

Lorie Smith is a website designer who formed her design studio called 303 Creative. Smith started the company to promote causes she cared about as viewed through her religious beliefs. When choosing commissions, Smith only considers the messages they send, not the protected class of the messengers. Smith is a devoted and sincerely held Christian, and the issue of this case arose when she decided to expand her services to wedding website design. Smith sincerely believes that God ordains marriage between one man and one woman, but her home state of Colorado compels her to speak otherwise.

The Colorado Anti-Discrimination Act (CADA) classifies 303 Creative as a "public accommodation" Pet.App.171a that cannot refuse service "because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry the full and equal enjoyment of" 303 Creative's "services," Colo. Rev. Stat. 24-34- 601(2)(a); Pet.App.171a–72a. Though this act is meant to stop discrimination, Colorado uses it to censor those with religious beliefs that prohibit endorsing same-sex marriage. Indeed, although the state agrees that Smith's websites are a form of pure speech, they will force Smith to create content under CADA, even if the message is against her will.

There is no question that CADA compels speech; this was evident in *Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Commission* (2018). In that case ruling, the court sided with the petitioner due to Colorado's improper conduct towards his religious beliefs, but now, the court is tasked with making an official decision. Although the vector for expression has changed from cakes to websites, the question is presented. Can a public accommodations law compel an artist like Smith to speak a message against her will? If not, CADA violates the Free Speech clause of the First Amendment.

### **CADA Censors Speech based on content and viewpoint.**

Colorado admits that Smith's websites are pure speech and "expressive." Smith custom creates her websites to display moments of a couple's love story and the biblical implications of the joining of the "bride" and "groom" through God. Pet.App.187a; J.A.51–72.

Like Mr. Philips's Wedding Cakes in *Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Commission* (2018), Smith's Wedding Websites are expressive because they are used to convey specific messages. (*Masterpiece*) In this case, Smith's mechanism for communicating her views on marriage is expressive conduct protected by the First Amendment.

As decided by *Texas v. Johnson* (1989), the state may not enforce its views while suppressing expressive conduct, ensuring it may not shut down expressions it disagrees with (*Texas v. Johnson*).

This is not followed by CADA, though, as found by the 10th circuit, "The statute's very purpose is to [e]liminat[e] [certain] ideas about marriage in favor of others." Pet.App.24a. This case shows that Smith is an artist with a particular set of values she wishes to express. This is done through her websites, quantifying them as expressive conduct, which the First Amendment protects. The State of Colorado falsely accuses this as invalid. Their CADA statute specifically targets views against gay marriage with the intent of eliminating them and pushing its ideological agenda. Under the *Texas v. Johnson* verdict, this is unconstitutional, which establishes that states may not further their views by suppressing others.

Given this, one can see that CADA is unjustly censoring Smith's speech based on its content and her religious viewpoint, thus violating the First Amendment.

### **Colorado Compels Speech**

The CADA statute is not satisfied by violating only one part of the constitution, though. Colorado does not only wish to censor particular views illegitimately but also compel Smith to speak its own.

CADA's Accommodation clause prohibits places of public accommodation from denying "the full and equal enjoyment of" their services because of one's protected class. Colo. Rev. Stat. 24-34- 601(2)(a). For Smith, anyone requesting a custom-designed website must be made one. As the Tenth Circuit court stated, "the result of the Accommodation Clause is that [Smith is] forced to create custom websites,"—implying speech that "[she] otherwise would not." Pet.App.22a–23a.

As decided by the *West Virginia State Bd. of Educ. v. Barnette* (1943) ruling, the First Amendment grants one the right to exercise free speech and not to speak (*Barnette*). Respondents to this case would argue that the *Barnette* decision was bestowed upon the grounds that not participating in speech did not infringe upon the rights of others. This is so, but they misunderstand Smith's intentions. Smith has stated that she serves all people regardless of their protected class. As in the Masterpiece case, it's "the kind of [speech], not the kind of customer" (*Masterpiece*) that determines her discretion. This being so, Smith is not infringing upon patrons' rights to be served regardless of their protected class. Instead, Smith chooses commissions based on the messages she wishes to express. In this way, the issue is not one of identity, but ideological content. Like in *Barnette*, not purporting a message the state would like to promote does not hurt others (*Barnette*), thus Smith's right of refusal to promote gay marriage in her websites is protected by the first amendment.

Still, CADA insists that Smith must create wedding websites for same-sex couples. Compulsion by itself is unconstitutional. As stated by Chief Justice Roberts in *Rumsfeld v.*

Forum for Academic and Institutional Rights (2006), "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." (*Rumsfeld*, 1).

At this point, one can see that CADA forces Smith to speak, violating her first amendment right not to speak, as found in the *Barnette* decision. According to the Chief Justice, this court's precedence is against the government telling others what to say; By not ruling in favor of Smith, though, the court would directly contradict *Barnette* and its precedence. Therefore, it is apparent that *Barnette* illegally violates the first amendment by compelling speech.

#### **CADA is unable to Fulfill Strict Scrutiny.**

As made clear by Footnote 4 in *United States v. Carolene Products Co* (1938), this court has a special responsibility to defend the civil liberties of individuals. As this case deals with Lorie Smith's First Amendment freedoms of speech and expression, the commitment made clear in Footnote 4 applies to Smith.

The court's responsibilities to protect fundamental freedoms in individuals qualify this case for being reviewed under Strict Scrutiny. Furthermore, because CADA censors and compels speech based on content and viewpoint, it actively suppresses Smith's first amendment freedoms. Therefore, not only should the court apply Strict Scrutiny, but CADA must ALSO be able to withstand Strict Scrutiny.

As defined by *United States v O'Brien* (1968), Strict Scrutiny requires that government regulation have a compelling interest unrelated to free expression and be narrowly tailored. (*O'Brien*)

According to Colorado, CADA must compel Smith's speech to "eradicat[e] discrimination" and maintain access to goods and services. Pet.App.111a.

CADA's suppression is not narrowly tailored, though. Colorado has yet to demonstrate a widespread problem in web-design access, which is furthered by the incredibly vast scale of the internet. As 303 Creative is a web-based design company, patrons would have no difficulty in finding a myriad of other web-based designers from all over the world.

CADA also cannot demonstrate a compelling interest in their regulation. Indeed, although Colorado may fear that by protecting Smith's Speech, they allow widespread discrimination against LGBTQ people's access to goods in the marketplace, as found in *Tinker v Des Moines Independent Community School Dis.* (1969), fear of a negative consequence is not enough to overcome freedom of expression. Ruling against this would cripple free discourse.

CADA's attempts to prevent negative consequences, shown by its inability to be narrowly tailored, are unfounded. This voids Colorado's interest as being compelling. Since both aspects of *O'Brien's* Strict Scrutiny test cannot be met, CADA cannot satisfy strict scrutiny, demonstrating that it is unconstitutional and inconsistent with past freedom of speech and expression precedents.

From the evidence presented, it is apparent that CADA violates the first amendment free speech rights of artists such as Smith. In addition, the petitioner asks the court to find CADA unconstitutional and revoke its compulsion on Smith to create websites for homosexual couples.

Respectfully submitted,

-Callum Holley

