
Legal Groups FAQ On *303 Creative v. Elenis* Supreme Court Decision

From: GLBTQ Legal Advocates & Defenders, National Center for Lesbian Rights, American Civil Liberties Union, Lambda Legal, Human Rights Campaign, Transgender Legal Defense & Education Fund, National Women's Law Center

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Though perhaps predictable, the loss in *303 Creative v. Elenis* was still a gut punch for the LGBTQ+ community. For the first time in history, the Supreme Court granted a constitutional right for some businesses open to the public to engage in discrimination. We know all too well the harm and stigma that may follow. And all of this comes at a time of ferocious backlash to the strides made by the LGBTQ+ community and targeting of transgender and nonbinary people in particular.

While this is another disturbing reversal of settled law, this opinion is not a free pass to discriminate. Please read on because there are real limitations to the decision which need to be publicized. And please look for updates from us as future challenges unfold.

1. What did the Supreme Court do in *303 Creative*?

303 Creative involved a graphic design business in Colorado that expressed a desire to create wedding websites for different-sex couples but did not want to provide the same service to same-sex couples. The business claimed that as part of the services provided, it would vet each customer to make sure that the owner could agree to their project based on her Biblical beliefs. The business also professed that it would create customized and original art, designs, and wedding story text for each couple. The messages on those websites would be the business' Because Colorado's nondiscrimination law obligates all places of public accommodation, including 303 Creative, to serve everyone regardless of sexual orientation, the business sued, asking the courts to declare that it was entitled to violate Colorado law.

Though the discrimination was motivated by the owner's religious beliefs, the only question before the Supreme Court was whether the business was entitled under the First Amendment free speech clause to discriminate. The Court's ruling relied heavily on the specific important facts above about who was making what and how. The parties to the case had also agreed that the business was a "public accommodation" and that the intended websites would be "pure speech."

The Court held that the owner could not be compelled to speak in support of a matter of "public importance" that she opposed: "The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees."

2. What impact will this decision have on my day-to-day life?

You should expect continuity in your day-to-day life. Whether you shop at a store or on-line, you should not expect to face discrimination, and you will have legal protections from discrimination by public accommodations in the 22 states and more than 100 cities that prohibit discrimination based upon sexual orientation or gender identity. This includes when you are buying groceries, hardware or school books, when you are going to a hair salon, pharmacy, or bank, and when you are renting an event space, eating

at a restaurant, or attending concerts, art exhibits, or movies. We also know that most businesses, even those that are arguably “expressive,” will continue serving everyone without discrimination. And *303 Creative* didn’t change any laws about discrimination in areas other than public accommodations -- such as healthcare, employment, and government services.

The overwhelming majority of businesses would have no claim under *303 Creative* because they are not creating “expressive designs speaking messages,” nor are they providing original and customized services. The Court confirmed that “there are no doubt innumerable goods and services that no one could argue implicate the First Amendment.”

3. Are LGBTQ people still protected from discrimination under state and local public accommodation laws after the Court’s ruling in *303 Creative*?

Yes, in the vast majority of instances.

The *303 Creative* decision may be an issue if you go to a business selling custom expressive messages, where you work together on creating some end product that is and expresses the provider’s ideas. Some businesses may provide expressive “pure speech” on terms similar enough to *303 Creative* that they are allowed to discriminate. Such businesses could then proclaim their legal permission to discriminate, and that will be jarring to say the least. But that’s simply not how most businesses operate. Most products are not expressive of the provider’s or creator’s own message even if making them involved some creativity.

Because the Court has opened this door, extremists may attempt to expand this decision by repackaging rank discrimination as “expression,” such as the hair salon owner in Michigan who said it won’t serve transgender and nonbinary patrons is trying to do. But the decision does not authorize businesses to declare that their opposition to the LGBTQ+ people community is itself protected expression worthy of constitutional deference. We are right to be concerned, and we are just as right to push back where most businesses sell neither “pure speech” nor “expressive designs speaking messages.”

4. What does this decision mean for employment, housing, credit, or other non-discrimination protections?

This was a case about public accommodations, involving an expressive business selling “pure speech.” It does not apply to any other area of nondiscrimination law.

5. Is marriage equality in danger because of this decision?

No. Fear is understandable but *303 Creative* and marriage involve different areas of law. Where *303 Creative* is about free speech and discrimination by private businesses, equal marriage is grounded in principles of fundamental rights and equal protection that apply to the government. Also, keep in mind that the “Respect for Marriage Act,” passed with bipartisan majorities and signed by President Biden, requires state and federal respect for married couples and their families without regard to sex, race, ethnicity and national origin.

It would be outrageous for the Court to eliminate the freedom to marry of same-sex couples and nothing in this decision or the majority decision in *Dobbs v. Jackson Women's Health Organization* questioned that freedom.

6. Does it matter that 303 Creative had never made wedding websites and apparently was never asked to do so for any same-sex couples?

It's true that this was an entirely hypothetical case. 303 Creative said it had neither made wedding sites nor had customers at the time of filing suit. Normally cases require a concrete dispute grounded in actual facts.

We have also learned that the alleged request that 303 Creative received from a gay customer was in fact from a married heterosexual man who denies making the request. This was not the basis for the Court's holding, but it does highlight the difficulty of deciding important constitutional cases in the abstract where there is no actual evidence of how the business will be run, how service will be provided, and whether the websites to be designed would indeed be the business' "pure speech." Unfortunately, there was no adversarial process here to bring contradictions to light, which is part of what makes this decision so concerning.

7. What should I do if I experience discrimination based on my sexual orientation or gender identity?

Check to see whether there is a state or local nondiscrimination law that applies to this business or service. Take notes of what happened. Feel free to call one of our helplines for assistance:

- GLBTQ Legal Advocates & Defenders: online at [GLAD Answers](#) (online intake form), email GLADAnswers@glad.org, voicemail 800-455-GLAD. Translation available
- National Center for Lesbian Rights Helpline: 800-528-6257, <https://www.nclrights.org/get-help/>
- ACLU: email helplgbtq@aclu.org
- Lambda Legal: Legal Help Desk: [Legal Help Desk - Lambda Legal](#)
- Human Rights Campaign: online [complaint portal](#) and email legal@hrc.org
- Transgender Legal Defense & Educ. Fund: info@transgenderlegal.org
- National Women's Law Center: <https://nwlc.org/legal-help/> (for students and workers dealing with sex harassment/discrimination)