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Web designer Lori Smith of 303 Creative LLC claims she doesn't want to design anything for same-sex weddings.

ALLIANCE DEFENDING FREEDOM

A three-judge panel of the Denver-based US Court of Appeals for the 10th Circuit issued a decision on July 26 rejecting a website designer's First Amendment challenge to the Colorado Anti-Discrimination Act (CADA) prohibition of sexual orientation discrimination by public accommodations. The panel consisted of two circuit judges appointed by President Bill Clinton, and the circuit's dissenting chief judge, who was appointed by President George W. Bush.

303 Creative LLC is Lorie Smith's graphic and website design company. Smith claims that she is "willing to work with all people regardless of sexual orientation," but she doesn't want to be involved in designing anything for a same-sex wedding, due to her Christian religious beliefs. According to the opinion by Senior Circuit Judge Mary Beck Briscoe, Smith's company has not

done any wedding design business yet, but she claims that she plans to do so, so long as she isn't legally required to do work for same-sex weddings. She would like to be able to put a notice on her website that she does not design websites for same-sex weddings because of her religious beliefs.

Smith is represented by Alliance Defending Freedom, an Arizona-based law firm that specializes in religious freedom cases and has initiated many legal challenges to anti-discrimination laws. They filed suit against the members of the Colorado Civil Rights Commission and the state's Attorney General in the US District Court in Denver, seeking an injunction to block enforcement of the CADA against Smith and 303 Creative.

Smith's complaint alleges that requiring her to design for same-sex weddings would violate her right to free exercise of religion, and that a provision of the law prohibiting public accommodations from publishing any communication that indicates a person's patronage will be refused because of their sexual orientation violates her freedom of speech. She also claimed that the law is unconstitutionally vague and overbroad. And, she argued, refusing to design for same-sex weddings is not sexual orientation discrimination because she would refuse such business regardless of the sexual orientation of the customer seeking her design services.

Senior District Judge Marcia S. Krieger found that Smith and her business lacked standing to challenge the Accommodation Clause of CADA, since she had not begun designing wedding websites for customers, but that they did have standing to challenge the Communication provision. Judge Krieger granted the state's motion for summary judgment, and Smith appealed to the 10th Circuit. Throughout her opinion, Judge Briscoe refers to Smith and her business as "Appellants."

Judge Briscoe found that the Appellants have standing to challenge both the Accommodation and Communication parts of CADA, but on the merits she ruled that Judge Krieger was correct to grant the state's motion for summary judgment.

The court agreed with Smith that requiring her to design websites for same-sex marriages could be considered compelled speech, because the Accommodation Clause "compels Appellants to create speech that celebrates same-sex marriages," in that it would "force" them to "create websites – and thus, speech – that they would otherwise refuse." And, she wrote, "because the Accommodation Clause compels speech in this case, it also works as a content-based restriction. Appellants cannot create websites celebrating opposite-sex marriages, unless they also agree to serve customers who request websites celebrating same-sex marriages." As a result, the court must subject the provision to strict scrutiny, under which it is deemed unconstitutional unless it serves a compelling state interest and is narrowly tailored as necessary to achieve that interest.

In this case, the arguments that ADF advanced to convince the court that this is a compelled speech case came back to defeat their claim. ADF emphasized the artistic creativity that renders Smith's services "unique." After the court concluded that Colorado's decision to include sexual orientation in its accommodations provision signaled a compelling state interest to protect people from discrimination in obtaining goods and services due to their sexual orientation, the court's focus shifted to whether the provision was "narrowly tailored" to achieve that purpose. Is it possible that customers who desired the "unique" services offered by

Smith could obtain basically the same thing from an alternative vendor? ADF did such a good job at distinguishing Smith's unique talents that it persuaded the court that giving Smith an exemption from the statute would defeat the state's compelling interest, because these are not fungible services. In the court's view, somebody who provides a uniquely personal service has a virtual monopoly, so making an exception from the law effectively denies the service to the potential customer.

Consequently, the majority of the panel concluded that the Accommodation Clause survives strict scrutiny in this case.

As to the Communications Clause, the court ruled that it does not violate Free Speech rights, agreeing with District Judge Krieger that "Colorado may prohibit speech that promotes unlawful activity, including unlawful discrimination." Here the court relied on a 1973 Supreme Court opinion that rejected a newspaper's First Amendment defense against the demand by the Pittsburgh Commission on Human Relations that it stop publishing "help wanted" classified advertising specifying "male" or "female" applicants wanted, where a statutory ban on sex discrimination in employment made such advertising unlawful, even though it was clearly speech.

The court found that the statement Smith proposed to put on her website "expresses an intent to deny service based on sexual orientation — an activity that the Accommodation Clause forbids and that the First Amendment does not protect."

Turning to ADF's religious freedom arguments, the court found that CADA is a neutral law of general applicability, and thus under the Supreme Court's 1990 decision in Employment Division v. Smith, it easily survives judicial review. ADF argued that the Supreme Court's Masterpiece Cakeshop decision from 2018 should dictate the same outcome in this case, based on their contention that the Colorado Civil Rights Commission is not "neutral" regarding religion. Rejecting this argument, Judge Briscoe wrote, "Appellants provide no evidence that Colorado will ignore the court's instruction in Masterpiece Cakeshop, and thus provide no evidence that Colorado will enforce CADA in a non-neutral fashion."

The court noted that in a "public meeting held a few days after the Court's ruling in Masterpiece Cakeshop," the Director of the Commission (and lead defendant in this case), Aubrey Elenis, stated: "So in these cases going forward, Commissioners and ALJs and others, including the Staff at the Division, have to be careful how these issues are framed so that it's clear that full consideration is given to sincerely — what is termed as sincerely-held religious objections." Furthermore, Masterpiece was a case in which the Division was prosecuting the baker for refusing to make a wedding cake for a same-sex couple, which the court found to be "dissimilar" from this case, in which Smith was affirmatively challenging the constitutionality of the statute in the absence of any prosecution ongoing against her.

The court also rejected ADF's arguments that the Communication Clause was overbroad and vague, finding that its "application to protected speech is not substantial relative to the scope of the law's plainly legitimate applications," quoting from a 2003 Supreme Court opinion, and that there was no vagueness issue in this case, because the Communication Clause clearly applied to the statement proposed by Smith for her website that she would refuse to provide her services for same-sex weddings.

“We agree with the Dissent that ‘the protection of minority viewpoints is not only essential to protecting speech and self-governance, but also a good in and of itself,’” wrote Briscoe. “Yet, we must also consider the grave harms caused when public accommodations discriminate on the basis of race, religion, sex, or sexual orientation. Combatting such discrimination is, like individual autonomy, ‘essential’ to our democratic ideals. We agree with the Dissent that a diversity of faiths and religious exercise, including Appellants’, ‘enriches’ our society. Yet, a faith that enriches society in one way might also damage society in others, particularly when that faith would exclude others from unique goods or services. In short, Appellants’ Free Speech and Free Exercise rights are, of course, compelling. But so too is Colorado’s interest in protecting its citizens from the harms of discrimination. And Colorado cannot defend that interest while also excepting Appellants from CADA.”

Chief Judge Timothy Tymkovich’s dissent starts with a quote from George Orwell (“If liberty means anything at all, it means the right to tell people what they do not want to hear”) and goes downhill from there, finding that the First Amendment protects Lorie Smith from having to compromise her beliefs in order to operate her business. He argues that “the majority takes the remarkable — and novel — stance that the government may force Ms. Smith to produce messages that violate her conscience. In doing so, the majority concludes not only that Colorado has a compelling interest in forcing Ms. Smith to speak a government-approved message against her religious beliefs, but also that its public-accommodation law is the least restrictive means of accomplishing this goal. No case has ever gone so far.” He asserted: “The Constitution is a shield against CADA’s discriminatory treatment of Ms. Smith’s sincerely held religious beliefs.”

One might remember Judge Tymkovich’s former role as attorney general of Colorado defending Amendment 2, the initiative measure that forbade the state from protecting gay people from discrimination, which the Supreme Court declared unconstitutional as a violation of the Equal Protection Clause in Romer v. Evans in 1996.

What lies ahead for this case?

Because ADF represents 303 Creative and Smith, there are no financial constraints on requesting en banc review or attempting to get the case up to the Supreme Court. ADF is an issues organization with an agenda, and it routinely seeks further review in such cases.

En banc review would not necessarily be a “slam dunk” for ADF, however, as the 10th Circuit is not one of those that President Trump succeeded in tipping over to a conservative majority. Twelve seats are authorized, of which two stand vacant, most recently when Judge Briscoe elected senior status earlier this year. President Biden has nominated Veronica Rossman to fill one of the vacancies. Upon her confirmation, the Circuit will have six Democratic appointees and five Republican appointees — two by Trump and three by George W. Bush. Judge Briscoe and the other senior judge on the panel in this case, Michael Murphy, would be entitled under 10th Circuit rules to participate in an en banc review, tipping the balance to eight Democratic appointees. In what are widely seen as “culture war” cases, the political party of an appointing president frequently correlates with how the judges vote.

However, if this case gets to the Supreme Court, the chances of it being reversed seem greater, in light of the eagerness of several members of that court to overturn Employment Division v. Smith, and the general disposition of the Court’s conservative wing to expand constitutional

protection for Free Exercise of Religion and free speech for religious practitioners. While the Court's recent denial of review in the Arlene's Flowers case from the Washington Supreme Court suggests a lack of appetite to take up another same-sex wedding case so soon, the newly-emboldened conservative majority might vote to take another crack at the issue as a vehicle for overruling Smith.