IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC, a limited liability company; and LORI SMITH, Plaintiffs-Appellants, v. AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity; ANTHONY ARAGON, ULYSSES J. CHANEY, MIGUEL "MICHAEL" RENE ELIAS, CAROL FABRIZIO, HEIDI HESS, RITA LEWIS, and JESSICA POCOCK, as members of the Colorado Civil Rights Commission, in their official capacities; and CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity; Defendants-Appellees.	No. 17-1344

On Appeal from the United States District Court
for the District of Colorado

D.C. No. 16-cv-02372-MSK-CBS

DEFENDANTS' MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION PURSUANT TO 10TH CIR. R. 27.3(A)(1)(a)

Defendants, through the Colorado Attorney General, move to dismiss the appeal in the above-captioned case for lack of appellate jurisdiction pursuant to 10th Cir. R. 27.3(A)(1)(a).

Disclosure of opponent's position: Pursuant to 10th Cir. R. 27.1, undersigned has conferred with counsel for Plaintiffs, who stated that they oppose this Motion.

BACKGROUND

1. This matter is currently pending in the United States District Court for the District of Colorado, civil action number 16-cv-02372-MSK-CBS.

2. On September 1, 2017, the District Court issued an "Order Granting in Part and Denying in Part Motion to Dismiss and Denying Motion for Preliminary Injunction and Motion for Summary Judgment, with Leave to Renew." Exhibit A. Plaintiffs now seek appellate review of that Order.

3. In the Order, the District Court dismissed four claims asserted by Plaintiffs for lack of standing, but did not dismiss five additional claims. The District Court stayed determination of Plaintiffs' motion for a preliminary injunction and motion for summary judgment on the five remaining claims based on a pending matter before the United States Supreme Court, stating:

> The parties have agreed that the case is at issue and that the Preliminary Injunction Motion and Motion for Summary Judgment should be determined together in resolution of the matters in dispute on the merits. Although the Plaintiffs have standing to challenge the [remaining five claims], the Court declines to rule on the merits due to the pendency of *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 16-111 (U.S. Filed Jul. 22, 2016) before the United States Supreme Court. As noted, the factual and legal similarities between *Masterpiece Cakeshop* and this case are striking. It is likely that a determination by the Supreme Court will either guide determination of or eliminate the need for resolution of the issues in this case ….
>
> Further, the Court finds that the parties will not be prejudiced by delay in resolution of the issues in this case. … Thus, the Court denies the Motions for Preliminary Injunction and Summary Judgment with leave to renew after ruling by the United States Supreme Court in *Masterpiece Cakeshop*.

Order, p. 12. The U.S. Supreme Court has granted certiorari in *Masterpiece Cakeshop* and will hear oral argument on December 5, 2017.

ARGUMENT

4. "Federal courts are courts of limited jurisdiction; they must have a statutory basis for their jurisdiction." *Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994). A federal court of appeals "may address the merits of a lawsuit only if it satisfies the requirements for appellate jurisdiction set forth in 28 U.S.C. § 1291," *Harolds Stores Inc. v. Dillard Dep't. Stores, Inc.*, 82 F.3d 1533, 1541 (10th Cir. 1996), or if it is an interlocutory order that satisfies the requirements of 28 U.S.C. § 1292. *See New Mexico v. Trujillo*, 813 F.3d 1308, 1318 (10th Cir. 2016).

5. Section 1291 only grants jurisdiction to the court of appeals to review "final decisions of the district courts of the United States." *Harolds Stores*, 82 F.3d at 1541. "A final decision is one that fully resolves all claims for relief." *Id.* "To be final and appealable, the

district court's judgment must end the litigation and leave nothing to be done except execute the judgment." *Dalton v. United States*, 733 F.2d 710, 714 (10th Cir. 1984); s*ee also Copeland v. Toyota Motor Sales, USA, Inc.*, 136 F.3d 1249, 1252 (10th Cir. 1998). Here, there has been no "final decision" because although the Order dismissed four of Plaintiffs' claims, it did not finally resolve the remaining five claims.[1] To the contrary, an order staying a matter "ensures that litigation will continue in the District Court." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988). "If a stay merely delays litigation and does not effectively terminate proceedings, it is not considered a final decision." *Crystal Clear Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 415 F.3d 1171, 1176 (10th Cir. 2005). Thus, jurisdiction is not proper under Section 1291.

[1] As to the dismissed claims, the District Court did not issue a certification under Fed. R. Civ. P. 54(b) directing entry of a final judgment as to those claims. *See Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980).

6. Jurisdiction is also not proper under Section 1292. That Section grants jurisdiction to the courts of appeals over "[i]nterlocutory orders of the district courts … granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1). However, because it "was intended to carve out only a limited exception to … the long-established policy against piecemeal appeals," *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151, 1153 (10th Cir. 2007) (quotation omitted), courts "have construed [§ 1292(a)(1)] narrowly to ensure that appeal … will be available only in circumstances where an appeal will further the statutory purpose of permitting litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (quotations, alterations omitted). Thus, "[u]nless a litigant can show that an interlocutory order of the district court might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general

congressional policy against piecemeal review will preclude interlocutory appeal." *Id.*

7. Although the District Court's Order denied Plaintiffs' Motion for a Preliminary Injunction, as a technical matter, that denial does not make appellate jurisdiction appropriate for two reasons. *See Pimentel*, 477 F.3d at 1153 (noting the need to avoid a "superficial analysis" and to "look[ ] beyond the captions and vocabulary attached to district court orders to determine the actual, practical effect … before exercising appellate jurisdiction").

8. First, as noted by the District Court, Plaintiffs expressly agreed at a January 11, 2017 hearing "that (1) the Motion for Preliminary Injunction should be determined in conjunction with a determination on the merits; and (2) … this matter should be resolved through summary judgment." Order at 3. Plaintiffs' shift away from seeking preliminary relief is also reflected in their summary judgment briefing. *See* Exhibit B, Memo. in Support 76–77 (requesting only

permanent injunctive relief);[2] *see also* Exhibit C Reply at 33–36 (arguing that cases cited by Defendants are inapposite because they "all deal with preliminary, rather than permanent, injunction standards;" reiterating the standards for permanent relief and stating that their case meets each of the standards for permanent relief only; and only asking for permanent relief in their conclusion). As such, Plaintiffs have abandoned their request for preliminary injunctive relief before the District Court, and "appeal should be allowed only if the request for a preliminary injunction was in fact being pressed." 16 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3924.1 (3d ed. 2017). Indeed, "if an explicitly pleaded request has not been pursued by actual efforts to win an injunction, orders that merely postpone processing a case in which a permanent injunction is requested should not be appealable." *Id.*

[2] Denial of a summary judgment motion seeking a permanent injunction is not appealable under § 1292(a)(1). *See Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966).

9. Second, the District Court did not rule on the merits of Plaintiffs' request for a preliminary injunction, but instead denied relief pending a decision by the Supreme Court in *Masterpiece Cakeshop*, which the District Court concluded is likely to "either guide determination of or eliminate the need for resolution of the issues in this case." Order at 12. The District Court also expressly granted leave for Plaintiffs to renew their motions after the *Masterpiece Cakeshop* decision. Order at 12. The "actual, practical effect" of the District Court's ruling is thus more akin to a stay than a determination on the merits of Plaintiffs' arguments. *Pimentel*, 477 F.3d at 1153. The District Court's decision to await an imminent, controlling Supreme Court decision is an appropriate exercise of its case management authority and an efficient use of judicial resources. In any event, Plaintiffs cannot show either (1) that interlocutory appeal is necessary to avoid "serious, perhaps irreparable, consequence," or (2) "that the order can be effectually challenged only by immediate appeal." *Carson*, 450 U.S. at 84. Appellate jurisdiction is thus improper under Section

1292. *See Parker Livestock, LLC v. Okahoma Nat'l Stock Yards Co.*, 590 Fed. Appx. 737, 742-43 (10th Cir. Oct. 23, 2014) (holding that § 1292(a)(1) did not confer appellate jurisdiction over district court's order staying a case and postponing ruling on a request for preliminary injunction until the district court obtained a potentially dispositive ruling from the Secretary of Agriculture) (unpublished)

WHEREFORE, appellate jurisdiction is lacking in this matter and Defendants respectfully request that the instant appeal be dismissed.

Respectfully submitted this 12th day of October, 2017.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within DEFENDANTS' MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION PURSUANT TO 10TH CIR. R. 27.3(A)(1)(a) upon all parties herein this 12th day of October, 2017, by using the CM/EFC system which will send notification of such filing to the following:

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s/ *Sally Ott*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 16-cv-02372-MSK-CBS

303 CREATIVE LLC, a limited liability company;
LORIE SMITH,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity;
ANTHONY ARAGON, member of the Colorado Civil Rights Commission in his official capacity;
ULYSSES J. CHANEY, member of the Colorado Civil Rights Commission in his official capacity;
MIGUEL RENE ELIAS, "Michael" member of the Colorado Civil Rights Commission in his official capacity;
CAROL FABRIZIO, member of the Colorado Civil Rights Commission in her official capacity;
HEIDI HESS, member of the Colorado Civil Rights Commission in her official capacity;
RITA LEWIS, member of the Colorado Civil Rights Commission in her official capacity;
JESSICA POCOCK, member of the Colorado Civil Rights Commission in her official capacity;
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS and DENYING MOTION FOR PRELIMINARY INJUNCTION and MOTION FOR SUMMARY JUDGMENT,WITH LEAVE TO RENEW

THIS MATTER comes before the Court on the Plaintiffs' Motion for Preliminary Injunction **(#6)**, the Defendants' Response **(#38)**, and the Plaintiffs' Reply **(#40)**; the Defendants' Motion to Dismiss **(#37)**, the Plaintiffs' Response **(#43)**, and the Defendants' Reply **(#45)**; and the Plaintiffs' Motion for Summary Judgment **(#48)**, the Defendants' Response **(#50)**, and the Plaintiffs' Reply **(#51)**.

EXHIBIT A

PROCEDURAL HISTORY

Plaintiffs 303 Creative LLC ("303") and Lorie Smith filed this action challenging the constitutionality of two clauses of Colorado Revised Statues § 24-34-601(2) ("Public Accommodation Statute"). The two clauses at issue are as follows:

The first clause ("Accommodation Clause") states,

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation

The second clause ("Communication Clause") states,

> It is a discriminatory practice and unlawful for a person … directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement 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, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.

Colo. Rev. Stat. § 24-34-601(2)(a).

The Complaint actually asserts five claims challenging the validity of the Communication Clause under several provisions of the United States Constitution: the (1) Free Speech Clause, (2) Free Press Clause, and (3) Free Exercise Clause of the First Amendment, and (4) the Equal Protection Clause and (5) Due Process Clause of the Fourteenth Amendment. The Complaint also asserts four claims challenging the validity of the Accommodation Clause under the (1) Free Speech Clause and (2) Free Exercise Clause of the First Amendment, and the (3) Equal Protection Clause and (4) Due Process Clause of the Fourteenth Amendment.

Simultaneously with the Complaint, the Plaintiffs sought a preliminary injunction **(#6)** to restrain the Defendants from enforcing either statutory provision against them. The Defendants

then moved to dismiss the Plaintiffs' claims **(#37)**. At a hearing held on January 11, 2017, the parties agreed that (1) the Motion for Preliminary Injunction should be determined in conjunction with a determination on the merits; and (2) there were no disputed issues of material fact, no need for discovery, and this matter should be resolved through summary judgment. Consequently, the Plaintiffs filed their Motion for Summary Judgment **(#48)**, and the parties filed stipulated facts **(#49)**.

However, after briefing was completed on the Plaintiffs' Motion for Summary Judgment, the United States Supreme Court granted certiorari in a case involving similar facts and legal issues and raising issues of the constitutionality of the Public Accommodation Statute. In *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), *cert* granted, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 85 U.S.L.W. 3593 (U.S. June 26, 2017) (No. 16-111), a baker, citing religious objections, declined to bake a wedding cake for a same-sex couple and was prosecuted under the Public Accommodation Statute. The issues to be determined by the Supreme Court in that case are whether compelling the baker to provide services for a same-sex wedding under the Public Accommodation Statute violates the Free Speech Clause or Free Exercise Clause of the First Amendment, which are essentially identical to two of the issues presented in this action.

UNDISPUTED FACTS

The facts in this matter are not in dispute. The Court offers a brief summary of the pertinent facts here and elaborates as necessary in its analysis.

303 is a Colorado limited liability company that is wholly owned and operated by Ms. Smith. Defendant Aubrey Elenis is the Director of the Colorado Civil Rights Division. Defendants Anthony Aragon, Ulysses J. Chaney, Miguel "Michael" Rene Elias, Carol Fabrizio,

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Heidi Hess, Rita Lewis, and Jessica Pocock are members of the Colorado Civil Rights Commission ("Commission"). Defendant Cynthia H. Coffman is the Colorado Attorney General.

303 offers services to the general public, including graphic design, website design, social media management and consultation, marketing, branding strategy, and website management training. Ms. Smith provides these services for 303 without the assistance of employees or contractors.

Ms. Smith describes herself as a Christian and states that her religious beliefs are central to her identity. She believes that she must use her talents in a manner that glorifies God and that she must use her creative talents in operating 303 in a way that she believes will honor and please him.

Consistent with her beliefs, Ms. Smith limits the scope of services she is willing to provide to 303's customers. She is willing to work with all people regardless of their race, religion, gender, and sexual orientation, but she "will decline any request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman."

Although 303 does not currently do so, Ms. Smith intends to expand its services by offering to build websites for couples who plan to marry. These websites would be intended to keep a couple's friends and family informed about the upcoming wedding. Ms. Smith desires to use the websites to "affect the current cultural narrative regarding marriage". Because she believes that marriage is ordained of God and should only be between one man and one woman, she intends to deny any request a same-sex couple may make for a wedding website.

Ms. Smith has prepared a Proposed Statement that she intends to post on 303's website to explain 303's policies with regard to wedding websites. It reads:

> 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.

According to Ms. Smith, the only reason why 303 has not begun offering to build wedding websites and she has not posted the Proposed Statement is that doing so would violate the Accommodation and Communication Clauses of the Public Accommodation Statute and expose her and 303 to penalties and civil liability.

ANALYSIS

A. Standing

The Defendants argue under Federal Rule of Civil Procedure 12(b)(1) in their Motion to Dismiss that the Plaintiffs lack standing to challenge the Public Accommodation Statute and thus their claims must be dismissed.

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Standing is a component of subject-matter jurisdiction and may be challenged in a motion to dismiss under Fed. R. Civ. P. 12(b)(1). The party asserting the existence of subject matter jurisdiction (here the Plaintiffs) bears the burden of proving such jurisdiction exists, including the burden of demonstrating standing. *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1144 (10th Cir. 2010); *Montoya v. Chao,* 296 F.3d 952, 955 (10th Cir.2002).

The jurisdiction of federal courts is limited to actual cases or controversies. U.S. Const. art. III, § 2 cl.1. To have a cognizable case or controversy, a plaintiff must have standing to sue. *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 543 (10th Cir. 2016). Whether a plaintiff has standing is determined as of the date that he or she files the action. *Nova Health Sys*, 416 F.3d at 1154. When a plaintiff asserts multiple claims, he or she may have standing as to some claims but not to others, and under such circumstances, the claims for which the plaintiff lacks standing must be dismissed. *See Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007).

To establish standing, the Plaintiffs must demonstrate three elements. First, the Plaintiffs must have suffered an "injury in fact". Such injury must be concrete, particularized, and actual or imminent but not conjectural or hypothetical. Second, the injury must be fairly traceable to the challenged actions of the defendant. Finally, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Bronson*, 500 F.3d at 1106 (*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000)).

Working backwards through the elements listed above, the traceability and redressability elements can be addressed summarily. The Defendants claim that any injury to the Plaintiffs is not traceable to them, and that the Plaintiffs' injuries are not redressable because, even if the Court were to rule in the Plaintiffs' favor, private parties could bring an independent civil action against them for violations of the Public Accommodation Statute.

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An injury in fact is fairly traceable to a defendant if the defendant is charged with the responsibility to enforce the statute. *See Nova Health Sys.*, 416 F.3d at 1158. Because it is undisputed that the Commission is charged with the responsibility to enforce the Public Accommodation Statute, any injury is traceable to it. The Court declines to address whether every Defendant is charged with enforcement of the statute.

Redressability concerns whether a court is empowered to redress an injury, not whether the lawsuit would result in an outcome that redresses every injury. If a named defendant has the authority to enforce a statute, a plaintiff's injury caused by enforcement of the statute is redressable even if a private person could also seek to enforce the statute through a civil lawsuit. *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 905 (10th Cir. 2012). Again, because the Commission is charged with enforcing the statute, and is named as a defendant, it does not matter that a private person could also seek to enforce the statute. The Court can redress the injury traceable to enforcement of the statute by the governmental entities and actors.

The final standing element is whether the Plaintiffs have suffered an injury in fact. The Defendants argue that the Plaintiffs will not suffer any injury until they publically offer to build wedding websites, they receive a request for and then decline to build a website for a same-sex couple, the same-sex couple files a complaint against them, an administrative law judge finds that the Plaintiffs violated the Public Accommodation Statute and orders them to comply, and the Plaintiffs exhaust their state appellate remedies. The Plaintiffs respond that they are suffering two continuing constitutional injuries in so far as (1) they face a credible threat that the Defendants will enforce the Public Accommodation Statute and (2) the Public Accommodation Statue has a chilling effect on their ability to exercise their rights of free speech.

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Plaintiffs are correct that it is not necessary that the Public Accommodation Statute be enforced against them in order for there to be an "injury in fact". An "injury in fact" is recognized if the Plaintiffs show that a threatened injury is certainly impending, or there is a substantial risk that a harm will occur. *Tandy v. City of Wichita,* 380 F.3d 1277, 1283 (10th Cir.2004); *see also Steffel v. Thompson,* 415 U.S. 452, 459 (1974); *Bronson v. Swensen,* 500 F.3d 1099, 1107 (10th Cir. 2007); *U.S. v. Supreme Ct. of N.M.,* 839 F.3d 888, 901 (10th Cir. 2016); *Brammer-Hoelter v. Twin Peaks Charter Acad.,* 602 F.3d 1175, 1182 (10th Cir. 2010).

For a threat of injury to equate to an injury in fact, the Plaintiffs must show that (1) they intend to engage in conduct arguably affected by a constitutional interest, but proscribed by a statute, and (2) there exists a credible threat of enforcement of the statute for their conduct. *See Colo. Outfitters Ass'n v. Hickenlooper,* 823 F.3d 537, 545 (10th Cir. 2016); *see also Supreme Ct. of N.M.,* 839 F.3d at 901. For a threat of enforcement to be credible, the injury cannot rest on a "highly attenuated chain of possibilities", but rather the Plaintiffs must demonstrate that "but for" their decision not to engage in conduct proscribed by statute, there is a substantial risk the statute would be enforced against them. *See Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410-11 (2013).

It is helpful for analytical purposes to distinguish between two actions which Plaintiffs intend but have refrained from taking due to fear that the Public Accommodation Statute will be enforced against them:

1. Publishing the Proposed Statement on 303's website.
2. Declining any request by a same-sex couple to build a wedding website.

The Communication Clause would appear to prohibit publishing the Proposed Statement because the Statement announces an intention to deny service to persons based on sexual orientation. The Accommodation Clause would appear to prohibit the second action – refusal to

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provide services to a person because of his or her sexual orientation.[1] Thus, both intended actions would appear to be proscribed by the Public Accommodation Statute.

The next question is whether there is a credible threat that the Public Accommodation Statute will be enforced. As to publishing the Proposed Statement, once the Plaintiffs post it to their website, they arguably will have violated the Communication Clause. If any person files a formal complaint with the Commission against the Plaintiffs pursuant to Colo. Rev. Stat. §§ 24-34-306(1)(a), the Commission has no discretion to not enforce the statute. This was confirmed by its counsel during the January 11 hearing. Given the public interest in and legal disagreement that is evident in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 16-111 (U.S. filed Jul. 22, 2016), it is not difficult to find it likely that a complaint will be filed if the Proposed Statement is posted. Because the only conditions precedent to enforcement are the posting of the Proposed Statement and the filing of a complaint, the Court finds that the Plaintiffs are subject to a credible threat of enforcement.

However, such is not the case with the Plaintiffs' intent to decline any same-sex couple's request to build wedding websites. For the Plaintiffs to violate the Accommodation Statute there are many conditions precedent to be satisfied. The Plaintiffs must offer to build wedding websites, a same-sex couple must request Plaintiffs' services, the Plaintiffs must decline, and then a complaint must be filed. This scenario is more attenuated and thus more speculative. If the Court assumes that the Plaintiffs would offer to build wedding websites, decline a request by a same-sex couple, and the unhappy customer filed a complaint, there remains the question of whether a same-sex couple would request Plaintiffs' services.

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[1] Indeed, the Colorado Court of Appeals has determined that the refusal to provide goods or services for a same-sex wedding on religious grounds constitutes discrimination because of sexual orientation. *Masterpiece Cakeshop, Inc.*, 370 P.3d at 280-81.

The parties have submitted stipulated facts as to the number of web design companies in Denver, Colorado and in the United States, but such general information does not provide details as to how many web design companies offer wedding websites, how many websites are built for weddings, or how many same-sex couples use such services. On this evidence, the Court cannot determine the imminent likelihood that anyone, much less a same-sex couple, will request Plaintiff's services. The Plaintiffs also direct the Court to an email that Ms. Smith received on September 21, 2016, after the Complaint in this matter was filed. Ostensibly in response to a prompt from 303's website asking "If your inquiry relates to a specific event, please describe the nature of the event and its purpose", the email states: "My wedding. My name is Stewart and my fiancee is Mike. We are getting married early next year and would love some design work done for our invites (sic.), placenames(sic.), etc. We might also stretch to a website." This evidence is too imprecise, as well. Assuming that it indicates a market for Plaintiffs' services, it is not clear that Stewart and Mike are a same-sex couple (as such names can be used by members of both sexes) and it does not explicitly request website services, without which there can be no refusal by Plaintiffs. Because the possibility of enforcement based on a refusal of services is attenuated and rests on the satisfaction of multiple conditions precedent, the Court finds that the likelihood of enforcement is not credible.

Based on the record before the Court, the Plaintiffs have established an injury in fact sufficient for standing as to the intended posting of the Proposed Statement but not as to the intended denial of wedding website building services.

With regard to the speech related claims, the Plaintiffs also argue that their protected speech is currently being chilled by the threat of enforcement of the Public Accommodation

Statute.[2] A statute has a chilling effect on speech if it causes plaintiffs to refrain from speaking based on "an objectively justified fear of real consequences". *Brammer-Hoelter*, 602 F.3d at 1182. A plaintiff can show a chilling effect with:

> (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action[3]; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced.

Initiative & Referendum Institute, 450 F.3d at 1089.

Because the third element of this showing requires evidence of a credible threat that the statute will be enforced, the analysis duplicates that which is provided above. The evidence is sufficient to find a credible threat of enforcement of the Public Accommodation Statute only as to the posting of the Proposed Statement. With regard to the Proposed Statement, it is undisputed that it has been prepared and the sole impediment to its posting is enforcement of the Public Accommodation Statute. This is sufficient to show a chilling effect.

In summary, the Plaintiffs have standing only to pursue claims challenging the Communication Clause that arise from publication of the Proposed Statement. They lack standing to assert claims challenging the Accommodation Clause based on the possibility that they will decline all requests by same-sex couples to build wedding websites. Accordingly, such claims are dismissed for lack of subject-matter jurisdiction.

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[2] The Defendants argue that publishing the Proposed Statement and building websites constitutes conduct and not speech. Publishing a statement on a website is clearly speech. The Court need not resolve this issue, however, at this time. For purposes of the instant analysis, the Court will assume, without deciding, that building websites for another constitutes speech entitled to First Amendment protection.

[3] Evidence that they engaged in the type of speech affected in the past is not an indispensable element if other evidence sufficiently establishes that the Plaintiffs' fear of real consequences is not speculative.

EXHIBIT A

B. Denial of remaining motions

The parties have agreed that the case is at issue and that the Preliminary Injunction Motion and Motion for Summary Judgment should be determined together in resolution of the matters in dispute on the merits. Although the Plaintiffs have standing to challenge the Communication Clause of the Public Accommodation Statute, the Court declines to rule on the merits due to the pendency of *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 16-111 (U.S. filed Jul. 22, 2016) before the United States Supreme Court. As noted, the factual and legal similarities between *Masterpiece Cakeshop* and this case are striking. It is likely that a determination by the Supreme Court will either guide determination of or eliminate the need for resolution of the issues in this case as to whether prosecuting the Plaintiffs for publishing the Proposed Statement would violate their rights guaranteed by the Free Speech and Free Exercise Clauses of the First Amendment.

Further, the Court finds that the parties will not be prejudiced by delay in resolution of the issues in this case. The Plaintiffs are not currently offering to build wedding websites, and no evidence has been presented to show that their financial viability is threatened if they do not begin offering to do so. Thus, the Court denies the Motions for Preliminary Injunction and Summary Judgment with leave to renew after ruling by the United States Supreme Court in *Masterpiece Cakeshop*.

CONCLUSION

Defendants' Motion to Dismiss **(#37)** is **GRANTED IN PART**, and **DENIED IN PART.** For the foregoing reasons, the Court **GRANTS** the motion and **DISMISSES** Plaintiffs' claims challenging the constitutional validity of the Accommodation Clause of the Public Accommodation Statute under the (1) Free Speech Clause, (2) Free Exercise Clause, (3) Equal

EXHIBIT A

Protection Clause, and (4) Due Process Clause of the First and Fourteenth Amendments of the United States Constitution for lack of standing. The Motion is **DENIED** as to the Plaintiffs' five claims challenging the validity of the Communication Clause of the Public Accommodation Statute under the (1) Free Speech Clause, (2) Free Press Clause, (3) Free Exercise Clause, (4) Equal Protection Clause, and (5) Due Process Clause of the First and Fourteenth Amendments of the United States Constitution.

The Plaintiff's Motion for Preliminary Injunction and Motion for Summary Judgment **(#6)** and **(#48)** are **DENIED, WITH LEAVE TO RENEW** after a final ruling has been issued by the United States Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 16-111 (U.S. filed Jul. 22, 2016). Within 14 days of issuance of such ruling, the parties will advise this Court in writing of their desire to proceed (and if so whether they desire to refile or reopen their briefing on the Motion for Summary Judgment and Preliminary Injunction) or dismiss the action.

Dated this 1st day of September, 2017

BY THE COURT:

Marcia S. Krieger

Marcia S. Krieger
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-02372-CBS

303 CREATIVE LLC, a limited liability company; and
LORIE SMITH,

Plaintiffs,

vs.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity;
ANTHONY ARAGON;
ULYSSES J. CHANEY;
MIGUEL "MICHAEL" RENE ELIAS;
CAROL FABRIZIO;
HEIDI HESS;
RITA LEWIS; and
JESSICA POCOCK, as members of the Colorado Civil Rights Commission, in their official capacities; and
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

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to ensure that neither the "legislatures, courts, [n]or dominant political or community groups" may standardize the ideas that are acceptable in society about marriage or anything else. *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949). The Court should grant summary judgment in Lorie's favor to ensure that "individual freedom of mind in preference to officially disciplined uniformity" is preserved for all Americans to enjoy. *Barnette*, 319 U.S. at 637. "Tolerance is a two-way street" that applies to proponents of same-sex marriage as well as to religious dissenters. *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). "Otherwise, [CADA] mandates orthodoxy, not anti-discrimination." *Id.*

Accordingly, Plaintiffs respectfully request that the Court grant summary judgment in their favor and issue:

1. A permanent injunction ordering Defendants and anyone acting in concert with them from enforcing the Banned-Speech Provision facially and as applied to Plaintiffs' (a) desired communications promoting marriage as an institution between one man and one woman, (b) declining to create custom websites or graphics promoting events or ideas that violate their religious beliefs about marriage, including custom websites for same-sex weddings, and (c) explaining their religious beliefs about what they can and cannot create;

2. A declaration that the Banned-Speech Provision violates the First Amendment to the U.S. Constitution's Free Speech, Free Press, and Free Exercise Clauses, as well as the Fourteenth Amendment to the U.S. Constitution's Equal Protection and Due Process Clauses facially and as-applied to Plaintiffs' (a) desired communications promoting marriage as an institution between one man and one woman, (b) declining to create custom websites or graphics promoting events or ideas that violate their religious beliefs about marriage, including custom

websites for same-sex weddings, and (c) explaining their religious beliefs about what they can and cannot create;

3. A permanent injunction to stop Defendants and anyone acting in concert with them from enforcing the Compelled-Speech Provision to require Plaintiffs to create custom websites or graphics promoting events or ideas that violate their religious belief that marriage is an institution between one man and one woman, including custom websites promoting same-sex weddings; and

4. A declaration that the Compelled-Speech Provision violates the First Amendment to the U.S. Constitution's Free Speech, Free Press, and Free Exercise Clauses, as well as the Fourteenth Amendment to the U.S. Constitution's Equal Protection and Due Process Clauses as applied to force Plaintiffs to create custom websites or graphics promoting events or ideas that violate their religious beliefs that marriage is an institution between one man and one woman, including custom websites promoting same-sex weddings.

Respectfully submitted this 1st day of February, 2017.

s/ Jeremy D. Tedesco

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-02372-MSK-CBS

303 CREATIVE LLC, a limited liability company; and
LORIE SMITH,

Plaintiffs,

vs.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity;
ANTHONY ARAGON,
ULYSSES J. CHANEY,
MIGUEL "MICHAEL" RENE ELIAS,
CAROL FABRIZIO,
HEIDI HESS,
RITA LEWIS, and
JESSICA POCOCK, as members of the Colorado Civil Rights Commission, in their official capacities; and
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity;

Defendants.

MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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specifically served by squelching and coercing "the particular claimants" speech. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420-21 (2006). Defendants have not shown this, particularly in light of *Hurley*'s holding that applying public accommodations laws to expressive activity does not serve a valid—let alone compelling—state interest. *Hurley*, 515 U.S. at 578-79 (stating that if the purpose of "applying the state law to expressive conduct" is to coerce government-favored messages, then the objective is "decidedly fatal"). This is further cemented by the wide availability of expressive businesses nationwide, many of which market their services specifically for same-sex weddings, and all of which undercuts Defendants' unsubstantiated claim of widespread discrimination. App. 003-010. Coercing and squelching Lorie's individual speech only violates her constitutional rights. It does not serve any compelling state interest.

III. Injunctive Relief Is Proper And Necessary To Prevent Further Violation Of Plaintiffs' Rights: Plaintiff Will Suffer Irreparable Harm Absent A Permanent Injunction And Both the Balance Of Equities And The Public Interest Favor An Injunction.

Defendants urge the Court to deny Plaintiffs injunctive relief, but rely exclusively on cases that either found no First Amendment violation or where no First Amendment challenge was brought in the first place. These cases also all deal with preliminary, rather than permanent, injunction standards. Defs.' MSJ Resp. 25-26; *Heideman v. S. Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003) (denying nude dancers a disfavored preliminary injunction because the dancers failed to show a likelihood of success on their First Amendment challenge); *Prairie Band of Potawatomi Indians v. Pierce (Prairie Band I)*, 253 F.3d 1234, 1250 (10th Cir. 2001) (affirming the district court's finding of "irreparable harm" and granting of a disfavored preliminary injunction); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250 (10th Cir. 2003) (remanded, but the court

found a significant risk of irreparable harm absent a preliminary injunction stopping the development of a golf course that threatened bald eagle habitat); *Faircloth v. Colo. Dep't of Corr.*, 2016 WL 234356 (2016) (denying a pro se inmate a disfavored preliminary injunction related to limits on his outgoing mail costs because he could not prevail on either the merits or irreparable harm prongs of the test); *Conn. v. Mass.*, 282 U.S. 660 (1931) (concerning a preliminary injunction related to water rights between the states). These cases thus have no application to Lorie's case.

A permanent injunction is proper where the court finds "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Prairie Band Potawatomi Nation v. Wagnon (Prairie Band II)*, 476 F.3d 818, 822 (10th Cir. 2007). This case meets each of those requirements.

Lorie succeeds on the merits of her claims. *See supra.* She currently suffers irreparable harm in the chilling of her constitutional rights and that harm will continue absent an injunction. *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The balance of equities always lie in favor of vindicating First Amendment rights. *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("The threatened injury to Plaintiffs' constitutionally protected speech outweighs whatever damage . . . may [be] cause[d] [by] Defendants' inability to enforce what appears to be an unconstitutional statute."); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) ("[N]o substantial harm to others can be said to

inhere in [the] enjoinment" of Defendants' unequal application of the law.). And "it is always in the public interest to prevent the violation of a party's constitutional rights." *Verlo*, 820 F.3d at 1132; *see also Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."). After all, the vindication of constitutional rights "protect[s] the free expression of . . . millions." *Johnson*, 194 F.3d at 1163.

IV. The Court Should Not Abstain From Lorie's Claims.

Defendants repeat their request for abstention based on a pending petition for certiorari in a case involving a different expressive business owner. Plaintiffs have already responded to Defendants' arguments in detail and refer the Court to that briefing. Pls.' MTD Resp. 15-21. Suffice to say that abstention by all its names is restricted to cases involving the *same litigants* in state and federal court. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (so limiting *Younger* abstention); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (limiting *Rooker/Feldman* abstention); *Guttman v. Khalsa*, 446 F.3d 1027, 1031-32 (10th Cir. 2006) (same); *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994) (limiting *Colorado River* abstention); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) (same). Lorie is not a party to *any* state court proceeding. Therefore, to hold her "constitutional rights hostage to the outcome and timing" of another person's state court proceeding would enact a grave injustice, *Phelps v. Hamilton (Phelps I)*, 59 F.3d 1058, 1069 (10th Cir. 1995), and ignore the unique task of the federal courts to protect individual constitutional rights from state interference. *Mitchum*, 407 U.S. at 242. In the alternative, Defendants also urge this Court to take extraordinary action to stay Plaintiffs' case while Defendants wait and see if the Supreme Court

grants the petition for certiorari in *Masterpiece*. Defs.' MSJ Resp. 29-32. Plaintiffs responded in detail to this request as well when it was made at the motion to dismiss stage. Pls.' MTD Resp. 27-29. Defendants have not responded to that briefing. Instead, they reiterate their request that this Court perpetuate the irreparable harm Lorie suffers while they wait to see if the Supreme Court grants certiorari in an unrelated case. The Supreme Court receives 7,000-8,000 petitions for certiorari each term. It grants review in about 80 cases. *Id.* The statistical chance of the Supreme Court taking *Masterpiece* is 0.1% versus the 100% certainty that Lorie's irreparable harm will continue if this Court stays the case.

Moreover, a grant of certiorari in *Masterpiece* would not change this Court's "virtually unflagging" obligation to hear Lorie's case. *Sprint Commc'ns*, 134 S. Ct. at 591. To the extent a Supreme Court decision in *Masterpiece* might inform this Court's ruling, it can be considered if and when the Supreme Court rules on the merits of the *Masterpiece* case. This does not warrant a stay.

CONCLUSION

Lorie's case necessitates immediate action from the federal courts to free her chilled speech from the speech-coercing and speech-squelching power exercised by the State of Colorado. A permanent injunction is necessary to preserve Lorie's First and Fourteenth Amendment rights. Plaintiffs respectfully request that this Court issue one as soon as possible, with the other relief requested in Plaintiffs' Prayer for Relief.

Respectfully submitted this 8th day of March, 2017.

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