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Tenth Circuit Upholds Colorado's Anti-Discrimination Act Against Constitutional Challenge

Insight — 08/23/2021

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In '303 Creative Ltd. Liab. Co. v. Elenis', the Tenth Circuit held that a website designer had standing to challenge CADA, but that her constitutional challenges were without merit.

Lorie Smith, a website designer who does not want to design websites for same-sex weddings, challenged Colorado's Anti-Discrimination Act (CADA), arguing that it violates the First Amendment and, additionally, that it is unconstitutionally vague and overbroad. The Tenth Circuit disagreed. In *303 Creative Ltd. Liab. Co. v. Elenis*, No. 19-1413, 2021 U.S. App. LEXIS 22449, at *1 (10th Cir. July 26, 2021), the Tenth Circuit held that the website designer had standing to challenge CADA, but that her constitutional challenges were without merit.

CADA's Protections Against Discrimination

“CADA restricts a public accommodation's ability to refuse to provide services based on a customer's identity.” Id. at *2. A public accommodation is “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public.” Id. (citing Colo. Rev. Stat. §24-34-601(1)).

Under the “Accommodation Clause,” a public accommodation may not

> directly or indirectly … refuse … to an individual or group, because of … sexual orientation … the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation[.]

Id. at *3 (citing Colo. Rev. Stat. §24-34-601(2)(a)).

And under the “Communications Clause,” a public accommodation may not

> directly or indirectly … publish … any … communication … that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused … or that an individual's patronage … is unwelcome, objectionable, unacceptable, or undesirable because of … sexual orientation[.]

Id.

There are multiple “means of enforcement” under CADA, including a legal challenge by any person alleging a CADA violation and administrative charges that can be brought by the Commission, individual Commissioners, or the Colorado Attorney General. Id.

Website Designer and Her Company's Lawsuit

Smith runs a for-profit graphic and website design company called 303 Creative, LLC. She is “willing to work with all people regardless of sexual orientation” and is “generally willing to create graphics or websites for” LBGT customers. Id. at *6. Although Smith and 303 Creative do not currently offer “wedding-related services,” they “intend to do so in the future.” Id. But Smith “sincerely believes, however, that same-sex marriage conflicts with God's will.” Id. She therefore intends to design wedding websites for opposite-sex couples, but intends “to refuse to create similar websites that celebrate same-sex marriages.” Id. The plaintiffs also intend to publish a “Proposed Statement” explaining that creating websites for same-sex marriages “would compromise [Smith's] 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.” Id. at *7.

Because Smith and 303 Creative were unwilling to violate CADA, they had not yet offered wedding-related services or published the statement regarding Smith's beliefs, and defendants had not brought any charges against plaintiffs under CADA. Id. Rather, plaintiffs “brought a pre-enforcement challenge to CADA,” alleging “a variety of constitutional violations, including that CADA's Accommodation Clause and Communication Clause violated the Free Speech and Free Exercise Clauses of the First Amendment, and that CADA's Communication Clause violated the Due Process Clause of the Fourteenth Amendment because it was facially overbroad and vague.” Id. at *7-8. The plaintiffs sued a variety of individuals, including the director of the Colorado Civil Rights Division, members of the Colorado Civil Rights Commission, and Phil Weiser, the Colorado Attorney General (collectively, the defendants).

District Court Granted Summary Judgment in Favor of CADA

The parties agreed that the dispute could be resolved through summary judgment. Defendants argued that the plaintiffs lacked standing to challenge CADA and that, regardless, the plaintiffs' legal challenges failed. The district court found that plaintiffs had “standing to challenge the Communication Clause and not the Accommodation Clause.” Id. at *8. “The district court initially declined to rule on the merits of Appellants' Communication Clause challenges, however, because” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018), “was then pending before the United States Supreme Court.” Id. But “[a]fter the Supreme Court's ruling in *Masterpiece Cakeshop*,” the district court entered summary judgment in favor of the defendants on all claims. Plaintiffs appealed.

Tenth Circuit Held That Plaintiffs Had Standing

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" Id. at *9-10 (quotations omitted). "Under Article III, standing requires at least three elements: injury in fact, causation, and redressability." Id. at *10. The Tenth Circuit agreed with plaintiffs that they had established Article III standing.

First, because plaintiffs showed "both an intent to provide graphic and web design services to the public in a manner that exposes them to CADA liability, and a credible threat that Colorado will prosecute them under that statute," the circuit court agreed with plaintiffs that they had established an injury in fact. Id. at *10-11. Of particular note to the Tenth Circuit was the fact that, "Colorado has a history of past enforcement against nearly identical conduct," including against the baker in *Masterpiece Cakeshop*. Id. at *16. In that case, Colorado enforced CADA against a bakery that, because of its owner's religious beliefs, refused to provide custom cakes that celebrated same-sex marriages." Id. at *5. And "there is no indication that Colorado will enforce CADA differently against graphic designers than bakeries." Id. at *17.

Second, the Tenth Circuit also agreed that plaintiffs had shown causation and redressability. Id. at *19. "The causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." Id. (quotations omitted). And "[r]edressability requires that a favorable judgment would meaningfully redress the alleged injury." Id. (quotations omitted). Because defendants could impose "the burden of administrative proceedings," plaintiffs' injury was traceable to defendants.

CADA Does Not Violate the Free Speech Clause

The Tenth Circuit, applying strict scrutiny, first held that the Accommodations Clause did not violate the Free Speech Clause. The circuit court held that the Accommodation Clause compels speech because plaintiffs "are forced to create custom websites that they otherwise would not." Id. at *25. Moreover, "[b]ecause the Accommodation Clause compels speech … , it also works as a content-based restriction." Id. As either compelled speech or a content-based restriction, the Accommodation Clause "must satisfy strict scrutiny—i.e., Colorado must show a compelling interest, and the Accommodation Clause must be narrowly tailored to satisfy that interest." Id. at *26-27.

The Tenth Circuit held that "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace." Id. at *27. However, the court concluded that the "Accommodation Clause is not narrowly tailored to preventing dignity harms." Id. at *28. "As the Supreme Court has repeatedly made clear, [w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." Id. at *28-29 (quotations omitted). "As compelling as Colorado's interest in protecting the dignitary rights of LGBT

people may be, Colorado may not enforce that interest by limiting offensive speech." Id. at *29.

Even so, "[t]he Accommodation Clause is … narrowly tailored to Colorado's interest in ensuring equal access to publicly available goods and services." Id. (quotations omitted). "Excepting Appellants from the Accommodation Clause would necessarily relegate LGBT consumers to an inferior market because Appellants' unique services are, by definition, unavailable elsewhere." Id. at 31. "To be sure, LGBT consumers may be able to obtain wedding-website design services from other businesses; yet, LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants offer. Thus, there are no less intrusive means of providing equal access to those types of services." Id. at *32.

Next, the appellate court rejected plaintiffs' Free Speech challenge to the Communications Clause because "Colorado may prohibit speech that promotes unlawful activity, including unlawful discrimination." Id. at *36. "[T]he Proposed Statement," which the Communications Clause would prohibit, "expresses an intent to deny service based on sexual orientation—an activity that the Accommodation Clause forbids and that the First Amendment does not protect." Id. at *38. "Thus, the Proposed Statement itself is also not protected and Appellants' challenge to the Communication Clause fails." Id.

CADA Does Not Violate the Free Exercise Clause

The appellate court also rejected plaintiffs' Free Exercise challenge. Under this standard, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." Id.

Here, the Tenth Circuit held that CADA is a neutral law and that there was no evidence defendants "will enforce CADA in a non-neutral fashion." Id. at *39-40. Critically, in *Masterpiece Cakeshop*, the Supreme Court "instructed the Commission that it was 'obligated under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of … religious beliefs." Id. at *39. Given that, there wasn't sufficient reason to conclude defendants would act in a non-neutral manner toward plaintiffs.

The circuit court also held that that CADA was "generally applicable" because there were no relevant "individual exemptions" that would take it outside a law of general application. Id. at *42. However, the court noted that "on a more developed record, Appellants might show that Colorado enforces that standard in a way that discriminates against religion, violating the Free Exercise Clause." Id. at *48. "Yet, whatever issues may be presented in a future case, it is clear to us that CADA's causation standard itself is qualitatively different from the broad, discretionary analyses presented in other individualized exemption cases." Id.

CADA Does Not Violate the 14th Amendment

As an additional challenge to the Communication Clause, plaintiffs argued

that it was unconstitutionally overbroad and vague. The court rejected both arguments. The Communication Clause is not “unconstitutionally overbroad, because the Communication Clause's application to protected speech [is not] substantial … relative to the scope of the law's plainly legitimate applications.” Id. at *52. And plaintiffs' “vagueness challenge also fails because their Proposed Statement indicates a refusal of services.” Id. at *54.

Christopher Jackson and Jessica Smith are attorneys at Holland & Hart, specializing in complex commercial litigation. Chris is an experienced appellate advocate with a strong background in complex civil trials and state government investigations. Jessica has substantial appellate experience and leads the firm's religious institutions and First Amendment practice.