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FOR THE DISTRICT OF COLORADO
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Jeffrey P. Colwell
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(Appeal Fee Exempt)

Case No: 16-cv-02372-MSK

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

Date Filed: 10/25/2019

Appellant: 303 Creative LLC

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/ S. Phillips
Deputy Clerk

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

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 Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000)).

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

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 Statute 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
Chief Judge Marcia S. Krieger

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

303 CREATIVE LLC, and
LORIE SMITH,

Plaintiffs,

v.

AUBREY ELENIS,
ANTHONY ARAGON,
ULYSSES J. CHANEY,
MIGUEL RENE ELIAS,
CAROL FABRIZIO,
HEIDI HESS,
RITA LEWIS,
JESSICA POCOCK, and
PHIL WEISER¹,

Defendants.

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION
AND MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the Plaintiffs’ Motion for Preliminary Injunction (# 6) and the Plaintiffs’ Motion for Summary Judgment (# 48), the corresponding response and reply briefs, and the parties’ recent supplemental briefing (# 67, 68).

FACTS

Plaintiff Lorie Smith, through her wholly-owned company 303 Creative, LLC (“303”), is engaged generally in the fields of graphic design, website design, social media management and

¹ The Court *sua sponte* modifies the caption in this case to reflect the election of a new Colorado Attorney General since this action was commenced. Phil Wieser is substituted for Cynthia Coffman for purposes of the official capacity claims against the Colorado Attorney General.

consultation, marketing, branding strategy, and website management training. This case concerns Ms. Smith’s intention to expand 303’s business into the design of custom websites for customers planning weddings – that is, websites to keep a couple’s friends and family informed about the upcoming wedding.

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 those beliefs, Ms. Smith desire to limit the scope of her services. Although she is willing to work with all people regardless of their race, religion, gender, and sexual orientation, 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.” This restriction precludes provision of wedding website services for same-sex couples.

Ms. Smith has prepared a proposed statement (“the Statement”) that she intends to post on 303’s website to explain 303’s policies: 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.

Ms. Smith acknowledges that her intended website activities conflict with Colorado law, specifically C.R.S. § 24-34-601(2).² That statute provides:

It is a discriminatory practice and unlawful for a person . . . directly or indirectly, to publish . . . 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 . . . sexual orientation. (Hereafter, the "Communication Clause")

Violations of the Communications Clauses are enforced administratively by the Colorado Civil Rights Commission ("CCRC") and may be independently prosecuted by the Colorado Attorney General.

Believing that these provisions of Colorado law abridge her rights under the U.S. Constitution, Ms. Smith commenced this action against the Defendants, the members of the

² An earlier iteration of Ms. Smith's claims also challenged a separate provision of C.R.S. § 24-34-601(2), insofar as that statute prohibits persons from refusing to provide services to an individual or group because of, among other things, sexual orientation (the "Accommodation Clause"). Claims relating to the Accommodation Clause were dismissed by this Court on standing grounds.

CCRC (in their official capacities), and against Phil Weiser, Colorado's current Attorney General (also in his official capacity). At present, Ms. Smith asserts a challenge to the Communication Clause, contending that it violates the Free Speech, Free Press, and Free Exercise clauses of the First Amendment to the U.S. Constitution, and the Equal Protection and Due Process clauses of the Fourteenth Amendment. Because Ms. Smith has tendered the specific content of the Statement she intends to post, the Court treats her claims as asserting an as-applied challenge.³

Simultaneously with the Complaint, Ms. Smith sought a preliminary injunction (#6) to restrain the CCRC from enforcing the Communication Clause against her and 303. The parties eventually agreed that the Motion for Preliminary Injunction should be determined in conjunction with a determination on the merits through the mechanism of summary judgment. Consequently, the Plaintiffs filed their Motion for Summary Judgment (#48), and the parties filed stipulated facts (#49). Those facts are deemed incorporated herein and discussed in more detail below.

After briefing was completed, 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. This Court deferred consideration of the issues in this case, anticipating a dispositive substantive ruling by the Supreme Court on the issues presented here.

However, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n.*, 138 S.Ct. 1719

³ The CCRC has not given any formal opinion regarding the legality of Ms. Smith's proposed Statement nor threatened her with prosecution if she posts it. In the wake of the Supreme Court's ruling and criticism of the CCRC in *Masterpiece*, it is unclear what, if any, enforcement action the CCRC would seek to take *if* Ms. Smith actually posted her statement. Prior to the Supreme Court's ruling in *Masterpiece*, the Court found (# 52) that Ms. Smith has standing to challenge the application of the Communications Clause to her proposed disclaimer. In the absence of the Defendants tendering additional facts that now call that ruling into question, the Court will continue to assume, without necessarily finding, that Ms. Smith's standing is sufficient to proceed.

(2018), the Supreme Court avoided a ruling on the merits, returning the case to the lower courts. In light of the *Masterpiece* decision (and other decisions by the Supreme Court during the same term), the parties filed supplemental briefs (# 67, 68). The motions for preliminary injunction and summary judgment motions in this case are now ripe for determination.

For purposes of this ruling, the Court need only evaluate Ms. Smith’s summary judgment motion.⁴ That motion was filed prior to the Court’s dismissal of any Accommodation Clause challenge, making it somewhat difficult to extract those remaining arguments that remain pertinent to the Communication Clause itself. It appears to the Court that Ms. Smith alleges that: (i) the CCRC’s anticipated application of the Communication Clause to her Statement violates the Equal Protection clause of the 14th Amendment to the U.S. Constitution because the CCRC does not prosecute similarly-situated businesses expressing different religious beliefs; (ii) the Communication Clause violates the Substantive Due Process clause, in that it is vague and overbroad; (iii) the Communication Clause violates an otherwise unspecified constitutional right to “personal autonomy”; (iv) the Communication clause violates Ms. Smith’s free speech rights in various ways, in violation of the First Amendment; and (iv) the Communication Clause constitutes a substantial burden on Ms. Smith’s free exercise of religion, as guaranteed by the First Amendment, and does not survive strict scrutiny.

ANALYSIS

The Court begins by recognizing certain facts that are not in dispute. As is clear under the Public Accommodations Law, the Colorado legislature has determined that discrimination against persons on the basis of sexual orientation is contrary to the public interest and thus, is

⁴ Because the Court concludes that none of Ms. Smith’s constitutional challenges have merit, it necessarily follows that she cannot establish a likelihood of success on the merits sufficient to support a preliminary injunction.

prohibited in this state. This case does not invite this Court to weigh in on whether that law reflects sound policy or not. Rather, it is simply a fact: it is an unlawful act for a person to discriminate against others on the basis of sexual orientation in Colorado in the circumstances covered by the Public Accommodations Law.

In addition, it appears to be undisputed that the act Ms. Smith wishes to engage in – posting the Statement on her website – would violate the Communication Clause. Ms. Smith concedes that the Statement “indicates that the full and equal enjoyment of the services” that 303 provides “will be withheld from [potential customers] because of sexual orientation” - specifically, that same-sex couples could not hire 303 to design a website for their wedding, even though opposite-sex couples could.

The Court also emphasizes that it is not deciding whether Ms. Smith has a colorable constitutional right to refuse to provide wedding website services to same-sex couples. That question implicates the Accommodation Clause of the Public Accommodations Law which is not challenged.⁵ Instead, in this action the Court is limited to analyzing the constitutionality of the application of the Communication Clause. Thus, the analysis is extremely narrow. The Court assumes the constitutionality of the Accommodation Clause which prohibits discrimination against same-sex couples in the creation of wedding websites.⁶ The only question presented at this juncture is whether the Communication Clause unconstitutionally prohibits Ms. Smith from posting the Statement, which promises (or, if one would prefer, threatens) prospective customers

⁵ The Court has already determined that Ms. Smith lacks standing to challenge anything other than the Communication Clause.

⁶ Whether Ms. Smith would adhere to the representations in the Statement by refusing to actually provide website services to same-sex couples if requested is irrelevant. A violation of the Communication Clause occurs upon the posting of the offending notice or advertisement.

that she will refuse service to customers who wish her to create a wedding website for a same-sex wedding.

As to this issue the parties have stipulated to all pertinent facts, the Court applies the law to those facts to render a determination on the Plaintiffs' summary judgment motion. Fed. R. Civ. P. 56(a).

A. Summary judgment standard

Rule 56 of the Federal Rules of Civil Procedure facilitates the entry of a judgment only if no trial is necessary. *See White v. York Intern. Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary adjudication is authorized when there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Substantive law governs what facts are material and what issues must be determined. It also specifies the elements that must be proved for a given claim or defense, sets the standard of proof and identifies the party with the burden of proof. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989). A factual dispute is "genuine" and summary judgment is precluded if the evidence presented in support of and opposition to the motion is so contradictory that, if presented at trial, a judgment could enter for either party. *See Anderson*, 477 U.S. at 248. When considering a summary judgment motion, a court views all evidence in the light most favorable to the non-moving party, thereby favoring the right to a trial. *See Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

If the movant has the burden of proof on a claim or defense, the movant must establish every element of its claim or defense by sufficient, competent evidence. *See Fed. R. Civ. P. 56(c)(1)(A)*. Once the moving party has met its burden, to avoid summary judgment the

responding party must present sufficient, competent, contradictory evidence to establish a genuine factual dispute. *See Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991); *Perry v. Woodward*, 199 F.3d 1126, 1131 (10th Cir. 1999). If there is a genuine dispute as to a material fact, a trial is required. If there is no genuine dispute as to any material fact, no trial is required. The court then applies the law to the undisputed facts and enters judgment.

If the moving party does not have the burden of proof at trial, it must point to an absence of sufficient evidence to establish the claim or defense that the non-movant is obligated to prove. If the respondent comes forward with sufficient competent evidence to establish a *prima facie* claim or defense, a trial is required. If the respondent fails to produce sufficient competent evidence to establish its claim or defense, then the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Except as may be noted below, Ms. Smith generally bears the initial burden of making a *prima facie* showing that the Communication Clause infringes upon the various constitutional rights she invokes. In certain circumstances, such a showing shifts the burden of proof to the Defendants to defend the constitutionality of the statute.

B. Equal Protection Clause

The Equal Protection Clause of the 14th Amendment requires the state to treat similarly-situated persons similarly, or to provide a sufficient justification for any dissimilar treatment. As a result, an essential element of a claim of an Equal Protection violation is a showing that the plaintiff was similarly-situated to those persons that were treated more favorably. To be “similarly-situated,” the plaintiff’s position must be identical to the comparators “in all relevant

respects,” a particularly fact-intensive inquiry. *Grissom v. Roberts*, 902 F.3d 1162, 1173 (10th Cir. 2018).

Ms. Smith contends that the CCRC “ha[s] applied [the Communication Clause] only to expressive business owners like [herself] that disfavor messages promoting same-sex marriage,” but, in contrast, has refused to cite business who refused requests by customers to produce products bearing a pro-religious message. Specifically, Ms. Smith points to:

- The fact that “the only business that [the CCRC has] prosecuted for declining to create speech promoting an unwelcome message is a Christian Bakery” – that is, Masterpiece Cake Shop.

- That the CCRC refused to prosecute several complaints by a patron whose requests to “secular cake artists” to create cakes with messages criticizing same-sex marriage, promoting white supremacist messages, and denigrating the Koran were denied.

- That the CCRC “does not apply [the Communications Clause] to expressive business owners 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.” The evidence Ms. Smith cites in support of this contention is a website of a Colorado photographer whose webpage included photographs from a same-sex wedding, along with text that states that praises the couple involved and states that “it’s just unfortunate government & religion has not always recognized [same-sex marriage].”

None of the situations identified by Ms. Smith in her briefing involve comparators who are “similarly-situated” to her in all of the pertinent respects. Her citations to the CCRC’s prosecution of Masterpiece Cake Shop, and its refusal to prosecute other bakers who refused to bake particular cakes, do not implicate the Communication Clause, the sole portion of Colorado law that Ms. Smith challenges here. Situations in which a commercial entity actually refused service to a customer implicate the Accommodation Clause, but the Court has dismissed Ms. Smith’s Accommodation Clause challenge. Ms. Smith’s claims here are limited to challenges under the Communication Clause, and she has not shown that the bakers she refers to “publish[ed]” any “notice or advertisement” like the Statement, indicating that certain classes of

individuals would be denied the full enjoyment of those bakers' services. Thus, she is not similarly-situated to those bakers for purposes of an Equal Protection challenge to the Communication Clause.

She is also not similarly-situated to the photographer whose website promotes her willingness to photograph same-sex weddings. The photographer's website's praise of same-sex weddings gives no indication whatsoever that the photographer would refuse to photograph an opposite-sex wedding (or, for that matter, a wedding between two religious adherents).⁷ Because the Communication Clause is only concerned with advertisements or messages that threaten to refuse services on discriminatory grounds, nothing in the photographer's website would violate the Communication Clause in any way. Ms. Smith's own proffered Statement is unambiguous in stating that Ms. Smith intends to refuse her services to same-sex couples: "I will not be able to create websites for same-sex marriages."⁸ Thus, Ms. Smith is not similarly-situated to the photographer. In the absence of evidence that a similarly-situated comparator has received more favorable treatment than Ms. Smith anticipates, the Defendants are entitled to summary judgment on her Equal Protection claim.

C. Due Process Clause

⁷ Although Ms. Smith's affidavit refers only to selected portions of the photographer's website highlighting same-sex weddings, a review of the photographer's "Portfolio" page shows that she has photographed the weddings of numerous opposite-sex couples.

⁸ Because Ms. Smith brings this case as an as-applied challenge, the Court will not speculate as to whether the outcome might be different if Ms. Smith's proposed Statement limited itself to reciting her faith in general terms, without stating an express or implied intention to refuse service to certain categories of individuals. The Court examines only the Statement in its entirety as tendered.

Ms. Smith articulates two theories as to how the Communication Clause violates her rights under the Substantive Due Process Clause.⁹

The Court summarily rejects Ms. Smith’s first challenge, which asserts that the Communication Clause is void for vagueness because its prohibition against notices or advertisements that indicate that a putative customer’s patronage or presence “is unwelcome, objectionable, unacceptable, or undesirable” uses concepts that are so ill-defined as to invite the risk of arbitrary and discriminatory enforcement by the CCRC. Although the Court is unpersuaded by this argument, it need not reach it. Even if the Court were to agree that the quoted language in the Communication Clause were unconstitutionally vague and struck it, the remaining unchallenged portion of the Communication Clause would still suffice to render Ms. Smith’s Statement unlawful. As noted above, Ms. Smith’s Statement unambiguously states that she intends to deny certain services to individuals preparing for a same-sex wedding. Because unambiguous provisions of the Communication Clause clearly proscribe the message Ms. Smith seeks to convey, she cannot successfully challenge some other portion of the Communication Clause on vagueness grounds. *See Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144, 1151 (2017).

Ms. Smith’s second argument is less well-defined, seemingly assembled from selective snippets extracted, without context, from various Supreme Court opinions. She asserts that she has a constitutionally-guaranteed “right to own and operate her own expressive business,” and that the Communication Clause deprives her of that right. Her sources for such a claim are off-point. First, quoting *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), she argues that the

⁹ Although her briefing refers to asserting Procedural Due Process claims as well, none of her theories fit squarely within that rubric. Thus, the Court has evaluated her arguments through the lens of the Substantive Due Process clause only.

Fourteenth Amendment confers upon her a constitutional right “to engage in any of the common occupations of life . . . and to worship God according to the dictates of [her] own conscience.” The quoted passage is mere dicta, listing a variety of the rights that the Supreme Court has found to be secured by the concept of “liberty” guaranteed by the 14th Amendment; it also includes “the right of the individual to contract, . . . to acquire useful knowledge, to marry, establish a home and bring up children,” and others. *Roth* certainly does not stand for the proposition that the 14th Amendment guarantees individuals the right to operate a business constrained only by their religious beliefs; rather, *Roth* held that a non-tenured university professor had no constitutionally-guaranteed interest in continued employment or renewal of his teaching contract, absent a showing that the state had stigmatized him or restricted his ability to obtain other work.

She also cites *Reno v. Flores*, 507 U.S. 292, 301-02 (1993), for the proposition that “when the government infringes upon such liberty interests” – presumably the interest in engaging in an occupation and worshipping God – “courts apply strict scrutiny.” *Flores* does state that strict scrutiny review applies to governmental infringements on “certain fundamental liberty interests,” but the very next sentence of *Flores* is even more germane here. It emphasizes that a Substantive Due Process analysis “must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.” *Id.* *Flores* refused to find that juvenile immigration detainees who lacked available relatives had a constitutionally-guaranteed right to be released to the custody of other private custodians, rather than being detained in state child-care institutions. It further noted that “the mere novelty of such a claim is reason enough to doubt that substantive due process sustains it.” *Id.* at 303. Thus, to the extent *Flores* has some relevance to this case, it is not in support of Ms. Smith’s vague invocation of a constitutional

right to engage in a business that follows her religious beliefs instead of state law. Indeed, *Flores* suggests that the Court should exercise restraint in recognizing new constitutional rights worthy of protection under the Substantive Due Process clause. It is not enough to cobble together an asserted constitutional right from isolated sentences and clauses found scattered among various Supreme Court cases, and thus, the Court finds that Ms. Smith’s vaguely-defined Substantive Due Process claim invoking her right to operate an “expressive business” constrained only by “the dictates of her own conscience” fails.

D. “Personal autonomy”

Ms. Smith’s briefing also detours into an ill-defined claim that the Communication Clause infringes upon a judicially-recognized “right of citizens to have dignity in their own distinct identity,” citing *Obergefell v. Hodges*, 135 S.Ct. 2584, 2596 (2015). She argues that if cases like *Obergefell* can afford constitutional protection to “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and belief,” that same rationale should apply to protect “identity grounded in sincerely held religious beliefs” as well. The problem with this argument is that the Constitution already affords protections to religious beliefs pursuant to the Free Exercise and Establishment Clauses. There is little need to contort the principles underlying *Obergefell* – a case recognizing that the fundamental right to marry extends to same-sex marriages – into a new right protecting religious exercise when such protections exist within the First Amendment. Accordingly, to the extent any of Ms. Smith’s claims invoke this claimed constitutional right to “personal autonomy” or “personal identity,” they duplicate her other First Amendment challenges.

E. Free Speech

Ms. Smith offers several arguments as to why the Communication Clause violates the guarantee of Free Speech contained in the First Amendment. Several of those arguments, proffered before the Court dismissed her challenge to the Accommodation Clause, are no longer viable. For example, her argument that Colorado law impermissibly compels her to speak when she would prefer to remain silent might have been cognizable as a challenge to the Accommodation Clause – that is, if a customer had actually asked her to create a same-sex wedding website and she refused – but one can hardly say that the Communication Clause compels her to speak. To the contrary, the Communication Clause prohibits Ms. Smith from engaging in the very speech she wishes to engage in: posting her Statement. Thus, the Court ignores Ms. Smith’s arguments that are not germane to the Communication Clause. Similarly, Ms. Smith offers extensive argument as to whether her creation of wedding websites, like the creation of cakes in *Masterpiece*, is itself expressive conduct entitled to constitutional protection. Again, because this case has been narrowed to address only the Communication Clause, the Court does not reach that issue. The sole question before this Court concerns the Statement that Ms. Smith wishes to post on 303’s website. Thus, the Court turns to those arguments by Ms. Smith that are germane to that limited issue.

1. Content-neutrality

Ms. Smith’s first pertinent argument is that the Communication Clause acts as an impermissible content-related restriction on her proposed speech in the Statement. As a general rule, the government is prohibited from regulating speech based upon its content or the particular message it conveys. Such content-based restrictions are presumptively unconstitutional, and the government bears the burden of showing that they are narrowly-tailored to serve compelling

governmental interests. *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

However, the Supreme Court has recognized that the government may engage in a content-based restriction to prohibit speech that proposes an illegal act or transaction. In *Pittsburgh Press Co. v. Human Relations Commn.*, 413 U.S. 376 (1973), the City of Pittsburgh’s Human Relations Ordinance prohibited, among other things, discrimination in employment on the basis of sex. In furtherance of that proscription, the city’s Human Relations Commission promulgated an ordinance that prohibited employers from “publish[ing] or circulat[ing] any notice or advertisement relating to employment . . . which indicates any discrimination because of sex,” and further prohibited any person from assisting an employer in doing any act that violated the ordinance. The Commission prosecuted a newspaper publisher that published “help wanted” classified ads that were categorized separately as jobs of “Male Interest” and “Female Interest” based on the employer’s specifications. The newspaper challenged the ordinance as violating the First Amendment. *Id.* at 378-80.

The Supreme Court rejected the newspaper’s First Amendment challenge. It stated that “we have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.” It conceded that unlawful sex discrimination might be “less overt” than those examples, but no different in principle: such discrimination was prohibited by the ordinance and the legality of such a prohibition was not subject to challenge in the case. The Court held that “[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the

commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.” *Id.* at 388-89.

More recently, the Supreme Court hinted that this same line of analysis remains viable (albeit under a somewhat different rubric). In *R.A.V.*, the Court implied that “sexually derogatory ‘fighting words’” could be regulated by the government because they “may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.” 505 U.S. at 389-90. *R.A.V.* suggested that such a regulation would be valid under the Court’s “secondary effects” jurisprudence – that [w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *Id.*

These cases suggest that the Communication Clause, although nominally content-based, nevertheless survives constitutional scrutiny (so long as the Accommodation Clause is constitutional, which this Court assumes it is for purposes of this ruling). Much as the extant law in *Pittsburgh Press* prohibited sex discrimination, it is undisputed here that Colorado law prohibits discrimination on the basis of sexual orientation in the provision of public accommodations like those provided by 303. Thus, Ms. Smith’s Statement expressing her intention to engage in such discrimination, like the newspaper’s advertising of sex-segregated jobs, is a statement promoting an act that is illegal. *Pittsburgh Press* makes clear that the government’s ability to regulate unlawful economic activity allows it to prohibit advertisements of this type, even if it must do so by defining the prohibited message based on its content. *R.A.V.* reinforces this idea: the government may prohibit speech that would violate duly enacted anti-discrimination laws, even if it does so by reference to the speech’s content, because the government’s target is not the speech’s “expressive content” but rather its tendency to cause the

prohibited discrimination. The same concerns clearly underlie the Communications Clause here: the CCRC is not targeting Ms. Smith because of the expressive content of her Statement – that is, her professed love of weddings or even her belief that God calls her to make wedding websites. It targets her because her express statement that she “will not . . . create websites for same-sex marriages” is a specific promise to engage in unlawful discrimination against customers based on their sexual orientation.¹⁰ In such circumstances, the analysis of *Pittsburgh Press* (and the dicta of *R.A.V.*) make clear that the Communication Clause does not run afoul of the Free Speech clause of the First Amendment.

2. Overbreadth

Ms. Smith also makes a somewhat unclear argument that the Communication Clause is overbroad because it potentially applies to “newspapers, book publishers, printers, web designers, and other creative professionals who deal in pure speech.” She argues that these types of businesses – presumably of which she considers 303 to be one – “have the constitutional right to (1) create speech that accords with their beliefs; (2) solicit the expressive work they desire, and (3) decline to create speech with which they disagree.”

This argument fails to hit the Communication Clause target. The Communication Clause simply prohibits Ms. Smith from stating that she will not provide 303’s wedding website services to same-sex couples. It does not prohibit her from “solicit[ing] expressive work” – presumably wedding websites – generally, nor does it appear to prohibit her from “creat[ing] speech that accords with” her love of God or her view of the significance of marriage. And, as noted above, noting in the Communication Clause compels her to “create” any speech that she might disagree

¹⁰ Once again, this Court expresses no opinion as to whether a differently-worded Statement might be analyzed differently.

with, it simply prevents her from stating her intention to unlawfully discriminate. As such, the Court sees no colorable overbreadth challenge that Ms. Smith can bring against the Communication Clause.

3. Free speech vs. Nondiscrimination laws

Finally, Ms. Smith argues that “where free speech and nondiscrimination laws come into conflict, free speech wins,” and thus, the Court should strike down any anti-discrimination law, including the Communications Clause, that purports to prohibit or regulate otherwise expressive speech. Pithy as it may be, Ms. Smith’s argument is not an accurate statement of the law.

Cases like *Pittsburgh Press* make clear that the government’s interest in eradicating unlawful discrimination trumps the free speech rights of a person who wishes to advertise their willingness to unlawfully discriminate. Similarly, statutes like Title VII may expose a speaker or employer to liability for engaging in discriminatory remarks or comments that could be argued to constitute protected First Amendment speech, yet no court has ever declared that Title VII must yield to a speaker’s constitutional right to utter discriminatory speech in the workplace. In *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), an employer accused of discriminating against female candidates for partnership argued that Title VII’s anti-discrimination policies violated its First Amendment right to freedom of association. The Supreme Court disagreed, explaining that “invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.” See also *Baty v. Willamette Industries, Inc.*, 172 F.3d 1232, 1246 (10th Cir. 1999) (“ Title VII, in general, does not contravene the First Amendment”); *R.A.V., supra* (acknowledging that Title VII’s anti-discrimination requirements might justify content-based restrictions on otherwise-protected speech).

To be sure, there have been occasions where First Amendment speech or associational rights have been found to prevail over the application of state anti-discrimination laws. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Supreme Court weighed the tension between a state law requiring non-discrimination on the basis of sexual orientation in public accommodations and the free expression rights of the organizers of a St. Patrick’s Day parade who refused to allow a unit of gay and lesbian marchers to participate. The trial court ruled in favor of the marchers, ordering the organizers to allow the marchers in the parade. On appeal, the Supreme Court reversed. It drew a careful distinction between the public accommodation of the parade itself – which gay and lesbian individuals could participate in as, say, members of marching bands or other social groups invited to march – and the organizers’ message embodied by the parade as a whole. “The state courts’ application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation,” the Court explained, such that “any contingent of protected individuals with a message would have the right to participate in petitioners’ speech.” Doing so would deprive the organizers of the ability to choose the content of the message the parade was to convey. 515 U.S. at 573. The Court acknowledged that the anti-discrimination law in question served a valuable purpose in ensuring that gay and lesbian individuals would have equal access to public accommodations, but held that it could not be applied to expressive activity where “its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose.” *Id.* at 578.

But *Hurley* acknowledges limits in application of its teachings. It notes that “the State may at time prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information,” expressly citing *Pittsburgh*

Press, among others. 515 U.S. at 573. *Hurley* states that “outside that context” – commercial advertising – the government “may not compel affirmance of a belief with which the speaker disagrees,” implicitly suggesting that within the realm of commercial advertising, the state may require a speaker to acknowledge the state’s non-discrimination objectives (even if the speaker does not subjectively believe in them). *Id.* Here, the Communications Clause is expressly directed at advertising and other written promotional messages concerning public accommodations and services. Measured by the Supreme Court’s reasoning, Ms. Smith’s claims fall within the ambit of *Pittsburgh Press* analysis, rather than that found in *Hurley*. As explained above, *Pittsburgh Press* holds that an advertiser’s speech rights must yield to the state’s anti-discrimination interests. Because Ms. Smith’s posting of the Statement occurs in the context of advertising or promoting the business of 303 (and not, say, in Ms. Smith’s own private website or social media page), the same result applies. Thus, Ms. Smith’s free speech challenge to the Communication Clause fails.

F. Free Exercise

Finally, the Court comes to that portion of the First Amendment that guarantees Ms. Smith the right to engage in the free exercise of her religious beliefs. The Court accepts as true that Ms. Smith’s objections to same-sex marriage derive from her religious beliefs and are sincerely held. The Court will also assume (without necessarily finding) that the Communication Clause’s prohibition against Ms. Smith announcing the effects of her religious beliefs via 303’s advertising constitutes a substantial burden on Ms. Smith’s exercise of her religious beliefs.

The level of scrutiny applied to a state law like the Communications Clause depends on whether the law is one of general applicability whose burden on religious exercise is only incidental or whether the law is one that specifically seeks to regulate conduct because of that

conduct’s religious motivation. That distinction is aptly demonstrated by *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

In *Smith*, the plaintiff was an adherent of the Native American Church. He participated in rituals of that church that included followers ingesting peyote, a psychedelic plant that was regulated by federal and state law as a controlled substance. When his employer, a drug rehabilitation organization, learned of his peyote use, it terminated his employment. The plaintiff then applied for unemployment benefits from the State of Oregon, but the state found that his unlawful use of a controlled substance constituted “misconduct” that disqualified him from receiving such benefits. The plaintiff sued the state, arguing that denial of benefits violated his free exercise rights under the First Amendment. In assessing the interplay between the state law prohibiting the use of controlled substances and the plaintiff’s use of peyote in exercise of his religious beliefs, the Supreme Court began by recognizing that a state would likely be violating the First Amendment if it prohibited certain acts – such as the use of a particular substance – “only when they are engaged in for religious reasons or only because of the religious belief that they display.” 494 U.S. at 877-78 (emphasis added). But it drew a distinction between that situation and a state law requiring “an individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious beliefs forbid (or requires).” *Id.* at 878. In the latter situation, the Court explained, “prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision.” *Id.* Because the prohibition on the use of peyote was a law of general applicability, applying to all persons in Oregon and enacted for reasons unrelated to religious suppression, the Court affirmed the denial of benefits to Mr. Smith, even though the

law had the incidental effect of suppressing his religious exercise. Put differently, the Court refused to grant Mr. Smith a religious exemption to an otherwise valid law of general applicability.

In *Lukumi*, the religion in question was Santeria, a faith whose rituals included the practice of animal sacrifice. When members of the church announced an intention to found a house of worship in the city of Hialeah, Florida, city officials expressed “concern . . . that certain religions may propose to engage in practices which are inconsistent with public morals, peace, and safety.” Thereafter, the city enacted several ordinances that prohibited, among other things, the killing of an animal “in a public or private ritual or ceremony not for the primary purpose of food consumption.” The church sued to overturn the ordinances as a violation of its free exercise rights. The Supreme Court summarized its prior rule in *Smith* as stating that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” 508 U.S. at 531. But it held that a law that was not both “of general applicability” and “neutral” would be subject to strict scrutiny, requiring the government to demonstrate a compelling interest and narrow tailoring. The Court found that the ordinances in question were not “neutral,” because they were specifically directed at animal sacrifices because of their religious motivation, hence the city’s use of words like “ritual” and “sacrifice.” The Court also found that the law was not one of “general applicability,” because they were carefully drafted only to target religiously-motivated animal killings and not, say, animal killings resulting from sport fishing and the euthanizing of stray animals. Thus, the Court held that the ordinances should be subject to strict scrutiny and, upon such scrutiny, struck them down.

Here, the Communication Clause is both neutral and of general applicability. Unlike the ordinances in *Lukumi*, there is no suggestion that it is not neutral – that is, that it was specifically enacted in response to and with the purpose of frustrating anyone’s religious exercise. In 2008, the Colorado legislature added sexual orientation as a prohibited basis for discrimination in Colorado’s existing anti-discrimination framework governing public accommodations, housing, employment, club licensing, juror service, and various other incidents of daily life. 2008 Colo. Legis. Serv. Ch. 341 (S.B. 08-022). The parties have not proffered any legislative history that addresses the reasons for the legislature’s actions in 2008, although it is notable that Section 1 of S.B. 08-200 provides that “the general assembly hereby finds, determines, and declares that nothing in this act is intended to impede or otherwise limit the protections contained in section 4 of article II of the state constitution concerning the free exercise and enjoyment of religious profession and worship,” suggesting that the legislature’s goal was not to suppress religious exercise.

Moreover, the Communications Clause has general applicability, regulating the statements that discriminate against same-sex couples regardless of whether such statements are based on religious or other beliefs. There is nothing inherent in discrimination on the basis of sexual orientation that suggests that such a practice is necessarily linked to a particular religion or with religion itself. The Communications Clause is equally applicable to sexual orientation discrimination that arises from purely secular prejudices – for example based on fears that homosexuals will transmit HIV/AIDS, will transmit homosexuality itself, will attempt to “convert” heterosexuals to a “gay lifestyle”, will engage in pederasty or rape or other forms of sexual licentiousness, will cause society’s extinction because they do not reproduce, and so on. Such views can exist independently from any religious belief. Thus, a law that seeks to eradicate

sexual orientation discrimination is not inherently a law that targets religious exercise; rather, it is a law of general applicability that only incidentally affects those whose opposition to same-sex marriage springs from religious, not merely secular, objections.

Neutral laws of general applicability will be upheld against First Amendment challenge if the government demonstrates that the law is rationally related to a legitimate governmental interest. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006). Ms. Smith does not contend that the Communication Clause does not satisfy this deferential standard. Indeed, states have a paramount interest in protecting historically-disfavored groups from discrimination in the provision of public services.¹¹ *See e.g. R.A.V.*, 505 U.S. at 395 (stating that “we do not doubt” that the state interests in “ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination . . . are compelling”); *Board of Directors of Rotary Intl. v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (recognizing compelling state interest in “eliminating discrimination against women”). If the state’s interest in preventing discrimination on the basis of sexual orientation is compelling, it necessarily must follow that the state has a similarly-compelling interest in preventing persons or businesses from threatening to do that which the law prohibits. For example, the state’s interest in prohibiting businesses from engaging in racial discrimination would be rendered a mockery if businesses could nevertheless post a “WHITES ONLY” sign near the entrance to the business with the intent of discouraging patronage, even if the proprietors agreed to admit any minority individuals who dared to ignore the sign and seek entrance. Thus, the Court finds that the

¹¹ Ms. Smith has not argued that the State of Colorado’s decision to extend anti-discrimination protection on the basis of sexual orientation presents a less compelling governmental interest than does extending anti-discrimination protections to other protected classes. Cases like *Obergefell* and *Lawrence v. Texas*, 539 U.S. 558 (2003), make it abundantly clear that same-sex couples enjoy the same rights to equal protection of the laws as others.

Communication Clause is supported by an important (indeed, compelling) state interest in discouraging discrimination against protected groups. For the same reasons, the Court also finds that the Communication Clause is rationally related to the state’s interest in discouraging discrimination in the provision of public accommodations and business services.¹²

Accordingly, Ms. Smith cannot show that the Communication Clause violates her free exercise rights under the First Amendment.

G. Order to Show Cause

¹² Were the Court to instead apply strict scrutiny analysis to the Communication Clause, as Ms. Smith proposes it should, its conclusion would remain the same. The state’s interest in discouraging discrimination in public services is not only important, it is also compelling. Although the parties offer a minimal factual record on this point, the Court is hard-pressed to conceive of a less-restrictive means by which the state could serve that interest than by prohibiting business owners from advertising their intention to engage in acts of discrimination that are prohibited by law.

Ms. Smith proposes that Colorado could impose less-restrictive measures by, say, applying the Communication Clause only to threats by business owners to discriminate in providing employment, rather than other services. (Ms. Smith distinguishes between “the means by which citizens support their families” and “pure luxur[ies]” such as wedding websites.) But in doing so, she ignores the scope of the Accommodation Clause. The state’s compelling interest in it is to ensure that citizens can access all types of public accommodations without discrimination. It makes no distinction between necessary and luxury services. Because the Court must assume its constitutionality, and it is evident that the Communications Clause is designed to serve the same purposes, the measures that Ms. Smith suggests would be impermissibly narrow.

Ms. Smith also suggests that the state does not need a Communication Clause for industries where there are many competing providers and “powerful market forces weigh in favor” of those businesses providing services without discrimination. In short, Ms. Smith suggests that because there are many wedding website providers who don’t discriminate on the basis of sexual orientation, same-sex couples would not be harmed if only she (and presumably like-minded website creators) were allowed to promote their intention to do so. As the Court explained in *Fulton v. City of Philadelphia*, ___ F.3d ___, 2019 WL 1758355 (3d. Cir. Apr. 22, 2019), “[t]he government’s interest lies not in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do.” Thus, exempting Ms. Smith from the Communication Clause simply because she is one of only a few business owners that wish to engage in unlawful discrimination is not a less-restrictive means of achieving the state’s compelling interest in eradicating discrimination altogether.

Pursuant to Fed. R. Civ. P. 56(f), where consideration of a motion for summary judgment appears to indicate that not only should the motion be denied but that it may also be appropriate to enter judgment in favor of the non-movant, the Court should give the parties notice and an opportunity to be heard as to why such judgment should not be entered.

Here, the parties represented to the Court on January 11, 2017 that all of the pertinent evidence necessary for resolving the motions for injunctive relief and summary judgment were undisputed and that the matters could be decided entirely on briefs. Having now had the opportunity to consider the parties' stipulated facts, and in light of the analysis above, it would appear to the Court that it is appropriate to enter summary judgment in favor of the Defendants on all claims. Accordingly, within 21 days of this Order, the Plaintiffs shall show cause why summary judgment should not be entered in favor of the Defendants.

CONCLUSION

For the foregoing reasons, the Court **DENIES** the Plaintiffs' Motion for Preliminary Injunction (# 6) and Motion for Summary Judgment (# 48).

Dated this 17th day of May, 2019.

BY THE COURT:



Marcia S. Krieger
Senior United States District Judge

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

Civil Action No. 16-cv-02372-MSK

303 CREATIVE LLC, and
LORIE SMITH,

Plaintiffs,

v.

AUBREY ELENIS,
CHARLES GARCIA,
AJAY MENON,
MIGUEL RENE ELIAS,
RICHARD LEWIS,
KENDRA ANDERSON,
SERGIO CORDOVA,
JESSICA POCOCK, and
PHIL WEISER,

Defendants.¹

OPINION AND ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER comes before the Court pursuant to the Court’s May 17, 2019 Opinion and Order Denying Motion for Summary Judgment (# 72), and the Plaintiffs’ brief in response (# 74).

The Court assumes the reader’s familiar with the proceedings to date and the specific contents of the May 17, 2019 Order, which the Court deems incorporated herein by reference. In summary, Ms. Smith is the owner of 303 Creative, LLC (“303”),² and engaged in the business of

¹ The caption of this action has been amended consistent with the Defendants’ Notice of Substitution of Parties (# 78).

² For purposes of convenience, the Court will typically refer to both Plaintiffs jointly as either “Ms. Smith” or “303,” except where it is necessary to specifically identify distinguish between them.

creating customized wedding websites for her clients. Ms. Smith is a devout Christian, believes in “biblical marriage,” and opposes the extension of marriage rights to same-sex couples. Thus, she intends to decline any request that a same-sex couple might make to her to create a wedding website. That policy would appear to violate C.R.S. § 24-34-601(2), which prohibits discrimination in the provision of goods and services on various bases, including on the basis of sexual orientation (“the Accommodations Clause”). Ms. Smith also wishes to post a statement (“the Statement”) on 303’s website, advising of her policy and the reasons therefor. The posting of such a statement would appear to violate a separate provision of C.R.S. § 24-34-601(2), which prohibits the publication of any communication that advises that goods or services will be refused to patrons on the basis of, among other things, sexual orientation (“the Communications Clause”).

Before she posted her Statement and before any enforcement action was taken (or even threatened) against her, Ms. Smith and 303 commenced this action seeking a declaratory judgment that both the Accommodations Clause and the Communications Clause of C.R.S. § 24-34-601(2) violated her rights under the Free Speech and Free Exercise clauses of the First Amendment to the U.S. Constitution and the Equal Protection and Due Process clauses of the Fourteenth Amendment. This Court subsequently found that Ms. Smith could not demonstrate standing sufficient to support her challenge to the Accommodation Clause. Thus, the Court dismissed the claims directed at that clause, leaving only Ms. Smith’s challenge to the Communications Clause.

Ms. Smith moved for summary judgment in her favor on her claims. In the May 17, 2019 Order, this Court denied Ms. Smith’s motion. The Court further noted that, on the undisputed facts, it appeared that the Defendants were entitled to judgment in their favor on all of Ms.

Smith's claims. Pursuant to Fed. R. Civ. P. 56(f), the Court advised Ms. Smith of its intention to grant summary judgment to the Defendants and invited her to submit any further briefing and evidence that she desired on the issues in the motion. Ms. Smith filed a brief (# 74) and certain additional factual material (# 75), as well as two subsequent notices of supplemental authority (# 76, 77). The Court has considered those filings and, for the reasons set forth in May 17, 2019 Order, as supplemented herein, finds that judgment in favor of the Defendants is appropriate.

The Court deems its discussion in the May 17, 2019 Order to be incorporated herein and will neither repeat nor summarize that analysis. The Court uses the instant order to address any new legal and factual arguments raised by Ms. Smith in her response brief.

Ms. Smith first argues that this Court should not assume the legality of the Accommodation Clause, and should instead analyze Ms. Smith's constitutional challenges to that statute as well when considering her Communication Clause challenges. The cases Ms. Smith cites in support of this proposition are inapposite. *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 651 n. 9 (6th Cir. 1991), involved a statute that prohibited the publication of real estate advertisements that indicate the advertiser's intention to discriminate among prospective clients and purchasers on the basis of (among others) race. A housing-oriented community group sued a newspaper under that law, arguing that the newspaper routinely published real estate advertisements that almost universally contained photos of white models (thus implicitly discouraging minorities from applying for housing). Noting in *Housing Opportunities* stands for the proposition that the court, in assessing the ban on discriminatory advertising, should not have assumed the legality of any other statute. Ms. Smith instead cites *Housing Opportunities* for a bit of dicta set forth in a footnote. After noting that the advertisements in question did not "relate[] to an illegal activity," the court proceeded to

speculate about how its analysis might apply “if these advertisements were considered illegal.” The court explained that “[w]hen analyzing the constitutional protections accorded a particular commercial message, a court starts with the content of the message and not the label given the message under the relevant statute.” It goes on to state that “[s]tarting with the language of a statute would foreclose a court from ever considering the constitutionality of particular commercial speech because the statute would label such speech illegal and thus unprotected by the first amendment. Constitutional review by a court is not so easily circumvented.” 942 F.2d at 651 n. 9. But this footnote is referring to the court overlooking statutes that declare the advertisement itself to be illegal, not statutes that prohibit the conduct the advertisement is promoting. In other words, this Court does not deem Ms. Smith’s Statement to propose an unlawful act simply because the Communications Clause declares the Statement to be unlawful. Consistent with *Housing Opportunities*, this Court looks past the Communications Clause’s label and considers the content of the speech. But the content of Ms. Smith’s speech is unlawful because it proposes an action made unlawful by an entirely different statute – the Accommodation Clause. Nothing in *Housing Opportunities* suggests that this Court should ignore the effect of an entirely different statutory provision when assessing the legality of Ms. Smith’s Statement.

That principle is illustrated more clearly by *Bigelow v. Virginia*, 421 U.S. 809 (1975), the case upon which *Housing Opportunities* relies. In *Bigelow*, Virginia law prohibited the publication of any communication encouraging the procuring of an abortion. A newspaper publisher in Virginia ran an ad from a business in New York State that informed readers that “abortions are now legal in New York. There are no residency requirements. . . We will make all arrangements for you.” Virginia prosecuted the publisher under its statute and the publisher, and

the publisher appealed his conviction citing First Amendment protections. The Supreme Court reversed the conviction, finding that the advertisement was commercial speech that enjoyed First Amendment protection. Addressing the argument that the advertisement forfeited First Amendment protection because it proposed an illegal act, the Supreme Court noted that abortion services were legal in New York at the time. Thus, it explained, a state “may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.” 421 U.S. at 824-25. In other words, the Supreme Court ignored the superficial fact that Virginia law purported to declare the advertisement illegal, in the same way that this Court ignores the fact that the Communications Clause declares Ms. Smith’s Statement illegal. Instead, the Supreme Court analyzed whether the content of the advertisement proposed an illegal act. In *Bigelow*, it did not because procuring an abortion was legal in New York. Here, however, Ms. Smith’s Statement proposes to undertake an action that is made illegal by the Accommodation Clause, and thus, her statement forfeits First Amendment protection. More to the point however, nothing in *Bigelow* suggests that the court was required to separately assess the constitutionality of any law other than the law being enforced (the prohibition on advertising abortion services), and thus, *Bigelow* does not support Ms. Smith’s contention that this Court must separately assess the constitutionality of the Accommodation Clause while it evaluates Ms. Smith’s challenge to the Communications Clause.

Similarly, *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 506 (6th Cir, 2008), does not stand for the proposition Ms. Smith asserts. There, the state passed a tax on telecommunications services, but prohibited providers from “separately stating the tax on [customers’] bill[s].” Providers challenged, on First Amendment grounds, the prohibition against advising customers of the tax as a separate line item on bills. The state defended the

challenge in part by arguing that disclosing the tax on customer bills was not speech that enjoyed First Amendment protection because such speech was “illegal” – made so by the very statute the providers were challenging. “[T]hat contention simply chases the [state’s] tail,” the court explained, “[t]he lawfulness of the activity does not turn on the existence of the speech ban itself; otherwise, all commercial speech bans would all be constitutional.” 542 F.3d at 506. Once again, *BellSouth* illustrates a principle distinct from the one that Ms. Smith is urging here. If this Court were to simply declare Ms. Smith’s Statement to be devoid of First Amendment protection because the Communication Clause declared it unlawful, cases like *Bigelow* and *BellSouth* would expose that reasoning as error. But this Court has not done so. This Court finds that Ms. Smith’s statement proposes an unlawful act because it proposes to do something – deny services to same-sex couples -- that a different statute, the Accommodations Clause, prohibits. Nothing in any of the cases Ms. Smith cites suggest that a party challenging an advertising ban can use that challenge to attack an entirely different statute as well (*e.g.* the providers in *BellSouth* using the advertising ban to challenge the telecommunications tax itself; the editor in *Bigelow* using the advertising ban to challenge Virginia’s ban on abortions).

As this Court has already found, Ms. Smith lacks the standing to bring a direct challenge to the Accommodations Clause. Allowing her to use a claim challenging the Communications Clause as a Trojan Horse to challenge the Accommodations clause indirectly would undermine the Court’s prior finding with regard to standing. Accordingly, the Court rejects Ms. Smith’s argument that this Court cannot assume the constitutionality of the Accommodations Clause when evaluating her Communications Clause claim.³

³ Because the legality of the Accommodations Clause lies outside the scope of this Court’s review in this matter, Ms. Smith’s reliance on *Telescope Media Group v. Lucero*, ___ F.3d ___, 2019 WL 3979621 (8th Cir., Aug. 23, 2019), is misplaced. *Telescope* involved a challenge by a

Second, Ms. Smith argues that the Court’s May 17, 2019 Order failed to fully consider her arguments in support of her Free Exercise claim. Specifically, she contends that the Court failed to consider “whether certain statements by members of the Colorado Civil Rights Commission . . . reveal hostility toward [Ms. Smith’s] religious beliefs on marriage.” (Ms. Smith is referring to the same comments that animated the Supreme Court’s reasoning in *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 129-30 (2018).) But such comments are irrelevant to a pre-enforcement challenge like the one Ms. Smith brings here (as compared to a challenge to the circumstances under which the Accommodations Clause was actually enforced against Masterpiece Cake Shop). Whether the members of the Colorado Civil Rights Commission would be biased against Ms. Smith’s religious beliefs or not, if Ms. Smith were cited for violating the Communications Clause, has no

film-making business and its principals who offered to create wedding videos for opposite-sex couples but whose principals opposed, on religious grounds, extending those services to same-sex couples. The plaintiffs challenge Minnesota’s version of the Accommodations Clause and the 8th Circuit, in a divided opinion, reversed the District Court’s dismissal of the plaintiffs’ challenges. The 8th Circuit held that the creation of videos constituted First Amendment speech and that the state’s interest in eradicating discrimination was not sufficiently compelling to overcome the burdens that the law placed on that speech.

Because *Telescope* dealt with a challenge to a version of the Accommodations Clause, not the Communications Clause, its analysis is not relevant here. If Ms. Smith had standing to pursue her Accommodations Clause claims, *Telescope* might be germane. But this Court has carefully limited itself to analyzing only the Communication Clause, and thus, *Telescope* provides no guidance. (In any event, to the extent that the 8th Circuit’s analysis overlaps with certain portions of analysis in this Court’s May 17, 2019 Order, this Court would simply disagree with the 8th Circuit’s analysis, finding it unpersuasive.)

The Court notes that Ms. Smith appears to cite *Telescope*, in part, because it found that the plaintiffs there had standing to bring a pre-enforcement challenge to the Accommodation Clause-type statute., contrary to the finding made by this Court in this case. To the extent Ms. Smith intends her Notice of Supplemental Authority to request that the Court reconsider its September 1, 2017 Opinion and Order addressing Ms. Smith’s standing to bring her Accommodation Clause challenge, the Court finds that Ms. Smith’s simple citation to another case is not sufficient to meaningfully present a motion for reconsideration.

bearing on the question the Court considers at this time: whether Ms. Smith's Statement violates the Communications Clause as a matter of law.

For the foregoing reasons, the Court finds that the Defendants are entitled to summary judgment on all of Ms. Smith's claims in this action. The Clerk of the Court shall enter judgment in favor of the Defendants on all claims and close this case.

Dated this 26th day of September, 2019.

BY THE COURT:



Marcia S. Krieger
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02372-MSK

303 CREATIVE LLC, and
LORIE SMITH,

Plaintiffs,

v.

AUBREY ELENIS,
CHARLES GARCIA,
AJAY MENON,
MIGUEL RENE ELIAS,
RICHARD LEWIS,
KENDRA ANDERSON,
SERGIO CORDOVA,
JESSICA POCOOCK, and
PHIL WEISER,

Defendants.

FINAL JUDGMENT

Pursuant to and in accordance with Fed. R. Civ. P. 58(a) and the Opinion and Order Granting Summary Judgment, filed September 26, 2019, by the Honorable Marcia S. Krieger, Senior United States District Judge, and incorporated herein by reference as if fully set forth, it is hereby

ORDERED that judgment is hereby entered in favor of defendants, Aubrey Elenis, Charles Garcia, Ajay Menon, Miguel Rene Elias, Richard Lewis, Kendra Anderson, Sergio Cordova, Jessica Pocock, and Phil Weiser, and against plaintiffs, 303 Creative LLC and Lorie Smith. It is further

ORDERED that plaintiffs' complaint and action are dismissed with prejudice.

DATED at Denver, Colorado this 26th day of September, 2019.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

s/ Robert R. Keech

Robert R. Keech,
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

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;
CHARLES GARCIA,
KENDRA ANDERSON,
SERGIO CORDOVA,
MIGUEL “MICHAEL” RENE ELIAS,
AJAY MENON,
RICHARD LEWIS, and
JESSICA POCOCK, as members of the Colorado Civil Rights
Commission, in their official capacities, and
PHIL WEISER, Colorado Attorney General,
in his official capacity;

Defendants.

**PLAINTIFFS’ NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Notice is hereby given that Plaintiffs 303 Creative LLC and Lorie Smith hereby appeal to the United States Court of Appeals for the Tenth Circuit the *Final Judgment* in its entirety, ECF No. 80, entered on September 26, 2019, as well as the following orders in their entirety: (1) *Opinion and Order Granting Summary Judgment*, ECF No. 79, entered on September 26, 2019; 2) *Opinion and Order Denying Motion for Preliminary Injunction and Motion for Summary Judgment*, ECF No. 72, entered on May 17, 2019; and 3) *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*, ECF No. 52, entered on September 1, 2017.

Respectfully submitted this 25th day of October, 2019.

s/ Katherine L. Anderson

Kristen K. Waggoner (Arizona Bar. No. 032382)*
Jeremy D. Tedesco (Arizona Bar No. 023497)*
Jonathan A. Scruggs (Arizona Bar No. 030505)*
Katherine L. Anderson (Arizona Bar No. 033104)*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
kwaggoner@ADFlegal.org
jtedesco@ADFlegal.org
jscruggs@ADFlegal.org
kanderson@ADFlegal.org

Attorneys for Plaintiffs

**Admitted to the United States District Court for the District of Colorado.*

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, 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:

Skipper Spear
Senior Assistant Attorney General
Civil Litigation and Employment Law Section
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6435
Fax: (720) 508-6037
skip.spear@coag.gov

Vincent E. Morscher
Senior Assistant Attorney General
Civil Litigation and Employment Law Section
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6435
Fax: (720) 508-6037
vincent.morscher@coag.gov

Billy Lee Seiber
First Assistant Attorney General
Business and Licensing Section
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6435
Fax: (720) 508-6037
billy.seiber@coag.gov

Jack D. Patten, III
Assistant Attorney General
Civil Litigation and Employment Law Section
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6435
Fax: (720) 508-6037
jack.patten@coag.gov

Attorneys for Defendants

s/ Katherine L. Anderson
Katherine L. Anderson (Arizona Bar No. 033104)
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 (facsimile)
kanderson@ADFlegal.org

ALLMTN,APPEAL,JD1,MJ CIV PP,STAYDI,TERMED

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

303 Creative LLC et al v. Elenis et al
Assigned to: Chief Judge Marcia S. Krieger
Case in other court: USCA, 17-01344
Cause: 42:1983 Civil Rights Act

Date Filed: 09/20/2016
Date Terminated: 09/26/2019
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**
Alliance Defending Freedom-
Lawrenceville
1000 Hurricane Shoals Road, NE
Suite D-1100
Lawrenceville, GA 30043
770-339-0774
Fax: 770-339-6744
Email: dcortman@ADFlegal.org
ATTORNEY TO BE NOTICED

Jonathan Andrew Scruggs
Alliance Defending Freedom-Scottsdale
15100 North 90th Street
Suite 165
Scottsdale, AZ 85260
480-444-0020
Fax: 480-444-0028
Email: jscruggs@ADFlegal.org
ATTORNEY TO BE NOTICED

Katherine Leone Anderson
Alliance Defending Freedom-Scottsdale
15100 North 90th Street
Suite 165
Scottsdale, AZ 85260
480-444-0020
Fax: 480-444-0028
Email: kanderson@ADFlegal.org
ATTORNEY TO BE NOTICED

Michael L. Francisco
Statecraft PLLC-Colorado Springs
620 North Tejon Street
Suite 101
Colorado Springs, CO 80903
602-362-0036

Email: michael@statecraftlaw.com
TERMINATED: 05/17/2019

Rory Thomas Gray
Alliance Defending Freedom-
Lawrenceville
1000 Hurricane Shoals Road, NE
Suite D-1100
Lawrenceville, GA 30043
770-339-0774
Fax: 770-339-6744
Email: rgray@adflegal.org
ATTORNEY TO BE NOTICED

Samuel David Green
Alliance Defending Freedom-Scottsdale
15100 North 90th Street
Suite 165
Scottsdale, AZ 85260
480-444-0020
Fax: 480-444-0028
Email: sgreen@ADFlegal.org
ATTORNEY TO BE NOTICED

Jeremy David Tedesco
Alliance Defending Freedom-Scottsdale
15100 North 90th Street
Suite 165
Scottsdale, AZ 85260
480-444-0020
Fax: 480-444-0028
Email: jtedesco@ADFlegal.org
ATTORNEY TO BE NOTICED

Plaintiff

Lorie Smith

represented by **David Andrew Cortman**
(See above for address)
ATTORNEY TO BE NOTICED

Jonathan Andrew Scruggs
(See above for address)
ATTORNEY TO BE NOTICED

Katherine Leone Anderson
(See above for address)
ATTORNEY TO BE NOTICED

Michael L. Francisco
(See above for address)
TERMINATED: 05/17/2019

Rory Thomas Gray
(See above for address)
ATTORNEY TO BE NOTICED

Samuel David Green
(See above for address)
ATTORNEY TO BE NOTICED

Jeremy David Tedesco
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Aubrey Elenis
*Director of the Colorado Civil Rights
Division, in her official capacity*

represented by **Jack Davy Patten , III**
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway
Denver, CO 80203
720-508-6000
Fax: 720-508-6032
Email: jack.patten@coag.gov
ATTORNEY TO BE NOTICED

Leanne B. De Vos
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway
Denver, CO 80203
720-508-6411
Fax: 720-508-6037
Email: leanne.devos@coag.gov
TERMINATED: 01/19/2018

Skippere Stewart Spear
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway
Denver, CO 80203
720-508-6140
Fax: 720-508-6032
Email: skip.spear@coag.gov
ATTORNEY TO BE NOTICED

Vincent Edward Morscher
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway
Denver, CO 80203
720-508-6000

Fax: 720-508-6032
Email: Vincent.Morscher@coag.gov
ATTORNEY TO BE NOTICED

Defendant

Anthony Aragon
*member of the Colorado Civil Rights
Commission in his official capacity*

represented by **Billy Lee Seiber**
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway
Denver, CO 80203
720-508-6435
Fax: 720-508-6037
Email: billy.seiber@coag.gov
ATTORNEY TO BE NOTICED

Eric Holden Maxfield
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway
Denver, CO 80203
720-508-6404
Fax: 720-508-6032
Email: eric.maxfield@state.co.us
TERMINATED: 01/19/2018

Jack Davy Patten , III
(See above for address)
ATTORNEY TO BE NOTICED

Leanne B. De Vos
(See above for address)
TERMINATED: 01/19/2018

Skippere Stewart Spear
(See above for address)
ATTORNEY TO BE NOTICED

Vincent Edward Morscher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Ulysses J. Chaney
*member of the Colorado Civil Rights
Commission in his official capacity*

represented by **Billy Lee Seiber**
(See above for address)
ATTORNEY TO BE NOTICED

Eric Holden Maxfield
(See above for address)
TERMINATED: 01/19/2018

Jack Davy Patten , III

(See above for address)
ATTORNEY TO BE NOTICED

Leanne B. De Vos
(See above for address)
TERMINATED: 01/19/2018

Skippere Stewart Spear
(See above for address)
ATTORNEY TO BE NOTICED

Vincent Edward Morscher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Miguel Rene Elias
*"Michael" member Colorado Civil
Rights Commission in his official
capacity*

represented by **Billy Lee Seiber**
(See above for address)
ATTORNEY TO BE NOTICED

Eric Holden Maxfield
(See above for address)
TERMINATED: 01/19/2018

Jack Davy Patten , III
(See above for address)
ATTORNEY TO BE NOTICED

Leanne B. De Vos
(See above for address)
TERMINATED: 01/19/2018

Skippere Stewart Spear
(See above for address)
ATTORNEY TO BE NOTICED

Vincent Edward Morscher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Carol Fabrizio
*member Colorado Civil Rights
Commission in her official capacity*

represented by **Billy Lee Seiber**
(See above for address)
ATTORNEY TO BE NOTICED

Eric Holden Maxfield
(See above for address)
TERMINATED: 01/19/2018

Jack Davy Patten , III
(See above for address)

ATTORNEY TO BE NOTICED

Leanne B. De Vos
(See above for address)
TERMINATED: 01/19/2018

Skippere Stewart Spear
(See above for address)
ATTORNEY TO BE NOTICED

Vincent Edward Morscher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Heidi Hess
*member Colorado Civil Rights
Commission in her official capacity*

represented by **Billy Lee Seiber**
(See above for address)
ATTORNEY TO BE NOTICED

Eric Holden Maxfield
(See above for address)
TERMINATED: 01/19/2018

Jack Davy Patten , III
(See above for address)
ATTORNEY TO BE NOTICED

Leanne B. De Vos
(See above for address)
TERMINATED: 01/19/2018

Skippere Stewart Spear
(See above for address)
ATTORNEY TO BE NOTICED

Vincent Edward Morscher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Rita Lewis
*member Colorado Civil Rights
Commission in her official capacity*

represented by **Billy Lee Seiber**
(See above for address)
ATTORNEY TO BE NOTICED

Eric Holden Maxfield
(See above for address)
TERMINATED: 01/19/2018

Jack Davy Patten , III
(See above for address)
ATTORNEY TO BE NOTICED

Leanne B. De Vos
(See above for address)
TERMINATED: 01/19/2018

Skippere Stewart Spear
(See above for address)
ATTORNEY TO BE NOTICED

Vincent Edward Morscher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Jessica Pocock
*member Colorado Civil Rights
Commission in her official capacity*

represented by **Billy Lee Seiber**
(See above for address)
ATTORNEY TO BE NOTICED

Eric Holden Maxfield
(See above for address)
TERMINATED: 01/19/2018

Jack Davy Patten , III
(See above for address)
ATTORNEY TO BE NOTICED

Leanne B. De Vos
(See above for address)
TERMINATED: 01/19/2018

Skippere Stewart Spear
(See above for address)
ATTORNEY TO BE NOTICED

Vincent Edward Morscher
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

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

represented by **Jack Davy Patten , III**
(See above for address)
ATTORNEY TO BE NOTICED

Skippere Stewart Spear
(See above for address)
ATTORNEY TO BE NOTICED

Vincent Edward Morscher
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/20/2016	1	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: # 1 Exhibit A to Complaint, # 2 Exhibit B to Complaint, # 3 Summons of Aubrey Elenis, # 4 Summons of Anthony Aragon, # 5 Summons of Ulysses J. Chaney, # 6 Summons of Miguel Rene Elias, # 7 Summons of Carol Fabrizio, # 8 Summons of Heidi Hess, # 9 Summons of Rita Lewis, # 10 Summons of Jessica Pocock, # 11 Summons of Cynthia Coffman, # 12 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	3	SUMMONS issued by Clerk. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons, # 6 Summons, # 7 Summons, # 8 Summons, # 9 Magistrate Judge Consent Form) (dbera,) (Entered: 09/20/2016)
09/20/2016	4	CORPORATE DISCLOSURE STATEMENT. (Tedesco, Jeremy) (Entered: 09/20/2016)
09/20/2016	5	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	6	MOTION for Preliminary Injunction by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # 1 Affidavit of Lorie Smith in Support of Plaintiffs' Preliminary Injunctio, # 2 Appendix Part 1, # 3 Appendix Part 2, # 4 Appendix Part 3, # 5 Proposed Order (PDF Only))(Tedesco, Jeremy) (Entered: 09/20/2016)
09/20/2016	7	BRIEF in Support of 6 MOTION for Preliminary Injunction filed by Plaintiffs 303 Creative LLC, Lorie Smith. (Tedesco, Jeremy) (Entered: 09/20/2016)
09/21/2016	8	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	9	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	10	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	11	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	12	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	13	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	14	NOTICE re 6 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	15	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	16	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	17	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 17 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	19	MEMORANDUM RETURNING CASE. (dkals,) (Entered: 10/05/2016)
10/05/2016	20	CASE REASSIGNED pursuant to 19 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	21	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	22	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 Preparation for Rule 16(b) Scheduling Conference , 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	26	NOTICE re 21 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	27	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	28	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	29	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	30	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	31	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	32	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	33	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	34	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	35	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	36	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 Pocock Attorney 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	37	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	38	RESPONSE to 6 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	39	Proposed Scheduling Order by Plaintiffs 303 Creative LLC, Lorie Smith. (Tedesco, Jeremy) (Entered: 10/31/2016)
11/02/2016	40	REPLY to Response to 6 MOTION for Preliminary Injunction filed by Plaintiffs 303 Creative LLC, Lorie Smith. (Tedesco, Jeremy) (Entered: 11/02/2016)
11/07/2016	41	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 6 Motion for Preliminary Injunction and 37 Motion to Dismiss. FTR: Courtroom A-402. (amont,) (Entered: 11/07/2016)
11/08/2016	42	MEMORANDUM regarding 37 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 (mkssec,) (Entered: 11/08/2016)
11/09/2016	43	RESPONSE to 37 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 6 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	45	REPLY to Response to 37 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	46	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	47	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	48	MOTION for Summary Judgment <i>and Memorandum</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # 1 Affidavit of Lorie Smith, # 2 Affidavit of Jeremy Tedesco, # 3 Appendix in Support of Plaintiffs' Motion for Summary Judgment)(Tedesco, Jeremy) (Entered: 02/01/2017)
02/01/2017	49	STIPULATION re 48 MOTION for Summary Judgment <i>and Memorandum Joint Statement of Stipulated Facts</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L)(Tedesco, Jeremy) (Entered: 02/01/2017)
02/22/2017	50	RESPONSE to 48 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	51	REPLY to Response to 48 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	52	ORDER granting in part and denying in part 37 Motion to Dismiss, and denying 6 Motion for Preliminary Injunction and 48 Motion for Summary Judgment, by Chief Judge Marcia S. Krieger on 9/1/17. (dkals,) (Entered: 09/01/2017)
09/28/2017	53	NOTICE OF APPEAL as to 52 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)
09/29/2017	54	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 53 Notice of Appeal filed by 303 Creative LLC, Lorie Smith to the U.S. Court of Appeals. (Retained Counsel, Fee paid,) (Attachments: # 1 Preliminary Record)(dkals,) (Entered: 09/29/2017)
09/29/2017	55	USCA Case Number 17-1344 for 53 Notice of Appeal filed by 303 Creative LLC, Lorie Smith. (dkals,) (Entered: 09/29/2017)
10/12/2017	56	TRANSCRIPT ORDER FORM re 53 Notice of Appeal, by Plaintiffs 303 Creative LLC, Lorie Smith (Scruggs, Jonathan) (Entered: 10/12/2017)
10/12/2017	57	LETTER TO USCA and all counsel certifying the record is complete as to 53 Notice of Appeal filed by 303 Creative LLC, Lorie Smith. A transcript order form was filed stating that the necessary transcript is already on file. (Appeal No. 17-1344) Text Only Entry (dkals,) (Entered: 10/12/2017)
01/18/2018	58	NOTICE of Entry of Appearance of <i>Counsel</i> by Billy Lee Seiber on behalf of Anthony Aragon, Ulysses J. Chaney, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock Attorney Billy Lee Seiber added to party Anthony Aragon(pty:dft), Attorney Billy Lee Seiber added to party Ulysses J. Chaney(pty:dft), Attorney Billy Lee Seiber added to party Miguel Rene Elias (pty:dft), Attorney Billy Lee Seiber added to party Carol Fabrizio(pty:dft), Attorney Billy Lee Seiber added to party Heidi Hess(pty:dft), Attorney Billy Lee Seiber added to party Rita Lewis(pty:dft), Attorney Billy Lee Seiber added to party Jessica Pocock(pty:dft) (Seiber, Billy) (Entered: 01/18/2018)
01/19/2018	59	MOTION to Withdraw <i>as Counsel</i> by Defendants Anthony Aragon, Ulysses J. Chaney, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (De Vos, Leanne) (Entered: 01/19/2018)
01/19/2018	60	ORDER granting 59 Motion to Withdraw: The Clerk of the Court shall terminate Mr. Maxfield and Ms. De Vos as counsel for the Defendants. By Chief Judge Marcia S. Krieger on 1/19/18. Text Only Entry (msklc2,) (Entered: 01/19/2018)
06/15/2018	61	NOTICE re 52 Order on Motion to Dismiss, Order on Motion for Summary Judgment, Order on Motion for Preliminary Injunction (<i>Notice After U.S. Supreme Court Ruling on Masterpiece</i>) by Plaintiffs 303 Creative LLC, Lorie Smith (Scruggs, Jonathan) (Entered: 06/15/2018)
07/03/2018	62	NOTICE re 52 Order on Motion to Dismiss, Order on Motion for Summary Judgment, Order on Motion for Preliminary Injunction (<i>Notice to the Court Regarding Plaintiffs' Desire to Proceed</i>) by Plaintiffs 303 Creative LLC, Lorie Smith (Scruggs, Jonathan) (Entered: 07/03/2018)
07/12/2018	63	ORDER SETTING SUPPLEMENTAL BRIEFING DEADLINE: The Court notes the request made by the Plaintiffs in their 62 Notice and HEREBY ORDERS that all parties shall submit supplemental briefing regarding <i>Masterpiece</i> , <i>NIFLA</i> , and <i>Janus</i> , and their impact on Plaintiffs' case within 21 days from the date of this Order. by Chief Judge Marcia S. Krieger on 7/12/18. Text Only Entry (msksec,) (Entered: 07/12/2018)
07/30/2018	64	Unopposed MOTION for Extension of Time to <i>Submit Supplemental Briefing</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: 07/30/2018)
07/31/2018	65	ORDER granting 64 Unopposed Motion for Extension of Time to Submit Supplemental Briefing. Extension granted as to all parties up to and including August 6, 2018 . by Chief Judge Marcia S. Krieger on 7/31/18. Text Only Entry (mseksec,) (Entered: 07/31/2018)
08/06/2018	66	NOTICE of Entry of Appearance by Skippere Stewart Spear on behalf of Cynthia H. Coffman, Aubrey Elenis Attorney Skippere Stewart Spear added to party Cynthia H. Coffman(pty:dft), Attorney Skippere Stewart Spear added to party Aubrey Elenis(pty:dft) (Spear, Skippere) (Entered: 08/06/2018)
08/06/2018	67	SUPPLEMENT/AMENDMENT <i>Defendants' Supplemental Brief</i> by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (Spear, Skippere) (Entered: 08/06/2018)
08/06/2018	68	SUPPLEMENT/AMENDMENT <i>Plaintiffs' Supplemental Brief on Masterpiece, NIFLA, and Janus</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # 1 Exhibit 1)(Scruggs, Jonathan) (Entered: 08/06/2018)
08/14/2018	69	USCA Order and Judgment as to 53 Notice of Appeal, filed by 303 Creative LLC, Lorie Smith: this appeal is dismissed. (USCA Case No. 17-1344) (This document is not the Mandate) (dkals,) (Entered: 08/14/2018)
09/05/2018	70	MANDATE of USCA as to 53 Notice of Appeal, filed by 303 Creative LLC, Lorie Smith (USCA Case No. 17-1344) (dkals,) (Entered: 09/05/2018)
05/06/2019	71	MOTION to Withdraw as Attorney <i>Michael Francisco</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Francisco, Michael) (Entered: 05/06/2019)
05/17/2019	72	OPINION AND ORDER denying 6 Motion for Preliminary Injunction and 48 Motion for Summary Judgment by Judge Marcia S. Krieger on 5/17/19. (dkals,) (Entered: 05/17/2019)
05/17/2019	73	ORDER granting 71 Motion to Withdraw as Attorney. Attorney Michael L. Francisco terminated. By Judge Marcia S. Krieger on 5/17/19. Text Only Entry (msklc2,) (Entered: 05/17/2019)
06/07/2019	74	RESPONSE to 72 Order by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # 1 Affidavit of Jacob P. Warner, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C)(Anderson, Katherine) (Entered: 06/07/2019)
06/10/2019	75	Conventionally Submitted Material: Exhibit to 74 Response on 1 CD by Plaintiffs 303 Creative LLC, Lorie Smith. Text Only Entry (dkals,) (Entered: 06/10/2019)
08/30/2019	76	NOTICE of Supplemental Authorities re: 74 Response by Plaintiffs 303 Creative LLC, Lorie Smith (Attachments: # 1 Exhibit A)(Anderson, Katherine) (Entered: 08/30/2019)
09/23/2019	77	NOTICE of Supplemental Authorities (<i>Second</i>) re: 74 Response by Plaintiffs 303 Creative LLC, Lorie Smith (Attachments: # 1 Exhibit A)(Anderson, Katherine) (Entered: 09/23/2019)
09/26/2019	78	NOTICE of <i>Substitution of Parties</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: 09/26/2019)
09/26/2019	79	OPINION AND ORDER GRANTING SUMMARY JUDGMENT entered by Judge Marcia S. Krieger on 9/26/19. The Court finds that the Defendants are entitled to summary judgment on all of Ms. Smiths claims in this action. The Clerk of the Court shall enter judgment in favor of the Defendants on all claims and close this case. (rkeec) (Entered: 09/26/2019)
09/26/2019	80	FINAL JUDGMENT by Clerk in favor of Aubrey Elenis, Charles Garcia, Ajay Menon, Miguel Rene Elias, Richard Lewis, Kendra Anderson, Sergio Cordova, Jessica Pocock, and Phil Weiser and against 303 Creative LLC and Lorie Smith re: 79 Opinion and Order Granting Summary Judgment entered by Judge Marcia S. Krieger on 9/26/19. (rkeec) (Entered: 09/26/2019)
10/25/2019	81	NOTICE OF APPEAL as to 79 Order, 52 Order on Motion to Dismiss, Order on Motion for Summary Judgment, Order on Motion for Preliminary Injunction, 80 Clerk's Judgment, 72 Order by Plaintiffs 303 Creative LLC, Lorie Smith (Filing fee \$ 505, Receipt Number 1082-6964947) (Anderson, Katherine) (Entered: 10/25/2019)

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK**

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

October 28, 2019

Chris Wolpert
Chief Deputy Clerk

Ms. Katherine Leone Anderson
Mr. Jonathan Andrew Scruggs
Mr. Jeremy D. Tedesco
Ms. Kristen Waggoner
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, AZ 85260

RE: 19-1413, 303 Creative, et al v. Elenis, et al
Dist/Ag docket: 1:16-CV-02372-MSK-CBS

Dear Counsel:

The court has received and docketed your appeal. Please note your case number above. Copies of the Tenth Circuit Rules, effective January 1, 2019, and the Federal Rules of Appellate Procedure, effective December 1, 2018, may be obtained by contacting this office or by visiting our website at <http://www.ca10.uscourts.gov>. In addition, please note all counsel are required to file pleadings via the court's Electronic Case Filing (ECF) system. *See* 10th Cir. R. 25.3. You will find information regarding registering for and using ECF on the court's website. We invite you to contact us with any questions you may have about our operating procedures. Please note that all court forms are now available on the court's web site.

Attorneys must complete and file an entry of appearance form within 14 days of the date of this letter. *See* 10th Cir. R. 46.1(A). Pro se parties must complete and file the form within thirty days of the date of this letter. An attorney who fails to enter an appearance within that time frame will be removed from the service list for this case, and there may be other ramifications under the rules. If an appellee does not wish to participate in the appeal, a notice of non-participation should be filed via ECF as soon as possible. The notice should also indicate whether counsel wishes to continue receiving notice or service of orders issued in the case.

You are required to file a docketing statement within 14 days of filing the notice of appeal. If you have not yet filed that pleading, you should do so within 14 days of the

date of this letter. Please note that under 10th Cir. R. 3.4(B), the appellant is not limited to the issues identified in his docketing statement and may raise other appropriate issues in the opening brief. The court's docketing statement form was updated on January 1, 2019; please make sure you use the current form. It may be found at <http://www.ca10.uscourts.gov/clerk/forms>.

In addition to the docketing statement, all transcripts must be ordered within 14 days of the date of this letter. If no transcript is necessary, you must file a statement to that effect.

Appellant is not required to file a designation of record, but will be required to file an appendix with appellant's opening brief. *See* 10th Cir. R. 10.1 and 30.1.

Appellant must file an opening brief and appendix within 40 days after the date on which the district clerk notifies the parties and the circuit clerk that the record is complete for purposes of appeal. *See* 10th Cir. R. 31.1(A)(1). Motions for extension of time to file briefs and appendices must comply with 10th Cir. R. 27.1 and 27.6. These motions are not favored.

Briefs must satisfy all requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules with respect to form and content. *See* specifically Fed. R. App. P. 28 and 32 and 10th Cir. R. 28.1, 28.2 and 32, as well as 31.3 when applicable. In addition, we encourage all counsel, as applicable, to be familiar with 10th Cir. R. 46.4(B). Seven hard copies of briefs must be provided to the court within two days of filing via the court's Electronic Case Filing system. *See* 10th Cir. R. 31.5 and the court's [CM/ECF User's Manual](#). Appendices must satisfy the requirements of Fed. R. App. P. Rule 30 and 10th Cir. R. 30.1(A) through (F). Appendix volumes submitted under seal must be accompanied by a separate motion to seal. *See* 10th Cir. R. 30.1(D)(6). As of January 1, 2015, all appendices must be filed electronically, and a single hard copy provided to the court within two days of filing via the court's Electronic Case Filing system. *See* 10th Cir. R. 30 as well as the court's [CM/ECF User's Manual](#). Counsel are encouraged to utilize the court's [Briefing & Appendix checklist](#) when compiling their briefs and appendices.

Please contact this office if you have questions.

Sincerely,

A handwritten signature in cursive script that reads "Elisabeth A. Shumaker". The signature is written in black ink and has a long, sweeping horizontal line extending to the right at the end.

Elisabeth A. Shumaker
Clerk of the Court

cc: Eric H. Maxfield
Vincent Edward Morscher
Jack Davy Patten III
Billy Lee Seiber
Skippere S. Spear

EAS/lab