THE AMBIGUOUS NARRATIVE OF "EXPRESSIVE BUSINESS"

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I. INTRODUCTION

The terms "expressive conduct" and "expressive business" (also collectively referred to as "expressive") have become increasingly broad under the 303 Creative LLC v. Elenis 2023 Supreme Court decision.[1] Where to draw the line on which businesses may or may not deny services to a customer based on the First Amendment protections for expressive businesses has become blurred and broadened.[2] The Supreme Court's 303 Creative v. Elenis Opinion (the Opinion) provides legal grounds for certain public places of business, and businesses one typically does not view as expressive, to discriminate against members of the LGBTQ+ population by denying services.[3]

The negative policy and societal implications in the 303 Creative v. Elenis decision set a concerning precedent. Yet, the decision is binding. Businesses and consumers alike must be aware that businesses may use this case's precedent to deny services to LGBTQ+ customers if their ideologies do not align.[4]

Before citing 303 Creative v. Elenis as precedent, businesses must first be aware of the limitations of when a business is covered by the expressive business exemption to ensure compliance with the law. Using the interpretation of the text, prior case law, and the 11th Circuit "test" of whether a reasonable person would interpret a business's action as some sort of message, this article will attempt to dissect the vague definition of "expressive."

However, until a future Supreme Court holding explicitly defines "expressive business," it is up to businesses to decide how much trust they want to put in the definition being overly broad. Businesses must decide how much risk they want to take on for a Judge to see their work as arguably expressive.

First, historically relevant public accommodation laws and anti-discrimination policies set in place in the United States will be examined. Second, the 303 Creative v. Elenis majority decision will be analyzed to garner a better understanding of the decision and the lack of a concrete holding. Third, the types of businesses that may meet the 303 Creative v. Elenis criteria for an exemption under the public accommodations law will be analyzed. Fourth, the outlook after this case will be explored, with potential solutions briefly discussed.

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1. 303 Creative LLC v. Elenis, 600 U.S. 570, 600-01 (2023).

2. *Id.* at 602-03; Eduardo Gill-Pedro, *Protecting the Free Speech of Companies? The US Supreme Court Decision in 303 Creative LLC v. Elenis*, OXFORD HUM. RTS. HUB (Aug. 2, 2023), https://ohrh.law.ox.ac.uk/protecting-the-free-speech-of-companies-the-us-supreme-court-decision-in-303-creative-llc-v-elenis/.

3. *303 Creative LLC*, 600 U.S. at 596; Gill-Pedro, *supra* note 2.

4. *303 Creative LLC*, 600 U.S. at 636-38.

II. HISTORY OF ANTI-DISCRIMINATION POLICY AND PUBLIC ACCOMMODATION LAWS

A. Federal Protections

Federal anti-discrimination policies are at the forefront of the strongest protections against discrimination for protected, minority groups of individuals.[5] Without stringent policies and laws in place, people are free to discriminate and unjustly act against minority groups.[6] However, federal anti-discrimination public accommodation laws, including Title II of the Civil Rights Act of 1964 and Title III of the Americans with Disabilities Act of 1990 relating to public services, do not include sex or sexual orientation as a protected class.[7]

B. State Protections

As federal laws have yet to be amended to explicitly include sexual orientation as a protected class in consumer protection laws, states are tasked with implementing their own anti-discrimination laws to supplement the gap left by federal policies.[8] Forty-five states[9] and the District of Columbia have public accommodation laws that expressly prohibit discrimination based on sexual orientation and sex.[10]

Colorado is one such state that has a robust anti-discrimination law that outlaws any public accommodation discrimination (CADA).[11] CADA defines a public accommodation to include "any place of business engaged in any sales or offering services to the public."[12] CADA further states "[i]t is a discriminatory practice and unlawful for a person,

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5. *Government Discrimination: Equal Protection Law and Litigation*, Public accommodations, Gov. Discrim. § 13:6 (2024); 18 U.S.C.A. § 245 (West 1996); 42 U.S.C.A. § 2000a (West 1964); 42 U.S.C.A. § 12182 (West 1990).

6. *Government Discrimination: Equal Protection Law and Litigation,* Public accommodations, Gov. Discrim. § 13:6 (2024).

7. 18 U.S.C.A. § 245 (West 1996); 42 U.S.C.A. § 2000a (West 1964); 42 U.S.C.A. § 12182 (West 1990).

8. Bostock v. Clayton Cnty., 590 U.S. 644, 670 (2020); KAN. STAT. ANN. § 44-1001 (West); 14 C.J.S. Civil Rights § 85 (2024).

9. *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES, http://perma.cc/CP7B-AXX9 (last updated June 25, 2021). Alabama, Georgia, Mississippi, North Carolina, and Texas are the five states with no public accommodation laws providing protections on the basis of sex. *Id.*

10. *Bostock*, 590 U.S. at 683; KAN. STAT. ANN. § 44-1001 (West). Following the *Bostock* decision, multiple states, courts, and governmental agencies have begun to interpret sex as including sexual orientation, although this is not explicitly expressed in all statutes. Jon Davidson, *How the Impact of Bostock v. Clayton County on LGBTQ Rights Continues to Expand*, ACLU (June 15, 2022), https://www.aclu.org/news/civil-liberties/how-the-impact-of-bostock-v-clayton-county-on-lgbtq-rights-continues-to-expand.

11. COLO. REV. STAT. ANN. § 24-34-601 (West 2021).

12. *Id.*

directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sex, sexual orientation, gender identity, gender expression."[13]

While CADA appears on its face to protect LGBTQ+ individuals from the denial of services from businesses, it has limited authority to do so under the First Amendment when the services are considered "speech" by the business.[14] CADA has been the source of many lawsuits declaring it unconstitutional, with multiple lawsuits being filed in the Supreme Court against it.[15]

C. The Constitution

While these federal and state anti-discrimination laws provide protections for protected classes of individuals on the basis of race, religion, national origin, and other classes, these policies must not violate the Constitution.[16] The First Amendment provides that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."[17] Further, it has long been established that private citizens have the right to "expressive conduct" under the First Amendment of the Constitution.[18] All state laws and judges must comply with this provision and ensure no statute infringes on individuals' rights to these freedoms.[19] However, the right to freedom of speech has been expanded in its application in recent years.

To ensure that public accommodation laws do not conflict with the First Amendment, any public accommodation law must not abridge an individual's freedom of speech and expression.[20] But, where is the line drawn on what encompasses protected free speech? Like most of the Constitution, the First Amendment does not clearly define the hard line of free speech and allows case law to interpret the definition.[21] In the matter of freedom of speech and public accommodations laws, the freedom of speech provision can be used to severely limit the state's actions and abilities to afford equal rights to minorities. A plethora of cases

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13. *Id.* (emphasis added).

14. *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 406 F. Supp. 3d 1258, 1287-88 (M.D. Ala. 2019), *aff'd*, 6 F.4th 1247 (11th Cir. 2021), *cert. denied*, 142 S.Ct. 2453 (2021).

15. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n., 584 U.S. 617, 617 (2018).

16. U.S. CONST. art. VI, cl. 2; *303 Creative LLC*, 600 U.S. at 586-87.

17. U.S. CONST. amend. I, § 1 (emphasis added).

18. Spence v. State of Wash., 418 U.S. 405, 414 (1974) (holding the Washington flag misuse statute was unconstitutional when applied to a hanging of a privately owned American flag, upside down).

19. *See* U.S. CONST. art. VI, cl. 2.

20. *303 Creative LLC*, 600 U.S. at 584.

21. *See* U.S. CONST. amend. I, § 1.

attempt to explore where the line is in reference to freedom of speech, but none draw a hard line.[22]

III. 303 CREATIVE V. ELENIS

This section will now discuss the 303 Creative v. Elenis case background and decision to provide a better understanding of what went wrong in the decision and why the Supreme Court Justices had to decide the case in this manner.

The Supreme Court attempted to clarify when freedom of speech applies to business owners in the 303 Creative v. Elenis decision. Instead, the Supreme Court created a broader, more ambiguous policy. The Opinion also carved out an important exception to public accommodation laws for LGBTQ+ customers in state public consumer law statutes that expanded the Supreme Court's prior rulings against LGBTQ+ rights.[23]

For the first time in Supreme Court history, Supreme Court Justices held that businesses that provide expressive services can refuse customers on the basis of free speech under the First Amendment of the Constitution.[24] This landmark decision in 303 Creative v. Elenis stemmed from a Colorado graphic design company issuing a pre-emptive challenge against being forced to create a wedding website for a same-sex couple, which went against her beliefs and First Amendment rights.[25]

The Court held that CADA violates the First Amendment of the Constitution in certain situations.[26] Specifically, the ruling allows expressive businesses to deny services to customers, without legal penalty, and extends expressive conduct to "expressive businesses."[27]

While CADA is still upheld and the statute as a whole has not been declared unconstitutional, expressive businesses are now exempt from CADA. This exemption allows these businesses to lawfully deny services to customers if the services do not align with their ideology and their services fall under the expressive definition.[28] This decision sets concerning policy and societal implications that discrimination is legally accepted in certain businesses. The Opinion enforces prior notions that a

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22. *See also 303 Creative LLC*, 600 U.S. at 602-03; Boy Scouts of America et al. v. Dale, 530 U.S. 640, 656-60 (2000); Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 562-65 (W.D. Ky. 2020).

23. *Boy Scouts of America et al.*, 530 U.S. at 659-61; *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 639-40; *303 Creative LLC*, 600 U.S. at 592.

24. *303 Creative LLC*, 600 U.S. at 570-576.

25. *Id.*

26. U.S. CONST. amend. I, § 1; *Id.* at 598-03. The First Amendment of the United States Constitution protects freedom of speech and religion. U.S. CONST. amend. I, §1.

27. *303 Creative LLC*, 600 U.S. at 598-03.

28. Dakota Ball, *The 303 Creative Decision: Impacts, Realities, and Action*, EQUALITY OHIO (Aug, 9, 2023), https://equalityohio.org/the-303-creative-decision-impacts-realities-and-action/.

state, even on anti-discrimination grounds, cannot force a person to create speech that goes against that person's sincerely held beliefs.[29] Per the Opinion, the First Amendment does not include only "some speech," or speech that is not generally held out as "offensive."[30] It simply protects speech, and a commitment to some speech is not a commitment at all.[31] It is not the function of the Supreme Court to distinguish and decide what speech is deemed offensive.[32] Thus, the criteria for expressive business are not expressly defined.[33]

IV. IMPLICATIONS OF THE VAGUE HOLDING IN 303 CREATIVE

Before understanding the types of businesses and services that may and may not be denied, one must fully appreciate the vagueness in the 303 Creative v. Elenis holding's meaning of "expressive" to grasp the carefulness that must be employed when utilizing the decision as precedent.

The fatal flaw in 303 Creative v. Elenis rests on the Opinion failing to clarify exactly what an expressive business is.[34] While courts have attempted to clearly define expressive in private conduct matters, it has not been extended to business actions prior to this decision and has yet to be clearly defined in business matters.[35]

Without clear-cut criteria deciding whether or not a business is expressive, businesses may try to argue that they meet this unclear definition. Because of this, they will argue they do not need to provide services under the First Amendment, even if they do not qualify for the exception. In these instances, without the clear protection of the law, LGBTQ+ consumers will be unlawfully discriminated against. Further, even if these consumers file suit that businesses are unconstitutionally discriminating against them, without a clear basis to do so, there is no assurance as to how the case will turn out.[36] But the other side is also true. Some businesses that may meet this exception may be fearful of utilizing their First Amendment rights as they do not fully understand whether they are allowed to constitutionally refuse a customer if the business act goes against their beliefs. Businesses will be opening themselves up to

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29. *303 Creative LLC*, 600 U.S. at 592.

30. *Id.* at 602.

31. *Id.* at 603

32. *Id.* at 602.

33. Ball, *supra* note 28; Melissa Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, THE NEW REPUBLIC (June 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court. While standing is another issue of the decision, it will not be examined in this article.

34. *303 Creative LLC*, 600 U.S. at 591.

35. *Id.* at 593-595.

36. William Eskridge, *William Eskridge on 303 Creative v. Elenis Decision and Impact*, C-SPAN (Aug. 22, 2023), https://www.c-span.org/video/?529954-3/william-eskridge-303-creative-v-elenis-decision-impact.

potential litigation suits if they preemptively attempt to utilize the 303 Creative v. Elenis decision without first fully understanding the type of businesses it protects and the types of businesses it does not.[37] But what exactly falls under "expressive"?

V. WHAT CONSTITUTES EXPRESSIVE CONDUCT BY BUSINESSES?

A. The Historical Context of Expressive Conduct

Historically, the definition of expressive conduct has been laid out but has only been applied to private citizens' personal statements of rebellion.[38] Specifically, the cases discussing expressive conduct typically extend to matters such as the misuse of flags and official government documents.[39] In these cases, expressive conduct is defined as conduct that is obvious enough for a reasonable observer to infer a particularized message that the individual's speech was attempting to convey.[40] If speech explaining the message to accompany the conduct was necessary to convey its expressive nature, the conduct would typically not be considered expressive.[41] The Opinion states that "producing speech" is included in the protected actions of businesses so the Supreme Court's opinion on 303 Creative v. Elenis must be broader than this.[42]

B. Limited Definition of Expressive in 303 Creative

Next, we will attempt to clarify the definition of "expressive" using the Opinion. In the Opinion, Justice Gorsuch declares that all services from "pictures, films, paintings, drawings, and engravings," to "oral utterance and the printed word" qualify for First Amendment protections.[43] The Opinion goes on to point out words like "original, customized creation for each client,"[44] "creative professionals," "producing speech," and "unique services" in an attempt to describe exactly what it means to be an expressive business.[45] The majority declares (in what first appears to be an attempt to limit this decision) that states will continue to be legally authorized to uphold their public accommodation

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37. *Id.*

38. *Spence*, 418 U.S. at 401-11; United States v. O'Brien, 391 U.S. 367, 375-86 (1968) (holding that a criminal law banning burning a draft card did not violate the First Amendment, although burning a draft card as a protest against the Vietnam War constituted expressive conduct, since the government held a significant interest in protecting harm to the Selective Service System); *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1242-44.

39. *Spence*, 418 U.S. at 414; *O'Brien*, 391 U.S. at 386-87.

40. *Fort Lauderdale Food Not* Bombs, 901 F.3d at 1244.

41. *Id.*

42. *303 Creative LLC*, 600 U.S. at 590.

43. *Id.* at 587 (quoting *Kaplan v. California*, 413 U.S. 115, 119–120 (1973)). Gorsuch also references flags (*Shurtleff v. Boston*) and parades (*Hurley*).

44. *Id.* at 590-94 (quoting App. To Pet. for Cert. at 181a).

45. *Id.* at 590-94.

laws to protect LGBTQ+ people in a vast array of businesses.[46] Bringing all these fractured segments of the majority opinion together, the totality originally appears to state that the qualification of an expressive business may be limited to traditional artistic businesses.[47]

This idea fails however when the majority reminds us that the Boy Scouts are still considered an expressive business as, to some individuals, they offer a unique experience.[48] With this fact in mind, we must understand that the majority is attempting to define an expressive business but still provide a broader framework than that of only a traditional, artistic business, like a painter or photographer. The broadness of the term "expressive" in the Opinion and the example of the Boy Scouts results in implying the meaning of expressive business is a business that simply engages in conduct that is arguably expressive or artistic.

What is clear from the holding of 303 Creative v. Elenis is that traditional artistic businesses do fall under the "expressive business" exemption.[49] When a business is providing a clear-cut, unique, and original artistic product, that business may deny its services to LGBTQ+ customers on the basis of the business owner's faith.[50] These businesses include, but are not limited to, movie directors, muralists, and website designers.

While a graphic designer may not be forced to create a wedding website and a photographer may not be forced to photograph a wedding ceremony, under the 303 Creative v. Elenis decision, this does not give these same graphic designers and photographers the unilateral legal right to deny any service to any customer of their choosing.[51] The Supreme Court's guidance on whether a business may or may not discriminate likely rests on the 11th Circuit's test of whether the business is creating a unique, creative work product that a reasonable person would interpret as a message.[52]

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46. *Id.*

47. *Id.*

48. *Id.* at 592; *Boy Scouts of America et al.*, 530 U.S. at 658-61 (holding that the Boy Scouts of America was not required to allow members of the LQBTQ+ population as it interferes with the Boy Scouts of America's expressive message against the LGBTQ+ population); *Masterpiece Cakeshop*, 584 U.S. at 656.

49. *303 Creative LLC*, 600 U.S. at 590-94.

50. *Id.*

51. *Id.*

52. *Id.* at 592; Coral Ridge Ministries Media, Inc. v. Amazon.com, *Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021), *cert. denied sub nom.* Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453 (2022) (citing *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018)).

C. 11th Circuit Expressive Test

The 11th Circuit has identified a test to determine whether an action falls into the "expressive" class.[53] To determine whether something is expressive, the 11th Circuit "ask[s] whether the reasonable person would interpret [the action] as some sort of message, not whether an observer would necessarily infer a specific message" (the "test").[54] This test is likely the most definitive answer one will get to whether an action falls into the expressive class as it applies to 303 Creative v. Elenis. It is the closest a court has come to clearly defining what it means to be expressive, outside of an act of rebellion.[55] It is the closest concrete test one may use that encompasses the totality of what the Supreme Court is attempting to parse out in the Opinion.

Yet, it is important to note the limitations of this test, and why it should not be blindly relied on, but simply used as a tool. First, not all jurisdictions have adopted this test, and it is not binding. Second, this test was created in a non-business capacity. Third, this test still has not defined hard lines for when something is "a message". For these reasons, one must be careful in relying on this test. There is no guarantee as to how or if a Judge or jurisdiction will apply it.

VI. NEXT STEPS IN LIGHT OF THIS DECISION

A. Jurisdiction-Specific Determinations by the Court

With the power to clarify whether a business falls under the expressive exemption of a state public accommodation law resting on the Federal and State Courts, the jurisdiction may determine how the case is decided. More conservative states may interpret this ruling broadly, while more liberal states may construe this definition narrowly.[56] The inherent ambiguity of this Opinion leads to non-universal holdings on this issue, and uncertainty for businesses and consumers alike. This may result in the inability to exercise proper legal rights under public accommodation laws and the Constitution.[57]

Consumers and businesses will need to turn to the court system in an attempt to clarify this Opinion, but the court system itself will have difficulty deciding exactly how this Opinion applies to less, clearly

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53. *Coral Ridge Ministries Media, Inc.*, 6 F.4th at 1254.

54. *Id.* (quoting *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1240).

55. *Id.*

56. This has been seen in a California case narrowly interpreting the 303 Creative holding as only applicable to "pure speech" and not applicable to a preordered custom but multipurpose cake. C.R. Dep't v. Cathy's Creations, Inc., No. F085800, 2025 WL 457642 at 24 (Cal. Ct. App. Feb. 11, 2025).

57. Parents Defending Educ. v. Olentangy Local Sch. Dist. Bd. of Educ., 109 F.4th 453 (6th Cir. 2024), reh'g en banc granted, opinion vacated, 120 F.4th 536 (6th Cir. 2024)

defined creative businesses.[58] Court cases have already been brought forward on this topic, where the criteria for expressive becomes murkier. Such cases include parents against a public school district's ban on intentionally misgendering students and a private Christian preschool that claims anti-discrimination policies violate their First Amendment rights.[59] However, these cases are still in the process of being tried and appealed.[60]

A business with: (1) a legitimate concern that a customer is asking it to violate a closely held belief, and (2) a legitimate belief that it is an expressive business protected under its First Amendment rights, can first file a local court pre-emptive action for declaratory relief to confirm whether they fall under the expressive definition and may lawfully take this action under both the first amendment and its state statute.[61] By filing before denying these services, the business may ensure whether it meets the criteria for an exemption from its state's public accommodation law and avoid unlawful conduct.[62]

B. Potential Non-Legal Consequences for Businesses

While customers may not take legal action against an expressive business that lawfully denies them services, the customer may still take social action against the business, using their First Amendment rights to post on social media about the experience, reaching out to reporters to cover the denial on television, newspaper, or both, and completing other actions. While the business may not be subject to monetary legal fines, it must be cautious of the potential negative social impacts that could lead to negative monetary implications for the business.

The business at the heart of the 303 Creative v. Elenis decision received and continues to receive messages from people all over the United States unhappy with the fact that the business refuses to provide services to same-sex couples.[63] While the legal system can prevent the business from being forced to serve all customers, it cannot prevent consumers from expressing negative reactions to the business's decision.

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58. Human Rights Campaign, *This Is a Dangerous Decision. PERIOD. Supreme Court 303 Creative LLC v. Elenis Decision*, YOUTUBE (June 30, 2023), https://www.youtube.com/watch?v=N3O7H4tgC0I.

59. *Parents Defending Educ.*, 109 F.4th at 459; Darren Patterson Christian Acad. v. Roy, 699 F. Supp. 3d 1163, 1170 (D. Colo. 2023).

60. *Parents Defending Educ.*, 120 F.4th at 536; Darren Patterson Christian Acad., 699 F. Supp. 3d at 1163.

61. A. Declaratory Relief, RUTTER GROUP PRAC. GUIDE FED. CIV. PRO. BEFORE TRIAL CH. 10-A.

62. This course of action has been previously taken with multiple constitutional rights challenges. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1283; *303 Creative LLC*, 600 U.S. at 636-38.

63. 303 CREATIVE HOME PAGE, https://303creative.com/about/ (last visited Jan. 21, 2025).

VII. CONCLUSION

Until another case is accepted by the Supreme Court that forces the nine Justices to provide a clearer explanatory holding, businesses that are not clearly defined as expressive will need to tread carefully and weigh the benefits of denying services to customers, before doing so.

The Supreme Court had the ability to prevent the dilemma of this ambiguity by simply adding a paragraph providing a narrower definition of expressive as it relates to the constitutional exception to public accommodation laws. Instead, it is leaving the burden of untangling the broad meaning to the lower courts, businesses, and consumers alike.