

303 CREATIVE LLC V. ELENIS – IT’S NOT ABOUT RELIGIOUS LIBERTY

By Stephen Smith*

In *303 Creative LLC v. Elenis*,¹ a web designer complained that Colorado state law required her to “speak” in a way that supports same-sex marriage, against her will.² The Supreme Court concluded that public accommodation laws requiring the provision of services to the public on a non-discriminatory basis must give way to free speech concerns when those laws “compel an individual to create speech she does not believe.”³ The majority’s opinion puts a religious liberty tint on a case that purports to have no religious component, in terms of legal doctrine. The case was decided under the Free Speech Clause of the First Amendment.⁴ The Free Exercise Clause – the typical source of religious liberty claims – is never mentioned in the decision.⁵

*Loving v. Virginia*⁶ struck down anti-miscegenation laws under the Equal Protection and Due Process Clauses, but did nothing to impede the right of individuals to express a retrograde belief in the wrongfulness of mixed-race marriage: that expression would be protected by the Free Speech Clause.⁷ In *303 Creative*, the Court has empowered people who hold that belief – and perhaps any other – to act in accordance with it when they choose customers to whom they would provide commercial services. So long as the service they offer can be characterized as “expressive,” it is immunized from laws that require services to be provided to the public on a non-discriminatory basis.⁸ Much will be written on this, and has.⁹ This essay’s modest goal is to bring attention to the insignificance of the religious garb this lawsuit wore before the Court. We may feel some degree of sympathy for the facts of this case – it came before the Court trumpeting a religious liberty component.¹⁰ Indeed, the religious liberty angle may be the way in which the case filters into the consciousness of the general public.¹¹ But that is ultimately irrelevant to the reasoning of the Court, and to how the case may be subsequently deployed.

* Associate Clinical Professor, Santa Clara University School of Law

¹ No. 21-476, slip op. at 1 (U.S. June 30, 2023).

² *Id.* at 2-4.

³ *Id.* at 1.

⁴ *Id.*

⁵ *See generally id.*

⁶ 388 U.S. 1 (1967).

⁷ *E.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional[.]”).

⁸ *See 303 Creative LLC*, slip op. at 11.

⁹ *See generally* Lydia E. Lavelle, *Freedom of Speech: Freedom to Creatively Discriminate?*, 29 *CARDOZO J. EQUAL RTS. & SOC. JUST.* 69, 71 (2022).

¹⁰ Adam Liptak, *Supreme Court to Hear Case of Web Designer Who Objects to Same-Sex Marriage*, *N.Y. TIMES* (Feb. 22, 2022), <https://www.nytimes.com/2022/02/22/us/colorado-supreme-court-same-sex-marriage.html> (explaining case as addressing “how to reconcile claims of religious liberty with laws barring discrimination based on sexual orientation.”).

¹¹ Adam Liptak & Abbie Van Sickle, *Here’s What to Know About the Free Speech Decision*, *N.Y. TIMES* (June 30, 2023, 10:15 AM), <https://www.nytimes.com/live/2023/06/30/us/gay-rights-free-speech-supreme-court#heres-what-to-know-about-the-gay-rights-decision> (describing case as “the latest in a series of decisions in favor of religious people and groups, notably conservative Christians, who celebrated the ruling on Friday as a victory for religious freedom.”).

Like many states, Colorado has a state law prohibiting discrimination on the basis of certain protected characteristics.¹² “The law prohibits a public accommodation from denying ‘the full and equal enjoyment’ of its goods and services to any customer based on the customer’s race, creed, disability, sexual orientation, or other statutorily enumerated trait.”¹³ Public accommodation laws are “designed to ensure that customers or patrons who seek the services, privileges, and advantages of establishments that serve the public are not discriminated against on the basis of” their protected characteristics.¹⁴

Lorie Smith, the owner of 303 Creative LLC, is a purported website designer and graphic designer who plans to start – but has not yet started – a business providing those services.¹⁵ According to stipulations between 303 Creative LLC and the State of Colorado, the websites she may prospectively create will be “expressive in nature,” and are designed “to communicate a particular message.”¹⁶ The stipulations further assert that Smith “will produce a final story for each couple using her own words and her own ‘original artwork.’”¹⁷ The United States Supreme Court concluded that by requiring Smith to accept clients who seek a website commemorating a same-sex marriage, the law mandated that “[i]f she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs[.]”¹⁸

The Court’s opinion repeatedly sets forth facts pertaining to Ms. Smith’s religious motivations in seeking to refuse to “speak” by creating websites promoting¹⁹ same-sex marriage.²⁰ According to Ms. Smith, “she has never created expressions that contradict her own views for anyone—whether that means generating works that encourage violence, demean another person, or defy her religious beliefs by, say, promoting atheism.”²¹ She feared that Colorado’s public accommodation law would, “force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman.”²²

The Supreme Court set forth various stipulations between the parties pertaining to Smith’s religious motivations. One is an assertion that “[s]he will not produce content that ‘contradicts biblical truth’ regardless of who orders it.”²³ A related stipulation reports that “[h]er belief that marriage is a union between one man and one woman is a sincerely held religious conviction.”²⁴ The question of whether a religious belief is “sincerely held,” is, of course, a familiar component

¹² COLO. REV. STAT. §24–34–601 (2021).

¹³ *303 Creative LLC*, slip op. at 3 (quoting COLO. REV. STAT. §24–34–601(2)(a) (2021)).

¹⁴ *Bauer v. Muscular Dystrophy Ass’n, Inc.*, 268 F. Supp. 2d 1281, 1293 (D. Kan. 2003), *aff’d*, 427 F.3d 1326 (10th Cir. 2005).

¹⁵ *303 Creative LLC*, slip op. at 1-2.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 11.

¹⁹ This verb is uncertain. Mentioning? Celebrating? The limits of what speech is supposedly compelled are not explored in the decision. The Court accepts stipulations on “expressiveness” and “artwork” without interrogating what those words might mean.

²⁰ *See 303 Creative LLC*, slip op. at 4.

²¹ *Id.* at 2.

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.*

of Free Exercise Clause inquiries.²⁵ But it is irrelevant to the issues before the Court. Moreover, many of the cases relied on most heavily by the Court involve gay plaintiffs wanting access to public accommodations – a parade,²⁶ the Boy Scouts²⁷ – and similarly carry the gloss of religious objection.²⁸ Ultimately, however, religious liberty has nothing to do with the outcome of this case any more than those. The case is decided entirely on Free Speech Clause grounds.²⁹ In addition to the just-mentioned *Hurley* and *Dale* cases, which were First Amendment freedom of association cases, the Court relies on compelled speech cases like *West Virginia Board of Education v. Barnette*.³⁰

The religious freedom garb with which the case presents itself is a red herring, and perhaps a useful rhetorical trick. It provides a potentially sympathetic backdrop³¹ to a legal outcome that may have results that are much less sympathetic. The case protects the secular reactionary who disapproves of minority groups as well as the person claiming a religious justification for her desire not to do business with them.

The dissent notes this, specifically:

[T]he reason for discrimination need not even be religious, as this case arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for “traditional” families. And so on.³²

Accordingly, it seems important not to view *303 Creative LLC* as a signature achievement in religious liberty, but as a decision to be wary of. Its free speech maximalism will present ongoing challenges to generally applicable discrimination laws.

The future battles *303 Creative LLC* will lead to will be over what types of commercial activity are “expressive” and therefore protected by the Court’s holding. This will be made difficult, however, by the majority’s failure to explore what it means to be “expressive” or communicative as a legal matter.³³ The Court simply accepted the parties’ stipulations to that effect.³⁴ We can anticipate creative attempts to expand the universe of “expressive” commerce. Perhaps offering a motel room is not,³⁵ but how about offering rooms in a Bible-themed B&B? Does renting a room

²⁵ See *Frazee v. Illinois Dep’t of Emp. Sec.*, 489 U.S. 829, 834 (1989).

²⁶ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 562 (1995).

²⁷ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651 (2000).

²⁸ *303 Creative LLC*, slip op. 7-9.

²⁹ See *id.* at 11.

³⁰ 319 U. S. 624 (1943).

³¹ Religious liberty has been described as one of the “highest values in our society.” *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 996 (7th Cir. 2021).

³² *303 Creative LLC*, slip op. at 37 (Sotomayor, J. dissenting).

³³ One definition of expression that the Court has previously provided requires “intent to convey a particularized message” and “the likelihood . . . that the message would be understood by those who viewed it.” *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

³⁴ *303 Creative LLC*, slip op. at 9. The Court accepted stipulations that were more characterizations than facts. What if Smith’s “original artwork” were simply the placing of text on a stock photo? Is typing “John and James are getting married” over a Getty Images sunset an expressive act that requires protection? What is a scrivener expressing?

³⁵ See *id.* at 13.

there to a gay couple require the innkeeper to “speak” to an audience it does not wish to? What about the t-shirt printer who decides he doesn’t want to print a shirt that says “Black is Beautiful”? Is the typesetting he does “expressive” work that must therefore be free from the coercive power of the state that the *303 Creative LLC* majority would see at work in requiring him to print the shirt? Making this determination, according to the majority, “can sometimes raise difficult questions.”³⁶ Future cases will see these “difficult questions” arising in less sympathetic factual settings.

³⁶ *Id.* at 22.