You Can't Say That!

Compelling Free Speech Issues before the Supreme Court

By Brent S. Bean

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Congress shall make no law … abridging the freedom of speech…
–U.S. Constitution, Amdt 1

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From this seemingly innocuous pronouncement stem many decades of legal interpretation about what speech can and cannot be regulated by government. Certain types of speech are afforded little if any First Amendment protection, such as obscenity, defamation, false advertising, and fighting words. Scores of cases define just what those terms mean based on the context of their use and how far the government can go in controlling self-expression. Recently, the Supreme Court has further interpreted the bounds of government efforts to regulate free speech, notably addressing the technological advancements of our era.

This article reviews the landscape of free speech rights as they relate to content-based restrictions, compelled speech, and viewpoint discrimination. Several recent cases regarding these issues are pending before the Supreme Court. The rulings on these matters will further define how our most fundamental right - free speech- is safeguarded or restricted.

Compelled Speech

None are more hopelessly enslaved than those who falsely believe they are free.

–Johann Wolfgang von Goethe

The compelled speech doctrine extends free speech protections beyond keeping the government from suppressing what people want to say; it also bars the government from compelling people to express things they do not want to say. "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." John Roberts, Chief Justice. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47, 57 (2006). For example, in *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624 (1943), the Court held that a state cannot force children to stand, salute the flag, and recite the Pledge of Allegiance. That state policy, Justice Jackson wrote, was a "compulsion of students to declare a belief….If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id*. at 631, 642. Likewise in *Wooley v. Maynard,* 430 U.S. 705, 714 (1977), the Supreme Court held "the right to refrain from speaking at all" is included in the right to free speech. The State may not force a speaker to deliver someone else's message.

There are limits to this doctrine, though. For example, the right against compelled speech does not entitle a property owner to avoid the use of their property as a forum for speech by others. In *Prune-Yard Shopping Ctr. v. Robins,* 447 U.S. 74 (1980), the Supreme Court upheld a California Supreme Court decision saying that a group of residents had a right to speak and petition in shopping areas even where the centers are privately owned. *Id*. at 78. The shopping center may be forced to use its property as a forum for the speech of others. *Id*. at 85. The Court rejected the argument that a private property owner had a First Amendment right not to provide his property as a forum for the speech of others. The Court reasoned the law did not force the shopping center to say anything and that it could disavow the speech by posting signs where they spoke, emphasizing that no specific viewpoint is dictated by the State to be displayed on the shopping center's property. *Id*., at 85-88.

Newspapers and other media outlets may avail themselves of this right. In *Miami Herald Pub Co. v. Tornillo,* 418 U.S. 241 (1974), the Supreme Court held that newspapers are not required to publish editorial replies as required by Florida's "right to reply" statute. That law gave a political candidate equal space to answer criticism and attacks by a newspaper. Tornillo, a political candidate, demanded space in the Miami Herald to answer criticism of his candidacy. The Burger-led Court held that Florida's statute was an intrusion on the function of editors. It further found the law compelled the newspaper to print that which it otherwise would not and thus violated their rights to free speech.

Even a parade may constitute speech for purposes of this First Amendment issue. In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp of Boston*, 515 U.S. 557 (1995), the Court struck down a Massachusetts accommodation law's application to a St. Patrick's Day parade. The Supreme Court found it unconstitutional for forcing parade organizers to allow the participation of the Irish American Gay, Lesbian & Bisexual Group. The law effectively declared the sponsors' speech itself to be the public accommodation. *Id*. at 573. The Court held that the "speaker has the autonomy to choose the content of his own message." *Id*. Organizing the parade and selecting the participants was expressive, so applying the public accommodation law to force the organizers to include unwanted speech was an impermissible intrusion on the parade sponsors' freedom of speech.

In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47 (2006), the government sought to enforce the Solomon Amendment requiring law schools to open their campuses to military recruiters. The Court stated that the government is limited in its "ability to force one speaker to host or accommodate another speaker's message." *Rumsfeld*, 547 U.S. at 60. Nonetheless, the Court held the Solomon Amendment was constitutional and that the law schools' denial of access is not inherently expressive so as to implicate the First Amendment. The law schools' conduct (in denying access) was only understood in light of the law school's speech explaining such, which they were still free to do.

In 2018 the Supreme Court issued a trilogy of opinions regarding compelled speech. The first was *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. ___, 138 S. Ct. 2361 (2018), in which the Court analyzed the California FACT Act. The Act required licensed pro-life centers that offer pregnancy-related services to provide notice to women that the State provides free or low-cost services, including abortions, and required the centers to provide women a telephone number to call. The State said the purpose of its law was to ensure residents know their rights and what health care is available to them. The Court found the statute was a content-based regulation of speech. Content-based laws must survive strict scrutiny. The Court reiterated the standard reflects the "fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter or its content." *Id*. at 2371. It went on to hold that a state cannot compel pregnancy crisis centers to inform patients about the availability of abortions because this requirement

"alters the content of their speech." *Id*. Furthermore, the content of the mandated speech required the centers to advertise the very practice that they were devoted to opposing.

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The second was *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 584 U.S. _____, 138 S. Ct. 1719 (2018). The issue in this highly publicized case was whether owners of public accommodations can refuse certain services based on the First Amendment; specifically, whether declining to bake a cake for a same-sex marriage wedding was protected speech. Masterpiece argued that he had to use his artistic skills to make an expressive statement inconsistent with his First Amendment rights. The Colorado Civil Rights Commission found that Masterpiece violated its anti-discrimination public accommodation law (CADA) by discriminating against same-sex persons. The commission's decision was affirmed by the Colorado Court of Appeals. The issue before the Supreme Court was whether applying CADA to compel Masterpiece to create an expression that conflicted with its sincerely held religious beliefs about marriage violated the First Amendment. The Supreme Court determined that the Colorado Civil Rights Commission did not employ neutrality and reversed the commission's decision. *Id*. at 1732.

The Court did not rule on the broader question of whether the state anti-discrimination accommodation law applied in the case. Instead, it held the commission breached its duty not to base laws or regulations on hostility to a religion or a religious viewpoint, thus violating the free exercise clause. Holding the government cannot act in a manner that passes judgment upon or presupposes the illegitimacy or religious beliefs and practices, the Court found that the Commissioners made egregious and biased comments by saying that freedom of religion has been used as an excuse to justify all kinds of discrimination throughout history was one of the "most despicable pieces of rhetoric that people can use to … hurt others." *Id*. at 1729.

The third case was *Janus v. AFSCME*, Council 31, 585 U.S. ___, 138 S. Ct. 2448 (2018). The issue in this case was whether public employees, under the First Amendment, may be forced to subsidize a union even if they choose not to join and disagree with the positions it takes in collective bargaining and related activities. The Supreme Court held that "this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id*. at 2460. The Supreme Court further affirmed that freedom of speech, "includes both the right to speak freely and the right to refrain from speaking at all." *Id*., at 2463. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Id*., at 2464.

"When speech is compelled … additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Id., (quoting Barnette* 319 U.S. at 634).

Viewpoint Discrimination

Viewpoint discrimination is poison to a free society.

–Justice Samuel Alito

A subset of content-based speech restrictions involves "viewpoint discrimination." Where the government regulates speech based on the ideology of the speaker it is a more egregious form of content discrimination. Targeting not only subject matter but particular views taken by speakers on a subject is a blatant violation of the First Amendment. *See Speech First v. Cartwright*, 32 F.4th 1110, 1126 (11th Cir. 2022). The government may not discriminate against speech based on the ideas or opinions the speech conveys. *Iancu v. Brunetti*, --U.S.--, 139 S. Ct. 2294, 2299 (2018). *See also Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S. Ct. 2512 (1995) (denial of funds based upon the message of the student group was viewpoint discrimination because it regulated speech based on ideology or opinion). A law which only restricts criticism is not content-neutral; if it simultaneously is not narrowly tailored, it may violate the First Amendment. *Boos v. Berry*, 485 U.S. 312 (1988) (striking down a D.C. statute that criminalized the display of a sign criticizing a foreign government within 500 feet of its embassy).

The Modern Town Square, Discrimination, and Compelling Free Speech and Expressive Conduct

Freedom of speech means freedom for those who you despise, and freedom to express the most despicable views. It also means that the government cannot pick and choose which expressions to authorize and which to prevent.

–Alan Dershowitz

Two cases, one of which is before the Supreme Court, encapsulate the intersection between permissible government speech regulation and compelled speech. The resolution of these matters will impact the future of free speech.

303 Creative, Inc. v. Elenis

In *303 Creative, Inc. v. Elenis*, the Tenth Circuit Court of Appeals ruled that a Colorado Anti-Discrimination Act (CADA) did not violate the First Amendment rights of a web designer, 303 Creative, Inc. which did not want to be required by Colorado to make same-sex couple wedding websites. *Elenis*, 6 F.4th 1160 (10th Cir. 2021). The issue before the court is whether the application of CADA compels an artistic business to provide services that violate that business's free speech rights. That is, whether applying CADA to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

CADA prohibits discrimination in public accommodations. It provides that a public accommodation may not refuse to a person "because of … sexual orientation" the full and equal enjoyment of the good, services … of a place of public accommodation…" Colo. Rev Stats. §24-34-601(2)(a). CADA applies to businesses in Colorado that choose to serve the public and requires those businesses not to discriminate. 303 Creative asserts that it does not want to create wedding websites depicting same-sex marriages. 303 Creative claims that its right not to comply with CADA arises from its expressive artistic and customized services; as such, the government cannot compel it to provide services in opposition to its ideology. Colorado contends that granting businesses a right to discriminate if their product is expressive is an exception that would swallow the rule and require judges to determine whether a good or service is sufficiently expressive to permit such a free speech right. *Id*., at 1169-70.

The Tenth Circuit found that Colorado had such a compelling interest in remedying a "long and invidious history of discrimination based on sexual orientation."

In this case, the owner of 303 Creative is an artist specializing in graphic and website design. She accepts projects based on the message rather than who requests the service. The owner says she would provide design services to any client regardless of sexual orientation so long as the project does not depict a same-sex marriage. For example, if a gay person wanted a marriage website for a heterosexual wedding, she would create one. Thus, she argues the identity of the customer is immaterial, rather it is the nature of the message she restricts. *Id*., at 1170.

The Tenth Circuit held that Colorado could force 303 Creative to create websites for same-sex couples. More specifically, the Tenth Circuit upheld the application of CADA to the business. While acknowledging that freedom of speech prohibits the government from telling people what they must say, if 303 Creative chooses to offer website design services to the public, it cannot discriminate based on sexual orientation. *Id*. at 1177-78. The Circuit Court acknowledged that CADA has the effect of compelling 303 Creative to create websites it would otherwise refuse. *Id*. at 1177. CADA compels speech in this case and is a content-based restriction. *Id*. at 1178, *citing Becerra*, 138 S. Ct. at 2371. Because strict scrutiny applies, the State must show that it had a compelling interest in restricting this speech and that the law is narrowly tailored to satisfy that interest.

The Tenth Circuit found that Colorado had such a compelling interest in remedying a "long and invidious history of discrimination based on sexual orientation." *Id*. at 1178. Though the court agreed that CADA was not narrowly tailored to prevent dignitary harms, it concluded there was no need for such restriction. "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 1179. The majority did find, however, that CADA's compelling interest in ensuring equal access to publicly available goods and services was narrowly tailored. CADA applies here only because 303 Creative intends to sell its unique services to the public.

The question then becomes whether Colorado's interest in ensuring equal access to the marketplace generally still applies with the same force to 303 Creative's case specifically. The Court held that allowing an exception for 303 Creative would relegate LGBT consumers to an inferior market; an exception would limit market access because 303 Creative's services are unique. Thus, CADA is narrowly tailored to ensure equal access. *Id*. at 1182. The Court concluded that 303 Creative's free speech rights are compelling, but so are Colorado's interests in protecting its citizens from the harms of discrimination. Colorado cannot defend these interests while excepting 303 Creative from CADA. *Id*. at 1190.

In an impassioned dissent, Chief Judge Tymkovicth wrote that the scope of the majority's decision was "staggering" and compelled 303 Creative to provide its artistic services in violation of its constitutional rights. *Id*. at 1204. Finding the law content-based and subject to strict scrutiny, the dissent argued that the Supreme Court's emphatic disapprobation of compelled expressive speech leaves little room for alternate conclusions. The dissent found the majority did not afford Smith's expressive and artistic speech any protection, endorsing CADA's compulsion of both speech and silence. "The majority concedes that CADA forces artists to create an individualized, expressive artwork that conveys a message betraying their beliefs – yet finds this constitutionally permissible." *Id*. at 1198. 303 Creative argued not that it would deny access to gay customers, but rather it simply would not produce a website celebrating a same-sex marriage. "[J]ust as the government cannot coerce affirmations of belief, it also cannot require an individual to be a 'courier for [the State's] message,' even when that message does not otherwise interfere with the individual's own speech." *Id*. at 1193. "Nor can the government require a speaker to be a courier for another citizen's message." *Id*.

The dissent focused on *Hurley's* application to expressive speech. In *Hurley*, the government's application of its public accommodation law was found unconstitutional because it made the expressive speech (the parade) the public accommodation, thereby changing its message. *Hurley*, 515 U.S. at 572. Chief Judge Tymkovicth thus observed: "This is the central lesson of *Hurley*. A state may not regulate speech itself as a public accommodation under anti-discrimination laws. . . . [Otherwise,] the State could wield CADA as a sword, forcing an unwilling Muslim movie director to make a film with a Zionist message or requiring an atheist muralist to accept a commission celebrating Evangelical zeal."" *Id*. at 1199. The dissent also found that the law was viewpoint-based and therefore an even more blatant free speech violation. "Because the government is regulating 'speech based on 'the specific motivating

ideology or the opinion or perspective of the speaker' it is a more 'egregious form of content discrimination.'" *Id*. at 1201 *quoting Rosenberger,* 515 U.S. at 829. This case was argued before the Supreme Court on December 5, 2022, and an opinion is expected late spring or early summer 2023.

NetChoice, LLC v. Paxton

Suppose that instead of restricting the free speech of citizens, the government mandated that a private business not be allowed to decide the speech it will allow in hosting a forum for speech or other expression. This is the backdrop of *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

In this matter, the State of Texas passed a law in 2021 barring social media companies from censoring users based on their viewpoints. Texas designated these platform companies as "common carriers," akin to Verizon and AT&T. Under the common carrier doctrine, states may impose nondiscrimination obligations on such companies that hold themselves out to the public. The issue before the Fifth Circuit was whether the First Amendment prohibits laws restricting viewpoints, content, or speakers on websites from engaging in editorial choices about whether and how to publish and disseminate speech.

Texas Statute HB20 regulates social media platforms with more than 50 million monthly active users. Section 7 of the statute provides a platform may not censor a user, a user's expression, or a user's ability to receive expression of another based on the viewpoint of the user or other person, the viewpoint represented in the user's expression or other person's expression, or a user's geographic location in this state. The prohibition on viewpoint-based censorship does not limit the expression a platform is specifically authorized by federal law to censor. "Censor" under Texas state law means "to block, ban, remove, deplatform, demonetize, deboost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." Tex. Civ. Prac. & Rem. Code §143A.001(1).

NetChoice challenged the law, claiming that platforms have a First Amendment right to curate content and decide whether to host specific instances of speech as they see fit. They argue the government cannot tell platforms what they can and cannot "print." *See e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The district court issued an injunction after finding that the social media platforms were not "common carriers" and were simply engaging in editorial discretion by managing and arranging content on their platforms.

The Fifth Circuit, in what can be described as a tour de force opinion, reversed the injunction entered by the district court. The Court approved of the concept that social media platforms are common carriers and also held HB20 does not chill speech, it chills censorship, for which there is no support in the First Amendment. *Id*. at 448. The Court further held that Section 7 of HB20 does not regulate a platform's speech at all, rather it protects other people's speech and regulates the platform's conduct. *Id*. The Fifth Circuit noted that Section 230 of the Commutations Decency Act supports this view, as Congress indicated platforms are not "speaking" when they host other people's speech. Finally, the Court held that even if Section 7 regulates the platforms' speech, the statute satisfies the intermediate scrutiny that applies to content-neutral rules. *Id*. at 485.

"The implications of the platforms' argument are staggering. On the platforms' view, email providers, mobile phone companies, and banks could cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate, or business." *Id*. at 445. "We reject the Platforms' attempt to extract a freewheeling censorship right from the Constitution's free speech guarantee. The platforms are not newspapers. Their censorship is not speech." *Id*. at 494. "[T]he Platforms cannot invoke 'editorial discretion' as if uttering some sort of First Amendment talisman to protect their censorship. Were it otherwise, the shopping mall in *PruneYard* and the law schools in *Rumsfeld* could have changed the outcomes of those cases by simply asserting a desire to exercise 'editorial discretion' over the speech in their forums." *Id*. at 464.

The Court observed that the State can regulate the manner in which private entities host, transmit, or otherwise facilitate speech. "So the First [A]mendment doctrine permits regulating the conduct of an entity that hosts speech, but generally forbids forcing the host itself to speak or interfering with the host's own message." *Id*. at 455. In distinguishing *Miami Herald* and *Hurley*, the Court wrote, "the compelled speech violation[s] (in those cases) … resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id*. at 459. Not so in the platforms' case. "Section 7 does nothing to prohibit the Platforms from saying whatever they want to say in whatever way they want to say it." *Id*. at 455. Hosting content is not tantamount to endorsing the same. Relying on PruneYard, the majority wrote that platforms, like the mall owner, "could 'expressly disavow any connection with the [pamphleteers'] message by simply posting signs." … Nor did [the] … law impermissibly compel the mall itself to speak." Id. at 456, citing *PruneYard*, 447 U.S. at 87-88.

The Court opined that the platform's so-called expressive right would arise, if it did, much like that in Rumsfeld, where "accommodating the military's message [did] not affect the law schools' speech." *Id*. at 459, *citing Rumsfeld*, 547 U.S. at 64. Thus, even though the law required the entity to accommodate the speech of others, it did not limit what the host could say nor require the host to say anything. *Id*. As such, the majority reasoned that nothing in HB20 prohibits the platforms from speaking or proscribes any content-based penalty. "HB20 is constitutional because it neither compels nor obstructs the Platform's speech in any way." *Id*. at 494.

The Fifth Circuit also concluded that requiring the platforms to host certain content thus does not implicate the holding in *Hurley*. There, the law could not require the host to accommodate speech in contrast to their values or expressive message. *Hurley* is limited to a speech host who is intimately connected with the hosted speech, yet the platforms did not contend they were "intimately connected" with the communication. *Id*., at 461. The Court thus held that a speech host must make one of two showings to mount a First Amendment challenge. Either the challenged law (1) compels the host to speak or (2) restricts the host's own speech. It found neither to be the case in *NetChoice*. *Id*. at 459.

The Fifth Circuit also agreed with the State that the platforms are common carriers. The common carrier doctrine provides that states have the authority to impose nondiscrimination obligations on companies that hold themselves out to serve all members of the public. Bolstering this view, the court pointed to the platforms' admission in arguing for Section 230 protection. Section 230 is a much-publicized provision that reduces the platforms' exposure to defamation liability for hosted content. That protection provides that the platforms shall not be treated as the publisher or speaker of content developed by other users. Here, however, "[f][irst, they suggest the user-submitted content they host is their speech; and second, they argue they are publishers akin to a newspaper. Section 230, however, instructs courts not to treat the Platforms as 'the publisher or speaker' of the user-submitted content they host." *Id.* at 466. The Court reasoned the platforms cannot have it both ways.

Although concurring with portions of the majority opinion, Judge Southwick dissented and the framed the issue as whether social media companies engage in First Amendment-protected expression when they moderate their users' content. *Id.* at 495. He asserted that such conduct was protected, relying principally on *Miami Herald*. "The majority does not understand the selection process itself (of curating user comments) as First Amendment expression…. I do." *Id.* at 498.

NetChoice file a petition for writ of certiorari on December 15, 2022. This case has not yet been selected for review. Of note is a similar case from the Eleventh Circuit also involving NetChoice but with a Florida statute. *See NetChoice v. Attorney General of Florida*, 34 F.4th 1196 (11th Cir. 2022) (Florida's "Stop Social Media Censorship Act" likely violated the First Amendment because Florida law sought to regulate content). The Eleventh Circuit viewed the social media companies' actions to moderate content as an editorial function of a private company over which government has no power. Effectively, the Eleventh Circuit accepted the argument that *Miami Herald* governed this action and reasoned that just as the government cannot tell a newspaper what to publish, it cannot tell a social media company what content to allow on its platform. Since the Fifth Circuit adopted the opposite rationale, the Supreme Court may accept this case to resolve the split.

Social Media, Public Platforms, and the Road Ahead

The resolution of these two cases (assuming *NetChoice* is accepted for review) will create interesting contours to the debate on compelled speech. "While 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 reasons than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

The Supreme Court's decision in *303 Creative* will likely depend on how it answers several questions: Does Colorado's enforcement of CADA compel 303 Creative to speak messages it does not choose to say? Does CADA make the expressive speech itself the public accommodation? Does forcing 303 Creative to comply with CADA impermissibly change its message and violate its free speech? If not, how does the Court reconcile *Hurley*? Similarly, is Colorado compelling 303 Creative to be a courier for another citizen's message? Does *Becerra* guide the Court in its teaching that government compelled speech cannot force a citizen to speak the very words it opposes? What practically would be the result of allowing an exception to CADA if an artist who provides publicly available products and services could refuse to produce products or services on certain subjects?

Likewise, the Court's decision in *NetChoice* will likewise turn on similar questions. Is the State of Texas compelling the speech of social media platforms or are they removing censorship? Are social media platforms more like newspapers who are entitled to create their own editorial content or telephone companies to whom anti-discrimination laws properly apply? If Texas can apply a state anti-discrimination accommodation law to social media platforms, why can Colorado not do the same with respect to a commercial business of an artist? If social media platforms are common carriers, does that distinction stand as the basis for differential treatment of 303 Creative's ability to curate its own content?

Are social media platforms like shopping malls required to host the speech of others? Are they even more like shopping malls in that they actively seek to host the speech of others? Does *PruneYard* guide the Court's interpretation of the platforms' constitutionally permissible conduct is this regard? Could the shopping center in *PruneYard* pick and choose what messages it would allow? If not, how are social media platforms different?