Legal Update Article

U.S. Supreme Court Hears Oral Argument in Case Testing Limits of State Anti-Discrimination Law

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The U.S. Supreme Court weighed the rights of LGBTQ+ people to be free from discrimination in the marketplace against a Colorado business owner's right to free speech when it heard oral argument in *303 Creative LLC v. Elenis* (No. 21-476) on December 5, 2022.

Background

Lorie Smith is the owner of 303 Creative LLC, a Colorado-based web and graphic design business. Smith wants to expand her services to include wedding websites only for opposite-sex weddings because her religious beliefs preclude her from providing these services for same-sex weddings. Smith wants to state this position on her business's website.

Smith's business, 303 Creative LLC, is a "public accommodation" covered by the Colorado Anti-Discrimination Act (CADA). A public accommodation is defined as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public."

Under CADA, public accommodations are prohibited from refusing to serve an individual or group on the basis of sexual orientation. The law also bars business from announcing an intent to discriminate.

Pre-Enforcement Challenge

This case comes before the Court on a "pre-enforcement" challenge. This allows an individual or a business to challenge a law in court before being subject to its enforcement.

Smith is seeking exemption from CADA that would allow her to refuse to provide web services for same-sex marriages and to announce that she will not provide web services for same-sex marriages on her website.

Oral Argument

Although rooted in First Amendment principles, the two sides' arguments were diametrically opposed.

Through her attorney, Kristen Waggoner of conservative religious legal organization Alliance Defending Freedom, Smith asked the Court to rely on its 1995 decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* (515 U.S. 557). (Waggoner came before the Court in a same-sex wedding-related challenge to CADA in 2018, when she represented the petitioner, a baker, in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719.)

In *Hurley*, the Court articulated a two-part test to determine whether a private parade organizer violated Massachusetts public accommodation law when it refused to allow

LGBTQ+ groups to march in the Boston St. Patrick's Day parade. Under the *Hurley* test, the court first asks whether the services provided is speech. Next, the court asks whether accommodating the speech will affect the business's message. The Court determined that compelling the parade organizers to allow LGBTQ+ groups to march would be equivalent to compelling the organizers to send a message with which they disagreed.

Waggoner argued here that websites are speech and requiring Smith to provide websites for same-sex marriages would be compelling her to speak in support of same-sex marriage in violation of her personal beliefs.

Represented by Colorado Solicitor General Eric Olson, Colorado argued that the Court's 2006 decision in *Rumsfeld v. Forum for Academic and Institutional Rights* (547 U.S. 47) had greater precedential value.

In *Rumsfeld*, the Court held that a federal law withholding federal funding from law schools that limited military recruiters' access to students did not violate the First Amendment because that law regulated conduct, not speech. According to the Court, that law "affects what law schools must do … not what they may or may not say."

Similarly, Colorado argued, CADA only requires Smith to sell her products or services to anyone who wants to buy them. The law does not regulate the content of that product or service.

Justices' Questions

The justices divided along predictable ideological lines as they questioned the parties. At the heart of their questions was whether Smith objected to the content of the speech, as she claimed, or to status of the individual or group seeking her services, as Colorado argued.

Justice Elena Kagan questioned Waggoner about whether a purely informational wedding website could be said to import a certain belief on the owner of the web design firm. Justice Sonia Sotomayor pursued a similar line of questioning, then expanded her inquiries to determine the limits of the individuals or groups Smith would refuse to serve.

Justice Ketanji Brown Jackson presented a hypothetical that many of her colleagues revisited throughout the nearly three-hour-long oral argument. In her scenario, a photographer seeks to recreate holiday portraits in the theme of the 1946 film "It's a Wonderful Life." This photographer invites the public to purchase photos taken with Santa Clause at the mall, but, in keeping with the aesthetic vision of his theme, will only sell photographs of white children.

At the other end of the ideological spectrum, Justice Amy Coney Barrett presented hypotheticals that allowed Waggoner to sketch the outlines of when her client would refuse service: a wedding website for a heterosexual couple who wanted a statement on their website that gender is irrelevant to their relationship, and a wedding website for a heterosexual couple who wanted to tell the story of how their current relationship began with extra-marital affairs.

Justice Jackson presented her hypothetical to Olson, and later Deputy U.S Solicitor General Brian H. Fletcher, both of whom agreed it was factually on-point. Justice

Samuel Alito put his own spin on it with more facts involving a Black Santa who refused to take photographs with a child wearing a Ku Klux Klan robe. Olson noted that Ku Klux Klan robes are not protected characteristics under CADA.

Justice Neil Gorsuch and Justice Brett Kavanaugh questioned Olson at length about how his analysis of the law would fare when applied to a publisher that refused to publish books with pro-life positions or a press release-writer who refused to write press releases for religious groups he disliked.

Potential Impact on Employers

Regardless of whether the Court decides Colorado's public accommodations law can have exceptions based on the type of business, the primary impact of the Court's decision will be on the groups protected by public accommodation laws. The Court's decision will also impact how employers subject to public accommodation laws may approach their trade.

The analysis is more complicated than asking merely what public accommodation laws permit or prohibit. If the Court finds for Smith, an employer subject to state public accommodation laws might be free to deny service to certain people based on the employer's religious beliefs without legal consequence. As always, employers should be deliberate and careful to consider reputational impact and avoid fostering work environments that may lead to harassment and discrimination. Employers also should consider including LGBTQ+ training in their employee anti-harassment and discrimination training.

Jackson Lewis attorneys are available to answer questions about the potential impact this decision could have on employers and to help design and deliver effective harassment and discrimination training that addresses LGBTQ+ issues and the accommodation process, updating anti-harassment and discrimination policies, and providing advice and counsel on how to navigate potential changes in public accommodation laws.