FACT SHEET: 303 CREATIVE V. ELENIS

BACKGROUND FACTS

- Case was filed by 303 Creative, a Colorado web designer, seeking a declaration that the Colorado Civil Rights Act's public accommodations anti-discrimination provision is unconstitutional if applied to her planned business. That business is described as including designing web pages for weddings. 303 Creative's principal argues that her religious belief is that same-sex marriages are not true marriages and she does not wish to support such acts. She seeks an opinion from the US Supreme Court that the application of the Colorado public accommodations law to her business would require her to provide wedding webpages for same-sex couples in contravention of her beliefs. Her specific argument is that the law then compels her to "speak" via such webpages in a manner that contravenes her wishes.
- This case is a "pre-enforcement challenge": it has no real factual background other than the positions stipulated by the parties, since the web designer never started the wedding webpage design part of her business plan, arguing that she is afraid to do so without protection from the application of the public accommodations law.

ARGUMENTS

For the designer:

- Designer argues that by being forced to create webpages for same-sex couples' weddings, she is being compelled to speak in a fashion which she does not choose. She is arguing that the Court's holding in the Hurley case (upholding restrictions on gay group seeking to march in Boston's St. Patrick's Day parade, i.e. that they can march but cannot identify their "cause" because it is not within the intentions of the parade organizers) is precedent for her position.
- In response to liberal justices questions, she says that being required to create the same-sex couple's webpage, she is being forced to "speak". She is not arguing that she is concerned about being perceived as endorsing such marriages. She compares herself to a ghostwriter, who would be forced to create a writing with which they do not agree. She agrees that a web "designer" who is only creating a "plug and play" webpage service where couples plug in all their own information and go live would not be compelled speech and not the subject of this case, because that "speech" is already out in the stream of commerce.
- Twenty states, as amici, filed a brief stating that their practice re: application of their public accommodations laws is consistent with our argument, i.e. if there is creative or expressive content, they do not apply their law to that, unlike Colorado. The test first is: is this speech? And if it is, then is the content objectionable to the speaker evidenced in the speech being sought.

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ARGUMENTS CONT.

For the State:

- The Colorado public accommodations law requires any business to provide equal access to its goods or services. Even with respect to websites, the application of the public accommodations law only incidentally affects expression. The mandate is to serve, here, gay couples in the same manner as heterosexual couples.
- The exemption sought by the designer is extremely broad, and would protect discrimination based not just on religious beliefs, but on any racist, sexist, or otherwise bigoted views. But the history of public accommodations laws is that they do not carve out an exception for expressive conduct, they apply to all those who operate a trade to the public. Most artists are not public accommodations.
- The State relies on the FAIR case as precedent. In that case, law schools were required by law to provide spaces and times for recruiting by the military, even though the law schools objected to the military's "don't ask, don't tell" personnel policy. The speech by recruiters was objectionable, and the law schools were required to post notices advertising the recruitment location and time. This Court held that the impact on speech by the legal mandate was merely incidental to a content-neutral regulation of conduct.
- A refusal to provide a wedding website for a same-sex couple is simply status-based discrimination against gays and lesbians because their status and their conduct (marriage in this case) is inextricably intertwined. And any discrimination based upon a protected status is outlawed by the public accommodations law. If the case here were that the designer puts on every wedding website that she creates the statement "I believe marriage is only valid between a man and a woman", state law would not prohibit that, because that is pure speech and the website would be available to all persons.

POTENTIAL OUTCOMES

- Marriage between two persons of the same sex is not inextricably intertwined with sexual orientation, and therefore this case is not status-based discrimination. Since it is not status-based discrimination, the refusal to create same-sex wedding webpages is not a violation of a public accommodations law.
- Designing a website (other than a plug and play type site) is inherently an expressive activity, the creation of which is a message by the designer, and therefore a requirement to create any website for any customer is a direct burden on free speech and is compelled speech, which is impermissible.
- A wedding website design service that is offered to the public is a public accommodation. A refusal to provide such service in the context