

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

Presented by Mark Satta, Assistant Professor of Philosophy
on Tuesday, June 20, 2023
to the Wayne State University Academy of Scholars



WAYNE STATE UNIVERSITY

Research Specializations

- Epistemology
- Philosophy of Language
- Philosophy of/and Law



Key Subject Matters

- Freedom of Speech
- Religious Freedom
- LGBTQ Rights



303 Creative v. Elenis

- Lorie Smith is a Christian web designer working in Colorado.
- She is the owner and sole member of 303 Creative LLC.
- Smith wants to expand her web design business to include wedding websites but doesn't want to make websites for same sex couples.



303 Creative v. Elenis

- Smith wants to include a statement on her business website that states that she will not make websites for same-sex weddings and that explains her religious motivations for this position.
- Smith recognizes these actions would likely violate Colorado's Anti-Discrimination Act (CADA), so has filed a pre-enforcement claim.



Smith's Proposed Statement

“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.”

CADA's Accommodation Clause

A public accommodation may not “directly or indirectly . . . refuse . . . to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation”

Colo. Rev. Stat. § 24-34-601(2)(a)

CADA's Communication Clause

A public accommodation also may not “directly or indirectly . . . publish . . . any . . . communication . . . that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused . . . or that an individual’s patronage . . . is unwelcome, objectionable, unacceptable, or undesirable because of . . . sexual orientation . . .”

Colo. Rev. Stat. § 24-34-601(2)(a)

Masterpiece Cakeshop

- CADA was also the statute at issue in *Masterpiece Cakeshop v. Colorado* (2018).
- In that case, baker Jack Phillips was sued for violating CADA when he refused to make a cake for a same-sex wedding.
- Phillips claimed that enforcement of CADA against him violated his First Amendment religious free exercise and free speech rights.



Masterpiece Cakeshop

- Several lower courts concluded that Phillips had violated CADA.
- In 2018, the Supreme Court vacated Phillips' conviction by ruling on a tangential religious free exercise issue.
- The Supreme Court did not determine whether public accommodations have religious freedom or free speech rights to deny services for same-sex weddings.



Masterpiece Cakeshop

- Involved the creation of a product that did not contain speech, at least in the colloquial sense.
- Created a legal question about when, if ever, baking and selling a cake constitutes *expressive conduct* (i.e., conduct, other than speech, that is protected by the First Amendment due to the message it sends).

303 Creative

- Involves the creation of a product with written text, which is speech for the purposes of the First Amendment.
- The parties in the case have agreed to the stipulated claim that Smith's websites are "pure speech."

Masterpiece Cakeshop

- Provided wedding services prior to legalization of same-sex marriage.
- Sought only freedom from *compelled speech* (i.e., freedom from saying what one doesn't want to say).
- Was sued and became the defendant in unchosen litigation.

303 Creative

- Seeking to begin providing wedding services in response to legalization of same sex marriage.
- Seeking freedom from compelled speech *plus* the freedom to state a policy denying service to same-sex weddings.
- Is seeking injunction as the plaintiff in a pre-enforcement challenge.

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- Is seeking injunction as the plaintiff in a pre-enforcement challenge.


Thesis

If we take Smith at her own word, Smith's primary aim is not freedom from compelled speech, but rather the permission to use commercial discrimination as a means of sending a religious message.

Smith's Proposed Statement (Partial)

...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.**”



VIVIAN & KEVIN

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our wedding

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September | New York NY

But couldn't the creation of a wedding website with a particular design, at least in theory, explain, proclaim, celebrate, or promote Smith's conception of marriage?





You're Invited



LILY AND LUKE

SATURDAY NOVEMBER 17, 2017
LITTLETON, COLORADO

- WE INVITE YOU TO CELEBRATE OUR MARRIAGE -



THE BARN AT DEER CREEK OPEN SPACE
555 WEST DEER CREEK DRIVE
LITTLETON, COLORADO 80128

Complimentary valet parking available for our guests





[HOME](#) [OUR STORY](#) [WEDDING EVENTS](#) [WEDDING PARTY](#) [RSVP](#) [GUEST BOOK](#) [REGISTRY](#) [PHOTOS](#) [BLOG](#) [CONNECT](#)

R.S.V.P.
RESPONDEZ, S'IL VOUS PLAÎT
LET US KNOW YOU'RE COMING!

Our Blog



Lily's Favorite Scripture

Read the Blog

We spent a lot of time thinking about our wedding reading. We want to say things...

Read the Blog



Plant our Flower Girl & Ring Bearer

Read the Blog

We got our Flower Girl and Ring Bearer from our favorite nursery...

Read the Blog



Penny Doting Story

Read the Blog

While looking for things to do for the wedding, we found a...

Read the Blog



Hurry! Hurry! Floral Socks!

Read the Blog

Here at our wedding, we had a lot of fun with the...

Read the Blog



Hi-Progression!

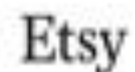
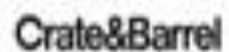
Read the Blog

We used a lot of...

Read the Blog

Our Registry

View all of our registries on the following:



To make a wedding gift in PayPal:



To make a wedding gift on our website, you can make one on our gift box.

LUKE & LILY
100 N. 1st Street
London, Kentucky 40302

LILY'S FAVORITE SCRIPTURE

LILY'S FAVORITE SCRIPTURE



"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."

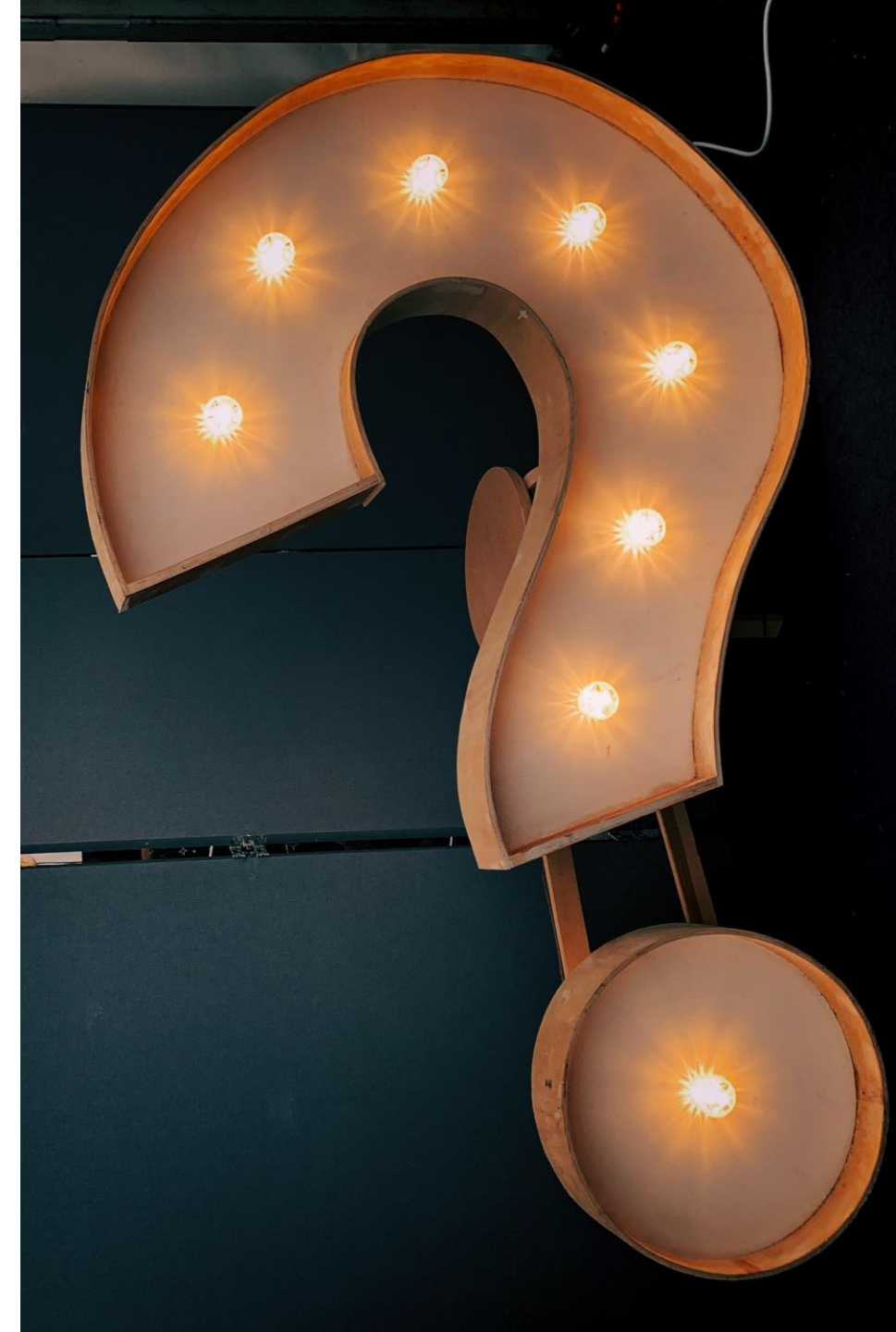
Matthew 19:4-6

The open book of this wedding album is a quieting reading day with the scriptures that have been a part of the lives of Luke and Lily.

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Matthew 19:4-6

An objector might say
“Okay, so maybe Smith
wants to send her message
through a pattern of
selective service, but is it
fair to call this pattern of
selective service an act of
discrimination?”



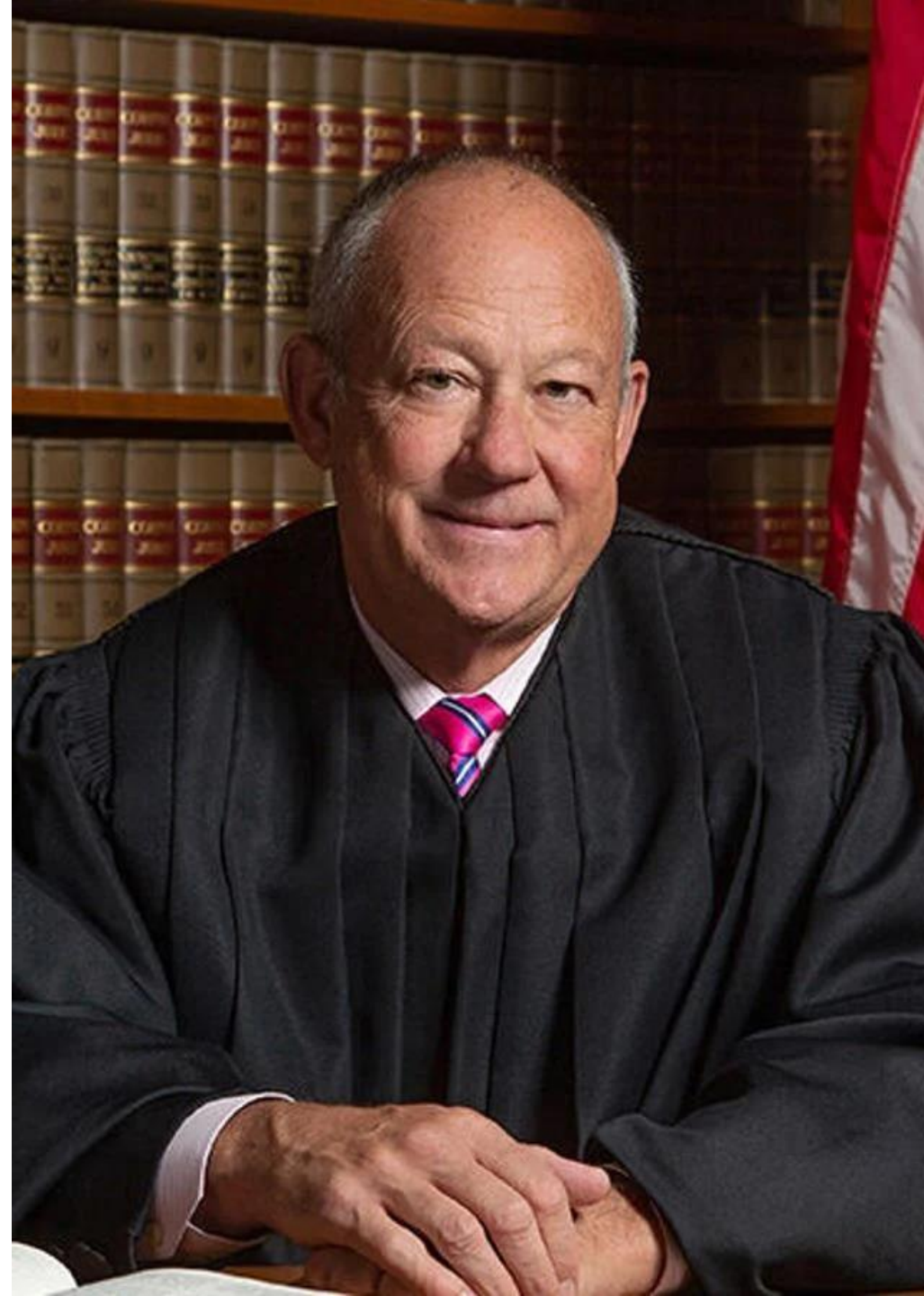
3 Mistaken Arguments

- “Smith is not seeking to discriminate because she provides many services to LGBTQ customers.”
- “The parties agreed to the stipulated fact that Smith will serve anyone.”
- “Smith’s refusal to make websites for same-sex weddings is about the message and not the status of the customers.”



“Ms. Smith is willing to work with all people regardless of classifications such as race, creed, sexual orientation and gender; and 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.”

- Chief Judge Timothy Tymkovich
(dissenting in the 10th Circuit opinion)



Partial Discrimination

- This response rests on an ambiguity as to what it means to “work with all people.”
- It is true that Smith does not categorically object to serving LGBTQ customers.
- But partial discrimination is still discrimination.



Justice Gorsuch: And, counsel, we also have stipulations from Colorado that the plaintiff is willing to work with all people, regardless of classifications such as race, creed, sexual orientation, and gender, right?

Mr. Fletcher: In some respects, yes, but not—

Justice Gorsuch: No...I just read it. Do you disagree with that? It's a stipulated fact in this case.

Mr. Fletcher: That is stipulated, but it's also clear that she will not provide any wedding website for a same-sex couple.



Partial Discrimination

- This response rests on an ambiguity as to what it means to “work with all people.”
- It is true that Smith does not categorically object to serving LGBTQ customers.
- But partial discrimination is still discrimination.



Justice Barrett: I think, here, there's a difference of opinion about whether turning down the same-sex couple simply for purposes of a marriage announcement is a turn-down based on status or message...

Mr. Fletcher: In general, in public accommodations laws, we say, when you discriminate against someone because they want you to print a website or serve an event or cater an event for something that you disagree with, we wouldn't say that that's a status-based refusal. And I think that's correct... I think it's a context like the Court's recognition in *Bray* that a tax on yarmulkes is a tax on Jews. There are certain rare contexts where status and conduct are inextricably intertwined, and I think the Court has rightly recognized that same-sex marriage is one of them.



Thesis

If we take Smith at her own word, Smith's primary aim is not freedom from compelled speech, but rather the permission to use commercial discrimination as a means of sending a religious message.

Smith's Statement

- I've argued that it is the act of discriminating between providing wedding websites for different-sex couples but not same-sex couples that meets Smith's communicative aims.
- But doesn't the statement Smith wants to put on her business webpage also explain, proclaim, celebrate, and promote her view of marriage?



Speech Act Theory

- Mid-twentieth century philosopher J. L. Austin sought to broaden how philosophers thought about language.
- Austin focused on the way in which we used language for more than simply making truth evaluable claims.
- 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*.

J. L. AUSTIN

How to **DO**
THINGS
with **WORDS**

EDITED BY J.O. URMSON

“Two men stand beside a woman. The first man turns to the second, and says ‘Shoot her.’ The second man looks shocked, then raises a gun and shoots the woman.” (Example from Austin discussed by philosopher Rae Langton.)

- The first man engaged in the *locutionary act* of saying “Shoot her.”—i.e. he “uttered a sentence that has a particular meaning, as traditionally conceived.”
- The first man engaged in the *perlocutionary act* of causing the man to feel shocked—i.e. a brought about an effect with his words.
- The first man engaged in the *illocutionary act* of urging the second to shoot the woman. “That description captures the action constituted by the utterance itself.”



Illocutions that Discriminate

- Philosopher Mary Kate McGowan has argued that the illocution of some speech acts is to discriminate.
- She gives the example of a store owner in the segregated American South who puts up a “Whites Only” sign.
- We could also think of an example where that same store owner says “Whites Only” when a person of color attempts to buy something from the store.



Smith's Proposed Statement (Partial)

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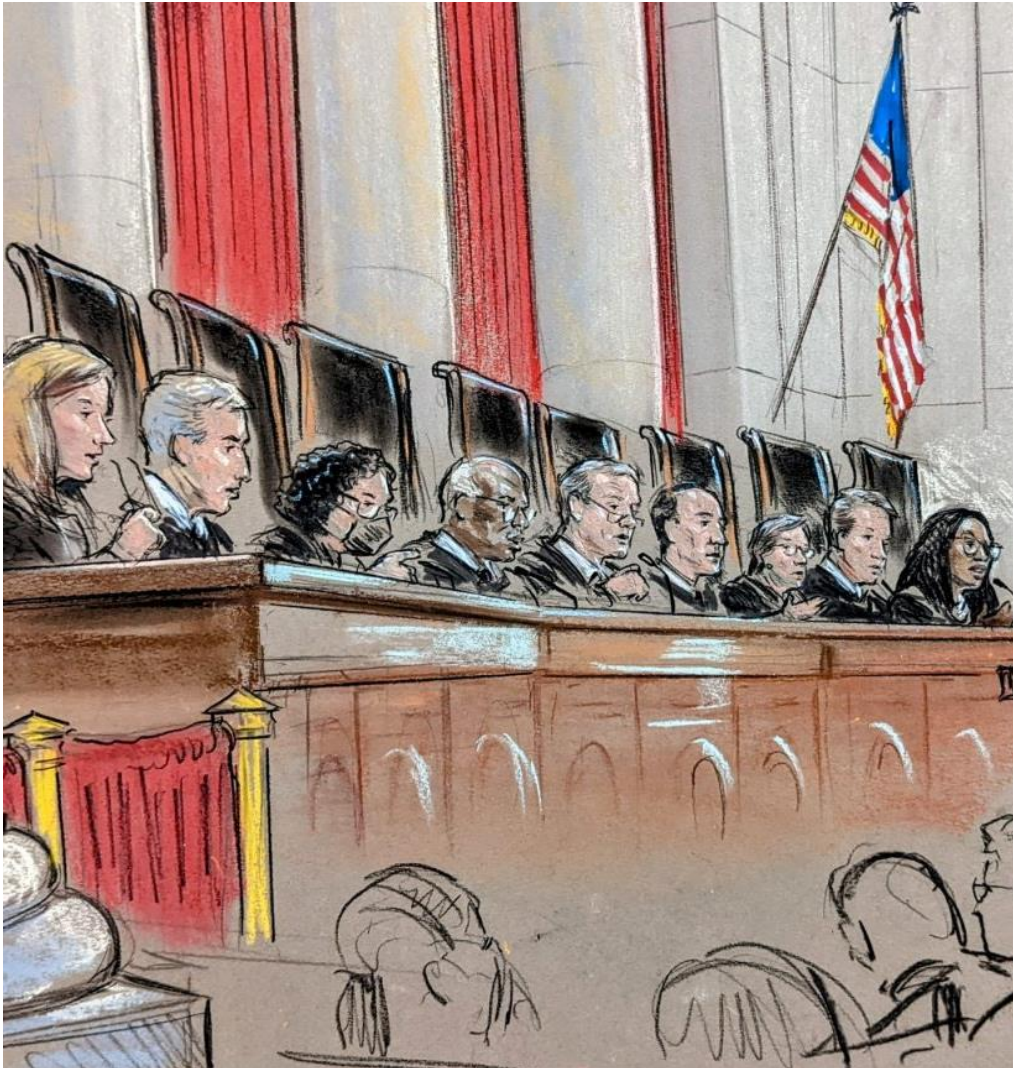
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Political and Legal Implications

- If the Supreme Court sides with Smith in this case (which I think it likely will), then this creates an opportunity for people to enter the commercial marketplace *in order to send messages through whom they serve what*.
- The basic playbook will be to find services that the Court will find expressive and that are closely tied to disfavored identities and to refuse to offer those services.
- This seems like a realistic worry, given increasing sociopolitical polarization and desires to harness the expressive power of law and the marketplace.



What Should the Court do?



- *303 Creative v. Elenis* is, in some respects, a tricky case.
- Generally, courts consider constitutional public accommodations laws requiring that everyone receive service, regardless of protected status.
- Generally, courts do not permit compelling those engaged in artistic speech to create messages they don't want to send.
- It seems that one of these general principles cannot apply in this case.

Thanks for your time and attention!