After *303 Creative v. Elenis* and *Groff v. DeJoy* – An Update on Religious and Free Speech Rights to Discriminate

Speakers:
Jenny Pizer (Moderator) (Lambda Legal)
David Cruz (USC Gould School Of Law)
Alison Gill (American Atheists)
Nikolas Nartowicz (Americans United for Separation of Church and State)

This workshop will explore the likely implications for LGBTQ+ people of the Supreme Court's decisions, anticipated by the end of the current term, in *303 Creative v. Elenis* and *Groff v. DeJoy*. It also will address ongoing disputes in courts and state legislatures about the religious and speech rights of public school teachers and of religious schools to discriminate against LGBTQ+ students, the evolving interpretations and uses of the federal Religious Freedom Restoration Act (RFRA) and state analogs to excuse otherwise unlawful conduct, and Biden administration rule changes concerning accommodations for applicants and recipients of federal funds that object on religious grounds to nondiscrimination and other program requirements.

Background Materials:

No. 21-476. ***303 Creative LLC, et al., Petitioners v. Aubrey Elenis, et al., Respondents***

Decision Below: 6 F.4th 1160 (10th Cir. July 26, 2021)

Petition GRANTED limited to the following question: Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

Questions presented in the cert petition:

Artist Lorie Smith is a website designer who creates original, online content consistent with her faith. She plans to (1) design wedding websites promoting her understanding of marriage, and (2) post a statement explaining that she can only speak messages consistent with her faith. But the Colorado Anti-Discrimination Act (CADA) requires her to create custom websites celebrating same-sex marriage and prohibits her statement--even though Colorado stipulates that she "work[s] with all people regardless of ... sexual orientation." App.53a, 184a.

The Tenth Circuit applied strict scrutiny and astonishingly concluded that the government may, based on content and viewpoint, force Lorie to convey messages that violate her religious beliefs and restrict her from explaining her faith. The court also upheld CADA under *Employment Division v. Smith*, 494 U.S. 872 (1990), even though CADA creates a "gerrymander" where secular artists can decline to speak but religious artists cannot, meaning the government can compel its approved messages.

The questions presented are:

1. Whether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First Amendment.

2. Whether a public-accommodation law that authorizes secular but not religious exemptions is generally applicable under Smith, and if so, whether this Court should overrule *Smith*.

Selected party briefs and amicus briefs filed on the merits in the U.S. Supreme Court:

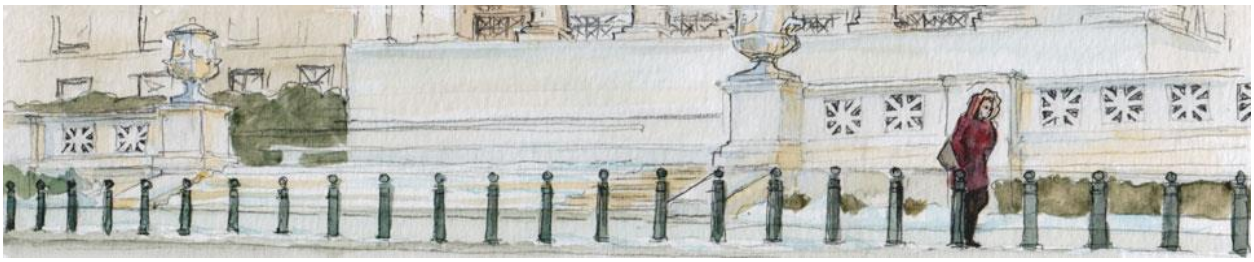
- Petitioners' Opening Brief: http://www.supremecourt.gov/DocketPDF/21/21-476/226347/20220526141015058_21-476%20Brief%20for%20Petitioner.pdf
- Brief amici curiae of Prof. Dale Carpenter, et al.: http://www.supremecourt.gov/DocketPDF/21/21-476/226637/20220531142739104_21-476%20tsac%20Professor%20Carpenter%20et%20al.pdf
- Brief amici curiae of The First Amendment Scholars in support of Petitioners: https://www.supremecourt.gov/DocketPDF/21/21-476/227034/20220602175836187_21-476%20Amici%20First%20Amendment%20Scholars%20Supp.%20Pet.2.pdf
- Brief of Respondents Aubrey Elenis, et al.: http://www.supremecourt.gov/DocketPDF/21/21-476/233350/20220812133015020_21-476%20Brief%20for%20Respondents%20Final.pdf
- Brief amicus curiae of United States Supporting Respondents: https://www.supremecourt.gov/DocketPDF/21/21-476/234119/20220819182151542_21-476%20303%20Creative%20LLC%20v.%20Elenis%20FINAL.pdf
- Brief amici curiae of GLBTQ Legal Advocates & Defenders, et al., in Support of Respondents: http://www.supremecourt.gov/DocketPDF/21/21-476/234061/20220819145906224_21-476%20Brief.pdf
- Brief amici curiae of The Freedom From Religion Foundation, et al. in Support of Respondents: https://www.supremecourt.gov/DocketPDF/21/21-476/233894/20220818140350294_21-476_Amicus%20Brief.pdf
- X Brief amici curiae of 30 Religious, Civil Rights, and Grassroots Organizations in Support of Respondents: http://www.supremecourt.gov/DocketPDF/21/21-476/234336/20220824115057783_Final_303%20Creative%20Amicus.pdf
- Brief amici curiae of American Civil Liberties Union, et al.: http://www.supremecourt.gov/DocketPDF/21/21-476/233992/20220819114720388_21-476%20303%20Creative%20v%20Elenis%20et%20al%20Amicus%20Brief.pdf
- Reply of petitioners 303 Creative LLC, et al.: http://www.supremecourt.gov/DocketPDF/21/21-476/237603/20220912112429290_21-476%20Merits%20Reply%20Brief.pdf

SCOTUSblog
INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

SCOTUS NEWS

Justices will hear free-speech claim from website designer who opposes same-sex marriage

By Amy Howe on Feb 22, 2022 at 4:11 pm



Nearly four years after the Supreme Court declined to decide whether compelling a Colorado baker to bake a cake for same-sex couples would violate his right to freedom of speech, the justices agreed to take up a similar question in another case from Colorado, this time involving a website designer. The justices' decision to grant review in *303 Creative LLC v. Elenis* sets up yet another major ruling on the intersection between LGBTQ rights and religious beliefs.

The case that the court agreed on Tuesday to hear was filed by Lorie Smith, who owns a graphic design firm and wants to expand her business to include wedding websites. Because she opposes same-sex marriage on religious grounds, Smith does not want to design websites for same-sex weddings, and she wants to post a message on her own website to explain that. But a Colorado law prohibits businesses that are open to the public from discriminating against gay people or announcing their intent to do so.

Smith went to federal court, seeking a ruling that Colorado could not enforce its anti-discrimination law against her. The U.S. Court of Appeals for the 10th Circuit agreed that Smith's "creation of wedding websites is pure speech," and that Colorado law compels Smith to create speech that she would otherwise refuse. But the anti-discrimination law does not violate the Constitution in this case, the court of appeals concluded, because the law is narrowly tailored to the state's interest in ensuring that LGBTQ customers have access to the unique services that Smith provides. Same-sex couples might be able to have their wedding websites designed by someone else, the court of appeals explained, but those customers "will never be able to obtain wedding-related services of the same quality and nature as those that" Smith offers.

After considering the case at four consecutive conferences, the justices agreed to take up Smith's claim under the free speech clause of the First Amendment. They declined to review two other questions that Smith raised in her petition for review: whether requiring Smith to create custom websites for same-sex couples violates the First Amendment's free exercise clause, and whether the Supreme Court should overrule its 1990 decision in *Employment Division v. Smith*, which held that government actions usually do not violate the free exercise clause as long as they are neutral and apply to everyone. The case

nonetheless promises to be a major ruling because it may clarify when business owners who are engaged in expressive activities are entitled to religious-based exemptions from laws protecting civil rights.

Unlike ***Biden v. Texas***, the case that the justices **agreed to fast-track** on Friday, involving the Biden administration's efforts to end the Trump-era program known as the "remain in Mexico" policy, the justices did not set *303 Creative* for argument during their April argument session or otherwise give any sign that they planned to expedite the briefing. The case will therefore presumably be argued during the 2022-23 argument session, joining **the pair of cases involving the role of race in university admissions** and **the challenge to Alabama's redistricting plan** in what already promises to be another blockbuster term.

*This article was **originally published at Howe on the Court**.*

Posted in **Merits Cases**

Cases: **303 Creative LLC v. Elenis**

Recommended Citation: Amy Howe, *Justices will hear free-speech claim from website designer who opposes same-sex marriage*, SCOTUSblog (Feb. 22, 2022, 4:11 PM), https://www.scotusblog.com/2022/02/justices-will-hear-free-speech-claim-from-website-designer-who-opposes-same-sex-marriage/

ARGUMENT ANALYSIS

Conservative justices seem poised to side with web designer who opposes same-sex marriage

By **Amy Howe** on Dec 5, 2022 at 7:18 pm

Lorie Smith speaks to reporters after the argument in *303 Creative LLC v. Elenis*. (Katie Barlow)

The Supreme Court heard oral argument on Monday in **the case of Lorie Smith**, a website designer and devout Christian who wants to expand her business to include wedding websites – but only for opposite-sex couples. Smith is challenging a Colorado law that prohibits most businesses from discriminating against LGBTQ customers. Requiring her to create websites for same-sex weddings, she argues, would violate her right to freedom of speech.

At the oral argument, Justice Sonia Sotomayor asserted that a ruling for Smith would be the first time that the Supreme Court had ruled that "commercial businesses could refuse to serve a customer based on race, sex, religion, or sexual orientation." But Chief Justice John Roberts countered that the Supreme Court has never approved efforts to compel speech that is contrary to the speaker's belief, and his five conservative colleagues signaled that they were likely to join him in a ruling for Smith.

Representing Smith, lawyer Kristen Waggoner emphasized that Smith "decides what to create based on the message, not who requests it." Smith is not asking the Supreme Court, she emphasized, to create new law. Instead, she assured the justices, she is only asking them to apply their existing precedent. Under the Supreme Court's 1995 decision in ***Hurley v. Irish-American Gay, Lesbian, & Bisexual Group***, holding that Massachusetts could not require the private organizers of Boston's St. Patrick's Day parade to allow an LGBTQ group to march in the parade, the question before the court is a simple two-part test: Is the good or service involved speech, and – if so – is the message affected by the speech it was required to accommodate? The answer in this case to both questions, Waggoner concluded, is yes.

Colorado Solicitor General Eric Olson told the justices that **the law at the center of the case**, known as a public-accommodation law because it requires businesses that serve the public to serve everyone, merely targets discriminatory sales, rather than a speaker's message. A store, he noted, could decide that it will only sell Jewish-themed items, but it can't refuse to sell those items to Muslim or Christian customers. And he warned that the exemption that Smith is seeking is "sweeping": It would apply not only to sincere religious beliefs like Smith's, he said, but also to all kinds of racist, sexist, and bigoted claims.

The court's more liberal justices expressed doubt about whether, in creating a wedding website, Smith would be expressing a message at all. Noting that two of her clerks are engaged to be married, Justice Elena Kagan observed that the clerks' wedding websites contain similar features – for example, the couples' names, their wedding dates, and links to things like the schedules for the wedding weekend and the couples' registries. "They're not particularly ideological or particularly religious," Kagan said. "They're not particularly anything." Therefore, Kagan suggested, the dispute in Smith's case is not about the content of the speech, but instead Smith's resistance to its use in a same-sex wedding.

Waggoner pushed back, telling Kagan that Smith's objection does not stem from how the site would be used or by whom, but instead from the fact that Colorado's public-accommodation law would require her to create a message that she believes to be false.

Sotomayor also questioned the idea that Smith would be creating a message. When Waggoner asserted that the message of the wedding website was the invitation to celebrate a couple's marriage, Sotomayor was skeptical. Smith, she insisted, would not be sending the invitation; the couple who is being married sends the invitation.

Sotomayor then moved on to a topic that was the focus of considerable attention for the more liberal justices: whether Smith's proposed rule would allow businesses to refuse to serve other groups protected by anti-discrimination laws. Sotomayor asked whether a designer could refuse to create wedding websites for interracial couples or for people with disabilities who want to marry.

Justice Ketanji Brown Jackson offered another hypothetical: the case of a shopping-mall photography business that wants to offer sepia-toned portraits with Santa Clause, evoking the 1946 classic "It's a Wonderful Life" – but only for white children.

Waggoner countered that such a scenario would be different, and not protected by the First Amendment because the speaker's objection "is not contained in" the photograph that the photographer would produce. But in any event, she continued, the Supreme Court's First Amendment case law has protected speech that many people would regard as "vile."

Waggoner's response did not seem to satisfy the liberal justices, but Justice Amy Coney Barrett was more receptive to Waggoner's argument that Smith's decision about whether to create a website was based on the message, rather than the people requesting it. She offered Waggoner two hypotheticals involving websites that would conflict with Smith's beliefs about marriage. The first involved an opposite-sex couple who wanted their website to include a statement that they believe that concepts of gender are irrelevant to their relationship, and the second involved an opposite-sex couple who wanted to include the story of their relationship, which began while they were married to other people. In both of those cases, Waggoner agreed, Smith would decline to create the websites.

Demonstrators march in front of the Supreme Court on Monday morning before the argument in *303 Creative LLC v. Elenis*. (William Hennessy)

Justice Samuel Alito parried the liberal justices' suggestion that, if Smith prevails, it would open the door for other exemptions from public-accommodations laws, including for discrimination based on race. He noted that in the Supreme Court's 2015 decision in ***Obergefell v. Hodges***, establishing a constitutional right to same-sex marriage, Justice Anthony Kennedy had recognized that opponents of same-sex marriage could continue to oppose it and should enjoy First Amendment protection to do so. That recognition, Alito suggested, distinguishes opposition to same-sex marriage from, for example, opposition to interracial marriages.

Brian Fletcher, the principal deputy solicitor general who argued on behalf of the Biden administration in support of Colorado, resisted any effort to carve out an exemption for same-sex marriage. The Supreme Court's First Amendment cases, he argued, do not distinguish between "views we find odious and those we respect." He noted that in 1976, the Supreme Court ruled that private schools may not discriminate based on race. But if Smith prevails, he posited, a private school could exclude some children by arguing that the messages that it teaches "change when we express them to students of a different race."

Kagan raised another concern about the scope of Smith's proposed rule – specifically, what other businesses would be able to claim an exemption from anti-discrimination laws. For example, Kagan asked, would a ruling for Smith also allow a vendor to refuse to provide chairs for same-sex weddings?

Justice Brett Kavanaugh, who is often a key vote in closely divided cases, echoed Kagan's concern. If you win, he told Waggoner, the Supreme Court's next case will involve the caterer who objects to providing the food for same-sex weddings. Kavanaugh later referred to a "friend of the court" brief filed by a group of First Amendment scholars that drew a line between businesses who create speech and cannot be compelled to serve weddings, on the one hand, and providers of services that are not speech, who are not protected by the First Amendment. Smith's case would fall into the first category under their test, he observed, while a baker would fall into the second.

Waggoner acknowledged that there are "difficult line-drawing questions" whenever the Supreme Court is dealing with free-speech issues. But she agreed that a caterer does not create speech and therefore

wouldn't have the same right as Lorie Smith to decline to provide services for a same-sex wedding. "Art," she stressed, "is different."

Jackson offered a different way to frame the case. The real test, she suggested, should be whether the product someone like Smith provides would be regarded as an implicit endorsement – here, for same-sex marriage. If it is not, Jackson reasoned, it would not be protected by the First Amendment.

Fletcher agreed that the Supreme Court "has never recognized that sort of implicit problem as being sufficient." To the contrary, he noted, the court "squarely rejected it" in ***Rumsfeld v. Forum for Academic and Institutional Rights***, the 2006 decision holding that a federal law withholding some federal funding for colleges and universities that restricted the access of military recruiters to students did not violate the First Amendment. "No one doubted there was implicit support," he continued, "and no one doubted it was speech, but because it was incidental, the court upheld" the law.

Jackson's alternative theory did not, however, seem to find any traction among the court's conservative justices. A decision in the case is expected sometime next year.

*This article was **originally published at Howe on the Court**.*

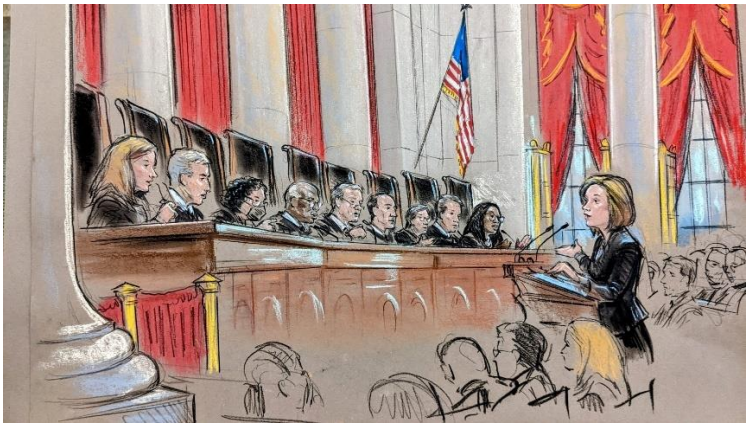
Posted in **Merits Cases**. Cases: **303 Creative LLC v. Elenis**

Recommended Citation: Amy Howe, *Conservative justices seem poised to side with web designer who opposes same-sex marriage*, SCOTUSblog (Dec. 5, 2022, 7:18 PM), https://www.scotusblog.com/2022/12/conservative-justices-seem-poised-to-side-with-web-designer-who-opposes-same-sex-marriage/

A VIEW FROM THE COURTROOM

"Scenes with Santa" and online-dating inquiries at the *303 Creative* argument

By **Mark Walsh** on Dec 5, 2022 at 7:29 pm



Kristen Waggoner argues for Lorie Smith, owner of 303 Creative LLC. (William Hennessy)

***A View from the Courtroom** is an occasional series offering an inside look at oral arguments and opinion announcements unfolding in real time.*

It's the last week of arguments before the holiday break, and the court has **the big wedding website case** today and **the independent legislature theory case** on Wednesday.

In the last few days, the court has been represented at some of Washington's biggest social and entertainment events of the year. On Thursday night, retired Justice Stephen Breyer and his wife, Joanna, attended the state dinner for French President Emmanuel Macron at the White House. When they arrived and walked, as most of the guests did, past a small retinue of reporters, Breyer was asked how he was enjoying retirement. The Washington Post **reported** that he "turned to pantomime … as if words had escaped this man of precise language. He clapped his hands to the sides of his face and then scribbled some imaginary rejoinder into the air." Some have said that with Breyer's retirement, the age of the "downright silly" hypotheticals had passed. That idea will be challenged today.

Meanwhile, on Sunday night, a star-studded crowd filled the Opera House at the John F. Kennedy Center for the Performing Arts, for the Kennedy Center Honors, a recognition of five artistic individuals or groups. Chief Justice John Roberts was in attendance, as he has been often in the past, and a White House pool reporter's dispatch indicated that the chief justice was shown briefly on the in-house screen applauding the presence of Paul Pelosi, the husband of outgoing House Speaker Nancy Pelosi and the victim of that vicious attack by a home intruder last month.

The chief was arguably not the most luminescent Roberts at the event last night. That would be Julia Roberts, who participated in the segment devoted to honoree George Clooney. (The other honorees were Amy Grant, Gladys Knight, Tania León, and the group U2. The edited show is scheduled to air on CBS on Dec. 28.)

There is no question about the artistry of the Kennedy Center honorees. In the courtroom today for ***303 Creative LLC v. Elenis***, there will be quite a bit of discussion of whether website designers, cake bakers, stationers (as in suppliers of wedding invitations), jewelers, caterers, and others occupied around the wedding business are indeed artists engaged in expressive conduct. It will also address whether freelance writers, political publicists, and writers and creators of hit Broadway musicals known to be seen by several recent justices are, in any sense, public accommodations. And the argument will veer into some uncharted territory.

Lorie Smith, whose website design business is the subject of today's case, is in the crowded courtroom this morning, seated in the second-to-last row of the public gallery.

Lorie Smith listens to oral argument in *303 Creative LLC v. Elenis*. (William Hennessy)

The VIP section of the courtroom is full today, with only a few faces we recognize. Jeffrey Minear, who retired at the end of September as counselor to the chief justice, is in the section, and he is soon joined by Patrick Jackson, the husband of Justice Ketanji Brown Jackson. We don't know who the other VIP guests know or what strings they pulled to score seats.

Otherwise, the star power is a little lacking, as it seems none of the Hollywood crowd in town for the Kennedy Center Honors decided to stick around to attend a big Supreme Court argument.

Amy Howe has the **main account** of the argument. Up first is Kristen Waggoner of Alliance Defending Freedom, who argued for cake artist Jack Phillips in ***Masterpiece Cakeshop v. Colorado Civil Rights Commission***. It is hard to believe, but that argument was five years ago to the day. One reporter spotted Phillips outside the courtroom today at a small rally to support Smith, but he apparently has not gotten into the courtroom.

Justice Elena Kagan presses Waggoner on a hypothetical that is "not really a hypothetical, because I happen to have two clerks in my chambers this year who are engaged, so, in looking at this case and preparing this case, I looked at their websites."

(It quickly becomes clear they are marrying other people, not each other.)

Kagan asks about a wedding website without much customized expression, and whether the designer could one day decide not to create sites for same-sex couples. She refers to a "standard" website, though Waggoner calls that "plug and play" and Smith throughout her briefing emphasizes that she doesn't do template websites and that her creations are customized around the story of each couple.

"That is speech," Waggoner says. "You are announcing a wedding. And if you believe the wedding to be false, then the government would be compelling you to say something that you otherwise wouldn't say."

Jackson has a hypothetical for Waggoner probably not inspired by her clerks. She asks about a photo outlet at a shopping mall that offers "Scenes with Santa," including sepia-toned vintage pictures evoking the 1940s and 1950s.

"But precisely because they're trying to capture the feelings of a certain era, their policy is that only white children can be photographed with Santa in this way because that's how they view the scenes with Santa that they're trying to depict," Jackson says.

She will refer to this several times as "It's a Wonderful Life" scenes, which I'm sure the rights holders of the 1946 Frank Capra Christmas class will be just thrilled about. (There are Black characters and extras in the film, but mostly as domestic workers or other minor roles.)

Waggoner says the photo store's "objection" is "not necessarily in that photograph, but even if it were, this court has protected vile, awful, reprehensible, violent speech in the past." Meanwhile, Justice Neil Gorsuch presses Colorado Solicitor General Eric Olson about the state's treatment of Phillips.

"Mr. Phillips did go through a re-education training program pursuant to Colorado law, did he not, Mr. Olson?" Gorsuch says.

Olson says the baker was required to go through "a process to make sure he was familiar with Colorado law."

"Someone might be excused for calling that a re-education program," Gorsuch says.


Eric Olson argues for Colorado. (William Hennessy)

Justice Samuel Alito asks Olson about "some hypotheticals in a brief submitted by Josh Blackman."

The examples come from an **amicus brief** in support of Smith co-written by Blackman, a professor and frequent commentator about the court, for the Jewish Coalition for Religious Liberty.

"A Jewish man and a Jewish woman, who are engaged to be married, ask a Jewish website designer to build a website to celebrate their [upcoming] nuptials. No problem." Alito says, adding only the bracketed word to the language from the brief, which added "Mazal tov!" to that example.

"Another Jewish man and a Christian woman, who are engaged to be married, ask a Jewish website designer to build a website to celebrate their nuptials. Big problem," Alito says, again quoting the brief. "Many Jews consider intermarriage an existential threat to the future of Judaism."

Does that website designer have to accept the second couple? he asks Olson. Yes, if they offer a general service to the public, they have to offer that regardless of religion, Olson says.

After some further back and forth, Alito is not done with the examples from the Jewish Coalition brief.

"An unmarried Jewish person asks a Jewish photographer to take a photograph for his JDate dating profile," Alito says, quoting the brief before adding his own observation that JDate "is a dating service, I gather, for Jewish people."

"It is," Kagan chimes in quickly, to laughter in the courtroom.

"All right," Alito continues, "maybe Justice Kagan will also be familiar with the next website I'm going to mention. 'Next, a Jewish person asks a Jewish photographer to take a photograph for his AshleyMadison.com dating profile.'"

Alito is leaning back in his chair, so his reference to AshleyMadison.com has a few people around the courtroom turning to their neighbor to apparently ask, first, "What did he say?" And some appear to be asking, "What's Ashley Madison?" And others just have wry smiles as another wave of laughs ripples through the courtroom about the Canada-based dating site marketing to married people or others already in relationships.

"I'm not suggesting that," Alito says. "I mean, she knows a lot of things, I'm not suggesting …" He just trails off.

The Jewish Coalition brief says of the Ashley Madison example, "Swipe left for *shanda*," with a footnote explaining the Yiddish word "to describe something shameful." (There are other Yiddish lessons in the brief.)

The reserved Josh Blackman I know is probably embarrassed a little by all this attention to his brief. Hah! Actually, within a half hour of Alito's questions — and before the argument is even over — Blackman has **posted on The Volokh Conspiracy about it**. "I was pleased that Justice Alito found useful the amicus brief" of the coalition, he writes.

The argument scheduled for 70 minutes goes on for 2 hours, 21 minutes, which is roughly in line with the trend this term of sessions running about double their set time. Today, at least, there is some consciousness of that.

Late in the argument, Jackson, addressing Deputy Solicitor General Brian Fletcher, who was arguing in support of Colorado, says, "Can I just say that I'm sort of trying to think about what you've just said in your exchange with …" She hesitates trying to get the name "Justice Kavanaugh" out.

"It's late," she says.

Brian Fletcher argues on behalf of the United State. (William Hennessy)

When Gorsuch gets a chance to question Olson, also well into the argument, he greets him with a hearty "Good morning."

"Is it still morning?" Olson says.

"Just barely," Gorsuch replies, at 11:36 a.m. "It must not feel like it standing where you are."

"I'm here all day, Justice Gorsuch," Olson says. Actually, he gets to leave after the first case, while the justices have to stick around for a **second, much more mundane argument about bankruptcy**. That one will defy the trend and clock in at a tidy 1 hour, 12 minutes.

Correction (Dec. 6 at 2:22 p.m.): An earlier version of this article erroneously reported that Justice Neil Gorsuch initially referred to Jack Phillips, the plaintiff in Masterpiece Cakeshop, *by the wrong name.*

Posted in **Merits Cases**, **Corrections**, **What's Happening Now**

Cases: **303 Creative LLC v. Elenis**

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No. 22-174. ***Gerald E. Groff, Petitioner v. Louis DeJoy, Postmaster General, Respondent***

DECISION BELOW: 35 F.4th 162 (3rd Cir. 2022)

CERT. GRANTED 1/13/2023

QUESTION PRESENTED:

Title VII of the Civil Rights Act of 1964 generally prohibits an employer from discriminating against an individual "because of such individual's * * * religion." 42 U.S.C. §§ 2000e-2(a)(l), (2). The statute defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Id. § 2000e(j). In Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), this Court stated that an employer suffers an "undue hardship" in accommodating an employee's religious exercise whenever doing so would require the employer "to bear more than a de minimis cost." Id. at 84.

The questions presented are:

1. Whether this Court should disapprove the more-than-de-minimis-cost test for refusing Title. VII religious accommodations stated in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

2. Whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself.

Selected party briefs and amicus briefs filed on the merits in the U.S. Supreme Court:

- Brief of petitioner Gerald E. Groff: http://www.supremecourt.gov/DocketPDF/22/22-174/255164/20230327094704821_Groff%20-%20Corrected%20Merits%20Brief.pdf
- Brief of respondent Louis DeJoy, Postmaster General, United States Postal Service: http://www.supremecourt.gov/DocketPDF/22/22-174/263069/20230407171128663_22-174bsUnitedStates%20CORRECTED.pdf
- Brief amicus curiae of The Freedom from Religion Foundation: http://www.supremecourt.gov/DocketPDF/22/22-174/262274/20230330111408732_22-174%20Brief.pdf
- Brief amici curiae of Americans United for Separation of Church and State and Lambda Legal Defense and Education Fund, Inc.: http://www.supremecourt.gov/DocketPDF/22/22-174/262358/20230330160431380_22-174%20bsac%20Americans%20United.pdf
- Reply of petitioner Gerald E. Groff: http://www.supremecourt.gov/DocketPDF/22/22-174/263041/20230407133103835_Groff%20Reply%20for%20Petitioner.pdf

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INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

Groff v. DeJoy

Docket No.	Op. Below	Argument	Opinion	Vote	Author	Term
22-174	3rd Cir.	Apr 18, 2023	TBD	TBD	TBD	OT 2022

Issues: (1) Whether the court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 stated in *Trans World Airlines, Inc. v. Hardison*; and (2) whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's coworkers rather than the business itself.

CASE PREVIEW

Justices to hear evangelical Christian postal worker's religious accommodation case

By Amy Howe on Apr 17, 2023 at 2:40 pm

On Tuesday the justices will hear former mail carrier Gerald Groff's case against the U.S. Postal Service. (Kristi Blokhin via Shutterstock)

Employees of the U.S. Postal Service are famous for delivering the mail even in the worst conditions. But when Gerald Groff was hired to work as a postal carrier in 2012, postal carriers didn't work on Sundays. That changed in 2013, when USPS signed a contract with Amazon to deliver the company's packages, including on Sundays. When Groff, an evangelical Christian, refused to work on Sundays, he was disciplined and eventually resigned. On Tuesday in *Groff v. DeJoy*, the Supreme Court will consider whether to overturn a nearly 50-year-old precedent on how employers must accommodate their employees' religious practices.

Federal law bars employers from firing workers for practicing their religion unless the employer can show that the worker's religious practice cannot "reasonably" be accommodated without "undue hardship." In 1977, the Supreme Court ruled in ***Trans World Airlines v. Hardison*** that the "undue hardship" standard is met whenever the accommodation would require more than a "de minimis" – that is, trivial or minimal – cost.

In Groff's case, his inability to work on Sunday did not initially cause any problems. Until 2016, the postmaster at the station where Groff worked did not require him to work on Sunday; in exchange, Groff covered other shifts during the week. But beginning in 2016, the postmaster told Groff that he would have to work on Sundays during the Postal Service's peak season, which begins in mid-November and runs through early January.

Groff opted instead to transfer to a smaller station that would not require him to work on Sundays. But a few months later, that station also began to deliver Amazon packages on Sundays. Groff offered to work extra shifts to avoid working on Sundays, but the postmaster continued to schedule him on Sundays – although he did offer to ask for volunteers to cover for Groff.

Groff was disciplined for his failure to report to work when scheduled on Sundays. In January 2019, he resigned from the Postal Service.

Procedural history

Groff then filed a lawsuit in federal court, where he argued that the Postal Service's failure to reasonably accommodate his religion violated Title VII of the Civil Rights Act, the federal law prohibiting discrimination against employees based on their religious practices. When a federal district judge rejected that argument, Groff appealed to the U.S. Court of Appeals for the 3rd Circuit, which upheld that decision.

The court of appeals agreed with Groff that the Postal Service's offer to find employees to swap shifts with Groff "did not eliminate the conflict between his religious practice and his work obligations" and that the Postal Service therefore had not provided him with a reasonable accommodation. But the court of appeals nonetheless affirmed. It explained that giving Groff an exemption from working on Sunday "caused more than a de minimis cost" for the Postal Service because it affected the rest of his workplace – for example, by requiring his coworkers to cover his shifts or deliver more mail.

Groff came to the Supreme Court last summer, asking the justices to take up his case and revisit *Hardison*'s "more than de minimis" test – which they agreed to do earlier this year.

In his brief on the merits, Groff urges the justices to jettison *Hardison*'s de minimis test, calling it "lawless and damaging." The plain language of Title VII clearly indicates that the phrase "undue hardship" imposes a higher bar than *Hardison*'s "more than a de minimis cost," he writes. The phrase suggests that the accommodations must impose a "significant difficulty or expense," Groff explains, for the employer.

Groff assures the court that it can overturn *Hardison* without worrying about stare decisis – the idea that courts should not overrule their prior cases unless there is a compelling reason to do so – because the Supreme Court in *Hardison*was not interpreting Title VII at all. Instead, Groff explains, the court was interpreting an Equal Employment Opportunity Commission guideline in place at the time. Therefore, Groff says, *Hardison*'s discussion of the "undue hardship" provision is dicta – that is, language that was not necessary to reach the decision and therefore is not binding in future cases.

But even if the de minimis test weren't dicta, Groff continues, the court should still throw it out. Not only is it clearly wrong, but the other criteria for overruling prior decisions are also met here. For example, employers and employees have not relied on the "de minimis" standard in structuring their employment

agreements. Those agreements are generally short term, and employers can adapt them if the "undue hardship" test were to change. But because the test has been the subject of criticism in recent years, Groff notes, employers should not have relied on it.

Hardison has also led to "extreme consequences," Groff says. Specifically, he contends, it has become a flat rule that "virtually any cost to an employer counts as undue hardship," so that lower courts "virtually always side with employers whenever an accommodation would impose any burden."

Groff argues that the 3rd Circuit was wrong in another respect. For purposes of Title VII, he asserts, what matters is whether the proposed accommodation would create an undue hardship for the employer's business, rather than for the employee's co-workers. In his case, he notes, his absences on Sunday had little to no effect on the Postal Service's business. "USPS fulfilled its contract with Amazon," he emphasizes, "and no packages went undelivered" as a result of his absences.

The federal government counters that the EEOC and courts have actually "long understood" the Supreme Court's decision in *Hardison* to provide more protection for religious employees "than the 'de minimis' language read in isolation might suggest." At the same time, the Biden administration concedes that the Supreme Court "can and should clarify that" *Hardison* provides such protection.

Groff has not, the Biden administration stresses, made the "extraordinary showing" required to overrule *Hardison*. The bar is particularly high, the Biden administration observes, because the court in *Hardison* was interpreting a federal law, rather than the Constitution – which means that Congress could change the law at any time if it disagrees with the court's interpretation. Indeed, the Biden administration notes, the Supreme Court has not overturned any of its cases interpreting statutes in 16 years.

The Biden administration also pushes back against Groff's suggestion that stare decisis concerns are not at play in his case because the court in *Hardison* was not interpreting Title VII. It doesn't matter whether the court in *Hardison* was interpreting the 1967 guidelines or Title VII as amended in 1972, the Biden administration insists. "Both the guidelines and the amended statute were squarely before the Court and an essential premise of the Court's decision was that they had the same meaning."

Finally, the Biden administration rejects Groff's contention that the key question under Title VII is whether the proposed accommodation would cause a hardship to the employer's business. Instead, the government says, the question is whether the accommodation would cause a hardship to the "conduct of the employer's business." In some cases, the government says, this could include the effects of an accommodation on an employee's co-workers, but the employer would need to show that the accommodation would "actually infringe on the rights of coworkers or cause disruption of work;" it is not enough that accommodating one employee's religious belief or exercise causes resentment or jealousy in other employees.

But even if the test is whether the proposed accommodation would create an undue hardship for the employer's business, the Biden administration concludes, the 3rd Circuit's ruling is still correct. Because USPS is required to be financially self-sufficient, it was "critically important to the USPS that Sunday Amazon delivery be successful." Accommodating Groff, the Biden administration writes, "would have imposed an undue hardship on USPS by requiring it to violate its memorandum of understanding with the union, operate with insufficient staff, and burden workers — burdens that actually contributed to other employees quitting or transferring."

Various "friend of the court" briefs supporting Groff urge the justices to overturn *Hardison*. Briefs from **Sikh, Muslim**, **Hindu**, **Jewish**, and **Seventh-Day Adventist** groups all tell the justices that *Hardison*'s "de minimis" standard has had a particularly damaging effect on religious minorities. Members of minority religions, they explain, are more likely to require accommodations in the workplace

– for example, because businesses and the government may not be closed to observe religious holidays in the same way that they do for Sundays or Christian holidays like Christmas and Easter. But at the same time, they observe, religious minorities are also less likely to receive those accommodations, because employers can meet the "de minimis" standard so easily. As a result, the groups say, the current interpretation of the "undue hardship" provision requires many religious minorities to choose between their faith and their jobs.

A brief from **Regent University's Robertson Center for Constitutional Law** argues that the "de minimis" standard has disproportionately harmed working-class employees. Since 2000, the center writes, more than 60% of the religious-accommodation cases filed in federal courts were brought by plaintiffs in jobs requiring a high school diploma and a year of experience. "The time has come," the center contends, "to restore to working-class Americans the full protection of Title VII's plain language."

A "friend of the court" brief by **local governments** urges the justices to leave the "de minimis" standard in place. Local governments are both the largest employer in the United States and the provider of "critical public functions such as law enforcement, fire protection, and emergency medical assistance." And although they make "good faith efforts every day to accommodate" their employees' religious practices, the local governments explain, they cannot always do so, "not only because of budgetary limitations but also because in many circumstances providing requested accommodation would compromise the ability of local governments to fulfill their critical duties to the public." If local governments are required to accommodate religious practices that impose more than de minimis costs, they say, they will likely have to cut back on the services that they provide, because "raising additional revenue through increased taxes or other means is often not a realistic or politically viable option."

Although it has been 46 years since the court's decision in *Hardison*, the issue in Groff's case is one with which the current court is very familiar. His petition for review was the fourth in the past few years asking the justices to overrule their decision in *Hardison,* and both the federal government (during the Trump administration) and three justices – Clarence Thomas, Samuel Alito, and Neil Gorsuch – had called for the court to do so. The court's conservative majority in recent years has been sympathetic to religious-discrimination claims, suggesting that Groff is likely to find a friendly audience at Tuesday's oral argument.

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ARGUMENT ANALYSIS

Justices look for common ground in postal worker's religious liberty case

By Amy Howe on Apr 18, 2023 at 5:01 pm

In 2013, after signing a contract to deliver packages for Amazon, the U.S. Postal Service began requiring postal carriers to work on Sundays. (Rblfmr via Shutterstock)

The Supreme Court heard oral argument on Tuesday in a case that asking the justices to decide how far employers must go to accommodate the religious practices of their employees. Federal law bars employers from discriminating against workers for practicing their religion unless the employer can show that the worker's religious practice cannot "reasonably" be accommodated without "undue hardship." The employee in Tuesday's case, Gerald Groff, is asking the justices to overturn their 1977 decision in ***Trans World Airlines v. Hardison***, which indicated that an "undue hardship" is anything that would require more than a trivial or minimal cost. But after nearly two hours of oral argument, it wasn't clear that a majority of the court was prepared to do so. Instead, even some of the court's conservative justices appeared inclined to strike a compromise, leaving *Hardison* in place, while at the same time making clear that a trivial burden is not enough to justify failing to accommodate an employee's religious beliefs.

The dispute now before the court arose when Groff, who is an evangelical Christian, declined to work as a postal carrier on Sundays, because he believes that the day should be devoted to worship and rest. Groff offered to work extra shifts, but the postmaster continued to schedule him on Sundays, while at the same time seeking volunteers to cover for Groff. After Groff failed to report to work when scheduled on Sundays, he was disciplined and eventually resigned.

Groff then went to federal court, where he argued that the U.S. Postal Service's failure to reasonably accommodate his religion violated Title VII of the federal Civil Rights Act, which bars discrimination against employees based on their religion. But the U.S. Court of Appeals for the 3rd Circuit disagreed. It ruled that giving Groff an exemption from working on Sunday "caused more than a de minimis cost" for the USPS because it affected the rest of his workplace.

Representing Groff in the Supreme Court, lawyer Aaron Streett told the justices that there is "no reason" why employees should receive less protection for their religious practices than workers covered by other federal civil rights laws, such as the Americans with Disabilities Act. The court should interpret the plain text of Title VII to mean that employers should accommodate their employees' religious practices unless doing so would require "significant difficulty and expense," Streett argued.

Justice Clarence Thomas, who has previously joined Justices Samuel Alito and Neil Gorsuch in calling for the court to revisit *Hardison*, was sympathetic. His questions for Streett focused on whether the Supreme Court in *Hardison* was interpreting the same version of Title VII that is now before the justices. Groff contends that because it was not, *Hardison*'s discussion of the "undue hardship" provision is not binding in future cases.

Streett reiterated this point at Tuesday's oral argument, stressing that the Supreme Court in *Hardison* was instead interpreting an Equal Employment Opportunity Commission guideline in place at the time.

Two of the court's liberal justices saw things differently. Justice Sonia Sotomayor asked Streett why the Supreme Court should adopt the "significant difficulty or expense" standard used in other statutes when Congress has declined to do so.

Streett countered that there is nothing to suggest that Congress has accepted *Hardison*'s "undue hardship" standard. But that comment drew criticism from Justice Elena Kagan, who suggested that no such evidence is required. In cases involving the Supreme Court's interpretation of statutes, she observed, the presumption of stare decisis – that is, the principle that courts should not overturn their prior precedent unless there is a good reason to do so – "is at its peak" because Congress can always change the law. But in this case, she continued, Congress hasn't done so, and "you can count on a finger" how many times we have overruled a statutory decision in that context.

Justice Ketanji Brown Jackson seemed to suggest not only that this was a question better left for Congress, but also that there were good reasons why the court shouldn't overturn *Hardison*. *Hardison*, she observed, "has been on Congress's radar screen for a very long time, and they've never changed it. And I guess I'm concerned that … a person could fail to get what they want in Congress what they want with respect to changing the statutory standard and then just come to the court and say, you give it to us."

Alito pushed back, suggesting that there may be good reasons for the Supreme Court to revisit *Hardison* now even if Congress has failed to act. For example, he posited, the Supreme Court may have adopted the "de minimis" test in *Hardison* because it was concerned that requiring an employer to do more might violate the Constitution; for similar reasons, Congress may have feared that it couldn't adopt a higher standard in the wake of *Hardison*.

Kagan was incredulous at this suggestion. "Now," she said, "we're guessing as to what the court may have thought in *Hardison*, which it never said in *Hardison*, or what Congress might have thought, even though it never said it" – "using our fortune-teller apparatus"?

Representing the Postal Service, U.S. Solicitor General Elizabeth Prelogar told the justices that there is "no reason to dispense with *Hardison* and discard" the "substantial body of case law that has developed" to analyze undue hardship claims under Title VII. That case law, Prelogar contended, "provides meaningful protection to religious observants."

Alito, however, appeared unconvinced that the law provides as much protection as Prelogar asserted. He cited "friend of the court" briefs filed by religious minorities, including Sikh, Muslim, and Orthodox Jewish groups. "They all say that is just not true," Alito told Prelogar, "and that *Hardison* has violated their right to religious liberty."

But other conservative justices appeared more amenable to leaving *Hardison*, if not the "de minimis" standard, in place. Justice Brett Kavanaugh noted that a footnote in *Hardison* had referred to the employer in that case having done all that it could do without incurring "substantial costs." That standard, Kavanaugh observed, seems "perfectly appropriate."

Gorsuch sought to find what he described as "common ground" between Groff and USPS. Because both sides agree that "de minimis can't be the test … because Congress doesn't pass civil rights legislation to

have de minimis effect," Gorsuch told Prelogar, why can't the Supreme Court simply make clear that the "de minimis" test is incorrect "and be done with it and be silent as to the rest of it?"

Prelogar was generally enthusiastic about Gorsuch's suggestion. "I think, if this court made clear that the 'de minimis' language should not be taken literally to mean every dollar above a trifle is immunizing the employers from liability, that is absolutely a correct statement of the law." And under that test, she continued, the accommodation that Groff sought would still be an undue hardship for USPS, because it had "manifold impacts both on coworkers and on USPS's ability to deliver the mail."

More broadly, Prelogar stressed, she wanted to avoid a new standard in which the body of law developed over the past 46 years would be "irrelevant for helping to guide employers in understanding their obligations and courts in applying the statute" in commonly recurring cases involving employees seeking accommodations for their religious practices.

Although Chief Justice John Roberts also seemed open to leaving *Hardison* in place, he warned Prelogar that the wholesale adoption of earlier cases might not be that simple because, as Alito suggested earlier, the Supreme Court's religion cases have developed over the years as well. "In other words, if we're going to do this and say 'de minimis' doesn't really mean de minimis, it means something more significant," lower courts will "have to take into account our religious jurisprudence as it exists today."

Prelogar resisted any suggestion that "those developments in the law call into question what the lower courts have done." Instead, she maintained, courts have looked at the "separate question of, when do the particular burdens and costs on an employer cross that line and are rightly characterized as undue?"

A decision in the case is expected by summer.

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