Case No. 19-1413

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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303 CREATIVE LLC and **LORIE SMITH**,

Plaintiffs-Appellants,

v.

AUBREY ELENIS, et al.,

Defendants-Appellees,

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

APPELLANTS' APPENDIX: VOLUME 2 OF 3

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Oral Argument is Requested

January 22, 2020

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Kate Anderson

From: 303 Creative [info@303creative.com]
Sent: Wednesday, September 21, 2016 12:34 PM
To: Jeremy Tedesco
Subject: Fwd: 303RequestForm Result #9741406

Lorie Smith
Sent from my iPhone

Begin forwarded message:

From: form_engine@fs21.formsite.com
Date: September 21, 2016 at 1:08:42 PM MDT
To: info@303creative.com
Subject: 303RequestForm Result #9741406
Reply-To: form_engine@fs21.formsite.com

Reference #	9741406
Status	Complete
Your Name *	Stewart
Email *	stewcurran@gmail.com
Phone	4155218593
Website:	onlymoreneverless.com
Briefly describe the nature of your business/organization *	Personal
If your inquiry relates to a specific event, please describe the nature of the event and its purpose:	My wedding. My name is Stewart and my fiancee is Mike. We are getting married early next year and would love some design work done for our invites, placenames etc. We might also stretch to a website.
How can 303creative help you? *	Website Design Services Graphic Design Services
Last Update	2016-09-21 14:08:43
Start Time	2016-09-21 14:06:36
Finish Time	2016-09-21 14:08:43
IP	12.27.99.35
Browser	Chrome

OS	Mac
Referrer	http://303creative.com/contact/

Denver Art Museum Wedding

Denver Art Museum Wedding. What a fun wedding this was. Brian and Adam live in Los Angeles, but planned their wedding for Denver at the C. Duncan Pavilion at the DAM (Denver Art Museum). Adam and Brian both work in the entertainment industry and wanted their wedding to feel a bit like one of the movie premier parties they attend in Hollywood. That, in combination with the couple having such a sense of humor and having family and friends that really know how to have fun, it was a sure recipe for a great day to celebrate their love. There were so many great moments all day and night, but one of my favorites was over at the Hotel Monaco, where the two grooms got ready in a suite together. They got to spend time together beforehand, but when it came time to get dressed, they did so in separate rooms within the suite and revealed their wedding day outfits once dressed. It was a really special moment. So, now I'm going to get out of the way with less words and get on with the photos, but I just want to mention one more thing. 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. Ok, now on to the photos! Congratulations, guys!

WE BELIEVE

The mountains are the best place to get married. Followed by a beach on the ocean.

A bride is not complete without her groom. (or her bride or a groom without his groom) It is a day not just about one person, it is about the whole that you are about to make. The day is about connection. To each other, to the people you choose to celebrate this union with.

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 government is finally recognizing you for the beautiful people you are.

In always loving graciously.

There are no rules for your wedding. Traditional to non traditional, a wedding is what you make it because of what YOU believe in and how you envision it. There is no right or wrong way to do a wedding.

There are no accidents. The universe has a way of working it self out.

Dogs are often more loyal than a person. The uncomplicated love they have for you is the best thing ever. They are always welcome wherever you go, especially to your wedding or engagement session.

Romantic is more how you see the world than how you see your partner. They just happen to coincide.

Marriage is the most epic adventure. One that doesn't end until the day you die and one that is constantly challenging you and changing you into the person you were meant to be.

In carefree living and letting the life roll off your back.

MEET SARAH

I was born for the theatre, and the magic of getting lost in someone else's story.

I could live on Jelly Bellys .. and perfectly salted margaritas.

I believe My cabin is the best place on earth. It is filled with family stories, memories of my Grandpa, fishing, hiking, and the best stargazing in the world.

I believe one voice is enough to change the world.

I believe hot chocolate and puppy snuggles could solve most the world's problems.

I thrive on afternoon naps (outside in a hammock, of course). And I love rain ..period (Especially on a tin roof, thanks Nora.)

If I could Stitch Fix everything in my life, I would. I hate shopping but love clothes and pretty things for my home.

I believe that all true beauty lives in imperfection.

The feeling of the water over your waders and the cast of a fly rod is the epitome of relaxation to me. No distractions - just me, the water, and the fish.

I've been known to disappear into the mountain roads for entire afternoons. Just me, my Jeep and the most beautiful state on earth.

I could live in Chacos or hiking boots. Going barefoot always works too.

I believe all people deserve to be loved graciously.

I believe being wrapped in hand-crafted blankets and being hypnotized by a fire that is too-large is heaven on earth.

I believe love is best as an adventure, because surprises should always be shared.

I believe in falling in love, over and over. Every. Single. Day.

XO,
Sarah

PHILLIP + GARY | CHAUTAUQUA ELOPEMENT | SAME-SEX WEDDING PHOTOGRAPHER

FEBRUARY 10, 2015

ELOPEMENTS, SAME-SEX WEDDINGS

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 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 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. They are from Texas and were visiting friends and decided that since they were in Colorado they would make it official. 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 and such sweet sweet people.

My favorite part may be the incorporation of Gary's birth son and all the super heroes. It was beautiful to see all their relationships and how their family was made and will continue to be made.

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.

CASTLE ROCK NEWS-PRESS (/)

Wedding photographer celebrates court ruling

'Huge step forward' seen in same-sex decision


(/uploads/original/1435431623_7797.jpg)

Anginet Page has been photographing same sex wedding ceremonies for years. Courtesy photo

Posted Saturday, June 27, 2015 2:02 am

Ashley Reimers (mailto:areimers@coloradocommunitymedia.com)

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."

Page is a photojournalist and has been shooting weddings for over a decade, many of them same-sex ceremonies. She lives in Brighton, but works in the Denver metro area, along the Front Range and even internationally.

Upon hearing the news of the U.S. Supreme Court's ruling that legalized same-sex marriages across the United States, Page was overwhelmed with emotion. She said she never thought the day would come that all of her friends, regardless of their beliefs and regardless of how they love, could get married legally in all 50 states.

"It's a huge blessing to be part of the excitement and to be able to see this happen," said Page, holding back tears. "It's been a long time coming. It's one more step towards everybody truly understanding that love is pure and nonjudgmental."

Page, owner of Anginet Photography, is a member of EnGAYged Weddings, an LGBT wedding planning directory and forum for lesbian, gay, bisexual, transgender and straight couples. She said the organization has done an incredible job to rally around and support all couples.

Following the Supreme Court ruling, Page said she expects her business to get busier, which she welcomes with open arms.

"Just thinking about my friends who don't have to live in fear any longer is very exciting," Page said. "So many same-sex couples try to convince themselves that the paperwork doesn't matter, but it does. It's just a huge step forward."

Keywords

gay marriage (/search_mode/keyword/browse.html?search_filter=gay marriage), Supreme Court (/search_mode/keyword/browse.html?search_filter= Supreme Court), Colorado (/search_mode/keyword/browse.html?search_filter= Colorado), Anginet Photography (/search_mode/keyword/browse.html?search_filter= Anginet Photography), (/search_mode/keyword/browse.html?search_filter=)

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Nicole Nichols

PHOTOGRAPHY

for the Rebellious & Romantic Free Spirit

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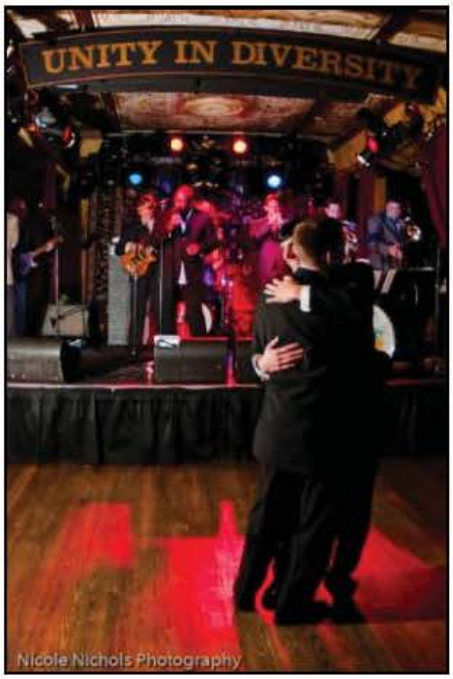
JEREMIE & JONATHAN'S WEDDING IN NEW ORLEANS – PICTURE PREVIEW

Posted in: Weddings



wedding reception at House of Blues in New Orleans

Jeremie & Jonathan recently celebrated their love with a beautiful ceremony at the Metropolitan Community Church followed by a reception at the House of Blues in the French Quarter.

We started with pictures of the wedding party in front of the church on Carrollton St., and we got even got lucky enough to have a streetcar stop for us to take some pictures in front of it. 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 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.

After the wedding everyone jumped on a bus to the House of Blues downtown. Everyone danced & partied into the night with the awesome band, The Bucktown All Stars. Their cake & custom designed Mardi Gras beads were a perfect match to the antique New Orleans decor of the House of Blues. And the HOB's motto, "unity in diversity" couldn't have fit better. Thanks Jeremie & Jonathan for allowing me to be a part of your special event! Check out just a few of the shots from the wedding day below, much more to come!

Nicole Nichols

PHOTOGRAPHY

for the Rebellious & Romantic Free Spirit

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DENVER PRIDEFEST WITH CO GAY WEDDINGS

Posted in: Special Events/ Documentary

2012 Denver Pridefest Pictures in Civic Center Park

PRIDEFEST – COLORS, CULTURE, FASHION, LOVE

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 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 of Events Unwrapped started CO Gay Weddings to help the gay and transgender community find LGBT friendly wedding professionals that don't discriminate on sexual orientation. The parade started early Sunday morning at Cheeseman Park, headed downtown through Capitol Hill, and ended at Civic Center Park in the heart of the city. Pridefest went all weekend long, filling Civic Center Park with live music, community booths, and lots of colorful people and entertainment.

Play the slideshow below to see some of my pictures of the parade, the party, and lots of unique interesting people! And if you are looking for a photographer for your commitment ceremony or gay wedding, please contact me. Even though it may not be yet technically legal in Colorado, I would love to document your special celebration. Check out this gay wedding in New Orleans I photographed a couple years ago for some inspiration.

CO WEDDING PHOTOGRAPHER: DENVER BOTANICAL GARDENS & TIVOLI

Posted in: Weddings

ASHLEY & PAIGE'S FUN MODERN WEDDING AT DENVER BOTANIC GARDENS

sunset pictures in front of the Tivoli in downtown Denver

I knew after photographing Ashley & Paige's engagement session that these two would be laid back and a lot of fun to work with. You can check out their engagement pictures around downtown Denver here. And their wedding day was certainly just that. These two ladies got married at Denver Botanical Gardens last summer. We set up a first sight with the brides in the Tropical Conservatory, which was such a beautiful romantic moment it almost brought me to tears. The first sight allowed us to get a lot of their family and wedding party pictures out of the way, which is always a nice bonus on the wedding day. Then when it was time to walk down the aisle, they each walked up to the ceremony site with their fathers, coming from different sides of the garden. They pronounced their love in front of their family and closest friends in the "All American Selections Garden" and then afterwards we walked around the botanical gardens for more pictures.

We then all headed to the historic Tivoli building on the Auraria Campus in downtown Denver. We did more pictures with the wedding party around this historic landmark which was originally home to the Tivoli Brewing Company. And then it was time for the party to begin! Ashley & Paige rented out the Turnhalle in the Tivoli, a unique urban venue with brick walls, a wrap-around balcony, and great views of the Denver city skyline. They decorated the venue with their wedding colors of navy blue, mint green, and grey, and added modern DIY touches such as painted vases and table cards named after different parts of Denver. After they did their first dance they each danced with their father and then they swapped and danced with each other's dads, which was a great personal touch. The brides and all their guests certainly enjoyed a fun-filled party. Their friends and family got down on the dance floor, enjoyed the fun photo booth, playing corn hole, and choosing treats from the all green candy bar. And for their bouquet toss Ashley & Paige each tossed their bouquet of flowers to male and female single guests. It was fun non-traditional twist to the bouquet toss and gave people two chances to catch the bouquet. When it was time for the party to end the guests gathered outside for a fun sparkler send-off and the brides were whisked away in a bike buggy.

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.

No. 16-111

In the Supreme Court of the United States

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

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS,
Respondents.

On Petition for Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF THE COLORADO CIVIL RIGHTS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Colorado's public accommodations law forbids sexual-orientation discrimination by businesses engaged in sales to the public. The question presented is whether that law impermissibly compels speech when it is applied to a commercial bakery that refuses to sell a wedding cake of any kind to any same-sex couple.

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INTRODUCTION

Public accommodations laws have long operated across the country to "eliminat[e] discrimination and assur[e] citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). Because they "plainly serve[ ] compelling state interests of the highest order," *id.*, these laws have repeatedly survived First Amendment challenge. "Provisions like these 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, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557, 572 (1995); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987); *Roberts*, 468 U.S. at 626–27; *cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259–60 (1964).

Colorado's Anti-Discrimination Act, COLO. REV. STAT. § 24-34-301 *et seq*. (the "Act"), has been in effect for more than 100 years. It prohibits businesses that sell goods to the public from discriminating based on race, creed, sex, and other protected characteristics. In 2008, the Act was expanded to prohibit discrimination based on sexual orientation. In this case, the Act was applied to a commercial bakery that refused to sell any wedding cake, of any design, to any same-sex couple. Petitioners challenge that application of the Act as unconstitutional under the First Amendment.

Because the record does not support the claim of compelled speech on which Petitioners' question presented is based, because there is no split in authority among lower courts, and because the decision

below is consistent with this Court's precedents, certiorari should be denied.

STATEMENT

Factual background. Petitioner Masterpiece Cakeshop, Ltd., is a Colorado limited liability company that sells both pre-made and custom-baked goods to the public, including birthday cakes, cookies, brownies, and wedding cakes. Petitioner Jack Phillips owns and operates the company. Petitioners are willing to serve gay and lesbian customers and will create custom cakes for them for a variety of occasions. But Petitioners have a policy, based on Phillips's religious beliefs, of refusing to sell any wedding cake of any design to a same-sex couple. Pet. App. 53a, 65a.

Respondents Charlie Craig and David Mullins are a Colorado same-sex couple. In 2012, they planned to marry in Massachusetts and have a reception afterward in Colorado.[1] Accompanied by Craig's mother, Craig and Mullins went to Masterpiece to buy a wedding cake for their reception. *Id.* at 5a, 64a.

At the shop, the couple was met by Phillips. When they told Phillips that they were interested in purchasing a wedding cake for their wedding, he replied that it was his standard business practice not to provide cakes for same-sex weddings. He explained that he would sell the couple other baked goods, including "birthday cakes, shower cakes, … cookies and brownies." But, he said, "I just don't make cakes for same-sex weddings." *Id.* at 4a–5a, 64a–65a.

[1] At the time, same-sex marriage was legal in Massachusetts but prohibited in Colorado. Pet. App. 5a.

Craig, Mullins, and Craig's mother immediately left. They never discussed details about the cake that Craig and Mullins were seeking, such as the cake's design or whether it would include any special features or messages. *Id.* at 4a, 65a.[2]

Review by the Civil Rights Division. Craig and Mullins each filed a discrimination complaint with the Colorado Civil Rights Division,[3] charging a violation of the public accommodations provisions of the Act. *Id.* at 260a–62a, 269a–71a. Under those provisions, it is a discriminatory practice to deny to anyone "because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry … the full and equal enjoyment of the goods [and] services … of a place of public accommodation." COLO. REV. STAT. § 24-34-601(2)(a), Pet. App. 93a–94a. A "place of public accommodation" includes any "place of business engaged in any sales to the public." COLO. REV. STAT. § 24-34-601(1), Pet. App. 93a.[4] "Sexual orientation"

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[2] The next day, Craig's mother called Masterpiece to ask Phillips why he had turned them away. Phillips responded that he would not make a wedding cake for a same-sex couple due to his religious beliefs. Again, the two did not discuss any details regarding the cake that Craig and Mullins had hoped to buy. Pet. App. 65a.

[3] The Colorado Civil Rights Division is the agency charged with enforcing Colorado's anti-discrimination laws in the areas of employment, housing, and public accommodations. COLO. REV. STAT. § 24-34-302. The Colorado Civil Rights Commission, Respondent here, is the bipartisan board that conducts hearings of cases investigated and prosecuted by the Division. COLO. REV. STAT. § 24-34-303.

[4] The public accommodations provisions of the Act contain exceptions similar to those found in other state and federal public

means "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof." COLO. REV. STAT. § 24-34-301(7), Pet. App. 97a.

The Colorado Civil Rights Division conducted an investigation of Craig's and Mullins's complaints under COLO. REV. STAT. § 24-34-306(2)(a). After completing its investigation, the Division concluded that the claims of unlawful discrimination were supported by probable cause because Craig and Mullins are members of a protected class and had been denied a type of service usually offered by Masterpiece under circumstances that gave rise to an inference of unlawful discrimination. Pet. App. 5a. The Division attempted to resolve the charge through conciliation; when that effort failed, the case was referred to the Colorado Civil Rights Commission.

Administrative proceedings. The Commission issued notices of hearing and formal complaints. The cases were consolidated and assigned to an Administrative Law Judge. The parties agreed to various factual stipulations and filed cross-motions for summary judgment, both asserting that there were no genuine issues of material fact. *See id.* at 64a–65a. Based on the undisputed facts, the judge rejected

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accommodations laws. *See* Pet. App. 42a–43a. For example, those provisions do not apply to churches, synagogues, mosques, or other places used primarily for religious purposes. COLO. REV. STAT. § 24-34-601(1), Pet. App. 93a. Moreover, a place of public accommodation may be restricted to one sex if a patron's sex bears a bona fide relationship to the goods, services, or facilities offered there. COLO. REV. STAT. § 24-34-601(3), Pet. App. 94a–95a.

Petitioners' argument that requiring Phillips to bake a wedding cake for a same-sex couple was tantamount to compelling him to speak. Phillips "categorically refused" to accept the cake order "before there was any discussion about what that cake would look like." *Id.* at 75a. He "was not asked to apply any message or symbol to the cake" that could be reasonably interpreted as endorsing or advocating for same-sex marriage, and, the judge observed, "[f]or all Phillips knew at the time, [Craig and Mullins] might have wanted a nondescript cake that would have been suitable for consumption at any wedding." *Id.*

The judge distinguished hypothetical scenarios involving bakeries that might refuse to serve customers because of the particular design of a requested cake. "In [those] cases, it [would be] the explicit, unmistakable, offensive message" that would allow the baker to refuse the order. *Id.* at 78a. In this case, in contrast, Petitioners refused to bake any cake, without regard to what was written on it or what it might look like. *Id*.

The judge concluded that Petitioners had violated the Act and ordered them to cease and desist discriminating against same-sex couples by refusing to sell them a product that they would sell to heterosexual couples. *Id.* at 87a–88a. The Commission unanimously affirmed the judge's decision. *Id.* at 57a–58a.

The Colorado Court of Appeals decision. Petitioners appealed, and the Colorado Court of Appeals affirmed.

The court unanimously held that Petitioners had refused to serve Craig and Mullins "because of" their sexual orientation and concluded that under Colorado law, Petitioners could not "refuse services to Craig and Mullins that [they] otherwise offer[ ] to the general public." *Id.* at 13a, 19a. In so holding, the court again distinguished circumstances under which other Colorado bakeries have refused to sell cakes to members of the public "because of the offensive nature of the requested message" that was to appear on the cakes. *Id.* at 20a n.8. Facts like those, the court held, are not presented by this case. *Id*.

The court also rejected Petitioners' First Amendment claims, basing its decision largely on Petitioners' refusal to make Craig and Mullins a cake "before any discussion of the cake's design." *Id.* at 28a; *see also id.* at 4a, 35a. The only conduct at issue, the court observed, was Petitioners' "basing [their] decision to serve a potential client, at least in part, on the client's sexual orientation." *Id.* at 29a. Prohibiting that conduct, the court held, did not violate the First Amendment. *Id.* at 29a, 35a–36a, 45a–46a.

The Colorado Supreme Court denied review of the unanimous decision of the court of appeals. *Id.* at 54a–55a.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for three reasons.

First, this case is an improper vehicle to address Petitioners' compelled expression claim, which is the basis of the question presented. According to the stipulations and undisputed facts, Petitioners declined to sell Craig and Mullins a wedding cake of any design based solely on the fact that they are a same-sex couple. Had Petitioners refused to serve the couple because they sought a cake with a particular design or which featured a specific message, this case would have presented different legal issues. As postured, however, this case does not raise Petitioners' question.

Second, this case presents no split of authority that requires resolution by this Court. Jurisdictions across the country have consistently agreed with the position taken by the Colorado Court of Appeals—that public accommodations laws may prohibit businesses from refusing to serve same-sex couples. And any conflicts among the cases that Petitioners cite are inapplicable here.

Third, the ruling by the Colorado Court of Appeals adhered to this Court's precedents and does not conflict with this Court's compelled speech and free exercise decisions.

I. This case is an improper vehicle to address the question presented because the record does not support the compelled expression claim on which the question is based.

The question presented is premised on a factual assertion that is not supported by the record. Petitioners argue that under the decision below, Colorado's public accommodations law "compel[s] Phillips to create expression that violates his sincerely held religious beliefs." Pet. i. More specifically, Petitioners claim that "Colorado requires [Phillips] … to interview the same-sex couple and develop a custom design celebrating their union," to "research and draft [a] message" he disagrees with, and "to conceive and form an artistic monument to a concept of marriage he finds morally objectionable." *Id.* at 16–17.

None of this is accurate. The parties stipulated that the "conversation between Phillips and [Craig and Mullins] was very brief, with no discussion between the parties about what the cake would look like." Pet. App. 65a; *see also id.* at 287a (statement by Phillips conceding that the "entire interaction lasted no more than 20 seconds"). It is undisputed that Petitioners declined to serve Craig and Mullins without any consideration of whether the cake would be pre-made or custom-made, and regardless of what elements or design the particular cake would include. Petitioners acted not based on the design of the requested cake or the message it might have conveyed, but based on a blanket policy of refusing to sell a wedding cake of any kind to any same-sex couple. *See id.* at 65a (Phillips "informed [Craig and Mullins] that he does not create wedding cakes for same-sex weddings"); *id.* at 75a

(Phillips "categorically refused" to serve Craig and Mullins "before there was any discussion about what th[e] cake would look like").[5]

The Colorado Court of Appeals repeatedly emphasized that the record did not allow it to determine whether the process of making Craig's and Mullins's cake, or the cake itself, would have been "sufficiently expressive" to raise First Amendment concerns. *Id.* at 29a. "[B]ecause Phillips refused to prepare a cake for Craig and Mullins before any discussion of the cake's design," the court held, "the ALJ could not determine whether Craig's and Mullins' desired wedding cake would constitute symbolic speech." *Id.* at 28a. The court recognized that a case with different facts might require a different outcome:

> We recognize that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections maybe implicated. However, we need not reach this issue. We note, again, that Phillips denied

[5] The Petition includes a discussion of the history of cake making, asserting that "wedding cakes are uniquely personal to the newly married couple and require significant collaboration between the couple and the artist to create the perfect design." Pet. 4–5. This discussion is unsupported by record facts, and neither the administrative law judge nor the court of appeals below made any findings regarding those assertions. Instead, as support for its assertions, the Petition cites an instructional guide for cake decorating and an appellate brief that Petitioners filed before the Colorado Civil Rights Commission (which itself relies on the instructional guide). *Id*. (citing *The Essential Guide to Cake Decorating* (2010) and Pet. App. 185a).

> Craig's and Mullins' request without any discussion regarding the wedding cake's design or any possible written inscriptions.

Id. at 34a–35a.

Indeed, in cases involving requests to create cakes that feature specific designs or messages that are offensive to the vendor, Colorado law dictates a different result. The Colorado Civil Rights Division has dismissed complaints by a customer who claimed that three bakeries refused to serve him because of his religion when they declined to create specific, custom-designed cakes featuring particular messages. The customer had requested that the bakeries make cakes shaped like an open Bible, inscribed with messages such as "Homosexuality is a detestable sin. Leviticus 18:2" or images such as two groomsmen holding hands before a cross, with a red "X" over them. *Id.* at 20a n.8; *see also id.* at 300a. Each bakery refused to create cakes with those specific designs. *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X, Pet. App. 310a; *Jack v. Azucar Bakery*, Charge No. P20140069X, Pet. App. 301a; *Jack v. Gateaux, Ltd.*, Charge No. P20140071X, Pet. App. 320a. The Division concluded that none of the bakeries had refused service because of the customer's religious beliefs, and they all would have refused to create cakes "for anyone, regardless of creed, where a customer requests derogatory language or imagery." Pet. App. 307a; *see also id*. at 297a–98a, 316a.

Here, had Petitioners been asked to prepare a custom cake featuring a message concerning same-sex marriage, this case would present a different record and raise different issues. Petitioner is correct that,

under Colorado law, "[a]n African-American baker may decline to create a custom cake celebrating the racist ideals of a member of the Aryan Nation" and "a Muslim baker may refuse to create a custom cake denigrating his faith for the Westboro Baptist Church." Pet. 31. And, of course, Phillips himself may not be compelled to create "cakes with offensive written messages" such as "anti-American or anti-family themes, atheism, racism, or indecency." *Id.* at 5. But this is not because of the identity of the customer; it is because of the specific messages and designs that the customer would be requesting. The record here does not raise the compelled speech claim for which Petitioners seek review.

II. There is no split in authority for this Court to resolve.

The Petition implies that courts across the country are divided in their approach to various legal questions bearing on cases like this one. In fact, the courts are uniform. Petitioners cite not a single case that has exempted a wedding vendor from a public accommodations law due to an objection to same-sex marriage. And while First Amendment cases often present difficult legal questions, the various purported splits in authority that Petitioners do identify are not implicated by this case.

A. Courts have uniformly upheld the application of public accommodations laws in similar contexts.

In the past three years, a number of courts have applied public accommodations laws to wedding

vendors that have refused to serve same-sex couples. Each court has sided with the decision below.

In *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014), a wedding photographer refused to provide services for a same-sex couple's wedding. The photographer argued that New Mexico's antidiscrimination law violated her First Amendment speech and free exercise rights. The New Mexico Supreme Court rejected the photographer's challenge, holding that "if [the photographer] offers its services to the public, [it must] provide those same services to clients who are members of a protected class." *Id*. at 68.

In *Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, (Wash. Sup. Ct. Feb. 18, 2015), *hr'g granted*, 2016 Wash. LEXIS 349 (Wash. Mar. 2, 2016), a florist refused to provide flower arrangements for a same-sex couple's wedding. The florist argued that Washington's antidiscrimination law violated her First Amendment speech and religion rights. The court rejected those arguments, explaining that "[t]he existing jurisprudence on this issue … is soundly against the [florist]." *Id*. slip op. 39–40.

In *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016), the owners of a wedding venue refused to rent the venue for a same-sex couple's wedding. The venue owners argued that New York's human rights law violated their free speech and free exercise rights. *Id*. at 38–42. The New York appeals court rejected those challenges, concluding that state law "simply requires them to … offer the same goods and services to same-sex couples that they offer to other couples." *Id*. at 41.

Finally, in *Brush & Nib Studio, LC v. City of Phoenix*, CV 2016-052251 (Sup. Ct. of Ariz., Maricopa Cty., Sept. 16, 2016) (unreported), a stationery vendor sought to refuse to serve same-sex couples. The stationer sued the City of Phoenix, arguing that it should be enjoined from enforcing its antidiscrimination law under the First Amendment. The court rejected this claim, explaining that "the only thing compelled by the ordinance is the sale of goods and services to persons regardless of their sexual orientation. There is nothing about the ordinance that prohibits free speech or compels undesired speech." *Id*. slip op. 9.

Petitioners cite no example of a court that has disagreed with the analysis reflected in these decisions.

B. Petitioners' asserted inter-jurisdictional conflicts are not implicated by this case.

Unable to identify a split among courts confronting similar factual and legal issues, Petitioners cite cases arising in a wide variety of contexts, claiming that the decision below either creates or exacerbates splits with those cases on three separate legal questions. None of those alleged splits in authority—to the extent they exist at all—are implicated here.

Zoning cases. First, Petitioners claim that the decision below conflicts with cases from the Ninth and Eleventh Circuits involving municipal codes that banned tattoo parlors. Pet. 18–22. Those cases—*Buehrle v. City of Key West*, 813 F.3d 973 (11th Cir. 2015) and *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010)—have no relevance here. Neither case involved a claim of compelled expression,

and neither case involved a public accommodations law. The tattoo parlors in those cases did not seek to avoid serving a subset of customers; they sought instead to avoid government regulation that entirely prohibited them from engaging in expressive conduct. The constitutional doctrine that was central to those cases—the "time, place, manner" doctrine—played no role in the decision below.

Petitioners nonetheless assert that because *Buehrle* and *Anderson* found that tattoos are, as a general matter, a form of protected expression, the ruling below necessarily conflicts with those decisions. Pet. 21. This is incorrect for two reasons.

First, a ruling about the expressive nature of tattoos has limited relevance to a ruling about the claimed medium of expression at issue here. The First Amendment is necessarily fact-specific. *Hurley*, 515 U.S. at 567 ("[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection."). Here, the record does not disclose the features or the messages that might have been part of the particular cake at issue and instead involves a business's categorical policy not to serve a particular product to a particular subset of customers.

Second, the Colorado Court of Appeals recognized that the act of creating a cake could, in certain circumstances, be expressive and could therefore implicate the First Amendment. *See* Pet. App. 34a–35a. Thus, a "municipal ban" on cake shops, *cf. Anderson*, 621 F.3d at 1055, or "an ordinance strictly limiting the number of [cake shops] permitted to operate," *Buehrle*,

813 F.3d at 975, could give rise to a First Amendment claim—just as bans on tattoo parlors can. Here, however, under the particular facts and legal framework of this case, "the compelled conduct [at issue] is the Colorado government's mandate that [Petitioners] comport with [Colorado law] by not basing [the] decision to serve a potential client, at least in part, on the client's sexual orientation." Pet. App. 29a. In applying that mandate to the facts presented here, the court below did not conflict with *Buehrle* or *Anderson*.

Cases applying the* Spence-Johnson *factors. Petitioners next claim that the federal circuits disagree regarding the legal test that determines whether conduct is "expressive" and therefore protected by the First Amendment. Pet. 22–25. Petitioners assert that the circuits have used three separate approaches: some, Petitioners argue, adhere to *Texas v. Johnson*, 491 U.S. 397 (1989) and *Spence v. Washington*, 418 U.S. 405 (1974); some hew to what Petitioners describe as a more lenient test under *Hurley*; and some take what Petitioners call "an intermediate approach." Pet. 23–24. Petitioners do not argue that the Colorado Court of Appeals explicitly chose one of these three approaches but that its analysis "most closely resembles" what Petitioners call the "stringent approach." *Id.* at 24–25.

Whether or not the purported split is real, the decision below does not implicate it. All of the cases that Petitioners cite recognize that, regardless of what legal test is employed, the outcome of a Free Speech claim depends heavily on the facts and the context, and it is the person seeking to avoid the application of state law that bears the burden of proving the

expressiveness of the relevant conduct.[6] Here, the court of appeals applied both the *Spence-Johnson* test and the approach from *Hurley*. Pet. App. 26a, 32a–33a. Rather than attempt to narrow the scope of its analysis to a single formulation of the expressive-conduct test, the court rejected Petitioners' claims under *both* lines of cases. *Id*. And it repeatedly emphasized that the outcome was dictated by the stipulated and undisputed facts, not by reliance on any particular analytical approach: "Phillips refused to prepare a cake for Craig and Mullins before any discussion of the cake's design, [and] the [administrative law judge] could not determine whether Craig's and Mullins' desired wedding cake would constitute symbolic speech subject to First Amendment protection." *Id.* at 28a; *id.* at 32a ("Nothing in the record supports the conclusion that a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an

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[6] *Blau v. Fort Thomas Pub. Sch. Dist*., 401 F.3d 381, 389–90 (6th Cir. 2005) (examining the record to conclude that the plaintiffs "ha[d] not met their burden of showing that the First Amendment protects" a middle-schooler's desire to "wear clothing that she likes"); *Holloman v. Harland*, 370 F.3d 1252, 1269 (11th Cir. 2004) (holding that "the record amply supports Holloman's contention that the defendants violated his constitutional right to be free from compelled speech"); *Church of the Am. Knights of the KKK v. Kerik*, 356 F.3d 197, 205–07 (2d Cir. 2004) (stating that "[t]he party asserting that its conduct is expressive bears the burden of demonstrating that the First Amendment applies" and carefully examining the evidentiary record to determine whether wearing masks amounted to expressive conduct); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 161–65 (3d Cir. 2002) (noting the plaintiffs' burden to prove the expressiveness of their conduct and concluding that "the plaintiffs ha[d] not introduced evidence" of expressiveness).

endorsement of same-sex marriage ….”); *see also id.* at 29a–30a.

Even Petitioners concede that the test the court applied below was not dispositive; they assert only that they “would be far more likely to receive free speech protection” under their preferred test. Pet. 25. Given the record, this case does not present the opportunity to resolve the purported conflict that Petitioners identify.

Cases examining the unequal application of government policy. Finally, Petitioners claim that the decision below conflicts with cases from the Third, Sixth, and Tenth Circuits. *Id.* at 30–31. Those cases hold that if a state law or policy contains various exceptions, but refuses to permit an exception for religious exercise, then the law or policy must be reviewed under heightened scrutiny. Again, those cases are inapposite here, and the decision below did not diverge from them.

In Petitioners’ view, the Act contains a “myriad of exceptions”:

> An African-American baker may decline to create a custom cake celebrating the racist ideals of a member of the Aryan Nation. Likewise, a Muslim baker may refuse to create a custom cake denigrating his faith for the Westboro Baptist Church. Three secular cake artists my reject a Christian’s custom cake order because they find his religious message critical of same-sex marriage offensive.

Id. at 31–32. These factual scenarios do not describe “exceptions” to Colorado law. They describe how public

accommodations laws work in general. A business may refuse service for a number of reasons, such as the specific design of the product a customer asks the business to create. They may not refuse service based on the identity of the customer.

The cases Petitioners cite, in contrast, *did* involve government policies that denied exceptions to accommodate religion but granted exceptions for other reasons. *Ward v. Polite*, 667 F.3d 727, 735–37 (6th Cir. 2012) (allowing counseling students to decline to engage in various counseling-related services, but not for religious reasons); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298–99 (10th Cir. 2004) (excusing a Jewish student from coursework, but not a Mormon student, and applying exceptions to the Mormon student inconsistently); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (allowing police officers to grow beards for medical but not religious reasons). None of those cases suggests—as Petitioners do—that a public accommodations law forbidding discrimination against same-sex couples must be subject to heightened scrutiny if it allows a "Muslim baker [to] refuse to create a custom cake denigrating his faith." Pet. 31. Petitioners identify no court that has taken that radical position. They thus present no split in authority for this Court to resolve.

III. The decision below does not conflict with this Court's compelled-speech and free-exercise precedent.

As a final matter, Petitioners claim that the decision below conflicts with this Court's compelled speech and free exercise precedent. Neither assertion is correct.

Compelled Speech. Petitioners assert that the court of appeals rejected their compelled speech claim "based on the feeble justification that Phillips' speech is legally required." Pet. 18. That is not an accurate description of the court of appeals' analysis. The court instead determined that the "compelled conduct" at issue—ceasing to discriminate based on a customer's identity—cannot reasonably be misconstrued as carrying a message about same-sex marriage. Pet. App. 29a–30a. Thus, the court rested its conclusion not only on the fact that nondiscrimination is legally required in Colorado but also on the fact that the mandated conduct, in the context of this case, did not amount to forced expression. *Id.* at 36a ("[W]e conclude that the compelled conduct here is not expressive ...."). Identical reasoning led to a similar conclusion in *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006). There, the Court held that law schools could be compelled to host military recruiters despite First Amendment objections because "a law school's decision to allow recruiters on campus is not inherently expressive." *Id.* at 64.

Of course, if businesses or individuals are in fact forced to express the messages of the government[7] or a third party,[8] the First Amendment is implicated. But mandating nondiscrimination by a business open to the public "is a far cry from the compelled speech" that violates the Constitution. *Id.* at 62.

This Court's decision in *Hurley* does not suggest otherwise. Contrary to Petitioners' characterization, Pet. 17, it illustrates why the decision below, and its understanding of Colorado law and the First Amendment, is correct. *Hurley* involved a "peculiar" application of a public accommodations law and was decided in the specific "context of an expressive parade." 515 U.S. at 572, 577. The parade's organizers did not exclude any person from marching because of that person's identity; they excluded a particular "contingent" of marchers that wished to engage in an "expressive demonstration of their own." *Id*. at 572–73. Here, consistent with the First Amendment, Colorado law does not prohibit a business from exercising its

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[7] *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (prohibiting the government from mandating that aid organizations publish a policy opposing prostitution); *Wooley v. Maynard*, 430 U.S. 705 (1977) (prohibiting a State from requiring citizens to display an ideological motto on their license plates); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (prohibiting a State from punishing students who decline to salute the flag and recite the pledge of allegiance).

[8] *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (prohibiting a regulator from requiring a utility company to include a consumer group's message in its mailings); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (requiring a newspaper to publish a politician's speech).

speech rights: "an Islamic cake artist [may] refus[e] to create a cake denigrating the Quran." Pet. 1. And the conduct that Colorado law prohibits—declining to serve couples because of their sexual orientation—does not raise the First Amendment concerns that motivated *Hurley*. "[S]elling a wedding cake to all customers free of discrimination does not convey a celebratory message …." Pet. App. 30a. Marching as a "parade unit carrying its own banner," in contrast, does. *Hurley*, 515 U.S. at 572.

Free exercise. Petitioners' final argument, Pet. 25–26, is that the court of appeals' decision conflicts with this Court's holding in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). That case involved an ordinance whose "object" was "suppression of the central element of the … worship service" of a disfavored religion. *Id*. at 534. Its reasoning has never been extended to suggest that a generally applicable public accommodations law like Colorado's—which "serves the State's compelling interest in eliminating discrimination," *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549—cannot be applied to prevent discrimination against same-sex couples or any other identifiable group of customers.[9] This Court has

[9] Petitioners quote a statement of one Colorado Civil Rights Commissioner expressing the opinion that religion has been used to justify discrimination. Pet. at 29. This statement, Petitioners claim, reflected hostility to religious belief. Even if that were true, that statement did not reflect the views of the Commission as a whole, nor does it show that the Act, generally or as applied here, singles out religious conduct for unfavorable treatment in contravention of *Lukumi*. No other member of the Commission supported the statement, nor was that statement or any similar sentiment included in the Commission's Order.

"never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990). In rejecting Petitioners' claims below, the court of appeals did not depart from this Court's free exercise precedent.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Colorado Civil Rights Commission

November 29, 2016

STATE OF COLORADO

CITY AND COUNTY OF DENVER

Colorado Civil Rights Commission Meeting

Held on July 25, 2014

Colorado State Capitol

200 East Colfax Avenue, Old Supreme Court Chambers

In re: CHARLIE CRAIG and DAVID MULLINS v. MASTERPIECE CAKESHOP, INC.

Case No: P20130008X, CR2013-0008

This transcript was taken from an audio recording by Katherine A. McNally, Certified Transcriber, CET**D-323.

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P R O C E E D I N G S

* * * * *

(Commencement of audio at 00:00.0.)

THE CHAIRMAN: Calling the meeting to order. This is the Friday, July 25th, 2014, meeting of the Colorado Civil Rights Commission.

Would all of those that are present please feed your name into the record?

COMMISSIONER VELASQUEZ: Susie Velasquez, Greeley, Colorado.

COMMISSIONER RICE: Diane Rice, Loveland, Colorado.

MS. McPHERSON: Jennifer McPherson, with the Division.

MS. MALONE: Shayla Malone, with the Division.

MR. MORTURE: Vince Morture (phonetic), Deputy Attorney General, counsel for the Division.

MR. MAXFIELD: Eric Maxfield, First Assistant AG, from the Division.

COMMISSIONER ADAMS: Commissioner Adams, Fountain, Colorado Springs, Colorado.

COMMISSIONER HESS: Commissioner Hess, from Grand Junction, Colorado.

COMMISSIONER SAENZ: Rosa Saenz, from Denver.

COMMISSIONER JAIRAM: Raju Jairam, Fort Collins Colorado.

THE CHAIRMAN: And --

MS. MARTIN: Oh, I'm just observing.

THE CHAIRMAN: Yes, ma'am. But you need to tell us who you are, please.

MS. MARTIN: Oh, I'm Nicolle Martin.

THE CHAIRMAN: Okay. Nicolle Martin with --

MS. MARTIN: Counsel for complainants -- I'm sorry. Counsel for respondents and appellants --

THE CHAIRMAN: Oh. Okay, (indiscernible).

MS. MARTIN: -- (indiscernible) Masterpiece.

THE CHAIRMAN: Okay. Thank you.

And I guess we do have a quorum.

(Conclusion of audio at 01:13.8; commencement of audio at 08:40.0.)

THE CHAIRMAN: Okay. Eric.

MR. MAXFIELD: So there is a Motion to Stay final agency order filed by respondents in the Craig v. Masterpiece Cakeshop case. There is a complainant's response in option to the Motion for Stay that was filed, I think, yesterday. And (indiscernible) has to take a look at that.

Procedurally, the -- either party (indiscernible) a stay of the final agency order from

the Commission. And then if that is granted, there'll be a stay in place. If it's denied, then they may also seek a stay from the Court of Appeals. The Court of Appeals could grant or deny the stay during the pendency of the appeal, which was also noticed by Masterpiece, Inc.

So if there are questions about the Commission's authority and the reasoning around the possible granting of the stay or denial, I can try to answer those. It is -- and then that's something that I can do here and now to you, you know, in open session, or if you would want to waive attorney/client privilege, or you could ask to go into -- make a motion to go into executive session, and we could have a closed session for attorney advice on the merits of the Motion to Stay.

THE CHAIRMAN: My question is, Do we need to respond to this or make a motion today or need a motion today?

MR. MAXFIELD: Yes. This -- this ought to receive action today, either a grant or denial of the stay.

THE CHAIRMAN: Okay.

MALE SPEAKER: I would like to have an opportunity to read this. I don't know about the others.

FEMALE SPEAKER: And maybe we can sometime take a short break, and when we finish the public -- and at the beginning of our executive session and a few minutes to read this stuff, because we --

MALE SPEAKER: Yes.

FEMALE SPEAKER: -- I don't think we've seen it until now.

MALE SPEAKER: (Indiscernible) last night.

MR. MAXFIELD: One thing that I could offer is that the -- the legal standard identified by both parties in the general sense is the same. So I don't think that there's a contest about that. And so you'll see the elements -- four elements set out clearly by both parties, and for which I think there's agreement.

FEMALE SPEAKER: Okay.

MALE SPEAKER: And then if we need any advice, then we could go into closed session?

MR. MAXFIELD: Yes.

THE CHAIRMAN: Okay.

MR. MAXFIELD: Yeah.

THE CHAIRMAN: So it -- I guess we all finished through the public session, take maybe a 10-, 15-minute break, give everyone have a chance to read this --

MALE SPEAKER: Um-hmm.

THE CHAIRMAN: -- and then we'll discuss it.

MALE SPEAKER: Okay.

THE CHAIRMAN: Does that work?

FEMALE SPEAKER: Um-hmm. And then if we -- before we break up executive session --

THE CHAIRMAN: Before -- yeah, if we need to go into executive session (indiscernible).

FEMALE SPEAKER: Okay. (Indiscernible) --

THE CHAIRMAN: (Indiscernible) merit.

FEMALE SPEAKER: -- if we have this on the agenda, we'll (indiscernible) --

THE CHAIRMAN: Yes.

FEMALE SPEAKER: -- have to go into executive session (indiscernible), okay?

THE CHAIRMAN: Is that acceptable?

FEMALE SPEAKER: Yes.

THE CHAIRMAN: All right. Any audience participation?

(Conclusion of audio at 11:48.4; commencement of audio at 17:35.1.)

THE CHAIRMAN: Okay. What we have here in front of us is -- anyway, we're here to discuss the Masterpiece Cakeshop, Case (indiscernible). Anyway, here's the agenda.

FEMALE SPEAKER: Oh, yeah.

THE CHAIRMAN: Oh, here it is. Okay. We're

here to discuss Case P2013008X, CR2013-00H, Charlie Craig and David Mullins versus Masterpiece Cakeshop.

MALE SPEAKER: Um-hmm.

THE CHAIRMAN: There's a motion for a stay of the final Commission -- I mean, the Commission's final order, and then there's a response by the defendant in opposition. And then there's -- we've also been given a notice of appeal regarding a court, the appellate court, I guess.

So anyone want to lead off?

FEMALE SPEAKER: I'll lead.

Mr. Chair, I move that the Commission deny the Motion to Stay in -- for the Commission case.

FEMALE SPEAKER: Second.

THE CHAIRMAN: Okay. There's a motion on the floor and a second to deny the respondent's motion for a stay of the final order by this Commission.

MALE SPEAKER: Um-hmm.

THE CHAIRMAN: Okay. Are there any comments or discussions about this before I put it to a vote?

FEMALE SPEAKER: Yes, sir.

THE CHAIRMAN: Go ahead.

FEMALE SPEAKER: I'd like to make a couple comments.

First of all, I think for us to grant a stay

would be to say that we disagree with our own order, final order. And of the arguments that are made, I think there is -- by virtue of our order, we determined that there is a public -- bless you --

FEMALE SPEAKER: Thank you.

FEMALE SPEAKER: -- there is a public interest in enforcing this, that clearly the public is hurt by actions such as those taken by Masterpiece Cake. Complying with the order is not harmful or irreparable to Masterpiece Cake. I don't see that any harm is done there.

I -- I further believe that if you're going to do business in Colorado, you have to follow the Colorado Antidiscrimination Act, and for us to give a stay in this case would be to say, oh, unless you don't want to. So anyway, I -- I believe that we have to live by our convictions and our orders (indiscernible) the respondent to do so.

THE CHAIRMAN: Susan?

FEMALE SPEAKER: I would just like to point out, and I agree with the documents of the plaintiffs that -- that the document that was in front of us from the -- the plaintiffs' response.

THE CHAIRMAN: Oh, okay.

FEMALE SPEAKER: -- that they have not

demonstrated a likelihood of success, because they were rejected three times before. And as Diane pointed out, we made a decision then. And I don't believe that -- that they have a likelihood of success.

THE CHAIRMAN: Okay. Commissioner Saenz?

FEMALE SPEAKER: I --

THE CHAIRMAN: No comments?

FEMALE SPEAKER: No.

THE CHAIRMAN: Commissioner Hess?

COMMISSIONER HESS: I agree with what's been said.

THE CHAIRMAN: Commissioner Adams?

COMMISSIONER ADAMS: I would agree with Commissioner Rice's and (indiscernible) assessment of what has transpired.

FEMALE SPEAKER: I have one more comment.

THE CHAIRMAN: Go ahead.

FEMALE SPEAKER: In regard to the respondent's argument -- endless argument, this is that they -- this argument's been made before, and it -- it holds no water, as far as I'm concerned, whatsoever. You -- and we said this in the hearing, and we need to repeat this over and over, you cannot separate the fact that these men -- their -- their sexual orientation from the action of wanting to celebrate the marriage, anymore than you

could a case between races in many years gone past.

And the U.S. Supreme Court has found over and over that you cannot discriminate on the basis of race, and sexual orientation is a status absolutely like race or -- so -- and you can't separate the fact that these gentlemen want to marry from the fact that they are homosexual.

THE CHAIRMAN: Okay. (Indiscernible.)

I have some comments, and that is, you know, Mr. Phillips says that he wants to be respected or his views and religious views to be respected, and I believe that the general public also needs to -- you know, their views need to be respected.

The -- the issue here is whether or not the couple that went in to get service were treated with dignity and respect, and the fact of the matter are they were not, and it's also clear that they were turned away. And those have all been established.

And I don't believe that the individual's right to practice his religion violates other people's rights to free access, especially when the business is open to the public and serving the public.

Now, what Mr. Phillips does in private is his own business. And I agree that, you know, we cannot separate same sex marriage and say that I'm not

discriminating against gay couples, because I mean, by the very definition, when two people of the same sex want to get married, it tells me that they are of a certain sexual orientation. So that argument, again, fails.

Go ahead.

FEMALE SPEAKER: Well, I just want to point out that this -- this case is really not about same sex marriage. It's -- it's about a couple -- it's just about a gay couple that wanted a cake to celebrate a life event in their life.

FEMALE SPEAKER: Um-hmm.

FEMALE SPEAKER: That doesn't really -- it could have been a civil union. It could have been a -- you know, let's wrap, you know, ribbon around a tree and -- and -- and say that we hope, you know, the world gets to be a better place with us in it as a couple. So it's not -- I mean, I think there's some rhetoric that this is a case about same sex marriage. Well, it's really not. It's really about a case about denial of service.

FEMALE SPEAKER: You -- yeah, you're exactly right --

MALE SPEAKER: Um-hmm.

FEMALE SPEAKER: -- Commissioner Hess.

I would also like to reiterate what we said in

the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be -- I mean, we -- we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to -- to use their religion to hurt others. So that's just my personal point of view.

THE CHAIRMAN: Okay. Any other comments?

Okay. So there's a motion on the floor to deny the respondent's Motion for Stay of our final order. And all those in favor, please signify by saying aye.

(A chorus of ayes.)

THE CHAIRMAN: Those opposed?

Any abstentions?

Therefore the Commission denies the respondent's motion for a stay of our final order.

(Conclusion of audio at 27:54.1.)

* * * * *

C E R T I F I C A T E

I, Katherine McNally, Certified Transcriptionist, do hereby certify that the foregoing pages 1 through 12 constitute a full, true, and accurate transcript, from electronic recording, of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

SIGNED and dated this 8th day of August 2014.

Katherine A. McNally

KATHERINE A. McNALLY
Certified Electronic Transcriber
CET**D323

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,

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.

JOINT STATEMENT OF STIPULATED FACTS

The parties jointly submit the following stipulated facts:

1. Colorado's Anti-Discrimination Act ("CADA"), found at Colo. Rev. Stat. §§ 24-34-301, *et seq.* provides that "[i]t is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . ." Colo. Rev. Stat. § 24-34-601(2)(a).

2. CADA defines a "place of public accommodation" to include "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).

3. CADA also provides that it is unlawful for a person "directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." Colo. Rev. Stat. § 24-34-601(2)(a).

4. If a person believes that an individual or business has violated CADA, that person can seek redress by either filing a civil action in state court or by filing a charge alleging discrimination or unfair practice with the Colorado Civil Rights Division ("Division"). Colo. Rev. Stat. §§ 24-34-306(1)(a), 24-34-602-603.

5. If a person files a civil action and the state court finds a violation of CADA, the court shall fine the individual or business between $50.00 and $500.00 for each violation. Colo. Rev. Stat. § 24-34-602(1)(a).

6. If a person files a charge alleging discrimination or unfair practice with the Division, the Director of the Division ("Director"), with the assistance of the Division's staff, shall make a prompt investigation of the charge. Colo. Rev. Stat. § 24-34-306(2)(a).

7. The Colorado Civil Rights Commission ("Commission"), individual Commissioners, or the Colorado Attorney General also have independent authority to file charges alleging discrimination or unfair practice when they determine that the alleged discriminatory or unfair practice imposes a significant societal or community impact. Colo. Rev. Stat. § 24-34-306(1)(b).

8. If the Commission, individual Commissioners or the Colorado Attorney General file a charge alleging discrimination or unfair practice, the Director, with the assistance of the Division's staff under the Director's supervision, shall make a prompt investigation of the charge. Colo. Rev. Stat. §§ 24-34-306(1)(b) and (2)(a).

9. The Director, with the assistance of the Division's staff, investigates all charges of discrimination or unfair practice received by the Division. Colo. Rev. Stat. § 24-34-306(2)(a).

10. The Director can issue subpoenas to witnesses and compel the testimony of witnesses. Colo. Rev. Stat. § 24-34-306(2)(a).

11. The Director, or the Director's designee, who shall be an employee of the Division, determines whether probable cause exists for crediting charges of discrimination or unfair practice. Colo. Rev. Stat. § 24-34-306 (2)(b).

12. If the Director or the Director's designee determines that probable cause does not exist, he or she shall dismiss the charge and provide notice to the charging party of their right to file an appeal of the dismissal to the Commission. Colo. Rev. Stat. § 24-34-306(2)(b)(I).

13. If the Director of the Division determines that probable cause does exist, the Director provides the parties a written notice of the finding and commences compulsory mediation. Colo. Rev. Stat. § 24-34-306(2)(b)(II).

14. The Commission hears appeals from the Director's findings. Colo. Rev. Stat. § 24-34-306(2)(b)(I).

15. The Commission can issue notices and complaints to set hearings either before the Commission, a Commissioner, or before an Administrative Law Judge. Colo. Rev. Stat. § 24-34-306(4).

16. After presentation of all the evidence at hearing, the Commission, Commissioner or Administrative Law Judge makes findings determining whether the individual or business engaged in any discriminatory or unfair practice as defined by CADA. Colo. Rev. Stat. § 24-34-306(9).

17. If either the Commission, a Commissioner or an Administrative Law Judge makes a finding that the individual or business under investigation violated CADA, the Commission has the power and authority under CADA to issue cease-and-desist orders to prevent violations of CADA and to issue orders requiring the charged party to "take such action" as the Commission, a Commissioner or an Administrative Law Judge may order. Colo. Rev. Stat. § 24-34-306(9).

18. Aubrey Elenis is the Director of the Division and is named as a Defendant in her official capacity only.

19. Ms. Elenis's authority in relation to CADA is specified in Colo. Rev. Stat. §§ 24-34-302, 24-34-306.

20. Commissioners Anthony Aragon, Ulysses J. Chaney, Miguel "Michael" Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, and Jessica Pocock are members of the Commission and are named as Defendants in their official capacities only.

21. Mr. Aragon's, Mr. Chaney's, Mr. Elias's, Ms. Fabrizio's, Ms. Hess's, Ms. Lewis's, and Ms. Pocock's authority to enforce CADA is specified in Colo. Rev. Stat. §§ 24-34-305, 24-34-306, 24-34-605.

22. Cynthia H. Coffman is the Colorado Attorney General and is named as a Defendant in her official capacity only.

23. Ms. Coffman's authority in relation to CADA is specified in Colo. Rev. Stat. § 24-34-306.

24. Prior to the filing of Plaintiffs' case, the Division received a charge of discrimination "because of" sexual orientation from a same-sex couple against a Colorado bakery, Masterpiece Cakeshop, Inc., a public accommodation, which is owned and operated by Jack Phillips ("Phillips"), a Christian cake artist.

25. The facts and procedure of the Masterpiece Cakeshop case is found in the decision published by the Colorado Court of Appeals on August 13, 2015, titled *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc., and any successor entity, and Jack C. Phillips and Colorado Civil Rights Commission*, 2015 COA 115, for which the Court may take judicial notice, as well as the following documents: Colorado Civil Rights Division's Probable Cause Determination in *Charlie Craig v. Masterpiece Cakeshop, Inc.* dated March 5, 2013, attached as Exhibit C; Colorado Civil Rights Division's Probable Cause Determination in *David Mullins v. Masterpiece Cakeshop, Inc.* dated March 5, 2013, attached as Exhibit D; Administrative Law Judge's Initial Decision in *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc. and Jack C. Phillips* dated December 6, 2013, attached as Exhibit E; and Colorado Civil Rights Commission's Final Agency Order in *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc. and Jack C. Phillips* dated May 30, 2014, attached as Exhibit F.

26. Phillips and Masterpiece Cakeshop's petition for writ of certiorari to the Colorado Supreme Court was denied on April 25, 2016.

27. Phillips and Masterpiece Cakeshop's petition for writ of certiorari to the U.S. Supreme Court is currently pending.

28. During the pendency of Phillips and Masterpiece Cakeshop's case, the Division considered three claims of discrimination brought by William Jack ("Jack"), a professing Christian, against three Colorado bakeries, all public accommodations: Azucar Bakery, Le Bakery Sensual, Inc., and Gateaux, Ltd. The facts and procedure of these matters are discussed in the following documents: Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Azucar Bakery* dated June 30, 2015, attached as Exhibit G; Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Gateaux, Ltd.* dated June 30, 2015, attached as Exhibit H; Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Le Bakery Sensual, Inc.* dated June 30, 2015, attached as Exhibit I; Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Azucar Bakery* dated March 24, 2015, attached as Exhibit J; Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Gateaux, Ltd.* dated March 24, 2015, attached as Exhibit K; and Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Le Bakery Sensual, Inc.* dated March 24, 2015, attached as Exhibit L.

29. Plaintiff Lorie Smith is a lifelong resident of the State of Colorado and a citizen of the United States of America.

30. Ms. Smith is a Christian.

31. Ms. Smith's religious beliefs, including her religious understanding about marriage as an institution between one man and one woman, are central to her identity, her understanding of existence, and her conception of her personal dignity and identity.

32. Ms. Smith's decision to speak and act consistently with her religious understanding of marriage defines her personal identity.

33. Ms. Smith believes that her life is not her own, but that it belongs to God, and that He has called her to live a life free from sin.

34. Ms. Smith believes that everything she does – personally and professionally –should be done in a manner that glorifies God.

35. Ms. Smith believes that what is sinful versus what is good is rooted in the Bible and her personal relationship with Jesus Christ.

36. Ms. Smith believes that she will one day give an account to God regarding the choices she made in life, both good and bad.

37. Ms. Smith believes that God instructs Christians to steward the gifts He has given them in a way that glorifies and honors Him.

38. Ms. Smith 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.

39. Ms. Smith's creative talents include artistic talents in graphic design, website design, and marketing.

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

41. She was then employed by other companies to do graphic and web design before starting her own company, 303 Creative.

42. Ms. Smith started 303 Creative because she desired the freedom to use her creative talents to honor God to a greater degree than was possible while working at other companies.

43. 303 Creative is a for-profit limited liability company organized under Colorado law with its principal place of business in Colorado.

44. Ms. Smith is the sole member-owner of Plaintiff 303 Creative LLC.

45. Through 303 Creative, Ms. Smith 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.

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

47. All of Plaintiffs' website designs are expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message.

48. As the sole owner and operator of 303 Creative, Ms. Smith controls the scope, mission, priorities, creative services, and standards of 303 Creative.

49. Ms. Smith does not employ or contract work to any other individuals.

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

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

52. Ms. Smith also considers color, positioning, movement, angle, light, complexity, and other factors when designing graphics.

53. 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.

54. Ms. Smith 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.

55. As a seasoned designer, Ms. Smith helps clients implement the ideal websites and graphics—oftentimes by designing custom graphics and textual content for their unique needs — to enhance and effectively communicate a message.

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

57. When designing and creating graphics or websites, Ms. Smith 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 Ms. Smith and her clients.

58. Ms. Smith 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.

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

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

61. This means Ms. Smith seeks to use 303 Creative to bring glory to God and to share His truth with its clients and the community.

62. Ms. Smith strives to serve 303 Creative's customers with love, honesty, fairness, transparency, and excellence.

63. Ms. Smith designs unique visual and textual expression to promote the purposes, goals, services, products, organizations, events, causes, values, and messages of her clients insofar as they do not, in the sole discretion of Ms. Smith, (1) conflict with Plaintiffs' religious beliefs or (2) detract from Plaintiffs' goal of publicly honoring and glorifying God through the work they perform.

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

65. 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.

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.

67. 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.

68. When considering a potential project, Ms. Smith 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.

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

70. 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.

71. 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 Ms. Smith's Christian faith.

72. 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.

73. Ms. Smith believes that our cultural redefinition of marriage conflicts with God's design for marriage as a lifelong union between one man and one woman.

74. Ms. Smith 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.

75. Ms. Smith 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.

76. Ms. Smith is compelled by her religious beliefs to use the talents God has given her to promote God's design for marriage in a compelling way.

77. Ms. Smith is compelled by her religious beliefs to do this by expanding the scope of 303 Creative's services to include the design, creation, and publication of wedding websites.

78. Consistent with Plaintiffs' religious beliefs, the wedding websites that Plaintiffs wish to design, create, and publish will promote and celebrate the unique beauty of God's design for marriage between one man and one woman.

79. By creating wedding websites, Ms. Smith and 303 Creative will collaborate with prospective brides and grooms in order to use their unique stories as source material to express Ms. Smith's and 303 Creative's message celebrating and promoting God's design for marriage as the lifelong union of one man and one woman.

80. The collaboration between Plaintiffs and their clients who desire custom 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.

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

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

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

84. An example of the type of wedding website that Plaintiffs desire to design for their prospective clients is attached as Exhibit A.[1]

85. Plaintiffs wish to immediately announce their services for the creation of wedding websites.

86. 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.

[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.

87. This addition to the website is attached as Exhibit B.[2]

88. 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 addition to 303 Creative's webpage.

89. For example, the addition to 303 Creative's 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.

90. 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.

91. For example, the addition to 303 Creative's 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.

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

[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.

93. 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).

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

95. Unwilling to violate their sincerely held religious beliefs, but similarly unwilling to violate CADA and suffer the consequences, Plaintiffs are refraining from publishing the website referenced above and from designing, creating, and publishing wedding websites that celebrate and promote marriages between one man and one woman.

96. If not for CADA, Plaintiffs would have already made the addition to 303 Creative's webpage referenced above 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.

97. If Plaintiffs obtain the relief requested in the Complaint, they will immediately publish the addition to 303 Creative's webpage referenced above and begin work designing, creating, and publishing wedding websites.

98. There are numerous companies in the State of Colorado and across the nation that offer custom website design services, the areas of 303 Creative's specialization.

99. For example, the online directory http://sortfolio.com/ lists 245 web design companies in Denver alone and hundreds more nationwide.

100. Likewise, the online directory http://www.designfirms.org lists 114 web design companies in Colorado and 5,618 in the United States as a whole.

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

102. Ms. Smith has a contact form on 303 Creative's webpage where the public can contact her to request her graphic and website design work.

103. The parties also stipulate to the admissibility of the following exhibits:

- Exhibit A – An example of the type of wedding website that Plaintiffs desire to design for their prospective clients. The attached exhibit is a compilation of captured images of the sample wedding website, modified in size and scope to enhance readability in printed form.
- Exhibit B - A compilation of captured images of Plaintiffs' desired addition to 303 Creative's website that are modified in size and scope to enhance readability in printed form.
- Exhibit C - Colorado Civil Rights Division's Probable Cause Determination in *Charlie Craig v. Masterpiece Cakeshop, Inc.* dated March 5, 2013.
- Exhibit D - Colorado Civil Rights Division's Probable Cause Determination in *David Mullins v. Masterpiece Cakeshop, Inc.* dated March 5, 2013.
- Exhibit E - Administrative Law Judge's Initial Decision in *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc. and Jack C. Phillips* dated December 6, 2013.

- Exhibit F - Colorado Civil Rights Commission's Final Agency Order in *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc. and Jack C. Phillips* dated May 30, 2014.
- Exhibit G - Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Azucar Bakery* dated June 30, 2015.
- Exhibit H - Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Gateaux, Ltd.* dated June 30, 2015.
- Exhibit I - Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Le Bakery Sensual, Inc.* dated June 30, 2015.
- Exhibit J - Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Azucar Bakery* dated March 24, 2015. Pursuant to Colo. Rev. Stat. § 24-34-306(3), Defendants are prohibited from disclosing information gathered during the Division's investigation of a charge unless the information is disclosed as a result of the Commission noticing the matter for public hearing. Exhibit J contains information covered by this prohibition. Since Exhibit J was not disclosed by Defendants, and was referenced in the Masterpiece Cakeshop decision, Defendants stipulate to its admissibility
- Exhibit K - Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Gateaux, Ltd.* dated March 24, 2015. Pursuant to Colo. Rev. Stat. § 24-34-306(3), Defendants are prohibited from disclosing information gathered during the Division's investigation of a charge unless the information is disclosed as a result of the Commission noticing the matter for public hearing. Exhibit K contains information

covered by this prohibition. Since Exhibit K was not disclosed by Defendants, and was referenced in the Masterpiece Cakeshop decision, Defendants stipulate to its admissibility

- Exhibit L - Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Le Bakery Sensual, Inc.* dated March 24, 2015. Pursuant to Colo. Rev. Stat. § 24-34-306(3), Defendants are prohibited from disclosing information gathered during the Division's investigation of a charge unless the information is disclosed as a result of the Commission noticing the matter for public hearing. Exhibit L contains information covered by this prohibition. Since Exhibit L was not disclosed by Defendants, and was referenced in the Masterpiece Cakeshop decision, Defendants stipulate to its admissibility

Respectfully submitted this 1st day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2017, 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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Attorneys for Defendants Aragon, Chaney, Elias, Fabrizio, Hess, Lewis and Pocock

s/ Jeremy D. Tedesco

Jeremy D. Tedesco (Arizona Bar No. 023497)
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 (facsimile)
jtedesco@ADFlegal.org

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

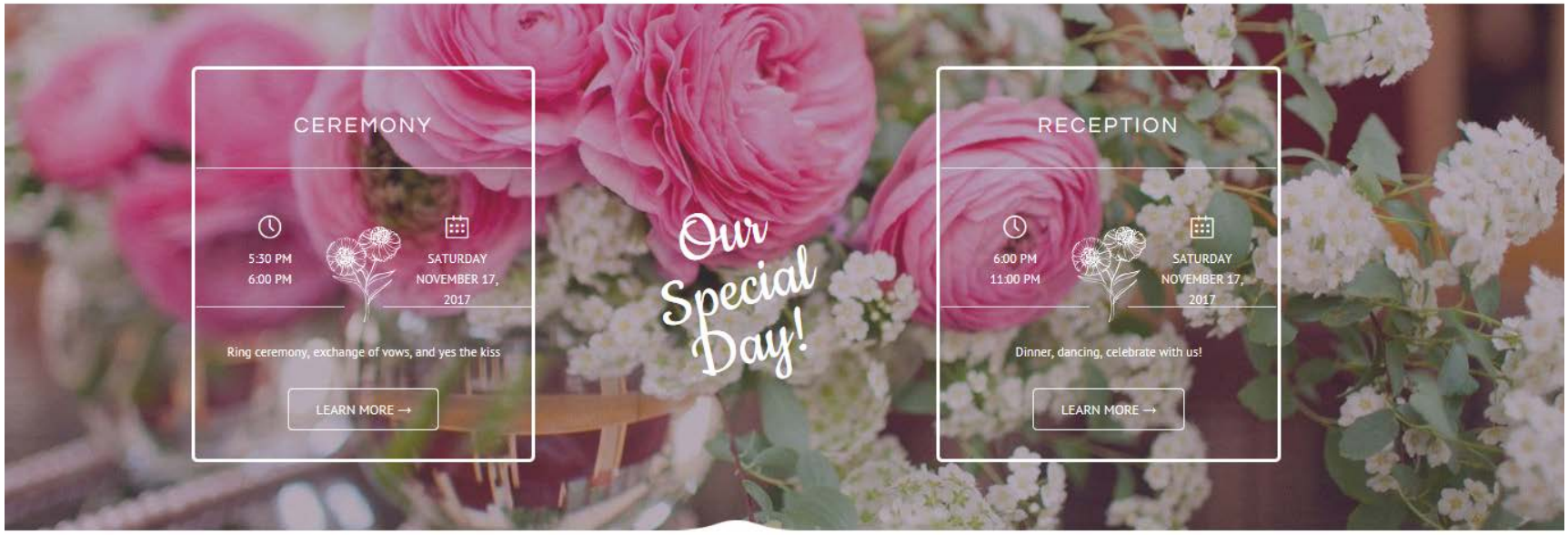
....UNTIL WE GET MARRIED!

28 MINUTES : 44 SECONDS

LUKE WILLIAMS

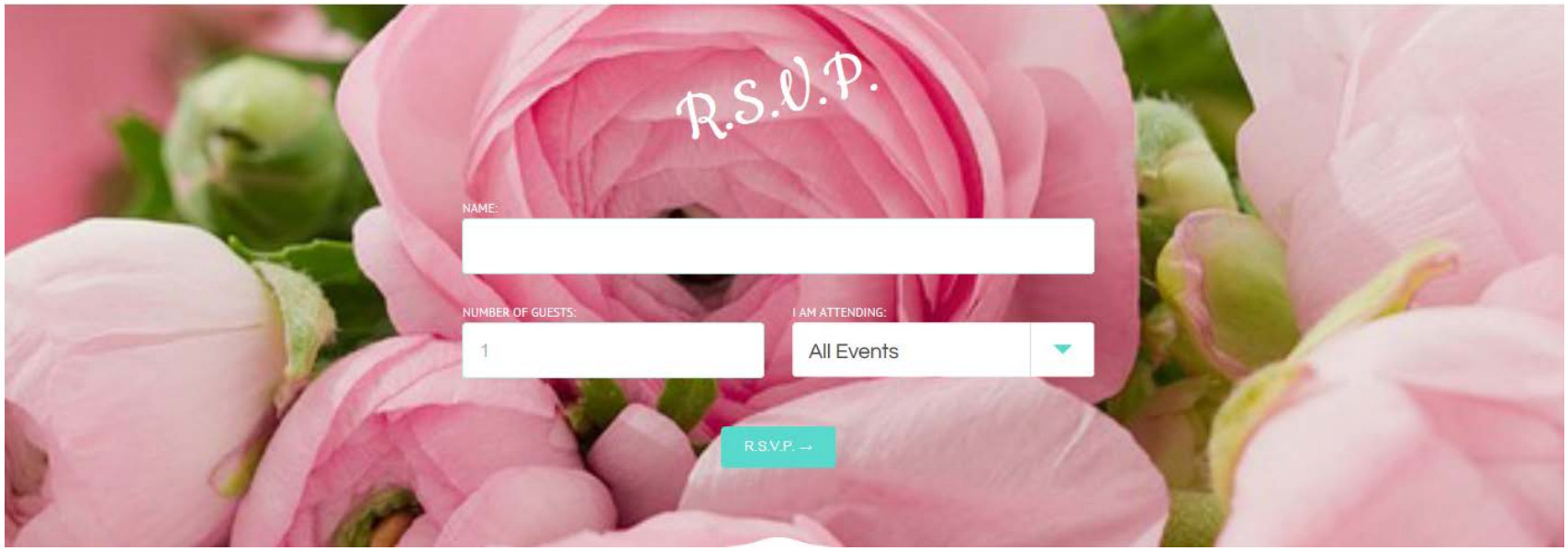
THE GROOM

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 ~



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

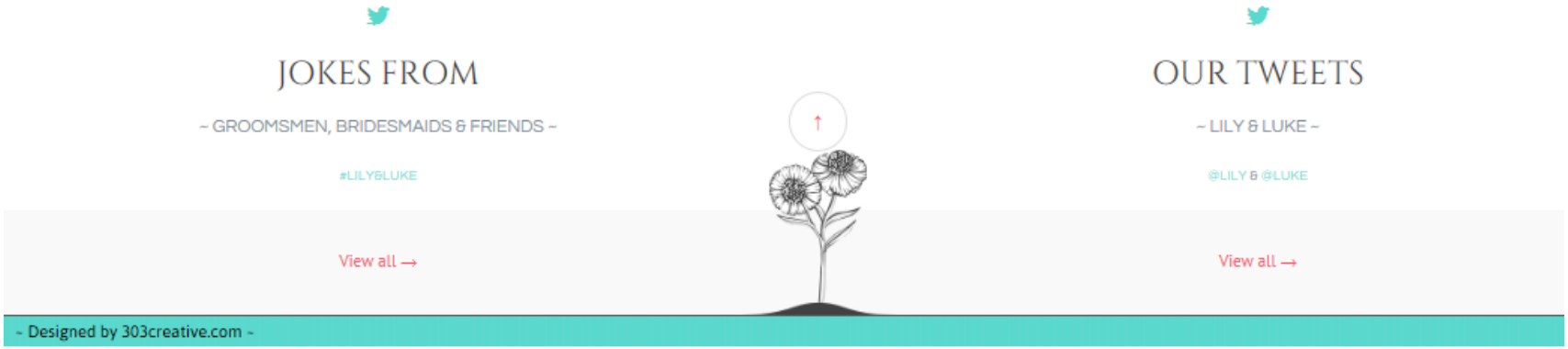
March 15, 2016

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

Posted in: Love

VIEW ALL POSTS →

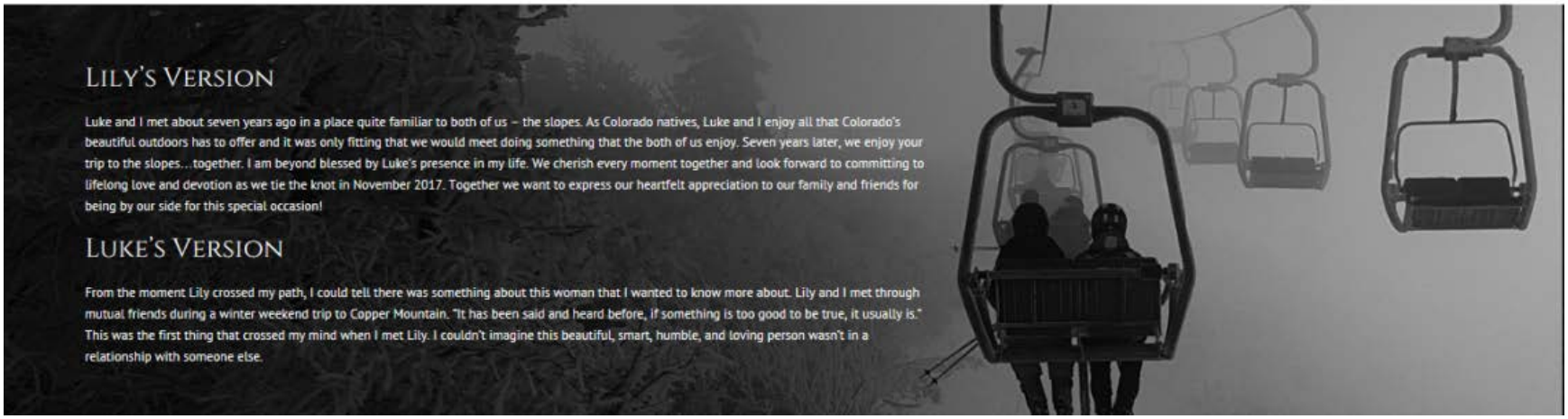
Bring your Dancing Shoes!


JOKES FROM
~ GROOMSMEN, BRIDESMAIDS & FRIENDS ~
#LILY&LUKE
View all →
OUR TWEETS
~ LILY & LUKE ~
@LILY & @LUKE
View all →
~ Designed by 303creative.com ~

LUKE Williams & LILY Robinson

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

It All Began Seven Years Ago

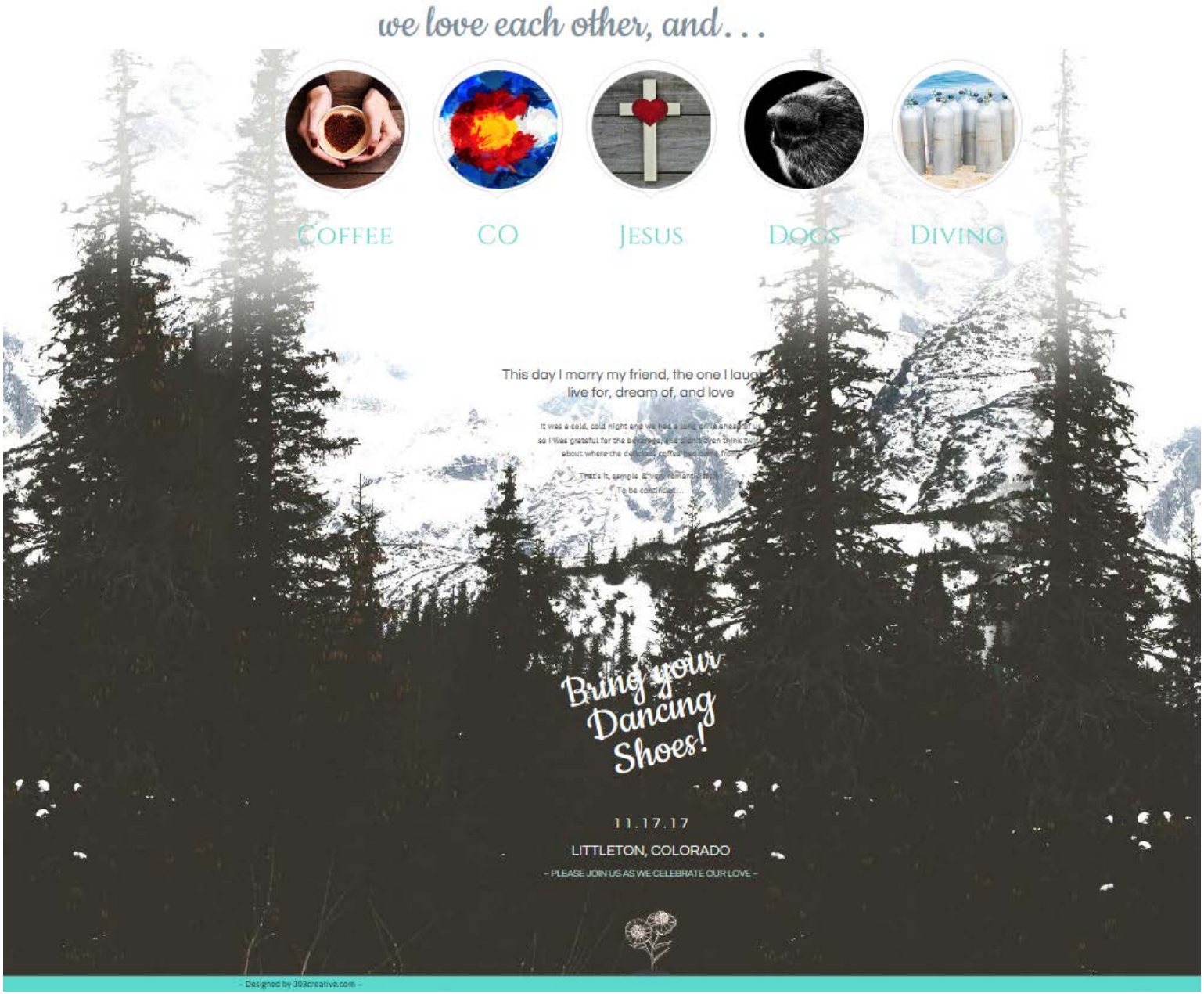


LILY'S VERSION

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
Bring your Dancing Shoes!
11.17.17
LITTLETON, COLORADO
– PLEASE JOIN US AS WE CELEBRATE OUR LOVE –
– Designed by 303creative.com –

LUKE Williams & LILY Robinson

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

- Designed by 303creative.com -

LUKE Williams & LILY Robinson

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

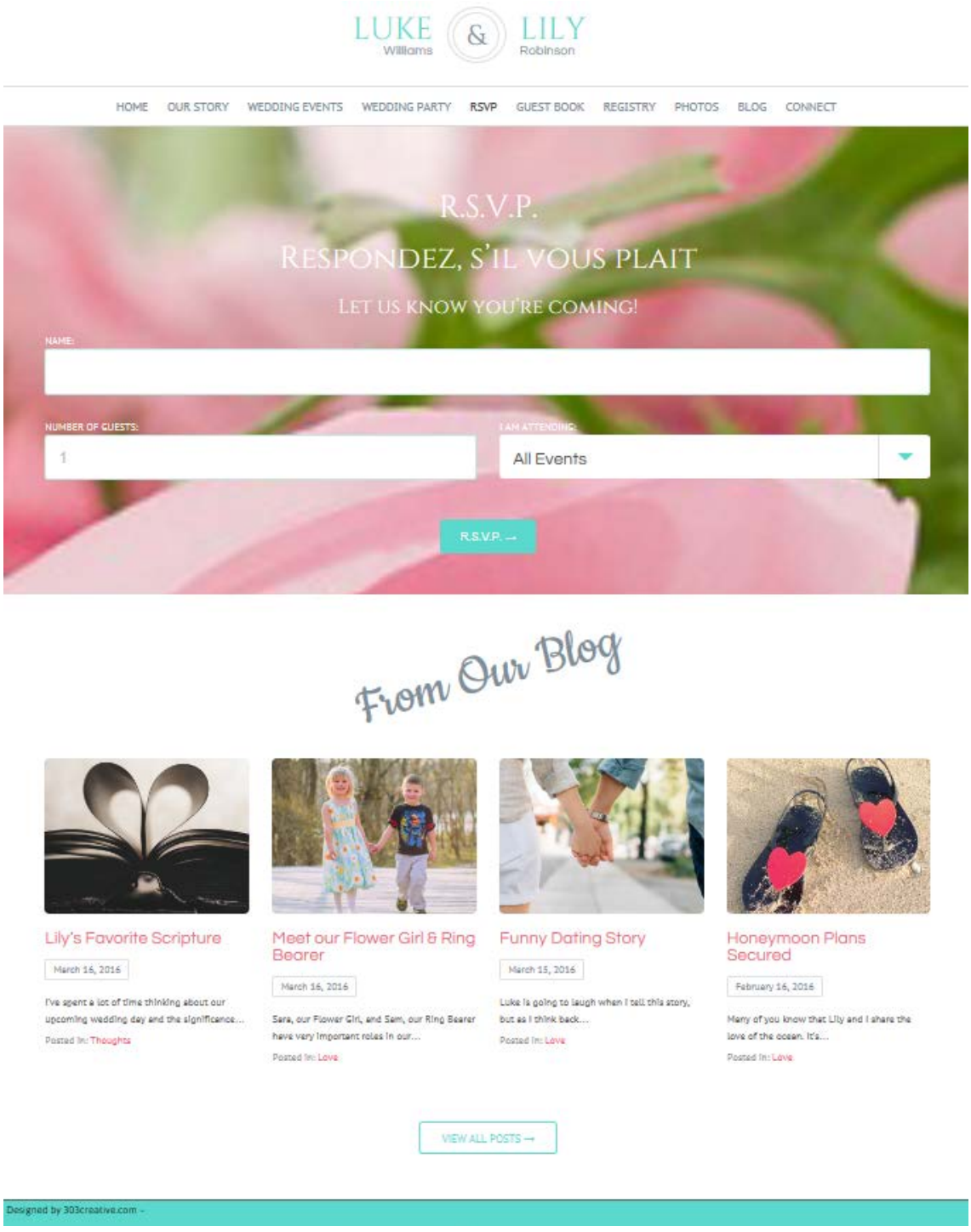
SAMUEL FINE
Groom's Uncle

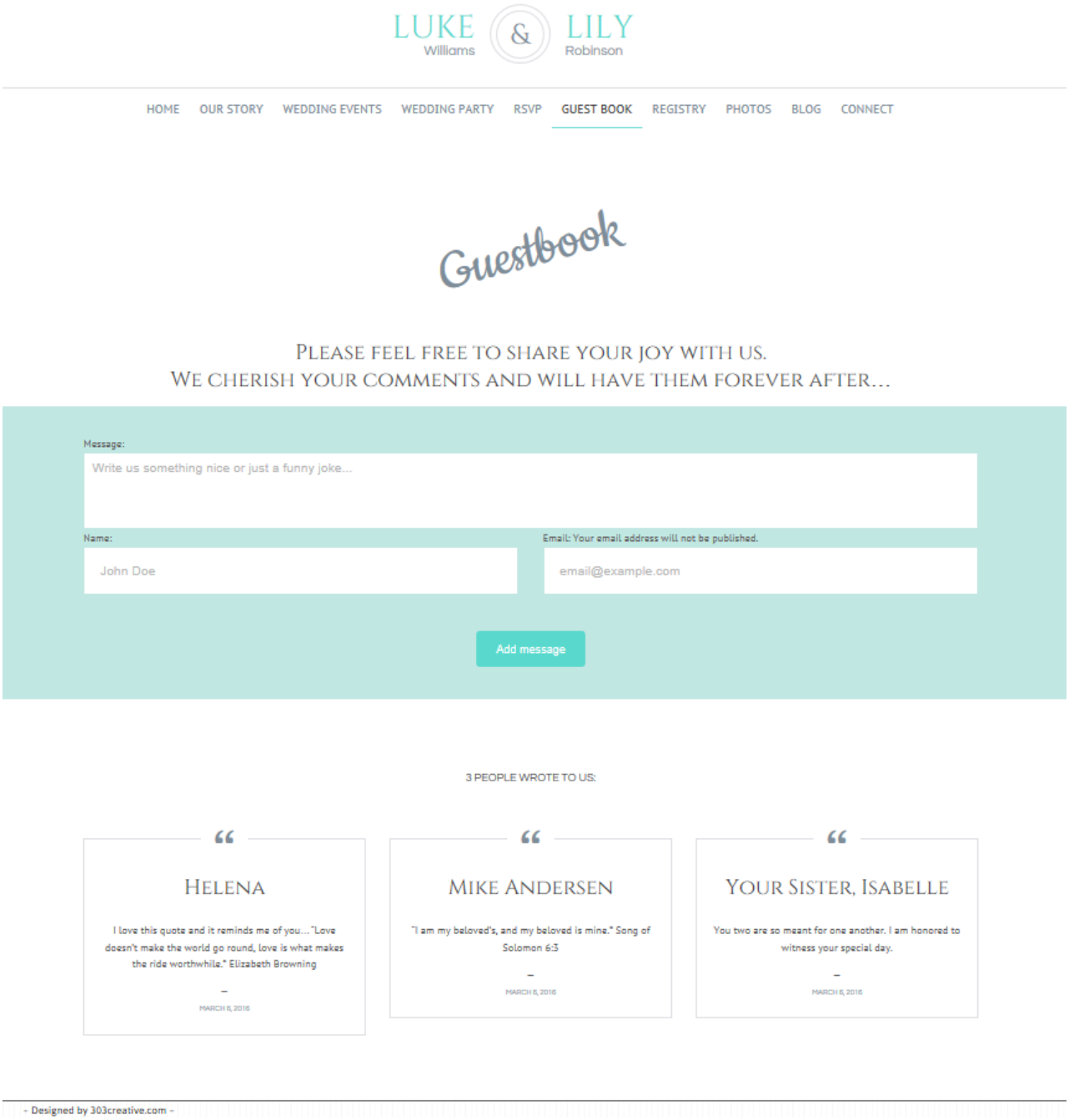
TOM SMITH
Groom's Uncle

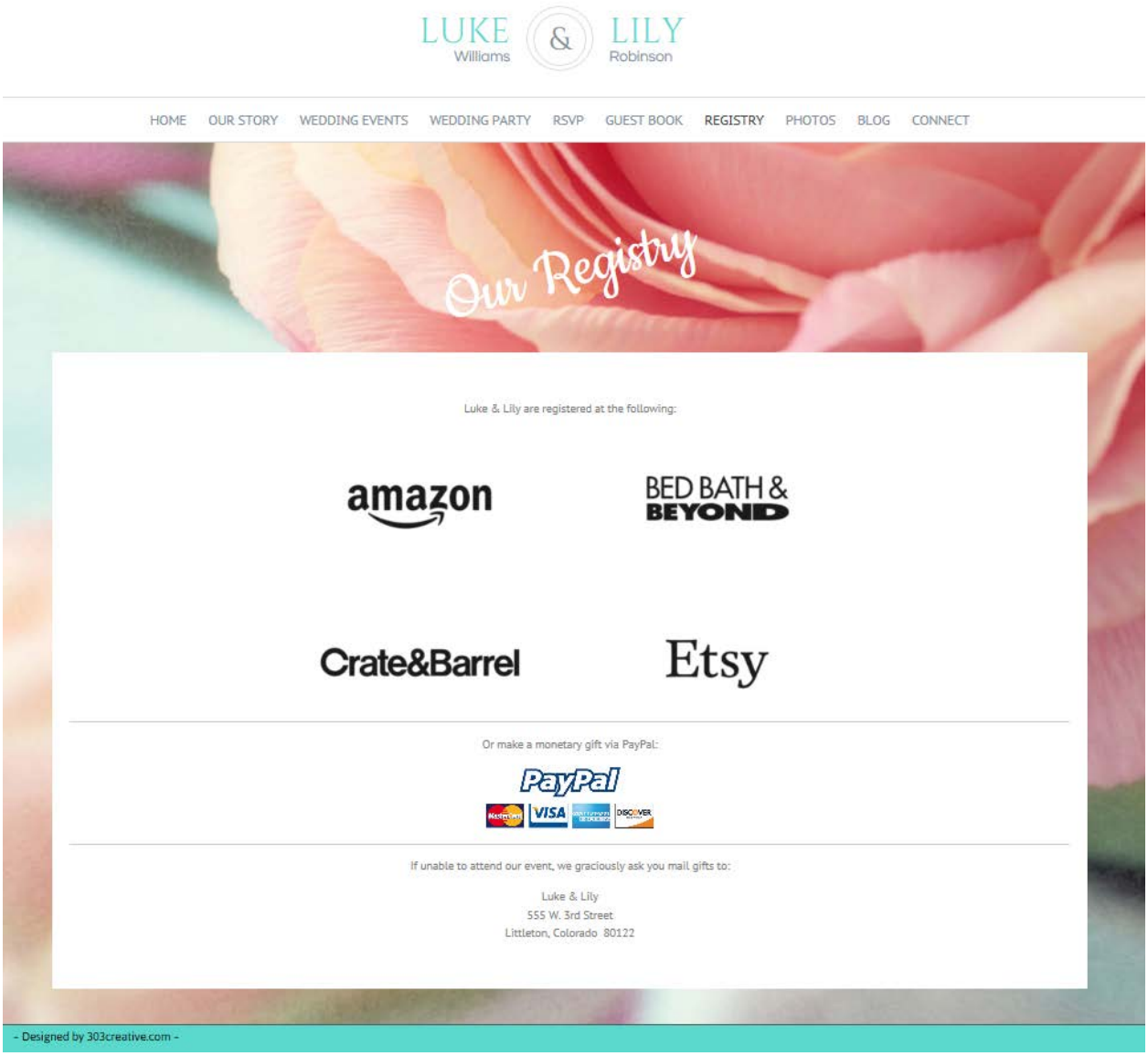
JOKES FROM
~ GROOMSMEN, BRIDESMAIDS & FRIENDS ~
#ASHLEY@MICHAELWEDDING
View all →

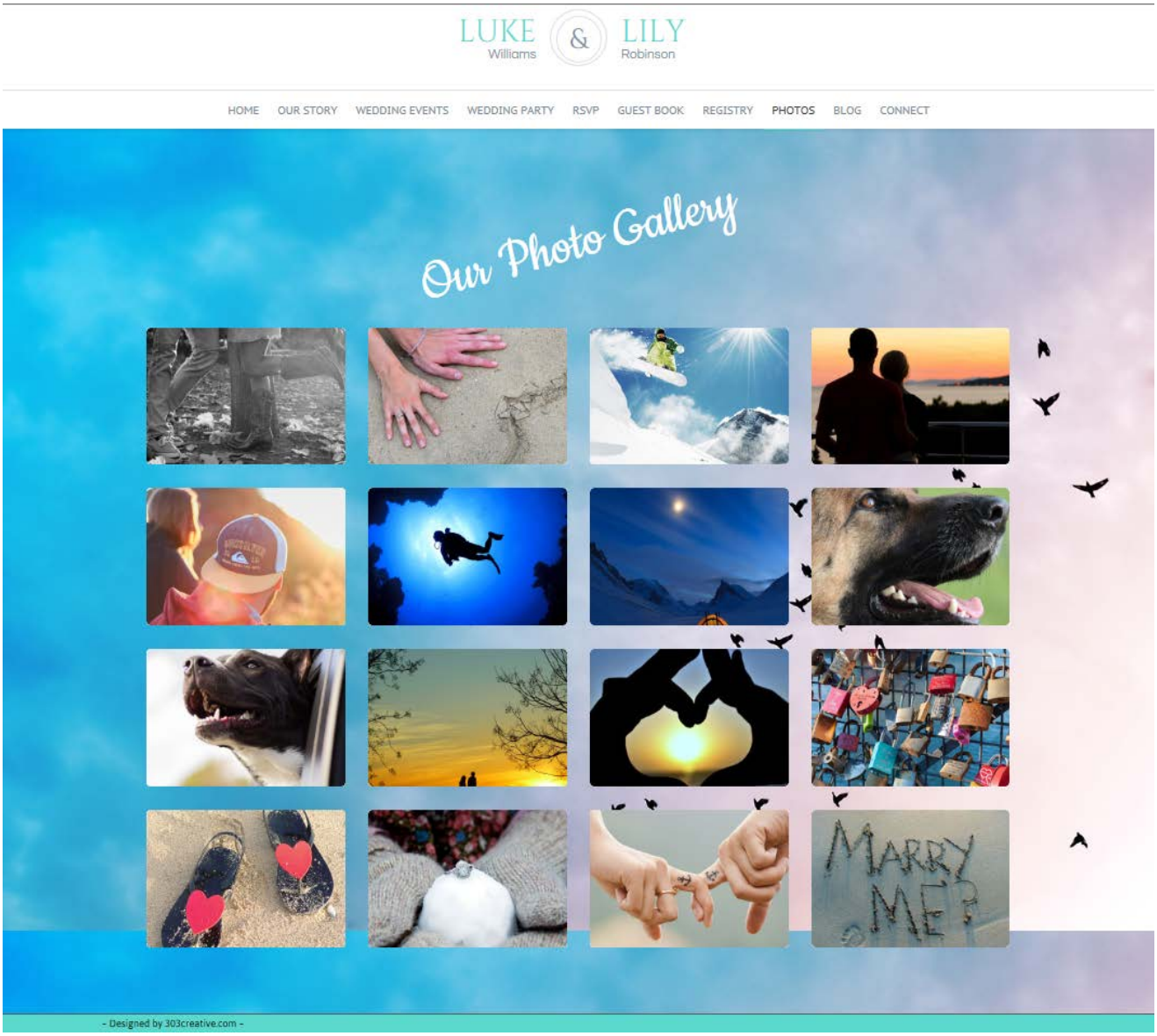
OUR TWEETS
~ ASHLEY & MICHAEL ~
@ASHLEY & @MICHAEL
View all →

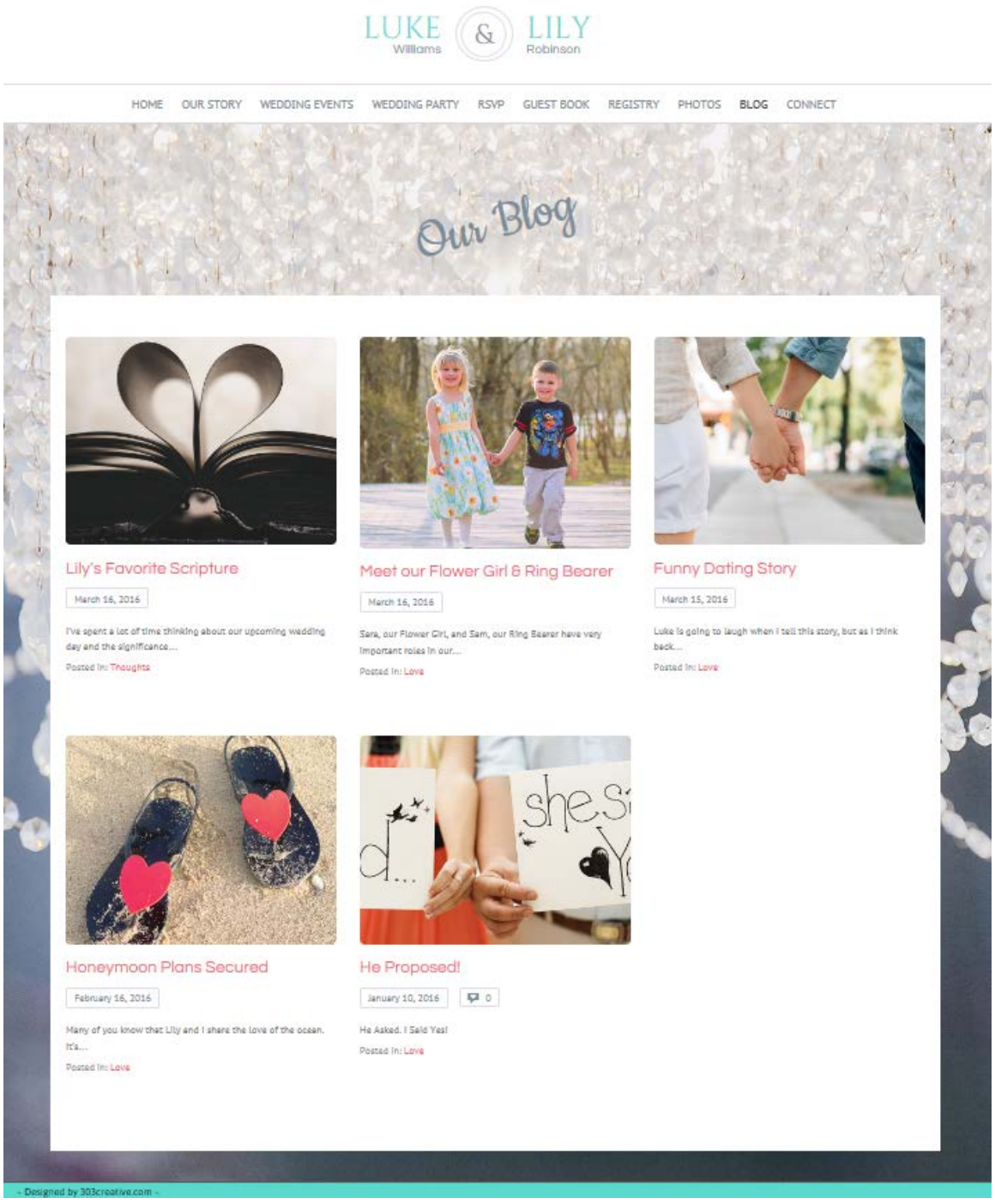
~ Designed by 303creative.com ~


LUKE & LILY
Williams Robinson
HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT
R.S.V.P.
RESPONDEZ, S'IL VOUS PLAIT
LET US KNOW YOU'RE COMING!
NAME:
NUMBER OF GUESTS:
1
I AM ATTENDING:
All Events
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
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
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
VIEW ALL POSTS →
Designed by 303creative.com


LUKE & LILY
Williams Robinson
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
- Designed by 303creative.com -


LUKE & LILY
Williams Robinson
HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT
Our Registry
Luke & Lily are registered at the following:
amazon
BED BATH & BEYOND
Crate&Barrel
Etsy
Or make a monetary gift via PayPal:
PayPal
If unable to attend our event, we graciously ask you mail gifts to:
Luke & Lily
555 W. 3rd Street
Littleton, Colorado 80122
- Designed by 303creative.com -


LUKE & LILY
Williams
Robinson
HOME
OUR STORY
WEDDING EVENTS
WEDDING PARTY
RSVP
GUEST BOOK
REGISTRY
PHOTOS
BLOG
CONNECT
Our Photo Gallery
MARRY ME?
- Designed by 303creative.com -


LUKE & LILY
Williams Robinson
HOME OUR STORY WEDDING EVENTS WEDDING PARTY RSVP GUEST BOOK REGISTRY PHOTOS BLOG CONNECT
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
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
He Proposed!
January 10, 2016
0
He Asked. I Said Yes!
Posted In: Love
- Designed by 303creative.com -

LUKE Williams & LILY Robinson

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

LILY'S FAVORITE SCRIPTURE

I've spent a lot of time thinking about our upcoming wedding day and the significance it has for me spiritually. I'm reminded of a verse 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 NASB

Thoughts

Like Tweet +1 Pin it

LUKE Williams & LILY Robinson

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

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

Like Tweet +1 Pin it

– Designed by 303creative.com –

LUKE Williams & LILY Robinson

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

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

Like Tweet +1 Pin it

signed by 303creative.com -

LUKE Williams & LILY Robinson

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

Like Tweet +1 Pin it

Designed by 303creative.com -

LUKE Williams & LILY Robinson

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

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

– Designed by 3Dcreative.com –

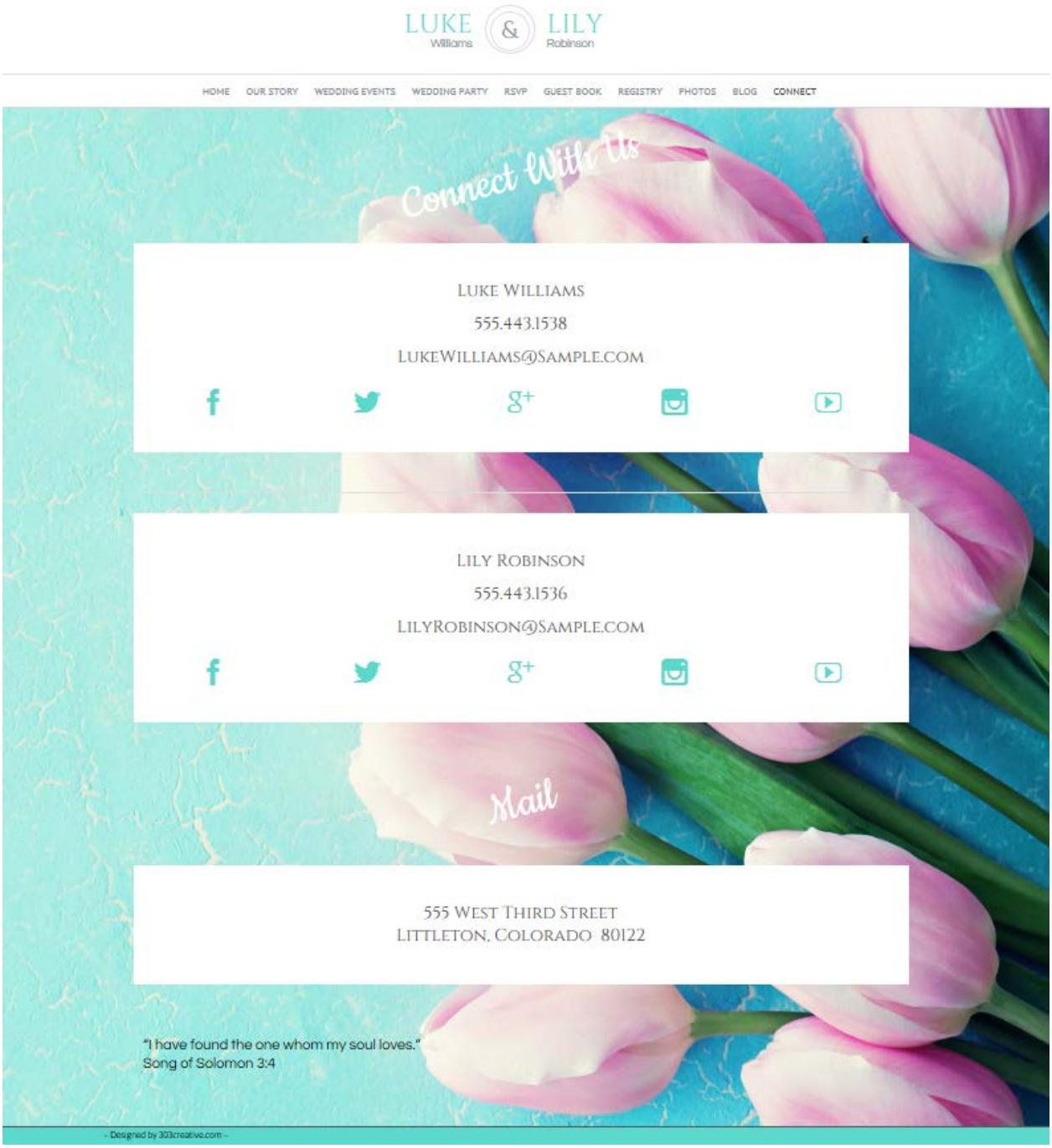
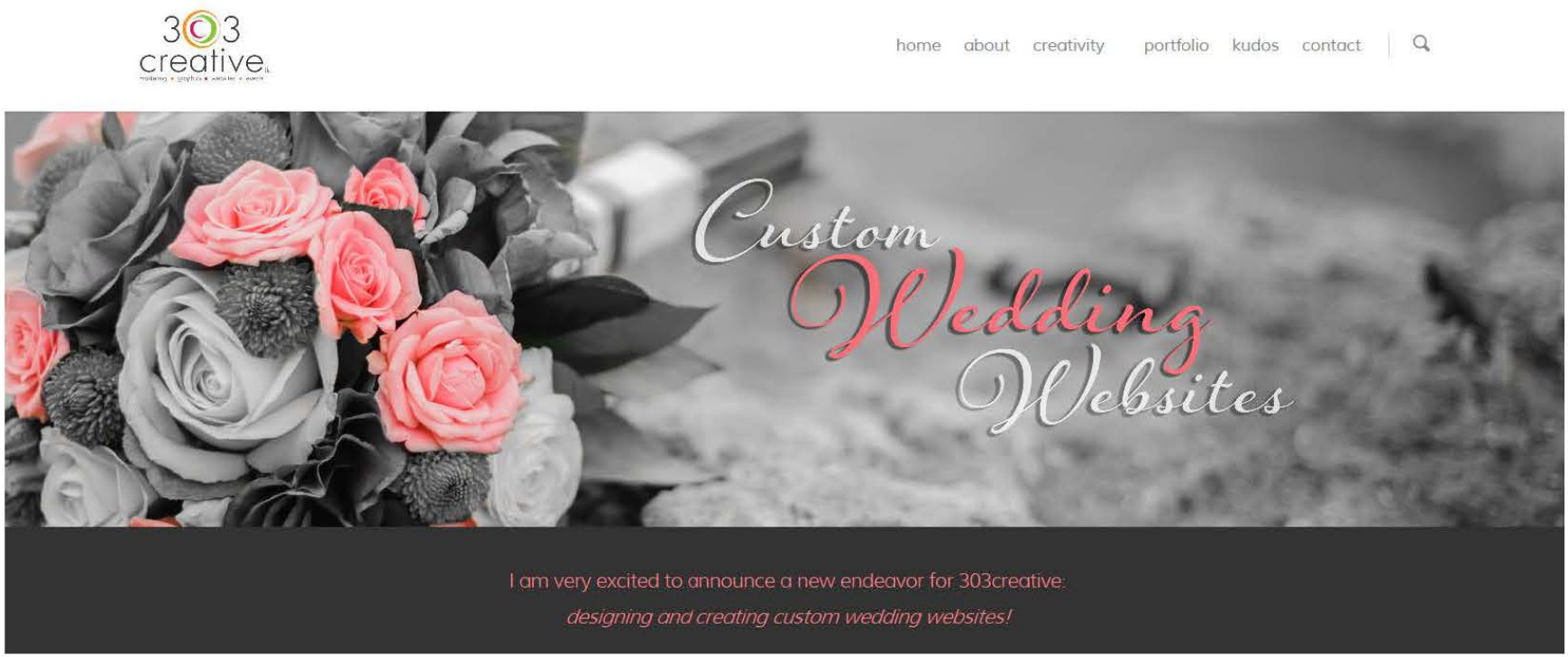
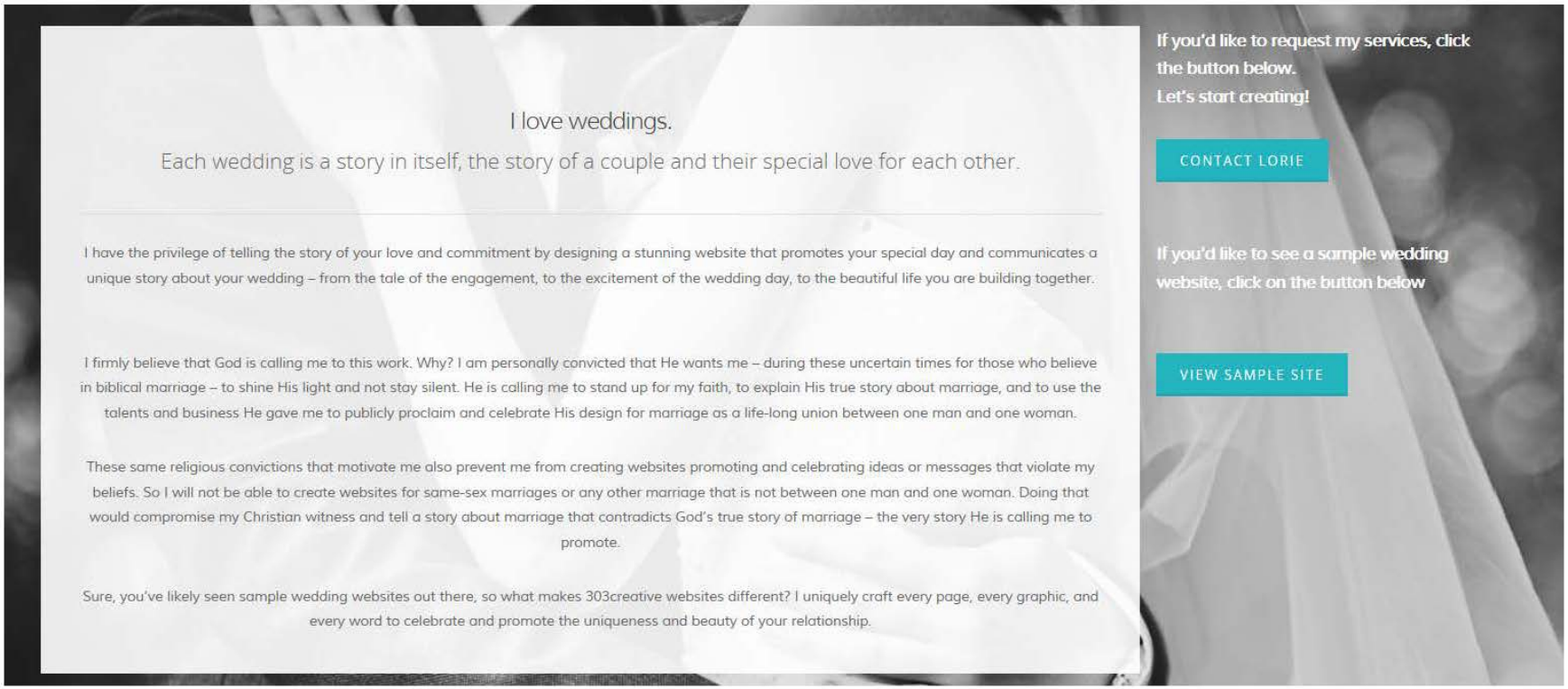

LUKE & LILY
Williams
Robinson
HOME
OUR STORY
WEDDING EVENTS
WEDDING PARTY
RSVP
GUEST BOOK
REGISTRY
PHOTOS
BLOG
CONNECT
Connect With Us
LUKE WILLIAMS
555.443.1538
LUKEWILLIAMS@SAMPLE.COM
LILY ROBINSON
555.443.1536
LILYROBINSON@SAMPLE.COM
Mail
555 WEST THIRD STREET
LITTLETON, COLORADO 80122
"I have found the one whom my soul loves."
Song of Solomon 3:4
- Designed by 303creative.com -

EXHIBIT B


303 creative
home about creativity portfolio kudos contact
Custom Wedding Websites
I am very excited to announce a new endeavor for 303creative:
designing and creating custom wedding websites!


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!

EXHIBIT C

Dora
Department of Regulatory Agencies

John W Hickenlooper
Governor

Barbara J. Kelley
Executive
Director

Division of Civil Rights
Steven Chavez
Director of Division of Civil Rights

1560 Broadway, Suite 1050
Denver, CO 80202
(303) 894-2997
(303) 894-7830 (fax)
(800) 262-4845 (toll free)

200 West "B" Street, Suite 234
Pueblo, CO 81003
(719) 542-1298
(303) 869-0498 (fax)

222 S. 6th Street, Suite 301
Grand Junction, CO 81505
(970) 248-7303
(970) 248-7304
(970) 242-1262 (fax)

http://www.dora.state.co.us/civil-rights

Charge No. P20130008X

Charlie Craig
1401 E. Girard Pl , #9-135
Englewood, CO 80113 — Charging Party

Masterpiece Cakeshop
3355 S. Wadsworth Blvd.
Lakewood, CO 80227 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is sufficient evidence to support the Charging Party's claim of denial of full and equal enjoyment of a place of public accommodation based on his sexual orientation. As such, a Probable Cause determination hereby is issued.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about July 19, 2012, the Respondent, a place of public accommodation, denied him the full and equal enjoyment of a place of accommodation on the basis of his sexual orientation (gay). The Respondent avers that its standard business practice is to deny service to same-sex couples based on religious beliefs.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P 2d 288 (Colo. 2000).

The Respondent is a bakery that provides cakes and baked goods to the public, and operates within the state of Colorado.

The Charging Party states that on or about July 19, 2012, he visited the Respondent's place of business for the purpose of ordering a wedding cake with his significant other, David Mullins ("Mullins"), and his mother Deborah Munn ("Munn"). The Charging Party and his partner planned to travel to Massachusetts to marry and intended to have a wedding reception in Denver upon their return. The Charging Party and his significant other were attended to by the Respondent's Owner, Jack Phillips ("Phillips") The Charging Party asserts that while viewing photos of the available wedding cakes, he informed the owner that the cake was for him and his significant other. The Charging Party states that in response, Phillips replied that his standard business practice is to deny service to same-sex couples based on his religious beliefs. The Charging Party states that based on Phillips response and refusal to provide service, the group left the Respondent's place of business.

The Charging Party states that on July 20, 2012, in an effort to obtain more information as to why her son was refused service, Munn telephoned Phillips. During this telephone conversation, Phillips stated that "because he is a Christian, he was opposed to making cakes for same-sex weddings for any same-sex couples."

The record reflects that Phillips subsequently commented to various news organizations, that he had turned approximately six same-sex couples away for this same reason. The Respondent has not argued that it is a business that is principally used for religious purposes.

Respondent Owner Jack Phillips ("Phillips") states that on July 19, 2012, the Charging Party, Mullins, and Munn visited his bakery and stated that they wished to purchase a wedding cake. Phillips asserts that he informed the Charging Party that he does not create wedding cakes for same-sex weddings. According to Phillips, this interaction lasted no more than 20 seconds. Phillips states that the Charging Party, Mullins, and Munn subsequently exited the Respondent's place of business. The Respondents avers that on July 20, 2012, during a conversation with Munn, he informed her that he refused to create a wedding cake for her son based on his religious beliefs and because Colorado does not recognize same-sex marriages.

The Respondent states that the aforementioned situation has occurred on approximately five or six past occasions. The Respondent contends that in those situations, he advised potential customers that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. Respondent owner Phillips adds that he told the Charging Party and his

partner that he could create birthday cakes, shower cakes, or any other cakes for them. The Respondent asserts that this decision rested in part based on the fact that the state of Colorado does not recognize same sex marriages.

In an affidavit provided by the Charging Party during the Division's investigation, Stephanie Schmalz ("S. Schmalz") states that on January 16, 2012, she and her partner Jeanine Schmalz ("J. Schmalz") visited the Respondent's place of business to purchase cupcakes for their family commitment ceremony. S. Schmalz states that when she confirmed that the cupcakes were to be part of a celebration for her and her partner, the Respondent's female representative stated that she would not be able to place the order because "the Respondent had a policy of not selling baked goods to same-sex couples for this type of event." Following her departure from the Respondent's place of business, S. Schmalz telephoned the Respondent to clarify its policies. During this telephone conversation, S. Schmalz learned that the female representative was an owner of the business and that it was the Respondent's stated policy not to provide cakes or other baked goods to same-sex couples for wedding-type celebrations.

S. Schmalz subsequently posted a review on the website Yelp describing her experiences with the Respondent. An individual identifying himself as "Jack P. of Masterpiece Cakeshop" posted a reply to Schmalz's review, in which he stated that "...a wedding for [gays and lesbians] is something that, so far, not even the State of Colorado will allow" and did not dispute that he refuses to serve gay and lesbian couples planning weddings or commitment celebrations.

S. Schmalz states that after learning of the Respondent's policy, she later contacted the Respondent's place of business and spoke to Phillips. During this conversation, S. Schmalz claimed to be a dog breeder and stated that she planned to host a "dog wedding" between one of her dogs and a neighbor's dog. Phillips did not object to preparing a cake for S. Schmalz's "dog wedding."

In an affidavit provided by the Charging Party during the Division's investigation, Samantha Saggio ("Saggio") states that on May 19, 2012, she visited the Respondent's place of business with her partner, Shann Chavez ("Chavez") to look at cakes for their planned commitment ceremony. Saggio states that upon learning that the cake would be for the two women, the Respondent's female representative stated that the Respondent would be unable to provide a cake because "according to the company, Saggio and Chavez were doing something 'illegal.'"

In an affidavit provided by the Charging Party during the Division's investigation, Katie Allen ("Allen") and Alison Sandlin ("Sandlin") state that on August 6, 2005, they visited the Respondent's place of business to taste cakes for their planned commitment ceremony. Allen states that upon learning of the women's intent to wed one another, the Respondent's female representative stated, "We can't do it then" and explained that the Respondent had established a policy of not taking cake orders for same-sex weddings, "because the owners believed in the word of Jesus."

Allen and Sandlin state that they later spoke directly with Phillips. During this conversation, Phillips stated that "he is not willing to make a cake for a same-sex commitment ceremony, just as he would not be willing to make a pedophile cake."

Discriminatory Denial of Full and Equal Enjoyment of Services – Sexual Orientation (gay)

To prevail on a claim of discriminatory denial of full and equal enjoyment of services, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought goods, services, benefits or privileges from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied a type of service usually offered by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his sexual orientation. The Charging Party visited the Respondent's place of business for the purpose of ordering a wedding cake for his wedding reception. The evidence indicates that the Charging Party and his partner were otherwise qualified to receive services or goods from the Respondent's bakery. During this visit, the Respondent informed the Charging Party that his standard business practice is to deny baking wedding cakes to same-sex couples based on his religious beliefs. The evidence shows that on multiple occasions, the Respondent turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. The Respondent's representatives stated that it would be unable to provide a cake because "according to the company, [the potential same-sex customers] were doing something 'illegal,'" and "because the owners believed in the word of Jesus." The Respondent indicates it will bake other goods for same sex couples such as birthday cakes, shower cakes or any other type of cake, but not a wedding cake. As such, the evidence shows that the Respondent refused to allow the Charging Party and his partner to patronize its business in order to purchase a wedding cake under circumstances that give rise to an inference of unlawful discrimination based on the Charging Party's sexual orientation.

Based on the evidence contained above, I determine that the Respondent has violated C.R.S. 24-34-402, as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(II), as re-enacted, the Parties hereby are ordered by the Director to proceed to attempt amicable resolution of these charges by compulsory mediation. The Parties will be contacted by the agency to schedule this process.

On Behalf of the Colorado Civil Rights Division

Steven Chavez, Director
or Authorized Designee

3/5/2013
Date

CERTIFICATE OF MAILING

This is to certify that on March 7, 2013 a true and exact copy of the Closing Action of the above-referenced charge was deposited in the United States mail, postage prepaid, addressed to the parties listed below.

CCRD #
P20130008X

Charlie Craig
1401 E. Girard Pl, #9-135
ENGLEWOOD, CO 80113

Sara Rich
ACLU Foundation of Colorado
303 E. 17th Ave., Ste. 350
DENVER, CO 80203

Masterpiece Cakeshop
3355 S. Wadsworth Boulevard
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Nicolle Martin
7175 W. Jefferson Ave., Ste 4000
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EXHIBIT D

Dora
Department of Regulatory Agencies

John W. Hickenlooper
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Barbara J. Kelley
Executive
Director

Division of Civil Rights
Steven Chavez
Director of Division of Civil Rights

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222 S 6th Street, Suite 321
Grand Junction, CO 81505
(970) 248-7363
(970) 248-7384
(970) 242 1262 (fax)

Charge No. P20130007X

David Mullins
1401 E. Girard Pl., #9-135
Englewood, CO 80113 — Charging Party

Masterpiece Cakeshop
3355 S. Wadsworth Blvd.
Lakewood, CO 80227 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is sufficient evidence to support the Charging Party's claim of denial of full and equal enjoyment of a place of public accommodation based on his sexual orientation. As such, a **Probable Cause** determination hereby is issued.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about July 19, 2012, the Respondent, a place of public accommodation, denied him the full and equal enjoyment of a place of accommodation on the basis of his sexual orientation (gay). The Respondent avers that its standard business practice is to deny service to same-sex couples based on religious beliefs.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery that provides cakes and baked goods to the public, and operates within the state of Colorado.

The Charging Party states that on or about July 19, 2012, he visited the Respondent's place of business for the purpose of ordering a wedding cake with his significant other, Charlie Craig ("Craig"), and his mother Deborah Munn ("Munn"). The Charging Party and his partner planned to travel to Massachusetts to marry and intended to have a wedding reception in Denver upon their return. The Charging Party and his significant other were attended to by the Respondent's Owner, Jack Phillips ("Phillips"). The Charging Party asserts that while viewing photos of the available wedding cakes, he informed the owner that the cake was for him and his significant other. The Charging Party states that in response, Phillips replied that his standard business practice is to deny service to same-sex couples based on his religious beliefs. The Charging Party states that based on Phillips response and refusal to provide service, the group left the Respondent's place of business.

The Charging Party states that on July 20, 2012, in an effort to obtain more information as to why her son was refused service, Munn telephoned Phillips. During this telephone conversation, Phillips stated that "because he is a Christian, he was opposed to making cakes for same-sex weddings for any same-sex couples."

The record reflects that Phillips subsequently commented to various news organizations, that he had turned approximately six same-sex couples away for this same reason. The Respondent has not argued that it is a business that is principally used for religious purposes.

Respondent Owner Jack Phillips ("Phillips") states that on July 19, 2012, the Charging Party, Craig, and Munn visited his bakery and stated that they wished to purchase a wedding cake. Phillips asserts that he informed the Charging Party that he does not create wedding cakes for same-sex weddings. According to Phillips, this interaction lasted no more than 20 seconds. Phillips states that the Charging Party, Craig, and Munn subsequently exited the Respondent's place of business. The Respondents avers that on July 20, 2012, during a conversation with Munn, he informed her that he refused to create a wedding cake for her son based on his religious beliefs and because Colorado does not recognize same-sex marriages.

The Respondent states that the aforementioned situation has occurred on approximately five or six past occasions. The Respondent contends that in those situations, he advised potential customers that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. He adds that he told the Charging Party and his partner that he "could

create birthday cakes, shower cakes, or any other cakes." The Respondent asserts that this decision rested in part based on the fact that the state of Colorado does not recognize same sex marriages.

In an affidavit provided by the Charging Party during the Division's investigation, Stephanie Schmalz ("S. Schmalz") states that on January 16, 2012, she and her partner Jeanine Schmalz ("J. Schmalz") visited the Respondent's place of business to purchase cupcakes for their family commitment ceremony. S. Schmalz states that when she confirmed that the cupcakes were to be part of a celebration for her and her partner, the Respondent's female representative stated that she would not be able to place the order because "the Respondent had a policy of not selling baked goods to same-sex couples for this type of event." Following her departure from the Respondent's place of business, S. Schmalz telephoned the Respondent to clarify its policies. During this telephone conversation, S. Schmalz learned that the female representative was an owner of the business and that it was the Respondent's stated policy not to provide cakes or other baked goods to same-sex couples for wedding-type celebrations.

S. Schmalz subsequently posted a review on the website Yelp describing her experiences with the Respondent. An individual identifying himself as "Jack P. of Masterpiece Cakeshop" posted a reply to Schmalz's review, in which he stated that ".. a wedding for [gays and lesbians] is something that, so far, not even the State of Colorado will allow" and did not dispute that he refuses to serve gay and lesbian couples planning weddings or commitment celebrations.

S. Schmalz states that after learning of the Respondent's policy, she later contacted the Respondent's place of business and spoke to Phillips. During this conversation, S. Schmalz claimed to be a dog breeder and stated that she planned to host a "dog wedding" between one of her dogs and a neighbor's dog. Phillips did not object to preparing a cake for S. Schmalz's "dog wedding."

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In an affidavit provided by the Charging Party during the Division's investigation, Katie Allen ("Allen") and Alison Sandlin ("Sandlin") state that on August 6, 2005, they visited the Respondent's place of business to taste cakes for their planned commitment ceremony. Allen states that upon learning of the women's intent to wed one another, the Respondent's female representative stated, "We can't do it then" and explained that the Respondent had established a policy of not taking cake orders for same-sex weddings, "because the owners believed in the word of Jesus."

Allen and Sandlin state that they later spoke directly with Phillips. During this conversation, Phillips stated that "he is not willing to make a cake for a same-sex commitment ceremony, just as he would not be willing to make a pedophile cake."

Discriminatory Denial of Full and Equal Enjoyment of Services – Sexual Orientation (gay)

To prevail on a claim of discriminatory denial of full and equal enjoyment of services, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought goods, services, benefits or privileges from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied a type of service usually offered by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his sexual orientation. The Charging Party visited the Respondent's place of business for the purpose of ordering a wedding cake for his wedding reception. The evidence indicates that the Charging Party and his partner were otherwise qualified to receive services or goods from the Respondent's bakery. During this visit, the Respondent informed the Charging Party that his standard business practice is to deny baking wedding cakes to same-sex couples based on his religious beliefs. The evidence shows that on multiple occasions, the Respondent turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs The Respondent's representatives stated that it would be unable to provide a cake because "according to the company, [the potential same-sex customers] were doing something 'illegal,'" and "because the owners believed in the word of Jesus." The Respondent indicates it will bake other goods for same sex couples such as birthday cakes, shower cakes or any other type of cake, but not a wedding cake. As such, the evidence shows that the Respondent refused to allow the Charging Party and his partner to patronize its business in order to purchase a wedding cake under circumstances that give rise to an inference of unlawful discrimination based on the Charging Party's sexual orientation.

Based on the evidence contained above, I determine that the Respondent has violated C.R.S. 24-34-402, as re-enacted

In accordance with C.R.S. 24-34-306(2)(b)(II), as re-enacted, the Parties hereby are ordered by the Director to proceed to attempt amicable resolution of these charges by compulsory mediation. The Parties will be contacted by the agency to schedule this process

On Behalf of the Colorado Civil Rights Division

Steven Chavez, Director
or Authorized Designee

3/5/2013
Date

4

CERTIFICATE OF MAILING

This is to certify that on March 7, 2013 a true and exact copy of the Closing Action of the above-referenced charge was deposited in the United States mail, postage prepaid, addressed to the parties listed below.

CCRD #
P20130007X

David Mullins
1401 E. Girard Pl, #9-135
ENGLEWOOD, CO 80113

Sara Rich
ACLU Foundation of Colorado
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EXHIBIT E

STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
CHARLIE CRAIG and DAVID MULLINS, Complainants, vs. **MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS,** Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **CR 2013-0008**

INITIAL DECISION
GRANTING COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT
AND DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Complainants allege that Respondents discriminated against them due to their sexual orientation by refusing to sell them a wedding cake in violation of Colorado's anti-discrimination law. The material facts are not in dispute and both parties filed motions for summary judgment. Following extensive briefing by both sides, oral argument was held before Administrative Law Judge (ALJ) Robert Spencer at the Office of Administrative Courts on December 4, 2013. Complainants were represented by Paula Greisen, Esq., and Dana Menzel, Esq., King & Greisen, LLC; Amanda Goad, Esq., American Civil Liberties Union Foundation LGBT & AIDS Project; and Sara Rich, Esq., and Mark Silverstein, Esq., American Civil Liberties Union Foundation of Colorado. Respondents were represented by Nicolle H. Martin, Esq.; Natalie L. Decker, Esq., The Law Office of Natalie L. Decker, LLC; and Michael J. Norton, Esq., Alliance Defending Freedom. Counsel in Support of the Complaint was Stacy L. Worthington, Senior Assistant Attorney General.

Case Summary

Complainants, a gay couple, allege that on July 19, 2012, Jack C. Phillips, owner of Masterpiece Cakeshop, Inc., refused to sell them a wedding cake because of their sexual orientation. Complainants filed charges of discrimination with the Colorado Civil Rights Commission, which in turn found probable cause to credit the allegations of discrimination. On May 31, 2013, Counsel in Support of the Complaint filed a Formal Complaint with the Office of Administrative Courts alleging that Respondents discriminated against Complainants in a place of public accommodation due to sexual orientation, in violation of § 24-34-601(2), C.R.S. Counsel in Support of the Complaint seeks an order directing Respondents to cease and desist from further discrimination,

as well as other administrative remedies.[1]

Hearing began on September 26, 2013 and was continued until December 4, 2013 to give the parties time to complete discovery and fully brief cross-motions for summary judgment. Complainants and Counsel in Support of the Complaint contend that because there is no dispute that Masterpiece Cakeshop is a place of public accommodation, or that Respondents refused to sell Complainants a wedding cake for their same-sex wedding, that Respondents violated § 24-34-601(2) as a matter of law. Respondents do not dispute that they refused to sell Complainants a cake for their same-sex wedding, but contend that their refusal was based solely upon a deeply held religious conviction that marriage is only between a man and a woman, and was not due to bias against Complainants' sexual orientation. Therefore, Respondents' conduct did not violate the public accommodation statute which only prohibits discrimination "because of . . . sexual orientation." Furthermore, Respondents contend that application of the law to them under the circumstances of this case would violate their rights of free speech and free exercise of religion, as guaranteed by the First Amendment of the U.S. Constitution and Article II, sections 4 and 10 of the Colorado Constitution.

Because it appeared that the essential facts were not in dispute and that the case could be resolved as a matter of law, the ALJ vacated the merits hearing of December 4, 2013 in favor of a hearing upon the cross-motions for summary judgment. For the reasons explained below, the ALJ now grants Complainants' motion for summary judgment and denies Respondents' motion.

Findings of Fact

The following facts are undisputed:

1. Phillips owns and operates a bakery located in Lakewood, Colorado known as Masterpiece Cakeshop, Inc. Phillips and Masterpiece Cakeshop are collectively referred to herein as Respondents.

2. Masterpiece Cakeshop is a place of public accommodation within the meaning of § 24-34-601(1), C.R.S.

3. Among other baked products, Respondents create and sell wedding cakes.

4. On July 19, 2012, Complainants Charlie Craig and David Mullins entered Masterpiece Cakeshop in the company of Mr. Craig's mother, Deborah Munn.

5. Complainants sat down with Phillips at the cake consulting table. They introduced themselves as "David" and "Charlie" and said that they wanted a wedding cake for "our wedding."

6. Phillips informed Complainants that he does not create wedding cakes for same-sex weddings. Phillips told the men, "I'll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings."

7. Complainants immediately got up and left the store without further

[1] The fines and imprisonment provided for by § 24-34-602, C.R.S. may only be imposed in a proceeding before a civil or criminal court, and are not available in this administrative proceeding.

discussion with Phillips.

8. The whole conversation between Phillips and Complainants was very brief, with no discussion between the parties about what the cake would look like.

9. The next day, Ms. Munn called Masterpiece Cakeshop and spoke with Phillips. Phillips advised Ms. Munn that he does not create wedding cakes for same-sex weddings because of his religious beliefs, and because Colorado does not recognize same-sex marriages.

10. Colorado law does not recognize same-sex marriage. Colo. Const. art. II, § 31 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state"); § 14-2-104(1), C.R.S. ("[A] marriage is valid in this state if: . . . It is only between one man and one woman.")

11. Phillips has been a Christian for approximately 35 years, and believes in Jesus Christ as his Lord and savior. As a Christian, Phillips' main goal in life is to be obedient to Jesus and His teachings in all aspects of his life.

12. Phillips believes that the Bible is the inspired word of God, that its accounts are literally true, and that its commands are binding on him.

13. Phillips believes that God created Adam and Eve, and that God's intention for marriage is the union of one man and one woman. Phillips relies upon Bible passages such as Mark 10:6-9 (NIV) ("[F]rom the beginning of creation, God made them male and female, for this reason, a man will leave his father and mother and be united with his wife and the two will become one flesh. So they are no longer two, but one. Therefore, what God has joined together, let not man separate.")

14. Phillips also believes that the Bible commands him to avoid doing anything that would displease God, and not to encourage sin in any way.

15. Phillips believes that decorating cakes is a form of art and creative expression, and that he can honor God through his artistic talents.

16. Phillips believes that if he uses his artistic talents to participate in same-sex weddings by creating a wedding cake, he will be displeasing God and acting contrary to the teachings of the Bible.

Discussion

Standard for Summary Judgment

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. C.R.C.P. 56(c); *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 570 (Colo. 2008). A genuine issue of material fact is one which, if resolved, will affect the outcome of the case. *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1082 (Colo. 2009).

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when,

as a matter of law, based on undisputed facts, one party could not prevail. *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 548 (Colo. 2006). However, summary judgment is a drastic remedy and should be granted only upon a clear showing that there is no genuine issue as to any material fact. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007). Even where it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate. *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791, 795 (Colo. 1993).

The fact that the parties have filed cross-motions does not decrease either party's burden of proof. When a trial court is presented with cross-motions for summary judgment, it must consider each motion separately, review the record, and determine whether a genuine dispute as to any fact material to that motion exists. If there are genuine disputes regarding facts material to both motions, the court must deny both motions. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1340 (Colo. 1988).

Having carefully reviewed the parties' cross-motions, together with the documentation supporting those motions, the ALJ concludes that the undisputed facts are sufficient to resolve both motions.

Colorado Public Accommodation Law

At first blush, it may seem reasonable that a private business should be able to refuse service to anyone it chooses. This view, however, fails to take into account the cost to society and the hurt caused to persons who are denied service simply because of who they are. Thus, for well over 100 years, Colorado has prohibited discrimination by businesses that offer goods and services to the public.[2] The most recent version of the public accommodation law, which was amended in 2008 to add sexual orientation as a protected class, 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.

Section 24-34-601(2), C.R.S. (emphasis added).

A "place of public accommodation" means "any place of business engaged in any sales to the public, including but not limited to any business offering wholesale or retail sales to the public." Section 24-34-601(1), C.R.S. "Sexual orientation" means "orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person's perception thereof." Section 24-34-301(7), C.R.S. "Person" includes individuals as well as business and governmental entities. Section 24-34-301(5), C.R.S.

There is no dispute that Respondents are "persons" and that Masterpiece Cakeshop is a "place of public accommodation" within the meaning of the law. There is also no dispute that Respondents refused to provide a cake to Complainants for their

[2] *See* § 1, ch. 61, Laws of 1895, providing that "all persons" shall be entitled to the "equal enjoyment" of "places of public accommodation and amusement."

same-sex wedding. Respondents, however, argue that the refusal does not violate § 24-34-601(2) because it was due to their objection to same-sex weddings, not because of Complainants' sexual orientation. Respondents deny that they hold any animus toward homosexuals or gay couples, and would willingly provide other types of baked goods to Complainants or any other gay customer. On the other hand, Respondents would refuse to provide a wedding cake to a heterosexual customer if it was for a same-sex wedding. The ALJ rejects Respondents' argument as a distinction without a difference.

The salient feature distinguishing same-sex weddings from heterosexual ones is the sexual orientation of its participants. Only same-sex couples engage in same-sex weddings. Therefore, it makes little sense to argue that refusal to provide a cake to a same-sex couple for use at their wedding is not "because of" their sexual orientation.

Respondents' reliance on *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) is misplaced. In *Bray,* a group of abortion clinics alleged that anti-abortionist demonstrators violated federal law by conspiring to deprive women seeking abortions of the right to interstate travel. In rejecting this challenge, the Supreme Court held that opposition to abortion was not the equivalent of animus to women in general. *Id.* at 269. To represent unlawful class discrimination, the discrimination must focus upon women "*by reason of their sex.*" *Id.* at 270 (emphasis in original). Because the demonstrators were motivated by legitimate factors other than the sex of the participants, the requisite discriminatory animus was absent. That, however, is not the case here. In this case, Respondents' objection to same-sex marriage is inextricably tied to the sexual orientation of the parties involved, and therefore disfavor of the parties' sexual orientation may be presumed. Justice Scalia, the author of the majority opinion in *Bray,* recognized that "some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." *Id.* at 270. Similarly, the ALJ concludes that discrimination against same-sex weddings is the equivalent of discrimination due to sexual orientation.[3]

If Respondents' argument was correct, it would allow a business that served all races to nonetheless refuse to serve an interracial couple because of the business owner's bias against interracial marriage. That argument, however, was rejected 30 years ago in *Bob Jones Univ. v. U.S.,* 461 U.S. 574 (1983). In *Bob Jones*, the Supreme Court held that the IRS properly revoked the university's tax-exempt status because the university denied admission to interracial couples even though it otherwise admitted all races. According to the Court, its prior decisions "firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination." *Id.* at 605. This holding was extended to discrimination on the basis of sexual orientation in *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, ___ U.S. ___, 130 S.Ct.

[3] In a case similar to this one but involving a photographer's religiously motivated refusal to photograph a same-sex wedding, the New Mexico Supreme Court stated that, "To allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the [state public accommodation law]." *Elane Photography, LLC v. Willock,* 2013 N.M. Lexis 284 at p. 4, 309 P.3d 53 (N.M. 2013).

2971, 2990 (2010). In rejecting the Chapter's argument that denying membership to students who engaged in "unrepentant homosexual conduct" did not violate the university's policy against discrimination due to sexual orientation, the Court observed, "Our decisions have declined to distinguish between status and conduct in this context." *Id.*

Nor is the ALJ persuaded by Respondents' argument that they should not be compelled to recognize same-sex marriages because Colorado does not do so. Although Respondents are correct that Colorado does not recognize same-sex marriage, that fact does not excuse discrimination based upon sexual orientation. At oral argument, Respondents candidly acknowledged that they would also refuse to provide a cake to a same-sex couple for a commitment ceremony or a civil union, neither of which is forbidden by Colorado law.[4] Because Respondents' objection goes beyond just the act of "marriage," and extends to any union of a same-sex couple, it is apparent that Respondents' real objection is to the couple's sexual orientation and not simply their marriage. Of course, nothing in § 24-34-601(2) compels Respondents to recognize the legality of a same-sex wedding or to endorse such weddings. The law simply requires that Respondents and other actors in the marketplace serve same-sex couples in exactly the same way they would serve heterosexual ones.

Having rejected Respondents' arguments to the contrary, the ALJ concludes that the undisputed facts establish that Respondents violated the terms of § 24-34-601(2) by discriminating against Complainants because of their sexual orientation.

Constitutionality of Application

To say that Respondents' conduct violates the letter of § 24-34-601(2) does not resolve the case if, as Respondents assert, application of that law violates their constitutional right to free speech or free exercise of religion. Although the ALJ has no jurisdiction to declare a state law unconstitutional, the ALJ does have authority to evaluate whether a state law has been unconstitutionally applied in a particular case. *Horrell v. Dep't of Admin.,* 861 P.2d 1194, 1204 n. 4 (1993) (although the state personnel board has no authority to determine whether legislative acts are constitutional on their face, the board "may evaluate whether an otherwise constitutional statute has been unconstitutionally applied with respect to a particular personnel action"); *Pepper v. Indus. Claim Appeals Office,* 131 P.3d 1137, 1146 (Colo. 2005). The ALJ will, therefore, address Respondents' arguments that application of § 24-34-601(2) to them violates their rights of free speech and free exercise of religion.[5]

Free Speech

The state and federal constitutions guarantee broad protection of free speech. The First Amendment of the United States Constitution bars congress from making any

[4] As the result of passage of SB 03-011, effective May 1, 2013, civil unions are now specifically recognized in Colorado.

[5] Corporations like Masterpiece Cakeshop have free speech rights. *Citizens United v. Federal Election Comm'n,* 558 U.S. 310 (2010). In addition, at least in the Tenth Circuit, closely held for-profit business entities like Masterpiece Cakeshop also enjoy a First Amendment right to free exercise of religion. *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1137 (10th Cir. 2013).

law "abridging the freedom of speech, or of the press," and the Fourteenth Amendment applies that protection to the states. Article II, § 10 of the Colorado Constitution states that, "No law shall be passed impairing the freedom of speech." Free speech holds "high rank . . . in the constellation of freedoms guaranteed by both the United States Constitution and our state constitution." *Bock v. Westminster Mall Co*., 819 P.2d 55, 57 (Colo. 1991). The guarantee of free speech applies not only to words, but also to other mediums of expression, such as art, music, and expressive conduct. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) ("the Constitution looks beyond written or spoken words as mediums of expression . . . symbolism is a primitive but effective way of communicating ideas.")

Respondents argue that compelling them to prepare a cake for a same-sex wedding is equivalent to forcing them to "speak" in favor of same-sex weddings – something they are unwilling to do. Indeed, the right to free speech means that the government may not compel an individual to communicate by word or deed an unwanted message or expression. *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) (compelling a student to pledge allegiance to the flag "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control"); *Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (compelling a motorist to display the state's motto, "Live Free of Die," on his license plate forces him "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.")

The ALJ, however, rejects Respondents' argument that preparing a wedding cake is necessarily a medium of expression amounting to protected "speech," or that compelling Respondents to treat same-sex and heterosexual couples equally is the equivalent of forcing Respondents to adhere to "an ideological point of view." There is no doubt that decorating a wedding cake involves considerable skill and artistry. However, the finished product does not necessarily qualify as "speech," as would saluting a flag, marching in a parade, or displaying a motto. *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 thereby to express an idea.")[6] The undisputed evidence is that Phillips categorically refused to prepare a cake for Complainants' same-sex wedding before there was any discussion about what that cake would look like. Phillips was not asked to apply any message or symbol to the cake, or to construct the cake in any fashion that could be reasonably understood as advocating same-sex marriage. After being refused, Complainants immediately left the shop. For all Phillips knew at the time, Complainants might have wanted a nondescript cake that would have been suitable for consumption at any wedding.[7] Therefore, Respondents' claim that they refused to provide a cake because it would convey a message supporting same-sex marriage is specious. The act of preparing a cake is simply not "speech" warranting First

[6] Upholding O'Brien's conviction for burning his draft card.

[7] Respondents point out that the cake Complainants ultimately obtained from another bakery had a filling with rainbow colors. However, even if that fact could reasonably be interpreted as the baker's expression of support for gay marriage, which the ALJ doubts, the fact remains that Phillips categorically refused to bake a cake for Complainants without any idea of what Complainants wanted that cake to look like.

Amendment protection.[8]

Furthermore, even if Respondents could make a legitimate claim that § 24-34-601(2) impacts their right to free speech, such impact is plainly incidental to the state's legitimate regulation of discriminatory conduct and thus is permissible. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Supreme Court rejected the argument that withholding federal funding from schools that denied access to military recruiters violated the schools' right to protest the military's sexual orientation policies. In the Court's opinion, any impact upon the schools' right of free speech was "plainly incidental" to the government's right to regulate objectionable conduct. "The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Id. a*t 62 (quoting *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490 (1949)). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld, supra.* "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Id.*

Similarly, compelling a bakery that sells wedding cakes to heterosexual couples to also sell wedding cakes to same-sex couples is incidental to the state's right to prohibit discrimination on the basis of sexual orientation, and is not the same as forcing a person to pledge allegiance to the government or to display a motto with which they disagree. To say otherwise trivializes the right to free speech.

This case is also distinguishable from cases like *Barnette* and *Wooley* because in those cases the individuals' exercise of free speech (refusal to salute the flag and refusal to display the state's motto) did not conflict with the rights of others. This is an important distinction. As noted in *Barnette*, "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin." *Barnette*, 319 U.S. at 630. Here, the refusal to provide a wedding cake to Complainants directly harms Complainants' right to be free of discrimination in the marketplace. It is the state's prerogative to minimize that harm by determining where Respondents' rights end and Complainants' rights begin.

Finally, Respondents argue that if they are compelled to make a cake for a same-sex wedding, then a black baker could not refuse to make a cake bearing a white-

[8] The ALJ also rejects Respondents' argument that § 24-34-601(2), C.R.S. bars them from "correcting the record" by publicly disavowing support for same-sex marriage. The relevant portion of § 24-34-601(2) only bars businesses from publishing notice that individuals will be denied service or are unwelcome because of their disability, race, creed, sex, sexual orientation, marital status, national origin, or ancestry. Nothing in § 24-34-601(2) prevents Respondents from posting a notice that the design of their products is not an intended to be an endorsement of anyone's political or social views.

supremacist message for a member of the Aryan Nation; and an Islamic baker could not refuse to make a cake denigrating the Koran for the Westboro Baptist Church. However, neither of these fanciful hypothetical situations proves Respondents' point. In both cases, it is the explicit, unmistakable, offensive message that the bakers are asked to put on the cake that gives rise to the bakers' free speech right to refuse. That, however, is not the case here, where Respondents refused to bake any cake for Complainants regardless of what was written on it or what it looked like. Respondents have no free speech right to refuse because they were only asked to bake a cake, not make a speech.

Although Respondents cite *Bock v. Westminster Mall Co., supra,* for the proposition that Colorado's constitution provides greater protection than does the First Amendment, Respondents cite no Colorado case, and the ALJ is aware of none, that would extend protection to the conduct at issue in this case.

For all these reasons the ALJ concludes that application of § 24-34-601(2) to Respondents does not violate their federal or state constitutional rights to free speech.

Free Exercise of Religion

The state and federal constitutions also guarantee broad protection for the free exercise of religion. The First Amendment bars congress from making any law "respecting an establishment of religion or prohibiting the free exercise thereof," and the Fourteenth Amendment applies that protection to the states. Article II, § 4 of the Colorado Constitution states that, "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity on account of his opinions concerning religion." The door of these rights "stands tightly closed against any governmental regulation of religious beliefs as such." *Sherbert v. Verner,* 374 U.S. 398, 402 (1963).

The question presented by this case, however, does not involve an effort by the government to regulate what Respondents *believe*. Rather, it involves the state's regulation of *conduct*; specifically, Respondents' refusal to make a wedding cake for a same-sex marriage due to a religious conviction that same-sex marriage is abhorrent to God. Whether regulation of conduct is permissible depends very much upon the facts of the case.

The types of conduct the United States Supreme Court has found to be beyond government control typically involve activities fundamental to the individual's religious belief, that do not adversely affect the rights of others, and that are not outweighed by the state's legitimate interests in promoting health, safety and general welfare. Examples include the Amish community's religious objection to public school education beyond the eighth grade, where the evidence was compelling that Amish children received an effective education within their community, and that requiring public school education would threaten the very existence of the Amish community, *Wisconsin v. Yoder,* 406 U.S. 205 (1972); a Jewish employee's right to refuse Saturday employment without risking loss of unemployment benefits, *Sherbert v. Verner, supra;* and a religious sect's right to engage in religious soliciting without being required to have a license,

Cantwell v. Connecticut, 310 U.S. 296 (1940).

On the other hand, the Supreme Court has held that "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare." *Wisconsin v. Yoder,* 406 U.S. at 220. To excuse all religiously-motivated conduct from state control would "permit every citizen to become a law unto himself." *Employment Division v. Smith,* 494 U.S. 872, 879 (1990). Thus, for example, the Court has upheld a law prohibiting religious-based polygamy, *Reynolds v. United States,* 98 U.S. 145 (1879); upheld a law restricting religious-based child labor, *Prince v. Massachusetts,* 321 U.S. 158 (1944); upheld a Sunday closing law that adversely affected Jewish businesses, *Braunfeld v. Brown,* 366 U.S. 599 (1961); upheld the government's right to collect Social Security taxes from an Amish employer despite claims that it violated his religious principles, *United States v. Lee,* 455 U.S. 252 (1982); and upheld denial of unemployment compensation to persons who were fired for the religious use of peyote, *Employment Division v. Smith, supra.*

As a general rule, when the Court has held religious-based conduct to be free from regulation, "the conduct at issue in those cases was not prohibited by law," *Employment Division v. Smith,* 494 U.S. at 876; the freedom asserted did not bring the appellees "into collision with rights asserted by any other individual," *Braunfeld v. Brown,* 366 U.S. at 604 ("It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin"); and the regulation did not involve an incidental burden upon a commercial activity. *United States v. Lee,* 455 U.S. at 261 ("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.")

Respondents' refusal to provide a cake for Complainants' same-sex wedding is distinctly the type of conduct that the Supreme Court has repeatedly found subject to legitimate regulation. Such discrimination is against the law (§ 24-34-601. C.R.S.); it adversely affects the rights of Complainants to be free from discrimination in the marketplace; and the impact upon Respondents is incidental to the state's legitimate regulation of commercial activity. Respondents therefore have no valid claim that barring them from discriminating against same-sex customers violates their right to free exercise of religion. Conceptually, Respondents' refusal to serve a same-sex couple due to religious objection to same-sex weddings is no different from refusing to serve a biracial couple because of religious objection to biracial marriage. However, that argument was struck down long ago in *Bob Jones Univ. v. United States, supra*.

Respondents nonetheless argue that, because § 24-34-601(2) limits their religious freedom, its application to them must meet the strict scrutiny of being narrowly drawn to meet a compelling governmental interest. The ALJ does not agree. In *Employment Division v. Smith, supra,* the Court announced the standard applicable to cases such as this one; namely, that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes

(or proscribes)." *Employment Division v. Smith,* 494 U.S. at 879.[9] This standard is followed in the Tenth Circuit, *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 649 (10th Cir. 2006) (a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge).

Only if a law is not neutral and of general applicability must it meet strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993) (because a city ordinance outlawing rituals of animal sacrifice was adopted to prevent church's performance of religious animal sacrifice, it was not neutral and of general applicability and therefore had to be narrowly drawn to meet a compelling governmental interest). *Town of Foxfield v. Archdiocese of Denver,* 148 P.3d 339 (Colo. App. 2006) is an example of how this test has been applied in Colorado. In *Town of Foxfield*, the court of appeals held that a parking ordinance was subject to strict scrutiny because it was not of general applicability in that it could only be enforced after receipt of three citizen complaints, and was not neutral because there was ample evidence that it had been passed specifically in response to protests by the church's neighbors. *Id.* at 346.

Section 24-34-601(2) is a valid law that is both neutral and of general applicability; therefore, it need only be rationally related to a legitimate government interest, and need not meet the strict scrutiny test. There is no dispute that it is a valid law. *Hurley,* 515 U.S. at 572 ("Provisions like these 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, and they do not, as a general matter, violate the First or Fourteenth Amendments.")[10] Colorado's public accommodation law is also neutral and of general applicability because it is not aimed at restricting the activities of any particular group of individuals or businesses, nor is it aimed at restricting any religious practice. Any restriction of religious practice that results from application of the law is incidental to its focus upon preventing discrimination in the marketplace. Unlike *Church of Lukumi Babalu Aye* and *Town of Foxfield,* the law is not targeted to restrict religious activities in general or Respondents' activities in particular. Therefore, § 24-34-601(2) is not subject to strict scrutiny and Respondents are not free to ignore its restrictions even though it may incidentally conflict with their religiously-driven conduct.

Respondents contend that § 24-34-601 is not a law of general applicability because it provides for several exceptions. Where a state's facially neutral rule contains a "system" of individualized exceptions, the state may not refuse to extend that system of exceptions to cases of "religious hardship" without compelling reason. *Smith*, 494 U.S. at 881-82. But, the only exception in § 24-34-601 that has anything to do with religious practice is that for churches or other places "principally used for religious purposes." Section 24-34-601(1). It cannot reasonably be argued that this exception is targeted to restrict religious-based activities. To the contrary, the exemption for

[9] Respondents have not cited the ALJ to any Colorado law that requires a higher standard. Although Congress made an attempt to legislatively overrule *Smith* when it passed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1(a), the Supreme Court has held that RFRA cannot be constitutionally applied to the states. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). Colorado has not adopted a state version of RFRA, and no Colorado case imposes a higher standard than *Smith*.

[10] Of course, the ALJ has no jurisdiction to declare CADA facially unconstitutional in any event.

churches and other places used primarily for religious purposes underscores the legislature's respect for religious freedom.[11] *Conestoga Wood Specialties Corp. v. Sebelius,* 917 F.Supp.2d 394, 410 (E.D. Pa. 2013) (the fact that exemptions were made for religious employers "shows that the government made efforts to accommodate religious beliefs, which counsels in favor of the regulations' neutrality"), ***aff'd*** 724 F.3d 377 (3rd Cir. 2013).

The only other exception in § 24-34-601 is a secular one for places providing public accommodations to one sex, where the restriction has a bona fide relationship to the good or service being provided; such as a women's health clinic. Section 24-34-601(3). The Tenth Circuit, however, has joined other circuits in refusing to interpret *Smith* as standing for the proposition that a narrow secular exception automatically exempts all religiously motivated activity. *Grace United,* 451 F.3d at 651 ("Consistent with the majority of our sister circuits, however, we have already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption.") The ALJ likewise declines to do so.

Respondents argue that § 24-34-601(2) must nevertheless meet the strict scrutiny test because the Supreme Court has historically applied strict scrutiny to "hybrid" situations involving not only the free exercise of religion but also other constitutional rights such as freedom of speech. *Smith,* 494 U.S. at 881-82. Respondents contend that this case is a hybrid situation because the public accommodation law not only restricts their free exercise of religion, but also restricts their freedom of speech and amounts to an unconstitutional "taking" of their property without just compensation in violation of the Fifth and Fourteenth Amendments. Therefore, they say, application of the law to them must be justified by a compelling governmental interest, which cannot be shown.

The mere incantation of other constitutional rights is not sufficient to create a hybrid claim. *See Axson-Flynn v. Johnson*, 356 F.3d. 1277, 1295 (10th Cir. 2004) (requiring a showing of "'fair probability, or a likelihood,' of success on the companion claim.") As discussed above, Respondents have not demonstrated that § 24-34-601(2) violates their rights of free speech; and, there is no evidence that the law takes or impairs any of Respondents' property or harms Respondents' business in any way. On the contrary, to the extent that the law prohibits Respondents from discriminating on the basis of sexual orientation, compliance with the law would likely increase their business by not alienating the gay community. If, on the other hand, Respondents choose to stop making wedding cakes altogether to avoid future violations of the law; that is a matter of personal choice and not a result compelled by the state. Because Respondents have not shown a likelihood of success in a hybrid claim, strict scrutiny does not apply.

Summary

The undisputed facts show that Respondents discriminated against Complainants because of their sexual orientation by refusing to sell them a wedding cake for their same-sex marriage, in violation of § 24-34-601(2), C.R.S. Moreover,

[11] In fact, such an exception may be constitutionally required. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* ___ U.S. ___, 132 S.Ct. 694, 705-06 (2012).

application of this law to Respondents does not violate their right to free speech or unduly abridge their right to free exercise of religion. Accordingly, Complainants' motion for summary judgment is GRANTED and Respondents' motion for summary judgment is DENIED.

Initial Decision

Respondents violated § 24-34-601(2), C.R.S. substantially as alleged in the Formal Complaint. In accordance with §§ 24-34-306(9) and 605, C.R.S., Respondents are ordered to:

(1) Cease and desist from discriminating against Complainants and other same-sex couples by refusing to sell them wedding cakes or any other product Respondents would provide to heterosexual couples; and

(2) Take such other corrective action as is deemed appropriate by the Commission, and make such reports of compliance to the Commission as the Commission shall require.

Done and Signed
December 6, 2013

_____
ROBERT N. SPENCER
Administrative Law Judge

Hearing digitally recorded in CR#1

EXHIBIT F

STATE OF COLORADO **COLORADO CIVIL RIGHTS COMMISSION** 1560 Broadway, Suite 1050, Denver, Colorado 80202	
CHARLIE CRAIG and DAVID MULLINS, Complainant/Appellant, vs. **MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILIPS** Respondent/Appellee.	▲ **COURT USE ONLY** ▲ **Case No.:** CR 2013-0008
FINAL AGENCY ORDER	

This matter came before the Colorado Civil Rights Commission ("Commission") at its regularly scheduled monthly meeting on May 30, 2014. During the public session portion of the monthly meeting the Commission considered the record on appeal, including but not limited to the following:

- Initial Decision of Administrative Law Judge Robert N. Spencer ("ALJ") in this matter ("Initial Decision");
- Respondents' Brief in Support of Appeal;
- Complainants' Opposition to Respondents' Appeal;
- Counsel in Support of the Complainants' Answer Brief; and
- Documents listed in the Certificate of Record.

Based upon the Commission's review and consideration, it is hereby ORDERED that the Initial Decision is ADOPTED IN FULL. In doing so, we further AFFIRM the following:

1. The Order Granting Complainants' Motion for Protective Order is AFFIRMED; and

2. The Order concerning Respondents' Motion to Dismiss the Formal Complaint and Motion to Dismiss Phillips is AFFIRMED;

REMEDY

It is further ORDERED by the Commission that the Respondents take the following actions:

1. Pursuant to § 24-34-306(9) and 605, C.R.S., the Respondents shall cease and desist from discriminating against Complainants and other same-sex couples by refusing to sell them wedding cakes or any product Respondents would sell to heterosexual couples; and

2. Pursuant to 24-34-306(9) and 605, C.R.S., the following REMEDIAL MEASURES shall be taken:

   a. The Respondents shall take remedial measures to ensure compliance with the Public Accommodation section of the Colorado Anti-Discrimination Act, § 24-34-601(2), C.R.S., including but not limited to comprehensive staff training on the Public Accommodations section of the Colorado Anti-Discrimination Act and changes to any and all company polices to comply with § 24-34-601(2), C.R.S. and this Order.

   b. The Respondents shall provide quarterly compliance reports to the Colorado Civil Rights Division for two years from the date of this Order. The compliance reports shall contain a statement describing the remedial measures taken.

   c. The Respondents' compliance reports shall also document the number of patrons denied service by Mr. Phillips or Masterpiece Cakeshop, Inc., and the reasons the patrons were denied service.

Dated this 30th day of May, 2014, at Denver Colorado

Katina Banks, Chair
Colorado Civil Rights Commission
1560 Broadway, Suite 1050
Denver, CO 80202

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **FINAL AGENCY ORDER** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 2nd day of June 2014 addressed as follows:

Nicolle H. Martin
7175 W. Jefferson Avenue, Suite 4000
Lakewood, CO 80235

Natalie L. Decker
26 W. Dry Creek Cr., Suite 600
Littleton, CO 80120

Michael J. Norton
Alliance Defending Freedom
7351 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111

Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260

Kristen K. Waggoner
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14241 N.E. Woodinville-Duvall Rd., No. 488
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Charlie Craig
c/o Sara J. Rich
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350

Paula Greisen
King & Greisen
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Denver, CO 80203

Counsel in support of the Complaint

Counsel for the Commission

Shayla Malone

EXHIBIT G

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

June 30, 2015

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104

Charge Number: P20140069X; William Jack vs. Azucar Sweet Shop and Bakery.

Dear Mr. Jack:

This letter is to inform you that the Colorado Civil Rights Commission has reviewed your appeal. The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director's decision of no probable cause.

If you wish to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, you need to file within 90 days of the date of this mailing pursuant to CRS 24-34-306(2)(b)(I)(B & C).

Pursuant to CRS 24-34-306 (2) (b) (I) if you as the Charging Party do not file such an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action.

On behalf of the Commission

Rufina Hernández,
Director

cc: Azucar Sweet Shop and Bakery
David Goldberg

EXHIBIT H

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

June 30, 2015

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104

Charge Number: P20140071X; William Jack vs. Gateaux, Ltd.

Dear Mr. Jack:

This letter is to inform you that the Colorado Civil Rights Commission has reviewed your appeal. The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director's decision of no probable cause.

If you wish to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, you need to file within 90 days of the date of this mailing pursuant to CRS 24-34-306(2)(b)(I)(B & C).

Pursuant to CRS 24-34-306 (2) (b) (I) if you as the Charging Party do not file such an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action.

On behalf of the Commission

Rufina Hernández,
Director

cc: Gateaux, Ltd.
Kathleen Davia

EXHIBIT I

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

June 30, 2015

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104

Charge Number: P20140070X; William Jack vs. Le Bakery Sensual, Inc.

Dear Mr. Jack:

This letter is to inform you that the Colorado Civil Rights Commission has reviewed your appeal. The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director's decision of no probable cause.

If you wish to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, you need to file within 90 days of the date of this mailing pursuant to CRS 24-34-306(2)(b)(I)(B & C).

Pursuant to CRS 24-34-306 (2) (b) (I) if you as the Charging Party do not file such an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action.

On behalf of the Commission

Rufina Hernández,
Director

cc: Le Bakery Sensual, Inc.
Jack Robinson

EXHIBIT J

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

Charge No. P20140069X

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104 Charging Party

Azucar Bakery
1886 S. Broadway
Denver, CO 80210 Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is insufficient evidence to support the Charging Party's claims of unequal treatment and denial of goods or services based on creed. As such, a **No Probable Cause** determination hereby is issued.

The Division finds that the Respondent did not discriminate based on the Charging Party's creed. Instead, the evidence reflects that the Respondent declined to make the Charging Party's cakes, as he had envisioned them, because he requested the cakes include derogatory language and imagery. The evidence demonstrates that the Respondent would deny such requests to any customer, regardless of creed.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about March 13, 2014, he was treated unequally and denied goods or services in a place of public accommodation based on his creed, Christianity. The Respondent denies the allegations of discrimination and avers that the requested cake by the Charging Party was denied solely on the basis that the writing and imagery were " hateful and offensive".

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof,

then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery operating within the State of Colorado.

The Charging Party visited the Respondent's store on or about March 13, 2014, and was met by Pastry Chef Lindsay Jones ("Jones") (Christian). The Charging Party asked Jones for a price quote on two cakes made in the shape of open Bibles. The Charging Party requested that one of the cakes include an image of two groomsmen, holding hands in front of a cross, with a red "X" over the image. The Charging Party also requested that each cake be decorated with Biblical verses. On one of the cakes, he requested that one side read "God hates sin. Psalm 45:7" and on the opposite side of the cake "Homosexuality is a detestable sin. Leviticus 18:2." On the second cake, which he requested include the image of the two groomsmen with a red "X" over them, the Charging Party requested that it read: "God loves sinners," and on the other side "While we were yet sinners Christ died for us. Romans 5:8." The Charging Party did not state that the cakes were intended for a specific purpose or event.

After receiving the Charging Party's order, Jones excused herself from the counter and discussed the order with Owner Marjorie Silva ("Silva") (Catholic) and Manager Michael Bordo ("Bordo") (Catholic). Silva came to the counter to speak with the Charging Party. Silva asked the Charging Party about his general cake request and the Charging Party explained that he wanted two cakes made to look like Bibles. The Charging Party then explained to Silva that he wanted the verses as referenced above to appear on the cakes.

Silva states that she does not recall the specific verses that the Charging Party requested, but recalls the words "detestable," "homosexuality," and "sinners." The parties dispute what occurred next. The Charging Party alleges that Silva told him that she would have to consult with an attorney to determine the legality of decorating a cake with words that she felt were discriminatory. Silva denies that she told the Charging Party that she needed to consult with

an attorney, and states that she informed the Charging Party that she would make him cakes in the shape of Bibles, but would not decorate them with the message that he requested. Silva states that she declined to decorate the cakes with the verses or image of the groomsmen and offered instead provide him with icing and a pastry bag so he could write or draw whatever message he wished on the cakes himself. Silva also avers that she told the Charging Party that her bakery "does not discriminate" and "accept[s] all humans."

Later that day, the Charging Party returned to the bakery to inquire if Silva was still declining to make the cakes as requested. Bordo states that he reiterated the bakery would bake the cakes, but would not decorate them with the requested Biblical verses or groomsmen. The Charging Party asked Bordo if "he consider[ed] not baking [his] cake discrimination against [him] as a Christian," to which Bordo responded "no." The Charging Party then left the bakery.

The Charging Party maintains that he did not ask the Respondent or its employees to agree with or endorse the message of his envisioned cakes.

The Respondent avers that the Charging Party's request was not accommodated because it deemed the design and verses as discriminatory to the gay, lesbian, bisexual, and transgender community. The Respondent further states that "in the same manner [it] would not accept [an order from] anyone wanting to make a discriminatory cake against Christians, [it] will not make one that discriminates against gays." The Respondent states that it welcomes all customers, including the Charging Party, regardless of their protected class.

The evidence demonstrates that the Respondent specializes in cakes for various occasions, including weddings, birthdays, holidays, and other celebrations. On the Respondent's website, there are images of cakes created for customers in the past. There are numerous cakes decorated with Christian symbols and writing. Specifically, in the category of "Baby Shower and Christening Cakes" there are images of three cakes depicting the Christian cross, two of which include the words "God Bless" and one inscribed with "Mi Bautizo" (Spanish for "my baptism"). There is also an image of a wedding cake created by the Respondent depicting an opposite sex couple embracing in front of a Christian cross. The Respondent's website also provides that the bakery will make cakes "for every season of the year," including the Christian holidays of Easter and Christmas.

The Respondent states that it has previously denied cake requests due to business constraints, such as inability to meet customer deadlines due to high demand, but maintains that it would deny any requests deemed "offensive" or "hateful."

Comparative data reflects that the Respondent employs six persons, of whom three are Catholic and three are non-Catholic Christian. The record reflects that, in an average year, the Respondent produces between 60 and 80 cakes with Christian themes and/or symbolism.

Unequal Treatment

To prevail on a claim of discriminatory denial of equal treatment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified

recipient of the goods and services of the Respondent; and (4) the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Charging Party alleges that the Respondent treated him differently than persons of non-Christian creed by "demeaning his beliefs." There is insufficient evidence to demonstrate the Respondent treated the Charging Party differently than customers outside of his protected class.

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class (2) the Charging Party sought services or goods from the Respondent; (3) the Charging party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Respondent was a qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Respondent denied the Charging Party's request to make cakes that included the Biblical verses and an image of groomsmen with a red "X" over them. The circumstances do not give rise to an inference that the Respondent denied the Charging Party goods or services based on his creed. Indeed, the evidence demonstrates that the Respondent would have made a cake for the Charging Party for any event, celebration, or occasion regardless of his creed. Instead, the Respondent's denial was based on the explicit message that the Charging Party wished to include on the cakes, which the Respondent deemed as discriminatory. Additionally, the evidence demonstrates that the Respondent regularly creates cakes with Christian themes and/or symbolism, which are presumably ordered by Christian customers. Finally, the Respondent avers that it would similarly deny a request from a customer who requested a cake that it deemed discriminatory towards Christians.

Based on the evidence contained above, I determine that the Respondent has not violated C.R.S. 24-34-601(2), as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(I)(A) and Rule 10.6(A)(1) of the Commission's Rules of Practice and Procedure, the Charging Party may appeal the dismissal of this case to the Commission within ten (10) days, as set forth in the enclosed form.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or

b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(l)].

On Behalf of the Colorado Civil Rights Division

Jennifer McPherson, Interim Director
Or Authorized Designee

3/24/2015
Date

EXHIBIT K

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

Charge No. P20140071X

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104 — Charging Party

Gateaux, Ltd.
1160 N. Speer Blvd.
Denver, CO 80204 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is insufficient evidence to support the Charging Party's claims of unequal treatment and denial of goods or services based on creed. As such, a **No Probable Cause** determination hereby is issued.

The Division finds that the Respondent did not discriminate based on the Charging Party's creed, but instead refused to create cakes for anyone, regardless of creed, where a customer requests derogatory language or imagery.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about March 13, 2014, he was denied equal treatment and access to goods or services in a place of public accommodation based on his creed, Christianity. The Respondent denies the allegations of discrimination and avers that the cake order requested by the Charging Party was denied because the cakes included what was deemed to contain "offensive" or "derogatory" messages and imagery. In addition, the Respondent was uncertain whether it could technically create the cakes as described by the Charging Party.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof,

then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery operating within the State of Colorado.

The Charging Party visited the Respondent's store on or about March 13, 2014, and was met by Manager Michelle Karmona ("Karmona"). The Charging Party asked Karmona for a price quote on two cakes. The Charging Party requested that two sheet cakes be made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. The Charging Party requested that one of the cakes include an image of two groomsmen, holding hands, with a red "X" over the image. On one cake, he requested that one side read "God hates sin. Psalm 45:7" and on the opposite side of the cake "Homosexuality is a detestable sin. Leviticus 18:2." On the second cake, with the image of the two groomsmen covered by a red "X," the Charging Party requested that it read: "God loves sinners" and on the other side "While we were yet sinners Christ died for us. Romans 5:8." The Charging Party did not state to the Respondent or the Division whether the cake was intended for a specific purpose or event.

The parties dispute the events that occurred next. The Charging Party alleges that Karmona initially indicated that the Respondent would be able to make the Bible shaped cakes, but once she read the Biblical verses, she excused herself from the counter. The Charging Party further alleges that Karmona returned a short time later, informing him that she had spoken with the Respondent's Owner, Kathleen Davia ("Davia") (Catholic). The Charging Party claims that at this time Karmona informed him that the Respondent would bake the cakes, but would not include such a "strong message." The Respondent denies that this occurred, claiming instead that the Charging Party had indicated that he wanted the groomsmen to be three-dimensional figurines with a "Ghostbusters X" over the figures. Karmona felt the Respondent would be unable to accommodate the request as described by the Charging Party, based on "technical capabilities." The Respondent claims that the Charging Party was told that the

Bible-shaped cakes, with the Biblical verses, *sans* the groomsmen figurines and "Ghostbusters X," could be made.

The Respondent avers that, as with all customers, the Charging Party was asked to elaborate as to the purpose of the cakes, how he wished to present it, and how he would use it. The Charging Party would not provide an explanation to the Respondent. The Respondent alleges that it was the Charging Party's refusal to elaborate that left it with the impression that it would not be able to produce the cakes as requested by the Charging Party. The Respondent avers that it consistently requests that customers provide an image for them to replicate when it is something the Respondent does not "stock." For example, the Respondent avers that a customer requesting a cake with the image of a popular cartoon character can easily be created; however, when a customer requests a specific image without a photo reference or elaboration of the image, the Respondent will decline the request. Karmona then referred the Charging Party to another bakery with the belief that that bakery would be better suited to create the cakes as envisioned by the Charging Party.

The Respondent does not have a specific policy regarding the declination of a customer request, but states that the employee who receives the order also decorates the cake. It is the Respondent's position that, based on its individual employees' pastry knowledge, experience, and qualifications, they are best able to determine whether they have the ability to create the cake that a customer requests. Therefore, in the case of the Charging Party's request, Karmona determined that she would be unable to create the cakes as the Charging Party described.

The Respondent states that it has previously denied customer requests based on technical requirements, including inability to create the requested image, and requests for buttercream iced cakes where the Respondent maintained a fondant decorated cake would be preferable. Additionally, the Respondent states that it has denied customer requests for cakes that included crude language such as "eat me" or "ya old bitch" or "naughty images," on the basis that the imagery and messages were not what the Respondent wished to represent in its products. The Respondent's other reasons for declining customers' request include: availability of the product, insufficient time to create the cake requested, and scheduling conflicts.

The Charging Party avers that he did not ask the Respondent, or any of its employees, to agree with or endorse the message of his envisioned cakes.

Comparative data indicates that the Respondent employs six persons, of whom two are non-Catholic Christian, two are Agnostic, one is Catholic, and one is Atheist. The record reflects that the Respondent regularly creates Christian themed cakes and pastries, including items for several Catholic and non-Catholic Christian church events. Additionally, the evidence demonstrates that they have produced a number of cakes with Christian imagery and symbolism during the relevant time period.

The Respondent states that the Charging Party is welcome to return to the bakery.

Unequal Treatment

To prevail on a claim of discriminatory denial of equal treatment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; and (4) the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party visited the Respondent and sought two cakes bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Charging Party alleges that the Respondent treated him differently than persons outside of his protected class by "demeaning his beliefs." The evidence demonstrates that the Respondent attempted to engage the Charging Party in a dialogue regarding the cakes in more detail, which the Charging Party declined. There is insufficient evidence to demonstrate that the Respondent treated the Charging Party differently based on his creed. The evidence demonstrates that the Respondent would not create cakes with wording and images it deemed derogatory. The Respondent has denied other customers request for derogatory language without regard to the customer's creed.

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class (2) the Charging Party sought services or goods from the Respondent; (3) the Charging arty is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party visited the Respondent and sought two cakes bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Respondent denied the Charging Party's request to make cakes that included the Biblical verses and an image of groomsmen with a red "X" over them. The circumstances do not give rise to an inference that the Respondent denied the Charging Party goods or services based on his creed. Instead, the evidence suggests that based on the Respondent's understanding of the Charging Party's request, it would be unable to create the cake that he envisioned. The record reflects that the Respondent has denied customer requests for similar reasons. Additionally, the evidence demonstrates that the Respondent regularly produces cakes and other baked goods with Christian symbolism and messages, and continues to welcome the Charging Party in its bakery.

Based on the evidence contained above, I determine that the Respondent has not violated C.R.S. 24-34-601(2), as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(I)(A) and Rule 10.6(A)(1) of the Commission's Rules of Practice and Procedure, the Charging Party may appeal the dismissal of this case to the Commission within ten (10) days, as set forth in the enclosed form.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or

b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(l)].

On Behalf of the Colorado Civil Rights Division

Jennifer McPherson

Jennifer McPherson, Interim Director
Or Authorized Designee

3/24/2015
Date

EXHIBIT L

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

Charge No. P20140070X

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104 — Charging Party

Le Bakery Sensual, Inc.
300 E. 6th Ave.
Denver, CO 80203 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is insufficient evidence to support the Charging Party's claims of unequal treatment and denial of goods or service based on creed. As such, a **No Probable Cause** determination hereby is issued.

The Division finds that the Respondent did not discriminate based on the Charging Party's creed, but instead refused to create cakes for anyone, regardless of creed, where a customer requests derogatory language or imagery.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about March 13, 2014, he was denied equal treatment and access to goods or services in a place of public accommodation based on his creed, Christianity. The Respondent denies the allegations of discrimination and avers that the cake requested by the Charging Party was denied solely on the basis that the writing and imagery were "hateful."

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in

the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery operating within the State of Colorado.

The Charging Party visited the Respondent's store on or about March 13, 2014, and was met by Owner John Spotz ("Spotz") (no religious affiliation). The Charging Party asked Spotz for a price quote on two cakes. The Charging Party requested that two sheet cakes be made to resemble open Bibles. Spotz informed the Charging Party that he "had done open Bibles and books many times and that they look amazing." The Charging Party then elaborated that on one cake, he wanted an image of two groomsmen, appearing before a cross, with a red "X" over the image. The Charging Party described the image as "a Ghostbusters symbol over the illustration to indicate that same-sex unions are un-Biblical and inappropriate." The Charging Party wanted Biblical verses on both cakes. The Charging Party showed Spotz the verses, which he had written down on a sheet of paper, and read them aloud. The verses were: "God hates sin. Psalm 45:7" "Homosexuality is a detestable sin. Leviticus 18:2" and on the cake with the image of groomsmen before a cross with a red "X", the verses: "God loves sinners" and "While we were yet sinners Christ died for us. Romans 5:8."

After the Charging Party made the request for the image of the groomsmen with the "X" over them, Spotz asked if the Charging Party was "kidding him." The Charging Party responded that his request was serious. Spotz then informed the Charging Party that he would have to decline the order as envisioned by the Charging Party because he deemed the requested cake "hateful." The Charging Party did not state to Spotz or the Division whether the cakes were intended for a specific purpose or event. The Charging Party then left the bakery, after Spotz declined to create the cakes as the Charging Party had requested.

The Charging Party maintains that he did not ask the Respondent, or its employees, to agree with or endorse the message of his envisioned cakes.

The Respondent avers that everyone, including the Charging Party, is welcome at its bakery, regardless of creed, race, sex, sexual orientation or disability. The Respondent states that its refusal to create the specific cake requested by the Charging Party was based on its policy "not [to] make a cake that is purposefully hateful and is intended to discriminate against any person's creed, race, sex, sexual orientation, disability, etc." The Respondent avers that the Charging Party's request was intended to "denigrate individuals of a specific sexual orientation."

The record reflects that the Respondent specializes in making unique and intricate cakes for various occasions. The Respondent's website provides "[it] can design cakes that look like people, cars, motorcycles, houses, magazines, and just about anything you can imagine." The Respondent's website also includes images of cakes it has created for customers in the past, including cakes made to look like books and magazines. The Respondent also makes wedding cakes for both opposite sex and same sex couples, as well cakes for the Christian holidays of Christmas and Easter.

The Respondent denies that it has ever denied services or goods to customers based on their creed and/or religion.

It is the Respondent's position that production of the cake requested by the Charging Party would run afoul of C.R.S. § 24-34-701, which provides that a place of public accommodation may not "publish . . . or display in any way manner, or shape by any means or method . . . any communication . . . of any kind, nature or description that is intended or calculated to discriminate or actually discriminates against any . . . sexual orientation . . . ."

Spotz states that the only time he recalls denying a cake request was when he received a phone call in which the caller asked if he could decorate a cake with "a sexy little school girl."

Comparative data reflects that the Respondent employs four persons, of whom one is Catholic, one is Jewish, and two have no religious affiliation. The record reflects that the Respondent creates at least one Christian themed cake per month, increasing to three or four Christian themed cakes in the month of December.

Unequal Treatment

To prevail on a claim of discriminatory denial of equal treatment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; and (4) the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Charging Party alleges that the Respondent treated him differently than persons of non-Christian creed by "demeaning his beliefs." There is insufficient evidence to demonstrate the Respondent treated the Charging Party differently than other customers because of his creed.

The Charging Party's request was denied because he requested the cakes include language and images the Respondent deemed hateful.

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class (2) the Charging Party sought services or goods from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is "un-Biblical and inappropriate." The Respondent denied the Charging Party's request to make cakes that included the requested Biblical verses and an image of groomsmen with a red "X" over them. The circumstances do not give rise to an inference that the Respondent denied the Charging Party goods or services based on his creed. Instead, the evidence demonstrates that the Respondent was prepared to create the cakes as described by the Charging Party, until he requested the specific imagery of the two groomsmen with a red "x" placed over image and the "hateful" Biblical verses. Additionally, the record reflects that the Respondent has produced cakes featuring Christian symbolism in the past, which were presumably ordered by Christian customers.

Based on the evidence contained above, I determine that the Respondent has not violated C.R.S. 24-34-601 (2), as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(I)(A) and Rule 10.6(A)(1) of the Commission's Rules of Practice and Procedure, the Charging Party may appeal the dismissal of this case to the Commission within ten (10) days, as set forth in the enclosed form.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or

b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(I)].

On Behalf of the Colorado Civil Rights Division

Jennifer McPherson, Interim Director
Or Authorized Designee

3/24/2015
Date

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 SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

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COME NOW Defendants, by and through counsel, and pursuant to Fed. R. Civ. P. 56, who respond to Plaintiffs' motion for summary judgment (**# 48**) as follows.

The reason this litigation was initiated, and the target of Plaintiffs' ire, is a recent decision titled *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015). In *Masterpiece,* the Colorado Court of Appeals interpreted the public accommodations section of the Colorado Anti-discrimination Act (CADA) under similar facts and legal arguments that Plaintiffs raise here, and in lawsuits filed by the same Plaintiffs' counsel in numerous other jurisdictions. Plaintiffs' effort to blame Defendants[1] for the legal interpretation in *Masterpiece*, and their demand for federal court intervention to block the precedent established in *Masterpiece*, is the true purpose of this litigation. Like other jurisdictions that have considered and rejected challenges to similar anti-discrimination legislation, this Court should dismiss Plaintiffs' claims. In the alternative, this Court should defer to the Supreme Court and its consideration of the pending petition for certiorari in the *Masterpiece* case, which will decide the same issues raised in this litigation.

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[1] Plaintiffs continue to lump all Defendants together even though they have separate and unique statutory authority. This is contrary to fundamental pleading requirements articulated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Nevertheless, in order to be consistent in this response, and without waiving any argument, Defendants will be referred to as such, unless otherwise noted.

FACTS

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

JURISDICTIONAL ARGUMENTS

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

1. Burden of proof and elements

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

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

(TOC), Inc., 528 U.S. 167, 180-81 (2000).

2. Elements that cannot be proven by Plaintiffs

Elements (i) and (ii) – injury in fact traceable to Defendants' action:

Plaintiffs allege throughout their summary judgment motion that Defendants have "applied" CADA to Plaintiffs. **(# 48)**. The stipulated facts do not support this. **(# 49)**. Instead, Plaintiffs offer a speculative injury, based on a neutral law of general application, and a Colorado Court of Appeals decision interpreting that law. Before Plaintiffs could potentially suffer any injury, ten things must occur:

1. Plaintiffs offer their wedding website service to the public;
2. A person attempts to obtain the service;
3. Plaintiffs deny the service based on the person's sexual orientation;
4. The person denied service files a charge of discrimination with the Colorado Civil Rights Division;
5. The Division investigates the charge and the Director or her designee finds probable cause to credit the charge;
6. Mandatory conciliation is attempted and fails;
7. The Colorado Civil Rights Commission decides to notice the case for hearing;
8. An ALJ holds a hearing and rules against Plaintiffs;
9. The Commission affirms the decision and orders Plaintiffs to cease and desist the discriminatory practice; and;
10. Plaintiffs exhaust their state appellate remedies.

(# 49, ¶¶ 6-17); C.R.S. §§ 24-34-306, 307 (2016). Not one of these things has happened. Consequently, there is no injury.

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). The Tenth Circuit has routinely applied the *Clapper* analysis to standing questions in First Amendment suits. *See*, *e.g., Cope v. Kansas State Bd. of Educ.*, 821 F.3d 1215, 1222-23 (10th Cir. 2016) (holding that standing did not exist where state education standards that had the potential to establish non-religious views about the cause and nature of life expressly preserved local school districts' authority to determine their own curricula and what curricula would be adopted was speculative, as was any resulting injury); *c.f. Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125-26 (10th Cir. 2013) (finding standing in religious challenge to the Affordable Care Act because failure to comply would result in "immediate tax penalties," but not addressing other grounds for standing based on "potential regulatory action" and "possible private lawsuits").

As to the first mandatory action that must occur, Plaintiffs argue they have not offered their services to the public for fear that Defendants would enforce CADA. (**# 49, ¶¶ 95-96**), Plaintiffs cannot, however, manufacture standing by self-inflicted harm, based on an unrealized fear of a hypothetical future injury that is not pending. *Clapper*, 133 S. Ct. at 1151-52.

Plaintiffs allege injury by presuming Defendants are determined to enforce CADA against them, absent any case ever being filed. On the contrary, Defendants

are statutorily prohibited from predetermining such an outcome. *See* C.R.S. § 24-34-305(3) ("In exercising the powers and performing the duties and functions under parts 3 to 7 of this article, the commission, the division, and the director shall presume that the conduct of any respondent is not unfair or discriminatory until proven otherwise.")

Plaintiffs also allege injury by arguing that Defendants have chilled their free speech rights. Because Defendants have taken no action here, Plaintiffs rely on the public accommodation provisions of CADA and the Colorado Court of Appeals *Masterpiece* decision (**# 49, ¶25**), which intercepted the law.

CADA's public accommodation statutes do not, on their face, prohibit or punish Plaintiffs from publishing a wedding website or posting a message stating that they will not provide the website services to same-sex couples due to Plaintiffs' religious beliefs. (**# 49, ¶¶1-3**). Because Plaintiffs readily admit they have no problem abiding by CADA's public accommodation provisions by providing service to anyone, regardless of their sexual orientation, (**# 49, ¶¶ 64-65**), the statute has not chilled Plaintiffs' speech.

Furthermore, CADA's public accommodations law is a neutral law of general applicability, so it 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). Colorado has not only a

legitimate interest, but a compelling interest 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 recent Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) concretely establishes this point:

> [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) (religious motivation should not excuse compliance with laws); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group,* 515 U.S. 557, 572 (1995) (public accommodation laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination...."); *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).

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

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

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

not target religiously motivated conduct, so it is distinguishable from the ordinance in *Lukumi*.

Plaintiffs additionally seem to argue that Colorado's public accommodations law is not neutral nor generally applicable because Plaintiff Smith should be exempted from CADA's requirements like a church. They argue, she "objects to celebrating same-sex marriage on the same religious grounds as a church, yet the state denies her an exemption from CADA . . ." **(# 48, at pp. 59-60)**. The Colorado Court of Appeals rejected this argument in *Masterpiece.* The bakery admitted that it did not contend that the bakery was used for primarily religious purposes. *Masterpiece*, 370 P.3d at 290-92. Here, there are no stipulated facts to support any assertion that Plaintiff 303 Creative should be exempted from CADA because the business is used for principally religious purposes.[3]

Plaintiffs argue injury based on three non-binding Director's decisions involving three other bakeries that refused to create offensive messages on cakes. **(# 48, pp. 3, 5, 10, 11, 44, 59, 74; # 49)** *see also Masterpiece*, 370 P.3d at 282, n. 8. The Director found no probable cause and the Commission denied their appeals. **(# 49, ¶¶ 28, 103, Exhibits G-L)** Those decisions cannot presume that a different

[3] On February 16, 2017, the Washington Supreme Court unanimously rejected *en banc* the same types of challenges to the state's anti-discrimination laws Plaintiffs' counsel made concerning a florist who refused to provide flower arrangements for a same-sex couple's wedding. *See State of Washington v. Arlene's Flowers, Inc.*, 2017 Wash. LEXIS 216 at **36-40 (Wash. Feb. 16, 2017).

result would occur here, especially because the actions of the Director and Commission in those matters have no binding precedent or effect. *See AT&T Techs. Inc. v. Royston*, 772 P.2d 1182, 1186 (Colo. App. 1989) (Directors' probable cause findings are only administrative determinations and are not binding); *Demetry v. Colorado Civl Rights Comm'n*, 752 P.2d 1070, 1072 (Colo. App. 1988) (these preliminary proceedings are without legal effect until a suit is brought and Commission's denial does not constitute a final agency action subject to appeal).

Finally, Plaintiffs argue standing under *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014), *Cressman v. Thompson*, 719 F.3d 1139 (10th Cir. 2013) and *Ward v. Utah*, 321 F.3d 1263 (10th Cir. 2003). All three cases are distinguishable because the laws at issue in *Susan B. Anthony List , Cressman* and *Ward* explicitly prohibited specific types of speech, and subjected the speaker to criminal liability for violating those laws. CADA prohibits only conduct, i.e. businesses may not refuse to serve persons based on a person's protected class, or inform the public they will refuse service to persons based on a protected class. **(# 49, ¶¶1-3).** CADA does not prohibit or criminalize speech.

Element (iii) - favorable decision will address injury.

Pursuant to § 24-34-602(1)(a), C.R.S., any person denied a public accommodation may initiate their own independent civil action in state court without ever filing a charge with the Division. **(# 49, ¶¶4-5)**. If a person does so, he or she is prohibited from filing a charge of discrimination with the Commission.

See § 24-34-602(3) ("relief provided by this section is an alternative to that authorized by § 24-34-306(9), and a person who seeks redress under this section is not permitted to seek relief from the commission."). An injunction against Defendants will not prevent anyone from initiating an independent civil action against Plaintiffs to enforce CADA's public accommodation provisions regarding sexual orientation. No facts support a contrary result.

SUBSTANTIVE ELEMENTS THAT PLAINTIFFS CANNOT ESTABLISH

A. Plaintiffs fail to show CADA violates Plaintiffs' free speech rights

1. Burden of proof and elements

a. CADA does not compel or restrict Plaintiffs' speech.

Plaintiffs allege CADA forces them to create wedding websites for same-sex couples in opposition to Plaintiffs' personal religious beliefs or otherwise restricts them from being critical of same-sex marriage by punishing them for refusing to create such websites. Plaintiffs cannot succeed on the merits.

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 Acad. & 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 exists here.[4]

ii. CADA does not compel Plaintiffs to speak the government's message.

CADA does not compel Plaintiffs to speak in favor of or against same-sex weddings. 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 endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation.").

Contrary to *Barnette*, 319 U.S. at 642, and *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977), and as recognized in *Masterpiece,* CADA does not compel a vendor to convey a particular message for or against same-sex weddings; only, that it treat

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

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, LLC v. Willock*, 309 P.3d 53m, 64 (N.M. 2013) (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 rely on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), to support their position that Plaintiffs are entitled to choose the content of their own message and CADA cannot compel them to express an unwanted message. In *Hurley*, a private, non-profit group that organizes the Boston Saint 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. On review,

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, § 24-34-601(2)(a), applies only to Plaintiffs' business operation, and their decision to refuse to serve persons based on their sexual orientation. This type of statute does not fall under *Hurley's* purview. *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*).

Similarly, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), do not support Plaintiffs' position. 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 stipulated facts because CADA does not mandate a message in support of same-sex marriage or 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 statue 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 the 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 § 24-34-601(2)(a), of CADA did not force the baker to host or accommodate any particular view on marriage. CADA required only that the baker 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.

Further, 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."); *Rumsfield,* 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."); *Arlene's Flowers, Inc.,* 2017 Wash. LEXIS 216 at **28-32 (holding that decision to provide or refuse to provide flowers for a wedding does not inherently express a message about a particular wedding).

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 persons providing services to the public, such as architects, chefs, hair stylists, baristas, etc., 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 is a slippery slope that has been rejected by a number of courts on the basis that antidiscrimination laws target conduct, not

speech. *See 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' free press rights.

Plaintiffs' speech is not chilled, as they allege, and they are not required to espouse a particular viewpoint on same-sex marriage merely because the law requires service to same-sex and opposite sex couples equally. *Masterpiece* held that § 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.

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 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 be only between a man and a woman.

CADA does not prohibit, limit, or otherwise impinge 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 would be justifiably curtailed because CADA serves the compelling interest of prohibiting discrimination, entirely unrelated to the suppression of ideas. *See e.g., Arlene's Flowers, Inc.*, 2017 Wash. LEXIS 216 at **54-55 (rejecting plaintiff's expressive association claim noting that "the Supreme Court has never held that a commercial enterprise, open to the general public, is an 'expressive association' for purposes of First Amendment protections.").

d. CADA does not violate the equal protection clause.

Plaintiffs' refer to three non-binding determinations resulting from charges of discrimination filed by a person alleging discrimination based on creed against bakeries that declined to produce cakes with specific messages. **(# 49, ¶ 28).** They claim an equal protection violation based on some of the Defendants actions in these cases, and their actions in the *Masterpiece*. The argument is unavailing for three reasons.

First, Plaintiffs have no idea how many determinations the Director or Commission have issued or reviewed, or what the facts and allegations of those charges were, since those matters are confidential and not subject to public disclosure. *See* C.R.S. § 24-34-306(3) (Commission and staff may not disclose filing of charge or actions on charges unless notice for public hearing). **(# 49, ¶ 103, J-L).**

Second, as discussed previously, 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 Techs. Inc.*, 772 P.2d at 1186 (Colo. App. 1989). Since these decisions have no binding precedent or effect, Plaintiffs cannot show unequal treatment.

Third, the Colorado Court of Appeals distinguished the three bakeries in *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 containing derogatory, offensive messages. *Id.*

e. CADA survives strict scrutiny.

Plaintiffs claim that CADA does not survive strict scrutiny. However, as discussed above, CADA is a neutral law of general applicability, which is not subject to strict scrutiny. Even assuming, *arguendo*, that strict scrutiny applies to CADA, 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.

Plaintiffs argue that because there are other website designers who are willing to serve same-sex couples with wedding designs, Defendants do not have a compelling interest in CADA's public accommodations law because same-sex couples can go somewhere else to obtain those types of services. (**#48, pp. 72-73**). This same argument was made by Plaintiffs' counsel in the *Arlene's Flowers* case, and "emphatically" rejected by the Washington Supreme Court. *Arlene's Flowers, Inc.*, 2017 Wash. LEXIS 216 at *53.

Here, Plaintiffs' argument not only strains credulity, it devalues the purpose of Colorado's anti-discrimination laws, which the State has a compelling interest in eradicating discriminatory behaviors. *Id.* ("emphatically" rejecting the same

argument noting that every court to address the question has concluded that public accommodations laws "do not simply guarantee access to goods or services," but instead "they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace.").

B. Plaintiffs fail to show CADA violates Plaintiffs' due process rights.

Plaintiffs argue that CADA violates their procedural due process rights because the terms "unwelcome, objectionable, unacceptable, or undesirable" in C.R.S. § 24-34-601(2)(a) are impermissible vague. Plaintiffs also argue that CADA violates Plaintiff's Smith's substantive due process rights because the statute deprives her to own and operate a business. Neither argument is correct for four reasons.

First, to "prevail on either a procedural or substantive due process claim under 42 U.S.C. § 1983, 'a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectable … interest.'" *Nichols v. Board of County Comm'rs*, 506 F.3d 962, 969 (10th Cir. 2007) (quoting *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000)). As demonstrated throughout this response, Plaintiffs have not identified any action by the Defendants against Plaintiffs. Instead, any harm suffered by Plaintiffs is self-inflicted based on a misinterpretation of the *Masterpiece* decision. Thus, Plaintiffs do not satisfy this basic requirement of a due process claim.

Second, the "void for vagueness" doctrine applies where the government deprives a person of life or liberty under a law "so vague that if fails to give ordinary people fair notice of the conduct it punishes, or so standardless that in invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2552, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). However, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Hence, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (rejecting facial challenge to statute even though standards were "undoubtedly flexible, and the officials implementing them w[ould] exercise considerable discretion").

The language used here – "unwelcome, objectionable, unacceptable, or undesirable" – is not so vague as to be constitutionally infirm and is subject to ready definition by reference to any dictionary, such as Merriam-Webster:

- "Unwelcome" means "not wanted or welcome."
- "Objectionable means "undesirable" or "offensive."
- "Unacceptable" means "not acceptable," "not pleasing," or "unwelcome."
- "Undesirable" means "not desirable" or "unwanted."[5]

[5] https://www.merriam-webster.com/dictionary.

Indeed, the United States District Court for the Southern District of Iowa recently rejected an identical argument by Plaintiffs' counsel regarding the terms "unwelcome, objectionable, not acceptable, or not solicited" as contained in Iowa's antidiscrimination laws. *Fort Des Moines Church of Christ v. Jackson*, 16-cv-00403-SMR-CFB, 2016 U.S. Dist. LEXIS 143677, *50 (S.D. Iowa Oct. 14, 2016) ("Though not perfect, the terms sufficiently describe messages of limited access to a public accommodation's good or services based on membership in a protected class."). [6]

Third, substantive due process only applies to fundamental interests. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 768 (10th Cir. 2008). There is no fundamental right to carry on a business. Fundamental rights include "the right to marry, to have children, to direct the education and raising of one's own children, to marital privacy, to use contraception and obtain abortions, and to bodily integrity. *Id.* at 770-71. While economic well-being may be protected by procedural due process, it is not a fundamental right. *Lambert v. Hartman*, 517 F.3d 433, 444 (6th Cir. 2008), cert. denied, 129 S. Ct. 905 (2009). Similarly, there is no fundamental right to practice a chosen profession. *Younger v. Colorado State Bd. of Law Exam'rs*, 625 F.2d 372, 377 n.3 (10th Cir. 1980). If there is no fundamental right to

[6] In contrast, Plaintiff's rely on and quote from the decision of *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001). However, in that case the Third Circuit did "not reach the merits of Saxe's vagueness claim." *Id.* at 40.

economic well-being or to practice a chosen profession, then there is no fundamental right to carry on a particular business, such as designing wedding websites. And, while practicing one's religion may be a fundamental right, the Defendants have not impinged on that right in the least.

Fourth, assuming that Plaintiffs' could identify a fundamental right, they cannot meet the standard for establishing a substantive due process violation. "[T]he standard for judging a substantive due process claim is whether the challenged government action would 'shock the conscience of federal judges.'" *Uhlrig v. Harder*, 64 F.3d 567, 573 (10th Cir. 1995) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 126, (1992)), cert. denied, 516 U.S. 1118 (1996). To satisfy this standard, "a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power." *Id.* at 574. Instead, Plaintiffs "must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Id.* As example, under these principals courts have found a violation when school officials paddle a nine-year-old until the paddle breaks and blood soaks through her clothes, but not when school officials force a mentally disabled ten-year-old to clean out a clogged toilet with his bare hands. *See Perry v. Taser Int'l Corp.*, 07-cv-00901-REB-MJW, 2008 WL 961559, *2 (D. Colo. April 8, 2008) (comparing various cases to address what rises to the level of a substantive due process violation). Here, there is no stipulated fact establishing that any of the

Defendants have engaged in conscience-shocking conduct.

PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF

A. Plaintiffs will not suffer irreparable harm if the injunction is denied.

1. Burden of proof and elements

"To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). 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*, 133 S. Ct. at 1148 and 1150.

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. These ten mandatory facts, as listed previously, have not yet occurred. The failure of one of these steps to occur results in no injury to Plaintiffs.

B. 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 Plaintiffs' religious belief, speech concerning same-sex marriage, and 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 this country's lengthy civil

rights history. As previously mentioned, 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.

Furthermore, the Supreme Court has also held 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).

C. 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 v. Ashcroft*, 389 F.3d 973, 977 (10th Cir. 2004). 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. Ziriax*, 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).

ABSTENTION ARGUMENT

A. Abstention mandates dismissal of this action.

1. Burden of proof and elements

Since this is a court of limited jurisdiction, it is presumed no jurisdiction exists. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs carry the burden to establish jurisdiction by a preponderance of the evidence. *Id.*

Abstention is known by several names – *Pullman*, *Burford*, *Younger*, *Rooker-Feldman*, *Colorado River* – based on the Supreme Court case where it was first applied to a particular set of facts. This "division is a mere organizational convenience." 17A Charles Alan Wright, et al., *Federal Practice & Procedure* § 4241 (3d ed. 2016). However titled, "[c]onsiderations of federalism are at the heart of abstention," including: (i) comity - respect for the independence of the state governments, avoiding needless conflict with a state's administration of its own affairs, and avoiding federal resolution of unsettled questions of state law; and (ii) promotion of an efficient federal judiciary by avoiding duplicative litigation and the decision of federal constitutional questions. *Id.* Dismissing, staying, or certifying a case based on abstention falls within the sound discretion of the district court. *Id.*

2. Elements that cannot be proven by Plaintiffs

In an effort to streamline these proceedings, Defendants address abstention generally, considering each principal of our federalism set forth above. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987) (addressing *Pullman*, *Younger*, and *Rooker-Feldman* abstention simultaneously because "the various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases.")

a. Comity.

As identified previously, the United States Supreme Court has held that states have a compelling interest in eliminating discrimination through use of public accommodation laws. Further, a federal court should not interfere with state officers in exercising their duties under such laws. See *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943).[7]

Pursuant to Colorado law, Plaintiffs' claims may be properly adjudicated in administrative forums and state courts. A federal court must presume that these state remedies are both adequate and a proper arena to settle federal constitutional questions. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)

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

("Accordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary."). There is simply no reason to subject Colorado and its officers to federal jurisdiction where the issues raised herein, involving both state law and a compelling state interest, could be resolved through state proceedings.

b. Efficient federal judiciary.

Masterpiece involves identical claims to those here, it has not yet been fully adjudicated, and is pending before the United States Supreme Court on Plaintiff's counsels' request for certiorari review. Plaintiffs are essentially asking this Court to overrule *Masterpiece*, which is not appropriate relief from a district court and the court should abstain. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 412 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Further, addressing the same issues in multiple jurisdictions is not favored. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). Where separate actions seek similar declaratory relief, identity of parties is not necessary for abstention to apply. *Landis v. North America Co.*, 299 U.S. 248, 254 (1936) ("we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical"). Instead, any "formula" that would limit stays to matters where identical parties

are involved "is too mechanical and narrow." *Id.* at 255. The harm that may befall one plaintiff in one court while a second court decides the same issue raised by a second plaintiff "are counsels of moderation rather than limitations upon power" to enter a stay. *Id.*

Importantly, should the Supreme Court grant certiorari in *Masterpiece*, any decision by this Court would become advisory. This alone counsels a stay. *See Pennzoil*, 481 U.S. at 11 n.9. ("In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised.").

CONCLUSION

Plaintiffs request to enjoin Defendants "and anyone acting in concert with them" from enforcing a neutral law of general application must be rejected. Defendants have never taken any action against Plaintiffs. The entirely of their dispute is with the interpretation of Colorado's public accommodation law by a Colorado appellate court. This forum is not the place to resolve that quarrel.

Defendants respectfully request that the Court deny all relief sought and dismiss this matter.

Respectfully submitted this 22nd day of February, 2017.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT 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 22nd day of February, 2017, addressed as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

vs.

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

Defendants.

MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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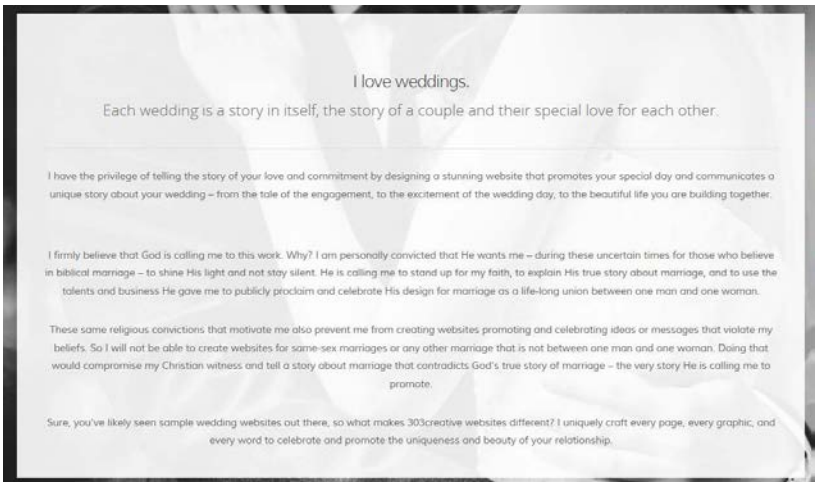

Is this speech? Plaintiffs say it is. Defendants say it is not, resting their entire case on the premise that custom words and graphics are conduct, not speech. That premise is wrong.

Federal courts have answered this question, consistently holding that words and custom images like Lorie's[1] are pure speech afforded the most rigorous protection under the Constitution. *Cressman v. Thompson (Cressman II)*, 798 F.3d 938, 951-52 (10th Cir. 2015) (holding that "[t]he concept of pure speech is fairly capacious," including, in addition to words, "music without words, dance, theater, movies, and pictures, paintings, drawings, and engravings," as well as "tattoos, artwork, custom-painted clothing, and stained-glass windows," all of which are "rigorously protected" and citing various federal cases holding the same) (internal quotations and alterations omitted).

[1] In accordance with prior briefing and for simplicity's sake, this motion refers to both Plaintiffs collectively as "Lorie" whenever possible.

Moreover, the Defendants stipulated that all of Lorie's graphic and website designs are expressive, although their most recent briefing omits that fact. Joint Statement of Stipulated Facts ¶¶ 46-47 ("Stipulated Facts") ("All of Plaintiffs' graphic designs" and "website designs are expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message."). This includes the custom wedding websites she intends to create. Stipulated Facts ¶¶ 81-82 ("Plaintiffs' custom wedding websites will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story."). These stipulations are binding. *Vallejos v. C.E. Glass Co.*, 583 F.2d 507, 510 (10th Cir. 1978) ("As a general rule, a stipulation is a judicial admission binding on the parties making it . . . .").

No doubt thus exists that Lorie's case is about the State of Colorado's pure-speech coercing and pure-speech squelching efforts. Significantly, Defendants do not deny those efforts. Instead, they repeat their position that Lorie's speech violates CADA and warrants punishment. *See e.g.* Defs.' Resp. to Pls.' Mot. for Summ. J. and Mem. in Supp. 28, ECF No. 50 ("Defs.' MSJ Resp.") (characterizing Plaintiffs' free speech claims as no more than a request "to bar Defendants from enforcing Colorado's public accommodations law so that they can discriminate against same-sex couples on the basis of their religious belief"); 27 (accusing Lorie of "using religion to perpetuate discrimination against individuals" in "violat[ion of] . . . state[] laws[]"); 6, 20, 26 (suggesting that a blanket interest in "erasing discrimination against its citizens," "eradicating discriminatory behaviors," or "eliminating discrimination" justifies any and all enforcement of CADA even against speech); 8, 20 (calling messages opposing same-sex marriage "derogatory" and "offensive"). Defendants' prior briefing and oral argument before this Court stated the same.

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 "accusing her of "assert[ing] her religious beliefs as a reason to discriminate"); Defs.' Mot. to Dismiss V. Compl. for Decl. and Inj. Relief 2, ECF 37 ("Defs.' MTD Br.") (same); Hr'g Tr. (Jan. 11, 2017) 8:10, ECF No. 47 (describing the statement Lorie desires to post on 303 Creative's website as "discriminatory language").

In defense of their actions, Defendants raise only distractions. Primary among these are the persistent treatment of Lorie's speech as conduct, the confusion of Lorie's as-applied and facial challenges, and the accusation that Lorie's case is no more than a collateral attack on *Craig v. Masterpiece Cakeshop*, 370 P.3d 272 (Colo. Ct. App. 2015). None of these arguments are prevailing. Yet, they are so pervasive in Defendants' briefing that they bear discussion at the onset.

Lorie's speech falls comfortably within the Tenth Circuit's definition of pure speech. *See* Pls.' Mot. for Summ. J. and Mem. in Supp., Section II.A.1.a, ECF No. 48 ("Pls.' MSJ Br."); Stipulated Facts ¶¶ 46-47, 81-82; *see also supra* Section II.A. Lorie intends to speak into the culture on the subject of marriage by (1) posting her desired statements on 303 Creative's website and by (2) creating custom wedding websites exclusively promoting marriages between one man and one woman. Stipulated Facts ¶¶ 46-59, 71, 73-92, Ex. A (sample custom wedding website), Ex. B (desired statement for 303 Creative's website). [2] Both types of expression are made up of

[2] The character of Lorie's protected expression is not impacted by its electronic medium. Numerous courts have found electronic text, images, and graphics to be protected speech. *See* Pls.' MSJ Br. 26, n.4. Her graphic and website designs, therefore, are just the modern equivalent

custom words and graphics expressing Lorie's views and values. The only difference between the two is that one is sold. Yet, commissioned speech remains protected under the Constitution. *Cressman II*, 798 F.3d at 951-952 (including the commercial sale of "tattoos, the sale of original artwork," and the sale of "custom-painted clothing" within the "fairly capacious" definition of pure speech) (internal quotations and alterations omitted); *see also supra* Section II.A.

Defendants' response also conflates Lorie's as-applied and facial challenges. This includes arguments to the effect that the Compelled Speech Provision does not violate Lorie's rights on its face. Lorie does not contest the facial validity of the Compelled Speech Provision, Colo. Rev. Stat. § 24-34-601(2)(a). Lorie only facially challenges the Banned Speech Provision. This provision is a content-based restriction on speech because it regulates speech about a handful of topics ("disability, race, creed, color, sex, sexual orientation, marital status, national origin, [and] ancestry") while leaving virtually all other topics unregulated. V. Compl. ¶ 223; Pls.' MSJ Br. Section II.A.1.e.; *see supra* Section II.D. The provision is facially overbroad and vague due to its undefined terms – "directly," "indirectly," "unwelcome," "objectionable," "unacceptable," or "undesirable," that grant the Defendants unbridled discretion to censor protected speech. Colo. Rev. Stat. § 24-34-601(2)(a); V. Compl. ¶¶ 252-265, 266-273, 345-370; Pls.' MSJ Br. Section II.E, II.A.1.f.; *see also supra* Section II.D., II.G. The statute's vague language also violates the free exercise clause by allowing individualized, secular exemptions while excluding individual religious exemptions. V. Compl. ¶¶ 293-329; Pls.' MSJ Br. Section II.C.; *see supra* Section II.E. And it is not neutral or generally applicable, in violation of the free exercise clause, because it

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of the 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).

contains categorical exemptions including for any "church, synagogue, mosque, or other place that is principally used for religious purposes." *Id.*; Colo. Rev. Stat. § 24-34-601(1); Pls.' MSJ Br. Section II.C.; *see supra* Section II.E. All of Lorie's other claims are to as-applied application of CADA that squelch or compel her expression. V. Compl. ¶¶ 205-398.

The as-applied nature of these challenges highlights the weakness of Defendants' claim that Lorie raises no more than a collateral attack on *Masterpiece Cakeshop*, 370 P.3d 272. This case is about Lorie—a life-long Colorado native with a talent for graphic and website design who is barred by her government from speaking and creating freely in accordance with her religious beliefs. Stipulated Facts ¶¶ 92-97.

That injury is Lorie's, not Masterpiece's. The two cases concern different litigants, different businesses, and different expression. However, *Masterpiece* matters because it is a concrete example of Defendants' speech-squelching and speech-compelling enforcement of CADA. *Masterpiece* demonstrates two things: First, that Defendants interpret CADA to prohibit commissioned speakers from declining to create messages that celebrate same-sex marriage, and second, that Defendants believe they have the authority to compel speech and punish messages with which they disagree. *See* Ex. F (Commission's Final Agency Order (1) adopting the Administrative Law Judge ("ALJ") decision that found Jack Phillips and Masterpiece Cakeshop in violation of CADA for declining to create a wedding cake for a same-sex ceremony and (2) issuing "remedial measures" that included a "cease and desist" order requiring Phillips to create custom wedding cakes for same-sex couples, and orders forcing him to file compliance reports with the state and put his staff through reeducation training about CADA); *see also* Ex. E (related ALJ decision). The threat of punishment is real and Defendants have done everything they can to

reinforce it. Defs.' MSJ Resp. 6, 8, 20, 27-28 (collectively confirming their authority under CADA to punish speech they deem discriminatory, including views that are critical of same-sex marriage). That fact makes Defendants' accusation that Lorie invented this case to challenge *Masterpiece* all the more disingenuous. Defs.' MSJ Resp. 1. It also renders Lorie's need for relief from this Court all the more urgent.

STATEMENT OF FACTS

The material facts are contained in the following documents and the Court can properly rely upon them: Stipulated Facts, the Affidavit of Lorie Smith in Support of Plaintiffs' Motion for Summary Judgment, ECF No. 48-1; the Affidavit of Counsel for the Plaintiffs, Jeremy D. Tedesco, In Support of Plaintiffs' Motion for Summary Judgment, ECF No. 48-2; and the Appendix, ECF No. 48-3 ("App."). Defendants do not dispute these facts. Instead, Defendants raise a blanket objection to "non-stipulated facts." Defs.' MSJ Resp. 2. That objection is misplaced.

Plaintiffs followed this Court's direction and filed a separate statement of stipulated facts. *See* Stipulated Facts; *see also* Courtroom Minutes 2, ECF No. 46 ("The parties will also file a separate stipulation of facts."); Hr'g Tr. 12:3-13:2 (stating same). But that filing does not preclude Plaintiffs from properly directing the Court to undisputed facts not contained in the stipulation. Federal Rule of Civil Procedure 56 instructs as much. Fed. R. Civ. P. 56(c). Ignoring this federal procedure, Defendants view themselves as the sole arbiters of the record on summary judgment, with the power to shape the record by withholding agreement despite having no basis to do so. That is not how Rule 56 operates. *Id.*

To dispute a material fact under Rule 56, Defendants must point to evidence in the record, or submit additional evidence, contradicting the disputed fact. Fed. R. Civ. P. 56(c). Defendants have not done this as to any fact, let alone a material one. Therefore, all material facts are agreed, admitted, and properly before this Court on summary judgment. Fed. R. Civ. P. 56.

ARGUMENT

I. This Court's Jurisdiction Is Well-Established.

Standing in this case is well-established and Defendants' response only underscores it. Lorie has standing because her constitutionally protected speech is chilled based on a credible threat of enforcement. Defendants do not dispute that, repeatedly 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 espousing Defendants' power to enforce CADA against such "discrimination." *See* Defs.' MSJ Resp. 6, 8, 20, 26-28; Defs.' MPI Resp. 2, 6; Defs.' MTD Br. 2, 3-4, 16-19; *see also* Stipulated Facts ¶¶ 7-28 (Defendants' stipulation to each of the Defendants' power to enforce CADA).

In light of these statements, Lorie's case presents classic pre-enforcement standing in the wake of *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2346 (2014); *Cressman v. Thompson (Cressman I)*, 719 F.3d 1139, 1147 (10th Cir. 2013); and *Ward v. Utah*, 321 F.3d 1263, 1269-70 (10th Cir. 2003). These three cases control and they confirm that where there is a credible threat of enforcement and the chilling of constitutionally protected speech, as in Lorie's case, a plaintiff has standing. *Susan B. Anthony List*, 134 S. Ct. at 2346 (upholding the standing of two advocacy groups to challenge a state law on a pre-enforcement basis on the chilling effect on their speech); *Cressman I*, 719 F.3d at 1147 (affirming a motorist's standing to bring a First Amendment pre-

enforcement challenge to state law); and *Ward*, 321 F.3d at 1269-70 (holding that an animal rights activist had standing to bring a pre-enforcement challenge to a state law that chilled his speech).

Defendants ignore this pre-enforcement standing test entirely. Their only reference to this binding case law is a summary dismissal at the end of their standing section on the alleged basis that these cases involved statutes that "explicitly prohibit specific types of speech" and carry criminal penalties. Defs.' MSJ Resp. 9. But like the statutes in those cases, CADA also explicitly prohibits speech. It prohibits "unwelcome, objectionable, unacceptable, or undesirable" speech. Stipulated Fact. ¶ 3; *see also* Hr'g Tr. 8:4-9:7 (Defense counsel confirmed that any individual can file a complaint, triggering a mandatory investigation, based on a business owner's speech on their website). However, a statute need not explicitly prohibit speech to be challenged. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (finding an otherwise valid public accommodations statute unconstitutional only as it is "peculiar[ly]" applied to speech); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-60 (2000) (same).

Defendants' suggestion regarding the criminal nature of statutes is similarly unavailing. Federal courts do not limit pre-enforcement challenges to cases involving criminal statutes. *See e.g. Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 788-789 (2011) (pre-enforcement, free speech challenge to statute punishing the sale of violent video games to minors with a civil fine of up to $1,000). Doing so would shield every civil statute from pre-enforcement judicial review.

Rather than grapple with the binding precedent, Defendants simply restate their arguments from their motion to dismiss. *See generally* Defs.' MTD Br. For example, the "ten item list" reappears. Defs.' MSJ Resp. 3. Defendants argue that "ten things must occur" before Plaintiff sustains injury, which occurs after Lorie has exhausted all of her appeal rights. *Id.* Yet, *Susan B.*

Anthony List instructs that the threat of a commission proceeding is *an injury*. *Susan B. Anthony List*, 134 S. Ct. at 2345-46 ("The burdens that Commission proceedings can impose . . . are of particular concern" particularly because "the target" of a "complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests."). Indeed at oral argument on January 11, 2017, Defense Counsel agreed that the triggering event for enforcement in Lorie's case is the mere initiation of a complaint, not the exhaustion of appeal rights, because the complaint triggers a mandatory investigation. Hr'g Tr. 8:21-23 ("Well, the State's position is that a matter needs to be initiated before any prosecution is made."); *Id.* 9:2-7 (confirming in response to the Court's question that the Division "exercises no discretion as to the complaints it pursues" and "has no discretion whether it could accept a complaint as long as it is filed").

This statement alone excludes items five through ten on Defendants' list. Defs.' MSJ Resp. 3. Items one and three—Plaintiffs' offering of wedding website services and Plaintiffs' declining of a request to create a website promoting same-sex marriage—are fully within Lorie's control. And Lorie has stipulated to both, stating that she is prepared to offer custom wedding website services immediately and that she will decline a request to create a custom wedding website promoting same-sex marriage. Stipulated Facts ¶¶ 92-97.

This leaves only the third party request. Yet, as the Supreme Court announced in *Doe v. Bolton*, absence of a third party request does not negate standing. 410 U.S. 179, 188 (1973) (affirming physician plaintiffs' standing even though they could not violate the law absent a request by a third party to perform an abortion); *see also Am. Civil Liberties Union 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."). Moreover, Lorie has already received such a request. App. 001-002 (email from Stewart to 303 Creative requesting graphic and website design services for his same-sex wedding). Lorie has not responded to the request because she is not currently creating custom wedding websites solely because of CADA. Stipulated Facts ¶¶ 95-96. However, the request highlights her need for relief from this Court. If she were in the wedding industry, that request would have placed Lorie in the impossible position of choosing between compliance with CADA and exercising her fundamental rights. Stipulated Facts ¶¶ 92-97. In addition to lifting the unlawful chill on her speech, that is the impossible choice she seeks to avoid by filing this pre-enforcement lawsuit. *Id.*

Defendants also re-assert *Clapper v. Amnesty Int'l USA* as if it is binding here. 133 S. Ct. 1138 (2013). As previously briefed, *Clapper* has little application outside of its unique facts. *See* Pls.' Resp. to Defs.' Mot. to Dismiss Pls.' V. Compl. for Decl. and Inj. Relief 8, ECF 43 ("Pls.' MTD Resp."). *Clapper* confronted a foreign intelligence surveillance statute that was completely discretionary, required a five-step process before the alleged injury (surveillance) could occur, and triggered—by nature of the statute at issue—an "especially rigorous" "standing inquiry." *Clapper*, 133 S. Ct. at 1143-1147. In addition to this high standard, which has no application to Lorie's case, the statute in *Clapper* exempted the plaintiffs and those plaintiffs did not facially violate the statute. *Id.* at 1148. The case, therefore, has no application to Lorie's. *Susan B. Anthony List*, which followed *Clapper*, tracks the law of this Circuit, announced in *Cressman I* and *Ward* that an injury is not speculative if it is based on a credible threat of enforcement. *Susan B. Anthony List*, 134 S.Ct. at 2346.

Defendants' erroneous reliance on *Clapper* is not resolved by reference to *COPE v. Kansas State Bd. of Educ.*, 821 F.3d 1215, 1222-23 (10th Cir. 2016), an establishment clause case that like *Clapper* has little application beyond its specific facts. The case concerned Board of Education guidance standards that had not yet been adopted or implemented by the local school boards. *Id.* The court found no standing existed because the guidance could be implemented without causing injury. *Id.* Unlike in *COPE*, the Defendants here have already implemented the law in an unconstitutional way and promised to do so again. Ex. C-F (Commission findings and orders regarding Masterpiece); Defs.' MSJ Resp. 6, 8, 20, 26-28; Defs.' MPI Resp. 2, 6; Defs.' Mot. to Dismiss 2, 3-4, 16-19; Stipulated Facts ¶¶ 7-28. Defendants' reference to *Hobby Lobby* in defense of standing is even less compelling. Defs.' MSJ Resp. 4. Failure to *address* standing based on "potential regulatory action" is not the same as *denying* standing on that basis. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125-26 (10th Cir. 2013).

Lorie's case, in contrast, presents a current and irreparable injury—her chilled speech. Stipulated Facts ¶¶ 92-97. There is nothing speculative about it. Yet, in a final attempt to avoid having to address the merits of this case, Defendants accuse Lorie of self-inflicting harm and wrongly presuming enforcement. Defs.' MSJ Resp. 4. Both statements are incredible and disingenuous given Defendants' persistent threats against her and promises to enforce CADA to squelch and coerce her speech. Defs.' MSJ Resp. 6, 8, 20, 26-28; Defs.' MPI Resp. 2, 6; Defs.' MTD Br. 2, 3-4, 16-19.

Finally, without citation to any case law, Defendants suggest that the Court cannot redress Plaintiffs' injury because private citizens can file private lawsuits alleging violations of CADA. Defs.' MTD Br. 9-10. Redressability need not be "complete" but 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 *Mass. v. EPA*, 549 U.S. 497, 526 (2007)); *see also Larson v. Valente*, 456 U.S. 228, 243 (1982); *Cressman I*, 719 F.3d at 1146-47.

A favorable decision will immediately redress Lorie's chilled speech injury by allowing her to speak. Stipulated Facts ¶ 97 ("If Plaintiffs obtain the relief requested in the Complaint, they will immediately publish the addition to 303 Creative's webpage referenced above and begin work designing, creating, and publishing wedding websites."). A favorable decision will also define the constitutional confines of CADA for future litigation, in the event a civil suit is later filed. This Court, therefore, can properly redress Lorie's injury.

II. Summary Judgment Is Appropriate As A Matter of Law.

Defendants' response raises no dispute of material fact. The dispute remains one of differing views of the case law and legal principles that control Lorie's case. For the reasons discussed below, the Court should decide those legal questions in Lorie's favor.

A. Defendants' application of CADA violates Lorie's free speech rights by coercing her to create unwanted expression.

The First Amendment guarantees every individual "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The latter protection, known as the compelled speech doctrine, bars the government from coercing unwanted expression. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("It is, however, a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'") (internal citation omitted). This doctrine, first recognized in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624

(1943), has been jealously guarded by the Court in an unbroken line of cases. *Hurley*, 515 U.S. at 573 ([O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'") (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986)); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-258 (1974) (rejecting government efforts to "compel[] editors or publishers to publish that which reason tells them should not be published") (internal quotations omitted); *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 634 (the government may not "compel [an individual] to utter what is not in his mind"); *Cressman II*, 798 F.3d at 950 (noting that "a State runs afoul of the First Amendment if it 'compel[s] a party to express a view with which the private party disagrees") (internal citation omitted). "[T]he fundamental rule of protection under the First Amendment" is therefore, that "a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

Cressman v. Thompson controls this Court's compelled speech analysis. Under *Cressman*, a plaintiff makes out a compelled-speech claim if she "establish[es] (1) speech; (2) to which [s]he objects; that is (3) compelled by some governmental action." *Cressman II*, 798 F.3d at 951. Lorie has done this. Lorie's custom wedding websites are pure speech. *Id.*; Stipulated Facts ¶¶ 46-47, 81-82 (Defendants' stipulation that Lorie's graphic, website designs, and custom wedding websites are expression.). Lorie objects to creating pure speech that violates her religious beliefs, including speech promoting same-sex marriages. Stipulated Facts ¶¶ 60-61, 63, 66-71, 73-80, 88-92, 94. And Defendants' plan to enforce CADA to force Lorie to create custom websites for same-sex marriages if she creates custom websites celebrating marriages between one man and one woman. Defs.' MSJ Resp. 6, 8, 20, 26-28; Defs.' MPI Resp. 2, 6; Defs.' MTD Br. 2. Indeed

Defendants have a record of enforcing CADA in such a speech compelling way. *See* Ex. C-F (Commission orders compelling the owner of Masterpiece Cakeshop to create speech, custom wedding cakes, celebrating same-sex marriages in violation of his strong religious objection.). While Defendants quibble with the role of *Masterpiece* they do not dispute the interpretation of CADA that *Masterpiece* confirms—namely, that an expressive business cannot decline to create custom expression because the expression conveys an unwanted message promoting same sex marriage without violating CADA. *See* Defs.' MSJ Resp. 6, 8, 11, 17, 20, 27-28; Defs.' MPI Resp. 2, 6; and Defs.' MTD Br. 2 (collectively 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 confirming their perceived right to regulate Lorie's speech).

Defendants' brief is notable for its lack of reference to federal case law. Instead, Defendants urge the Court to rely on three state court decisions that applied public accommodations laws to force expressive business owners to create unwanted speech celebrating same-sex marriages. Defs.' MSJ Resp. 11-21 (citing *Masterpiece Cakeshop*, *Arlene's Flowers*, and *Elane Photography* repeatedly). 42 U.S.C. § 1983's very purpose is, however, "to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law. . . ." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Federal, not state decisions, should guide the Court's ruling here. Moreover, the judgments in two of the three cases, *Arlene's Flowers* and *Masterpiece Cakeshop*, are not final, as the U.S. Supreme Court may grant review.

Additionally, the errors in the reasoning in these three state court cases are too numerous to recite. It suffices to say that although federal courts have not decided whether custom floral arrangements and wedding cakes are speech, they have unanimously ruled that words and custom images are pure speech. *See e.g.*, *Hurley* 515 U.S. at 569; *Cressman II*, 798 F.3d at 952. And even *Masterpiece* and *Arlene's Flowers* agree that pure speech receives full constitutional protection. *Masterpiece Cakeshop*, 370 P.3d at 288 ("We recognize that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage, and in such cases, First Amendment speech protections may be implicated."); *State v. Arlene's Flowers, Inc.*, No. 91615-2, 2017 WL 629181, at 10 n. 13 (Wash. Feb. 16, 2017) (agreeing with the *Anderson* court's "finding that tattoos receive First Amendment protections by pointing out that they 'are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection'") (*quoting Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010)); *see also* Stipulated Facts ¶¶ 46-47, 81-82 (Defendants stipulation that Lorie's graphic and website designs "are expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message" and that her "custom wedding websites will be expressive in nature using text, graphics, and in some cases videos to celebrate and promote the couple's unique love story.").

Many courts agree. To list a few:

- *Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n*, No. 14-CI-04474, at 10-11 (Fayette Cir. Ct. Apr. 27, 2015) (appeal pending)[3]: An LGBT organization brought a public accommodations claim against the owner of a closely-held small print and graphic-design shop because he referred its request

[3] Opinion available at: http://perma.cc/75FY-Z77D

for t-shirts promoting a LGBT pride festival. *Id.* at 10-11. Based on *Hurley*, a state trial court held that the county could not "compel [the print shop] and its owners to print a t-shirt conveying a message [they] do not support." *Id.* at 11.

- *Bono Film & Video, Inc. v. Arlington Cty. Human Rights Comm'n*, 72 Va. Cir. 256, 2006 WL 3334994 (Va. Cir. Ct. Nov. 16, 2006): An LGBT person requested that the owner of a closely-held film and video postproduction company turn betacams of two LGBT films into VHS tapes and filed a complaint with the local human rights commission when he declined. *Id.* at *1. After initially finding sexual orientation discrimination, the commission dismissed the case because the owner declined not based on the patron's "sexual orientation" but on his opposition to the films' "content," which he found religiously objectionable. *Id.* at *1-2.

- *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 pursuant to a state public accommodations law that prohibited sex discrimination. *Id.* at 59. A federal district court recognized that forcing ministers to speak to a mixed gender audience would necessarily change "the content and character of the speech" and barred application of the law. *Id.*

- *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, 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 999-1000.

- *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 they had 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.

Ignoring these progeny, Defendants suggest that *Hurley*'s compelled speech ruling is cabined to the non-profit realm. Defs.' MSJ Resp. 12-13. Yet, *Hurley* itself affirmed that the right not to speak is "enjoyed by business corporations generally . . . as well as by professional publishers." *Hurley*, 515 U.S. at 574. And federal courts have consistently extended free speech

protection to for-profit businesses. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 784 (1988) (protecting for-profit fundraisers); *Pac. Gas* , 475 U.S. at 4 (protecting for-profit electric company); *Tornillo*, 418 U.S. at 243 (protecting for-profit newspaper); *Anderson*, 621 F.3d at 1061 (protecting for-profit tattoo business); *Beurhle v. City of Key West*, 813 F.3d 973, 976-78 (11th Cir. 2015) (protecting for-profit tattoo business); *Cressman II*, 798 F.3d at 951-952 (listing the commercial sale of "tattoos, the sale of original artwork," and sale of "custom-painted clothing" within the "fairly capacious" definition of pure speech) (internal quotations and alterations omitted); *see also White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) ("White's sale of his paintings" does not "remove[] them from the ambit of protected expression."); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the . . . speech is sold rather than given away.").

Defendants attempt to side-step this venerable case law by claiming the primary Supreme Court cases on this point, *Tornillo* and *Pacific Gas*, are distinguishable because in both cases the compelled speech claim rested on the government requirement that a speaker "disseminate a third-party message along with its own protected message." Defs.' MSJ Resp. 13. Yet, Defendants' creative "intermingled" speech theory is not the law, as the Supreme Court has never required a compelled speech litigant to prove that their speech is combined with someone else's speech to prevail. *Cf. Agency for Int'l Dev.*, 133 S. Ct. at 2327 ("It is, however, a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'") (internal citation omitted); *Hurley*, 515 U.S. at 573; *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 634; *Cressman II*, 798 F.3d at 951. Rather, as *Cressman* confirms, the Supreme

Court's test for a compelled speech claim is unwanted speech "compelled by some governmental action." *Id.*

Furthermore, CADA fails even Defendants' faulty articulation of the compelled speech test. As applied, CADA forces Lorie to disseminate messages promoting same-sex marriage with her message of the distinct virtue of marriage between one man and one woman. Defs.' MSJ Resp. 6, 8, 11, 17, 20, 26-28 (stating Defendants' interpretation of CADA as requiring Lorie to create custom wedding websites for same-sex weddings if she creates custom wedding websites extolling the virtues of marriage between one man and one woman); *see also* Ex. F (Commission order compelling Jack Phillips, owner of Masterpiece Cakeshop, to create custom wedding cakes disseminating a message promoting same-sex marriage). For example, Lorie's custom wedding websites state, "We invite you to celebrate our marriage." Ex. A. Defendants' application of CADA requires her to state this message of celebration for same-sex marriages as well as marriages between one man and one woman in violation of her religious beliefs.

Defendants try to bolster the point with a citation to *Rumsfeld* but that effort is unavailing. Defs.' MSJ Resp. 14. The law in *Rumsfeld* required schools to provide an empty room for student "interviews and recruiting receptions" with military recruiters on equal terms with other employers. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 64 (2006). Because "the schools [were] not speaking," no pure speech was directly at issue. *Id.* The schools merely had to allow "expressive activities by others on [their] property." *Id.* at 65. Defendants do not seek to force Lorie to open an empty room, they want Lorie to create the pure speech *herself*.

Rumsfeld would have been more akin to the present matter had the government demanded that the law schools create posters promoting the very thing they objected to: the military's policy

barring homosexuals from service. *See id*. at 52 & n.1. But the law schools were not required to create any expression regarding that policy. Such compulsion would have impermissibly "interfer[ed] with a speaker's desired message" because the law schools opposed that policy. *Cf. id*. at 52, 64. Yet that is the type of compulsion involved here, wherein Defendants interfere with Lorie's desired message explaining God's design for marriage by requiring her to design and publish websites promoting a different conception of marriage. *See* Defs.' MSJ Resp. 6, 8, 11, 17, 20, 26-28.

Defendants further suggest that they can force Lorie to speak a message that violates her religious beliefs because the public would likely attribute her coerced speech to the patron. Yet, Defendants stipulated to the contrary—"Viewers of the wedding websites will know that the websites are Plaintiffs' original artwork because all of the wedding websites will say 'Designed by 303Creative.com.'" Stipulated Facts ¶ 83; *see also Buehrle*, 813 F.3d at 977 (stating that the First Amendment's protection is not "a mantle, worn by one party to the exclusion of another and passed between them" but instead "protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it"). Defendants' stipulation is binding. *Vallejos*, 583 F.2d at 510. Additionally, third party perception is irrelevant when it comes to pure speech. *Cressman II*, 798 F.3d at 952-955 (applying the *Spence-Johnson* test only to symbolic expression, not pure speech). The government may not coerce undesired speech regardless of third party perceptions. That consideration is only relevant when symbolic conduct is at issue, which is not the case here. *Id*.

Defendants finally suggest that protecting Lorie's speech creates a slippery slope that protects "architects, chefs, hair stylist, baristas, etc." Defs.' MSJ Resp. 16-17. Yet, those

businesses do not sell expression. Instead the slippery slope slides the other direction. Refusing to protect Lorie's speech means that no expressive business is safe. The government may compel any commissioned speaker to violate her beliefs, including, for example, forcing:

- gay musicians to play the piano at a Westboro Baptist Church fundraiser;
- atheist singers to sing hymns at a Catholic Easter service;
- Muslim printers to print a synagogue's pro-Israel pamphlets; or
- lesbian web designers to create a Mormon group's website criticizing same-sex marriage.

Who will be coerced simply depends on which viewpoint temporarily holds majoritarian sway. If the state truly enforced CADA in an even-handed manner, it would force the African-American baker to create a custom cake celebrating the racist ideals of a member of the Aryan Nation or the Muslim baker to create a custom cake denigrating his faith for the Westboro Baptist Church. But it does not. *See* App. 029.

B. Defendants' application of CADA is a prior restraint on publication that violates Lorie's right to free press.

The Free Press Clause stands as "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). Its chief purpose is "to prevent previous restraints upon publication." *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 713 (1931). Certainly no private speaker should "fear 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). Defendants' application of CADA to Lorie's speech violates her right to free press and chills her speech because if she publishes her desired speech on the unique virtue of one man and one woman marriages and

criticizes or opposes same-sex marriages, she will be punished. Defs.' MSJ Resp. 6, 8, 20, 26-28; Stipulated Facts ¶¶ 92-97.

Defendants respond by citing *Masterpiece* for the proposition that CADA "does not prohibit a for-profit vendor from expressing its views on same-sex marriage." Defs.' MSJ Resp. 17. Yet, that is not what *Masterpiece* holds. The Colorado Court of Appeals stated in *Masterpiece* that "CADA prohibits Masterpiece from displaying or disseminating a notice . . . indicating that those engaging in same-sex marriage are unwelcome in the bakery." *Masterpiece Cakeshop,* 270 P.3d at 288. Certainly a posting stating Lorie's opposition to same-sex marriage would make a same-sex couple feel "unwelcome." And Defendants agree. In briefing and at oral argument, Defendants consistently call views, like Lorie's, opposing same-sex marriage "offensive," "derogatory" and "discriminatory." Defs.' MSJ Resp. 8, 20; Defs.' MPI Resp. 18; Hr'g Tr. 8:10. Defense Counsel affirmed in Court that Defendants will investigate any complaint submitted against her for language she posts on her 303 Creative website. Hr'g Tr. 7:5-9:7. That investigation violates her free press rights and chills her speech. Moreover, the certainty of a probable cause finding is no mystery given Defendants' statements that Lorie's desired statement is "discriminatory language" and that views opposing same sex marriage are "offensive" and "derogatory." Defs.' MSJ Resp. 8, 20; Defs.' MPI Resp. 18; Hr'g Tr.8:10.

Defendants' back-up position is that Lorie can post a disclaimer, disassociating herself from her customers' viewpoints. Defs.' MSJ Resp. 17. Federal courts have ruled that disclaimers do not remedy the free speech violation, particularly when pure speech is involved. *Pac. Gas*, 475 U.S. at 15 n. 11 ("The presence of a disclaimer . . . does not suffice to eliminate" the burden on speech). *PruneYard,* which the Defendants cite, did not rule differently. *Pruneyard Shopping*

Center v. Robins, 447 U.S. 74 (1980). Like *Rumsfeld*, *PruneYard* involved the mere requirement that a shopping center provide an empty space for others' expression. As the Supreme Court observed in *Pacific Gas* and *Hurley*, the shopping center was not required to speak, so compelled speech and freedom of press were not at issue, as they are in Lorie's case. *Pac. Gas*, 475 U.S. at 12 ("Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets . . . ."); *Hurley*, 515 U.S. at 580 (stating same). Defendants do not ask Lorie to provide an empty space for same-sex couples to speak their own message about marriage, they demand that Lorie create the speech herself, an invasion of the mind that cannot be remedied by a disclaimer.

Moreover, since any disclaimer Lorie could post would necessarily look much like the statement she desires to post on her website now, Defendants have already precluded that posting. Stipulated Facts ¶¶ 85-92, Ex. B (desired statement). Defendants have already stated that this "disclaimer" constitutes "discriminatory language" that will be investigated as soon as they receive a Complaint. Hr'g Tr. 8:10. Lorie is left unable to exercise her free press rights.

C. Defendants' application of CADA violates Lorie's rights to free association.

Defendants suggest that Lorie's free association rights are not violated because she can exercise that freedom in other contexts—for example, the church she attends or the groups in which she seeks membership. Defs.' MSJ Resp. 18. That is cold comfort. Failure to violate Lorie's free association rights in all respects does not justify the violation of her rights in one respect. Otherwise, *Dale* would have been decided differently. *Dale*, 530 U.S. at 656 (holding that a public accommodations law as applied to the Boy Scouts to force them to retain a homosexual assistant

scoutmaster, "runs afoul of the Scouts' freedom of expressive association" by "significantly affect[ing] its expression"). The First Amendment guarantees the "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). This joint "advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech" regardless of "whether the beliefs sought to be advanced . . . pertain to political, economic, religious or cultural matters." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Banning Lorie from declining to collaborate with those expressing different philosophies of marriage, profoundly impacts Lorie's speech and violates her free association rights. Letting her attend the church of her choice does not remedy that harm.

D. Defendants' application of CADA is content-based and discriminates on the basis of viewpoint; grants the Defendants' unbridled discretion to censor speech; creates an unconstitutional condition; and as to the Banned Speech Provision is overbroad. Defendants do not dispute any of these violations.

Defendants have not responded to the merits of several of Plaintiffs' speech claims, thus conceding them. These include Lorie's challenges that, as applied, the Compelled Speech and Banned Speech provisions are unconstitutionally content and viewpoint based and grant the Defendants' unbridled discretion to censor speech; that, as applied, the Compelled Speech Provision and the Banned Speech Provision violate the unconstitutional conditions doctrine; and finally that the Banned Speech Provision is facially overbroad. Plaintiffs refer the Court to prior briefing on all three points. Pls.' MSJ Br. 41-47 (content and viewpoint discrimination, unbridled discretion); 53-55 (unconstitutional conditions); 47-49, 62-65 (overbreadth, vagueness, unbridled discretion). However, Defendants' most recent briefing further confirms the validity of all three claims.

As to content and viewpoint discrimination, Defendants leave no doubt that they interpret CADA to prohibit Lorie from declining to create custom wedding websites for same-sex marriages based on the objectionable message they convey, Defs.' MSJ Resp. 6, 8, 20, 27-28 (collectively describing Lorie's intent to decline such messages as discrimination that violates CADA), while they allow other expressive business owners to decline messages opposing same-sex marriage, labeling such messages "derogatory, offensive messages." Defs.' MSJ Resp. 20. This accords with Defendants' position in regard to the complaints against Masterpiece, Azucar Bakery, Gateaux, Ltd., and Le Bakery Sensual and demonstrates their exercise of unbridled discretion. Ex. C-L (Commission findings and orders regarding the messages declined by these four cake artists).

Defendants' statements confirm that Lorie must give up her free speech and free exercise rights to enter the marketplace, thus proving her unconstitutional conditions claim. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (explaining the unconstitutional conditions doctrine applies to forfeiting "one constitutionally protected right as the price for exercising another"); *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004) (explaining that it is "an especially malignant unconstitutional condition" to require citizens "to surrender a constitutional right . . . to exercise . . . other fundamental rights").

Finally, Defendants' broad construction of the language in the Banned Speech Provision emphasizes its expansive breadth. Defs.' MSJ Resp. 22. Indeed, Defense Counsel confirmed that any citizen can file a subjective complaint based on any language an expressive business owner posts online and the Defendants will investigate it on a mandatory basis. Hr'g Tr. 8:4-9:7; Pls.' MSJ Br. Section II.E; *see also supra* Section II.G.

E. Defendants' application of CADA violates Lorie's right to free exercise of her religion.

While not separately addressed, Defendants appear to challenge Plaintiffs' free exercise claims in the course of their standing discussion, asserting that the law is neutral and generally applicable. Defs.' MSJ Resp. 5-9.

The law is neither neutral nor generally applicable. It contains categorical exemptions, for any "church, synagogue, mosque, or other place that is principally used for religious purposes", Colo. Rev. Stat. § 24-34-601(1), undermining its neutrality and general applicability, and Defendants enforce it in such a way that individualized assessments are rampant. *See* Pls.' MSJ Br. 55-60. These individualized assessments permit expressive businesses to decline unwanted messages for secular reasons, but not for religious reasons. This is evident, for example, in the Defendants' dispositions of complaints against the four bakeries who each declined to create cakes that conveyed unwanted messages about same-sex marriage. Ex. C-L (Commission findings and orders related to the complaints filed against Azucar Bakery, Gateaux, Ltd., Le Bakery Sensual, and Masterpiece). The Division found no probable cause for discrimination as to the three bakeries who declined to create cakes conveying messages opposing same-sex marriage based on secular objections to the messages. Ex. G-L. The Commission affirmed those decisions and the Defendants stand by them here. *Id.*; Defs.' MSJ Resp. 6, 20 (labeling messages critical of same-sex marriage "derogatory" and "offensive").Yet, the Division found probable cause for discrimination against similarly situated cake artist, Jack Phillips, who declined to create a custom wedding cake because it conveyed a message promoting same-sex marriage in violation of his religious beliefs. Ex. C-F. They promise the same decision against Lorie. Defs.' MSJ Resp. 6, 8, 20, 26-28 (confirming that CADA requires Lorie to create custom wedding websites

celebrating same-sex weddings despite her religious objection to the message those websites convey). This leaves Lorie unable to exercise her religious beliefs, which compel her to speak publicly about God's design for marriage. Stipulated Facts ¶¶ 71-79, 92-97.

Defendants try to undermine Lorie's free exercise claim by accusing her of using religion to justify discrimination. Defs.' MSJ Resp. 6-7, 27-28. But Lorie's case is about speaker autonomy, not discrimination, as Defendants suggest. As the Supreme Court explained in *Hurley*, when a public accommodations law is "applied to expressive activity . . . simply to require speakers to modify the content of their expression" it unconstitutionally infringes "speaker[] autonomy." *Hurley*, 515 U.S. at 578. That is not discrimination, it is preserving "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 642.

Moreover, the cases Defendants rely on have no application to Lorie's case. In *Duarte*, *U.S. Jaycees*, and *Hishon*, the Supreme Court's rulings rested on findings that the public accommodations laws at issue had no effect whatsoever on the objectors' speech. *See, e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (explaining that the association's "ability to carry out [its] [expressive] purposes" was not affected); *U.S. Jaycees*, 468 U.S. at 627 (confirming that the association could "exclude individuals with ideologies or philosophies different from" its own); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (noting the firm could not show any way in which its speech "would be inhibited"). Here in contrast, Lorie's desired speech is precluded and coerced by Defendants' application of CADA. Stipulated Facts ¶¶ 92-97.

Moreover, Defendants' citations to *Lee* and *Bob Jones* do not help them. These cases did not consider free exercise claims involving speech, and each case presented a fact specific analysis that is distinguishable from Lorie's case. *Lee* recognized a burden on free exercise rights, but found that there was simply no less restrictive alternative to the unconditional payment of taxes. *United States v. Lee*, 455 U.S. 252 (1982). When considered by the Supreme Court in *Hobby Lobby*, the Court limited *Lee* to its tax related facts. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784 (2014). Similarly, *Bob Jones* considered a university's tax exempt status and claims of race discrimination in education. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Its analysis, necessarily, focused on the distinct history of systematic discrimination based on race in this country, *id.*, a history that has no application to Lorie's case as she is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender." Stipulated Facts. ¶ 64.

F. Defendants' application of CADA violates the equal protection clause.

Defendants' entire equal protection claim response comes down to an argument that the Court should not consider the dispositions in Azucar Bakery, Gateaux, Ltd, or Le Bakery Sensual, Inc., because they are administrative determinations. Defs.' MSJ Resp. 19; Ex. J-L (No probable cause findings). Defendants omit the fact that the Commission affirmed the findings on appeal in all three cases, issuing "final agency order[s]". Ex. G-I ("Commission's Final Agency Order[s]" affirming the no probable cause findings in all three cases). Moreover, Defendants do not renounce the determinations of those complaints. Instead, they defend them and repeatedly affirm their interpretation of CADA. Defs.' MSJ Resp. 8 (stating that the three bakeries "refused to create offensive messages on cakes"), 20 (stating that the desired cakes "contain[ed] derogatory,

offensive messages"); Defs.' MPI Resp. 18 ("[T]he three bakeries refused to make a cake for a patron . . . because of the derogatory, offensive message, not because of the patron's creed."); Hr'g Tr. 8:10 (calling Lorie's desired statement for her 303 Creative's website "discriminatory language"). According to the Defendants, CADA prohibits expressive business owners from declining to create messages promoting same-sex marriage but permits expressive business owners to decline to create messages opposing same-sex marriage because those messages are offensive and derogatory. Defs.' MSJ Resp. 8, 20. Offensiveness has never been a permissible standard for the regulation of speech. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Moreover, Defendants' repeated affirmation of the results in *Masterpiece Cakeshop* versus the determinations in Azucar Bakery, Gateaux, Ltd, and Le Bakery Sensual, Inc. prove the violation of the equal protection clause. Defendants have treated expressive businesses with Lorie's views on marriage differently than similarly-situated owners in the past and they promise to do so in the future.

Defendants also suggest that Plaintiffs cannot prevail in an equal protection claim because Plaintiffs do not know how the Division has disposed of every complaint it has received. Equal Protection does not require the Defendants to apply CADA unconstitutionally in every circumstance. It suffices that Defendants apply it unconstitutionally to Lorie, particularly since she raises an as applied challenge. Defendants have confirmed their unconstitutional application here. This is only emphasized by their explanation of *Masterpiece*—that to "refuse to make a wedding cake for a same-sex couple" is a refusal "because of their sexual orientation" but to

refuse to make a cake opposing same-sex marriage is permissible because such a cake is "derogatory, offensive" expression. Defs.' MSJ Resp. 19-20. There is no question that Defendants enforce CADA in violation of Lorie's equal protection rights.

G. Defendants' application of CADA violates the due process clause, both procedurally and substantively.

CADA is unconstitutionally vague because it fails to define "directly," "indirectly," "unwelcome," "objectionable," "unacceptable," and "undesirable" leaving Lorie and anyone subject to the statute unable to identify what activity is prohibited. Colo. Rev. Stat. § 24-34-601(2)(a). Moreover, Defendants have issued no guidance interpreting the statute despite their authority to do so. The dictionary definitions Defendants proffer highlight CADA's vagueness rather than fixing it. Defs.' MSJ Resp. 22. "Not welcome" is no more descriptive than "unwelcome" for example. *Id.* And citing "unwelcome" to define "unacceptable" or "undesirable" to define "objectionable" is unhelpful. *Id.*

The problem is that each of these terms is subjective. What is "unacceptable" to one person will be entirely acceptable to another, and what might make one person feel "unwelcome" may have the opposite impact on another. And none of this sheds any light on what activity is prohibited and what is allowed. This leaves Defendants as the exclusive authority on these issues and even they cannot articulate what these terms mean. Defs.' MSJ Resp. 22. When questioned by this Court, Defense Counsel confirmed that the Division's investigation (the harm Lorie seeks to avoid by chilling her speech) is mandatory upon the filing of a complaint by any individual who subjectively believes that a "posting [contains] discriminatory language." Hr'g Tr. 7:5-9:7. Defendants are thus left to make a probable cause determination based solely on their subjective views of which statements are "unacceptable," "unwelcome," "objectionable," and "undesirable,"

and which are not. This sort of unbridled discretion is precisely what the Due Process Clause prohibits. And we have seen that unbridled discretion in practice as Defendants have reached incongruous conclusions in reviewing complaints against the four similarly situated bakeries who all declined to create cakes because of the messages requested, not the status of the patrons requesting them. Ex. C-L.

Defendants' only response to Plaintiffs' substantive due process claim is the bare assertion that there is no fundamental right to carry on a business. Defs.' MSJ Resp. 23. Unsurprisingly, Defendants make that assertion and cite nothing in support because their argument contradicts Supreme Court precedent. "[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]," as recognized by the Supreme Court. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *see also Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) ("Without 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."). This is essential to an individual's participation and realization of their "self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

Defendants' application of CADA to Lorie bars her from full participation in the "economic life" of the community by prohibiting her from pursuing her entrepreneurial dream, in accordance with her religious beliefs, to promote marriages between one man and one woman through the creation of custom wedding websites. Stipulated Facts. ¶¶ 42, 71-79. Accordingly, Defendants' actions must satisfy strict scrutiny, which they do not. *See supra* Section II.H.

Because Defendants violate Lorie's fundamental right in this regard, the "shock the conscience" standard cited by Defendants does not apply. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 768 (10th Cir. 2008) (explaining that laws that infringe fundamental rights must satisfy strict scrutiny, not the "shock the conscience" standard); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003) ("While the 'shocks the conscience' standard applies to tortious conduct challenged under the Fourteenth Amendment, it does not . . . eliminate more categorical protection for 'fundamental rights'.") (internal citations omitted).

Defendants do not dispute, thereby conceding, that their application of CADA infringes Lorie's personal autonomy and dignity. *See* V. Compl. ¶¶ 372-399 (Pls.' Fifth Cause of Action); Pls.' MSJ Br. Section II.F. Indeed, Defendants' latest round of briefing only renews their disparagement of Lorie's religious views as "discriminatory" and "offensive," and confirms that they will require her to promote a view of marriage that violates her beliefs, bar her public message on marriage, and exclude her from the marketplace based on her religious beliefs. Defs.' MSJ Resp. 6, 8, 11, 17, 20, 26-28. This stands in stark violation of the personal dignity and autonomy protections recognized by the Supreme Court in *Obergefell v. Hodges.* 135 S. Ct. 2584, 2597 (2015).

H. Defendants' application of CADA cannot survive strict scrutiny.

Since Defendants' application of CADA to Lorie violates her fundamental constitutional rights, it must survive strict scrutiny. This test is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997), and "it is the rare case in which . . . a law survives strict scrutiny," *Burson v. Freeman*, 504 U.S. 191, 211 (1992). As the Supreme Court instructed: "The state must specifically identify an actual problem in need of solving, and the

curtailment of free speech must be actually necessary to the solution." *Brown*, 564 U.S. at 799 (internal citations omitted).

To overcome strict scrutiny, Defendants bear the burden of showing that their application of CADA to Lorie is justified by a compelling state interest and is narrowly tailored to serve that interest. They have done neither. Defendants do not even attempt to establish narrow tailoring, thereby conceding that point. Defendants' compelling interest statement is so broad that they might as well have conceded that point as well.

Defendants announce a compelling interest in "erasing discrimination against its citizens," "eradicating discriminatory behaviors," and "eliminating discrimination." Defs.' MSJ Resp. 6, 20, 26. But such broad-based interests do not satisfy the requirements of strict scrutiny. *Dale*, 530 U.S. at 656, 659 (holding that despite the goal of "prevent[ing] discrimination" that justifies the enactment of public accommodations laws, "state interests embodied in . . . [the] public accommodations law do[es] not justify . . . intrusion on the . . . rights to freedom of expressive association."); *Hurley*, 515 U.S. at 572-73 (same in regards to freedom of speech). As the Supreme Court noted in *Dale*, public accommodations laws, "originally enacted to prevent discrimination" by those providing basic necessities like food, lodging, and transportation, "have expanded to cover more places" over time. *Dale*, 530 U.S. at 656. The ever-increasing expansion of these laws increases the likelihood of "conflict between state public accommodation laws and . . . First Amendment rights." *Id.* at 657. When those conflicts occur, First Amendment rights prevail. *See e.g. Id.*; *see also supra* Section II.A. (collecting cases).

Moreover, the compelling interest test demands a particularized assessment requiring Defendants to show that the interest is specific, not a "broadly formulated interest[]," and

specifically served by squelching and coercing "the particular claimants" speech. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420-21 (2006). Defendants have not shown this, particularly in light of *Hurley*'s holding that applying public accommodations laws to expressive activity does not serve a valid—let alone compelling—state interest. *Hurley*, 515 U.S. at 578-79 (stating that if the purpose of "applying the state law to expressive conduct" is to coerce government-favored messages, then the objective is "decidedly fatal"). This is further cemented by the wide availability of expressive businesses nationwide, many of which market their services specifically for same-sex weddings, and all of which undercuts Defendants' unsubstantiated claim of widespread discrimination. App. 003-010. Coercing and squelching Lorie's individual speech only violates her constitutional rights. It does not serve any compelling state interest.

III. Injunctive Relief Is Proper And Necessary To Prevent Further Violation Of Plaintiffs' Rights: Plaintiff Will Suffer Irreparable Harm Absent A Permanent Injunction And Both the Balance Of Equities And The Public Interest Favor An Injunction.

Defendants urge the Court to deny Plaintiffs injunctive relief, but rely exclusively on cases that either found no First Amendment violation or where no First Amendment challenge was brought in the first place. These cases also all deal with preliminary, rather than permanent, injunction standards. Defs.' MSJ Resp. 25-26; *Heideman v. S. Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003) (denying nude dancers a disfavored preliminary injunction because the dancers failed to show a likelihood of success on their First Amendment challenge); *Prairie Band of Potawatomi Indians v. Pierce (Prairie Band I)*, 253 F.3d 1234, 1250 (10th Cir. 2001) (affirming the district court's finding of "irreparable harm" and granting of a disfavored preliminary injunction); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250 (10th Cir. 2003) (remanded, but the court

found a significant risk of irreparable harm absent a preliminary injunction stopping the development of a golf course that threatened bald eagle habitat); *Faircloth v. Colo. Dep't of Corr.*, 2016 WL 234356 (2016) (denying a pro se inmate a disfavored preliminary injunction related to limits on his outgoing mail costs because he could not prevail on either the merits or irreparable harm prongs of the test); *Conn. v. Mass.*, 282 U.S. 660 (1931) (concerning a preliminary injunction related to water rights between the states). These cases thus have no application to Lorie's case.

A permanent injunction is proper where the court finds "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Prairie Band Potawatomi Nation v. Wagnon (Prairie Band II)*, 476 F.3d 818, 822 (10th Cir. 2007). This case meets each of those requirements.

Lorie succeeds on the merits of her claims. *See supra.* She currently suffers irreparable harm in the chilling of her constitutional rights and that harm will continue absent an injunction. *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The balance of equities always lie in favor of vindicating First Amendment rights. *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("The threatened injury to Plaintiffs' constitutionally protected speech outweighs whatever damage . . . may [be] cause[d] [by] Defendants' inability to enforce what appears to be an unconstitutional statute."); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) ("[N]o substantial harm to others can be said to

inhere in [the] enjoinment" of Defendants' unequal application of the law.). And "it is always in the public interest to prevent the violation of a party's constitutional rights." *Verlo*, 820 F.3d at 1132; *see also Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."). After all, the vindication of constitutional rights "protect[s] the free expression of . . . millions." *Johnson*, 194 F.3d at 1163.

IV. The Court Should Not Abstain From Lorie's Claims.

Defendants repeat their request for abstention based on a pending petition for certiorari in a case involving a different expressive business owner. Plaintiffs have already responded to Defendants' arguments in detail and refer the Court to that briefing. Pls.' MTD Resp. 15-21. Suffice to say that abstention by all its names is restricted to cases involving the *same litigants* in state and federal court. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (so limiting *Younger* abstention); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (limiting *Rooker/Feldman* abstention); *Guttman v. Khalsa*, 446 F.3d 1027, 1031-32 (10th Cir. 2006) (same); *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994) (limiting *Colorado River* abstention); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) (same). Lorie is not a party to *any* state court proceeding. Therefore, to hold her "constitutional rights hostage to the outcome and timing" of another person's state court proceeding would enact a grave injustice, *Phelps v. Hamilton (Phelps I)*, 59 F.3d 1058, 1069 (10th Cir. 1995), and ignore the unique task of the federal courts to protect individual constitutional rights from state interference. *Mitchum*, 407 U.S. at 242. In the alternative, Defendants also urge this Court to take extraordinary action to stay Plaintiffs' case while Defendants wait and see if the Supreme Court

grants the petition for certiorari in *Masterpiece*. Defs.' MSJ Resp. 29-32. Plaintiffs responded in detail to this request as well when it was made at the motion to dismiss stage. Pls.' MTD Resp. 27-29. Defendants have not responded to that briefing. Instead, they reiterate their request that this Court perpetuate the irreparable harm Lorie suffers while they wait to see if the Supreme Court grants certiorari in an unrelated case. The Supreme Court receives 7,000-8,000 petitions for certiorari each term. It grants review in about 80 cases. *Id.* The statistical chance of the Supreme Court taking *Masterpiece* is 0.1% versus the 100% certainty that Lorie's irreparable harm will continue if this Court stays the case.

Moreover, a grant of certiorari in *Masterpiece* would not change this Court's "virtually unflagging" obligation to hear Lorie's case. *Sprint Commc'ns*, 134 S. Ct. at 591. To the extent a Supreme Court decision in *Masterpiece* might inform this Court's ruling, it can be considered if and when the Supreme Court rules on the merits of the *Masterpiece* case. This does not warrant a stay.

CONCLUSION

Lorie's case necessitates immediate action from the federal courts to free her chilled speech from the speech-coercing and speech-squelching power exercised by the State of Colorado. A permanent injunction is necessary to preserve Lorie's First and Fourteenth Amendment rights. Plaintiffs respectfully request that this Court issue one as soon as possible, with the other relief requested in Plaintiffs' Prayer for Relief.

Respectfully submitted this 8th day of March, 2017.

s/ Jeremy D. Tedesco

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I hereby certify that on March 8, 2017, 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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