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303 Creative and the Question of Governmental Authority to Dictate Commercial Transactions

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ABSTRACT

In June 2023, the nation awaited a decision from the United States Supreme Court in *303 Creative LLC v. Elenis*. At its core, the case presented the question of whether free speech rights outweighed a state's interest in prohibiting discrimination through its public accommodation laws. If the Supreme Court had ruled against 303 Creative and compelled its owner, Lorie Smith, to design a website for same-sex weddings despite Ms. Smith's sincerely-held religious beliefs that such marriages are not biblical, free speech rights in America would have been at the mercy of what the majority deemed acceptable speech.

Although the Court correctly categorized Ms. Smith's services as speech and placed more value on free speech when it conflicted with a state's nondiscrimination laws, the decision leaves significant questions unresolved. One key issue is whether civil government has authority to force citizens to sell goods or services that do not constitute speech when selling such goods or services conflicts with the seller's sincerely-held religious beliefs. This Article explains the *303 Creative* decision, highlights the tension between the First Amendment rights and nondiscrimination laws, and explores the scope of government's authority to prohibit discrimination—namely, whether individuals are accountable to God or government for matters of conscience and heart.

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Davis for her invaluable research, and the Liberty University Law Review for publishing the articles from the 2023 Supreme Court Review.

ARTICLE

303 CREATIVE AND THE QUESTION OF GOVERNMENTAL AUTHORITY TO DICTATE COMMERCIAL TRANSACTIONS

Rena M. Lindevaldsen[†]

ABSTRACT

In June 2023, the nation awaited a decision from the United States Supreme Court in 303 Creative LLC v. Elenis. *At its core, the case presented the question of whether free speech rights outweighed a state's interest in prohibiting discrimination through its public accommodation laws. If the Supreme Court had ruled against 303 Creative and compelled its owner, Lorie Smith, to design a website for same-sex weddings despite Ms. Smith's sincerely-held religious beliefs that such marriages are not biblical, free speech rights in America would have been at the mercy of what the majority deemed acceptable speech.*

Although the Court correctly categorized Ms. Smith's services as speech and placed more value on free speech when it conflicted with a state's nondiscrimination laws, the decision leaves significant questions unresolved. One key issue is whether civil government has authority to force citizens to sell goods or services that do not constitute speech when selling such goods or services conflicts with the seller's sincerely-held religious beliefs. This Article explains the 303 Creative *decision, highlights the tension between the First Amendment rights and nondiscrimination laws, and explores the scope of government's authority to prohibit discrimination—namely, whether individuals are accountable to God or government for matters of conscience and heart.*

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I. INTRODUCTION

In June 2023, the Supreme Court delivered the long-anticipated decision in *303 Creative LLC v. Elenis*.[1] The question presented was whether a state's public accommodations law that prohibited nondiscrimination based on sexual orientation could compel an artist to speak (by forcing her to create a website) or prohibit her from speaking (by prohibiting her from publishing a statement of her religious beliefs) without violating her First Amendment free speech rights.[2] In other words, the Court had to decide whether nondiscrimination or free speech was a more compelling state interest. It is no exaggeration to say that if the Court had held that Colorado's Anti-Discrimination Act could constitutionally require Ms. Smith, as the owner of 303 Creative LLC, to design websites for same-sex weddings despite her sincerely-held religious beliefs that such marriages are not biblical, the decision would have eviscerated the protections afforded under the Free Speech Clause. The First Amendment would have been reduced to a protection of free speech only if the speech was deemed sufficiently enlightened by the leaders of the day; any speech that offended the politically-motivated sensibilities of those in the legislatures or on the bench could be silenced.

Lorie Smith owns 303 Creative LLC.[3] She is a custom website designer who desired to expand her portfolio of services to include custom wedding websites.[4] Ms. Smith has a sincerely-held religious belief that marriage is between one man and one woman and, as a result, cannot create custom wedding sites celebrating same-sex marriages.[5] She provides all her services to customers regardless of their sexual orientation but will not create websites celebrating same-sex weddings.[6] Colorado, however, took the position that speech sold as a service must comply with public accommodation laws that prohibit discrimination on the basis of sexual

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

2 *Id.* at 2307–08.

3 *Id.* at 2308.

4 *Id.*

5 *See id.*

6 *See id.* at 2308–09.

orientation.[7] 303 Creative brought suit seeking an injunction against the law as applied to its custom website services.[8]

The case required the Court to answer several legal issues. First, the Court had to determine whether creating custom websites constituted speech protected by the First Amendment.[9] Then it had to determine whether the Colorado anti-discrimination laws were a content-based restriction on speech, which would mean Colorado needed to demonstrate that it had a compelling governmental interest for its speech restriction that also was narrowly tailored to achieve that interest.[10] Finally, the Court had to decide which interest—prohibiting discrimination or protecting free speech—was entitled to greater protection.[11] After finding that the custom website designs constituted Ms. Smith's pure speech,[12] the Court concluded that Colorado's compelling interest in eradicating discrimination could not prevail over Ms. Smith's right to free speech.[13] In fact, the Court declared that "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail."[14]

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

[8] *Id.* at 2308.

[9] *Id.* at 2310–13. During oral argument before the United States Supreme Court, the Justices asked a number of questions focused on whether creating the wedding websites constituted speech. Justice Kagan asked questions about the extent of the customization—whether clients just picked templates that Ms. Smith then put together. Transcript of Oral Argument at 7–8, *303 Creative*, 143 S. Ct. 2298 (No. 21-476). Justice Sotomayor asked questions directed at a determination of whether the website, or custom wedding invitations, constituted the speech of the designer or the couple. *Id.* at 12, 16.

[10] *See 303 Creative*, 143 S. Ct. at 2313–14. The Court's opinion did not explore the question of whether Colorado's Anti-Discrimination laws were narrowly tailored to achieve a compelling interest. Thus, the opinion seems to reflect the position that free speech rights are more compelling than a state's compelling interest in eradicating discrimination, obviating the need for lower courts to engage in the strict scrutiny analysis.

[11] *See generally id.* at 2310.

[12] *Id.* at 2312.

[13] *See generally id.* at 2314–15.

[14] *Id.* at 2315. Despite the Supreme Court's declaration that the result was clear, lower courts had reached inconsistent results when presented with similar cases. *See, e.g.*, State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1237 (Wash. 2019) (en banc) (holding that a Washington antidiscrimination law that required florist to sell flowers for a same-sex wedding did not violate her First Amendment rights); Brush & Nib Studio, LC v. City of

Although the *303 Creative* Court correctly protected free speech rights that conflicted with a state's non-discrimination laws, as Part III of this Article will explain, there is one significant question left unresolved: if speech is not implicated in the goods or services sold, does civil government have the authority to force citizens to sell goods and services pursuant to nondiscrimination laws when doing so conflicts with the seller's sincerely-held religious beliefs? Given that this Article is written as part of a Supreme Court review—explaining the Court's decision in *303 Creative* and discussing its implications—Part III raises more questions than it answers. Hopefully, however, this Article inspires deeper thought on the proper role of government in our daily lives, the long-term implications of a culture that is becoming untethered from an objective standard for truth, and how our Constitution intended to mediate the tension between competing beliefs on weighty matters.

II. *303 CREATIVE LLC V. ELENIS*

Lorie Smith is the owner of 303 Creative LLC.[15] Through her company, she "offers website and graphic design, marketing advice, and social media management services."[16] When she decided to expand her offerings to include custom website design for weddings, she realized the Colorado Anti-Discrimination Act (CADA) would require her to violate her religious and free speech rights.[17] Specifically, two complementary provisions in

Phoenix, 448 P.3d 890, 926 (Ariz. 2019) (holding that a city ordinance requiring custom wedding site designers to design invitations for same-sex weddings infringed their free speech and free exercise rights under the Arizona Constitution); Telescope Media Grp. v. Lucero, 936 F.3d 740, 758 (8th Cir. 2018) (holding that Minnesota could not constitutionally require wedding videographers to video same-sex weddings in violation of their religious beliefs); Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (holding that the New Mexico Human Rights Act did not violate free speech guarantees of Christian photographer whose religious beliefs prevented her from photographing same-sex weddings); Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 559 (W.D. Ky. 2020) (holding that a wedding photographer who refused to photograph same-sex weddings stated a claim for relief that the nondiscrimination provision infringed her First Amendment rights).

15 *303 Creative*, 143 S. Ct. at 2308.

16 *Id.*

17 *See id.*

CADA would, on the one hand, compel her to speak contrary to her beliefs and, on the other hand, prohibit her from speaking because of the beliefs she held.[18] One clause, referred to as the Accommodation Clause, prohibits a public accommodation from denying "'the full and equal enjoyment' of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait." [19] The Accommodation Clause would have required Ms. Smith to create custom wedding websites for same-sex couples despite her sincerely-held religious beliefs.[20] The other clause, referred to as the Communication Clause, "prohibits a public accommodation from 'publish[ing] . . . any written . . . communication' indicating that a person will be denied 'the full and equal enjoyment' of services or that he will be 'unwelcome, objectionable, unacceptable, or undesirable' based on a protected classification."[21] The Communication Clause would have prohibited her from putting a statement on her website explaining why her beliefs prevent her from creating websites for a same-sex wedding.[22] The two clauses work in tandem, such that any speech inconsistent with the Accommodation Clause is prohibited by the Communication Clause.[23]

Ms. Smith explained that the custom wedding websites would include "text, graphic arts, and videos to 'celebrate' and 'conve[y]' the 'details' of their 'unique love story.'"[24] The websites would explain how the couple met, explain their background, and share with readers the plans for their wedding and the future.[25] Anyone visiting the website would know Ms. Smith was the creator because the name of her company would be disclosed on every site.[26] Although Ms. Smith provides websites and other services to

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[18] *Id.* at 2308–09, 2309 n.1.

[19] *Id.* at 2308–09 (quoting COLO. REV. STAT. § 24-34-601(2)(a) (2022)).

[20] *See id.*

[21] 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 1209 n.1 (2023) (alterations in original) (quoting COLO. REV. STAT. § 24-34-601(2)(a) (2022)).

[22] *See* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1182 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

[23] *See 303 Creative*, 143 S. Ct. at 1208–09, 2309 n.1.

[24] *Id.* at 2308.

[25] *Id.*

[26] *Id.*

all individuals regardless of their sexual orientation, she could not create custom sites for same-sex weddings because she believes that "marriage should be reserved to unions between one man and one woman."[27]

Concerned that Colorado would enforce CADA against her, either with fines, a cease-and-desist order, or other action, Ms. Smith brought a pre-enforcement challenge seeking injunctive relief to prevent the state from forcing her to create wedding websites contrary to her beliefs.[28] Given Colorado's history of enforcing CADA against other artists who refused to provide services for same-sex weddings, she was concerned that if she began offering website services for weddings, Colorado would force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman.[29]

The United States District Court for the District of Colorado granted summary judgment in favor of Colorado.[30] In a rather short opinion, the district court *assumed* the Accommodation Clause was constitutional and held that Ms. Smith lacked standing to bring a pre-enforcement challenge to the Accommodation Clause.[31] As a result, under the Communication Clause, the court concluded that Colorado could constitutionally prohibit speech made illegal under the Accommodation Clause.[32] Ms. Smith

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[27] *Id.*; *see also 303 Creative*, 6 F.4th at 1170 (stating that she provides all her services without regard to sexual orientation but that she would refuse to create a wedding website for a same-sex couple even if a heterosexual friend of, or wedding planner for, the same-sex couple asked for the website).

[28] *303 Creative*, 143 S. Ct. at 2308. Both the Tenth Circuit Court of Appeals and Supreme Court held that 303 Creative had standing to bring a pre-enforcement challenge because she had established a credible threat of enforcement against her. Colorado has enforced the provisions in the past, including in the *Masterpiece Cakeshop* case that made its way to the Supreme Court. Colorado also refused to disavow future enforcement of CADA against 303 Creative. *Id.* at 2310.

[29] *Id.* at 2308–10.

[30] 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907, 912 (D. Colo. 2019), *aff'd*, 6 F.4th 1160 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

[31] *Id.* at 908, 911.

[32] *Id.* at 910–11.

appealed to the Tenth Circuit, which affirmed the district court's decision, albeit on slightly different grounds.[33]

A. Tenth Circuit Decision

At the outset, the Tenth Circuit disagreed with the district court on standing, finding that Ms. Smith had standing to bring her pre-enforcement claims.[34] In particular, she demonstrated "both an intent to provide graphic and web design services to the public in a manner that exposes them to CADA liability, and a credible threat that Colorado will prosecute them under that statute."[35] Ms. Smith's proposed statements fell squarely within the Communication Clause,[36] and her refusal to provide website design services to a same-sex couple's request for a website celebrating their marriage fell squarely within the Accommodation Clause.[37]

She also had a credible fear of prosecution.[38] All three factors used to determine whether a credible fear of prosecution exists were satisfied.[39] "First, Colorado ha[d] a history of past enforcement [of] nearly identical conduct."[40] Colorado's enforcement of CADA led to a Supreme Court decision and several lower court opinions arising from Masterpiece Cake Shop's refusal to bake custom cakes celebrating messages contrary to the owner's religious beliefs.[41] Second, any person, not just a prosecutor or

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[33] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

[34] *Id.* at 1171–75.

[35] *Id.* at 1172.

[36] *See id.* at 1168–70.

[37] *See id.* at 1177.

[38] *Id.* at 1172.

[39] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1174 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

[40] *Id.*

[41] In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2017), the United States Supreme Court reversed lower court rulings against Jack Phillips, as owner of Masterpiece, because the Colorado Civil Rights Commission's hearing process did not comply with the Free Exercise Clause's requirement of religious neutrality. Significantly, the commissioners demonstrated hostility toward Jack Phillips' religious beliefs. *Masterpiece Cakeshop*, 138 S. Ct. at 1732. Just weeks after the Supreme Court opinion, Colorado issued a new probable cause determination against Jack Phillips, alleging that he discriminated

agency, could file a complaint against Ms. Smith.[42] Thus, as soon as Ms. Smith opened her business, any customer refused service could file a claim.[43] Finally, the state had not disavowed enforcement of CADA against Ms. Smith or her business.[44] After finding that Ms. Smith satisfied the standing requirements of causation, redressability, and ripeness, the court turned to the free speech claim.[45]

The Tenth Circuit took a novel approach to the speech analysis. It agreed with Ms. Smith that creation of wedding websites is "pure speech."[46] The court's conclusion rested on the sites' "express approval and celebration of the couple's marriage, which is itself often a particularly expressive event."[47] CADA made Ms. Smith's speech the public accommodation, subject to the nondiscrimination provisions.[48] The Accommodation Clause compels Ms. Smith "to create websites—and thus, speech—that [she] would otherwise refuse."[49] The Tenth Circuit then determined that the Accommodation Clause was a content-based restriction.[50] It was content-based because its purpose is to "'excis[e] certain ideas or viewpoints from the public dialogue'" and to "eliminat[e] discriminatory bias . . . ."[51] As a result, the court explained that "[w]hether viewed as compelling speech or as a content-based restriction, the Accommodation Clause must satisfy strict scrutiny . . . ."[52] The court readily concluded that the Accommodation

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against a different customer based on the customer's transgender status. Jack Phillips sued various Colorado officials and entities alleging that they violated his First and Fourteenth Amendment rights. *See* Masterpiece Cakeshop, Inc. v. Elenis, 445 F. Supp. 3d 1226, 1232 (D. Colo. 2019).

42 *303 Creative*, 6 F.4th at 1174.

43 *Id.*

44 *Id.*

45 *Id.* at 1175–76.

46 *Id.* at 1176.

47 *Id.*

48 *See generally* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1176–78 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

49 *Id.* at 1177.

50 *Id.* at 1178.

51 *Id.* (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)) (citing Hurley v. Irish-Am. Gay, 515 U.S. 557, 579 (1995)).

52 *Id.*

Clause advanced "a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in assessing the commercial marketplace."[53] Thus, the Tenth Circuit's analysis focused primarily on whether the clause was narrowly tailored to achieve the state's compelling interests.[54]

The Tenth Circuit held that the Accommodation Clause was not narrowly tailored to preventing dignitary harms, but it was narrowly tailored to Colorado's interest in ensuring equal access to publicly available goods and services.[55] As to the first point, although Colorado had an interest in protecting the dignitary rights of those who would be denied services, it properly concluded that it "could not enforce that interest by limiting offensive speech."[56] The court acknowledged that the First Amendment protected a wide range of offensive speech, including Ms. Smith's speech.[57]

As to the second point, however, the court concluded that the Accommodation Clause was narrowly tailored to the state's interest in ensuring access to goods and services offered for sale in the commercial marketplace.[58] The court framed the question as "whether Colorado's interest in ensuring access to the marketplace *generally* still applies with the same force to Appellants' case *specifically*—i.e., 'whether [Colorado] has such an interest in denying an exception to [Appellants].'"[59] It explained that to grant an exception to Ms. Smith would "relegate LGBT consumers to an inferior market because Appellants' *unique* services are, by definition, unavailable elsewhere."[60] Ms. Smith's services are unique because they are speech, which is "inherently not fungible."[61] Consequently, "LGBT

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[53] *Id.*

[54] *See generally* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1179–82 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

[55] *Id.* at 1179.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1180 (quoting Fulton v. Philadelphia, 141 S. Ct. 1868, 1881 (2021)).

[60] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1180 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

[61] *Id.*

customers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants' offer."[62]

Continuing with that line of analysis, the Tenth Circuit compared her custom-made website business to that of a monopoly. It then explained that when a monopoly is present, there are "unique anti-discrimination concerns" because customers are "faced with a sole supplier who could decide for all sorts of reasons, including invidious motives, to refuse to deal with a group of potential consumers."[63] Where unique goods and services are involved, that is "where public accommodation laws are most necessary to ensur[e] equal access."[64] The court specifically rejected any argument that the sincerity of Ms. Smith's beliefs were relevant to the legal question.[65] Instead, the focus is on the fact that places of public accommodation must be open to everyone.[66]

The opinion makes plain that the resolution to the "tension" between free speech, on the one hand, and public accommodation laws that require a person to violate her sincerely-held religious beliefs, on the other, is that the free speech rights lose.[67] In its monopoly discussion, the court did not even consider the reality that customers could readily obtain their goods and services elsewhere in the market.[68] Indeed, the court's opinion stands for the proposition that all custom, artistic services or goods sold to the public necessarily constitute a monopoly and, thus, cannot be exempted from public accommodation laws.

The Tenth Circuit quickly dispensed with Ms. Smith's claim under the Communication Clause.[69] The Tenth Circuit agreed with the District Court's conclusion that the Communications Clause was constitutional because "Colorado may prohibit speech that promotes unlawful activity,

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[62] *Id.*

[63] *Id.* at 1180–81.

[64] *Id.* at 1181.

[65] *Id.*

[66] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1181 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

[67] *Id.* at 1181–82.

[68] *Id.* at 1180.

[69] *Id.* at 1182–83.

including unlawful discrimination."[70] The Tenth Circuit also concluded that the Accommodation Clause did not violate Ms. Smith's free exercise rights.[71] The Supreme Court agreed to hear the case, but only as to the question of "[w]hether applying a public accommodation law to compel an artist to speak or stay silent . . . violates the Free Speech . . . Clause[] of the First Amendment."[72]

B. Supreme Court Decision

Justice Gorsuch delivered the opinion of the Court, with three justices dissenting.[73] The first paragraph of the opinion frames its scope: the case does not involve a state's authority to prohibit discrimination in the sale of goods and services but whether the government can compel you to create and then sell speech that you do not believe in.[74] The Supreme Court opinion only addressed the merits of the Accommodation Clause (which required Ms. Smith to create speech) and not the Communications Clause (which prohibited her from placing a statement on her website explaining that she would not create websites that violated her religious beliefs) because Colorado conceded that its authority to prohibit speech under the Communication Clause rested on its position that Ms. Smith's refusal to create the websites was unlawful.[75] In other words, if Ms. Smith unlawfully discriminated under the Accommodation Clause, then the Communication Clause could prohibit her from stating on her site that she engaged in unlawful discrimination.

The Court relied heavily on well-established precedent to conclude that CADA violated Ms. Smith's First Amendment free speech rights. The analysis started with the most basic principle that the First Amendment free

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[70] *Id.* at 1182.

[71] For purposes of this Article, because the United States Supreme Court only granted review on the free speech question, the free exercise claim is not discussed in any detail.

[72] Order Granting Certiorari, 142 S. Ct. 1106 (2022).

[73] *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2307 (2023). The three dissenting justices were Justices Sotomayor, Kagan, and Jackson. *Id.* at 2322.

[74] *Id.* at 2307–08.

[75] *Id.* at 2308–10, 2309 n.1. ("Because Colorado concedes that its authority to apply the Communication Clause to Ms. Smith stands or falls with its authority to apply the Accommodation Clause, . . . we focus our attention on the Accommodation Clause.").

speech clause was designed "to protect the 'freedom to think as you will and to speak as you think.'"[76] The framers understood these protections "both as an end and as a means."[77] It is an end because it is one of the inalienable rights referred to in the Declaration of Independence. It is a "means because the freedom of thought and speech is 'indispensable to the discovery and spread of political truth.'"[78] It is only when all views are allowed to flourish and be expressed that we can "test and improve our own thinking . . . as individual[] [citizens] and as a Nation."[79]

The Court repeated its oft-stated premise that the First Amendment protects "an uninhibited marketplace of ideas."[80] The Court relied on *West Virginia Board of Education v. Barnette*,[81] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[82] and *Boy Scouts of America v. Dale*[83] to emphasize that the First Amendment protects a person's right to speak "regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,'[84] and likely to cause 'anguish' or 'incalculable grief.'"[85] The reason for those protections is because it is

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[76] *Id.* at 2310 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000)).

[77] *Id.* (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

[78] *Id.* at 2311 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

[79] 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2311 (2023) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

[80] *Id.* (quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

[81] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (requiring public school students to salute the flag and recite the Pledge of Allegiance violated the First Amendment).

[82] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (holding unanimously that requiring private citizens who organize a parade to include a group expressing a message that the organizers do not wish to convey violates the First Amendment by making private speech subordinate to the public accommodation requirement).

[83] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (applying New Jersey's public accommodation law to require the Boy Scouts to admit a homosexual scout leader violates the Boy Scout's First Amendment rights of expressive association).

[84] *303 Creative*, 143 S. Ct. at 2312 (quoting *Hurley*, 515 U.S. at 574).

[85] *Id.* (quoting Snyder v. Phelps, 562 U.S. 443, 456 (2011)).

equally offensive to First Amendment principles for a government to compel an individual to speak a message the government prefers.[86]

The Court agreed with the Tenth Circuit's conclusion that Ms. Smith's website design constitutes pure speech, that the speech is Ms. Smith's speech, and that Colorado seeks to compel Ms. Smith to create speech that conflicts with her sincerely-held religious beliefs.[87] Contrary to the Tenth Circuit's opinion, the Court concluded that forcing Ms. Smith to choose whether to speak a message she disagrees with or face sanctions for expressing her own beliefs, represents an impermissible violation of the First Amendment's free speech clause.[88]

The Court expressed concern over the natural consequences of the Tenth Circuit's logic. Significantly, "the government . . . [could] compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait."[89] All types of artists and speakers could be forced to convey only a government-approved viewpoint, regardless of the person's beliefs.[90] Recognizing that governments "have a 'compelling interest' in eliminating discrimination in places of public accommodation,"[91] those antidiscrimination laws are still subject to the Constitution. [92] The Court made clear that when a state public accommodations law collides with the Constitution: *the Constitution* "*must prevail*."[93] The Court offered a few examples:

> Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the

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[86] *Id.*

[87] *Id.* at 2312–13.

[88] *Id.*

[89] *Id.* at 2313.

[90] 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312–14 (2023).

[91] *Id.* at 2314 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984)) (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964)).

[92] *Id.* at 2315.

[93] *Id.* (emphasis added).

> world's great works of literature and art were created with the expectation of compensation.[94]

The Tenth Circuit's monopoly argument would lead to the absurd conclusion that the more unique or talented the artist, the more easily the government could conscript the artist to convey a government's approved message.[95]

After rejecting the State's argument that it can compel or silence speech because it is speech made for compensation, the Court denounced any claim that "the First Amendment's protections belong only to speakers whose motives the government finds worthy."[96] Rather, protecting messages the government disagrees with is a primary purpose of the First Amendment: constitutional "protections belong to all, including to speakers whose motives others may find misinformed or offensive."[97]

The majority opinion properly characterized the dissent's position as one that believes the price for doing business in the United States is that you forfeit First Amendment rights.[98] In other words, because a person chooses to open a business, the government can then dictate how the person engages in business, which includes forcing a business owner to violate her sincerely-held religious beliefs. The majority believed the dissent had failed to consider the ramifications of its position—that the principle goes both ways. As a result, the government could force an atheist muralist to paint a scene "celebrating Evangelical zeal" or could require a "gay website designer to create websites for a group advocating against same-sex marriage, so long as these speakers would accept commissions from the public with different messages."[99] Alternatively, the majority thought the dissent found those "possibilities untroubling because it trusts state governments to coerce only

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94 *Id.* at 2316.

95 *Id.* at 2315.

96 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2317 (2023).

97 *Id.*

98 *Id.* at 2320.

99 *Id.*

'enlightened' speech."[100] The majority found that trust of government is "a dangerous one indeed."[101]

Toward the end of its opinion, the majority chided the dissent as abandoning a fundamental tenet of the First Amendment guarantees: that "[a] commitment to speech for only *some* messages and *some* persons is no commitment at all. . . . [I]f liberty means anything at all, it means the right to tell people what they do not want to hear."[102] One of our most cherished liberties is the right "to think for ourselves and to express [our] thoughts freely."[103]

The dissenting opinion, written by Justice Sotomayor, reflects at least five faulty premises in the way it balanced First Amendment rights against public accommodation laws.[104] First, the dissenting opinion relies heavily on the "humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his social identity."[105] The dissent, however, only acknowledges the humiliation and frustration that the customer may feel when denied services or goods—it altogether ignores any humiliation or frustration on the part of the seller who is told his religious views are unacceptable to

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100 *Id.*

101 *Id.*; *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 579 (1995). It makes no constitutional difference that the government believes its "broad prophylactic rule" furthers a very important interest. Rather than compel or silence speech, the government can advance its interests by promoting its own message. It cannot "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.*

102 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2321 (2023).

103 *Id.*

104 *Id.* at 2322 (Sotomayor, J., dissenting).

105 *Id.* at 2324 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring)); *cf.* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2431 (2022) (quoting Lee v. Weisman, 505 U.S. 577, 590 (1992)) (There is "a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.'") (differing on whether society or the individual must tolerate a social norm that varies).

society and that he must speak a government-approved perspective or face monetary penalties.[106]

Second, the dissent repeatedly refers to public accommodations laws as remedying arbitrary and invidious discrimination without any meaningful acknowledgment of the sincere beliefs of those who have religious beliefs that conflict with public accommodations laws.[107] Discrimination, meaning differential treatment, can exist without it being arbitrary and invidious. For example, "arbitrary" is defined as "existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will."[108] Similarly, "invidious discrimination" is defined as the "act of treating a class of persons unequally in a manner that is malicious, hostile, or damaging. It refers to discrimination that is motivated by animus or ill will towards a particular group, rather than based on a legitimate, non-discriminatory reason."[109] Those words assume a lack of rationality or the presence of malice. Yet, contrary to the dissent's characterization, those who hold sincerely-held religious beliefs against same-sex marriage are not irrational or malicious simply because they hold those views. Indeed, the Court, in *Obergefell v. Hodges*,[110] acknowledged the long-held, sincere convictions of

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[106] *303 Creative*, 143 S. Ct. at 2323–25 (Sotomayor, J., dissenting); *cf.* Chelsey Nelson Photography LLC v. Louisville/Jefferson City Metro Gov't, 479 F. Supp. 3d 543, 564–65 (W.D. Ky. 2020), *abrogated by* 624 F. Supp. 3d 761, 807–08 (W.D. Ky. 2022) (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018)) (citing Whitney v. Cal., 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)) ("Challenging questions remain unanswered at the intersection of free speech, religious liberty, and equal treatment. Courts must navigate these difficult issues without imposing indignities on religious believers when they engage in expressive conduct and 'without subjecting gay persons to indignities when they seek goods and services in an open market.' The solution is more dialogue, not less.").

[107] *303 Creative*, 143 S. Ct. at 2327 (Sotomayor, J., dissenting) ("arbitrarily denied"); *id.* at 2331 ("invidious discrimination").

[108] *Arbitrary*, MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/arbitrary (last visited Oct. 29, 2023).

[109] *Invidious Discrimination*, CORNELL LAW SCHOOL, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/invidious_discrimination#:~:text=Invidious%20discrimination%20is%20a%20legal,legitimate%2C%20non%2Ddiscriminatory%20reason (last visited Oct. 29, 2023).

[110] Obergefell v. Hodges, 576 U.S. 644 (2015).

those who believe marriage should continue to be defined as one man and one woman.[111] The dissent's characterization of Ms. Smith's beliefs as invidious and arbitrary reveals the dissent's own bias toward specific religious beliefs.

Third, the dissent asserts that "LGBT people do not seek any special treatment" but only seek to "inhabit public spaces on the same terms and conditions as everyone else."[112] Similar to the first point above, the dissent only sees one side of the equation.[113] Simply stating that LGBT individuals want or deserve to inhabit American life and live on the same terms as others does not resolve the inherent conflict that exists with Ms. Smith's desires to also inhabit American life and to live on the same terms as others.

Fourth, the dissent ignores the facts and mischaracterizes Ms. Smith's position as discriminating against customers based on their sexual orientation.[114] Ms. Smith, however, made clear that she provides her goods and services to customers regardless of their sexual orientation but will not create a website that supports same-sex marriage, regardless of who asks for the site.[115] Thus, it is not the protected status of the customer that prevents Ms. Smith from creating the website, but the content of the speech she is being asked to create that dictates the services she will or will not provide. Rather than acknowledge the fact she does not discriminate based on sexual orientation, the dissent calls her position "embarrassing."[116] The dissent states that Ms. Smith's position "sends the message that we live in a society with social castes."[117] But the dissent ignores the reality that requiring Ms. Smith to violate her sincerely-held beliefs also sends the message that we

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[111] *Id.* at 679–80; *cf.* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1925 (2021) (Barrett, J., concurring) ("[L]umping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs.").

[112] 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2330 (2023) (Sotomayor, J., dissenting).

[113] *Fulton*, 141 S. Ct. at 1925 (society can keep its promise to religious individuals who desire to continue to advocate against same-sex marriage "while still respecting the 'dignity,' 'worth,' and fundamental equality of all members of the community") (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018)).

[114] *303 Creative*, 143 S. Ct. at 2333 (Sotomayor, J., dissenting).

[115] *Id.* at 2308 (majority opinion).

[116] *Id.* at 2339 (Sotomayor, J., dissenting).

[117] *Id.* at 2341.

live in a society with social castes. If the Accommodation Clause were applied to require Ms. Smith to create a website celebrating a same-sex marriage, Colorado's laws would ensure that LGBT individuals are in a higher social caste than those with sincerely-held religious beliefs that marriage is the union of one man and one woman.

The dissent attempts to skirt this issue by stating that Colorado does not compel Ms. Smith to create messages she disagrees with.[118] The dissent says Ms. Smith could simply change her business model.[119] For example, she could limit her website designs to only those conveying a biblical message describing marriage as the union of one man and one woman.[120] Thus, if someone wanted a website without that message, Ms. Smith could refuse.[121] The dissent, again, fails to appreciate the weight of its position. It is forcing Ms. Smith to change her business model and limit the services she provides to avoid running afoul of state law. Finally, the dissent acknowledges that weddings are among the "most profound moments in a human's life"[122] but dismisses any claim by Ms. Smith that the Accommodations Clause violates her constitutional rights by requiring her to violate her sincerely-held beliefs about those profound moments in a person's life.[123]

Although *303 Creative* properly protects the free speech rights of those who sell goods or services that can be characterized as pure speech, it ignores the broader question of whether the government has any authority to impose nondiscrimination laws against businesses as a condition of being able to sell their goods and services to the public.

III. QUESTIONS TO PONDER AFTER *303 CREATIVE*

Although *303 Creative* was a good decision insofar as it protected free speech rights that conflict with public accommodations laws, it leaves lower courts to grapple with several questions, including the scope of government authority to dictate non-speech-based commercial transactions that conflict

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118 *Id.* at 2336.

119 *See id.*

120 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2336 (2023) (Sotomayor, J., dissenting).

121 *Id.* at 2337.

122 *Id.* at 2342.

123 *See id.* at 2343.

with sincerely-held religious beliefs. As discussed in the Introduction above, the scope of this Article does not include a thorough discussion of the lingering issues resulting from *303 Creative*. Rather, this Article seeks to raise some fundamental questions for further analysis and consideration.

The first question for the lower courts to grapple with after *303 Creative* is where to draw the line between services that are protected speech and those that are not. Justice Kavanaugh stated during oral argument that the parties on both sides seemed to agree that "hairstylists, landscapers, plumbers, caterers, tailors, jewelers, and restaurants ordinarily wouldn't have a First Amendment free speech right to decline to serve a same-sex wedding."[124] Without conceding the accuracy of Justice Kavanaugh's statement that those categories of service providers would not be protected by the First Amendment, once a court determines that someone's services or goods do *not* constitute speech, the next question is what protections business owners have in the face of anti-discrimination laws.

To answer that second question, we must examine whether government has authority to force a business to enter into contractual relationships with all qualified customers who desire to purchase the good or service.[125] Given that the dissent in *303 Creative* claimed that when a person chooses to go into business and sell her services, she forfeits her First Amendment rights, it naturally follows that the dissent believes government has the authority to force business owners to contract with qualified customers.[126] But what authority does the government have to force a person to contract with any and every qualified customer?

The most obvious response is that government cannot force a party to enter into a contractual relationship. An essential element of an enforceable contract is that the parties voluntarily agree to contract.[127] One reason for the voluntariness requirement is because there are legal obligations imposed on parties who choose to contract, including financial remedies for

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[124] Transcript of Oral Argument at 43, *303 Creative*, 143 S. Ct. 2298 (No. 21-476).

[125] The use of the phrase "qualified customers" removes from the analysis any questions about ability of the customer to pay for the item—whether in cash or on credit.

[126] *See 303 Creative*, 143 S. Ct. at 2322 (Sotomayor, J., dissenting).

[127] Ogden v. Saunders, 25 U.S. 213, 256 (1827) (characterizing the construction of a contract as "depending essentially upon the will of the parties").

breach.[128] The United States Constitution similarly reflects the importance of contract rights. Article I, section 10, clause 1 prohibits state governments from impairing the obligations of contracts entered into by private parties.[129] To the extent the right to contract—or not contract—is an inherent right we possess, reflected in the fact that the government cannot impair contractual obligations, it also must necessarily be limited in its ability to force individuals to enter into contractual relationships.

Chief Justice Marshall described the nature of the right to contract as "intrinsic" to mankind:

> [I]ndividuals do not derive from government their right to contract, but bring that right with them into society . . . . This results from the right which every man retains *to acquire property, to dispose of that property according to his own judgment*, and to pledge himself for a future act. These rights are not given by society, but are brought into it.[130]

The Chief Justice understood the truth articulated in the Declaration of Independence—that "[w]e . . . are endowed by [our] Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness."[131] As reflected in the Chief Justice's quote, deciding what property to acquire and dispose of is among those unalienable rights. That basic principle is consistent with the biblical commands to each individual to take dominion over the earth and to be good stewards with what God has

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[128] *See id.* at 257 ("What is it, then, which constitutes the obligation of a contract? . . . [I]t is the law which binds the parties to perform their agreement.").

[129] U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); *see also* THE FEDERALIST NO. 44 (James Madison) ("[L]aws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . [It is a] constitutional bulwark in favor of personal security and private rights . . . .").

[130] *Ogden*, 25 U.S. at 346 (Marshall, C.J., dissenting) (emphasis added).

[131] THE DECLARATION OF INDEPENDENCE (U.S. 1776); *see also* Vlaming v. West Point Sch. Bd., No. 211061, 2023 Va. LEXIS 62, *40 (Dec. 14, 2023) ("The right to religious liberty . . . was a 'natural right' bestowed by the 'Almighty God' and not by any assembly of mortal men.") (quoting Jefferson's 1786 Act for Religious Freedom).

provided to us.[132] Because each person will be responsible to God for stewardship of his time, talents, and property, a necessary question is what role, if any, does government have to interfere with that individual responsibility by forcing individuals to enter into a commercial transaction?

This brings us to a third question—or set of questions—for consideration: whether the government has any authority to legislate against beliefs it views as discriminatory and whether any such governmental authority to legislate against discrimination includes authority to force people to violate their conscience. Our First Amendment jurisprudence has rested on well-established principles, including the principle that citizens have the right to express their opinions, regardless of how offensive, hurtful, or wrong.[133] We have favored speech over censorship, trusting that truth would prevail in the marketplace of ideas.[134] We also have resisted the notion that the government should be the one deciding what speech is permissible.[135]

A recent Virginia Supreme Court decision correctly understood that the rights of conscience must prevail over government efforts to prohibit speech it deems impermissible.[136] In *Vlaming*, a high school teacher refused to identify students by their preferred pronouns. Instead, he chose to avoid

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[132] *Genesis* 1:28 ("And God blessed them. And God said to them, 'Be fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth.'"); *Matthew* 25:21 ("His master said to him, 'Well done, good and faithful servant. You have been faithful over a little; I will set you over much. Enter into the joy of your master.'"); *see also* Brandon Clay, *Why We Work*, ANSWERS IN GENESIS (June 22, 2021), https://answersingenesis.org/environmental-science/stewardship/why-we-work/.

[133] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1924 (2021) (Barrett, J., concurring) ("In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding."); Texas v. Johnson, 491 U.S. 397, 420 (1989) (striking down a statute prohibiting the burning of the American flag, explaining that the way to preserve the flag's unique message is not to punish those who disagree with the message of the flag but for the government to create its own message in an effort to persuade them that they are wrong).

[134] 303 Creative v. Elenis, 143 S. Ct. 2298, 2310–11 (2023).

[135] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2374–75 (2018).

[136] *Vlaming*, 2023 Va. LEXIS 62.

the use of pronouns altogether. The Court framed the question presented as:

> whether Vlaming's sincerely held religious beliefs caused him to commit overt acts that "invariably posed some substantial threat to public safety, peace or order," and if so, whether the government's compelling state interest in protecting the public from that threat, when examined under the rigors of strict scrutiny, could be satisfied by "less restrictive means."[137]

The Court reversed the lower court's order, which had granted defendants' motion to dismiss the claims for failure to state a claim. Although the case applied Virginia's free exercise clause rather than the First Amendment to the United States Constitution, the opinion made several excellent points when considering the proper balance between nondiscrimination and freedom of conscience.

First, religious liberty rights prevail over claims that speech must be silenced (or compelled) because it is objectionable or hurtful.[138] Only the most compelling government reason could justify coercing citizens to pledge "verbal allegiance to ideological views that violate their sincerely held religious beliefs."[139] Second, government can accommodate sincerely held religious views without violating the prohibition against religious establishment. The Court explained that "[i]mplicit in [the government's] argument is a startling fallacy: Any government accommodation of a religious person's sincerely held views—particularly those that the government finds unorthodox—somehow establishes a religious beachhead on the shores of the secular state."[140]

Third, the Court rebuffed the school board's attempt to rely on its "health, safety, security, or discipline" as a basis for requiring its teachers to use a student's preferred pronoun.[141] The Court explained that there must

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137 *Id.* at *32–*33 (citations omitted).

138 *Id.*

139 *Id.* at *34.

140 *Id.* at *43.

141 *Id.* at *63.

be a limiting principle to the government's police powers to promote health, safety, and morals because that is the justification for most, if not all, laws. That limiting principle must be one that avoids interpreting Virginia's laws in a manner that "would render it a dead letter and defeat its essential purpose."[142] Fourth, the Court reminded us that "government coercion, even when indirect, cannot constitutionally compel individuals to 'mouth support' for religious, political, or ideological views that they do not believe."[143] Forcing individuals to "endorse ideas they find objectionable is always demeaning," and, for that reason, "require[s] 'even more immediate and urgent grounds' than a law demanding silence."[144] Thus, the government has to meet a higher burden to justify compelled speech than it does when it censors speech.[145]

Finally, the Court disavowed any inherent government authority to "declare by ipse dixit that controversial ideas are now uncontroversial."[146] The concept of gender identity is one of many "sensitive political topics."[147] Such controversial ideological matters deserve the highest protection because the "freedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order."[148] Indeed, just a few years ago, the Supreme Court explained that "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and *the people lose when the government is the one deciding which ideas should*

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[142] Vlaming v. West Point Sch. Bd., No. 211061, 2023 Va. LEXIS 62, *64 (Dec. 14, 2023) (quoting Graham v. Community Mgmt. Corp., 805 S.E.2d 240, 244 (Va. 2017)).

[143] *Id.* at *69 (quoting Janus v. American Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018)).

[144] *Id.* at *69–*70 (quoting *Janus*, 138 S. Ct. at 2464).

[145] *Id.* at *71. The Court relied on *303 Creative* to support its compelled speech analysis. *Id.* at *70.

[146] *Id.* at *75.

[147] *Id.* at *74.

[148] Vlaming v. West Point Sch. Bd., No. 211061, 2023 Va. LEXIS 62, *75 (Dec. 14, 2023) (quoting W. Va. State Bd. Of Educ. v. Barnette 319 U.S. 624, 642 (1943)).

prevail."[149] In modern times, however, as individualism has taken root and flourished, these fundamental principles are being challenged.

In his book, *The Rise and Triumph of the Modern Self,* theologian and historian Carl R. Trueman explored the historical development of expressive individualism and how it poses a significant threat to our personal liberties.[150] He describes three worlds in his book. The "first world" is a pagan world.[151] The "second world" is one based on religious faith.[152] And the "third world" reflects those cultures that "do not root their cultures, their social orders, their moral imperatives in anything sacred. *They . . . justify themselves . . . on the basis of themselves*."[153] The only moral criterion in the third world is whether it contributes "to the feeling of well-being in the individuals concerned."[154] There are "no transcendent ethical standards, either laws or virtues, to which they need to conform themselves."[155] In fact, God and His divine revelation are considered irrelevant.[156]

Instead of turning to objective, transcendent truths for determining the right conduct, expressive individualists focus on emotions. "Emotivism is the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling . . . ."[157] The threat to free speech and other fundamental freedoms is that a system of moral judgments based on feelings will place increasing emphasis on "words as means of oppression."[158] Those oppressive words cause "psychological harm" and, thus, "need to be policed and

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[149] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2375 (2018) (emphasis added).

[150] CARL R. TRUEMAN, THE RISE AND TRIUMPH OF THE MODERN SELF: CULTURAL AMNESIA, EXPRESSIVE INDIVIDUALISM, AND THE ROAD TO SEXUAL REVOLUTION (2020).

[151] *Id.* at 75.

[152] *Id.*

[153] *Id.* at 76 (emphasis added).

[154] *Id.* at 79.

[155] *Id.* at 187.

[156] *Cf.* TRUEMAN, supra note 150, at 87.

[157] *Id.* at 85 (quoting ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 11–12 (2nd ed. 1985)).

[158] *Id.* at 55.

suppressed."[159] The resulting tendency is to "assert our moral convictions [that are untethered to objective truth] as normative and correct by rejecting those with which we disagree as irrational prejudice rooted in personal, emotional preference. That is precisely what underlies the ever-increasing number of words ending in *-phobia* by which society automatically assigns moral positions . . . to the category of neurotic bigotry."[160]

Carl Trueman devoted considerable time in his book to the specific issue that framed the *303 Creative* conflict—that of traditional religious views on human sexuality. He discussed how traditionalists are marginalized by those who reject objective truth and rely on their individual morals as the basis for what is right.

> [A]ny religion that maintains a traditional view of sexual activity and refuses to recognize identities built on desires and activities that they regard as wrong is by definition engaged in oppressing those who claim such identities. . . . [T]raditionalists only maintain their beliefs about sex and sexual mores on the grounds of irrational bigotry. In short, they are either stupid or immoral or both. In such a world, the idea that religious freedom is a social good is not simply increasingly implausible, it is also increasingly distasteful, disturbing, and undesirable. To put it differently, the social imaginary of the West is no longer that of the American founders, for whom religious freedom was regarded as a good that actually helped social cohesion; it is now regarded as something that poses a potentially lethal threat to that cohesion.[161]

Not only did we see this marginalization represented through Colorado's public accommodation laws, but the marginalization permeated Justice Sotomayor's dissent, which was joined by Justices Kagan and Jackson. As

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159 *Id.*

160 *Id.* at 87.

161 *Id.* at 400.

discussed above, the dissenting opinion attacked Ms. Smith's beliefs as invidious, discriminatory, and inappropriate in the commercial marketplace.[162] The dissent failed to even acknowledge the harm caused to Ms. Smith by the public accommodation laws.

303 Creative highlights the zero-sum conflict discussed by Trueman.

> It is precisely because matters of basic identity, and therefore of what constitutes dignity and appropriate recognition, are at stake that makes a negotiated settlement impossible. To allow religious conservatives to be religious conservatives is to deny that people are defined by their sexual orientation, and to allow that people are defined by their sexual orientation is to assert that religious conservativism is irrational bigotry and dangerous to the unity of the commonwealth.[163]

Because expressive individualists believe traditional views on sexuality constitute irrational bigotry that is dangerous to society, the path forward for those who hope to protect not only First Amendment rights but other fundamental rights hinges on answering the question posed at the outset of this Article: Does civil government have the authority to force citizens to sell goods and services pursuant to nondiscrimination law when doing so conflicts with the seller's sincerely-held religious beliefs?

IV. CONCLUSION

Although we save for another day a discussion of an answer to that question, a key biblical truth that should guide the discussion is that God, not government, is sovereign over the hearts and minds of His Creation. God delegated only limited authority to civil government, and when we allow government to claim jurisdiction over matters of conscience and heart, like it does with modern nondiscrimination laws, then our

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[162] 303 Creative v. Elenis, 143 S. Ct. 2298, 2337 (2023) (Sotomayor, J., dissenting).

[163] TRUEMAN, supra note 150, at 402.

government is no longer limited in its jurisdiction; rather, it claims total jurisdiction, which only God rightly possesses.[164]

[164] *Cf.* ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 34–35 (1973).