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Legal Sidebar

303 Creative v. Elenis: Supreme Court Recognizes Free Speech Exception to Nondiscrimination Law

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In *303 Creative LLC v. Elenis*, issued on June 30, 2023, the Supreme Court ruled that the First Amendment's Free Speech Clause barred a state from enforcing its nondiscrimination law against a website designer who did not want to create websites for same-sex weddings. As a prior Legal Sidebar explains, in recent years, the Supreme Court has been presented with a number of appeals involving religious objections to complying with nondiscrimination laws. The Court's rulings on these appeals addressed protections for religious exercise. In contrast, while the plaintiff's objections in *303 Creative* were religiously motivated, the case focused on the scope of Free Speech Clause protections for her speech. Accordingly, while the case has implications for religious objectors to federal laws, it also has broader free speech implications.

Background

The petitioner is a graphic artist and website designer who challenged Colorado's nondiscrimination law on behalf of herself and her company. Her business, 303 Creative, creates custom websites for clients—but according to the petitioner, she will not create any content that contradicts her religious beliefs, including her belief that marriage is "solely the union of one man and one woman." At the time she filed her lawsuit, she did not offer wedding-related design services but alleged that she wanted to expand her business. If she did offer services to weddings, she would not create websites or offer other services to same-sex weddings. The petitioner was concerned this practice would violate a Colorado law prohibiting discrimination on the basis of sexual orientation.

The case involved two provisions of Colorado's law prohibiting "public accommodations" (essentially, businesses offering goods or services to the public) from refusing service on the basis of certain protected characteristics, including race, sex, or sexual orientation. The first provision, referred to as the "Accommodation Clause," states that a public accommodation may not refuse "the full and equal enjoyment" of goods or services based on a person's sexual orientation, among other protected characteristics. The second provision, referred to as the "Communication Clause," states that a public

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accommodation may not publish any communication indicating that a person will be refused goods or services because of a protected characteristic.

The petitioner brought a pre-enforcement challenge arguing that if Colorado enforced this law in a way that forced her to provide services to same-sex weddings, the state would violate constitutional protections for speech and religion. As relevant to the Supreme Court decision, she argued that forcing her to design websites for same-sex weddings would impermissibly compel her to speak in violation of the First Amendment's Free Speech Clause. A federal appeals court agreed that forcing her to create websites would implicate free speech protections, but ruled that the state's interest in ensuring equal access to publicly available services could justify applying its nondiscrimination law in these circumstances.

Supreme Court Majority Opinion

In a 6-3 opinion, the Supreme Court sided with the graphic designer. Justice Gorsuch wrote the majority opinion. The Court focused on the Colorado law's "Accommodation Clause," reasoning that the constitutionality of the "Communication Clause" depended on the state's ability to apply the first clause.

The Court first addressed the procedural posture of the case. Although Colorado had not sought to compel the designer to make any websites for marriages (and she may not have received any actual requests to create a website for a same-sex marriage), the majority observed generally that Colorado had enforced its law in the past. Prior enforcement included *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a 2018 Supreme Court case involving a religious baker who refused to make a cake for a same-sex wedding. In the Supreme Court appeal of *303 Creative*, the parties did not dispute that the designer established a "credible threat" of state enforcement if she refused to create same-sex wedding sites. Nonetheless, the parties disputed what relief was appropriate on a pre-enforcement challenge. Colorado argued that the case was not ripe for resolution, saying that without knowing the content of any possible websites or how the designer would work with any customers, it was impossible to determine whether the state's enforcement would target the designer's speech by dictating the content of her custom websites, or if it would instead would target the discriminatory conduct of refusing to work with a same-sex customer. The Supreme Court disagreed, citing the parties' previous stipulations that the designer would work with clients "of any sexual orientation."

The Court then concluded that the custom wedding websites qualified as "pure speech," emphasizing the parties' stipulation that the designer would "create these websites to communicate ideas—namely, to 'celebrate and promote the couple's wedding and unique love story'" as well as the designer's ideas of "a true marriage." The Court further held that the websites would be "*her* speech." Although the designer would be sharing a couple's story and acting at their direction, combining her speech with the couple's, the First Amendment protected her own speech. Further, given that each website would be custom-designed, the Court said the designer's services could not merely be viewed as akin to selling "an ordinary commercial product" off the shelves to all customers. Accordingly, the Court ruled that Colorado sought to compel the designer to speak, celebrating marriages she did not wish to celebrate and creating "an impermissible abridgment of the First Amendment's right to speak freely." More broadly, the Court disclaimed a principle that would "allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe." The majority indicated, for example, that the government could not force "'an unwilling Muslim movie director to make a film with a Zionist message,' or 'an atheist muralist to accept a commission celebrating Evangelical zeal.'"

Historically, the Court has applied a variety of different standards to evaluate laws compelling speech. The majority opinion in *303 Creative* did not expressly state what level of constitutional scrutiny it used to evaluate this application of the Colorado nondiscrimination law. The lower court had applied an analysis known as "strict scrutiny," which is very difficult for the government to satisfy. However, as mentioned above, the lower court concluded Colorado met this stringent standard of constitutional review.

In contrast, the Supreme Court merely said that the First Amendment did not "tolerate[]" this compelled speech. Justice Gorsuch elaborated, "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail." The Court distinguished prior cases that had applied a lower level of constitutional scrutiny to reject First Amendment challenges to public accommodations laws or similar hosting-type requirements. Unlike those prior cases, the Court held that Colorado would be directly regulating speech rather than only "incidentally" burdening speech.

Supreme Court Dissenting Opinion

Justice Sotomayor wrote the dissent, joined by Justices Kagan and Jackson. She argued that Colorado's law "targets conduct, not speech, for regulation, and the *act* of discrimination has never constituted protected expression under the First Amendment." The dissent opened by discussing the history and purposes of public accommodations laws: ensuring equal access and equal dignity in the public market, and preventing businesses open to the public from engaging in "unjust discrimination." Justice Sotomayor asserted that the majority opinion "conflates denial of service and protected expression," and characterized Colorado's law as a "valid regulation[] of conduct." In her view, the law did not dictate the content of the designer's speech or prohibit her from speaking her own message; for example, the designer could "offer only wedding websites with biblical quotations describing marriage as between one man and one woman," so long as she offered those websites "without regard to customers' protected characteristics." Justice Sotomayor claimed that allowing public businesses "to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws," allowing a department store, for example, to "sell 'passport photos for white people.'"

The dissent would have applied an intermediate level of scrutiny to the law's "neutral regulation of commercial conduct." Justice Sotomayor would have held that Colorado could satisfy that level of scrutiny, noting the state's compelling interest in eliminating discrimination and the law's tailoring to that goal. Justice Sotomayor acknowledged that this application of Colorado's law "would require the company to create and sell speech." However, the critical factor, in her view, was that Colorado was only applying the law "to the refusal to provide same-sex couples the full and equal enjoyment of the company's publicly available services," and consequently was only compelling speech incidental to the content-neutral regulation of conduct.

Considerations for Congress

The past decade or so has seen a significant number of claims for religious exemptions from nondiscrimination policies, and the Supreme Court ruled in two earlier cases that state and local governments violated constitutional protections for *religious exercise* when they ordered a baker to make a wedding cake for a same-sex wedding and when they attempted to apply nondiscrimination policies to a Catholic foster-care contractor. In recent years, however, the Supreme Court had largely avoided the *speech* claims it confronted in *303 Creative*.

303 Creative prevents a state from applying its nondiscrimination law in certain circumstances. The decision only specifically applies to this particular plaintiff but could prevent Colorado and other states from enforcing their nondiscrimination laws in ways that require other businesses to create speech. The ruling also could have implications for the application of federal law. Many of the major federal statutes prohibiting discrimination do not expressly include sexual orientation as a protected class. However, a number of agencies have regulations expressly prohibiting such discrimination in federal programs. In addition, in 2020, the Supreme Court interpreted Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, to also prohibit discrimination based on sexual orientation or gender identity. This interpretation raised the question whether other federal laws prohibiting sex discrimination encompass similar protections, and the Department of Health and Human Services (HHS)

and the Department of Education have proposed rules that would interpret the Affordable Care Act and Title IX to prohibit discrimination on the basis of sexual orientation and gender identity. (Litigation is ongoing regarding the proper interpretation of these other federal laws.)

Some of these federal laws have limited exceptions for religious entities. Beyond these exceptions, in the past few years, some regulated entities have cited a federal statute, the Religious Freedom Restoration Act (RFRA), to seek broader religious exemptions from federal nondiscrimination requirements. One high-profile example came when HHS granted a waiver from nondiscrimination regulations for religious foster care agencies in South Carolina in 2019—then rescinded the exemption in 2021. Ten days before the ruling in *303 Creative*, as discussed in a recent edition of CRS's *Congressional Court Watcher*, a federal appeals court granted a RFRA exemption from Title VII to an employer claiming a sincere religious objection.

303 Creative illuminates another potential avenue for religious employers to seek an exemption from nondiscrimination laws. However, the availability of an RFRA claim turns (in part) on whether the federal government has burdened a person's religious exercise. By comparison, the protections of the Free Speech Clause extend beyond religious speech, though the Clause requires a plaintiff to show they were engaged in speech or inherently expressive activity—that is, activity that communicates something to third parties. Free speech claims under *303 Creative* will thus only be available to businesses engaged in speech, who may be able to claim the government would be compelling speech the businesses "do[] not wish to provide" through certain applications of federal nondiscrimination law. Further litigation on state laws may determine whether, for example, wedding venues or bakers are engaged in protected speech. The majority opinion acknowledged that determining which businesses are expressive could "raise difficult questions" in the future.

If plaintiffs can show they are engaged in protected expression, the Free Speech Clause will not be limited to religiously motivated expression about same-sex marriage. In the future, a web designer might hypothetically object to designing a site that would "celebrate and promote" an interracial marriage, a gay pride parade, or a religious charity. As Justice Sotomayor's dissent highlighted, in the past, business owners have raised First Amendment objections to prohibitions on race and sex discrimination. At least with respect to race discrimination, some have suggested the government might be able to satisfy strict constitutional scrutiny to justify applying nondiscrimination laws to First-Amendment-protected activity. However, the majority opinion in *303 Creative* could be read as taking an unqualified approach to these compelled speech claims: nondiscrimination laws simply cannot be applied to compel speech, regardless of how strong the government's interest might be or how well-tailored the law is to that interest. Lower courts will have to determine what level of constitutional scrutiny should govern future free expression objections to nondiscrimination laws in such circumstances.

303 Creative's compelled speech ruling could also have implications for efforts to regulate social media platforms. Social media platforms, like the anticipated wedding websites in this case, "contain 'images, words, symbols, and other modes of expression.'" Pending Supreme Court petitions raise free speech challenges to Florida and Texas laws limiting websites' ability to take down or restrict user content. As discussed in a prior Legal Sidebar, these lawsuits similarly allege that these state laws would unlawfully compel the sites to convey speech with which they disagree. *303 Creative* casts doubt on states' ability to compel websites to communicate messages they do not wish to endorse: the Supreme Court stated that the government may not "coopt an individual's voice for its own purposes" by forcing a business to provide an "outlet for speech." However, it may be open to question whether websites that would not be producing custom-designed products for customers are engaged in equivalent expressive activity to the website designer in *303 Creative*. Social media platforms may not be considered to "speak[] for pay" in the same way as the website designer—although the Supreme Court has recognized that private entities may exercise constitutionally protected "editorial discretion" over speech in forums they host.

If Congress were to disagree with the Court's ruling in this case, its options to respond would be somewhat limited. Congress cannot alter the protections of the First Amendment absent a constitutional amendment, so the Free Speech Clause will continue to provide exceptions to certain applications of federal laws. Future litigation in this area may inform congressional consideration of issues like the application of federal nondiscrimination laws or other provisions (like net neutrality laws or other "must carry" provisions) that could compel businesses to speak.

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