MEMORANDUM

To: Interested Parties

From: Joshua Perry
Solicitor General / Chief of the Division of Appeals

Date: July 11, 2023

Subject: **Guidance: Protecting LGBTQ+ Rights in Connecticut After *303 Creative***

Many Connecticut residents were hurt and angered by *303 Creative v. Elenis*, the U.S. Supreme Court's recent decision allowing a web designer to refuse to create original, custom-designed wedding websites for same-sex couples.[1] *303 Creative* was wrongly decided, and sent a frightening and deeply painful message to LGBTQ+ people in Connecticut and across the country.

But the Supreme Court did not erase hard-won protections for Connecticut's LGBTQ+ community. This preliminary memorandum highlights *303 Creative*'s limited impact here. Strong state and federal anti-discrimination laws continue to protect LGBTQ+ people in Connecticut.[2] Attorney General William Tong and the Office of the Connecticut Attorney General will continue to stand with LGBTQ+ people against hate and discrimination.

Connecticut Businesses Must Not Illegally Discriminate Against LGBTQ+ Customers

In the vast majority of instances, Connecticut businesses must continue to follow state and federal laws that forbid illegal discrimination against LGBTQ+ people. A review of *303 Creative*'s logic and facts shows why the decision has such limited reach.

303 Creative came out of Colorado, which (like Connecticut) forbids "public accommodations" from discriminating against people who are—or who are perceived to be—LGBTQ+. A public accommodation is "any establishment" that "caters or offers its services or facilities or goods to the general public."[3] In Colorado (again, like in

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[1] *303 Creative v. Elenis*, 21-476, 600 U. S. _____, 2023 U.S. LEXIS 2794 (2023).

[2] For an overview of Connecticut's anti-discrimination laws protecting LGBTQ+ people, *see* GLAD, *Know Your Rights: LGBTQ+ Discrimination in Connecticut*, https://www.glad.org/kyr-lgbtq-ct/ (last visited July 5, 2023).

[3] Conn. Gen. Stat. § 46a-63.

Connecticut) public accommodations may not deny equal service and treatment based on sexual orientation, gender identity, or gender expression.[4]

The owner of 303 Creative, a Colorado-based web design company, agreed that she was generally obliged to serve LGBTQ+ people. But she sought a narrow exception to the state's public accommodation laws because she did not want to create original wedding websites—with custom-designed artwork and language—for same-sex couples. Making those specially commissioned websites, she argued in a federal lawsuit, was her unique form of expression. And, under the First Amendment's free speech guarantee, she could not be forced to express a message that she rejected.

Six justices of the Supreme Court agreed. But even those justices did not question "the vital role public accommodations laws play in realizing the civil rights of all Americans."[5] Instead, they carved out an exception for the extremely rare facts in *303 Creative*: A commercial service where an artist accepts carefully vetted commissions to create custom-tailored, original works of expressive "pure speech."

Attorney General Tong joined an *amicus* brief in *303 Creative* defending LGBTQ+ rights, and we continue to believe that the Court's majority was wrong. First: A commercially created wedding website is not the designer's own speech. The message on the site is the couple's message of celebration, not the designer's. Second: The majority broke from precedent. Anti-discrimination laws have been understood to forbid conduct—the act of discriminating—not speech.[6] And Colorado's public accommodations law did not compel the web designer to speak. Instead, she chose to offer her commercial speech for hire. The state law simply barred her from turning away LGBTQ+ people seeking a service that she voluntarily offered to everyone else.

Even on its own terms, though, *303 Creative* is strictly limited to its unusual facts. Most significantly:

- The decision does not cast doubt on the constitutionality of most anti-discrimination laws, since most businesses and services are nothing like the customized, tailored, "pure speech" in *303 Creative*. *303 Creative* does not, for instance, allow an event space to refuse to host a wedding for an LGBTQ+ couple, or a stationary store to refuse to sell them off-the-shelf invitations.

- The decision creates no right to religious discrimination. *303 Creative* was a free speech case, not a freedom of religion case. It does not allow business owners to

[4] 2021 Colo. Ch. 156, 2021 Colo. HB. 1108 (May 20, 2021).

[5] *303 Creative*, 2023 U.S. LEXIS 2794 at *27.

[6] *See 303 Creative*, 2023 U.S. LEXIS 2794 at *78 (Sotomayor, J., dissenting) ("[T]he focal point of its prohibition is on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services.") (emphasis in original; cleaned up).

discriminate because of religious or philosophical objections to same-sex marriage or to LGBTQ+ identity.[7]

Of course, the decision's narrow scope does not alleviate the very real pain of people who are subjected to discrimination. Nor can it tamp down the frustration of those who correctly believe courts should never sanction bigotry. But it does mean that the decision's practical effect in Connecticut should be relatively limited, leaving most businesses and other institutions subject to anti-discrimination laws in all their services and activities.

303 Creative Leaves Intact a Broad Range of Other Protections for LGBTQ+ People in Connecticut

303 Creative only spoke to a narrow subset of "public accommodations." All other anti-discrimination laws, state and federal, remain entirely untouched. For instance, even after *303 Creative*:

- *Marriage equality remains the law*. It is protected by the U.S. Constitution, the Connecticut Constitution, and state law. A federal statute requires other states to respect same-sex marriages that are legal in Connecticut.[8]

- *Employers cannot discriminate against LGBTQ+ employees*. Federal and state laws prohibit employers from discriminating against LGBTQ+ employees based on sexual orientation or gender identity and expression.[9]

- *It is illegal to discriminate against LGBTQ+ people in housing and credit decisions*. Connecticut law forbids financial institutions from discriminating based on sexual orientation or gender identity/expression.[10] Discrimination against LGBTQ+ people in residential housing transactions—including listing, buying, selling, and renting—is also illegal.[11]

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[7] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("[I]t is a general rule that such 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] *Obergefell v. Hodges*, 576 U.S. 644 (2015) (federal constitution); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135 (2008) (state constitution); 2009 Conn. Public Act 09-13 (state law); Respect for Marriage Act, Public Law 117-228 (2022) (federal and interstate recognition).

[9] Conn. Gen. Stat. § 46a-81c(1) (forbidding sexual orientation discrimination in employment); Conn. Gen. Stat. § 46a-60(a) (forbidding discrimination based on gender identity or expression); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Title VII of the federal Civil Rights Act of 1964 prohibits employment discrimination based on LGBTQ+ status).

[10] Conn. Gen. Stat. §§ 46a-81f (sexual orientation), 46a-66 (gender identity/expression).

[11] Conn. Gen. Stat. § 46a-64c.

- *Connecticut's hate crime laws protect LGBTQ+ people.* Connecticut's criminal laws deter and punish hate crimes – including intimidation and violence – based on anti-LGBTQ+ bigotry or bias.[12]

What Comes Next? Vigilance and Resolve

303 Creative lands at a time when many LGBTQ+ people already feel that courts and state governments have turned on them. Not Connecticut's courts, and not Connecticut's government.

Connecticut's Office of the Attorney General remains a staunch ally of LGBTQ+ people, here and across the country. In the past few years, our work has included filing briefs opposing an Alabama law that prevents youth and their parents from choosing medically indicated, gender-affirming care[13]; a West Virginia law that categorically bars transgender girls from participating in high-school sports[14]; and Florida's notorious "don't say gay" law, which blocks schools from even mentioning LGBTQ+ issues.[15]

The Office will continue to fight for the rights of LGBTQ+ people. That means staying vigilant to ensure that courts do not further erode civil rights and that businesses do not incorrectly take *303 Creative* as a license to discriminate. We will continue to engage, in courts across the country, to protect LGBTQ+ rights. And we are prepared to use our civil rights enforcement jurisdiction—which this Attorney General asked for and the General Assembly created in 2021[16]—to go on offense for LGBTQ+ residents.

[12] Conn. Gen. Stat. § 53a-181i-181l.

[13] *Eknes-Tucker v. Alabama*, 22-11707 (11th Cir.).

[14] *B.P.J. v. West Virginia State Bd. of Ed.*, 23-1078 (4th Cir.).

[15] *M.A. v. Florida State Bd. of Ed.*, 22-cv-134 (N.D. Fla.).

[16] 2021 Conn. Public Act 21-128 (encoded at Conn. Gen. Stat. § 3-129g).