
SUPREME COURT OF THE UNITED STATES
303 CREATIVE LLC v. ELENIS
June 30, 2023
[6 to 3]

OPINION: GORSUCH/ ROBERTS/ THOMAS/ ALITO/ KAVANAUGH/ BARRETT...Like many States, Colorado has a law forbidding businesses from engaging in discrimination when they sell goods and services to the public. Laws along these lines have done much to secure the civil rights of all Americans. But in this particular case Colorado does not just seek to ensure the sale of goods or services on equal terms. **It seeks to use its law to compel an individual to create speech she does not believe. The question we face is whether that course violates the Free Speech Clause of the First Amendment.**

I

A

Through her business, 303 Creative LLC, Lorie Smith offers website and graphic design, marketing advice, and social media management services. Recently, she decided to expand her offerings to include services for couples seeking websites for their weddings. As she envisions it, her websites will provide couples with text, graphic arts, and videos to "celebrate" and "convey" the "details" of their "unique love story." The websites will discuss how the couple met, explain their backgrounds, families, and future plans, and provide information about their upcoming wedding. All of the text and graphics on these websites will be "original," "customized," and "tailored" creations. The websites will be "expressive in nature," designed "to communicate a particular message." Viewers will know, too, "that the websites are Ms. Smith's original artwork," for the name of the company she owns and operates by herself will be displayed on every one.

While Ms. Smith has laid the groundwork for her new venture, she has yet to carry out her plans. She worries that, if she does so, Colorado will force her to express views with which she disagrees. Ms. Smith provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation. **But 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. Ms. Smith does not wish to do otherwise now, but she worries...that, if she enters the wedding website business, the State will**

force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman. Ms. Smith acknowledges that her views about marriage may not be popular in all quarters. But, she asserts, the First Amendment's Free Speech Clause protects her from being compelled to speak what she does not believe. The Constitution, she insists, protects her right to differ.

Let's take some time to understand what America would look like if the dissenters (Sotomayor, Kagan and Jackson) had prevailed and, therefore, why they should be impeached. Christians who wish to honor their beliefs and who's business involved expression (web designers, artists, talk radio hosts, bakers), just to name a few, would be out of business. Muslims the same. A Muslim baker, for example, would be forced by their government to make a cake with a goofy Muhammad caricature on the top for the Anti-Muslim League. A gay artist would be forced to paint a mural for a conservative Christian organization depicting the gay life-style as a sin. Literally no one with values they hold dear (whether Christian, atheist, Muslim or gay) could participate in the world of expression. Sounds Orwellian, to me. At a minimum, reprehensible.

B

To clarify her rights, Ms. Smith filed a lawsuit in federal district court. In that suit, she sought an injunction to prevent the State from forcing her to create wedding websites celebrating marriages that defy her beliefs. To secure relief, Ms. Smith first had to establish her standing to sue. That required her to show "a credible threat" existed that Colorado would, in fact, seek to compel speech from her that she did not wish to produce...

To facilitate the district court's resolution of the merits of her case, Ms. Smith and the State stipulated to a number of facts:

- Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," and she "will gladly create custom graphics and websites" for clients of any sexual orientation.
- She will not produce content that "contradicts biblical truth" regardless of who orders it.
- Her belief that marriage is a union between one man and one woman is a sincerely held religious conviction...

C

Ultimately, the district court ruled against Ms. Smith. So did the Tenth Circuit. For its part, the Tenth Circuit held that Ms. Smith had standing to sue...

Turning to the merits, however, the Tenth Circuit held that Ms. Smith was not entitled to the injunction she sought...As the majority [in the court below] saw it, Colorado has a compelling interest in ensuring "equal access to publicly available goods and services," and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer "unique services" that are, "by definition, unavailable elsewhere."

Chief Judge Tymkovich dissented. He observed that "ensuring access to a *particular* person's" voice, expression, or artistic talent has never qualified as "a compelling state interest" under this Court's precedents. Nor, he submitted, should courts depart from those precedents now. "Taken to its logical end," Chief Judge Tymkovich warned, his colleagues' approach would permit the government to "regulate the messages communicated by *all* artists" - a result he called "unprecedented."

We granted certiorari...

II

The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." They did so because they saw the freedom of speech "both as an end and as a means." An end because the freedom to think and speak is among our inalienable human rights. A means because the freedom of thought and speech is "indispensable to the discovery and spread of political truth." By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation. For all these reasons, "if there is any fixed star in our constitutional constellation," *West Virginia Bd. of Ed. v. Barnette*, it is the principle that **the government may not interfere with "an uninhibited marketplace of ideas."**

From time to time, governments in this country have sought to test these foundational principles. In *Barnette*, for example, the Court faced an effort by the State of West Virginia to force schoolchildren to salute the Nation's flag and recite the Pledge of Allegiance. If the students refused, the State threatened to expel them and fine or jail their parents. Some families objected

on the ground that the State sought to compel their children to express views at odds with their faith as Jehovah's Witnesses. When the dispute arrived here, this Court offered a firm response. In seeking to compel students to salute the flag and recite a pledge, the Court held, state authorities had "transcended constitutional limitations on their powers." Their dictates "invaded the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."

A similar story unfolded in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995). There, veterans organizing a St. Patrick's Day parade in Boston refused to include a group of gay, lesbian, and bisexual individuals in their event. The group argued that Massachusetts's public accommodations statute entitled it to participate in the parade as a matter of law. Lower courts agreed. But this Court reversed. Whatever state law may demand, this Court explained, the parade was constitutionally protected speech and requiring the veterans to include voices they wished to exclude would impermissibly require them to "alter the expressive content of their parade." The veterans' choice of what to say (and not say) might have been unpopular, but they had a First Amendment right to present their message undiluted by views they did not share.

Then there is *Boy Scouts of America v. Dale*. In that case, the Boy Scouts excluded James Dale, an assistant scoutmaster, from membership after learning he was gay. Mr. Dale argued that New Jersey's public accommodations law required the Scouts to reinstate him. The New Jersey Supreme Court sided with Mr. Dale, but again this Court reversed. The decision to exclude Mr. Dale may not have implicated pure speech, but this Court held that the Boy Scouts "is an expressive association" entitled to First Amendment protection. And, the Court found, forcing the Scouts to include Mr. Dale would "interfere with its choice not to propound a point of view contrary to its beliefs."

As these cases illustrate, the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided" and likely to cause "anguish" or "incalculable grief." Equally, the First Amendment protects acts of expressive association. Generally, too, the government may not compel a person to speak its own preferred messages. Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his

own speech that he would prefer not to include. All that offends the First Amendment just the same.

III

Applying these principles to this case, we align ourselves with much of the Tenth Circuit's analysis. The Tenth Circuit held that the wedding websites Ms. Smith seeks to create qualify as "pure speech" under this Court's precedents. We agree. It is a conclusion that flows directly from the parties' stipulations. They have stipulated that Ms. Smith's websites promise to contain "images, words, symbols, and other modes of expression." They have stipulated that every website will be her "original, customized" creation. And they have stipulated that Ms. Smith will create these websites to communicate ideas - namely, to "celebrate and promote the couple's wedding and unique love story" and to "celebrate and promote" what Ms. Smith understands to be a true marriage...

We further agree with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech. Again, the parties' stipulations lead the way to that conclusion. As the parties have described it, Ms. Smith intends to "vet" each prospective project to determine whether it is one she is willing to endorse. She will consult with clients to discuss "their unique stories as source material." And she will produce a final story for each couple using her own words and her own "original artwork." Of course, Ms. Smith's speech may combine with the couple's in the final product. But for purposes of the First Amendment that changes nothing. An individual "does not forfeit constitutional protection simply by combining multifarious voices" in a single communication.

As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide. As the Tenth Circuit observed, if Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to "force her to create custom websites" celebrating other marriages she does not. Colorado seeks to compel this speech in order to "excise certain ideas or viewpoints from the public dialogue." Indeed, the Tenth Circuit recognized that the coercive "elimination" of dissenting "ideas" about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith.

We part ways with the Tenth Circuit only when it comes to the legal conclusions that follow. While that court thought Colorado could compel

speech from Ms. Smith consistent with the Constitution, our First Amendment precedents laid out above teach otherwise. In *Hurley*, the Court found that Massachusetts impermissibly compelled speech in violation of the First Amendment when it sought to force parade organizers to accept participants who would "affect their message." In *Dale*, the Court held that New Jersey intruded on the Boy Scouts' First Amendment rights when it tried to require the group to "propound a point of view contrary to its beliefs" by directing its membership choices. And in *Barnette*, this Court found impermissible coercion when West Virginia required schoolchildren to recite a pledge that contravened their convictions on threat of punishment or expulsion. Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in "remedial . . . training," filing periodic compliance reports as officials deem necessary, and paying monetary fines. Under our precedents, that "is enough," more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely.

Consider what a contrary approach would mean. Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic - no matter the underlying message - if the topic somehow implicates a customer's statutorily protected trait. Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require "an unwilling Muslim movie director to make a film with a Zionist message," or "an atheist muralist to accept a commission celebrating Evangelical zeal," so long as they would make films or murals for other members of the public with different messages. Equally, the government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. As our precedents recognize, the First Amendment tolerates none of that.

In saying this much, we do not question the vital role public accommodations laws play in realizing the civil rights of all Americans. This Court has recognized that governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. This Court has

recognized, too, that public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." ...

States may "protect gay persons, just as they can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment." Consistent with all of this, Ms. Smith herself recognizes that Colorado and other States are generally free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses.

At the same time, this Court has also recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech.

Nor is it any answer, as the Tenth Circuit seemed to suppose, that Ms. Smith's services are "unique." In some sense, of course, her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes... Were the rule otherwise, the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted to disseminate the government's preferred messages. That would not respect the First Amendment; more nearly, it would spell its demise.

IV

Before us, Colorado appears to distance itself from the Tenth Circuit's reasoning. Now, the State seems to acknowledge that the First Amendment *does* forbid it from coercing Ms. Smith to create websites endorsing same-sex marriage or expressing any other message with which she disagrees. Instead, Colorado devotes most of its efforts to advancing an alternative theory for affirmance.

The State's alternative theory runs this way. To comply with Colorado law, the State says, all Ms. Smith must do is repurpose websites she will create to celebrate marriages she *does* endorse for marriages she does *not*. She sells a product to some, the State reasons, so she must sell the same product to all. At bottom, Colorado's theory rests on a belief that the Tenth Circuit erred at the outset when it said this case implicates pure speech. Instead, Colorado says,

this case involves only the sale of an ordinary commercial product and any burden on Ms. Smith's speech is purely "incidental." On the State's telling, then, speech more or less vanishes from the picture - and, with it, any need for First Amendment scrutiny. In places, the dissent seems to advance the same line of argument.

This alternative theory, however, is difficult to square with the parties' stipulations. As we have seen, the State has stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create "customized and tailored" speech for each couple. The State has stipulated that "each website 303 Creative designs and creates is an original, customized creation for each client." The State has stipulated, too, that Ms. Smith's wedding websites "will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story." As the case comes to us, then, Colorado seeks to compel just the sort of speech that it tacitly concedes lies beyond the reach of its powers.

Of course, as the State emphasizes, Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is "the sole member-owner." But none of that makes a difference. Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers.

Colorado next urges us to focus on the *reason* Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the "protected characteristics" of certain customers. But once more, the parties' stipulations speak differently. The parties agree that Ms. Smith "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites" do not violate her beliefs. That is a condition, the parties acknowledge, Ms. Smith applies to "all customers." Ms. Smith stresses, too, that she has not and will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments. Nor, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections

belong to all, including to speakers whose motives others may find misinformed or offensive...

V

It is difficult to read the dissent and conclude we are looking at the same case. Much of it focuses on the evolution of public accommodations laws and the strides gay Americans have made towards securing equal justice under law. And, no doubt, there is much to applaud here. But none of this answers the question we face today: Can a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?...

The dissent even suggests that our decision today is akin to endorsing a "separate but equal" regime that would allow law firms to refuse women admission into partnership, restaurants to deny service to Black Americans, or businesses seeking employees to post something like a "White Applicants Only" sign. Pure fiction all.

In some places, the dissent gets so turned around about the facts that it opens fire on its own position. For instance: While stressing that a Colorado company cannot refuse "the full and equal enjoyment of its services" based on a customer's protected status, the dissent assures us that a company selling creative services "to the public" *does* have a right "to decide what messages to include or not to include." But if that is true, what are we even debating?

Instead of addressing the parties' stipulations about the case actually before us, the dissent spends much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive services covered by the First Amendment. But those cases are not *this* case. Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve "pure speech." Nothing the dissent says can alter this - nor can it displace the First Amendment protections that follow...

Finally, the dissent comes out and says what it really means: Once Ms. Smith offers some speech, Colorado "would require her to create and sell speech, notwithstanding her sincere objection to doing so" - and the dissent would force her to comply with that demand. Even as it does so, however, the dissent

refuses to acknowledge where its reasoning leads. In a world like that, as Chief Judge Tymkovich highlighted, governments could force "an unwilling Muslim movie director to make a film with a Zionist message," they could compel "an atheist muralist to accept a commission celebrating Evangelical zeal," and they could require a gay website designer to create websites for a group advocating against same-sex marriage, so long as these speakers would accept commissions from the public with different messages. Perhaps the dissent finds these possibilities untroubling because it trusts state governments to coerce only "enlightened" speech. But if that is the calculation, it is a dangerous one indeed.

The dissent is right about one thing - "what a difference" time can make. Eighty years ago in *Barnette*, this Court affirmed that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." The Court did so despite the fact that the speech rights it defended were deeply unpopular; at the time, the world was at war and many thought respect for the flag and the pledge "essential for the welfare of the state." Fifty years ago, this Court protected the right of Nazis to march through a town home to many Holocaust survivors and along the way espouse ideas antithetical to those for which this Nation stands. Five years ago, in a case the dissenters highlight at the outset of their opinion, the Court stressed that "it is not . . . the role of the State or its officials to prescribe what shall be offensive."...

Today, however, the dissent abandons what this Court's cases have recognized time and time again: A commitment to speech for only *some* messages and *some* persons is no commitment at all. By approving a government's effort to "eliminate" disfavored "ideas," today's dissent is emblematic of an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic. But "if liberty means anything at all, it means the right to tell people what they do not want to hear." (quoting G. Orwell).

In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. In the past, other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the First Amendment's boundaries by seeking to compel speech they thought vital at the time. But, as this Court has long held, the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider "unattractive," "misguided, or even hurtful". **But**

tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is *Reversed*.

DISSENT: SOTOMAYOR/KAGAN/JACKSON...Not Provided.