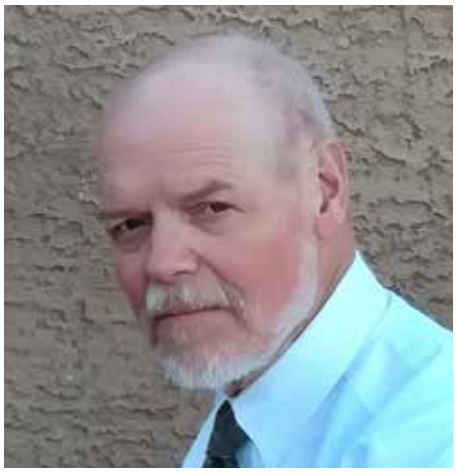
Current Events Column | 303 Creative as Harbinger



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The answer depends on how you frame the question. Is Lorie Smith offering a website design service, or is she making an artistic statement?

In her petition for cert[1] from the 10th Circuit[2] she argued both, but the Court pointedly took up only the free speech claim.[3] And a majority of six justices ultimately concluded[4] she is not refusing a public accommodation to same-sex couples as such, but refusing to "celebrate" same-sex marriages. Which, they said, she has a right to do.

This may turn out to be a very narrow result, allowing a public-facing business to refuse service to someone in a protected class because of the owner's religious beliefs, but only if the service is inherently "expressive," whatever that exactly means, and only if that expression can somehow be attributed to the owner herself.

One might quarrel whether 303 Creative actually meets this description, but this is the premise on which the majority decided the case. Also of course they found that Ms. Smith was not refusing service to gays or lesbians or other non-heterosexuals as such. The parties had stipulated[5] that she would accept other commissions from anyone, but she would not create a website "celebrating" a same-sex marriage regardless who was paying.

How Did We Get Here?

Toward the end of his dissent in *Obergefell*[6] back in 2015, Chief Justice Roberts observed that while the majority, in requiring states to license same-sex marriages and to recognize such marriages performed elsewhere, had said that religious believers might continue to "advocate" and "teach" their view of marriage as not including same-sex couples, *i.e.*, free speech, there was (in his view "ominously") no mention of free exercise.

He predicted that "hard questions" would likely soon come before the Court, and he gave as examples

> a religious college provid[ing] married student housing only to opposite-sex married couples, or a religious adoption agency declin[ing] to place children with same-sex married couples.[7]

That latter scenario arrived in 2019 with a petition for cert from the decision of the Third Circuit in *Fulton v. Philadelphia*[8] rejecting the claim of a Catholic social services agency that the city had wrongly refused to contract with it for foster care services because it would not agree to certify same-sex couples as foster parents.

The Court was actually unanimous in reversing that decision,[9] though three of the more "conservative" justices concurred in the result only.

The principal opinion, authored by Chief Justice Roberts, reasoned that because the city's non-discrimination policies allowed for discretionary exceptions they were not "neutral and generally applicable." The policies thus fell outside the scope of the 1990 decision in *Employment Division v. Smith*,[10] which had allowed Oregon to deny unemployment benefits to two individuals who had been discharged from their employment at a drug rehab facility for sacramental use of peyote, which was then illegal in that state.

A Brief Detour

Justices Alito and Gorsuch each wrote separately[11] concurring in the result but complaining that one of the questions the Court had agreed to take up in granting cert was whether *Smith* should be overruled, and instead the principal opinion expressly deflected the question. Each joined in the other's opinion, and Justice Thomas joined in both.

These three wanted the Court to restore what had been the law before *Smith*, as articulated for example in the 1963 opinion in *Sherbert v. Verner*,[12] that governmental action, even if facially neutral, that indirectly imposes substantial burdens on the free exercise of a religious practice may be justified only by a compelling state interest. What we used to call "strict scrutiny" back in con law class.

The petitioner in *Sherbert* had been denied unemployment benefits because, as a Seventh Day Adventist, she had

refused to accept employment that would have required her to work Saturdays. The Court reversed a South Carolina state supreme court ruling[13] upholding that denial.

There are rabbit holes here involving school prayer and blue laws we will not go down. This is just a brief detour.

In any event, Justice Barrett wrote a concurring opinion[14] in *Fulton*, in which Justice Kavanaugh concurred, rationalizing their choice not to deal with *Smith* just yet. Justice Breyer also joined that opinion except for the first paragraph, which did acknowledge that eventually *Smith* probably ought to be overruled.

In 1993 in response to *Smith*, a nearly unanimous Congress enacted the Religious Freedom Restoration Act,[15] ostensibly reinstating the *Sherbert* test, but in 1997 in *City of Bourne v. Flores*[16] the Court ruled this legislation could not be applied to the states.

Congress responded in 2000 with further legislation,[17] enacted by unanimous consent in both chambers, premised on its powers to spend and to regulate interstate commerce. But as its name implies, the Religious Land Use and Institutionalized Persons Act reaches only land use and prisons.

In all other contexts, the states are still subject to *Smith*. If we are talking about free exercise.

Where We Are Now?

But none of this was addressed in *303 Creative* because the Court had granted cert only on the free speech question. Still, some of the reasoning is similar.

A more immediately relevant precedent here is the 2006 opinion in *Rumsfeld v. FAIR*,[18] in which a unanimous Court, eight to zero -- the case had been argued before Justice Alito took the bench -- rejected a constitutional challenge to the so-called "Solomon Amendment"[19] to the 1996 defense appropriations bill. That legislation, as further amended in 2004, provides that an institution of higher education that denies military recruiters access to their students equal to that afforded other, non-military recruiters will be cut off from various sources of government funding.

The legislation had been enacted in response to several law schools having denied military recruiters access to their students, in protest against the statutory exclusion of gays from openly serving in the military. Paren, the "don't ask, don't tell" policy was repealed in 2010.[20] The plaintiffs in *FAIR* were an association of law schools and law faculties who had adopted policies opposing discrimination on various grounds, including sexual orientation.

The Court ruled that while there was an expressive component to the plaintiffs' facilitating recruiters' access -- sending e-mails, distributing flyers, etc. -- this was merely "incidental" to non-expressive conduct,[21] and that requiring the plaintiffs to accommodate the recruiters' messaging was not the same as compelling them to speak contrary to their beliefs.

The law schools and law faculties, in other words, would not be "identified" with the recruiters' speech. They might openly disassociate themselves from that speech, so long as they provided equal access.

This in contrast to Court's 1995 ruling in *Hurley v. Irish-American GLIB*,[22] that the organizers of a Saint Patrick's Day parade in Boston could properly exclude a contingent of gays, lesbians, and bisexuals, despite a state public accommodations law, not because of their sexual orientations *per se*, but because their presence in the parade, behind a banner identifying them as such, would convey a message with which the organizers did not want to be identified -- in Justice Souter's own words,

> that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.[23]

The parade organizers could not, said the Court, be compelled to express views with which they disagreed.

How it is Played

In her dissent in *303 Creative*, Justice Sotomayor argued the analogy to *FAIR* was the more persuasive. Ms. Smith was offering website design services, she was not "celebrating" marriages. Any expressive component to her services was incidental. No one visiting a site she had designed would attribute its messaging to her. She could post whatever "harmful" or "low-value" statements she wanted on her own website, but she should not be allowed to post, in effect, "straight couples only."[24]

What *FAIR* requires, said Justice Sotomayor, is not that Ms. Smith affirmatively endorse same-sex marriage, but that if she is offering goods and services to the consuming public, she offer them on equal terms to anyone. She need include an expressive component "only if and to the extent" this is included in the package offered to others.[25]

Ms. Smith's lawyers had conceded in oral argument that she would refuse to sell to a gay or lesbian couple a website identical in every respect to a site she had created for a heterosexual couple, except for the names. This, said Justice Sotomayor, "is status-based discrimination, plain and simple."[26] She pointed out that the same logic would allow a similar business to refuse goods or services to an interracial couple.[27]

Justices Kagan and Jackson joined this dissent.

Where to From Here

The same day it decided *303 Creative*, the Court granted cert from and vacated[28] a decision of the Oregon appeals court in *Klein v. Bureau of Labor*[29] affirming the determination of the named agency that

a baker had violated that state's public accommodations statute by refusing to bake a cake to celebrate a lesbian couple's marriage.

As a footnote, although *Masterpiece Cake*[30] was itself decided not on substantive but on procedural grounds, on remand the Colorado civil rights commission withdrew its cease and desist order and vacated its order that the respondent implement "remedial measures."[31] So the baker in that case was permitted to continue to refuse to provide wedding cakes for same-sex couples.

Going forward, we may expect to see any number of cases in which providers of wedding-related services may claim exemption from anti-discrimination laws on the ground that their services include an "expressive" component that is not "incidental." These will be very fact-specific, but unfortunately *303 Creative* has set a very low bar -- unless it is remembered, as the majority itself pointed out, that these conditions were stipulated by the parties in the present case. Another party might be put to proof.

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[1] Docket no. 21-476, filed 09/24/21.
[2] *303 Creative LLC* v. *Elenis,* 6 F.4th 1160 (10th Cir. 2021).
[3] Docket no. 21-476, order dated 02/22/22.
[4] *303 Creative LLC* v. *Elenis,* 600 U. S. ___ (2023).
[5] Slip opinion at 4.
[6] *Obergefell v. Hodges*, 576 U.S. 644, 686 ff., Roberts, C.J., dissenting (2015).
[7] Ibid. at 711.
[8] 922 F.3d 140 (3d Cir. 2019).
[9] *Fulton v. City of Philadelphia*, 593 U.S. ___, 141 S.Ct. 1868 (2021).
[10] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990).
[11] 141 S.Ct. at 1883 ff., 1926 ff.
[12] 374 U.S. 398 (1963).
[13] *Sherbert v. Verner*, 240 S.C. 286, 125 S.E.2d 737 (1962)
[14] 141 S.Ct. at 1882.
[15] Pub.L. 103-141, 107 Stat. 1488 (11/16/93), codified at 42 U.S.C. §§2000bb through 2000bb-4.
[16] 521 U.S. 507 (1997).
[17] Pub.L. 106–274, 114 Stat. 803 (09/22/20), codified at 42 U.S.C. §§2000cc et seq.
[18] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 126 S.Ct. 1297 (2006).
[19] 10 U.S.C. §983 (Supp. 2005).
[20] Pub.L.No. 111–321, 124 Stat. 3515 (09/20/11).
[21] 547 U.S. at 62.
[22] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).
[23] Ibid. at 574.
[24] 600 U.S. at ___, Sotomayor, J., dissenting, slip opinion at 26, fn. 10.
[25] Ibid. at 33.
[26] Ibid. at 31.
[27] Ibid. at 37.
[28] Docket no. 22-204, order entered 06/30/23.
[29] *Klein v. Bureau of Labor and Industries*, 363 Or. 224, 434 P.3d 25 (2018).
[30] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* , 584 U.S. ___, 138 S.Ct. 1719 (2018).
[31] Case No. CR 2013-0008, Final Agency Order on Remand (10/02/18), https://drive.google.com/file/d/1l0VfWNR6CJ05I2ah5KbMMF7u_25M9QIF/view?pli=1 last accessed 10/23/23.