Legal Update Article

# U.S. Supreme Court: First Amendment Entitled 'Expressive' Web Designer to Refuse Service to Same-Sex Couples

By Michelle E. Phillips, Christopher M. Repole, Jennifer E. Burgess &

June 30, 2023

## Meet the Authors


### Michelle E. Phillips

(She/Her)
Principal
914-872-6899
Michelle.Phillips@jacksonlewis.com



### Christopher M. Repole

(He/Him)
Principal
(212) 545-4019
Christopher.Repole@jacksonlewis.com


Colorado's Anti-Discrimination Act (CADA) constituted an impermissible infringement on its citizens' First Amendment right to freedom of speech, as the Act could compel individuals and businesses to engage in speech with which they disagree, the U.S. Supreme Court has ruled in a 6-3 decision written by Justice Neil Gorsuch. *303 Creative LLC v. Elenis*, No. 21-476 (June 30, 2023).

The case asked the Court to weigh the rights of LGBTQ+ people to be free from discrimination in the marketplace against a Colorado business owner's First Amendment right to free speech.

Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Brett Kavanaugh, and Amy Coney Barrett joined Justice Gorsuch's opinion. Justice Sonia Sotomayor filed a dissenting opinion, which was joined by Justices Elena Kagan and Ketanji Brown Jackson.

### Background

Lorie Smith is the owner of 303 Creative LLC, a Colorado-based web and graphic design business. Smith's lawsuit alleged that she wanted to expand her services to include wedding websites. However, Smith wants to provide these services for opposite-sex weddings only, because her religious beliefs preclude her from providing these services for same-sex weddings. Smith wants to state this position on her business's website.

Smith's business, 303 Creative LLC, is a "public accommodation" covered by CADA. A public accommodation is defined as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public."

Under CADA, public accommodations are prohibited from refusing to serve an individual or group on the basis of sexual orientation. The law also bars a business from announcing an intent to discriminate.

### Pre-Enforcement Challenge

This case came before the Court on a "pre-enforcement" challenge, which allows an individual or a business to challenge a law in court before being subject to its enforcement.

Smith sought an exemption from CADA enforcement that would allow her to refuse to provide web services for same-sex marriages and to announce that she will not provide web services for same-sex marriages on her website.

Jennifer E. Burgess
(BER-jis • She/Her • Jen)
KM Attorney
312-442-6104
Jennifer.Burgess@jacksonlewis.com

## Related Services

Employment Litigation
Trials and Appeals
Workplace Training

### Previous Challenge to CADA

Previously, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 138 S. Ct. 1719 (2018), the Court heard a similar case related to a baker who objected to making a wedding cake for a same-sex couple. However, the Court in that instance issued a narrower holding, which did not directly address the First Amendment issue answered in this decision.

### The Decision

Analogizing to its previous First Amendment jurisprudence, the Court concluded that requiring a website designer to "defy her conscience about a matter of major significance" would violate the First Amendment's protections.

The Court's discussion focused heavily on its conclusion that Colorado's law would require an *expressive* business to engage in speech that it would not otherwise engage. Such a mandate, ruled the Court, violates the First Amendment's principle that the government may not "'alter' the 'expressive content' of [one's] message."

The parties to this case stipulated that making a website for a same-sex wedding was "expressive." As a result, the Court was not asked to (and did not) provide guidance or new legal principles regarding the "difficult question" of what constitutes sufficiently "expressive" speech.

Despite its holding, the Court acknowledged that public accommodations laws serve an important and undisturbed purpose. Therefore, the Nation's public accommodations laws remain largely in effect and continue to require the non-discriminatory treatment of individuals by non-expressive businesses.

### Dissent

In her dissent, Justice Sotomayor placed the majority's decision in a larger historical context. Since the enactment of public accommodations laws, people have claimed the laws infringed on their religious liberty or free speech rights. However, as the Court has always rejected arguments that serving racial minorities violates religious liberty by "contravening the will of God," she explained the majority asks the wrong question and reaches the wrong answer.

Justice Sotomayor said public accommodations laws generally, and CADA specifically, represent a "compelling state interest" to prevent discrimination and adhering to these laws, in essence, is the cost of doing business in Colorado. "A public accommodations law does not force anyone to start a business, or to hold out the business's goods or services to the public at large … [or] compel any business to sell any particular good or service." She continued, "But if a business chooses to profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination."

Calling the majority's application of the law profoundly wrong and "amusing, if it were not so embarrassing," Justice Sotomayor argued that the majority's decision "collapses the distinction between status-based and message-based refusals of service." Justice Sotomayor concluded by admonishing business owners in America to choose whether to live out the values in the Constitution. "Make no mistake: Invidious discrimination is not one of them," she proclaimed.

## Implications for Employers

The Court's decision obviously affects Colorado businesses insofar as they operate as places of public accommodations. Based on the decision, those businesses cannot be compelled to offer products or services to members of the public if the products or services include speech with which the businesses disagree.

While the full scope of the decision's impact on businesses' rights and obligations toward employees remains to be seen, employers must still comply with applicable employment non-discrimination statutes. That means employers must continue to take steps to prevent harassment and discrimination on any basis. Part of that effort should involve robust management training on handling accommodation requests and employee training, including LGBTQ+ training as part of existing anti-harassment and discrimination training.

Jackson Lewis attorneys are available to answer questions about the potential impact of this decision, to help design and deliver effective anti-harassment and anti-discrimination training and on how to navigate the interactive accommodation process, on updating anti-harassment and discrimination policies, and to provide advice and counsel on how to comply with public accommodations laws.