



# EXPLAINER

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## FAQs: LGBTQ+ Discrimination and *303 Creative LLC v. Elenis* July 24, 2023

### Author:

Ricardo Pacheco, Senior Legislative Affairs Associate  
([ricardo@progressivecaucuscenter.org](mailto:ricardo@progressivecaucuscenter.org))

### Background

The *303 Creative LLC v. Elenis* case concerned a challenge to the Colorado Anti-Discrimination Act (CADA) brought by 303 Creative LLC, a graphic design firm, and its owner, Lorie Smith. CADA is a Colorado law that prohibits businesses open to the public from discriminating based on various protected characteristics, including sexual orientation. Smith argued that CADA violated her First Amendment rights to free speech and religious freedom by compelling her to create websites for same-sex weddings and preventing her from communicating her intent to discriminate against same-sex couples on her website.

A [district court](#) and the [U.S. Court of Appeals for the Tenth Circuit](#) ruled against 303 Creative LLC, after which the case was appealed to the U.S. Supreme Court. The Supreme Court agreed to consider the case to determine whether CADA's application in this instance violated the First Amendment's free speech clause. The Court did *not* consider whether CADA violates religious freedom. On June 30, 2023, the Supreme Court sided with 303 Creative LLC in a 6-3 opinion. [According to the Court](#), "the First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees." Below are frequently asked questions regarding *303 Creative LLC v. Elenis* and its implications.

### Who were the key parties involved in the case?

The plaintiff was Lorie Smith, the founder, owner, and sole member of 303 Creative LLC, a graphic design company. The defendants were the State of Colorado and Aubrey Elenis, the Director of the Colorado Civil Rights Division.

### What is the Colorado Anti-Discrimination Act (CADA), and how did it relate to this case?

CADA targets discrimination based on various protected characteristics, including sexual orientation. Specifically, CADA's Accommodation Clause prohibits places open to the public, like businesses, from refusing to serve individuals fully and equally

because of the individuals' protected characteristics, including sexual orientation. CADA's Communication Clause similarly bars businesses from publishing anything indicating they will refuse full and equal service to individuals because of their protected characteristics. This case concerns whether CADA's enforcement violates Lorie Smith's First Amendment right to free speech.

### **How did CADA's enforcement harm 303 Creative LLC?**

It did not. Lorie Smith's lawsuit against Colorado was a pre-enforcement case, meaning that she was challenging CADA's legality before Colorado enforced the law and fined 303 Creative LLC. Furthermore, she [had neither created any wedding websites](#), nor communicated her business's intent to deny this service to same-sex couples.

### **Do you need to show you were harmed to sue someone or something?**

Yes, this concept is known as "standing." The Tenth Circuit Court of Appeals concluded that 303 Creative LLC had standing to bring this pre-enforcement challenge because Lorie Smith had a credible fear of prosecution, given that her business *intended* to discriminate against same-sex couples and violate CADA.

### **On what grounds did 303 Creative LLC challenge CADA in court?**

303 Creative LLC challenged CADA because, according to the owner, the law violated free speech and religious exercise rights. Lorie Smith argued that creating websites for same-sex weddings would contradict her religious beliefs and compel her to send a message she does not believe in, thus infringing upon her freedom of speech. She also claimed that, in barring her from communicating her intent to refuse this service to couples based on their sexual orientation, CADA violated her right to free speech.

### **How did the district court and the U.S. Court of Appeals for the Tenth Circuit rule in this case?**

The district court and the U.S. Court of Appeals for the Tenth Circuit both ruled in Colorado's favor, upholding CADA's constitutionality. They found that CADA did not violate the First Amendment's protection of free speech or religious exercise. The courts determined that CADA regulated *conduct* rather than speech, serving a compelling government interest in preventing discrimination and ensuring equal access to public accommodations, such as a business like 303 Creative LLC. They concluded that CADA was narrowly tailored to achieve these objectives. Lorie Smith appealed to the U.S. Supreme Court, which agreed to only consider the free speech question.

## **What was the central question before the Supreme Court in the 303 Creative LLC v. Elenis case?**

The central question before the Supreme Court was whether CADA ran afoul of the First Amendment's free speech safeguard. Lorie Smith argued that Colorado was *forcing* her to speak by barring her business from discriminating against same-sex couples, as she contended that to make a wedding website is to send a [“message”](#) she disagrees with because it is an [“expressive”](#) service. At the same time, she alleged, the state was [preventing her from stating her plans](#) and rationale for discriminating against same-sex couples.

## **How was 303 Creative LLC v. Elenis similar to the 2018 Supreme Court case Masterpiece Cakeshop v. Colorado?**

Both cases concerned discrimination against same-sex couples and the same Colorado anti-discrimination law. In [Masterpiece Cakeshop v. Colorado](#), the Supreme Court ruled 7-2 in favor of a Colorado baker who refused to create a wedding cake for a same-sex couple. The Court decided that Colorado's Civil Rights Commission had not been neutral when determining that the baker violated CADA and violated his First Amendment right to free religious exercise.

## **How did the 303 Creative LLC v. Elenis and Masterpiece Cakeshop v. Colorado cases differ?**

These cases differed in several ways. First, the services the Colorado businesses denied or intend to deny are different. In *Masterpiece Cakeshop v. Colorado*, a baker refused to create a wedding cake for a same-sex couple. In *303 Creative LLC v. Elenis*, a website designer intended to refuse to create wedding websites for same-sex couples. Second, the baker in *Masterpiece Cakeshop v. Colorado* [had actually denied a service](#) to a same-sex couple and was subsequently penalized under CADA. [Lorie Smith had not](#) been asked to create a wedding website for a same-sex couple and, accordingly, had not been penalized under CADA.

Third, in *Masterpiece Cakeshop v. Colorado*, the Supreme Court determined that Colorado's Civil Rights Commission had violated the baker's First Amendment right to free religious exercise. In *303 Creative LLC v. Elenis*, the Supreme Court did not consider whether CADA violates Lorie Smith's free exercise right—it only considered her free speech right. Moreover, the Supreme Court's decision in *Masterpiece Cakeshop v. Colorado* was limited to that specific case. The Court [did not establish a broad precedent on anti-LGBTQ+ discrimination](#) that could have been applied to *303 Creative v. Elenis*.

## **How did the Supreme Court rule and why?**

On June 30, 2023, the Supreme Court ruled 6-3 in favor of Lorie Smith and 303 Creative LLC, finding that CADA violated the First Amendment. Specifically, [the Court found](#) that the websites that Smith wanted to create constituted an expressive

service and, therefore, for Colorado to bar her from discriminating against same-sex couples would be to “force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance,” thereby violating her right to freedom of speech.

## **What is the *303 Creative LLC v. Elenis* case’s significance for LGBTQ+ rights and anti-discrimination laws in the United States?**

The *303 Creative LLC v. Elenis* case could have significant implications for LGBTQ+ rights and anti-discrimination laws in the United States. Following the Court’s ruling, a hairdresser in Michigan posted on social media that they would [deny service](#) to LGBTQ+ clients, advising them to “seek services at a local pet groomer.” Similarly, a [Texas judge](#) who was previously reprimanded for refusing to perform same-sex marriages has submitted a brief arguing that the recent Court ruling should allow her to deny marriage ceremonies.

Because the Court decided to allow businesses to discriminate against LGBTQ+ people under the guise of free speech and expression, it is possible that “expressive” businesses may also use the decision to justify discrimination against *additional* protected groups of people. The case could even be used to validate discrimination on racial grounds. This would render anti-discrimination protections ineffective. According to the [American Civil Liberties Union \(ACLU\)](#):

*“Granting businesses that choose to sell to the public a free speech right to discriminate if their product is expressive would either swallow the rule against discrimination or require judges to make impossible assessments about whether a good or service is sufficiently expressive to give rise to a right to discriminate.”*

## **Conclusion**

The Supreme Court's decision in *303 Creative LLC v. Elenis* comes at a critical juncture, as the LGBTQ+ community across the United States faces constant threats. From attempts to [ban books that feature gay characters](#) to [restricting which bathrooms](#) transgender people can use, the rising hostility towards LGBTQ+ people underscores the urgent need for federal, comprehensive anti-discrimination policies. The [Equality Act](#), for example, would provide explicit anti-discrimination protections for LGBTQ+ people across key areas of life, including employment, housing, credit, education, public spaces and services, federally funded programs, and jury service. The bill passed the House of Representatives during the 117th Congress by a 224-206 vote, but it has not been voted on during this Congress. The Court’s decision in *303 Creative LLC v. Elenis* makes the need for a nationwide law that protects LGBTQ+ people even more acute.