DAILY NEWS

Free speech vs. nondiscrimination: The Supreme Court must find a middle ground

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Now pending before the U.S. Supreme Court: Can a private business be compelled to design a website for a gay wedding?

Lorie Smith runs 303 Creative, a website design firm she'd like to expand to include wedding websites — but not for same-sex weddings, which she fervently opposes. In 2021, a federal appeals court rejected Smith's challenge to Colorado's Anti-Discrimination Act, which bars businesses open to the public from bias toward certain groups, including gays. Smith had argued website design is a form of expressive speech, protected by the First Amendment.

The court agreed that her creations qualified as speech but held the law was nonetheless warranted to ensure that LGBTQ customers have access to the unique services that Smith would provide — an odd justification given more than 700,000 same-sex weddings in the United States without a single case documenting an inability to obtain a customized website.
Hardcore libertarians maintain that private parties doing business on private property should have a right to associate (or not) with whomever they please. Of course, the law is quite different — which means that the Supreme Court might have to resolve some rather knotty problems: Should Black florists be forced to design flower arrangements for a Ku Klux Klan funeral? Should liberal web designers have to design a site for a conservative candidate?

To be sure, Klan members and conservatives are not protected under Colorado law. But a thin line sometimes separates ideology (not protected) from religion (protected). Maybe Klan membership doesn't cross that line, but how about Muslims who practice Sharia law? Should a gay baker be forced to design a cake for a Sharia-Muslim who would punish sodomy with death?

Interestingly, although gays are protected in Colorado, they are not protected under federal and many state public accommodation laws. Both the identity of protected groups and the definition of "public accommodations" vary across jurisdictions. To avoid repeated litigation, the courts would be well-advised to establish a framework that focuses on the type of goods, services, and activities that implicate First Amendment concerns.

The key here is the message, not the gay couple. Smith has said she would design a website for gay couples for just about any occasion — but not for their wedding. Nor would she design a

same-sex wedding website for heterosexual well-wishers, or other websites with messages that offended her deeply-held beliefs, such as a site that contradicted biblical truths or promoted abortion. To Smith, it's the message that matters, not the identity of the customer.

How, then, should courts assess whether a product should be exempt from anti-discrimination laws?

For each case, courts should ask a number of pertinent questions.

First, is the item a standard, off-the-shelf product or a customized, made-to-order article that requires unique input by the seller? If the item is standardized, it must be provided to all customers without discrimination.

Next, does creation of the item convey a specific message by word, non-verbal content, or discernible link between the creator and the item? The message need not be an endorsement; mere acceptance or toleration would be sufficient.

Finally, does the message violate a sincerely held belief of the seller? And if so, does the buyer (and the pertinent public accommodations statute), allow the seller to communicate his objection to the message?

A "no" answer to the final question completes the three-part test and signifies that private businesses should be able to exclude customers even though they may be members of the protected group.

Would that process cover all the borderline cases? No. But it would cover Smith, whose creations would be painstakingly tailored to the story of each couple. And it would provide a practical, bright line rule that covers the large majority of transactions. Then, we could indulge a few gray areas at the margin that courts could resolve.

Still, what about the dignitary harm to those minorities who bear the brunt of discrimination? Why should they be refused service — the same service extended to virtually all other customers – merely because, as Justice Kennedy wrote in the Obergefell vs. Hodges case, which legalized same-sex marriage, they "aspire[d] to the transcendent purposes of marriage?"

The response comes from a unanimous 1988 court opinion in Hustler Magazine vs. Falwell, which declared that some dignitary harms must be condoned in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment."

The court should reach the same conclusion in 303 Creative.

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