

Case No. 19-1413
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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' APPENDIX: VOLUME 1 OF 3

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Attorneys for 303 Creative LLC and Lorie Smith
Oral Argument is Requested

January 22, 2020

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CERTIFICATE OF DIGITAL SUBMISSION

1. I hereby certify that all required privacy redactions have been made.

2. I hereby certify that a hard copy of the Appellants' Appendix (Volumes 1-3) 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.

3. I hereby certify that this document has been scanned for viruses with the most recent version of a commercial virus scanning program, Traps Advanced Endpoint Protection, version 4.2.6, and is free of viruses according to that program.

Date: January 22, 2020

s/ Jonathan A. Scruggs
Jonathan A. Scruggs

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2020, a true and accurate copy of this Appendix (volumes 1-3) was electronically filed with the Court using the CM/ECF system, which will send notification to all counsel of record. In addition, two identical CD copies with the audio files included in this Appendix are being filed conventionally with the Clerk of Court, and a CD copy is also being mailed to the following:

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ALLMTN,APPEAL,MJ CIV PP,STAYDI,TERMED

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

303 Creative LLC et al v. Elenis et al
Assigned to: Chief Judge Marcia S. Krieger
Case in other court: USCA, 17-01344
U.S. Court of Appeals, 10th Cir., 19-
01413
Cause: 42:1983 Civil Rights Act

Date Filed: 09/20/2016
Date Terminated: 09/26/2019
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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

09/21/2016	8	NOTICE of Entry of Appearance by Jonathan Andrew Scruggs on behalf of All Plaintiffs Attorney Jonathan Andrew Scruggs added to party 303 Creative LLC (pty:pla), Attorney Jonathan Andrew Scruggs added to party Lorie Smith (pty:pla) (Scruggs, Jonathan) (Entered: 09/21/2016)
09/21/2016	9	NOTICE of Entry of Appearance by Michael L. Francisco on behalf of All Plaintiffs Attorney Michael L. Francisco added to party 303 Creative LLC (pty:pla), Attorney Michael L. Francisco added to party Lorie Smith(pty:pla) (Francisco, Michael) (Entered: 09/21/2016)
09/21/2016	10	NOTICE of Entry of Appearance by Katherine Leone Anderson on behalf of All Plaintiffs Attorney Katherine Leone Anderson added to party 303 Creative LLC (pty:pla), Attorney Katherine Leone Anderson added to party Lorie Smith (pty:pla) (Anderson, Katherine) (Entered: 09/21/2016)
09/22/2016	11	NOTICE of Entry of Appearance by Rory Thomas Gray on behalf of All Plaintiffs Attorney Rory Thomas Gray added to party 303 Creative LLC (pty:pla), Attorney Rory Thomas Gray added to party Lorie Smith(pty:pla) (Gray, Rory) (Entered: 09/22/2016)
09/22/2016	12	NOTICE of Entry of Appearance by David Andrew Cortman on behalf of All Plaintiffs Attorney David Andrew Cortman added to party 303 Creative LLC (pty:pla), Attorney David Andrew Cortman added to party Lorie Smith(pty:pla) (Cortman, David) (Entered: 09/22/2016)
09/26/2016	13	NOTICE of Entry of Appearance by Samuel David Green on behalf of All Plaintiffs Attorney Samuel David Green added to party 303 Creative LLC (pty:pla), Attorney Samuel David Green added to party Lorie Smith(pty:pla) (Green, Samuel) (Entered: 09/26/2016)
09/26/2016	14	NOTICE re 6 MOTION for Preliminary Injunction <i>Notice of Updated Results of Conferral Per Local Rule 7.1(a)</i> by Plaintiffs 303 Creative LLC, Lorie Smith (Tedesco, Jeremy) (Entered: 09/26/2016)
09/29/2016	15	NOTICE of Entry of Appearance by Jack Davy Patten, III on behalf of Cynthia H. Coffman, Aubrey ElenisAttorney Jack Davy Patten, III added to party Cynthia H. Coffman(pty:dft), Attorney Jack Davy Patten, III added to party Aubrey Elenis(pty:dft) (Patten, Jack) (Entered: 09/29/2016)
09/30/2016	16	NOTICE of Entry of Appearance by Vincent Edward Morscher on behalf of Cynthia H. Coffman, Aubrey ElenisAttorney Vincent Edward Morscher added to party Cynthia H. Coffman(pty:dft), Attorney Vincent Edward Morscher added to party Aubrey Elenis(pty:dft) (Morscher, Vincent) (Entered: 09/30/2016)
10/04/2016	17	CONSENT to Jurisdiction of Magistrate Judge by Plaintiffs 303 Creative LLC, Lorie Smith All parties do not consent.. (Tedesco, Jeremy) (Entered: 10/04/2016)
10/05/2016	18	CASE REASSIGNED pursuant to 17 Consent to Jurisdiction of Magistrate Judge. All parties do not consent. This case is reassigned to Judge Lewis T. Babcock. All future pleadings should be designated as 16-cv-02372-LTB. (Text Only Entry) (nmarb,) (Entered: 10/05/2016)

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

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

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

		Please see the Notice of Electronic Availability of Transcripts document at www.cod.uscourts.gov. Transcript may only be viewed at the court public terminal or purchased through the Court Reporter/Transcriber prior to the 90 day deadline for electronic posting on PACER. (mgeor,) (Entered: 01/30/2017)
02/01/2017	48	MOTION for Summary Judgment <i>and Memorandum</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # 1 Affidavit of Lorie Smith, # 2 Affidavit of Jeremy Tedesco, # 3 Appendix in Support of Plaintiffs' Motion for Summary Judgment)(Tedesco, Jeremy) (Entered: 02/01/2017)
02/01/2017	49	STIPULATION re 48 MOTION for Summary Judgment <i>and Memorandum Joint Statement of Stipulated Facts</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L)(Tedesco, Jeremy) (Entered: 02/01/2017)
02/22/2017	50	RESPONSE to 48 MOTION for Summary Judgment <i>and Memorandum</i> filed by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (Morscher, Vincent) (Entered: 02/22/2017)
03/08/2017	51	REPLY to Response to 48 MOTION for Summary Judgment <i>and Memorandum</i> filed by Plaintiffs 303 Creative LLC, Lorie Smith. (Tedesco, Jeremy) (Entered: 03/08/2017)
09/01/2017	52	ORDER granting in part and denying in part 37 Motion to Dismiss, and denying 6 Motion for Preliminary Injunction and 48 Motion for Summary Judgment, by Chief Judge Marcia S. Krieger on 9/1/17. (dkals,) (Entered: 09/01/2017)
09/28/2017	53	NOTICE OF APPEAL as to 52 Order on Motion to Dismiss, Order on Motion for Summary Judgment, Order on Motion for Preliminary Injunction by Plaintiffs 303 Creative LLC, Lorie Smith (Filing fee \$ 505, Receipt Number 1082-5731693) (Anderson, Katherine) (Entered: 09/28/2017)
09/29/2017	54	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 53 Notice of Appeal filed by 303 Creative LLC, Lorie Smith to the U.S. Court of Appeals. (Retained Counsel, Fee paid,) (Attachments: # 1 Preliminary Record)(dkals,) (Entered: 09/29/2017)
09/29/2017	55	USCA Case Number 17-1344 for 53 Notice of Appeal filed by 303 Creative LLC, Lorie Smith. (dkals,) (Entered: 09/29/2017)
10/12/2017	56	TRANSCRIPT ORDER FORM re 53 Notice of Appeal, by Plaintiffs 303 Creative LLC, Lorie Smith (Scruggs, Jonathan) (Entered: 10/12/2017)
10/12/2017	57	LETTER TO USCA and all counsel certifying the record is complete as to 53 Notice of Appeal filed by 303 Creative LLC, Lorie Smith. A transcript order form was filed stating that the necessary transcript is already on file. (Appeal No. 17-1344) Text Only Entry (dkals,) (Entered: 10/12/2017)
01/18/2018	58	NOTICE of Entry of Appearance <i>of Counsel</i> by Billy Lee Seiber on behalf of Anthony Aragon, Ulysses J. Chaney, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica PocockAttorney Billy Lee Seiber added to party Anthony Aragon(pty:dft), Attorney Billy Lee Seiber added to party Ulysses J.

		Chaney(pty:dft), Attorney Billy Lee Seiber added to party Miguel Rene Elias (pty:dft), Attorney Billy Lee Seiber added to party Carol Fabrizio(pty:dft), Attorney Billy Lee Seiber added to party Heidi Hess(pty:dft), Attorney Billy Lee Seiber added to party Rita Lewis(pty:dft), Attorney Billy Lee Seiber added to party Jessica Pocock(pty:dft) (Seiber, Billy) (Entered: 01/18/2018)
01/19/2018	59	MOTION to Withdraw <i>as Counsel</i> by Defendants Anthony Aragon, Ulysses J. Chaney, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (De Vos, Leanne) (Entered: 01/19/2018)
01/19/2018	60	ORDER granting 59 Motion to Withdraw: The Clerk of the Court shall terminate Mr. Maxfield and Ms. De Vos as counsel for the Defendants. By Chief Judge Marcia S. Krieger on 1/19/18. Text Only Entry (msklc2,) (Entered: 01/19/2018)
06/15/2018	61	NOTICE re 52 Order on Motion to Dismiss, Order on Motion for Summary Judgment, Order on Motion for Preliminary Injunction (<i>Notice After U.S. Supreme Court Ruling on Masterpiece</i>) by Plaintiffs 303 Creative LLC, Lorie Smith (Scruggs, Jonathan) (Entered: 06/15/2018)
07/03/2018	62	NOTICE re 52 Order on Motion to Dismiss, Order on Motion for Summary Judgment, Order on Motion for Preliminary Injunction (<i>Notice to the Court Regarding Plaintiffs' Desire to Proceed</i>) by Plaintiffs 303 Creative LLC, Lorie Smith (Scruggs, Jonathan) (Entered: 07/03/2018)
07/12/2018	63	ORDER SETTING SUPPLEMENTAL BRIEFING DEADLINE: The Court notes the request made by the Plaintiffs in their 62 Notice and HEREBY ORDERS that all parties shall submit supplemental briefing regarding <i>Masterpiece</i> , <i>NIFLA</i> , and <i>Janus</i> , and their impact on Plaintiffs' case within 21 days from the date of this Order. by Chief Judge Marcia S. Krieger on 7/12/18. Text Only Entry (msksec,) (Entered: 07/12/2018)
07/30/2018	64	Unopposed MOTION for Extension of Time to <i>Submit Supplemental Briefing</i> by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (Patten, Jack) (Entered: 07/30/2018)
07/31/2018	65	ORDER granting 64 Unopposed Motion for Extension of Time to Submit Supplemental Briefing. Extension granted as to all parties up to and including August 6, 2018 . by Chief Judge Marcia S. Krieger on 7/31/18. Text Only Entry (msksec,) (Entered: 07/31/2018)
08/06/2018	66	NOTICE of Entry of Appearance by Skippere Stewart Spear on behalf of Cynthia H. Coffman, Aubrey ElenisAttorney Skippere Stewart Spear added to party Cynthia H. Coffman(pty:dft), Attorney Skippere Stewart Spear added to party Aubrey Elenis(pty:dft) (Spear, Skippere) (Entered: 08/06/2018)
08/06/2018	67	SUPPLEMENT/AMENDMENT <i>Defendants' Supplemental Brief</i> by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock. (Spear, Skippere) (Entered: 08/06/2018)
08/06/2018	68	

		SUPPLEMENT/AMENDMENT <i>Plaintiffs' Supplemental Brief on Masterpiece, NIFLA, and Janus</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # 1 Exhibit 1)(Scruggs, Jonathan) (Entered: 08/06/2018)
08/14/2018	69	USCA Order and Judgment as to 53 Notice of Appeal, filed by 303 Creative LLC, Lorie Smith: this appeal is dismissed. (USCA Case No. 17-1344) (This document is not the Mandate) (dkals,) (Entered: 08/14/2018)
09/05/2018	70	MANDATE of USCA as to 53 Notice of Appeal, filed by 303 Creative LLC, Lorie Smith (USCA Case No. 17-1344) (dkals,) (Entered: 09/05/2018)
05/06/2019	71	MOTION to Withdraw as Attorney <i>Michael Francisco</i> by Plaintiffs 303 Creative LLC, Lorie Smith. (Francisco, Michael) (Entered: 05/06/2019)
05/17/2019	72	OPINION AND ORDER denying 6 Motion for Preliminary Injunction and 48 Motion for Summary Judgment by Judge Marcia S. Krieger on 5/17/19. (dkals,) (Entered: 05/17/2019)
05/17/2019	73	ORDER granting 71 Motion to Withdraw as Attorney. Attorney Michael L. Francisco terminated. By Judge Marcia S. Krieger on 5/17/19. Text Only Entry (mskle2,) (Entered: 05/17/2019)
06/07/2019	74	RESPONSE to 72 Order by Plaintiffs 303 Creative LLC, Lorie Smith. (Attachments: # 1 Affidavit of Jacob P. Warner, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C)(Anderson, Katherine) (Entered: 06/07/2019)
06/10/2019	75	Conventionally Submitted Material: Exhibit to 74 Response on 1 CD by Plaintiffs 303 Creative LLC, Lorie Smith. Text Only Entry (dkals,) (Entered: 06/10/2019)
08/30/2019	76	NOTICE of Supplemental Authorities re: 74 Response by Plaintiffs 303 Creative LLC, Lorie Smith (Attachments: # 1 Exhibit A)(Anderson, Katherine) (Entered: 08/30/2019)
09/23/2019	77	NOTICE of Supplemental Authorities (<i>Second</i>) re: 74 Response by Plaintiffs 303 Creative LLC, Lorie Smith (Attachments: # 1 Exhibit A)(Anderson, Katherine) (Entered: 09/23/2019)
09/26/2019	78	NOTICE of <i>Substitution of Parties</i> by Defendants Anthony Aragon, Ulysses J. Chaney, Cynthia H. Coffman, Aubrey Elenis, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock (Morscher, Vincent) (Entered: 09/26/2019)
09/26/2019	79	OPINION AND ORDER GRANTING SUMMARY JUDGMENT entered by Judge Marcia S. Krieger on 9/26/19. The Court finds that the Defendants are entitled to summary judgment on all of Ms. Smiths claims in this action. The Clerk of the Court shall enter judgment in favor of the Defendants on all claims and close this case. (rkeec) (Entered: 09/26/2019)
09/26/2019	80	FINAL JUDGMENT by Clerk in favor of Aubrey Elenis, Charles Garcia, Ajay Menon, Miguel Rene Elias, Richard Lewis, Kendra Anderson, Sergio Cordova, Jessica Pocock, and Phil Weiser and against 303 Creative LLC and Lorie Smith re: 79 Opinion and Order Granting Summary Judgment entered by Judge Marcia S. Krieger on 9/26/19. (rkeec) (Entered: 09/26/2019)

10/25/2019	81	NOTICE OF APPEAL as to 79 Order, 52 Order on Motion to Dismiss, Order on Motion for Summary Judgment, Order on Motion for Preliminary Injunction, 80 Clerk's Judgment, 72 Order by Plaintiffs 303 Creative LLC, Lorie Smith (Filing fee \$ 505, Receipt Number 1082-6964947) (Anderson, Katherine) (Entered: 10/25/2019)
10/28/2019	82	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 81 Notice of Appeal, filed by 303 Creative LLC, Lorie Smith to the U.S. Court of Appeals. (Retained Counsel, Fee paid,) (Attachments: # 1 Preliminary Record, # 2 Docket Sheet)(sphil,) (Entered: 10/28/2019)
10/28/2019	83	USCA Case Number 19-1413 for 81 Notice of Appeal, filed by 303 Creative LLC, Lorie Smith. (sphil,) (Entered: 10/28/2019)
11/08/2019	84	TRANSCRIPT ORDER FORM re 81 Notice of Appeal, by Plaintiffs 303 Creative LLC, Lorie Smith (Anderson, Katherine) (Entered: 11/08/2019)
11/12/2019	85	LETTER TO USCA and all counsel certifying the record is complete as to 81 Notice of Appeal, filed by 303 Creative LLC, Lorie Smith. A transcript order form was filed stating that the necessary transcript is already on file. (Appeal No. 19-1413) Text Only Entry. (sphil,) (Entered: 11/12/2019)

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

Civil Action No. _____

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

Plaintiffs,

vs.

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

Defendants.

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Lorie Smith is the sole owner and operator of 303 Creative LLC, a company specializing in graphic and web design.
2. Lorie is also a Christian who believes that God has called her to use her talents and her company in a way that honors Him.
3. Because of her religious beliefs and her desire to affect the current cultural narrative regarding marriage that contradicts those beliefs, Lorie wants to use her talents and the

expressive platform she has in 303 Creative to celebrate and promote God’s design for marriage as an institution between one man and one woman.

4. Lorie believes that God is calling her to promote and celebrate His design for marriage by designing and creating custom wedding websites for weddings between one man and one woman only.

5. As part of discharging her religious duty, Lorie also desires to explain her religious beliefs about marriage on her website and in communications with prospective clients, including why those beliefs prevent her from designing websites celebrating and promoting same-sex weddings.

6. But Colorado law strips Lorie and 303 Creative of the freedom to choose what messages to create and to convey in the marriage context.

7. Colorado law makes it unlawful for Lorie and 303 Creative to publish, display, or mail any communication stating that they will not design, create, or publish websites celebrating same-sex marriages. *See* Colo. Rev. Stat. § 24-34-601(2)(a).

8. Colorado law also makes it unlawful for Lorie and 303 Creative to publish, display, or mail any communication indicating that a person’s patronage at 303 Creative is “unwelcome, objectionable, unacceptable, or undesirable” because of sexual orientation. *See* Colo. Rev. Stat. § 24-34-601(2)(a).

9. Therefore, Lorie and 303 Creative cannot explain on 303 Creative’s website their religious belief that God designed marriage as an institution between one man and one woman and why they cannot create wedding websites promoting and celebrating any other conception of marriage.

10. Colorado law also provides that if Lorie and 303 Creative design, create, and publish wedding websites celebrating and promoting marriages between one man and one woman, they must also willingly design, create, and publish wedding websites celebrating and promoting same-sex marriages. *See* Colo. Rev. Stat. § 24-34-601(2)(a).

11. Therefore, if Lorie and 303 Creative speak their desired message celebrating and promoting marriage between one man and one woman, Colorado law requires that they also be willing to speak messages they find highly objectionable and that contradict their sincerely held religious beliefs.

12. Because Lorie and 303 Creative cannot speak messages promoting and celebrating conceptions of marriage contrary to their religious beliefs, Colorado law prevents them from expressing their desired message—that marriage is a God-ordained institution between one man and one woman—through the design, creation, and publication of wedding websites.

13. If Lorie and 303 Creative were to convey their desired messages and decline to convey objectionable messages, they would face costly and onerous investigations, fines of up to \$500 for each violation, and oppressive mandates—such as staff re-education training—that can themselves compel objectionable speech.

14. Thus, solely because of Colorado law, Lorie and 303 Creative are refraining from expressing their views of God’s design for marriage on 303 Creative’s website and from offering their services to design, create, and publish wedding websites expressing their desired message celebrating and promoting marriage as an institution between one man and one woman.

15. To restore their constitutional freedoms to speak their beliefs and not be compelled to speak messages contrary to those beliefs, and to ensure that other creative professionals in

Colorado have the same freedoms, Lorie and 303 Creative ask this Court to enjoin Colo. Rev. Stat. § 24-34-601(2)(a) and declare that it violates their rights.

JURISDICTION AND VENUE

16. This civil rights action raises federal questions under the United States Constitution, particularly the First and Fourteenth Amendments, and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

17. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343.

18. This Court has authority to award the requested declaratory relief under 28 U.S.C. §§ 2201-02 and Federal Rule of Civil Procedure 57; the requested injunctive relief under 28 U.S.C. § 1343 and Federal Rule of Civil Procedure 65; and costs and attorneys' fees under 42 U.S.C. § 1988.

19. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because all events giving rise to the claims herein occurred within the District of Colorado and all Defendants reside in the District of Colorado.

IDENTIFICATION OF PLAINTIFFS

20. Plaintiff Lorie Smith is an evangelical Christian.

21. She is a resident of the State of Colorado and a citizen of the United States of America.

22. She is also the sole member-owner of Plaintiff 303 Creative LLC.

23. 303 Creative is a for-profit limited liability company organized under Colorado law.

24. 303 Creative's principal place of business is located in Colorado.

IDENTIFICATION OF DEFENDANTS

25. Aubrey Elenis, as Director of the relevant division of Colorado state government known as the Colorado Civil Rights Division, Colo. Rev. Stat. § 24-34-302, and as one with authority to enforce the law at issue, *see, e.g.*, Colo. Rev. Stat. §§ 24-34-302, 24-34-306, is named as a defendant in her official capacity.

26. Commissioners Anthony Aragon, Ulysses J. Chaney, Miguel “Michael” Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, and Jessica Pocock, as members of the Colorado Civil Rights Commission with authority to enforce the law at issue, *see, e.g.*, Colo. Rev. Stat. §§ 24-34-305, 24-34-306, 24-34-605, are named as defendants in their official capacities.

27. Colorado Attorney General Cynthia H. Coffman, as one with authority to enforce the law at issue, *see, e.g.*, Colo. Rev. Stat. § 24-34-306, is named as a defendant in her official capacity.

28. All Defendants reside in the District of Colorado.

STATEMENT OF FACTS

Colorado Law Both Compels and Bans Speech

29. Colorado’s Anti-Discrimination Act (“CADA”) bans discrimination in places of public accommodation that occurs “because of” disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.

30. A “place of public accommodation” includes “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public.” Colo. Rev. Stat. § 24-34-601(1).

31. This lawsuit challenges two provisions of CADA, both of which are codified in the same sentence of the law.

32. The first provision provides that it is unlawful for a person to do the following:

. . . 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.

33. This provision is codified at Colo. Rev. Stat. § 24-34-601(2)(a) and will be referred to as the “Banned-Speech Provision.”

34. CADA does not define “unwelcome,” “objectionable,” “unacceptable,” or “undesirable.”

35. CADA does not include any standards or criteria for Defendants to abide by in determining whether a business's speech communicates that persons are “unwelcome,” “objectionable,” “unacceptable,” or “undesirable.”

36. The second provision provides that it is “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” Colo. Rev. Stat. § 24-34-601(2)(a).

37. This mandate, which compels expression when applied to expressive businesses, will be referred to as the “Compelled-Speech Provision.”

38. As used herein, references to “CADA” encompass both the Banned-Speech Provision and the Compelled-Speech Provision, as well as related provisions, such as those pertaining to CADA’s enforcement.

39. If Defendants become aware of an alleged violation of CADA, Defendants will investigate the alleged violation.

40. If Defendants conclude that there has been a violation of CADA, Defendants will use their authority under CADA to end the violation.

41. Defendants’ power under CADA includes the ability to file a charge alleging discrimination.

42. Defendants’ power under CADA includes the ability to investigate charges of discrimination.

43. Defendants’ power under CADA includes the ability to determine whether probable cause exists for crediting charges of discrimination.

44. Defendants’ power under CADA includes the ability to hold hearings regarding charges of discrimination.

45. Defendants’ power under CADA includes the ability to issue subpoenas when evaluating charges of discrimination.

46. Defendants’ power under CADA includes the ability to compel mediation regarding charges of discrimination.

47. Defendants’ power under CADA includes the ability to determine whether the individual or business under investigation violated CADA.

48. Defendants' power under CADA includes the ability to issue notices of a right to sue to those alleging a violation of CADA.

49. Defendants' power under CADA includes the ability to issue cease-and-desist orders to prevent violations of CADA.

50. Defendants' power under CADA includes the authority to issue orders requiring the charged party to "take such action" as Defendants may order.

51. Remedial measures that Defendants have ordered in the past in enforcing CADA include those, such as re-education training, designed to indoctrinate persons charged with discrimination and compel them to profess Defendants' views on same-sex marriage and related subjects.

52. Defendants order these remedial measures to change the beliefs and speech of the charged parties.

53. Defendants even compel business owners to re-educate their staff, yet another form of compelled speech.

54. If a person believes that an individual or business has violated the Banned-Speech Provision or the Compelled-Speech Provision, that person can seek redress in court and, upon a finding of a violation, the court shall fine the individual or business between \$50.00 and \$500.00 for *each* violation.

Defendants Equate Opposing Same-Sex Marriage with Sexual Orientation Discrimination

55. Defendants interpret the Compelled-Speech Provision's ban on declining to provide services to people "because of" sexual orientation as including a ban on declining to provide

expressive services celebrating or promoting same-sex marriage because of political, moral, social, or religious objections to same-sex marriage.

56. Defendants have publically taken this position in litigation.

57. Because the Defendants consider it discrimination “because of” sexual orientation for a business to decline to provide expressive services promoting a same-sex marriage where it would provide expressive services promoting an opposite-sex marriage, the Banned-Speech Provision additionally bars public accommodations and their owners from publishing, circulating, issuing, displaying, posting, or mailing any communication that directly or indirectly indicates that the public accommodation will not provide expressive services that celebrate or promote same-sex marriage because of political, moral, social, or religious objections to same-sex marriage.

58. Such barred communications include statements that a business and its owners cannot provide expressive services celebrating or promoting same-sex marriage because of their religious beliefs.

59. Such barred communications include statements that a business and its owners believe that God designed marriage exclusively to be a union between one man and one woman and that any other conceptions of marriage are contrary to God’s design.

60. Such barred communications include statements that a business and its owners believe that marriages between one man and one woman offer benefits to society or children that same-sex marriages do not offer.

Defendants Apply CADA in a Content and Viewpoint Based Manner

61. Defendants apply CADA in a way that allows certain views but punishes different views regarding marriage.

62. Defendants' viewpoint-based application of CADA is illustrated by the decisions of the Colorado Civil Rights Division ("Division") and the Colorado Civil Rights Commission ("Commission") regarding complaints of discrimination made against four Colorado bakeries.

63. The first Colorado bakery is Masterpiece Cakeshop, Inc., a public accommodation, which is owned and operated by Jack Phillips ("Phillips"), a Christian man.

64. A same-sex couple entered Masterpiece Cakeshop to order a wedding cake that they intended to use to celebrate their wedding at a wedding reception.

65. Because of his religious belief that God designed marriage to be a union between one man and one woman, Phillips respectfully declined to use his creative talents to create a wedding cake celebrating and promoting the marriage of the same-sex couple.

66. Phillips, however, informed the couple that while his religious beliefs prevented him from creating the requested wedding cake, he could provide other baked goods to them.

67. Despite this offer of service, the couple filed complaints with the Division alleging discrimination "because of" sexual orientation in violation of the Compelled-Speech Provision.

68. Former Interim Director Jennifer McPherson, on behalf of the Division, issued a probable cause determination concluding that Masterpiece Cakeshop violated the Compelled-Speech Provision's prohibition of discrimination "because of" sexual orientation by declining to create the wedding cake due to Phillips and Masterpiece Cakeshop's religious beliefs about marriage.

69. Phillips and Masterpiece Cakeshop challenged this determination, but Defendants maintained their position all the way to the Colorado Supreme Court where Phillips and Masterpiece Cakeshop's petition for writ of certiorari was denied on April 25, 2016.

70. In defending themselves, Phillips and Masterpiece Cakeshop repeatedly expressed their willingness to serve everyone, regardless of sexual orientation, but their unwillingness to design and make cakes celebrating events or ideas that violate their Christian views.

71. For example, Phillips and Masterpiece Cakeshop noted that they will not create cakes promoting Halloween, anti-American themes, anti-family themes, atheism, racism, or indecency.

72. Despite these facts, Defendants maintained their position that Phillips and Masterpiece Cakeshop violated the Compelled-Speech Provision by declining to design and prepare the cake due to their objection to the cake's message, which promoted and celebrated same-sex marriage, and that determination was upheld by the Colorado Court of Appeals.

73. During the pendency of Phillips' and Masterpiece Cakeshop's case, the Division considered claims of discrimination brought against three other Colorado bakeries.

74. William Jack ("Jack"), a professing Christian, brought three complaints against the following public accommodations: Azucar Bakery, Le Bakery Sensual, Inc., and Gateaux, Ltd.

75. Regarding Azucar Bakery, Jack requested that the bakery provide him with price quotes for two cakes to express his religious views in opposition to same-sex marriage.

76. Jack requested that both cakes be made to look like Bibles; that both cakes bear the image of two groomsmen with a red "x" over the image; and that the cakes include three citations to the Bible and their accompanying text that conveyed the religious basis for his opposition to same-sex marriage.

77. Azucar Bakery said that it would not make cakes bearing the references to the Bible verses or the image that Jack requested.

78. Jack then filed a “creed” discrimination claim with the Division under CADA’s Compelled-Speech Provision.

79. Defendants define CADA’s prohibition on “creed” discrimination as encompassing “all aspects of religious beliefs, observances or practices, as well as sincerely-held moral and ethical beliefs as to what is right and wrong, and/or addresses ultimate ideas or questions regarding the meaning of existence, as well as the beliefs or teachings of a particular religion, church, denomination or sect.” 3 CCR 708-1:10.2(H).

80. Former Interim Director Jennifer McPherson, on behalf of the Division, issued a “No Probable Cause” determination regarding Jack’s claim of “creed” discrimination.

81. The Division reached this determination by concluding that Azucar Bakery did not refuse to make the cakes due to Jack’s religion, but because Azucar Bakery objected to the message that would be expressed by the cakes.

82. In concluding that Azucar Bakery did not commit religious discrimination by refusing to make a cake for a Christian that expressed religious messages in opposition to same-sex marriage, the Division also noted that the bakery was willing to make other goods for Christians.

83. The matters involving Le Bakery Sensual, Inc. and Gateaux, Ltd. involved substantially similar facts, charges, rationales, and resolutions as those involved in the Azucar Bakery matter.

84. Thus, the Division concluded that the three bakeries did *not* violate the Compelled-Speech Provision’s prohibition of discrimination “because of” creed/religion when they refused to design and make a cake promoting religious messages opposing same-sex marriage because (1) their objection was message-based and (2) they gladly serve Christian customers who do not promote messages they find objectionable. The Commission affirmed these determinations.

85. In stark contrast, the Division and Commission concluded that Jack Phillips and Masterpiece Cakeshop violated the Compelled-Speech Provision’s prohibition of discrimination “because of” sexual orientation because they declined to design and make a cake celebrating and promoting messages supporting same-sex marriage due to their objection to that message. The Division and Commission reached this conclusion despite the fact that Phillips and Masterpiece Cakeshop happily serve gay and lesbian customers who are not asking them to promote messages they find objectionable.

86. All four bakeries willingly served people that fell within the protected classifications of CADA, and objected to the requested cakes based on their message—not any protected status of the customers.

87. However, when the requested message was one celebrating same-sex marriage, the Division and Commission concluded that declining to express it violates the Compelled-Speech Provision.

88. Whereas, when the requested message was one opposing same-sex marriage, the Division and Commission concluded that declining to express it did not violate the Compelled-Speech Provision.

89. Thus, Defendants force expressive businesses to express messages supporting same-sex marriage but they allow expressive businesses to refuse to express messages opposing same-sex marriage.

90. This is a content- and viewpoint-based interpretation and application of CADA.

Lorie Smith and Her Faith

91. Lorie Smith is a lifelong resident of Colorado, a devoted wife, a caring mother, and a dedicated Christian who is very involved in ministry.

92. Although she is a daughter, a wife, and a mother, Lorie identifies first and foremost as a Christian—a follower of Jesus Christ.

93. In addition to attending church and Bible study weekly, Lorie volunteers as an instructor in her church's ministry program for toddlers, leads multiple women's ministry events, and handles all of her church's print and electronic marketing and website outreach.

94. Lorie's religious beliefs are central to her identity, her understanding of existence, and her conception of her personal dignity and autonomy.

95. As a Christian, Lorie believes that her life is not her own, but that it belongs to God (1 Corinthians 6:19-20) and that He has called her to live a life free from sin (Romans 6:12-13).

96. Lorie also believes that everything she does—personally and professionally—should be done in a manner that glorifies God. (1 Corinthians 10:31; 2 Corinthians 5:15; Colossians 3:17; 1 Peter 4:11.)

97. Lorie believes that she will one day give an account to God regarding the choices she made in life, both good and bad. (2 Corinthians 5:10; Romans 14:12.)

98. Lorie's understanding of what is sinful versus what is pure, lovely, admirable, excellent, or praiseworthy are rooted in the Bible and her personal relationship with Jesus Christ.

99. Lorie believes that God instructs Christians to steward the gifts He has given them in a way that glorifies and honors Him. (1 Peter 4:10-11.)

100. Therefore, Lorie believes that she must use the creative talents God has given to her in a manner that honors God and that she must not use them in a way that displeases God.

303 Creative: Making Dreams Come True

101. Lorie has always been a creative, artistic, outgoing person, and has used and honed these traits at various companies in the fields of graphic design, website design, and marketing.

102. She also developed her skills at the University of Colorado Denver, where she received a business degree with an emphasis in marketing.

103. Desiring to have the freedom to use her creative talents to honor God to a greater degree than possible while working at other companies, Lorie started 303 Creative LLC.

104. 303 Creative is a business in Colorado that offers a variety of services to the public, including the following: graphic design, website design, social media management and consultation services, marketing advice, branding strategy, training regarding website management, and innovative approaches for achieving client goals.

105. As the sole owner and operator of 303 Creative, Lorie controls the scope, mission, priorities, services, and standards of 303 Creative.

106. 303 Creative does not employ or contract work to any other individuals, and Lorie is solely responsible for all of the services provided by 303 Creative.

107. As required by her sincerely held religious beliefs, Lorie seeks to live her life and operate 303 Creative in accordance with the tenets of her Christian faith.

108. One reason 303 Creative exists is to bring glory to God and to share His truth with its clients and the community by operating according to principles that honor and glorify God.

109. To this end, Lorie and 303 Creative seek to fulfill Jesus' command to love their neighbors as themselves and to do unto others as they would have done unto themselves by serving their customers with love, honesty, fairness, transparency, and excellence.

110. One purpose of 303 Creative is to develop and design unique visual and textual expression to promote the purposes, goals, services, products, events, causes, values, and messages of its clients insofar as they do not, in the sole discretion of Lorie, (1) conflict with Plaintiffs' religious beliefs or (2) detract from Plaintiffs' goal of publicly honoring and glorifying God through the work they perform.

111. Plaintiffs are willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender.

112. Plaintiffs do not object to and will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites do not violate their religious beliefs, as is true for all customers.

113. Lorie and 303 Creative are unwilling to use their creative services to promote purposes, goals, services, products, organizations, events, causes, values, or messages that conflict with Plaintiffs' beliefs.

114. Among other things, Plaintiffs 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 as between one man and one woman.

115. Therefore, Plaintiffs' "Contract for Services" includes the following provision:

Consultant has determined that the artwork, graphics, and textual content Client has requested Consultant to produce either express messages that promote aspects of the Consultant's religious beliefs, or at least are not inconsistent with those beliefs. Consultant reserves the right to terminate this Agreement if Consultant subsequently determines, in her sole discretion, that Client desires Consultant to create artwork, graphics, or textual content that communicates ideas or messages, or promotes events, services, products, or organizations, that are inconsistent with Consultant's religious beliefs.

116. When considering a potential project, Lorie will view the prospective client's website (if applicable) and ask questions of the prospective client to assist in the vetting process of determining whether the requested project conflicts with Plaintiffs' religious beliefs and whether it is a good fit given Plaintiffs' skills, schedule, preferences, and workload.

117. If Plaintiffs determine that they are unwilling to assist with a project promoting particular purposes, goals, services, organizations, products, events, causes, values, or messages they find objectionable, Plaintiffs endeavor to refer the prospective client to a different company that can assist them.

118. There are numerous companies specializing in the areas of 303 Creative's specializations.

119. Even if Plaintiffs were to hire additional employees or contract out work, it would violate their sincerely held religious beliefs to have the employees or independent contractors do work for Plaintiffs that Plaintiffs cannot do themselves due to their religious beliefs.

120. Another purpose of 303 Creative is to develop and design unique visual and textual expression that promotes, celebrates, and conveys messages that promote aspects of Lorie's Christian faith.

121. In furtherance of this end, 303 Creative regularly provides services to various religious and non-religious organizations that are advocating purposes, goals, services, events, causes, values, or messages that align with Plaintiffs' religious beliefs.

122. One of 303 Creative's specializations is custom graphic design for use online and in print.

123. One of 303 Creative's other specialties is custom website design and maintenance.

124. All of the graphic designs Plaintiffs create are expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message.

125. All websites designed by Plaintiffs are also expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message.

126. The visual and textual content Plaintiffs produce in both graphic design and website design are their own expression.

127. As a seasoned designer, Lorie helps individuals and entities implement the ideal websites and graphics—oftentimes by designing custom graphics and textual content for the unique needs involved—to enhance and effectively communicate the desired messages.

128. Although clients often have a very basic idea of what they wish for in a graphic or a website and sometimes offer specific suggestions, Lorie's creative skills transform her clients' nascent ideas into pleasing, compelling, marketable graphics or websites conveying the intended messages.

129. When designing and creating graphics or websites, Lorie is typically in close contact with her clients as they each share their ideas and collaborate to develop graphics or websites that express a message in a way that is pleasing to both Lorie and her clients.

130. Lorie ultimately has the final say over what she does and does not create and over what designs she does and does not use for each website.

131. For each website 303 Creative makes, Lorie typically creates and designs original text and graphics for that website and then combines that original artwork with text and graphics that Lorie had created beforehand or that Lorie receives from the client or from other sources. Lorie then combines the original text and graphics she created with the already existing text and graphics to create a wholly new, original website that is unique for each client.

132. Each website 303 Creative designs and creates is an original, customized creation for each client.

133. In her website design work, Lorie devotes considerable attention to color schemes, fonts, font sizes, positioning, harmony, balance, proportion, scale, space, interactivity, movement, navigability, and simplicity.

134. Lorie also considers color, positioning, movement, angle, light, simplicity, complexity, and other factors when designing graphics.

135. Lorie takes these factors and more into account to design websites and graphics that express the desired messages in a compelling manner.

136. Every aspect of the websites and graphics Plaintiffs design contributes to the overall messages that Plaintiffs convey through the websites and graphics and the efficacy of those messages.

137. Lorie personally devotes herself to her design work, drawing on her inspiration and sense of beauty to create websites and graphics that effectively communicate the intended messages.

303 Creative: Promoting God’s Design for Marriage

138. Lorie believes that our cultural redefinition of marriage conflicts with God’s design for marriage as a lifelong union between one man and one woman.

139. Lorie believes that this is not only problematic because it violates God’s will, but also because it harms society and children because marriage between one man and one woman is a fundamental building block of society and the ideal arrangement for the rearing of children.

140. Lorie believes that our culture’s movement away from God’s design for marriage is particularly pronounced in the wake of the Supreme Court’s *Obergefell v. Hodges* decision, which held that there is a constitutional right to same-sex marriage.

141. Lorie believes that the graphic design, web design, and marketing talents God blessed her with equip her to convey messages to the public in a compelling way.

142. Lorie’s sincerely held religious belief is that she should use the talents God has given her to promote God’s design for marriage.

143. Lorie is compelled by her religious beliefs to accomplish this by expanding the scope of 303 Creative’s services to include the design, creation, and publication of wedding websites.

144. Consistent with her religious beliefs, Lorie desires to use her graphic design, web design, and marketing talents to promote and celebrate only marriages involving one man and one woman.

145. The wedding websites Plaintiffs wish to design, create, and publish will promote and celebrate the weddings of unique one-man, one-woman couples.

146. By celebrating and promoting the weddings of unique one-man, one-woman couples, Lorie and 303 Creative will be expressing messages that promote God's design for marriage as an institution between one man and one woman.

147. By creating wedding websites, Lorie and 303 Creative will also be collaborating with individuals who are marrying and will be using their unique stories as source material to express Lorie's and 303 Creative's message celebrating and promoting marriage as a union of one man and one woman.

148. The interaction between Plaintiffs and their clients who desire wedding websites will also allow Plaintiffs to strengthen and encourage marriages by sharing biblical truths with their clients as they commit to lifelong unity and devotion as man and wife.

149. The wedding websites will always be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story.

150. All of these expressive elements will be customized and tailored to the individual couple and their unique love story.

151. The messages communicated on the wedding websites will be Plaintiffs' speech.

152. Viewers of the wedding websites will know that the websites are Plaintiffs' speech because all of the wedding websites will say "Designed by 303Creative.com."

153. Even if this designation did not exist, many viewers of the wedding websites would still know that the websites are Plaintiffs' speech because couples that marry frequently inform their guests which entities provided services for the wedding and guests frequently make inquiries regarding the same.

154. A true and correct copy of an example of the type of wedding website that Plaintiffs desire to design for their prospective clients is attached as Exhibit A.¹

155. Plaintiffs are prepared to announce their services for the creation of wedding websites.

156. In fact, Plaintiffs have already designed an addition to 303 Creative's website announcing the expansion of their services to include custom wedding websites, but this addition is not yet viewable by the public.

157. A true and correct copy of this addition to the website is attached as Exhibit B.²

158. This webpage expresses Plaintiffs' love for weddings and the unique story of love and commitment told by each wedding and the wedding websites that describe them.

159. The webpage also expresses Plaintiffs' religious motivation for creating wedding websites.

160. Plaintiffs' intended message of celebration and promotion of their religious belief that God designed marriage as an institution between one man and one woman will be unmistakable to the public after viewing the webpage.

161. For example, the webpage states the following:

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.

¹ Exhibit A is a compilation of captured images of the website that are modified in size and scope to enhance readability in printed form.

² Exhibit B is a compilation of captured images of the website that are modified in size and scope to enhance readability in printed form.

162. As part of Plaintiffs’ religious calling to celebrate God’s design for marriage and due to their sincerely held religious belief that they must be honest and transparent about the services that they can and cannot provide, the webpage also states that their religious beliefs prevent them from creating websites celebrating same-sex marriages or any other marriage that contradicts God’s design for marriage.

163. For example, the webpage states the following:

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.

164. As part of their religiously-motivated speech, Plaintiffs desire to—and are prepared to—publish this webpage immediately.

303 Creative: Suffering from CADA’s Usurpation of Freedom

165. As a Colorado place of business engaged in sales to the public and offering services to the public, 303 Creative is a “place of public accommodation” subject to CADA. Colo. Rev. Stat. § 24-34-601(1), (2)(a).

166. The Banned-Speech Provision makes it illegal for Plaintiffs to publish the webpage referenced in paragraphs 156–157.

167. This is because the Banned-Speech Provision makes it unlawful for a public accommodation to publish, display, or post any written or electronic communication indicating that it will not provide expressive services celebrating or promoting a same-sex marriage that it will provide for marriages involving one man and one woman.

168. Plaintiffs’ webpage announcing their services includes such communications.

169. The Compelled-Speech Provision also prevents Plaintiffs from publishing the website.

170. If, as the website referenced in paragraphs 156–157 does, Plaintiffs were to offer their creative services for the design and creation of wedding websites celebrating and promoting marriages between one man and one woman, the Compelled-Speech Provision would require Plaintiffs to also provide their creative services for the design and creation of wedding websites celebrating and promoting other types of marriages, including those between people of the same sex.

171. If Plaintiffs publish the website referenced in paragraphs 156–157, thereby advertising that they will design and create wedding websites, Plaintiffs will receive requests to provide those expressive services for same-sex weddings.

172. It would violate their sincerely held religious beliefs to create a wedding website for a same-sex wedding because, by doing so, they would be expressing a message celebrating and promoting a conception of marriage that is contrary to God’s design for marriage.

173. Plaintiffs are unwilling to express a message celebrating and promoting any conception of marriage outside of the understanding of marriage as a union of one man and one woman.

174. Not only would creating a wedding website for a same-sex wedding express a message that Plaintiffs are unwilling to express, but it would also undercut the effectiveness of Plaintiffs’ desired expression promoting marriage as a union between one man and one woman, harm Plaintiffs’ reputation among their Christian clients and friends, and adversely impact Plaintiffs’ ability to share additional biblical truths with others.

175. Therefore, if Plaintiffs begin creating wedding websites, they will only be able to create wedding websites celebrating and promoting marriages involving one man and one woman.

176. However, the Compelled-Speech Provision, and Defendants' application thereof, does not allow Plaintiffs this freedom.

177. Unwilling to violate their sincerely held religious beliefs, but similarly unwilling to violate CADA and suffer the consequences, Plaintiffs are compelled to refrain from publishing the website referenced in paragraphs 156–157 and from designing, creating, and publishing wedding websites that celebrate and promote marriages between one man and one woman.

178. If not for CADA, Plaintiffs would have already made the webpage referenced in paragraphs 156–157 viewable to the public and begun offering their creative services for the design, creation, and publication of wedding websites that celebrate and promote marriages between one man and one woman.

179. CADA is the only reason that Plaintiffs are not engaging in their desired religious, political, moral, and social speech promoting marriage as an institution between one man and one woman and expressing their opposition to same-sex marriage.

180. If Plaintiffs obtain the relief requested in this Complaint, they will immediately publish the webpage referenced in paragraphs 156–157 and begin work designing, creating, and publishing wedding websites.

181. Website design services are widely available from businesses in the State of Colorado and across the nation.

182. For example, the online directory <http://sortfolio.com/> lists 243 web design companies in Denver alone and hundreds more nationwide.

183. Likewise, the online directory <http://www.designfirms.org> lists 131 web design companies in Colorado and 6,745 in the United States as a whole.

184. The online directory <http://unitedstateswebdesigndirectory.com> further lists 127 web design companies in Colorado and 4,097 countrywide.

185. Accordingly, persons will be able to easily access web design services to promote same-sex marriages if Plaintiffs are permitted to follow their convictions by declining to promote same-sex marriages while promoting marriages between one man and one woman.

Expressive Businesses in Colorado Advocate for Same-Sex Marriage

186. As explained, CADA is preventing Plaintiffs from celebrating and promoting their religious views about marriage in the manner they desire.

187. However, CADA allows other expressive businesses that are public accommodations under CADA to celebrate and promote their views about marriage.

188. This distinction in treatment is based on the particular view that an expressive business holds regarding marriage.

189. If an expressive business wishes to oppose same-sex marriage, Defendants, through CADA, silence them.

190. If, however, an expressive business wishes to support same-sex marriage, Defendants allow them to do so.

191. For example, Nicole Nichols Photography, a wedding photography company based in Denver, Colorado, has a history of advocating for and celebrating same-sex marriage.

192. On October 22, 2010, the owner of Nicole Nichols Photography stated on her business's webpage that she photographed a gay wedding and loved how the pastor "focused his sermon on how normal a gay union is, perhaps not popular, but certainly just as normal as any two people

sharing their love & lives together. Throughout history gays have always been a part of reality, and always will be, it[']s just unfortunate government & religion has not always recognized it.”

193. The webpage with this quote is available here: <http://nicolenichols.com/blog/weddings/wedding-gay-new-orleans/>.

194. On June 29, 2012, the photography company announced its participation in the Denver Pridefest and noted that the owner is “a big supporter of gay rights,” is “a strong believer that ALL should have the right to marry whomever he or she wants,” and believes that “love can change the world.”

195. The webpage with these quotes is available here: <http://nicolenichols.com/blog/special-events/denver-pridefest-co-gay-weddings/>.

196. The owner of the photography company also published the following statement celebrating the Supreme Court’s *Obergefell* decision and advocating for the expansion of same-sex marriage to the remainder of the world: “I’m so proud of not only our state of Colorado, but the nation, for finally legalizing gay and lesbian marriages. All men and women should share the same rights that a legal marriage allows Hopefully the rest of the world will soon follow.”

197. The webpage with this quote is available here: <http://nicolenichols.com/blog/weddings/denver-gay-wedding-photographer-denver-botanical-gardens-tivoli-hall/>.

198. Upon information and belief, many other Colorado expressive businesses and their owners promote their views in favor of same-sex marriage via the platforms of their public accommodations and publish their willingness to create expression celebrating those unions.

199. Plaintiffs support the rights of these expressive businesses and their owners to express their beliefs and conduct their businesses in a way that promotes those beliefs and does not promote contrary beliefs. Plaintiffs simply wish to enjoy those same freedoms. Yet CADA strips Plaintiffs of these freedoms. That is the foundational reason for this lawsuit – to restore Plaintiffs to an equal footing with other expressive business owners in regard to their right to express messages that are consistent with their beliefs, and to avoid expressing those messages that are not.

ALLEGATIONS OF LAW

200. Plaintiffs Lorie Smith and 303 Creative LLC are subject to and must comply with Colorado laws, including Colo. Rev. Stat. § 24-34-601(2)(a).

201. At all times relevant to this Complaint, each and all of the acts alleged herein were attributed to Defendants, which acted under color of a statute, regulation, custom, or usage of the State of Colorado.

202. The impact of chilling and deterring Plaintiffs Lorie Smith and 303 Creative LLC from exercising their constitutional rights constitutes imminent and irreparable harm to Lorie Smith and 303 Creative LLC as a result of Defendants' policy and practice.

203. Plaintiffs Lorie Smith and 303 Creative LLC have no adequate or speedy remedy at law to correct or redress the deprivation of its rights under the United States Constitution by Defendants.

204. Unless the conduct of Defendants is enjoined, Plaintiffs Lorie Smith and 303 Creative LLC will continue to suffer irreparable injury.

CAUSES OF ACTION

First Cause of Action:

Violation of the Free Speech and Free Press Clauses of the First Amendment of the United States Constitution: Content and Viewpoint Discrimination, Compelled Speech, Expressive Association, Unconstitutional Conditions, Unbridled Discretion, and Overbreadth

205. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1–204 of this Complaint.

206. Plaintiff Lorie Smith is the sole owner and operator of Plaintiff 303 Creative, a closely-held limited liability company.

207. Plaintiff Lorie Smith is a Christian who operates 303 Creative in accordance with her sincerely held religious beliefs.

208. Plaintiffs, in accordance with their sincerely held religious belief that all of their actions must be in accordance with the teachings of the Bible and their understanding of God’s plan, will only design, create, publish and sell custom websites that are consistent with their religious beliefs.

209. It is the sincerely held religious belief of Plaintiffs that the only proper conception of marriage is a marital covenant between one man and one woman.

210. Plaintiffs design, create, and publish artistic, custom websites promoting and celebrating various messages.

211. In doing so, Plaintiffs create and promulgate speech.

212. Each website Plaintiffs create is their own speech.

213. Plaintiffs’ custom websites, including the choice of graphics, format, sizing, color scheme, font size, font color, text, and interface; the process of designing and creating the

websites; the process of marketing, selling, and promoting the websites; the act of publishing the websites; and the business of designing, creating, publishing, and selling websites, all constitute protected speech under the First Amendment.

214. When Plaintiffs design and create a wedding website, they intend to and are creating speech celebrating and promoting the wedding described on the website.

215. Plaintiffs desire to design wedding websites to celebrate and promote their religious understanding of marriage as an institution between one man and one woman and as a fundamental building block of society.

216. Plaintiffs also desire to use their talents and platform to disseminate their view of God's design for marriage as an institution between one man and one woman and the benefits that such marriages have for society.

217. It would violate Plaintiffs' religious beliefs and conflict with their message about marriage to design and create a wedding website for any wedding, such as a same-sex wedding, that does not celebrate the marital union of one man and one woman.

218. Plaintiffs' design and creation of websites celebrating and promoting marriage between one man and one woman, and their decision to decline to design and create websites promoting any other conception of marriage, are protected by the First Amendment.

219. Plaintiffs also wish to inform the public that they are unwilling to create speech for events promoting marriages that are not between one man and one woman, including same-sex marriages. Along with this explanation, Plaintiffs wish to elucidate their religious reasons for not creating custom websites that violate their religious beliefs regarding marriage.

220. Plaintiffs wish to make such statements on their website and in electronic communications with prospective clients.

221. This desired speech is protected by the First Amendment.

CADA is Content Based and Viewpoint Discriminatory

222. The First Amendment's Free Speech Clause prohibits laws that regulate protected speech based on its content or viewpoint.

223. The Banned-Speech Provision is content-based because it regulates speech about a handful of topics—specifically disability, race, creed, color, sex, sexual orientation, marital status, national origin, and ancestry—while leaving as unregulated speech on the virtually unlimited number of other topics not listed in CADA.

224. For example, the Banned-Speech Provision prohibits statements asserting that political positions supporting same-sex marriage are misguided but allows statements opposing other political positions of all sorts.

225. This is content-based discrimination forbidden by the First Amendment.

226. The Banned-Speech Provision is also viewpoint discriminatory.

227. Defendants enforce the Banned-Speech Provision in a viewpoint discriminatory manner at least in relation to the topic of marriage.

228. Defendants will not prosecute or threaten to prosecute under the Banned-Speech Provision expressive businesses or their owners that provide wedding services and state that they support same-sex marriage and create for and promote messages in favor of same-sex marriage.

229. Defendants will, however, prosecute under the Banned-Speech Provision expressive businesses and their owners that provide wedding services and who state that they oppose same-

sex marriage, that they exclusively favor marriages between one man and one woman, or that they decline to express messages favoring same-sex marriage.

230. Thus, in order to avoid prosecution and punishment, Colorado expressive businesses and their owners providing expressive wedding services must refrain from speaking messages that exclusively favor marriages between one man and one woman, that oppose same-sex marriage, or that decline to affirmatively promote or celebrate same-sex marriage.

231. This singling out, punishing, suppressing, and deterring certain speech solely based on its viewpoint about marriage is unlawful viewpoint discrimination.

232. If Plaintiffs were to make their desired statements, they would violate the Banned-Speech Provision's content- and viewpoint-based restrictions on speech and face investigation and other penalties for the violation.

233. The Compelled-Speech Provision is also content and viewpoint based.

234. The First Amendment prevents the government from compelling people to create, express, or support a message not of their own choosing or to speak when they would rather remain silent.

235. Plaintiffs will only design and create wedding websites that promote and celebrate marriages between one man and one woman.

236. If Plaintiffs enter the business of designing and creating wedding websites for weddings celebrating and promoting the lifelong commitment of one man and one woman, the Compelled-Speech Provision requires them to also design and create wedding websites celebrating and promoting same-sex weddings.

237. Thus, the Compelled-Speech Provision requires Plaintiffs to engage in expression that they do not desire to convey—expression that violates their core religious beliefs—by requiring them to design and create websites celebrating and promoting same-sex marriage.

238. If Plaintiffs begin designing and creating wedding websites, as they desire, they will be subject to penalties for declining to design and create websites that promote and celebrate a conception of marriage that violates their deeply held religious beliefs.

239. The penalties that Plaintiffs may face for declining to promote messages they deem objectionable can include fines of up to \$500 for *each* violation, Colo. Rev. Stat. § 24-34-602(1)(a), a costly and onerous investigation, Colo. Rev. Stat. § 24-34-306(2)(a), an order requiring them to comply with CADA, Colo. Rev. Stat. § 24-34-306(9), and an order requiring them to take a variety of steps, such as reporting their own behavior to the Commission, engaging in indoctrination training, and affirmatively informing the public that they lack the First Amendment right to decline to produce and promote objectionable messages, *see* Colo. Rev. Stat. §§ 24-34-306(9), 24-34-605.

240. Notably, many of the potential penalties are themselves government-compelled speech.

241. The content and viewpoint-based nature of CADA is further illustrated by the punishment Jack Phillips and Masterpiece Cakeshop received for declining to celebrate and promote messages favoring same-sex marriage while Colorado businesses such as Azucar Bakery were permitted to decline to promote messages opposing same-sex marriage.

242. The fact that the Compelled-Speech Provision requires businesses to express messages consistent with government orthodoxy about same-sex marriage, while allowing them to decline to express messages contrary to such orthodoxy, is rank content and viewpoint discrimination.

The Compelled-Speech Provision Violates Plaintiffs' Right to Free Association

243. The First Amendment prohibits the government from compelling persons to expressively associate with others in the process of creating and disseminating speech.

244. The First Amendment also prohibits the government from banning people from expressively associating with others in the process of creating and disseminating speech.

245. Plaintiffs engage in expressive association when they decide to accept a client and collaborate with them to use the client's unique story and wedding event as source material for Plaintiffs' creation of speech that furthers Plaintiffs' beliefs.

246. The Compelled-Speech Provision harms Plaintiffs' ability to promote their beliefs about religion and marriage by requiring them to either decline to associate with clients and events that will help them promote messages celebrating marriages between one man and one woman or to willingly associate with clients and events that will require them to speak messages that completely contradict their desired messages.

247. Plaintiffs cannot authentically or convincingly promote their beliefs about religion and marriage if they are forced to associate with clients or events that will require Plaintiffs to express contradictory messages about religion and marriage.

CADA Conditions Benefits on Surrendering Rights

248. The First Amendment's Free Speech Clause prohibits the government from conditioning a benefit on the relinquishment of a constitutional right.

249. CADA imposes a content and viewpoint-based litmus test on the ability of Coloradans to own and operate an expressive business.

250. Plaintiffs have the First Amendment right to choose the content of their expression, to promote the messages they desire to promote, to participate in the creation of the speech they deem desirable, to exercise their religion by promoting messages consistent with their religious beliefs, and to decline to promote messages contrary to their religious beliefs.

251. But the Compelled-Speech Provision mandates that Plaintiffs create messages celebrating and promoting same-sex marriage and the Banned-Speech Provision bars them from expressing their religious views about same-sex marriage, thereby unconstitutionally conditioning the receipt of an essential benefit—specifically, the right to make a living in the occupation of one’s choice, the right to run a business, and the right to sell speech—on the willingness of Plaintiffs to surrender these First Amendment rights.

CADA’s Provisions Grant Defendants Unbridled Discretion

252. The First Amendment’s Free Speech Clause prohibits the government from regulating expression based on guidelines that give officials unbridled discretion to arbitrarily allow some expression and prohibit other expression.

253. In its application of the Compelled-Speech Provision, Defendants have shown that they have unbridled discretion to arbitrarily allow some expression and prohibit other expression.

254. If an expressive business is asked to create expression consistent with the ideology of Defendants and inconsistent with the beliefs of the expressive business, Defendants can oftentimes punish the expressive business if it adheres to its beliefs by declining to create the objectionable expression.

255. Defendants can do so by saying that the business owner declined to create the requested expression “because of” the protected classification of the customer rather than the objectionable nature of the message.

256. Defendants’ actions with respect to Jack Phillips and Masterpiece Cakeshop illustrate this point.

257. However, if a prospective customer asks an expressive business to produce a message that the business *and* Defendants find objectionable, Defendants are happy to afford the business owner the right to decline the objectionable speech.

258. Defendants can do so by saying that the business owner declined to create the requested expression due to the objectionable nature of the message rather than “because of” the protected classification of the customer.

259. Defendants’ actions with respect to Azucar Bakery and other bakeries illustrate this point.

260. Thus, Defendants have unbridled discretion to determine arbitrarily that one declination to create objectionable speech is “because of” a protected classification, and therefore illegal under the Compelled-Speech Provision, and to determine that another declination is because of the objectionable nature of the speech rather than the protected classification of the customer.

261. The Banned-Speech Provision also grants unbridled discretion to Defendants by making it unlawful for a public accommodation to “publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates . . . 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.”

262. CADA does not define “unwelcome,” “objectionable,” “unacceptable,” or “undesirable,” and does not explain what statements “indicate” that someone would be unwelcome, objectionable, unacceptable, or undesirable “because of” a protected classification.

263. This language allows Defendants to censor speech out of dislike for particular viewpoints, allows Defendants to hide inappropriate viewpoint discrimination behind this language, and prevents potential speakers from knowing whether their speech violates the law.

264. Anytime a public accommodation or its owner opposes or criticizes someone’s ideas, someone’s beliefs, someone’s actions, or someone’s speech, Defendants could determine that that statement indicates someone is unwelcome, objectionable, unacceptable, or undesirable.

265. Because almost any statement could violate the wide reach of the Banned-Speech Provision, Defendants have unbridled discretion to pick and choose which statements violate the law, thereby subjecting the First Amendment rights of Plaintiffs and similarly situated citizens to the whims of government officials.

The Banned-Speech Provision is an Overbroad Prior Restraint on Speech

266. The Banned-Speech Provision is overbroad because it prohibits public accommodations from directly or indirectly publishing, circulating, issuing, displaying, posting, or mailing “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 . . . because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.”

267. This language applies to both expressive and non-expressive businesses.

268. Nothing in the Banned-Speech Provision limits its scope to statements about non-expressive activities.

269. This language is overbroad because it restricts the right of expressive businesses like newspapers, book publishers, printers, musicians, authors, movie studios, playwrights, web designers, and others to create speech and communicate it in accordance with their beliefs and to decline to speak and create speech that violates their beliefs.

270. The Banned-Speech Provision is also overbroad because it prohibits public accommodations from “directly or indirectly” publishing, circulating, issuing, displaying, posting, or mailing “any written, electronic, or printed communication, notice, or advertisement that indicates . . . 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.”

271. This prohibits too many protected statements—including political and religious ones—that oppose or criticize someone’s ideas, beliefs, actions, or speech.

272. It also prohibits too many protected statements—including political and religious ones—that exclusively favor someone’s ideas, beliefs, actions, or speech.

273. Further, the Banned-Speech Provision’s restriction on communications that even “indirectly” communicate a barred message imperils even more protected expression because what constitutes an “indirect” communication is completely undefined and thus permits enforcement officials to hide their viewpoint discrimination.

The Banned-Speech Provision Violates the Free Press Clause

274. The Free Press Clause prevents previous restraints upon publication and guarantees each individual’s right to make their thoughts public before the community.

275. The Free Press Clause protects Plaintiffs’ right to discuss their religious beliefs about marriage on their website without previous restraint or fear of subsequent punishment by the government.

276. Defendants unlawfully apply the Banned-Speech Provision to forbid Plaintiffs from publishing religious speech critical of same-sex marriage on their website because such speech might “directly or indirectly” indicate that requests for custom same-sex wedding websites would be “unwelcome, objectionable, unacceptable, or undesirable.”

277. Defendants’ unlawful application of CADA to expressive activity is the only reason Plaintiffs have refrained from publishing speech on their website explaining their religious reasons for promoting only marriage between a man and a woman.

278. Defendants’ application of CADA to prevent Plaintiffs from engaging in the free and general discussion of public matters, like marriage, violates the Free Press Clause.

The First Amendment Violations Chill Plaintiffs’ Speech and Fail Strict Scrutiny

279. Absent the Banned-Speech and Compelled-Speech Provisions, Plaintiffs would immediately enter the field of promoting and celebrating marriages between one man and one woman through custom wedding websites.

280. Plaintiffs are prepared to begin this work by making the website reflected in Exhibit B announcing their wedding-website design services available online for public consumption.

281. The only things preventing Plaintiffs from designing and creating websites celebrating and promoting marriage as an institution between one man and one woman are the Banned-Speech Provision and the Compelled-Speech Provision and Defendants' application thereof in a way that punishes those who decline to celebrate and promote same-sex marriage.

282. Because of CADA, Plaintiffs are chilled, deterred, and restricted from engaging in their desired expression celebrating and promoting marriage as an institution between one man and one woman.

283. Plaintiffs currently suffer the ongoing harm of self-censorship of their desired, protected speech, in order to avoid penalties under the Compelled-Speech and Banned-Speech Provisions.

284. The Banned-Speech Provision prohibiting statements indicating that someone is unwilling to celebrate and promote same-sex marriage and prohibiting other political, religious, or social commentary that may indicate that someone is "unwelcome, objectionable, unacceptable, or undesirable," and Defendants' enforcement of the Banned-Speech Provision, chills, deters, and restricts not only Plaintiffs' speech but the speech of third parties as well.

285. If not for CADA, Plaintiffs would immediately publish on their website the webpage attached as Exhibit B announcing their desire to celebrate marriages between one man and one woman through the creation of custom wedding websites, their religious views regarding marriage, and their inability to celebrate same-sex marriages or other conceptions of marriage that are not between one man and one woman.

286. Because CADA infringes First Amendment free speech rights, it must further a compelling interest in a narrowly tailored way.

287. CADA does not serve any legitimate, rational, substantial, or compelling interest by forcing Plaintiffs to violate their First Amendment free speech or free press rights.

288. CADA does not serve any legitimate interest in a narrowly tailored way by forcing Plaintiffs to violate their First Amendment free speech or free press rights.

289. Defendants have alternative, less restrictive means to achieve any legitimate interests rather than forcing Plaintiffs to abandon their First Amendment free speech and free press rights.

290. Accordingly, as applied to Plaintiffs, the Compelled-Speech Provision's requirement that Plaintiffs create custom websites celebrating and promoting same-sex marriage if they decide to create custom websites celebrating marriages between one man and one woman infringes Plaintiffs' rights to speak and refrain from speaking, and to associate or refrain from associating, as protected by the First and Fourteenth Amendments of the United States Constitution.

291. Accordingly, facially and as applied to Plaintiffs, the Banned-Speech Provision's prohibition of statements indicating that someone is unwilling to celebrate and promote same-sex marriage and its prohibition on other political, religious, or social commentary that may indicate that someone is "unwelcome, objectionable, unacceptable, or undesirable" because they are part of a protected class violates Plaintiffs' right to speak freely as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

292. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

Second Cause of Action:
Violation of Plaintiffs' First Amendment Right to Free Exercise of Religion

293. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1–204 of this Complaint.

294. Plaintiffs' sincerely held religious beliefs prohibit them from celebrating or promoting messages contrary to their understanding of the teachings of the Bible.

295. Plaintiffs sincerely believe that the Bible teaches that marriage is designed by God to be a lifelong union between one man and one woman only.

296. Therefore, Plaintiffs cannot design a wedding website for a same-sex wedding because that requires Plaintiffs to promote and celebrate messages contrary to their religious beliefs.

297. Plaintiffs hold sincere religious beliefs that require them to tell their clients and the general public that they cannot create custom expression that conflicts with their religious beliefs and the reasons they cannot create such custom expression.

298. Plaintiffs would violate their religious beliefs if they misled their customers to think that they create custom expression celebrating and promoting same-sex marriage when they do not.

299. Plaintiffs hold sincere religious beliefs requiring them to explain their religious beliefs about marriage and the religious reasons for and meaning of their expression.

300. Plaintiffs' religious beliefs about marriage, expression, honesty, and business come from the Bible and Christian doctrine.

301. The Compelled-Speech Provision forces Plaintiffs to choose between three unacceptable options: (1) decline to create custom expression celebrating and promoting same-sex wedding ceremonies because of their religious beliefs and suffer investigation, prosecution, and penalties as a result; (2) violate their religious beliefs by creating custom expression celebrating and

promoting same-sex wedding ceremonies in order to comply with the law; or (3) restrict their religious exercise by refraining from using their God-given talents and platform to create custom expression celebrating and promoting marriages as God designed them.

302. The Banned-Speech Provision forces Plaintiffs to choose between two impossible options: (1) adhere to their religious beliefs, publish their religiously motivated and required statements, and suffer investigation, prosecution, and penalties; or (2) violate their religious beliefs and refrain from publishing their religiously motivated and required statements.

303. The Compelled-Speech Provision violates Plaintiffs' right to the free exercise of religion by conditioning the right to own and operate a business that designs wedding websites celebrating and promoting marriage as God designed it on their willingness to violate their religious beliefs by celebrating and promoting same-sex marriage.

304. The Banned-Speech Provision violates Plaintiffs' right to the free exercise of religion by stopping them from operating their business in an open and honest way by barring them from stating what messages they will not express due to their religious beliefs.

305. The Banned-Speech Provision violates Plaintiffs' right to the free exercise of religion by preventing them from using their closely-held business as a platform to express their religious beliefs about marriage, the expression of which are religiously motivated.

306. The Compelled-Speech Provision and Defendants' enforcement thereof impermissibly prefer some religious views over others by allowing those whose religion is consistent with same-sex marriage to own and operate an expressive business in the wedding industry while punishing those who own and operate marriage-related expressive businesses in accordance with their religious beliefs that prohibit them from celebrating or promoting same-sex marriage.

307. The Banned-Speech Provision and Defendants' enforcement thereof impermissibly prefer some religious views over others by allowing those who own and operate public accommodations to express religious beliefs in favor of same-sex marriage but not allowing them to express religious beliefs against same-sex marriage.

308. CADA is not facially or operationally neutral or generally applicable and imposes special disabilities on Plaintiffs due to their religious beliefs.

309. CADA, facially and as applied by Defendants, is not neutral or generally applicable because Defendants enforce it through a system of individualized exemptions under which they assess the reasons for an exemption and grant exemptions for nonreligious reasons but not for religious reasons.

310. CADA, facially and as applied by Defendants, is not neutral or generally applicable because it contains categorical exemptions, including one for any "church, synagogue, mosque, or other place that is principally used for religious purposes." Colo. Rev. Stat. § 24-34-601(1).

311. Given CADA's broad exemption for such religious entities, Defendants have no legitimate basis for refusing to extend a religious exemption to Plaintiffs who have at least as strong of a religious objection to celebrating and promoting same-sex marriage as any of the exempted entities and at least as strong of a religious motivation to express messages about their religious beliefs regarding God's design for marriage as any of the exempted entities.

312. Additionally, Defendants apply CADA in a way that protects the religious beliefs of expressive business owners who share their views, but punishes expressive business owners who hold religious beliefs contrary to Defendants' views.

313. For example, when an expressive business owner's religious beliefs prevent her from promoting and celebrating same-sex marriage, Defendants enforce the Compelled-Speech Provision in a manner that requires the expressive business owner to violate her religious beliefs by promoting and celebrating same-sex marriage if she wishes to be in the marriage industry.

314. In contrast, when an expressive business owner's beliefs lead her to refuse to promote and celebrate a religious message opposing same-sex marriage, Defendants interpret the Compelled-Speech Provision as allowing the business to decline to create the message that both the business owner and Defendants find objectionable.

315. CADA also violates Plaintiffs' free exercise rights under the hybrid rights doctrine because it implicates free exercise rights in conjunction with other constitutional protections, like the right to free speech.

316. Plaintiffs' compliance with their religious beliefs constitutes a religious exercise under the First Amendment.

317. CADA substantially burdens Plaintiffs' religious exercise.

318. CADA imposes severe coercive pressure on Plaintiffs to change or violate their religious beliefs and chills and deters Plaintiffs' religious exercise by suppressing their religiously motivated and required messages.

319. Absent the Compelled-Speech Provision, Plaintiffs would immediately act in accordance with their religious beliefs by entering the field of designing and creating wedding websites celebrating and promoting marriage as God designed it.

320. Absent the Banned-Speech Provision, Plaintiffs would immediately speak and publish their religiously motivated and required messages about God’s design for marriage and the religious reasons that they are unwilling to celebrate other views of marriage.

321. If not for CADA, Plaintiffs would immediately publish on their website the webpage attached as Exhibit B announcing their desire to celebrate marriages as God designed them, their religious views regarding marriage, and their inability to celebrate same-sex marriages or other conceptions of marriage that are not between one man and one woman.

322. Plaintiffs currently suffer ongoing harm because of CADA—namely, the self-censorship and suppression of their religiously motivated and required messages to avoid violating the law and incurring resulting penalties.

323. Because CADA is not facially or operationally neutral or generally applicable and imposes special disabilities on Plaintiffs due to their religious beliefs, and because it also burdens other fundamental constitutional rights, it must further a compelling interest in a narrowly tailored way.

324. Defendants do not serve any legitimate, rational, substantial, or compelling interest in forcing Plaintiffs to violate their religious beliefs by designing and creating a wedding website that celebrates and promotes same-sex marriage.

325. Defendants do not serve any legitimate, rational, substantial, or compelling interest in forcing Plaintiffs to violate their religious beliefs by refraining from expressing their religiously motivated and required statements.

326. To achieve any legitimate interests that Defendants may assert, Defendants have many alternative, less restrictive mechanisms available.

327. Accordingly, as applied to Plaintiffs, the Compelled-Speech Provision violates their free-exercise rights.

328. Accordingly, facially and as applied to Plaintiffs, the Banned-Speech Provision violates their free-exercise rights.

329. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

Third Cause of Action:
Violation of Plaintiffs' Fourteenth Amendment Right to Equal Protection

330. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1–204 of this Complaint.

331. The government may not treat someone disparately as compared to similarly situated persons and businesses when such disparate treatment burdens a fundamental right.

332. Plaintiffs are similarly situated to other persons and expressive businesses that provide marriage-related services and express religious and political messages about marriage.

333. The Compelled-Speech Provision and Defendants' enforcement thereof treat Plaintiffs' religious and political speech and religious exercise differently from those similarly situated to Plaintiffs by permitting those whose religious and political beliefs support same-sex marriage to own and operate a marriage-related expressive business according to their religious and political beliefs without fear of punishment, while imposing penalties on those who own and operate marriage-related expressive businesses according to their religious and political beliefs that bar them from celebrating and promoting same-sex marriage.

334. The Compelled-Speech Provision and Defendants' enforcement thereof make it illegal for public accommodations and their owners to decline to express views favoring one conception of marriage that they may find objectionable—namely, the view that it is good for two people of the same sex to marry—but permissible to decline to express views favoring a contrary conception of marriage that they may find objectionable—namely, the view that it is not good for two people of the same sex to marry.

335. That CADA permits public accommodations to decline to express one view about marriage but does not allow them to decline to express another view about marriage is revealed

by the different outcomes reached by Defendants in applying the Compelled-Speech Provision to Masterpiece Cakeshop and the similarly situated Azucar Bakery, Le Bakery Sensual, Inc., and Gateaux, Ltd.

336. The Banned-Speech Provision and Defendants' enforcement thereof treat Plaintiffs' religious and political speech and religious exercise differently from those similarly situated to Plaintiffs by permitting those whose religious and political beliefs support same-sex marriage to express their beliefs without fear of punishment, while imposing penalties on those who express political and religious beliefs opposing same-sex marriage.

337. CADA, and Defendants' discriminatory enforcement thereof, violates several fundamental rights of Plaintiffs, such as their freedom of speech and free exercise of religion.

338. When the enforcement of laws, like CADA, infringe on such fundamental rights, courts presume discriminatory intent.

339. In this case, the presumption of discriminatory intent is borne out by Defendants' intentional discrimination against the rights of free speech and free exercise of religion by Plaintiffs and those like Plaintiffs who hold traditional Christian beliefs about marriage as an institution between one man and one woman.

340. The discriminatory intent is also shown by the different outcomes reached by Defendants in applying the Compelled-Speech Provision to Masterpiece Cakeshop and the similarly situated Azucar Bakery, Le Bakery Sensual, Inc., and Gateaux, Ltd.

341. Defendants lack any legitimate, rational, substantial, or compelling state interest for such disparate treatment of Plaintiffs.

342. Defendants' disparate treatment of Plaintiffs is not narrowly tailored to further any legitimate government interest Defendants' may allege.

343. CADA, as applied to Plaintiffs, therefore violates their right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

344. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

Fourth Cause of Action:
Violation of Plaintiffs' Fourteenth Amendment Right to Due Process

345. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1–204 of this Complaint.

346. The Fourteenth Amendment to the United States Constitution guarantees Plaintiffs the right to due process of law, which includes the right to own and operate a business and earn a livelihood free from unreasonable governmental interference.

347. CADA unreasonably interferes with Plaintiffs' due process rights by threatening them with punishment if they operate 303 Creative in accordance with their religious convictions.

348. The Due Process Clause of the Fourteenth Amendment also prohibits the government from censoring speech or outlawing behavior pursuant to vague standards that grant unbridled discretion to government officials to arbitrarily prohibit some expression and action and that fail to give speakers and actors sufficient notice whether their speech or actions violate the law.

349. The Banned-Speech Provision contains vague language because it prohibits the publication of statements indicating that an individual is “unwelcome, objectionable, unacceptable, or undesirable” because that individual belongs to one of the particular classifications, such as “sexual orientation,” covered by CADA.

350. CADA never defines “unwelcome,” “objectionable,” “unacceptable,” or “undesirable.”

351. CADA also fails to explain what statements indicate that someone is “unwelcome, objectionable, unacceptable, or undesirable” “because” that individual belongs to one of the classifications stated in CADA.

352. CADA also fails to define what constitutes an “indirect” communication versus a “direct” communication.

353. This vague language grants Defendants unbridled discretion to censor speech out of dislike for particular viewpoints and to hide their viewpoint discrimination behind vague language.

354. This vague language, and Defendants' unbridled discretion to choose how to enforce the language, prevents potential speakers from knowing whether their speech violates the law.

355. Anytime a public accommodation or its owner opposes or criticizes someone's ideas, someone's beliefs, someone's actions, or someone's speech, Defendants could determine that the statement communicates that a person is unwelcome, objectionable, unacceptable, or undesirable.

356. Thus, citizens of common intelligence must guess about what it means to make a statement indicating that someone is "unwelcome, objectionable, unacceptable, or undesirable" because that person belongs to a protected classification and they will differ in the conclusions they reach in making this assessment.

357. The Banned-Speech Provision provides insufficient warning or notice as to what expression is prohibited.

358. Because almost any statement could violate the Banned-Speech Provision, Defendants must pick and choose which statements violate the law.

359. Therefore, the rights of Plaintiffs and other Coloradans now turn on the whim of government officials, and Plaintiffs and other Coloradans therefore cannot know whether their desired speech violates the law.

360. Because the Banned-Speech Provision does not provide sufficient clarity to those who desire to speak and empowers Defendants to impose severe penalties on speakers whose views

they disfavor, Plaintiffs have not and will not publish their desired statements about the speech they are unwilling to engage in and their religious views on marriage in order to avoid violating the law and incurring the accompanying penalties.

361. If not for the vagueness in the Banned-Speech Provision, Plaintiffs would speak their desired messages immediately.

362. The Banned-Speech Provision chills and deters Plaintiffs' speech.

363. Plaintiffs currently suffer ongoing harm because of the Banned-Speech Provision—namely, the self-censorship and suppression of their protected speech to avoid violating CADA and incurring penalties.

364. Because CADA chills, deters, and infringes on the due process rights of Plaintiffs and other citizens, CADA must further a compelling interest in a narrowly tailored way.

365. Defendants have no legitimate, rational, substantial, or compelling interest in stopping Plaintiffs from owning and operating a business and from earning a livelihood.

366. CADA and Defendants do not serve any legitimate interest in a narrowly tailored way by stopping Plaintiffs from owning and operating a business and from earning a livelihood.

367. Defendants do not serve any legitimate, rational, substantial, or compelling interest in using vague language to deter Plaintiffs from communicating as they desire.

368. The Banned-Speech Provision and Defendants do not serve any legitimate interest in a narrowly tailored way in using vague language to deter Plaintiffs' speech.

369. Defendants have many alternative, less restrictive mechanisms to achieve any legitimate interests.

370. Accordingly, facially and as applied to Plaintiffs, the Banned-Speech Provision violates their right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution.

371. Accordingly, as applied to Plaintiffs, the Compelled-Speech Provision violates their right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution.

Fifth Cause of Action:
Fourteenth Amendment Substantive Due Process and Equal Protection Challenge to Denial of Religious Identity, Personal Dignity, Personal Autonomy, and Personal Liberty

372. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1–204 of this Complaint.

373. The Supreme Court’s majority opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and other Supreme Court precedent, dictates that the Fourteenth Amendment protects the liberty of individuals to make choices central to their own dignity and autonomy, including choices that define their personal identity and beliefs.

374. Lorie’s religious understanding is that human dignity arises from God’s creation of man in His own image. *See* Genesis 1:26-27.

375. Lorie understands that a Christian becomes a “new creation in Christ” and this knowledge is a key aspect of her identity as a Christian. 2 Corinthians 5:17.

376. According to the Supreme Court’s decision in *Obergefell*, the Fourteenth Amendment protects the rights of individuals to serve their God in accordance with the dictates of their own consciences, thereby allowing them to make the decisions that define their personal identity and inseparable religious beliefs.

377. The Fourteenth Amendment, under longstanding caselaw, also guarantees the right to pursue one’s entrepreneurial dreams, engage in the common occupations of life, operate a business, earn a livelihood, and continue employment unmolested.

378. In the United States, the right to pursue one’s entrepreneurial dreams is fundamental as a matter of history and tradition.

379. The Fourteenth Amendment protects such personal rights essential to individuals' orderly pursuit of happiness.

380. The desire of individuals to use their own talents and imaginations to pursue a livelihood is part of the deeply held ethos of the American dream. To deny that dream to those with certain deeply held religious beliefs is to devalue their identity, dignity, liberty, and potential to find fulfillment, and imposes on them an abhorrent degree of stigma and injury.

381. According to Supreme Court precedent, such as *Obergefell*, while a state can have its own views of the ideal ordering of society, when it imposes those beliefs through law with the necessary consequence of putting the imprimatur of the State on excluding people with certain personal beliefs from the pursuit of basic liberties, they demean and stigmatize those individuals in a manner forbidden by the Fourteenth Amendment.

382. Under the Supreme Court's precedent, to deny certain people the right to engage in business in a way that is consistent with their own concepts of existence and identity is to deny them liberty, disparage their intimate personal choices and identity, and devalue their personhood.

383. Lorie's religious beliefs, including her religious understanding about marriage as an institution between one man and one woman, are central to her dignity, autonomy, and identity. Mark 10:6-9; Ephesians 5: 31-33.

384. Although she is a daughter, a wife, and a mother, Lorie identifies first and foremost as a Christian—a follower of Jesus Christ—and her decision to act consistently with her religious understanding of marriage defines her personal identity.

385. Lorie's sincerely held religious understanding is that she must conduct herself in accordance with the teachings of the Bible whether at home or at work. Colossians 3:23-25.

386. Lorie cannot live consistently with her religious understanding and Christian identity if she is required to say or do things that are inconsistent with her faith or if she is forbidden to say or do what she desires to further or promote her Christian beliefs.

387. Lorie's sincerely held religious understanding that God designed marriage as a lifelong institution between one man and one woman, and that any other conception of marriage violates God's plan, is inextricably intertwined with her own identity, beliefs, equal dignity as a citizen, and personal autonomy.

388. Lorie's desire to engage in the marketplace by celebrating weddings as she believes God designed them is an expression of her personal identity and her religious understanding of marriage, both of which are central to her equal dignity as a citizen and personal autonomy.

389. Lorie's decision to publically express her beliefs about marriage is a religious calling that defines her personal identity and beliefs and is central to her equal dignity as a citizen and personal autonomy.

390. Lorie's ability to follow her chosen expressive profession, in keeping with her religious beliefs, free from unreasonable government interference also comes within the definition of "liberty" and "property" under the Due Process Clause.

391. The Due Process Clause's definition of "liberty" further protects Lorie's right to express her religious understanding of marriage and establish her religious self-definition in the political, civic, and economic life of the larger community.

392. The Compelled-Speech Provision's requirement that Lorie facilitate, participate in, celebrate, and promote same-sex weddings if she uses her business to celebrate and promote weddings that she believes are wonderful in the eyes of God devalues her self-identity, dignity, liberty, intimate personal choices, and personhood and instead denies her dignity as an equal citizen, stigmatizes her as a social pariah, disallows her from pursuing her chosen profession, and punishes her in violation of the Fourteenth Amendment.

393. The Banned-Speech Provision's requirement that Lorie refrain from speaking about her religious understanding of marriage denies her the right to make intimate personal choices central to her equal dignity as a citizen, personal autonomy, identity, beliefs, liberty, and personhood and devalues her dignity as an equal citizen, stigmatizes her as a social pariah, disallows her from pursuing her chosen profession, and punishes her in violation of the Fourteenth Amendment.

394. Because CADA infringes these rights under the Fourteenth Amendment, it must further a compelling interest in a narrowly tailored way.

395. CADA does not serve any legitimate, rational, substantial, or compelling interest by forcing Lorie to abandon her religious identity, equal dignity as a citizen, personal autonomy, and liberty, and instead imposing gross stigma and denying Lorie's equal dignity as a citizen.

396. In addition to CADA not serving a legitimate—let alone compelling—interest, it is not narrowly tailored to do so regardless.

397. Defendants have alternative, less restrictive means to achieve any legitimate interest rather than forcing Lorie to abandon her religious identity, equal dignity as a citizen, personal autonomy, and personal liberty and face government-imposed stigma.

398. Accordingly, as applied to Lorie, CADA denies Lorie the right to make intimate choices that define her religious identity, personal dignity, personal autonomy, and personal liberty and instead stigmatizes Lorie and denies her equal dignity as a citizen in violation of the Fourteenth Amendment of the United States Constitution.

399. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs ask this Court to enter judgment against Defendants and to provide the following relief:

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

2. A declaration that the Banned-Speech Provision violates the United States Constitution's Free Speech Clause, Free Press Clause, Free Exercise Clause, Equal Protection Clause, and Due Process Clause facially, and as-applied to Plaintiffs' desired communications (a) promoting marriage exclusively as an institution between one man and one woman, (b) declining to create websites or graphics promoting events or ideas that violate their beliefs about marriage, such as websites for same-sex weddings, and (c) explaining their religious beliefs about what they can and cannot create;

3. A preliminary injunction and permanent injunction to stop Defendants and any person acting in concert with them from enforcing the Compelled-Speech Provision to require Plaintiffs to create websites or graphics promoting events or ideas that violate their beliefs that marriage should only be an institution between one man and one woman, such as websites promoting same-sex weddings;

4. A declaration that the Compelled-Speech Provision violates the United States Constitution's Free Speech Clause, Free Exercise Clause, Equal Protection Clause, and Due Process Clause when the Compelled-Speech Provision is applied to force Plaintiffs to create websites or graphics promoting events or ideas that violate their beliefs that marriage should only be an institution between one man and one woman, such as websites promoting same-sex weddings;

5. That this Court adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy so that these declarations shall have the force and effect of a final judgment;

6. That this Court retain jurisdiction of this matter for the purpose of enforcing its orders;

7. That this Court award Plaintiffs' costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988;

8. That this Court issue the requested injunctive relief without a condition of bond or other security being required of Plaintiffs; and

9. That this Court grant any other relief that it deems equitable and just in the circumstances.

Respectfully submitted this 20th day of September, 2016.

s/ Jeremy D. Tedesco

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(770) 339-0774
(770) 339-6744 (facsimile)
dcortman@ADFlegal.org
rgray@ADFlegal.org

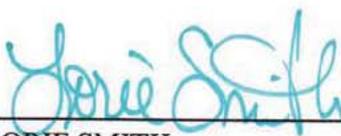
Michael L. Francisco (Colorado Bar No. 39111)
MRD Law
3301 West Clyde Place
Denver, CO 80211
(303) 325-7843
(303) 723-8679 (facsimile)
MLF@mrdlaw.com

Attorneys for Plaintiffs

DECLARATION UNDER PENALTY OF PERJURY

I, LORIE SMITH, a citizen of the United States and a resident of the State of Colorado, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 19th day of September, 2016, at Littleton, Colorado.



LORIE SMITH
303 CREATIVE LLC

EXHIBIT A



You're Invited



LILY AND LUKE

SATURDAY NOVEMBER 17, 2017
LITTLETON, COLORADO

- WE INVITE YOU TO CELEBRATE OUR MARRIAGE -





LILY ROBINSON

THE BRIDE



449
DAYS

:

1
HOURS

...UNTIL WE GET MARRIED!

28
MINUTES

:

44
SECONDS



LUKE WILLIAMS

THE GROOM

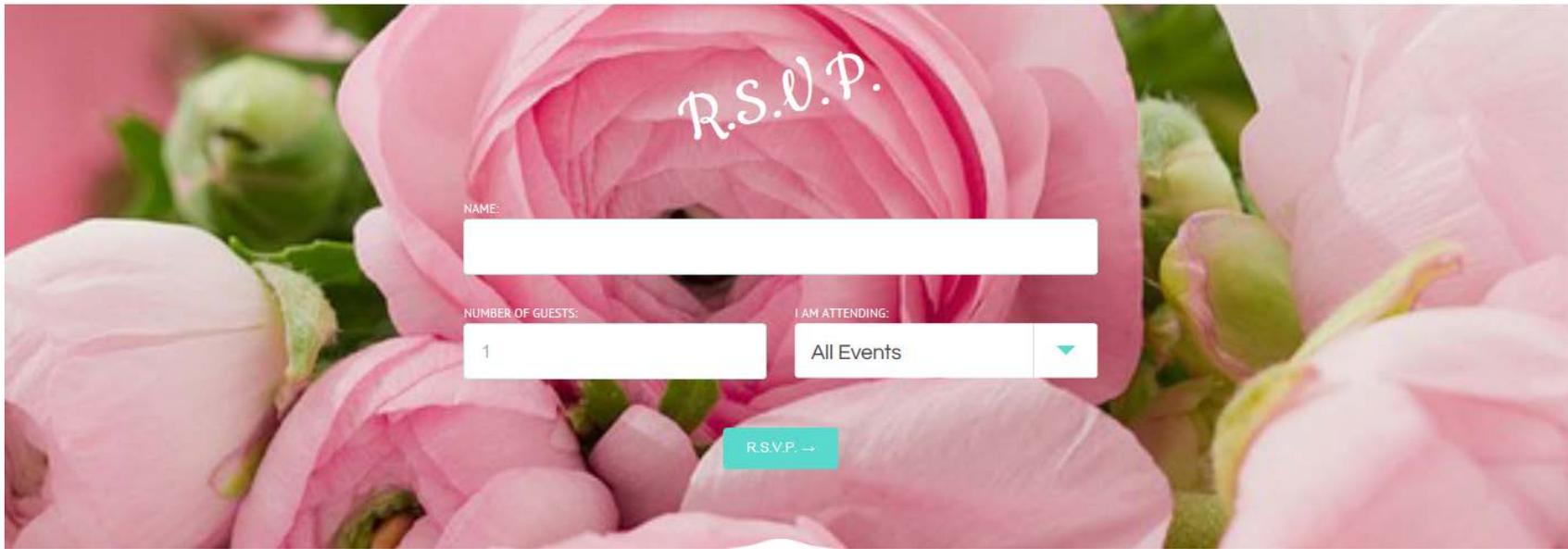


OUR WEDDING EVENTS



"FOR THIS REASON A MAN SHALL LEAVE HIS FATHER AND HIS MOTHER, AND BE JOINED TO HIS WIFE; AND THEY SHALL BECOME ONE FLESH."

~ Genesis 2:24 ~



R.S.V.P.

NAME:

NUMBER OF GUESTS: I AM ATTENDING: ▼

OUR PHOTO GALLERY

[All](#) Gallery



[VIEW OUR PHOTO GALLERY →](#)

OUR BLOG



Lily's Favorite Scripture

March 16, 2016

I've spent a lot of time thinking about our upcoming wedding day and the significance...

Posted in: [Thoughts](#)



Meet our Flower Girl & Ring Bearer

March 16, 2016

Sara, our Flower Girl, and Sam, our Ring Bearer have very important roles in our...

Posted in: [Love](#)



Funny Dating Story

March 15, 2016

Luke is going to laugh when I tell this story, but as I think back...

Posted in: [Love](#)

[VIEW ALL POSTS →](#)

*Bring your
Dancing
Shoes!*



JOKES FROM

- GROOMSMEN, BRIDESMAIDS & FRIENDS -

#LILY&LUKE

[View all →](#)



OUR TWEETS

- LILY & LUKE -

@LILY & @LUKE

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It All Began Seven Years Ago

LILY'S VERSION

Luke and I met about seven years ago in a place quite familiar to both of us – the slopes. As Colorado natives, Luke and I enjoy all that Colorado's beautiful outdoors has to offer and it was only fitting that we would meet doing something that the both of us enjoy. Seven years later, we enjoy your trip to the slopes...together. I am beyond blessed by Luke's presence in my life. We cherish every moment together and look forward to committing to lifelong love and devotion as we tie the knot in November 2017. Together we want to express our heartfelt appreciation to our family and friends for being by our side for this special occasion!

LUKE'S VERSION

From the moment Lily crossed my path, I could tell there was something about this woman that I wanted to know more about. Lily and I met through mutual friends during a winter weekend trip to Copper Mountain. "It has been said and heard before, if something is too good to be true, it usually is." This was the first thing that crossed my mind when I met Lily. I couldn't imagine this beautiful, smart, humble, and loving person wasn't in a relationship with someone else.



we love each other, and...



COFFEE



CO



JESUS



DOGS



DIVING

This day I marry my friend, the one I laugh
live for, dream of, and love

It was a cold, cold night and we had a long drive ahead of us
so I was grateful for the beverage and didn't even think about
about where the delicious coffee had come from

That's it, simple & very romantic
To be celebrated...

*Bring your
Dancing
Shoes!*

11.17.17

LITTLETON, COLORADO

- PLEASE JOIN US AS WE CELEBRATE OUR LOVE -



HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT



SATURDAY NOVEMBER 17, 2017
HALF PAST FIVE O'CLOCK IN THE EVENING

An old superstition claims that being married on the half hour brings good fortune because the minute hand is ascending toward Heaven.

CEREMONY DETAILS



5:30 PM
6:00 PM



Saturday November 17, 2017

LOCATION

The Barn at Deer Creek Open Space
555 West Deer Creek Drive
Littleton, Colorado 80128

PARKING

Complimentary valet parking is available for our guests

WEATHER

Our ceremony location is set in an outdoor mountain setting during the Fall months. We encourage you to dress accordingly.

ATTIRE

Formal



TO FOLLOW CEREMONY
SIX O'CLOCK IN THE EVENING

RECEPTION DETAILS


6:00 PM
11:00 PM




Saturday November 17, 2017

LOCATION

The Barn at Deer Creek Open Space
555 West Deer Creek Drive
Littleton, Colorado 80128

SPIRITS

Fine selection of local Colorado wines, full bar, and virgin cocktails

DINNER MENU

First Course

Roasted Red Pepper Bisque
Served with Cilantro Creme Fraiche

Second Course

Petite Hearts of Romaine with Parmigiano, Seasoned Croutons, and Zesty Citrus Dressing

Entree

Filet Mignon with Zinfandel Reduction, Truffled Potatoes and California Vegetables or Grilled Pacific Salmon Served Over Risotto Cake, Accompanied by Spinach and Tomato Coulis

Dessert

Wedding Cake

DANCING

Bring your dancing shoes; it's time to celebrate!



THE BARN AT DEER CREEK OPEN SPACE
555 WEST DEER CREEK DRIVE
LITTLETON, COLORADO 80128

Complimentary valet parking is available for our guests



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HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT



Bridesmaids

"Each of these ladies has a special place in my heart and I am honored that they'll be standing by my side on my special day." ~ Lily ~



KYLIE SHANNON

MAID OF HONOR



Kylie and Lily have been friends since their early years in middle school where they met on the school bus and they have been best friends ever since.



KIRA JAMESON

BRIDESMAID



Kira and Lily have been close friends since meeting through a mutual friend while attending the same college.



AVA SONOMA

BRIDESMAID



Ava and Lily met during their Junior year at the University of Colorado.

Groomsmen

"You guys have been there for me (and Lily) since the very beginning. I'm honored to have you support us in our next chapter of life." ~Luke



MARK SUTTON

BEST MAN



Mark and Luke have been great friends since about the age of five when they met at the local neighborhood pool.



JUDE TRAVOS

GROOMSMAN



Jude and Luke met through mutual friends during their high school years in Littleton, Colorado.



ZACHARY JONES

GROOMSMAN



Zachary and Luke met at work about four years ago. Both enjoy skiing and weekend outdoor adventures with "the guys".

*Pastor
Phil*



PHIL JACOBS

Pastor Phil has known both Luke and Lily for three years.

*Flower Girl
Ring Bearer*



SARA AND SAM

These two cuties, our niece and nephew, will be helping us on our special day.

Bride's Family

GRACE ROBINSON

Mother of the Bride

BRADLY ROBINSON

Father of the Bride

HELENA ROBINSON

Grandmother of the Bride

ISABELLE SONG

Sister of the Bride

KERRY ROBINSON

Sister of the Bride

Groom's Family

JESSICA WILLIAMS

Mother of the Groom

MARK WILLIAMS

Father of the Groom

WILMA WILLIAMS

Grandmother of the Groom

LARRY WILLIAMS

Brother of the Groom

Ushers

ALAN GREEN

Bride's Uncle

SAMUEL FINE

Groom's Uncle

TOM SMITH

Groom's Uncle



JOKES FROM

- GROOMSMEN, BRIDESMAIDS & FRIENDS -

#ASHLEYMICHAELWEDDING

[View all](#)



OUR TWEETS

- ASHLEY & MICHAEL -

@ASHLEY & @MICHAEL

[View all](#)





HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT

R.S.V.P.
 RESPONDEZ, S'IL VOUS PLAÎT
 LET US KNOW YOU'RE COMING!

NAME:

NUMBER OF GUESTS:

I AM ATTENDING:

R.S.V.P. →

From Our Blog



Lily's Favorite Scripture

March 16, 2016

I've spent a lot of time thinking about our upcoming wedding day and the significance...
 Posted In: [Thoughts](#)



Meet our Flower Girl & Ring Bearer

March 16, 2016

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Funny Dating Story

March 15, 2016

Luke is going to laugh when I tell this story, but as I think back...
 Posted In: [Love](#)



Honeymoon Plans Secured

February 16, 2016

Many of you know that Lily and I share the love of the ocean. It's...
 Posted In: [Love](#)

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HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT

Guestbook

PLEASE FEEL FREE TO SHARE YOUR JOY WITH US.
WE CHERISH YOUR COMMENTS AND WILL HAVE THEM FOREVER AFTER...

Message:
Write us something nice or just a funny joke...

Name: John Doe

Email: Your email address will not be published.
email@example.com

Add message

3 PEOPLE WROTE TO US:

“

HELENA

I love this quote and it reminds me of you... "Love doesn't make the world go round, love is what makes the ride worthwhile." Elizabeth Browning

—
MARCH 6, 2016

“

MIKE ANDERSEN

"I am my beloved's, and my beloved is mine." Song of Solomon 6:3

—
MARCH 6, 2016

“

YOUR SISTER, ISABELLE

You two are so meant for one another. I am honored to witness your special day.

—
MARCH 6, 2016



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Our Registry

Luke & Lily are registered at the following:



Or make a monetary gift via PayPal:



If unable to attend our event, we graciously ask you mail gifts to:

Luke & Lily
555 W. 3rd Street
Littleton, Colorado 80122



HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT

Our Photo Gallery



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Our Blog



Lily's Favorite Scripture

March 16, 2016

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February 16, 2016

Many of you know that Lily and I share the love of the ocean. It's...

Posted In: [Love](#)



He Proposed!

January 10, 2016

0

He Asked. I Said Yes!

Posted In: [Love](#)



HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONTACT

LILY'S FAVORITE SCRIPTURE



Lily Robinson March 04, 2016



I've spent a lot of time thinking about our upcoming wedding day and the scriptures that have for me spiritually. I'm reminded of a piece of scripture in the New Testament and it's one of my favorites...

“And He answered and said, “Have you not read that He who created them from the beginning made them male and female, and said, ‘For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh’? So they are no longer two, but one flesh. What therefore God has joined together, let no man separate.”

Matthew 19:4-6 NIVB

■ Thoughts



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MEET OUR FLOWER GIRL & RING BEARER



Lily Robinson March 16, 2016



Sara, our Flower Girl, and Sam, our Ring Bearer have very important roles in our special day. These two darlings are Luke's sister's children. We couldn't be more happy to have them share this special day with us.

Love



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FUNNY DATING STORY



Lily Robinson March 15, 2016



Luke is going to laugh when I tell this story, but as I think back to our seven years together, it's one of those memories that stands out in my mind.

After dating for three or four months, Luke planned a romantic evening and took me to an Italian restaurant for dinner. We enjoyed a romantic meal, wonderful conversation, and as we headed to the car, Luke realized he had locked the keys inside! Our romantic evening ended with a visit from the local locksmith.

Love

[f Like](#) [Tweet](#) [+1](#) [Pin it](#)

signed by 303creative.com -



HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT

HONEYMOON PLANS SECURED



Luke Williams February 16, 2016



Many of you know that Lily and I share the love of the ocean. It's only fitting that our honeymoon would take us on a dive vacation to Belize in December 2017.

Love



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HE PROPOSED!



Lily Robinson January 10, 2016



He Asked. I Said Yes!

Love

[Like](#) [Tweet](#) [+1](#) [Pin it](#)

Write a comment:

Message:

Write us something nice or just a funny joke...

Name:

John Doe

Email:

email@example.com

Your email address will not be published.

Post Comment



HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT

Connect With Us

LUKE WILLIAMS

555.443.1538

LUKEWILLIAMS@SAMPLE.COM



LILY ROBINSON

555.443.1536

LILYROBINSON@SAMPLE.COM



Mail

555 WEST THIRD STREET
LITTLETON, COLORADO 80122

"I have found the one whom my soul loves."
Song of Solomon 3:4

- Designed by 303creative.com -

EXHIBIT B



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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.

Sure, you've likely seen sample wedding websites out there, so what makes 303creative websites different? I uniquely craft every page, every graphic, and every word to celebrate and promote the uniqueness and beauty of your relationship.

If you'd like to request my services, click the button below.
Let's start creating!

[CONTACT LORIE](#)

If you'd like to see a sample wedding website, click on the button below

[VIEW SAMPLE SITE](#)

Why a Wedding Website?

A custom, easy, and unique way to take your invitation far beyond the envelope.

Website Features:



Custom Website Domain – A website address of your choice (ie: www.bride&groom.com).



Personal Assistant – Unlike many of the out-of-the-box wedding website options out there, you can rest assured that I will be your one and only contact throughout the design process. No 1-800 numbers, no generic email addresses, no support tickets. You'll have my direct line and personal email address for every step of the process.



Custom Design – I fully customize the look, feel, theme, message, color palettes, and design to celebrate you and your special day.



Engagement Story Page – A page inspired by you and written by Lorie, that captures and conveys the cherished storybook details of your love story.



Ceremony Page – A place where I communicate details about your wedding ceremony including the time, place, decor, and other personal details.



Reception Page – A place where I share details about your celebration.



Wedding Party Page – A place where I introduce your bridesmaids and groomsmen.



Location Page – A place where I communicate details about where your wedding and reception will be held, maps, directions, and anything else needed to get people from A to B.



Online Guestbook – A place for guests to share their excitement, leave notes, and communicate with you leading up to your big day.



Guest RSVP Page – A place for people to indicate whether or not they will attend.



Photo Gallery – A place where I display highlights of your life together, including your engagement, wedding, reception, and even your honeymoon.



Couple Blog – A place to share your thoughts and updates as you lead up to your special day.



Gift Registry Page – A place to share details of your wish list.



Social Media Integration – Share, post, tweet, snap on your favorite social media sites and automatically post them to your wedding website.



"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, that includes the tale of the engagement, the excitement of the wedding day, and the beautiful life you are building together."

LS

For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh.

Genesis 2:24 NASB

And He answered and said, "Have you not read that He who created them from the beginning made them male and female, and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? So they are no longer two, but one flesh. What therefore God has joined together, let no man separate."

Matthew 19:4-6 NASB

So, are you interested yet?

LET'S START CREATING!

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

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

Defendants.

DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION FOR PRELIMINARY
INJUNCTION [DOC. NO. 6]

Defendants Aubrey Elenis, Anthony Aragon, Ulysses J. Chaney, Miguel
Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock, and Cynthia H.
Coffman (collectively “Defendants”), by and through their undersigned counsel,
submit their Response to Plaintiffs’ Motion For Preliminary Injunction [Doc. No. 6].

In support thereof, Defendants state as follows:

I. INTRODUCTION

The right to marry is a fundamental right, guaranteed to same-sex couples
under the Due Process and Equal Protection Clauses of the Fourteenth
Amendment. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

Plaintiffs, however, seek the Court's permission to discriminate against same-sex couples in services provided to all other members of the general public, in violation of Colorado's Anti-discrimination Act (CADA).

For reasons discussed below, Defendants request that this Honorable Court deny Plaintiffs' request for preliminary injunction in its entirety.

II. BACKGROUND

A. Colorado's Public Accommodation Law.

Section 24-34-601(2)(a), of CADA, reads in pertinent part,

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 . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation

See § 24-34-601(2)(a), C.R.S. (2016) (CADA also prohibits discrimination on the basis of disability, race, creed, color, sex, marital status, national origin, and ancestry).

“Sexual orientation” was added to the public accommodation law in May 2008. *See* Senate Bill 08-200, signed by the Governor on May 29, 2008. CADA defines “sexual orientation” as “an individual’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual’s perception thereof.” § 24-34-301(7), C.R.S. (2016).

Further, a place of public accommodation means in relevant part, “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public including but not

limited to a business offering wholesale or retail sales to the public” § 24-34-601(1), C.R.S. (2016).

B. The *Masterpiece Cakeshop* Case.

Masterpiece Cakeshop involves a baker, Jack Phillips (“Phillips”), who refused to bake a wedding cake for a same-sex couple based on his Christian beliefs. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 277 (Colo. App. 2015); [Doc. No. 1 ¶¶64-65]. The couple filed a charge of discrimination with the Colorado Civil Rights Division (“CCRD”) alleging discrimination based on sexual orientation under CADA. *Id.* at 278. The CCRD conducted an investigation and issued a notice finding probable cause to credit the discrimination allegation. *Id.* A complaint was filed and an Administrative Law Judge issued a decision finding that Mr. Phillips’s refusal of service was a violation of CADA. *Id.* On review the Colorado Civil Rights Commission (“CCRC”) affirmed the order, and on appeal, the Colorado Court of Appeals affirmed the CCRC’s order. *Id.* at 277-78.

The Colorado Supreme Court denied Phillips’ writ of certiorari on April 25, 2016. *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm’n*, No. 15SC738 (Colo. Apr. 25, 2016). On July 22, 2016, Phillips filed a petition for writ of certiorari with the United States Supreme Court. Phillips and Masterpiece Cakeshop are represented by Alliance Defending Freedom (“ADF”), the same firm representing Plaintiffs in the instant matter. The question presented in the Petition is as follows:

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

C. 303 Creative LLC And Lorie Smith.

Plaintiff 303 Creative LLC and its sole member-owner, Plaintiff Lorie Smith, have been operating a business in Colorado that provides services to the public since February 2012. [Doc. No. 1 ¶104].¹ Plaintiffs would like to expand the business to design wedding websites; however, that service is not yet available to the public. [Doc. No. 1 ¶¶ 155-57]. Plaintiffs want to refuse this service to same-sex couples. [Doc. No. 1, ¶¶ 144, 172-75, 219].

Plaintiffs claim that CADA prevents them from expressing their personal religious belief that marriage is only between one man and one woman because it compels them to offer same-sex couples the same services it offers opposite sex couples. [Doc. No. 1, ¶¶ 9-12]. Plaintiffs also claim that Colorado's public accommodation law violates their freedom of expressive association because it forces them to associate with same sex-couples. [Doc. No. 1, ¶¶ 246-47].

¹ Plaintiff 303 Creative LLC was formed in 2012. *See* Colorado Secretary of State's business database; *see also* Fed. R. Evid. 201(b); *Llewellyn v. Allstate Home Loans, Inc.*, No. 08-cv-00179-WJM-KLM, 2011 U.S. Dist. LEXIS 68931, 2011 WL 2533572, at *1 & n.2 (D. Colo. June 27, 2011) (taking judicial notice of records found on the Colorado Secretary of State's website).

III. PLAINTIFFS FAIL TO DEMONSTRATE THE ELEMENTS REQUIRED FOR ENTRY OF A PRELIMINARY INJUNCTION

A. Federal Rule of Civil Procedure 65 And Legal Standards.

The purpose of a preliminary injunction is to preserve the status quo pending a final decision on the merits. *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992). Because a preliminary injunction is an extraordinary remedy, Plaintiffs' right to relief must be clear and unequivocal. *Pinson v. Pacheco*, 2010 U.S. App. LEXIS 20813, at *5 (10th Cir. Oct. 7, 2010) (citing *SCFCIL, Inc. v. Visa USA, Inc.*, 936 F. 2d 1096, 1098 (10th Cir. 1991)).

To obtain a preliminary injunction pursuant to Fed. R. Civ. P. 65, Plaintiffs must establish: (1) a likelihood of success on the merits; (2) a likelihood that Plaintiffs will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in Plaintiffs' favor; and (4) that the injunction is in the public interest. *See Roda Drilling v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (citation omitted). "It is the movant's burden to establish that each of these factors tips in his or her favor." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003).

Preliminary injunctions that alter the status quo, mandatory preliminary injunctions, or preliminary injunctions that give a movant all the relief it would be entitled to after prevailing at trial are disfavored. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd and remanded*, 546 U.S. 418 (2006). As such, a movant seeking such an injunction must make a heightened showing of the four factors. *Roda Drilling*, 552

F.3d at 1209.

Plaintiffs fail to satisfy their heavy burden of demonstrating to this Court that Defendants should be enjoined.

B. Plaintiffs Are Unlikely To Succeed On The Merits.

1. Plaintiffs' Claims Are Not Justiciable.

Defendants moved to dismiss Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief ("Complaint") [Doc. No. 1] under F.R.C.P. 12(b)(1) for lack of standing. [Doc. No. 37, at pp. 5-7]. Defendants also moved to dismiss on abstention grounds in light of the *Masterpiece Cakeshop* case and Colorado's compelling interest in eliminating discrimination. [*Id.* at pp. 8-13]. Defendants also moved to dismiss Plaintiffs' Complaint for failure to state a claim under F.R.C.P. 12(b)(6) and improper pleading under F.R.C.P. 8(a). [*Id.* at pp. 13-21]. Defendants, therefore, incorporate by reference their motion to dismiss.

2. Courts Have Unanimously Rejected Near Identical Claims Raised By Similar Plaintiffs.

Plaintiff Smith is not the first vendor to assert her religious beliefs as a reason to discriminate against same-sex couples. The past couple of years, several plaintiffs have filed near identical lawsuits around the country, in an effort to create an issue where none exists. In each instance, they have failed.²

- In *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), a photographer refused to provide wedding photography services for a same-sex couple's wedding. ADF argued in that case that New Mexico's antidiscrimination law violated the plaintiff's First Amendment right to freedom of speech and religion. *Id.* at 60. The New Mexico

² ADF represented or represents plaintiffs in each of these lawsuits.

Supreme Court rejected ADF's challenge to the state's antidiscrimination law. *Id.* at 59. The United States Supreme Court unanimously rejected ADF's petition for writ of certiorari on April 7, 2014. *See Elane Photography, LLC v. Willock*, 134 S. Ct. 1787 (2014).

- In *Gifford v. McCarthy*, 137 A.D. 3d 30 (N.Y. App. Div. 2016), a venue owner refused to rent a venue for a same-sex couple's wedding. ADF argued in that case that New York's human rights law violated the plaintiff's First Amendment right to freedom of speech and religion. *Id.* at 38-42. The New York appeals court rejected ADF's challenges to its antidiscrimination law. *Id.*
- In *Washington v. Arlene's Flowers, Inc.*, 2015 WL 720213 (Wash. Sup. Ct. Feb. 18, 2015), a florist refused to provide flower arrangements for a same-sex couple's wedding. ADF argued in that case that Washington State's antidiscrimination law relating to trade and commerce violated the First Amendment right to freedom of speech, association, and religion. The Washington court rejected ADF's challenges to the state's antidiscrimination law. *Id.* ADF has appealed to Washington State's Supreme Court.
- As discussed above, in *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), a baker refused to sell a wedding cake to a same-sex couple for their wedding. ADF argued in that case that Colorado's antidiscrimination law violated the plaintiff's First Amendment freedom of speech and religion. *Id.* at 285-94. The Colorado Court of Appeals rejected ADF's challenges. ADF filed a petition for writ of certiorari with the United States Supreme Court, *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission, et al.*, No. 16-111 on July 22, 2016, which is pending. [Doc. No. 5].
- Most recently, in *Brush & Nib Studio, LC v. City of Phoenix*, CV 2016-052251, (Superior Court of Arizona, Maricopa County, Sept. 16, 2016), a paper-goods vendor that makes items like thank-you cards, prints, and wedding invitations wanted to refuse these services to same-sex couples who were getting married. ADF argued that the City of Phoenix should be enjoined from enforcing its antidiscrimination law on the grounds that the law violated the First Amendment right to freedom of speech and religion. *Id.* The court

rejected ADF's challenges to the City's antidiscrimination law. *Id.* ADF has appealed to Arizona state's appellate court.³

3. Plaintiffs' First Amendment Claims Fail Because CADA Does Not Compel A Particular Type of Speech Or Association.

Plaintiffs allege that CADA violates their First Amendment freedoms of speech, press, and expressive association. [Doc. No. 7, at p. 10]. In each instance, however, Plaintiffs cannot succeed on the merits.

a. CADA Does Not Compel Or Restrict Plaintiffs Speech.

Plaintiffs allege that CADA forces them to create wedding websites for same-sex couples in opposition to Plaintiffs' personal religious beliefs, which is that marriage can only be between one man and one woman; or otherwise restricts them from being critical of same-sex marriage by punishing them for refusing to create such websites for same-sex couples. [Doc. No. 7, at pp. 16-22]. For the reasons discussed below, Plaintiffs cannot succeed on the merits.

³ Plaintiffs rely on one unpublished trial court decision from Kentucky to argue, in essence, that discrimination against same-sex couples on the basis of religion is permissible. *See Hands on Originals, Inc. v. Human Rights Comm'n*, No. 14-CI 04474 (Fayette Cir. Ct. Apr. 27, 2015). However, ADF's reliance on this case is misplaced, and it is easily distinguishable, as noted in *Masterpiece*. In that case, a T-shirt printing company was found to not violate the local antidiscrimination law when it refused to print T-shirts celebrating premarital romantic and sexual relationships among gays and lesbians because evidence established that it refused to provide heterosexual couples T-shirts promoting premarital romantic or sexual relationships. *Masterpiece*, 370 P.3d at 282, n. 8. *Masterpiece* held that "[o]pposition to premarital romantic and sexual relationships, unlike opposition to same-sex marriage, is not tantamount to discrimination on the basis of sexual orientation," particularly when same-sex and opposite sex couples are being treated the same. *Id.* Here, however, Plaintiffs are asking the Court to allow them to discriminate against same-sex couples because of their sexual orientation, by refusing to provide same-sex couples services that Plaintiffs will otherwise provide opposite sex couples because Plaintiffs do not believe in same-sex marriage.

i. The Supreme Court Recognizes Two Types Of Compelled Speech.

The compelled speech doctrine first articulated in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), applies in two scenarios. First, government is generally prohibited from requiring an individual “to speak the government’s message.” *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). Second, the government may not generally require an individual to “host or accommodate another speaker’s message.” *Id.* Neither scenario applies in this matter.⁴

ii. CADA Does Not Compel Plaintiffs To Speak The Government’s Message.

Section 24-34-601(2)(a), of CADA, does not impact Plaintiffs’ First Amendment rights because it does not compel them to speak in favor of or against same-sex weddings.

To the contrary, as held in *Masterpiece*, CADA merely requires that Plaintiffs not discriminate against customers as it concerns the “full and equal enjoyment of the goods, services, facilities, privileges . . . of a place of public accommodation.” *See* § 24-34-601(2)(a), C.R.S., (2016); *Masterpiece*, 370 P.3d at 283 and 291 (“We conclude that the Commission’s order merely requires that Masterpiece not discriminate against potential customers in violation of CADA”) and “[w]e reiterate that CADA does not compel Masterpiece to support or

⁴ Plaintiffs’ Motion, case citations, and arguments contained therein appear to focus on the second line of cases. However, Defendants will briefly address the first scenario to the extent Plaintiffs are, indeed, raising a substantive issue with the first line of cases.

endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation.”).

Contrary to the Supreme Court’s decisions in *Barnette*, 319 U.S. at 642, and *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977), and as recognized in *Masterpiece*, Section 24-34-601(2)(a) of CADA does not compel a vendor to convey a particular message for or against same-sex weddings; only, that it treat same-sex couples the same as opposite sex couples with the “full and equal enjoyment of the goods, services, facilities, privileges . . . of a place of public accommodation.” *See* § 24-34-601(2)(a), C.R.S., (2016); *Masterpiece*, 370 P.3d. at 286; *see also e.g., Elane Photography*, 309 P.3d at 64 (New Mexico’s anti-discrimination law “only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation.”); *Brush & Nib Studio*, CV 2016-052251, (Superior Court of Arizona, Maricopa County, Sept. 16, 2016) (holding that the City of Phoenix’s anti-discrimination law did not require plaintiffs to speak any message, nor did it prohibit plaintiffs from stating their religious views concerning same-sex marriage).

iii. CADA Does Not Compel Plaintiffs To Host Or Accommodate Another Speaker’s Message.

Plaintiffs largely rely on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), to support their position that Plaintiffs, like the parade organizers in *Hurley*, are entitled to choose the content of their own message and cannot be compelled to express an unwanted message by CADA. [Doc. No. 7, at p.

16]. Plaintiffs' reliance on *Hurley* is misplaced.

In *Hurley*, a private, non-profit organization that organizes the Boston St. Patrick's Day parade denied the Gay, Lesbian and Bisexual Group of Boston's (GLIB) application to march in the parade. *Id.* at 561. The Massachusetts courts concluded that the parade sponsors violated the state's law prohibiting discrimination in places of public accommodation. *Id.* at 561, 563-64. The Supreme Court first noted that public accommodation laws generally do not violate the First and Fourteenth Amendments, because the focal point of their prohibition is "on the act of discriminating against individuals," not to target speech. *Id.* at 572. It held, however, that because the parade sponsors were required to include GLIB, the state courts were effectively requiring them "to alter the expressive content of their parade," in violation of the First Amendment. *Id.* at 572-73. In other words, the Supreme Court found that the government improperly attempted to apply public accommodation law to "speech itself." *Id.* at 573.

Here, however, Section 24-34-601(2)(a), of CADA applies to Plaintiffs' business operation, and their decision to not offer services to same-sex couples as opposed to targeting speech itself. *See e.g., Elane Photography*, 309 P.3d at 68 (distinguishing *Hurley*, and stating, "Defendants cite no reported decision extending the holding of *Hurley* to commercial enterprise carrying on a commercial activity."); *Masterpiece*, 370 P.3d at 287 (distinguishing *Hurley*). Furthermore, a for-profit company like Plaintiff 303 Creative can hardly be likened to a non-profit organization and parade, and any message that may be attributed to the same.

Similarly, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and

Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986), do not support Plaintiffs' position. [Doc. No. 7, at pp. 18-19]. In both cases, the government required a speaker to disseminate a third-party message along with its own protected speech. *Tornillo*, 418 U.S. at 257-58 (rejecting law that compelled newspapers to print responses from political candidates who had been criticized in editorials); *Pacific Gas & Electric*, 475 U.S. at 9-14 (rejecting law that compelled utility company to include copies of a specific environmentalist publication with bills sent to customers). Both cases are inapplicable to the purported facts presented in Plaintiffs' Complaint.

Here, Section 24-34-601(2)(a), of CADA does not mandate that Plaintiffs host a message in support of same-sex marriage, let alone any message. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Supreme Court rejected arguments by law schools that a statute requiring them to provide access to military recruiters equal to other recruiters violated their freedom of speech by forcing them to accommodate or host another speaker's message. *Id.* at 52-60. Instead, the Court found that the statute regulated "what law schools must *do* . . . not what they may or may not say." *Id.* at 60 (emphasis in original); *see also e.g., R. A. V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct.").

In *Elane Photography*, the New Mexico Supreme Court stated that the "United States Supreme Court has never found a compelled-speech violation arising from the application of anti-discrimination laws to a for-profit public

accommodation. In fact, it has suggested that public accommodation laws are generally constitutional.” 309 P.3d at 65-66. The court held that its public accommodations law did not compel the photographer to convey any particularized message, but rather “only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation.” *See* 309 P.3d at 64. The United States Supreme Court unanimously rejected ADF’s petition for writ of certiorari on April 7, 2014. *See Elane Photography, LLC v. Willock*, 134 S. Ct. 1787 (2014).

In, *Masterpiece*, the Colorado Court of Appeals held that Section 24-34-601(2)(a), of CADA, did not force a wedding cake baker to host or accommodate any particular view on marriage; only that it offer the same services to its customers regardless of their sexual orientation. *Masterpiece*, 370 P.3d at 63 (“Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally.”); *Rumsfield*, 547 U.S. at 64-65 (rejecting law school argument that forcing them to treat military and nonmilitary recruiters the same compels them to send “the message that they see nothing wrong with the military’s policies [against gays in the military], when they do,” because students “can appreciate the difference between speech a school sponsors and speech the school permits because it is legally required to do so.”).

iv. Any Message Conveyed Would Be Attributed To The Party Being Married, Not Plaintiffs.

Furthermore, to the extent any message is conveyed at all, reasonable observers would attribute that message to the individuals being married, not

Plaintiffs. *Masterpiece*, 370 P.3d at 286 (“[T]o the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.”); *Rumsfeld*, 547 U.S. at 64-65; *Elane Photography*, 309 P.3d at 69-70 (“It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple’s views on issues ranging from the minor (the color scheme, the hors d’oeuvres) to the decidedly major (the religious service, the choice of bride or groom.”).

Here, Plaintiffs cannot argue that any message being conveyed is anything other than the customers. For example, couples may choose to not put biblical verses on their website; they may choose to put secular photos on the website in lieu of photos of religious symbols; and they may choose the style or size of font, types of graphics, and color scheme. [Doc. No. 1, ¶¶ 128-29] (Plaintiffs recognize that customers have ideas of what they desire to be on their website and Plaintiffs work in close contact with customers to get their ideas to collaborate on the finished product). Indeed, *Masterpiece* recognized that because vendors like Plaintiffs charge for their services, it reduces “the likelihood that a reasonable observer will believe that [Plaintiffs] support the message expressed in [their] finished product.” *Masterpiece*, 370 P.3d at 287.

To this end, Plaintiffs’ website design service is also not constitutionally protected speech. *See United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends to thereby

express an idea.”). Under Plaintiffs’ logic, any number of business owners such as architectural firms, restaurants, or hair salons could refuse service to same-sex couples on the basis of their religious belief under the auspices that their services are artistic and creative. This simply is not the case, and has been rejected by a number of courts, including the United States Supreme Court, because antidiscrimination laws target conduct, not speech. *See* Defendants’ Response at Section III.B.3.a.ii and iii; *see also e.g., Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.”).

b. CADA Does Not Affect Plaintiffs’ Rights Under The Free Press Clause.

Moreover, Plaintiffs’ speech is not chilled, as they allege [Doc. No. 7, at p. 22], and they are not required to espouse a particular viewpoint on same-sex marriage merely because they are required to serve same-sex and opposite sex couples equally. *Masterpiece* held that Section 24-34-601(2)(a), of CADA does not prohibit a for-profit vendor from expressing its views on same-sex marriage; it does not prohibit a vendor from expressing its religious opposition to it; and a vendor remains free to disassociate itself from its customers’ viewpoints. *Masterpiece*, 370 P.3d at 288.

As exemplified, Plaintiffs remain free to post disclaimers “in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA.” *Id.*; *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (“[S]igns, for example, could disclaim any

sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.”); *Elane Photography*, 309 P.3d at 47 (“Elane Photography is free to disavow, implicitly or explicitly, any message that it believes the photographs convey” and it is unlikely that reasonable observers will interpret Elane Photography as sending a message that it supports same-sex marriage by merely treating same-sex and opposite-sex customers alike). As such, there is no violation of the free press clause.

c. CADA Does Not Affect Plaintiffs’ Rights Of Expressive Association.

Plaintiffs also allege that CADA forces them to violate their freedom of expressive association because it requires Plaintiff Smith to agree with a viewpoint contrary to her religious belief or to stop collaborating with individuals who share her view that marriage can only be between a man and a woman. [Doc. No. 7, at p. 21].

There is nothing in CADA that prohibits, limits, or otherwise impinges Plaintiff Smith’s right to associate with anyone who does or does not share her religious views. Indeed, Plaintiff Smith can attend any church, practice any form of religion, or belong to any group that wishes to espouse views against same-sex marriage, as she desires.

Furthermore, even if there was the slightest infringement on Plaintiffs’ expressive association, which there is not, Plaintiffs’ rights are justifiably curtailed because CADA serves the compelling interest of prohibiting discrimination, entirely unrelated to the suppression of ideas. *See Hurley*, 515 U.S. at 572 (public

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

d. CADA Does Not Violate The Equal Protection Clause.

Plaintiffs’ Complaint references three charges of discrimination in which a person filed complaints based on creed against bakeries that declined to produce cakes with religious messages. [Doc. No. 1 ¶¶ 73-84]. Plaintiffs’ allege that Defendants have treated these bakeries dissimilar to *Masterpiece*, and they claim that Plaintiffs are “in the exact same position.” [Doc. No. 7, at p. 24]. Plaintiffs also allege that CADA is content based discrimination. [Doc. No. 7, at p. 10]. The Complaint seeks relief based on a belief that decisions made in these matters harmed Plaintiffs. [Doc. No. 1 ¶¶ 241-242; 256-259; 313-314; 335; 340]. However, these matters resulted in no-probable cause determinations by the Director and no further action was taken. [Doc. No. 1 ¶80].

The Director’s findings of probable cause or no probable cause are not quasi-judicial rulings and only non-binding administrative determinations reached

without the benefit of a hearing. *AT&T Technologies Inc. v. Royston*, 772 P.2d 1182, 1186 (Colo. App. 1989). Since these decisions have no binding precedent or effect, Plaintiffs fail to state a claim meriting relief as to these decisions.

Furthermore, the Colorado Court of Appeals distinguished the three bakeries from Masterpiece in its decision when ADF made the same arguments. *Masterpiece*, 370 P.3d at 282, n. 8. Notably, Masterpiece refused to make a wedding cake for a same-sex couple *because of their sexual orientation* based on the owner's religious belief; while the three bakeries refused to make a cake for a patron that would say "Homosexuality is a detestable sin. Leviticus 18:2" because of the derogatory, offensive message, not because of the patron's creed. *Id.* Here, Plaintiffs are "in the exact same position" as *Masterpiece*, because they intend to refuse service to a same-sex couples *only because of their sexual orientation*. [Doc. No. 7, at pp. 8, 24]. Plaintiffs' reliance on the three other bakery cases has already been addressed by *Masterpiece*, and is simply inapposite, and CADA does not engage in content based discrimination.

Last, Plaintiffs' argument concerning other bakeries and declining to produce a derogatory, offensive message is already raised in the pending petition for writ of certiorari in *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission, et al.*, No. 16-111. [Doc. No. 5]. As such, this Court should abstain from addressing this issue as stated in Defendants' motion to dismiss. [Doc. No. 37].

Plaintiffs claim that CADA does not survive strict scrutiny. [Doc. No. 7, at pp.25-26]. However, CADA is a neutral law of general applicability, which is not

subject to strict scrutiny. “A law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge.” *Grace v. United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). Here, Colorado has not only a legitimate interest, but a compelling one in erasing discrimination against its citizens. *Masterpiece*, 370 P.3d at 293 (concluding that CADA is rationally related to Colorado’s interest in eliminating discrimination in places of public accommodation). Indeed, the most recent Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) concretely establishes this point as follows:

[t]he principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield. *The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.*

Id (italics added); *see also e.g., Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (noting that religious motivation should not excuse compliance with laws). This decision is the latest in a long line of cases that find that eradicating discrimination through state’s laws serves a compelling interest. *See e.g.,* Defendants’ Response at Section III.B.3.c., and cases cited therein.

Even assuming, *arguendo*, that strict scrutiny applies to CADA, which it does not, CADA would survive strict scrutiny because it furthers a compelling interest and is narrowly tailored to that interest. As discussed above, CADA serves

a compelling state interest in eradicating discrimination in places of public accommodation. Moreover, CADA is narrowly tailored to achieve this purpose for the reasons discussed herein.

C. Plaintiffs Will Not Suffer Irreparable Harm If The Injunction Is Denied.

“To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.” *Heideman*, 348 F.3d at 1189 (citation omitted). Irreparable harm is not harm that is “merely serious or substantial.” *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). “Establishing irreparable harm is “not an easy burden to fulfill.” *Greater Yellowstone Coal v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003).

“[A] party seeking preliminary injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.” *See Faircloth v. Colo. Dep’t of Corr.*, No. 16-cv-00908-GPG, 2016 U.S. Dist. LEXIS 58077, at *4 (D. Colo. May 2, 2016) (citation omitted). A preliminary injunction should not be granted “against something merely feared as liable to occur at some indefinite time in the future.” *See e.g., Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931).

Plaintiffs’ injury is speculative, vague, and does not satisfy the heightened legal standard. The Supreme Court recently restated its reluctance “to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment” because a “theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.” *Clapper v. Amnesty Int’l USA*,

133 S. Ct. 1138, 1148 and 1150 (2013).

Here, Plaintiffs fail to allege an injury that is certain, great, or actual by Defendants, and only speculates as to what may happen if numerous, theoretical facts occur. Specifically, those facts would have to be as follows: (1) Plaintiffs make their custom design website service available to the public; (2) a person attempts to obtain the service; (3) Plaintiffs deny the service based on the person's protected class; (4) the person denied service files a charge of discrimination with the Division; (5) the Division investigates the charge and the Division director or designee finds that there is probable cause to credit the charge; (6) mandatory conciliation is attempted and fails; (7) the Commission decides to notice the case for hearing; (8) an ALJ holds a hearing and rules against Plaintiffs; and (9) the Commission affirms the decision and orders Plaintiffs to cease and desist the discriminatory practice. None of these facts have yet occurred; and the failure of one of these steps to occur would result in no injury to Plaintiffs.

D. The Balance Of Equities And The Public Interest Are Against Issuing An Injunction.

Courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Port-a-Pour, Inc. v. Peak Innovations, Inc.*, 49 F. Supp. 3d 841, 873 (D. Colo. 2014) (citations omitted). Under the heightened standard of review, Plaintiffs must make a strong showing that their threatened injury outweighs the injury to the public under the preliminary injunction. *See Heideman*, 348 F.3d at 1190.

Here, Plaintiffs argue, in essence, that Defendants should be enjoined

because their religious belief, speech concerning same-sex marriage, and their desire to refuse services to same-sex couples outweigh any interest the State of Colorado has in eliminating discrimination in places of public accommodation.

Plaintiffs' argument is unavailing, and counter to a lengthy civil rights history. As previously mentioned above, the United States Supreme Court has recognized, time and time again, that states have a compelling interest in eliminating discrimination, and statutes, like CADA, further that interest. *See e.g.*, Defendants' Response at Section III.B.3.c., and cases cited therein.

Furthermore, the Supreme Court has also held, time and time again that using religion to perpetuate discrimination against individuals, and violate a state's laws, is inappropriate. *Reynolds*, 98 U.S. at 166-67 (noting that religious motivation should not excuse compliance with laws); *United States v. Lee*, 455 U.S. 252, 261 (1982) (rejecting religious exercise challenge to law requiring employers to pay social security tax for employees stating, "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."); *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968) (finding that while defendant had a constitutional right to espouse the religious views of his choosing, he did not have "a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious

beliefs.”); *see also e.g., Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984)

(“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 relief.”) (citation omitted).

E. Plaintiffs Cannot Meet The Heavy Burden Required For A Disfavored Injunction.

Plaintiffs requested injunction would alter the status quo and is, as such, disfavored and subject to a heightened standard. “[T]he limited purpose of a preliminary injunction ‘is merely to preserve the relative positions of the parties until a trial on the merits can be held.’” *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (quoting *O Centro Espirita*, 389 F.3d at 977.).

Plaintiffs ask this Court to bar Defendants from enforcing Colorado’s public accommodation law so that they can discriminate against same-sex couples on the basis of their religious beliefs.

When a movant asks for a disfavored injunction, it “must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.” *Id.* (quoting *O Centro Espirita*, 389 F.3d at 975). In such cases, Plaintiffs “[h]ave a heightened burden of showing that the traditional four factors weigh heavily and compellingly in its favor before obtaining a preliminary injunction.” *See Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012) (internal quotations and citations omitted); *see also Awad v. Ziriya*, 670 F.3d 1111, 1126 (10th Cir. 2012) (noting that a movant must make a “strong showing” with

regard to likelihood of success on the merits and with regard to the balance of harms).

Here, for the reasons discussed above, Plaintiffs cannot meet this burden, and their request to enjoin Defendants should be denied.

VI. CONCLUSION

Plaintiffs cannot demonstrate the heightened standards that they (1) are likely to succeed on the merits of this case; (2) that they suffered irreparable harm; (3) that the balance of public interests or equities tips in their favor; or (4) that they can meet the heavy burden for their disfavored injunction. Defendants respectfully request this Court deny Plaintiffs' request to enjoin their enforcement of Colorado's public accommodation law for the reasons discussed above.

Respectfully submitted this 19th day of October, 2016.

s/ Jack D. Patten, III

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CERTIFICATE OF SERVICE

I certify that I served the foregoing DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [DOC. NO. 6] upon all parties herein by e-filing with the CM/ECF system maintained by the court or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 19th day of October, 2016, addressed as follows:

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s/ Jack D. Patten, III

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CHIEF JUDGE MARCIA S. KRIEGER**

Courtroom Deputy: Patricia Glover
Court Reporter: Mary George

Date: January 11, 2017

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

Parties:

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

Plaintiffs,

Counsel Appearing:

Jeremy Tedesco
Katherine Anderson
Michael Francisco

v.

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

Vincent Morscher

Defendants.

COURTROOM MINUTES

HEARING: Law and Motion

9:30 a.m. Court in session

The Court addresses the issues outlined in its Order setting this hearing (Doc. #44)

Statements from counsel.

Courtroom Minutes
Chief Judge Marcia S. Krieger
Page 2

The parties agree that there is no need for an evidentiary hearing.

ORDER: Plaintiffs' motion for summary judgment will be filed by February 1, 2017; responses will be filed by February 22, 2017 and reply filed by March 8, 2017. The parties will also file a separate stipulation of facts.

ORDER: The reference of the Motion to Dismiss (**Doc. #37**) to Magistrate Judge Shaffer is withdrawn. The Court will rule on the motion(s) for preliminary injunction, summary judgment and dismissal simultaneously.

9:49 a.m. Court in recess.

Total Time: 19 minutes.
Hearing concluded.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-2372-MSK-CBS

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

Plaintiffs,

vs.

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.

REPORTER'S TRANSCRIPT
(Law and Motion Hearing)

Proceedings before the HONORABLE MARCIA S. KRIEGER,
Judge, United States District Court for the District of
Colorado, commencing at 9:30 a.m., on the 11th day of
January, 2017, in Courtroom A901, United States Courthouse,
Denver, Colorado.

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APPEARANCES

KATHERINE L. ANDERSON and JEREMY D. TEDESCO, Alliance
Defending Freedom - Scottsdale, 15100 North 90th Street,
Suite 165, Scottsdale, Arizona 85260, AND

MICHAEL L. FRANCISCO, MRDLaw, 3301 West Clyde Place,
Denver, Colorado 80211, appearing for the plaintiffs.

VINCENT E. MORSCHER, Colorado Attorney General's
Office, Ralph L. Carr Colorado Judicial Center, 1300
Broadway, Denver, Colorado 80203, appearing for the
defendants.

MARY J. GEORGE, FCRR, CRR, RMR
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

P R O C E E D I N G S

(Call to order of the court at 9:30 a.m.)

THE COURT: Court is convened today in case No. 16
cv 2372. This is encaptioned 303 Creative LLC and Lorie
Smith versus a number of defendants: Aubrey Elenis,
Anthony Aragon, Ulysses Chaney, Miguel Elias, Carol
Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock and
Cynthia Coffman.

And the matter's set down for a law and motion
hearing because there's been a motion for a preliminary
injunction filed here, and there also has a pending motion
to dismiss.

Could I have entries of appearance, please.

MS. ANDERSON: Yes. Kate Anderson here on behalf
of plaintiffs. I'm joined by cocounsel Jeremy Tedesco and

1 Michael Francisco.

2 THE COURT: Thank you. And, counsel, you need to
3 speak into the microphone. You have a soft voice and it
4 kind of dissipates in the courtroom, so either pull that
5 microphone toward you or go to the lectern, please.

6 MS. ANDERSON: All right.

7 THE COURT: Good morning and welcome to all of
8 you.

9 MR. MORSCHER: Good morning, Your Honor. Vincent
10 Morscher, Deputy Attorney General, representing all
11 defendants in this matter.

12 THE COURT: Good morning and welcome to you as
13 well.

14 MR. MORSCHER: Thank you.

15 THE COURT: Before setting this hearing down, I
16 asked you to be prepared to -- or I said -- when I set it
17 down, I asked you to be prepared to address a number of
18 issues. And I've had an opportunity to review what you've
19 filed. I think some of those issues may have clarified in
20 the subsequent filings.

21 The purpose of our hearing here is to streamline
22 what's going on and get a path forward. First of all, let
23 me ask the plaintiffs why you named all of the defendants,
24 Aragon through Pocock, as defendants when essentially all
25 you're suing is the Colorado Civil Rights Division.

1 MS. ANDERSON: Your Honor, this is a case of
2 pre-enforcement challenge, challenging the
3 constitutionality of state statute.

4 THE COURT: I know that.

5 MS. ANDERSON: And the reason we named each of
6 those defendants is following the history of *ex parte Young*
7 and *Muskogee* in the Tenth Circuit and *Wilson v. Stocker*
8 saying that the way to avoid sovereign immunity when you're
9 challenging the constitutionality of a state statute is to
10 sue the people with enforcement power. And what's required
11 is some enforcement power. So each of those defendants has
12 some enforcement power and that is why we named them.

13 THE COURT: They have enforcement power if they
14 act as a unit and they direct the director, correct?

15 MS. ANDERSON: Their enforcement power, as we
16 understand it, is to file complaints, to investigate, to
17 order hearings, and on down the line.

18 THE COURT: Individually?

19 MS. ANDERSON: The -- the A.G. and the
20 commissioners and the commission can all file complaints,
21 which is part of the enforcement power.

22 THE COURT: All right. So the members of the
23 commission can file complaints; that's -- that's their
24 enforcement power that you're concerned about?

25 MS. ANDERSON: Yes.

1 THE COURT: All right. Then let me ask the
2 defendant -- or counsel for the defendants: What I
3 understand is that simply the posting of this website,
4 notwithstanding the content, would not cause any
5 prosecution; is that correct?

6 MR. MORSCHER: That's correct, Your Honor. Just
7 by having this service out there, it still takes a number
8 of steps by independent actors to actually get it before,
9 initially, the division and then eventually the commission,
10 assuming, you know, various things happen.

11 So, you know, only if someone approaches a
12 website, seeks out the service, is denied the service based
13 on, you know, presumably their sexual orientation, and then
14 they file a charge, then it would be an issue. However, as
15 we mentioned, the independent party can still go to state
16 court on their own and completely bypass the filing with
17 the division and they could seek relief in state court
18 automatically.

19 THE COURT: All right. But we're not concerned
20 about that. We're concerned about enforcement. And what I
21 just heard you say comports with what I read, which is that
22 the plaintiffs -- or plaintiffs here will not suffer any
23 injury unless service is denied; is that correct? Because
24 there will be no enforcement unless service is denied.

25 MR. MORSCHER: Well, that's correct. I mean,

1 they -- yes, they cannot take any action until facts
2 happen, and service would have to be denied before they
3 could take action and face --

4 THE COURT: All right. So what I understand
5 you're saying is that the plaintiffs composed the website,
6 there would be no enforcement taken simply because the
7 website is posted.

8 MR. MORSCHER: I mean, that's correct. The --
9 that's correct.

10 THE COURT: Okay. And that the only enforcement
11 that would occur, if any, would be after someone has
12 requested service and the plaintiffs have denied service;
13 is that correct?

14 MR. MORSCHER: Well, I guess when you are talking
15 enforcement, you know, what does that mean? Because they
16 still -- there still needs to be an investigation, there
17 still needs to be all these other steps before it's
18 actually noticed for a hearing --

19 THE COURT: Well, we're not talking about that.
20 We're talking about what is the triggering event? Is the
21 triggering event the posting of the website or is the
22 triggering of the -- triggering event the denial of
23 service?

24 MR. MORSCHER: The -- as far as defendants are
25 concerned, Your Honor?

1 THE COURT: Uhm-hum.

2 MR. MORSCHER: As far as defendants are concerned,
3 the triggering event is when a charge is filed and probable
4 cause is found.

5 THE COURT: Well, let me -- let me run down some
6 concepts, then, here. Let's hypothetically say that the
7 plaintiffs post the website and somebody complains about
8 the language on the website. Would that constitute a
9 complaint?

10 MR. MORSCHER: If they filed a charge alleging
11 that?

12 THE COURT: Uhm-hum.

13 MR. MORSCHER: I -- that would be a complaint,
14 correct.

15 THE COURT: And would the defendants take any
16 action to investigate that?

17 MR. MORSCHER: If it was determined that they had
18 jurisdiction, for instance, it was filed timely, and it
19 fell under the statute, then the Civil Rights Division
20 would initiate an investigation.

21 THE COURT: Okay. Do you understand what I'm
22 really asking you? Because if it is, as you have listed in
23 your pleadings, a requirement that service be denied, then
24 the plaintiffs have no standing with regard to any claim
25 based on free speech. But if you are saying that

1 enforcement could occur based on someone complaining about
2 the language on the website, not the denial of service,
3 then they may have standing.

4 MR. MORSCHER: Well, if they -- if you're going
5 towards the issue of posting the information under that
6 part of the statute that talks about a public accommodation
7 and not putting that out there, then, yes, certainly I
8 think someone would have an argument that they are not
9 being denied service but someone is committing an illegal
10 act by posting this discriminatory language on a website.

11 THE COURT: Well, there the injury that is alleged
12 would be an injury based on a denial of free speech, a
13 chilling effect. And if I understand the Government here,
14 the State of Colorado, to say we're not going to prosecute
15 simply because people put statements on their websites
16 about what services they do and do not intend to render,
17 we're going to wait until some service is denied before we
18 begin prosecution, then there's very little chilling effect
19 as to the speech; it is, indeed, conduct that is being
20 prosecuted. So what is the State's position?

21 MR. MORSCHER: Well, the State's position is that
22 a matter needs to be initiated before any prosecution is
23 made. And that really depends on the independent actor
24 looking at what is posted and filing a charge with the
25 division. Or it could be that they're denied service. It

1 could be either one.

2 THE COURT: Okay. Sounds like the State exercises
3 no discretion as to the complaints it pursues.

4 MR. MORSCHER: The only discretion it exercises is
5 jurisdictional and -- yes, I mean, that's correct. It has
6 no discretion whether it could accept a complaint as long
7 as it is filed.

8 THE COURT: Okay. All right. Then let's turn to
9 the motion for preliminary injunction. Have you discussed
10 what facts are in dispute and whether or not you need an
11 evidentiary hearing?

12 MR. MORSCHER: We did have a discussion, Your
13 Honor. You know, we don't believe that any facts are in
14 dispute in this matter. Certainly the facts that we think
15 are material to this are defendants' business and their
16 operations and their intent and their personal beliefs.
17 Seeing as nothing has been filed or done here, we don't
18 dispute that.

19 We certainly dispute their statement of what the
20 law is and who has the authority and jurisdiction to take
21 action. They -- they put all the defendants in one group,
22 and all defendants have independent authority, so we
23 don't -- you know, certainly we dispute that. But
24 otherwise, there's no disputed facts here.

25 THE COURT: So you're prepared to resolve this on

1 briefs?

2 MR. MORSCHER: That's correct, Your Honor.

3 THE COURT: All right. Let me hear from the
4 plaintiffs.

5 MS. ANDERSON: Your Honor, we agree that there's
6 no need for an evidentiary hearing, there's no facts in
7 dispute, and this could be decided on the briefs.

8 THE COURT: All right. Sounds to me like the
9 relief that you're requesting in the motion for preliminary
10 injunction is exactly the same relief that you're
11 requesting on the merits, correct?

12 MS. ANDERSON: No, Your Honor. We are -- on the
13 merits we also have a facial challenge asking for facial
14 relief. On the motion for preliminary injunction we're
15 only asking for as-applied relief, that she be able to
16 speak freely on her website and that she be able to enter
17 the industry and begin creating custom wedding websites --

18 THE COURT: What's the difference with regard to
19 the evidence that would be considered?

20 MS. ANDERSON: There could -- probably none, Your
21 Honor. There could be --

22 THE COURT: That's right.

23 MS. ANDERSON: Yeah.

24 THE COURT: All right. Then why shouldn't I just
25 combine the determination of the motion for preliminary

1 injunction with the determination on the merits under Rule
2 42(b)?

3 MS. ANDERSON: I think you could, Your Honor, as
4 long as you decided promptly the issues. There's
5 irreparable harm going on right now with her chilling of
6 her speech, so we would urge the Court to make a decision
7 quickly.

8 THE COURT: Well, I'm not inclined to make two
9 rulings.

10 MS. ANDERSON: So what would Your Honor -- what is
11 Your Honor thinking?

12 THE COURT: When are you going to be prepared to
13 address your issues?

14 MS. ANDERSON: I'm sorry?

15 THE COURT: When are you going to be prepared to
16 address your issues?

17 MS. ANDERSON: Could I take just a brief moment?

18 THE COURT: Sure.

19 MS. ANDERSON: Thank you.

20 Your Honor, we would propose, then, that we
21 file -- on an expedited briefing schedule, that within
22 about three weeks we file summary judgment.

23 THE COURT: How long will it take the State to
24 respond?

25 MR. MORSCHER: Your Honor, we're fine with

1 whatever the Court decides. We can respond within 20 days
2 of that.

3 THE COURT: All right. Then I'll set a deadline
4 for filing of motion for summary judgment. There will need
5 to be stipulated facts. Please understand if you do not
6 stipulate to all the facts, I'll deny the motion
7 outright --

8 MS. ANDERSON: Yes, Your Honor.

9 THE COURT: -- because that means we need to have
10 a hearing. So you'll need to have stipulated facts.
11 Please do not put those stipulated facts in your brief.
12 Please list the stipulated facts that you agree to.

13 Motion for summary judgment will be filed three
14 weeks from today. Ms. Glover, can you give us a deadline.

15 COURTROOM DEPUTY: Yes, I can. Three weeks from
16 today is February 1st.

17 THE COURT: All right. The response will be filed
18 three weeks from that date.

19 COURTROOM DEPUTY: Which would be February 22d.

20 THE COURT: All right. And the reply, if any,
21 will be filed 14 days thereafter.

22 COURTROOM DEPUTY: March 8th.

23 THE COURT: Okay. Court withdraws the reference
24 of the motion to dismiss docket No. 37 to Magistrate Judge
25 Shaffer and will rule on the motion for preliminary

1 injunction, motion for summary judgment, and motion to
2 dismiss simultaneously.

3 Any need for clarification, further explanation,
4 anything else we need to do?

5 MR. TEDESCO: I have one point of clarification.

6 THE COURT: Would you speak into a microphone,
7 please.

8 MR. TEDESCO: Thank you, Your Honor. I just
9 wondered if the State was going to be filing a cross-motion
10 for summary judgment. Right now --

11 THE COURT: Why would the State file a motion for
12 cross -- a cross-motion for summary judgment?

13 MR. TEDESCO: I don't know if they intend to or
14 not. And since we were figuring out the schedule --

15 THE COURT: Let me be real honest about motions
16 for summary judgment. Cross-motions for summary judgment
17 are not helpful. The only issue on a motion for summary
18 judgment is whether or not we need a trial. If we do not
19 need a trial, meaning there's no genuine dispute as to a
20 material fact, then the Court can enter judgment to the
21 party entitled as a matter of law. It does not matter who
22 files the motion.

23 MR. TEDESCO: Thank you, Your Honor.

24 THE COURT: All right. Anything else we need to
25 do today?

1 MS. ANDERSON: No, Your Honor.

2 MR. MORSCHER: Nothing from defendants, Your
3 Honor.

4 THE COURT: All right. I have one last question
5 for the plaintiffs, and that is whose website would this
6 be? You have two plaintiffs here.

7 MS. ANDERSON: It's her business website, 303
8 Creative.

9 THE COURT: Okay. So who owns -- would own the
10 website and whose speech would be involved?

11 MS. ANDERSON: It would be both. She's the sole
12 owner of the company --

13 THE COURT: Well, it doesn't work that way. Under
14 *Hobby Lobby*, we know that entities can't have speech. So
15 are you saying this is the speech of 303 Creative LLC, or
16 are you saying that essentially this is Lorie Smith, not an
17 LLC?

18 MS. ANDERSON: We are saying it is her speech
19 through her company. So it's her company speech.

20 THE COURT: Okay. Then you may want to think
21 about dismissing Lorie Smith from the caption of the
22 action.

23 MS. ANDERSON: We will consider it, Your Honor.

24 THE COURT: Okay. Great. Thank you all very
25 much. I look forward to receiving your briefs, and we will

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take it from there.

MS. ANDERSON: Thank you, Your Honor.

MR. MORSCHER: Thank you, Your Honor.

THE COURT: We will stand in recess.

(Proceedings concluded at 9:49 a.m.)

* * * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 18th day of January, 2017.



MARY J. GEORGE, FCRR, CRR, RMR

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

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

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

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN
SUPPORT**

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COME NOW Plaintiffs 303 Creative LLC and Lorie Smith, who move for summary judgment on all of the claims in the Verified Complaint For Declaratory and Injunctive Relief, ECF No. 1 pursuant to Fed. R. Civ. P. 56. In support of their motion, Plaintiffs rely on the arguments herein, Joint Statement of Stipulated Facts with Exhibits A through L, Affidavit of Lorie Smith in Support of Plaintiffs’ Motion for Summary Judgment, Affidavit of Jeremy D. Tedesco in Support of Plaintiffs’ Motion for Summary Judgment, Appendix in Support of Plaintiffs’ Motion for Summary Judgment, the Verified Complaint, all documents previously filed with the Court, and any oral argument granted by the Court.

INTRODUCTION

This case is about protected expression and Defendants’ efforts both to coerce and squelch it. Plaintiff Lorie Smith owns and operates Plaintiff 303 Creative LLC, a small business that specializes in graphic design, website design, and related marketing, social media management, and consultation services.¹ Joint Statement of Stipulated Facts (“Stipulated Facts”) ¶¶ 42, 45, 48. Like many other creative professionals, Lorie started her own business to use her design skills in keeping with her unique artistic vision, which—in Lorie’s case—is firmly grounded in her Christian faith. Stipulated Facts ¶¶ 42, 60. This entrepreneurial venture would allow Lorie to use her talents in keeping with her faith by explaining on 303 Creative’s website her reasons for (1) creating speech aligned with her religious values and (2) declining to create speech that does not. Stipulated Facts ¶¶ 60-63, 66-69, 86-90. But Defendants currently strip away Plaintiffs’ freedom to do both.

¹ For simplicity’s sake, this motion refers to both Plaintiffs collectively as “Lorie” whenever possible.

Colorado’s Anti-Discrimination Act (“CADA”) bars businesses (expressive and non-expressive alike) from discriminating on the basis of a person’s disability, race, creed, color, sex, sexual orientation, marital status, and national origin or ancestry. Colo. Rev. Stat. § 24-34-601(2)(a); Stipulated Facts ¶ 1. Lorie does not decide what speech to create based on any of these protected characteristics and CADA should thus have no application to her. Stipulated Facts ¶¶ 66-69. But Lorie does decide what speech to design and create based on her religious beliefs, including the conviction that marriage is a union instituted by God between one man and one woman. *Id.* It is undisputed here that Defendants interpret her message-based objection to celebrating same-sex marriage as sexual orientation discrimination prohibited by CADA. Defs.’ Resp. to Pls.’ Mot. for Prelim. Inj. 2, 6, ECF No. 38 (“Defs.’ MPI Resp.”) (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate... in violation of Colorado’s Anti-discrimination Act...” and asserting “her religious beliefs as a reason to discriminate”); Defs.’ Mot. to Dismiss V. Compl. for Decl. and Inj. Relief 2, ECF No. 37 (“Mot. to Dismiss”) (stating same). This improper application of CADA puts Lorie at imminent risk of state punishment.

In fact, Defendants apply CADA’s ban on sexual orientation discrimination to require all expressive businesses like 303 Creative that design, create, and publish protected expression promoting marriages between one man and one woman to do the same for same-sex marriages. *Id.*; *see also* Stipulated Facts ¶¶ 24-25, Ex. F, at 2 (Final Agency Order from the Colorado Civil Rights Commission (“Commission”) ordering cake artist, Jack Phillips, to “cease and desist from discriminating against Complainants and other same-sex couples by refusing to sell them wedding cakes or any product [Phillips] would sell to heterosexual couples . . .”). They deem it immaterial

that expressive businesses create constitutionally protected speech. Whether a business cleans floors after a wedding ceremony or creates art celebrating it, Defendants treat them exactly the same, so long as they disfavor messages that promote same-sex marriage. *Id.* Defendants’ interpretation of CADA thus requires Lorie to create graphic designs and custom webpages celebrating same-sex wedding ceremonies if she creates custom webpages celebrating weddings between one man and one woman. *Id.* Defendants effectuate this compelled-speech requirement by banning Lorie from making public statements that suggest she will decline requests to create designs or custom webpages promoting and celebrating same-sex weddings.² *Id.* But expressive business owners, like secular cake artists, that publicly refuse to send religious messages critical of same-sex marriage may create and speak freely because Defendants allow them to operate by different rules. Stipulated Facts ¶ 28, Ex. G-L (the Commission found no probable cause for charges of discrimination against three bakeries who declined to create cakes with messages critical of same-sex marriage).

This application of CADA to Lorie and 303 Creative violates the First Amendment, the Unconstitutional Conditions Doctrine, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. A cardinal principle of the Free Speech Clause is that speakers—and, in particular, artists—have the right to control their own speech. The government cannot compel creative professionals to remain silent or speak, let alone force them to send messages about marriage they find “morally objectionable.” *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977). Yet Defendants have done just that. They apply CADA to silence Lorie’s religious speech about

² For the statements Lorie desires to publish, *see* Stipulated Facts ¶ 87, Ex. B.

marriage and force her to create custom graphics, webpages, and text that celebrate a conception of marriage that violates her faith. But the First Amendment’s very purpose is to prevent such incursions into the “sphere of intellect and spirit,” which must be free “from all official control.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The Constitution protects this freedom for at least two reasons. First, art inherently involves the “subtle shaping of thought” about marriage and any other subject in our society and thus deserves strong protection as pure speech. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *see also Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (explaining that the definition of pure speech is “fairly capacious” and includes not only words, but also things like “pictures, paintings, drawings, and engravings” and “the sale of original artwork” (quotation and alterations omitted)). Here, Lorie wishes to design, create, and publish websites promoting biblical marriage for this very reason—to use her art to protest and ultimately change the prevailing view of marriage in our society. Stipulated Facts ¶¶ 71, 73-79.

Second, any attempt by the government to favor one viewpoint over another demands intense skepticism. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (explaining that the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content” (quotation omitted)). Defendants are clearly playing favorites: they permit artists to speak and create messages favoring same-sex marriage and to decline promoting opposing messages but threaten with investigations, re-education training, and fines those who hold a contrary view and object to promoting viewpoints they find morally objectionable. Aff. of Lorie Smith in Supp. of Pls.’ Mot. for Summ. J. ¶¶ 9-36 (“Lorie Smith Aff.”); App. in Supp. of Pls.’ Mot. for Summ. J. (“App.”) 003-010 (excerpts from expressive businesses who provide

services for weddings and post messages in favor of same-sex marriage); Stipulated Facts ¶¶ 24-25, 28, Ex. C-L (Defendants found probable cause for a charge of discrimination against Jack Phillips and Masterpiece Cakeshop for declining to create a cake celebrating a same-sex marriage but found no probable cause for charges of discrimination against three bakeries that declined to create cakes conveying messages critical of same-sex marriage). Yet, unpopular speech is precisely what the First Amendment exists to protect. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) (noting that free speech “shield[s] just those choices of content that in someone’s eyes are misguided, or even hurtful”). When the government enforces ideological orthodoxy on marriage or any topic, no citizen is safe. *See Barnette*, 319 U.S. at 637 (recognizing that the First Amendment exists to protect “individual freedom of mind” against government coercion).

In this case, CADA and Defendants’ discriminatory enforcement of it force Lorie to make an impossible choice. She can either (1) remain silent on the subject of marriage and abandon her right to create and publish the speech of her choosing, as directed by her religious beliefs, or (2) speak out on the subject of marriage, exercise her right to create and publish the speech of her choosing, and incur investigations, re-education training, mandatory reporting, and fines of up to \$500 for each violation of CADA, or (3) design custom websites celebrating a view of marriage that she finds morally objectionable and speak a message that she would otherwise decline to speak absent compulsion by the state. Colo. Rev. Stat. §§ 24-34-306(2)(a), -306(9), -602(1)(a), -605; Stipulated Facts ¶¶ 92-97.

No American should be forced to choose between her constitutional rights and government punishment. Defendants’ efforts to force Lorie to do so are unconstitutional. The Court should

grant summary judgment in her favor and hold—as other courts have already done—that when states interpret public accommodation laws to interfere with freedom of speech, the First Amendment preempts their enforcement. *See Hurley*, 515 U.S. at 581 (applying a state public accommodation law to require private parade organizers to include the message of an LGBT group violates the First Amendment). Otherwise, if Defendants’ discriminatory actions are allowed to stand, the Supreme Court’s promise that private individuals “who adhere to religious doctrines, may continue to advocate ... that, by divine precepts, same-sex marriage should not be condoned” is a dead letter and citizens like Lorie will be excluded from society based on their religious identity and beliefs. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

STATEMENT OF FACTS

Lorie Smith started 303 Creative LLC to have the freedom to incorporate her faith into her work. Stipulated Facts ¶ 42. After graduating from the University of Colorado Denver with a business degree in marketing, Lorie went to work for several years for traditional companies doing graphic design, website design, and marketing. Stipulated Facts ¶¶ 40-41. In these companies, Lorie found herself unable to use her artistic skills for a higher purpose in the way she always dreamed. Stipulated Facts ¶ 42. This troubled Lorie because her Christian faith teaches that every talent comes from God and should be used to honor Him. Stipulated Facts ¶¶ 37-38. So Lorie started her own small business, 303 Creative LLC. Stipulated Facts ¶¶ 42-45.

Lorie is 303 Creative’s owner/operator and sole employee. Stipulated Facts ¶ 44. Through 303 Creative, Lorie offers a variety of creative services to the public, including graphic design and website design, and in concert with those design services social media management and consultation services, marketing advice, branding strategy, training regarding website

management, and innovative approaches for achieving client goals. Stipulated Facts ¶ 45. Lorie controls the scope, mission, priorities, creative services, and standards of 303 Creative. Stipulated Facts ¶ 48. She does not employ or contract work to any other individuals, so each new graphic or website design is Lorie's original and custom work. Stipulated Facts ¶¶ 49-50, 83.

In creating her custom works, Lorie draws on her personal inspiration and sense of beauty to create websites and graphics, containing images, words, symbols, and other modes of expression to enhance and effectively communicate particular messages. Stipulated Facts ¶¶ 46-47, 54-55. She devotes considerable attention to artistic principles, such as color schemes, fonts, font sizes, positioning, harmony, balance, proportion, scale, space, interactivity, movement, navigability, simplicity, in her website design work. Stipulated Facts ¶¶ 51, 56-57. She also considers color, positioning, movement, angle, light, complexity, and other factors when designing graphics. Stipulated Facts ¶¶ 50, 56-57. Every aspect of Lorie's websites and graphics are designed to enhance and effectively communicate the particular message. Stipulated Facts ¶¶ 53-57. Lorie has been thrilled to be able to use 303 Creative to promote particular messages aligned with her religious beliefs. Stipulated Facts ¶ 71.

Guided by her faith, Lorie seeks to live and operate 303 Creative in accordance with the tenets of her Christian faith and in a way that brings glory to God and shares His truth with her clients and community. Stipulated Facts ¶¶ 60-61. She does this in many ways, including by treating her clients with love, honesty, fairness, transparency, and excellence and by being selective about the messages and events she creates and promotes—always ensuring they are consistent with her religious beliefs. Stipulated Facts ¶¶ 58, 62-63, 66-69.

To ensure this is the case and that all prospective clients are fully aware of 303 Creative's religious purpose, Lorie ultimately decided to include a special condition in her "Contract for Services" that allows the refusal to create any artwork, graphics, or textual content that communicates ideas or messages inconsistent with her beliefs. Stipulated Facts ¶ 67. Among other things, Lorie does not 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 between one man and one woman. Stipulated Facts ¶ 66. If a commission conflicts with its religious beliefs, Lorie will attempt to refer the prospective client to another graphic and website design company that can be of help. Stipulated Facts ¶ 69.

One key way Lorie felt called to serve God through her work was by designing, creating, and publishing custom wedding websites celebrating the union of a man and a woman. Stipulated Facts ¶¶ 73-80. Society's drift away from a biblical view of marriage was deeply troublesome to her. *Id.* Conveying the beauty of God's design for marriage by using her graphic design, web design, and marketing talents to celebrate the unique story of how a bride and groom met, fell in love, and got married was a perfect way for Lorie to convey her religious message about marriage in a compelling way. Stipulated Facts ¶¶ 73-80. All of Lorie's design work is artistic, expressive, and informational in nature, and her wedding websites will be the same, using images, words, graphics, and other modes of expression to tell a couple's unique story. Stipulated Facts ¶¶ 46-47, 81-83. Creating custom wedding websites will also give Lorie an opportunity to encourage her clients' marriages by sharing biblical truths with the bride and groom throughout the consultative process she uses to learn about them and their relationship. Stipulated Facts ¶ 80.

So Lorie prepared a special addition to 303 Creative’s website announcing the expansion of her services to include custom wedding websites. Stipulated Facts ¶¶ 85-87, Ex. B. This webpage explains Lorie’s excitement about the message of love and commitment told through each couple’s union and her desire to create a wedding website that expresses their distinctive story. Stipulated Facts ¶¶ 88-89. It describes Lorie’s religious motivation for offering this artistic service and her goal that God’s design for marriage between a man and a woman would be clear to anyone viewing the final product. *Id.* To be open and transparent about the services Lorie will provide, 303 Creative’s website addition also explains that Lorie “will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman” because “[d]oing that would compromise [her] Christian witness and tell a story about marriage that contradicts God’s true story of marriage—the very story He is calling [her] to promote.” Stipulated Facts ¶¶ 90-91. Plaintiffs desire, and are prepared, to publish the religious speech contained on this website immediately. Stipulated Facts ¶¶ 92.

But 303 Creative’s webpage for wedding website design services never saw the light of day because of Defendants’ application of CADA. Stipulated Facts ¶¶ 93-97. CADA includes a provision—the Banned-Speech Provision—that makes it illegal

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 ... services ... of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual’s patronage or presence ... 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); Stipulated Facts ¶ 3. Another CADA provision—the Compelled-Speech Provision—makes it “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 ... services ... of a place of public accommodation.” Colo. Rev. Stat. § 24-34-601(2)(a); Stipulated Facts ¶ 1.

Defendants have interpreted these provisions as prohibiting expressive businesses from declining to create speech that celebrates same-sex marriage for religious or moral reasons, but permitting expressive businesses that support same-sex marriage to decline to create religious speech critical of the practice. For example, when a Christian bakery—Masterpiece Cakeshop—declined to design and create a custom wedding cake celebrating a same-sex marriage, the Civil Rights Division concluded that it engaged in illegal sexual orientation discrimination under CADA. Stipulated Facts ¶¶ 24-25, Ex. C-D (the Civil Rights Division found probable cause for both charges of discrimination against Jack Phillips after he declined to create a cake celebrating a same-sex marriage based on his Christian faith). The Civil Rights Division found it immaterial that the Christian baker would serve anyone regardless of sexual orientation and that he simply could not promote a message at odds with his faith. *Id.*

Yet when a Christian customer later filed complaints against three other bakeries—Azucar Bakery, Le Bakery Sensual, Inc., and Gateaux, Ltd.—based on their refusal to create religious expression critical of same-sex marriage, the Civil Rights Division found no illegal discrimination under CADA based on creed. Stipulated Facts ¶¶ 28, Ex. G (“The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director’s decision of no probable cause” against Azucar Bakery); *see also* Ex. H-I (making the same findings of “no probable cause” against Le Bakery Sensual, Inc. and Gateaux, Ltd); Ex. J-L (Division findings of

“no probable cause” against the three bakeries). And it did so despite the fact that creed discrimination encompasses “all aspects of religious beliefs, observances, and practices ... [including] *the beliefs or teachings of a particular religion,*” 3 C.C.R. § 708-1:10.2(H) (emphasis added). The only way the Civil Rights Division could resolve these matters in favor of the three bakeries was by recognizing (1) a distinction between discriminating based on a customer’s protected status and declining a commission based on a disagreeable message and (2) the significance of the secular bakeries’ willingness to create other items for a member of a protected class. Stipulated Facts ¶¶ 28, Ex. J, at 3 (The Division found that Azucar Bakery’s refusal was “based on the explicit message that the Charging Party wished to include on the cakes” not on his “creed” and noted that Azucar creates her cakes for Christians); *see also* Ex. K-L (finding the same in charges against Le Bakery Sensual, Inc. and Gateaux, Ltd.). But the Civil Rights Division applies these factors only to expressive businesses that approve of messages promoting same-sex marriage. *Id.*; Stipulated Facts ¶¶ 24-25, Ex. C-F (Division findings that Jack Phillips and Masterpiece Bakery violated CADA by declining to create a cake celebrating a same-sex marriage). For the Christian bakery who disapproved of messages promoting same-sex marriage, they did not matter. *Id.* In stark contrast to the Civil Rights Division’s exoneration of three secular bakeries from creed discrimination charges, the Civil Rights Division ruled that the Christian bakery committed unlawful discrimination under CADA. *Id.*

303 Creative is in the same predicament as Masterpiece Cakeshop, the Christian bakery described above. It creates expression and is happy to serve all people without reference to personal characteristics, such as race, creed, sexual orientation, and gender. Stipulated Facts ¶¶ 64-65. What 303 Creative cannot do is create speech that promotes messages at odds with its faith.

Stipulated Facts ¶¶ 63, 66-68. But, according to Defendants, declining to create speech celebrating a same-sex marriage violates CADA. Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate... in violation of Colorado’s Anti-discrimination Act...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same). This interpretation of CADA has severely chilled Plaintiffs’ protected speech, particularly as CADA’s Banned-Speech Provision bans Lorie from directly or indirectly publishing any religious message that could conceivably make same-sex couples feel unwelcome. Stipulated Facts ¶¶ 92-97. It has also kept her from entering the wedding industry to create custom wedding websites. *Id.*

Further, all named Defendants have enforcement power under CADA. Mot. to Dismiss 3-4, 17-19; Stipulated Facts ¶¶ 4-23. For example, Ms. Elenis, the Civil Rights Division Director (“Director”) has authority to investigate all charges alleging discrimination or unfair practice, issue subpoenas make probable cause findings and conduct compulsory mediation. Stipulated Facts ¶¶ 9-13, 18-19. Mr. Aragon, Mr. Chaney, Mr. Elias, Ms. Fabrizio, Ms. Hess, Ms. Lewis, and Ms. Pocock, as commissioners on the Civil Rights Commission, have authority to independently file charges alleging discrimination or unfair practice, hear appeals from the Directors’ probable cause findings, issue notices to set hearings, preside over hearings, and make findings and issue orders pursuant to those hearings, including ordering an accused individual or business to engage in remedial measures. Stipulated Facts ¶¶ 14-17, 20-21. Ms. Coffman, the Colorado attorney general has authority to independently file charges alleging discrimination or unfair practice, triggering a mandatory investigation by the Director. Stipulated Facts ¶¶ 14, 22-23.

Because of the looming threat of an enforcement action, Lorie has not made viewable to the public the portion of 303 Creative’s website that announces the availability of custom wedding websites and its religious reasons for creating only messages that promote marriage between a man and a woman. Stipulated Facts ¶¶ 93-97. She has also not begun creating custom wedding websites. *Id.* But for Defendants’ interpretation of CADA, Lorie would have already published this website and began offering creative services for the creation, design, and publication of wedding websites that promote marriages between one man and one woman. Stipulated Facts ¶¶ 95-97. CADA is the only reason that Lorie has not done so. Stipulated Facts ¶ 96. If Plaintiffs obtain relief from this Court, Lorie will immediately publish the website described above and begin work creating, designing, and publishing wedding websites that communicate her religious view of marriage. Stipulated Facts ¶ 97.

However, despite not being in the wedding industry, Lorie has received a request to provide custom graphic and website design services for a same-sex wedding ceremony. *Lorie Smith Aff.* ¶¶ 3-8; App. 001-002. If she were in the wedding industry, this request would place Lorie in the impossible situation she seeks to avoid by filing this lawsuit—create the celebratory message and violate her beliefs or decline to create the celebratory message and violate the law. Stipulated Facts ¶¶ 94-95.

STANDARD OF REVIEW

Summary judgment is appropriate under Fed. R. Civ. P. 56(a) if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Plaintiffs and Defendants agree that no material facts are in dispute and that this case should be decided as a matter of law. *See* Law & Mot. Hr’g Tr. 9: 13-20 (Jan. 11, 2017), ECF No. 47 (“Hr’g Tr. (Jan.

11, 2017)”) (“[W]e don’t believe that any facts are in dispute in this matter. Certainly the facts that we think are material to this are defendants’ business and their operations and their intent and their personal beliefs.... [W]e don’t dispute that. We certainly dispute their statement of what the law is”). And rightly so, for the determination of whether “speech warrants constitutional protection is a question of law to be resolved by the court on a motion for summary judgment.” *Lee v. Bd. of Cnty. Comm’rs of Arapahoe Cnty.*, 18 F. Supp. 2d 1143, 1157 (D. Colo. 1998).

“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000); *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (“In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified.”). The state’s burden in cases of content or viewpoint discrimination is even greater because “the usual presumption of constitutionally afforded [state] enactment is reversed,” courts deem the law “presumptively invalid,” and the state “bears the burden to rebut that presumption.” *Playboy*, 529 U.S. at 817 (quotation omitted).

ARGUMENT

I. This Court Has Jurisdiction To Decide Plaintiffs’ Claims.

Susan B. Anthony List, Cressman, and *Ward* control the standing inquiry in this case. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2346 (2014) (ruling that two advocacy groups’ had standing to bring First and Fourteenth Amendment pre-enforcement challenges to a state law criminalizing false statements about candidates during political campaigns because of the chilling effect on their speech); *Cressman v. Thompson*, 719 F.3d 1139, 1147 (10th Cir. 2013) (concluding

that a motorist had standing to bring a First Amendment pre-enforcement challenge to a state law prohibiting him from covering an image on his license plate to which he had a religious objection); *Ward v. Utah*, 321 F.3d 1263, 1269-70 (10th Cir. 2003) (holding that an animal rights activist had standing to bring a pre-enforcement challenge to a state hate-crime statute because of the chilling effect on his speech.). All three cases involved pre-enforcement challenges to state law. *Id.* All three cases found standing. *Id.* And all three cases dictate standing in Lorie’s case because she currently stands unable to exercise her First Amendment rights for fear of government punishment. *Id.*

These three cases also set out the test for pre-enforcement standing—namely that a plaintiff who intends to engage in a course of conduct, arguably protected by the constitution but prescribed by statute, suffers an injury in fact so long as there is some a credible threat of enforcement. *Susan B. Anthony List*, 134 S. Ct. at 2342; *Cressman*, 719 F.3d at 1145; *Ward*, 321 F.3d at 1267. This test satisfies the “injury in fact” requirement under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), and triggers the Court’s “virtually unflagging” duty to decide the merits of the case, *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); see also *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994) (quoting same), so long as a plaintiff names defendants with enforcement authority under the law, thus meeting the causation element of standing, and the Court can redress the plaintiff’s injury. *Susan B. Anthony List*, 134 S. Ct. at 2341; *Cressman*, 719 F.3d at 1144; *Ward*, 321 F.3d at 1266. The test is most leniently applied when, as here, the plaintiff’s injury is the “chilling effect on h[er] desire to exercise h[er] First Amendment rights.” *Ward*, 321 F.3d at 1266-67; see also *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)

(“Because of the significance of First Amendment rights, the Supreme Court ‘has enunciated other concerns that justify a lessening of prudential limitations on standing.’”); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (“[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing.”).

Lorie readily satisfies the aforementioned test for pre-enforcement standing.

A. Plaintiffs Suffer an Injury in Fact.

1. Plaintiffs Intend to Engage in Constitutionally Protected Speech Prescribed by Statute.

Lorie desires to exercise her First Amendment right to speak on the subject of marriage between one man and one woman. Stipulated Facts ¶¶ 71-97. She intends to do this by creating custom wedding websites that celebrate such marriages and by posting her religious beliefs about marriage on 303 Creative’s website, along with her policy of taking only those creative projects that accord with her religious beliefs. *Id.*; Stipulated Facts ¶¶ 66 (“Among other things, Plaintiffs 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.”). As this statement pertains to marriages, Lorie’s website will inform her customers that she cannot create any custom websites that celebrate marriage as a union other than between one man and one woman. *Id.* Lorie’s custom wedding websites are pure speech and she has taken concrete steps towards publishing this speech. Stipulated Facts ¶¶ 81-89.

As explained in detail below, Lorie’s creation of custom wedding websites and the publishing of statements regarding marriage on Lorie’s website are pure speech protected by the First and Fourteenth Amendments. *See infra* Part II.A.1.a.. Both are Lorie’s original works of

texts and graphics published on the internet for the world to see. Stipulated Facts ¶¶ 93-97. Both are central to Lorie’s desire to speak freely on the subject of marriage. Stipulated Facts ¶¶ 71-80, 90. And both are inextricably intertwined since the speech on 303 Creative’s website serves the primary purpose of describing the views and policies by which Lorie runs her expressive business, including the creation of custom wedding websites. Stipulated Facts ¶¶ 88-91.

Lorie’s speech is prohibited by both the Banned Speech Provision and the Compelled Speech Provision of CADA. *See* Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate against same-sex couples... in violation of Colorado’s Anti-discrimination Act...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same); Hr’g Tr. (Jan. 11, 2017) 8:7-10 (“...[C]ertainly I think someone would have an argument that they are not being denied service but someone is committing an illegal act by posting this discriminatory language on a website.”). Because of this, Lorie must chill her desired speech. Stipulated Facts ¶¶ 93-97. And that is a concrete injury in fact sufficient to provide standing for a pre-enforcement challenge.

2. Lorie Faces a More Than Credible Threat of Enforcement.

Courts “assume a credible threat of prosecution in the absence of compelling contrary evidence.” *Ward*, 321 F.3d at 1269 (quoting *Mangual v. Rotger Sabat*, 317 F.3d 45, 57 (1st Cir. 2003)); *see also* *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988) (“The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume

otherwise.”).³ However, this Court need not assume anything here because the Defendants have confirmed the threat of enforcement.

At the January 11th hearing in this case, Defendants’ counsel conceded that the Defendants will investigate any and all charges of discrimination or unfair practice against Lorie as soon as they receive a complaint that she has either posted content on her website that someone finds “unwelcoming” or that she operates her business in a way that someone finds discriminatory by, for instance, declining to create a custom wedding website for a same-sex couple. Hr’g Tr. (Jan. 11, 2017), 7:17-20 (“If it was determined that they had jurisdiction, for instance, it was filed timely, and it fell under the statute, then the Civil Rights Division would initiate an investigation.”); 8:7-10 (“...[C]ertainly I think someone would have an argument that they are not being denied service but someone is committing an illegal act by posting this discriminatory language on a website.”); 9:4-5 (“The only discretion it exercises is jurisdictional” so the Division “has no discretion whether it could accept a complaint as long as it is filed.”). In their briefing, Defendants’ repeatedly identified Lorie’s speech as “discriminat[ion],” Mot. to Dismiss 2, in “violation of Colorado’s Anti-discrimination Act.” Defs.’ MPI Resp. 2. Defendants also accused Lorie of “assert[ing] her religious beliefs as a reason to discriminate against same-sex couples,” Defs.’ MPI Resp. 6, and characterized views, like hers, that are critical of same-sex marriage on religious grounds, as

³ Compelling contrary evidence historically has included evidence that a statute is moribund, *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004), or clear statements from the state defendants denouncing any intent to enforce the law, *Winsness v. Yocum*, 433 F.3d 727, 731 (10th Cir. 2006) (“[A]ssurances from prosecutors that they do not intend to bring charges are sufficient to defeat standing....” (quoting *D.L.S.*, 374 F.3d at 975)); *Mink v. Suthers*, 482 F.3d 1244, 1255 (10th Cir. 2007). The Defendants have not denounced an intent to enforce and instead have stated they will enforce the law to punish Lorie if she speaks as she desires. *See infra*.

“derogatory, and offensive message[s].” Defs.’ MPI Resp. 18. These statements leave no question as to the Defendants’ view of the legality of Lorie’s protected speech. Indeed, Defendants’ past enforcement of CADA against Masterpiece Cakeshop confirms their aggressive application of the statute to punish similar religious expression. Stipulated Facts ¶¶ 24-25, Ex. C-F.

The credible threat is further supported by the Division’s punishment of Jack Phillips, the cake artist who owns and operates a Colorado bakery called Masterpiece Cakeshop. *See Susan B. Anthony List*, 134 S. Ct. at 2345 (“[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not “chimerical.”); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (stating the same). Like Lorie, Phillips believes marriage is an institution between one man and one woman. Stipulated Facts ¶¶ 24-25, Ex. E, at 3 (“Phillips believes . . . that God’s intention for marriage is the union of one man and one woman.”). In line with his beliefs, he declined to design and create a custom cake celebrating a same-sex wedding. *Id.* After the same-sex couple filed a charge of discrimination, the Division aggressively prosecuted Phillips all the way to the U.S. Supreme Court. *Id.* And Defendants’ require Phillips to create custom cakes promoting same-sex ceremonies, submit to re-education training for himself and his staff, and file regular reports with the Division justifying any decision he makes to decline an order for any reason. Stipulated Facts ¶¶ 24-25, Ex. F (Commission’s Final Agency Order). With such prospects of onerous and expensive investigations, subpoenas, hearings, appeals, findings, and orders, Lorie cannot take the risk of speaking freely.

Defendants will likely respond, as they did in their Motion to Dismiss, by referring the Court to an irrelevant ten-item list of events they claim must occur before they will enforce CADA. Mot. to Dismiss 6-7. This list is inapposite. Nearly everything on that list is what Lorie can only

avoid by chilling her protected speech. The only remaining item is the request from a third party to create a custom wedding website for a same-sex ceremony and that does not impact pre-enforcement standing. Under the Defendants' interpretation of CADA, Lorie violates the Banned Speech Provision as soon as she posts her desired statements on her own website regardless of any third party requests. Defendants ignored this fact in their prior briefing but confirmed at the January 11th hearing that as soon as Lorie posts her statements she violates CADA and can be investigated and punished. *See supra*. Similarly, under Defendants' interpretation of CADA, Lorie violates the law as soon as she begins creating custom wedding websites for any marriages between one man and one woman because she is doing so under a policy that states she will only create custom wedding websites for such unions and not for other types of marriages, including same-sex weddings. Stipulated Facts ¶¶ 90-91. That policy, as she posts it on her website, will violate CADA regardless of any third party request. Hr'g Tr. (Jan. 11, 2017) 7:17-20, 8:7-10; 9:4-5. This forces Lorie to make the decision about what she can and cannot create before entering the industry and, based on her convictions, puts her in immediate violation of the law if she enters the wedding market. Moreover, Lorie has already received a request to design materials for a same-sex wedding, as explained below.

The suggestion that lack of a third party request negates standing is contradicted by caselaw. That exact issue was presented in *Doe v. Bolton*, 410 U.S. 179, 188 (1973), a case in which the U.S. Supreme Court considered a challenge to an abortion statute. The Court affirmed the physician plaintiffs' standing even though they could not violate the law absent a request by a third party to perform an abortion. *Id.*; *see also ACLU v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012) (recognizing that "[p]reenforcement suits always involve a degree of uncertainty about

future events.”); *Brandt v. Vill. of Winnetka*, 612 F.3d 647, 649 (7th Cir. 2010) (“Any pre-enforcement suit entails some element of chance.”).

The Supreme Court’s holding makes eminent sense because any other result would bar Lorie, and pre-enforcement plaintiffs like her, from federal court. In addition to violating CADA upon entering the industry by merely announcing her policy against promoting non-biblical marriage, Lorie will also violate CADA when she effectuates that policy by declining a request to create a website promoting a same-sex marriage. Based on the customers’ complaint which Defendants must investigate—they have no discretion to decline—or their own independent charge of discrimination, Defendants can immediately commence investigations and other enforcement actions against Lorie. Hr’g Tr. (Jan. 11, 2017) 7:17-20 (“If it was determined that they had jurisdiction [over a complaint], for instance, it was filed timely, and it fell under the statute, then the Civil Rights Division would initiate an investigation.”). This state court proceeding mandates abstention by federal courts, therefore precluding Lorie from a federal venue in which to vindicate her constitutional rights. *Sprint Commc’ns*, 134 S. Ct. at 591-94 (2013); *see also Younger v. Harris*, 401 U.S. 37, 41 (1971); *Phelps v. Hamilton*, 59 F.3d 1058, 1063-64 (10th Cir. 1995). Therefore, Lorie’s only opportunity to exercise her right to bring a pre-enforcement lawsuit in federal court is to bring that suit before she violates the law which means *before* she receives a third party request. Anything else forces Lorie to gamble with her conscience and her rights as she enters an expressive business knowing she will likely receive a request, and trigger punishment.

Notably, any claim that Lorie will never receive a request to create a custom website celebrating a same-sex ceremony is no longer legitimate because Lorie has received such a request.

Aff. ¶¶ 3-8, App. 001-002. Even though she is not currently in the wedding industry, Lorie received an email inquiry on September 21, 2016 asking her to “design...invites, placenames, etc.” as well as maybe “stretch[ing] to a website” for a same-sex wedding ceremony. *Id.* If Lorie were already in the wedding industry, that request would have placed her in the impossible position of choosing between compliance with CADA and compliance with her conscience. Stipulated Facts ¶¶ 93-97. That impossible choice is the very one she seeks to avoid by filing this pre-enforcement lawsuit. *Id.* Once Lorie begins promoting her custom wedding websites, she will likely get more requests. She should not have to choose between violating her conscience and violating the law.

B. Plaintiffs’ Injury is Caused by the Defendants as the Enforcers of CADA.

“It is well-established that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to *possess authority to enforce the complained of provision.*” *Cressman*, 719 F.3d at 1145 (quoting *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007)) (emphasis in original). *Ex Parte Young* and its progeny set out this exception to Eleventh Amendment Sovereign Immunity, which allows a plaintiff to seek prospective relief against a state law by naming those enforcement officials with “some connection” to “the enforcement of the act.” *Ex Parte Young*, 209 U.S. 123, 157 (1908); *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 827-28 (10th Cir. 2007); *Wilson v. Stocker*, 819 F.2d 943, 945-46 (10th Cir. 1987). As the Tenth Circuit confirmed in *Wilson*, “[a] suit against a state officer in his official capacity is of course, a suit against the State’ ... thus a controversy exists not because the state official is himself a source of injury, but

because the official represents the state whose statute is being challenged as the source of injury.” 819 F.2d at 947 (quoting *Diamond v. Charles*, 476 U.S. 54, 57 n.2 (1986)).

Although Defendants have disputed the legal standard for “causation,” they do not dispute each Defendants’ specific “connection” to “the enforcement” of CADA. Stipulated Facts ¶¶ 4-23; *see also* Mot. to Dismiss 3-4,17-19. The parties agree that under CADA the Defendants have the following authority. Defendant Elenis, as Director of the Colorado Civil Rights Division, has authority over all investigations of all charges of discrimination or unfair practice received by the Division. Stipulated Facts ¶¶ 9-13, 18-19. Defendant Elenis also has the power to issue subpoenas, determine whether probable cause exists for crediting charges of discrimination or unfair practice, dismiss charges, issue probable cause determinations, and commence compulsory mediation. *Id.* Defendants Aragon, Chaney, Elias, Fabrizio, Hess, Lewis, and Pocock, as members of the Commission have the power to file charges of discrimination or unfair practice, hear appeals from the Directors’ findings, issue notices and complaints to set hearings before the Commission or an ALJ, make findings at hearings before the Commission, and after a finding by the Commission or an ALJ that an individual or business violated CADA, the power to issue orders including cease-and-desist orders and other remedial measures. Stipulated Facts ¶¶ 14-17, 20-21. Defendant Coffman, as Colorado Attorney General, has authority to file charges of discrimination. Stipulated Facts ¶¶ 14, 22-23. Each of these powers enforces CADA. *Susan B. Anthony List*, 134 S. Ct. at 2345-46 (“We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review. The burdens that Commission proceedings can impose . . . are of particular concern [when]

.... the target of a ... complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests....”) (internal citation omitted).

No question exists that Defendants have the authority to enforce CADA. The parties both agree that they do. Importantly, the precise nature of that authority is not significant because Defendants are sued only in their official capacities and Plaintiffs do not seek to impose personal liability upon them.

C. This Court Can Redress Plaintiffs’ Injury.

Redressability need not be “complete” and is satisfied where “the risk of harm ‘would be reduced *to some extent* if petitioners received the relief they seek.’” *Consumer Data Indus. Ass’n v. King*, 678 F.3d 898, 902 (10th Cir. 2012) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007)); *see also Larson v. Valente*, 456 U.S. 228, 243 (1982); *Cressman*, 719 F.3d at 1146-47. A favorable decision from this Court will redress Plaintiffs’ injuries by barring Defendants from enforcing CADA to ban or compel Lorie’s protected speech. It will also significantly reduce, if not eliminate, the chances that a private plaintiff would file a lawsuit in an attempt to compel her to create speech she cannot create or punish her for publishing statements regarding her religious beliefs about marriage.

II. Plaintiffs are Entitled to Summary Judgment as a Matter of Law.

As previously noted, the material facts of this case are not in dispute. Plaintiffs and Defendants simply have differing views of the legal principles that control this case. For the reasons outlined below, the Court should decide those legal questions in Lorie’s favor.

A. Defendants’ Application of CADA Violates Plaintiffs’ First Amendment Rights to Freedom of Speech, the Press, and Expressive Association.

Defendant’s application of CADA to Lorie and 303 Creative violates three rights guaranteed by the First Amendment: (1) freedom of speech, (2) freedom of the press, and (3) freedom of expressive association, as explained below.

1. Applying CADA to Force Plaintiffs to Create Speech Celebrating Same-Sex Weddings and to Prohibit Plaintiffs from Publishing Speech Communicating Their Religious View of Marriage Violates the Free Speech Clause.

CADA violates Lorie’s rights under the Free Speech Clause of the First Amendment in at least five separate ways. It not only punishes Lorie’s religious speech about marriage based on its content and viewpoint, but also fails to offer any protection against viewpoint discrimination by enforcement officials. What is more, CADA compels Lorie to create morally-objectionable speech promoting same-sex marriage and bans Lorie from publishing religious speech opposing same-sex marriage. The statute’s speech-coercing and speech-squelching terms also employ facially overbroad language that covers a substantial amount of protected expression. Last but not least, CADA renders it impossible for Lorie to form an artistic partnership or expressive association solely with those who share her expressive purpose of promoting biblical marriage. These critical errors render CADA’s application to Lorie unlawful and parts of the statute unconstitutional on their face.

a. The Free Speech Clause Protects Plaintiffs’ Right to Speak and Create Art.

Lorie’s custom wedding webpages, which are composed of images, words, graphics, and other forms of expression, are pure speech protected by the First Amendment. Stipulated Facts ¶¶ 46-47. The Tenth Circuit has recognized that “[t]he concept of pure speech is fairly capacious.” *Cressman*, 798 F.3d at 952. Pure speech includes not just the written or spoken word but “music

without words, dance, theater, movies, and pictures, paintings, drawings, and engravings,” as well as “tattoos, artwork, custom-painted clothing, and stained-glass windows.” *Id.* at 952 (internal quotations and alterations omitted). Lorie’s custom wedding websites, which are composed of custom text and graphics, as well as other forms of expression, fit comfortably into this description of pure speech.

It is important to note that although pure speech extends well “beyond written ... words,” it unquestionably includes them. *Hurley*, 515 U.S. 569. The custom text Lorie writes celebrating the union of a man and a woman, as well as the words Lorie authors explaining her religious reasons for declining to promote same-sex marriage, is therefore unquestionably speech protected by the First Amendment. Stipulated Facts ¶¶ 86-89, 91; *see also Cressman*, 798 F.3d at 954 (noting that courts dealing with “images in the context of ... accompanying ... text” have routinely assumed that protected speech exists).

So are the custom graphics Lorie designs for her custom webpages. Stipulated Facts ¶¶ 50, 55, 79. For they are simply the modern equivalent of traditional visual media like “pictures, ... paintings, drawings, and engravings” that courts have protected as speech for over forty years. *Kaplan v. California*, 413 U.S. 115, 119 (1973). In fact, Lorie’s graphic design business deals in nothing less than “an artist’s sale of [her] own original work,” which always qualifies as pure speech because Lorie creates custom graphic designs for each client and incorporates those designs into her custom websites. *Cressman*, 798 F.3d at 953; *see* Stipulated Facts ¶ 59.⁴ While those

⁴ Numerous courts have found electronic text, images, and graphics to be protected speech. *See, e.g., Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (video games are protected speech); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-51 (2002) (virtual child pornography is protected speech); *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (noting that the

websites may contain both original and pre-existing content, the website as a whole is a new, original creation. Stipulated Facts ¶¶ 50, 56-59. For instance, the meaning of any pre-existing images and videos that Lorie incorporates into her website designs are changed by the new overarching context that she alone creates. *See Hurley*, 515 U.S. at 569-70 (“[A] private speaker does not forfeit constitutional protection ... by failing ... to generate, as an original matter, each item featured in the communication.”). Lorie’s web designs are—simply put—the modern digital equivalent of incorporating another’s “pictorial rendition” into “a larger collage,” a well-known artistic practice, which the Tenth Circuit has acknowledged results in pure speech. *Cressman*, 798 F.3d at 953; *see* Stipulated Facts ¶¶ 50-59.

Indeed, Lorie’s business of graphic and webpage design is inherently expressive in every respect. Stipulated Facts ¶¶ 46-47; *cf. Hurley*, 515 U.S. at 568 (recognizing that parades are inherently expressive). Not only is Lorie’s artistic and informational product expressive, so too is her artistic design process, and the business of creating graphics and webpages itself. Stipulated Facts ¶¶ 45-59; *cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (“This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment.”). It is well settled that the processes expressive businesses use to create speech are themselves entitled to First Amendment protection. Take newspapers, for example; in some

internet is a “dynamic, multifaceted category of communication” that “includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue.”); *Doe v. Shurtleff*, 628 F.3d 1217, 1222 (10th Cir. 2010) (“The Supreme Court has also made clear that First Amendment protections for speech extend fully to communications made through the medium of the internet.”).

respects, they are businesses like any other. But they deal in speech not widgets. Thus, if a decision effects a newspapers' choice of content, that choice is constitutionally protected.

An unbroken line of federal caselaw proves this point. Newspapers have the freedom to select their own writers and editorial staff because those employment decisions—which are generally subject to pervasive government regulation—affects their speech. *See, e.g., McDermott v. Ampersand Publ'g, Inc.*, 593 F.3d 950, 962 (9th Cir. 2010) (the First Amendment protects a “publisher’s choice of writers”); *Newspaper Guild of Greater Philadelphia, Local 10 v. NLRB*, 636 F.2d 550, 560 (D.C. Cir. 1980) (“[E]ditorial control [is] within the First Amendment’s zone of protection ...”). Likewise, no law may compel newspapers to publish a written work because they have the right to editorial control or speaker autonomy. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (“[A]ny ... compulsion to publish that which reason tells them should not be published is unconstitutional” (quotation omitted)); *Novotny v. Tripp County*, 664 F.3d 1173, 1177 (8th Cir. 2011) (“requir[ing] that a privately owned newspaper publish [a] letter to the editor” would “infringe upon the right of the newspaper itself to decide what content it includes on its own editorial page”). Newspapers’ right to control their own speech extends even to their commercial decisions whether to accept an ad. *See, e.g., Miss. Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (holding “the First Amendment interdicts judicial interference with the editorial decision” to reject an ad).

Less iconic expressive businesses receive the same constitutional protection. The First Amendment protects speech creation of both high and low varieties. Few are able to make a living selling their original paintings and other works of visual art. But an artist’s creation and sale of her original artwork is constitutionally protected. *See, e.g., White v. City of Sparks*, 500 F.3d 953,

957 (9th Cir. 2007) (“[A]n artist’s sale of his original paintings is entitled to First Amendment protection.”); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) (holding that “[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection” and that “[t]he sale of protected materials is also protected”).

Not many people would find the design and sale of violent video games comparable to the business of dealing in visual art. But the Supreme Court has held that “video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.” *Brown v. Entm’t Merchants Ass’n*, 564 U.S. at 790. As a result, government regulation of violent video games engenders strict scrutiny, even when mere age restrictions on their purchase are at issue. *See id.* at 799 (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny ...”).

The same is true of the business of designing and creating tattoos, which is conventionally considered one of the lower forms of art available. No less than two courts of appeals have invalidated restrictions on operating a tattoo parlor based on the Free Speech Clause of the First Amendment. *See Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (“We join the Ninth Circuit in holding that the act of tattooing is sheltered by the First Amendment, in large part because we find tattooing to be virtually indistinguishable from other protected forms of artistic expression.”); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063 (9th Cir. 2010) (“[T]he

business of tattooing qualifies as purely expressive activity ... and is therefore entitled to full constitutional protection”).

This line of diverse precedents demonstrate that the government’s ability to regulate expressive businesses, *i.e.*, those that deal in speech creation, is constitutionally limited. Precedent is so well established in this regard that, in its filings with the Supreme Court in the *Masterpiece* case, the State of Colorado admitted that bakeries operated by cake artists may qualify for free speech protection. App. 032 (“[C]reating a cake could ... be expressive and could therefore implicate the First Amendment.”); App. 033 (admitting regulation of a cake shop “could give rise to a First Amendment claim”). It could hardly do otherwise because the state had previously admitted that the Christian cake artist in question’s work demonstrated “considerable skill and artistry.” Stipulated Facts ¶¶ 24-25, Ex. E, at 7. If newspapers, painters, video game developers, tattooists, and cake artists all receive a First Amendment shield in operating their businesses because they produce speech, Lorie’s operation of her graphic and web design business is protected by the Free Speech Clause as well.⁵ That is because Lorie’s custom wedding webpages are composed of unique combinations of images, words, graphics, and other forms of expression that—individually and collectively—qualify as pure speech. Stipulated Facts ¶¶ 46-47.

The Free Speech Clause thus offers Lorie and 303 Creative strong protection against Defendants’ speech-coercing and speech-squelching application of CADA. *Cressman*, 798 F.3d at 951 (noting that “‘pure speech’ activities are rigorously protected regardless of meaning”).

⁵ Indeed, the Supreme Court protected even expressive businesses that deal in pornography because the parties agreed that they produced speech. *See, e.g., United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 811 (2000) (noting that because Playboy’s television programming is not “obscene” all parties agreed that it “has First Amendment protection”).

Indeed, the right to speak and the right not to speak are simply two sides of the same coin. *See Agency for Int’l Dev. v. Alliance for Open Soc. Int’l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” (quotation omitted)). It would be utterly meaningless for Lorie to publish an explanation of why she cannot design websites for same-sex weddings if Colorado may force her to actually create them in practice. Stipulated Facts ¶ 91; *see Pac. Gas & Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1, 16 (1986) (explaining that free speech “protection would be empty” if “the government could require speakers to affirm in one breath that which they deny in the next”).

Moreover, the speech that Lorie creates as the sole owner and operator of 303 Creative equally belongs to her and her closely-held corporation. They both may accordingly challenge the state’s unconstitutional actions here. Seven years ago in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court recognized “that First Amendment protection extends to corporations,” *id.* at 342, because “[w]hen the Government seeks to use its full power ... to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves,” *id.* at 356.

A couple of years later in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) (en banc), the Tenth Circuit clarified how *Citizens United*’s holding applies to joint religious speech by closely-held-for-profit businesses and their owners. It held that protected speech is equally attributable to the closely-held business, *see id.* (“We see no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its

religious expression.”), and its owner(s), *see id.* (“A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court, we do not see how we can distinguish this form of evangelism from any other.”).

The Supreme Court affirmed the Tenth Circuit’s reasoning in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014), when it clarified that “[a] corporation is simply a form of organization used by human beings to achieve desired ends.... And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.” The same is true of free speech. *See Hobby Lobby*, 723 F.3d at 1135 (“We see no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression.”). Tellingly, the individual owners of Hobby Lobby and Conestoga were named plaintiffs along with their closely-held corporations during the entire course of litigation that resulted in victory at the Supreme Court. *See Hobby Lobby*, 134 S. Ct. at 2765 (“The Hahn’s and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment”); *id.* at 2766 (“The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause.”). Thus, Lorie and 303 Creative’s constitutional rights are identical and they are both proper plaintiffs here. *See id.* at 2785 (“The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.”).

b. Free Speech Exceptions to Nondiscrimination Laws are Routinely Mandated by Federal Courts.

The potential of nondiscrimination laws to unconstitutionally interfere with protected expression has long been recognized by federal courts. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) (noting “the potential for conflict between state public accommodation laws” and “the First Amendment”); *Hurley*, 515 U.S. at 572 (characterizing as “peculiar” and striking down the application of a state public accommodation law to speech). Defendants’ extreme position that CADA regulates only conduct and thus allows for no free speech exception directly conflicts with this precedent. Title VII is a widely revered nondiscrimination statute but even it “steers into the territory of the First Amendment” when “pure expression is involved.” *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596-97 (5th Cir. 1995). For this reason, the Supreme Court has twice rejected attempts to apply public accommodation laws to interfere with private speech. *Dale*, 530 U.S. at 658; *Hurley*, 515 U.S. at 578.

Lower federal courts have correctly received the Supreme Court’s message: where free speech and nondiscrimination laws come into conflict, free speech wins.⁶ Here are just a few relevant examples where federal district courts have held just that:

- *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995): Cleveland prevented Nation of Islam ministers from delivering “separate speeches to men and women” at a conference held in a city convention center pursuant to a state public accommodations law that prohibited sex discrimination. *Id.* at 59. A federal district court held that forcing ministers to speak to a mixed gender audience would necessarily change “the content and character of the speech” and barred that particular application of the nondiscrimination law. *Id.*

⁶ If Defendants properly interpreted the MHRA, there would be no conflict between the statute and Lorie’s free speech rights. Lorie selects her website and graphic design projects based on the message requested, not the sexual orientation of her patrons. Stipulated Facts ¶¶ 58, 63-69.

- *Claybrooks v. Am. Broad. Cos.*, 898 F. Supp. 2d 986, 989-90 (M.D. Tenn. 2012): African-American men who auditioned for, but were rejected by, the producers of ABC’s television show *The Bachelor* sued for racial discrimination under 42 U.S.C. § 1981. *Id.* at 989-90, 1000. A federal district court dismissed the suit because “the First Amendment protects the producers’ right unilaterally to control their own creative content” and base their casting decisions “on whatever considerations the producers wish to take into account.” *Id.* at 1000.
- *S. Bos. Allied War Veterans Council v. City of Boston*, 297 F. Supp. 2d 388 (D. Mass 2003): Boston officials forced parade organizers to allow a Veterans for Peace group to march at the end of their St. Patrick’s Day parade, even though the organizers had previously denied the anti-war group’s request to take part. *Id.* at 394. A federal district court held that these private speakers had the right “not [to] have the message of an opposing group forced on them by the state,” *id.* at 393, and that a distance of “no less than a mile” between the groups was required to adequately “distinguish the two sets of speech,” *id.* at 399.

These cases establish that even nondiscrimination laws have their limits. One is private speech.

c. Creative Professionals Regularly Select Projects Based on Their Values and Preferred Message.

In the creative professions, it is standard practice for artists to operate based on their values and to associate their professional work with a certain message to the exclusion of others. Recent controversy surrounding the election of President Trump has brought this to light. Perhaps the first creative professional to object publically to the election result was Sophie Theallet, a well-known fashion designer who often dressed first lady Michelle Obama. Theallet views her “family-owned company” as “not just about money” but as a vehicle for exercising her “artistic freedom” and “philosophical ideas,” which include the “celebration of diversity.” Because she viewed President Trump as compromising those values, Theallet issued a letter stating that she would not provide her fashion designs to his wife.⁷ The Washington Post’s fashion critic defended Theallet’s and certain other fashion designers’ stance in this regard, explaining: “[F]or those designers for

⁷ Rosemary Feitelberg, LA Times, *Sophie Theallet vows not to dress Melania Trump*, <http://www.latimes.com/fashion/la-ig-wwd-sophie-theallet-melania-trump-20161117-story.html>.

whom fashion serves as their voice in the world, they should not feel obligated to say something in which they do not believe.”⁸

Controversy regarding whether artists should perform at the presidential inauguration followed Theallet’s letter. Some accepted, while others declined. Media speculation ran rampant for weeks regarding whether members of the Radio City Rockettes would lose their jobs because they refused to perform.⁹ And at least one member of the Mormon Tabernacle Choir resigned rather than “endorsing” what she viewed as “tyranny and fascism by singing for this man.”¹⁰ But not all creative professionals’ objections were so limited. One website designer and internet marketing provider in New Mexico went so far as to say that his company would refuse service to any Republican or supporter of President Trump because “he has a moral obligation to stand up for what he believes is right.”¹¹

Expressive business owners of all stripes share this principle even if they do not take it to such extremes. The lesbian owners of a New Jersey t-shirt company, for example, defended the decision of a Christian t-shirt printing shop to decline to create t-shirts promoting a local LGBT

⁸ Robin Givhan, Washington Post, *Should designers dress Melania and Ivanka?* https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/01/12/should-designers-dress-melania-and-ivanka-the-question-is-more-complex-than-it-seems/?tid=a_inl&utm_term=.8c21491699ef.

⁹ Nick Younker, Inquisitr, *Donald Trump Inauguration: Rockette Willing to Lose Job Not to Perform at Ceremony*, <http://www.inquisitr.com/3844671/donald-trump-inauguration-rockette-willing-to-lose-job-not-to-perform-at-ceremony/>.

¹⁰ Job Eugene Scott, CNN, *Mormon Tabernacle Choir member quits*, <http://www.cnn.com/2016/12/30/politics/mormon-tabernacle-choir-member-quits-trump-inauguration/>.

¹¹ KOB4, *Business owner refusing service to Trump supporters*, <http://www.kob.com/albuquerque-news/business-owner-refusing-service-president-elect-donald-trump-supporters-matthew-blanchfield-1st-in-seo-internet-marketing-company/4325531/>; Matthew Blanchfield, LinkedIn, <https://www.linkedin.com/in/mathew-blanchfield-29b319b0>.

pride festival on the ground that creative professionals often refuse “to do something against what they believe in.” For them, the moral objection would be to creating t-shirts for the Westboro Baptist Church, but the same principle controlled.¹² Professional speech creators may not use proper legal terminology but their instincts are correct. Federal courts have recognized their right to speaker autonomy, *i.e.*, private speakers’ right to control their own speech. *See, e.g., Cressman*, 798 F.3d at 952 (discussing a wide range of “media” that are safeguarded because “their expressive character ... falls within a spectrum of protected speech” (quotation omitted)).

d. Defendants’ Application of CADA Unlawfully Forces Lorie to Create Speech.

The Free Speech Clause grants “both the right to speak freely and the right to refrain from speaking at all.” *Wooley*, 430 U.S. at 714. This latter aspect, known as the compelled speech doctrine, bars the government from coercing unwanted expression. *See Alliance for Open Soc.*, 133 S. Ct. at 2327 (“It is ... a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.” (quotation omitted)).

The First Amendment’s ban on compelled speech applies just as strongly to public accommodation laws as it does to any other statute. For example, the Supreme Court in *Hurley*, 515 U.S. at 572-75, held that Massachusetts’ public accommodation law could not be used to force the organizers of a St. Patrick’s Day parade to admit an LGBT contingent expressing an unwanted message regarding the “unqualified social acceptance of gays and lesbians.” The Court held that

¹² Billy Hallowell, *The Blaze*, *T-Shirt Maker Who Refused to Print Gay Pride Shirt is Being Punished — but These Lesbian Business Owners Reveal Why They’re Supporting Him*, <http://www.theblaze.com/news/2014/11/07/lesbian-business-owners-tell-glenn-beck-why-they-support-the-t-shirt-maker-whos-now-being-punished-for-refusing-to-print-gay-pride-shirts/>.

any effort to declare the parade “sponsors’ speech itself to be the public accommodation” was bound to fail because the state “may not compel affirmance of a belief with which the speaker disagrees.” *Id.* at 573. Lorie, like the parade organizers in *Hurley*, has “the autonomy to choose the content of [her] own message” and cannot be compelled to express an unwanted message by the state. *Id.*; *see also Dale*, 530 U.S. at 642 (invalidating the application of a public accommodation law that interfered with speech).

A more straightforward violation of the compelled speech doctrine than Defendant’s mandate that Lorie design, create, and publish custom websites celebrating same-sex weddings is hard to fathom. Making out a compelled-speech claim in the Tenth Circuit requires that “a party ... establish (1) speech; (2) to which he objects; that is (3) compelled by some governmental action.” *Cressman*, 798 F.3d at 951. All three factors are met here. First, Lorie’s custom wedding websites are pure speech, as explained above. *See supra* Part II.A.1.a. Second, it is clear that Lorie has strong religious objections to creating speech that promotes same-sex marriage. Stipulated Facts ¶¶ 60-61, 63, 66-71, 73-80, 88-92, 94. In fact, Lorie desires to publish speech explaining that such unions “contradict[] God’s true story of marriage—the very story He is calling [303 Creative] to promote.” Stipulated Facts ¶ 91. Third, Defendants seek to apply CADA to compel Lorie to design, create, and publish that speech. Stipulated Facts ¶ 95; Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate against same-sex couples... in violation of Colorado’s Anti-discrimination Act...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same). Defendants’ prosecution of Masterpiece Cakeshop proves that they require expressive business owners that object to same-sex marriage—

like Lorie—to create and publish speech promoting same-sex weddings if they create and publish speech celebrating weddings between one man and one woman. Stipulated Facts ¶¶ 24-25, Ex. C-F (Commission orders related to Masterpiece Cakeshop). But the compelled speech doctrine prevents a speaker from “being forced to speak” on the subject of same-sex marriage. *Cressman*, 719 F.3d at 1152 (quotation omitted).

That is particularly true here where Lorie designs, creates, and publishes artistic expression. See *Redgrave v. Bos. Symphony Orchestra*, 855 F.2d 888, 905 (1st Cir. 1988) (“[T]he law’s typical reluctance to force private citizens to act, ... augments its constitutionally based concern for the integrity of the artist.”). The Free Speech Clause protects not only the pure speech Lorie creates, but also her process for creating that pure speech. Stipulated Facts ¶¶ 46-47, 50-59; see *Cressman*, 798 F.3d at 954 (noting that artistic “creation is itself an act of self-expression”); *Buehrle*, 813 F.3d at 977 (refusing to “draw[] a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded.” (quoting *Anderson*, 621 F.3d at 1061)).

Because Lorie wants to design custom webpages for the express purpose of honoring God’s design for marriage, Stipulated Facts ¶¶ 71, 73-79, a critical part of her creative process is subject matter selection: Lorie will use the unique stories of brides and grooms to communicate, in an engaging way, the distinctive beauty of marriage between one man and one woman to the general public. Stipulated Facts ¶¶ 79-81. Modifying Lorie’s artistic subject matter to include same-sex weddings fundamentally changes her message about marriage and what merits celebration in that context. Weddings are, after all, inherently expressive events that celebrate “the uniting of two people in a committed long-term relationship.” *Kaahumanu*, 682 F.3d 789, 799 (9th Cir. 2012).

It is impossible for Lorie to communicate that such unions should *only* be between a man and a woman if Colorado may force her to design and create custom websites promoting and celebrating same-sex weddings in practice. *Id.*; Stipulated Facts ¶¶88-91, 94.

Lorie is rightly proud of her artistic work and an important means of defining her religious message about marriage is placing the text “Designed by 303Creative.com” on all of her custom wedding websites. Stipulated Facts ¶ 83. No one in our society listens to hypocrites. Yet forcing Lorie to communicate a celebratory message about same-sex marriage would “compromise [her] Christian witness and tell a story about marriage that contradicts” the teachings of her faith before a watching world. Stipulated Facts ¶ 91. Colorado’s attempts to force Lorie to promote a view of marriage she does not hold must necessarily fail because, under the First Amendment, Lorie has the “autonomy to choose the content of [her] own message.” *Hurley*, 515 U.S. at 573; *see also id.* at 576 (explaining that the government cannot “require speakers to affirm in one breath that which they deny in the next” (quotation omitted)).

Defendants will invariably claim that these free speech protections do not apply because (1) Lorie’s speech belongs to her clients and (2) 303 Creative is a for-profit business. But neither argument holds water. Federal courts have rejected the peculiar notion that free speech protections apply only to those who commission an expressive work and not to the artist who creates it. *Buehrle*, 813 F.3d at 977 (“The First Amendment protects the artist who paints a piece just as surely as it protects ... the buyer who purchases it”); *Anderson*, 621 F.3d at 1062 (recognizing that both the artist and the patron “are engaged in expressive activity”). Lorie’s custom wedding websites consist of unique combinations of graphics, images, and text that promote the bride’s and groom’s story of love and commitment in a way that promotes biblical marriage. Their creation

is “an act of self-expression” on Lorie’s part that promote her religious vision of marriage to society at large. *Cressman*, 798 F.3d at 954. Lorie’s pure speech is attributable to her not only because it is her original artwork, but also because the wedding websites she designs will bear the text “Designed by 303Creative.com.” Stipulated Facts ¶83. Lorie is thus “intimately connected with the communication advanced” on any website she creates and publishes. *Hurley*, 515 U.S. at 576. And in those circumstances, the forced “dissemination of a view contrary to one’s own” violates “the speaker’s right to autonomy over the message.” *Id.*; see also *Obergefell*, 135 S. Ct. at 2607 (recognizing that “[t]he First Amendment ensures that religious organizations and persons [like Lorie] are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faith, and to their own deep aspirations to continue the family structure they have long revered.”).

Just as importantly, *Hurley*, 515 U.S. at 574, recognized that the freedom not to engage in or publish unwanted speech is “enjoyed by business corporations generally” and “professional publishers” in particular. Precedent supports no other view, as the Supreme Court has protected for-profit businesses against compelled speech for at least forty years. See, e.g., *Pac. Gas*, 475 U.S. at 5-6 (protecting a for-profit electric company); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (shielding a for-profit newspaper). In keeping with this precedent, a trial court in Kentucky invalidated the application of a public accommodation law to compel an expressive business to print t-shirts for a gay-pride festival. *Hands on Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm’n*, No. 14-CI 04474 (Fayette Cir. Ct. Apr. 27, 2015).¹³

¹³ The *Hands on Originals* opinion is available at <http://perma.cc/75FY-Z77D>.

This Court should do the same here because Defendants are similarly compelling Lorie to speak in an unlawful manner. *See also Claybrooks*, 898 F. Supp. 2d at 1000 (holding that a federal anti-discrimination law could not be used to compel a for-profit television studio to engage in race-blind casting decisions). “[A] speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.” *Riley v. Nat’l Fed. of the Blind of N.C.*, 487 U.S. 781, 801 (1988); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (explaining that “a great deal of vital expression” results from an “economic motive”). Supreme Court caselaw is unambiguous in this respect: “[T]he degree of First Amendment protection is not diminished merely because the [expression] is sold rather than given away.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 756 n.5 (1988).

Because Defendants’ interpretation of CADA forces Lorie to create pure speech against her will, that application of the statute is unconstitutional and should be held invalid. *See Dale*, 530 U.S. at 659 (noting that in *Hurley* the Court “applied traditional First Amendment analysis to hold the application of [a] public accommodations law to [protected expression] violated the First Amendment” without engaging in strict scrutiny).

e. CADA Regulates Speech Based on Its Content and Viewpoint, and Unconstitutionally Allows for Viewpoint Discrimination.

“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 135 S. Ct. at 2226. Defendants apply CADA in a content-based manner by targeting speech critical of same-sex marriage for censure and punishment, while allowing speech in favor of same-sex marriage to flourish. Stipulated Facts ¶¶ 24-25, 28, Ex C-L (Commission and Division rulings finding probable cause for charges of

discrimination against Jack Phillips and Masterpiece Bakery but finding no probable cause against Azucar Bakery, Gateaux, Ltd, or Le Bakery Sensual, Inc.); App. 003-010 (websites from other artists who provide expressive services for weddings who have posted messages in favor of same-sex marriage); Defs.’ MPI Resp. 18 (characterizing views, like Lorie’s, that are critical of same-sex marriage as “derogatory, and offensive message[s].”).

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed*, 135 S. Ct. at 2227. Because CADA guards against discrimination based on a narrow set of characteristics, that is certainly true here. Colo. Rev. Stat. § 24-34-601(2)(a). Only ideas or messages related to protected characteristics may implicate CADA’s Banned-Speech or Compelled-Speech Provisions. For example, CADA does not require a Democrat speech writer to draft a speech for a Republican because political affiliation is not a protected characteristic. *But see* D.C. Stat. §§ 2-1401.01 & 2-1402.31 (banning discrimination by a public accommodation based on “political affiliation”). Sexual orientation is protected, however, so under Defendants’ interpretation of CADA, Lorie is forced to design, create, and publish custom wedding websites that promote and celebrate a same-sex wedding. Stipulated Facts ¶¶ 93-97; Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate against same-sex couples... in violation of Colorado’s Anti-discrimination Act...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same). In short, the message expressed determines whether CADA applies. The First Amendment, however, does not allow Colorado to impose “special prohibitions on ... speakers who express views on disfavored subjects” without first bearing the burden of

overcoming strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992); *cf. Campbell v. Robb*, 162 F. App'x 460, 468 (6th Cir. 2006) (ruling that the Fair Housing Act's similar publication ban is content based).

The Supreme Court's decision in *R.A.V.* proves this point. In that case, a city ordinance banned only a limited class of fighting words that insulted based on a person's "race, color, creed, religion, or gender." 505 U.S. at 391. Only invectives relating "to one of the[se] disfavored topics" implicated the speech ban. *Id.* As a result, those who insulted based on "political affiliation, union membership, or homosexuality [were] not covered." *Id.* The Supreme Court held that the ordinance was content based and that, in its real operation, it resulted in "viewpoint discrimination" because speakers sharing the city's values in favor of "tolerance and equality" could use fighting words, such as "aspersions upon a person's mother," at will. *Id.* Only "opponents" of the city's ideology were subject to the speech ban because they chose to address someone's race, color, creed, religion, or gender in a negative manner. *See, e.g., id.* at 391-92 ("One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'"). But government has "no such authority to license one side of a debate to fight freestyle, while requiring the others to follow Marquis of Queensberry rules." *Id.* at 392.

That is precisely what Colorado has done by allowing expressive businesses who support same-sex marriage to speak freely, while subjecting expressive businesses that oppose same-sex marriage to an onerous set of speech-compelling and speech-squelching rules. When the Christian owner of Masterpiece Cakeshop declined to design and create a cake celebrating a same-sex union because it communicated an unwelcome message about marriage, the Civil Rights Division ruled

that he must “cease and desist from discriminating against ... same-sex couples.” Stipulated Facts ¶¶ 24-25, Ex. F, at 2. But when three secular cake artists declined commissions to create cakes with a religious message critical of same-sex marriage for a Christian patron based on their unwelcome message, the Civil Rights Division found no evidence of unlawful discrimination because the “denial was based on the explicit message that the [customer] wished to include on the cakes,” Stipulated Facts ¶ 28, Ex. J, at 4; *see also* Ex. K, L, which Defendants arbitrarily deem “derogatory, and offensive message[s],” Def.’s MPI Resp.18. This interpretation of CADA is inherently content and viewpoint based.

According to Defendants, whether an expressive business may decline a commission based on its message depends solely on its view of same-sex marriage. Expressive businesses that oppose same-sex marriage and decline an order based on its opposing message violate CADA, whereas those who support same-sex marriage and decline an order based on its opposing message do not. Stipulated Facts ¶¶ 24-25, 28, Ex. C-L (Defendants found probable cause for a charge of discrimination against Jack Phillips and Masterpiece Cakeshop for declining to create a cake celebrating a same-sex marriage but found no probable cause for charges of discrimination against three bakeries that all declined to create cakes conveying messages critical of same-sex marriage.). This is blatant viewpoint discrimination—the most egregious form of content discrimination possible—because Defendants differentiate among similarly situated expressive businesses based solely on their “specific motivating ideology or ... opinion or perspective.” *Reed*, 135 S. Ct. at 2230 (quotation omitted); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”); *Church on*

the Rock v. City of Albuquerque, 84 F.3d 1273, 1279 (10th Cir. 1996) (explaining that viewpoint discrimination occurs when “[t]he prohibited perspective, not the general subject matter” trigger[s] the decision to bar ... private expression (quotation omitted)).

Just as Defendants force artists to *create* expression celebrating same-sex marriage under the Compelled-Speech Provision, they apply the Banned-Speech Provision to ban any *speech* “directly or indirectly” suggesting artists—like Lorie—would decline such a commission based on their religious viewpoint. Stipulated Facts ¶ 3; Hr’g Tr. 8:7-10 (“...[C]ertainly I think someone would have an argument that they are not being denied service but someone is committing an illegal act by posting this discriminatory language on a website.”). But when the government “favor[s] some speakers over others” due to preference for certain content—in this case, speech favorable towards same-sex marriage—strict scrutiny applies. *Reed*, 135 S. Ct. at 2230 (quotation omitted). And rightly so, for the First Amendment’s very purpose is to prevent the government from wielding laws like CADA “to suppress disfavored speech” in a manner that could potentially serve “invidious, thought-control purposes.” *Id.* at 2229 (quotation omitted).

In fact, it is impossible for a speech-regulating law like CADA to be viewpoint neutral unless it incorporates affirmative “protection ... for viewpoint neutrality.” *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). “[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints.” *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006); *see also Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) (“[W]e conclude that the prohibition against unbridled discretion is a component of the viewpoint-

neutrality requirement.”); *Kaahumanu*, 682 F.3d at 806 (joining the Seventh and Fourth Circuits in holding “that the viewpoint neutrality requirement includes the prohibition on a licensing authority’s unbridled discretion”). Laws generally meet this requirement by incorporating “reasonably specific and objective” guidelines that are “narrowly drawn” and which contain “reasonable and definite standards” for enforcement. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002) (quotation omitted).

CADA contains no such guidelines or standards. To the contrary, it gives Defendants *carte blanche* authority to decide whether an expressive business’s decision to turn down an order was based on its message or “because of” a protected characteristic. Colo. Rev. Stat. § 24-34-601(2)(a). It makes no difference whether Defendants have demonstrably misused the unbridled discretion provided by CADA because it is “the *pervasive threat inherent in its very existence* that constitutes the danger to freedom of discussion.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (quotation omitted) (emphasis added). But Defendants have, in fact, used their unbridled discretion in a viewpoint-based manner to require expressive businesses that oppose same-sex marriage on religious grounds to create speech celebrating it, whereas they have allowed expressive businesses that support same-sex marriage to refuse to create religious speech critical of the practice. Stipulated Facts ¶¶ 24-25, Ex. C-L.

Likewise, CADA provides no guidelines or standards to restrict Defendants’ ability to decide that expressive businesses’ communications are off-putting enough to make members of a protected group feel “unwelcome, objectionable, unacceptable, or undesirable.” Colo. Rev. Stat. § 24-34-601(2)(a); Stipulated Facts ¶ 3. The vagueness and subjectivity of these terms cannot be overstated. Speech that would make some people feel unwanted would be perfectly congenial to

others. No objective standard of “unwelcomeness” or “objectionability” exists and CADA makes no effort to define these terms in order to provide one. That is, in and of itself, sufficient to render CADA unconstitutional. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (Alito, J.) (invalidating a school policy that banned “any unwelcome verbal ... conduct which offends ... because of” protected characteristics); *Armstrong v. Dist. of Columbia Pub. Library*, 154 F. Supp. 2d 67, 79-80 (D.D.C. 2001) (striking down a library regulation that denied access to patrons with an “objectionable” appearance).

State officials enforcing the statute are, in practice, left to their own devices, which—as we know—includes a willingness to coerce speech from expressive businesses that reject same-sex marriage and unwillingness to coerce speech from expressive businesses that share their pro-same-sex-marriage views. Stipulated Facts ¶¶ 24-25, 28, Ex. C-L; *see, e.g., City of Lakewood*, 486 U.S. at 771 (explaining that when there are no “limits as to what reasons [government officials] may give” for their decisions and their rulings “need not be made with any degree of specificity,” the “standards necessary to insure constitutional decisionmaking” are absent). CADA’s failure to establish any “narrowly drawn, reasonable and definite standards” to guide Defendants’ exercise of discretion and their failure to “rely on any objective factors” in enforcing the statute results in the vesting of “unbridled discretion in ... government official[s].” *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992). This allows for viewpoint discrimination, which violates the First Amendment.

f. CADA’s Banned-Speech Provision is an Unconstitutionally Overbroad Prior Restraint on Speech.

A law must be facially “invalidated as overbroad if 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). That is true in regards to CADA’s Banned-Speech Provision, which makes it unlawful to “directly or indirectly” publish, circulate, issue, display, post, or mail “any written, electronic, or printed communication, notice, or advertisement that indicates ... 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); Stipulated Fact ¶ 3.

Because the Speech-Ban Provision is not limited to non-expressive businesses, it applies to newspapers, book publishers, printers, web designers and other creative professionals who deal in pure speech. These private speakers all 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, as outlined above. *See supra* Parts II.A.1.c and d; *cf. Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 578 (6th Cir. 2013) (declining to interpret the Fair Housing Act’s publication ban to prohibit statements that would “discourage an ordinary reader of a particular protected class ... [because] using ‘discourage’ could create First Amendment concerns by creating an overly broad restriction on speech”). Yet CADA robs them of that right if they oppose same-sex marriage.

In addition, the Banned-Speech Provision is remarkably broad in scope, extending to speech that “directly or *indirectly*” makes any member of a protected class feel undesirable as a patron. Colo. Rev. Stat. § 24-34-601(2)(a) (emphasis added). This vague and subjective prohibition bans the expression of any number of opinions critical of others’ political, religious, and social views, even though such speech lies at the heart of the First Amendment. *See Wooley*,

430 U.S. 714 (recognizing that the First Amendment “secures the right to proselytize religious, political, and ideological causes”). CADA’s Banned-Speech Provision also encompasses positive statements that are exclusive in nature, such as communications indicating that only one religion is true and of eternal significance. For that would mean all other religions are untrue and their adherents are simply wasting their time. That would surely make some protected class members feel unwelcome.

Because CADA’s Banned-Speech Provision bans a broad swathe of expression that might cause others offense, it is overbroad and facially unconstitutional regardless of this Court’s holding regarding Lorie’s speech here. *See Nat’l Council for Improved Health v. Shalala*, 122 F.3d 878, 882 (10th Cir. 1997) (“[A]n overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable.” (quotation omitted)).

g. Defendants’ Application of CADA’s Banned-Speech Provision Violates Plaintiffs’ Rights Under the Free Press Clause.

The chief purpose of the Free Press Clause is “to prevent previous restraints upon publication.” *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). Although some perceive this clause as protecting only news media, the freedom of press is far broader. It is “a guarantee to individuals of their personal right to make their thoughts public and put them before the community.” *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 149 (1967). The Free Press Clause protects Lorie’s right to publish religious speech on her website explaining why same-sex marriage should not be condoned without fear of retribution or censorship. Stipulated Facts ¶ 91. Indeed, one of the functions of that clause is to protect private speakers like Lorie from “fear [of] physical or economic retribution solely because of what they choose to think and publish.” *Curtis*, 388 U.S.

at 151; *see also Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (noting the freedom of press protects the ability “to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment” by the government).

But Defendants apply CADA’s Banned-Speech Provision to forbid Lorie from publishing religious speech critical of same-sex marriage on 303 Creative’s website because that speech might “directly or indirectly” indicate that requests for custom same-sex wedding websites would be “unwelcome” or “denied.” Colo. Rev. Stat. § 24-34-601(2)(a); *see* Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate against same-sex couples... in violation of Colorado’s Anti-discrimination Act...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same); Hr’g Tr. 8: 7-10 (“...[C]ertainly I think someone would have an argument that they are not being denied service but someone is committing an illegal act by posting this discriminatory language on a website.”). And they do so on pain of investigations, re-education training, reporting requirements, and fines of up to \$500 for each violation. Colo. Rev. Stat. §§ 24-34-306(2)(a), -306(9), -602(1)(a), -605; Stipulated Facts ¶¶ 5-17. Defendants’ application of CADA to expressive businesses is the only reason that Lorie has not published speech on 303 Creative’s website explaining her religious reasons for promoting only marriages between a man and a woman. Stipulated Facts ¶¶ 95-97. This significant restraint on Lorie’s right to publish violates the Free Press Clause. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 249–50 (1936) (explaining that “any action of the government” that prevents the “free and general discussion of public matters” violates the Free Press Clause). Accordingly, the Court should declare the Banned-Speech Provision unlawful.

It is no answer to say that Lorie’s speech may be proscribed because 303 Creative is a business or that CADA makes such speech about marriage illegal. As the Supreme Court explained in *Near*, 283 U.S. at 720-21, over eighty years ago,

[c]haracterizing [Plaintiffs’] publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint.... Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes.... The freedom ... from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments.

h. Defendants’ Application of CADA’s Compelled-Speech Provision Violates Plaintiffs’ Freedom of Expressive Association.

Implicit in the First Amendment is a “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *see also NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (explaining that associating “for the advancement of beliefs and ideas is an inseparable aspect of ... freedom of speech” and that “it is immaterial whether the beliefs sought to be advanced ... pertain to political, economic, religious or cultural matters”). Lorie’s collaboration with individuals who desire custom wedding websites that reflect the beauty of God’s design for marriage is expressive association of the classic sort between a like-minded artist and patrons. Stipulated Facts ¶¶ 55-59, 79-82; *see Dale*, 530 U.S. at 648 (noting that only “some form of expression” with others is required to raise a free association claim). This freedom of expressive association includes a right “not to associate” with those promoting competing views. *Id.* (quotation omitted). Defendants violate that right here by applying CADA’s Compelled-Speech Provision to require Lorie to engage in expressive associations with persons seeking to promote a view of marriage that directly opposes her own.

Just like in *Dale*, where applying a public accommodation law to force the Boy Scouts to associate with a gay scoutmaster would send the conflicting message that “homosexual conduct [is] a legitimate form of behavior,” *Dale*, 515 U.S. at 653, requiring Lorie to design, create, and publish custom websites promoting same-sex weddings would send the message that she celebrates same-sex marriage. This would undoubtedly “affect[] in a significant way” Lorie’s ability to promote the unique beauty of God’s design for one-man-one-woman marriage through the creation of custom wedding websites. *Id.* at 648; *see* Stipulated Facts ¶¶ 71, 73-79, 88-89. Indeed, it would force Lorie either “to propound a point of view contrary to [her] beliefs” or stop collaborating with those who share her expressive purpose of promoting only marriage between a man and a woman. *Dale*, 515 U.S. at 654; *see* Stipulated Facts ¶¶ 88-89. But “the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed” in this way. *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). CADA does not justify such a “severe intrusion” into Lorie’s freedom of expressive association. *Dale*, 515 U.S. at 642.

It makes no difference that Colorado does not *also* limit Lorie’s ability to attend church and join strictly religious groups that often engage in internally-focused religious expression. “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). That Lorie’s “public debate of religious ideas [about marriage], like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection.” *McDaniel v. Paty*, 435 U.S. 618, 640 (1978).

In short, Defendants’ application of CADA places a “serious burden” on Lorie’s right to expressive association and thus violates the First Amendment. *Dale*, 530 U.S. at 658; *see also id.* at 659 (“The state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.”).

B. Defendants’ Application of CADA Forces Lorie to Choose Between Operating an Expressive Business in Colorado and Her First Amendment Rights in Violation of the Unconstitutional Conditions Doctrine.

Defendants cannot force Lorie to forgo the exercise of her First Amendment rights as a condition of operating an expressive business in Colorado. *See Greene v. McElroy*, 360 U.S. 474, 492 (1959) (noting that the “right ... to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts” of the Due Process Clause); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (explaining the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests”). The unconstitutional conditions doctrine bars the state not just from prohibiting Lorie’s exercise of her rights to free speech, the press, and expressive association outright, but also from “deter[ing], or chilling” the exercise of those rights. *Bd. of Comm’rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (quotation omitted); *see also Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976) (explaining the unconstitutional conditions doctrine applies “however slight the inducement ... to forsake [constitutional] rights”). Here, Defendants have severely chilled Lorie’s exercise of her First Amendment rights by applying CADA to force her to design, create, and publish custom wedding websites promoting same-sex weddings if she does so for weddings

between one man and one woman. Stipulated Facts ¶¶ 95-98; Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate against same-sex couples... in violation of Colorado’s Anti-discrimination ACT...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same).

A fundamental principle of First Amendment law is that the government may not dilute a private person’s speech “by forcing the inclusion of all views on” a given topic. *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 572 (7th Cir. 2001) (citing *Hurley*, 515 U.S. at 575-76). Yet Defendants have conditioned Lorie’s right to operate a business that creates expression about marriage between a man and a woman on her agreement to create unwanted expression about same-sex weddings. Stipulated Facts ¶¶ 24-25, 95; Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate against same-sex couples... in violation of Colorado’s Anti-discrimination Act...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same); *cf.* *Hobby Lobby.*, 134 S. Ct. at 2783 (expressing concern that the Affordable Care Act would “effectively exclude [some religious] people from full participation in the economic life of the Nation.”). This indirect attempt to force Lorie to design and create speech promoting same-sex marriage, something Defendants plainly could not do directly, violates the unconstitutional conditions doctrine. *See Perry*, 408 U.S. at 597 (explaining the government cannot deny a benefit to “produce a result [it] could not command directly”) (quotation omitted).

Defendants’ application of CADA to Lorie violates the unconstitutional conditions doctrine and should accordingly be invalidated. *See Alliance for Open Soc’y Int’l*, 133 S. Ct. at

2329 (“[W]e have held that the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.” (quotation omitted)).

C. Because CADA is Neither Neutral Nor Generally Applicable, Its Application to Lorie Violates the Free Exercise Clause.

“Marriage is sacred to those [like Lorie] who live by their religions” *Obergefell*, 135 S. Ct. at 2594. Her belief that marriage “is by its nature a gender-differentiated union of man and woman” ordained by God has long “been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” *Id.* Lorie’s faith requires that she not create or promote a message contrary to the teachings of the Bible. Stipulated Facts ¶¶ 60-61, 63. As a result, she cannot design a custom website for a same-sex wedding because that would entail speaking a message about marriage that is contrary to God’s design. Stipulated Facts ¶ 94. Just as importantly, Lorie’s faith requires her to explain her religious beliefs about marriage and the religious reasons for and meaning of her expression. Stipulated Facts ¶¶ 73-78. In fact, her purpose for entering the marriage market in the first place is to “affect the current cultural narrative regarding marriage” by promoting God’s design for marriage between one man and one woman. Ver. Compl. ¶¶ 3-4; Stipulated Facts ¶¶ 73-78. She cannot do that without communicating her religious view that biblical marriage is correct and all other views on marriage are “wrong ... based on [the] decent and honorable religious ... premises” of her Christian faith. *Obergefell*, 135 S. Ct. at 2602.

Defendants’ interpretation of CADA’s Compelled-Speech Provision substantially burdens the exercise of Lorie’s religious beliefs by making it impossible for her to speak exclusively in favor of biblical marriage through the design of custom wedding websites without incurring state

investigations, prosecutions, and penalties. Stipulated Facts ¶¶ 5-17; Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate against same-sex couples... in violation of Colorado’s Anti-discrimination Act...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same). Lorie must therefore choose between complying with the demands of her faith and incurring significant government punishment or violating her religious beliefs in order to avoid state censure. *Id.* Stipulated Facts ¶ 95; *cf. Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.”). In the same vein, CADA’s Banned-Speech Provision puts Lorie between a rock and a hard place. She can either comply with her religious beliefs by publishing religious statements regarding God’s design for marriage and be investigated, prosecuted, and fined by the state or forfeit her First Amendment rights, comply with the speech ban, and abandon the callings of her faith. *Id.* Either way, Lorie may only comply with one set of commands—the state’s or God’s. *Cf. Hobby Lobby*, 134 S. Ct. at 2778 (asking whether the law in question “impose[d] a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*”).

A statute “burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Defendants’ application of CADA to Lorie fails on both counts. First,

a law is not neutral if authorities apply it in a biased manner. In *Lukumi*, for instance, officials interpreted an ordinance banning the unnecessary killing of animals as rendering “[k]illings for religious reasons ... unnecessary, whereas most other killings [fell] outside the prohibition.” *Id.* at 537. As a result of this prejudicial interpretation of the statute by enforcement officials, the Supreme Court concluded that the law was not religiously neutral. *Id.* at 537-38. Equally important to the Supreme Court’s holding was the fact that state officials engaged in “an evaluation of the particular justification for [each] killing” and thus created “a system of individualized governmental assessment of the reasons for the relevant conduct.” *Id.* at 537. For it is hornbook law that the government may not refuse to extend a system of individualized exemptions “to cases of religious hardship without compelling reason.” *Id.* (quotation omitted).

Defendants’ application of CADA is just as biased and case-specific as that of the enforcement officials in *Lukumi*. See App. 051-052 (commissioner stating that “[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history,” such as “slavery” and “the holocaust,” and opining that using “freedom of religion” to “justify discrimination ... is one of the most despicable pieces of rhetoric that people can use”); Def.’s MPI Resp. 2, 6 (denigrating Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate” and asserting “her religious beliefs as a reason to discriminate”). In fact, they have already punished a Christian cake artist under CADA because he objected to speaking a message that promotes same-sex marriage on religious grounds. Stipulated Facts ¶¶ 24-25, Ex. F. But when three secular cake artists who supported same-sex marriage refused to speak a customer’s religious message critical of same-sex marriage, which included requested cites to the Bible, Defendants decided that no violation of CADA occurred

because the cake artists' refusal was "based on the explicit message that the [customer] wished to include on the cakes." Stipulated Facts ¶ 28, Ex. G-L. Defendants reached this conclusion despite the fact that creed or religious discrimination under CADA encompasses "all aspects of religious beliefs, observances, and practices ... [including] *the beliefs or teachings of a particular religion.*" 3 C.C.R. 708:1:10.2(H) (emphasis added). What is more, the state has indicated that it is perfectly acceptable for "[a]n African-American baker [to] decline to create a custom cake celebrating the racist ideals of a member of the Aryan Nation" and for "a Muslim baker [to] refuse to create a custom cake denigrating his faith for the Westboro Baptist Church." App. 029. This interpretation of the law is inherently biased and viewpoint based. *See supra* Part II.A.1.e.

Defendants plainly assess the expressive business owners' specific rationale in determining whether declining an order violates CADA. That is precisely why they required the owner of Masterpiece Cakeshop to submit "compliance reports" documenting "the number of patrons denied service ... and the *reasons* the patrons were denied service." Stipulated Facts ¶¶ 24-25, Ex. F, at 2 (emphasis added). CADA is not neutral as a result because Defendants employ a system of individualized, ad-hoc exemptions in enforcing the statute. The First Amendment therefore prohibits Defendants from denying a religious exception to Lorie because doing so would "devalue[] religious reasons for [declining an order] by judging them to be of lesser import than nonreligious reasons" and single out her "religious practice [of declining to speak unwanted messages] for discriminatory treatment." *Lukumi*, 508 U.S. at 537-38.

Second, CADA cannot be considered generally applicable in any meaningful sense. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990) (establishing "a generally applicable criminal law" that brooked no exception as the gold standard under the Free

Exercise Clause). To Plaintiffs' knowledge, the only expressive business to which CADA has ever been applied is Masterpiece Cakeshop. Stipulated Facts ¶¶ 24-25, Ex. C-F. Defendants exempted three secular bakeries that refused to create speech criticizing same-sex marriage for a Christian customer. Stipulated Facts ¶ 28, Ex. G-L. They also indicated that African-American cake artists may refuse to speak an offensive white-supremacist message for the Aryan Nation and that Muslim cake artists are not required to create offensive speech denigrating the Quran. App. 029. It is therefore plain that Defendants have "fail[ed] to prohibit nonreligious conduct that endangers [CADA's interest in non-discrimination] in a similar or greater degree than" Lorie's actions do. *Lukumi*, 508 U.S. at 543. Due to this substantial underinclusiveness, CADA fails the general-applicability test. *See id.* (ruling that a law banning animal killing was "underinclusive for [its] ends" and thus lacked general applicability). It is, by now, quite apparent that CADA's onerous speech restrictions are burdens "that society is prepared to impose upon [religious objectors to same-sex marriage] but not upon itself." *Id.* at 545. And that is the "precise evil ... the requirement of general applicability is designed to prevent." *Id.* at 546.

The Free Exercise Clause also forbids the state from "preferring some religious groups over" others. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953). CADA includes a categorical exemption for any "church, synagogue, mosque, or other place that is principally used for religious purposes." Colo. Rev. Stat. § 24-34-601(1). Lorie objects to celebrating same-sex marriage on the same religious grounds as a church, yet the state denies her an exemption from CADA and requires her to create speech promoting same-sex marriage that violates her conscience and contravenes her faith. Stipulated Facts ¶¶ 73, 89, 91, 95. No legitimate reason exists for the government to exempt some religious believers from CADA but not others. *Cf. Hobby Lobby*, 134

S. Ct. 2786 (“RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.”); *Conestoga Wood Specialties Corp. v. Sec. of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 415 (3d Cir. 2013) (Jordan, J., dissenting), *rev’d by Hobby Lobby*, 134 S. Ct. 2751 (2014) (noting that religious discrimination is inherent in the attempt “to say that some religiously motivated [groups]—the ones picked by the government—are exempt while others are not”). After all, the state would hardly have exempted churches from CADA unless it recognized that marriage has profound spiritual implications for many. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) (“[M]any religions recognize marriage as having spiritual significance ...”). Such differential treatment is of “paramount concern when a law has the incidental effect of burdening religious practice” and it renders CADA not generally applicable. *Lukumi*, 508 U.S. at 542.

Because CADA is neither neutral nor generally applicable, Defendants must justify their application of the statute to Lorie under the rigorous strict scrutiny test. *See id.* at 446 (“To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” (quotations omitted)).

D. Defendants’ Application of CADA Only to Expressive Businesses That Disfavor Same-Sex Marriage Violates the Equal Protection Clause.

The Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Distinctions among similarly-situated groups that affect fundamental rights “are given the most exacting scrutiny,” *Clark v. Jeter*, 486 U.S. 456, 461 (1988), and discriminatory intent is presumed,

see Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (“[W]e have treated as presumptively invidious those classifications that ... impinge upon the exercise of a ‘fundamental right.’”). Because Defendants’ disparate application of CADA impinges Plaintiffs’ fundamental rights to free speech, the press, and expressive association, as well as free exercise, discriminatory intent is presumed here. *See supra* Part II.A. and II.C.

Defendants have applied CADA’s Compelled-Speech Provision only to expressive business owners like Lorie that disfavor messages promoting same-sex marriage. The *only* business that Defendants have prosecuted for declining to create speech promoting an unwelcome message is a Christian bakery that declined to create a custom wedding cake celebrating a same-sex marriage. Stipulated Facts ¶¶ 24-25, Ex. C-F. Three similarly situated secular cake artists who refused to create cakes criticizing same-sex marriage for a Christian patron were not prosecuted, an African–American cake artist may refuse to create a custom cake with a white-supremacist message for the Aryan Nation, and a Muslim cake artist may decline a custom order from the Westboro Baptist Church denigrating the Quran. Stipulated Facts ¶ 28, Ex. G-L; App. 029. Yet Defendants apply CADA’s Compelled-Speech Provision to force Lorie to design, create, and publish custom wedding websites promoting and celebrating same-sex weddings because they label her religious conviction “discrimination.” Defs.’ MPI Resp. 2, 6.

Moreover, Defendants do not apply CADA’s Banned-Speech Provision 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.” Colo. Rev. Stat. § 24-34-601(2)(a); Lorie Smith Aff. ¶¶ 009-036; App. 003-010. Nicole Nichols Photography, a Denver-based photography company, for example,

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Defendants' Application of CADA Deprives Lorie of the Right to Own and Operate Her Own Expressive Business and thus Violates Her Right to Substantive Due Process.

“[W]ithout doubt,” the Fourteenth Amendment protects a person’s freedom “to engage in any of the common occupations of life... and to worship God according to the dictates of [her] own conscience.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972); *see also Truax v. Raich*, 239 U.S. 33, 41 (1915) (“It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”); *Greene*, 360 U.S. at 492 (“[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of [due process].”). These liberties are “essential to the orderly pursuit of happiness by free men.” *Roth*, 408 U.S. at 572. When the government infringes on such fundamental liberty interests, courts apply strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

Defendants’ application of CADA impermissibly interferes with Lorie’s right “to engage in any of the common occupations of life... [and] to worship God according to the dictates of [her] own conscience...,” *Roth*, 408 U.S. at 572, by conditioning her ability to participate in the wedding industry on the forfeiture of her religious convictions and the violation of her conscience. Stipulated Facts ¶ 95. The Constitution protects “more than just freedom of belief.” *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). It protects “the right to express those beliefs and to establish one’s religious (or non-religious) self-definition in the political, civic, and economic life of our larger community.” *Id.* Defendants’ application of CADA, however, forces Lorie to choose whose commands she will obey—the state’s or God’s. Stipulated Facts ¶ 95. If she chooses

incorrectly, the state precludes Lorie from participating in the “economic life” of the “larger community,” a result the Constitution does not tolerate. *See Hobby Lobby*, 134 S.Ct. at 2785 (Kennedy, J., concurring); Stipulated Facts ¶¶ 5-17. As explained in Section III *infra*, Defendants can show no compelling interest to warrant such an unreasonable infringement of Lorie’s fundamental liberty interest to own and operate a family business, which is protected as both a liberty and property interest under the Due Process Clause.

F. Under Governing Supreme Court Precedent, Defendants Have Violated Lorie’s Personal Autonomy in Violation of the Due Process and Equal Protection Clauses By Precluding Her from Pursuing Her Entrepreneurial Dreams, Stigmatizing Her Religious Beliefs About Marriage, Labeling Her as a Discriminatory Lawbreaker, and Threatening Her with Hefty Fines, Reeducation Programming, and Invasive Reporting Requirements.

The Supreme Court’s decisions in *Obergefell*, 135 S. Ct. at 2596, and underlying cases have recognized a right of citizens “to have dignity in their own distinct identity.” To the extent such right has been recognized by recent Supreme Court precedent, the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs,” particularly where sexual preference is concerned. *Id.* at 2597. If personal identity related to sexual preference is constitutionally protected, identity grounded in sincerely held religious beliefs must be equally safeguarded as well.

In this case, Lorie’s personal identity is rooted in her Christian beliefs. Stipulated Facts ¶¶ 30-32, 33-38. Lorie identifies first and foremost as a Christian—a follower of Jesus Christ—and her decision to act consistently with her religious understanding of marriage defines her personal identity. Stipulated Facts ¶ 30. For that reason, Lorie believes that “everything she does – personally and professionally – should be done in a manner that glorifies God.” Stipulated Facts ¶

34. Lorie’s desire to engage in the marketplace by celebrating weddings as she believes God designed them is an expression of her personal identity and her religious understanding of marriage, both of which are central to her equal dignity as a citizen and personal autonomy. Stipulated Facts ¶¶ 30-34, 36.

Supreme Court caselaw recognizes Lorie’s autonomy to express her Christian identity through her work. One of the Court’s primary concerns in *Hobby Lobby*, 134 S. Ct. at 2783, was that the government’s interpretation of the Affordable Care Act would “effectively exclude [Christian family business owners] from full participation in the economic life of the Nation” because they could not “in good conscience provide” insurance coverage for abortifacient drugs. In his concurrence, Justice Kennedy expounded upon this liberty to start a family business and operate it accordance with one’s faith:

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one’s religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

Hobby Lobby, 134 S. Ct. at 2785 (Kennedy, J., concurring). Justice Kennedy’s reasoning in *Hobby Lobby* has roots in the Due Process Clause of the Fourteenth Amendment, which has long protected citizens’ right to engage “in any of the common occupations of life ... to worship God according to the dictates of [their] own conscience[s], and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.” *Roth*, 408 U.S. at 572 (quotation and alteration omitted).

Yet Defendants have interpreted CADA to exclude Lorie from the economic life of the nation based on her religious beliefs about marriage and thus rendered it impossible for her to pursue the American dream of starting a family business and working to make it a success. *See Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 500 (3d Cir. 1992) (“[I]ndependent entrepreneurs have been seen as the heart and lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system.” (quoting Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1153-54 (1981))). Courts have long recognized that the “right to earn a livelihood and to continue employment unmolested” is essential to the pursuit of happiness. *Truax*, 239 U.S. at 38. Defendants rob Lorie of that freedom here by applying the Compelled-Speech Provision to force her to eschew the wedding business unless she is willing to abandon the commands of her faith and promote same-sex weddings in which she does not believe. Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate against same-sex couples... in violation of Colorado’s Anti-discrimination Act...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same); Stipulated Facts ¶¶ 24-25, Ex. C-F; *see Obergefell*, 135 S. Ct. at 2594 (recognizing that “[m]arriage is sacred to those who live by their religions” and that many religious people view marriage, “by its nature” as “a gender-differentiated union of man and woman”). What is more, Defendants apply the Banned-Speech Provision to forbid Lorie from communicating her religious understanding of marriage to the public at large even though the Supreme Court has recognized that the Constitution “ensures that religious ... persons are given proper protection as they seek to

teach the principles” of their faith in regards to marriage and other subjects. *Obergefell*, 135 S. Ct. at 2607.

Defendants’ heavy prohibitions are backed up by substantial threats. They have already investigated, prosecuted, and punished a Christian cake artist for politely declining to design an artistic wedding cake to celebrate a same-sex couple’s nuptials. Stipulated Facts ¶¶ 24-25, Ex. C-F. After subjecting him to years of costly inquiries, hearings, and appeals, Defendants labeled him a “discriminator” and ordered him to create any cakes for “same-sex couples” that he would create for “heterosexual couples,” no matter what text they contain or what message they sent. Stipulated Facts ¶¶ 24-25, Ex. F, at 2. Defendants further ordered the Christian cake artist to reeducate his employees through “comprehensive staff training” on CADA in order to change their beliefs regarding same-sex marriage and mandated that he provide invasive “quarterly compliance reports” for a period of “two years” describing these “remedial [education] measures,” as well as “the number of patrons denied service ... and the reasons the patrons were denied service.” Stipulated Facts ¶¶ 24-25, Ex. F, p.2. In this case, Defendants have indicated they would do the same to Lorie if she creates or publishes original speech about biblical marriage. Defs.’ MPI Resp. 2, 6 (characterizing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to discriminate” and asserting “religious beliefs as a reason to discriminate”). She is imminently threatened not only with the costly litigation, “discriminator” label, speech-coercing and speech-squelching order, and intrusive reporting requirements mentioned above, but also with a fine of up to \$500 for *each* decision to decline an artistic commission based on her religious beliefs that Defendants arbitrarily deem violative of CADA. Colo. Rev. Stat. § 24-34-602(1)(A); Stipulated Facts ¶ 5.

In short, Defendants have excluded Lorie from the marketplace based on her beliefs and public message about marriage. *But see Obergefell*, 135 S. Ct. at 2607 (“[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”). Yet if “there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, national, religion, or others matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S. at 642. The state is free to support same-sex marriage by any number of means but when that preference turns into “enacted law and public policy” that expels religious objectors from public life, things have gone too far. *Obergefell*, 135 S. Ct. at 2602.

At that point, “the imprimatur of the State itself [is placed] on an exclusion that soon demeans or stigmatizes those [like Lorie] whose own liberty is then denied.” *Id.*; *cf. Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (“The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the ... law.”). It “disparage[s]” Lorie’s spiritual choices and “diminish[es] [her] personhood” for Defendants to bar her religious message, *Obergefell*, 135 S. Ct. at 2602, malign her as a “discriminator,” and threaten her with investigations, reeducation training, fines, and reporting requirements simply for seeking to express her religious “beliefs” and establish her “religious ... self-definition in the political, civic, and economic life of our larger community,” *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). Prohibiting Lorie from operating an expressive business in the State of Colorado “serves to disrespect and subordinate” her in an unconstitutional manner by rendering

her a societal outcast and robbing her of the ability to pursue the American dream by expanding her closely-held business. *Obergefell*, 135 S. Ct. at 2604.

III. Defendants’ Application of CADA Fails Strict Scrutiny

Because Defendants’ application of CADA to Plaintiffs violates their fundamental constitutional rights, it must satisfy strict scrutiny, “the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). Satisfying this standard requires Defendants to show that their application of CADA is narrowly tailored to serve a compelling state interest. *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). “[I]t is the rare case in which ... a law survives strict scrutiny.” *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

An interest in eliminating discrimination is not compelling in the abstract. The Court must “look beyond broadly formulated interests” in prohibiting discrimination in general and consider only Defendants’ interest in applying CADA to Lorie, “the particular claimant” whose constitutional rights are infringed. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006). In “other words,” the Court must “look to [Defendants’] marginal interest in enforcing” CADA against Lorie here, *Hobby Lobby* 134 S. Ct. at 2779.

As the Supreme Court explained in *Hurley*, applying public accommodation laws to expressive activity does not serve a valid—let alone a compelling—state interest. 515 U.S. at 578-79 (noting it would be a “decidedly fatal objective” to apply a public accommodation law to coerce government-favored messages from private speakers). CADA’s failure to satisfy the compelling interest test is further cemented by the fact that custom wedding website designs are available from expressive businesses nationwide. Stipulated Facts ¶¶ 98-101. Powerful market forces weigh in

favor of expressive businesses promoting same-sex weddings. Few expressive business owners are willing to lose income and engender negative press by declining to celebrate them. Thus, allowing Lorie to speak freely will not limit anyone’s access to expressive services, particularly in a state like Colorado where many citizens hold progressive beliefs regarding marriage and other subjects. *Lorie Smith Aff.* 009-036; App. 003-010.

Furthermore, it is well established that a law “cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Reed*, 135 S. Ct. at 2232. Defendants have applied CADA’s speech-coercing and speech-squelching terms *only* to religious opponents of same-sex marriage—expressive business owners who support same-sex marriage are exempt. Stipulated Facts ¶¶ 24-25, Ex. C-F. That, in and of itself, demonstrates that applying CADA only to Lorie and those who share her religious marriage views does not serve a compelling government interest.

Nor do Defendants serve a valid state interest by banning Lorie’s publication of religious speech about God’s design for marriage simply because some patrons may find it “offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). “In most circumstances, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes.” *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) ((quotation and alterations omitted)). No one is forced to look at Lorie’s website and those offended by her religious statements about marriage are free to avert their eyes and look elsewhere. Critically, “[d]isapproval of a [public accommodation’s] statement does not legitimize use of the [state’s]

power to compel the speaker to alter the message by including one more acceptable to others.” *Hurley*, 515 U.S. at 581. Society’s changing views on marriage do not justify burdening Lorie’s First Amendment rights. As the Supreme Court explained in *Dale*, “the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.” 530 U.S. at 660.

CADA is also far from narrowly tailored. When the government pursues its “proffered objectives,” such as an interest in combatting discrimination, against religious conduct—as Defendants have done in applying CADA to Masterpiece Cakeshop and Lorie—but does “not pursue[] [it] with respect to analogous non-religious conduct”—as Defendants have done by refusing to apply CADA to three secular bakeries who discriminated based on creed—the law is underinclusive and not narrowly tailored. *Lukumi*, 508 U.S. at 546. The obvious answer to this narrow tailoring problem is for Defendants to apply the same message-based exception to Lorie that it applied to three secular bakeries. *See* Stipulated Facts ¶ 28, Ex. G-L (exempting a secular bakery from CADA because its refusal to promote a religious message critical of same-sex marriage “was based on the explicit message” and the bakery “regularly creates cakes ... ordered by Christian customers”). Lorie is also happy to serve LGBT individuals and simply has a religious message-based objection to promoting same-sex marriage. Stipulated Facts ¶¶ 63-67, 89, 91. But Defendants apply CADA’s speech-coercing and speech-squelching terms to her and not other expressive business owners because she disagrees, on religious grounds, with the state’s policy favoring same-sex marriage. Defs.’ MPI Resp. 2, 6 (describing Lorie’s efforts to live and work in accordance with her religious beliefs about marriage as “seek[ing] ... permission to

discriminate against same-sex couples... in violation of Colorado’s Anti-discrimination ACT...” and asserting “her religious beliefs as a reason to discriminate”); Mot. to Dismiss 2 (stating same).

In the alternative, Defendants could employ a far narrower publication ban that does not reach protected expression, such as the one contained in 42 U.S.C. § 2000e-3, which relates only to discriminatory statements about employment—the means by which citizens support their families. But instead, Colorado compels Lorie to design, create, and publish custom wedding websites promoting same-sex weddings—a pure luxury—against her will and bans her from publishing any speech that might “directly or indirectly” make some patrons subjectively feel “unwelcome” or undesirable. Such broad speech-coercing and speech-squelching measures are not tailored (let alone narrowly tailored) in any sense. Defendants cannot demonstrate that they are “actually necessary” to solve “an ‘actual problem,’” as the Constitution requires. *Brown*, 564 U.S. at 799. Indeed, Defendants’ decision not to enforce CADA against anyone but religious objectors to promoting same-sex marriage shows that discrimination by expressive businesses on protected grounds is not a significant problem in Colorado. Stipulated Facts ¶¶ 24-25, 28, Ex. C-L; see *Lukumi*, 508 U.S. at 547 (“[T]he ordinances are underinclusive to a substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions.”).

CONCLUSION

No matter how commendable their goals, Defendants cannot pursue them in an unconstitutional manner. Colorado may prohibit invidious discrimination without resorting to art manipulation, speech bans, and idea extraction. As a society, we have seen such efforts “to coerce uniformity of sentiment” before. *Barnette*, 319 U.S. at 640. That is why the Constitution exists,

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

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

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

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

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

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

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

Respectfully submitted this 1st day of February, 2017.

s/ Jeremy D. Tedesco

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2016, the foregoing was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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

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

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

Plaintiffs,

vs.

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

Defendants.

**AFFIDAVIT OF LORIE SMITH IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

I, Lorie Smith, hereby declare as follows:

1. I am competent to testify, and, in addition to my sworn testimony in the Verified Complaint, make this declaration based on my personal knowledge.
2. I own and manage the website: www.303creative.com (“my website”). This is the website for my business, 303 Creative, LLC.

3. On my website, people can submit electronic requests for my creative services through the “contact” webpage.
4. Information received from requests for creative services submitted via the “contact” webpage on my website are immediately reduced to email form and sent to my email inbox once the requestor clicks “submit.”
5. When I receive emails containing requests for creative services from my website via the “contact” webpage, it is my routine business practice to keep these requests and, if appropriate, respond.
6. On September 21, 2016, I received a request through the “contact” webpage on my website from a person named, “Stewart,” reference number 9741406, to create graphic designs for invitations and other materials for a same-sex wedding (“same-sex wedding request”).
7. The same-sex wedding request indicated the prospective client may also desire me to create a website for a same-sex wedding.
8. A true and accurate copy of this same-sex wedding request is included in the Appendix at pages 001-002.
9. Expressive businesses in Colorado regularly maintain websites that share stories of their art and their clients.
10. On these websites, creative professionals often communicate social, political, and religious messages in telling the stories of their clients and sharing the messages they express with their art.
11. Many expressive businesses in Colorado freely express their views in favor of same-sex marriage.

12. For example, I personally visited each of the websites referred to in paragraphs 13, 17-18, 20, 26, 29, 31, and 33 *infra* on January 30, 2017.

13. Brian Kraft Photography, before the legalization of same-sex marriage in Colorado, posted on its blog at <http://blog.briankraft.com/denver-art-museum-wedding/>:

It's a shame that I even feel the need to mention it—as it should be a non-issue, but as you enjoy these wedding photos of this wonderful same sex couple, please note how “right” everything is between these two and everyone that surrounds them, yet in the State of Colorado it is still not “right” (by law) to consider their union a “marriage,” with the benefits that come with that. Fortunately, Adam and Brian live in California, where they are finally offered the rights they so deserve. Hopefully all states will follow suit as soon as possible.

14. This Brian Kraft Photography blog post excerpt was found on a webpage directly under a header titled “Brian Kraft Photography” that also served as a hyperlink back to the Brian Kraft Photography blog homepage.

15. This Brian Kraft Photography blog post excerpt was not found in a comment section or other place where members of the public could create content to be published on the website.

16. A true and accurate copy of this Brian Kraft Photography blog post excerpt is included in the Appendix at page 003.

17. Sarah Roshan Wedding Photographer similarly states on its homepage at <http://sarahroshan.com/>, under the heading “We Believe”: “There doesn't always have to be one bride and one groom. We fully support and love our LGBT couples. We are so happy that the US [sic] government is finally recognizing you for the beautiful people you are.”

18. Sarah Roshan Wedding Photographer also states on its homepage at <http://sarahroshan.com/>, under the heading “Meet Sarah”: “I believe one voice is enough to change the world.”
19. True and accurate copies of these excerpts from the Sarah Roshan Wedding Photographer homepage are included in the Appendix at pages 004-005.
20. In the introduction to a gallery of same-sex wedding pictures posted on its website at <http://www.sarahroshanphoto.com/phillip-gary-chautauqua-elopement-same-sex-wedding-photographer/>, Sarah Roshan Wedding Photographer further states:

After Colorado ruled that a ban on gay marriage was unconstitutional I had a wave of peace and just started to cry. This topic always is rooted so deep in what I believe not only about gay marriage but the world. I grew up doing theatre and so, as the stereotype would have it about half of my male friends were gay and a decent amount of my female friends as well. I truly believe that our differences and hate are taught. I was never taught that same-sex couples love any different than a heterosexual couple and therefor[e] my views on this subject have always been love is love. I stand for love period. I am so happy that our country is moving in a direction of less and less judgement [sic] and more and more equality and love for each other. We are all different. That is what makes us beautiful. How we love is all the same.

When I got a phone call for Phillip and Gary’s elopement back in October, I was so excited! This was to be my first same-sex wedding since the law took effect I found myself tearing up behind my lens. This means so much to so many people. Something that I took for granted they were finally able to do. Reading the piece of paper that said marriage. All of it was magical

. . . .

Colorado is not yet 6 months into allowing gay marriage so I am looking forward to many more weddings, and someday I hope that people won’t even give it a second thought. Love is love after all.

21. A true and accurate copy of this Sarah Roshan Wedding Photographer webpage excerpt is included in the Appendix at page 006.

22. These Sarah Roshan Wedding Photographer statements were found on a webpage directly under a header titled “Sarah Roshan Wedding Photographer,” a business logo, within a top menu containing links to other parts of the website.
23. These Sarah Roshan Wedding Photographer statements were not found in a comment section or other place where members of the public could create content to be published on the website.
24. Anginet Photography also expresses its views favoring same-sex marriage.
25. Anginet Photography, through its owner Anginet Page, expressed its views regarding same-sex marriage to Castle Rock News-Press following the U.S. Supreme Court’s *Obergefell* decision.
26. Castle Rock News-Press’s story explaining Anginet Photography’s support for same-sex marriage is located at <http://castlerocknewspress.net/stories/Wedding-photographer-celebrates-court-ruling,192421>.
27. This Castle Rock News-Press story, entitled “Wedding photographer celebrates court ruling,” explains that Anginet Page left the Mormon church because of her support for same-sex marriage:

As long as she can remember, Anginet Page said, she supported same-sex marriage rights. Her passion for marriage equality even led her to leave the Mormon church.

“I was raised LDS, and one of the main reasons I left the church was because they didn’t support the right for people to love freely,” she said. “And so my whole life has been geared towards having same-sex marriage be legalized. The fact that it has is incredible.”
28. A true and accurate copy of this Castle Rock News-Press story is included in the Appendix at page 007.

29. In introducing pictures of a same-sex wedding on its website at <http://nicolenichols.com/blog/weddings/wedding-gay-new-orleans/>, Nicole Nichols Photography also notes its support for same-sex marriage and criticizes religions that express a different view:

. . . I loved their pastor's English accent & how he focused his sermon on how normal a gay union is, perhaps not popular, but certainly just as normal as any two people sharing their love & lives together. Throughout history gays have always been a part of reality, and always will be, its [sic] just unfortunate government & religion has not always recognized it. It was great to see that Jeremie & Jonathan's wedding was certainly full of lots of family & friends celebrating their love & bond.

30. A true and accurate copy of this Nicole Nichols Photography blog post excerpt is included in the Appendix at page 008.

31. On its blog at <http://nicolenichols.com/blog/special-events/denver-pridefest-co-gay-weddings/>, Nicole Nichols Photography further publicized its support for same-sex marriage and participation in Denver Pridefest:

I am a strong believer that ALL should have the right to marry whomever he or she wants.

Other than for the art and the challenge, one of the reasons I became a wedding photographer is because I'm a lover...a sentimental romantic that has always "awed" when I see *any* two people in love. I have no enemies, I love everyone. Sure some have called me a naive idealistic hippie, but I *really* do believe love can change the world. And if someone wants to express their love to another person through a wedding, well they should have the right do [sic] get married, and get divorced, just like everyone else!

Not only am I a big supporter of gay rights...but also of brightly colored costumes, parades, and just having fun! So, on Sunday June 17th I was proud to be walking in support of CO gay weddings in the annual Denver Pridefest Parade. Wedding planner extraordinaire Mark . . . started CO Gay Weddings to help the gay and transgender community find LGBT friendly wedding professionals that don't discriminate on sexual orientation

32. A true and accurate copy of this Nicole Nichols Photography blog post excerpt is included in the Appendix at page 009.

33. In introducing pictures of a same-sex wedding on its blog at <http://nicolenichols.com/blog/weddings/denver-gay-wedding-photographer-denver-botanical-gardens-tivoli-hall/>, Nicole Nichols Photography also expressed its support for the Supreme Court's decision in *Obergefell*:

It was an honor to witness and be able to document the strong endearing love Ashley & Paige share. And I'm so proud of not only our state of Colorado, but the nation, for finally legalizing gay and lesbian marriages. All men and women should share the same rights that a legal marriage allows, from getting to file taxes together to being allowed to visit their spouse in severe hospital situations. Hopefully the rest of the world will soon follow. Love conquers all.

34. A true and accurate copy of this Nicole Nichols Photography blog post excerpt is included in the Appendix at page 010.

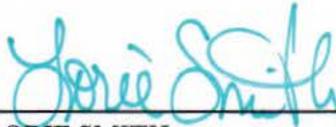
35. These Nicole Nichols Photography blog post excerpts were found on a webpage directly under a header titled "Nicole Nichols Photography," a business logo and hyperlink back to the Nichole Nichols Photography website homepage.

36. These Nicole Nichols Photography blog post excerpts were not found in a comment section or other place where members of the public could create content to be published on the website.

DECLARATION UNDER PENALTY OF PERJURY

I, LORIE SMITH, a citizen of the United States and a resident of the State of Colorado, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 1st day of February, 2017, at Littleton, Colorado.



LORIE SMITH
303 CREATIVE LLC

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

Civil Action No. 1:16-cv-02372

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

Plaintiffs,

vs.

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

Defendants.

**AFFIDAVIT OF COUNSEL FOR THE PLAINTIFFS, JEREMY D. TEDESCO, IN
SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

I, Jeremy D. Tedesco, hereby declare as follows:

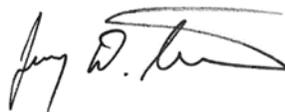
1. I am competent to testify and make this declaration based on my personal knowledge.
2. I serve as co-counsel for the respondent in *Craig v. Masterpiece Cakeshop, Inc.*, No. P20130008X.

3. On July 25, 2014, a meeting of the Colorado Civil Rights Commission (“Commission”) was held at which the Commission decided whether a stay should be issued following its final decision in the *Masterpiece* case.
4. Following this meeting, respondents, through counsel, requested that the Commission provide an audio recording of the meeting.
5. The Commission responded by providing respondents’ counsel a copy of the audio recording of the meeting, which I then caused to be delivered, unchanged, to a certified transcriber, Katherine A. McNally, at Arizona Reporting Service, Inc.
6. Ms. McNally produced a certified transcription of excerpts of the audio recording, a true and accurate copy of which is found at pages 041-053 of the Appendix.

DECLARATION UNDER PENALTY OF PERJURY

I, JEREMY TEDESCO, a citizen of the United States and a resident of the State of Arizona, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 1st day of February, 2017, at Scottsdale, Arizona.



Jeremy Tedesco
Attorney for Plaintiffs