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Do Blue States Have Rights?

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In light of President Donald Trump's clear statements, both on the campaign trail and his inaugural speech, that his administration plans to make "culture wars" a calling card of his presidency, stating for example, that "*it will henceforth be the official policy of the United States government that there are only two genders, male and female*," advocates of human and civil rights are appropriately contemplating whether and to what extent they will be able to protect marginalized members of society in their communities.

For many years, there was an axiom – often espoused by "conservative" politicians and judges – that states should have the right to govern themselves on fundamental issues, such as abortion, LGBTQ+ rights, including gay marriage, or other polarizing social issues -- a doctrine known as "States' Rights."

While many progressives have decried this doctrine as a means to allow conservative majorities in certain states to dictate and impose their values on minorities within those states, there has also been a sense that progressive majorities in blue states could use the same doctrine to pass and enforce state laws that protect minorities, and that conservative activists and even a conservative Supreme Court would be unwilling or unable to override such laws based on the States' Rights doctrine.

However, as Trump's "Make America Great Again" (MAGA) movement deepens its influence

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across all branches of government, including a Supreme Court with three "conservative" justices he appointed, there are growing, well-founded concerns that MAGA-aligned judges may hinder blue states from enforcing their own laws protecting marginalized communities.

In *303 Creative LLC v. Elenis,* 143 S.Ct. 2298 (2023) *(303 Creative)*, in which a 6-3 majority of the court, which included all of its "conservative" members, ruled that Colorado, a state that has become electorally more progressive since the early 2000s, could not enforce its Anti-Discrimination Act (CADA) against a website designer who refused to design wedding websites for same-sex couples based on her belief that God is calling her to explain God's "true story of

marriage," which is according to her is a "union between one man and one woman."

Like other state anti-discrimination laws, CADA prohibits "public accommodations," or essentially all public-facing businesses, from denying "the full and equal enjoyment" of its goods and services to any customer based on race, religion, sexual orientation, and other legally protected characteristics. Indeed, as the Supreme Court itself stated in an earlier case: "*[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public*." *Masterpiece Cakeshop v. Colorado C.R. Comm'n,* 138 S. Ct. 1719, 1728 (2018).

While the enforcement of CADA as to the website designer would appear to be an example of Colorado exercising its states' rights to "protect gay persons," in a 6-3 opinion, the majority in *303 Creative* ruled in favor of the web designer. The majority differentiated between the provision of standardized goods or services and the creation of custom, expressive works that involve the business owner's ideological or artistic input, and held that the government cannot compel individuals or businesses to express messages that they disagree with, even when they operate in the public marketplace.

Notably, the majority equated Colorado's enforcement of CADA with forcing the designer to speak Colorado's preferred message over her own.

Critics of the majority's decision in *303 Creative* have warned that the concept of "compelled speech" espoused by the majority is a slippery slope that may result in little more than a license to discriminate under the guise of first amendment protection. These concerns may not be so far afield.

For example, in *Emilee Carpenter, LLC v. James,* 107 F.4th 92 (2d Cir. 2024) *(Carpenter)*, a photographer in New York, one of the most solidly blue states in the country, challenged New York's public accommodations laws, which, similar to CADA, prohibit public-facing businesses from denying services based on sexual orientation, among other protected characteristics.

The photographer claimed that her religious beliefs about marriage justify refusing to provide her expressive wedding photography services to same-sex couples. In relevant part, when the case was initially before the district court in 2021, the court aptly reasoned that the wedding photographer challenged New York's prohibition on *"limited menus*," or a business' ability to pick and choose what goods and services it provides to what customers based on protected characteristics (like sexual orientation). *See Emilee Carpenter, LLC v. James,* 575 F. Supp. 3d 353, 372 (W.D.N.Y. 2021).

The district court ruled in favor of New York and against the photographer, reasoning that : "*It is not difficult to imagine the problems created where a wide range of custom-made services are available to a favored group of people, and a disfavored group is relegated to a narrower selection of generic services. Thus, unique goods and services are where public accommodation laws are most necessary to ensuring equal access*." (citing *303 Creative LLC v. Elenis,* 6 F.4th 1160, 1181 (10th Cir. 2021)).

The district court's sound reasoning is currently in peril. In *Carpenter*, the Second Circuit remanded the case back to that district court to consider a "developed and specific factual record" and determine whether New York's public accommodation laws "compel Carpenter's expressive activity as contemplated by *303 Creative." See Carpenter,* 107 F.4th at 103. The Second Circuit characterized *303 Creative* as a limited holding emphasizing that "facts matter" when balancing first amendment protections against a government's regulatory interests.

However, requiring the fact-intensive inquiry contemplated by *303 Creative* where a state's public accommodation law is being challenged

opens the door to various right-wing challenges to blue states' efforts to legislate protections for their marginalized communities.

The Supreme Court's reasoning in *303 Creative* can be boiled down to a grant of permission to individuals and businesses to deny services (*i.e.*, to provide a limited menu) based on personal objections, so long as the services involve some element of expression.

It also sends a stark message to blue states, which are traditionally more progressive and protective of marginalized communities. The basis of the website designer's personal objection in *303 Creative* was a sincerely held religious belief against same-sex marriage, but the first amendment protects secular personal objections as well.

Refusals of service like the one in *303 Creative* may become more common if individuals or business owners find a way to claim that their products and services constitute "expressive speech."

For example, while the dissent in *303 Creative* thought otherwise, will it now be possible for businesses that offer passport photos to deny those services to Mexican-Americans because the owner opposes immigration from Mexico? Can a chef who claims that his cooking is expressive speech refuse to serve interracial couples at his restaurant based on a personal objection to interracial marriage even though the prohibition on this type of discrimination is seemingly settled law?

Under *303 Creative*, the possibilities for using "expressive speech" as a shield and cudgel of discrimination are troubling and numerous, especially in light of MAGA's ever expanding influence over american society.

For example, in his first day in office, President Trump signed an Executive Order titled "*Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*" (the Gender Order), which amounts to a federal anti-transgender mandate.

Among other things, the Gender Order requires that "*every agency and all Federal employees acting in an official capacity on behalf of their agency*" use Trump's binary definition of "sex" when enforcing any laws "*governing sex-based rights, protections, opportunities, and accommodations,*" and that agency heads, such the Equal Employment Opportunity Commission, "*prioritize investigations and litigation to enforce the rights and freedoms identified*" in the Gender Order, which include "*protect[ing] freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male*."

The Gender Order will likely be used as a means to impose MAGA's anti-transgender values on all 50 states, even blue states who have legislated protections for this vulnerable community.

So, where do these legal developments leave blue state efforts to protect individuals at the state level? Regarding executive orders specifically, blue states will likely file lawsuits arguing certain executive orders are unconstitutional or exceed the president's authority, or to the extent feasible, decline to use state resources to enforce or support the order.

However, in light of the Supreme Court's *303 Creative* "compelled speech" doctrine, advocates of human and civil rights have real reason to worry that the courts, including the highest court in the land, many no longer allow blue states the historical right to protect marginalized citizens in their own jurisdictions from discrimination.

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