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Supreme Court Debates Whether Web Designers Can Be Forced To Make Gay Wedding Pages

Scott Shackford

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Whether designing a webpage for customers counts as speech and therefore whether a designer could be compelled by Colorado law to design wedding pages for same-sex couples took center stage before the Supreme Court this morning.

Creative 303 LLC vs. Elenis came before the Court this morning and brought with it a tangled thicket of competing Supreme Court precedents about when the government can compel businesses or institutions to pass along messages or ideas they object to. At the heart of this case, Lorie Smith, owner of Creative 303 LLC, wants to design web pages for weddings. But she has religious objections to same-sex marriage and doesn't want to design pages to celebrate gay couples. This puts her at odds with the Colorado Anti-Discrimination Act, and so she has gone to federal court to try to get a ruling in her favor.

In a debate surpassing two hours, the justices discussed whether Smith is actually engaged in "expressive speech" if she doesn't put her own messages on these webpages, the distinctions between rejecting a customer and rejecting a statement, and which Supreme Court precedents should influence this case's outcome.

Kristen Waggoner, Smith's attorney and a lawyer for Alliance Defending Freedom, wanted the Court to turn to *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, a 1995 case where the Supreme Court ruled that the organizers of Boston's St. Patrick's Day Parade could not be compelled to allow marchers bearing a banner for the gay organization into the parade, which would have forced them to convey a message of support parade organizers did not agree with.

Colorado was represented by Solicitor General Eric Olson and bolstered by Brian Fletcher, principal deputy solicitor general of the United States. The Justice Department agrees with Colorado that Smith does not have the option to simply turn away all same-sex couples. They asked the Court to use *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* as a guiding precedent. That 2006 decision held that colleges could be compelled to provide space for military recruiters despite any moral objections they may have.

Smith has not been accused of turning away anybody as yet. She has asked the Court to rule before she begins turning away same-sex clients as is within her First Amendment rights. So, the debate this morning revolved around several hypothetical situations, since neither side has any actual examples of Smith turning anybody away.

In a fashion similar to those who followed *Masterpiece Cakeshop v. Colorado*, the justices questioned the boundaries of what actually counted as speech or expression. Throughout the proceedings, Justice Elena Kagan mulled over the difference between a wedding site where a designer simply plugged in information provided to them and a site where the designer was actually expected to craft particular messages celebrating the marriage. She noted that the examples of sites Creative 303 included didn't appear to state any sort of celebratory messages but did wonder whether Smith could be compelled to add "God bless this union" onto a site against her religious convictions. While there seemed to be an agreement that she could not be compelled to do so, the justices struggled to find where the line between speech and discrimination was drawn. In *Masterpiece*, the Supreme Court punted that central question. Now, they're revisiting it.

Waggoner saw the line as pretty easy to determine: Smith's webpages and their content all count as Smith's speech. It's up to Smith to decide what she would and would not allow to be included on the webpages she was designing. Olson and Fletcher argued that Smith's rejection of same-sex marriages was essentially the equivalent of rejecting same-sex customers (Waggoner and Smith disagree) because it was a case where the conduct and the identity of the customer are "inextricably entwined."

The more conservative justice seemed inclined toward siding with Smith, concerned about future hypothetical cases where a freelance speechwriter could be forced to write speeches for political candidates or positions he or she found disagreeable. Could a freelance public relations professional be forced to write a release for the Church of Scientology?

Justice Amy Coney Barrett wondered if a site serving the gay community could be required to run heterosexual wedding announcements alongside same-sex ones. Olson responded that the site probably wouldn't hold itself out as a "public accommodation," but if it did, it would be required to run them. There was a fairly brief discussion of whether there were limits to what the government classifies a "public accommodation" that perhaps could have been fleshed out more. Colorado appears to have a very broad definition that includes nearly any good or service that is offered "to the public."

Justice Neil Gorsuch noted the *amicus* brief by the Cato Institute, joined by UCLA law professor Eugene Volokh (of *The Volokh Conspiracy*) and Southern Methodist University Dedman School of Law professor Dale Carpenter (also a contributor to *The Volokh Conspiracy*) in support of Smith. Though Volokh and Carpenter had taken Colorado's side against wedding cake baker Jack Phillips, they're supporting Smith in this case, arguing that "forcing her to create websites to which she objects is a speech compulsion." Gorsuch also incidentally described the anti-discrimination training that Phillips was ordered to undergo (before the Supreme Court ruled in his favor) as "re-education."

It is very difficult to predict based on today's debate what exactly the Supreme Court could decide. Because of the intersection of First Amendment protections and public accommodation discrimination protections, the questions were far-ranging and hit many areas. It seems likely that the ruling will be in favor of Creative 303, but it's also clear that the justices are looking for

the right place to put a dividing line between protecting people from compelled speech and the government's interest in enforcing public accommodation laws. "How do you draw the line?" was a question raised in several contexts by multiple justices. We'll find out in the spring.