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Blunt Speech Rights

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INTRODUCTION

There is a lot to be said about the Supreme Court's decision in *303 Creative LLC*. In the wake of the decision there will be a range of commentaries like those presented in this Issue. I want to draw attention to a particular aspect of the opinion, part of a broader trend in the Court's First Amendment jurisprudence, towards blunt, sweeping rules.[1] By a blunt rule, I mean a simple, coarse one that lacks nuance or distinctions. Blunt rules, by their nature, tend to be sweeping: nuance, that is, distinguishing cases based on various factors, limits the scope of a decision. Jamal Greene argues that blunt rulings are part and parcel with the general approach to constitutional jurisprudence of treating rights as trumps.[2] But I think there is more to it in this area of law than that. Sometimes a blunt, sweeping rule can be a good thing—simplicity has its virtues.[3] A simple, categorical rule can be easier to understand and apply, clearer, and better engage with the public. At the end of the day, though, *303 Creative LLC* does not fully deliver on those virtues.

I. A TREND IN FIRST AMENDMENT JURISPRUDENCE

Perhaps the clearest illustration of the Supreme Court's tendency towards blunt rulings when it comes to the First Amendment is *Citizens United*.[4] The main holding of *Citizens United*, that there are no carveouts in campaign finance law for corporations, is well-known. It is clearly a blunt rule—the very point of the decision is to remove a category (corporations) from special treatment. The Court's reasoning is

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[1] Robert Post, *Public Accommodations and the First Amendment:* 303 Creative *and "Pure Speech,"* 2023 S. CT. REV. 1, 1; *see also* Andrew Koppelman, *Why Gorsuch's Opinion in '303 Creative' Is So Dangerous*, AM. PROSPECT (July 12, 2023), https://prospect.org/justice/2023-07-12-gorsuch-opinion-303-creative-dangerous/ [https://perma.cc/N4WQ-5NEH].

[2] Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 34–35 (2018).

[3] *See, e.g.*, Nicholas Almendares, *The Undemocratic Class Action*, 100 WASH. U. L. REV. 611, 650 (2023).

[4] Citizens United v. FEC, 558 U.S. 310 (2010).

noteworthy in many ways.[5] The lynchpin is that the First Amendment permits no distinctions based on the identity of the speaker. Justice Kennedy's opinion invokes this idea over and over, so much so that the dissent chides him for it.[6] It is the foundational premise that he keeps coming back to and it all but decides the case.[7] It sets up speech rights as a blunt on/off switch. They apply the same way to any speaker; it's one size fits all.

We can imagine all sorts of ways we might distinguish between speakers, which *Citizens United* methodically rejects.[8] The Court dismisses out of hand the notion that the corporate form, and the legal advantages it confers, could justify distinct constitutional treatment.[9] Likewise, the Court resists treating political action committees (PACs) differently from ordinary, for-profit corporations. The argument, which had some traction in earlier cases, was that when a PAC or interest group spends money in politics, it distorts the marketplace of ideas less than when other entities do because their funds represent a rough indication of public support (both in numbers and intensity) for its political positions in a way that general corporate funds do not.[10] Apple's or Walmart's money is disconnected from its politics, whereas the Sierra Club's or National Rifle Association's is more closely tied to its political mission, or so the argument goes. Here, again, the Court rejects making distinctions, leading to a blunter rule.[11]

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[5] *See, e.g.*, Nicholas Almendares & Catherine Hafer, *Beyond* Citizens United, 84 FORDHAM L. REV. 2755, 2764–80 (2016).

[6] *Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part) ("The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation.").

[7] The other key argument in *Citizens United* is its treatment of potential compelling government interests. *Id.* at 340–41 (majority opinion).

[8] *E.g.*, *id.* at 352–53 ("At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.").

[9] After noting the advantages that corporations are granted by law, the Supreme Court states: "This does not suffice, however, to allow laws prohibiting speech. 'It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'" *Id.* at 351. The sentence the Court quotes comes from Justice Scalia's dissent in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 680 (1990), which *Citizens United* overrules.

[10] *Austin*, 494 U.S. at 659–60, *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010); McConnell v. FEC, 540 U.S. 93, 205 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010); *see also Citizens United*, 558 U.S. at 331 ("The holding and validity of *Austin* were essential to the reasoning of the *McConnell* majority opinion.").

[11] As Kennedy puts it in *Citizens United*:

> It is irrelevant for purposes of the First Amendment that corporate funds may have little or no correlation to the public's support for the corporation's political ideas. All speakers, including individuals and the

Continuing this theme, Kennedy asserts that making distinctions amongst speakers so as to treat corporations differently would mean that media corporations could, potentially, be subject to these laws.[12] Such a rule would even allow the government to ban books, a traditional bugbear in First Amendment law.[13] This is, of course, a slippery slope argument, a mode of reasoning that is prominent in *303 Creative LLC*,[14] and is another example of the Court's discomfort with nuanced distinctions when it comes to speech. There is also something curious to it: it admits for the sake of argument the possibility of making one distinction, treating corporations differently from other speakers, but not further distinctions between types of corporations (e.g., a special rule for media corporations). In *Citizens United*, the Court goes so far as to indicate that wealth itself qualifies as a forbidden distinction: "The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."[15] If that is true, though, then it would seem that any limit on political spending would be unconstitutional on its face.

Other distinctions or mitigating facts were similarly set aside by the Court. Nothing stops a corporation from setting up a political action committee, for instance.[16] In fact, the petitioners already had a well-funded one.[17] Likewise, it was not deemed important that the speech restrictions were for only limited periods in the run-up to elections or primaries.[18] *Citizens United* is not the only case where the Supreme Court elevates simplicity when it comes to speech rules. *FEC v. Wisconsin Right to Life, Inc.*[19] also calls for a blunt, easy to apply rule when it comes to speech.[20] In these cases the Supreme Court favored straightforward, categorical rules that admit few deviations.

II. *303 CREATIVE LLC* AS A BLUNT, SWEEPING RULE

303 Creative LLC displays the same tendency as *Citizens United*. It is another blunt, sweeping decision with few distinctions in the area of speech rights. It is worth

> media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.

Citizens United, 558 U.S. at 351.

[12] *Id.* at 351–53.

[13] *Id.* at 349.

[14] Greene traces the tendency to invoke a slippery slope argument as a categorical mode of constitutional discourse. *See* Greene, *supra* note 2, at 56, 62.

[15] 558 U.S. at 350.

[16] *Id.* at 337–38.

[17] *Id.* at 393, 419 (Stevens, J., dissenting in part and concurring in part).

[18] *Id.* at 337 (majority opinion).

[19] *See generally* 551 U.S. 449 (2007).

[20] *Id.* at 468–69, 473–74; *id.* at 492–93 (Scalia, J., concurring).

reiterating that *303 Creative LLC* is a speech decision, not a religion one. While petitioner Lorrie Smith asserted that designing websites for same-sex couples would violate her religious rights,[21] the decision rests on prohibitions against compelled speech.

In an opinion by Justice Gorsuch, the Supreme Court largely eschews the familiar tiers of scrutiny we expect to see in speech cases. There is little discussion of the government's compelling interest or whether the Colorado Anti-Discrimination Act (CADA) is narrowly tailored to its end. The opinion makes some reference to the purpose behind the law, characterizing its "very purpose" as "the coercive elimination of dissenting ideas about marriage."[22] If that is the purpose, though, then that would largely decide the case in and of itself since that presumably does not constitute a compelling government purpose,[23] assuming strict scrutiny applies.[24] Instead of this mode of analysis, the heart of *303 Creative LLC* is a compact, elegant syllogism. It can be summed up as: the First Amendment categorically forbids compelled speech, and the wedding websites in this case, by stipulation, qualify as such.[25] Forcing Smith, or anyone else, to design websites for any and everyone would constitute compelled speech and is therefore unconstitutional. On this formulation, there is no need for the machinery of strict scrutiny; the categorical prohibition on compelled speech does not seem sensitive to the government's interest, compelling or not.[26]

It bears underscoring how sweeping the compelled speech framing ends up being. If the decision was framed in terms of religious liberty, then it might be confined to sincerely held religious convictions. Compelled speech, on the other hand, covers *any proposition*.[27] It should include matters both great and trivial as well as positions that the speaker even *agrees with*. Just because someone believes something does not mean they want to be compelled to say it. The decision is clearly broader than it has to be to achieve the result. *303 Creative LLC* occasionally gestures towards the importance, both personal and societal, of the speech in question.[28]

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[21] 303 Creative LLC v. Elenis, 600 U.S. 570, 589–90 (2023).

[22] *Id.* at 588. This observation is drawn from the Court of Appeals' assessment of CADA as well as some previous case law. *See* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 578–79 (1995). *But see* Post, *supra* note 1, at 13–14 n.47.

[23] *See, e.g.*, *Hurley*, 515 U.S. at 578–79.

[24] There is some discussion of whether the imposition on speech is merely incidental, which could affect whether strict scrutiny was appropriate, that Gorsuch concludes is resolved by the parties' stipulations. *303 Creative LLC*, 600 U.S. at 593–94.

[25] Post, *supra* note 1, at 14.

[26] Contrast the approach taken in *303 Creative LLC* with the one the Roberts Court adopted in *Citizens United* and *Williams-Yulee*, where the discussion of what did and did not count as a compelling government interest played a central role in the analysis. Almendares & Hafer, *supra* note 5, at 2764; Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445–47 (2015).

[27] *See 303 Creative LLC*, 600 U.S. at 638–39 (Sotomayor, J., dissenting).

[28] *See id.* at 596 (majority opinion) ("[A]bout a question of political and religious

It is unclear how this fits into the opinion's logic because it is not part of the main syllogism—it could be an essential part of the ruling or dicta.[29] Further, this would seem to mostly leave the decision of what counts as sufficiently important up to the speaker[30] and what counts as a "major" issue has, of late, been hotly debated at the Supreme Court.[31] We can imagine other distinctions that could be made in addition to limiting the principle to speech at odds with one's religious beliefs. Commercial speech could be treated differently than other forms of speech, which the Court rejects.[32] Or, whether there were ready substitutes available, i.e., whether same-sex couples could easily find someone offering the same services, could be an important factor.[33] Like *Citizens United*, though, *303 Creative LLC* treats nearly all speech, regardless of content or context, the same. It lays down a blunt, categorical rule.

To be fair, *303 Creative LLC* does impose some limiting distinctions, which Robert Post explicates.[34] For my purposes here, I think the key criteria is that the service is primarily expressive and understood to involve the seller's own expression. This rules out restaurants (not expressive) and booksellers (not the retailer's expression) but includes movie directors[35] and, by stipulation, website designers. These distinctions may come from the websites being designated "pure speech."[36] Such a classification could serve to distinguish *303 Creative LLC* from a case like *O'Brien*,

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significance."); *id.* at 598 ("[C]oerce an individual to speak contrary to her beliefs on a significant issue of personal conviction . . . ."); *id.* at 602–03 ("In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance.").

[29] Consider the following statement in the majority opinion: "A commitment to speech for only *some* messages and *some* persons is no commitment at all. . . . The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish." *Id.* at 602–03; *see also* Post, *supra* note 1, at 25–26 (pointing out instances where people are compelled to speak about such matters).

[30] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 700, 721 (2014); *id.* at 724 ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.").

[31] *Cf.* West Virginia v. EPA, 597 U.S. 697, 724 (2022) ("[T]his is a major questions case."); *id.* at 774 (Kagan, J., dissenting) ("The Clean Power Plan was not so big. It was not so new. And to the extent it was either, that should not matter."). What constitutes something major or significant may be in the eye of the beholder. Consider the *West Virginia* dissent's argument: "The majority states, for example, that the rule would have 'reduce[d] GDP by at least a trillion 2009 dollars by 2040.' That sounds like a lot, but it is in fact 'equivalent to changes of a few tenths of 1 percent from baseline.'" *Id.* at 774 n.6.

[32] *303 Creative LLC*, 600 U.S. at 593–94.

[33] Gorsuch gestures towards this but does not make much of it. *See id.* at 590; *see also id.* at 610 (Sotomayor, J., dissenting).

[34] Post, *supra* note 1, at 15–21.

[35] The Court also includes speechwriters here. *303 Creative LLC*, 600 U.S. at 594. But a speechwriter might plausibly be seen as a "hired gun" and their work as their client's speech and not their own.

[36] Post, *supra* note 1, at 14–15.

which upheld a punishment for destroying a draft card during an anti-war protest on the grounds that while the conduct, in that case, was undoubtedly expressive, the main purpose behind the law was not to curtail speech.[37] However, Post notes: "'Pure speech' is not a technical or well-defined term of First Amendment jurisprudence. Gorsuch apparently means by it roughly 'speech' in the ordinary sense of the word."[38] Throughout the opinion, Gorsuch uses terms like pure speech, speech,[39] expressive activity,[40] and so on seemingly interchangeably.

But *303 Creative LLC* may have even broader implications. Many professions and transactions entail speech—it saturates our lives.[41] The majority opinion leans heavily on precedents involving "expressive associations." Sometimes, membership or participation is expressive in and of itself, and the Court states: "Equally, the First Amendment protects acts of expressive association."[42] Therefore, even if speech is not the defining characteristic of the transaction, the First Amendment's stark prohibitions against compelled speech could still apply. Speech is not the primary stock in trade for the Boy Scouts: they are not in the business of producing bespoke websites[43] or art installations. Yet *Boys Scouts v. Dale*[44] figures prominently into Gorsuch's opinion,[45] and that organization is one which benefits from First Amendment protections against compelled speech.[46]

As Gorsuch explains, "there are no doubt innumerable goods and services that no one could argue implicate the First Amendment."[47] However, there remain plenty—maybe not innumerable, but still a lot—of transactions that plausibly involve expression *or* expressive association. An incomplete list of the questions left open by *303 Creative LLC* includes:

- Lawyers would seem to be an easy example. They produce "original, customized" speech on behalf of their clients.[48] Can a lawyer refuse to

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[37] United States v. O'Brien, 391 U.S. 367, 377 (1968). The analogue to *O'Brien* that the Court turns to in *303 Creative LLC* is *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). *303 Creative LLC*, 600 U.S. at 596.

[38] Post, *supra* note 1, at 14.

[39] *See 303 Creative LLC*, 600 U.S. at 579.

[40] *See id.* at 596–97.

[41] *E.g.*, Post, *supra* note 1, at 25 ("[V]irtually all human relationships are constituted by speech.").

[42] *303 Creative LLC*, 600 U.S. at 586.

[43] "The websites and graphics Ms. Smith designs are 'original, customized' creations . . . . Those wedding websites will be 'customized and tailored.'" *Id.* at 582 (stipulations by the parties).

[44] *See generally* 530 U.S. 640 (2000).

[45] *See 303 Creative LLC*, 600 U.S. at 584, 586, 589, 592, 600 n.6.

[46] *Id.* at 586, 589, 592.

[47] *Id.* at 591 (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 632 (2018)).

[48] *Id.* at 582.

serve a client at will? Can ethics rules still compel them to find substitute representation if they do?

- What about architects? Designing buildings can certainly be expressive. Could designing a building constitute expressive association?
- Realtors? A sales pitch might be tailored to a specific client and is the speech of the realtor. Would compelling them to give their spiel to clients constitute compelled speech? Would this apply to sales in general?
- Advertising? *303 Creative LLC* carves out "purely factual and uncontroversial information, particularly in the context of commercial advertising."[49] That would seem to cover something like nutrition labels or drug facts.[50] Anti-fraud, defamation, and other rules may require a lot more.
- Securities regulation relies primarily on disclosure. Is this kind of compelled speech now unconstitutional?
- What about associations? Can a law firm or other association refuse a position to anyone on forced expression grounds?
- Noncompete agreements? Could *compelled silence* be imposed against someone in a career that entails speech or expressive activity?
- Finally, what does *303 Creative LLC* portend for Kennedy's proposed disclosure regime as a way of addressing money in politics,[51] which seems to be one of the few constitutionally permissible means of doing so.[52]

As this list indicates,[53] the sweep of *303 Creative LLC* could be extraordinarily broad. The Supreme Court declines to sort all this out for us, offering little guidance as to how *303 Creative LLC*'s principles are to be applied.[54] Gorsuch explains that

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[49] *Id.* at 596 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995)).

[50] Although these may be a far cry from uncontroversial. *See, e.g.*, Johnny Diaz, *Pennsylvania Doctor Accused of Prescribing Ivermectin for Covid Is Fired*, N.Y. TIMES (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/us/pennsylvania-doctor-ivermectin-fired.html?searchResultPosition=1 [https://perma.cc/TRE2-FRYA]; Alyssa Lukpat & Emma Goldberg, *Some Americans Ignore Warnings Against Using Ivermectin to Treat Covid*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/09/05/us/ivermectin-health-experts.html [https://perma.cc/22YJ-JPGS].

[51] Citizens United v. FEC, 558 U.S. 310, 369–70 (2010). *But see* Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 611–12 (2021).

[52] For other proposals, see generally Almendares & Hafer, *supra* note 5.

[53] This list is by no means exhaustive. Post includes jury duty, medical and legal advice, education, and tax returns as further examples of compelled speech. Post, *supra* note 1, at 46–47.

[54] There are other examples of Supreme Court cases with sweeping implications that are not fully addressed. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 540–44 (2010) (Breyer, J., dissenting); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 893–98 (2009) (Roberts, C.J., dissenting).

the case itself is all but settled by the parties' stipulations.[55] So, the Court refuses to be cast "adrift on a sea of hypotheticals."[56] That is a curious position given that the majority opinion entertains many hypotheticals and the very case is, itself, hypothetical.[57] Observers and lower courts alike might wonder how a case without such elaborate stipulations might play out.

III. THE VIRTUES AND VICES OF SIMPLICITY

I have argued that *303 Creative LLC* establishes is a blunt, sweeping rule, which will undoubtedly have profound consequences going forward. I also connected the blunt, categorical approach taken in *303 Creative LLC* to a broader trend in speech law: a majority of justices in recent years have favored simplicity over nuance when it comes to speech rights. Blunt, simple law, even blunt, simple constitutional law, is not altogether a bad thing.[58] Simplicity has its virtues. All else being equal, simple rules are easier to understand. That makes them easier to both follow and apply, which would help both speakers and courts. The public, possibly mediated through interlocutors like academics and reporters, can better understand a simple rule and are better able to evaluate the justifications behind it.

I find it hard, however, to say that *303 Creative LLC*, or *Citizens United* for that matter, really delivers on these virtues. Simplicity is most important when people must make immediate, snap judgments, such as with search and seizure rules.[59] *303 Creative LLC* is directed, essentially, at the Colorado Civil Rights Commission—a sophisticated legal actor that gets to carefully consider cases and issue its own rulings.[60] It should be more than capable of managing a complex rule, especially in the area of its own specialized expertise.

Simple rules are generally easier to apply. Clarity and consistent application are especially important when it comes to the First Amendment because of the potential to chill speech. In other words, overdeterrence is especially problematic when it comes to regulating speech. However, while *303 Creative LLC* lays down a fairly blunt rule, it is surprisingly vague.[61] As noted above, there is an array of open questions.

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[55] 303 Creative LLC v. Elenis, 600 U.S. 570, 599 (2023).

[56] *Id.*

[57] Smith had not started her wedding website design business prior to the litigation. *Id.* at 580.

[58] Robert Post argues that simple, one size fits all rules are inappropriate for speech. Post, *supra* note 1, at 1.

[59] *E.g.*, Graham v. Connor, 490 U.S. 386, 396–97 (1989).

[60] *Colorado Civil Rights Commission*, COLO. DEP'T OF REGUL. AGENCIES, https://ccrd.colorado.gov/ccrd-home/regulatory-information/colorado-civil-rights-commission [https://perma.cc/YWQ7-EW7S] (last visited Apr. 30, 2024).

[61] Robert Post puts it forcefully:

> The category of "pure speech" is such a blunt doctrinal instrument that it contradicts Gorsuch's stated ambition to leave most public

Gorsuch indicates that most public accommodation laws will remain undisturbed.[62] But, if that is the case, then such a blunt, sweeping rule seems inapt. The most likely result is a proliferation of lower court opinions with different assessments of what the First Amendment now requires.

Finally, consider how the public views *303 Creative LLC*. A simple ruling should facilitate public understanding and assessment. Is the Supreme Court's vision of the First Amendment something the people want to sign on to? Barry Friedman maintains that at its best the Supreme Court helps shape and reify the people's understanding of the Constitution and their rights.[63] A simpler opinion facilitates dialogue between the people and the judiciary. There is a genuine clash of values in this case.[64] Yet the majority opinion, especially, is a precedent-laden affair, and the key thing, I think, is that the precedent in this case is divided. On one side of the ledger are cases like *Dale*, on the other there are cases like *Hishon*.[65] Perhaps unsurprisingly, precedent settles little in this case. *303 Creative LLC* thus represents a missed opportunity. The Supreme Court could have better helped us sort out what kind of society we want to live in.

> accommodations laws in place. *303 Creative* is in this sense at war with itself. The ambiguity gives ample room for lower courts to pick at the bones of all public accommodations laws. One can safely predict that *303 Creative* will be erratically applied to produce arbitrary and politically slanted outcomes.

Post, *supra* note 1, at 35.

[62] *See 303 Creative LLC*, 600 U.S. at 591–92, 598 n.5.

[63] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 367–68, 381–85 (2009).

[64] This arguably undermines the justification for having the judiciary decide the issue in the first place. Richard Fallon, *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1730–31 (2008).

[65] *See generally* Hishon v. King & Spalding, 467 U.S. 69 (1984). As Justice Sotomayor notes in her *303 Creative LLC* dissent, this case is especially important as it involves a law firm, whose services are clearly expressive. *303 Creative LLC*, 600 U.S. at 622–23 (Sotomayor, J., dissenting).