



Free Speech, Same-Sex Marriage, and Anti-Discrimination Laws
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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President, and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a non-partisan, non-profit, chartered by Congress, to increase awareness and understanding of the Constitution among the American people. On December 5th, the Supreme Court heard oral arguments in *303 Creative versus Elenis*. The petitioner is a website designer in Colorado who says that creating wedding websites for same-sex couples would violate her religious beliefs. And Colorado public-accommodations law says that businesses can't discriminate on the basis of sexual orientation. To recap the arguments and explore the issues in the case, we have two superb guests. Joshua Matz is partner at Kaplan Hecker & Fink, and co-author of *Uncertain Justice: The Roberts Court and the Constitution*. He filed an amicus brief with public-accommodation law scholars on behalf of the respondent. Joshua, it's wonderful to welcome you back to We the People.

[00:01:03] Joshua Matz: Thanks for having me, Jeff. It's always a pleasure to join.

[00:01:05] Jeffrey Rosen: And Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law. He's the author of *The First Amendment and Related Statutes* and founder of the Volokh Conspiracy Blog. He filed an amicus brief with the Hamilton Lincoln Law Institute, on behalf of the petitioner. Eugene, it's great to welcome you back to the show.

[00:01:24] Eugene Volokh: Always a great pleasure. Thanks.

[00:01:26] Jeffrey Rosen: Let's begin with the arguments on behalf of the petitioner, Lorie Smith. Her counsel argued before the court that she serves all people, deciding what to create based on the message, not who requests it, but Colorado declares her speech a public-accommodation and insists that she create and speak messages that violate her conscience. She says the court rejects this as government-compelled speech. Eugene, let us about Lorie Smith's argument.

[00:01:50] Eugene Volokh: Sure. So the Supreme Court has held that people generally may not be compelled to speak. And that's true, even if the compulsion seems pretty minor. The classic case on this is *Wooley v. Maynard*, a late 1970s case where somebody objecting to having the motto, "Live Free or Die" on his New Hampshire license plates. He wanted to tape over it. Now it was quite clear to anybody on New Hampshire roads that this wasn't... this wasn't a personally chosen message on his part. That was the motto that was excuse me,

"Live Free or Die" was not a personally chosen message on his part. That was a motto required by the state. Nobody would have believed that he was endorsing the message. But he would say, "I don't care about endorsement. I just do not want to convey this message. I do not want to be," as the Supreme Court put it, "A mobile billboard for this message." And the court said, "Absolutely. He is entitled to not have to display this message." Why? Because of, of the right to refrain from speaking, which includes the right to refrain from, from having this on your car. It's a facet of your individual freedom of mind. That an individual is entitled to say, "I want not part of the propagation of this message."

[00:03:11] Well, individual freedom of mind is at least as much implicated, I'd say a lot more implicated, when people are required not just to display an obvious... a message that's obviously required by somebody else, but to create a message that they don't want to create. So, let's take it from let's just take an example, quite analogous to website design. Imagine it's just freelance writing. Imagine somebody says, "I'm a freelance writer. I will take pretty much all jobs because I need to make a living and each, each task doesn't pay much. I will write press releases for all sorts of organizations. But when the Scientologists come to ask me, or when the West Borough Baptist Church comes to ask me, or maybe when some, some more mainstream, but still way too conservative for me, church or religious organization comes to ask me, I'm going to say no. Because I do not want to be an instrument for the propagating of their views. To me sure, my name might never even be attached to it, maybe I don't have to sign the press releases. They'll be obviously their message, but I am being asked to write their message and I do not want to write it. I do not want to use my mind to compose the most effective message, supporting a religious viewpoint that I disapprove."

[00:04:33] Is that discrimination in a place of public-accommodation? Well, under laws that are read broadly enough, like the Colorado law, presumably it would be, if a website design business is a place of public-accommodation. Wouldn't be under federal law or the law of some other states, but it is under Colorado law, then a freelance press release writer is an also public-accommodation. Is it discrimination? Yes, he's discriminating there. He's discriminating based on religion, rather than sexual orientation, but of course, even more public-accommodation statutes cover religion than over sexual orientation. So he'd be covered by the law, but I would hope we'd all agree that he would have a First Amendment right to say, "No. My individual freedom of mind secures to me the right not to have to promulgate messages that I disapprove of."

[00:05:24] And if that's true for just for the very minor task of having to attach your license plate, say to your car and be driving along and have... know that there are these four words, on this government-issued license plate, then it's even more true if you're being required to actually create speech. So, that's our position in our brief, and I think it's quite consistent to... and I mean, it is basically a facet of Ms. Smith's position, the woman who, who is *303 Creative*. Now note, we were on the other side of the cake baker case, because we don't think that baking a cake is speech. We don't think driving a limo or renting space in a hotel is speech. But setting up a webpage, singing the song as wedding singer, creating a press release, photographing a wedding, video graphing a wedding, those are speech. And you can't be compelled under the... given the First Amendment, to create anything.

[00:06:23] **Jeffrey Rosen:** Thank you so much for that. Joshua, in your brief, you argue that the application of Colorado's Anti-Discrimination Act does not burden petitioner's free speech rights. Public-accommodation laws regulate conduct, not speech, so long as they're a

content neutral, any incidental impact on speech general does not raise First Amendment concerns. Tell us about your argument, which the government made at the Supreme Court.

[00:06:47] Joshua Matz: Sure. It's a pleasure to do that. I'd actually like to step back and, and just acknowledge that this area of First Amendment law is riddled with distinctions that many people, including many lawyers, find confusing. And, and so you talk about, you know, speech, and conduct, and regulation of conduct incidental to speech, and a person's head can start to spin. So I'm gonna get there. But I'd actually just like to start with a few more fundamental points. The first is that, as Justice Sotomayor identified, the ruling that the petitioner here is asking for would be unprecedented. No federal court in the history of the Republic, until possibly the Supreme Court now, in this case, as ever held that a person who holds themselves out to the public at large, in the commercial marketplace, has a First Amendment free speech right to discriminate against potential customers in the provision of goods and services, on the basis that providing those goods and services, as required by law, would violate their free speech rights.

[00:07:50] And so, we're talking about a ruling that has never come up, even though the long march of the late 20th century, in which a great many people had a great many objections to the expansion of civil rights law, and to the welcoming into American commerce of many groups that had previously been excluded from it. Professor Volokh describes this as sort of flowing from longstanding First Amendment principles. I just wanna start by identifying that it's 2022. We've been around as a Republic for a while. And no one has ever successfully asserted a claim of the sort that's being asserted here. The closest analogy is someone involved in a parade, which is very different than an ordinary commercial venture open to the public at large. And usually, when public-accommodations laws are applied to those kinds of businesses, the understanding is that they are not regulating speech. They're regulating conduct and the First Amendment does not apply to conduct in the same way.

[00:08:47] And the reason that's understood is because all they regulate is the active discrimination in the provision of goods and services. So, they don't require a business to say anything in particular, at least directly. They don't directly regulate speech. They just say that in providing goods and services, which is conduct, you can't refuse to serve people or treat them worse or differently on the basis of certain characteristics that, historically, have been used to deprive many groups of free and equal access to the marketplace in this country. And it's understood that prohibiting discrimination can incidentally affect what people say. Because if you're not allowed to discriminate, you might have to speak to a customer, or you can't put up a sign that says, "We don't serve Jews here," even if you wanna put that sign up. So, it may prohibit some of your speech. But the understanding has always been that that regulation of speech is incidental to the regulation of discriminatory conduct. And that and that doesn't pose a First Amendment barrier.

[00:09:49] And in this case, the United States and the government of Colorado explained, I think very convincingly, that this, you know, that this is a situation that doesn't raise any substantial First Amendment concern. And the reason for that is Ms. Smith runs a business in which she makes websites. Not just one website. She makes websites for all sorts of entities, including, like, marijuana dispensary, and law firms, and DJs, and all sorts of people. And one of the things she wants to do is make wedding websites. And she only wants to make wedding websites that celebrate or that are for opposite-sex marriage, and doesn't wanna make wedding websites that, in any way, could be taken as endorsing or supporting or

whatever, same-sex marriages. And so, she would refuse to provide a wedding website to a same-sex marriage couple. And she made clear at the oral argument that even if she had created a website for an opposite-sex couple, and a same-sex couple wanted the identical website, and just wanted to put in some of their own pictures, she would refuse to provide that service to them.

[00:10:51] And so, all that's regulated here is the discriminatory conduct of refusing to serve on the basis of a protected characteristic. And it's true that that incidentally may be taken as affecting a message of some kind. But if the rule that Professor Volokh describes were accepted, if petitioner's will were accepted, then all manner of businesses and commercial enterprises throughout the country that could point to some aspect of their work that involves speaking or expressing something, might suddenly say that they are free to engage in discrimination against whoever they want on First Amendment grounds. And the overall effect of this is to take the perpetrators of discrimination and present them as though they're actually the victims in this situation, because they are not free to express and to speak their discriminatory message in the form of the manner in which they run their business, and their willingness to, to serve people who approach them.

[00:11:46] Anyway, the government and Colorado, make it very clear that under the court's longstanding precedent, this kind of application of the civil rights law is, is just a regulation of conduct, that any regulation of speech is incidental, and that while there may be cases that are much harder cases, and there may indeed be some cases where there are First Amendment limits on the application of civil rights law, this really isn't one of them.

[00:12:09] Jeffrey Rosen: Thank you so much for that. Eugene, your brief got a shout-out during the oral argument from Justice Kavanaugh. He said, "I felt the amicus brief of Professors Carpenter and Volokh was fairly interesting. They say a website designer is unlike a baker, and that Hurley is the key precedent. They say there's no serious question the case involved compelled speech." Tell us about your argument, which Justice Kavanaugh was interested in, that it's not true that all businesses whose work involves speech might claim a right to be exempt from civil rights laws, as Joshua Matz said. But instead, a very narrow category of businesses whose work, like that of a website designer, is inherently artistic or expressive.

[00:12:51] Eugene Volokh: Right. So, it's true all businesses involve speech. You have to talk about things. Like, if you're a baker, or even if you're a caterer, you have to say, "Oh, you know, watch out. That plate is hot," let's say, if you're a waiter for, for the caterer. Or, "Oh, do you want the gluten-free version or not?" So, it's true when what you're providing is non-speech products. In our view, that very much includes cakes, but also, again, limo rides and various other things, then, then, yes. When you have to be required to provide a product, and you could be required to give people kind of factual instructions about it. If you check into a hotel, not only are you entitled to a room, you're entitled to be told, spoken to about what the room number is. So, that much...that much we agree with. And that covers the overwhelming majority of all businesses. It's true that no Supreme Court case has allowed this particular kind of exemption. And that's why the case is before the Supreme Court. If it had already allowed this exemption probably that would have been dispositive to the lower court.

[00:13:52] No Supreme Court case has ever, to my knowledge, authorized a requirement that speakers create... or that, let's say creators, create speech that they didn't want to. I mean,

there've been and...public-accommodation laws for quite a while that have generally been applied to places like restaurants, like bars, like hotels. Only very recently have they been applied to photographers, to writers, to videographers, to calligraphers and the like, those cases, lower court cases have, in fact, split on the subject. So, for example, just three years ago, the Eighth Circuit held in favor of the right of videographers not to video record a wedding. So, this is indeed a new case that's coming from the court, but there's... and we, we have to argue by now that you...because there have been no binding precedent, either way on the subject. So, our point is simply that creators, as particular providers a very narrow range of services are entitled to choose what they're gonna create.

[00:14:51] And I noticed that the response to that argument would indeed sweep in the press release writer. So, just to be clear, if somebody wants to go out there and be a freelance writer, because that's their way of making a living and they, they create messages. And then under, under the, the other side's argument, that means they could be forced to, either give up their business, or create a message for a religious group, let's say, because again, these laws cover religion, that this person disapproves of. And I think that can't be right. I don't think under the First Amendment somebody could be required as a condition of continuing his business to create messages that, that he or she dis- dislikes. Now, there is one other particular factual twist. This claim that Ms. Smith wouldn't even provide exactly the same site to a same-sex couple as to an opposite-sex couple. I think it's never exactly the same site. There's always gonna be some modification, right? You're gonna have to change the names of the people. You may have to change the words, 'bride and groom' to 'groom and groom', you're gonna have to change certain photos to other photos.

[00:16:03] But let me give another example. Imagine a wedding singer. Imagine, imagine Kanye West's third cousin, who's a wedding singer, and who says, "You know, I'm going to sing these particular songs, praising some wedding. But I disapprove of Jewish weddings. Or I disapprove of interracial weddings. And I don't wanna sing at those weddings." I would say that person has the right to do that. Because each song, at a wedding... or I shouldn't say necessarily each song, but many songs are celebratory of that wedding. So, even if you're singing the same thing, exactly the same thing, and again, it almost never come up to being exactly the same thing on the wedding website, but for a song, it could be exactly the same son- song. It has a different message. When you...when you sing a song saying, "This is glorious," it has a different message if the this is one kind of event than another kind of event. So, I mean, I'm Jewish myself. I would not be happy that people would refuse to do that to me, although I'd go on and move on to some other wedding singer.

[00:17:05] But I think a wedding singer, even if he's a freelancer who generally sings everywhere, is entitled to pick and choose which events he's going to sing at and celebrate, and which events he doesn't. That's, I think, a fundamental part, again, of this individual freedom of mind that the Supreme Court has told us the first time pertaining to this case.

[00:17:22] Jeffrey Rosen: Joshua, what did the other justices make of Eugene Volokh's distinction between musical accompanists and website designers and wedding singers on the one hand, and limousine drivers, hotel operators, and caterers on the other? Did you see interest in converging towards his solution? And, and what were the objections to it?

[00:17:41] Joshua Matz: I didn't see particular interest in his proposed solution. And frankly, I don't think there's much to commend it myself. Again, just to step back, I think

pretty much everyone agrees that there are some circumstances in which a public-accommodations law as applied to somebody who wants to engage in discrimination could raise a First Amendment burden. And then you would ask whether there are sufficient government interests to overcome that burden. Everyone agrees that there are some circumstances where there's a burden. I think for the most part, everyone agrees that you wanna keep those circumstances very narrow. Because otherwise, the public-accommodations laws would be eviscerated and there would be a risk of widespread discrimination in society on the basis of sexual orientation, religion, race, disability status, national origin, immigration status, you name it. but also, there would be widespread confusion. If the supreme court issues an opinion that has a very unclear standard, then a great many people will be unclear whether the civil rights laws apply to them. And that would be an extraordinarily unfortunate position for, for American society.

[00:18:45] So, the Supreme Court is trying to find some way of articulating this idea that the civil rights laws and the overwhelming majority of their applications are constitutional and there are some circumstances where they're not. Now, the petitioner in this case presented a much broader view than Eugene's. Her view was that anytime somebody is engaged in something that involves speech or expression and the message that their expressing could be affected in any way by the application of a law, like the civil rights law, that is unconstitutional. And that seems to capture an enormous range of conduct, because a lot of people who practice a lot of trades can describe aspects of what they do as involving expression or speech or creativity or symbolic meaning or whatever. And I take Professor Volokh have rejected many of those points in, in his brief, right? He, he comes in and says, "No, no, no. There's a different middle ground." The middle ground is that most professions, viewed as a whole, from a kind of historical point of view, are not really expressive."

[00:19:45] And, and he has a list of them. I wrote some of them down. Chefs, caterers, bakers, hotel operators, limo drivers, landscaping, and firms. And in general, those entities all have to comply with the Anti-Discrimination Law, except sometimes in, in his brief, maybe they don't if what they're being asked to do involves putting certain kinds of words on a page. and maybe words on a page are some kind of exception. And then he says, "But there are some professions that are kind of inherently and historically understood as artistic or creative, like photographers, videographers, website designers, printers, painters, singers, and in general, the application of the civil rights laws to them, I believe him to be saying, would violate the First Amendment. And so, you know, you get a proposed approach, which Kavanaugh, Justice Kavanaugh maybe hinted at is, the way to resolve this tension is to just for the Supreme Court and the lower courts to spend the next 20 years making a list of, like, every profession in the United States and basically saying as to this profession, the civil rights laws presumptively do or don't apply under the First Amendment, except maybe in certain kinds of factual settings where actually the opposite outcome attaches.

[00:20:53] At least that's how I understand what that position to be. I have to say, I don't think that position makes a great deal of sense, both because the judgements involved would be, in my view, totally arbitrary and subjective. there's essentially no original public understanding or precedent on any of that. So, this would just be a group of federal judges, and Professor Volokh, I guess, just opining on whole professions and whether they, historically or not, qualify as a medium that... as a whole. And that, by the way, is a quote from his brief in the *Masterpiece* case, are sufficiently expressive in nature. You know, it strikes me as arbitrary and it strikes me as unworkable. Because you can easily imagine

examples from within these professions where you would think it's bizarre not to say that the civil rights law applies, right? Imagine a poet who comes to a local bookstore and offers to sell poems to everybody for their birthday. And this poet's sort of dominant message and theme is the celebration of Americana. And so, she'll create poems for everybody, but won't serve any immigrants or people of a different national origin, because her poems express the beauty of being American. And she just doesn't think that celebrating their birthday is consistent.

[00:22:00] Or, imagine a portrait artist who sets up shop on a boardwalk and makes portraits of everybody who walks by. And his story is that his portraits are an expression of his abiding belief in the beauty of the human form, and so, he won't make portraits for anybody who is disabled, because he thinks disabled persons are an abomination, and a failure of the achievement of human perfection, right? You, you know, this is an artist, this is someone who's writing words. I would have no problem with the application of the civil rights laws to them in those situations. , and, and I think the idea that just because you use words or pick up a paintbrush you can say, "We don't serve Black people here," or, "We don't serve Jews here," goes way too far in describing the scope of First Amendment protections and would be totally inconsistent with our historical traditions. And so, in my mind, there are more natural limits, which I'm happy to talk about, right? I, I think the more natural limits are really circumstances where you would reasonably and understand the person who's selling goods or services to be expressing a message of their own, in the products that they're selling.

[00:23:04] And this was a common theme at the oral argument. Many justices asked questions touching on this idea of, you know, who would even understand this wedding website to be, like, Ms. Smith, you know. I don't think anyone who I sent my invite to thought my website designer was the one inviting anybody to the wedding, or expressing a belief about my wedding. You know, and so there's a question of, would you even understand the person who's selling stuff to be expressing a message here that you would that you need to protect? And where the law isn't interfering with a message. That's their own message. And they're instead simply required to simply serve all comers on a neutral basis, and expressing messages that ultimately belong to their consumer. That, to me, strikes a, a more reasonable balance. But I have to say, the idea that you can just look profession to profession and pronounce of them, the way that Professor Volokh did in his Masterpiece brief, and again in his brief here, and then have little carve outs within that, based on whether the particular thing they're doing involves words, I have to say it just strikes me as totally unworkable. And, and I did not see a majority of the court biting on that approach.

[00:24:09] Jeffrey Rosen: Eugene, Justices Sotomayor and Kagan did offer an objection along the lines that Joshua Matz suggests. Justice Kagan said, "What about a wedding website that announces the wedding date, and registry and... or tells the story of how a couple met." She said two of her own clerks were engaged and they had a wedding website that didn't over any message. It was just where, where to register for the gifts. What's your response to the idea that it makes more sense to distinguish between laws interfering with a message and laws requiring goods and services to serve all customers on equal terms?

[00:24:43] Eugene Volokh: Well, first I think Joshua laid out the implications of at least his position, which is that people could be forced to, not just put up a website saying, "Here's where you go for the wedding," but to write poems. That a poet, freelance poet could be forced to write a poem, on pain of being fined or having to quit his business, that he doesn't

want to write, because we think that his decision is unfairly discriminatory. Given the protection given to individual freedom of mind, simply for the decision not to have a slogan on a government-issued license plate on the back of your car, seems hard for me to square an individual freedom of mind with a legal obligation to write poems and paint portraits that you, for whatever reason of your own, however apprehensible it may be, don't want to write or don't want to paint. So, now it's true that some of the justices seen it as possibly much narrower. So, which is to say, "Look, if all it is just very simple, factual details, like, 'Here is the hotel that we reserved rooms at. Here is the date. Maybe here are some prominent landmarks or prominent events in the area you might wanna visit.'" Then it begins to look somewhat less ideological.

[00:26:06] As opposed to, for example, I think, a lot of websites do have messages about love, about what a great event this wedding is, about what a great thing their love is, and so on and so forth. That is what I think is probably not terribly administrable. It seems to me that people have the right not to create and not to say things, even that are highly banal, for rather than just an ideological message. So, just to give an example, I believe, Louisiana has a license plate that says, "Sportsman's Paradise." Now, you know, you could just say, "This is kind of pretty bland. It's not 'Live Free or Die'", it's not a command to do something. Not a message of patriotism." But somebody says, "Well, wait a minute. That suggests to me that the sporting there is shooting things. And I'm against that." Then the person should be free to tape over that without our questioning, "Well, you know, is it just... Yeah, it's just the state motto, it's not anything really that ideological."

[00:27:00] But the other thing I wanted to point to, because I think some other justices did indeed stress that as Joshua did, but I think is, is quite out of place here is this point about how people wouldn't perceive the website as being the designer's speech. And on that, I very much agree. I don't think people would perceive the website as the designer's speech. But people would not perceive "Live Free or Die" on a license plate in New Hampshire, especially before the *Wooley v. Maynard* decision, as the driver's speech, right? Otherwise it'd be very weird. "Oh, wow. All New Hampshire drivers just wanna live free or die. How do we know? We see that. They put it on their license plate." Of course they didn't put it on their license plate. It was the government that put it there. And the dissent in *Wooley* said, "Well, since there's no implication here that it's the driver's message, no problem." The majority rejected that. The majority didn't focus on possibility that someone would foolishly perceive the license plate as being the driver's speech. The majority said your individual freedom of mind gives you the right not to be an instrument for the dissemination of a message that you choose not to disseminate.

[00:28:10] And if simply driving around with a slogan on your government-issued license plate is an unconstitutional interference with freedom of mind because it makes you an instrument for dissemination of this message, than surely, requiring someone to write a poem, or requiring someone to paint a painting, or requiring someone to write press release, or requiring someone to write text on a wedding site, is even more an interference with individual freedom of mind.

[00:28:38] **Jeffrey Rosen:** Joshua, your response to Eugene's argument about freedom of mind? And then, tell us about some of the unusual hypotheticals that arose in the argument. Justice Samuel Alito asked whether a Black Santa posing for a Christmas photo in a mall should have to sit for pictures with a child who's dressed up in a Ku Klux Klan outfit. What

was the implication of that question? And of the answer that the Santa would not be required to sit for the photo, but Ku Klux Klan outfits are not protected characteristics under public-accommodation laws.

[00:29:08] Joshua Matz: Sure. It's a great question. And in some ways, this argument was the tale of two Santas, and I wanna make sure that we talk about that at, at some length. Maybe it's worth starting with, with just one quick response to Professor Volokh if that's okay. Which is, I feel strongly about, you know, protecting First Amendment rights, you know, but the question is, where is someone speaking? And there are... is all manner of activity in American life than involves literal words or that involves creativity or where a person may feel that what they're doing carries some great expressive or symbolic importance. And if we were to say that, you know, strict scrutiny applies to any regulation of any of that, we'd live in a monarchic society. And more importantly, among... in the world that you're describing is one that invites a society, you know, whittled with signs that say, "We don't serve Jews here." I mean, I think it's interesting that you chose the Kanye West example, of all the artists in the United States you could have mentioned, you picked him.

[00:30:01] To me, you know maybe the... you have a baseline level of comfort that I don't with that idea, but to me, the notion that, you know, which has never been previously adopted, that anyone who opens a store and offers to serve the public at large, in commerce, can then say, "But actually, this whole thing is a giant, artistic endeavor, or undertaking, , and therefore, I'm just exempt from the requirement that I abide by the civil rights laws," is one that would pose an enormous challenge to important aspects of the structure of modern American life. And it would invite a very different kind of society. and it's in line with several recent cases from the Supreme Court, in which the Supreme Court has conferred constitutional protection in, in a number of settings on conduct that has historically been understood as discriminatory. Either against gay people or in other settings.

[00:30:54] But it would... I, you know, I don't wanna sort of glide pass the point that we're just protecting free speech and let the chips fall where they may. The implications here are severe. And one person's freedom of speech may be another's experience of substantial dignitary harm, and another's inability to access certain goods and services in their local market, or in any market at all. And the government's interests here are, are weighty and compelling. And, you know, and the argument that everything that someone in business does, if they're in a certain line of work counts as First Amendment speech has never been the rule, and I'm not sure it would be a particularly good idea to make it the rule now. You know, and I think the hypotheticals illustrate this. The justices love to use hypotheticals as a way of teasing out the implications of you know, broad claims about legal principle. And there were two important hypotheticals at the Supreme Court argument, both of them involving Santa. And one of which, Justice Jackson's, I thought was a good hypothetical. And Justice Alito's, which struck me as maybe a less illuminating hypothetical.

[00:31:53] So, Justice Jackson, let me start with hers, hypothesizes they're both mall Santas, by the way. So, apparently the justices are spending lots of time at the mall these days. You know, Justice Jackson says, "Imagine a mall Santa, and, you know, the, the photographer for that Santa has this kind of, It's A Wonderful Life, 1940s, idyllic sort of scene that they wanna create. And so, they want all of their photos to express this understanding of a certain moment of an American ideal. But it would be inconsistent with that to include Black children, because in their mind, that moment and that era and that sort of sort of vision that

they wanna express about America, and Christmas, and Santa, you know, is one that was fundamentally white. And so, Latina and Asian and Black children are really just not welcome to participate in the photos. It's very hard for me to see how under the petitioner's argument, or your argument, that isn't protected by the First Amendment, and we can have a new wave of mall Santas around the country that say, "We don't serve Black and brown children here, , because my artistic vision and my freedom of mind is such that I need to be able to create portraits that tell a very particular story."

[00:33:02] "And I'm not discriminating based on status. It's not that I'm discriminating against Black and brown people. It's just that I want to tell a message, a story, and then inclusion of certain kinds of people would be inconsistent with that. And so, the government is interfering with my ability to express this message, which just incidentally happens to require the exclusion of people of a particular status." Right? That's one hypothetical. That's the hypothetical I worry about. The United States government worries about it too. It sort of aligned itself with that. It identified a related hypothetical. You know, imagine a photograph who says, "I don't like to express the, the view that women should be in business," and says, "Therefore, I won't be any portraits of woman CEOs or women in the workroom. Because that's antithetical to my beliefs about women." Or a school this is actually a case call the *Runyon* case that you know, I'm sure well, where a school wants to express the message and teach the message with words and ideas of segregation. And says, "Well, we admitted, admitted Black and brown children to our school would be inconsistent with the message we wanna send, so we really shouldn't do that." And it's hard for me to know what the limit is there.

[00:34:06] So, that's one. There was a whole line of hypotheticals designed to tease out the unnerving implications of adopting this rule that the petitioner advocated and that I will attribute to you here, because I take your position to be consistent with it. Then, then there's the Justice Alito's hypothetical. Justice Alito says, "Well, what if there's a Santa..." And Justice Alito hypothesized that this Santa is a Black person. And, and this, this Black Santa that he, you know, doesn't want to take pictures of any child in a KKK costume. And then Justice Alito helpfully, but in my mind, somewhat inexplicably, thought it was useful to volunteer that Black children probably don't often dress up as KKK folks. The difficulty with that hypothetical, the things that make it not illuminating is that KKK status is not a protected trait. There are no laws that prohibit discrimination on the basis of being a member of the KKK. You could broaden it, maybe, to political ideology. That feels like it's probably a stretch. you could take the view that wearing a KKK costume is sort of often correlated with being white and is not generally correlated with being Black. And so, you know, it raises the question of can people define their services in ways that tend to be more or less attractive to certain protective groups?

[00:35:18] But the basic difficulty, I think, of the hypothetical is he hypothesizes a situation in which somebody wants to engage in discrimination that isn't actually prohibited. Because people, as general rule, are free to define the goods and services they offer. And they are free and general to refuse to provide those goods and services, as long as they do it consistently, and as long as they don't refuse to provide it on the basis of protected characteristics. So anyway, there were two Santa hypotheticals. I thought one was quite illuminating. I thought the other was perhaps less helpful.

[00:35:48] Jeffrey Rosen: Eugene, what is your response to the two Santa hypotheticals, both to Justice Jackson's and to Justice Alito, and what did you think of other hypotheticals that arose in the oral argument more generally?

[00:36:00] Eugene Volokh: So, I do think that a photographer cannot be required by the government to photograph people, subjects, whatever, that he doesn't wanna photograph. That's fundamental aspect of, again, the right not to be compelled to create speech, the individual freedom of mind. I think the same thing is true of writers, of poets, of singers. And sometimes, like First Amendment rights generally, it's going to be used to bad purposes. But that's the First Amendment. Now I do think most malls would not be eager to have that kind of Santa there. So they'll say, "Nope, don't do it at the mall." But if he sets up shop on some public for or sidewalk, or whatever else and says that, you know, I think that is constitutionally protected speech. I also think that it's actually pretty easy to distinguish speakers from or essentially people who create speech from people who are in other businesses. In fact, First Amendment law would have to do that all the time as to speech restrictions.

[00:36:57] So, we know, there are cases that say, "If you wanna setup a monopoly on slaughterhouses in a city, you are free to do that city. You can do the... government. You're free to do that. If you want to, to ban bakers in your city, because you think the smell leads people to overeat. Well, you're free to do that." It's a bad idea, wouldn't wanna live in that city, but you're free to do that. On the other hand, if you wanna ban photographers, well, at the very least, it's gonna be a First Amendment issue there. The law necessarily... any time you have freedom of speech, you have to be able to distinguish creation of speech from creation of non-speech. So, I don't think that would be a problem. But as to the Klan outfit, actually as it happens quite a few jurisdictions have laws that ban discrimination based on political beliefs or affiliation, which often include speech. Now, they're not generally states. They're generally cities or counties. An example is Seattle, which bans discrimination based on political ideology, including conducted related to that, which basically means conveying such messages.

[00:38:02] Ann Arbor is another example. It bans the discrimination based on political beliefs, which includes opinion manifested in speech or association. So, membership in the Klan and wearing the expressed insignia of the Klan would qualify. California has an open-ended, or at least a law that has been op- read as open-ended as to public-accommodations. And I wanna say about 30 or 40 years ago, that law was applied to a restaurant that wanted to exclude Nazis from eating there. And the court said, "Look, that's discrimination in public-accommodation based on ideology." And in fact, there had been precedence from the California Supreme Court interpreting the law as saying, "Look, you can't discriminate against members of the John Birch Society, or members of the ACLU." And of course, since the law has to be viewpoint neutral, it would apply to the KKK, as well.

[00:38:55] So, Justice Alito's hypo is, is perfect plausible in those jurisdictions, which again, might include, the law is somewhat unclear, but might include my own state of California, which I hear is a pretty large one, and a bunch of other cities and counties. And again, the logic of Joshua's position and of the government's position, I think very much applies to that. Because after all, these, these categories of prohibited discrimination and public-accommodations law, they're just setup by the legislature, or sometimes by the courts interpreting legislation. Used to be sexual orientation wasn't generally covered. Nowadays, a

lot of jurisdictions, though not all, do. And then a smaller number, but still some, cover political ideology. My view is, a photographer, a writer, cannot be required to write or photograph any message. They can't be barred from discriminating based on the ideology of the message. Political ideology. They can't be barred from discriminating based on the religious ideology of the message. Again, the great bulk of these laws do ban, more than ban sexual orientation discrimination, ban discrimination based on religion. So likewise it seems to me, more broadly, they are entitled to pick and choose.

[00:40:06] There will be lots of public pressure precluding them from doing that in a lot of such instances, but it has to be their exercise of their individual freedom of mind do decide what it is that they will and will not photograph or write about or whose weddings they'll sing at, and the like.

[00:40:24] **Jeffrey Rosen:** Joshua, what are the implications of Eugene's position that the individual freedom of mind entitles a press release writer, or photographer, or freelance writer not to sell to anyone a speech that offends their religious beliefs? Justice Gorsuch asked that question in the oral argument. He said, "You can't change their religious beliefs. That's their religious beliefs." Although he said, "Mr. Phillips did go through a re-education training program, pursuant to Colorado law," and he pushed back and said someone might be excused for calling that a re-education program. If Justice Gorsuch embraces the, the, broadest version of the freedom of mind argument, what would be the consequences for public-accommodation laws?

[00:41:02] **Joshua Matz:** I think they'd be substantial. And I wanna highlight at the outset that, you know, in talking about why I disagree with Professor Volokh and, and I assume with Justice Gorsuch, my point isn't, you know, their argument has bad outcomes and for that reason alone it should be rejected, although I do think it would have bad outcomes. It's that I think the argument is wrong on its merits. There's a reason why we made it through decades of the Civil Rights Era without the claim of this kind ever succeeding, or even being taken seriously, and why the nearest analog to it in multiple cases was rejected by the Supreme Court. It's not like for decades and decades as the nation created and expanded civil rights law it just didn't occur to anybody that, "Well, gee. Maybe this is unconstitutional in a huge number of potential applications to all manner of expressive businesses."

[00:41:59] I think it's wrong now, and I think it was wrong then. I think there's no original support for it. There's no tradition that supports it. And the idea that when a person enters into commerce and hangs up a shingle and offer their goods and services to the world at large, that the fact that those services involve some speech or expressive component transforms everything they're doing into an exercise of the First Amendment, you know, where regulating it imperils the freedom of mind in this nation, strikes me as massively overblown. To me, the more interesting question is where do you draw the line? My sense is that the overwhelming majority of commercial activity is conduct, not speech. And that any regulation of speech that occurs from the civil rights laws is incidental to the underlying regulation of discriminatory conduct. And, you know, like I said, there are some harder cases where the, you know, it, it would be understood that the activity that the enterprise is engaged in is its own speech and not the speech of the people who hire it. And to me, that's where you may encounter more First Amendment limits and where you'd have a balancing inquiry into the state's interest versus the individual right.

[00:43:05] But, but the approach that Professor Volokh describes, the approach that petitioner's oppressed, the approach that Justice Gorsuch suggested sympathy for is much broader than that. It would create, in the short to medium term, a lot of uncertainty and instability across the country in where and how the civil rights laws apply. It would create uncertainty about who is protected. Justice Alito seemed to suggest an argument that discrimination against gay people, like me, is different than discrimination against Black people. I don't know if he plans to go through every protected group and decide, you know, thumbs up or thumbs down. Whether women or disabled people or immigrants, or whoever gets protected. Maybe Justice Alito would feel find just going through the list and, and calling yay and nay on all of them. But that doesn't strike me as anything other than an exercise of power and, you know, policy preference. and not an exercise of law worthy of the name.

[00:44:01] And so, you know, there's this extraordinary potential for the position that's being advocated here to really undermine public confidence in the availability of civil rights law to encourage a culture in which perpetrators of discrimination cast themselves as victims of a regulatory regime that exists to try to protect a quality of access in the marketplace for all people. That, in very concrete terms, would lead, in some parts of the country to folks having a really hard time accessing basic goods and services in their community and would call to mind parts of the, mid-20th century, in which you needed a book, or maybe now a website that tells you which local stores will serve you, depending on what your...you know, what characteristics you have and what services you're looking for. And you know, that's just a different world than we've lived in for quite some time. I think it's a world that would be deeply unfortunate, that would cause a widespread amount of, of conflict and suffering and material disadvantage for historically disadvantaged groups.

[00:45:06] And it's not a world that's required by the First Amendment. It simply isn't. It's never been understood to be required by it. And, you know, Professor Volokh suggested earlier that what's changed is that we've expanded the civil rights laws. What's changed is that there's a six justice, quite conservative majority on the Supreme Court. That's what's changed. Justice Kennedy, who I clerked for and Justice O'Connor, if I had... you know I doubt very much that either of them would accepted anything like the broader version of the claims being pressed here. Which do not, in any way, follow from cases like *Hurley*, and in my mind are foreclosed by cases like *Rumsfeld versus FAIR*. And so, you know, the world has changed. But what's changed is personnel at the Supreme Court. And I think it's part of that larger story. And, and while I appreciate that there's a real clash of principle here, , and that there are folks who feel very strongly about not wanting to participate in the pervasion of certain kinds of services, you know its long been understood, and rightly so, that the price of participating in our commercial marketplace, and of promising to serve the public at large, is that you can't hang up signs that say you do not serve people based on certain characteristics.

[00:46:15] **Jeffrey Rosen:** Thank you so much for that. Well, it's time for closing arguments in this excellent discussion. And Eugene, first one is to you. Please, tell We the People listeners why you believe that applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

[00:46:33] **Eugene Volokh:** The First Amendment protects the right to freedom of speech, which the Supreme Court has rightly said includes the right to choose whether to speak or not to speak. In the service of protecting the freedom of mind, the freedom of people not to

become instruments for propagating views that they dislike. It protects good people, protects bad people, protects people who some people think are good, some people think are bad. That's the First Amendment. And I think it's important to, to, to protect it, even when people use it for what we think are bad purposes. If somebody, or but... it is, well, settled that somebody has a right not to even have a license plate, a government issued license plate on his car that conveys a message he is opposed to. Seems to me even clearer that a poet has a right not to compose poems that he dislikes, for whatever reasons, good or bad. A portrait painter has a right not to paint portraits. A photographer has a right not to take photographs. As I understand Mr. Matz argument, he would in fact coerce every one of them, on pain of having to close up shop and no longer be in business, into creating speech that they disapprove of.

[00:47:45] That, I think, is fundamentally contrary to the First Amendment. To be sure, a lot of business take the examples that are covered by federal Anti-Discrimination Law; hotels, restaurants, but a wide range of other business that do not create speech, are subject to Anti-Discrimination Laws. There's no First Amendment problem. But, and, and in fact, if you look at the civil rights struggle, it wasn't about the right to have poets write poems that they don't wanna write, or even photographers take photographs they don't wanna photograph. This is a relatively new thing as I first noticed it coming up about 20 years or so ago. And there's been a trickle of cases about that since. When it comes to access to non-speech commercial services, absolutely, there's no First Amendment problem, because there's no creation of speech. But when it comes to creating speech, people should be entitled to say, "I do not wanna write a press release for this religion, or for this political group." Mr. Matz points out and I agree, the government can't pick and choose between the Anti-Discrimination Law categories. I don't think there should be one rule or race and one for sexual orientation.

[00:48:49] But it follows that those jurisdictions that ban discrimination based on political affiliation under Mr. Matz's perspective, those laws would also be applicable. The photographer really wouldn't be able to say, "I refuse to photograph people wearing Swastikas or wearing t-shirts with text expressing views I don't like, wearing MAGA hats." As certainly a city could say, "You can't deny, as a restaurant, deny service to someone wearing a MAGA hat." But I do think that they can... that a photographer is entitled to say, "I photograph to create a particular, particular speech product. And a particular kind of speech. And this is a kind of speech I don't wanna create. I don't wanna create a speech that I believe is hateful or I believe is wrong for whatever reasons." That's just part of this individual freedom of mind. And I think that the First Amendment does protect it. And I hope the Supreme Court agrees.

[00:49:41] Jeffrey Rosen: Joshua, last word is to you. Why do you believe that, and I'm reading from the question presented. Why do you believe that applying a public-accommodation law to compel and artist to speak or stay silent does not violate the free speech clause of the First Amendment?

[00:49:57] Joshua Matz: I don't. The problem is the question presented, that you just read, is started at a very high level of generality. And I think what Professor Volokh and I do agree on, we may not agree on much, but what we do agree on is that these are context sensitive judgements of a certain kind. I don't think that the First Amendment has no role to play in the civil rights laws. I think it has a very limited and very distinct role to play, where the law is forcing an entity to express a message that it doesn't want to express and that other people

would understand to be its own message, rather than the message of the people who have hired it. and in my few, that doesn't apply to a case like this one, where a website designer offers a suite of services then nobody...what... you know, no one understands when you open a wedding website that the person who designs the website is the one inviting you to the wedding or endorsing the message or expressing anything in particular, particularly if you look at the rest of Ms. Smith's catalog, which includes a wide range of activities, , from all manner of life, that don't at all seem consistent with the vision that she has presented to the court as defining her work in this case.

[00:51:03] And where Professor Volokh and I agree is the First Amendment has a role to play here. Where we disagree is over how you draw that line. I would draw it quite narrowly. He claims to draw it narrowly, but I think in practice, would draw it quite broadly. Because even within, you know, he, he says that there are a number of cases, like restaurants, for example, where it wouldn't apply. But I've read his briefs carefully and it's my understanding that if my husband and I went to a restaurant and asked for a cake that celebrated our anniversary and that involved writing words on a cake that said something like, "Happy Anniversary", maybe he'd have a different view of it. And whether or not Professor Volokh did, which, you know, doesn't matter to me in the immediately sense any number of judges or advocates could. And so, every one of those things can become a lawsuit. And so, adopting this rule, which is, in my view, not just wrong as a matter of the First Amendment, and massively over-broad as a reading of what it means to engage in speech for a business that holds itself out to the public, adopting that rule isn't just wrong, but it's dangerous.

[00:52:04] It would create a lot of uncertainty and a lot of instability and if I had to guess, a lot of conflict, and a pretty ugly turn in American life, in which discrimination becomes constitutionally protected and normalized. In a which everyone is fighting to find new and innovative ways to describe their business as engaged in free speech or expressive activity, to exempt those businesses not only from the civil rights laws, but maybe the labor laws, or other health and safety regulations, right? Once you start constitutionalizing these aspects of ordinary commercial activity, any number of regulations are potentially up for grabs. And so, you know, Ms. Smith wants to present this as a case about someone who just opposes same-sex marriage and why can't she just live that belief and not serve gay people if they ask for a wedding website? But the stakes are much bigger. And the stakes are much broader for people of all faiths, for people of all backgrounds. And I worry that the Supreme Court will probably take a position closer to Professor Volokh's than mine. I think if it does so, that would be egregious error. And my instinct is that a great deal of misfortune, and in some cases, suffering, will follow in the wake of that kind of ruling.

[00:53:16] **Jeffrey Rosen:** Thank you so much, Eugene Volokh and Joshua Matz, for a civil, deep, and clarifying discussion of this important case, *303 Creative versus Elenis*. Eugene, Joshua, thank you so much for joining.

[00:53:31] **Joshua Matz:** Thank you.

[00:53:32] **Eugene Volokh:** Thanks very much for having us.

[00:53:34] **Jeffrey Rosen:** Today's show was produced by Melody Rowell, and engineered by Kevin Kilbourne. Research was provided by Kelsang Dolma, Sophia Gardell, Sam Desai,

and Lana Ulrich. Please rate, review, and subscribe to We the People on Apple, and recommend the show to friends, colleagues, or anyone, anywhere, who's eager for a weekly dose of constitutional illumination and civil debate and always remember the National Constitution Center's a private non-profit. We rely on the generosity, the passion, and the engagement of [00:54:00] people from across the country who are inspired by our non-partisan mission of constitutional education and debate. Support the mission by becoming a member or give a donation of any amount, at [constitutioncenter.org](https://www.constitutioncenter.org). On behalf of the National Constitution Center, I'm Jeffrey Rosen.