



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
OFFICE OF THE CLERK

Alfred A. Arraj
United States Courthouse
901 19th Street
Denver, Colorado 80294
www.cod.uscourts.gov

Jeffrey P. Colwell
Clerk

Phone: (303) 844-3433

Date: 9/29/2017

☐ Pro Se ☒ Retained ☐ CJA ☐ FPD ☐ USA or other
Federal Agency
(Appeal Fee Exempt)

Case No: 16-cv-02372-MSK-CBS

☐ Amended Notice of Appeal
☐ Other pending appeals
☐ Transferred Successive
§2254 or §2255

Date Filed: 9/28/2017

Appellant: Plaintiffs

Pro Se Appellant:

☐ IFP forms mailed/given ☐ Motion IFP pending ☐ Appeal fee paid
☐ IFP denied ☐ Appeal fee not paid

Retained Counsel:

☒ Appeal fee paid ☐ Appeal fee not paid ☐ Motion IFP filed

The Preliminary Record on Appeal is hereby transmitted to the Tenth Circuit Court of Appeals. Please refer to the forms, procedures, and requirements for ordering transcripts, preparing docketing statements and briefs, and designations of the record that are found on the Tenth Circuit's website, www.ca10.uscourts.gov.

If not already completed, either an appeal fee payment for filing this case or filing of a motion to proceed *in forma pauperis* will be made to this District Court.

The transcript order form must be filed in the District Court as well as the Court of Appeals within 14 days after the notice of appeal was filed with the District Court.

If you have questions, please contact this office.

Sincerely,

JEFFREY P. COLWELL, CLERK

by: s/D. Kalsow
Deputy Clerk

cc: Clerk of the Court, Tenth Circuit Court of Appeals

ALLMTN,APPEAL,JD1,MJ CIV PP,STAYDI

U.S. District Court
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:16-cv-02372-MSK-CBS

303 Creative LLC et al v. Elenis et al
Assigned to: Chief Judge Marcia S. Krieger
Referred to: Magistrate Judge Craig B. Shaffer
Cause: 42:1983 Civil Rights Act

Date Filed: 09/20/2016
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

303 Creative LLC
a limited liability company

represented by **David Andrew Cortman**
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Plaintiff

Lorie Smith

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Samuel David Green
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Jeremy David Tedesco
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ATTORNEY TO BE NOTICED

V.

Defendant

Aubrey Elenis
*Director of the Colorado Civil Rights
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Defendant

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Defendant

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Defendant

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Defendant

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Defendant

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Defendant

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Defendant

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Defendant

Cynthia H. Coffman
*Colorado Attorney General, in her
official capacity*

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ATTORNEY TO BE NOTICED

Vincent Edward Morscher
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ATTORNEY TO BE NOTICED

Date Filed	#	Page	Docket Text
09/20/2016	<u>1</u>		COMPLAINT <i>for Declaratory and Injunctive Relief</i> against All Defendants (Filing fee \$ 400,Receipt Number 1082-5162084)Attorney Jeremy David Tedesco added to party 303 Creative LLC(pty:pla), Attorney Jeremy David Tedesco added to party Lorie Smith(pty:pla), filed by Lorie Smith, 303 Creative LLC. (Attachments: # <u>1</u> Exhibit A to Complaint, # <u>2</u> Exhibit B to Complaint, # <u>3</u> Summons of Aubrey Elenis, # <u>4</u> Summons of Anthony Aragon, # <u>5</u> Summons of Ulysses J. Chaney, # <u>6</u> Summons of Miguel Rene Elias, # <u>7</u> Summons of Carol Fabrizio, # <u>8</u> Summons of Heidi Hess, # <u>9</u> Summons of Rita Lewis, # <u>10</u> Summons of Jessica Pocock, # <u>11</u> Summons of Cynthia Coffman, # <u>12</u> Civil Cover Sheet)(Tedesco, Jeremy) (Entered: 09/20/2016)
09/20/2016	2		Case assigned to Magistrate Judge Craig B. Shaffer. Text Only Entry (dbera,) (Entered: 09/20/2016)
09/20/2016	<u>3</u>		SUMMONS issued by Clerk. (Attachments: # <u>1</u> Summons, # <u>2</u> Summons, # <u>3</u> Summons, # <u>4</u> Summons, # <u>5</u> Summons, # <u>6</u> Summons, # <u>7</u> Summons, # <u>8</u> Summons, # <u>9</u> Magistrate Judge Consent Form) (dbera,) (Entered: 09/20/2016)
09/20/2016	<u>4</u>		CORPORATE DISCLOSURE STATEMENT. (Tedesco, Jeremy) (Entered: 09/20/2016)
09/20/2016	<u>5</u>		NOTICE OF CASE ASSOCIATION by Jeremy David Tedesco on behalf of 303 Creative LLC, Lorie Smith (Tedesco, Jeremy) (Entered: 09/20/2016)
09/20/2016	<u>6</u>		MOTION for Preliminary Injunction by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # <u>1</u> Affidavit of Lorie Smith in Support of Plaintiffs' Preliminary Injunctio, # <u>2</u> Appendix Part 1, # <u>3</u> Appendix Part 2, # <u>4</u> Appendix Part 3, # <u>5</u> Proposed Order (PDF Only))(Tedesco, Jeremy) (Entered: 09/20/2016)

			09/20/2016)
09/20/2016	<u>7</u>		BRIEF in Support of <u>6</u> MOTION for Preliminary Injunction filed by Plaintiffs 303 Creative LLC, Lorie Smith. (Tedesco, Jeremy) (Entered: 09/20/2016)
09/21/2016	<u>8</u>		NOTICE of Entry of Appearance by Jonathan Andrew Scruggs on behalf of All Plaintiffs Attorney Jonathan Andrew Scruggs added to party 303 Creative LLC(pty:pla), Attorney Jonathan Andrew Scruggs added to party Lorie Smith(pty:pla) (Scruggs, Jonathan) (Entered: 09/21/2016)
09/21/2016	<u>9</u>		NOTICE of Entry of Appearance by Michael L. Francisco on behalf of All Plaintiffs Attorney Michael L. Francisco added to party 303 Creative LLC(pty:pla), Attorney Michael L. Francisco added to party Lorie Smith(pty:pla) (Francisco, Michael) (Entered: 09/21/2016)
09/21/2016	<u>10</u>		NOTICE of Entry of Appearance by Katherine Leone Anderson on behalf of All Plaintiffs Attorney Katherine Leone Anderson added to party 303 Creative LLC(pty:pla), Attorney Katherine Leone Anderson added to party Lorie Smith(pty:pla) (Anderson, Katherine) (Entered: 09/21/2016)
09/22/2016	<u>11</u>		NOTICE of Entry of Appearance by Rory Thomas Gray on behalf of All Plaintiffs Attorney Rory Thomas Gray added to party 303 Creative LLC(pty:pla), Attorney Rory Thomas Gray added to party Lorie Smith(pty:pla) (Gray, Rory) (Entered: 09/22/2016)
09/22/2016	<u>12</u>		NOTICE of Entry of Appearance by David Andrew Cortman on behalf of All Plaintiffs Attorney David Andrew Cortman added to party 303 Creative LLC(pty:pla), Attorney David Andrew Cortman added to party Lorie Smith(pty:pla) (Cortman, David) (Entered: 09/22/2016)
09/26/2016	<u>13</u>		NOTICE of Entry of Appearance by Samuel David Green on behalf of All Plaintiffs Attorney Samuel David Green added to party 303 Creative LLC(pty:pla), Attorney Samuel David Green added to party Lorie Smith(pty:pla) (Green, Samuel) (Entered: 09/26/2016)
09/26/2016	<u>14</u>		NOTICE re <u>6</u> MOTION for Preliminary Injunction <i>Notice of Updated Results of Conferral Per Local Rule 7.1(a)</i> by Plaintiffs 303 Creative LLC, Lorie Smith (Tedesco, Jeremy) (Entered: 09/26/2016)
09/29/2016	<u>15</u>		NOTICE of Entry of Appearance by Jack Davy Patten, III on behalf of Cynthia H. Coffman, Aubrey ElenisAttorney Jack Davy Patten, III added to party Cynthia H. Coffman(pty:dft), Attorney Jack Davy Patten, III added to party Aubrey Elenis(pty:dft) (Patten, Jack) (Entered: 09/29/2016)
09/30/2016	<u>16</u>		NOTICE of Entry of Appearance by Vincent Edward Morscher on behalf of Cynthia H. Coffman, Aubrey ElenisAttorney Vincent Edward Morscher added to party Cynthia H. Coffman(pty:dft), Attorney Vincent Edward Morscher added to party Aubrey Elenis(pty:dft) (Morscher, Vincent) (Entered: 09/30/2016)
10/04/2016	<u>17</u>		CONSENT to Jurisdiction of Magistrate Judge by Plaintiffs 303 Creative LLC, Lorie Smith All parties do not consent.. (Tedesco, Jeremy) (Entered: 10/04/2016)
10/05/2016	18		CASE REASSIGNED pursuant to <u>17</u> Consent to Jurisdiction of Magistrate Judge. All parties do not consent. This case is reassigned to Judge Lewis T.

		Babcock. All future pleadings should be designated as 16-cv-02372-LTB. (Text Only Entry) (nmarb,) (Entered: 10/05/2016)
10/05/2016	<u>19</u>	MEMORANDUM RETURNING CASE. (dkals,) (Entered: 10/05/2016)
10/05/2016	20	CASE REASSIGNED pursuant to <u>19</u> Memorandum Returning Case: This case is reassigned to Chief Judge Marcia S. Krieger. All future pleadings should be designated as 16-cv-02372-MSK. (Text Only Entry) (dkals,) (Entered: 10/05/2016)
10/05/2016	<u>21</u>	Unopposed MOTION for Hearing/Conference <i>Regarding Case Status</i> by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (Patten, Jack) (Entered: 10/05/2016)
10/06/2016	<u>22</u>	NOTICE of Entry of Appearance by Eric Holden Maxfield on behalf of Anthony Aragon, Ulysses J. Chaney, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica PocockAttorney Eric Holden Maxfield added to party Anthony Aragon(pty:dft), Attorney Eric Holden Maxfield added to party Ulysses J. Chaney(pty:dft), Attorney Eric Holden Maxfield added to party Miguel Rene Elias(pty:dft), Attorney Eric Holden Maxfield added to party Carol Fabrizio(pty:dft), Attorney Eric Holden Maxfield added to party Heidi Hess(pty:dft), Attorney Eric Holden Maxfield added to party Rita Lewis(pty:dft), Attorney Eric Holden Maxfield added to party Jessica Pocock(pty:dft) (Maxfield, Eric) (Entered: 10/06/2016)
10/06/2016	23	ORDER REFERRING CASE to Magistrate Judge Craig B. Shaffer: IT IS ORDERED that pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed. R. Civ. P. 72(a) and (b), this matter is referred to the assigned United States Magistrate Judge to:(1)Convene a scheduling conference under Fed. R. Civ. P. 16(b), enter a Scheduling Order meeting the requirements of D.C.COLO.LCivR 16.2, enter such orders as appropriate to enforce the Scheduling Order, and resolve discovery matters;(2)ADR: Court sponsored alternative dispute resolution is governed by D.C.COLO.LCivR 16.6. Early Neutral Evaluation is approved. On the informal request of the magistrate judge or on the request of the parties by motion, the Court may direct the parties to engage in a settlement conference conducted by the magistrate judge if the parties have engaged in an Early Neutral Evaluation and are unable to afford or otherwise attain private settlement assistance;(3)Hear and determine referred matters in accordance with 28 U.S.C. § 636(b)(1)(A) and (B). by Chief Judge Marcia S. Krieger on 10/6/16. Text Only Entry (msksec,) (Entered: 10/06/2016)
10/06/2016	24	MINUTE ORDER: A Scheduling Conference is set for 11/7/2016 at 11:00 AM in Courtroom A 402 before Magistrate Judge Craig B. Shaffer. ORDERED that the parties shall adhere to the deadlines and instructions as set forth in <u>Preparation for Rule 16(b) Scheduling Conference</u> , located on the court's website under "Judicial Officers." By Magistrate Judge Craig B. Shaffer on 10/6/2016. Text Only Entry (cbslc2) (Entered: 10/06/2016)
10/06/2016	25	ORDER REGARDING CUSTODY OF EXHIBITS AND DEPOSITIONS USED IN EVIDENTIARY HEARINGS AND TRIALS: Any exhibits and depositions used during evidentiary hearings or trials, counsel for the parties shall retrieve the originals of such exhibits and depositions from the Court following the evidentiary hearing or trial, and shall retain same for 60 days

		beyond the later of the time to appeal or conclusion of any appellate proceedings. The Court will retain its copy of the exhibits for the same time period after which the documents will be destroyed. by Chief Judge Marcia S. Krieger on 10/6/16. Text Only Entry (pglov) (Entered: 10/06/2016)
10/06/2016	<u>26</u>	NOTICE re <u>21</u> Unopposed MOTION for Hearing/Conference <i>Regarding Case Status</i> by Plaintiffs 303 Creative LLC, Lorie Smith (Tedesco, Jeremy) (Entered: 10/06/2016)
10/07/2016	<u>27</u>	SUMMONS Returned Executed by All Plaintiffs. Anthony Aragon served on 9/28/2016, answer due 10/19/2016. (Tedesco, Jeremy) (Entered: 10/07/2016)
10/07/2016	<u>28</u>	SUMMONS Returned Executed by All Plaintiffs. Aubrey Elenis served on 9/28/2016, answer due 10/19/2016. (Tedesco, Jeremy) (Entered: 10/07/2016)
10/07/2016	<u>29</u>	SUMMONS Returned Executed by All Plaintiffs. Carol Fabrizio served on 9/28/2016, answer due 10/19/2016. (Tedesco, Jeremy) (Entered: 10/07/2016)
10/07/2016	<u>30</u>	SUMMONS Returned Executed by All Plaintiffs. Cynthia H. Coffman served on 9/28/2016, answer due 10/19/2016. (Tedesco, Jeremy) (Entered: 10/07/2016)
10/07/2016	<u>31</u>	SUMMONS Returned Executed by All Plaintiffs. Heidi Hess served on 9/28/2016, answer due 10/19/2016. (Tedesco, Jeremy) (Entered: 10/07/2016)
10/07/2016	<u>32</u>	SUMMONS Returned Executed by All Plaintiffs. Jessica Pocock served on 9/28/2016, answer due 10/19/2016. (Tedesco, Jeremy) (Entered: 10/07/2016)
10/07/2016	<u>33</u>	SUMMONS Returned Executed by All Plaintiffs. Miguel Rene Elias served on 9/28/2016, answer due 10/19/2016. (Tedesco, Jeremy) (Entered: 10/07/2016)
10/07/2016	<u>34</u>	SUMMONS Returned Executed by All Plaintiffs. Rita Lewis served on 9/28/2016, answer due 10/19/2016. (Tedesco, Jeremy) (Entered: 10/07/2016)
10/07/2016	<u>35</u>	SUMMONS Returned Executed by All Plaintiffs. Ulysses J. Chaney served on 9/28/2016, answer due 10/19/2016. (Tedesco, Jeremy) (Entered: 10/07/2016)
10/14/2016	<u>36</u>	NOTICE of Entry of Appearance <i>Entry of Appearance</i> by Leanne B. De Vos on behalf of Anthony Aragon, Ulysses J. Chaney, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica PocockAttorney Leanne B. De Vos added to party Anthony Aragon(pty:dft), Attorney Leanne B. De Vos added to party Ulysses J. Chaney(pty:dft), Attorney Leanne B. De Vos added to party Aubrey Elenis(pty:dft), Attorney Leanne B. De Vos added to party Miguel Rene Elias(pty:dft), Attorney Leanne B. De Vos added to party Carol Fabrizio(pty:dft), Attorney Leanne B. De Vos added to party Heidi Hess(pty:dft), Attorney Leanne B. De Vos added to party Rita Lewis(pty:dft), Attorney Leanne B. De Vos added to party Jessica Pocock(pty:dft) (De Vos, Leanne) (Entered: 10/14/2016)
10/19/2016	<u>37</u>	MOTION to Dismiss <i>Verified Complaint for Declaratory and Injunctive Relief</i> by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (Morscher, Vincent) (Entered: 10/19/2016)
10/19/2016	<u>38</u>	RESPONSE to <u>6</u> MOTION for Preliminary Injunction filed by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock.

		(Patten, Jack) (Entered: 10/19/2016)
10/31/2016	<u>39</u>	Proposed Scheduling Order by Plaintiffs 303 Creative LLC, Lorie Smith. (Tedesco, Jeremy) (Entered: 10/31/2016)
11/02/2016	<u>40</u>	REPLY to Response to <u>6</u> MOTION for Preliminary Injunction filed by Plaintiffs 303 Creative LLC, Lorie Smith. (Tedesco, Jeremy) (Entered: 11/02/2016)
11/07/2016	<u>41</u>	COURTROOM MINUTES/MINUTE ORDER for proceedings held before Magistrate Judge Craig B. Shaffer: Scheduling Conference held on 11/7/2016. Pursuant to the request of counsel, discovery is STAYED pending a ruling on <u>6</u> Motion for Preliminary Injunction and <u>37</u> Motion to Dismiss. FTR: Courtroom A-402. (amont,) (Entered: 11/07/2016)
11/08/2016	42	MEMORANDUM regarding <u>37</u> MOTION to Dismiss <i>Verified Complaint for Declaratory and Injunctive Relief</i> filed by Heidi Hess, Ulysses J. Chaney, Jessica Pocock, Carol Fabrizio, Miguel Rene Elias, Cynthia H. Coffman, Rita Lewis, Aubrey Elenis, Anthony Aragon. Motions referred to Magistrate Judge Craig B. Shaffer by Chief Judge Marcia S. Krieger on 11/8/16. Text Only Entry (msksec,) (Entered: 11/08/2016)
11/09/2016	<u>43</u>	RESPONSE to <u>37</u> MOTION to Dismiss <i>Verified Complaint for Declaratory and Injunctive Relief</i> filed by Plaintiffs 303 Creative LLC, Lorie Smith. (Tedesco, Jeremy) (Entered: 11/09/2016)
11/21/2016	44	ORDER: The Court will conduct a non-evidentiary hearing on the Plaintiffs' Motion for Preliminary Injunction <u>6</u> on 1/11/2017 at 09:00 AM. The parties shall be prepared to address: (i) each Plaintiff's standing to request the various items of relief they seek; (ii) whether the facts pertinent to the Motion for Preliminary Injunction are disputed, such that an evidentiary hearing is necessary; (iii) if there are factual disputes, what facts are disputed; and (iv) how long of an evidentiary hearing is necessary and when that hearing should be scheduled. By Chief Judge Marcia S. Krieger on 11/21/16. Text Only Entry (msklc2,) (Entered: 11/21/2016)
11/23/2016	<u>45</u>	REPLY to Response to <u>37</u> MOTION to Dismiss <i>Verified Complaint for Declaratory and Injunctive Relief</i> filed by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (Morscher, Vincent) (Entered: 11/23/2016)
01/11/2017	<u>46</u>	MINUTE ENTRY for Law and Motion Hearing held before Chief Judge Marcia S. Krieger on 1/11/2017. Deadlines and other matters addressed are as set forth in the Minutes. Court Reporter: Mary George. (pglov) (Entered: 01/11/2017)
01/30/2017	<u>47</u>	TRANSCRIPT of Law and Motion Hearing held on January 11, 2017 before Judge Krieger. Pages: 1–15. NOTICE – REDACTION OF TRANSCRIPTS: Within seven calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal identifiers from the electronic transcript of the court proceeding. If a Notice of Intent to Redact is not filed within the allotted time, this transcript will be made electronically available after 90 days. Please see the Notice of Electronic Availability of Transcripts

			document at www.cod.uscourts.gov . Transcript may only be viewed at the court public terminal or purchased through the Court Reporter/Transcriber prior to the 90 day deadline for electronic posting on PACER. (mgeor,) (Entered: 01/30/2017)
02/01/2017	<u>48</u>		MOTION for Summary Judgment <i>and Memorandum</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # <u>1</u> Affidavit of Lorie Smith, # <u>2</u> Affidavit of Jeremy Tedesco, # <u>3</u> Appendix in Support of Plaintiffs' Motion for Summary Judgment)(Tedesco, Jeremy) (Entered: 02/01/2017)
02/01/2017	<u>49</u>		STIPULATION re <u>48</u> MOTION for Summary Judgment <i>and Memorandum Joint Statement of Stipulated Facts</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J, # <u>11</u> Exhibit K, # <u>12</u> Exhibit L)(Tedesco, Jeremy) (Entered: 02/01/2017)
02/22/2017	<u>50</u>		RESPONSE to <u>48</u> MOTION for Summary Judgment <i>and Memorandum</i> filed by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (Morscher, Vincent) (Entered: 02/22/2017)
03/08/2017	<u>51</u>		REPLY to Response to <u>48</u> MOTION for Summary Judgment <i>and Memorandum</i> filed by Plaintiffs 303 Creative LLC, Lorie Smith. (Tedesco, Jeremy) (Entered: 03/08/2017)
09/01/2017	<u>52</u>	12	ORDER granting in part and denying in part <u>37</u> Motion to Dismiss, and denying <u>6</u> Motion for Preliminary Injunction and <u>48</u> Motion for Summary Judgment, by Chief Judge Marcia S. Krieger on 9/1/17. (dkals,) (Entered: 09/01/2017)
09/28/2017	<u>53</u>	25	NOTICE OF APPEAL as to <u>52</u> Order on Motion to Dismiss, Order on Motion for Summary Judgment, Order on Motion for Preliminary Injunction by Plaintiffs 303 Creative LLC, Lorie Smith (Filing fee \$ 505, Receipt Number 1082-5731693) (Anderson, Katherine) (Entered: 09/28/2017)

**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).

PROCEDURAL HISTORY

Plaintiffs 303 Creative LLC (“303”) and Lorie Smith filed this action challenging the constitutionality of two clauses of Colorado Revised Statutes § 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,

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.

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 Env’tl. 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.

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.

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

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.

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 fiancée 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 action³; (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.

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.

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

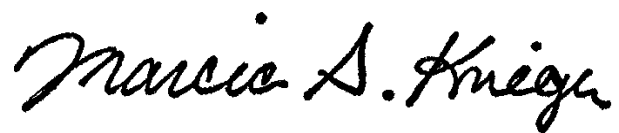
Defendants’ Motion to Dismiss (#37) is **GRANTED IN PART**, and **DENIED IN PART**. For the foregoing reasons, the Court **GRANTS** the motion and **DISMISSES** Plaintiffs’ claims challenging the constitutional validity of the Accommodation Clause of the Public Accommodation Statute under the (1) Free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

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
Chief United States District Judge

**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.

NOTICE OF APPEAL

Notice is hereby given that *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*, Plaintiffs in the above named case, 303 Creative LLC and Lorie Smith, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the Order which granted in part and denied in part Defendants’ Motion to Dismiss and denied Plaintiffs’ Motions for Preliminary Injunction and Summary Judgment, with leave to renew only after the United States Supreme Court issues a final ruling in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 16-111 (U.S. filed July 22, 2016) entered in this action on September 1, 2017.

Respectfully submitted this 28th day of September, 2017.

s/ Katherine L. Anderson

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2016, I electronically filed the foregoing Notice of Appeal with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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