

17-1344

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC, a limited liability company,
et al.,

Plaintiffs - Appellants,

v.

AUBREY ELENIS, Director of the Colorado Civil
Rights Division, in her official capacity, et al.,

Defendants - Appellees.

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

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

APPELLEES' SUPPLEMENTAL APPENDIX

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CERTIFICATE OF SERVICE

I certify that on the 1st day of February 2018, I electronically filed the foregoing **Supplemental Appendix** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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**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.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

items for a member of a protected class. Ver. Compl. ¶¶ 81-84; App. 20. But the Civil Rights Division applies these factors only to expressive businesses that approve of messages promoting same-sex marriage. Ver. Compl. ¶¶ 86-89. For the Christian bakery who disapproved of messages promoting same-sex marriage, they did not matter. Ver. Compl. ¶¶ 70-72, 85; App. 5-6, 14, 44-46, 49-51. In stark contrast to the Civil Rights Division's exoneration of three secular bakeries from creed discrimination charges, the Civil Rights Division ruled that the Christian bakery committed unlawful discrimination under CADA. Ver. Compl. ¶¶ 84-89; App. 12-15, 46, 51.

303 Creative is in the same predicament as Masterpiece Cakeshop, the Christian bakery described above. Ver. Compl. ¶¶ 63-72, 85-89. It creates expression and is happy to serve all people without reference to personal characteristics, such as race, creed, sexual orientation, and gender. Ver. Compl. ¶¶ 111-12. What 303 Creative cannot do is create speech that promotes messages at odds with its faith. Ver. Compl. ¶¶ 113-17. This includes graphic designs and custom webpages that demean or disparage individuals, promote sexual immorality, support the destruction of unborn children, incite violence, or promote any type of marriage that is not between one man and one woman. Ver. Compl. ¶ 114. If a commission conflicts with its religious beliefs, Lorie will attempt to refer the prospective client to another graphic and website design company that can be of help. Ver. Compl. ¶ 117. But, according to Defendants, declining to create speech celebrating a same-sex marriage violates CADA. Ver. Compl. ¶¶ 68-72; App. 5-6, 14-15, 46, 51. This interpretation of CADA has severely chilled Plaintiffs' protected speech, particularly as CADA's Banned-Speech Provision bans 303 Creative from

in compliance with CADA because (1) their denials were based on an unwelcome message and (2) the bakeries would create other items for Christians. Ver. Compl. ¶¶ 80-84. And Defendants have admitted that a bakery owned by an African-American could refuse to create a custom cake sending a white-supremacist message for the Aryan Nation and a bakery owned by a Muslim baker could reject a custom cake order from the Westboro Baptist Church denigrating the Quran, presumably for the same reasons. App. 8-9. But Defendants deemed it immaterial that the Christian bakery also declined to create a custom same-sex wedding cake based on its unwelcome message about marriage and was more than happy to create other items for gay and lesbian customers. Ver. Compl. ¶¶ 66-69; App. 5. 303 Creative is in the exact same position: it declines to create custom wedding websites promoting same-sex marriages but is happy to create other websites for gay and lesbian clients that do not conflict with its religious beliefs. Ver. Compl. ¶¶ 110-14. Yet Defendants apply CADA’s Compelled-Speech Provision to force 303 Creative to design, create, and publish custom wedding websites promoting and celebrating same-sex weddings.

Moreover, Defendants do not apply CADA’s Banned-Speech Provision to expressive businesses that strongly advocate the acceptance of same-sex marriage and whose messages “directly or indirectly” indicate that requests from religious customers with opposing beliefs would be “unwelcome” or “denied.” Colo. Rev. Stat. § 24-34-601(2)(a); Aff. ¶¶ 13-31; App. 35-42. Nicole Nichols Photography, a Denver-based photography company, for example, has published speech criticizing “religion” for “not always recogniz[ing]” same-sex marriage, praising the *Obergefell* decision, and announcing its participation in the Denver Pridefest. Ver. Compl. ¶¶ 192-97; Aff. ¶¶ 26-31; App. 40-42. But, just as with the three secular bakeries

IN THE UNITED STATES DISTRICT COURT
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Civil Action No. 16-cv-02372-MSK-CBS

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

Plaintiffs,

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.

DEFENDANTS' MOTION TO DISMISS VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

COME NOW Defendants, by and through counsel, and pursuant to Fed. R.
Civ. P. 12(b)(1), 12(b)(6) and 8, who move to dismiss all claims asserted in
Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief (# 1) for lack of
subject matter jurisdiction and failure to state a claim.

Defendants certify, pursuant to D.C. Colo. L. Civ. R. 7.1(A), that undersigned counsel conferred with Plaintiff's counsel regarding the relief sought in this motion. Plaintiffs oppose the motion in its entirety.

INTRODUCTION

Plaintiffs seek the Court's permission to discriminate against same-sex couples in services provided to all other members of the general public. Based on a lack of subject matter jurisdiction, Plaintiffs' failure to state a claim and the Complaint's failure to abide by Fed. R. Civ. P. 8, the Court should decline to entertain this request and dismiss the Complaint.

FACTS

1. Colorado's Public Accommodation Law.

Colorado's statutes on public accommodation fall under the Colorado Anti-Discrimination Act (CADA) §§24-34-301 to -804, C.R.S. (2016). Under the law, it is a discriminatory practice and unlawful for a person to refuse, based on sexual orientation, "the full and equal enjoyment of the . . . services . . . of a place of public accommodation." § 24-34-601(2)(a), C.R.S. (**# 1 ¶36**).

People, who believe they were denied a public accommodation based on their protected class, may follow one of two different paths to seek a remedy. The first option is to bring a civil action against the person in a state court for the county in which the violation occurred. §24-34-602(1)(a), C.R.S. (**# 1 ¶54**). Either party has

the right to a jury trial and appeal of the final judgment. §24-34-603, C.R.S. *See also Arnold v. Anton Coop. Ass'n*, 293 P.3d 99, 103-104 (Colo. App. 2011) (holding that the county and district courts have concurrent jurisdiction over public accommodation claims). Those who follow this path may not seek any relief from the Colorado Civil Rights Commission (Commission). §24-34-602(3), C.R.S.

The other option is to file a charge of discrimination with the Colorado Civil Rights Division (Division) pursuant to §24-34-306(1)(a), C.R.S. The Commission, a Commissioner, or the Colorado Attorney General may also file a charge alleging a discriminatory or unfair practice when any of them determine that “the alleged discriminatory or unfair practice imposes a significant societal or community impact.” §24-34-306(1)(b), C.R.S. Once a charge is filed, the Division Director, with the assistance of staff, must conduct an investigation of the charge. §24-34-306(2)(a), C.R.S.

After an investigation, the Director or designee must determine “whether probable cause exists for crediting the allegations of the charge.” §24-34-306(2)(b), C.R.S. If she determines that probable cause does not exist, the Director dismisses the charge and provides notice that the charging party may either: (A) file an appeal to the Commission; or (B) file a civil action in district court. §24-34-306(2)(b)(I), C.R.S.

If the Director finds probable cause, she provides the parties a written notice of such finding, and commences compulsory mediation. §24-34-306(2)(b)(II), C.R.S.

If mediation fails, the Commission has the discretion to issue a notice and complaint to set a hearing before the Commission or an Administrative Law Judge, pursuant to §24-4-105, C.R.S. (the state Administrative Procedures Act). §24-34-305(d), §24-34-306(4) and (8), C.R.S. If it is found after hearing that a respondent engaged in a discriminatory practice, the Commission may order the respondent to cease and desist from the discriminatory practice, and “take such action as it may order in accordance with the provisions of” CADA. §24-34-306(9), C.R.S. (# 1 ¶¶49-50). Any party aggrieved by a final order of the Commission may seek judicial review in the Colorado Court of Appeals. §24-34-307(1) and (2), C.R.S.

2. The *Masterpiece Cakeshop* case.

Jack Phillips is a wedding cake baker who refused to bake a wedding cake for a same-sex couple based on his Christian beliefs and objection to same-sex marriage. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 277 (Colo. App. 2015); (# 1 ¶¶64-65). The couple filed a charge of discrimination with the Division alleging discrimination based on sexual orientation under CADA. *Id.* at 278. The Division investigated and issued a notice finding probable cause to credit the discrimination allegation. *Id.* A complaint was filed and an Administrative Law Judge found that Mr. Phillips’s refusal of service violated CADA. *Id.* On review, the Commission affirmed the order, and on appeal, the Colorado Court of Appeals affirmed the Commission’s decision. *Id.* at 277-78.

The Colorado Supreme Court denied certiorari on April 25, 2016.

Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n, No. 15SC738 (Apr. 25, 2016). On July 22, 2016, Phillips filed a petition for writ of certiorari with the United States Supreme Court. *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission, et al.*, No. 16-111. Phillips and Masterpiece Cakeshop are represented by Alliance Defending Freedom, the same firm representing Plaintiffs in the instant matter. (# 5).

3. 303 Creative LLC and Lorie Smith.

Plaintiff's 303 Creative LLC and its owner, Lorie Smith, operate a business in Colorado that provides services to the public (# 1 ¶104). Plaintiffs would like to expand the business to design custom websites; however, that service is not yet available (# 1 ¶¶155-57). When the service is available to the public, Plaintiffs want to refuse this service to same-sex couples (# 1 ¶¶ 144, 172-175, 219). Plaintiffs' do not allege that Defendants have taken any action against Plaintiffs (# 1 ¶¶ 1-399).

ARGUMENT

1. Plaintiffs fail to allege Fed. R. Civ. P. 12(b)(1) jurisdiction over all claims.

A. Burden of proof: Since this is a court of limited jurisdiction, it is presumed that no jurisdiction exists absent an adequate showing that federal jurisdiction should be invoked. *United State ex rel. Hafter v. Spectrum Emergency*

Care, Inc., 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs are claiming jurisdiction, therefore they carry the burden to show it by a preponderance of the evidence. *Id.*

B. Elements: In order to satisfy the requirements for Article III standing, Plaintiffs must show (i) an “injury in fact” that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (ii) the alleged injury must be fairly traceable to the challenged action of the defendant; (iii) it must be likely, not merely speculative, that a favorable decision will redress the injury. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000).

C. Elements not supported by Complaint:

element (i) - injury: The Complaint does not allege an actual injury caused by Defendants and only speculates as to what may happen *if* numerous facts occur. Specifically, those facts would have to be as follows: (1) Plaintiffs make their wedding website service available to the public; (2) a person attempts to obtain the service; (3) Plaintiffs’ deny the service based on the person’s sexual orientation; (4) the person denied service files a charge of discrimination with the Division; (5) the Division investigates the charge and the Director or designee finds that there is probable cause to credit the charge; (6) mandatory conciliation is attempted and fails; (7) the Commission decides to notice the case for hearing; (8) an ALJ holds a hearing and rules against Plaintiffs; (9) the

Commission affirms the decision and orders Plaintiffs to cease and desist the discriminatory practice; and (10) the Plaintiffs exhaust their state appellate remedies. None of these ten facts have yet occurred; and the failure of any one step to occur would result in no injury to Plaintiffs.

Indeed, the Supreme Court recently restated its reluctance “to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment” because a “theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1148 and 1150 (2013).

element (ii) - action by Defendants: Plaintiffs do not allege an injury traceable to an action by Defendants. Defendants have not made any decisions that caused harm to Plaintiffs.

element (iii) - favorable decision will address injury: Pursuant to §24-34-602(1)(a), C.R.S., any person who is denied a public accommodation may initiate their own independent civil action in state court without ever filing a charge with the Division. (**# 1, ¶54**). If a person does so, he or she is prohibited from filing a charge of discrimination with the Commission. *See* §24-34-602(3) (“relief provided by this section is an alternative to that authorized by section 24-34-306(9), and a person who seeks redress under this section is not permitted to seek relief from the commission.”). Therefore, an injunction against Defendants will not prevent

anyone from initiating an independent civil action against Plaintiffs to enforce CADA's public accommodation provisions with regard to sexual orientation.

2. The *Younger* doctrine merits abstention

A. Burden of proof: Since this is a court of limited jurisdiction, it is presumed that no jurisdiction exists absent an adequate showing that federal jurisdiction should be invoked. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs are claiming jurisdiction, therefore they carry the burden to show it by a preponderance of the evidence. *Id.*

B. Elements: The *Younger* doctrine, *Younger v. Harris*, 401 U.S. 37 (1971), provides "that federal courts not interfere with state court proceedings by granting equitable relief-such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings when such relief could adequately be sought before the state court." *See Rienhardt v. Kelley*, 164 F.3d 1296, 1302 (10th Cir. 1999). The Supreme Court has extended *Younger* abstention to include administrative proceedings to enforce state anti-discrimination laws. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625 (1986).

Under the *Younger* doctrine, federal courts must abstain from exercising jurisdiction when: (i) there is an ongoing state criminal, civil, or administrative proceeding, (ii) the state court provides an adequate forum to hear the claims

raised in the federal complaint, and (iii) the state proceedings “involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies.” *Amanatullah v. Colo. Bd. of Med. Exam’rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). If these conditions are met, abstention is nondiscretionary and must be invoked. *Id.*

C. Elements not supported by Complaint:

(i) – (iii): The Complaint relies on the *Masterpiece Cakeshop* case to allege that Defendants would harm Plaintiffs based on how that case was adjudicated (#1, ¶¶241, 256, 335, 340). *Masterpiece Cakeshop* has not yet been fully adjudicated, and is pending before the United States Supreme Court on certiorari review (# 5). Therefore, an ongoing proceeding exists for which Plaintiffs allege harm.

Colorado has a compelling interest in enforcing its public accommodation laws and, pursuant to state law, Plaintiffs’ claims may be properly adjudicated in administrative forums and state courts if a complaint is ever filed.¹ The United States Supreme Court has held that states have a compelling interest in

¹ Colorado’s compelling interest in enforcing CADA and not subjecting persons participating in the process to liability is reflected in state law which provides that Commissioners and persons “participating in good faith in the making of a complaint or a report or in any investigative or administrative proceeding” authorized by CADA, “shall be immune from liability in any civil action brought against him for acts occurring while acting in his capacity as a commission member or participant.” §24-34-306(13), C.R.S.

eliminating discrimination through use of public accommodation laws. *See e.g.*, *Hurley v. Irish-American*, 515 U.S. 557, 572 (1995) (public accommodation laws “are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination....”); *see also Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 549 (1987) (government had a compelling interest in eliminating discrimination against women in places of public accommodation); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (“acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (government had a compelling interest in eliminating racial discrimination in private education).

3. The *Rooker-Feldman* doctrine merits abstention.

A. Burden of proof: Since this is a court of limited jurisdiction, it is presumed that no jurisdiction exists absent an adequate showing that federal jurisdiction should be invoked. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs are claiming jurisdiction, therefore they carry the burden to show it by a preponderance of the evidence. *Id.*

B. Elements: The Tenth Circuit applies the *Rooker-Feldman* doctrine to federal claims actually decided by a state court, and federal claims inextricably intertwined with a state court judgment. To discern whether the “inextricably intertwined” standard of the doctrine applies, the Court asks whether (i) the injury alleged by the federal plaintiff has resulted from the state court judgment itself or is distinct from that judgment, and whether (ii) the state-court judgment has caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress. *Merrill Lynch Bus. Fin. Servs. v. Nudell*, 363 F.3d 1072, 1076 (10th Cir. 2004).

C. Elements not supported by Complaint:

elements (i) – (ii): The *Masterpiece Cakeshop* decision addressed the federal constitutional issues that are addressed in the Complaint. (# 1 ¶¶67-69; 72). Plaintiffs argue that they will suffer harm as a result of the decision. (#1, ¶¶241, 256, 335, 340). The Court should refuse to hear this case in light of this interest and the ongoing *Masterpiece Cakeshop* matter which was decided by the Colorado Court of Appeals on the same arguments made in the Complaint, and is currently pending before the United States Supreme Court on Plaintiffs’ counsel’s petition for writ of certiorari. (# 1 ¶¶63-72; # 5).

4. Colorado River doctrine merits abstention.

A. Burden of proof: Since this is a court of limited jurisdiction, it is presumed that no jurisdiction exists absent an adequate showing that federal jurisdiction should be invoked. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs are claiming jurisdiction, therefore they carry the burden to show it by a preponderance of the evidence. *Id.*

B. Elements: The *Colorado River* doctrine permits a federal court to dismiss or stay a federal action in deference to pending parallel state court proceedings, based on “considerations of wise judicial administration, giving regarding to consideration of judicial resources and comprehensive disposition of litigation.” *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976); *Fox v. Maulding*, 16 F.3d 1079, 1080 (10th Cir. 1994).

The Court must determine whether the state court suit and federal suit are parallel, meaning that substantially the same parties litigate substantially the same issues in different forums. *Id.* at 1081. The Tenth Circuit’s approach is to examine state proceedings as they actually exist to determine whether they are parallel to federal court proceedings. *Id.* Factors to consider include whether either court has assumed jurisdiction over property, desirability of avoiding piecemeal litigation, the order in which the courts obtained jurisdiction, the

progress of the two cases, which forum's substantive law governs the merits of the litigation, and the adequacy of the state forum to protect the rights of parties. *Id.* at.1081-1082.

C. Elements not supported by Complaint:

element (i): As addressed above, the adequacy of the state courts and the *Masterpiece Cakeshop* case's progress through consideration by the United States Supreme court, merits abstention.

5. Plaintiffs have failed to state a claim under Fed. R. Civ. P. 12(b)(6) as to Defendants' authority and actions.

A. Burden of proof: In order to state a claim under 42 U.S.C. § 1983, the complaint must allege facts which, if assumed to be true, would demonstrate that a defendant deprived plaintiff of a right secured by the United States Constitution or federal law while acting under color of state law. *Gaines v. Stenseng*, 292 F.3d 1222, 1225 (10th Cir. 2002) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970) ("emphasizing that a § 1983 plaintiff must prove the defendant deprived him of a right secured by the Constitution and laws of the United States"). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must plead facts that allow "the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged.” *Id.* The allegations must “permit the court to infer more than the mere possibility of misconduct.” *Id.* at 679.

“Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* A complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

The 12(b)(6) analysis has two prongs. First, the court identifies and disregards “the allegations in the complaint that are not entitled to the assumption of truth,” that is, those allegations which are legal conclusion, bare assertions, or merely conclusory. *Iqbal*, 556 U.S. at 680. Otherwise, every motion to dismiss could be defeated by “an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 678. Second, the Court considers the remaining factual allegations “to determine if they plausibly suggest an entitlement to relief.” *Id.* at 681. Where a plaintiff cannot assert a valid claim for relief, a court should not waste its valuable time and resources considering the matter. *Twombly*, 550 U.S. at 558.

“Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.” *Schneider v. City of Grand Junction Police*

Dep't, 717 F.3d 760, 768 (10th Cir. 2013) (citing *Foote v. Speigel*, 118 F.3d 1416, 1423 (10th Cir. 1997)). More specifically, “[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676.

The *Iqbal* standard has “greater bite” in the “context of a § 1983 claim against individual government actors, because ‘they typically include complex claims against multiple defendants.’” *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011) (citations omitted). Where several government actors are named as defendants, “it is particularly important ... that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state.” *Robins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (emphasis in original). Further, “the plaintiff’s facile, passive-voice showing that his rights ‘were violated’ will not suffice. Likewise insufficient is a plaintiff’s more active-voice yet undifferentiated contention that ‘defendants’ infringed his rights. ... Rather, it is incumbent upon a plaintiff to identify *specific* actions taken by *particular* defendants” *Pahls v. Thomas*, 718 F.3d 1210, 1225-26 (10th Cir. 2013) (internal citations and quotation marks omitted, emphasis in original).

B. Elements: In order to establish a claim under 42 U.S.C. §1983, Plaintiffs must show: (i) there was a violation of rights protected by the federal Constitution or created by federal statute or regulation, (ii) proximately caused, (iii) by the conduct of a ‘person’ (iv) who acted under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.” *Sumnum v. City of Ogden*, 297 F.3d 995, 1001 (10th Cir. 2002).

C. Elements not supported by Complaint:

elements (i)-(iv): The Complaint inaccurately describes Defendants’ actual authority and power, and in doing so, fails to demonstrate that Defendants violated or will violate Plaintiffs’ rights.

The Complaint names three groups of Defendants: the Director of the Division, the Commission’s members, and the Attorney General. (# 1, ¶¶25-27). It alleges that the Director’s authority stems from §§24-34-302 and 306, C.R.S. (#1, ¶25), the Commission’s authority stems from §§24-34-305, 306 and 605, C.R.S. (# 1, ¶26), and the Attorney General’s authority stems from §24-34-306, C.R.S. (# 1, ¶27).

Despite the plain language of the statutes, Plaintiffs assert that all three groups of Defendants have the exact same authority under CADA, including: investigate charges of discrimination (# 1, ¶42), determine whether probable cause exists for crediting charges (# 1, ¶43), hold hearings (# 1, ¶44), issue subpoenas (# 1, ¶45), compel mediation (# 1, ¶46), determine whether the individual or business

under investigation violated CADA (#1, ¶47), issue notices of a right to sue (# 1, ¶48), issue cease and desist orders (# 1, ¶49), issue orders requiring parties to take specific actions (# 1, ¶50).

The Complaint misstates Defendants' legal authority by alleging that all Defendants either have certain enforcement powers or have taken specific actions based on their powers that have or will harm Plaintiffs (# 1 ¶¶ 227-229; 255-265; 276-278; 284; 289; 306-307; 309-314; 324-326; 333-337; 339-342; 353-355; 358; 360; 365-369; 397). Finally, the Prayer For Relief erroneously lumps all Defendants together based on their alleged authority (# 1 p.59, ¶¶1, 3).

Each Defendant has different, separate and unique obligations and/or options they may initiate under CADA, that are contrary to what is alleged in the Complaint. As a result, Defendants conduct has not harmed Plaintiffs.

The Director and Division staff investigates charges of discrimination, issue subpoenas to compel information, issue a determination of probable cause or no probable cause, and conduct mandatory conciliation if cause is found, or dismiss if no cause is found. §§24-34-306(1) and (2), C.R.S.; *Demetry v. Colorado Civil Rights Commission*, 752 P.2d 1070, 1071 (Colo. App. 1988). The Division's investigation is merely preparatory to further proceedings and if cause is found, rights and obligations of parties are fixed at a *de novo* proceeding. *Id.* at 1072. These preliminary proceedings are, therefore, without legal effect until suit is brought. *Id.* The sufficiency of an investigation or the evidence underlying an agency's

findings of discrimination cannot be challenged in the *de novo* hearing. *E.E.O.C. v. Keco Indust. Inc.*, 748 F.2d 1097 (6th Cir. 1984); *AT&T Technologies Inc. v. Royston*, 772 P.2d 1182, 1186 (Colo. App. 1989) (the Director's findings of probable cause or no probable cause are not quasi-judicial rulings, only administrative determinations reached without the benefit of an adversarial hearing, and the rulings are not binding).

The Complaint alleges that actions taken by the Division Director in three different public accommodation cases caused harm to Plaintiffs for which they are entitled to relief. The Complaint references three charges of discrimination based on creed against bakeries that declined to produce cakes with religious messages and anti-same sex marriage messages (# 1 ¶¶ 73-84). The Complaint seeks relief based on a belief that decisions made in these matters harmed Plaintiffs (# 1 ¶¶ 241-242; 256-259; 313-314; 335; 340). These matters resulted in no-probable cause determinations by the Director and no further action was taken (# 1 ¶80).²

The Director's finding of no probable cause in these matters was not a quasi-judicial ruling, only an administrative determination reached without the benefit of

² The Commission and Division are prohibited by law to disclose any information about matters, such as these, that have not been made public by noticing them for a hearing. §24-34-306(3), C.R.S. However, since the decisions were addressed in *Masterpiece Cakeshop*, 370 P.2d at 282, n.8, they are addressed for the limited purpose of this Motion.

an adversarial hearing, and it is not binding. *AT&T Technologies Inc.*, 772 P.2d at 1186. These decisions have no binding precedent or effect on other persons.

Contrary to Plaintiffs' allegations, the Director has no authority to take action against a person about whom a charge of discrimination is filed. She may only process the charge, investigate, make a finding and, if she finds cause, attempt conciliation. §§24-34-306(1) and (2), C.R.S. Since Plaintiffs' misstate the Director's authority to take the actions alleged in the Complaint, Plaintiffs cannot show any conduct by the Director to deprive Plaintiffs of any right.

The Commission's authority as it relates to the Complaint's allegations only comes into play after the Division's investigation, determination, and failure of conciliation, and only if, in its discretion, it decides to notice a case for hearing. §§ 24-34-305(d) and 24-34-306. The Commission is the quasi-judicial body that reviews evidence, considers arguments, and renders a decision under the administrative procedures act. §§24-4-105 and 24-34-306(9). The Commission has taken no action to deprive Plaintiffs of any right. Therefore, Plaintiffs fail to state a claim against the Commission members.

The Attorney General has very limited interaction with CADA's public accommodation provision. CADA's general section provides that the Attorney General may file a charge alleging a discriminatory or unfair practice when she determines "the alleged discriminatory or unfair practice imposes a significant societal or community impact." §24-34-306(1)(b). CADA's public accommodation

statute, §24-34-601, *et seq.*, does not mention the Attorney General at all.

Plaintiffs' misstate the Attorney General's authority to take the actions alleged in the Complaint. Therefore, they cannot show any conduct that has or will be taken by the Attorney General to deprive Plaintiffs of any right.

6. Plaintiffs have failed to state a claim under Fed. R. Civ. P. 8.

A. Burden of proof: A complaint must satisfy Rule 8 and a failure to do so can supply a basis for dismissal since Rule 41(b) specifically authorizes a district court to dismiss an action for failing to comply with any aspect of the Federal Rules of Civil Procedure. *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice Center*, 492 F.3d 1158, 1161 (10th Cir. 2007).

B. Elements: Fed. R. Civ. P. 8(a) states that a complaint shall contain (i) "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(d)(1) states that (ii) each "allegation must be simple, concise, and direct." When a complaint does not comply with Rule 8, the district court has the authority to dismiss the complaint. "A dismissal without prejudice under Rule 8 is within the sound discretion of the trial court." *Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197, 1203 (8th Cir. 1992) (citations omitted).

C. Elements not supported by Complaint:

elements (i) and (ii): Plaintiffs' Complaint is 61 pages long containing 399 paragraphs, many of which are redundant. The Complaint contains 15 paragraphs that reference the Bible or Bible passages, without ever referencing

which version of the Bible Plaintiffs are citing.³ See e.g., *Ellis v. State*, U.S. Dist. LEXIS 17131, 4-5 (N.D. Ill. Nov. 3, 1992) (noting that plaintiff's complaint violated Rule 8, in part, because it was "interspersed with religious pleas to defendants . . . and quotes from the Bible."), *Seehausen v. Gonzalez*, 2012 U.S. Dist. LEXIS 85022, 4-5 (C.D. Cal. May 8, 2012) (dismissing plaintiff's complaint in part for violating Rule 8 because it contained "disquisitions from the Bible."). Defendants should not be required to admit what an unidentified version of the Bible does or does not contain, and they certainly should not be required to either admit or deny the truth of what is said in the Bible.

Defendants request that the Complaint be dismissed for failure to abide by Fed. R. Civ. P. 8.

STAY OF PROCEEDINGS

If this Court denies Defendants' motion to dismiss, then it should stay these proceedings in light of the pending petition for certiorari in the *Masterpiece* case. The United States Supreme Court has expressed a strong preference to avoid a multiplicity of suits challenging the same law through requests for declaratory and injunctive relief. See *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). When multiple suits are filed addressing the same law, "actions in all but one jurisdiction might be stayed pending the conclusion of one proceeding." *Id.* at 155. "A court

³ See <https://www.bible.com/versions>, listing 49 English versions of the Bible and hundreds of other versions.

may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere.” *Id.* Further, if “a multiplicity of suits are undertaken in order to harass the Government or to delay enforcement, relief can be denied on this ground alone. *Id.*

The power to stay a proceeding “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Diamond v. Vickery*, 2013 U.S. Dist. LEXIS 20013, *2, 12-cv-01891-MSK (D. Colo. Feb. 14, 2013) (quoting *Landis v. North Am Co.*, 299 U.S. 248, 254 (1930)). “Federal courts have relied upon this principle to stay proceedings in which similar or identical litigation was simultaneously pursued in another court.” *Id.* (citing *In re Kozeny* 236 F.3d 615 (10th Cir. 2000); *Ventura v. David’s Bridal*, 248 F.3d 1139 (5th Cir. 2001); *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976).) Proceeding in this case before the Supreme Court rules on the ADL’s petition for certiorari in *Masterpiece* raises the possibility of this Court issuing an opinion that could be at odds with that of the Supreme Court, and thus advisory.

CONCLUSION

Plaintiffs lack standing to bring this action because they cannot show they suffered an injury in fact, based on Defendants’ actions, which an injunction would remedy. The only matter for which Plaintiffs could possibly allege to have some

impact on their rights in the future, *e.g.* enforcement of the *Masterpiece Cakeshop* decision, is pending certiorari review before the United States Supreme Court, and is not final. Moreover, the Complaint generalizes the enforcement powers of all Defendants, contrary to law. Plaintiffs have, therefore, failed to state claims against Defendants. Finally, the Complaint fails to meet the pleading requirements of Rule 8. Based on the arguments in this Motion, the Complaint should be dismissed.

Respectfully submitted this 19th day of October, 2016.

s/ Vincent Edward Morscher _____

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CERTIFICATE OF SERVICE

I certify that I served the foregoing DEFENDANTS' MOTION TO DISMISS VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF upon all parties herein by e-filing with the CM/ECF system maintained by the court or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 19th day of October, 2016, addressed as follows:

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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 PRELIMINARY INJUNCTION**

First Amendment. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

ARGUMENT

Plaintiffs Lorie Smith and 303 Creative (hereinafter, “Lorie”) are likely to succeed on the merits of their claims because CADA (1) bans Lorie from publishing a website that explains her religious motivation for designing, creating, and publishing custom wedding websites promoting marriages between one man and one woman and explaining her religious beliefs, which prevent her from promoting any other conception of marriage, and (2) forces Lorie to create websites promoting any conception of marriage—even those with which she disagrees—if she creates websites promoting marriages between one man and one woman. This unlawful application of CADA to Lorie cannot survive strict scrutiny because Colorado cannot show that it is narrowly tailored to serve a compelling interest. A preliminary injunction should issue.

I. Lorie is Likely to Succeed on the Merits of Her Constitutional Claims.¹

A. CADA Violates the First Amendment Because it Bans and Compels Speech.

1. CADA Bans Lorie From Posting Her Religious Views on Marriage.

Lorie has designed a website that explains, among other things, her beliefs about marriage and her position on creating content that violates her beliefs. MPI Doc. No. 7 at 20. But Lorie cannot post these statements because CADA bans their content. MPI Doc. No. 7 at 15, 19-20. Lorie’s website explains that while she is happy to serve any person, she is “not ... able to create websites for same-sex marriages or any other marriage that is not between one man and one

¹ Notably, the State does not respond to, or acknowledge, Lorie’s unconstitutional conditions claim. MPI Doc. No. 7 at 22-23. Thus, it should be deemed admitted.

enforcement authority under CADA, plainly can be relied on as evidence of how the State enforces the law.

Second, the State asserts that in a footnote the Colorado Court of Appeals addressed “the same arguments” and distinguished the inequitable prosecutions in *Masterpiece*. Defs.’ MPI Resp. Doc. No. 38 at 18. But there was no equal protection claim before the court in *Masterpiece*, nor did the court purport to address any such claim. See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015). The State also cements its unequal treatment of Lorie by affirming the position that a bakery may refuse to print words opposing homosexuality (because it declines the message) but Lorie may be forced to create and publish words celebrating same-sex marriage. Defs.’ MPI Resp. Doc. No. 38 at 18. Even the *Masterpiece* Court recognized that cake designs and inscriptions may convey protected messages, though it found none in that particular case. *Masterpiece Cakeshop, Inc.*, 370 P.3d at 288. But the State here asserts a much farther reaching unequal enforcement of CADA that directly implicates fundamental free speech rights.

E. The State has Failed to Establish that it has a Compelling Interest in Forcing Lorie to Create Same-Sex Wedding Websites or that it Uses the Least Restrictive Means to Accomplish its Asserted Interests.

When the government infringes fundamental rights like free speech, free association, and equal protection, as it has here, it must satisfy strict scrutiny. MPI Doc. No. 7 at 25. Curiously, the State argues that it does not have to meet this burden because it claims “CADA is a neutral law of general applicability.” Defs.’ MPI Resp. Doc. No. 38 at 18-19. This unique standard, however, when met, exempts only free exercise claims from strict scrutiny. See *e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-33 (1993). While Lorie pled

a free exercise claim, she did not offer it as a basis for the present motion for preliminary injunction. The State’s citation to a free exercise standard is beside the point.⁴

The State also contends that it meets strict scrutiny by merely asserting a broad and general interest in “eradicating discrimination in places of public accommodation.” Defs.’ MPI Resp. Doc. No. 38 at 16-17, 19-20. Strict scrutiny, however, “look[s] beyond broadly formulated interests justifying the general applicability of government mandates” and determines whether this searching form of scrutiny “is satisfied through application of the challenged law ‘to the person’—the particular claimant whose” rights are being infringed. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *see also Hobby Lobby*, 134 S. Ct. at 2779. The government cannot meet this exacting test simply by proffering a generic interest in eradicating discrimination. Instead, under strict-scrutiny analysis, the government must prove that it has an interest sufficiently compelling to justify requiring Lorie herself to create custom same-sex wedding websites in violation of her conscience. *Id.*

In addition, the cases the State cites to support its generic nondiscrimination interest are factually distinguishable. In *Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) and *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), requiring the groups to include women did not “affect in any significant way the existing members’ ability to carry out their various purposes.” 481 U.S. at 548; 468 U.S. at 627. Here, requiring Lorie and 303 Creative to create, design, and publish custom messages celebrating same-sex marriage, significantly affects—indeed cripples—their ability to carry out their expressive purpose which is to “publicly

⁴ Lorie reserves the right to proffer her Free Exercise claim and refute the assertion that the law is neutral and generally applicable in further merits proceedings but is not required to respond to this allegation at this time because it relates to a claim not at issue in these proceedings.

**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**

has published speech criticizing “religion” for “not always recogniz[ing]” same-sex marriage, praising the *Obergefell* decision, and announcing its participation in the Denver Pridefest. Lorie Smith Aff. ¶ 31-32; App. 009. Just as with the three cake artists discussed above, Defendants would consider this speech compliant with CADA. But if sexual orientation and celebrating same-sex marriage is “closely correlated” enough to strip away speaker autonomy under CADA, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 279 (2015), surely the Christian creed and religious criticism of same-sex marriage are as well. *See* 3 C.C.R. 708-1:10.2(H). Yet Defendants have concluded that only speech by expressive business owners like Lorie that find same-sex marriage morally objectionable is banned.

This disparate treatment of similarly situated speakers for no rational, let alone compelling, reason violates the Equal Protection Clause. As such, this Court should strike down Defendants’ application of CADA to Lorie as violative of the Fourteenth Amendment.

E. Defendants’ Application of CADA Violates Lorie’s Right to Substantive and Procedural Due Process.

The Fourteenth Amendment protects every citizens’ right to life, liberty, and property from state deprivation. U.S. Const. amend. XIV, sec. 1. Defendants’ application of CADA violates Lorie’s rights to procedural and substantive due process because the statute is impermissibly vague and deprives her of the fundamental liberty to own and operate an expressive business and earn a livelihood free from unreasonable governmental interference.

1. The Banned-Speech Provision is Impermissibly Vague and Therefore Violates Lorie’s Right to Procedural Due Process.

The Due Process Clause proscribes impermissibly vague statutes. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“It is a basic principle of due process that an enactment is

void for vagueness if its prohibitions are not clearly defined.”). A vague statute is a peculiar evil because it prevents a person of ordinary intelligence from “know[ing] what is prohibited” and conforming her actions to the law. *Id.* Vague statutes also invite arbitrary and discriminatory enforcement, leaving people subject to the unknowable whim of government officials charged with enforcing the law. *Id.* When a vague statute implicates First Amendment rights, “a heightened vagueness standard” applies. *Brown*, 564 U.S. at 793; *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (“For standards of permissible statutory vagueness are strict in the area of free expression.... These freedoms are delicate and vulnerable, as well as supremely precious in our society.”).

To determine whether a statute is impermissibly vague, the Court must evaluate (1) whether the statute is sufficiently definite to allow ordinary people to understand what is prohibited and (2) whether the statute encourages “arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The U.S. Supreme Court focuses most closely on the second part of this test because of its concern that statutes void of minimal enforcement guidelines allow government officials to dangerously and arbitrarily “pursue their personal predilections” in the enforcement of the law. *Id.* at 358. When government officials are afforded “virtually complete discretion” to enforce a law, lawmaking power is effectively stripped from the people and vested in the “moment-to-moment judgment” of enforcement officials, *id.* at 358-60, increasing the likelihood that less popular people or viewpoints will be unlawfully discriminated against. The Due Process Clause does not permit such unrestrained government power.

The Banned-Speech Provision is impermissibly vague because it lacks sufficient definiteness to apprise an ordinary person of what is unlawful and the legislature did not establish

minimal enforcement guidelines to prevent arbitrary and discriminatory enforcement. Specifically, the Banned-Speech Provision prohibits a business from publishing statements indicating an individual within a protected class is “unwelcome, objectionable, unacceptable, or undesirable,” Colo. Rev. Stat. § 24-34-601(2)(a), without establishing *any*—yet alone minimal—enforcement guidelines to stave off discriminatory or capricious enforcement. For example, the legislature did not define how statements may be determined to be objectively “unwelcome,” “objectionable,” “unacceptable,” or “undesirable.” And the vagueness and subjectivity of these terms are in a class of their own.

As stated in Section II.A.1.e *supra*, no objective standard of “unwelcomeness” or “objectionability” exists, rendering the Banned-Speech Provision unconstitutional on its face. *See Saxe*, 240 F.3d at 215 (3d Cir. 2001) (Alito, J.) (invalidating a school policy that banned “any unwelcome verbal... conduct which offends... because of” protected characteristics); *Armstrong*, 154 F. Supp. 2d at 79-80 (striking down a liberty regulation that denied access to patrons with an “objectionable” appearance). People experience offense and displeasure when they encounter differing viewpoints in a pluralistic society everyday. But no one in this country has an interest “in being free from public criticism,” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), even if exposure to opposing views causes “severe emotional distress,” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). While the Constitution does not require absolute clarity, *United States v. Powell*, 423 U.S. 87, 96 (1975), a statute, such as the Banned-Speech Provision, that leaves people of common intelligence completely guessing as to its meaning runs afoul of the Due Process Clause, *Keyishian v. Board of Regents of Univ. of N.Y.*, 385 U.S. 589, 604 (1967).

This alone renders the Banned-Speech Provision unconstitutionally vague but the Colorado legislature also failed to define the necessary discriminatory nexus between an unwelcoming “indirect” communication (versus a “direct” communication) and an individual’s membership in a protected class. Without such minimal guidance, enforcement officials are impermissibly granted power to interpret CADA however they like. *Kolender*, 461 U.S. at 358-60. And Defendants’ enforcement history—allowing expressive businesses that support same-sex marriage to speak freely, while muzzling and imposing severe penalties on expressive businesses that oppose same-sex marriage and wish to speak a different message—belies any suggestion of restraint. Stipulated Facts ¶¶ 24-25, 28, Ex. C-L.

Based on the vague language in the statute, Defendants have unbridled discretion to censor speech out of a dislike for particular viewpoints—viewpoints on subject matters that extend much more broadly than the same-sex marriage context. Even a person of highest intelligence would have difficulty understanding what statements and messages are within the basket of unlawful expression outlawed by the Banned-Speech Provision and, therefore, would “steer far wider of the unlawful zone.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal quotation marks and citations omitted). The only criteria informing Defendants’ findings of unlawful discrimination is their own *ad hoc* judgment. Because the Banned-Speech Provision invites government agents to “pursue their personal predilections” in the enforcement of the law—an invitation Defendants have readily accepted—it is impermissibly vague and violates Lorie’s right to procedural due process. *Kolender*, 461 U.S. at 357-61.

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. 16-cv-02372-MSK-CBS

303 CREATIVE LLC, a limited liability company; and
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Commission, in their official capacities, and
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official
capacity;

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

FACTS

All material facts are contained in the Joint Statement of Stipulated Facts (# 49). Defendants object to Plaintiffs' "Statement of Facts" in "Plaintiffs' Motion for Summary Judgment and Memorandum in Support" (# 48) because it violates the Court's January 11, 2017 order. Defendants also object to Plaintiffs' inclusion of non-stipulated facts and the Appendix (# 48-3), as violating the same order.

JURISDICTIONAL ARGUMENTS

A. Plaintiffs fail to allege Fed. R. Civ. P. 12(b)(1) jurisdiction over all claims.

1. Burden of proof and elements

Since this is a court of limited jurisdiction, it is presumed no jurisdiction exists absent an adequate showing it should be invoked. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs allege jurisdiction; therefore they must show it by a preponderance of the evidence. *Id.*

To establish Article III standing, Plaintiffs must show (i) an "injury in fact" that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (ii) the alleged injury must be fairly traceable to the challenged action of the defendant; and (iii) it must be likely, not merely speculative, that a favorable decision will redress the injury. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*

574, 604 (1983) (government had a compelling interest in eliminating racial discrimination in private education).

Plaintiffs' reliance on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) for the proposition that CADA's public accommodations law is neither neutral nor generally applicable is misplaced. That case involved an ordinance whose "object" was "suppression of the central element of the ... worship service" of a disfavored religion. *Id.* at 534. The Supreme Court's reasoning there has never been extended to suggest that a generally applicable public accommodations law like Colorado's – which "serves the State's compelling interest in eliminating discrimination," *Bd. of Dirs. Of Rotary Int'l*, 481 U.S. at 549 – cannot be applied to prevent discrimination against same-sex couples or any other identifiable group of customers.²

Further, CADA's public accommodations law protects everyone in Colorado from discrimination because of "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry . . ." (# 49, ¶1). CADA does

² Plaintiffs quote one Colorado Civil Rights Commissioner expressing the opinion that religion has been used to justify discrimination. (# 48, at p.57; # 48-3). The Court should disregard the statement for three reasons. First, relying on a statement contained in the Plaintiffs' Appendix violates the Court's January 11, 2017 Order because the statement is not a stipulated fact. Second, the statement did not reflect the views of all Commissioners, nor does it show that CADA, generally or as applied, singles out religious conduct for unfavorable treatment in contravention of *Lukumi*. Third, the statement was made during deliberation of a whether to grant a stay, not in deciding the merits of the case. (# 49, ¶103, Exs. C, D, and F).

**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**

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] enjoyment” 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

No. 16-111

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND
JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,

Respondents.

*On Writ of Certiorari to the
Colorado Court of Appeals*

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether applying Colorado's public-accommodation law to compel artists to create expression that violates their sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

PERTINENT CONSTITUTIONAL PROVISIONS

The texts of the First and Fourteenth Amendments to the United States Constitution are found at Pet.App.92a. The relevant portions of the Colorado Anti-Discrimination Act are set forth at Pet.App.93a-95a.

STATEMENT OF THE CASE

A. Factual Background

1. *Phillips's Work as a Cake Artist.* After discovering his artistic talents in high-school art class, Phillips has spent the last forty years honing the craft of elaborate custom cake design. Joint Appendix ("JA") 160. He and his wife own their own family business, Masterpiece Cakeshop, where for the last twenty-four years Phillips has made custom cakes and developed a reputation for his exceptional designs. JA157, 190. Phillips opened Masterpiece to gain greater artistic freedom, better integrate his faith and work, and provide employment for his family and others in the community. JA163-64.

Phillips approaches cake design as an art form. He creates his custom cakes by using several fine-art skills such as sketching, sculpting, and painting. JA160-62; *The Essential Guide to Cake Decorating* 5 (2001) ("*Essential Guide*"). Even Masterpiece's logo, which features an artist's paint palette with a paintbrush and whisk, reflects Phillips's artistic approach. JA160, 172. All who enter his shop are greeted by a drawing of Phillips sketching himself at an easel. JA160, 173.

them that “a wedding has occurred, a marriage has begun, and the couple should be celebrated.” JA162.

Phillips specially crafts every wedding cake he creates. Before designing it, he meets with the couple to learn their desires, personalities, preferences, and wedding details. JA161. Then he sketches the design on paper (often multiple times), sculpts it into shape, creates ornamental and symbolic details to place on it, and decorates it using artistic techniques like hand-painting, air-brushing, and sculpting, JA161-62; *see also* Garrett, *supra*, at 5 (explaining that wedding cakes involve “sculpting, food painting, and hand-shaped ornaments made out of a sugar material”).

Phillips’s artwork serves as a focal point of the marriage celebration and, through it, his expression is present there. JA162. Also, Phillips himself is present when he delivers and sets up the cake, *id.*, and sometimes interacts with the couple’s family and friends, JA163. Many who have seen Phillips’s work at a wedding have later commissioned him to create a custom cake for them. *Id.*

3. *Phillips’s Faith.* Phillips is a Christian who strives to honor God in all aspects of his life, including how he treats people and runs his business. JA157, 163. Phillips closes Masterpiece on Sundays so that he and his employees can attend religious services. JA164. And because of his faith, he pays his employees above the market rate and helps them with financial and personal needs outside of work. JA163-64.

Phillips gladly serves people from all walks of life, including individuals of all races, faiths, and sexual

orientations. JA164. But he cannot design custom cakes that express ideas or celebrate events at odds with his religious beliefs. JA158-59, 164-66. For example, Phillips will not design cakes that celebrate Halloween; express anti-family themes (such as a cake glorifying divorce); contain hateful, vulgar, or profane messages (such as a cake disparaging gays and lesbians); or promote atheism, racism, or indecency. JA165. These limitations on Phillips's custom work have no bearing on his premade baked items, which he sells to everyone, no questions asked.

As core tenets of his faith, Phillips believes that marriage is a sacred union between one man and one woman, and that it represents the relationship of Jesus Christ and His Church. JA157-58. The wedding signifies that the “two [have] become one flesh” and that no one should separate “what God has joined together.” *Id.* Regardless of whether Phillips's wedding clients plan an overtly religious event, he believes that all weddings are sacred and that they create an inherently religious relationship. *Id.* Because weddings and marriage have such religious significance to Phillips, he would consider it sacrilegious to express through his art an idea about marriage that conflicts with his religious beliefs. JA157-59. For this reason, he will not design custom cakes that celebrate any form of marriage other than between a husband and a wife. JA159.

4. *Craig and Mullins's Request.* In July 2012, Charlie Craig and David Mullins visited Masterpiece with Craig's mother, Deborah Munn. JA168. At the time, Colorado did not recognize same-sex marriages. JA169.

It effectively declared that if Phillips communicates on a topic that implicates a protected classification, he must express a contrary message upon request. That, however, “mandates orthodoxy” of expression, “not anti-discrimination.” *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

In addition, the Commission has “exact[ed] a penalty on the basis of the content” of Phillips’s speech and forced him to express views different from his own. *Tornillo*, 418 U.S. at 256. Because he chose to design art celebrating marriages between one man and one woman, the Commission required him to violate his faith by celebrating opposing ideas. Since Phillips cannot do that, the Commission’s order has forced him to shut down his wedding business completely, slashing his income by 40%, forcing the loss of most of his staff, and silencing his artistic voice on marriage. By enthroning itself as master of Phillips’s artistic voice, the Commission invaded the freedom that the First Amendment promises to artists. *See Playboy*, 529 U.S. at 818.

Worse yet, the Commission’s order—which the Colorado Court of Appeals affirmed in full—deepens the compelled-speech injury in two ways. First, the order demands that Phillips report to the Commission every single order that he declines for two years. Pet.App.58a. But the very notion of artistic freedom chafes at a requirement that Phillips must give an account to the government for the use of his artistic discretion. Second, the Commission’s order requires Phillips to reeducate his staff, including his family members, by essentially telling them that he was wrong to operate Masterpiece consistently with his religious beliefs. *Id.* No one should ever be compelled

But the Commission's change of heart appears to be litigation posturing since it continues to take its more extreme position in *303 Creative, LLC v. Elenis*, No. 16-cv-02372-MSK-CBS (D. Colo.) (excerpts of relevant filings reprinted in Addendum). There, a custom website designer named Lorie Smith seeks an injunction ensuring that the Commission cannot compel her to design websites that express ideas (such as support for same-sex marriage) in conflict with her conscience. See Addendum at 12a-20a (reciting relevant stipulated facts from the case, including the stipulation that all Smith's "website designs are expressive in nature, as they contain images, words, symbols, and other modes of expression"). The Commission has argued that if Smith creates websites for weddings, CADA requires her to write words and design images that celebrate same-sex marriages. Addendum at 2a-3a. The Commission justifies its position by insisting that Smith's "website design service is ... not constitutionally protected speech." Addendum at 6a.

Such a narrow reading of the First Amendment threatens the expressive freedom of countless artists and other professionals who create speech for a living. If Respondents have their way, laws like CADA will empower the government to punish (and banish from entire professions) individuals like Phillips who serve all people but decline to express all ideas or celebrate all events. Consistent with *Hurley*, this Court should firmly reject such a constrained reading of the First Amendment. Artists and other speakers must remain free to create expression as their consciences dictate—not as the state demands. Any other outcome would replace the First Amendment's majestic

scrutiny.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Two cases encapsulate this Court’s doctrine on neutrality and general applicability. *Employment Division v. Smith* held that “an across-the-board criminal prohibition” on illegal drug use satisfied both of those requirements, 494 U.S. 872, 884 (1990), while *Lukumi* concluded that ordinances gerrymandered to punish adherents of one faith fell “well below the minimum standard necessary to protect First Amendment rights,” 508 U.S. at 543. Here, the Commission’s discriminatory application of CADA distinguishes this case sharply from *Smith*. By punishing Phillips while protecting cake artists who support same-sex marriage, the Commission’s actions raise many of the neutrality and general-applicability concerns articulated in *Lukumi*.

1. The Commission Has Not Neutrally Applied CADA.

“Official action that targets [specific] religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.” *Lukumi*, 508 U.S. at 534. The Free Exercise Clause “forbids subtle departures from neutrality, and covert suppression of particular religious beliefs.” *Id.* at 534 (quotation marks and citations omitted). To unmask this, neutrality analysis considers “the effect of a law in its real operation,” *id.* at 535, and “the interpretation given to the [statute]” by the state, *id.* at 537.

The Commission has applied CADA to target Phillips’s religious beliefs for adverse treatment. Cake artists who support same-sex marriage may

decline to oppose it, while those who oppose same-sex marriage must support it. *See supra* at 36. In no world is that a neutral interpretation of the law.

Highlighting this differential treatment, the Commission has offered markedly inconsistent analysis when considering whether these two groups of cake artists violate CADA. First, the court below said that the other cake artists could refuse an order because of “the offensive nature of the requested message.” Pet.App.20a n.8. But it is undisputed that Phillips declined Craig and Mullins’s request because he too did not want to express ideas that offend his religious convictions about marriage. To be sure, the requested cakes criticizing same-sex marriage included words. But that is no basis for treating Phillips worse. His custom wedding cakes are “highly distinctive structures” that function as “markers for weddings,” and as such, they inherently express ideas about marriage. Charsley, *supra*, at 121. Accordingly, Phillips’s speech-based decision is entitled to at least as much respect as the speech-based decisions of others.

Second, both the Commission and the court below regarded criticism of same-sex marriage as offensive, while dismissing any suggestion that support for same-sex marriage might be offensive to some. Pet.App.20a n.8; JA237, 246-47. Not only does that logic openly disfavor Phillips’s views, it rests on a notion—offensiveness—that the state has no business invoking when regulating matters of speech and religion. *See Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion).

Third, for the three cake designers who refused to criticize same-sex marriage, the court below considered essential the fact that they served people of all faiths. Pet.App.20a n.8. But for Phillips, his willingness to serve customers of all sexual orientations was dismissed out of hand as a “distinction without a difference.” Pet.App.69a; *see also* Pet.App.19a.

Fourth, the court below told Phillips (1) that his custom wedding cakes do not communicate anything, (2) that even if they did, the expression was not his but his clients, and (3) that no one would attribute meaning to his cakes beyond compliance with CADA. Pet.App.29a-31a. Yet the court did not subject the other cake artists to anything remotely resembling that analysis; instead, it readily accepted that their cakes would communicate a message and that they could refuse to express it. Pet.App.20a n.8.

Fifth, the Commission’s one-sided construction of CADA affords broader protection to LGBT consumers than to people of faith. Indeed, the Commission has expanded CADA’s sexual-orientation protection by refusing to distinguish between speech and status in that context, while simultaneously diminishing the statute’s religious protection by distinguishing between the speech and status of religious people. Such preferential treatment for one group over another contravenes basic notions of neutrality.

Furthermore, the Commission’s discriminatory reading of CADA extends beyond cake designers. Although CADA does not require expressive professionals to create materials with offensive written designs or words, Pet.App.20a n.8, the

Commission insists in the *303 Creative* case that a graphic designer would violate that statute if she declines to build websites with specific designs or words celebrating same-sex marriage. *See* Addendum at 2a-3a, 6a. The Commission thus applies different rules to all expressive professionals depending on their views about same-sex marriage: supporters get a pass, but opponents get punished.

A review of all these situations reveals something striking: people of faith who do not support same-sex marriage always lose. Whether they are the customer requesting an expressive item or the professional declining to create it, the Commission consistently opposes them. This unequal application of the law impermissibly “single[s] out” a specific religious belief “for discriminatory treatment.” *Lukumi*, 508 U.S. at 538; *see also Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 165-68 (3d Cir. 2002) (holding that a selective application of a law against a particular religious practice triggers strict scrutiny).

The reason for this discriminatory treatment is not difficult to discern, for the Commission hardly conceals its disdain for Phillips’s religious views. At a deliberative hearing in this case, one commissioner, with no disagreement from the others, had this to say:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust, whether it be – I mean, we – we can list hundreds of situations where freedom of religion has been used to justify

A. The State’s Asserted Access Interest Is Not Undermined Here, and Its Efforts to Advance It Are Not Narrowly Tailored.

The Colorado Court of Appeals referenced the Commission’s interest in ensuring that “goods and services ... are available to all of the state’s citizens.” Pet.App.50a. But Respondents have introduced no evidence suggesting that same-sex couples have problems accessing cake artists, or any other creators of expression, willing to celebrate their weddings.

Nor could they. See Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 Ind. L.J. 693, 721 (2017) (“[T]here is no evidence of widespread denials of service to gay customers”). The evidence shows that Craig and Mullins acquired (free of charge) a custom-made, rainbow-layered wedding cake from another local cake artist. JA175-76, 184-85. Nothing suggests that they had difficulties doing that. And as our amici explain, same-sex couples in the greater Denver area (where Phillips is located) have ample access to cake artists who will design custom cakes for same-sex weddings. See generally Am. Br. Law and Economics Scholars at Part II.A.

In light of this, affirming Phillips’s religious and expressive freedom in these circumstances does not undermine the Commission’s asserted interest in ensuring that same-sex couples have access to custom wedding cakes. And for the same reasons, punishing Phillips is not narrowly tailored to advance that interest. The state need not strip away Phillips’s freedom for same-sex couples to obtain the artistic wedding cakes they seek.

evidence whatsoever on that point, and thus it has failed to satisfy strict scrutiny.⁹

C. The State’s Dignitary Interest Does Not Satisfy Strict Scrutiny.

Respondents focused much of their arguments below on the Commission’s interest in preventing discrimination that “deprives persons of their individual dignity.” Appellees Ct. App. Br. at 36. Yet an interest in avoiding some dignitary harms—though a real concern in certain circumstances—cannot override Phillips’s First Amendment freedoms and his own equally important dignitary interests.

1. The State’s Dignitary Interest Is Not Compelling in this Case.

“[C]ontext matters’ in applying the compelling interest test.” *Gonzales*, 546 U.S. at 431 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)). The context here is a conscientious man of faith who does not engage in invidious discrimination against any class of people. He will create his custom art for everyone, including LGBT patrons, but he declines all requests (regardless of the requester’s identity) to create custom artistic expression that conflicts with his faith. Phillips did not categorically refuse to serve

⁹ The Colorado Court of Appeals cited one document to support its discussion of the state’s alleged economic interests. See Pet.App.50a (citing Mich. Dep’t of Civil Rights Report). That 2013 report discussed the circumstances in a different state (Michigan), relied extensively on anecdotes and anonymous statements, and focused heavily on the limitations facing same-sex couples before they could marry. Such feeble evidence does not come close to carrying the state’s heavy burden under strict scrutiny.

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JA167 (“It has everything to do with the nature of the wedding”); Rev. Patrick Mahoney Am. Br. 2-13.

As Phillips has explained, and Respondents do not dispute, each of his wedding cakes announces the couple’s union as a marriage and conveys celebratory messages about the event. Pet. Br. 19-21. Like messages communicated through other speech, the ideas expressed through Phillips’s wedding cakes—which are temporary sculptures celebrating the marriage—depend on their context. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 477 (2009) (explaining that “[t]he message” conveyed through “a monument” may “be altered by” location, surroundings, and social milieu); *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (considering “the context in which [speech] occurred”). In particular, a wedding cake at a same-sex marriage celebrates that union as a marriage, which is a message that Phillips cannot in good conscience convey.

Other examples illustrate how artists can quickly decide that a different context would unacceptably alter the meaning of their art:

- African American sculptors who have designed Latin-cross-shaped sculptures for Lutheran churches would know that those same items express different messages if created for an Aryan Nations Church event.
- Catholic artists who have created custom rainbow designs for children’s events at Catholic churches would know that the same artwork conveys different messages if made for an LGBT pride festival.