Case No. 19-1413

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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303 CREATIVE LLC and **LORIE SMITH**,

Plaintiffs-Appellants,

v.

AUBREY ELENIS, et al.,

Defendants-Appellees,

On appeal from the United States District Court
for the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 1:16-cv-02372-MSK

APPELLANTS' OPENING BRIEF

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Oral Argument is Requested

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CORPORATE DISCLOSURE STATEMENT

Consistent with Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants 303 Creative LLC and Lorie Smith state that 303 Creative LLC is a limited liability company organized under Colorado law, and that it neither issues stock nor has a parent corporation.

STATEMENT OF RELATED APPEALS

Plaintiffs 303 Creative and Lorie Smith filed a previous appeal before this Court in this matter. *303 Creative v. Elenis*, No. 17-1344 (10th Cir. Dec. 18, 2017).

INTRODUCTION

The government should never force a Muslim artist to photograph pornography, a gay designer to create a website promoting one-man, one-woman marriage, or a Jewish PR professional to craft anti-Israel propaganda. Plaintiff-Appellant Lorie Smith[1] seeks the same freedom here.

Lorie is a talented website designer and small business owner who lives her faith in what she creates and publishes online. While Lorie gladly serves everyone no matter *who* they are, she cannot create all *content* requested—including content that demeans, incites violence, or promotes any conception of marriage other than between one man and one woman. Defendant-Appellees ("Colorado") concede that Lorie serves regardless of status, does not discriminate against LGBT persons, and makes only message-based referrals. Aplt. App. 2–322-23 (¶¶ 64-66, 69).[2]

Yet Colorado still deploys its public-accommodation law (the Colorado Anti-Discrimination Act, or CADA) to (1) force Lorie to create websites celebrating same-sex weddings and (2) ban Lorie from posting a statement explaining the content she can create. This attack on Lorie's faith and editorial freedom targets "the fundamental First Amendment rule"—that "a speaker has the autonomy to choose the content of [her] own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 558, 573 (1995).

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[1] Unless context indicates otherwise, "Lorie" includes 303 Creative.

[2] Lorie's record citations will appear as "Aplt. App. [Vol. #]–[Page #]."

Artists across the country have faced investigations, fines, financial ruin, and even jail for seeking the freedom Lorie wants. Colorado has prosecuted cake designer Jack Phillips *twice* under CADA—once to the U.S. Supreme Court—for exercising that same freedom. Phillips faced death threats, lost 40% of his income, and had to let go most of his staff.

Considering this, Lorie faces a substantial risk from CADA. She would be foolish to operate her business the way her faith compels her, risking both livelihood and liberty, in the hope Colorado will change its campaign against those who share her beliefs. So Lorie has reasonably stopped speaking to avoid punishment—not creating any wedding websites or posting her desired statement for three years.

The First Amendment prohibits Colorado's attempted compulsion and censorship. Courts routinely protect speakers' freedom to control what they say, including speakers who share Lorie's marriage beliefs in the exact same pre-enforcement posture as this litigation. *Telescope Media Grp. v. Lucero (TMG)*, 936 F.3d 740, 750-59 (8th Cir. 2019) (film studio); *Brush & Nib Studio, LC v. City of Phoenix (B&N)*, 448 P.3d 890, 902-17 (Ariz. 2019) (art studio).

As these cases illustrate, the district court incorrectly left Lorie exposed to Colorado's unjust prosecutions. This Court should reverse, grant Lorie summary judgment, and restore her freedom to choose what she says and what she celebrates online.

JURISDICTIONAL STATEMENT

The district court had jurisdiction to hear this case under 28 U.S.C. §§ 1331 and 1343 because Lorie raises First and Fourteenth Amendment claims. Aplt. App. 1–020 (¶¶ 16-19). This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered final judgment on September 26, 2019, and Lorie timely filed her appeal notice on October 25, 2019. Aplt. App. 3–760, -762.

STATEMENT OF THE ISSUES

Lorie Smith creates online content, like websites, for all clients. Her faith compels her to (i) create online content celebrating weddings between one man and one woman, and (ii) post a statement declining to create content inconsistent with this view. Colorado's public accommodation law (CADA) bans this statement and requires Lorie to create online content celebrating same-sex weddings if she does so for opposite-sex weddings. Lorie has not created any wedding content or posted her statement to avoid violating CADA. Meanwhile, Colorado has allowed secular speakers (three bakeries) to decline to create speech objectionable to them. The issues presented are:

1. Whether Lorie has standing to challenge the CADA provision forcing her to create online content celebrating same-sex weddings if she does so for opposite-sex weddings.

2. Whether CADA violates the First Amendment by forcing Lorie to create online content celebrating same-sex weddings if she does so for opposite-sex weddings.

3. Whether CADA violates the First Amendment by banning Lorie's statement explaining the online wedding content she can create consistent with her faith.

4. Whether a CADA provision is facially overbroad, vague, or allows unbridled discretion when it bans communications indicating someone is "unwelcome, objectionable, unacceptable, or undesirable" at public accommodations because of certain protected traits.

STATEMENT OF THE CASE

Lorie Smith and 303 Creative

Lorie Smith is a website and graphic designer, a Christian, and the owner of 303 Creative LLC. Aplt. App. 2–318-20 (¶¶ 29, 30, 39, 44). She discovered her love for creating very young and developed a talent for website and graphic design while working at corporate firms. *Id.* at 2–319-20 (¶¶ 40-41). But Lorie hungered for freedom to promote things she cared about—things like promoting small businesses, helping people, and supporting churches and nonprofits. *Id.* at 2–320, -324 (¶¶ 42, 72). So Lorie launched 303 Creative. *Id.* at 2–320 (¶ 42).

Lorie's dream has largely come true; she now has final say over what she creates. *Id.* at 2–320-21 (¶¶ 48, 58). Her designs are original, custom, and perfectly tailored to each client. *Id.* at 2–320, -325 (¶¶ 50, 81-82). She brands her sites "Designed by 303Creative.com" so that viewers know each design is her original artwork. *Id.* at 2–325-26 (¶¶ 83, 88). And everything she creates—each image, word, or symbol—conveys the exact message she desires. *Id.* at 2–320-22, -325-26 (¶¶ 45-46, 53, 59, 63, 81-82, 88).

To that end, Lorie only creates artwork consistent with her faith. *Id.* at 2–318-19 (¶¶ 30-39). She strives to live and operate 303 Creative to honor God. *Id.* at 2–322 (¶¶ 60-63). Lorie does this by sharing her faith through the celebratory messages she creates. *Id.* (¶¶ 60-61). She often

designs websites for religious and other organizations that promote values she shares. *Id*. at 2–324 (¶¶ 71-72).

Lorie selectively accepts projects, not clients. As Colorado stipulates, she does not discriminate against anyone when creating websites or graphics. *Id*. at 2–322 (¶¶ 64-65). She is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," including those who are "gay, lesbian, or bisexual…." *Id*. (¶ 64). But she cannot create websites or graphics that promote messages contrary to her faith *for anyone*, such as messages that "contradict[ ] biblical truth; demean[ ] or disparage[ ] others; promote[ ] sexual immorality; support[ ] the destruction of unborn children; incite[ ] violence; or promote[ ] any conception of marriage other than marriage between one man and one woman." *Id*. at 2–322-23 (¶¶ 65-66). Lorie tries to refer requests she cannot fulfill to another competent designer. *Id*. at 2–323 (¶ 69).

Lorie's custom wedding websites

As Lorie's business grew, so did her passion to promote her faith—particularly her beliefs about marriage. Aplt. App. 2–324 (¶ 71). Lorie saw our culture adopting new beliefs about marriage after *Obergefell v. Hodges* and felt compelled to promote what her faith teaches her is God's design for marriage: a lifelong union between one man and one woman.

Aplt. App. 2–324 (¶¶ 73-77). Lorie decided to expand her business to include wedding websites. *Id.* (¶ 78).

Lorie wants these websites to "celebrat[e] and promot[e]" her "religious belief that God designed marriage as an institution between one man and one woman" while she encourages couples with whom she collaborates to "commit to lifelong unity and devotion as man and wife." *Id.* at 2–325-26 (¶¶ 79-82, 88). These wedding websites contain Lorie's original artwork, are custom and tailored to each couple, and convey Lorie's particularized celebratory message about biblical marriage. *Id.* at 2–325-26 (¶¶ 79-82, 88-89). This intended message "will be unmistakable to the public." *Id.* at 2–326 (¶ 88).

Lorie also wants to be upfront about the messages she can promote. *Id.* (¶¶ 90). So when Lorie created a website addition announcing her wedding expansion, she also created a statement explaining her religious convictions and desire to create content consistent with them. *Id.* at 2–325-26, -333-61, -362-66 (¶¶ 84-87, 90-92, Exs. A, B).

Before Lorie could post that statement or publish any wedding websites, she discovered that Colorado interprets CADA to force her to create wedding websites celebrating same-sex marriage if she does so for opposite-sex weddings. *Id.* at 2–317-18, -327, -367-420 (¶¶ 24-28, 94-97, Exs. C-L); *see also* Appellees' Br. at 17, *303 Creative LLC v. Elenis*, No. 17-1344 (10th Cir. Feb. 1, 2018), Doc. No. 01019939442. She also discovered that Colorado reads CADA to ban her website statement. Aplt

App. 2–317-18, -327, -367-420 (¶¶ 24-28, 94-97, Exs. C-L). So although Lorie can immediately publish her statement and begin creating wedding websites, she has refrained to avoid punishment. *Id.* at 2–327 (¶¶ 94-97); *see also* Appellees' Br. at 17, *303 Creative LLC v. Elenis*, No. 17-1344 (10th Cir. Feb. 1, 2018), Doc. No. 01019939442.

The law and Colorado's enforcement of it

Because 303 Creative is a "public accommodation," Aplt. App. 2–327 (¶ 93), it is subject to CADA, which makes it:

> unlawful for a person, directly or indirectly, to refuse … because of … sexual orientation … the full and equal enjoyment of the … services … [of a] public accommodation…

Colo. Rev. Stat. § 24-34-601(2)(a) ("Accommodation Clause"). CADA also makes it unlawful to:

> directly or indirectly … publish … any … communication … that indicates that the full and equal enjoyment of the … services … [of a] public accommodation will be refused … or that an individual's patronage or presence … is unwelcome, objectionable, unacceptable, or undesirable because of … sexual orientation...

Colo. Rev. Stat. § 24-34-601(2)(a) ("Communication Clause").[3] Colorado enforces both clauses with fines up to $500 per violation, cease-and desist orders, reporting and reeducation requirements, and more. Aplt. App. 2–314, -316-17, -393-96 (¶¶ 5, 17, 25, Ex. F). Anyone can file CADA

[3] Lorie calls this entire clause the Communication Clause but calls the Clause's last part (banning communications indicating someone's patronage or presence is "unwelcome, objectionable, unacceptable, or undesirable" because of certain traits) the "Unwelcome Provision."

complaints with the Colorado Civil Rights Division or pursue civil actions in state court, and each named Appellee here can initiate complaints. *Id.* at 2–314-15 (¶¶ 4-5, 7). Complaints trigger mandatory investigation, including subpoenas, compelled witness testimony, compulsory mediation, hearings, appeals, and binding determinations and orders. *Id.* at 2–314-17, -367-96 (¶¶ 6-17, 25, Ex. C-F).

Colorado has already enforced CADA against those with Lorie's religious beliefs. In 2013, cake designer Jack Phillips declined to create a custom cake celebrating a same-sex wedding, and Colorado prosecuted him to the U.S. Supreme Court—costing Phillips 40% of his income and most of his employees. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n (Masterpiece I)*, 138 S. Ct. 1719 (2018); Br. for Pet'rs at 6, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762, at *6. The Supreme Court ruled for Phillips because Colorado violated the First Amendment by acting with "clear and impermissible hostility toward [his] … religious beliefs." 138 S. Ct. at 1721, 1729.

This hostility appeared in two ways. First, Colorado publicly demeaned Phillips' religious beliefs about marriage by calling them "despicable pieces of rhetoric," comparing them to ideas "used to justify … slavery … [and] the holocaust," and conveying that Phillips must "compromise" his beliefs if he wants to "do business in the state." *Id.* at 1729. Colorado never disavowed these statements. *Id.* at 1730, 1732.

Second, Colorado inconsistently enforced CADA—prosecuting Phillips for declining to create a cake celebrating a same-sex wedding but allowing three other bakeries to decline requests with religious texts critical of same-sex marriage. *Id*. at 1730. Although all four bakeries said they served protected-class members generally and would not create cakes they considered offensive, Colorado only prosecuted Phillips. *Id.*; Aplt. App. 2–367-420.

Colorado has not repented. After *Masterpiece I*, the Commission met publicly in June 2018 to discuss the opinion, and Commissioners affirmed the very statements *Masterpiece I* condemned. As Commissioner Lewis defiantly declared, "I support Commissioner Diann Rice and her comments. I don't think she said anything wrong. And if this was 1950s, it would have a whole different look. So I was very disappointed by the Supreme Court's decision." Aplt. App. 3–609.

Then, in October 2018, the Commission charged Phillips with violating CADA a *second time*—because Phillips declined to create a cake celebrating a lawyer's gender transition. Aplt. App. 3–765-73.[4]

[4] This Court may take judicial notice of these and other public records referenced throughout this brief. *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007). *See* Pls.' Mot. for Prelim. Inj., Ex. 1, *Masterpiece II*, No. 1:18-cv-02074-WYD-STV (D. Colo. Jan. 18, 2019), ECF No. 104-3; Pls.' Mot. for Prelim. Inj., Ex. 5, *Masterpiece II*, No. 1:18-cv-02074-WYD-STV (D. Colo. Jan. 18, 2019), ECF No. 104-7. Lorie has reproduced these public records in Appellants' Appendix.

After 18 months, Colorado eventually dismissed this second complaint, but only after Phillips sued in federal court, and that court found sufficient allegations of Colorado's continued religious hostility. Order, *Masterpiece Cakeshop Inc. v. Elenis (Masterpiece II)*, No. 1:18-cv-02074-WYD-STV (D. Colo. Jan. 4, 2019), ECF No. 94; Aplt. App. 3–774-78.[5]

To this day, Colorado has not disavowed its anti-religious actions or statements. Instead, it has doubled down on those statements here. Colorado has characterized Lorie's claims as an effort to "us[e] religion to perpetuate discrimination against individuals, and violate … state[ ] laws," Aplt. App. 2–455; labeled religious beliefs opposing same-sex marriage "derogatory, offensive messages," *id*. at 2–448; and asserted the right to regulate Lorie's religious speech because it finds that content "discriminat[ory]," *id.*

Colorado is not alone. Other governments have tried to use laws like CADA to force artists to convey messages that violate beliefs like Lorie's. *See TMG*, 936 F.3d 740*, B&N*, 448 P.3d 890; Pet. for Writ of Cert., *Arlene's Flowers, Inc. v. Washington*, No. 19-333 (U.S. Sept. 11, 2019).

All this animosity forced Lorie to file this lawsuit in 2016 to protect her First Amendment rights. Aplt. App. 1–017-112.

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[5] This document is a public record. *See* Defs.' Mot. to Dismiss, Ex. G, *Scardina v. Masterpiece Cakeshop Inc.*, No. 2019CV32214 (Colo. Dist. Ct. July 22, 2019), Filing ID No. 36F53B3CF4991.

Lorie's lawsuit and the district court's orders

Lorie sought a preliminary injunction to stop her ongoing First Amendment injuries. Aplt. App. 3–510. Colorado moved to dismiss, and the district court heard both motions in early 2017. Aplt. App. 3–510-11. At that hearing, the parties agreed no factual disputes existed, and the court ordered Lorie to seek summary judgment, consolidating that with the other pending motions. Aplt. App. 1–149-53 (Hr'g Tr. 9:8-13:2).

Then in September 2017, the court partially granted Colorado's motion to dismiss and denied Lorie's motions. It concluded Lorie had standing for her Communication Clause claims, dismissed her Accommodation Clause claims for lack of standing, and declined to resolve Lorie's Communication Clause claims until the Supreme Court decided *Masterpiece I*. Aplt. App. 3–509-21. Lorie filed an interlocutory appeal that this Court dismissed for insufficient jurisdiction because the district court lifted its stay after *Masterpiece I*. Order & Judgment at 3-6, *303 Creative LLC v. Elenis*, No. 17-1344 (10th Cir. Aug. 14, 2018), Doc. No. 010110037049.

In May 2019, the district court issued a second order. It denied Lorie's summary judgment motion for her Communication Clause claims and ordered her to explain why it shouldn't enter final judgment against her. It did so by first "assum[ing] the constitutionality of the Accommodation Clause"—that this Clause could constitutionally compel Lorie to

create online content—without analyzing that question. Aplt. App. 3–568.

The court then reasoned that the Communications Clause could legally ban Lorie's statement declining to create content celebrating same-sex weddings because the government can ban statements intending illegal conduct and the Accommodation Clause made it illegal to not create content celebrating same-sex weddings. *Id.* at 3–576-79.

In response, Lorie urged the district court not to bypass the critical question of the Accommodation Clause's constitutionality and thereby assume her activity was unprotected just because Colorado interpreted CADA that way. *Id.* at 3–589-93.

In September 2019, the district court issued its final order. *Id.* at 3–752-61. The court agreed it could not assume Lorie's statement intended illegal activity just because the Communication Clause banned it. But the court defended its assumption because it depended on "an entirely different statute," i.e., the Accommodation Clause, which Colorado interpreted as requiring Lorie to create online content celebrating same-sex weddings. *Id.* at 3–755.

SUMMARY OF ARGUMENT

For the same reasons Colorado cannot force LGBT designers to create websites criticizing same-sex marriage, Colorado cannot force Christian designers to create websites celebrating same-sex marriage. Colorado's public accommodation law, CADA, forces Lorie Smith to do the latter (via the Accommodation Clause) and stops her from publishing a statement explaining what she can create (via the Communication Clause). Both results violate the First Amendment.

The district court rejected Lorie's Accommodation Clause claims on standing grounds and her Communication Clause claims on the merits by assuming that Lorie discriminates. That was wrong and contradicts the stipulated facts and recent Supreme Court and other appellate decisions, bypassing the judiciary's core duty to analyze the parties' arguments. Lorie can challenge CADA for hindering her First Amendment rights, which protect her ability to speak consistent with her religious beliefs.

Standing. Lorie has standing to challenge the Accommodation Clause because it is intertwined with the Communication Clause. As the district court conceded, Lorie can challenge the Communication Clause because it bans her statement declining to create certain websites. But whether the Communication Clause can do so depends on whether the Accommodation Clause can constitutionally force Lorie to create the

websites discussed in her statement. When standing and the merits conceptually coalesce like this, courts address the underlying issue.

Lorie also has independent standing to challenge the Accommodation Clause because she faces a substantial risk from it. According to Colorado's own briefs, Lorie would violate the Accommodation Clause if she only created websites celebrating opposite-sex weddings. And Colorado has already enforced this Clause against others like Lorie. Lorie responded by not creating any wedding websites to avoid violating CADA. Courts don't require speakers to violate unconstitutional laws before challenging them.

Speech. CADA violates the First Amendment because it compels Lorie to speak—to design and publish websites (pure speech) conveying messages that violate her religious beliefs. Nor can Colorado infringe Lorie's editorial freedom by labeling it "discrimination." Lorie serves all people but cannot convey all messages. She chooses what she says, not who she serves. Other printers, publishers, writers, and internet companies do the same. Lorie deserves the same freedom.

Because Colorado cannot compel Lorie to create websites, it cannot ban her statement saying which websites she can create. That ban censors Lorie's statement based on content and viewpoint. One provision of CADA even fails facially because it vaguely and overbroadly bans any communication indicating someone is "unwelcome, objectionable,

unacceptable, or undesirable" at public accommodations because of certain traits.

Religious Animus. Only one year ago, the Supreme Court chastised Colorado for making religiously hostile comments and inconsistently enforcing CADA to target someone with religious beliefs like Lorie's. But Colorado has not changed or disavowed these actions. Colorado still allows secular speakers to choose what they create while forcing religious speakers to create speech that violates their religious beliefs. Colorado officials even affirmed the very comments the Supreme Court condemned and lobbed similar barbs at Lorie. Colorado's ad hoc system of enforcing CADA targets Lorie's beliefs, allows individualized assessments, infringes her hybrid rights, and contradicts our nation's history and tradition of religious tolerance. That too violates the First Amendment.

Interests. Colorado can still enforce CADA to stop actual status discrimination. Colorado can let speakers choose what to say while stopping businesses from choosing who they serve. In our pluralistic society where we disagree about so much, that's precisely the approach the First Amendment requires.

STANDARD OF REVIEW

This Court reviews summary judgment awards de novo, applying the same standard as district courts. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009). This Court also reviews standing questions and First Amendment claims de novo. *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 898 (10th Cir. 2016); *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1219 (10th Cir. 2007).

ARGUMENT

I. Lorie has standing to challenge CADA's Accommodation Clause.

Lorie cannot freely create online content because of CADA's Accommodation Clause, and she cannot publish a statement because of CADA's Communication Clause. While the district court held that Lorie had standing to challenge the latter, the court said she lacked it to challenge the former. But Lorie has standing to challenge the Accommodation Clause for two reasons: (A) these two Clauses are intertwined, and (B) the Accommodation Clause creates a substantial risk of harm.

A. Lorie has standing to challenge the Accommodation Clause because it is intertwined with her Communication Clause challenge.

Lorie's faith prohibits her from creating content celebrating same-sex weddings, and she has crafted a statement to explain her faith to the public. Yet the Accommodation Clause requires the former, and the Communications Clause bans the latter. But whether Lorie can constitutionally do the latter depends on whether she can constitutionally do the former. Everyone agrees Lorie may not post statements intending to do illegal, unprotected activities. But she *can* post statements intending to do constitutionally protected activities. Her ability to post depends on the constitutionality of what she's posting about, meaning her two challenges are intertwined. Because this Court must determine what Lorie can decline before deciding what statement she can post, Lorie has standing.

The district court recognized that Lorie's two challenges were intertwined, explaining that "the Communication Clause … survives constitutional scrutiny" if "the Accommodation Clause is constitutional" in compelling Lorie's speech. Aplt. App. 3–578. That's why the district court stayed Lorie's Communication Clause challenge to see how *Masterpiece I* addressed an Accommodation Clause challenge. *Id*. at 3–521.

Colorado agrees: "if [Jack Phillips's] compelled-speech theory is correct [i.e., the Accommodation Clause cannot compel him to create cakes celebrating same-sex weddings], he *must likewise* have the right to hang a sign on his bakery's door" declining to create such cakes. Br. of Resp't Colo. Civil Rights Comm'n at 34-35, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838416, at *35 (emphasis added). So too here.

These concessions are decisive because courts reach the merits when standing and the merits are intertwined. *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319 (1973) ("If applicants are correct on the merits they have standing," because "[t]he case in that posture is in the class of those where standing and the merits are inextricably intertwined."); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) (addressing constitutional challenge because "we could not resolve the question … [of] standing without addressing the constitutional issue"); *Kerr v. Polis*, 930 F.3d 1190, 1198-99 (10th Cir. 2019) (reaching merits because "[t]he

standing question and merit question here are not two separate and independent issues" but are "intertwined and inseparable") (citation omitted).

Two courts recently affirmed this principle, allowing speakers' pre-enforcement challenges to public accommodation laws for compelling their speech and banning statements like Lorie's. *TMG*, 936 F.3d 740 (wedding filmmakers), *B&N*, 448 P.3d 890 (wedding calligrapher and painter). As these cases explain, whether someone can publish statements declining to create speech turns on whether they can constitutionally decline that speech in the first place. *TMG*, 936 F.3d at 757, n.5 ("If creating videos were conduct that Minnesota could regulate, then the State could invoke the incidental-burden doctrine to forbid the Larsens from advertising their intent to engage in discriminatory conduct. But in this case, Minnesota cannot compel the Larsens to speak, so it cannot force them to remain silent either.") (cleaned up); *B&N*, 448 P.3d at 926 (art studio could post statement because its "intended refusal to make custom wedding invitations celebrating a same-sex wedding is legal activity").

Here, the district court took a different path. It refused to reach Lorie's Accommodation Clause challenge, *assumed* this Clause constitutionally compelled her speech, then rejected her Communication Clause challenge based on that assumption. Aplt. App. 3–568, -578. To its credit, the district court conceded that statutes cannot ban speech just

because they declare speech illegal. That would be circular and thus "error." *Id*. at 3–757 (citing various cases).

But the district court saw Lorie's case as different because an "entirely different statute" (the Accommodation Clause) made Lorie's speech illegal, not the Communication Clause itself. *Id*. at 3–755. That's incorrect. For one thing, the Accommodation and Communication Clauses appear in the very same provision of the very same statute. Colo. Rev. Stat. § 24-34-601(2)(a). For another, the circularity remains whether Colorado invokes one statute or two. Either way, Colorado is banning constitutionally protected speech. The Constitution forbids that. *Ragin v. New York Times Co.*, 923 F.2d 995, 1003 (2d Cir. 1991) (defending communication clause would be circular "if there were doubt about [the government's] power to prohibit speech" about the underlying activity).

Bigelow v. Virginia proves the point. 421 U.S. 809 (1975). There, Virginia banned advertisements in Virginia for abortion services legally provided in New York. *Id* at 811. *Bigelow* invalidated this ban primarily because "the activity advertised pertained to constitutional interests"—i.e. the activity described in the advertisement was constitutionally protected no matter what New York or Virginia declared. *Id*. at 822. *Accord Carey v. Population Servs., Int'l*, 431 U.S. 678, 700-01 (1977) (invalidating restriction on abortion advertisement because "the information suppressed by this statute related to activity with which, at least in some respects, the State could not interfere.") (cleaned up);

Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345-46 (1986), *abrogated by 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (interpreting *Carey* and *Bigelow* this way); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976) (same for *Bigelow*).

Contrary to the district court's conclusion, *Bigelow* does "require[ ]" courts "to separately assess the constitutionality" of laws *if necessary* to determine the constitutionality of banning speech. Aplt. App. 3–756. When legal issues are conceptually intertwined, courts do not assume legality and insulate unconstitutional actions; they take up the substantive question. *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1238-39 (11th Cir. 2017) (provision could not restrict advertisement when another provision declared advertisement term misleading because "[s]uch reasoning is self-evidently circular…").

Indeed, courts must examine both statutes or officials will use shell games to silence protected speech. Under the district court's theory, Virginia could ban all abortions in one statute, then ban promotion of illegal activities in another, thereby making all abortion advertisements illegal. Or Colorado could interpret CADA's Accommodation Clause to force freelance writers to accept requests to write books promoting every

religion, then punish any writer (or even any newspaper) for publishing advertisements to write books solely to promote Islam.[6]

As these examples show, free speech does not turn on statutory labels. It turns on substance. This Court should recognize Lorie's standing to raise her Accommodation Clause challenge.

B. Lorie can independently challenge the Accommodation Clause because she faces a substantial risk of harm from it.

Colorado promises to punish Lorie if she designs wedding websites only for opposite-sex weddings, and Lorie has reasonably stopped speaking to avoid punishment. This grants her independent standing to challenge the Accommodation Clause.

To establish Article III standing, a plaintiff must show an injury-in-fact, causation, and redressability. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014). Here, the district court only questioned Lorie's injury-in-fact. Aplt. App. 3–514-15. But Lorie need not "first expose [her]self to actual arrest or prosecution" to challenge laws deterring "the exercise of [her] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). And particularly so here, where Lorie suffers a "chilling effect" on her First Amendment freedoms; courts analyze standing most leniently. *Ward v. Utah*, 321 F.3d 1263, 1266-67 (10th Cir. 2003). To prove injury-in-fact in a pre-enforcement context, Lorie need only allege

[6] The Communication Clause restricts any "person" from publishing statements, including third-party publishers.

an intent to engage in a course of conduct arguably affected with a constitutional interest, conduct arguably proscribed by statute, and a credible threat of prosecution. *SBA List*, 573 U.S. at 159.

Lorie meets this test. She wants to exercise her First Amendment right to design and create wedding websites celebrating opposite-sex marriage exclusively. Aplt. App. 2–324-27 (¶¶ 71-97). Colorado's position is that the Accommodation Clause forbids this. *Id*. at 2–455 (arguing that Lorie seeks to "us[e] religion to perpetuate discrimination against individuals, and violate…state[ ] law[ ]").

And the threat of enforcement is not just credible, it's certain. Colorado has repeatedly enforced the Accommodation Clause to compel other speakers to promote same-sex weddings. *Id*. at 2–368-96, 3–769-73. *See SBA List*, 573 U.S. at 166 (standing supported when speaker "alleged an intent to engage in the same speech that was the subject of a prior enforcement proceeding…").

And Colorado has never disavowed its intent to compel Lorie. To the contrary, it has affirmed its intent to do so. Aplt. App. 3–526; *Sup. Ct. of N.M.,* 839 F.3d at 901 (credible threat generally exists when law proscribes desired conduct "on its face" and state "has not disavowed" enforcement intent) (cleaned up); *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009) (finding it "more than a little ironic that [government] would suggest Petitioners lack standing and then,

later in the same brief, label [Petitioners] as a prime example of ... the very problem the Rule was intended to address") (cleaned up).

Based on this, Lorie has reasonably stopped speaking and suffers ongoing harm. *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 414 n.5 (2013) (plaintiffs may "reasonably incur costs to mitigate or avoid" future harm).

The district court disagreed, reasoning that any harm rested on four contingencies: (1) Lorie creating wedding websites, (2) receiving an objectionable request, (3) declining, and (4) a complaint being filed. Aplt. App. 3–517. But the first three are not contingent. Lorie alone controls whether she creates wedding websites. And she would do so but for CADA. *Id*. at 1–041 (¶ 178) & 2–327 (¶ 96).

And as for objectionable requests, Lorie already received one. A prospective customer named "Stewart" contacted Lorie through her webpage, asking about custom graphics and a website to celebrate his wedding to his fiancé, "Mike." *Id*. at 2–260.

Now the district court dismissed this request as "imprecise," saying it did not "explicitly request" a website. *Id.* at 3–518. But the request asked about Lorie's website services and asked her to address those services. *Id.* at 2–260. Because Lorie is religiously obligated to "be honest and transparent about" her services (*Id*. at 1–039 (¶ 162)), she could only respond one way—saying she does not create what the request asked about: websites celebrating same-sex weddings. And even if Lorie had remained silent, she would still have violated the Accommodation

Clause, which forbids "indirectly … withhold[ing] … [or] deny[ing] … full and equal enjoyment of" services. Colo. Rev. Stat. § 24-34-601(2)(a). *Accord Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1041 n.4 (9th Cir. 2008) (person injured if merely "deterred from patronizing" public accommodation because ADA requires "full and equal enjoyment" of services).

The district court also disregarded the request because Stewart and Mike could be women. Aplt. App. 3–518. But according to Social Security Administration (SSA) data, only a nanoscopic number of women have been named Stewart or Mike since 1880. Lorie faces a 16 times greater chance of being struck by lightning than either name being female.[7] The circumstances clear the preponderance-of-the-evidence standard for standing, particularly taking reasonable inferences in Lorie's favor. *N. Laramie Range All. v. F.E.R.C.*, 733 F.3d 1030, 1034 (10th Cir. 2013).

As for whether anyone will file a complaint against Lorie, the district court already concluded this was likely because of "the public

[7] According to SSA data, 184,531,970 women born between 1880 and 2018 have registered for a social security card. SSA, https://bit.ly/35C7qiR, (last visited Jan. 21, 2020). Of those, 662 were named "Mike" (.000359%) and 78 "Stewart" (.000042%). Aplt. App. 3–779-82 (table created by Appellants summarizing data). The probability of a woman being named either "Mike" or "Stewart" in this data set is .000401%. In contrast, a woman has a 1/15,300 (.006536%) chance of being struck by lightning. Nat'l Weather Serv., https://bit.ly/36KAm9S (last visited Jan. 21, 2020). All of this data is judicially noticeable. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 (10th Cir. 2009) (judicially noticing information on government website).

interest in" cases like this. Aplt. App. 3–517. When a law chills speech, courts *assume* people will file complaints for statutory violations, particularly when, as here, private parties can file complaints. *SBA List*, 573 U.S. at 159. Reality bears this out. Private parties have filed multiple complaints against Jack Phillips for violating CADA by doing what Lorie wants to do. Aplt. App. 2–368-78, 3–765-68.

In sum, Lorie's standing does not rest on a "highly attenuated chain of possibilities." Aplt. App. 3–516. She faces a "substantial risk" of harm because of CADA's severe penalties, Colorado's enforcement history, its stated legal position, complaints filed against others, and the request Lorie already received. That is all Lorie needs to show.

Importantly, Lorie is not required to show a "literal[ ] certain[ty]" of future harm. *Clapper*, 568 U.S. at 414 n.5. "Preenforcement suits always involve a degree of uncertainty about future events." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012). *Accord Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019) (standing supported when plaintiff relies "on the predictable effect of Government action on the decisions of third parties"); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (physicians could challenge abortion restriction even though they could not violate law without request to perform abortion); *Sup. Ct. of N.M.*, 839 F.3d at 900, 902-903 (attorneys could challenge rule affecting their subpoena practices even though they could not identify "any particular subpoena that is presently at issue…").

Other circuits agree and have recognized standing despite much more "contingent" harm than here. *E.g.*, *N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 504-05 (D.C. Cir. 2019) (political party could challenge solicitation restriction on investment agents without identifying anyone who would donate through investment agents because the "single inference" that someone would donate through agent was "eminently reasonable" and not based on causal chain with "several links"); *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 363, 364 n.21 (3d Cir. 2014) (political party could challenge law allowing third parties to sometimes obtain court costs for objecting to ballot signatures—a harm contingent on "three links long" causal chain—because others had suffered harm in past); *Cutshall v. Sundquist*, 193 F.3d 466, 471-72 (6th Cir. 1999) (sex offender could challenge state law allowing disclosure of personal information if requested by local officials, even though offender did not identify any pending request).

Most significant, courts have *uniformly* found standing in the same factual and legal context as Lorie's case—where speakers brought pre-enforcement challenges to public accommodation laws for compelling them to create artwork celebrating same-sex weddings. *TMG*, 936 F.3d at 749-50 (standing because state had already enforced its public accommodation law in similar way against others); *B&N*, 448 P.3d at 899-902 (similar). This Court should not depart from this consensus. Lorie is reasonably likely to suffer harm if she only creates websites

celebrating opposite-sex weddings. She should not have to risk violating the law and suffering like Jack Phillips to vindicate her rights.

II. CADA's Accommodation and Communication Clauses violate Lorie's First Amendment rights to free speech and religious exercise.

Turning to the merits, CADA's Accommodation Clause compels Lorie to speak (§§ A-B below) and the Communication Clause silences her speech. (§ C). Colorado also applies these Clauses to target Lorie's religious views, treating her worse than others. (§ D.) These applications fail strict scrutiny. (§ E.) They therefore violate Lorie's rights to free speech and free exercise.

A. The Accommodation Clause compels Lorie to speak and infringes her editorial freedom by forcing her to design and publish websites that violate her faith.

The "First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796-97 (1988). This means a speaker has "the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. Central to this autonomy is a speaker's freedom to exercise "editorial control and judgment" over her message. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) ("[A]s a general matter, the Government may not interfere with the

editorial judgments of private speakers on issues of public concern ....”). But Colorado violates these principles by compelling Lorie to design and publish websites conveying messages that violate her faith.

According to this Court, a compelled speech claim has three elements: (1) speech, (2) that the speaker objects to, and (3) the government compels. *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). *Accord Hurley*, 515 U.S. at 572-73 (applying same elements). Lorie satisfies each element, and that triggers strict scrutiny. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal. (PG&E)*, 475 U.S. 1, 19 (1986) (plurality) (applying strict scrutiny to law compelling speech).

1. Lorie's websites and graphics are pure speech that the First Amendment protects.

Lorie creates custom webpages and graphics that are “expressive in nature” in that they contain “images, words, [and] symbols” and “communicate a particular message.” Aplt. App. 2–320 (¶¶ 45-47). The same holds for her future wedding websites. As stipulated, all these wedding websites “will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story.” *Id.* at 2–325 (¶ 81). *See also id.* (¶ 84) (providing example).

These stipulations make Lorie's graphics and websites pure speech that the First Amendment protects. *Cressman*, 798 F.3d at 952 (pure speech includes written and spoken words, pictures, and drawings); *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) (“[P]ublishing

Netbuffs.com is undoubtedly an activity protected by the First Amendment.").

2. Lorie's faith requires her to object to the message conveyed by websites celebrating same-sex marriage.

As Colorado has stipulated, Lorie objects to creating custom websites for same-sex weddings because "by doing so, [Lorie and her studio] would be expressing a message celebrating and promoting a conception of marriage that they believe is contrary to God's design for marriage." Aplt. App. 2–327 (¶ 94). This concession makes sense.

Lorie's websites and graphics "communicate a particular message," and "[e]very aspect of" her graphics "contributes to the overall messages" Lorie conveys through her websites, and her wedding websites celebrate and promote the couple's wedding and unique love story. *Id*. at 2–320-21, -325 (¶¶ 45-47, 53, 81). By creating wedding websites and graphics about a same-sex wedding, Lorie would necessarily convey messages celebrating that same-sex wedding and marriage—messages that violate her faith. *Id*. at 2–323-24, -327 (¶¶ 66, 78, 94). *TMG*, 936 F.3d at 752-53 (forcing filmmakers to create films conveying "the same 'positive' message … about same-marriage as they do for opposite-sex marriage" compels speech).

Just because Lorie objects to this message does not mean she objects to any person because of their status. Colorado concedes that

Lorie serves regardless of status, does not discriminate against LGBT persons, and makes only message-based referrals. Aplt. App. 2–322-23 (¶¶ 64-66). But Lorie cannot create content that violates her faith *for anyone*, no matter who they are. *Id.* (¶¶ 65-66). Her objection always turns on the content of what's requested, not the orientation of who's requesting. Just as atheist graphic designers can decline to create websites promoting Christianity without discriminating against Christians, so too can Lorie decline to create websites promoting same-sex marriage without discriminating against anyone.

The Supreme Court drew the same message/status distinction in *Hurley*. There, the Court allowed parade organizers to decline a LGBT group's request to march with its banner in a parade because that decision turned on a "message [the organizers] disfavored" (i.e., the "unqualified social acceptance of gays and lesbians"), not anyone's sexual orientation. 515 U.S. at 572, 574-75 (organizers did not exclude "homosexuals as such" from parade). *Accord Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653-54 (2000) (affirming distinction).

As the Arizona Supreme Court recently said in a case like Lorie's, an artist's "message-based refusal" to celebrate same-sex weddings deserves protection; that refusal "is *not* based on a customer's sexual orientation." *B&N*, 448 P.3d at 910-11 (emphasis added); *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (distinguishing exclusion based on someone's views from exclusion based on status);

World Peace Movement of Am. v. Newspaper Agency Corp., 879 P.2d 253, 258 (Utah 1994) (newspaper did not commit status discrimination when declining to print religious group's advertisement because "it was the message itself that [the newspaper] rejected, not its proponents").

That's true for Lorie too. Colorado has so stipulated, Aplt. App. 2–322-23 (¶¶ 64-66), and these stipulations are decisive. They disprove the district court's assumption that Lorie discriminates. *Id.* at 3–578. And they prove she objects only to speaking particular messages. Nothing more.

3. Colorado compels Lorie to design and publish websites to which she objects.

Colorado has conceded that it compels Lorie to create websites celebrating same-sex weddings. For the past eight years, Colorado has interpreted CADA to require speakers (including Lorie) to create speech celebrating same-sex weddings if they do so for opposite-sex weddings. Aplt. App. 2–456 (claiming that Lorie seeks to "discriminate against same sex couples" in violation of CADA); Br. for Resp't Colo. Civil Rights Comm'n at 20, 24, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838416, at *20, *24 (interpreting CADA to compel cake designer to "add congratulatory" content on cakes with which he disagreed).

Colorado roots this interpretation in the Accommodation Clause—which requires public accommodations to provide "full and equal enjoyment of" its "services" regardless of sexual orientation. Colo. Rev.

Stat. § 24-34-601(2)(a). But Colorado goes beyond the text to require *equal messages*, i.e. creative professionals must speak the same message about same-sex marriage as about opposite-sex marriage. *Supra* Br. for Resp't Colo. Civil Rights Comm'n, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838416, at *20, *24. *See also TMG*, 936 F.3d at 748-49 (Minnesota adopting same interpretation of similar law).

And CADA's penalties demand compliance. Colorado punishes commissioned speakers who speak exclusively in favor of opposite-sex marriages with fines, cease-and-desist orders, mandatory staff re-education training, and reporting requirements. *See* Aplt. App. 2–316-17, -367-96 (¶¶ 17, 25, Ex. C-F). These penalties compel Lorie.

In response, Colorado says the Accommodation Clause regulates discriminatory business conduct, not speech. Aplt. App. 2–437. But this confuses facial and as-applied invalidity. The public accommodation law in *Hurley*, for example, did "not, on its face, target speech or discriminate on the basis of its content"; its "focal point" was stopping "the act of discriminating." 515 U.S. at 572. But the law still compelled speech because its "application … had the effect of declaring … speech itself [the parade] to be the public accommodation." *Id*. at 573. *Hurley* instructs courts to look beyond a law's text or purpose to whether it applies to speech. *Id*. at 572; *accord* TMG, 936 F.3d at 752, 758 (making this point); *B&N*, 448 P.3d at 913-14 (same). And here the law does. It applies to

Lorie's websites and graphics, compelling her to create them and infringing her editorial judgment.

Colorado says *Hurley*'s protection is limited to nonprofits. Aplt. App. 2–440. But *Hurley* rejected that very distinction. 515 U.S. at 574 (compelled speech protections "enjoyed by business corporations generally," including "professional publishers"). So have many other courts. *TMG*, 936 F.3d at 752, 758 (public accommodation could not compel for-profit film studio); *B&N*, 448 P.3d at 913-14 (same for art studio); *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 962 (9th Cir. 2010) (applying *Hurley* to protect newspaper); *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 999 (M.D. Tenn. 2012) (applying *Hurley* to protect television studio from non-discrimination law).

Public accommodation laws, including CADA, regularly apply to nonprofits. Colo. Rev. Stat. § 24-34-601(1) (public accommodations include "place of business" *and* "any [other] place offering services … to the public); *Hurley*, 515 U.S. at 572, 580 (citing cases allowing these laws to apply to nonprofits). That application is not "peculiar"; what's peculiar is when officials apply these laws to "speech itself." *Id.* at 558.

Finally, Colorado defends compelling Lorie by attributing any message in Lorie's websites to her clients. Aplt. App. 2–443-46 (arguing "reasonable observers" would do this). But this defense doesn't work. Colorado has already stipulated that (1) "[v]iewers" of Lorie's wedding websites "will know that the websites are [her] original artwork…";

(2) these websites "express Ms. Smith's and 303 Creative's message…"; and (3) "Plaintiffs' intended message of celebration … will be unmistakable to the public…" *See id.* at 2–325-26 (¶¶ 79, 83, 88).

The defense also fails legally. The government may not force someone to express "another speaker's message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). That's why the Supreme Court has found compelled speech in situations where no one would attribute speech to the objector. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (state's motto on license plate); *PG&E*, 475 U.S. at 6-7, 15 n.11 (newsletter attributed to someone besides objector). *Accord B&N*, 448 P.3d at 911-12 (rejecting misattribution argument).

Indeed, under Colorado's misattribution theory, the government could compel *any commissioned speaker* to express *any message* whatsoever—from freelance writers, lawyers, publishers, painters, printers, and graphic designers to advertising firms, newspapers, and internet companies. That has never been the law. *Lorie* creates the websites. They're her speech. Colorado may not compel it.

4. Lorie should enjoy the same editorial freedom other online speakers regularly exercise.

Lorie seeks the freedom to control what internet content she creates and publishes online. But this is not unusual. Large internet companies regularly exercise this editorial freedom and invoke compelled-speech principles to do so. Lorie deserves as much, if not more, freedom.

For example, in *Jian Zhang v. Baidu.com*, an internet company blocked certain webpages on its search engine, and some citizens sued, , attempting to use New York's public accommodation law to force the company to publish certain search results on its webpage. 10 F. Supp. 3d at 435-36. The court dismissed the lawsuit because it would violate the company's First Amendment right to exercise "editorial control." *Id.* at 439-40.

Companies like Google, Yahoo, Microsoft, and Facebook have won similar cases protecting their editorial freedom to control their website content. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007) (companies cannot be compelled to place advertisements on their webpages); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-CV-646-FtM-PAM-CM, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017) (Google cannot be compelled to place certain results in search engine); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (Facebook had "First Amendment right to decide what to publish and what not to publish on its platform.").

The Communication Decency Act confirms this editorial freedom. Congress enacted the CDA to stop lawsuits threatening "freedom of speech in the new and burgeoning Internet medium." *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 27-28 (2d Cir. 2015). The law provides tort immunity to "interactive computer service" providers when they act as "the publisher or speaker" of content provided by someone else. 47 U.S.C.

§ 230. And as CDA caselaw confirms, internet companies use "a publisher's traditional editorial functions" when they decide "whether to publish, withdraw, postpone or alter content" on its webpages. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Yet Colorado tries to force Lorie to do exactly that—publish certain content online. That infringes her traditional editorial function.[8]

This is not to say governments can never regulate these large internet companies. Perhaps some monopoly rationale would suffice. But if large companies have the freedom to control what their websites say, a small website designer like Lorie does too.

5. Compelling Lorie to speak creates a dangerous and limitless principle.

As just discussed, Lorie seeks freedoms others regularly exercise. But Colorado seeks a novel and limitless power—the power to compel commissioned speakers to speak any message the government wants.

This principle does not stop online or with debates about marriage. If Colorado can use CADA to compel Lorie to design and publish websites she disagrees with, then Colorado can also force:

[8] To be clear, the CDA does not immunize Lorie because she creates her own content rather than publishing someone else's. But CDA caselaw illuminates what constitutes editorial judgment online. If online publishers exercise editorial control when they publish someone's speech, then certainly online creators like Lorie exercise editorial control when they create and publish their own speech.

- a gay tattoo designer to ink "Homosexuality is an abomination. Leviticus 18:22" on a Mormon's arm;
- a LGBT-owned printing company to design t-shirts condemning bisexuality for the Westboro Baptist Church;
- a Muslim web designer to create websites promoting synagogues because the designer will do so for mosques;
- an Atheist singer to sing hymns at a Catholic Easter service; or
- a progressive bar association to publish statements promoting Israel.[9]

In fact, if Colorado can compel Lorie, nothing stops it from adding "political beliefs" as a protected class to CADA and then forcing speakers to convey political messages with which they disagree, such as forcing Democratic speechwriters to write speeches supporting Republican politicians. Some public accommodation laws already do this.[10] *TMG*, 936 F.3d at 756 (making this point).

As these examples show, free-speech protections transcend this case and any particular debate about marriage. These freedoms apply to all. Otherwise, they hinge on the views of who happens to hold office. In our pluralistic society, giving speakers that freedom is the better course—for everyone.

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[9] Eugene Volokh, *Court Allows Lawsuit Against Ideological Group for Discriminatory Rejection of Noncommercial Ad in Its Publication*, The Volokh Conspiracy (March 19, 2018), https://bit.ly/2VVZeH7.

[10] *E.g.*, Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B); Madison, Wisc. Code of Ordinances §§ 39.03(2), (5).

B. The Accommodation Clause compels Lorie to speak based on content and viewpoint.

While Lorie satisfies this Court's three-part test for compelled speech, the Accommodation Clause goes even further. It compels Lorie's speech based on content and viewpoint. That too triggers strict scrutiny. *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996) (strict scrutiny for such restrictions).

The Accommodation Clause regulates Lorie's speech based on content and viewpoint in three ways. First, the Clause compels Lorie to speak content that she would not otherwise convey. This "necessarily alters the content" of her expression and constitutes "a content-based regulation of speech." *Riley*, 487 U.S. at 795. *Accord Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2371 (2018) (same); *B&N*, 448 P.3d at 912-14 (same as to law forcing art studio to create invitations celebrating same-sex wedding).

Second, the Accommodation Clause only punishes Lorie because she conveys certain content elsewhere. If Lorie sticks to creating websites promoting clean energy or gun control, she is safe. Only if Lorie creates websites promoting opposite-sex marriage must she create websites promoting same-sex marriage.

In this way, the content of Lorie's prior speech triggers the Accommodation Clause's application. That makes the application content-based. *Tornillo*, 418 U.S. at 256 (statute "exacts a penalty on the basis of the content" because it required newspapers to print editorial

only if they printed editorial with particular content earlier); *PG&E*, 475 U.S. at 13-14 (plurality) (law regulates based on content if it "condition[s] [access] on any particular expression" conveyed); *TMG*, 936 F.3d at 753 (law applied in content-based way because it treated films on opposite-sex marriage "as a trigger for compelling [filmmakers] to talk about a topic they would rather avoid—same-sex marriages") (cleaned up).

Third, the Accommodation Clause mandates access only to particular viewpoints. If Lorie creates websites promoting opposite-sex marriage, the Clause does not require her to create websites advocating lower taxes, only websites promoting same-sex marriage.

Accordingly, the Accommodation Clause is viewpoint-based, awarding "access … only to those who disagree with [Lorie's] views." *PG&E*, 475 U.S. at 13-14 (law viewpoint-based because it did not award access to company's newsletter "to the public at large," only to those "who disagree with [the company's] views"); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 654 (1994) (law in *PG&E* "conferred benefits to speakers based on viewpoint"). Viewpoint- and content-based applications like these must overcome strict scrutiny.

C. The Communications Clause also restricts Lorie's speech based on its content and viewpoint.

Just as the government cannot compel speech without satisfying strict scrutiny, it cannot restrict speech based on "its ideas, its subject matter, or its content" without satisfying strict scrutiny. *Reed v. Town of*

Gilbert, 135 S. Ct. 2218, 2226 (2015) (citation omitted). A law restricts speech based on content if it facially draws distinctions based on a speaker's message or if it cannot be justified without reference to speech's content. *Id.* at 2227. A law restricts speech based on viewpoint when it "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Communication Clause fails all these tests. Facially, the Clause prohibits "any … communication" indicating that "services … will be refused" or that an individual "is unwelcome, objectionable, unacceptable, or undesirable" because of "sexual orientation." Colo. Rev. Stat. § 24-34-601(2)(a). This text forbids communications with certain content—denials related to sexual orientation. Statements saying "no photographs of animals" are allowed; statements (like Lorie's) saying "no websites of same-sex weddings" are forbidden. Aplt. App. 3–531. Even the district court agreed the Clause was content-based. *Id.* at 3–578.

The Clause is viewpoint-based too. It allows Lorie to post a statement supporting marriage generally, supporting same-sex *and* opposite-sex marriage, or indicating a willingness to create websites celebrating same-sex *and* opposite-sex marriages. She just cannot express views supporting *only* opposite-sex marriage or indicate a desire to *only* create websites celebrating those marriages. These restrictions favor "inclusive" views on the topic of marriage over others. That's

viewpoint discrimination. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (registration ban on just disparaging trademarks was viewpoint-based); *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996) (it was viewpoint discrimination for the government to ban a sign saying "gay marriage is a sin" but allowing a sign advocating "person's right to choose whatever mate he or she wishes").

To uphold the Clause's application to Lorie, the district court *assumed* Lorie's statement tried to commit illegal status discrimination—which was wrongly based on assuming that the Accommodation Clause was constitutional. Aplt. App. 3–576-79. But that assumption contradicts the stipulated facts and caselaw too. *See* § II.A.2. Of course, Colorado can restrict statements indicating an intent to do something illegal *and constitutionally unprotected*, like employment discrimination, fighting words, statements creating hostile work environments, and solicitation. Aplt. App. 3–576-80 (citing examples); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception,* 101 Cornell L. Rev. 981, 1011 (2016) (explaining this doctrine). But that does not mean Colorado can declare protected speech to be illegal conduct and ban statements about that speech willy-nilly. "Speech is not conduct just because the government says it is." *TMG*, 936 F.3d at 752.

Colorado can no more ban Lorie's statement than ban a group's statement indicating its intent to exclude certain messages from its parade. Or as the Eighth Circuit explained, banning a statement like

Lorie's "rests on a faulty premise." *TMG*, 936 F.3d at 757 n.5. "[I]n this case" Colorado "cannot compel [Lorie] to speak, so it cannot force [her] to remain silent either." *Id.* (film studio can post statement like Lorie's). *See also B&N*, 448 P.3d at 926 (art studio can post statement like Lorie's).

Finally, citing *Hurley*, the district court says Colorado can force speakers to affirm "non-discrimination objectives" in "the realm of commercial advertising." Aplt. App. 3–582. But this theory repeats the *Hurley*-only-protects-unpaid-speakers mistake. *See* § II.A.3 *supra.* (rejecting this interpretation). This theory also overlooks *Hurley*'s actual statement: that government can prescribe orthodoxy in commercial advertising by "requiring the dissemination of purely factual and uncontroversial information." 515 U.S. at 573 (cleaned up). But websites celebrating same-sex marriage are not purely factual or uncontroversial. *NIFLA*, 138 S. Ct. at 2372 (refusing to apply commercial disclosure doctrine to notices about "abortion, anything but an 'uncontroversial' topic"). And the Communication Clause does not *compel* disclosures anyway; it *restricts* speech, as the district court said. Aplt. App. 3–576.

Just as important, Lorie's desired statement is not commercial speech. It does more than propose a commercial transaction; it discusses her religious views. *Harris v. Quinn*, 573 U.S. 616 (2014) (defining commercial speech). At the very least, Lorie's statements contain religious speech "inextricably intertwined with" commercial speech and that triggers strict scrutiny. *Riley*, 487 U.S. at 796.

Even if couched as commercial speech, Lorie's statement would "advertise[] an activity itself protected by the First Amendment" (creating certain websites). *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983). And that still triggers greater scrutiny. *Id.*

In fact, because the Communications Clause regulates Lorie's speech based on viewpoint, the Clause triggers strict scrutiny regardless whether her speech is commercial. *Matal*, 137 S. Ct. at 1767-69 (five justices agreeing that lower scrutiny did not apply to viewpoint-based restrictions on commercial speech); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 39 (2d Cir. 2018) (interpreting *Matal* this way). *Accord R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."). So no matter how Colorado construes Lorie's speech, its decision to ban Lorie's statement triggers strict scrutiny.

D. The Accommodation and Communication Clauses punish Lorie for her religious views.

Like many other "reasonable and sincere people," Lorie holds the "decent and honorable religious" view that God ordained marriage as "a gender-differentiated union of man and woman." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2602 (2015); Aplt. App. 2–319, -324 (¶¶ 31, 73-74). Lorie's faith compels her to proclaim this view about marriage through her wedding websites and her desired statement, and her faith prohibits her from contradicting this view by creating websites celebrating same-

sex marriage. Aplt. App. 2–324-26 (¶¶ 71-80, 85-92). Yet CADA forces Lorie to celebrate views contrary to her religious beliefs and stay silent about her own views while giving this freedom to those with secular views. This violates the Free Exercise Clause in multiple ways.

1. The Accommodation and Communication Clauses are not generally applicable or neutral when applied to Lorie.

While generally applicable and neutral laws sometimes trigger minimal scrutiny, laws without these characteristics face greater hurdles. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (strict scrutiny); *Masterpiece I*, 138 S. Ct. at 1732 (per se invalidation of non-neutral application). CADA's application to Lorie falters for the same three reasons the Supreme Court condemned in *Masterpiece I* and *Lukumi*.

First, Colorado officials verbally indicated their hostility toward Lorie's religious beliefs. Commissioners initially did so during the *Masterpiece I* litigation, when they compared religious beliefs like Lorie's to beliefs causing slavery and the Holocaust. 138 S. Ct. at 1729-30. Colorado has not disavowed these statements and certainly not done so in a purposeful, public, and equally persuasive way as the initial inappropriate comments. *Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016) (setting this as test for state to remove taint of prior unconstitutional actions).

No matter, after *Masterpiece I*, Colorado officials affirmed the very comments the Supreme Court condemned. As one commissioner noted at a public meeting a few days after the *Masterpiece I* ruling: "I support Commissioner Diann Rice and her comments [about slavery and the Holocaust]. I don't think she said anything wrong. And if this was 1950s, it would have a whole different look. So I was very disappointed by the Supreme Court's decision." Aplt. App. 3–609. No commissioner disagreed.

Even during this litigation, Colorado has made statements that mirror those from *Masterpiece I*, accusing Lorie of using "her religious beliefs as a reason to discriminate," Aplt. App. 1–114, -118, and "using religion to perpetuate discrimination," *id*. at 1–134, 2–456. Colorado has even called Lorie's beliefs about marriage "derogatory" and "offensive" and compared them to beliefs justifying race discrimination. *Id*. at 1–128-30, 2–434-35. As these recent statements show, officials cannot possibly apply CADA fairly to Lorie.

Nor does this problem go away if Colorado passed CADA permissibly. While the district court focused on this factor alone (*id*. at 3–582-87), Colorado must pass *and apply* CADA in a neutral way. *Masterpiece I* proves this. It condemned CADA's hostile application without mentioning legislative history.

Second, setting comments aside, Colorado applies CADA more favorably to secular speakers who decline requests for secular reasons. The Supreme Court explained this point in *Masterpi*ece *I* after Colorado

exonerated three secular bakeries for declining requests to create religious messages objectionable to them but punished Jack Phillips for declining to create secular messages objectionable to his religion. 138 S. Ct. at 1730-31; Aplt. App. 2–317-18, -367-420 (¶¶ 24-28, Ex. C-L). Colorado still has not disavowed this selective "religious-speakers policy." The discriminatory policy remains in place.

In fact, Colorado has doubled down after *Masterpiece I*. Since then, Colorado tried to prosecute Jack Phillips for declining to create another cake objectionable to his religious beliefs. Order, *Masterpiece II*, No. 1:18-cv-02074-WYD-STV (D. Colo. January 4, 2019) (detailing these facts), ECF No. 94. Based on this incident, a federal district court identified enough allegations of Colorado's bad faith to keep the case because Colorado had continued its "disparate treatment" of prosecuting religiously motivated objections to secular messages while allowing secularly motivated objections to religious messages. *Id*. at 20-22.

Colorado's treatment of Lorie proves its "religious-speakers policy" still exists. For example, this policy operated by attributing religious objectors' speech to their clients and by ignoring how they served LGBT clients generally; yet Colorado reversed these presumptions for secular objectors—attributing their speech to them and emphasizing how they served religious persons generally. *Masterpiece I*, 138 S. Ct. at 1730-31. Colorado still uses the same analysis for religious speakers like Lorie, attributing their speech to their clients and ignoring how they serve

LGBT people generally. Aplt. App. 2–322-23 (¶¶ 64-66) & 2–443-46. *See also* Defs.' Resp. to Pls.' Am. Mot. for Prelim. Inj. 16-18, *Masterpiece II*, No. 1:18-cv-02074-WYD-STV (D. Colo. Feb. 8, 2019), ECF No. 116. This proves the "religious-speakers policy" remains.

The hostility behind Colorado's policy is even clearer when applied to Lorie. Unlike *Masterpiece I*, Colorado *concedes* that Lorie serves clients regardless of status, does not discriminate against LGBT persons, and makes message-based referrals. Aplt. App. 2–322-23 (¶¶ 64-66). Yet Colorado *still* seeks to punish her under CADA. This makes Lorie exactly like the secular bakeries in *Masterpiece I*—speakers who generally serve clients in protected classes but who decline to speak certain messages. Colorado allows these bakeries to decline creating objectionable messages. But Colorado compels Lorie. Only one thing explains this discrepancy: religious hostility.

Third, Colorado's "religious-speakers policy" allows individualized assessments and creates gerrymandered exemptions that disfavor religion. A system of individualized assessments requires "case-by-case inquiries" that use a "subjective test" that allows officials to selectively burden religious exercise—such as an administrative process that uses a vague, "good cause" standard. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297-98 (10th Cir. 2004) (cleaned up).

Colorado's "religious-speakers policy" fits this description to a tee. Colorado officials subjectively decide on a case-by-case basis when

speakers can decline to create speech. Secular speakers who generally serve religious clients can decline whenever they find a request "objectionable." *Masterpiece I*, 138 S. Ct. at 1730-31. Religious speakers like Lorie and Jack Phillips who generally serve LGBT clients cannot. This is not a "good cause" standard; it's a "Colorado-chooses" standard.

And religious persons fare poorly under it. Religious speakers must create speech inconsistent with their beliefs. Religious clients cannot ask creative professionals to create speech consistent with their beliefs. Secular speakers can decline to create speech when they choose. Secular clients can request whatever they want. There's just one constant. Religious people always lose. In sum, Colorado's case-by-case system produces categorically unequal results, exempting secular speakers for doing what religious speakers cannot. This is no surprise. The officials making the case-by-case judgments have declared their religious hostility many times. Biased officials mean biased applications.

In response, the district court dismissed Colorado's inconsistent treatment because Colorado exonerated the three secular bakeries in *Masterpiece I* under the Accommodation Clause, not the Communication Clause. Aplt. App. 3–571-72. But that does not fix the problem. The Accommodation Clause currently prohibits Lorie from speaking and Lorie has standing to challenge it. *Supra* § I. And Colorado's "religious-speakers" policy appears in the Communication Clause too: Colorado cannot decide if a speaker posts a valid statement declining to speak

unless Colorado uses its problematic "religious-speakers" policy to decide whether that decline is valid or invalid. *Supra* § I.A (discussing intertwinement).

That's not unusual. It's one of the many problems with a *system* of individualized assessments—a "pattern of ad hoc discretionary decisions" not confined to one "written policy" or law. *Axson-Flynn*, 356 F.3d at 1297-99. Because this system appears in both the Accommodation and Communication Clauses and because both Clauses affect Lorie, Colorado violates the First Amendment no matter what statutory subsection Colorado invoked.

2. The Accommodation and Communication Clauses violate Lorie's hybrid rights.

Like selective applications, applications that burden religious exercise and a companion constitutional right also trigger strict scrutiny. *Axson-Flynn*, 356 F.3d at 1295-97 (recognizing hybrid-rights doctrine). This doctrine applies when a companion constitutional claim is "colorable," meaning "a fair probability or likelihood, but not a certitude, of success on the merits." *Id.*

Lorie meets this test because CADA violates her speech rights. *See* § II.A-C. At the very least, CADA colorably infringes these rights, particularly since the Supreme Court considers compelling and restricting religious speakers paradigmatic hybrid-rights violations. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881-82

(1990) (citing historic examples). *Accord TMG*, 936 F.3d at 759 (confirming this principle).

This conclusion makes greatest sense here where Colorado concedes that Lorie creates protected speech. Aplt. App. 2–320 (¶¶ 45-47) (stipulating that websites are "expressive in nature" and "communicate a particular message"). If the hybrid-rights doctrine carries any weight, it at least justifies ratcheting from rational or intermediate to strict scrutiny when a law burdens protected speech—opposed to applications that burden no protected speech.

3. The Accommodation and Communication Clauses regulate Lorie contrary to our nation's history.

Setting these other problems aside, CADA also deserves strict scrutiny for burdening Lorie's religious exercise in ways inconsistent with our nation's history and tradition. Laws that do this must always overcome strict scrutiny. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) ("The contention that *Smith* forecloses recognition of" well-established historical precepts "rooted in the Religion Clauses has no merit"). And we know burdening Lorie falls outside this tradition because *Smith* itself recognized the historical anomaly of compelling and silencing religious speakers. *See* § II.D.2.

To the extent this Court interprets *Smith* differently, *Smith* should be overruled. While this Court cannot do that, Lorie preserves this issue

for appeal. *See Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring) (criticizing *Smith* because that decision "drastically cut back on the protection provided by the Free Exercise Clause" but noting that the case before the Court did not ask to revisit *Smith*).

E. The Accommodation and Communication Clauses fail strict scrutiny.

Because CADA violates Lorie's constitutional rights, CADA's application must satisfy strict scrutiny—the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To do so, Colorado must prove that CADA's application narrowly serves a compelling interest. *Reed*, 135 S. Ct. at 2226. Colorado can do neither.

Turning to compelling interest, the district court said that stopping discrimination justified regulating Lorie. Aplt. App. 3–586-87. But strict scrutiny "look[s] beyond broadly formulated interests" to consider "the asserted harm of granting specific exemptions to particular … claimants." *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 431 (2006). In other words, Colorado must identify an "actual problem in need of solving" and then limit its restriction only as "necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (cleaned up).

But compelling and silencing Lorie does not stop discrimination. Lorie does not discriminate against anyone. *See* II.C. She declines to convey messages she disagrees with while serving people regardless of their status. *Id*. And public accommodation laws have no "legitimate end" when they compel speakers like that. *Hurley*, 515 U.S. at 578. *Accord TMG*, 936 F.3d at 755 (reaching same conclusion about public accommodation law compelling films and silencing statement like Lorie's); *B&N*, 448 P.3d at 914-15 (same as to art studio). Colorado can curb discriminatory conduct without compelling or silencing Lorie.

Likewise, Colorado has not proved any actual problem. Colorado does not identify a single Colorado public accommodation that discriminates based on sexual orientation, much less one that declines to create websites promoting same-sex marriage. That's decisive. "[A]necdote and supposition" do not suffice; Colorado must prove an "actual problem … in this case." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822-23 (2000). In fact, the record proves the opposite of what Colorado must show: many other website designers are available to provide wedding websites. Aplt. App. 2–327-28 (¶¶ 99-101).[11] In this environment, forcing Lorie to create websites is unnecessary.

[11] *Gay + Lesbian Weddings*, The Knot, https://bit.ly/2Rl3vmo (last visited Jan. 21, 2020); *Top Five Wedding Website Builders (Updated for 2018)*, Wedding Lovely Blog (Aug. 27, 2018), https://bit.ly/2RhfJMY.

Overlooking this problem, the district court redefines the state's interest from ensuring access to "eradicating" certain practices "altogether." *Id.* at 3–587 (n.12). But this redefinition takes Colorado's "nondiscrimination purpose" as "overrid[ing] all conflicting individual rights and liberties." *B&N*, 448 P.3d at 923-24. In contrast, *Masterpiece I* "clearly contemplated that some exemptions … were permissible." *Id.* In other words, courts should balance the interests—not just consider those seeking websites but also consider Lorie because "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning…." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

As for narrow tailoring, Colorado falters here because compelling and silencing Lorie is not "the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). For one alternative, Colorado could interpret its law to allow message-based objections. Courts around the country already do this. *See* § II.A.2 (citing cases in Arizona, Utah, the Eighth Circuit, and elsewhere).

The federal government does this for its laws too. *E.g.*, 29 C.F.R. § 1604.2 (interpreting Title VII to allow production studios to make classifications when "necessary for the purpose of authenticity or genuineness…e.g., [selecting] an actor or actress"); Br. for the United States as Amicus Curiae Supporting Pet'rs at 22, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111) (interpreting First Amendment as Lorie does).

In fact, Colorado already *interprets* CADA this way sometimes—allowing secular bakeries to decline to convey messages objectionable to them. *See* II.D.2. Colorado cannot explain why it allows this, but it must force Lorie—who also serves everyone regardless of status—to promote same-sex marriage. This under-inclusivity undermines any basis for regulating Lorie. *Reed*, 135 S. Ct. at 2232 (law "cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited.") (cleaned up).

Next, Colorado could track the federal public accommodation law and not apply CADA to expressive businesses. 42 U.S.C. § 2000a(b) (defining public accommodations as hotels, restaurants, and theaters). Other states already do this. *See* Fla. Stat. § 760.02(11); S.C. Code Ann. § 45-9-10(B); *Hatheway v. Gannett Satellite Info. Network, Inc.*, 459 N.W.2d 873, 875-76 (Wis. Ct. App. 1990) (not applying public accommodation law to newspaper).

Or Colorado could follow cases that do not apply public accommodation laws to highly selective entities. *Vejo v. Portland Pub. Sch.*, 204 F. Supp. 3d 1149, 1168 (D. Or. 2016) (selective university program); *Cut 'N Dried Salon v. Dep't of Human Rights*, 713 N.E.2d 592, 595-96 (Ill. App. Ct. 1999) (selective insurance company).

Lastly, Colorado could exempt artists who speak about weddings. Mississippi already does this without any problems. Miss. Code. § 11-62-

5(5)(a). Any of these options would still achieve Colorado's goals while also respecting the First Amendment. Punishing Lorie does neither.

III. The Unwelcome Provision facially violates the First and Fourteenth Amendments because it is overbroad, vague, and grants unbridled discretion.

The Unwelcome Provision bans speech that indicates someone's "patronage or presence … is unwelcome, objectionable, unacceptable, or undesirable because of" protected characteristics. Colo. Rev. Stat. § 24-34-601(2)(a). This language is overbroad and vague and grants unbridled discretion to Colorado officials.

Overbreadth. A statute is overbroad when a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). The Unwelcome Provision is overbroad because terms like unwelcome, objectionable, unacceptable, or undesirable are elastic and ban too much speech. These terms could cover any critical statement related to protected classes on a public accommodation's website—statements like "Israel commits murder" or "Catholicism is wrong." And what about the statement, "God created marriage to be between a man and woman." Some might say that statement indicates LGBT people are unwelcome. If core political and religious speech like this is barred, the ban is simply too broad.

That is why other courts have invalidated the same language as overbroad. *B&N*, 418 P.3d at 442-43 (striking "unwelcome," "objectionable," "unacceptable," and "undesirable" language as overbroad); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (invalidating harassment policy as overbroad because it banned "any unwelcome verbal…conduct which offends…because of" protected characteristics); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 77-80 (D.D.C. 2001) (invalidating policy on "objectionable" appearance as overbroad). *Cf. Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 577-78 (6th Cir. 2013) (ban on advertisements that "discourage" certain protected classes would be overbroad).

Vagueness and unbridled discretion: To comply with the Fourteenth Amendment, laws must give people an understanding of what is prohibited and provide minimal guidelines for enforcement officials. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). These requirements are more stringent for speech restrictions. *Murphy v. Matheson,* 742 F.2d 564, 569 (10th Cir. 1984).

In a similar vein, the First Amendment forbids laws that "delegate overly broad … discretion" to government officials or "allow[] arbitrary application," because "such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

The Unwelcome Provision also fails these standards. CADA does not define "objectionable, unwelcome, unacceptable, or undesirable." Nor is it obvious what these terms ban. As the examples above illustrate, officials could take *any* critical statement related to protected classes on a public accommodation's website as indicating clients are unwelcome or objectionable or undesirable. Colorado officials are thus free to apply the law selectively to restrict views they dislike.

The district court countered that litigants may not facially challenge a law for vagueness if the law clearly applies to their own conduct. Aplt. App. 3–573. But the Supreme Court recently changed that principle. *Henry v. Spearman*, 899 F.3d 703, 708-09 (9th Cir. 2018) (surveying this change in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and relevant cases). And this principle does not bar challenges to laws that grant too much enforcement authority. *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 409-10 (D.C. Cir. 2017). The district court just misstated the law.

CONCLUSION

Colorado wants to force Lorie to promote online precisely that which violates her deepest faith convictions. What's more, Colorado seeks to silence Lori from sharing her religious views with others. While Colorado may commendably apply CADA sometimes, it does not do so here.

Fortunately, CADA, equality, and the First Amendment can co-exist. The path is simple. Allow speakers to choose the messages they speak, not the clients they serve. Lorie does this. Colorado concedes it. And other speakers do it too—in Colorado and across the country. Singling out Lorie makes no sense. There is a better way, and the First Amendment requires Colorado to take it.

Lorie therefore asks this Court to reverse the lower court and direct that summary judgment be entered in her favor, plus a permanent injunction protecting her constitutional freedoms.

ORAL ARGUMENT STATEMENT

Lorie respectfully requests oral argument. This case involves important and complex First Amendment issues that greatly affect Lorie's and others' constitutional freedoms. Oral argument will materially help this Court decide the issues.

Dated: January 22, 2020

Respectfully submitted,

s/ Jonathan A. Scruggs

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Date: January 22, 2020

s/ Jonathan A. Scruggs
Jonathan A. Scruggs

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2. I hereby certify that a hard copy of the Appellants' Opening Brief will be submitted to the Court pursuant to 10th Cir. R. 31.5 and will be an exact copy of the version submitted electronically via the Court's ECF system.

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Date: January 22, 2020

s/ Jonathan A. Scruggs
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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2020, a true and accurate copy of this brief and addenda was electronically filed with the Court using the CM/ECF system, which will send notification of such filing to the following:

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Date: January 22, 2020

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ADDENDA

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 Statues § 24-34-601(2) ("Public Accommodation Statute"). The two clauses at issue are as follows:

The first clause ("Accommodation Clause") states,

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

The second clause ("Communication Clause") states,

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

Colo. Rev. Stat. § 24-34-601(2)(a).

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

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

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

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

UNDISPUTED FACTS

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

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

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 Statue has a chilling effect on their ability to exercise their rights of free speech.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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 WEISER[1],

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

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[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

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[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

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[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'sconstitutional 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

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[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

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[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

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[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 form "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, there 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 nor 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

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[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

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

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[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]

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[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

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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.)

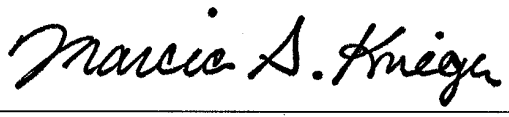
The Court notes that Ms. Smith appears to cite *Telescope*, in part, because it found that the plaintiffs there had standing to bring a pre-enforcement challenge to the Accommodation Clause-type statute., contrary to the finding made by this Court in this case. To the extent Ms. Smith intends her Notice 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 POCOCK, 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