

No. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY;
LORIE SMITH,
Petitioners,

v.

AUBREY ELENIS, ET AL.,
Respondents.

*On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit*

**BRIEF FOR WEBSITE AND GRAPHIC
DESIGNERS AS *AMICI CURIAE*
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICI CURIAE*¹

Amici are a diverse group of custom website and graphic designers from around the United States. They work with individuals and with companies (both for-profit and not-for-profit) to create customized websites and graphics that highlight and share a message. Sometimes that message is about a particular good or service that is being offered (for sale or free of charge); other times, the message may be simply sharing news or information to educate; still others, the message may be to convey or stimulate a particular emotion. The custom websites and graphics may be shared broadly to the general public, or only available to a discrete audience. But regardless of how broadly the websites and graphics are viewed or what particular message they share, each custom website and graphic is a separately designed work of art that expresses a message through the creative genius of its creator.

There are many differences among *amici*. Some are solo practitioners operating at a single location while others are companies with a significant workforce spread across multiple states. Some (like David Carson) are known worldwide for their design work over many decades, while others have only recently started to hone their design skills. *Amici* vary by industry served, as well as by the types of design and marketing services provided. They vary by race, gender, and religion. *Amici* also vary by

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Letters of blanket consent to the filing of *amicus* briefs are filed on the docket by counsel for all parties.

ideology with some happy to create custom websites or graphic designs for same-sex weddings (like those at issue in this case) while others would choose not to do so based upon their sincerely held moral or religious convictions.

Amici do not take any position with regard to which party should prevail in this case. Rather, their joint interest lies in making a single point – custom websites and graphics are expressive works of art which reflect the voice of their creators.

Amici are:

- Joshua Adams, Melbourne, Florida
- Bop Design, Inc., San Diego, California
- David Carson / davidcarsondesign (worldwide lecturer), New York / California
- Joseph Carter-Brown, Catonsville, Maryland
- Daor Design, LLC, San Antonio, Texas, and San Francisco, California
- Eclarian, LLC, Jenison, Michigan
- Randy M. Ellis, Chicago, Illinois
- Fear Not Studios, L.L.C., Avon, Indiana
- Get Visible Inc., Phoenix, Arizona
- Spence Hackney, Carolina Beach, North Carolina
- Joel Kallman, Michigan
- Lform Design, LLC, Montclair, New Jersey
- Joe Moss, Michigan
- Palmetto Mountain d/b/a iVelocity Marketing, Saint Louis, Missouri
- Proclaim Interactive, Inc., Carolina Beach, North Carolina

- Rock Paper Simple, Melbourne, Florida
- 5ivehat Agency, Chicago, Illinois

SUMMARY OF THE ARGUMENT

This case is about *custom* websites and graphics, *i.e.*, those “made or performed according to personal order.” *Custom*, Webster’s Third New International Dictionary (1986). It is not about mass-produced products which stock a shelf or come out of a factory. It is not about “drag and drop” software programs which allow any person to create their own free website without the individualized assistance of a designer. People seek out the help of *custom* designers because they want something the designer has that is not available through a free website software program, namely that person’s artistic genius and expression.

Custom website and graphic design is an *art*. The very words used to describe the process of fashioning the custom product – *creating / designing* – reflect that reality. Indeed, the process of designing a custom website or graphic is indistinguishable from the design process involved in other forms of art, such as sculpture, painting, music and poetry. Each art form requires the artist to make subjective decisions about how to communicate a certain message or emotion to an audience, and then translate those decisions into a particular medium.

The Court agreed to hear this case on a single question: *Whether applying a public accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.* For

amici, the key word in that question is “artist.” *Amici* do not take a position on which party in this case should prevail, or what level of scrutiny the Court should apply in analyzing First Amendment rights. But *amici* do have a keen interest in ensuring that whichever way the Court rules, it clearly recognizes and acknowledges that custom website and graphic designers are artists whose expressive work is entitled to the same treatment and protection under the law as other artists.

ARGUMENT

I. Websites Are the Expressive Doorways of the Modern World.

The façade of physical buildings, formed with tangible materials (stone, metal, brick, mortar and concrete), are usually the first thing a visitor to that space sees. They convey a powerful message. In the case of the design of the Supreme Court Building, the massive columns and bronze doors “signify[] the importance of the proceedings that occur within.” *The Bronze Doors: Information Sheet*, Office of the Curator, Supreme Court of the United States (updated Sept. 10, 2021), <https://perma.cc/8FDV-FX62>. Not only is this message conveyed through the soaring and majestic columns and the solid materials used, it is further emphasized through the bas-reliefs on the Court’s bronze doors depicting important events in the Western tradition of justice (e.g., the acceptance of the common law or signing of the Magna Carta). The Court’s information sheet reflects how strongly their creator felt about those bronze doors: “Out of all our monumental projects, spread over two lifetimes, the Supreme Court doors are the only work

that we ever signed – that’s how important they were.” (quote by John Donnelley, Jr., Sculptor) *Id.*

In a similar way, websites are the modern doorway or entrance for many companies. Unlike physical architecture which has limitations on the number of people who can travel to and visit it, digital websites and graphics are seen and viewed by a practically unlimited audience located anywhere in the world. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997) (recognizing that the internet “constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers and buyers.”). That large audience increases the importance of how the website is designed, including its look, function, and the experience of those who encounter it. Just as a beautiful cover on a book can lead viewers to open it to find out more, so a well-designed webpage can draw the viewer in to explore further.

II. Custom Website and Graphic Design Is an Artistic and Expressive Activity.

A. A “custom” product is materially different than a “mass-produced” product.

This case requires a distinction between *custom* goods, and non-custom goods, *i.e.*, those which are mass-produced and can be purchased off the shelf. *See* Pet.App.181a (noting that “[e]ach website 303 Creative designs and creates is an original, customized creation for each client.”). Return, for example, to the stately doors of the Supreme Court Building. If the Court had wanted a set of doors that were simply functional in opening and closing, it could

have obtained any standard doors from a door supply company. Instead, the Court wanted something unique and expressive. The Court Building Commission, in consultation with architect Cass Gilbert and sculptor John Donnelly, “decided that the building should have monumental bronze doors with sculptured panels depicting important events in the development of the law.” David Mason, *The Supreme Court’s Bronze Doors*, 63 A.B.A. J. 1395, 1397 (Oct. 1977). While the Commission “suggested the important events to be depicted in the door’s panels, the actual creation of the scenes to illustrate these events was left primarily to Cass Gilbert and John Donnelly.” *Id.*

Armed with that starting concept, the designer and sculptor put their creative genius to work. Their process started with research at the New York Public Library about the historical events to incorporate in the reliefs. *Id.* at 1398. They then moved to the numerous artistic decisions involved in the design, such as how to configure the reliefs, what figures to show, how the figures would stand, the size of the figures, the angle of the figures’ bodies, the clothing of the figures, the background scenes / buildings to show behind the figures, the type of decorative borders surrounding each scene, the type of floral patterns used to highlight the edging, and the type of columns on either side of the reliefs. The sculptor then took those designs and translated them into physical reality through “actual clay models and subsequently the plaster molds from which the bronze panels were to be cast.” *Id.*

The beauty and expressive content of the finished doors is unquestionable. “Through the perception of

Cass Gilbert, John Donnelly, and their advisers, together with the unique patience, fortitude, and total artistic skill of John Donnelly, Jr., we have in these eight sculptured panels a unique, thoughtful, and visible record of the development of the law from the earliest times, indicating that the origins and development of the law lie in discussion and debate on important questions by educated laymen, judges, advocates, and scholars.” *Id.* at 1399. The fact that the doors also serve a functional purpose does not make them any less works of art. *See generally U.S. v. Perry*, 146 U.S. 71, 74-75 (1892) (recognizing that “works of art” include “objects primarily designed for a useful purpose, but made ornamental to please the eye and gratify the taste”); U.S. Const. art. 1, § 8, cl. 8 (granting to Congress the power to promote the “useful Arts”).

In a similar way, a person interested in obtaining their own website can choose from either non-custom or custom options. A non-custom website is one typically created through a process called “drag and drop” or “pick and plug.” It typically involves an online software program that provides basic layout choices and allows a person to insert their own text or pictures in pre-selected locations on a page. Such programs do not require any particularized skill or training and allow anyone to set up a very basic website in short order and at no (or very limited) expense.

Take the example of a couple who desire a website for their wedding. Free non-custom options abound. A starting place could be the website theknot.com which advertises a “Free Wedding Website Made for You.” There, interested parties can select from one of

numerous pre-made design layouts, insert their photo and text and *Voila!* – their new non-custom website is up and running. Or if they do not like the free designs and layouts offered on The Knot, numerous other drag and drop wedding website layouts are available from competitors (*e.g.*, withjoy.com, minted.com, zola.com, weddingwire.com, wix.com).

But some people do not want an off-the-shelf website. They want something special and unique, something that is tailored specifically to them and their needs. They want the unique expression that a custom designer offers. Pet.App.182a (the designs by Lorie Smith are created by “drawing on her inspiration and sense of beauty”). *See also Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (recognizing that a poster design embodies “the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity . . . which is one man’s alone.”)

By highlighting this distinction between mass-produced and custom goods, *amici* do not mean to suggest that mass-produced goods cannot be artistic or expressive. Rather, the key distinction between the two involves the creator’s relationship to the message. With a mass-produced good, the creator has essentially handed over their tools (paint, brush, easel) to the public, who can use that good to express any message they wish. The creator is only minimally involved in the final message, just as a paint supplier is only minimally involved in an artist’s painting. For a custom work, however, the designer is the one doing the creating and is therefore an integral part of the message. *See* Pet.App.182a-183a (stipulation that

Lorie Smith works closely with clients in her design work to “express a message in a way that is pleasing to both Ms. Smith and her clients” but “Ms. Smith ultimately has the final say over what she does and does not create”).

B. What is graphic design?

“Design” refers to “the arrangement of elements that make up a work of art.” *Design*, Webster’s Third New International Dictionary (1986); *see e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017) (“Design refers here to the combination of details or features that go to make up the useful article”) (cleaned up). “Graphic design” specifically focuses upon *visual* elements, *i.e.*, those that can be experienced with sight (rather than the other senses). *See Graphic Design*, Merriam-Webster Online Dictionary, <https://perma.cc/BGB9-ZNVY> (last updated May 24, 2022) (defining graphic design as “the art or profession of using design elements (such as typography and images) to convey information or create an effect”); *Star Athletica*, 137 S. Ct. at 1009 (“graphic” means “of or pertaining to drawing or painting”). Those visual elements include the ones stipulated to by the parties in this case: color schemes, fonts, font sizes, positioning, harmony, balance, proportion, scale, space, angle, light, complexity, and simplicity. Pet.App.182a.

Graphics are inherently expressive. As symbols, they are a “primitive but effective way of communicating ideas.” *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943)). For instance, using “an emblem . . . to symbolize some

system, idea, institution or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.” *Id.* See also *Shurtleff v. City of Boston, Massachusetts*, 142 S. Ct. 1583, 1590 (2022) (recognizing the expressive nature of a symbolic “piece of cloth” - a flag – based upon its content, presence and position).

Some of the most well-known graphic designs are brands or logos. No words are needed for viewers to understand the expressive nature of these symbols or which companies and goods they represent:



Other graphics, like the new logo created by world-renowned designer David Carson² for Shift Clean

² *Amicus* David Carson has been a world leader in graphic design for decades. He has been listed as the third *Most Influential Graphic Designer Working Today*, Graphic Design USA, <https://perma.cc/3Q4U-GYJL> (last visited May 24, 2022), and the sixth *Most Influential Graphic Designer of the Past 50 Years*, Graphic Design USA, <https://perma.cc/6URB-E6QZ> (last visited May 24, 2022), while *Newsweek* magazine said he “changed the public face of graphic design,” Peter Plagens, *The Font of Youth*, *Newsweek*, Feb. 25, 1996, <https://perma.cc/8WDZ-6TPL>. His work is included in the “bible” of graphic design history, Philip B. Meggs & Alston W. Purvis, *Meggs’ History of*

Energy (a company focused on battery-powered solutions for marine fleets) incorporate text of varying sizes and colors, spacing and a + symbol representing a battery's positive terminal.



Graphic designs exist in multiple mediums, ranging from the traditional print mediums of books, magazines and newspapers to the more recent digital medium of computers and the internet. Examples of non-digital graphics (each designed by David Carson) include:

Graphic Design 578, 653-54 (6th ed. 2016), and the permanent collection of the London Museum of Design (among others).

Cover art for a boxed set of John Coltrane recordings:



A whiskey bottle label and box.

A map of the USA for Amtrak on-board magazine:



Website design is a subset of graphic design that exists solely in a digital medium. The digital format allows designers to incorporate some additional design elements not always present in a physical medium, such as movement, navigability and interactivity. Pet.App.182a. The digital medium also permits incorporation of audio design elements, with the use of sounds and videos.

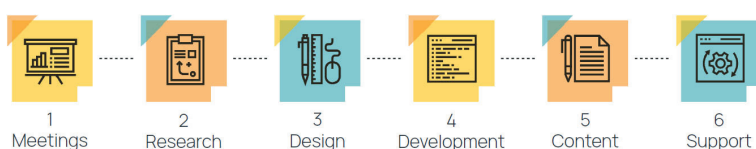
III. An Overview of the Design Process.

A. From conception to finished design.

Custom website designers approach a design project in much the same way as artists practicing in more traditional, non-digital mediums. For instance, recall the process for the designer and sculptor of the Supreme Court doors. They first met with the Building Commission, then conducted research, then

designed, developed and cast the doors, and finally installed the finished product. Website designers are no different.

In the stipulated facts of this case, the parties describe how 303 Creative / Lorie Smith approaches a website or graphic design project. Pet.App.181a-185a Lorie’s process is familiar to *amici* who each engage in a similar (if not entirely identical) process.³ The following graphic (by Lform Design) reflects the general stages in that process:



First, the designer meets with a potential customer to determine the customer’s needs and whether the designer’s particular skill set is a good match for what the customer desires. Pet.App.185a (Lorie Smith conducts a “vetting process” to determine whether a potential customer is “a good fit given Plaintiffs’ skills, schedule, preferences, and workload.”). For instance, some designers develop niche practices creating websites for a particular industry, such as dental practices, non-profits,

³ While this process is familiar to *amici*, they note that the Court has not previously addressed a case specifically dealing with website design. Thus *amici* believe it is important to describe that process in detail to assist the Court. *See generally Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 806 (2011) (Alito, J. and Roberts, C.J. concurring) (in applying First Amendment protections to “new and rapidly evolving technology . . . we should make every effort to understand the new technology.”) (cleaned up)

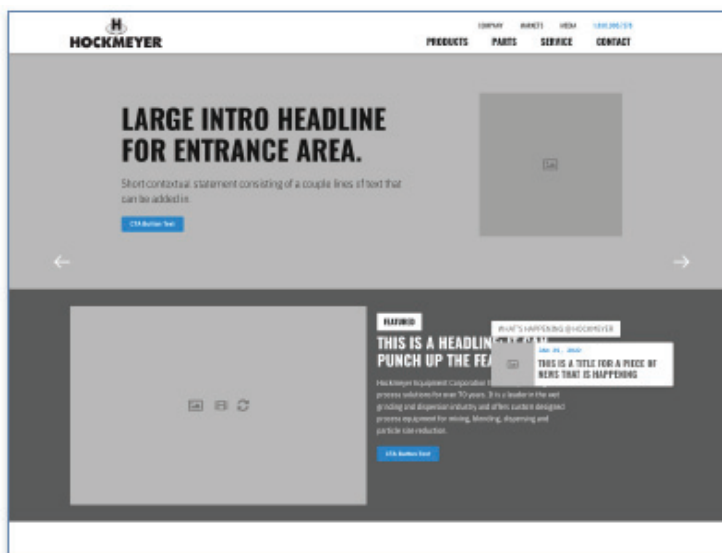
schools, or law firms. Others develop a specialty in websites used by a particular market segment. For example, B2B (Business to Business) designers specialize in websites geared toward a business audience, rather than retail consumers. Others focus their design skills upon UX (User Experience). If the skill set of the custom designer is not a good fit for the project (or the potential customer is unwilling to pay the price for that designer's artistry), the designer will refer the customer to someone else. Pet.App.185a

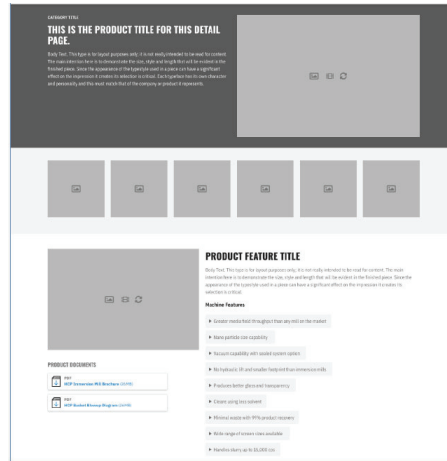
Second, assuming the skill set matches, the designer will then engage in research to better understand the who, when, where, why and how of the project. That research starts with learning more about the customer (*What's unique about you or your company? To whom is the website targeted? What do you want a website to accomplish for you? If a website is for marketing, how does it fit into your broader marketing strategy? Do you want a logo or other custom graphics designed as part of the project? Do you already have a particular look, feel, or color pallet that you have used in the past and want to incorporate?*). Research may also include competitor analysis (*What are similar people doing with their websites?*) and statistics review.

The third step of the process is the design process itself. This is where the expression and artistic genius of the designer fully manifests itself. Pet.App.182a ("Although clients often have a very basic idea of what they wish for in a graphic or a website and sometimes offer specific suggestions, Ms. Smith's creative skills transform her client's nascent ideas into pleasing, compelling, marketable graphics or websites conveying a message.").

Starting with an essentially blank screen, the designer creates “wire-frames” and “style scapes” / mood boards.

(i) Wire-frames. “Wire-framing refers to the process by which a three-dimensional digital object is given structure. . . . The structure works like a skeleton. A digital artist must create each bone of the skeleton.” Michael Palumbo, *Copyright Protection for the Fruits of Digital Labor: Finding Originality in Digital Wire-Frames*, 44 New Eng. L. Rev. 127, 145 (2009). While a wire-frame may look like a finished digital image, “it does not have texture or ‘skin,’ that is, the appearance of texture or color.” *Id.* Here are several examples of wire-frames:





In each, you can see that the focus is clearly upon layout, with no concern at this stage for color, text or tone. The wire-frame provides the building block structure on which the rest of the website and graphics are built.

(ii) Style scapes / Mood Boards. If a wire-frame is the interior skeleton of the design, style scapes (sometimes called “mood boards”) are focused on the exterior – colors, font type, font size, images, language tone – the skin, “feel” or “mood” of the website. Here is an example created by Lform Design:



Note how the designer has selected artistic features that express the seriousness and substance of this industrial equipment supplier – darker colors, sturdy

thick style fonts, straight lines, and solid rectangular imagery.

After obtaining customer feedback on the wireframes and style scapes, the designer then moves to the fourth (and often most time-intensive) stage – development. Development involves creating drafts of the various webpages based upon the selected layouts and style. The designer will typically create a “sitemap,” which visually depicts how the various webpages will link and interact with each other (or with other third-party websites). For large projects, there may be dozens of webpages to create and link together. Then the designer will add additional features such as the website menu (similar to the index of a book), and interactive features (*e.g.*, pop-up boxes, animations, infographics). Some of these features may require the designer to create their own coding (*i.e.*, computer programming). The designer may also create one portion of the website which is accessible to the public and another which is designed solely for internal use by employees of the company (each with their own particular feel and style).

In the fifth stage, the designer adds content (text, graphics, audio, video) to the webpages. That content may come from the client or may be new items created by the designer, such as a logo, photographs, and charts. Like 303 Creative, many website designers add their personal signature to the webpages they create. *See* Pet.App.187a (all of 303 Creative wedding websites will say “Designed by 303Creative.com”). These signatures proclaim to the public who the artist is and help to attract future clientele.

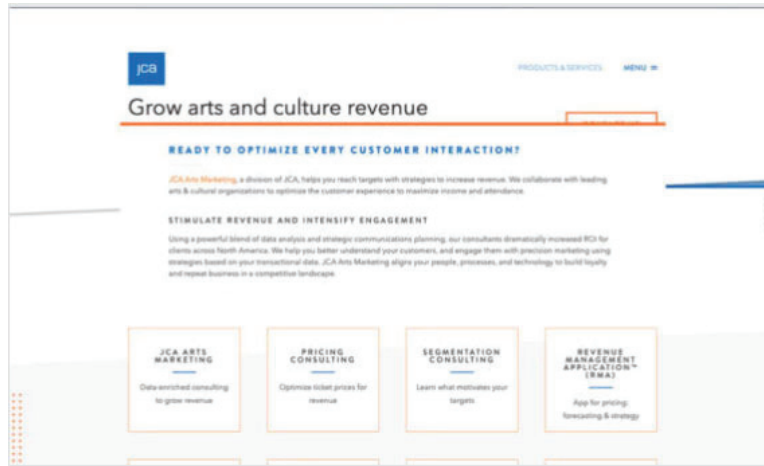
Finally, once the content has been fully added, the designer tests the website to ensure that all elements are fully functioning and, if so, the new website is then launched (*i.e.*, made “accessible” to the public). Typically, since websites are interactive, the designer will remain engaged to provide support and updates for the client over an extended period.⁴

B. Transforming non-custom webpages into custom works of art.

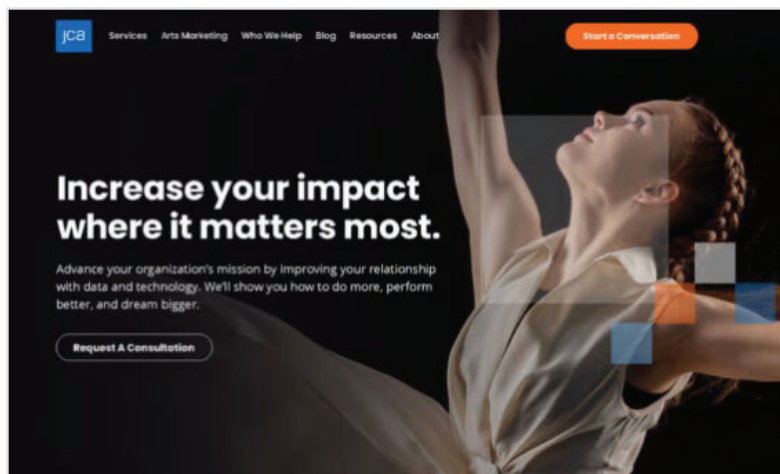
This general website design process is used for both new websites as well as redesigns of existing websites. It fills a need for people who are no longer satisfied with a non-custom drag and drop site, but want a custom, artistic presence. For instance, Bop Design was tasked with helping a nonprofit consulting firm on a website redesign project.

⁴ The activities performed in each stage of the website design process are often categorized differently by designer. For instance, Bop Design uses the following six categories: (1) Discovery; (2) Concept; (3) Content; (4) Design; (5) Develop; and (6) Launch. Regardless of the titles used, the general steps taken in the design process are similar for each website designer, starting with meetings and research at the beginning, design and development in the middle and website launch at the end.

Here is the former website homepage:



This website has stiff lines, lots of text, and nothing that stands out. Now compare the redesign:

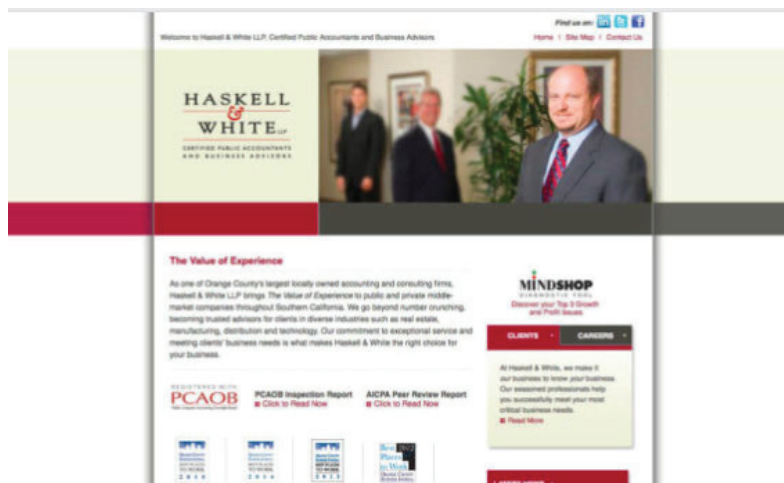


The difference is dramatic. The new webpage has a central point of focus – the elegant dancer who evokes an image of the arts organizations which this consultant targeted. The amount of text is greatly reduced and design elements added (e.g., the blocks of varying shapes and colors imposed over the dancer).

The main words on the page are increased in size and placed against a black background for maximum impact. The dancer's skirt is faded out as it meets the text, thus drawing the picture and the text into a harmonious balance. This new webpage expresses elegance, refinement and culture, *even without any reference to the text on the page.*

Or compare these before and after images of the webpage for an accounting firm (also by Bop Design):

Before:

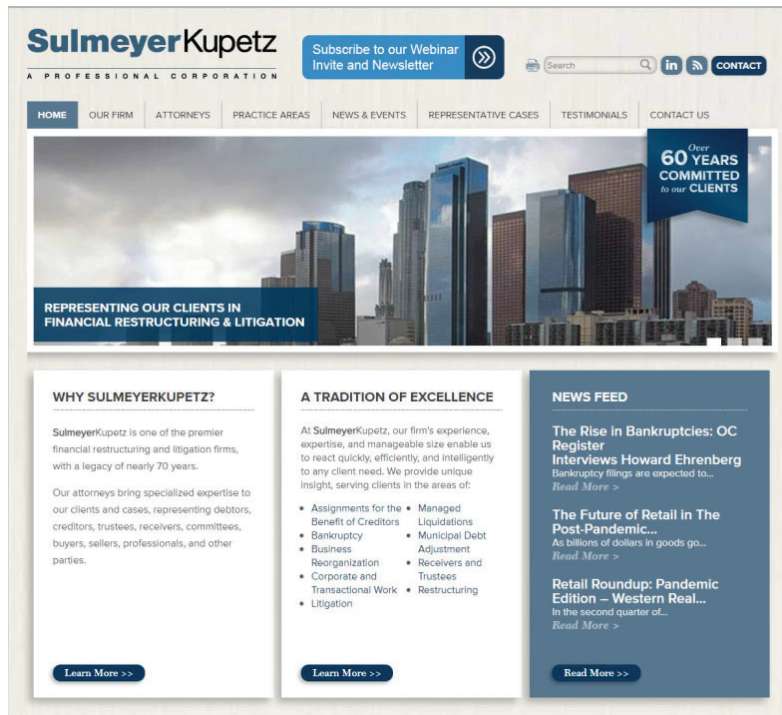


After:



The former is boxy and full of text. It does nothing to draw the viewer in. The latter, on the other hand, incorporates images layered on top of each other with an intriguing window reflection, a new vibrant color scheme, a new logo which cleverly layers the client initials at different angles / colors, and a clean, sophisticated look. It takes a product which *looks* like a non-custom website and through custom design makes it attractive and appealing. In other words, it adds the art, creativity and expression of the designer.

Or one more example of a website redesign, this time by Get Visible for a law firm:



The former website has a non-custom feel, with lots of text in uniform boxes. The stormy sky looks menacing, and the lighting is dreary.

In comparison, the revised custom website is beautiful and cheery. Gone is the mass of distracting small text, replaced with just four words in large bold letters announcing the firm's main area of practice. A new custom graphic design logo sits atop the page. There are no more clunky text boxes, just sleek,

layered imagery. The artist has created something new and appealing.



IV. Custom Websites and Graphics Are Expressive Works That Enjoy First Amendment Protection.

A. The Constitution protects expression with or without words.

First Amendment protections are not limited to purely written or oral speech. Rather, the Court has held time and again that human *expression*, whether with or without words, is entitled to First Amendment protection. Protected forms of expression include:

- **Music** – *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music is one of the oldest forms of human expression” based upon “its capacity to appeal to the intellect and to the emotions”);
- **Pictures, films, videos, paintings, drawings, and engravings** – *Kaplan v. California*, 413 U.S. 115, 119–20 (1973); *United*

States v. Stevens, 559 U.S. 460, 468-72 (2010) (recordings of animal cruelty);

- **Flags** – *Shurtleff v. City of Boston, Massachusetts*, 142 S. Ct. 1583, 1590 (2022) (a “Christian flag” – “red cross on a blue field against a white background”); *Stromberg v. People of State of Cal.*, 283 U.S. 359, 368-69 (1931) (red flag);
- **Wearing an armband** – *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 505 (1969);
- **Parades** – *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568-70 (1995) (“Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.”);
- **Magazines** – *Winters v. New York*, 333 U.S. 507, 510 (1948) (First Amendment protects both informing and entertaining since “[w]hat is one man’s amusement, teaches another’s doctrine.”);
- **Entertainment** – *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (protecting nude dancing and noting “motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee”);
- **Custom wedding cakes** – *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719, 1723 (2018) 1742-44 (Thomas, J., concurring in part) (“[C]reation of custom

wedding cakes is expressive” and protected by the First Amendment); and

- **Video Games** – *Brown* 564 U.S. at 790 (2011) (“Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.”).

The Court has also specifically recognized that *designs* are expressive and therefore subject to First Amendment analysis. For instance, in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015), the Court noted that designs on license plates (whether the “Lone Star” graphic, an image of the World Trade Center towers, or a proposed image of a square Confederate battle flag) “convey the messages communicated through those designs.” *See also Star Athletica, L.L.C.*, 137 S. Ct. at 1012-13 (recognizing that a design on cheerleading uniforms created by “the arrangement of colors, shapes, stripes, and chevrons” was a “two-dimensional work of art”).

B. Digital expressions are constitutionally protected.

First Amendment protections also apply regardless of the particular *medium* used for the expression. “[T]he basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different

medium for communication appears.” *Brown*, 564 U.S. at 790 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). The Court has applied this principle directly to online communications. See generally *Reno*, 521 U.S. at 849-853 (1997) (applying First Amendment protections to communications over the internet as “a unique medium . . . available to anyone, anywhere in the world”). Thus, a graphic designer’s expressive work receives the same Constitutional protection whether the design is created in physical form (*e.g.*, on the cover of a magazine or a flag) or solely in digital form (*e.g.*, in a computer file or on a website). Whether created using newsprint and ink, or the ones and zeroes of computer coding, the design remains equally expressive. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (recognizing that “websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”)

C. Custom website and graphic design are expressive conduct of the *designer*.

Although custom website and graphic designers often start with a message that their customers wish to convey, this does not detract from the designers’ own First Amendment rights or make them any less expressive speakers in the design process. Custom designers are not simply copy machines. For example, John Donnelly knew that the Court Commission wanted bronze doors depicting scenes about the law, but it was his expressiveness that brought those messages to life and which remains imbued in the doors almost a century later. Likewise, composer John Williams’ expressive musical brilliance is no less present in the musical score for

the Star Wars movies simply because a third party asked him to write the score or explained how the various themes would need to relate to the movie characters. *See generally Hurley*, 515 U.S. at 568-70 (“First Amendment protection does not require a speaker to generate, as an original matter, each item featured in the communication.”) (cleaned up).

The court below correctly noted that the “creation of [custom] wedding websites is pure speech.” 303 *Creative LLC v. Elenis*, 6 F.4th 1160, 1176 (10th Cir. 2021). Even where the “particularized message” is not initially generated by the artist, the Court has recognized that creator’s free speech rights. *Hurley*, *supra* (holding that First Amendment protections apply to parade organizers who “like a composer” select and organize the participants of the parade to convey a message). Just like a newspaper or magazine, a website “is more than a passive receptacle or conduit for news, comment, and advertising.” *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (holding that advertisement selection by a newspaper is protected speech). The website designer and graphic artist are “intimately connected with the communication advanced,” and as the authors of the creative work, their artistic expression constitutes protected speech. *Hurley*, 515 U.S. at 576; *see also Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (“As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”). That protection applies regardless of whether the artist signs their creation

(as John Donnelly did for the Court doors and 303 Creative and many *amici* do on each of their website designs) or the design is left unsigned.

As shown above, unlike the builders of a location simply serving as “a passive receptacle or conduit” through which messages are routed, *Tornillo*, 418 U.S. at 258; *see also Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64-65 (2006), custom website and graphic designers do much more than merely open a door to provide a place for people to gather or speak. A designer’s artistic work entails much more “expressive quality” and conduct than that “of a parade, newsletter, or the editorial page of a newspaper,” *Rumsfeld*, 547 U.S. at 64, all of which are protected expressions.

D. Copyright Law supports the view that website and graphic design constitute artistic expression entitled to First Amendment protection.

The People gave Congress the power “to promote the Progress of Science and useful Arts.” U.S. Const. art. I, § 8, cl. 8. One way the People, through Congress, have chosen to promote the arts is through the Copyright Act, which protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). “Works of authorship include ... pictorial, graphic, and sculptural works,” § 102(a)(5), which are defined to include “two-dimensional ... works of fine, graphic, and applied art, photographs, prints and art

reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans,” § 101. The author of an original work is entitled to ownership of any copyright. *See Reid*, 490 U.S. at 737 (citing and quoting § 201(a)).

Website designers and graphic artists are the authors who translate ideas and desires into the fixed, tangible expressions communicated on webpages for the whole world to see. *See id.* Webpages and their content can meet the definition of original works of authorship and, therefore, may qualify for copyright protection. *See* Compendium of U.S. Copyright Office Practices § 1006 (3d ed. 2014), <https://perma.cc/2J5M-A5VS>. In fact, a search of copyright titles for “website” on the Library of Congress Copyright Public Catalog returns over 1,300 registered copyrights.⁵ This reinforces the importance society has placed on artistic works including those “fixed” on internet websites, and it supports the conclusion that custom webpages and their graphics constitute artistic expression entitled to First Amendment protection.

⁵ <https://perma.cc/K59U-LD4F> (last visited May 24, 2022).

CONCLUSION

For the foregoing reasons, this Court should make clear in its opinion that, regardless of which party prevails, designers of custom websites and graphics are engaged in an *expressive* art and are entitled to the same protections under the First Amendment as artists using any other medium.

Respectfully submitted,

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