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Commercial Discrimination as Religious Messaging in *303 Creative v. Elenis*

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Abstract: In *303 Creative LLC v. Elenis*, a web designer sought a legal right to refuse to make wedding websites for same-sex couples while making wedding websites for other couples as a service provided by her business open to the public. The web designer also sought a legal right to post a notice on her business webpage stating that she would refuse to provide such services for same-sex couples' weddings. Here, I argue that *303 Creative* marks a fairly radical break from previous legal cases dealing with whether service providers have the legal right to deny services for same-sex weddings. This is because, if we take the web designer at her word, the web designer appears to have sought these legal rights, in significant part, in order to use an act of commercial discrimination as an act of religious message sending. In support of this conclusion, I argue that acts of selective commercial service constitute the primary means by which the web designer sought to promote her preferred religious messages and that these acts of selective commercial service are acts of discrimination. I also discuss some of the significance of this case for religion and politics in the United States.

Keywords: First Amendment; freedom of speech; religious freedom; lgbtq rights

1. Introduction

In June 2023, the U.S. Supreme Court issued its opinion in *303 Creative LLC v. Elenis*. The key questions in the case were (1) whether a web designer had a First Amendment free speech right to refuse to make wedding websites for same-sex couples, even while making wedding websites for other couples, and (2) whether that web designer had a First Amendment free speech right to include a statement on her business webpage stating that she would not make wedding websites for same-sex couples. In a 6-3 decision, the Court concluded that the First Amendment granted the web designer both rights.[1]

In many ways, *303 Creative* resembles other cases that have been litigated in recent years dealing with whether sellers in the commercial marketplace have First Amendment free speech or religious free exercise rights to refuse services for same-sex couples' weddings. It is natural to frame those cases as legal attempts to correctly balance LGBTQ civil rights and equality, on the one hand, and the rights of sellers in the commercial marketplace to create only messages they want to send and to provide only goods and services that accord with their religious convictions on the other. To some extent, this also describes *303 Creative*.

But in another way, such a framing misdescribes—or at least radically under-describes—what happened in *303 Creative*. I focus here on a significant way in which *303 Creative* differs from most of the cases that came before it. In past cases like *Masterpiece Cakeshop v. Colorado* and *Elane Photography v. Willock*, the free speech issue was whether those providing commercial goods or services had a right to refuse to provide goods that they believed sent a message they did not endorse.[2] Thus, the free speech issue in those cases was only whether they had the freedom *not* to do something.

Initially, *303 Creative* may appear to be about the same thing. Lorie Smith, the sole owner and operator of 303 Creative LLC, argued that the First Amendment could not compel her to "speak" through the creation of wedding websites for same-sex couples, even if she were making wedding websites for other couples. A majority of the Supreme

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Court's justices agreed with her. But if we take her at her word, Smith sought more than mere freedom from compulsory speech or service. She also sought a right to discriminate in the commercial marketplace for the purposes of sending a message. More precisely, she sought—and was granted—a right to use marketplace discrimination *as her message*.

This is because the primary message Smith claims she wants to send (i.e., a message defending what she thinks is "God's true story of marriage"), she wants to send specifically by engaging in commercial discrimination. While Smith has not acknowledged this explicitly, I argue that this can be shown by looking at the things Smith claims she is seeking to do by making wedding websites. I argue that only the act of commercial discrimination itself plausibly sends the message Smith claims she sued in order to be able to send. I think this conclusion is important, in large part, because Smith's attempt to get legal permission to use commercial discrimination as a means of sending a religious message marks a relatively novel move in the "culture war" between those on the Christian right promoting anti-LGTBQ policies and those seeking full legal equality for LGBTQ people.

That Smith sought to secure the right to use commercial discrimination to send a religious message is the key claim I defend in this paper. For purposes of argument, it will be useful to break this claim down a bit. First is the claim that Smith sought the right to use selective provision of her wedding website services as a way of sending a religious message. Second is the claim that the way in which Smith sought to selectively provide her wedding website services (to male–female couples but not to same-sex couples) constitutes discrimination.

The first claim is perhaps the most important: the novel move Smith made here was to obtain a right to message-send through selective marketplace service to some people but not others. I argue for this in Sections 2 and 4. Still, there is additional value in calling things what they are. Selectively providing wedding website services to male–female couples but not same-sex couples is a form of discrimination based on sexual orientation. I argue for this in Section 3. There is logical space for one to reject the conclusion that Smith's actions constitute discrimination while still accepting the conclusion that the kind of selective service Smmarith plans to provide constitutes religious messaging through commercial conduct. In Section 5, I discuss some political upshots of Smith's success in obtaining a right to use commercial discrimination as a means of message sending in our highly socio-politically polarized society.

2. The Commercial Marketplace and the Marketplace of Ideas

Even before the Supreme Court recognized the constitutional right to marry someone of the same sex in 2015, legal conflicts were developing over whether those who provide commercial goods and services for weddings generally have a First Amendment right to refuse to provide those goods and services to same-sex couples specifically.[3] Typically, merchants seeking to engage in such refusals have argued that they have both a right to free speech and a right to free exercise under the First Amendment to refuse service in these cases. Here, I put aside the free exercise issue and focus solely on the free speech issue, which is what the Supreme Court also chose to do in *303 Creative*.[4]

Prior to *303 Creative*, most of the initial conflicts had a few key characteristics in common.[5] First, the merchants in these earlier cases were already providing goods and services to weddings before same-sex marriages were legally recognized across the U.S. Thus, such merchants may have entered their goods and services into the marketplace without foreseeing that there might someday be laws requiring them to provide those goods and services for the weddings of same-sex couples. Second, the relevant goods and services in these earlier cases were not speech in the colloquial sense. Instead, these merchants offered other services like making wedding cakes, creating floral arrangements, or taking wedding photos. Because these activities were not literal speech but arguably were acts of creative expression, there were tricky legal questions about whether and when providing such goods and services for weddings ought to count as expressive conduct

legally covered by the First Amendment's free speech provision. These are questions the Supreme Court has not yet resolved.

303 Creative differs from these earlier cases in both respects. First, Smith had not previously provided wedding websites as part of her web design business, and there is no evidence that she had any plans to do so prior to the Supreme Court's recognition of the constitutional right to marry someone of one's own sex. Rather, Smith brought a pre-enforcement challenge, asking courts to hold that the Colorado Anti-Discrimination Act—which protects against discrimination based on sexual orientation, among other characteristics, in public accommodations—would violate the U.S. constitution if enforced against her for refusing to make wedding websites for same-sex couples, even if she were making wedding websites generally available for other couples.

Second, wedding websites generally involve a significant amount of written text. If Smith is producing that text, then she is engaged in the production of speech (although questions remain about whether that speech is *her* speech). Thus, Smith's case presented an opportunity to circumvent some of the legal issues concerning expressive conduct that were part of earlier cases. These differences in *303 Creative* are significant but do not constitute what I think is the most radical new development in this case.

In the initial cases, the merchants raised worries about their ability *not* to send a message they claimed would be sent if they provided the relevant goods or services for weddings for same-sex couples. Smith did that too. But Smith's case is not just—and I will argue not primarily—about this. Smith also litigated for the right *to send* a message by a particular means.[6] That particular means of message sending is providing services for male–female couples' weddings while refusing to provide those services for same-sex couples' weddings. To see why this is so, we need to take a closer look at what Smith herself said about what she was seeking to do in her suit.

Smith's suit challenged two provisions of the Colorado Anti-Discrimination Act (CADA). The first provision, the Accommodation Clause, prevents public accommodations from refusing to provide the full and equal enjoyment of their goods or services to individuals or groups because of various protected characteristics, including sexual orientation.[7] Smith argued that the Accommodation Clause would, in violation of the First Amendment, *compel* her to speak if it were used to require her to make wedding websites for same-sex couples.

The second provision, the Communication Clause, prevents places of public accommodation from publishing any communication indicating that they will refuse patrons the full and equal enjoyment of their goods or services because of protected characteristics, including sexual orientation.[8] Smith argued that the Communication Clause would, in violation of the First Amendment, *prevent* her from speaking if it were used to bar her from stating on her website that she would not offer her wedding website services for the weddings of same-sex couples.

Both the Tenth Circuit's opinion and the Supreme Court's oral arguments focused almost exclusively on the Accommodation Clause issue. It was not until the Communication Clause issue was discussed in Justice Sonia Sotomayor's dissenting opinion in the case that this latter issue gained significant attention. Perhaps as a result, there has been little discussion of what the Communication Clause issue reveals about the novel developments in *303 Creative*. But, it is the statement that Smith claimed she wanted to include on her website in violation of the Communications Clause that begins to show that the issue of compelled speech raised by the Accommodation Clause was a secondary issue derived from Smith's primary communicative goal. Or at least that is how things seem if we take Smith at her word, i.e., if we assume that she meant what she said during litigation. The statement Smith claimed in her suit that she wants to put on 303 Creative's business website reads, in full, as follows:

"I love weddings.

Each wedding is a story in itself, the story of a couple and their special love for each other.

I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding—from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together.

I firmly believe that God is calling me to this work. Why? I am personally convicted that He wants me—during these uncertain times for those who believe in biblical marriage—to shine His light and not stay silent. He is calling me to stand up for my faith, to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman.

These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage—the very story He is calling me to promote."[9]

This statement is worth providing in full because of what it claims to share about Smith's motivations and aims in seeking to expand her web design business and in pursuing this lawsuit.

Note that Smith claims that she believes God is calling her to, among other things, "explain His true story about marriage" and "publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman". The most natural reading of Smith's statement is that by God's "true story about marriage", she means her view that God's "design for marriage" is "a life-long union between one man and one woman". Additionally, the most natural reading of her final sentence is that God is calling her to "promote" this same thing. Thus, Smith claims that God has called her to explain, publicly proclaim, celebrate, and promote this specific conception of marriage as a life-long union between one man and one woman. She also claims that, in response to God's calling, this is why she seeks to make wedding websites to begin with.

This naturally leads to a question: which of the actions that Smith wants to take would constitute an explanation, public proclamation, celebration, or promotion of this specific conception of marriage? We can begin by eliminating a candidate: making wedding websites for male–female couples. To make a wedding website for a couple comprised of a man and a woman is not to explain, publicly proclaim, celebrate, or promote the view that marriage is a life-long union between one man and one woman.

To see why, consider that The Knot, Zola, and many other wedding website companies make websites for heterosexual couples and that these companies do not thereby engage in acts of explaining, publicly proclaiming, celebrating, or promoting the view that marriage is a life-long union between one man and one woman. That they do not engage in such acts—and seemingly do not want to do so—is evidenced by the fact that these wedding website companies also make websites for same-sex couples. It is implausible to hold that by making websites for male–female couples, these companies are explaining, publicly proclaiming, celebrating, or promoting a view of marriage that their other actions seem to reject. Thus, making wedding websites for male–female couples on its own does not accomplish the things that Smith claims she is aiming to do in response to God's calling.

But there is a related action (or perhaps set of actions, depending on how one conceptualizes what constitutes an action) that might do this instead, namely, providing wedding websites for male–female couples while refusing to make analogous wedding websites for same-sex couples. Making websites by itself does not accomplish Smith's stated communicative aims. It is the making of websites for some and not for others based on couples' sexual orientations that does this.

Thus, making wedding websites is not what explains, proclaims, celebrates, or promotes Smith's view of marriage. Making discriminatory choices about which weddings to make websites for does. Smith's creation of wedding websites through her business is a

commercial service. Thus, it is an act of commercial discrimination that explains, proclaims, celebrates, and promotes Smith's religious messages. The commercial discrimination and these communicative acts are, in fact, one and the same. One does not merely cause the other; one *is* the other. Therefore, commercial discrimination itself is the communicative act Smith sought a legal right to engage in.

At this point, one might argue that I have moved too fast in at least two ways. First, one might question my use of the word *discrimination*. Smith herself denies that she discriminates against LGBTQ customers. I consider this issue in Section 3. Second, one might think that perhaps we can adopt a charitable interpretation of Smith's plans in order to salvage the idea that she could explain, publicly proclaim, celebrate, and promote the specific conception of marriage she accepts through the creation of wedding websites for heterosexual couples alone. I consider this objection now.

While it is generally true that making a wedding website for a heterosexual couple does not send a message that marriages can only be between one man and one woman, one could imagine a wedding website that might do this. For example, a wedding website could include a page titled "Our values" or even "Our Web Designer's Values" that could include claims like "We believe that God has designed marriage specifically to be a union between one man and one woman" or "Our web designer believes that God has designed marriage specifically to be a union between one man and one woman. By making this website she explains, proclaims, celebrates, and promotes this view!" One might think such examples strain credulity. Even most of those ardently committed to Smith's view of marriage probably would not want to pay for a wedding website that centers this kind of political messaging. But, the creation of such websites is theoretically possible. The question then becomes whether it is plausible that Smith intends to send her message this way. We need not speculate here because, as part of her suit, Smith provided a mockup of what one of her wedding websites would look like.[10]

This mockup wedding website contains no such explicit messaging explaining, proclaiming, celebrating, or promoting the view that marriage is a life-long union between a man and a woman. In the mockup, there is no indication as to whether the bride or groom have been married before. Thus, the website does not seem to explain, proclaim, celebrate, or promote the view that marriage is a *life-long* union. Similarly, there is nothing that says marriage is limited to one man and one woman. Thus, it does not seem to explain, proclaim, celebrate, or promote that aspect of Smith's view of marriage either. Instead, the website contains the standard sorts of pages one would expect for a wedding website. The page titles on the website's menu are "Home", "Our Story", "Wedding Events", "Wedding Party", "RSVP", "Guest Book", "Registry", "Photos", "Blog", and "Connect".[11]

The closest this mockup gets to suggesting that marriage is limited to one man and one woman is in the blog section. There, a page titled "Lily's [the bride's] Favorite Scripture" contains a single passage, Matthew 19: 4–6, reading "And he answered and said, 'Have you not read that He who created them from the beginning made them male and female, and said 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? So they are no longer two, but one flesh. What therefore God has joined together, let no man separate."[12] This perhaps does some work toward showing how Smith's wedding websites for male–female couples could explain, proclaim, celebrate, and promote the view that marriage is limited to a union between one man and one woman. But, at most, it does so weakly and contingently for several reasons.

First, all indications suggest that the couple themselves will choose what posts to include in the blog section of their wedding website. Here, Smith has created a fictitious scenario in which a member of the couple happened to decide to include a blog page that consists solely of a scripture passage that some interpret as defending Smith's view of marriage. But there is no guarantee that any couple that Smith would work with would, in fact, ever choose such a passage of scripture to include as part of a favorite scripture page. Indeed, there is not even any guarantee that any couple would ever choose to have a favorite scripture page on the blog part of their website at all. There is also no indication

that even if a couple chose to include a favorite scripture passage page on their blog, they would not include scripture verses that some might interpret as counting against Smith's view of marriage, such as Galatians 3:28: "There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus".

Second, even if contrary to all indications in her mockup, the inclusion of this scripture passage was a common part of Smith's wedding websites; it is not clear that the inclusion of this passage explains, proclaims, celebrates, and promotes Smith's particular conception of marriage as only between one man and one woman. How best to interpret this passage is a contested theological issue (see, for example, Brownson 2013, pp. 85–109; Wielenberg 2015). Without additional exegesis or an indication of how the reader interprets the passage, the passage itself fails to explain or proclaim Smith's particular conception of marriage and, at best, may obliquely celebrate and promote it. Thus, while one could, in theory, offer wedding websites on the commercial market that explicitly explain, proclaim, celebrate, and promote the view that marriage is a life-long union between a man and a woman, it is doubtful that there is a market for such websites and, regardless, Smith herself has given us evidence that she does not plan to offer such websites. This reinforces the point that it is not the creation of the websites themselves that explain, proclaim, celebrate, and promote Smith's message about the nature of marriage. Rather, it is Smith's creation of wedding websites for some but not others that do this.

Since the 1960s, U.S. courts—including the Supreme Court—have regularly claimed that freedom of speech is important, in part, because it protects a "marketplace of ideas."[13] While the value and meaning of the marketplace metaphor is contested, it is clear that the "marketplace of ideas" is indeed metaphorical. As ChatGPT recently reminded me when it refused to make me a grocery list of things to buy at the marketplace of ideas, the marketplace of ideas is distinct from the actual commercial marketplace.[14] Everyone agrees that Smith is not legally prevented from explaining, proclaiming, celebrating, and promoting what she believes is God's view of marriage in the marketplace of ideas. She is undoubtedly free to do so. She can post her views on a non-commercial personal website, shout them from a megaphone in a public park, print them on leaflets and hand them out on the sidewalk, stand up and proclaim them in church, start a community advocacy group dedicated to promoting them, or type them up as a comment on a YouTube video.

Furthermore, everyone agrees that Smith is not legally prevented from explaining, proclaiming, celebrating, and promoting her views on marriage in the commercial marketplace.[15] She could sell on the commercial marketplace embroidered pillows, wooden plaques, painted canvases, or frosted cakes with written messages explicitly declaring her views on marriage. But Smith is not satisfied with any of these commercial or non-commercial routes for sending her message. What Smith wants is the ability to send messages through a specific form of commercial conduct—namely, selective provision of a service to some customers but not others on the basis of sexual orientation. Thus, Smith is seeking to turn the commercial marketplace into the marketplace of ideas, not through the provision of certain goods or services that include messages, but through sending messages *by* providing certain goods and services to some but not others—i.e., *by* engaging in acts of commercial discrimination.

But, the commercial marketplace is not the marketplace of ideas. This is a well-established part of First Amendment law, as evidenced by many aspects of Supreme Court jurisprudence. For example, laws against false advertising and commercial fraud can be used to prevent commercial actors from expressing certain viewpoints or ideas that people are generally free to express in other contexts.[16] Similarly, laws compelling speech are sometimes used to require commercial actors to disclose information about goods or services in the commercial context, which could not be used to require those same actors to express that information in their private lives.[17] Being prohibited from using whom one will serve in the commercial marketplace as a method of message-sending does not ban one from expressing those same messages in "the marketplace of ideas". To think otherwise is to confuse a marketplace with a metaphor.[18]

The Tenth Circuit and Supreme Court majorities both failed to properly distinguish the commercial marketplace from the marketplace metaphor in Smith's case. The Tenth Circuit noted, correctly, that "[a]s Colorado makes clear, CADA is intended to remedy a long and invidious history of discrimination based on sexual orientation."[19] From this true premise, the Tenth Circuit then concluded that "[t]hus, there is more than a 'substantial risk of excising certain ideas or viewpoints from the public dialogue,'" and that "[e]liminating such ideas is CADA's very purpose."[20] Neither conclusion follows.

Consider the first conclusion. Why would passing a law intended to remedy a history of discrimination based on sexual orientation pose a substantial risk of excising certain views from public dialogue? This is not at all clear. I think the most charitable reading might be to assume an implicit premise here that by legally banning discrimination based on sexual orientation in public accommodations, the state might stigmatize or express disapproval of certain disparaging ideas about those with minority sexual orientations. Perhaps it might. Law has expressive power. But this line of reasoning fails in at least two ways. First, to stigmatize or express disapproval of certain viewpoints is not to excise them. The government, as a speaker, can express disapproval of things without violating the First Amendment under the government speech doctrine.[21] Second, history shows that banning discrimination based on certain characteristics in public accommodation does not excise disparaging ideas or viewpoints about people with those characteristics from public dialogue. After all, banning discrimination in public accommodations based on race and religion has not excised racist or religiously bigoted views from public dialogue.

Thus, without more argument, readers are left with no good reason to think that passing a law aimed at remedying a history of discrimination based on a characteristic risks excising from public dialogue views about that characteristic or people with that characteristic. There is another interpretation one could give to the Tenth Circuit's argument here—namely, that to ban discrimination in public accommodations based on a protected characteristic *is* to excise certain views about that protected characteristic from public dialogue. But this is to conflate the commercial marketplace with the public square. Public dialogue is not limited to or even substantially constituted by literal marketplace transactions.

The Tenth Circuit's reasoning is even more mysterious concerning its conclusion that eliminating certain ideas "is CADA's very purpose". Not but two sentences earlier, the Tenth Circuit had correctly noted that CADA's purpose was to remedy a history of discrimination. But to seek to remedy discrimination in public accommodations is simply not to seek to eliminate certain ideas. There is a clear distinction between how the government may require commercial actors to behave and what ideas the government may allow commercial actors to have. In a democratic society, government has significant latitude in the former domain but none in the latter. And we do not generally consider laws aimed at regulating the former to be aimed at regulating the latter.

Ultimately, the Tenth Circuit sided with Colorado in part on the grounds that CADA promoted Colorado's compelling state interests of "protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace."[22] This may help explain why the Tenth Circuit erred in concluding that CADA was aimed at eliminating certain ideas. Theoretically, one way in which a state could seek to protect the dignity interests of members of marginalized groups would be to try to eliminate certain disparaging ideas about those groups. From there, one might think that by seeking to promote the dignity interests of LGBTQ people, a law might be seeking to eliminate certain disparaging ideas about LGBTQ people. But this line of reasoning misinterprets how Colorado seeks to protect the dignity interests of LGBTQ people. In prohibiting discrimination in public accommodations based on sexual orientation and gender identity, Colorado seeks to protect LGBTQ people from the indignity of being refused service. But protecting LGBTQ people from that indignity does not require that commercial service providers view LGBTQ people a certain way. Nor does it require that those commercial service providers treat LGBTQ people equally in their private lives. All it requires is that commercial service providers not use sexual orientation or gender identity

as a basis on which to decide whether commercial services will be granted on equal terms (cf. Keren, forthcoming).

The Supreme Court could have rectified this error about CADA's aims. Instead, it doubled down and used the Tenth Circuit's error as a basis from which to conclude that Colorado was seeking to use CADA to do something constitutionally impermissible. In writing for the majority, Justice Neil Gorsuch took as a starting point that Colorado sought to use CADA for the constitutionally impermissible purposes of eliminating certain ideas about marriage.[23] On this basis, Gorsuch implied that Colorado sought to use its law "to force individuals to toe the government's preferred line when speaking" on "matters of significance" and accused his colleagues who dissented of "approving a government's effort" to eliminate disfavored ideas in a way that was "emblematic of an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic."[24] This uncharitable reading of Colorado and the dissenting justices requires the unfounded assumption that seeking to eliminate discrimination on the basis of sexual orientation is equivalent to seeking to eliminate certain ideas about marriage. This conclusion holds only if, among other conditions, one treats the ability to selectively provide one's services based on sexual orientation as virtually the only method by which one could express certain views about marriage.

Unsurprisingly, the justices in the dissent rejected Gorsuch's view that CADA's purpose was to eliminate certain ideas about marriage. Writing for the dissent, Justice Sonia Sotomayor labeled Gorsuch's position an "astonishing view of the law", noting that "the Accommodation Clause and the State's application of it here allows Smith to include in her company's goods and services whatever 'dissenting views about marriage' she wants", and that the Supreme Court's own past rulings have held "that the purpose of a public accommodations law, as applied to the commercial act of discrimination in the sale of publicly available goods and services, is to ensure equal access to and equal dignity in the public marketplace."[25] Sotomayor corrected the Tenth Circuit's error by distinguishing laws that seek to regulate commercial conduct and that, at most, incidentally burden speech from laws seeking to regulate speech or ideas themselves. In so doing, she kept clear the distinction between attempting to speak specifically through acts of commercial discrimination versus attempting to speak generally. No one was trying to stop Smith from doing the latter. Her suit was about trying to obtain the right to do the former.

3. Discriminatory Actions

Having argued that Smith sued in order to gain the right to send a religious message through the act of providing wedding websites to male–female couples but not same-sex couples, I now turn to the question of whether that act should be considered an act of discrimination. I argue that it should be.

Scholars have recognized that there is no "universally accepted definition of discrimination" (Vandenhole 2005, p. 33; cf. Altman 2020). This is, in part, because the term "discrimination" is polysemous between what Andrew Altman calls "moralized" and "non-moralized" senses (Altman 2020). A moralized sense of "discrimination" is one in which "discrimination is wrong" is tautological because discrimination is a thick concept whereby discrimination is wrong by definition. A non-moralized sense of "discrimination" is one in which claiming that a particular act of discrimination is wrong represents a substantive moral judgment because being wrong is not part of the concept of discrimination itself. When I say that Smith wants to engage in commercial discrimination as an act of religious message sending, I am using the term "discrimination" in a non-moralized sense. This does not mean that I think the discrimination she seeks to engage in is morally permissible. I do not. But whether such discrimination is morally wrong is not relevant to my descriptive claim about what Smith aims to do. Thus, it is not part of the concept of discrimination I employ.

Despite the disagreements that exist over what exactly discrimination is, I adopt what I think is a fairly ecumenical conception of discrimination based on a "reasonable first

approximation" provided by Altman. On this conception, discrimination "consists of acts, practices, or policies that impose a relative disadvantage on persons based on their membership in a salient social group." (Altman 2020). My claim here is that if Smith were to offer commercial wedding websites for male–female couples but not same-sex couples, Smith would be engaging in discrimination based on sexual orientation.

Smith's lawyers, the dissenting judge at the Tenth Circuit, and the justices in the Supreme Court's majority relied on three arguments to conclude that Smith would not be engaging in sexual orientation discrimination if she made wedding websites for male–female couples but not same-sex couples. None of these arguments succeed.

The first two arguments were often presented together, so I assess them together. The first argument is that Smith will not be engaging in sexual orientation discrimination by refusing wedding websites to same-sex couples because she is willing to provide many *other* products to LGBTQ customers. The second argument is that the stipulated facts Colorado agreed to for purposes of litigation foreclose the possibility that there is a legal dispute about whether Smith would be engaging in sexual orientation discrimination in refusing wedding websites to same-sex couples. Judge Timothy Tymkovich made both arguments in his Tenth Circuit dissent:

> "It is important to understand from the outset that Ms. Smith and Colorado agree that she will serve anyone, regardless of protected class status. In the district court, both she and Colorado stipulated that: (1) Ms. Smith is 'willing to work with all people regardless of classifications such as race, creed, sexual orientation and gender'; and (2) Ms. Smith does 'not object to and will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites do not violate [her] religious beliefs, as is true for all customers.' . . .And counsel for Ms. Smith confirmed at oral argument that she would represent clients regardless of sexual orientation in creating websites that celebrate opposite-sex weddings. In short, Colorado appears to agree that Ms. Smith does not distinguish between customers based on protected-class status and thus advances the aims of CADA."[26]

Justice Gorsuch later embraced these arguments in his opinion for the majority:

> "Colorado next urges us to focus on the reason Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the 'protected characteristics' of certain customers. . .But once more, the parties' stipulations speak differently. The parties agree that Ms. Smith 'will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites'" do not violate her beliefs."[27]

The primary upshot of these arguments, at least for Gorsuch, is that Smith's refusal to provide wedding websites for same-sex couples is only an objection to the message that such service would provide and, thus, is not a case of sexual orientation discrimination.

But this reasoning is flawed in several respects. The first flaw is a failure to acknowledge that one can discriminate against members of a social group, even while providing some services to that group, so long as those services are less than or inferior to the services one provides to others. This is why CADA requires that public accommodations provide "full and equal enjoyment" of their services, regardless of one's protected social characteristics. Colorado objects to Smith's course of action not because she refuses to provide *any* service to LGBTQ customers but because she refuses to provide *full and equal* service to LGBTQ customers by denying them a service, wedding websites, that she provides other customers.

The Supreme Court has long recognized that providing only partial service due to a protected characteristic is still discriminatory service. For example, in *Katzenbach v. McClung*, the Supreme Court upheld the federal government's power to enforce federal

civil rights law against a restaurant, Ollie's Barbeque, that served both Black and White customers but would only allow White customers to dine in at the restaurant and required Black customers to receive take-out.[28] It would have been no defense for Ollie's Barbeque to claim that it was "willing to work with all people regardless of classifications such as race, creed, sexual orientation and gender". So long as Black customers were only given the option of take-out, while White customers could choose take-out or dine-in, Ollie's Barbeque was engaging in racial discrimination. Writing in dissent, Justice Sonia Sotomayor analogized Smith's case to Ollie's Barbeque, writing that Smith, "like Ollie McClung, who would serve Black people take-out but not table service, discriminates against LGBT people by offering them a limited menu."[29]

Neither would it have been a defense for Ollie's Barbeque to say that it would gladly provide service to Black customers as long as the customer's request did not violate their religious beliefs. The Supreme Court rejected this reasoning in *Newman v. Piggie Park Enterprises*, where it labeled as "patently frivolous" a restaurant owner's claim that enforcement of anti-discrimination law against it violated the First Amendment's religious free exercise clause.[30] Partial discrimination—regardless of whether it is motivated by sincere religious belief—is still discrimination because partial discrimination still imposes a relative disadvantage on persons due to their membership in a relevant social group.

Second, Tymkovich's and Gorsuch's reasoning is flawed in treating the parties as having stipulated the fact that Smith was not seeking to engage in sexual orientation discrimination. While Colorado did stipulate that Smith was "willing to work with all people" regardless of, among other things, sexual orientation, Colorado did not stipulate that she would work fully or equally with all people.

Tymkovich's and Gorsuch's positions rely on an ambiguity in what it means to "serve" or "work with" everyone. On one reading, to say that one will serve or work with everyone may imply that one will serve or work with everyone on equal terms. But clearly, that is not what Colorado agreed is the case. Otherwise, Colorado's position in the litigation becomes incoherent. There is no reason to posit such incoherence. This is because there is another reading of the stipulation—which is more faithful to the stipulation's literal text—on which to say that one will work with everyone simply means that no one is categorically barred from service. It means that Smith is willing to "serve" or "work with" everybody, regardless of protected characteristics, in at least some capacities. But that was true even in the case of Ollie's Barbeque. One could imagine such a restaurant owner claiming that they were willing to serve anyone, regardless of classifications such as race, creed, sexual orientation, and gender, but were only unwilling to let Black or gay people, for example, dine in the restaurant. Given the context of the suit, this second reading of Colorado's position is far more compelling. While Colorado agreed that Smith was not seeking to categorically deny service to LGBTQ customers, it did not stipulate that she was willing to provide *full or equal service* to LGBTQ customers. But, the provision of full and equal service is what is required to avoid discrimination.

The third argument offered by Smith and her lawyers—later embraced by the Tenth Circuit dissent and Supreme Court majority—was that Smith's refusal to provide wedding websites for same-sex weddings was *merely* a refusal to create certain messages and was, therefore, not a refusal based on the status of the customer, and thus not a case of sexual orientation discrimination.[31] While it seems true that Smith objects to creating some of the messages typically contained in a wedding website for a same-sex couple, this does not mean that her refusing to provide wedding websites for same-sex couples does not also still amount to sexual orientation discrimination. This is because some activities are so closely tied to certain identities that discriminating based on that activity is tantamount to discriminating against people with certain identities. Creating a wedding website for one's wedding to someone of the same sex is arguably an activity so closely tied to certain sexual orientations that refusing to create or sell wedding websites for same-sex weddings while creating and selling wedding websites for other weddings is tantamount to discriminating against people with those sexual orientations.

In past cases, the Supreme Court has shown an acute understanding of this point. For example, the Supreme Court has recognized that because of the close relationship between the conduct of wearing a yarmulke and Jewish identity, a "tax on wearing yarmulkes is a tax on Jews."[32] As Justice Elena Kagan recently pointed out, this is so "even if friends of other faiths might occasionally don one at a Bar Mitzvah."[33] As Kagan put it, being Jewish and wearing a yarmulke represents a case where "status and conduct" are "proxies for each other."[34] John Corvino explains the underlying logic, writing that "not all Jews wear yarmulkes, and not all persons wearing yarmulkes are Jews. Nevertheless, for a Jew, the wearing of a yarmulke is the practice of religion. Same for Muslim women and headscarves. Same, *mutatis mutandis*, for marrying someone of the same sex and sexual orientation." (Corvino 2018, p. 12).

When conduct and status are proxies for one another, discriminating based on one constitutes discrimination based on the other. The Supreme Court has already held that same-sex sexual activity and gay persons represent another such case where conduct and status are proxies for one another in this way.[35] This is true even though not all gay people engage in same-sex sexual activity, and not all people who engage in same-sex sexual activity are gay. The conduct of marrying someone of the same sex and being gay ought to be viewed as another instance in which conduct and status function as proxies for one another. Presumably, far fewer non-gay or non-bisexual people are marrying someone of the same sex than are engaging in occasional same-sex sexual activity. This strengthens the claim that if same-sex sexual activity can serve as a proxy for certain sexual orientations, so too can marrying someone of the same sex. Indeed, it is because marrying someone of the same sex is such a clear proxy for certain sexual orientations that it strains credulity to deny that refusing to provide wedding websites for same-sex couples while providing wedding websites for other couples is sexual orientation discrimination.[36]

Of course, just because what Smith sought the right to do constitutes sexual orientation discrimination does not automatically answer the question of whether Smith should win or lose her case (although it seems to me that one could imagine a reasonable legal system in which this issue is treated as dispositive). Just as Smith's conduct constitutes sexual orientation discrimination, so too does it also seem to constitute a case where a business owner seeks to avoid creating messages she does not want to create. To the extent that her wedding websites are customizable and expressive, Smith's case seemed to have raised a genuine case of conflicting rights—her right to be free from compelled speech on the one hand and the right of LGBTQ people to avoid discrimination in public accommodations on the other. But by refusing to acknowledge that Smith's proposed actions would constitute sexual orientation discrimination, the Supreme Court sidestepped this thorny legal question. The reality is that the activity Smith sought the right to engage in is a form of sexual orientation discrimination due to the inextricably intertwined nature of the conduct of marrying someone of the same sex and the status of having certain minority sexual orientations.

4. Discriminatory Speech Acts

So far, I have argued that what accomplishes Smith's stated aims is not the act of providing wedding websites for male–female couples but rather the act of providing wedding websites to male–female couples while denying that same service to same-sex couples. I argued that this action is best understood as a form of sexual orientation discrimination. Given that Smith's stated aims are communicative—i.e., to explain, publicly proclaim, celebrate, and promote what she believes is God's view of marriage—Smith was asking the Supreme Court to grant her permission to use commercial sexual orientation discrimination as a mode by which to send her message. Because her message is religious, she was asking the Court to grant her permission to use commercial discrimination as a mode of sending religious messages.

In making these arguments, I have focused on the discriminatory act of providing wedding website services to male–female couples but not same-sex couples. I focused on

this action because I argued it was the action that, in fact, accomplished Smith's stated communicative aims. At this point, one might respond that there is another action Smith sought the right to engage in that also accomplishes her communicative aims. This is the action of posting a message on her business website stating her communicative goals and why she will not provide wedding websites for same-sex couples in light of those goals. This response seems right. Smith's statement announcing that she seeks to explain, publicly proclaim, celebrate, and promote what she believes is God's view of marriage reflexively does most, if not all, of those things. The statement explains her view. Putting the statement on her business website publicly proclaims that view. Given the celebratory tone of the statement, posting the statement plausibly celebrates the view. And given the platform of her business webpage, posting the statement arguably promotes the view.

But these facts do not undermine my thesis that Smith is seeking to use commercial discrimination as religious messaging. They strengthen it. This is for two reasons. First, Smith's statement provides context for her refusal to provide wedding websites for same-sex couples. Without her statement, one might fail to recognize that she is engaging in sexual orientation discrimination. Smith's statement amplifies and clarifies the message sent by her act of providing wedding websites for some couples but not others.

Second, Smith's statement is itself an act of commercial discrimination. To put the point in terms of J. L. Austin's speech act theory, the statement is a speech act of discrimination. That is to say, the statement does not merely announce an act of discrimination. The statement *is* an act of discrimination. More specifically, it is an illocution of discrimination. A review of the basics of speech act theory shows why.

J. L. Austin focused on how we use language to do much more than simply state truth-evaluable claims (Austin 1962). We also use language to do things like promise, proclaim, promote, celebrate, contract, command, bet, baptize, ban, and a host of other activities. Austin referred to such actions through words as *speech acts* or *illocutions*. Austin distinguished illocutions from two other kinds of actions we can do with words: locutions and perlocutions. A locutionary act is the mere act of uttering words. A perlocutionary act is to bring about effects in the world through speech. But neither of these things captures what is unique about illocutionary acts.

These distinctions can perhaps best be clarified with an example. Imagine two grooms at their wedding. When they say "I do", they engage in the locutionary act of saying the words "I do". But this radically under-describes what they have just done. If they say "I do" under the appropriate circumstances—e.g., before someone who has the power to perform marriages, with enough witnesses present, with the intention to marry, etc.—they have engaged in the act of marrying. They have done this in saying the words "I do." In this context, the grooms saying the words "I do" and marrying are one and the same act. This is the sense in which "I do" can be an illocutionary act. This illocutionary act of marrying in saying "I do" may have all sorts of effects, which are not themselves illocutions. Their act may bring the grooms and their wedding guests joy, make a jealous ex feel upset, and change the possibilities for their tax filing status. These are perlocutionary effects of their saying "I do", and so their saying "I do" is, in that sense, also a perlocutionary act.

My claim here is that Smith's purposed statement, if put on her business website, would constitute both an illocutionary act of commercial discrimination and an illocutionary act of proclaiming a religious message. Once we understand this, we can understand more clearly how Smith's act of commercial discrimination simply is her act of sending a religious message. One and the same act of posting the statement on her business website would constitute both illocutionary acts.

There is nothing particularly novel about my observation that words can do things like discriminate. Catharine MacKinnon made this observation about the related act of segregating: "A sign that says 'Whites Only' is only words. Is it therefore protected by the First Amendment? Is it not an act, a practice, of segregation because what it means is inseparable from what it does?"[37] The answer to MacKinnon's first question is no; the sign is not protected by the First Amendment despite consisting solely of words. Something

being comprised of only words is not sufficient for it to receive First Amendment protection. This is because words can constitute all sorts of illegal acts, such as perjuring, defaming, threatening, conspiring, and segregating by race. The answer to MacKinnon's second question is, of course, that the "Whites Only" sign is indeed an act of segregation because what it means is inseparable from what it does. Just as the "Whites Only" sign is an act of segregation, so too is it an act of discrimination, at least in certain contexts.

This has been explored in more detail by Mary Kate McGowan, who concludes that "Whites Only" signs "constitute illegal acts of racial discrimination in virtue of enacting racially discriminatory permissibility facts in some (public) realm." (McGowan 2012, p. 123). She makes her case with the following example: "Jimmy, a good old boy in the segregated South, hangs a sign in his restaurant that reads: 'Whites Only'. The hanging of this sign enacts a segregatory (and hence discriminatory) policy for his restaurant." (McGowan 2012, p. 125). As McGowan goes on to explain, Jimmy's posting of the "Whites Only" sign constitutes an act of discrimination because he has the authority to set policy in his restaurant (even while lacking the power to make that policy legal) and, based on the context, the sign both communicates and enacts the policy that only white people will receive service in the restaurant (McGowan 2012, p. 125). McGowan considers the posting of the "Whites Only" sign in this context to be an illocution of discrimination. Specifically, she identifies it as an exercitive speech act—i.e., a speech act in which the speaker exerts power or influence. In this case, in posting the sign, Jimmy exerts his power to enact policy for his restaurant (McGowan 2012, pp. 126–27).

The question that remains then is whether Smith's statement would itself be an act of discrimination. Based on the arguments given so far, it seems that it would be. Just as Jimmy has the authority to set policy in his restaurant, so too Smith has the authority to set policy for her own business. And just as context makes it clear that Jimmy's posting a "Whites Only" sign enacts and communicates a policy that discriminates based on race, so too context makes it clear that Smith stating on her business webpage that "I will not be able to create websites for same-sex marriages" enacts and communicates a policy that discriminates based on sexual orientation, given that participating in a same-sex marriage functions as a proxy for certain minority sexual orientations.

One might argue that Smith's statement is different because it, at most, constitutes partial discrimination and because she is merely selective about what *messages* she sends, not which *clients* she serves. But this just restates objections raised and responded to in the previous section. If instead of a "Whites Only" sign, Jimmy had posted a sign stating "I will not be able to serve food to Black customers celebrating any event that implies that Blacks are equal to Whites," it would be no defense to claim that the discrimination was, at most, only partial or that Jimmy was merely being selective about what *messages* he sends, not which *clients* he serves. Sotomayor recognizes these facts in her dissent. She correctly observes that Smith "wants to post a notice on the company's website announcing this intent to discriminate" and that the Court's holding permits her to do just that by allowing her to "post a notice that says: Wedding websites will be refused to gays and lesbians."[38]

But Smith posting her proposed statement on her business webpage would not only enact discriminatory policy, and thus constitute an act of discrimination. It would also explain, proclaim, celebrate, and promote her message about what she believes God's view of marriage is. In short, it would be an act of religious message sending. Thus, just as the act of providing wedding websites for male–female couples while refusing to provide that same service to same-sex couples is simultaneously both an act of commercial discrimination and an act of religious message-sending, so too posting her proposed statement on her business webpage is simultaneously both an act of commercial discrimination and of religious message sending. In the former case, the same act constitutes both things. In the latter case, the same speech act constitutes both things. In both cases, the commercial discrimination is the religious message sending.[39]

5. Significance for U.S. Politics, Religion, and Culture

By refusing to acknowledge that Smith was seeking to discriminate both by refusing to provide a service to same-sex couples that she would otherwise make generally available and by posting a statement on her business website announcing this policy, the Court's majority avoided the key legal issue that Smith's case presented: how should the U.S. constitution balance a commercial service provider's expressive freedom with the right of states, like Colorado, to seek to protect LGBTQ people from facing discrimination in public accommodation? The Court's majority pretended that the case was easier than it was.

The fact that the Court's majority oversimplified matters does not on its own tell us what the correct outcome in the case should have been. Reasonable minds disagree about this. One could reasonably argue that it would be appropriate to carve out a narrow exception to public accommodation laws when the goods or services provided are clearly expressive and customizable.[40] One could also reasonably argue that once one enters the commercial marketplace as a public accommodation, one must accept certain incidental burdens on speech as part of the tradeoff for gaining the benefits of being a public accommodation.[41]

That said, by oversimplifying matters, the Court's majority failed to grapple with the costs of their decision. These costs should have been considered. My arguments in this paper identify one of the significant costs: In permitting someone to use commercial discrimination as a way of sending a religious message, the Court has incentivized other potential business owners to enter the commercial marketplace in order to meet the expressive aim of religious message sending through commercial discrimination. As such, a ruling like this has the potential to change the relationship between religion and politics in the United States by giving commercial vendors the opportunity to send religious messages through marketplace discrimination and proclamations announcing this discrimination on their websites and in their stores. The playbook is relatively simple. First, argue that one's relevant goods or services are expressive in nature and deserving of First Amendment protection. Second, begin discriminating in the provision of those goods or services and announce an intent to do so at one's place of business. Third, continue to gain the communicative benefits of your speech if sued (or better yet, file a pre-enforcement challenge even if you have not been sued!). Fourth, if you win your case, further entrench the acceptability of discriminating in this way, or if you lose, use your newfound status as a free speech and religious freedom martyr in the eyes of some to continue promoting your message.

In an earlier era, it may have seemed farfetched to think that many would be inclined to enter the commercial marketplace simply in order to promote such religious messages via discrimination. But this is, in fact, exactly what Smith told us she was doing. Furthermore, given increasing levels of negative partisanship and the development of partisan mega-identities that fuse religion and political identities and worldviews, it is not implausible that many people would be eager to send religious messages in this manner (cf. Mason 2018; Satta 2022). This is made all the easier if such potential marketplace participants can soothe their consciences by reminding themselves that the Supreme Court has held that such discriminatory behavior is not actually discrimination but only an objection to sending certain messages and an exercise of a fundamental right.

The problem is much worse, however, because the Court did not address the religious free exercise issue Smith raised and instead granted her the right to discriminate solely on free speech grounds. This means, at least for now, that those on all sides of the culture wars can play Smith's game. Just as those seeking to promote a religious message through commercial discrimination now have a playbook, so too do those seeking to promote *any* message through commercial discrimination. It does not seem farfetched to think that some people might feel incentivized to enter the commercial marketplace and adopt discriminatory marketplace practices in order to send messages about a wide range of things.

All of this makes it unsurprising that a commercial hairstylist has already sought to use the holding in *303 Creative* to deny service to transgender and gender nonbinary

people generally on the grounds that she has a First Amendment right to do so (see Impelli 2023). Even at oral arguments, Smith's lawyer announced future plans to try to expand a favorable holding in *303 Creative* to cover a wider array of service providers by arguing for a broader understanding of which kinds of commercial services ought to count as expressive.[42] This is to be expected, given that Smith's case is part of a broader litigation campaign that the conservative Christian legal advocacy group representing Smith—the Alliance Defending Freedom—is operating in order to obtain legal exemptions for religious vendors from providing goods or services for same-sex weddings.

To be clear, I am not suggesting that the Court's decision in *303 Creative* requires the Court to indefinitely permit these further bad consequences. If unwilling to change course in future cases, the Court can, and should, at least provide clear narrowing conditions that set more precise boundaries for when one has a free speech right to refuse to provide a commercial good or service due to the clearly expressive and customizable nature of the relevant good or service. Some legal scholars have argued that the Court did this in *303 Creative* (see, for example, Carpenter 2023). But other legal scholars disagree, arguing that the Court intentionally left the outer bounds of their decision open-ended so as to make it easier to later extend *303 Creative*'s holding to other commercial good and service providers, like those who make cakes or floral arrangements for weddings (see, for example, Koppelman 2023). The latter interpretation seems like the more straightforward reading of the Court's holding in *303 Creative* to me.

As the cultural conflicts between LGBTQ civil rights and First Amendment freedoms have evolved, so too have the legal strategies (cf. Jones 2016; Satta 2022). Smith sued in order to gain a novel right: the right to use commercial discrimination as a means of sending a religious message. In granting her that right, the Supreme Court tacitly endorsed that strategy and has created a new and deleterious mode by which commercial actors may seek to spread their religious and political messages.[43]

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Notes

1 *303 Creative, LLC v. Elenis*, 143 S. Ct. 2298 (2023).

2 See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

3 See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015).

4 See note 1 above.

5 A case that looks more like *303 Creative* is *Brush & Nib Studios, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019).

6 The Court's majority opinion in 303 Creative focused almost exclusively on Smith's claims about the messages she did not want to send in support of same-sex marriage. As a result, the Court's opinion focused most of its attention on the compelled speech doctrine. But if my analysis is correct, the Court should have focused on a second set of free speech issues in this case as well. This latter set of issues was largely overlooked in the majority's opinion, although many of these issues were discussed by the dissent.

7 *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1168 (10th Cir. 2021).

8 *303 Creative*, 6 F.4th at 1168–69.

9 *303 Creative*, 6 F.4th at 1200, fn. 7.

10 Joint Appendix for *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023) pages 51–71 (hereafter abbreviated J.A.)

11 J.A. at 51–71.

12 J.A. at 67.

[13] In his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919), Justice Olive Wendell Holmes Jr. wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market". Later, this idea was reintroduced in the pithier phrase of the "marketplace of ideas" in cases like *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J. concurring) and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

[14] ChatGPT's full response was "I'm sorry, but the concept of the 'marketplace of ideas' is not a literal place where you can buy groceries. It is a metaphor used to describe the exchange of ideas and opinions in a society. It is not a physical location where you can purchase tangible goods". ChatGPT response to "Write me a grocery list of things to buy at the marketplace of ideas", 9 January 2023. https://chat.openai.com/chat.

[15] See, e.g., *303 Creative*, 143 S. Ct. as 2336 (Sotomayor, J. dissenting) ("The State [Colorado] confirms that the company [303 Creative] is free to include or not to include any message in whatever services it chooses to offer.")

[16] See, e.g., *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *POM Wonderful LLC v. Coca-Cola Co*, 573 U.S. 102 (2014); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948).

[17] See, e.g., *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985); cf. (Redish 2019).

[18] This is not to say that the commercial marketplace does not sometimes play a role in facilitating the marketplace of ideas. It can and does in a variety of ways. For example, one can sell products that contain messages like books, magazines, movies, or t-shirts with text. One also might be able to "send a message" by shopping at stores that engage in certain practices (e.g., shopping only in stores that sell fair trade items) or even not shopping at certain stores that engage in practices one considers objectionable. But to acknowledge that the commercial marketplace can facilitate communication in the marketplace of ideas is not to make the mistake that the commercial marketplace is equivalent to the marketplace of ideas.

[19] *303 Creative*, 6 F.4th at 1178. This aligns with the recognition by Colorado's own courts that CADA was adopted "to fulfill the 'basic responsibility of government to redress discriminatory. . .practices.'" *Scardina v. Masterpiece Cakeshop, Inc.*, 528 P.3d 926, 936 (Colo. App. 4th Div. 2023).

[20] *303 Creative*, 6 F.4th at 1178.

[21] See, for example, the discussion in (Bezanson 2010).

[22] See note 20 above.

[23] See, for example, *303 Creative*, 143 S. Ct. at 2318.

[24] *303 Creative*, 143 S. Ct. at 2321, fn. 6.

[25] *303 Creative*, 143 S. Ct. at 2340 (Sotomayor, J. dissenting).

[26] *303 Creative*, 6 F.4th at 1192 (Tymkovich, J. dissenting).

[27] *303 Creative*, 143 S. Ct. 2298 (2023) at 2316–17.

[28] *Katzenbach v. McClung*, 379 U.S. 294 (1964).

[29] *303 Creative*, 143 S. Ct. at 2339 (Sotomayor, J. dissenting).

[30] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 403, fn. 5 (1968).

[31] See, for example, *303 Creative*, 143 S. Ct. at fn. 3.

[32] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

[33] *Marietta Mem'l Hosp. Emp. Health Ben. Plan v. DaVita Inc.*, 142 S. Ct. 1968, 1976 (2022) (Kagan, J., dissenting).

[34] *Marietta Mem'l Hosp.*, 142 S. Ct. at 1975 (Kagan, J., dissenting).

[35] See, e.g., *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U. S. 558, 575 (2003); *Marietta Mem'l Hosp.*, 142 S. Ct. 1975 (2022) (Kagan, J., dissenting).

[36] For a more detailed discussion and analysis of the connection between status and conduct in this line of cases, see (Sepinwall, forthcoming).

[37] MacKinnon (1987, pp. 193–94). MacKinnon's analysis aligns well with the Supreme Court's position in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006), that "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct".

[38] *303 Creative*, 143 S. Ct at 2333, 2334.

[39] Given that (1) plaintiffs in cases like *303 Creative* often bring both free speech and religious free exercise claims and (2) legal and cultural attempts to restrict LGBTQ rights in public accommodations are being led almost exclusively by those self-identified as religious, I think it is significant that the message Smith seeks to send it a religious one. That said, I do not think the message being religious is necessary for Smith's actions to be objectionable. Rather, I think courts should be wary of plaintiffs seeking to use commercial discrimination against a protected class as a way of sending *any* kind of message.

[40] This is the position taken, for example, in (Carpenter 2023).

[41] This was the basic line of reasoning in Sotomayor's dissent in *303 Creative*.

[42] Transcript of Oral Argument at 46, *303 Creative, LLC v. Elenis*, 143 S. Ct. 2298 (2023).

[43] Thanks to John Corvino and Eric Hiddleston for helpful feedback on earlier drafts of this paper.

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