DOES THE DISCOURSE ON *303 CREATIVE* PORTEND A STANDING REALIGNMENT?

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Perhaps the most surprising feature of the last Supreme Court Term was the extraordinary public discourse on 303 Creative LLC v. Elenis. *According to many commentators, the Court decided what was really a "fake" or "made-up" case brought by someone who asserted standing merely because "she worries." As a doctrinal matter, these criticisms are unfounded. But what makes this episode interesting is that the criticisms came from the legal Left, which has long been associated with expansive principles of standing. Doubts about standing in* 303 Creative *may therefore portend a broader standing realignment, in which liberal Justices become jurisdictionally hawkish. In the past, Justices who found themselves out of power have often tried to tighten justiciability principles. So, now that the Court has shifted decidedly rightward, it makes some sense for there to be an ideological reversal on federal court jurisdiction.*

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INTRODUCTION

303 Creative LLC v. Elenis[1] was a major ruling on free expression and antidiscrimination law, one whose implications are both unclear and potentially troubling. Yet an enormous amount of critical discussion about the case has focused on its procedural aspects rather than its merits holding.[2]

For jurisdictional issues like standing to consume public attention is remarkable, especially when there was so much else to talk about and criticize at the Court that week, to say nothing of the merits holding in *303 Creative* itself.[3] Something interesting is going on here.

I will try to untangle the different threads of procedural criticism regarding *303 Creative*. My basic conclusion is that, under existing caselaw, the Court had ample authority to reach the merits in *303 Creative*. Moreover, I see no clear reason why that conclusion is undermined by any postdecision factual discoveries to date, or any other objection.

In short, there is no procedural scandal here. Declining to reach the merits in *303 Creative* would have changed governing precedent and legal practice much more than what the Court actually did.

The discourse surrounding *303 Creative* is especially remarkable because the Left has long been associated with permissive principles of federal court jurisdiction.[4] Left critiques of *303 Creative* thus suggest the possibility of a broader standing realignment, in which the legal Left becomes jurisdictionally hawkish.

Standing realignments have happened before.[5] As power at the Supreme Court has shifted right and then left, dissenters have pressed jurisdictional limits on federal court authority. Now that the Court has shifted rightward again, we may be on the cusp of another ideological reversal on federal court jurisdiction. In fact, some recent rulings, such as the student loan case, indicate that a standing realignment is already well underway.[6]

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1 143 S. Ct. 2298 (2023).

2 *See infra* Section I.A.

3 *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355 (2023); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

4 For example, the Left has been associated with taxpayer standing and citizen standing. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 162–64 (2011) (Kagan, J., dissenting) (supporting standing under *Flast v. Cohen*, 392 U.S. 83 (1968)); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 269 (1988).

5 *See generally* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 592 (2010) ("After 1940, the political valence of the standing doctrine reverses . . . .").

6 *Nebraska*, 143 S. Ct. 2355; *see infra* Section III.B.

In that respect and others, the surprising discourse on *303 Creative* may be a harbinger of cultural and legal changes yet to come.

I. STANDING

Let's start with the main legal issue: did the plaintiff in *303 Creative* have standing to challenge Colorado's antidiscrimination laws?

A. "She Worries"

Here are the case's key facts. A web designer in Colorado named Lorie Smith wanted to offer web services related to weddings.[7] But she didn't want to create websites supportive of same-sex marriages, which she opposes.[8] Knowing that Colorado had viewed similar stances as unlawful discrimination on the basis of sexual orientation, Smith, through a corporation and with the aid of conservative group Alliance Defending Freedom, sued the State.[9]

Many legal commentators have argued—via social media, podcasts, television, and press articles—that there was no standing in *303 Creative*.[10] This wave of critical commentary washed over the public in

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7 *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308 (2023).

8 *Id.*

9 *Id.* at 2306, 2309.

10 *See, e.g.*, Melissa Gira Grant, *The Straight Man in the Gay Wedding Website Case Is Not the Real Problem*, NEW REPUBLIC (July 6, 2023), https://newrepublic.com/article/174113/straight-man-gay-wedding-website-case-not-real-problem [https://perma.cc/5NT9-F2F9] (collecting media coverage from various outlets); Strict Scrutiny, *What Else Can the Supreme Court Get Away With?*, CROOKED MEDIA, at 1:04:04 (July 3, 2023), https://crooked.com/podcast/what-else-can-the-supreme-court-get-away-with/ [https://perma.cc/K3PJ-C4GN] (web transcript) (Leah Litman: "[L]iterally in the opinion in [*303 Creative*] the court said [Lorie] Smith has standing because she faces an injury since, quote, she worries, end quote, she'll face some consequences for refusing to provide services to same sex couples for a wedding she's never been asked to provide."); *infra* notes 86–87.

For a relatively early, predecision expression of this basic theme, see Mark Joseph Stern, *The Real Story of* 303 Creative v. Elenis, SLATE (June 1, 2023, 5:52 AM), https://slate.com/news-and-politics/2023/06/real-story-behind-gay-marriage-case.html [https://perma.cc/YC7R-YMVL] ("This is a fake case. This is not a real case at all."). Stern acknowledges that "there have been a bunch of cases like this before," referencing past enforcement actions in Colorado and other states.

For responses to the criticisms, see, for example, Kristen Waggoner & Erin Hawley, *The Smearing of Lorie Smith*, WALL ST. J. (July 12, 2023, 12:11 PM), https://www.wsj.com/articles/the-smearing-of-lorie-smith-new-republic-free-speech-fake-case-pre-enforcement-2b1f362c [https://perma.cc/HZ63-WQV2]; and Ed Whelan, *Foolish Arguments Against Standing in* 303 Creative—*Part 1*, NAT'L REV. (July 3, 2023, 2:56 PM), https://www.nationalreview.com/bench-memos/foolish-arguments-against-standing-in-303-creative-part-1/ [https://perma.cc/GSD4-GSJN].

Notably, some Left scholars on social media have forcefully rebutted certain criticisms regarding the case's justiciability. *See, e.g.*, Eric Segall (@espinsegall), X (July 2, 2023, 10:48

early July. As a sitting U.S. senator then put it on Twitter: "I have no law degree and even I know the Court cannot adjudicate a hypothetical. This is an embarrassment of a new dimension."[11]

According to some of these critics, the Court held that the designer had standing to bring suit simply because "she worries" about potential liability.[12] A federal judge has even asserted as much in a judicial order, echoing Left talking points on social media.[13] This claim is incendiary because mere worries are a patently inadequate basis for standing under extant caselaw.[14]

However, the premise underlying this popular criticism is plainly incorrect. True, the Court did use the phrase "she worries," but it did so only to describe the case's factual background.[15] Later, the Court spent several pages approvingly recounting the standing analysis issued by the court of appeals. And that discussion applied a "credible threat" standard, consistent with settled caselaw.[16]

AM), https://twitter.com/espinsegall/status/1675516688853352448 [https://perma.cc/AQ8J-X894] ("[T]he pre-enforcement review in this case was typical of how the left has used courts for decades. If the left wants to use the courts again, it should be careful what it says about this case."); Jim Oleske (@JimOleske), X (July 3, 2023, 10:52 AM), https://twitter.com/JimOleske/status/1675880287233015808 [https://perma.cc/SP9D-K52C] ("I'm here to tell you that you are doing the cause no favors by misrepresenting Sotomayor's dissent. She did not dispute standing.").

11 This tweet was by Hawaii Senator Brian Schatz. Brian Schatz (@brianschatz), X (July 2, 2023, 11:56 PM), https://twitter.com/brianschatz/status/1675715173770997760 [https://perma.cc/2BCM-2B55]. As of this writing, the post has 1.7 million reported impressions on X. Or as Senator Sheldon Whitehouse tweeted: "Faux litigation takes a new step into fakery in a Supreme Court case." Sheldon Whitehouse (@SenWhitehouse), X (June 30, 2023, 9:39 AM), https://twitter.com/SenWhitehouse/status/1674774667280695296 [https://perma.cc/9WZ8-V8ZJ].

12 *See, e.g.*, Sherrilyn Ifill (@SIfill_), X (June 30, 2023, 3:34 PM), https://twitter.com/SIfill_/status/1674863999718940686 [https://perma.cc/7TC6-LZCK] ("So let me understand this. There is now a category of standing called 'she worries' standing which allows a potential plaintiff to file a case in federal court simpl[y] 'to clarify her rights'? I've now heard it all."). As of this writing, the post has two million reported impressions on X.

13 *See* Bullock v. Revell Enters., No. 23-CV-55, 2023 WL 4355036, at *1 (S.D. Miss. July 5, 2023) (Reeves, J.) (order denying motion to dismiss) ("In certain civil rights claims, we have just learned, a plaintiff can establish subject matter jurisdiction merely by expressing 'worries' about the defendant's future course of conduct." (citing *303 Creative*, 143 S. Ct. at 2308)).

14 *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 402 (2013).

15 *See 303 Creative*, 143 S. Ct. at 2308. The majority used the "she worries" phrase three times in part I.A of its opinion, which gave factual background. For example: "Specifically, she worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman." *Id.* The dissent quoted that line from the majority opinion. *See id.* at 2334 (Sotomayor, J., dissenting); *see infra* note 27.

16 *See id.* at 2308–10.

For example, the Court stated: "To secure relief, Ms. Smith first had to establish her standing to sue. That required her to show '*a credible threat*' existed that Colorado would, in fact, seek to compel speech from her that she did not wish to produce."[17]

And later: "Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces *a credible threat* that Colorado will seek to use [the Colorado Anti-Discrimination Act] to compel her to create websites celebrating marriages she does not endorse."[18]

Now, in fairness to the critics, some readers—myself included—tripped over the fact section of the majority opinion, which is written in Justice Gorsuch's rather folksy style and includes the now-infamous "she worries" expression.[19] In an age of social media, it's very easy to imagine people hitting that early line in the opinion and tweeting it out to the world—before reading a page or two further and realizing that that isolated snippet gives a misimpression of the Court's reasoning.

Relatedly, it's also possible that some readers did keep reading but, even having done so, still couldn't shake the sense, captured by Justice Gorsuch's perhaps infelicitous "she worries" phrase, that something was jurisdictionally amiss. These readers might then go on to use "she worries" to capture a broader or more diffuse dissatisfaction with the ruling's procedural qualities. The "she worries" idea would then be meant seriously, not literally.

Even so, some leading critics have explicitly said that the Court relied on mere "worries" to find standing.[20] And, again, that claim—if understood at face value—is simply incorrect.

Going further, some commentators appear to suggest that plaintiffs shouldn't be able to bring suit until they have violated the law, thereby exposing themselves to a risk of punishment. This perspective is visible, for example, in the many critics who emphasized that there had been no denial of services in *303 Creative*, much less an actual enforcement action against the designer.[21]

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17 *See id.* at 2308 (emphasis added) (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014)).

18 *See id.* at 2309 (emphasis added).

19 *See id.* at 2308.

20 *See supra* notes 10–13.

21 For example, Ian Millhiser has argued:

> [I]f Lorie Smith had been approached by a same-sex couple and refused to design a wedding website for them, and if she had then been sued for refusing to do so, then she would have a very strong First Amendment defense against such a suit. . . . But none of these events have actually happened. And, for that reason, the Supreme Court should have dismissed the case.

Yet that view is contrary to roughly a century of settled caselaw.[22] And that caselaw has enjoyed broad support.[23] The idea that opposition to pre-enforcement review was at least briefly in currency on the left is among the most surprising and interesting features of the popular reaction to this case.

To give some sense of why the "credible threat" standard has so much appeal—and why any Left opposition to pre-enforcement review is so startling—imagine a different and starker scenario. Let's say that someone wants to bring a soapbox to the town square and rail against the President. But on their way there, they see someone else get on a soapbox at roughly the same place, start criticizing the President, and get dragged away by police for violating a law barring public protest. Does that person have to endure arrest or worse in order to bring a federal court challenge? Or can the person instead establish these events and get a protective order or injunction, ensuring that they will be able to speak in accord with their constitutional rights?

Before *303 Creative*, it appeared widely agreed in U.S. legal culture that the imagined person could sue at once.[24] Yes, the suit would be pre-enforcement, and the plaintiff wouldn't yet have spoken in any way, much less have run afoul of the police. Maybe the new prospective speaker wouldn't actually be bothered at all by the police—the future, after all, is necessarily somewhat speculative. Yet there would be a credible threat of enforcement, based on the government's recent treatment of a similar individual. That is why standing would be proper, under current caselaw.[25] If we took seriously some of the more extravagant objections concerning *303 Creative*, however, that highly intuitive and longstanding conclusion would be called into question.

B. "Credible Threat"

Was the "credible threat" standard met in *303 Creative*?

Ian Millhiser, *Neil Gorsuch Has a Problem with Telling the Truth*, VOX (June 30, 2023, 3:36 PM), https://www.vox.com/scotus/2023/6/30/23779816/supreme-court-lgbtq-ruling-neil-gorsuch-303-creative-elenis [https://perma.cc/X4RW-Y63M].

22 *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 163–65 (1908); *see also* Babbitt v. United Farm Workers, 442 U.S. 289, 298 (1979); Abbott Lab'ys v. Gardner, 387 U.S. 136, 152–53 (1967) (ripeness).

23 *Cf.* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 357 (2019) ("There is zero public pressure to eliminate preenforcement review . . . . The field of modernizing administrative law has been ceded to those—on both the left and the right—who distrust the state.").

24 *See supra* notes 22–23.

25 *See, e.g.*, *Ex parte Young*, 209 U.S. at 163–65; *Abbot Lab'ys*, 387 U.S. at 152–53.

Before addressing this point head on, it's worth noting that there is an enormous amount of circumstantial evidence that the answer is yes.

At the time the Court decided the case, there was virtually a consensus among key case participants that the Court had jurisdiction. The court of appeals majority below (composed of two Clinton appointees who ruled against the designer on the merits) had found that there was standing.[26] Justice Sotomayor's extensive dissent in the Supreme Court in no way disputed the Court's standing analysis.[27] And the Biden Administration's Solicitor General, who has an institutional interest in advancing narrow views of standing and also sought to avoid a conservative merits ruling in *303 Creative*, likewise raised no standing objection.[28]

Even the State of Colorado, which was the respondent at the Supreme Court, raised only a conditional ripeness objection in its merits brief.[29] The heading of that roughly two-page section in the

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26 *See* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168, 1171–76 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022) (mem.), *rev'd*, 143 S. Ct. 2298 (2023). The district court had granted standing as to one of the designer's claims while denying standing as to another. *See id.* at 1170; *see also infra* Section I.C (discussing the district court ruling).

27 Thoughtful critics of the Court's ruling candidly acknowledged that the dissent didn't contest standing. *See, e.g.*, *infra* note 46; *see also* Adam Liptak, *What to Know About a Seemingly Fake Document in a Gay Rights Case,* N.Y. TIMES (July 3, 2023), https://www.nytimes.com/2023/07/03/us/politics/same-sex-marriage-document-supreme-court.html [https://perma.cc/QUJ7-T22C] ("In dissent, Justice Sonia Sotomayor did not discuss . . . the standing question."). To be clear, the dissent did quote the majority's expression "she worries" when recounting the facts of the case. *See 303 Creative*, 143 S. Ct. at 2334 (Sotomayor, J., dissenting). That section of the dissent also emphasized that the designer "has never sold a wedding website" and concluded that the "breadth of petitioners' pre-enforcement challenge is astounding." *Id.* In the dissent's view, the "sweeping nature of this claim should have led this Court to reject it." *Id.* Interestingly, the majority depicted this part of the dissent as effectively calling into question the propriety of deciding certain pre-enforcement claims. As the Court put it: "The dissent chides us for deciding a pre-enforcement challenge. But it ignores the Tenth Circuit's finding that Ms. Smith faces a credible threat of sanctions unless she conforms her views to the State's." *Id.* at 2318 (citations omitted). Taken at face value, though, the dissent argued only that the claim's breadth rendered it vulnerable on the merits.

28 *See* Brief for the United States as Amicus Curiae Supporting Respondents at 5–8, *303 Creative*, 143 S. Ct. 2298 (No. 21-476). Two amicus briefs at the merits stage did contest standing. *See* Brief of the Freedom from Religion Foundation et al. as Amici Curiae in Support of Respondents at 4–9, *303 Creative*, 143 S. Ct. 2298 (No. 21-476); Brief of Professor Kent Greenfield as Amicus Curiae in Support of Neither Party at 14–16, *303 Creative*, 143 S. Ct. 2298 (No. 21-476).

29 *See* Brief on the Merits for Respondents at 23, *303 Creative*, 143 S. Ct. 2298 (No. 21-476). The State did raise both standing and ripeness challenges in its brief in opposition to certiorari. *See* Brief in Opposition at 8–14, *303 Creative*, 143 S. Ct. 2298 (No. 21-476). The Court selected only a single, merits-based question presented. The State continued to press a conditional ripeness argument, as noted in the main text.

middle of a forty-five-page brief reads: "This case is not ripe *if* its resolution depends on the nature of the products or services offered by the Company."[30] So, "if" resolution did not so depend—as indeed, it did not—then even the State effectively conceded that there was a ripe dispute.

Given all this, one would expect a pretty strong argument that the case was justiciable. And that is exactly what you find.

Drawing on the court of appeals decision below—which, again, was issued by two Democratic appointees—the Court adduced three reasons why the threat facing the designer was credible.[31] First, "Colorado has a history of past enforcement against nearly identical conduct . . . ."[32] This factor is very powerful. If someone has done something and been enforced against, that would seem to make it credible that a new person would suffer enforcement for similar conduct.

Second, "anyone in the State may file a complaint against Ms. Smith and initiate 'a potentially burdensome administrative hearing' process . . . ."[33] So, even if most or nearly all people in Colorado would decline to initiate enforcement against the designer, it would only take one person to initiate proceedings and generate alleged censorship. This too seems like a significant point in favor of standing.

Third, "Colorado [has] decline[d] to disavow future enforcement" proceedings against the plaintiff.[34] With the case pending at the Court, the State was obviously well aware of what the plaintiff had in mind and could have put everyone at ease by disavowing any interest in enforcement—as sometimes does happen as late as oral argument.[35] Yet Colorado declined to do so. Instead, the State stayed conspicuously quiet about whether it would enforce. Given the circumstances, that silence speaks loudly. Who wouldn't view the threat as very credible indeed?

The Court then wrapped up: "Before us, no party challenges these conclusions."[36] And, as we have seen, the dissent, too, declined to take any issue with this persuasive and largely undisputed analysis.

If any Justice or party before the Court had managed to cast doubt on these conclusions, there was even more that the majority could have said. As the dissent pointed out at length, the designer wanted to issue

30 *See* Brief on the Merits for Respondents, *supra* note 29, at 23 (emphasis added).

31 *See 303 Creative*, 143 S. Ct. at 2310.

32 *Id.* (quoting *303 Creative*, 6 F.4th at 1174).

33 *Id.* (quoting *303 Creative*, 6 F.4th at 1174).

34 *Id.* (alteration in original) (quoting *303 Creative*, 6 F.4th at 1174).

35 *See, e.g.*, Transcript of Oral Argument at 42–45, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280).

36 *See 303 Creative*, 143 S. Ct. at 2310.

a notice on her website that she would not provide her services in connection with same-sex weddings.[37] In other words, the designer wanted to advertise what many, many people—including the dissenters—would view as a policy of express, invidious discrimination. Isn't it not just credible or likely, but *extremely likely* that the State of Colorado would take the same view? Wouldn't many people on the left be outraged if the State took no action in the face of such a declaration?

And it turns out that the designer's right to post the notice depended in part on her right to turn away work relating to same-sex marriage. Whether you have a right to advertise a certain activity often depends on whether you can legally perform the activity. For example, First Amendment doctrine cares whether an advertisement regards unlawful discrimination or a restriction in restraint of trade, as opposed to voting and politics.[38] That point carries over to *303 Creative*. As the majority put it, "Ms. Smith's Communication Clause challenge" (that is, her claim to post the notice) "hinges on her Accommodation Clause challenge" (that is, her claim to turn away work regarding same-sex marriages).[39] Thus, the designer's standing to challenge the notice effectively entitled her to adjudication of whether she had a right to turn away work expressing support for same-sex marriage.

In deeming the Court's standing conclusion persuasive, I don't mean to say that it's beyond any fair dispute. Caselaw changes. Courts make new distinctions. They narrow old holdings.[40] A smart lawyer can almost always distinguish a standing precedent, based on other asserted principles. It happens all the time.

My point instead is that the Court's decision on standing was very reasonable. More than that, the Court reached the best, most defensible result, given extant caselaw. And while I can admit reasonable disagreement on that score, particularly for people with qualms about existing precedents, that admission only underscores the true nature

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37 *Id.* at 2336 (Sotomayor, J., dissenting); *see also* Joint Statement of Stipulated Facts ¶ 91, 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907 (D. Colo. 2019) (No. 16-cv-02372), *reprinted in* Petition for a Writ of Certiorari at 189a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476); *id.* ¶ 95.

38 *See, e.g.*, Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 62 (2006) (noting that an employer might lawfully have "to take down a sign reading 'White Applicants Only'"); Sorrell v. IMS Health Inc., 564 U.S. 552, 564 (2011); *see also 303 Creative*, 143 S. Ct. at 2334 (Sotomayor, J., dissenting) (discussing the foregoing cases and principles).

39 *See 303 Creative*, 143 S. Ct. at 2319; *see also id.* at 2309 n.1 (noting that the one claim "stands or falls with" the other).

40 *See* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014).

of the disagreement. It would have been a decision *denying* standing that would really have changed the law.

Some sophisticated critics of *303 Creative* might argue that the decision reflects a kind of double standard or inconsistency. Liberal claimants challenging things like Texas's restrictive abortion laws end up not being heard,[41] whereas conservative claimants do. In various forms, this kind of criticism is very old and quite plausible.[42] Justices on both the left and the right sometimes find standing where doing so seems convenient in light of their merits views.[43]

In light of what I have argued, however, this kind of allegation is inapt as applied to *303 Creative*. This is a case where the existing rules were followed. Leading cases in the area are unanimous.[44] And no appellate judge—whether of the Right or the Left—disputed standing in *303 Creative* itself.[45] So this critique alone cannot explain, much less justify, the intense jurisdictional criticism leveled in this case.

In sum, there is no procedural scandal here.

C. Counterarguments

While there may not have been serious doubts about standing at the Court when *303 Creative* was decided, many doubts have now arisen. And some commentators have advanced thoughtful, nuanced defenses of their skepticism.[46] Much debate centers on *SBA List v.*

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41 *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021); *see also infra* note 105 (discussing this case). One interesting possibility is that some Left jurists or thinkers support the standing holding in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014), only because the state regulatory scheme there effectively sought to prevent pre-enforcement litigation. Yet the conservative majority in *Whole Woman's Health* did not prevent Texas from constructing a different regulatory scheme that had a similar effect. The key difference was that the regulatory schemes in *SBA List* and *303 Creative* involved private initiation of public enforcement actions, whereas the one in *Whole Woman's Health* relied entirely on private litigation for enforcement. These events could cause liberal Justices to worry that their permissive jurisdictional views will not be reciprocated, yielding a kind of unilateral disarmament. *See infra* Section III.B.

42 *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635 (2006) (calling the view that justiciability is driven by the merits "folk wisdom").

43 See examples in Section III.B below.

44 *See, e.g.*, *SBA List*, 573 U.S. 149.

45 Even the district court found standing as to one claim. *See infra* Section I.C.

46 Consider the thoughtful Substack post by Adam Unikowsky, a prominent Supreme Court litigator. *See* Adam Unikowsky, *Contrived Cases Make Bad Law: Why the Supreme Court Should Never Have Heard* 303 Creative—*Part 1 of 2*, ADAM'S LEGAL NEWSL. (July 6, 2023) https://adamunikowsky.substack.com/p/contrived-cases-make-bad-law [https://perma.cc/ZSQ7-RQ9Z]. Unikowsky, a former clerk for Justice Scalia, is a self-proclaimed "standing hawk." *Id.* Against that baseline, Unikowsky's bottom-line is that standing was "questionable," that the answer to the standing question is "I dunno," and that "[a] standing dove

Driehaus and whether it's distinguishable from *303 Creative*.[47] *SBA List* involved a group that spoke out against an electoral candidate.[48] Under state law, any private person could initiate enforcement actions against false public speech, and the criticized candidate did so.[49] Once the candidate's election ended, the enforcement action was dismissed as moot, but the group (SBA List) sought prospective relief against future enforcement actions in connection with future speech.[50] The Supreme Court unanimously concluded that SBA List had standing, and for reasons that should sound familiar. The group faced a "credible threat" of future enforcement actions that could be initiated by any number of persons in response to the group's future speech.[51] On its face, then, *SBA List* seems to support standing in *303 Creative*.

Some critics have pointed out that the plaintiff in *SBA List* had already been the target of an enforcement action, whereas the designer in *303 Creative* hadn't been.[52] Under precedents like *City of Los Angeles v. Lyons*, however, personal enforcement history in itself isn't relevant to the availability of prospective relief.[53] At most, that kind of personal history is one potential way of establishing a credible threat *in the future*. And that is precisely why *SBA List* pointed to it: what the plaintiff had to show was a "history of past enforcement," full stop.[54] It just so happened that the plaintiff in *SBA List* made that key showing by pointing to its own experiences.[55] While the designer in *303 Creative* didn't have that particular type of evidence of a credible threat, she had other evidence, as discussed above. So this distinction, while true, doesn't make a material difference.

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would say there's standing." *Id.* And note what that means about Left critics who railed confidently against standing: they adopted an even more hawkish posture regarding standing than an avowedly hawkish former Scalia clerk.

Or consider a blog post by David Post, *Case or Controversy Requirement? What Case or Controversy Requirement?*, VOLOKH CONSPIRACY (July 8, 2023, 11:32 AM) https://reason.com/volokh/2023/07/08/case-or-controversy-requirement-what-case-or-controversy-requirement/ [https://perma.cc/6RY8-8UTR]. Post candidly acknowledged much of the circumstantial evidence cutting against his views on standing. For instance, he was "at a loss to explain" why "the three dissenting Justices (Sotomayor, Kagan, and Jackson) made absolutely nothing of this." *Id.*; *see also id.* ("Not a single word about standing in Justice Sotomayor's long (38 pages!) and passionate dissenting opinion." (footnote omitted)).

47 *SBA List*, 573 U.S. 149.

48 *See id.* at 153.

49 *See id.* at 152, 154.

50 *See id.* at 155.

51 *See id.* at 161, 167.

52 *See, e.g.*, Unikowsky, *supra* note 46.

53 461 U.S. 95, 105–10 (1983).

54 *SBA List*, 573 U.S. at 164.

55 *See id.*

Critics have also emphasized the asserted improbability that any enforcement action would ever take place. Maybe the designer wouldn't receive requests to work on same-sex weddings, become the object of complaints, and so forth.[56] But we have seen that, under settled caselaw, the threat need only be "credible." And there are strong arguments that that standard was met—not just because of the designer's Accommodation Clause claim (to decline work supportive of same-sex marriage) but also, and even more clearly, because of her Communication Clause claim (to post a notice regarding her desired work policy).[57]

Some commentators have suggested that, while the designer *did* have standing as to the Communication Clause claim, that claim alone couldn't provide her with relief.[58] The template here is the district court decision, which found standing only as to the Communication Clause claim. In the view of the district court, the designer's asserted lack of standing to bring her Accommodation Clause claim indirectly doomed her Communication Clause claim as well. As the district court put it: "Allowing [the designer] to use a claim challenging the Communications Clause as a Trojan Horse to challenge the Accommodations clause indirectly would undermine the Court's prior finding with regard to standing."[59] The district court therefore assumed the lawfulness of the Accommodation Clause when evaluating the designer's challenge to the Communication Clause.[60]

The district court here correctly recognizes that the two claims are interlinked in some way but assumes that both claims must suffer if there isn't standing as to either one. But, why would that be so? The designer sought vindication of *both* her right not to speak (decline certain work) *and* her right to speak (post the notice).[61] If there is

56 *See, e.g.*, Post, *supra* note 46; Unikowsky, *supra* note 46.

57 *See supra* Section I.B.

58 *See* Unikowsky, *supra* note 46. I am grateful to Fred Smith for discussion here.

59 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907, 911 (D. Colo. 2019); *see also* Unikowsky, *supra* note 46 (agreeing that this view "seems right").

60 *See 303 Creative*, 405 F. Supp. 3d at 911 ("[T]he Court rejects Ms. Smith's argument that this Court cannot assume the constitutionality of the Accommodations Clause when evaluating her Communications Clause claim.").

61 This point distinguishes *303 Creative* from cases in which a plaintiff incurs costs through actions that do not themselves represent assertions of rights. In *Clapper v. Amnesty International USA*, 568 U.S. 398, 401 (2013), for instance, there was only one relevant constitutional interest: a right not to be surveilled. Because there was no separate right to undertake precautions, those efforts couldn't generate standing. *But see* Unikowsky, *supra* note 46 (arguing that *Clapper* supports the district court's reasoning in *303 Creative*). This point also distinguishes the theory of standing based on severability that the Court found forfeited in *California v. Texas*, 141 S. Ct. 2104, 2116 (2021); see also *id.* at 2130–33 (Alito, J., dissenting), advancing this theory. There, plaintiffs challenged one legal provision on

standing as to one of those two claims, then . . . there is standing as to that claim. And if it turns out that that conclusion as to standing indirectly allows litigation of a subsidiary issue, so what? The district court here seemed determined not to undermine its prior standing denial as to the Accommodation Clause claim. Yet someone's lack of standing as to Claim 1 cannot make them lose otherwise valid standing as to Claim 2. And if they have standing as to Claim 2, then they have the right to press whatever lawful arguments support that claim, including any subsidiary issues. Again, if there is standing as to the Communication Clause claim, then there is standing as to that claim—come what may.

Again, I don't want to overstate the foregoing points. A good-faith judge could read *SBA List* narrowly, or otherwise construe caselaw to avoid standing in *303 Creative*.[62] But even so, a good-faith judge could certainly decline to distinguish or narrow the relevant precedents. And agreement on *that* is enough to let the Court off the hook for most of the jurisdictional criticism it has received.

II. RELATED OBJECTIONS

The discourse featured other standing-relevant criticisms of *303 Creative*.

A. Factual Basis

At least two alleged factual problems came to light either just before or after the Court's ruling. And both of those allegations bear on whether—knowing what we know now—*303 Creative* should have been treated as justiciable. Because they were discovered so late in the day, these asserted revelations don't provide a sound basis for impugning the Court's decision. However, they could suggest a problem with the case, or even with the existing litigation system.

The first and better-known allegation requires a brief explanation. Shortly after initiating suit, the designer supposedly received a terse

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the ground that it was inseverable from another, allegedly unconstitutional provision. So there, too, the plaintiffs had only one relevant constitutional interest.

62 Could the standing holding in *SBA List* itself be more debatable than its unanimous outcome suggests? Perhaps the Court overstepped in *SBA List*, essentially brushing aside a serious standing problem to reach the juicy merits. Yet the result there seems highly intuitive. Alternatively, someone might think that standing *ought to* depend partly on the merits, such that a clearly unconstitutional restriction on political speech (*SBA List*) should more readily generate standing than a more debatably constitutional restriction on discriminatory behavior in the marketplace (*303 Creative*). That, however, is not the logic of extant caselaw.

request for web services in connection with a same-sex wedding.[63] This asserted fact featured in the designer's briefing throughout the case.[64] Why? Because it is very hard to view such requests as speculative if one has already taken place. Thus, this supposed fact tended to buttress the designer's claim of standing. Yet the district court doubted the significance of the asserted fact,[65] and neither the court of appeals nor the Supreme Court explicitly mentioned it at all.

On the eve of the Supreme Court's decision, Melissa Gira Grant of *The New Republic* broke the news that she had contacted the individual who had supposedly made the request, and he denied doing so.[66] This report was later confirmed.[67] By then, the Supreme Court had issued its decision without commenting on the matter. And Grant's story had set off a firestorm.[68]

Some reactions to Grant's story reveal an assumption that the attorneys in *303 Creative* fabricated the apparently bogus request to help their case. Other commentators, however, have expressed doubt on that point, at least until specific proof comes to light.[69] Clearly, any attempt to fabricate evidence—particularly by an attorney—would constitute unethical behavior.

For present purposes, the most relevant issue is whether this asserted factual revelation materially changes the standing analysis. For a skeptic of pre-enforcement review, the answer might be yes. Only an actual request for services, the skeptic might think, could possibly justify federal court review.

Yet we have already seen that, under governing caselaw, the case for standing was quite strong. And, in setting out that view, I didn't so

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63 *See* 303 Creative LLC v. Elenis, No. 16-cv-02372, 2017 WL 4331065, at *5 (D. Colo. Sept. 1, 2017).

64 *See, e.g.*, Appellants' Opening Brief at 25–26, 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021) (No. 19-1413); *see also* Unikowsky, *supra* note 46 (quoting the brief, inter alia).

65 *See 303 Creative*, No. 16-cv-02372, 2017 WL 4331065, at *5.

66 Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, NEW REPUBLIC (June 29, 2023) https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court [https://perma.cc/X7ZJ-SBGK].

67 *See, e.g.*, Colleen Slevin, Matthew Brown, & Jesse Bedayn, *The Man Named in the Supreme Court's Gay Rights Ruling Says He Didn't Request a Wedding Website*, AP (June 30, 2023, 7:18 PM), https://apnews.com/article/supreme-court-gay-rights-lgbtq-website-385ec911ce0ca2f415966078eddb66da [https://perma.cc/7PW4-4CEU].

68 *See supra* note 10; *see also, e.g.*, Laurence Tribe (@TribeLaw), X (July 1, 2023, 7:21 AM), https://twitter.com/tribelaw/status/1675102329056509952 [https://perma.cc/XG6N-BXZL] (noting "[s]o the case is built on a lie" and linking to Grant's story).

69 *See* Grant, *supra* note 10 ("We still don't know who submitted the fake inquiry."); Unikowsky, *supra* note 46 ("There is no evidence whatsoever that either 303 Creative or ADF (its counsel) fabricated the fake request. The allegation makes no sense.").

much as mention that the designer had received a request for services. In that respect, I have followed in the footsteps of every appellate judge who found standing in the case.[70]

The second alleged misrepresentation also comes from Grant, who has now earned a reputation for getting legal scoops.[71] Grant's newer article was admirably careful about the import of her discoveries. For instance, Grant noted about her own earlier story debunking the services request: "[T]he existence of the request was likely not going to be decisive in the ultimate outcome of the case."[72]

However, Grant argued that her new discovery "strikes closer to the heart of the matter."[73] As she explained: "In 2015, a web designer named Lorie Smith featured [a] wedding website in her portfolio of recent work . . . . But . . . [t]he page detailing her role in the wedding website's creation was removed some time before she filed a legal challenge [in 2016]."[74] Grant therefore argued: "It is now clear that Smith [the designer] had, in fact, built a wedding website and advertised that work on her own website without, it appears, any of the adverse consequences she and her attorneys said could follow."[75] Yet what the designer apparently did before wasn't the same as what she said she wanted to do going forward, such as posting a notice of the type that underlay her Communication Clause claim.

At any rate, Grant's piece candidly acknowledged: "[I]n fact, if ADF [who represented the designer] had shared what had happened with Smith's first wedding website, it may have strengthened her case."[76] Why? Because "ADF is now saying that Smith took the wedding website down because she feared the law, which could be a stronger argument for her speech being chilled."[77] Grant's piece thus recognized that this allegedly buried fact could have *helped* the designer's case for standing. Yet it is unlikely that a plaintiff would

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70 Unikowsky also argued: "[M]aybe Colorado didn't litigate this issue because it didn't think it could credibly say that 303 Creative's claims were too speculative, given that 303 Creative had told the Court that it had already received a request from a same-sex couple." Unikowsky, *supra* note 46. However, Colorado did raise standing in its brief in opposition to certiorari. *See supra* note 29. And, again, the claim for standing was strong without this one supposed fact. At any rate, Unikowsky, too, doubts that this asserted error in fact affected the result. *See* Unikowsky, *supra* note 46.

71 *See* Melissa Gira Grant, *A Real Wedding Website in a Fake Gay Wedding Website Case*, NEW REPUBLIC (July 25, 2023) https://newrepublic.com/article/174440/real-wedding-website-fake-gay-wedding-website-case [https://perma.cc/USP6-EYV7].

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

illicitly conceal something that is helpful to her case. And it would be more than a bit strange to criticize the designer for not telling us that her case was even stronger than we'd thought.

But perhaps recent stories have uncovered only the tip of an iceberg. Much of the designer's case could be fabricated or exaggerated, even if those potential fabrications haven't yet come to light. Adding to that concern, some of the factual premises of other cases handled by ADF have also been questioned.[78] Given what we currently know, however, another plausible view is that the litigants and courts in *303 Creative* didn't explore the foregoing factual issues in detail simply because they didn't matter very much, if at all. The parties entered joint stipulations on the key facts, without expending limited time on side issues.

And the judicial system was entitled to rely on those stipulations. As Justice Ginsburg emphasized for the Court in *Christian Legal Society v. Martinez*, a 5–4 liberal victory, "Factual stipulations are binding and conclusive."[79]

B. Case Selection

That *303 Creative* involved a lot of hypotheticals and a dearth of concrete facts might have supplied a good reason for the Court to exercise its discretion by declining to hear this particular case. Review in the Supreme Court, after all, is largely discretionary.[80] So, why not wait for a case like *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which involved an actual enforcement action with crisper facts?[81] Put in the jargon of the Supreme Court, maybe *303 Creative* was "a bad vehicle." That view strikes me as reasonable.[82]

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78 *See* Telescope Media Grp. v. Lucero, No. 16-4094, 2021 WL 2525412, at *3 (D. Minn. Apr. 21, 2021) (expressing skepticism regarding litigation brought by ADF); Unikowsky, *supra* note 46 (discussing *Telescope Media* and reasons to be suspicious toward ADF's litigation). Such controversy is hardly limited to ADF. For example, there was recently debate both on and off the Court regarding the factual basis of *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 107–08 (2022) ("In *Kennedy v. Bremerton School District*, the Court took the remarkable step of rewriting the facts of the case . . . .").

79 561 U.S. 661, 677, 675–78 (2010) (alterations omitted) (quoting 83 C.J.S. *Stipulations* § 93 (2000)). *Christian Legal Society* extensively relied on various joint stipulations, referencing the word "stipulation" and its variations about fifteen times.

80 *See* SUP. CT. R. 10.

81 *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018). *But see* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018).

82 *Cf.* Adam Unikowsky, *Contrived Cases Make Bad Law, Part 2*, ADAM'S LEGAL NEWSL. (July 15, 2023), https://adamunikowsky.substack.com/p/contrived-cases-make-bad-law-part [https://perma.cc/5NJW-ZZ6Y].

Yet there are strong counterarguments. *Masterpiece Cakeshop*, some might say, had afforded only inadequate or illusory relief—leaving many First Amendment claimants chilled.[83] So perhaps realistic plaintiffs would tend to be pre-enforcement claimants relying on plans or stipulations. Moreover, the stipulations in *303 Creative*, while abstract, were also clarifying in some respects, as they stripped away potentially complicating facts (such as might arise with wedding websites that do more than simply share expression). And, even in *Masterpiece*, there were factual uncertainties.[84] Finally, every Supreme Court case features hypotheticals. The Justices always care about the next case, or a different case, because they know that they are setting precedents for future rulings.

So it was reasonable for the Justices to view *303 Creative* as a permissible vehicle, maybe even a good one. And it is hard to deny that the considerable discretion that comes with certiorari can accommodate that view.

There is also a possible silver lining in the Court's stipulation-based approach: doing so arguably narrowed the Court's holding. By relying on the parties' abstract stipulations, the Court effectively reserved many factual permutations that could push toward a different result. Future cases will frequently involve those factual wrinkles and complications, thereby creating an opportunity for distinguishing or narrowing *303 Creative*. In other words, *303 Creative* could become a kind of baseline-setting ruling, somewhat like the famous but largely symbolic Commerce Clause ruling in *United States v. Lopez*.[85]

III. EXPLAINING THE DISCOURSE

The surprising discourse surrounding *303 Creative* suggests certain lessons.

A. Four Possibilities

So far, I've argued that the criticisms leveled against *303 Creative* are basically misplaced, or at least greatly overblown. Caselaw amply supported what the Court did. That conclusion raises an important question: why did procedural criticism regarding the case take off? I suggest four potential answers.

First, procedure matters. Jurisdiction isn't just something that you study in Civil Procedure or Federal Courts. True, the "she worries"

83 *See Masterpiece Cakeshop*, 138 S. Ct. at 1740, 1748 (Thomas, J., concurring in part and concurring in judgment).

84 *See id.* at 1723–24.

85 514 U.S. 549 (1995).

meme may have been especially popular among the fairly large number of lawyers at large in American society. But general media attention and other evidence suggests that at least some significant number of lay people also understand that courts have limited authority to rule. And those people can become incensed when they believe that that authority is being abused. The discourse on *303 Creative* thus shows that the judiciary's descriptive legitimacy is, to some significant degree, tethered to its observance of jurisdictional principles.

Second, soundbites matter. The idea that the Supreme Court decided a "fake case"[86] or "made-up case"[87] has a kind of popular resonance that sophisticated legal ideas don't, especially when coupled with a larger discourse suggesting shady happenings at the Court. Further, the unfounded "she worries" meme probably couldn't have happened without real-time, bite-sized mass communication. Commentators and audiences alike were ready to believe and repeat that the Justices were simply ignoring obvious legal principles, based on true but misleading snippets of information. The fact that these extreme criticisms can't survive scrutiny didn't undermine their transmissibility.[88] For instance, the "she worries" meme garnered quick uptake in a district court order—thereby proving that at least some chambers are attentively listening.[89]

Third, popular views matter. The merits of the Court's end-of-term rulings were fairly popular, or at least not that unpopular, making procedural complications a relatively effective basis to indict the Justices. For instance, race-based affirmative action and student debt relief certainly have their supporters, but polls suggest that they are also nationally unpopular, or close to it.[90] Whether the merits ruling

86 *Reporter Discovers Man Named in* 303 Creative *Case is Not Gay and Did Not Request a Wedding Website*, MSNBC (July 2, 2023), https://www.msnbc.com/ali-velshi/watch/reporter-discovers-man-named-in-303-creative-case-is-not-gay-and-did-request-a-wedding-website-186536005672 [https://perma.cc/KBG7-6AXH] (Neal Katyal appearing on Velshi).

87 *See* Zach Schonfeld, *Man Denies Making Request Cited in Landmark Supreme Court LGBTQ Case*, THE HILL (July 3, 2023, 2:06 PM), https://thehill.com/regulation/court-battles/4079303-man-denies-making-request-cited-in-landmark-supreme-court-lgbtq-case/ [https://perma.cc/6VZ8-5ADW] (quoting Colorado Attorney General Phil Weiser on June 30, 2023).

88 *See supra* notes 11–12.

89 *See supra* note 13.

90 *See, e.g.*, Ruth Igielnik, *A Majority of Americans Say Race Should Not Be a Factor in College Admissions.*, N.Y. TIMES (June 29, 2023), https://www.nytimes.com/2023/06/29/us/politics/affirmative-action-polls.html [https://perma.cc/M38U-NUYM]; Ben Kamisar, *Here's What Polling Says About Biden's Now-Scuttled Student Loan Plan*, NBC NEWS: MEET THE PRESS BLOG (June 30, 2023, 11:12 AM), https://www.nbcnews.com/meet-the-press/meetthepressblog/polling-says-bidens-now-scuttled-student-loan-plan-rcna92006

in *303 Creative* was unpopular is unclear at present. That uncertainty stems partly from abiding animus toward LGBTQ persons, but it also partly stems from significant support on the left for strong rights of free expression, including rights against compelled speech. Potential procedural problems may thus have been a relatively alarming feature of the Court's recent behavior.

Fourth, and most interestingly, power matters. In this Essay, I have focused on the law as it currently stands. But the law of standing, like all law, is frequently (and appropriately) in motion. Almost a century ago, restrictions on justiciability were associated with the Left.[91] Why? Because the Supreme Court was conservative. Later, the Court became liberal—and conservatives took up the task of championing jurisdictional limits.[92] Is the worm turning again? Are we seeing the start of a standing realignment, in which the Left becomes markedly more hawkish on standing and some related doctrines?

This last possibility merits focused attention.

B. A Standing Realignment?

Proving a standing realignment is tricky since both legal doctrine and case selection effects are dynamic.[93] Even so, there is reason to wonder.

Begin with *303 Creative* itself, which could easily be cited as evidence *against* the idea that legal culture is undergoing a standing realignment. Again, left-of-center jurists on both the court of appeals and the Supreme Court either supported standing or else left it unchallenged. Yet the discourse surrounding the case suggests that other trendsetters on the legal left are eager to push jurisdictional arguments in cases and contexts where liberal Justices, so far, are not.

Moreover, other cases evidence a standing realignment. In the student loan case, for instance, Justice Kagan's dissent for the three liberal Justices (herself included) emphasized standing as well as the

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[https://perma.cc/HTR6-U2DA] (reporting 47% support and 41% opposition, as well as past polling indicating slightly more opposition than support).

91 *See* Ho & Ross, *supra* note 5, at 596.

92 *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (complaining that standing had suffered "disregard . . . during the past few decades").

93 Imagine that the Left and Right haven't altered their views but that, after a change in the Court's composition, litigants decide to bring only the kind of case that the conservatives believe generate standing. The result might be a realignment in observed outcomes, as conservatives find standing where liberals don't. Thanks to Ryan Subel for pressing this point.

merits.[94] The key question was whether a particular loan service entity created by a state should count as part of the state specifically for standing purposes. Ascertaining the exact boundaries of state governments is an infamously murky undertaking, sometimes yielding different answers under different doctrines.[95] Yet Kagan's dissent hit hard on this issue.[96] So perhaps the left-leaning Justices are ready to cry foul whenever standing is a close or open question under existing caselaw, and many Left commentators are now ready to do so even when it isn't.

Other recent cases, too, have featured Left Justices enforcing standing restrictions, even when some conservative Justices haven't. This pattern has become increasingly noticeable since Justice Kennedy retired in 2018, generating a clear conservative majority on the Court. Besides the student loan case, take *United States v. Texas*, which ruled for the Biden Administration on standing, yielding a solo dissent by Justice Alito.[97] Or *California v. Texas*, where only Justices Alito and Gorsuch would have found standing.[98] Related areas of justiciability are also at play. Take *New York State Rifle and Pistol Ass'n v. City of New York*, where six Justices rejected a Second Amendment claim as moot, with Justices Alito, Thomas, and Gorsuch dissenting.[99] Additional examples of bipartisan standing denials include the failed efforts to challenge President Biden's victory in the 2020 election.[100] These cases can be viewed as liberal wins, even without liberal rulings on the merits. All in all, standing (and some related doctrines) have emerged as a vital way for Left Justices to snatch victories from the jaws of a conservative Court.

Notably, most of the foregoing cases involved litigation by conservative-aligned states pursuing ideologically charged objectives.[101] These cases cast Left Justices as skeptics of broad standing in

94 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2385 (2023) (Kagan, J., dissenting); *cf.* Dep't. of Educ. v. Brown, 143 S. Ct. 2343 (2023) (unanimously finding no standing in a separate student loan case).

95 The fact that all six conservative Justices found standing in *Biden v. Nebraska* also suggests a standing realignment, given the difficulty of that question. For an argument from the Right that standing should have been denied, see Brief for Samuel L. Bray & William Baude as Amici Curiae in Support of Petitioners at 6, *Nebraska*, 143 S. Ct. 2355 (No. 22-506).

96 *See Nebraska*, 143 S. Ct. at 2385–91 (2023) (Kagan, J., dissenting).

97 143 S. Ct. 1964, 1989 (2023) (Alito, J., dissenting).

98 141 S. Ct. 2104, 2123–35 (2021) (Alito, J., dissenting).

99 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting).

100 *See, e.g.*, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (mem.) (denying standing, with a separate, cryptic statement by Justice Alito, joined by Justice Thomas).

101 *See generally* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016). For a recent example of liberal Justices finding justiciability in a case

state-based litigation. That pattern suggests a partial reversal as compared with the Justice Kennedy–era ruling *Massachusetts v. EPA*, where only the relatively liberal Justices voted for "special solicitude" for state standing, over conservative opposition.[102]

Another way of grouping the cases would focus on administrative law. Both during and before the Justice Kennedy era, liberal Justices often supported broad standing in administrative-law cases, including environmental ones. *Massachusetts* is again a salient example.[103] Now, by contrast, the liberal Justices are developing a pattern of finding justiciability problems in cases on administrative law, with the student loan case being the latest illustration.[104]

In other areas, however, the Justice Kennedy–era Left/Right divide on standing persists. Consistent with *303 Creative* itself, Left Justices may remain relatively supportive of private standing (as opposed to state standing).[105] Most saliently, Left Justices continue to support statutorily conferred standing in cases like *TransUnion LLC v. Ramirez*,[106] even as the Court cuts back on it—a trend that may continue in this term's case on "tester" standing.[107] These cases call to

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brought by liberal states (and others), see *Trump v. New York*, 141 S. Ct. 530, 538 (2020) (Breyer, J., dissenting).

102 549 U.S. 497, 520 (2007). That said, the liberal Justices may have supported the "special solicitude" aspect of *Massachusetts v. EPA* only to secure Justice Kennedy's vote.

103 *Id.* Other examples include *Summers v. Earth Island Institute*, 555 U.S. 488, 501 (2009) (Breyer, J., dissenting), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581–82 (1992) (Stevens, J., concurring in judgment).

104 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2385 (2023) (Kagan, J., dissenting). Consider also *West Virginia v. EPA*, where Justice Kagan conceded that the Court "may be right that [its ruling] does not violate Article III mootness rules (which are notoriously strict)," but still argued that the Court "issues what is really an advisory opinion on the proper scope of the new rule EPA is considering." 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting). Justice Kagan argued that the Court should have denied certiorari. *See id.*

105 Abortion standing cases, though now defunct, offer a recent example. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2120 (2020) (finding third-party standing with the Chief joining the liberal four), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). *Whole Woman's Health v. Jackson*, too, arguably supports this claim. 142 S. Ct. 522 (2021). To simplify, the Court invoked several principles, including the "case" or "controversy" rule, to turn away certain pre-enforcement efforts to safeguard abortion rights, whereas the liberal Justices (along with the Chief Justice) supported those efforts. *Id.* at 532; *id.* at 545 (Sotomayor, J., concurring in judgment in part and dissenting in part). Yet the Court did not frame its key analysis in terms of standing, focusing instead on sovereign immunity, adversity, and other relatively distinct principles. *Id.* at 531–33 (majority opinion). *But cf.* at 539 n.1 (Thomas, J., concurring in part and dissenting in part) (concluding that the abortion providers lacked standing). *See generally supra* note 41 (discussing the basis and import of *Whole Woman's Health*).

106 141 S. Ct. 2190, 2225 (2021) (Kagan, J., dissenting); *see also* Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1634 (2020) (Sotomayor, J., dissenting).

107 *See* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 265 (1st Cir. 2022), *cert. granted*, 143 S. Ct. 1053 (2023).

mind Justice Kennedy–era cases like *Lujan v. Defenders of Wildlife*.[108] Yet support for statutorily conferred standing comports with leading conservative views in the 1960s to 1980s, as espoused by Justices Harlan and O'Connor.[109] Moreover, Justice Thomas today largely agrees with, and even outpaces, the Left Justices in this area—as evidenced by his remarkable lead dissent in *TransUnion*.[110] So this evidence against realignment is more complicated than it may appear.

These examples also show that the conservative Justices aren't uniformly moving toward permissive standing. The conservative who has become most inclined to recognize standing is Justice Alito. In recent years, Justice Alito has voted for standing about as often as the liberal Justices—albeit in different cases.[111] Already, Justice Alito may be a more likely vote for standing than, say, Justice Kagan.[112] However, most of the conservatives still tend to enforce vigorous standing rules.[113] That fact is what makes it feasible for the three liberal Justices to eke out jurisdictional wins on a supermajority conservative court. Thus, any standing "realignment" might not represent a complete change of relative ideological positions, so much as subtler reorientation. Neither the Left nor the Right may be easily pigeonholed as either standing hawks or standing doves across the board.[114]

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108 504 U.S. 555.

109 *See* Flast v. Cohen, 392 U.S. 83, 131 (1968) (Harlan, J., dissenting); *Lujan*, 504 U.S. at 589–90 (Blackmun, J., joined by O'Connor, J., dissenting).

110 *See TransUnion*, 141 S. Ct. at 2218–21 (Thomas, J., dissenting); *see also id.* at 2225–26 (Kagan, J., dissenting).

111 Apart from the above examples, consider Justice Alito's support for legislative standing. *See, e.g.*, Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1956 (2019) (Alito, J., dissenting); *see also infra* note 113.

112 Consider standing cases from September 2018 to September 2023. By my count, Justices Alito and Kagan each clearly found standing in four cases where the other reached the opposite view. Alito found standing in: *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023); *United States v. Texas*, 143 S. Ct. 1964, 1989 (2023) (Alito, J., dissenting); *California v. Texas*, 141 S. Ct. 2104, 2124 (2021) (Alito, J., dissenting); and *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. at 1956 (Alito, J., dissenting). Kagan found standing in: *TransUnion*, 141 S. Ct. at 2225 (Kagan, J., dissenting); *Trump v. New York*, 141 S. Ct. 530, 538 (2020) (Breyer, J., joined by Sotomayor & Kagan, JJ., dissenting); *June Medical L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); and *Thole v. United States Bank*, 140 S. Ct. 1615, 1634 (2020) (Sotomayor, J., joined by Ginsburg, Breyer & Kagan, JJ., dissenting).

113 As this discussion illustrates, the focus here is not simply on whether judicial ideology influences the application of legal principles, but rather on whether judicial ideology influences the very principles that different groups of judges espouse and apply. The former might be called shallow alignment, and the latter deep alignment.

114 The lower courts, too, offer evidence of a standing realignment. For example, some conservative judges have adopted a remarkably broad view of certain doctors' standing to challenge allegedly pro-abortion regulations, despite Supreme Court caselaw to the con-

Two structural factors suggest that the conservative Justices will continue to resist becoming standing doves, despite their new grip on the third branch. First, all the current Justices came up in the law after standing principles had been firmly established. Partly for that reason, they all have established recent personal precedents in favor of significant standing rules.[115] Second, the conservative Justices share a vision of the separation of powers that makes them relatively suspicious of congressional intrusion into the affairs of either the judiciary or the executive.[116] Standing rules offer a handy way of implementing that vision.

A useful contrast might be drawn with conservative views on administrative law. For decades, conservative jurists led by Justice Scalia championed both judicial deference to administrative agencies (under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*)[117] and strong limits on standing (under *Lujan*).[118] Today, however, the Court has left *Chevron* in the lurch while embracing antideferential principles like the major questions doctrine.[119] One straightforward explanation for this shift is that the judiciary is now controlled by conservative judges whose vigorous review of Democratic administrative measures would only be hampered by judicial deference to agencies.[120] By comparison, standing generates incentives for the legal Right that are more complex. Put cynically, standing is not just a hindrance to a conservative judiciary, but also a tool.

What realignment means for Left legal thought—if that is indeed taking place—is hard to anticipate. One possibility is that judicial complaints about the Court's overreaching might foster popular support for structural court reform. In recent years, Left legal thinkers have increasingly turned away from their long-held celebratory views of the federal courts. Whereas prominent conservative intellectuals

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trary. *See* All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 227–41 (5th Cir. 2023), *petition for cert. filed*, 92 U.S.L.W. 3088 (U.S. Oct. 12, 2023) (No. 23-395).

115 *See* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 839–42 (2023). A liberal pivot toward standing hawkishness is easier because Left Justices can rely on institutional precedents from which they have personally dissented. *See id.* at 854 n.187.

116 *See* Aaron L. Nielson, *Confessions of an "Anti-Administrativist,"* 131 HARV. L. REV. F. 1, 2 (2017); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017).

117 *See* 467 U.S. 837, 844 (1984).

118 *See* 504 U.S. 555, 562 (1992); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

119 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

120 *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022); Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 668 (2021).

like Robert Bork once argued against strong forms of judicial review and in favor of legislative overrides,[121] that mantle has now been taken up by progressive academics.[122] From one standpoint, jurisdictional hawkishness, especially when in dissent, lines up well with those broader currents in favor of judicial disempowerment.

At the same time, however, a Left resurgence on issues of jurisdiction could compete with political efforts at more fundamental reform. If the left-of-center jurists prove to be relatively successful at rendering the Court more self-restrained, then those victories would undercut the perceived need for legislative interventions, such as jurisdiction stripping.[123] The Court, one might say, would already be cabining its own jurisdiction. And we have seen that those sorts of efforts have already borne fruit. So, in different ways, new jurisdictional hawkishness among Left jurists might both feed the movement for court reform and stifle it.

More immediately, the next time that a case like *303 Creative* comes up, some or all Left Justices may be prepared to peel back existing doctrine, rather than silently abide by it. The Justices, after all, will have learned from the discourse on *303 Creative* that there is a lot of praise to be garnered by arguing from standing, even in the teeth of caselaw. And they, or their clerks, may also know that the liberal Justices' silence on standing in *303 Creative* generated friction. Some candid critics of the Court's ruling expressed exasperation that the liberal Justices hadn't tackled this issue.[124] So while the dissenters' jurisdictional silence may have comported with precedent, it also legitimated the Court and undercut its critics.

If the liberal Justices do begin to question jurisdiction in cases like *303 Creative*, a true standing realignment will have begun. Once it is no longer focused on cases involving conservative states, Left hawkishness on jurisdiction might begin to present itself as overt and systematized, rather than episodic or opportunistic. And, again, this shift could be fueled not only by favorable press from Left commentators in the public square, but also by more culturally grounded changes in the legal ideologies of clerks. The Left's pivot from jurisdictional hawkishness to dovishness during the mid-twentieth century partly

121 Robert H. Bork, *Our Judicial Oligarchy*, FIRST THINGS, Nov. 1996, at 21, 23.

122 *See, e.g.*, Written Statement of Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., to the Presidential Comm'n on the Sup. Ct. of the U.S. (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf [https://perma.cc/2QSK-5DLY]; *see also* Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS., Summer 2004, at 149.

123 *See, e.g.*, Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020) (defending jurisdiction stripping).

124 *See, e.g.*, *supra* note 46 (discussing Post).

represented a generational shift. Another such shift may be in progress.

Judicial strategy is also involved. If liberal Justices stretch to find standing in their most cherished areas of law, they will often succeed only in helping the conservative majority decide against them on the merits. So, rather than tolerate unilateral disarmament on standing, the liberal Justices might opt for less standing overall—thereby at least preventing the conservative Justices from maximizing their own ideological agenda. In other words, renouncing dovish standing might be the best way to maximize existing Left legal priorities.

In taking that step, today's liberal Justices would be following in the footsteps of early twentieth-century liberals like Justice Brandeis, as well as conservative jurists in the latter twentieth century, such as Justice Scalia.[125] And adopting that new role might be for the best. The legal system often benefits from having a bloc of jurists with a habit of enforcing strict justiciability limits, especially if other jurists (newly in power) might be tempted to loosen up. Counterintuitively, a dramatic realignment could be necessary to maintain a stable equilibrium.

CONCLUSION

Will the academy's overall posture toward standing shift in light of new trends in the law? Almost every year, law reviews publish articles contending that the Supreme Court has blundered by denying standing in salient cases. This Essay bucks each part of that pattern. The Court found standing. The immediate critical discourse has focused on popular-media allegations that standing was lacking. And my law-review intervention is to defend the Court.

In the early twentieth century, scholars pushing for foundational jurisdictional restrictions, such as then-Professor Felix Frankfurter, were often associated with the legal Left.[126] So if the Court remains conservative, and if liberal Justices and commentators become frequent enforcers of justiciability norms, then perhaps the ideological valence of much standing scholarship, too, will change.

125 *See, e.g.*, FEC v. Akins, 524 U.S. 11, 30 (1998) (Scalia, J., dissenting); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347–48 (1936) (Brandeis, J., concurring).

126 *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1376 n.26 (1988).