Freedom of Speech in Colorado

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- What does Colorado have against freedom of speech?
- First Jack Phillips of Masterpiece Cakeshop, now Lorie Smith of 303 Creative, LLC. Both have had cases against Colorado for violating their freedom of expression.
- Will the latest Supreme Court opinion finally teach Colorado a lesson?

Freedom of speech has been under attack in this country, and Colorado has been a big part of it. First, Jack Phillips of Masterpiece Cakeshop has spent ten years trying to defend his right to not be compelled to create custom cakes with messages which violate his beliefs. So when Lorie Smith wanted to expand her business into developing custom wedding websites, she was concerned that Colorado would do to her what it was doing to Jack Phillips. Her request for an injunction went all the way to the Supreme Court.

Freedom of speech includes the freedom not to be compelled to speak as well, but what happens when a person's freedom of speech conflicts with a state's law? In the case of 303 Creative LLC v. Elenis, the question was asked if the State of Colorado could dictate to Ms. Smith what type of message she had to communicate in her business.

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.

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I don't know how many times I've covered this, but then I doubt the justices on the Supreme Court read my articles. This cannot be a First Amendment case because Congress did not make this law.

Congress shall make no law … abridging the freedom of speech, or of the press;

U.S. Constitution, Amendment I

Since Congress did not make this law, it cannot be a violation of the First Amendment. So what this case truly is, is a violation of the Colorado Constitution:

No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty;

Colorado Constitution, Article II, Section 10

It's also a violation of the Fourteenth Amendment of the Constitution of the United States.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV

While the court opinion appears to focus on the First Amendment and freedom of speech, the real issue they were looking at was freedom of the press. Specifically, does the state have the power to compel others to publish content with which they disagree?

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 "conve[y]" 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.

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Ms. Smith wants to create and publish webpages, without being compelled to use them to communicate a message she doesn't agree with. Well, at least that was her plan.

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 Colorado has different plans. Specifically, 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.

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I'm sure this language came from Ms. Smith's attorney, because it uses the same phrases I've seen in other opinions used by lawyers. Since I've already explained why this case cannot be a First Amendment issue, let me explain why this is a free press case, not a free speech one.

Freedom of What?

Both the First Amendment of the United States Constitution and Article II, Section 10 of the Colorado Constitution protect both freedom of speech and press. Have you ever considered the difference between the two?

The faculty of uttering articulate sounds or words

Speech – Webster's 1828 Dictionary

Ms. Smith isn't planning to utter articulate sounds or words in her business, but publishing websites.

The art or business of printing and publishing.

Press – Webster's 1828 Dictionary

While Ms. Smith, and for that matter the Supreme Court, see this as a First Amendment Freedom of Speech case, it's really a Colorado Constitution Freedom of Press case and a Fourteenth

Amendment privileges and immunities cases.

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.

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Ms. Smith, having seen what had happened to Jack Phillips, and probably others, initiates a preemptive strike, filing a lawsuit and seeking an injunction against the State of Colorado before they have a chance to infringe on her rights. However, since she has not been aggrieved yet, she doesn't have an obvious standing for the courts. Generally, courts don't appear to like preemptive law suits, deciding to wait until someone actually suffers some harm before accepting them. In order to show that she had standing, Ms. Smith had to show a credible threat that the State of Colorado would compel her to publish websites that she did not want to produce.

In her lawsuit, Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA [Colorado Anti-Discrimination Act] to compel her to create websites celebrating marriages she does not endorse. … As evidence, Ms. Smith pointed to Colorado's record of past enforcement actions under CADA, including one that worked its way to this Court five years ago. See Masterpiece Cakeshop,

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Did Ms. Smith have a credible threat that Colorado would compel her to produce websites celebrating marriages she doe s not endorse? Absolutely. All the court had to do was look at a

previous case it had dealt with, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n. In that case the court found that Colorado had violated the Free Exercise Clause, not so much because they compelled speech, but because the Colorado Civil Rights Commission was hostile to Jack Phillips beliefs.

That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n

Like all such cases, Ms. Smith's case started in district court, where she lost. The case was appealed to the Tenth Circuit, which found that she did have standing, but was not entitled to the injunction she sought.

Turning to the merits, however, the Tenth Circuit held that Ms. Smith was not entitled to the injunction she sought. The court acknowledged that Ms. Smith's planned wedding websites qualify as "pure speech" protected by the First Amendment. … As a result, the court reasoned, Colorado had to satisfy "strict scrutiny" before compelling speech from her that she did not wish to create. Id… Under that standard, the court continued, the State had to show both that forcing Ms. Smith to create speech would serve a compelling governmental

interest and that no less restrictive alternative exists to secure that interest. … Ultimately, a divided panel concluded that the State had carried these burdens. As the majority 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." …

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The Tenth Circuit acknowledged that Ms. Smith's websites would be pure speech (press), so you would think that it would be protected. Unfortunately, under our current and irrational jurisprudence, we have this theory of "strict scrutiny".

A standard of Judicial Review for a challenged policy in which the court presumes the policy to be invalid unless the government can demonstrate a compelling interest to justify the policy. …

Once a court determines that strict scrutiny must be applied, it is presumed that the law or policy is unconstitutional. The government has the burden of proving that its challenged policy is constitutional. To withstand strict scrutiny, the government must show that its policy is necessary to achieve a compelling state interest. If this is proved, the state must then demonstrate that the legislation is narrowly tailored to achieve the intended result.

Strict Scrutiny – The Free Legal Dictionary

Under this interpretation of "judicial review", a court can find an act to be unconstitutional, but allow it anyway because of a "compelling government interest". The fact that this is a direct violation of both the Supremacy Clause and the justices' oaths of office doesn't seem to bother them one bit.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Article VI, Clause 2

As the supreme law of the land, once an act is found unconstitutional that should be the end of the debate. As has become quite common among today's courts though, they've placed their preferences and options above their oaths to support the Constitution.

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.

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Your freedom to speak and publish is not subject to government regulation. Not only do the constitutions of the several states and the United States prohibit government from restraining your expression, no matter how misguided they may think it to be, they cannot compel or coerce you into expressing the message they would prefer. Suppressing, even eliminating a message they did not like, is exactly what the State of Colorado has done with the CADA.

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 "forc[e her] to create custom websites" celebrating other marriages she does not. … Colorado seeks to compel this speech in order to "excis[e] certain ideas or viewpoints from the public dialogue." … Indeed, the Tenth Circuit recognized that the coercive "[e]liminati[on]" of dissenting "ideas" about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith.

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Before we look at the majority opinion, let's take a quick look at the dissent from justice Sotomayor, joined by justices Kagan and Jackson

Dissent

Five years ago, this Court recognized the "general rule" that religious and philosophical objections to gay marriage "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." … The Court also recognized the "serious stigma" that would result if "purveyors of goods and services who object to gay marriages for moral and religious reasons" were "allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' "…

Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. Specifically, the Court holds that the First Amendment exempts a website- design company from a state law that prohibits the company from denying wedding websites to same-sex couples if the company chooses to sell those websites to the public. The Court also

holds that the company has a right to post a notice that says, " 'no [wedding websites] will be sold if they will be used for gay marriages.' "…

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Reading this opening to the dissent, I was reminded of a letter written by Dietrich Bonhoeffer that was quoted under the title *Theory of Stupidity*:

Against stupidity we are defenseless. Neither protests nor the use of force accomplish anything here; reasons fall on deaf ears; facts that contradict one's prejudgment simply need not be believed –

Theory of Stupidity, Dietrich Bonhoeffer

A quick look at the facts stipulated by both Ms. Smith and the State of Colorado shows that at no time did Ms. Smith deny services to people based on their sexual preferences.

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

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Rather, she recognized it was illegal for the State of Colorado to coerce her to express a message with which she disagreed. It appears that, as Mr. Bonhoeffer noted, the dissenting justices "reasons fall on deaf ears; facts that contradict one's prejudgment simply need not be believed".

It’s like getting directions to drive from Nashville to Boston, but starting in San Diego. With such a flawed starting point it’s no wonder these justices came to such a ridiculous, may I even say stupid, conclusion. While the language he used was quite different, it appears Justice Gorsuch was just as confused by the dissenting opinion:

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?

When the dissent finally gets around to that question— more than halfway into its opinion—it reimagines the facts of this case from top to bottom. The dissent claims that Colorado wishes to regulate Ms. Smith’s “conduct,” not her speech. … Forget Colorado’s stipulation that Ms. Smith’s activities are “expressive,” … and the Tenth Circuit’s conclusion that the State seeks to compel “pure speech,” … The dissent chides us for deciding a pre-enforcement challenge. … But it ignores the Tenth Circuit’s finding that Ms. Smith faces a credible threat of sanctions unless she conforms her views to the State’s. … The dissent suggests (over and over again) that any burden on speech here is “incidental.” … All despite the Tenth Circuit’s finding that Colorado intends to force Ms. Smith to convey a message she does not believe with the “very purpose” of “[e]liminating . . . ideas” that differ from its own.

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Decision

Now let us look at the decision the rest of the justices came to.

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.

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Sadly, but not unexpectedly, Justice Gorsuch places the opinions of the court above the supreme law of the land. Rather than recognizing that the State of Colorado had made a law abridging the rights and privileges of a citizen of their state and applying the protections of the law unequally, he points to the courts' prior opinions, their precedent, to grant to Ms. Smith the justice she deserves. There is one portion of this opinion where Justice Gorsuch gives some recognition to the supremacy of the Constitution.

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. In Hurley, the Court commented favorably on Massachusetts' public accommodations law, but made plain it could not be "applied to expressive activity" to compel speech.

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Although they got to their decision predictably, via a convoluted act of judicial gymnastics, the court did, in a 6-3 decision, come to what I believe is the correct conclusion.

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.

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Conclusion

While I disagree with how the court arrived at its opinion, my concerns are not with the conclusion, but the fact that the placing of precedent above the supreme law of the land could have just as easily led the court to another conclusion. If the Constitution does not mean exactly what it says, it can mean nothing at all. And that, ladies and gentlemen, should concern us all.

While there are still concerns, today is a day to celebrate an important victory for freedom of expressions, whether by speech or by press. I hope this case will also provide relief not only to Jack Phillips, but to Darnelle Stuzman and all of our fellow Americans struggling to exercise their rights without government censorship or compelled speech.

Three cheers for Lorie Smith. For her courage to stand up, for her willingness to see this case through, and for the beautiful websites she can now design without worrying that the State of Colorado will try to compel her to publish a

message against her will.

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