

SCOTUS Deals Blow to LGBTQ+ Rights, Public Accommodation Law

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In the *303 Creative LLC v. Elenis* decision, the Supreme Court set back gains made by the LGBTQ+ community over the past decade. In a 6-3 decision, the nation's highest Court answered a question about the balance of religious liberty and civil rights for same-sex couples that had been unresolved since 2018's *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

The Supreme Court, on June 30, 2023, ruled in favor of a Christian graphic artist from Colorado, finding that the First Amendment prohibits the state from forcing the designer to express messages contrary to her closely held religious beliefs. The Court ruled 6-3 in favor of the designer, Lorie Smith, who feared the Colorado Anti-Discrimination Act would compel her to create wedding websites for same-sex couples.

Historical Context

Having achieved [nationwide marriage equality](#), secured the end of “[Don't Ask, Don't Tell](#),” and obtained [protection from employment discrimination](#), the LGBTQ+ community has enjoyed significant gains over the last decade. This has prompted a backlash at the state level, where hundreds of laws – many expressly directed towards transgender youth – have been introduced and sometimes enacted into law.

However, the question of whether “religious liberty” entitles a secular business to discriminate against LGBTQ+ patrons has remained up in the air. The Court had an opportunity to resolve this dispute in 2018 when hearing the *Masterpiece Cakeshop* case but ultimately declined to resolve the question of whether a baker's right to decline services to LGBTQ+ customers was protected under First Amendment Principles. At the time, the Court issued a narrow decision that reversed the Colorado Commission's decision on procedural grounds.

Since that time, the Court's 5-4 conservative majority that included Anthony Kennedy, a conservative who nonetheless authored the nation's most important opinions on LGBTQ+ equality, including *Obergefell*, has shifted to a 6-3 majority with no one taking up Kennedy's pro-gay-rights mantle. This shift strengthened the conservative majority elected to hear this case, which was issued alongside decisions [striking down affirmative action](#) and expanding the requirement for [employers to accommodate for religious beliefs](#).

Freedom of Speech Outweighs Public Accommodation Law

This case involves a website designer, Ms. Smith, who plans to create wedding websites but wants to limit the scope of her services by refusing to provide them to same-sex couples. She filed suit seeking to block enforcement of Colorado's anti-discrimination laws and lost at the district court, with the Supreme Court granting certiorari. Primarily, Ms. Smith argued that requiring her to create a "message" on a website violated her first amendment rights by compelling her to engage in speech that violated her strongly held religious belief. She analogized this to expressions contradicting her views toward violence.

Tracking the expected ideological lines of previous decisions involving [religious liberty](#) and [the First Amendment](#), the 6-3 majority found that Colorado's anti-discrimination law went beyond merely "securing the civil rights of all Americans" and rather sought to "compel an individual to create speech she does not believe." The law's Accommodation Clause prohibits the exclusion of any customer based on statutorily enumerated traits, including sexual orientation.

Basing its holding on prior decisions involving the First Amendment, the Court found that the government could not regulate the "pure speech" of Ms. Smith's website. It cautioned that allowing a state to compel businesses providing "expressive services," such as Ms. Smith's, to accept payment for speaking on any topic could force "artists, speechwriters, and others" to speak what they do not believe on pain of penalty because of the relation to an individual's protected characteristic. Still, the Court recognized that public accommodations laws are vital to the civil rights of all Americans.

In fact, much of the decision evolves into a comparison to the dissenting opinion of the other justices. The dissent, authored by Justice Sotomayor, decried the opinion as "grant[ing] a business open to the public a constitutional right to refuse to serve members of a protected class." Sotomayor focuses on the history of public accommodations law and its importance in modern society, citing that all but five states have analogous laws to the Colorado law at issue and that federal law has codified public accommodations law via the Americans with Disabilities Act of 1990.

Regardless, the Court ultimately held that the First Amendment's freedom from regulated speech outweighed Colorado's public accommodation law and determined that Ms. Smith should be allowed to expressly exclude LGBTQ+ individuals from receiving her services.

What Businesses Need to Know

This decision is a broad expansion on a business' right to refuse services to individuals. However, it does not expressly overrule other anti-discrimination provisions, including the prohibition on discrimination against *employees* under Title VII and the ADA, which prohibits discrimination by "places of public accommodation" based on age, sex, sexual orientation, or gender identity. Individual states' anti-discrimination and public accommodation laws may also have varying provisions that could be interpreted differently to the facts of this case.

This holding also specifically applies to a set of facts involving “speech”-related services. Companies could face different outcomes depending on the services they provide, especially if considered a place of “public accommodation” under the ADA.

Ultimately, the decision provides additional protections for business owners with strongly held religious beliefs, but they still remain aware of the potential legal consequences of refusing to provide services to members of any protected class.

For more information about this case and how it may apply to you or your business, contact a member of McGlinchey’s Labor and Employment team.

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