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"We Do No Such Thing": *303 Creative v. Elenis* and the Future of First Amendment Challenges to Public Accommodations Laws

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"We Do No Such Thing": *303 Creative v. Elenis* and the Future of First Amendment Challenges to Public Accommodations Laws

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ABSTRACT. In *303 Creative v. Elenis*, the Supreme Court ruled that a business had a right to refuse to design a wedding website for a same-sex couple. But properly understood, the decision's parameters are narrow, and the decision should have minimal effect on public accommodations laws.

INTRODUCTION

It is not uncommon for parties in litigation to talk past each other. But it's rarer for Supreme Court Justices to do so. By the time the Court decides a case, there have generally been multiple rounds of briefing in the lower courts, at least two lower court decisions, extensive briefing and argument in the Supreme Court, and the internal exchange of drafts by the Justices. At that point, you would expect the Justices at least to agree on the question they are answering. But in *303 Creative v. Elenis*, the Supreme Court's 2023 decision pitting free speech against equal protection norms, the majority, written by Justice Gorsuch, and the dissent, by Justice Sotomayor, are proverbial ships passing in the night. As Gorsuch acknowledged, "It is difficult to read the dissent and conclude we are looking at the same case."[1] They weren't. And that is critical to understanding both the decision itself and its precedential consequences.

In *303 Creative*, a wedding website designer claimed that the First Amendment prohibited Colorado from requiring her to design a wedding website for a gay couple. To the majority, the case asked whether a government could "coerce

1. 303 Creative v. Elenis, 600 U.S. 570, 597 (2023).

an individual to speak contrary to her beliefs on a significant issue of personal conviction, all in order to eliminate ideas that differ from its own."[2] The dissent did not disagree that *if* that were what Colorado's public accommodations law did, it would violate the First Amendment. But the dissent did not understand Colorado's law to do anything of the kind.

To the dissent, the question presented was instead whether "a business open to the public [has] a constitutional right to refuse to serve members of a protected class."[3] And on *that* question, the majority agreed with the dissent that no such right exists. Indeed, when Justice Sotomayor accused the majority of authorizing businesses providing "expressive" services or products to refuse to serve customers based on their identity in a protected class, the majority retorted, "[W]e do no such thing."[4]

In short, the two sides disagreed not so much about the *constitutional principles* that apply, but about the character of the *Colorado law* as it applied in this case. Where the majority understood Colorado's law to require the business to make for a gay couple a website communicating a message that the business owner objected to making *for anyone*, the dissent understood the law merely to require the business to offer *the same service* to gay couples that it would provide to straight couples. One saw the law as prohibiting a decision to refuse service because of the *message* requested; the other saw it as prohibiting only refusals of service based on the *identity* of the customer or user.

That confusion stemmed in large part from the fact that the case was filed before the Colorado law had been applied to the website designer. Indeed, the suit was filed before the website designer served *any* customers, much less turned any away.[5] As a result, it was unclear whether the business would merely refuse to design websites bearing particular messages it objected to providing for anyone, or whether it would refuse to design any wedding website for a gay couple, even one whose content was materially identical to one it would design for a straight couple. Indeed, it was not even clear that Colorado would deem its law violated if the business merely refused to provide to gay couples a website that it would object to providing for anyone; Colorado's representations in its brief suggested that such a business decision would not constitute discrimination under its law.

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2. *Id.* at 598; *see also id.* at 597 (framing the issue as whether a state can "force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead").

3. *Id.* at 603 (Sotomayor, J., dissenting).

4. *Id.* at 598 (majority opinion).

5. *Id*. at 580.

In this abstract pre-enforcement posture, the majority and dissent treated the case as presenting two starkly different questions. Their disagreement was not about the answers to those questions, but to what question was actually presented. Neither the majority nor dissent recognized a First Amendment right to turn away a customer because of his protected characteristics—the core conduct prohibited by Colorado's law, and public accommodations laws generally. And both would agree that if the law compelled a business to communicate a particular message in order "to eliminate ideas that differ from its own,"[6] as the majority saw it, that application would be unconstitutional.

What, then, did the Court actually decide? The answer will determine the decision's consequences for future First Amendment challenges to public accommodations laws. The Court has previously rejected multiple First Amendment claims by businesses—including universities, restaurants, law firms, and business associations—seeking exemptions from public accommodations and antidiscrimination laws.[7] The majority in *303 Creative* did not purport to overturn or even question those precedents. Accordingly, to make sense of the Court's doctrine, one must seek to harmonize this decision, recognizing a First Amendment exemption, with a long line of cases rejecting seemingly similar claims.

The best way of doing so is to take the Court at its word. According to the majority, this case involved a business owner unwilling to design *for anyone* a website whose content contravened her beliefs by expressly celebrating a same-sex marriage. It did *not* involve a business that sought to refuse services to customers based on their sexual orientation. On the majority's view, Lorie Smith, 303 Creative's owner, objected to the *message* the state was compelling, not the *identity* of the customers. And equally significantly, according to the majority, the state's interest in applying its public accommodations law where the business did not object to the identity of the customers but to the message requested was *suppressing disfavored ideas* about marriage, not prohibiting discriminatory sales.

Understood in that light, the decision should have minimal impact on the enforcement of public accommodations and antidiscrimination laws, because it recognizes a First Amendment right only where: (1) a business objects only to expressing a particular message *for anyone*, not where it objects to serving certain customers because of their identity; and (2) the state's interest in requiring the business to provide the service is the suppression of disfavored ideas. Because that is not the situation in the vast majority of instances in which antidiscrimination laws are applied to expressive businesses, the decision leaves standing

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6. *303 Creative*, 600 U.S. at 598.

7. *See, e.g.*, Newman v. Piggie Park Enter., 390 U.S. 400, 402-03 n.5 (1968); Runyon v. McCrary, 427 U.S. 160, 176 (1976); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 11-12 (1988); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984).

what the Court has described as the "general rule"—namely, that religious and philosophical objections "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[8]

To make the distinction concrete, imagine two paradigm cases. The first involves a t-shirt designer who has chosen to design and sell to the public t-shirts bearing various logos. If a gay customer asks him to make a t-shirt stating "Gay Pride," the designer has a First Amendment right to say no if he would not make such a t-shirt for anyone. If the designer would not make such a logo for anyone, then not making it for a gay customer is not discrimination on the basis of sexual orientation. *303 Creative* recognizes a First Amendment right to choose what to offer to the public in the first place, not a right to identity-based discrimination. And if the state required the t-shirt designer to make the "Gay Pride" design because it sought to eliminate disfavored ideas about sexual orientation, the law's application would plainly violate the First Amendment.

Now imagine a t-shirt designer who affixes a sign on his door announcing, "No Gays Served." He won't sell to gay customers t-shirts he would happily sell to straight customers, no matter their message. That policy discriminates on the basis of customer identity, not on the basis of the message on any particular shirt. The fact that the design service is expressive would not give the designer a First Amendment right to discriminate on the basis of the customer's sexual orientation. As Gorsuch insisted, "[W]e do no such thing."[9]

The majority in *303 Creative* treated the case as analogous to the first example, because in its view the web designer would not design a website that said "Celebrate Same-Sex Marriage" for anyone, and the state was requiring it to do so in order to suppress disfavored ideas. To the dissent, the case was analogous to the second example, because the designer sought an exemption from designing *any* websites for same-sex weddings, and the state's interest was the content-neutral one of prohibiting identity-based discrimination in sales.

In this Essay, I offer both a critique of the majority's opinion and an explanation of its holding that harmonizes it with precedent and fundamental First Amendment principles. The critique will maintain that the majority's assessments of the state's interest in enforcing the law, and of the relief 303 Creative sought, were deeply flawed. The majority opinion erroneously asserted that Colorado's interest was the elimination of disfavored ideas, when in fact the state sought merely to prohibit identity-based discrimination in sales. And the majority viewed 303 Creative's objection as message-based, not identity-based, even though the business sought a court order allowing it to turn away all gay couples

8. *See* Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1727 (2018).

9. *303 Creative*, 600 U.S. at 598.

seeking a wedding website, regardless of content. The majority's assumptions about how the law operated were wrong. But those are the assumptions on which the Court's holding rests, and therefore they cabin its decision in important ways. A t-shirt designer can refuse to design "Gay Pride" t-shirts for anyone. But it cannot turn away customers because they are gay.

The majority's principal analytic mistake stems in significant part from its focus on the nature of the business's service as expressive, or as it puts it, "pure speech." This is the beginning of a First Amendment inquiry, but not the end. The more significant inquiry where a law regulates expressive conduct focuses on the state's regulatory interest. Even a "pure speech" business cannot put up a sign saying "No Blacks Served." Where a law regulates conduct (discrimination in commercial sales) without regard to whether the conduct is communicative, its application to an expressive business triggers only fairly deferential "intermediate scrutiny."[10] And that scrutiny permits government regulation so long as it furthers a substantial interest without unnecessarily infringing First Amendment interests.[11] The interest in prohibiting discrimination in the economic marketplace is substantial, and prohibiting identity-based discrimination is precisely tailored to that end. The majority in *303 Creative* concluded, however, that Colorado's interest in applying its law in this instance was not in forestalling identity-based discrimination, but in suppressing disfavored ideas. There is no support for that assertion, and Justice Gorsuch's opinion offers none. At the same time, the Court's holding expressly rests on that assertion, and it therefore applies only where a state's interest is in fact in suppressing disfavored ideas rather than fighting identity-based discrimination. Because that will rarely be the case, the decision, properly understood, establishes only a very narrow exemption from public accommodations laws.

Part I of this Essay will briefly lay out the background of the case, including its pre-enforcement posture, which enabled the case to be tried on abstract stipulations instead of actual facts that might have clarified how the law worked and what the designer sought. Part II offers a three-part critique of the Court's decision: First, contrary to the majority's assertion, the Colorado law does not actually compel businesses to offer services or products of any particular content. Second, the law regulates the conduct of discriminatory sales in a content-neutral manner and was not, as the majority asserts, designed to eliminate disfavored ideas. And third, because the majority's rationale rests squarely on those two mistaken assumptions about how the Colorado law operated, it is fundamentally flawed.

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10. United States v. O'Brien, 391 U.S. 367 (1968).

11. *Id.*

Part III turns to the implications of the decision for future First Amendment challenges to public accommodations laws. Because the majority's holding is expressly predicated on a peculiar understanding of Colorado's law, that understanding limits its precedential scope. It establishes only that the First Amendment is violated where (1) a public accommodations law requires a business to provide an expressive service conveying a message the business owner would not willingly provide to anyone, *and* (2) the state does so for the purpose of eliminating disfavored ideas. While it will sometimes be difficult to distinguish between a decision to discriminate on the basis of customer identity and a refusal to express a particular message for anyone, in most cases the distinction should be clear, especially where there has been a concrete refusal and therefore an opportunity to assess why the service was denied.

I. THE DISPUTE AND DECISION

The owner of 303 Creative, Lorie Smith, never created a wedding website for anyone before she filed suit.[12] No one sought her services, and therefore she never turned away anyone, much less a gay couple.[13] She sued before the law was applied to her, arguing that she was chilled from entering the business of wedding website design out of fear that Colorado's public accommodations law, the Colorado Anti-Discrimination Act (CADA), would require her to create a website celebrating a same-sex wedding if she offered to create websites celebrating weddings of opposite-sex couples.[14] Such pre-enforcement challenges are not uncommon in the First Amendment context. Because speech is easily chilled, the Court permits an individual facing a credible threat of enforcement under a statute she claims violates her First Amendment rights to sue in advance of any enforcement for a declaration of her rights.[15]

Because of the suit's pre-enforcement posture, however, it was adjudicated in the absence of any concrete facts concerning either the content of any requested websites or any alleged act of discrimination. Instead, the parties litigated on the basis of stipulations about Smith's intentions and the nature of the services she sought to provide. The parties stipulated:

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12. *303 Creative*, 600 U.S. at 580.

13. *Id.*

14. Joint Appendix to Brief of Petitioners at 237-306, 303 Creative v. Elenis, 600 U.S. 570 (2023), No. 21-476 (Verified Complaint for Declaratory and Injunctive Relief, 303 Creative LLC v. Elenis, 404 F. Supp. 3d 907 (D. Colo. 2019), No. 16-CV-02372).

15. *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 15 (2010); Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 119 (1989).

- "Smith is 'willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender,' and she 'will gladly create custom graphics and websites' for clients of any sexual orientation."
- "She will not produce content that 'contradicts biblical truth' regardless of who orders it."
- "The websites and graphics Smith designs are 'original, customized' creations that 'contribut[e] to the overall messages' her business conveys 'through the websites' it creates."
- "[The websites she designs] will 'express Smith's and 303 Creative's message celebrating and promoting' her view of marriage."[16]

303 Creative requested a broad injunction declaring its right to "declin[e] to create websites or graphics promoting events or ideas that violate their beliefs about marriage, such as websites for same-sex weddings."[17] Thus, it appeared to assert a right to refuse to sell *any* "websites for same-sex weddings," and not just websites containing specific messages. The district court denied relief, and the court of appeals affirmed. The U.S. Court of Appeals for the Tenth Circuit reasoned that the law as applied to 303 Creative was content-based, and therefore had to satisfy strict scrutiny.[18] But it concluded that the state's interest in eliminating discrimination on the basis of sexual orientation from the commercial marketplace was compelling and that the law's prohibition was narrowly tailored to that end.[19]

The Supreme Court reversed in a 6-3 decision. Writing for the majority, Justice Gorsuch reasoned that the website design service is "pure speech" (although he never defined the term), and that the websites Smith would create would be "her 'original customized' creation," designed to tell a story "using her own words and her own 'original artwork.'"[20] He also emphasized that she objected to making a website with a message promoting same-sex marriage for anyone.[21] And Gorsuch repeatedly asserted that Colorado's interest in applying its public accommodations law in this instance was "to 'excis[e] certain ideas or viewpoints

16. *303 Creative*, 600 U.S. at 582 (quoting Appendix to Petition for Writ of Certiorari at 181a-87a, *303 Creative*, 600 U.S. 570 (No. 21-476)).

17. Joint Appendix to Brief of Petitioners at 304, *303 Creative*, 600 U.S. 570 (No. 21-476).

18. 303 Creative v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021).

19. *Id.* at 1179-80.

20. *303 Creative*, 600 U.S. at 588, 594 (quoting Appendix to Petition for Writ of Certiorari at 181a-83a, *303 Creative*, 600 U.S. 570 (No. 21-476)).

21. *Id.* at 594-95.

from the public dialogue'" and to "force someone . . . to speak *its* preferred message."[22]

From these premises, Justice Gorsuch concluded that Colorado's law impermissibly compelled Smith to express views she would not voluntarily express for anyone. Such a content-based law would trigger strict scrutiny. While the Court did not formally apply that test, it acknowledged that the state had a compelling interest in combatting discrimination, but concluded that it could not compel speech in this content-based manner to further that end.[23]

Justice Gorsuch's view of how CADA operated here is illustrated by his heavy reliance on three prior cases: a World War II-era law that compelled Jehovah's Witness children to salute the flag and recite the Pledge of Allegiance; a Massachusetts public accommodations law that required a privately organized St. Patrick's Day parade to allow a gay contingent to march under a banner celebrating their sexual orientation; and a New Jersey law that required the Boy Scouts to accept as a leader an openly gay man despite the association's asserted opposition to homosexuality.[24] The first two cases involved affirmative government efforts to require individuals or associations to express views they ideologically opposed; the third involved requiring the Boy Scouts to accept as a leader someone whose sexual orientation contravened one of the principles their association sought to further. In Gorsuch's view, CADA operated similarly here, compelling Smith to express a particular message she would not willingly express for anyone.

Justice Sotomayor dissented, joined by Justices Kagan and Jackson, objecting that "[t]oday, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class."[25] In her view, the Colorado law did not regulate the content of what 303 Creative offered to the public, but merely required it to provide whatever it chose to sell on a nondiscriminatory basis to all customers. Thus, she viewed the law as a content-neutral regulation of conduct. Like prior nondiscrimination laws challenged by businesses on First Amendment grounds, it should therefore be subjected only to intermediate scrutiny under *U.S. v. O'Brien*, which it easily satisfied.[26] As she put it, "It is well settled that a public accommodations law like [CADA] does not 'target speech or discriminate on the basis of its content.'

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22. *Id.* at 588 (quoting Turner Broad. Sys. v. FCC, 512 U.S. 633, 642 (1994)); *id.* at 597.

23. *Id.* at 590-92.

24. *Id.* at 584-86 (discussing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

25. *Id.* at 603 (Sotomayor, J., dissenting).

26. *Id.* at 627-29.

Rather, 'the focal point of its prohibition' is 'on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services.'"[27]

The dissent charged the majority with permitting expressive businesses to discriminate on the basis of a customer's 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. A large retail store could reserve its family portrait services for 'traditional' families."[28] Justice Gorsuch's response was unequivocal: "[W]e do no such thing."[29]

II. A CRITIQUE OF THE COURT'S DECISION

The disagreement at the center of *303 Creative* turned on competing characterizations of how Colorado law applied to 303 Creative's business. The majority saw a content-based law aimed at suppressing disfavored ideas that would require a Muslim filmmaker, for example, to make a Zionist film.[30] By contrast, the dissent saw a content-neutral regulation of conduct that left businesses entirely free to select the content of what they sold and merely required them to sell it equally to all.[31] These different understandings of how CADA applied, more than differences in constitutional principle, were dispositive.

The dissent has the better of the facts and argument. Properly understood, the Colorado law does not "compel" speech at all; it leaves to individuals *both* the choice whether to open a business "to the public" in the first place and, even then, the choice of what products and services to sell. And CADA is not aimed at eliminating the expression of dangerous ideas, but at prohibiting discriminatory conduct in commercial sales. The majority's opinion rests on a fundamentally flawed understanding of what Colorado's law requires.

A. What Is Compelled?

The majority viewed CADA, as applied to 303 Creative, as compelling a business owner to speak against her will. If she designs a wedding website for opposite-sex couples, she would be required to design a similar website for a gay couple. Justice Gorsuch saw this as classic compelled speech, akin to West Virginia

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27. *Id.* at 628 (citation omitted) (quoting *Hurley*, 515 U.S. at 572).

28. *Id.* at 638.

29. *Id.* at 598 (majority opinion).

30. *Id.* at 589, 601.

31. *Id.* at 627-28 (Sotomayor, J., dissenting).

requiring school children to pledge allegiance to the flag in *West Virginia State Board of Education v. Barnette*.[32] The law's application, Gorsuch insisted, is unconstitutional in the same way that a compelled pledge is. But this characterization of CADA misunderstands the very limited "compulsion" it imposes in two important ways. First, the law only applies to those who voluntarily choose to open a business "to the public" generally. It does not govern the vast majority of filmmakers, writers, and artists, who operate on a freelance basis, and do not offer their service to the public at large. Smith chose to offer her services to the public generally, and it's only because of that voluntary decision that her business is governed by CADA at all.

Second, even businesses open to the public are free under Colorado's law to choose what to sell; the law merely requires them not to turn away customers because of protected characteristics. Smith was entirely free to define the content of the products or services she sought to offer. As Colorado told the Court, she could have offered to provide only websites reading, "Marriage is Between a Man and a Woman," and as long as she offered that service to all, Colorado law would not be violated. Thus, unlike a law requiring students to pledge allegiance, the Colorado law did not actually compel any particular message.

Accordingly, Colorado law would not require a Muslim filmmaker to make a Zionist film, as Justice Gorsuch imagined. The vast majority of filmmakers operate on a freelance basis, and do not offer their filmmaking service "to the public," so they are not covered at all. The law would govern a filmmaker only if he offered to make films of any content "to the public" at large.[33] But no filmmaker operates that way. They choose their projects and clients selectively. And as such, they are not "public accommodations."

As a general matter, public accommodations laws are either explicitly limited to businesses that are open to the public or have been so construed by state courts.[34] Most of these laws apply only to a business open "to the general public" (twenty-three states) or "to the public" (ten states).[35] CADA itself governs only

32. *Id.* at 585 (majority opinion) (discussing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

33. As Colorado made clear: "The Act does not, as the Company claims, compel a Hindu calligrapher to 'write flyers proclaiming, "Jesus is Lord."' It requires only that if the calligrapher chooses to write such a flyer, they sell it to Christian and Hindu customers alike." Brief for Respondents at 2, 303 Creative v. Elenis, 600 U.S. 570 (2023), No. 21-476 (citation omitted) (quoting Brief for Petitioner at 27, 303 Creative v. Elenis, 600 U.S. 570 (2023), No. 21-476).

34. *See generally State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURES (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/JL62-4JEN] (listing state public accommodations laws and categories protected from discrimination).

35. For a list of state public accommodations laws, see Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondents app. at 31, 303 Creative v. Elenis, 600 U.S. 570 (2023), No. 21-476. Some states, and the federal government in Title II of the Civil Rights Act,

businesses that sell goods or services "to the public."[36] Like other public accommodations laws, Colorado's law governs "commercial relationship[s] offered generally or widely," and not "personal contractual relationships . . . where the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association and there is reason to assume that the choice made reflects 'a purpose of exclusiveness . . . .'"[37] Because of this limitation, courts have declined to apply public accommodations laws to businesses that are not open to the public at large.[38]

The only "artists" whom CADA and similar laws govern are those who offer their artistic services to the public at large, such as a corporate photography studio or a sketch artist at a street fair. As Justice Sotomayor explained:

> A professional photographer is generally free to choose her subjects . . . . The State does not regulate that choice. If the photographer opens a portrait photography business to the public, however, the business may not deny to any person, because of race, sex, national origin, or other protected characteristic, the full and equal enjoyment of whatever

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instead list specific types of businesses that qualify as a public accommodation—but what unites the places listed is that they are open to the public. In addition, many state laws, like Colorado's, expressly exempt entities generally not open to the public, such as places principally used for religious purposes, e.g., COLO. REV. STAT. ANN. § 24-34-601(1) (West 2021), or private clubs, e.g., MONT. CODE ANN. § 49-2-101(20)(b) (2021). *See also* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e) (2018) (stating that federal law prohibiting discrimination by public accommodations does not apply to "establishment[s] not in fact open to the public").

36. COLO. REV. STAT. ANN. § 24-34-601(1) (West 2021) (defining public accommodation as "any place of business engaged in any sales *to the public* and any place offering services, facilities, privileges, advantages, or accommodations *to the public*") (emphasis added).

37. Runyon v. McCrary, 427 U.S. 160, 187, 189 (1976) (Powell, J., concurring); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 616, 621 (1984) (explaining that the Minnesota Supreme Court found a public accommodations statute covered Jaycees because it "is a 'public' business in that it solicits and recruits dues-paying members based on unselective criteria").

38. *See, e.g.*, Jankey v. Twentieth Century Fox Film Corp., 212 F.3d 1159, 1161 (9th Cir. 2000) (holding that the Americans with Disabilities Act ("ADA"), which applies to public accommodations, does not apply to a Fox production studio because it is an "establishment not in fact open to the public" (quoting 42 U.S.C. § 2000a(e) (2018)); Jenkins v. Wholesale Alley, Inc., No. 05-CV-03266, 2007 WL 9701996, at *7 (N.D. Ga. Sept. 11, 2007) (holding that the ADA does not apply to a privately owned wholesale market that sells only to member-customers and their guests because it was not open to the public). *See generally* 14 C.J.S. *Civil Rights* § 96 (2022) (finding a photography business that "was hired by certain clients but did not offer its services to the general public . . . was not [a] public accommodation, and a state's Human Rights Act would not apply to the business's choice of whom to photograph or not").

> services the business chooses to offer. That is so even though portrait photography services are customized and expressive.[39]

Justice Gorsuch asserted that because CADA applies to any business that makes any sale "to the public," it would in fact govern many freelance artists and writers who accept commissions from the public.[40] But Gorsuch cited not a single example of Colorado — or any other state — applying a public accommodations law to a freelancer who chooses to accept commissions on personal, contractual bases. And he simply ignored all the statutory language and precedent to the contrary.

The second limit on any actual compulsion, also unacknowledged by Justice Gorsuch, is that even as to businesses that do offer their services "to the public," CADA does not dictate the *content* of what they make or sell. Colorado could not have been more explicit about this feature of its law, stating on the second page of its brief: "The Company is free to decide what design services to offer and whether to communicate its vision of marriage through biblical quotes on its wedding websites. The Act requires only that the Company sell whatever product or service it offers to all regardless of its customers' protected characteristics."[41] Colorado represented that 303 Creative could proclaim on all its wedding websites that the Bible blesses only marriages between a man and a woman.[42]

Thus, in direct contrast to the West Virginia pledge requirement, CADA does not compel any particular message; it is not, in other words, content-based. Even as to the businesses that serve the public, the law leaves them entirely free to choose the content of what they sell. The only way to analogize this law to the compulsory pledge is to ignore these features of the law. And that's precisely what Justice Gorsuch did.

B. A Regulation of Conduct, Not Content

The majority's second and even more fundamental error was in focusing on the character of the business rather than on the character of the government regulation. Justice Gorsuch described 303 Creative's service as "pure speech," a term he never defined, and seemed to reason that therefore the law impermissibly compelled speech. If that were enough to resolve the case, nothing would stop an expressive business from announcing that it will not serve Blacks, women, or

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39. 303 Creative v. Elenis, 600 U.S. 570, 630 (Sotomayor, J., dissenting).

40. *Id.* at 601 n.7 (majority opinion).

41. Brief for Respondents at 2, 303 Creative v. Elenis, 600 U.S. 570 (2023), No. 21-476.

42. *Id.* at 12 ("[The Colorado Anti-Discrimination Act (CADA)] does not interfere with the Company's choice to offer only websites of its own design, including those with biblical passages stating that marriage is a union of one man and one woman.").

Jews. But as noted above, Gorsuch insisted that the case does not stand for that proposition.

Justice Gorsuch's mistake was to look at the problem from the wrong end of the telescope. The proper inquiry in this setting focuses not on whether a business's service is expressive or "pure speech," but whether the state's interest is targeted at conduct or expression. The mere fact that a business's product or service is expressive — think of bookstores, newspapers, hair stylists, or law firms — does not mean that any regulation of its commercial sales violates the First Amendment. CADA regulates the commercial *conduct* of sales to the public, wholly without regard to whether a particular business's product or service is "expressive."[43]

The First Amendment analysis in this area is well-settled. Where laws regulate conduct with both expressive and nonexpressive elements — such as offering for sale a wedding website design — the First Amendment is surely *implicated*. But as long as those laws regulate conduct and are "unrelated to the suppression of expression," only a relatively deferential intermediate scrutiny standard applies.[44]

The Court first announced this doctrine in *United States v. O'Brien*,[45] and that decision is instructive here. David O'Brien brought a First Amendment challenge to a law prohibiting the destruction of draft cards as applied to his burning of

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43. In a forthcoming article, Robert Post similarly focuses on the speech itself and argues that Gorsuch overstates the scope of the constitutional prohibition on compelling speech. Post notes that the mere fact that a business engages in "pure speech" does not mean it cannot be compelled to express certain messages, citing the regulation of commercial and professional speech. Robert Post, *Public Accommodations and the First Amendment:* 303 Creative *and "Pure Speech"* 23-25 (Yale L. Sch. Pub. Rsch. Paper), https://ssrn.com/abstract=4571196 [https://perma.cc/R8M7-TS4M]. Post persuasively argues that determining the permissibility of compelled speech requires an assessment of the character of the speech. The fullest protection extends to speech that is part of "public discourse," while commercial and trade speech receive lesser protection. That is true. But like Gorsuch, Post's approach also focuses on the wrong question. As I elaborate in this Section, the threshold issue, before one asks whether speech is of a type that might permit greater content-based regulation, is whether the challenged law is a content-based regulation of speech at all, or instead a content-neutral regulation of conduct. That threshold inquiry requires an examination not of the type of speech regulated, but of the government's regulatory interest. Burning a draft card to express opposition to the war clearly constitutes expression that is part of core public discourse, but if the state's regulation is not targeted at what the burning communicates, but at the conduct regardless of what it communicates, the law is subject only to intermediate scrutiny and will generally be upheld. *See* United States v. O'Brien, 391 U.S. 367 (1968). Before one even reaches the questions Post addresses in his article about the permissibility of some content-based compulsions of speech, one must first assess whether the regulation is content-based in the first place. Properly understood, CADA is not content-based, as explained in the text that follows.

44. *O'Brien*, 391 U.S. at 376-77.

45. 391 U.S. 367 (1968).

his draft card during an antiwar protest. No one disputed that O'Brien's act was expressive; it was political expression, which receives the First Amendment's highest protection.[46] But it also involved conduct—the burning of a card. The Court did not stop at identifying O'Brien's act as expressive. Instead, it explained that the level of First Amendment scrutiny the law's application warranted turned not on the character of O'Brien's act, but on the *government's regulatory interest* in prohibiting that act.[47] The Court upheld the law, even though it had the effect of punishing O'Brien's political expression, because the government's interest was in maintaining efficient administration of the draft by ensuring that everyone possessed a draft card that identified their status in the event of a need to call up soldiers. That interest was "unrelated to the suppression of expression" because it would be impaired regardless of whether O'Brien burned his card in a public protest or secretly tore it to pieces in the privacy of his own home. Because this regulatory interest was "unrelated to the suppression of expression,"[48] the law's effect on O'Brien's expression was "incidental," and the law was upheld. (That the effect was "incidental" does not mean that it was insubstantial; it only means that affecting expression was not the purpose of the law, but merely an "incidental" effect).

Where, by contrast, the government's regulatory interest is targeted at what conduct communicates, as with laws that prohibit flag burning, the law is content-based and strict scrutiny applies.[49] Here, too, it is the nature of the government's interest, not the nature of the act, that determines the level of scrutiny. A law banning public fires generally (in the interest of public safety) would be content-neutral and would trigger only intermediate scrutiny, even if it were applied to the burning of a flag. The very same indisputably expressive act—flag burning—cannot be prohibited by a law selectively targeting flag burning, but can be prohibited by a law that generally prohibits public burning. The critical inquiry, then, is not whether an individual's act is expressive, but why the government is regulating it. For this reason, the stipulation that 303 Creative's design service was expressive, or as Gorsuch put it, "pure speech," should not have been dispositive; the determinative question was *why* Colorado banned discrimination by businesses that serve the public, and *why* it was applying it in this instance.[50]

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46. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

47. *O'Brien*, 391 U.S. at 382.

48. *Id.* at 376-77.

49. *See* Texas v. Johnson, 491 U.S. 397, 412 (1989).

50. The same analysis applies to sleeping in parks, another form of conduct that can be expressive. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289 (1984), the Court upheld a ban on sleeping overnight in Lafayette Park, a national park across from the White House, as applied to a group that sought to camp overnight to protest treatment of the homeless. No one doubted that the protest was expressive, and that application of the law would therefore

Antidiscrimination laws regulate *conduct*—treating people differently based on a protected characteristic, such as race or sex—and therefore should generally trigger only intermediate scrutiny even when applied to expressive businesses. Thus, the Court rejected a law firm's First Amendment objection to a Title VII suit alleging sex discrimination in a partnership decision, concluding that there is "no constitutional right . . . to discriminate"—even though law firm services, which consist of oral and written advice and advocacy, are indisputably expressive.[51] But a law that targeted a law firm's speech by preventing it from making certain arguments would be content-based and would "implicat[e] central First Amendment concerns."[52] Here, again, the determinative question is not whether the law firm's services are expressive, but whether the government's regulatory interest is focused on what the services express, or on conduct regardless of its expressive character.[53]

Colorado's interest in prohibiting discrimination in sales, like Congress's interest in enacting Title VII, is to ensure equal treatment in the economic marketplace. CADA bars discrimination by *all* businesses that serve the public, entirely without regard to whether their product or service is expressive. The law applies equally to "expressive" businesses—such as bookstores, corporate photo studios, and newspapers—and "nonexpressive" businesses, such as hardware stores. The interest in combatting discriminatory refusals to serve customers is "unrelated to the suppression of expression," and affects expression only incidentally. As such, Colorado correctly argued its law was subject only to intermediate scrutiny.[54]

The Court gave short shrift to this argument, asserting that it was "difficult to square with the parties' stipulations."[55] Under the stipulations, Justice Gorsuch reasoned, Colorado was not merely regulating Smith's sales, but compelling

impede expression. But because the law furthered conservation interests "unrelated to suppression of expression," its effects on expression were "incidental," and the Court upheld the prohibition under intermediate scrutiny. *Id.* at 299.

51. In *Hishon v. King & Spalding*, a law firm argued that applying Title VII to require it to consider a woman for partnership "would infringe [its] constitutional rights of expression or association." 467 U.S. 69, 78 (1984).

52. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547-48 (2001).

53. For similar reasons, the Court rejected a First Amendment challenge to a nondiscrimination law in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006). The Court acknowledged that the law requiring equal treatment of military recruiters would compel the schools to provide assistance that "often includes elements of speech," such as emails and bulletin notices. But "[a]s a general matter, the [law] regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60.

54. Brief of Respondents at 10, 21-23, 303 Creative v. Elenis, 600 U.S. 570 (2023), No. 21-476.

55. *303 Creative*, 600 U.S. at 593.

her to provide a "pure speech" service that she objected to providing to anyone, regardless of their identity. Smith, Gorsuch noted, "provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation."[56] And "she has never created expressions that contradict her own views *for anyone*—whether that means generating works that encourage violence, demean another person, or defy her religious beliefs by, say, promoting atheism."[57] Thus, he understood the law's application in this instance not merely to require her to provide the same service to all, as Colorado maintained, but to require her to provide a service with a particular content that she would not willingly provide to anyone—a website whose content affirmatively celebrated same-sex marriage in her own words.

Relatedly, the majority also relied heavily on its determination that Colorado's interest in enforcing CADA against 303 Creative was "the coercive '[e]liminati[on]' of dissenting 'ideas' about marriage."[58] As Justice Gorsuch put it, "Colorado seeks to compel this speech in order to 'excis[e] certain ideas or viewpoints from the public dialogue.'"[59] As shown above, such a regulatory interest in "the suppression of expression" triggers strict scrutiny under *O'Brien*, because it is content-based.[60]

Was Colorado's interest actually in eliminating dissenting ideas about marriage? Justice Gorsuch cited only the Tenth Circuit's decision for this characterization, but the Tenth Circuit, in turn, falsely equated an interest in eliminating discrimination with an interest in suppressing certain ideas. As the Tenth Circuit put it:

> CADA's purpose and history also demonstrate how the statute is a content-based restriction. As Colorado makes clear, CADA is intended to remedy a long and invidious history of discrimination based on sexual orientation. Thus, there is more than a "substantial risk of excising certain ideas or viewpoints from the public dialogue." Eliminating such ideas is CADA's very purpose.[61]

This is a non sequitur. To seek to remedy a history of discrimination by prohibiting discriminatory conduct does not remotely amount to an interest in "eliminating" discriminatory "ideas" from the public dialogue. The Tenth

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56. *Id.* at 580.

57. *Id.* (emphasis added).

58. *Id.* at 588 (quoting 303 Creative v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021)).

59. *Id.* (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 633, 642 (1994)).

60. *See* Texas v. Johnson, 491 U.S. 397, 412 (1989); United States v. O'Brien, 391 U.S. 367, 377 (1968).

61. *303 Creative*, 6 F.4th at 1178 (quoting *Turner Broad. Sys.*, 512 U.S. at 642).

Circuit's *ipse dixit* wholly collapses the distinction between regulating conduct and controlling speech. If it were correct, *every* antidiscrimination law would be a content-based regulation of speech, subject to strict scrutiny. Title VII, Title VI, the Voting Rights Act, and the Americans with Disabilities Act, to name but a few, would all be invalid as content-based laws unless they could satisfy strict scrutiny. Yet as already noted, the Supreme Court has repeatedly upheld antidiscrimination laws against First Amendment challenges without triggering strict scrutiny.[62] That is because antidiscrimination laws, including CADA, are aimed not at *ideas* or *speech* but at discriminatory *conduct*. They seek to eliminate conduct, such as denials of housing, jobs, education, the vote, or access to public accommodations, based on an individual's race, sex, sexual orientation, religion, and the like.

Moreover, in this case 303 Creative sought an exemption from the law regardless of the content of any particular website. As noted above, but ignored by the majority opinion, 303 Creative requested an injunction allowing it to "declin[e] to create . . . websites for same-sex weddings"—regardless of their content.[63] 303 Creative thus appeared to assert a right to refuse services to a same-sex couple even if the website's content was *identical* to one the company would make for an opposite-sex couple. If a couple named Drew and John requested a simple website announcing "Drew and John's Wedding" and providing basic details about where and when the wedding would take place, 303 Creative would design the website if Drew were a woman, but not if Drew were a man. Refusing to design the *identical website* for a gay couple that it would design for a straight couple is paradigmatic identity-based discrimination. Yet the majority insisted that its decision did not create a right to discriminate on the basis of the status of the customer, but only on the basis of the message requested. [64]

The dissent properly understood CADA as regulating the conduct of discriminatory sales, for reasons unrelated to the suppression of expression.[65] Because the law is targeted at conduct irrespective of expression, its effect on 303

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62. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 176 (1976); Hishon v. King & Spalding, 467 U.S. 69, 78-79 (1984); Roberts v. U.S. Jaycees, 468 U.S. 609, 617-29 (1984); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 11-12 (1988).

63. Joint Appendix to Brief of Petitioners at 304, 303 Creative v. Elenis, 600 U.S. 570 (2023), No. 21-476 (quoting Verified Complaint for Declaratory and Injunctive Relief, 303 Creative LLC v. Elenis, 404 F. Supp. 3d 907 (D. Colo. 2019), No. 16-CV-02372).

64. Defenders of the majority might claim that the websites actually express different messages, notwithstanding their identical content, depending on whether Drew is a man or a woman. But that would collapse the distinction, which the majority repeatedly insisted upon, between identity-based refusals of service, which it said it was *not* protecting, and decisions not to provide to anyone an expressive service of specific content, which the Court interpreted the First Amendment to protect. For a fuller discussion, *see infra* Part III.

65. 303 Creative v. Elenis, 600 U.S. 570, 605-09 (2023) (Sotomayor, J., dissenting).

Creative's speech is "incidental," in the same sense that the effect of the draft card law on O'Brien's expression was incidental. In the dissent's view, 303 Creative sought a First Amendment right to discriminate on the basis of the status of its customers because it refused to make any wedding website for a same-sex wedding, even if the website's content is identical to one it would make for an opposite-sex wedding.[66] As a content-neutral regulation of conduct with an incidental effect on expression, CADA need satisfy only intermediate scrutiny, which it does because it furthers an important interest in fighting discrimination in a direct and tailored way.

In other words, the majority struck down one law and the dissent would have upheld another. The majority viewed the law as compelling a business to create particular *content* that it would not make for anyone, for the content-based purpose of excising disfavored ideas from the market. The dissent, meanwhile, saw the law as regulating the conduct of discriminatory sales, with only an incidental effect on speech.

C. The Role of False Predicates in the Majority's Reasoning

Justice Gorsuch's characterization of CADA as a content-based law compelling speech for the purpose of suppressing disfavored ideas was critical to every step of his reasoning. Whether right or wrong as a factual matter, it is the predicate for the Court's analysis.

The majority's treatment of precedent illustrates the point. For example, Justice Gorsuch repeatedly compared the application of CADA to the flag-salute law invalidated in *West Virginia State Board of Education v. Barnette*.[67] The flag-salute law was indisputably a content- and viewpoint-based compulsion of speech; it specified the exact content of what children were expected to communicate each morning.[68] Gorsuch's invocation of *Barnette* makes sense only if CADA similarly compels speech because of its content.

The same is true for the Court's reliance on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[69] *Hurley* struck down the "peculiar" application of a public accommodations law to a privately organized St. Patrick's Day parade, where the state interpreted its law to require private parade organizers to allow a gay Irish organization to march under a banner proclaiming and celebrating their identity.[70] The parade organizers were willing to have gay plaintiffs

66. *Id.* at 625.

67. 319 U.S. 624 (1943).

68. *Id.* at 626.

69. 515 U.S. 557 (1995).

70. *Hurley*, 515 U.S. at 572.

participate in the parade, but the state applied the law to require them to include a *message* (via the banner) to which the parade organizers objected, no matter who expressed it.

Barnette and *Hurley* are analogous to CADA only if it, too, compels businesses to express messages of a particular content, and not merely to sell to all on an equal basis whatever service they choose to offer. Absent that misunderstanding of CADA, the analogies simply do not work.

But the clearest indication of the central role that the majority's mischaracterization of CADA played in its reasoning is found in its discussion of *Lee v. Ashers Baking Co.*,[71] a U.K. Supreme Court case involving a baker's refusal to make a cake bearing a particular message for a gay customer. Justice Gorsuch cited *Ashers* as an example of the core distinction upon which the *303 Creative* decision rests: namely, between refusals to provide a service because of a customer's status and refusals based on the content of the message requested. Gorsuch wrote: "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."[72] He then cited *Ashers*, in which a gay activist asked a baker to make a cake bearing the specific message "Support Gay Marriage." The baker refused, explaining that the message violated his Christian faith, and that he would not make a cake bearing that message for anyone. The U.K. Supreme Court ruled in favor of the bakery, finding that the "less favourable treatment was afforded to the message not to the man."[73] As the U.K. court explained, "The reason for treating Mr. Lee less favourably than other would-be customers was not his sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way."[74] "The objection was to the message, not the messenger."[75] Thus, the U.K. Supreme Court held, the denial was not discriminatory.

Gorsuch saw *303 Creative* as analogous to *Ashers*, because he understood CADA to require Smith, like Ashers Bakery, to design a website expressing a message for a gay couple that she objected to expressing for anyone. As he read CADA, it would require Smith to make the website even if, as in *Ashers*, "the objection was to the message, not the messenger."

In other words, what the U.K. Supreme Court in *Ashers* held as a matter of British antidiscrimination law, the U.S. Supreme Court in *303 Creative* held as a

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71. [2018] UKSC 49 (appeal taken from N. Ir.).

72. 303 Creative v. Elenis, 600 U.S. 570, 595 n.3 (2023).

73. [2018] UKSC 49 at [47].

74. *Id.* at [23].

75. *Id.* at [22].

matter of U.S. constitutional law: where a business will not provide a product or service expressing a particular message *to anyone*, it need not do so for a member of a protected class. In the United Kingdom, where there is no First Amendment, the court reasoned that the denial of service was not discriminatory because the bakery was not treating gay customers differently. The U.S. Supreme Court reached the same result in *303 Creative* but framed its decision in constitutional terms: The First Amendment precludes a state from requiring a business to sell to members of a protected class an expressive product or service that it objects to selling to anyone. But both decisions rest on their assessment that the businesses in question objected to providing a certain message to anyone. And neither decision supports a business's selective refusal to serve a customer because of his or her protected identity—no matter how expressive the business's work.[76]

To the dissent's contention that CADA regulated only the conduct of sales, not the content of the service Smith chose to sell, the majority retorted that the dissent was "reimagin[ing] the facts of this case from top to bottom:"[77]

> The dissent claims that Colorado wishes to regulate Smith's conduct, not her speech. Forget Colorado's stipulation that Smith's activities are "expressive," and the Tenth Circuit's conclusion that the State seeks to compel "pure speech" . . . . The dissent suggests (over and over again) that any burden on speech here is "incidental." All despite the Tenth Circuit's finding that Colorado intends to force Smith to convey a message she does not believe with the "very purpose" of "[e]liminating . . . ideas" that differ from its own.[78]

As I have shown, it was the majority, not the dissent, that reimagined the facts from top to bottom. But its mischaracterization of CADA is the linchpin of its reasoning, and therefore cabins the decision's implications for other public accommodations cases.

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76. Indeed, *Ashers Bakery* suggests that the U.S. Supreme Court could well have resolved *303 Creative* on statutory, not constitutional grounds, by concluding that what it understood Smith sought to do—to refuse to create certain messages regardless of the identity of the customer—did not violate Colorado law. As noted above, Colorado represented that Smith was free to determine the content of her service, so long as she did not deny it to some based on their status. So, if the majority understood the facts here to involve a message-based denial rather than a messenger-based denial, it could have, *and should have*, simply ruled that Smith's conduct did not violate CADA.

77. *Id.* at 597.

78. *Id.*

III. *303 CREATIVE*'S IMPLICATIONS

Taking into account the essential predicates of the Court's reasoning, *303 Creative* holds only that where (1) a public accommodations law requires a business to make an expressive product or service bearing a message that it credibly objects to making *for anyone*, *and* (2) the state does so in order to eliminate disfavored ideas, the First Amendment is violated. It would be a mistake, as Gorsuch himself insisted, to read the decision more broadly to permit expressive businesses to engage in identity-based discrimination.[79]

The Court's opinion rests on two critical assumptions: (1) Smith's objection was based on the *message* she was asked to express in her own words, not on the *identity* of her customers, and she objected to expressing that message no matter who requested it; and (2) Colorado's interest in requiring 303 Creative to design a website celebrating same-sex marriage under these circumstances was in "the coercive '[e]limination' of 'dissenting ideas' about marriage," not in the prohibition of status-based discrimination in sales.[80]

The First Amendment right the Court announced rests on *both* conditions. First, it applies only where a business is *not* engaged in status-based discrimination but objects to the content of a specific message requested. Thus, a corporate photography studio that offered its services to the public could not refuse to take photographs of Black families. If a business is willing to sell a particular expressive product or service to some customers, it cannot refuse to sell the same product or service to others on the basis of their protected status. *303 Creative* protects only message-based objections, not identity-based ones. To return to the paradigm cases discussed at the outset, It allows a t-shirt designer to refuse to make a "Gay Pride" t-shirt, but not to refuse to serve gay customers.

The second necessary predicate of the Court's decision was its conclusion that the state's interest in applying the public accommodations law in this instance was in eliminating dissenting ideas and compelling the expression of the state's preferred message. As we have seen, under the Court's "expressive conduct" *O'Brien* doctrine, such a purpose triggers strict scrutiny, because it is not "unrelated to the suppression of expression."[81] But where, as will generally be the case with antidiscrimination laws, the state's interest is in prohibiting discriminatory conduct, irrespective of any communicative content, intermediate

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79. *Id*. at 598.

80. *Id.* at 588, 597-98, 602-03.

81. Texas v. Johnson, 491 U.S. 397, 403 (1989) ("If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must [apply] a more demanding standard." (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968))).

scrutiny will still apply. It was precisely on this ground that the majority rejected the dissent's invocation of *O'Brien*. [82] So as long as the state's interest is in prohibiting discrimination, it will be able to compel the provision of expressive services to a customer, notwithstanding the business's objection. The corporate photography studio can be compelled to take photos of a Black family if it takes photos of White families.

Thus, expressive businesses cannot discriminate on the basis of the status of their customers, even if they object to the message that the act of selling an expressive service to that customer might send. A bakery that generally sells to the public birthday cakes reading "Happy Birthday" in icing could not refuse to sell such a cake to the family of a disabled child, even if the bakery owner objected to celebrating the lives of the disabled. The only difference between the products would be the identity of the recipient or user, and the state's interest in prohibiting such discriminatory treatment is "unrelated to the suppression of expression," and would plainly satisfy *O'Brien* intermediate scrutiny.

As we have seen, the majority in *303 Creative* simply repeated the Tenth Circuit's baseless assertion that Colorado's interest in applying CADA was in eliminating disfavored ideas.[83] The majority made no attempt to justify the charge, even as it was the linchpin of its rejection of *O'Brien*'s intermediate scrutiny. But as we have also seen, the Court (unlike the Tenth Circuit) did not suggest that *all* antidiscrimination statutes, or even all applications of CADA, are so motivated. Indeed, the Court's insistence that expressive businesses cannot discriminate on the basis of identity would not make sense if CADA were in fact aimed at the elimination of disfavored ideas in all circumstances; it would then be invalid on its face, not just as to this application.

While Gorsuch did not expressly advance this argument, a public accommodations law could be "unrelated to the suppression of expression," and subject to intermediate scrutiny in most circumstances, yet content-based in others. *303 Creative* and *Hurley* both invalidate "peculiar" applications of generally constitutional public accommodations laws. Even when a law generally regulates conduct in a content-neutral manner, a particular *application* of the law may be content-based. That appears to be how the Court viewed Colorado's law here. While the state's general interest in precluding discrimination in sales is content-neutral, when the law is applied to require a business, not to stop discriminating, but to create a unique message that the business objects to creating for anyone, that application is content-based.

This principle finds support in First Amendment law beyond public accommodations. In *Cohen v. California*, for example, the defendant was convicted

82. *303 Creative*, 600 U.S. at 600 n.6.

83. *Id.* at 584.

under a "breach of the peace" statute for wearing a jacket in court bearing the words "Fuck the Draft."[84] Even though a breach-of-the-peace statute is generally directed at conduct, not speech, the Supreme Court held that where the breach of the peace stemmed from what the words on the jacket communicated, that *application* was related to the suppression of expression, and therefore content-based. Had Cohen been convicted for screaming "Fuck the Draft" at the top of his lungs in court, so that the breach came about because of the volume of the words, not what they communicated, the state's interest would have been "unrelated to the suppression of expression" and *O'Brien* would have applied. But the breach, such as it was, stemmed only from the *content* of what the jacket communicated.

So, too, with public accommodations laws. As a general matter, they regulate the conduct of discrimination in sales. Therefore, when applied to expressive businesses they generally need only satisfy intermediate scrutiny under *O'Brien*. But where it is the *content* of the expression that triggers the government's interest, they may be treated as content-based. In *Hurley*, for example, the Court expressly recognized that as a general matter the Massachusetts public accommodations law at issue regulated conduct, but noted that in that particular application, it was being used not just to prohibit discriminatory conduct, but to compel inclusion of a specific banner to which the organizers objected no matter who carried it.[85] For that reason, the law's application triggered not intermediate, but stringent First Amendment scrutiny.

In short, *303 Creative* teaches that it is only when a public accommodations law is applied in a peculiar manner—not to prohibit discriminatory conduct, but to compel speech that the owner objects to providing for anyone—and does so in order to excise disfavored ideas, that it raises serious First Amendment concerns.

This reading makes sense not only of the *303 Creative* opinion itself, which repeatedly states that it is not licensing status-based discrimination, but also of the Court's broader jurisprudence in this area, none of which the Court overruled. *303 Creative* creates a narrow exception to antidiscrimination laws, where they are applied not to prohibit identity-based discrimination, but to compel a business to create a unique message that the business objects to providing to anyone. It does not mean that a caterer, florist, or baker can refuse to provide

84. 403 U.S. 15, 16 (1971).

85. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995) (explaining that the Massachusetts public accommodations law "does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds," but noting that "[i]n the case before us, however, the Massachusetts law has been applied in a peculiar way").

food, flowers, or a cake for a wedding merely because the participants are of the same sex and the vendor objects to the implicit message providing those services sends.

Indeed, as the U.K. Supreme Court decision suggests, this may not actually be an exception to antidiscrimination law at all. The refusal to make a "Support Gay Marriage" cake for anyone does not treat customers differently based on their sexual orientation: it equally denies the service to all.

To be clear, I do not think Colorado's interest, even as to this particular application, was in excising disfavored ideas or forcing the company to express the state's favored message. Nor do I think CADA's particular application to 303 Creative was content-based. Colorado repeatedly represented that Smith was entirely free to include whatever content she chose on her websites, and merely required her to treat all customers equally. The majority cited no evidence to the contrary. And without any concrete application of CADA to 303 Creative, it was not possible to know, as the majority nonetheless simply assumed, that the state would compel 303 Creative to provide a service to a gay couple that it objected to providing to anyone. But those are the facts as the majority saw them and upon which it rested its conclusion. And those facts therefore define—and limit—its holding.

As a result, the decision does not exempt any business from compliance with antidiscrimination laws simply because the business objects to the "message" compliance would send. To trigger strict scrutiny, the state's interest in a particular application must arise from what is being communicated and not from discriminatory conduct. Where that is not the case, and it won't be in the vast majority of applications of antidiscrimination laws, *303 Creative* creates no First Amendment exemption, regardless of how "expressive" a business is.

Nor does the decision stand for the proposition that any application of a public accommodations law to an expressive business is necessarily content-based. As noted above, a wedding-website service that offered a template to be filled out by the couple would be expressive, and might even be said to be "pure speech," but such a business could not announce that it would not serve gay couples getting married out of opposition to same-sex weddings, any more than a bakery could refuse to sell cakes bearing "Happy Birthday" messages to the families of disabled children based on the baker's opposition to celebrating disabled lives. In those instances, the state interest underlying the public accommodations law would be prohibiting discriminatory sales, not requiring the businesses to offer a service they would deny to everyone.

Thus, the decision in *303 Creative* rests on the distinction between constitutionally unprotected status-based discrimination and constitutionally protected message-based decision-making where the state seeks not to prohibit discriminatory conduct, but to excise disfavored ideas.

When it comes to expressive services that celebrate a particular individual or individuals, it can be difficult to draw the line. Is a refusal to design a wedding website for gay couples a status-based refusal to serve based on the identity of the customer, or a message-based refusal to design a website bearing a message celebrating same-sex marriage for anyone? If the majority's insistence that its decision does not permit status-based discrimination is to hold, courts must draw that line, and not allow businesses an end run around nondiscrimination mandates by simply repackaging status-based denials of service as message-based.

The distinction should be easy to draw with respect to final products. A bookstore can refuse to stock books on a particular subject matter, even if it does so along racial lines, but it must sell whatever it stocks to all. A Black power bookstore could stock only books on African American subjects. But it could not put up a sign reading, "No Whites Served Here."

Nor should it be difficult to draw the line with most expressive services. A sign painter can refuse to paint signs saying Black Lives Matter as long as he would refuse to paint such a sign for anyone, but cannot refuse to paint a sign he would paint for others because the customer or user is Black.

With expressive personal services, the line can be more challenging to draw, as *303 Creative* illustrates. But as noted above, a concrete application could have greatly clarified matters, revealing whether Smith truly objected only to particular messages, or objected to designing *any* wedding website for a gay couple. And the concrete application may also reveal whether the state's interest is in prohibiting the discriminatory treatment of customers, on the one hand, or in compelling the business to provide a service it would not offer to anyone.

Finally, to honor the distinction between message-based and identity-based refusals to serve, businesses should not be permitted to incorporate discrimination into the very definition of the service they provide. A bakery cannot define its service as "birthday cakes for white people" and thereby gain a First Amendment right to refuse to sell a birthday cake to a Black family. Similarly, a florist cannot say she designs flowers for opposite-sex weddings only, because she objects to the implicit message that selling her service to a gay couple might send. If the business has to know the identity of the customer in order to know whether it will provide a service, it is engaged in status-based discrimination, not protected speech.

Some might argue that this is precisely what 303 Creative did—it defined its service as "wedding websites celebrating opposite-sex weddings." Its broad request for an injunction shielding it from providing any wedding website for same-sex weddings gives credence to that point. But that is not how the majority viewed it. In its view, Smith was like the t-shirt designer who would not design a "Gay Pride" t-shirt for anyone. And for purposes of the decision's precedential

value, what matters is that the Court deemed her refusal to be based on a message she opposed expressing for anyone, and that the state's interest in compelling her to provide the service in any event was in excising disfavored ideas.

CONCLUSION

In the end, it is not clear that the majority and the dissent in *303 Creative* actually disagreed about the substance of the constitutional law that applied. The majority expressly proclaimed that it was not authorizing expressive businesses to discriminate based on the identity of their customers. And the dissent nowhere suggested that it would uphold a law requiring a business to provide an expressive service to gay customers that it would not provide to anyone, nor that it would bless a state law enacted for the purpose of eliminating disfavored ideas. The dissent would have struck down the Colorado law as the majority understood it to operate (suppressing disfavored ideas), and the majority would have upheld the law as the dissent understood it to operate (prohibiting only identity-based discrimination). The majority did not license identity-based discrimination, and the dissent did not suggest that states can require businesses to offer expressive services that they would not otherwise offer to anyone.

To the same effect, while Colorado formally lost the case, the Court's decision does not actually require the state to alter its general enforcement of its public accommodations law. The decision holds that the law cannot be applied to eliminate disfavored ideas, to require businesses to express the state's favored message, or to compel a business to sell a customized expressive service that the business would otherwise not offer for sale to anyone. But Colorado repeatedly stated that its law did none of that. Just as the majority said when the dissent accused it of authorizing status-based discrimination, so too can Colorado say to the Supreme Court, "[W]e do no such thing."

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