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GUEST COLUMN

Case pits LGBTQ access to public accommodations against vendors' First Amendment rights

By Sanford Jay Rosen and Thomas Nolan

Against the backdrop of the LGBTQ equal rights legal movement over the last half century, *303 Creative LLC, v. Elenis*, 6 F. 4th 1160 (10th Cir. 2021), which the U.S. Supreme Court recently agreed to review, may appear to involve comparatively low stakes. No LGBTQ people are at risk of arrest, being frozen out of the political process, losing their job, or being denied the right to marry. 303 Creative is a pre-enforcement action challenging several provisions of Colorado's civil rights enforcement scheme extending access to public accommodations to LGBTQ people. The case is about whether a specialized commercial website for celebrating peoples' weddings ether may lawfully deny its services to LGBTQ people due to the vendor's freedoms of speech and religion. The stakes actually are high on both sides.

Just 36 years ago, by a 5-4 vote, the Supreme Court upheld Georgia's anti-sodomy law after Georgia police literally invaded Michael Bowers' bedroom. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Justice Harry Blackmun was unsparing in his eloquent dissent, setting the table for perhaps the fastest moving social revolution in American history: "I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.' Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.' *Herring v. State*, 119 Ga. 709, 721 (1904)."

Justice Anthony Kennedy in 2018. | New York Times News Service

Blackmun's dissent got to the heart of the matter by declaring that LGBTQ people are just that — people — and as such are entitled to the same liberty and rights as other people. It helped steer the path to Justice Anthony Kennedy's opinion 17 years later overturning Bowers by a 6-3 vote in *Lawrence v. Texas*, 539 U.S. 558 (2003), explaining that "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."

Subsequent landmark victories for gay rights came over the next 13 years, with *United States v. Windsor*, 570 U.S. 744 (2013), striking down parts of the Defense of Marriage Act that denied federal recognition of same-sex marriage, followed by *Obergefell v. Hodges*, 576 U.S. 644 (2015), making the right of same-sex couples to marry the law of the land and discarding a precedent from some 40 years earlier that a constitutional claim of the right to same-sex marriage does not present a substantial federal question — i.e., even the idea was frivolous. *See Baker v. Nelson*, 409 U.S. 810 (1972).

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on his 1996 decision in *Romer v. Evans*, 517 U.S. 620 (1996), striking down Colorado's anti-gay Amendment 2, which had barred any legislation at any level of government in Colorado protecting the rights of gay people.

After Justice Kennedy retired, in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court decided that Title VII of the Civil Rights Act of 1964 protects LGBTQ people from employment discrimination. Applying his textualist approach, Justice Neil Gorsuch's majority opinion acknowledged that the arc of history and social progress matters in applying a statute's actual language rather than the "intentions" of enactors that are not stated in a statute's broad language: "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

Justice Gorsuch is a solid legal and social conservative. His opinion was joined by Chief Justice John Roberts to make a 6-3 majority. His decision showed the power of the legal and social movement for LGBTQ rights.

303 Creative is the second case from Colorado in four years pitting LGBTQ people's public accommodation rights against religious freedom and compelled speech concerns. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm's*, 138 S. Ct. 1719 (2018), was the first. It involved a baker who refused to create cakes for same-sex weddings, although he was willing to provide other services to LGBTQ people. Justice Kennedy's majority opinion was in favor of the baker, but he did not weigh the competing constitutional values in play — equal access to public accommodations versus religious and expressive freedom. The court found instead that the Colorado Civil Rights Commission had shown impermissible hostility to the baker's religious freedom claims because some commissioners' comments suggested hostility towards the baker's religious belief-based justification for his refusal to make cakes for gay weddings and other comments and actions of the commission similarly evidenced a lack of neutrality towards religious-based speech.

Justice Kennedy's Masterpiece opinion framed the competing claims at issue in 303 Creative perfectly by identifying the competing constitutional values, explaining that "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." The Supreme Court's decision in 303 Creative may well answer many of the questions left open by Masterpiece.

Plaintiffs in 303 Creative argue that Colorado's public accommodation law, which was amended in 2007 and 2008 to include sexual orientation, would compel the owner to create websites for gay marriages as a condition of entering the marketplace for marriage websites in general. Hence, the law unconstitutionally compels her to speak violating her First Amendment expressive and religious freedoms. A divided panel of the 10th U.S. Circuit Court of Appeals ruled against her, concluding that Colorado's public accommodations law "is narrowly tailored to Colorado's interest in ensuring equal access to the commercial marketplace."

The majority carefully threaded the needle. They acknowledged as they must the weight of the religious freedom and compelled speech concerns and the governing strict scrutiny standard, noting that the type of website at issue "is pure speech." Through those prisms they contentiously weighed the conflicting constitutional values — equal access to public accommodations and competing free exercise and speech concerns. With eloquence equaling Justice Blackman's dissent in Bowers, the majority concluded that Colorado's interest in assuring that LGBTQ people have equal access the plaintiff's services has enough weight to survive strict scrutiny and overcome the competing First Amendment concerns: "We agree with the dissent 'the that protection of minority viewpoints is not only essential to protecting speech and self-governance, but also a good in and of itself.' Dissent at 1196. Yet, we must also consider the grave harms caused when public accommodations discriminate on the basis of race, religion, sex, or sexual orientation. Combatting such discrimination is, like individual autonomy, 'essential' to our democratic ideals. And we agree with the Dissent that a diversity of faiths and religious exercise, including Appellants', 'enriches' our society. Dissent at 1211- 12. Yet, a faith that enriches society in one way might also damage society in another, particularly when that faith would exclude others from unique goods or services. In short, Appellants' Free Speech and Free Exercise rights are of course compelling. But so too is Colorado's interest in protecting its citizens from the harms of discrimination."

Both the majority and the dissent stress the sincerity and legitimacy of the owner's religious objections to gay marriage. Id. at 1170 (majority explaining that "Ms. Smith sincerely believes, however, that same sex marriage conflicts with God's will.") and 1190 (dissent discussion of concern that law will make "Ms. Smith's artistic talents the vehicle for a message anathema to her beliefs.") Unlike the majority, the dissent fails to acknowledge the seriousness of the claims on both sides of the issue.

As an aside, both the majority and the dissent in 303 Creative emphasize the unique artistic elements of websites celebrating marriages. Although we favor defending artistic expression, we do not agree with panel's embrace of the unique creative characteristics of wedding websites. We looked at a number of them, and they all seemed pretty predictable and generic.

Some of the recent decisions striking down pandemic restrictions on church services, and changes in Supreme Court membership suggest a different result in the Supreme Court from the 10th Circuit's — one more favorable to religious freedom. *See, e.g., South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (Statement of Justice Gorsuch, ignoring the obvious differences in layout and the spacing of people in grocery stores and churches and incorrectly asserting that "California has openly imposed more stringent regulations on religious institutions than on many business" without constitutionally relevant basis). Of note, Justice Gorsuch was also a harsh critic of the Colorado Civil Rights Commission in Masterpiece.

All may turn on how Justices Brett Kavanaugh and Amy Coney Barrett vote. Both joined the court after the Masterpiece was decided, and both took a somewhat more circumspect position on the California pandemic case. Although he voted with the dissenters in Bostock, the Title VII case, Justice Kavanaugh wrote a separate dissent that concerned respecting the role of legislators. He also took pains to emphasize his agreement with his mentor Justice Kennedy's statements in Masterpiece: "This Court has previously stated, and I fully agree, that gay and lesbian Americans 'cannot be treated as social outcasts or as inferior in dignity and worth.'" Perhaps the arc of history and social justice will prevail yet again.