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The Three Elements of *303 Creative* and How They Limit the Decision's Impact

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In 303 Creative LLC v. Elenis*, the Supreme Court held that a state could not use a public accommodation law to require a wedding website business to create websites for gay weddings. As the Court saw it, the First Amendment shielded the company because its owner did not want to express speech supporting same-sex marriage—and being forced to create websites for same-sex weddings would compel just that.*

Some public reaction to the Court's opinion—perhaps understandably—construed the case as a full-on attack on gay rights, giving businesses a so-called license to discriminate that could not be limited to the wedding context. This Comment argues that this reaction is overstated. In fact, the Court's opinion is highly limited to the precise factual circumstances of that case. And those facts were extraordinarily favorable to 303 Creative because of factual stipulations that are unlikely to be present in future cases.

Because the Court's opinion is based on unusually lopsided stipulated facts, this Comment argues that it is unlikely that many businesses will be able to present a 303 Creative *free*

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speech defense against a public accommodation law. Businesses will need to show (1) a public accommodation law would force them to create new speech; (2) that speech would be, at least in part, the business's own speech; and (3) that speech would actually express the message that the business wishes not to express. This Comment explains that these factors are unlikely to be met in many future cases, which should limit 303 Creative*'s practical impact.*

INTRODUCTION

"I fear that the symbolic damage of the Court's opinion is done. But that does not mean we are powerless in the face of the decision."
- Dissenting Opinion in *303 Creative*[1]

In *303 Creative LLC v. Elenis*, the U.S. Supreme Court held that a website designer could refuse to create wedding websites for same-sex marriages even though a state public accommodations law required her to serve all customers regardless of sexual orientation.[2] According to the Court, the First Amendment's Free Speech Clause could not stand for a state requiring a business owner to create speech (the websites) that expressed a message she would otherwise

[1] 303 Creative LLC v. Elenis, 600 U.S. 570, 639 (2023) (Sotomayor, J., dissenting).

[2] *303 Creative*, 600 U.S. at 589.

not express (approval of same-sex marriage).[3] Since most states and many local governments have similar laws, the Court's opinion seems poised to have an impact across the country.[4]

What sort of an impact, though? To be sure, the holding has done "symbolic damage" and has undermined the "promise of freedom": It limits the government's ability to "assure that a dollar in the hands of [one person] will purchase the same thing as a dollar in the hands of a[nother]."[5] How much of a limitation is it? Is *303 Creative* a "sweeping"[6] decision that "could easily also be extended to all range of businesses"?[7] Or does it provide only an "extremely limited" and "highly fact-specific"[8] exception to public accommodation laws? The opinion tells us that states remain "free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses" where the First Amendment is not implicated.[9] But, how should courts figure out which businesses implicate the First Amendment and which do not?

This Comment seeks to provide a framework to answer that question. It does not question the holding of *303 Creative*; instead, it looks to explain it and analyze the possible impacts. In doing so, this Comment argues that *303 Creative* should be thought of as

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[3] *Id.* at 592 ("[N]o public accommodations law is immune from the demands of the Constitution."); *id.* at 588 ("[I]f [the website designer] offers wedding websites celebrating marriages she endorses, the State intends to force her to create custom websites celebrating other marriages she does not." (cleaned up) (citation omitted)).

[4] *Id.* at 605 n.2 (listing state laws and noting that "numerous local laws offer similar protections").

[5] *Id.* at 640 (Sotomayor, J., dissenting) (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968)).

[6] Matt Lavietes & Jo Yurcaba, *What the Supreme Court's Gay Wedding Website Ruling Means for LGBTQ Rights*, NBC NEWS (June 30, 2023), https://www.nbcnews.com/nbc-out/out-news/supreme-courts-gay-wedding-website-ruling-means-lgbtq-rights-rcna92022.

[7] Devan Cole, *What the Supreme Court's LGBTQ Rights Decision Means*, CNN (June 30, 2023), https://www.cnn.com/2023/06/30/politics/lgbtq-rights-public-accommodations-laws-supreme-court/index.html.

[8] *Statement on Supreme Court Ruling in* 303 Creative v. Elenis, GLBTQ LEGAL ADVOCS. & DEFS. (June 30, 2023), https://www.glad.org/statement-on-supreme-court-ruling-in-303-creative-v-elenis.

[9] *303 Creative*, 600 U.S. at 591–92.

providing a highly limited First Amendment exception to public accommodation laws only when a business would be forced to (1) create speech that (2) can be considered its own speech (3) expressing a message it does not want to express. As explained below, these elements are difficult to meet, and 303 Creative only could do so because of the extremely favorable stipulated facts in that case.

Part I traces background speech law including coverage of the Free Speech Clause[10] and the standard applied to different types of regulations.[11] It notes that the Free Speech Clause covers pure speech[12] and expressive conduct[13] as well as compelled speech.[14] Part II summarizes *303 Creative*'s factual and procedural background,[15] the opinion of the Tenth Circuit,[16] and the Supreme Court's opinion[17]. Part III attempts to make *303 Creative* mechanical: it identifies three elements that businesses must meet to state a claim for *303 Creative* protection. The businesses must be compelled to create speech;[18] that speech must be, at least in part, *their own* speech;[19] and that speech must actually express a message they do not want to express.[20] In doing so, Part III also traces how the Court applied these elements to the stipulated facts[21] in *303 Creative*.[22]

Finally, Part IV applies the elements outlined in Part III to hypotheticals and real-life cases. It argues that a vast array of cases—for different reasons—will not be able to state a *303 Creative* claim. Many businesses simply do not deal in speech or would not have to create new speech because of a public accommodation law.[23] In

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10 *Infra* Section I.A.
11 *Infra* Section I.B.
12 *Infra* Section I.A.1.i.
13 *Infra* Section I.A.1.ii.
14 *Infra* Section I.A.2.
15 *Infra* Section II.A.
16 *Infra* Section II.B.
17 *Infra* Section II.C.
18 *Infra* Section III.A.1.
19 *Infra* Section III.B.1.
20 *Infra* Section III.C.1.
21 *See infra* Introduction to Part III, notes 80 and 161.
22 *Infra* Sections III.A.2, B.2, C.2.
23 *Infra* Section IV.A; *see also* hypotheticals outlined *infra* Section III.A.1.i.

other cases, the compelled speech could not meaningfully be considered the business's own speech.[24] And in yet other cases, a business will claim that its product expresses a particular message when it truly does not.[25] Part IV closes by pointing out that even when a business presents a case that seems quite similar to the facts of *303 Creative*, the business will still have a tougher road because it will probably not have the same helpful stipulated facts that 303 Creative did.[26]

The reach of *303 Creative* is important. Modern public accommodation laws ensure that everyone can access goods and services held out to the public regardless of traits like race, color, sex, sexual orientation, gender identity, religion, national origin, or disability.[27] Despite modern statutory innovations,[28] the basic idea is ancient: one who offers his services to all cannot withhold his service from any.[29] *303 Creative* subjects that idea to a constitutional speech defense that cannot be conceptually limited to the same-sex wedding context.[30] However, as argued below, it can be limited to highly specific and unusual factual circumstances. For this reason, the basic promise of public accommodation laws survives.

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[24] *Infra* Section IV.B.

[25] *Infra* Section IV.C.

[26] *Infra* Section IV.D.

[27] 303 Creative LLC v. Elenis, 600 U.S. 570, 605 n.1; *id.*at n.2 (listing state laws).

[28] *Id.* at 590–91 (discussing how jurisdictions have expanded and changed public accommodation laws).

[29] *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1303–1411 (1996) (tracing the history of public accommodation theory from the antebellum period to the end of the 20th Century); *see also, e.g.*, Lane v. Cotton, 88 Eng. Rep. 1458, 1464–65 (K.B. 1701) ("If an innkeeper refuse[s] to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse[s] to take a packet proper to be sent by a carrier . . . . [O]ne that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public.").

[30] *See 303 Creative*, 600 U.S. at 638 (Sotomayor, J., dissenting) ("[T]he decision's logic cannot be limited to discrimination on the basis of sexual orientation or gender identity . . . . A website designer could equally refuse to create a wedding website for an interracial couple, for example . . . . A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child.").

I. BACKGROUND ON THE LAW OF FREE SPEECH

The First Amendment does not allow the government to "abridg[e] the freedom of speech . . . ."[31] Protecting this freedom allows people to "think as [they] will and to speak as [they] think."[32] This Part observes the foundational frameworks used to analyze First Amendment coverage—which extends to speech, but not conduct (unless it has an expressive component).[33] It then discusses how the Court scrutinizes content-based regulations compared to content-neutral ones.[34] Finally, it states how and why laws that compel particular content are analyzed as content-based regulations.[35]

A. *Coverage of the Free Speech Clause*

The Free Speech Clause embodies "one of our society's defining principles":[36] "No official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[37] This "fixed star in our constitutional constellation"[38] means that "[a]ll ideas having even the slightest redeeming social purpose—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have full protection" of the First Amendment.[39] Importantly, however, the Free Speech Clause protects the "freedom of *speech*"[40]—not the freedom of *conduct*; it

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[31] U.S. CONST. amend. I. This clause, "of course, is applicable to the [s]tates through the Fourteenth Amendment." Bigelow v. Virginia, 421 U.S. 809, 811 (1975).

[32] Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000) (internal quotation marks omitted).

[33] *Infra* Section I.A.

[34] *Infra* Section I.B.

[35] *Infra* Section I.B.1.

[36] Texas v. Johnson, 491 U.S. 397, 415 (1989).

[37] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[38] *Id.*

[39] Roth v. United States, 354 U.S. 476, 484 (1957). There are, however, categories of speech not relevant here that do not receive full First Amendment protection. *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 326 n.181 (S.D.N.Y. 2000) (collecting cases). The idea is that these categories are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[40] U.S. CONST. amend. I (emphasis added).

therefore does not cover conduct that does not have an expressive component.[41]

1. THE CLAUSE COVERS SPEECH AND EXPRESSIVE CONDUCT

i. *Pure Speech*

"[P]ure speech . . . is entitled to comprehensive protection under the First Amendment."[42] Pure speech includes, of course, "the spoken or written word," but the definition does not end there.[43] Pictures, films, paintings, drawings, engravings, video games, music, and movies are all speech.[44] And this expansive definition of speech has not changed in the Internet era: In 1997, the Supreme Court saw no reason to "qualify[] the level of First Amendment scrutiny that should be applied" to the Internet.[45] Pure speech receives such broad protection because "[t]he vitality of civil and political institutions in our society depends on free discussion."[46]

ii. *Expressive Conduct*

The freedom of speech also includes certain types of conduct that "possess[] sufficient communicative elements to bring the First Amendment into play . . . ."[47] Because the melding of non-expressive and expressive aspects of speech "is likely to occur," this is a "fertile ground for hard cases."[48] The classic test, though, comes from *Spence v. Washington*: (1) The speaker must have an "intent to convey a particularized message"; and (2) based on context, "the likelihood [is] great that the message would be understood by those who viewed it."[49]

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[41] *See, e.g.*, United States v. Hansen, 599 U.S. 762, 782 (2023) ("[N]onexpressive conduct . . . does not implicate the First Amendment at all.").

[42] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (quotation marks omitted).

[43] Texas v. Johnson, 491 U.S. 397, 404 (1989).

[44] 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023) (collecting cases).

[45] Reno v. ACLU, 521 U.S. 844, 870 (1997).

[46] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

[47] *Johnson*, 491 U.S. at 404.

[48] Jane R. Bambauer, *The Relationships Between Speech and Conduct*, 49 U.C. DAVIS L. REV. 1941, 1941–42 (2016).

[49] 418 U.S. 405, 410–11 (1974) (per curiam).

Refusing to salute the flag,[50] displaying a red flag,[51] sit-ins,[52] cross burning,[53] and participating in a parade[54] have all been found to be conduct so expressive in context that it merited First Amendment coverage. The Court has also assumed that burning a draft card to protest the Vietnam War on the steps of a courthouse[55] and sleeping in a park as part of a demonstration highlighting the plight of the homeless[56] are cases of expressive conduct. In *Texas v. Johnson*, the Court explained that burning the American flag "implicate[d] the First Amendment"; the Court there "had little difficulty" holding that burning the flag met the first *Spence* factor in part because conduct relating to flags is inherently expressive.[57] As for the second *Spence* factor, the expressive nature of the flag burning was "intentional and overwhelmingly apparent"[58] in context considering it was the "culmination . . . of a political demonstration" outside of the Republicans' nomination of Ronald Reagan for President.[59]

At one time, the Supreme Court emphasized that to trigger the First Amendment, conduct used to ostensibly express an idea must be "inherently" expressive, meaning it needs no other speech to explain the message.[60] Indeed, the Supreme Court has "rejected the

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[50] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632–33 (1943).

[51] Stromberg v. California, 283 U.S. 359, 368–69 (1931).

[52] Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

[53] Virginia v. Black, 538 U.S. 343, 360 (2003).

[54] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 568–70 (1995).

[55] United States v. O'Brien, 391 U.S. 367, 376 (1968) ("Even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment . . . .").

[56] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("We assume for present purposes, but do not decide, that such is the case . . . .").

[57] Texas v. Johnson, 491 U.S. 397, 404–405 (1989). As the Court explained: "Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'" *Id.* at 405.

[58] *Id.* at 406.

[59] *Id.* at 405–06.

[60] Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 65–66 (2006) [hereinafter *Rumsfeld v. FAIR*].

view that 'conduct can be labeled "speech" whenever the person engaging in the conduct *intends* thereby to express an idea.'"[61] For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (hereinafter *Rumsfeld v. FAIR*), the Supreme Court considered whether a law implicated the First Amendment when it denied federal funding to law schools that did not offer the same recruiting space to military recruiters as they offered to other employers.[62] After holding that the law did not regulate speech, the Court considered whether it regulated expressive conduct.[63] The question was whether denying military recruiters access to campus space for recruitment activities expressed the law schools' message that they disagreed with military policy.[64] The Court held that denying space to the recruiters was not expressive conduct because the denial required additional speech to explain the message.[65] Unlike the flag burning in *Johnson*, which carried an "overwhelmingly apparent"[66] message, someone who found out that a law school denied space to recruiters would have "no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else."[67]

2. THE RIGHT NOT TO SPEAK OR EXPRESS ONESELF IS COVERED

"The freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'"[68] For this reason, the government can violate the Free Speech Clause when it compels speech.[69] This can happen in two ways. First, the government might

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[61] *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)) (emphasis added).

[62] *Id.* at 55, 60.

[63] *Id.* at 65.

[64] *Id.* at 65–66.

[65] *Id.* at 66.

[66] Texas v. Johnson, 491 U.S. 397, 406 (1989).

[67] *FAIR*, 547 U.S. at 66.

[68] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 892 (2018) (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

[69] *Id.*

compel speech by forcing people to articulate the government's preferred ideological message.[70] Second, the government might compel speech when it enacts a regulation that alters the content of a person's speech.[71]

The classic case of compelled speech was *West Virginia State Board of Education v. Barnette*.[72] There, the Court held that the state could not force a group of Jehovah's Witness schoolchildren to salute the flag and recite the Pledge of Allegiance.[73] The children did not want to salute the flag because doing so would express a message that violated their religious beliefs.[74] The Court held that forcing the students to express such a message that they disagreed with "invade[d] the sphere of intellect and spirit" protected by the First Amendment.[75]

B. *Applying the Proper Standard to the Government Regulation*

After establishing that a law touches speech or expressive conduct, the First Amendment inquiry then turns to whether the law in question is content-neutral or content-based.[76] "Regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" receive "the most exacting scrutiny."[77] On the other hand, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . ."[78] This distinction between content-based and content-neutral laws is "not always a simple task,"[79] but the "principal inquiry . . . is whether the

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[70] Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding unconstitutional a statute that required drivers to display slogan "Live Free or Die" on their license plates because this turned their private property into an "ideological billboard" for the state).

[71] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 765 (2018) (holding unconstitutional a requirement that forced anti-abortion clinics to inform patients about abortion services).

[72] 319 U.S. 624 (1943).

[73] *Id.* at 642.

[74] *Id.* at 629.

[75] *Id.* at 642.

[76] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994).

[77] *Id.* at 642.

[78] *Id.* (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[79] *Id.*

government has adopted a regulation of speech *because of* . . . the message it conveys," which triggers strict scrutiny as opposed to a lower level of scrutiny.[80]

1. CONTENT-BASED REGULATIONS

A regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed."[81] For that reason, in *Reed v. Town of Gilbert*, the Court applied strict scrutiny to a local ordinance that had different rules for signs depending on whether they gave directions to certain events, contained a political message, or offered an ideological message.[82] The Court in *Reed* applied strict scrutiny, noting that although "[t]his type of ordinance may seem like a perfectly rational way to regulate signs, . . . a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech . . . ."[83]

In most cases, the Court treats regulations compelling speech as content-based restrictions, subjecting them to strict scrutiny.[84] *Miami Herald Publishing Co. v. Tornillo* is instructive.[85] There, the Court held that a state law requiring newspapers to publish rebuttals from political candidates was content-based even though the law did not prevent the Herald "from saying anything it wished."[86] The law was content-based because it penalized the newspaper based on the content contained in the newspaper: If the paper did not contain the required editorial, the paper could be sued or even face misdemeanor charges.[87] The Court has reinforced this principle by holding

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[80] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis added).

[81] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); *see also* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 71–72 (2022) (applying lower scrutiny to sign ordinance that differentiated based on whether sign directed to on-premises or off-premises event).

[82] *Reed*, 576 U.S. at 164.

[83] *Id.* at 171.

[84] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 765 (2018) (recounting this standard and the exceptions of professional and commercial speech).

[85] 418 U.S. 241 (1973).

[86] *Id.* at 256 (quoting Appellant's Brief).

[87] *Id.* at 245–46 (citing Tornillo v. Mia. Herald Publ'g Co., 287 So. 2d 78, 82, 85 (Fla. 1973)).

that laws are content-based when they compel everything from ideological messages on license plates[88] to information about abortion availability at anti-abortion clinics.[89]

2. CONTENT-NEUTRAL REGULATIONS

While strict scrutiny applies to content-based regulations, the lower level of intermediate scrutiny applies when the government regulates speech in a content-neutral way.[90] This can happen when the government directly regulates just the "time, place, and manner" of all speech.[91] It can also happen when a government regulation of conduct incidentally burdens speech.[92] For example, in *United States v. O'Brien*, the Supreme Court considered whether David O'Brien had a First Amendment claim when he was prosecuted for burning his draft card on the steps of the South Boston Courthouse.[93] Assuming that burning the draft card was expressive, the Court said that it could still be regulated.[94] That was because the First Amendment allows regulations of conduct that combine speech and non-speech elements when those regulations (1) "further[] an important or substantial government interest" (2) "that is unrelated to the suppression of free expression" and is (3) "no greater than is essential to the furtherance of that interest."[95] In *O'Brien*, the Court held that the law prohibiting the destruction of draft cards met that standard.[96]

In summary, the First Amendment covers speech. It covers conduct that has a sufficiently expressive component. It also protects the right not to speak. Laws that regulate speech based on its content are subjected to strict scrutiny; laws that regulate speech in a content-neutral way are subjected to a lower level of intermediate scru-

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88 Wooley v. Maynard, 430 U.S. 705, 714–15 (1977).

89 *Becerra*, 585 U.S. at 765.

90 *E.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994).

91 *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790–96 (1989).

92 *See* Konigsberg v. State Bar of Calif., 366 U.S. 36, 50–51 (1961) (identifying "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise," as essentially a form of content-neutral regulation).

93 391 U.S. 367, 369 (1968).

94 *Id.* at 376.

95 *Id.* at 377.

96 *Id.* at 378–82.

tiny. Laws that compel speech—which may include public accommodation laws—are content-based regulations because they regulate the content of the speech. With this background in mind, this Comment now turns to the details of *303 Creative LLC v. Elenis*.

II. BACKGROUND ON *303 CREATIVE*

303 Creative LLC v. Elenis[97] was a pre-enforcement First Amendment challenge to the Colorado Anti-Discrimination Act[98] (CADA).[99] Lorie Smith, the sole owner-operator of the website design company 303 Creative, argued that if she started designing websites for weddings, the law might force her to create a website celebrating same-sex marriage (a message she did not want to express).[100] She argued—and the Supreme Court agreed—that this would violate the First Amendment.[101]

This Part discusses the facts of the case, the factual stipulations, and the procedural history.[102] It then recounts the Tenth Circuit's opinion, which held that the First Amendment applied to her claim but that the statute survived strict scrutiny.[103] Finally, it discusses the Supreme Court's reasoning and the dissenting opinion.[104]

A. *Factual and Procedural Background*

Lorie Smith ran 303 Creative LLC, a company that offered graphic design, marketing services, and social media management.[105] She wanted to expand her business to start offering wedding websites, which would "provide couples with text, graphic arts, and videos to 'celebrate' and 'conve[y]' the 'details' of their 'unique

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97 600 U.S. 570 (2023).

98 COLO. REV. STAT. § 24-34-601 (2024).

99 *303 Creative*, 600 U.S. at 580.

100 *Id.* at 579–80.

101 *Id.* at 580, 587–92.

102 *Infra* Section II.A; *see also infra* Part III, which discusses the stipulations in more detail.

103 *Infra* Section II.B.

104 *Infra* Section II.C.

105 *303 Creative*, 600 U.S. at 579.

love story.'"[106] But Smith would *never* create a website that promoted or celebrated a same-sex marriage.[107] So, Smith had a problem when her home state of Colorado passed a law requiring all public accommodations to provide "full and equal enjoyment" of their goods and services to all customers without regard to a list of traits that included sexual orientation.[108] If Smith were to make any wedding websites, she argued, Colorado would force her to also make websites about same-sex weddings (if requested).[109] "To clarify her rights,"[110] Smith sued.[111] The District Court granted summary judgment for Colorado,[112] and Smith appealed to the Tenth Circuit.[113]

Before discussing the Tenth Circuit's opinion, note the factual stipulations that Smith and Colorado agreed to. At the district court level, both sides stipulated to 102 individual facts and the admissibility of twelve exhibits.[114] Some of the stipulations are relatively mundane.[115] Others provide background on Smith, her business, and

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[106] *Id.*

[107] Petition for Writ of Certiorari app. at 184a, *303 Creative*, 600 U.S. 570 (2023) (No. 21-476), 2021 WL 4459045 [hereinafter Appendix to Cert. Petition]. (The provided Westlaw identifier does not include the appendix. Click the original document image or locate the Petition on the Supreme Court's docket to read the Appendix). Smith would be happy to *work with* gay clients—as long as their websites do not "promote[] sexual immorality . . . or promote[] any conception of marriage other than marriage between one man and one woman," among other things. *Id.*

[108] *303 Creative*, 600 U.S. at 580–81; COLO. REV. STAT. § 24-34-601(2)(a) (2024).

[109] *303 Creative*, 600 U.S. at 580.

[110] *Id.*

[111] *See generally* Complaint, 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907 (D. Colo. 2019) (No. 16-cv-2372).

[112] *See generally* 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907 (D. Colo. 2019), *aff'd*, 6 F.4th 1160 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023), *vacated*, 16-CV-02372, 2024 WL 1281445 (D. Colo. Mar. 26, 2024).

[113] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1170–71 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023).

[114] Appendix to Cert. Petition, *supra* note 107, at 173a–199a.

[115] Stipulations 1 to 24, for example, discuss the various provisions of CADA. Appendix to Cert. Petition, *supra* note 107, at 173a–178a.

her beliefs.[116] But others go to the very heart of the case. For example, both sides agreed that Smith's websites were expressive,[117] custom,[118] and would express a specific message.[119] (Part III discusses the substance of these stipulations.[120]) It is not entirely clear why Colorado agreed to these stipulations in the first place.[121] Indeed, the state tried to repudiate the stipulations at the Supreme Court.[122] Presumably, as some have written, there were strategic reasons to stipulate,[123] although in hindsight it may have been a mistake.[124] In any event, the stipulations were what they were—and the Supreme Court took them as fact.[125]

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[116] *See id.* at 179a–181a.

[117] *Id.* at 181a (Stipulation 47).

[118] *Id.* (Stipulation 50).

[119] *Id.* at 187a (Stipulation 81).

[120] One cannot resist mentioning another odd feature of *303 Creative*, although it apparently had no dispositive legal impact. When Smith first filed her lawsuit in September 2016, she had not received any requests for wedding websites, same-sex or otherwise. *See* Complaint, 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907 (D. Colo. 2019) (No. 16-cv-2372). The next February, though, in her Motion for Summary Judgment, she said she had now received a request. Mot. for Summary J. at 13, 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907 (D. Colo. 2019), 2017 WL 11745029. Years later, after *303 Creative* reached the Supreme Court, a journalist called the number associated with the supposed request. *See* Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, NEW REPUBLIC (June 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court. That number led to a heterosexual, married man who had no clue why his name, phone number, email address, and website were buried in a court case that had made its way to the U.S. Supreme Court. *Id.* Smith and her lawyers did not respond to requests for comment from the journalist. *Id.*

[121] Catherine J. Ross, Response, *303 Creative LLC v. Elenis*, GEO. WASH. L. REV. ON THE DOCKET (July 25, 2023), https://www.gwlr.org/303-creative-elenis-response.

[122] *See* Brief in Opposition at i, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023), No. 21-476.

[123] *See, e.g.*, Dakota Ball et al., *The* 303 Creative *Decision: Impacts, Realities, and Action*, EQUALITY OHIO (Aug. 9, 2023), https://equalityohio.org/the-303-creative-decision-impacts-realities-and-action/.

[124] *See, e.g.*, Burt Likko, *A Paucity of Limits, By Stipulation:* 303 Creative v. Elenis, ORDINARY TIMES (July 5, 2023), https://ordinary-times.com/2023/07/05/a-paucity-of-limits-by-stipulation/ ("Colorado lost the case because of these stipulations.").

[125] *See* further discussion *infra* at the beginning of Part IV.

B. *The Tenth Circuit's Opinion*[126]

Smith lost at the Tenth Circuit.[127] As relevant to this Comment, the panel[128] held that Colorado's anti-discrimination law (CADA) passed strict scrutiny as applied to Smith because it served the compelling interest of "ensuring 'equal access to publicly available goods and services'" and was narrowly tailored to that interest.[129] Then-Chief Judge Timothy M. Tymkovich dissented, arguing that CADA failed strict scrutiny because it was not narrowly tailored.[130]

1. THE PANEL OPINION

The panel opinion first held that Smith's "creation of wedding websites [was] pure speech."[131] As the panel explained, the websites used "text, graphics, and other media" to "express approval and celebration of [a] couple's marriage . . . ."[132] The panel also held that CADA forced Smith to create speech that she otherwise would not have, making it a content-based restriction subject to strict scrutiny.[133] Although CADA did not require Smith to speak a specific message (unlike, for example, the Pledge of Allegiance rule in *Barnette*[134]), the panel found that CADA still compelled speech because it had the effect of altering Smith's speech by forcing her to create the websites.[135]

Moving to the strict scrutiny analysis, the panel held that Colorado had compelling interests in (1) "protecting the dignity interests

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126 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021).

127 *Id.* at 1190.

128 Judges Mary Beck Briscoe and Michael R. Murphy were in the majority; then-Chief Judge Timothy M. Tymkovich dissented. *Id.* at 1167.

129 *Id.* at 1176–82 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984)).

130 *Id.* at 1202–05 (Tymkovich, C.J., dissenting).

131 *Id.* at 1176 (majority opinion).

132 *Id.* (comparing the websites to Telescope Media Grp. v. Lucero, 936 F.3d 740, 751–52 (8th Cir. 2019) (wedding video is speech) and Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 908 (Ariz. 2019) (custom wedding invitation is speech)).

133 *Id.* at 1177–78.

134 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

135 *303 Creative*, 6 F.4th at 1176–78 (citing Rumsfeld v. FAIR, 547 U.S. 47, 63 (2006)).

of members of marginalized groups" and (2) protecting their "interests in accessing the commercial marketplace."[136] As to the former, the panel held that CADA was not narrowly tailored.[137] As to the latter, though, the panel held that CADA *was* narrowly tailored because, essentially, "there are no less intrusive means of providing equal access" to the marketplace than to ensure that LGBT consumers can obtain the same services as non-LGBT consumers.[138]

2. THE DISSENT

The dissent agreed that CADA compels expression.[139] But it disagreed on the strict scrutiny issue.[140] The dissent would have held that although eliminating discrimination is a compelling interest, CADA was not narrowly tailored.[141] Among other things, the dissent argued that Colorado has other options to achieve its compelling interest.[142]

The majority could not accept these alternatives because it disagreed on a key principle: whether Colorado's "interest in ensuring access to the marketplace *generally*" can force Smith to serve LGBT customers specifically.[143] The majority said yes: because Smith's websites are unique and expressive, LGBT consumers will never be able to obtain the same product from anywhere else.[144] For that reason, excepting Smith from CADA would undermine Colorado's interest in ensuring equal access for LGBT consumers in the marketplace.[145]

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136 *Id.* at 1178.

137 *Id.* at 1179 ("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.").

138 *Id.* at 1180.

139 *Id.* at 1192–1202 (Tymkovich, C.J., dissenting).

140 *Id.* at 1202–05.

141 *303 Creative*, 6 F.4th at 1203–05.

142 *Id.* at 1204. The state could, for example, codify exceptions for certain types of messages, exempt artists engaged in expressive or custom art, exempt speech about weddings, or define public accommodations as not including expressive businesses. *Id.*

143 *Id.* at 1180.

144 *Id.*

145 *Id.*

The dissent saw this differently.[146] It called the majority's reasoning "novel" and "reductive," adding that it "leads to absurd results":[147]

> [T]he majority uses the very quality that gives the art value—its expressive and singular nature—to cheapen it. In essence, the majority holds that the *more* unique a product, the more aggressively the government may regulate access to it—and thus the *less* First Amendment protection it has . . . . [I]f speech can be regulated by the government solely by reason of its novelty, nothing unique would be worth saying.[148]

C. *The Supreme Court's Opinion*

Smith appealed to the Supreme Court.[149] Justice Gorsuch wrote the majority opinion, which Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Barrett joined.[150] The Court held that Colorado could not enforce its anti-discrimination law against Smith because doing so would compel her to produce speech expressing a message she disagreed with.[151] Justice Sotomayor wrote the dissent, which Justices Kagan and Jackson joined.[152] The dissenters would have held that because Colorado's law targets the conduct of status-based discrimination—not speech—it is subject to intermediate scrutiny, which it passes.[153]

1. THE MAJORITY

The majority agreed with "much of the Tenth Circuit's analysis."[154] Namely, it agreed that the websites were pure speech, that they were Smith's *own* speech, and that Colorado sought to *compel*

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146 *Id.* at 1204–05 (Tymkovich, C.J., dissenting).
147 *303 Creative*, 6 F.4th at 1204.
148 *Id.* (footnote omitted).
149 *See generally* Appendix to Cert. Petition, *supra* note 107.
150 303 Creative LLC v. Elenis, 600 U.S. 570, 575 (2023).
151 *Id.* at 587–92.
152 *Id.* at 603–640 (Sotomayor, J., dissenting).
153 *Id.* at 627–31.
154 *Id.* at 587.

speech that Smith did not want to provide.[155] The Court did not agree, though, that Colorado could "compel speech from Ms. Smith consistent with the Constitution."[156] The Court pointed to three cases as leading to this conclusion:

> In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court found that Massachusetts impermissibly compelled speech in violation of the First Amendment when it sought to force parade organizers to accept participants who would "affec[t] the[ir] message." 515 U.S. 557, 572 (1995). In *Boy Scouts of America v. Dale*, the Court held that New Jersey intruded on the Boy Scouts' First Amendment rights when it tried to require the group to "propound a point of view contrary to its beliefs" by directing its membership choices. 530 U.S. 640, 654 (2000). And in *West Virginia State Board of Education v. Barnette*, this Court found impermissible coercion when West Virginia required schoolchildren to recite a pledge that contravened their convictions on threat of punishment or expulsion. 319 U.S. at 624, 626–629 (1943). Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face sanctions . . . . Under our precedents, that is enough, more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely.[157]

The Court then clarified that it was "not question[ing] the vital role public accommodation laws play in realizing the civil rights of

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[155] *Id.* at 587–92. These few pages form the basis of the bulk of this Comment's analysis in Part III and its application in Part IV.

[156] *303 Creative*, 600 U.S. at 588. Note that the Court did not explicitly engage in a traditional strict scrutiny analysis. *See generally id.* at 587–92; *see also* Christopher R. Green, *Speech, Complicity, Scarcity, and Public Accommodation*, 2023 CATO SUP. CT. REV. 93, 95–96, 99.

[157] *303 Creative*, 600 U.S. 570, 588–89 (2023) (citations modified) (some quotation marks omitted) (final citation omitted).

all Americans,"[158] traced the expansion of public accommodation laws,[159] noted that the Court has "recognized that [such laws are not] immune from the demands of the Constitution,"[160] and registered its disagreement with the Tenth Circuit over whether the uniqueness of Smith's services mattered.[161]

2. THE DISSENT

In dissent, Justice Sotomayor called the majority "profoundly wrong." [162] She would have held that CADA "target[ed] conduct, not speech . . . and the *act* of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group."[163]

Sotomayor agreed with the majority that the websites involved elements of speech and that CADA would require Smith to produce speech she otherwise would not produce.[164] But, to Sotomayor, the "proper focus" was instead on the "character of state action and its relationship to expression."[165] In Smith's case, Colorado had enacted a regulation of conduct (compelling equal access for same-sex couples), which only incidentally burdens speech because it compels Smith's speech only if Smith offers to sell that speech to the public.[166]

Sotomayor distinguished *Hurley* and *Dale*, which were key cases for the majority.[167] In those cases, the expressive non-commercial associations did *not* argue that accepting someone from a certain group would burden their speech.[168] Instead, the parade organizers in *Hurley* argued that they did not want to march behind the GLIB banner and the Boy Scouts argued that they did not want

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158 *Id.* at 590.
159 *Id.* at 590–92.
160 *Id.* at 592.
161 *303 Creative*, 600 U.S. at 592.
162 *Id.* at 603 (Sotomayor, J., dissenting).
163 *Id.* at 604.
164 *Id.* at 631.
165 *Id.*
166 *Id.*
167 *303 Creative*, 600 U.S. at 634–35; *see supra* Section II.C.1.
168 *Id.* at 634–35.

to hire a gay rights *activist*.[169] In *303 Creative*, though, Smith operated a "clearly commercial entit[y]," which falls within the ordinary application of public accommodation laws.[170] According to Sotomayor, Smith planned to engage in status-based discrimination, which is not what happened in *Hurley* and *Dale*, and is the exact conduct that CADA seeks to proscribe.[171]

Finally, Sotomayor made clear that *303 Creative* could have a devastating impact.[172] Although the remainder of this Comment argues that the legal impact should be strictly limited to only very specific types of cases, it is still worth noting that the opinion does damage:

> By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. In this way, the decision itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service.[173]

III. THE 3-PART TEST FOR A SPEECH EXEMPTION FROM A PUBLIC ACCOMMODATION LAW

"[H]ow we analyze the case depends upon those stipulations."
- Justice Neil Gorsuch, during oral argument in *303 Creative*.[174]

Despite the fact that there is no fixing the stigmatic impact of *303 Creative*, this Comment now seeks to provide a legal framework for limiting the practical impact. This Part identifies—and seeks to

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169 *Id.*; *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000); *id.* at 654 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 574–75 (1995)).

170 *303 Creative*, 600 U.S. at 635 (alteration in original).

171 *Id.*

172 *Id.* at 636–40.

173 *Id.* at 637.

174 Transcript of Oral Argument at 86, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476), 2022 WL 17980103.

make mechanical and workable—the three-prong test the Court formulates. It goes like this: (1) the law in question must require the business to speak; (2) that speech must be attributable, at least in part, to the business; and (3) the compelled speech would express a message the business does not want to express. As observed below, 303 Creative was able to satisfy this rigorous test because of the extraordinarily favorable stipulations that removed the hardest questions from the Court's consideration.[175] The next Part turns to applying this test to various hypotheticals. Start, though, with two preliminary points.

First, note how lean the Court's analysis is on the issue of whether the compelled websites are pure speech.[176] Indeed, the Court does not need to engage in much factual analysis because this case, on these stipulated facts—and taking the majority's legal propositions as true[177]—is easy. Other than the strict scrutiny analysis, Colorado has functionally stipulated away the case.

Second, consider the textual source for the three-part test outlined here. This is the other reason the analysis seems to be lean: it incorporates parts of the Tenth Circuit's opinion. Indeed, the Court all but tells the reader to read the opinion below before it outlines each prong of the test. Take the first paragraph of Part III of the Supreme Court's opinion: "[W]e align ourselves with much of the

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[175] The Joint Statement of Stipulated Facts, of which there are 103, takes up nearly 20 pages. *See* Appendix to Cert. Petition, *supra* note 107, at 173a–191a. Part IV argues that the extensive stipulated facts led the Court to a murky holding that is normatively undesirable (murky holdings mean confused doctrine) but practically useful for litigants who wish to distinguish future cases from *303 Creative*.

[176] *See 303 Creative*, 600 U.S. at 587–88.

[177] There are two legal propositions this Comment does not challenge. First, it does not argue with the conclusion that CADA should be strictly scrutinized. *See* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021). The Tenth Circuit said strict scrutiny applies because CADA compels speech and therefore works a content-based restriction. *Id.* Justice Sotomayor presents compelling arguments, though, that a lower level of scrutiny is appropriate. *See 303 Creative*, 600 U.S. at 625–631 (Sotomayor, J., dissenting) (holding that CADA is a content-neutral regulation of conduct that only incidentally burdens speech; it is subject to—and passes—the *O'Brien* test). This Comment also does not argue with the Supreme Court's conclusion that its precedents do not allow Colorado to compel speech via a public accommodation law. *But see supra* note 129 (noting that the Court does not explicitly engage in a strict scrutiny analysis).

Tenth Circuit's analysis."[178] The Court then, in three paragraphs (plus an extra one to say that the websites can be speech even though they are on the Internet),[179] outlines the test:

- "The Tenth Circuit held that the wedding websites Ms. Smith seeks to create qualify as 'pure speech[. . . .]' We agree."[180]
- "We further agree with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech."[181]
- "Colorado seeks to compel speech Ms. Smith does not wish to provide . . . [a]s the Tenth Circuit observed . . . ."[182]

Because each prong of the test references the Tenth Circuit's opinion, this Part references it at times to supplement the Supreme Court's discussion.

A. *The Law Compels the Company to Create Speech*

1. THE DOCTRINE

The first prong asks whether a public accommodation law requires a company to speak. If it does, there may be a First Amendment issue. If not, there is not one. It helps to think of this prong in two parts.

- First, it matters what *exactly*, in a particular situation, the public accommodation law is compelling the business seeking protection to do. Not what the business does *in general*, but what specifically the public accommodation law would require.

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178 *303 Creative*, 600 U.S. at 587.
179 *Id.*
180 *Id.*
181 *Id.* at 588 (citing *303 Creative*, 6 F.4th at 1181 n.5).
182 *Id.*

- The second step is to simply ask, using established First Amendment jurisprudence,[183] whether the identified compelled action is expressive such that it can be considered pure speech or expressive conduct.

This two-part framework distinguishes what is *not* the question ("Is this a creative business?" "Does this business *ever* create speech?") from what *is* the question ("Does this public accommodation law compel this business to speak in ways it otherwise would not?").

i. *Question 1: What Does the Public Accommodation Law Compel this Business to Do?*

Public accommodation laws will not always clash with the First Amendment when they apply to a business that is creative or creates speech.[184] Public accommodation laws clash with the First Amendment only when they *require* a business to *create speech it otherwise would not create*. As an example, consider the law in *303 Creative* itself. Under that law, it is

> [U]nlawful for a person . . . to . . . deny to an individual or a group, because of [a protected class characteristic], the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .[185]

In other words, businesses who hold their services out to the public[186] must provide the same "full and equal enjoyment" of their

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183 *See supra* Part I.

184 "Not always" does a lot of work here and becomes useful in Part IV. Indeed, *303 Creative* does not hold that "creative businesses are constitutionally exempt from public accommodation laws," but rather something like: "public accommodation laws cannot force a business to produce speech expressing a message it does not want to express if that speech would be considered the business's own." Wordier—but narrower, too.

185 COLO. REV. STAT. § 24-34-601 (2024).

186 The statute defines public accommodation "broadly to include almost every public-facing business in the state." *Id.* § 24-34-601(1); *see 303 Creative*, 600 U.S. at 580–81.

goods or services to members of the listed classes as they provide to everyone else.[187] The statute, and others like it,[188] do not require businesses to do anything for people in the protected classes that they do not do for the general public.[189] The businesses simply must provide the same services to everyone.

A hypothetical may illustrate why identifying the precise compelled action is helpful. Consider the business Laura's Landscapes. This business sells its owner's premade paintings of landscapes. The paintings are each original works of art. But Laura, for whatever reason, has never and will never paint on-demand for a customer. Laura paints her paintings at home in private and then brings them into the store to sell them. So, what would a public accommodation law require Laura to do for people in the protected classes? Provide the same good or service she provides for the general public: sell her premade paintings. The law would *not* require her to acquiesce to the demand of a customer who wants a customized, original painting because Laura does not provide that service to any other customer.

On the other hand, consider Penny, who owns the store Penny's Portraits. The *only* thing Penny offers at Penny's Portraits is painting original family portraits. She, unlike Laura, does not offer off-the-shelf artwork for people to buy. She only offers her portrait service. A public accommodation law would require her to provide that same service to protected class members if she provides it to anyone. So, the exact same public accommodation law would require Penny—but not Laura—to paint paintings that she would otherwise not paint.

ii. *Question 2: Is that Compelled Action Speech?*

Next, the compelled action identified in question one is tested to see if it is speech. If it is not speech, there is no First Amendment issue. If it is speech, then a litigant may be able to make out a First Amendment claim. To sort this out, a court would perform a speech analysis by asking whether the compelled action is pure speech or expressive conduct, both of which receive First Amendment consideration—whereas conduct does not.

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[187] *See 303 Creative*, 600 U.S. at 581 (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 627 (2018)).

[188] *See id.* at 591 n.2 (listing statutes).

[189] *See id.* at 629 (Sotomayor, J., dissenting).

For instance, returning to the example in question one, a public accommodation law would require Penny (the custom portrait painter) to speak—but not Laura (the premade landscape painter). Laura, as discussed above, is required only to *sell* paintings she already made. But Penny is required to *make* new paintings under the public accommodation law that she would not otherwise make. Those paintings *are* speech.[190] For Laura, the analysis stops because she has no free speech issue and cannot make out a *303 Creative* claim. But because Penny is being compelled to speak, she *does* have a free speech issue, and may be able to make out a *303 Creative* claim.[191]

Only Penny can possibly make out a *303 Creative* claim even though most people would probably consider both businesses "creative" in a sense. They both do basically the same thing: paint pictures. But, again, whether a business *seems* creative does not resolve prong one of a *303 Creative* issue. What resolves the first prong is whether the action compelled by the law is speech.

2. CADA REQUIRED 303 CREATIVE TO CREATE SPEECH

The stipulated facts in *303 Creative* allow it to easily meet prong one outlined above. First, the Court identified what 303 Creative would be required to do under the public accommodation law: create new, original websites for each customer. Here the Court looked to Stipulations 45, 81, and 82.[192] Stipulation 45 lists the services 303 Creative offers—none of which are "selling a pre-made website."[193] Stipulation 81 calls the wedding websites "custom," meaning they

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[190] *See, e.g.*, Kaplan v. California, 413 U.S. 115, 119 (1973) (including "paintings" in list of things that have First Amendment protection).

[191] This is why the mechanical approach to prong one is helpful. At first blush, the artist and the painter both seem creative and both seem like they should get First Amendment protection. But just because their art gets speech protection in general does not mean they are both insulated from public accommodation laws.

[192] "[Colorado] has stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple." *303 Creative*, 600 U.S. at 593 (citing Appendix to Cert. Petition, *supra* note 107, at 181a, 187a).

[193] Appendix to Cert. Petition, *supra* note 107, at 181a. If 303 Creative's services *did* include the sale of pre-made websites, that would be a different case—one that the Court does not resolve. *See 303 Creative*, 600 US. at 593–96.

are made *new* for each customer,[194] and Stipulation 82 says that 303 Creative will "customize[] and tailor[]" each website "to the individual couple and their unique love story."[195] Taken together, these stipulations paint the picture not of a business selling pre-made off-the-shelf websites (like Laura the landscape painter), but of an artist making a new creation for each customer (like Penny the portrait painter). So, if 303 Creative offers its service—which is stipulated to be creation of a new, unique, expressive website—to *any* customer, it must also offer that service to members of the protected classes.

The Court then held that the compelled action—creating the websites—is speech. The Court gets there in two paragraphs of analysis, one of which is mostly a list of stipulations.[196] That list includes:

- Stipulation 46, which says the websites will "contain images, words, symbols, and other modes of expression that [303 Creative] use[s] to communicate a particular message";[197]
- Stipulation 50, which says that the websites will be "original, customized creation[s] for each client";[198]
- Stipulation 82, which says that the websites' "expressive elements will be customized and tailored to the individual couple and their unique love story";[199] and

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194 Appendix to Cert. Petition, *supra* note 107, at 187a.
195 *Id.*
196 *See 303 Creative*, 600 U.S. at 587.
197 Appendix to Cert. Petition, *supra* note 107, at 181a.
198 *Id.*
199 *Id.* at 187a.

- Stipulation 81, which says that the "wedding websites will be expressive in nature" to "celebrate and promote" each couple's "unique love story."[200]

The Court cites the Tenth Circuit's analysis of how those stipulations qualify the websites as speech.[201] That analysis essentially turns on the fact that the creation of the websites "implicates [303 Creative's] unique creative talents, and is thus inherently expressive."[202] Moreover, the Tenth Circuit held, the compelled websites would be (1) about a "particularly expressive event"; (2) "similar to wedding videos and invitations, both of which have been found to be speech"; and (3) "custom and unique."[203] In sum, the compelled action is making websites, the websites are speech, and therefore—both courts agree—Colorado's law compels 303 Creative to make speech. That is prong one.

B. *The Compelled Speech is the Company's Speech*

1. THE DOCTRINE

After determining that a public accommodation law would require a business to produce speech, the next question is whether that speech would be, at least in part, the business's own speech—even though it is requested by a third party.[204] For example, the Tenth Circuit pointed out that in *Hurley*, the parade organizers had a free speech claim despite the fact that "the speech would be initially generated by the participants, and not the organizer."[205] A newspaper, too, had a free speech claim against being forced to give space to a

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200 *Id.*

201 "The Tenth Circuit held that the wedding websites Ms. Smith seeks to create qualify as 'pure speech' under this Court's precedents. We agree." *303 Creative*, 600 U.S. at 587 (citing 303 Creative LLC v. Elenis, 6 F.4th 1160, 1176 (10th Cir. 2021)) (internal citation omitted).

202 *303 Creative*, 6 F.4th at 1176.

203 *Id.*

204 For example, the Tenth Circuit pointed to PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85 (1980), where a business could be forced to use its property "as a forum for the speech of others" in part because the business could not make out its own speech claim. *303 Creative*, 6 F.4th at 1177.

205 *Id.* at 1177 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569–570 (1995)).

politician rebuffing the paper's criticism because the newspaper makes editorial decisions about what speech to include in its pages—and those decisions are speech.[206] These cases demonstrate that just because a third party is involved does not mean that speech rights necessarily disappear.

2. 303 CREATIVE'S WEBSITES CONSTITUTE ITS OWN SPEECH.

The Supreme Court's analysis of why 303 Creative meets this prong should be familiar by now: "the parties' stipulations lead the way . . . ."[207] There are two sets of stipulations here that lead the Court to conclude the websites were 303 Creative's own speech: those that go to characteristics of the final product *and* those that show Smith's vetting process. Combined, the Court ties these threads to hold that it does not matter that Smith's speech "combine[s] with the couple's in the final product"[208]—she still has a speech interest in that product.

First, the final product has Smith's name on it and contains discrete elements that are her own speech. In a stipulation cited here and quoted elsewhere, both sides agreed that "[v]iewers of the wedding websites will know that the websites are [303 Creative's] original artwork because all of the wedding websites will say 'Designed by 303Creative.com.'"[209] The website also contains Smith's own original artwork and words,[210] both of which are undeniably her speech considered alone.

Second, the Court highlights the fact that Smith is quite discerning about what types of products she will take on. Indeed, she carefully "ve[ts]" each project to see if it is one she is "willing to endorse."[211] She will not take on a project that "contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one

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206 *Id.* (citing Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

207 303 Creative LLC v. Elenis, 600 U.S. 570, 588 (2023).

208 *Id.*

209 Appendix to Cert. Petition, *supra* note 107, at 187a.

210 *Id.* at 185a.

211 *303 Creative*, 600 U.S. at 588 (quoting Appendix to Cert. Petition, *supra* note 107, at 185a).

man and one woman."[212] The Tenth Circuit saw this vetting process as illustrating that Smith was engaged in a sort of quasi-editorial speech as opposed to behaving more like a host of other peoples' messages: "[Smith] actively create[s] each website, rather than merely hosting customer-generated content on [her] online platform."[213]

Neither court says which of these factors is dispositive, if any. They seem to boil down to a search for whether someone who saw the final product would associate it with Smith. The Court does not say how clear this association must be. It is at least sufficient that the business's name be on the final product, that the product contain discrete speech made by the business, and that the business does not take on projects it disagrees with.

C. *The Law Requires the Business to Express a Message it Does Not Want to Express*

1. THE DOCTRINE

This final prong is relatively straightforward, at least conceptually. The business seeking First Amendment insulation from a public accommodation law must show that the compelled speech would force it to express a message it does not want to express.[214] "[T]he Tenth Circuit observed,"[215] though, that this does not require that

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[212] Appendix to Cert. Petition, *supra* note 107, at 184a. Note that she will (according to the stipulated facts) "gladly create custom graphics and websites for gay, lesbian, or bisexual clients," unless their project violates her list of *topics* she won't include. *Id.* As Justice Sotomayor points out: "Apparently a gay or lesbian couple might buy a wedding website for their straight friends. This logic would be amusing if it were not so embarrassing. I suppose the Heart of Atlanta Motel could have argued that Black people may still rent rooms for their white friends." *303 Creative*, 600 U.S. at 633–34 (Sotomayor, J., dissenting) (footnote omitted).

[213] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1177 (10th Cir. 2021). The Tenth Circuit holds that Smith is more like the newspaper (which makes editorial decisions on what content to include) and less like the *Rumsfeld v. FAIR* law schools or the shopping center, which simply accommodate anybody else's speech but do not speak themselves because they do not make ideological decisions about whose speech to accommodate. *Id.*

[214] *See 303 Creative*, 600 U.S. at 588 ("As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide.").

[215] *Id.*

the state compel "a specific message or statement . . . ."[216] Instead, according to the Tenth Circuit, all that is required to find compelled speech is that "the complaining speaker's own message [is] *affected by* the speech it [is] forced to accommodate."[217] The Supreme Court agreed.[218] In recounting background First Amendment law, the Court noted that the government may not compel "a person to speak its message when he would prefer to remain silent or . . . force an individual to include other ideas with his speech that he would prefer not to include."[219] Such compelled speech would "offend[] the First Amendment just the same" as banning undesirable speech or expression.[220]

2. COLORADO SOUGHT TO COMPEL 303 CREATIVE TO EXPRESS MESSAGES IT DID NOT WANT TO EXPRESS

The Court holds that the public accommodation law would compel 303 Creative to express a message it would not otherwise express:

> As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide. As the Tenth Circuit observed, if Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to "forc[e her] to create custom websites" celebrating other marriages she does not."[221]

This holding takes just two sentences because neither side can dispute what seems to be a harder question than the Court lets on: Do the websites *really* express a message that Smith does not want

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[216] *303 Creative*, 6 F.4th at 1177.

[217] *Id.* at 1177–78 (quoting Rumsfeld v. FAIR, 547 U.S. 47, 63 (2006)) (emphasis added). It did not matter, the Tenth Circuit said, that Colorado's law "[did] not require a specific message or statement unrelated to regulating conduct." *Id.* at 1177. As the panel saw it, neither *Hurley* nor *FAIR* required such a showing. *Id.*

[218] *303 Creative*, 600 U.S. at 588.

[219] *Id.* at 586 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 568–70, 76 (1995); *FAIR*, 547 U.S. at 63–64).

[220] *303 Creative*, 600 U.S. at 586–87 (collecting cases); *see also* discussion *supra* Part I.

[221] *Id.* at 588 (citing *303 Creative*, 6 F.4th at 1178).

to express? Remember, Smith's entire claim rests on the proposition that she will not take on projects that "promote[] any conception of marriage other than marriage between one man and one woman."[222] (If, on the other hand, Smith simply refused to serve gay people unrelated to the speech she would have to make as a result, she would not have a First Amendment claim—as the majority itself recognizes. [223]) So, she only should get First Amendment protection from creating speech that expresses her undesired message. Unfortunately, we get no guidance from the Court on how to figure out what message a product expresses because the parties have already stipulated that through the websites, 303 Creative itself will "promote the couple's wedding and unique love story."[224] In other words, the parties stipulated (1) that Smith will not create speech that promotes same-sex marriage and (2) the compelled websites would promote same-sex marriage.

To summarize, *303 Creative* says that a business can shield itself from a public accommodation law if complying would (1) force the business to create speech; (2) that speech would be, at least in part, that business's *own* speech; and (3) that speech expresses a message the business does not want to express. And, in *303 Creative*, the business easily met that test because Colorado stipulated away the thorny factual questions. Next, this Comment will argue that future cases will be fought in the facts, and, as a practical matter, very few businesses will be able to meet the *303 Creative* test as it is currently formulated.

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[222] Appendix to Cert. Petition, *supra* note 107, at 184a.

[223] "While [the First Amendment] does *not* protect status-based discrimination unrelated to expression, generally it *does* protect a speaker's right to control her own message—even when we may disapprove of the speaker's motive or the message itself." *303 Creative*, 600 U.S. at 595 n.3.

[224] Appendix to Cert. Petition, *supra* note 107, at 187a (emphasis added).

IV. APPLYING THE *303 CREATIVE* FRAMEWORK TO OTHER BUSINESSES

"Determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind."
- Majority opinion in *303 Creative*[225]

Leading up to and following the release of the *303 Creative* opinion, Catherine J. Ross observed that media coverage of the opinion had "mischaracterize[d] the case as centering on the rights of LGBT persons," even though, as discussed at length above, the holding in fact turns on whether the state can use antidiscrimination laws to force businesses to produce undesired speech.[226] Although Ross agreed that the "dignity and marketplace rights of the LGBTQ community permeated the case," she said this framing could "exacerbate the likelihood that the majority opinion will be misused, giving rise to the very harms the critics—and the dissenters—most fear."[227] To counteract that, she urged "advocates for the dignity and rights of those who suffer discrimination to cabin the case within the narrow confines of its facts, its analysis, and its holding."[228]

This Comment seeks to do that. Part III explained the narrow nature of *303 Creative*'s reasoning and analysis. This Part works to provide a framework for applying that reasoning to future cases—one that does indeed cabin the opinion as opposed to expanding it. This framework is necessary in part because the *303 Creative* opinion does not give lower courts much guidance for navigating future cases.[229] Indeed, the majority chastises the dissent for "spend[ing] much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive

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225 *303 Creative*, 600 U.S. at 599.

226 Ross, *supra* note 121.

227 *Id.*

228 *Id.*

229 *See* Tobias Barrington Wolff, 303 Creative *and Constitutional Law by Stipulation*, REG. REV. (July 24, 2023), https://www.theregreview.org/2023/07/24/wolff-303-creative-and-constitutional-law-by-stipulation/ (arguing that the opinion gives little guidance to lower courts because of the stipulated facts).

services covered by the First Amendment."[230] Those cases, the majority says, "are not *this* case," and so there is no reason to address those hypotheticals in the opinion.[231]

But there is reason to address them here. So, below are hypotheticals and real-life cases that are *not 303 Creative*. They find themselves in a few buckets: the cases that will lack compelled speech; those that will have compelled speech, but where the speech will not be the business's *own* speech; and those where a business will be compelled to make its own speech, but where that speech will not express the message that the business claims it disagrees with. Finally, this Part concludes by pointing out that even cases where a business plausibly meets each of those elements could come out differently because the stipulations in *303 Creative* will not be present.

A. *Cases That Lack Compelled Speech*

First, many businesses will be unable to make out a *303 Creative* case simply because a public accommodation law will not require them to create speech.[232] 303 Creative's websites were considered pure speech based on the stipulations that they used images and words to express a customized message.[233] Many businesses will have a hard time on this factor because they simply do not create pure speech for their customers. Caterers, dress designers, tailors, florists, venues, and the like do not deal in pure speech. Outside the wedding context, businesses like restaurants, grocery stores, doctors, and countless others also do not deal in pure speech and thus may get stuck on this factor.

Some of the businesses, though, could perhaps argue that their products do have a sufficiently expressive component to be considered speech.[234] In these cases, courts will use the two-prong *Spence*

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230 *303 Creative*, 600 U.S. at 599.

231 *Id.*

232 *See id.* at 591 ("[T]here are no doubt innumerable goods and services that no one could argue implicate the First Amendment." (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 632 (2018)).

233 *Id.* at 587.

234 *See generally* Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241 (2016).

v. Washington test[235]: (1) Did the business intend to send a particularized message? (2) Would the audience have understood that message?[236] Although wedding vendors may *intend* to convey a message with their products or services,[237] it seems unclear that people who see those products or services would understand that message.[238] Consider the cakebaker, the dress designer, and the florist. Even if these businesses argue that by baking, designing, and arranging for weddings they *mean* to express their approval of those weddings, would someone attending those weddings realize that? It seems more likely that someone who sees these cakes, dresses, and flowers will presume that the couple paid the company to make them a product and the company followed through.

This is the holding of *Washington v. Arlene's Flowers, Inc.*[239] In that case, decided before *303 Creative*, a floral arrangement business argued that the Free Speech Clause insulated it from being forced to work with same-sex weddings.[240] The Washington Supreme Court disagreed.[241] For one thing, its arrangements were not pure speech.[242] Nor were they expressive conduct under *Spence*: On the second factor, the court held that creating floral arrangements is not speech because providing or refusing to provide flowers for a wedding "does not inherently express a message about that wedding."[243] Indeed,

> [P]roviding flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism . . . . [A]n outside observer

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235 Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam).

236 *See* Corbin, *supra* note 235, at 246.

237 *Id.* at 249–50.

238 *Id.* at 250–56.

239 441 P.3d 1203 (Wash. 2019) (en banc).

240 *Id.* at 1210, 1224.

241 *Id.* at 1225.

242 *Id.* ("[The] sale of wedding floral arrangements . . . is not 'speech' in a literal sense and is thus properly characterized as conduct.").

243 *Id.* at 1225–26 (citing Rumsfeld v. FAIR, 547 U.S. 47, 52, 55 (2006)); *see also* discussion *supra* Section I.A.1.ii.

> may be left to wonder whether a wedding was declined for one of at least three reasons: a religious objection, insufficient staff, or insufficient stock.[244]

303 Creative does nothing to change this outcome. Because providing flowers—or providing any other non-expressive service—does not implicate the First Amendment, it should not implicate *303 Creative* either.[245]

B. *Cases Where the Compelled Speech is Not the Company's Own Speech*

Next, there will be an interesting set of cases where a public accommodation law forces a company to create speech, but that speech is not the company's *own* speech. As a reminder, the Supreme Court held that 303 Creative's websites were its own speech for two main reasons. First, the final product had 303 Creative's name on it and contained discrete elements of 303 Creative's own speech. Second, Smith is careful to only choose projects that express ideas she agrees with.[246]

Imagine instead that couples would hire Smith and 303 Creative to create websites, but Smith would not write an original story about the couple or create her own original artwork. Instead, let's say she uses photos taken by the couple, a story written by the couple, and details about the ceremony and puts them together in an artistic way on a website. Let's also say for sake of argument that 303 Creative's name does not appear on the site at all. Now, the website *itself* may be speech. It probably still "celebrate[s]" and "conve[ys]" the couple's "unique love story."[247] But, no longer has Smith *herself* created any of her *own* discrete pieces of speech that appear in the final product. Rather, she has arranged speech she was *hired* to arrange

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[244] *Id.* at 1226.

[245] Keep in mind also that even businesses that deal in speech may not be forced to create speech under a public accommodation law. *See* discussion *supra* Section III.A.1.i.

[246] *See supra* Section II.B.2; 303 Creative LLC v. Elenis, 600 U.S. 570, 588 (2023).

[247] *303 Creative*, 600 U.S. at 579.

into a product itself that is speech that expresses her customers' message—not hers. And if the websites are not her *own* speech, she cannot make a *303 Creative* argument.

To be sure, some businesses will be able to satisfy this "own speech" element. For instance, a company that creates artistic wedding invitations would satisfy it if the designers "are involved in every aspect of designing and creating the invitations," making them "more than a 'scribe' for the customer."[248] And a tattoo artist probably combines her own speech and artwork with the customer's ideas in the same way.[249] Same for the pastor or wedding officiant, who might argue that their services are in part their own speech.[250] Just like 303 Creative could argue that its *own* speech was tied up in the websites, so could these businesses.

Other businesses will have a harder time. For example, consider a screen-printing company that makes custom wine glasses—the kind one might give out as a wedding favor. The company hosts a website where customers upload a design and then the company etches the design into the wine glass. Could a public accommodations law require that business to make wine glasses to be given out at same-sex weddings if it will make wine glasses to be given out at opposite-sex weddings? The wine glasses are arguably speech considering they use words and a design to celebrate a wedding.[251] But unless the company places its logo on the glasses, presumably nobody will ever know the company made them. Moreover, the company has not included any of its own speech in combination with the couple's. This company, unlike 303 Creative, is not "creating a customized art product [which] incorporates unique, expressive speech,"[252] but is rather acting as a "scribe"[253] for customers who

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[248] Brush & Nib Studio, LC v. City of Phx., 448 P.3d 890, 911 (Ariz. 2019).

[249] *See id.* (citing Buehrle v. City of Key West, 813 F.3d 973, 977 (11th Cir. 2015); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1062 (9th Cir. 2010)).

[250] *See, e.g.*, Kaahumanu v. Hawaii, 682 F.3d 789, 799 (9th Cir. 2012).

[251] *Cf.* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1176 (10th Cir. 2021) (holding the 303 Creative websites to be pure speech in part because they will use "text [and] graphics" to "express approval and celebration of [a] couple's marriage, which is itself often a particularly expressive event") (citing Obergefell v. Hodges, 576 U.S. 644, 657 (2015)).

[252] *Id.* at 1197 (Tymkovich, C.J., dissenting).

[253] Brush & Nib Studio, LC v. City of Phx., 448 P.3d 890, 911 (Ariz. 2019).

are submitting their own designs. This type of company *is* creating speech—just not its own.

C. *Cases Where the Compelled Speech Does Not Express the Undesired Message*

Finally, consider the cases where a public accommodation law might require a business to create speech that is sufficiently its own speech—but that speech will not express the message that the business owner disagrees with.

Returning to the world of wedding photography, consider the pending case of Chelsey Nelson, the owner of a wedding photography business who argues that a local government's public accommodation law cannot force her to shoot same-sex weddings.[254] Before the Supreme Court decided *303 Creative*, a district court in Kentucky ruled in her favor.[255] On appeal, Nelson argues that *303 Creative* "definitively resolves" her free speech claim because the two cases "involve almost identical laws, facts, issues, and arguments."[256] Nelson argues that she, like Smith, is "an artist . . . who uses images and words" to create customized expressive products.[257] Further, like Smith, Nelson argues that by photographing same-sex weddings she will express approval and celebration of those weddings, which she does not want to do.[258]

Unlike the state of Colorado in *303 Creative*, though, the defendant Louisville Metro has not stipulated to any of this.[259] Instead,

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[254] Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't, 624 F. Supp. 3d. 761, 771 (W.D. Ken. 2022). In April 2024, the Sixth Circuit remanded the case to the District Court to decide a mootness issue and a nominal damages issue. *See* Chelsey Nelson Photography LLC v. Louisville-Jefferson Cnty., Nos. 22-5884/5912, 2024 WL 1638860 (6th Cir. Apr. 16, 2024) (per curiam).

[255] *Chelsey Nelson Photography*, 624 F. Supp. 3d at 773–74.

[256] Chelsey Nelson Photography, LLC's and Chelsey Nelson's Supp. Brief, Chelsey Nelson Photography LLC v. Louisville-Jefferson Cnty., No. 22-5912 (6th Cir. July 13, 2023), 2023 WL 4687564, at *1.

[257] *Id.* at *2.

[258] *Id.* at *10 ("Louisville's law . . . forc[es] Nelson to create photographs and blogs promoting a view of marriage different from the view she wants to celebrate.").

[259] Supp. Brief of Appellants / Cross-Appellees Louisville-Jefferson Cnty. Metro Gov't, et al., Chelsey Nelson Photography LLC v. Louisville-Jefferson

Louisville Metro argues that Nelson's photography is "documentation of a significant day for the couple being married," but that no person would think the photographs constitute Nelson's approval of the wedding itself.[260] This argument has a certain common sense appeal. When one visits a wedding photographer's gallery or website, one tends not to assume that the wedding photographer has certified that she approves of all the marriages pictured. Instead, one assumes that she was hired to photograph the wedding and did so. And if a friend says that a certain photographer declined to shoot his wedding, one doesn't presume the photographer morally disapproved of his union—one would think the photographer was simply not available that weekend.[261] The New Mexico Supreme Court

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Cnty., No. 22-5912 (6th Cir. July 13, 2023), 2023 WL 4687553, at *2 ("That Nelson *intends* to convey a message with her wedding photography does not convert a generally applicable public accommodations law into a regulation of speech.") (citing United States v. O'Brien, 391 U.S. 167, 376 (1967)).

[260] First Brief of Appellants / Cross-Appellees Louisville-Jefferson Cnty. Metro Gov't, et al., Chelsey Nelson Photography LLC v. Louisville-Jefferson Cnty., No 22-5912 (6th Cir. July 13, 2023), 2023 WL 1468570, at *26.

[261] The *Chelsey Nelson Photography* District Court held the opposite—that reasonable viewers of Nelson's photos would be likely to think that Nelson was celebrating the marriage. Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't, 624 F. Supp. 3d 761, 783 (W.D. Ken. 2022). Louisville Metro argued that the expression "emanate[d] from the celebrants and officiant, not the photographer capturing them." *Id.* To the court, this was "too narrow a conception of photography, and of art. The Pulitzer, after all, goes to the photographer, not her subjects. And when a composer selects a musician to bring a song to life, is either less of an artist because the other's creative expression is also involved?" *Id.* This misses the point. True, the Pulitzer does go to the photographer. *See* Seymour Topping et al., *Administration of the Prizes*, PULITZER PRIZES, https://www.pulitzer.org/page/administration-prizes (last visited July 7, 2024). But surely nobody thinks that the photographer who wins the Pulitzer necessarily approves of what his subject is doing or expresses the same message as the subject does. *See generally Breaking News Photography*, PULITZER PRIZES, https://www.pulitzer.org/prize-winners-by-category/216 (last visited July 7, 2024) (listing prize winners and their subjects).

The District Court also pointed to the fact that Nelson does far more than click a button on a camera when she photographs events as evidence that viewers would assume from her photos that she approves of the wedding. *Chelsey Nelson Photography*, 624 F. Supp. 3d at 783. Again, though, this does not seem to follow. The level of work she puts into her photographs might make a viewer think she takes more pride in her work—but not that she is more likely to approve of what she's photographing. Is it more likely that a photographer who covers foreign

came to a similar conclusion pre-*303 Creative* in the case of *Elane Photography, LLC v. Willock*[262]:

> Reasonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events. It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom) . . . . Elane Photography is free to disavow, implicitly or explicitly, any messages that it believes the photographs convey . . . . [It may,] for example, post a disclaimer on [its] website or in [its] studio advertising that [it] oppose[s] same-sex marriage but that [it] compl[ies] with applicable antidiscrimination laws.[263]

All this is to say that future cases will not be as easy as *303 Creative* because they will lack the stipulation that the product at issue expresses a particular message.[264] It will be up to courts to engage in complex factual determinations to decide what message, exactly, a particular product expresses.

D. *Similar Cases Without Stipulations*

There may be a final set of cases: those with similar facts but no stipulations. In these cases, a company will argue that it sells a customized, unique speech product that expresses a message the company does not want to express. In these cases, like *Chelsey Nelson Photography*, *303 Creative*'s framework outlined in Part III would apply, but much of the litigation would take place in the facts.

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conflicts approves of her subjects' actions than a photographer who covers the county fair?

[262] 309 P.3d 53 (N.M. 2013).

[263] *Id.* at 69–70; *see also* Washington v. Arlene's Flowers, Inc., 41 P.3d 1203, 1226 (Wash. 2019) (en banc) (discussed *supra* Section IV.A).

[264] *See* Appendix to Cert. Petition, *supra* note 107, at 187a (Stipulation 81).

One such case could be that of the wedding videographer.[265] The videographer can plausibly argue it meets each element. A video about a wedding is pure speech. That video, because it is a complex, original piece of art made by the videographer, should be considered the videographer's own speech. Unlike the photograph, which is a single, discrete piece of media, the video is a complex assortment of video, pictures, sound, music, text, and graphics.[266] Also unlike a photograph, which documents a single moment in time, the video tells a story with a beginning, middle, and end. Because the videographer has edited this story together, someone who views an edited video of a wedding—set to music with text and voiceovers—may, in the right context, understand the videographer's own message of approval along with the couple's story.[267]

However, even in such a case, there will be any number of ways for it to come out differently than *303 Creative*. For one thing, many businesses are just not public accommodations in the first place.[268] Moreover, the business will have to win on each of the factors described above to state a claim. Each of these factors includes a complex and often debatable determination of how a reasonable listener might interpret a statement or action.

This uncertainty, on one hand, exposes an existential flaw of *303 Creative*: because the opinion rides on unique stipulated facts, the holding does not provide any guideposts for lower courts on how they should engage with real-life facts in future cases.[269] On the

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[265] *See, e.g.*, Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).

[266] *See* IPV, *What is Non-linear Editing?*, MEDIUM (Oct. 28, 2019), https://medium.com/ipv-video-essentials/what-is-non-linear-editing-708df5f0cc45 (explaining the video editing process).

[267] *See Telescope Media*, 936 F.3d at 748 (recounting that the videographer there wanted to create videos with the specific intent to "affect the cultural narrative regarding marriage").

[268] Colorado's Solicitor General made this argument in *303 Creative* but lost by stipulation. *See* Transcript of Oral Argument at 64, 71–72, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476), 2022 WL 17980103.

[269] Interestingly, even 303 Creative itself has only gotten limited relief. *See* 303 Creative v. Elenis, No. 16-cv-2372, 2024 WL 1281445, at *8–9 (D. Colo. Mar. 26, 2024). The district court enjoined Colorado from enforcing CADA against 303 Creative related to "creat[ing] websites depicting or celebrating same-sex weddings." *Id.* at *5. 303 Creative had asked for a broader injunction. *Id.* at *3. But the court limited the injunction only to the wedding website context because that was the only context for which 303 Creative had established standing

other hand, this uncertainty provides an opportunity for lawyers in future cases to contain *303 Creative*'s fallout.[270] By distinguishing their cases from the made-to-win stipulations in *303 Creative*, state and local governments can defend their public accommodation laws from First Amendment challenges.

CONCLUSION

As we have seen, *303 Creative* on its own terms is narrow. It applies only where a business would be forced to create speech that could be considered its own speech that expresses a message it does not want to express. As explored in Part IV, this excludes many businesses that lack one of those characteristics. While the opinion is sure to do—and has done—damage to the cause of equality and dignity for all, it does not give businesses a general "license to discriminate" against gay people or anyone else.[271]

At least not yet. The group that funded Smith's lawsuit is already seeking to extend *303 Creative*'s protections to the cake baker in *Masterpiece Cakeshop*[272]. Indeed, we are only at the beginning of the flood of cases coming that will seek to expand *303 Creative*'s

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to challenge CADA—even though the court's holding "discussed a state's ability to compel speech in broad terms . . . ." *Id.* at *4–5, 10.

[270] *See generally* Ross, *supra* note 121 (urging this result).

[271] *See* Sam Cerchio, *LGBTQIA+ Discrimination and the Impact of* 303 Creative LLC v. Elenis, LEAGUE OF WOMEN VOTERS (Nov. 30, 2023), https://www.lwv.org/blog/lgbtqia-discrimination-and-impact-303-creative-llc-v-elenis. Although *303 Creative* may not truly be a "license to discriminate," this article outlines a compelling personal reaction to the decision. *Id.* It also discusses how the opinion "emboldened a growing movement that attempts to devalue and punish our LGBTQIA+ population and paves the way for new discriminatory efforts." *Id.*

[272] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018)*; see also Masterpiece Cake Artist Asks CO Supreme Court to Uphold His Right to Create Freely*, ALLIANCE DEFENDING FREEDOM (Apr. 20, 2023), https://adflegal.org/press-release/masterpiece-cake-artist-asks-co-supreme-court-uphold-his-right-create-freely; Petitioners' Response to Notice of Supplemental Authority, *Masterpiece Cakeshop Inc. v. Scardina*, No. 2023SC000116 (Colo. S. Ct. July 18, 2023), available at https://drupal-files-delivery.s3.amazonaws.com/public/2023-07/Scardina-v-Masterpiece-Cakeshop-2023-07-18-Supplemental-Brief.pdf.

reach.[273] A judge in Texas has even argued that *303 Creative* protects her right not to officiate same-sex weddings.[274] "[I]t is hard to say," at this point, whether this coming flood of litigation will "forge limiting principles or . . . expand *303 Creative*'s boundaries beyond recognition . . . ."[275] By making *303 Creative*'s test mechanical, this Comment hopes to have provided a roadmap for advocates to keep the opinion's blast radius as small as possible.

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[273] *See, e.g.*, the *Chelsea Nelson Photography* case discussed *supra* Section IV.C.

[274] Notice of Supplemental Authority, Hensley v. State Comm'n on Judicial Conduct, No. 22-1145 (Tex. S. Ct. July 6, 2023), available at https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=49adffca-13f7-4b48-8601-febcf665e97a&coa=cossup&DT=OTHER&MediaID=be44dc5b743243a8-962a-dc70319a3ea2; *see also* Mike Scarcella, *Texas Judge Who Refused LGBT Weddings Wants Her Religious Rights Lawsuit Revived*, REUTERS (Apr. 11, 2023), https://www.reuters.com/legal/government/texas-judge-who-refused-lgbt-weddings-wants-her-religious-rights-lawsuit-revived-2023-04-11/; *see also* Ross, *supra* note 121 (calling the judge's argument "ludicrous").

[275] Ross, *supra* note 121.