



Written by [Bob Adelman](#) on July 28, 2021

Appeals Court: Colorado Can Both Compel and Prohibit Speech

A three-member panel of Colorado's 10th Circuit Court of Appeals [ruled 2-1 on Monday](#) that Lorie Smith, a Denver website developer, cannot refuse to create websites celebrating same-sex marriages. The panel also ruled that she cannot express her religious beliefs in explaining why she won't. Smith is being assisted by the public-interest law firm Alliance Defending Freedom (ADF), and ADF's Senior Counsel John Bursch, summed up the case:

The government should never force creative professionals to promote a message or cause with which they disagree. That is quintessential free speech and artistic freedom.

Colorado cake artist Jack Phillips has been harassed for years; Washington floral artist Barronelle Stutzman stands to lose nearly everything she owns; and now Lorie Smith is being told that she must speak views she opposes and can't post about her beliefs on her own business website.

How many more creative professionals will have to suffer before they receive recognition of their constitutionally protected freedoms — the rights they have always had in this country? Lorie is happy to design websites for all people; she simply objects to being forced to pour her heart, imagination, and talents into messages that violate her conscience.



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The dispute dates back to 2016, when Smith first filed suit claiming that Colorado's Anti-Discrimination Act (CADA) would, if enforced, violate her First Amendment-protected right to free speech and free exercise of religion. This is the same law that Colorado's Civil Rights Commission used to harass Phillips — a case that went to the Supreme Court, which narrowly ruled in Phillips' favor.



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The court ruled on Monday that the commission could force Smith to create messages celebrating same-sex weddings, but issued a “gag” order preventing her from publishing her dissenting reasons on her business website, 303Creative.com. This is what she wanted to publish:

These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs.

So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God’s true story of marriage — the very story He is calling me to promote.

The two-judge majority on the panel put Colorado’s law ahead of the U.S. Constitution:

We agree with [Smith] that “the protection of minority viewpoints is not only essential to protecting free speech and self-governance but also good in and of itself.”

Yet, we must also consider the grave harms caused when public accommodations [such as Smith’s] discriminate on the basis of race, religion, sex, or sexual orientation. Combatting such discrimination is ... “essential” to our democratic ideals.

And we agree with [Smith] that a diversity of faiths and religious exercise ... “enriches” our society. 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, [Smith’s] 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.

Chief Justice Timothy Tymkovich dissented, calling this ruling “remarkable” and “novel”:

The majority takes the remarkable — and novel — stance that the government may force Ms. Smith to produce messages that violate her conscience.... [It] concludes ... that Colorado has a compelling interest in forcing Ms. Smith to speak a government-approved message against her religious beliefs.

No case has ever gone so far.

The majority’s ruling, wrote Tymkovich, ushers in “a brave new world”:

The Constitution is a shield against CADA’s discriminatory treatment of Ms. Smith’s sincerely held religious beliefs ... [but] the majority ushers forth a brave new world when it acknowledges both speech and silence — yet finds this intrusion constitutionally permissible.

CADA [according to the panel’s ruling] forces Ms. Smith to violate her faith on pain of sanction both by prohibiting religious-based business practices and by penalizing her if she does speak out on these matters in ways Colorado finds “unwelcome” or “undesirable.”

ADF intends on filing an appeal to the Supreme Court. Wrote ADF’s Maureen Collins: “No one should



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be banished from the marketplace simply for living and working consistently with their religious beliefs. Not a cake artist. Not a floral artist. Not a web designer. That's why ADF will appeal this decision to the U. S. Supreme Court on Lorie's behalf."



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