

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

303 CREATIVE LLC and LORIE SMITH,
Plaintiffs-Appellants,

v.

AUBREY ELENIS, et al.,
Defendants-Appellees,

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

APPELLANTS' APPENDIX: VOLUME 3 OF 3

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January 22, 2020

TABLE OF CONTENTS

VOLUME 1

Civil Docket Sheet	App. 1
Complaint	App. 17
Complaint- Exhibit A	App. 79
Complaint- Exhibit B	App. 108
Defendants' Response to Plaintiffs' Motion for Preliminary Injunction	App. 113
Minute Entry re Law and Motion Hearing	App. 139
Transcript of Law and Motion Hearing	App. 141
Plaintiffs' Motion for Summary Judgment and Memorandum in Support	App. 156
Affidavit of Lorie Smith In Support of Plaintiffs' Motion for Summary Judgment.....	App. 248
Affidavit of Counsel for the Plaintiffs, Jeremy D. Tedesco, In Support of Plaintiffs' Motion for Summary Judgment	App. 256

VOLUME 2

Plaintiffs' Motion for Summary Judgment Appendix	App. 258
Joint Statement of Stipulated Facts	App. 313
Joint Statement of Stipulated Facts- Exhibit A	App. 333
Joint Statement of Stipulated Facts- Exhibit B	App. 362
Joint Statement of Stipulated Facts- Exhibit C	App. 367
Joint Statement of Stipulated Facts- Exhibit D	App. 373
Joint Statement of Stipulated Facts- Exhibit E	App. 379
Joint Statement of Stipulated Facts- Exhibit F	App. 393

Joint Statement of Stipulated Facts- Exhibit G.....	App. 397
Joint Statement of Stipulated Facts- Exhibit H.....	App. 399
Joint Statement of Stipulated Facts- Exhibit I.....	App. 401
Joint Statement of Stipulated Facts- Exhibit J.....	App. 403
Joint Statement of Stipulated Facts- Exhibit K.....	App. 409
Joint Statement of Stipulated Facts- Exhibit L.....	App. 415
Defendants’ Response to Plaintiffs’ Motion for Summary Judgment and Memorandum in Support	App. 421
Plaintiffs’ Memorandum of Law in Reply to Defendants’ Response to Plaintiffs’ Motion for Summary Judgment	App. 463

VOLUME 3

Order Granting In Part and Denying In Part Motion to Dismiss and Denying Motion for Preliminary Injunction and Motion for Summary Judgement, With Leave To Renew	App. 509
Order Setting Supplemental Briefing Deadline Regarding <i>Masterpiece</i> , <i>NIFLA</i> , and <i>Janus</i>	App. 522
Defendants’ Supplemental Brief on <i>Masterpiece</i> , <i>NIFLA</i> , and <i>Janus</i>	App. 524
Plaintiffs’ Supplemental Brief on <i>Masterpiece</i> , <i>NIFLA</i> , and <i>Janus</i>	App. 537
Plaintiffs’ Supplemental Brief on <i>Masterpiece</i> , <i>NIFLA</i> , and <i>Janus</i> - Exhibit 1.....	App. 550
Order and Judgment as to Notice of Appeal	App. 557
Opinion and Order Denying Motion for Preliminary Injunction and Motion for Summary Judgment.....	App. 563
Plaintiffs’ Response to Show Cause Order	App. 589
Affidavit of Jacob P. Warner in Support of Plaintiffs’ Response to Show Cause Order.....	App. 596

Plaintiffs’ Response to Show Cause Order- Exhibit A	App. 599
Plaintiffs’ Response to Show Cause Order- Exhibit B	App. 639
Plaintiffs’ Response to Show Cause Order- Exhibit C	App. 640
Plaintiffs’ Notice of Supplemental Authority	App. 644
Plaintiffs’ Notice of Supplemental Authority- Exhibit A	App. 651
Plaintiffs’ Second Notice of Supplemental Authority.....	App. 687
Plaintiffs’ Second Notice of Supplemental Authority- Exhibit A.....	App. 694
Opinion and Order Granting Summary Judgment.....	App. 752
Final Judgment	App. 760
Plaintiffs’ Notice of Appeal.....	App. 762
Charge of Discrimination from <i>Scardina v. Masterpiece</i>	App. 765
Notice of Hearing and Formal Complaint from <i>Scardina v.</i> <i>Masterpiece</i>	App. 769
Closure Order from <i>Scardina v. Masterpiece</i>	App. 774
Summary of Voluminous Social Security Administration Data	App. 779

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

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

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

Plaintiffs,

v.

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

Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS and
DENYING MOTION FOR PRELIMINARY INJUNCTION and MOTION FOR
SUMMARY JUDGMENT, WITH LEAVE TO RENEW**

THIS MATTER comes before the Court on the Plaintiffs’ Motion for Preliminary Injunction (#6), the Defendants’ Response (#38), and the Plaintiffs’ Reply (#40); the Defendants’ Motion to Dismiss (#37), the Plaintiffs’ Response (#43), and the Defendants’ Reply (#45); and the Plaintiffs’ Motion for Summary Judgment (#48), the Defendants’ Response (#50), and the Plaintiffs’ Reply (#51).

PROCEDURAL HISTORY

Plaintiffs 303 Creative LLC (“303”) and Lorie Smith filed this action challenging the constitutionality of two clauses of Colorado Revised Statutes § 24-34-601(2) (“Public Accommodation Statute”). The two clauses at issue are as follows:

The first clause (“Accommodation Clause”) states,

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

The second clause (“Communication Clause”) states,

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

Colo. Rev. Stat. § 24-34-601(2)(a).

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

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

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

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

UNDISPUTED FACTS

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

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

Heidi Hess, Rita Lewis, and Jessica Pocock are members of the Colorado Civil Rights Commission (“Commission”). Defendant Cynthia H. Coffman is the Colorado Attorney General.

303 offers services to the general public, including graphic design, website design, social media management and consultation, marketing, branding strategy, and website management training. Ms. Smith provides these services for 303 without the assistance of employees or contractors.

Ms. Smith describes herself as a Christian and states that her religious beliefs are central to her identity. She believes that she must use her talents in a manner that glorifies God and that she must use her creative talents in operating 303 in a way that she believes will honor and please him.

Consistent with her beliefs, Ms. Smith limits the scope of services she is willing to provide to 303’s customers. She is willing to work with all people regardless of their race, religion, gender, and sexual orientation, but she “will decline any request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman.”

Although 303 does not currently do so, Ms. Smith intends to expand its services by offering to build websites for couples who plan to marry. These websites would be intended to keep a couple’s friends and family informed about the upcoming wedding. Ms. Smith desires to use the websites to “affect the current cultural narrative regarding marriage”. Because she believes that marriage is ordained of God and should only be between one man and one woman, she intends to deny any request a same-sex couple may make for a wedding website.

Ms. Smith has prepared a Proposed Statement that she intends to post on 303's website to explain 303's policies with regard to wedding websites. It reads:

I love weddings.

Each wedding is a story in itself, the story of a couple and their special love for each other.

I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding - from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together.

I firmly believe that God is calling me to this work. Why? I am personally convicted that He wants me - during these uncertain times for those who believe in biblical marriage - to shine His light and not stay silent. He is calling me to stand up for my faith, to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman.

These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage-the very story He is calling me to promote.

According to Ms. Smith, the only reason why 303 has not begun offering to build wedding websites and she has not posted the Proposed Statement is that doing so would violate the Accommodation and Communication Clauses of the Public Accommodation Statute and expose her and 303 to penalties and civil liability.

ANALYSIS

A. Standing

The Defendants argue under Federal Rule of Civil Procedure 12(b)(1) in their Motion to Dismiss that the Plaintiffs lack standing to challenge the Public Accommodation Statute and thus their claims must be dismissed.

Standing is a component of subject-matter jurisdiction and may be challenged in a motion to dismiss under Fed. R. Civ. P. 12(b)(1). The party asserting the existence of subject matter jurisdiction (here the Plaintiffs) bears the burden of proving such jurisdiction exists, including the burden of demonstrating standing. *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1144 (10th Cir. 2010); *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir.2002).

The jurisdiction of federal courts is limited to actual cases or controversies. U.S. Const. art. III, § 2 cl.1. To have a cognizable case or controversy, a plaintiff must have standing to sue. *Colo. Outfitters Ass’n v. Hickenlooper*, 823 F.3d 537, 543 (10th Cir. 2016). Whether a plaintiff has standing is determined as of the date that he or she files the action. *Nova Health Sys*, 416 F.3d at 1154. When a plaintiff asserts multiple claims, he or she may have standing as to some claims but not to others, and under such circumstances, the claims for which the plaintiff lacks standing must be dismissed. *See Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007).

To establish standing, the Plaintiffs must demonstrate three elements. First, the Plaintiffs must have suffered an “injury in fact”. Such injury must be concrete, particularized, and actual or imminent but not conjectural or hypothetical. Second, the injury must be fairly traceable to the challenged actions of the defendant. Finally, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Bronson*, 500 F.3d at 1106 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000)).

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

An injury in fact is fairly traceable to a defendant if the defendant is charged with the responsibility to enforce the statute. *See Nova Health Sys.*, 416 F.3d at 1158. Because it is undisputed that the Commission is charged with the responsibility to enforce the Public Accommodation Statute, any injury is traceable to it. The Court declines to address whether every Defendant is charged with enforcement of the statute.

Redressability concerns whether a court is empowered to redress an injury, not whether the lawsuit would result in an outcome that redresses every injury. If a named defendant has the authority to enforce a statute, a plaintiff's injury caused by enforcement of the statute is redressable even if a private person could also seek to enforce the statute through a civil lawsuit. *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 905 (10th Cir. 2012). Again, because the Commission is charged with enforcing the statute, and is named as a defendant, it does not matter that a private person could also seek to enforce the statute. The Court can redress the injury traceable to enforcement of the statute by the governmental entities and actors.

The final standing element is whether the Plaintiffs have suffered an injury in fact. The Defendants argue that the Plaintiffs will not suffer any injury until they publically offer to build wedding websites, they receive a request for and then decline to build a website for a same-sex couple, the same-sex couple files a complaint against them, an administrative law judge finds that the Plaintiffs violated the Public Accommodation Statute and orders them to comply, and the Plaintiffs exhaust their state appellate remedies. The Plaintiffs respond that they are suffering two continuing constitutional injuries in so far as (1) they face a credible threat that the Defendants will enforce the Public Accommodation Statute and (2) the Public Accommodation Statue has a chilling effect on their ability to exercise their rights of free speech.

Plaintiffs are correct that it is not necessary that the Public Accommodation Statute be enforced against them in order for there to be an “injury in fact”. An “injury in fact” is recognized if the Plaintiffs show that a threatened injury is certainly impending, or there is a substantial risk that a harm will occur. *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir.2004); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Bronson v. Swensen*, 500 F.3d 1099, 1107 (10th Cir. 2007); *U.S. v. Supreme Ct. of N.M.*, 839 F.3d 888, 901 (10th Cir. 2016); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1182 (10th Cir. 2010). For a threat of injury to equate to an injury in fact, the Plaintiffs must show that (1) they intend to engage in conduct arguably affected by a constitutional interest, but proscribed by a statute, and (2) there exists a credible threat of enforcement of the statute for their conduct. *See Colo. Outfitters Ass’n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016); *see also Supreme Ct. of N.M.*, 839 F.3d at 901. For a threat of enforcement to be credible, the injury cannot rest on a “highly attenuated chain of possibilities”, but rather the Plaintiffs must demonstrate that “but for” their decision not to engage in conduct proscribed by statute, there is a substantial risk the statute would be enforced against them. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410-11 (2013).

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

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

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

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

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

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

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

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

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

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

Statute.² A statute has a chilling effect on speech if it causes plaintiffs to refrain from speaking based on “an objectively justified fear of real consequences”. *Brammer-Hoelter*, 602 F.3d at

1182. A plaintiff can show a chilling effect with:

(1) evidence that in the past they have engaged in the type of speech affected by the challenged government action³; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced.

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

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

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

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

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

B. Denial of remaining motions

The parties have agreed that the case is at issue and that the Preliminary Injunction Motion and Motion for Summary Judgment should be determined together in resolution of the matters in dispute on the merits. Although the Plaintiffs have standing to challenge the Communication Clause of the Public Accommodation Statute, the Court declines to rule on the merits due to the pendency of *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 16-111 (U.S. filed Jul. 22, 2016) before the United States Supreme Court. As noted, the factual and legal similarities between *Masterpiece Cakeshop* and this case are striking. It is likely that a determination by the Supreme Court will either guide determination of or eliminate the need for resolution of the issues in this case as to whether prosecuting the Plaintiffs for publishing the Proposed Statement would violate their rights guaranteed by the Free Speech and Free Exercise Clauses of the First Amendment.

Further, the Court finds that the parties will not be prejudiced by delay in resolution of the issues in this case. The Plaintiffs are not currently offering to build wedding websites, and no evidence has been presented to show that their financial viability is threatened if they do not begin offering to do so. Thus, the Court denies the Motions for Preliminary Injunction and Summary Judgment with leave to renew after ruling by the United States Supreme Court in *Masterpiece Cakeshop*.

CONCLUSION

Defendants' Motion to Dismiss (#37) is **GRANTED IN PART**, and **DENIED IN PART**. For the foregoing reasons, the Court **GRANTS** the motion and **DISMISSES** Plaintiffs' claims challenging the constitutional validity of the Accommodation Clause of the Public Accommodation Statute under the (1) Free Speech Clause, (2) Free Exercise Clause, (3) Equal

Protection Clause, and (4) Due Process Clause of the First and Fourteenth Amendments of the United States Constitution for lack of standing. The Motion is **DENIED** as to the Plaintiffs' five claims challenging the validity of the Communication Clause of the Public Accommodation Statute under the (1) Free Speech Clause, (2) Free Press Clause, (3) Free Exercise Clause, (4) Equal Protection Clause, and (5) Due Process Clause of the First and Fourteenth Amendments of the United States Constitution.

The Plaintiff's Motion for Preliminary Injunction and Motion for Summary Judgment (#6) and (#48) are **DENIED, WITH LEAVE TO RENEW** after a final ruling has been issued by the United States Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 16-111 (U.S. filed Jul. 22, 2016). Within 14 days of issuance of such ruling, the parties will advise this Court in writing of their desire to proceed (and if so whether they desire to refile or reopen their briefing on the Motion for Summary Judgment and Preliminary Injunction) or dismiss the action.

Dated this 1st day of September, 2017

BY THE COURT:



Marcia S. Krieger
Chief United States District Judge

From: COD_ENotice@cod.uscourts.gov
To: COD_ENotice@cod.uscourts.gov
Subject: Activity in Case 1:16-cv-02372-MSK 303 Creative LLC et al v. Elenis et al Order
Date: Thursday, July 12, 2018 11:16:29 AM

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U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

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Case Name: 303 Creative LLC et al v. Elenis et al

Case Number: [1:16-cv-02372-MSK](#)

Filer:

Document Number: 63(No document attached)

Docket Text:

ORDER SETTING SUPPLEMENTAL BRIEFING DEADLINE: The Court notes the request made by the Plaintiffs in their [62] Notice and HEREBY ORDERS that all parties shall submit supplemental briefing regarding *Masterpiece*, *NIFLA*, and *Janus*, and their impact on Plaintiffs' case within 21 days from the date of this Order. by Chief Judge Marcia S. Krieger on 7/12/18. Text Only Entry (msksec,)

1:16-cv-02372-MSK Notice has been electronically mailed to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

AUBREY ELENIS, et al.

Defendants.

DEFENDANTS' SUPPLEMENTAL BRIEF

Pursuant to the Court's orders of July 12 (**#63**) and 31 (**#65**), 2018, Defendants submit this brief regarding the impact of the Supreme Court's opinions in *Masterpiece*, *NIFLA*, and *Janus* on Plaintiffs' case as follows:

INTRODUCTION

Plaintiffs 303 Creative LLC and Lorie Smith filed this suit to challenge the constitutionality of the Accommodation and Communication Clauses of the Colorado Anti-Discrimination Act (CADA). On September 1, 2017, the Court dismissed Plaintiffs' challenge to the Accommodation Clause for lack of standing. (**#52**.) The Court stayed consideration of the Communication Clause challenge until after the Supreme Court issued its opinion in the related case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights*

Commission. Plaintiffs filed an interlocutory appeal of the Court's Order to the Tenth Circuit, styled *303 Creative LLC v. Elenis*, No. 17-1344. The Tenth Circuit will hear oral arguments on September 25, 2018.

On June 4, 2018, the Supreme Court issued its opinion in *Masterpiece*, 138 S. Ct. 1719 (2018). After the Supreme Court issued its decision, Plaintiffs informed this Court that they were renewing their previously stayed Communication Clause challenge, despite their pending appeal. (# 62.) While the Tenth Circuit is considering Plaintiffs' challenges to both the Accommodation and Communication Clauses, only the Communications Clause challenge is properly before this Court, and Defendants limit this supplemental brief accordingly. However, were the Tenth Circuit to reverse this Court's dismissal of the Accommodation Clause challenge and remand, Defendants request that this Court hold a status conference to determine how best to move this case forward. Defendants believe that if the Tenth Circuit reverses this Court's prior dismissal, further proceedings may be necessary.

With regard to Plaintiffs' remaining claims in this Court, the Communication Clause prohibits all places of public accommodation from posting a notice that the full and equal enjoyment of services will be denied to an individual because of various protected characteristics, including sexual orientation. § 24-34-601(2)(a), C.R.S. (2014). Plaintiffs, however, allege that

they intend to post a notice on their website that Plaintiff Smith “will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman” because of her religious beliefs. **(#52 at p. 5.)** They further allege that the Communication Clause makes it illegal to publish the proposed notice and that they are only refraining from publishing the notice due to CADA. As a result, Plaintiffs argue that the Communication Clause violates several provisions of the First and Fourteenth Amendments to the United States Constitution. **(*Id.* at p. 2.)**

The Supreme Court’s recent decision in *Masterpiece* undermines Plaintiffs’ claims. Like this case, *Masterpiece* addressed constitutional challenges to CADA, albeit to the Accommodation Clause only. In that context, the Supreme Court made clear that a State can enforce laws that require businesses to provide their products and services—including wedding-related products and services—to all members of the public on the same terms. *Masterpiece*, 138 S. Ct. at 1127-28. *Masterpiece* also confirms that strict scrutiny should not apply in this case and that Plaintiffs have not satisfied the standards for injunctive relief. As for the recent Supreme Court decisions in *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018) and *Janus v. American Federation of State, County, and Municipal Employees, Counsel 31*, 138 S. Ct. 2448 (2018), those cases are distinguishable and of no help to Plaintiffs’ case.

ARGUMENT

I. ***Masterpiece* supports Colorado’s position and undermines Appellants’ claims.**

Masterpiece concerned a challenge to the Accommodation Clause of CADA, under the First Amendment, and not a challenge to the Communication Clause. Further, *Masterpiece* was decided on narrow, fact-specific grounds concerning the treatment of several bakers by former members of the Colorado Civil Rights Commission, facts that are not relevant here. However, *Masterpiece* emphasized important principles that support Colorado’s position in this case.

A. ***Masterpiece* approved the enforcement of “unexceptional” public accommodations laws that prohibit notices which “impose a serious stigma on gay persons.”**

As *Masterpiece* recognized, “[f]or most of its history, Colorado has prohibited discrimination in places of public accommodation.” 138 S. Ct. at 1724–25. CADA is thus merely the latest enactment in a long Colorado “tradition of prohibiting discrimination in places of public accommodation.” *Id.* at 1725. This tradition is grounded in “compelling state interests of the highest order,” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984); namely, the eradication of discrimination in places of public accommodation on the basis of a protected classification. *See also Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (stating that a defense to Title II of the Civil Rights Act of 1964—a federal public accommodations law that prohibited discrimination based on race— was invalid

“because it contravenes the will of God and constitutes an interference with the free exercise of the Defendant’s religion” was “so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable”) (internal quotation marks and citations omitted).

Masterpiece endorsed that interest, emphasizing the importance of “civil rights laws that ensure equal access to goods, services, and public accommodations.” 138 S. Ct. at 1727. And although “[t]he First Amendment ensures that religious organizations and persons are given proper protection,” *id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015)), “[t]he Court’s precedents [also] make clear that ... the owner of a business serving the public[] might have his right to the free exercise of religion limited by generally applicable laws.” *Id.* at 1723–24; *see also Prince v. Mass.*, 321 U.S. 158, 177 (1944) (“[the] limitations which of necessity bound religious freedom ... begin to operate whenever activities begin to affect or collide with liberties of others or of the public”). CADA is such a law.

The Supreme Court also stated that it is “unexceptional” for CADA to “protect gay persons ... in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” *Masterpiece*, 138 S. Ct. at 1728; *see also Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (“Provisions like these are well within the State’s usual power to enact”). The Court emphasized that these specific protections are justified by society’s recognition that “gay persons and gay

couples cannot be treated as social outcasts or as inferior.” *Masterpiece*, 138 S. Ct. at 1727. Thus, a State’s laws “can, and in some instances must, protect them in the exercise of their civil rights.” *Id.*

As to weddings specifically, *Masterpiece* “assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony.” *Id.* However, the Court emphasized that any such exception must be narrowly confined. *Id.* Otherwise, “persons who provide goods and services for marriages and weddings might refuse to do so for gay persons,” and the resulting stigma would violate the “history and dynamics” of our civil rights laws. *Id.*

Masterpiece thus not only approved generally of public accommodations laws like CADA, but specifically endorsed its use of sexual orientation as a protected characteristic. And although the Court concluded that the now-former members of Colorado’s Civil Rights Commission had failed to accord the owner of the Masterpiece Cakeshop a “neutral and respectful consideration” of his religious beliefs, *id.* at 1729, it left no doubt that objections to gay marriage, whatever their source, “do not allow business owners ... to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Id.* at 1727.

Given *Masterpiece*’s narrow holding, the Court did not address the constitutionality of CADA’s Accommodation Clause. However, the Court provides

guidance to lower courts in reaching future decisions. Specifically, the majority opinion cautions against broad exemptions for religious beliefs that may invalidate the Communication Clause:

And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons.

Masterpiece, 138 S. Ct. at 1728-29; *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (finding if Congress prohibits employment-based racial discrimination, then States can require employers to remove “White Applicants Only” signs as a proper restriction on conduct not speech).

B. *Masterpiece* confirms that Plaintiffs’ challenge does not trigger strict scrutiny.

Although *Masterpiece* did not specify what level of scrutiny it applied to public accommodations laws like CADA, the Court repeatedly referred to such laws as “neutral and generally applicable.” *See, e.g.*, 138 S. Ct. at 1727 (holding that although religious objections to gay marriage are “protected views,” they “do not allow business owners ... to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law”). The Court concluded that the former Commission members had failed to consider the religious objection of the Masterpiece Cakeshop’s owner “with the neutrality

that the Free Exercise Clause requires,” 138 S. Ct. at 1731, but it never intimated that CADA itself was anything other than neutral and generally applicable. And “[a] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional [free exercise] challenge.” *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). Thus, *Masterpiece* undermines Plaintiffs’ assertion that CADA is subject to strict scrutiny.¹

C. *Masterpiece* supports the denial of Plaintiffs’ request for injunctive relief.

As the majority opinion in *Masterpiece* makes clear, a notice that “no goods or services will be sold if they will be used for gay marriages’ ... would impose a serious stigma on gay persons.” *Masterpiece*, 138 S. Ct. at 1728-29. However, that is exactly the type of notice that Plaintiffs wish to post in this case. Plaintiffs cannot establish that they are likely to succeed on their claim that the notice they seek to post is constitutionally protected when the Supreme Court has already recognized that an almost identical notice is not. Similarly, Plaintiffs do not suffer irreparable harm when they are prohibited from posting a notice that is not constitutionally protected.

¹ Regardless of the scrutiny applied, the Court “has long held, and reaffirms [in *Masterpiece*],” that “a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers.” 138 S. Ct. at 1733 n* (Kagan, J., concurring).

Additionally, *Masterpiece* confirms that the balance of equities does not tip in Plaintiffs' favor and that injunctive relief is not in the public's best interest. To the contrary, *Masterpiece* recognizes that gay persons and couples must be protected and not treated as social outcasts or inferior. *Id.* at 1727. This has long been the view in Colorado, such that years before the extension of marriage rights to same-sex couples, Colorado included sexual orientation as a protected characteristic. *Id.* at 1725 (noting that CADA was amended in 2007 and 2008 to include sexual orientation).²

Society has a strong interest in ensuring that all persons have equal access to goods and services in the economy, even—and perhaps especially—when religious or philosophical objections would otherwise lead a business owner “to deny protected persons equal access to goods and services.” *Id.* at 1727; *see also United States v. Lee*, 455 U.S. 252, 261 (1982) (“When followers of a particular [religious] 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”). There is no question that Plaintiffs' religious views must be respected, yet “[t]he exercise of [gay persons' and couples'] freedom on

² Because Colorado did not recognize same-sex marriages in 2012, the dilemma faced by the owner of Masterpiece Cakeshop was “particularly understandable” and his position “not unreasonable.” 138 S. Ct. at 1728. Marriage rights have now been extended to same-sex couples nationwide, so the same cannot be said today.

terms equal to others must be given great weight and respect by the courts.”

Masterpiece, 138 S. Ct. at 1727.

II. *NIFLA* and *Janus* do not support Plaintiffs’ claims.

NIFLA was a challenge to a California law requiring “crisis pregnancy centers” to post a government-drafted notice about publicly funded contraception and abortion services. 138 S. Ct. at 2365. The Court concluded that this notice requirement failed even intermediate scrutiny because it was “wildly underinclusive” and because the law “targets speakers, not speech.” *Id.* at 2375, 2378. But the “government-scripted, speaker-based disclosure requirement” in *NIFLA*, where the government *prescribed* the *content* of speech, *id.* at 2377, bears little resemblance to the content—and viewpoint—neutral language of CADA that only *prohibits* notices refusing services based on sexual orientation. Moreover, *NIFLA* reaffirmed that there is no First Amendment violation when “restrictions directed at commerce or conduct”—such as CADA—“impos[e] incidental burdens on speech.” *Id.* at 2373 (quotation omitted).

Janus similarly involved a challenge to an Illinois law *compelling* unions to collect fees even from non-member public employees on whose behalf the union negotiates. 138 S. Ct. at 2455. The Supreme Court declined to decide what level of scrutiny applied to that challenge, *id.* at 2465, because regardless of the scrutiny applied, this arrangement violated the non-members’ free speech rights. *Id.* at 2460 (concluding the forced payment of agency fees “compell[ed] them to subsidize

private speech on matters of substantial public concern.”). CADA has no requirement even remotely similar. And although Plaintiffs will doubtless point to *Janus*’s statement that “[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command,” *id.* at 2463, CADA’s prohibition on discrimination does not compel business owners to “mouth support” for anything, either directly or by charging fees used to subsidize others’ private speech.

Given Colorado’s long tradition of prohibiting discrimination, plus society’s recognition that “gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” *Masterpiece*, 138 S. Ct. at 1724–25, 1727, CADA is a constitutional application of a legitimate government interest in eradicating discrimination in places of public accommodation. *Id.* at 1727.

CONCLUSION

Masterpiece confirms that Defendants are entitled to summary judgment on Plaintiffs’ remaining claims concerning the Communications Clause. For the reasons stated above and in prior briefing, Colorado therefore respectfully requests that the Court find in favor of Defendants. However, if the Tenth Circuit reverses this Court’s dismissal of the Accommodation Clause challenge and remands for further consideration, Defendants request that this Court hold a status conference to determine how best to move this case forward.

Respectfully submitted this 6th day of August, 2018.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing DEFENDANTS' SUPPLEMENTAL BRIEF 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 6th day of August, 2018, 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.

PLAINTIFFS’ SUPPLEMENTAL BRIEF ON *MASTERPIECE*, *NIFLA*, AND *JANUS*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. Colorado violates the Free Exercise Clause by banning Lorie’s statement because of religious hostility.	2
II. Colorado violates the Free Speech Clause because it bans Lorie’s website statement based on content that is constitutionally protected.	4
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

<i>Brush & Nib Studio, LLC v. City of Phoenix</i> , 418 P.3d 426 (Ariz. Ct. App. 2018).....	7, 8
<i>Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston</i> , 515 U.S. 557 (1995).....	6
<i>Janus v. American Federation of State, County, & Municipal Employees, Council 31</i> , 138 S. Ct. 2448 (2018).....	4, 6, 7
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission</i> , 138 S. Ct. 1719 (2018).....	<i>passim</i>
<i>National Institute of Family & Life Advocates v. Becerra</i> (“NIFLA”), 138 S. Ct. 2361 (2018).....	1, 4, 5, 6
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218 (2015).....	5

Other Authorities

<i>Autumn Scardina v. Masterpiece Cakeshop Inc.</i> , Charge No. CP2018011310 (Colo. Civil Rights Commission June 28, 2018).....	3
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INTRODUCTION

Web designer Lorie Smith¹ seeks to stop Colorado from applying the Colorado Anti-Discrimination Act (“CADA”) to stop her from posting a religiously motivated statement on her website, compel her to create websites with objectionable content, and target her faith for punishment. Although this Court dismissed Lorie’s challenge to the provision compelling her to create websites, Lorie still wants to post her statement and CADA still forbids this. That violates the Constitution for two reasons that recent Supreme Court decisions affirm.

First, Colorado applies CADA to silence Lorie because of her religious beliefs. But *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* teaches that the government cannot act with “hostil[ity] to the religious beliefs of [its] citizens.” 138 S. Ct. 1719, 1731 (2018). Here, the same state is applying the same law to target a person holding the same religious beliefs while reciting the same rhetoric *Masterpiece* condemns—calling Lorie’s beliefs “offensive” and “discriminatory.” Defs.’ Resp. to Pls.’ Mot. for Summ. J. and Mem. in Supp. 6-8, 20 (“MSJ Resp.”), ECF No. 50. Yet Colorado does not condemn secular views and allows secular speakers (the three bakers mentioned in *Masterpiece*) to escape punishment. This rhetoric and inconsistency prove the hostility the Free Exercise Clause condemns.

Second, Colorado applies CADA to ban Lorie’s statement based on its content and viewpoint—content explaining her religious reasons for not creating websites celebrating same-sex marriage. Content-based restrictions trigger strict scrutiny. *Nat’l Inst. of Family & Life Advocates v. Becerra* (“NIFLA”), 138 S. Ct. 2361, 2371 (2018). Colorado tries to avoid this scrutiny, arguing that it can ban Lorie’s statement because it describes mere “conduct.” MSJ Resp. 13. But choosing what website content to create is not simply conduct; it’s protected speech—Lorie’s editorial judgment to choose what she can and cannot say. Because Lorie can decline to create websites, Colorado cannot ban her speech saying so.

¹ In this brief, “Lorie Smith” and “Lorie” refer to both plaintiffs.

In sum, Colorado is not protecting the right of its citizens to express and live “the principles that are so fulfilling and so central to their lives and faith.” *Masterpiece*, 138 S. Ct. at 1727 (citation omitted). This Court should ensure that Lorie is free to express and live consistently with her beliefs.

ARGUMENT

I. Colorado violates the Free Exercise Clause by banning Lorie’s statement because of religious hostility.

According to *Masterpiece*, public accommodation laws may not be applied with hostility toward religious beliefs. Colorado violated that command in *Masterpiece* and continues to do the same here. That hostility is obvious in two ways.

First, Colorado applied CADA against Jack Phillips—who holds the same beliefs about marriage as Lorie—and Colorado spoke against those beliefs, showing “clear and impermissible hostility toward [his] sincere religious beliefs.” 138 S. Ct. at 1729. According to officials, Phillips “can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state’”; Phillips must “compromise” his religious beliefs if he wants to do business in Colorado; and officials accused Phillips of using his faith to excuse discrimination. *Id.* (“Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery...the holocaust...we can list hundreds of situations where freedom of religion has been used to justify discrimination.”) Officials even described Phillip’s faith as “one of the most despicable pieces of rhetoric that people can use.” *Id.*

Colorado has never rectified those statements. It has not retrained enforcement officials or altered operating policies. At most, Colorado downplays those comments in this litigation—stating they do “not reflect the views of all Commissioners.” MSJ Resp. 7 fn.2. But *Masterpiece* rejected that argument. *Masterpiece*, 138 S. Ct. at 1729-30 (stating that the “statements cast

doubt on the fairness and impartiality” because “no objection to these comments” was made by other officials and the comments were never “disavowed in the briefs”). If statements by a few officials criticizing religious beliefs reveal the system’s mistreatment of Phillips, those statements also prove mistreatment of Lorie, *who holds the same beliefs*.

Worse, Colorado uses the same disparaging rhetoric to describe Lorie’s beliefs throughout this litigation. Colorado has argued that Lorie must compromise her beliefs to do business in Colorado. MSJ Resp. 11; Defs.’ Resp. to Pls.’ Mot. for Prelim. Inj. 15-16 (“MPI Resp.”), ECF No. 38. It has accused Lorie of “assert[ing] her religious beliefs as a reason to discriminate,” MPI Resp. 2, 6; Defs.’ Mot. to Dismiss V. Compl for Decl. and Inj. Relief 2 (“MTD”), ECF No. 37, and “using religion to perpetuate discrimination.” MPI Resp. 22; MSJ Resp. 27-28. It has called the beliefs about marriage “derogatory” and “offensive.” MPI Resp. 18; MSJ Resp. 8, 20. And it has compared Lorie’s beliefs to invidious race discrimination. MPI Resp. 16-17; MTD 10; MSJ Resp. 6-7. These statements all indicate that Colorado will enforce its law against Lorie just as it did against Phillips and that it will do so with the same anti-religious hostility.

Colorado’s hostility toward Lorie’s beliefs are confirmed in other ways. Mere weeks after Phillips prevailed in the Supreme Court, Colorado issued another probable-cause determination against him for allegedly violating CADA *again* when he declined to create a custom cake that expressed a message in violation of his religious beliefs. Determination in *Autumn Scardina v. Masterpiece Cakeshop Inc.*, Charge No. CP2018011310, dated June 28, 2018.² Given this consistent targeting of people of faith, Lorie cannot hope to receive “the

² Colorado found probable cause of discrimination even though Phillips declined to create the requested cake because of its message, has never created that cake for anyone, and was targeted by the complainant, an attorney who—on the day the news broke that the Supreme Court would hear *Masterpiece*—asked Masterpiece Cakeshop for a custom cake with a “blue exterior and a pink interior” to “reflect[] ... the fact that [he] transitioned from male-to-female.” Exhibit 1.

neutral and respectful consideration of [her] claims” which she is due, *Masterpiece*, 138 S. Ct. at 1729, absent this Court’s immediate intervention.

Colorado also showed hostility in *Masterpiece* by punishing Phillips for not creating cakes conveying objectionable messages but allowing three other bakeries to refuse to create cakes that they and the Commission found to convey “offensive” messages. 138 S. Ct. at 1730-31. As the Supreme Court observed, “[a] principled rationale for the difference in treatment... cannot be based on the government’s own assessment of offensiveness.” *Id.* at 1731.

Colorado has not changed this inconsistent treatment. In this litigation, it has not disavowed its free pass for the three bakeries, or changed its law to clarify a different path. As a result, those bakeries and other speakers may continue to decline to create expression they think offensive and may also erect statements declining to create those offensive messages. Yet Lorie can do neither. Colorado displays the same hostility in banning Lorie’s religiously motivated statement that it directed toward Phillips.

II. Colorado violates the Free Speech Clause because it bans Lorie’s website statement based on content that is constitutionally protected.

The Free Speech Clause also supports Lorie’s right to publish her views. Under this Clause, the government cannot compel or ban speech because it “is essential to our democratic form of government” and “furthers the search for truth.” *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). That is particularly true here where Lorie wants to speak about what website content she can and cannot create. Her right to speak is thus intertwined with her right to choose what she will and will not say.

Colorado infringes Lorie’s right by banning her statement because of its content and view. If a statement explains why someone creates websites celebrating same-sex marriage, it is allowed. But Lorie’s statement saying she *cannot* create those websites is banned. The restriction turns entirely on content and viewpoint. *NIFLA*, 138 S. Ct. at 2371 (“Content-based

regulations ‘target speech based on its communicative content.’” (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)). Accordingly, it triggers strict scrutiny. *Id.* at 2371.

Colorado tries to avoid this scrutiny by characterizing Lorie’s statement as “conduct,” MPI Resp. 14-15, as “discriminat[ory],” MPI Resp. 2, 6; MTD 2, and thus illegal. The Supreme Court has rejected that position too, holding that “the religious and philosophical objections to gay marriage are protected views.” *Masterpiece*, 138 S. Ct. at 1727; *accord id.* at 1729 (condemning statement comparing beliefs in marriage like Lorie’s to “all kinds of discrimination through history”).

Lorie’s statement does not even describe conduct; it describes a constitutionally protected decision—the decision not to convey messages celebrating same-sex marriage. *Masterpiece* acknowledged this possibility, noting that “objections to gay marriage are ... in some instances protected forms of expression.” *Id.* at 1727.

Significantly, Lorie creates website content for clients no matter their sexual orientation; she just will not create certain website content for anyone, such as content that disparages others, promotes violence, or celebrates same-sex marriage. Joint Statement of Stipulated Facts ¶ 66 (“Stipulated Facts”), ECF No. 49. That means her decision whether to create turns on the message, not the requestor—the what, not the who.³ So when CADA compels Lorie to create

³ For example, Lorie will create website content celebrating opposite-sex marriage for a bride’s homosexual father but will not create content celebrating same-sex marriage for a bride’s heterosexual father. *See Masterpiece*, 138 S. Ct. at 1735 (Gorsuch, J., concurring) (noting this fact proved that “it was the kind of cake, not the kind of customer, that mattered to” Phillips). In *Masterpiece*, Justices Kagan and Breyer concurred that it is not unlawful for business owners to decline a request for an expressive item that “they would not have made for any customer,” because doing so treats the requester “the same way they would have treated anyone else—just as [public accommodation law] requires.” 138 S. Ct. at 1733 (Kagan, J., concurring). In other words, business owners do “not engage in unlawful discrimination” when they “would not sell[a] requested [item] to anyone.” *Id.* at 1733 n*. Because Lorie declines websites with different content that are not “suitable for use at same-sex and opposite-sex weddings alike,” her decisions do not turn on her clients’ sexual orientation but on the content of their requested websites. *Id.* at 1733 n*.

website content, it does not regulate a “decision to refuse to serve persons based on their sexual orientation,” MSJ Resp. 13; *see also* MPI Resp. 4, 18, 22, MTD 5; it regulates “the choice of a speaker not to propound a particular point of view.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-75 (1995) (distinguishing an “intent to exclude homosexuals as such” from “disagreement” with a message promoting “unqualified social acceptance” of LGBT activities). That choice lies beyond the state’s power to punish.

Thus Colorado cannot compel Lorie to create website content for two reasons. First, compelling this alters the content of Lorie’s desired speech. Just like the law in *NIFLA* that compelled pro-life centers to discuss abortion, a law compelling Lorie to “speak a particular message” about marriage “alters the content” of her desired message and is a “content-based regulation of speech.” 138 S. Ct. at 2371 (citation omitted). Second, compelling content creation severely burdens Lorie. “Compelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned.” *Janus*, 138 S. Ct. at 2463. If merely forcing people “to subsidize ... speech” they oppose is “tyrannical,” then compelling Lorie to *create* objectionable content from scratch and publish it is unthinkable. *Id.* at 2464.

Colorado responds by dismissing Lorie’s expression as something “reasonable observers would attribute” to those “being married,” not her. MSJ Resp. 15. The respondents in *NIFLA* made similar arguments to no avail. Br. for Resp’t at 43-44, *NIFLA*, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1027815, at *43-44 (defending compelled disclosures because speakers can “expressly disavow” them and no one would think the disclosures “represent[] [their] personal choice”). The Supreme Court analysis ignored these arguments in its analysis. *NIFLA*, 138 S. Ct. at 2371-76. And for good reason. Such logic would allow officials to compel (or restrict) the speech of any commissioned speaker.

Moreover, Colorado cannot explain why its attribution point justifies compelling Lorie’s speech but not the speech of those declining to convey “anti-gay marriage symbolism.” *Masterpiece*, 138 S. Ct. at 1721. That discrepancy demonstrated Colorado’s hostility and inconsistency in *Masterpiece*. *Id.* It does here as well.

Undeterred, Colorado tries to frame CADA as regulating Lorie’s “business operation” instead of her speech. MSJ Resp. 13. The respondents in *Masterpiece* made the same pitch. Br. for Resp’ts Charlie Craig & David Mullins at 20, *Masterpiece*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838415, at *20 (arguing “generally applicable regulations of commercial conduct ... do not violate the First Amendment”). Yet no justice in *Masterpiece* embraced the theory that public accommodation laws transform speech created for profit into conduct. The majority said facially neutral laws cannot force for-profit ministers to perform same-sex wedding ceremonies. *Masterpiece*, 138 S. Ct. at 1727. The same logic applies to other expression. Websites speak even when created for profit. And because websites speak, Colorado cannot compel Lorie to create websites or ban her from explaining which websites she creates.

This point also explains why Lorie’s statement will not impose “a serious stigma on gay persons.” *Id.* at 1729. Lorie’s statement does not refuse to sell services based on someone’s sexual orientation; it declines to create particular websites based on their content. The former is improper; the latter constitutionally protected. The former objects to someone’s status; the latter objects to a particular message. It is therefore Lorie who suffers serious stigma, as her views are disparaged and her speech banned and compelled. *Janus* 138 S. Ct. at 2464 (explaining that compelling speech is “damag[ing]” and “always demeaning”). That violates the First Amendment.⁴

⁴ While Lorie primarily challenges Colorado’s banned-speech provision as-applied, she also challenges one part of that provision facially and as-applied—the part banning statements indicating someone is unwelcome, objectionable, unacceptable, or undesirable. As Lorie has explained already, this language is vague, overbroad, and allows unbridled discretion. Pls.’ Mot. for Summ. J. and Mem. in Supp. 47-49, 62-65, ECF No. 48; see *Brush & Nib Studio, LLC v.*

CONCLUSION

Masterpiece, *NIFLA*, and *Janus* instruct courts to balance the rights of both LGBT citizens and those who believe in traditional marriage while not banning or compelling speech in the process. Lorie's proposal does precisely this. It allows Colorado to ban statements enacting discriminatory conduct. But it forbids Colorado from censoring content or targeting religion. With Lorie, Colorado has done the latter. This Court should restore the constitutional balance.

City of Phoenix, 418 P.3d 426, 442-43 (Ariz. Ct. App. 2018) (invalidating the same language in Phoenix's public accommodation law).

Respectfully submitted this 6th day of August, 2018.

s/ Jonathan A. Scruggs

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2018, 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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EXHIBIT 1



COLORADO

Department of
Regulatory Agencies

Colorado Civil Rights Division

1560 Broadway Street, Suite 825
Denver, CO 80202

Charge No. CP2018011310

Autumn Scardina
7779 Everett Way
Arvada, CO 80005

Complainant

Masterpiece Cakeshop Incorporated
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 Complainant's claim of discrimination. As such, a **Probable Cause** determination is hereby 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 Complainant alleges that on or about June 26, 2017, she was denied full and equal enjoyment of a place of public accommodation based on her sex (female) and/or transgender status (gender identify).

The Respondent denies the allegation of discrimination and contends that it will not design custom cakes that express ideas or celebrate events at odds with its owner and staff's religious beliefs.

The legal framework under which civil rights matters are examined is as follows: The Charging Party bears the burden of proving that discrimination has occurred. 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 burden of explaining, with



sufficient clarity, a non-discriminatory justification for the action taken. This is in response to the specifically alleged action named in the charge. In addition, the Respondent has the burden to produce documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a non-discriminatory reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate reason is merely 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 treatment that 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 a preponderance of the evidence in the record, adequately shows that the Respondent's reason is pretext (i.e., is not to be believed), and that the Charging Party's protected status was the main reason for the adverse action taken. 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. See Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997); 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.

On or about June 26, 2017, the Complainant contacted the Respondent to order a cake and spoke with Debi Phillips ("D. Phillips") (female), Co-Owner. The Complainant contends that she requested a custom birthday cake. D. Phillips acknowledges that the Complainant called and requested a custom cake, but asserts that based on their conversation, it was not clear that she was requesting a birthday cake. D. Phillips states that she solicited details about the Complainant's wishes for the cake, including the date it was needed, the size, and desired flavors. The Complainant responded that she would need the cake by July 6, 2017, needed it to serve 6-8 people, and wanted the cake to have a blue exterior and a pink interior. The Complainant asserts that she "explained that the design was a reflection of the fact that [she] transitioned from male-to-female and that [she] had come out as transgender on [her] birthday." D. Phillips states that after the Complainant informed her that the cake was "to celebrate a sex-change from male to female," she instructed the Complainant that the Respondent would not make the requested cake. At this point, the phone call ended.

Shortly thereafter, the Complainant called the Respondent again and spoke with Lisa Eldfrick (“Eldfrick”) (female), Service Representative. The Complainant states that she told the person who answered, Eldfrick, that she had just called and was disconnected. She asserts that she told Eldfrick that she “was calling to order a birthday cake and that [she] wanted it to be blue on the outside and pink on the inside because [her] birthday was the same day as the day [she] came out as transgender.” Eldfrick asserts that she informed the Complainant that the Respondent would not fulfill this request. The evidence indicates that the Complainant questioned the Respondent’s policies and that Eldfrick ended the phone call without responding to the Complainant’s inquiries.

Jack Phillips (male), Owner, who admittedly makes all final business decisions for the Respondent, affirms this position, contending that the Respondent will not create custom cakes that address the topic of sex-changes or gender transitions. He contends that he will not support a message that “promote[s] the idea that a person’s sex is anything other than an immutable God-given biological reality.”

The Respondent asserts that it declines to make more than two to five custom cakes per week, due to time constraints. The Respondent also states that it refuses to make custom cakes for other expressions that it deems to be objectionable.

Denial of Full and Equal Enjoyment of a Place of Public Accommodation/Sex/Transgender Status:

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

The Complainant is a member of protected class based on her sex (female) and transgender status (gender identity). On or about June 26, 2017, the Complainant sought goods and service from the Respondent by requesting a custom cake. The Complainant was a qualified recipient of the services by the Respondent. An employee of the Respondent initially indicated that she was willing to assist the Complainant with this request, however, when the Complainant requested a blue exterior and a pink interior, explaining that the design reflected the Complainant’s gender transition from male to female, the Respondent refused to provide the requested service to the Complainant. The Respondent asserts that it will not provide the service of creating cakes that “promote the idea that a person’s sex is anything other than an immutable God-given biological reality.” The evidence thus

demonstrates that the refusal to provide service to the Complainant was based on the Complainant's transgender status. A claim of discriminatory denial of full and equal enjoyment of a place of public accommodation has been established. As asserted by the Supreme Court, "It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions are offered to other members of the public." Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. ____ (2018).

Based on the evidence contained above, I determine that the Respondents have violated C.R.S. 24-34-602, as re-enacted, in respect to the Complainant's claim that the Respondents denied her equal enjoyment of a place of public accommodation.

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


Aubrey Elenis, Director
Or Authorized Designee

6-28-2018
Date

Certificate of Mailing

This is to certify that on July 2, 2018 a true and exact copy of the Closing Action of the above-referenced charge was deposited in the U.S. mail, postage prepaid, addressed to the parties and or representatives listed below:

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FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 14, 2018

Elisabeth A. Shumaker
Clerk of Court

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

Plaintiffs - Appellants,

v.

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

Defendants - Appellees.

CENTER FOR CONSTITUTIONAL
JURISPRUDENCE; AMERICAN CIVIL
LIBERTIES UNION; AMERICAN CIVIL
LIBERTIES UNION OF COLORADO,

No. 17-1344
(D.C. No. 1:16-CV-02372-MSK-CBS)
(D. Colo.)

Amici Curiae.

ORDER AND JUDGMENT*

Before **McHUGH, KELLY**, and **MORITZ**, Circuit Judges.

Plaintiffs 303 Creative LLC and Lorie Smith sued various Colorado officials (collectively, the state) to preempt them from enforcing certain parts of the Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. § 24-34-601. The plaintiffs say the CADA interferes with their plan to design wedding websites for opposite-sex—but not same-sex—couples. Although there are some pertinent differences, the facts and legal issues in this case overlap substantially with those in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), which the Supreme Court recently decided.

The plaintiffs in this case moved for a preliminary injunction below. The district court suggested it expedite the litigation by ruling on summary judgment in conjunction with the preliminary injunction based on stipulated facts. The parties agreed. The district court then issued an order dismissing several of the plaintiffs' claims for lack of standing. And it decided not to reach the merits of the plaintiffs'

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument wouldn't materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

remaining claims while *Masterpiece Cakeshop* was pending before the Supreme Court. It explained:

The parties have agreed that the case is at issue and that the Preliminary Injunction Motion and Motion for Summary Judgment should be determined together in resolution of the matters in dispute on the merits. Although the [p]laintiffs have standing to challenge [part of the CADA], the [c]ourt declines to rule on the merits due to the pendency of *Masterpiece Cakeshop* . . . before the United States Supreme Court. As noted, the factual and legal similarities between *Masterpiece Cakeshop* and this case are striking. It is likely that a determination by the Supreme Court will either guide determination of or eliminate the need for resolution of the issues in this case

Further, the [c]ourt finds that the parties will not be prejudiced by delay in resolution of the issues in this case. The [p]laintiffs are not currently offering to build wedding websites, and no evidence has been presented to show that their financial viability is threatened if they do not begin offering to do so. Thus, the [c]ourt denies the Motions for Preliminary Injunction and Summary Judgment with leave to renew after ruling by the United States Supreme Court in *Masterpiece Cakeshop*.

App. vol. 3, 375.

The plaintiffs appealed this order. The state moved to dismiss this appeal for lack of appellate jurisdiction. We reserved judgment on that motion and the parties proceeded with their merits briefing. Then, while this appeal was pending, the Supreme Court announced its decision in *Masterpiece Cakeshop*. We ordered supplemental briefing on how that decision both affected our appellate jurisdiction and the merits of this appeal.

Meanwhile, the plaintiffs renewed their motions for a preliminary injunction and summary judgment in the district court, as the district court invited them to do in its original order. The district court also ordered supplemental briefing addressing

Masterpiece Cakeshop. The parties submitted their supplemental briefs to the district court the same day they submitted their supplemental briefs to us.

In light of these developments, we now rule on the state’s pending motion to dismiss.

Ordinarily, we only have jurisdiction to hear appeals from final orders in the district court. *See* 28 U.S.C. § 1291. But the plaintiffs argue we have jurisdiction in this case under 28 U.S.C. § 1292(a)(1), which grants us jurisdiction over certain interlocutory orders, including those that “refus[e] . . . injunctions.” As they see it, the district court’s order both expressly and effectively refused their preliminary-injunction request, so it’s appealable under § 1292(a)(1). The state urges us to view the order as a temporary stay that isn’t subject to appeal, especially now that the stay has expired.

Although we recognize that the district court used the word “denies” in reference to the plaintiffs’ motion for a preliminary injunction, App. vol. 3, 375, we agree with the state that the order is properly characterized as a stay, *see Forest Guardians v. Babbitt*, 174 F.3d 1178, 1185 n.11 (10th Cir. 1999) (“The labels of the plaintiff and the district court cannot be dispositive of whether an injunction has been requested or denied.”). After all, the district court expressly declined to reach the merits of the plaintiffs’ arguments and granted the plaintiffs leave to renew their motion once the Supreme Court decided *Masterpiece Cakeshop*. Nevertheless, the plaintiffs argue that we had appellate jurisdiction while the stay was in effect to the extent that the stay “had the ‘practical effect’ of refusing [the] plaintiffs’ injunction.”

Forest Guardians, 174 F.3d at 1185 (quoting *Carson v. Am. Brands, Inc.* 450 U.S. 79, 84 (1981)). But even if this court initially had jurisdiction, the stay has since expired, and the appeal is now moot. *See Video Tutorial Servs., Inc. v. MCI Telecomm. Corp.*, 79 F.3d 3, 5 (2d Cir. 1996) (“An interlocutory appeal from a temporary stay no longer in effect . . . is the paradigm of a moot appeal.”).

Moreover, even if we were to read the district court’s order as refusing the injunction, the district court effectively vacated that order upon the Supreme Court’s decision in *Masterpiece Cakeshop*, and it now appears ready to reconsider the plaintiffs’ motion for a preliminary injunction. Thus, this appeal is moot regardless of how we interpret the district court’s order. *See Primas v. City of Okla. City*, 958 F.2d 1506, 1513 (10th Cir. 1992) (dismissing interlocutory appeal as moot because district court vacated order appealed from). The plaintiffs’ actions below in renewing their preliminary-injunction motion and filing supplemental briefing in support of it are inconsistent with any argument to the contrary. Accordingly, we conclude that we lack jurisdiction under § 1292(a)(1) to review the plaintiffs’ preliminary-injunction motion.

The plaintiffs also seek to appeal the portion of the district court’s order dismissing some of their claims for lack of standing.¹ They argue we have pendent appellate jurisdiction over this part of the order. *See Berrey v. Asarco Inc.*, 439 F.3d 636, 647 (10th Cir. 2006) (“It is appropriate to exercise pendent appellate jurisdiction

¹ The plaintiffs initially appealed the portion of the district court’s order denying (pending *Masterpiece Cakeshop*) summary judgment as well. But they abandoned this part of their appeal in their supplemental brief.

. . . where resolution of the appealable issue necessarily resolves the nonappealable issue, or where review of the nonappealable issue is necessary to ensure meaningful review of the appealable one.”). But because we lack appellate jurisdiction over the portion of the order staying the preliminary-injunction motion, we cannot exercise pendent jurisdiction over any other part of the order. *See Shinault v. Cleveland Cty. Bd. of Cty. Comm’rs*, 82 F.3d 367, 371 (10th Cir. 1996). And because the plaintiffs don’t assert an alternative basis for us to review the partial dismissal, we dismiss the plaintiffs’ appeal in its entirety. *See EEOC v. PJ Utah, LLC*, 822 F.3d 536, 542 n.7 (10th Cir. 2016) (explaining appellant has burden of establishing appellate jurisdiction).

Therefore, even assuming we once had jurisdiction to hear this appeal, we conclude it is now moot. Accordingly, we grant the state’s motion to dismiss this appeal for lack of jurisdiction.

Entered for the Court

Nancy L. Moritz
Circuit Judge

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

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

**303 CREATIVE LLC, and
LORIE SMITH,**

Plaintiffs,

v.

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

Defendants.

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

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

FACTS

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

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

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

Ms. Smith describes herself as a Christian and states that her religious beliefs are central to her identity. She believes that she must use her talents in a manner that glorifies God and that she must use her creative talents in operating 303 in a way that she believes will honor and please him. Consistent with those beliefs, Ms. Smith desire to limit the scope of her services. Although she is willing to work with all people regardless of their race, religion, gender, and sexual orientation, she “will decline any request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman.” This restriction precludes provision of wedding website services for same-sex couples.

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

I love weddings.

Each wedding is a story in itself, the story of a couple and their special love for each other.

I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding - from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together.

I firmly believe that God is calling me to this work. Why? I am personally convicted that He wants me - during these uncertain times for those who believe in biblical marriage - to shine His light

and not stay silent. He is calling me to stand up for my faith, to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman.

These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage-the very story He is calling me to promote.

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

It is a discriminatory practice and unlawful for a person ... directly or indirectly, to publish . . . any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of . . . sexual orientation. (Hereafter, the "Communication Clause")

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

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

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

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

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

After briefing was completed, the United States Supreme Court granted certiorari in a case involving similar facts and legal issues and raising issues of the constitutionality of the Public Accommodation Statute. This Court deferred consideration of the issues in this case, anticipating a dispositive substantive ruling by the Supreme Court on the issues presented here.

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

A. Summary judgment standard

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

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

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

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

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

B. Equal Protection Clause

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

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

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

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

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

- That the CCRC “does not apply [the Communications Clause] to expressive business owners that strongly advocate the acceptance of same-sex marriage and whose messages directly or indirectly indicate that requests from religious customers with opposing beliefs would be unwelcome or denied.” The evidence Ms. Smith cites in support of this contention is a website of a Colorado photographer whose webpage included photographs from a same-sex wedding, along with text that states that praises the couple involved and states that “it’s just unfortunate government & religion has not always recognized [same-sex marriage].”

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

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

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

C. Due Process Clause

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

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

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

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

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

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

Fourteenth Amendment confers upon her a constitutional right “to engage in any of the common occupations of life . . . and to worship God according to the dictates of [her] own conscience.”

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

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

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

D. “Personal autonomy”

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

E. Free Speech

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

1. Content-neutrality

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

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

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

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

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

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

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

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

2. Overbreadth

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

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

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

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

3. Free speech vs. Nondiscrimination laws

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

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

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

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

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

F. Free Exercise

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

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

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

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

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

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

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

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

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

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

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

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

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

G. Order to Show Cause

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

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

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

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

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

CONCLUSION

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

Dated this 17th day of May, 2019.

BY THE COURT:

A handwritten signature in black ink, reading "Marcia S. Krieger". The signature is written in a cursive style with a large initial 'M' and 'K'. Below the signature is a horizontal line.

Marcia S. Krieger
Senior United States District Judge

**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.

**PLAINTIFFS 303 CREATIVE LLC AND LORIE SMITH’S RESPONSE TO SHOW
CAUSE ORDER**

Plaintiffs Lorie Smith and 303 Creative LLC (collectively Lorie) moved for a preliminary injunction and summary judgment to stop Colorado from applying the Colorado Anti-Discrimination Act (“CADA”) to compel her to create websites with objectionable content, ban her from posting a religiously motivated statement on her website, and target her faith for punishment. This Court denied both motions on May 17, 2019, and ordered Lorie to show cause why final judgment should not be entered in Colorado’s favor. Op. and Order

Denying Mot. for Prelim. Inj. and Mot. for Summ. J. 26, ECF No. 72 (“Op. and Order”). In response, Lorie asks that this Court analyze the merits of Lorie’s challenges to both the Accommodation Clause and the Communication Clause before entering final judgment.

This course is proper for two reasons. First, this Court should analyze and not assume the constitutionality of the Accommodation Clause or the illegality of Lorie’s desired statement based on that assumption. Courts have repeatedly declined to assume constitutionality in this way. *See Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 651 n.9 (6th Cir. 1991) (“When analyzing the constitutional protections accorded a particular commercial message, a court starts with the content of the message and not the label given the message under the relevant statute” otherwise it “would foreclose a court from ever considering the constitutionality of particular commercial speech because the statute would label such speech illegal.”) (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)); *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 506 (6th Cir. 2008) (“The lawfulness of the activity does not turn on the existence of the speech ban itself; otherwise, all commercial speech bans would all be constitutional.”).¹

As Lorie and this Court acknowledged, the merits of the Accommodation Clause and the Communication Clause are intertwined. Op. and Order 6, 16-17; Pls.’ Mot. for Summ. J. and Mem. in Supp. 16-17, ECF No. 48 (“Pls.’ MSJ”); Pls.’ Suppl. Br. regarding *Masterpiece*, *NIFLA*, and *Janus* 4, ECF No. 68 (“Pls.’ Suppl. Br.”). If Lorie has the constitutional right to decline to create objectionable websites, she has the constitutional right to state so publicly. But

¹ Lorie’s desired statement is not commercial speech, but these cases illustrate that even in the commercial speech context courts will not assume that speech is illegal.

instead of analyzing whether Lorie can constitutionally decline to create objectionable website content, this Court *assumed* she could not. Op. and Order 6. Based on that assumption, this Court in turn assumed Lorie’s desired statement seeks to engage in illegal discrimination. Op. and Order 16-17. But this was legal error.

And Lorie disputed those assumptions. Lorie has argued that her decision whether to create particular website content is not status discrimination but a content-based distinction that is constitutionally protected. Pls.’ Suppl. Br. 1-2. Based on this point, Lorie has argued that her desired statement is constitutionally protected and thus legal. Pls.’ Suppl. Br. 1-2; Pls.’ MSJ 3-4, 49-51. Because Lorie disputed this Court’s legal assumptions and because the merits of the Accommodation Clause and the Communication Clause are intertwined, this Court should evaluate whether the Accommodation Clause can compel Lorie to create objectionable website content in order to determine whether the Communication Clause can ban her desired statement. Indeed, courts regularly evaluate the merits of one provision when it is legally intertwined with another. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 715 n.2 (4th Cir. 1999) (rejecting argument that plaintiffs have standing to challenge only one of two statutory provisions where the provisions were “inextricably intertwined”).

Second, this Court failed to consider all of Lorie’s Free Exercise arguments. Although this Court considered some of those arguments, this Court did not consider whether certain statements by members of the Colorado Civil Rights Commission (including past Commissioner Diane Rice) reveal hostility toward Lorie’s religious beliefs on marriage. Op. and Order 20-25; *see also* Pls.’ Suppl. Br. 2-4. The Supreme Court relied on these statements in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* as proof of religious hostility. 138 S. Ct.

1719, 1729-30 (2018). But the Commission has yet to disavow those statements. And Colorado Commission members recently embraced those hostile statements when they met to discuss the *Masterpiece* decision at a recorded public hearing of the Commission. This recent embrace of hostile statements again proves the Commission's religious hostility toward beliefs like Lorie's. *See* Transcript of Proceedings of the Eleventh (2017-2018) Monthly Meeting before the Colorado Civil Rights Commission, Full Transcript, Except Executive Session, Transcribed from Audio Recordings 10:5-9 (June 22, 2018), attached here as Exhibit A (Commissioner Lewis: "I support Commissioner Diann Rice and her comments. I don't think she said anything wrong. And if this was 1950s, it would have a whole different look. So I was very disappointed by the Supreme Court's decision."); *see also* Audio Recording of the Eleventh (2017-2018) Monthly Meeting before the Colorado Civil Rights Commission (June 22, 2018), filed conventionally herewith as Exhibit B, and the Public Session Minutes of the Eleventh (2017-2018) Monthly Meeting before the Colorado Civil Rights Commission (June 22, 2018), attached here as Exhibit C.

It is proper for the Court to take judicial notice and consider this new evidence because it is a public record. *Moore v. Tulsa*, 55 F. Supp. 3d 1337, 1341 (N.D. Okla. 2014) (taking judicial notice of a public record based on the law that "[a] court may take judicial notice of 'matters that are verifiable with certainty' ... includ[ing] public records") (quoting *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979)); *see also* *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946 (10th Cir. 2001) ("[T]he Court is permitted to take judicial notice of its own files and records, as well as facts which are a matter

of public record.”). The comments were made in the course of a public hearing of a government body—the Colorado Civil Rights Commission. *See* Aff. of Jacob P. Warner ¶ 6 (“Warner Aff.”); *N. Arapaho Tribe v. Burwell*, 118 F. Supp. 3d 1264, 1280 n.7 (D. Wyo. 2015) (taking judicial notice of a letter submitted during notice-and-comment process for tribal action because it was a public record). They were produced by the Commission in separate litigation in the District of Colorado. *See* Warner Aff. ¶ 5, 7. As such, it is a matter of public record. *See* Exhibit B. In the alternative, this Court can exercise its broad discretion to supplement the record with this additional evidence as it is highly relevant to this Court’s free exercise analysis. *Wilson v. Vill. of Los Lunas*, 572 Fed. Appx. 635, 638-39 (10th Cir. 2014) (recognizing court’s broad discretion over requests to supplement).

In light of Lorie’s past arguments and this recent transcript indicating religious hostility, this Court should evaluate whether Colorado can constitutionally apply CADA against Lorie to compel her to speak against her religious beliefs. If the Court declines to evaluate these two arguments, as requested, Lorie asks that this Court enter final judgment.

Respectfully submitted this 7th day of June, 2019.

s/ Katherine L. Anderson

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2019, the foregoing was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record. Additionally, a copy of Exhibit B, which is being filed conventionally, has been mailed to counsel via USPS.

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

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

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

Plaintiffs,

vs.

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

Defendants.

**AFFIDAVIT OF JACOB P. WARNER IN SUPPORT OF PLAINTIFFS 303 CREATIVE
LLC AND LORIE SMITH’S RESPONSE TO SHOW CAUSE ORDER**

I, Jacob P. Warner, declare as follows:

1. I am a citizen of the United States and a resident of the State of Arizona. I am competent to make this declaration and the facts stated herein are within my personal knowledge.
2. I am an attorney for Alliance Defending Freedom and I was an attorney of record for Plaintiffs in the matter of *Masterpiece Cakeshop, Inc., et al. v. Elenis, et al.*, Case No. 1:18-cv-

02074-WYD-STV, previously pending in the United States District Court for the District of Colorado. The case was dismissed on March 5, 2019.

3. Attached as Exhibit A is a transcription of the proceedings of the Eleventh (2017-2018) Monthly Meeting before the Colorado Civil Rights Commission which took place on June 22, 2018.

4. Filed conventionally herewith as Exhibit B is the audio recording of the proceedings of the Eleventh (2017-2018) Monthly Meeting before the Colorado Civil Rights Commission which took place on June 22, 2018.

5. Colorado produced Exhibit B to Alliance Defending Freedom during the course of discovery in *Masterpiece Cakeshop, Inc., et al. v. Elenis, et al.*, Case No. 1:18-cv-02074-WYD-STV (D. Colo. dismissed Mar. 5, 2019).

6. Attached as Exhibit C are Public Session Minutes from the Eleventh (2017-2018) Monthly Meeting of the Colorado Civil Rights Commission which took place on June 22, 2018. These minutes state that this was a public session and that during the meeting Commissioners “voiced their opinion” about *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

7. Colorado produced Exhibit C to Alliance Defending Freedom during the course of discovery in *Masterpiece Cakeshop, Inc., et al. v. Elenis, et al.*, Case No. 1:18-cv-02074-WYD-STV (D. Colo. dismissed Mar. 5, 2019).

DECLARATION UNDER PENALTY OF PERJURY

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

Executed this 7th day of June, 2019, at Scottsdale, Arizona.

s/ Jacob P. Warner
Jacob P. Warner

**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
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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.

**TRANSCRIPTION OF THE PROCEEDINGS OF THE
ELEVENTH (2017-2018) MONTHLY MEETING BEFORE THE
COLORADO CIVIL RIGHTS COMMISSION WHICH TOOK
PLACE ON JUNE 22, 2018**

**EXHIBIT A TO PLAINTIFFS 303 CREATIVE LLC AND LORIE
SMITH’S RESPONSE TO SHOW CAUSE ORDER**

1 BEFORE THE COLORADO CIVIL RIGHTS COMMISSION

2

3 Eleventh (2017-2018) Monthly)
4 Meeting.)
5)

6

7

8

At: Denver, Colorado

9

Date: June 22, 2018

10

11

12

TRANSCRIPT OF PROCEEDINGS

13

FULL TRANSCRIPT, EXCEPT EXECUTIVE SESSION

14

15

TRANSCRIBED FROM AUDIO RECORDINGS

16

(Files: 6.22.18 1st Public Session.mp3 and 6.22.18 2nd
17 Public Session.mp3.)

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Katherine A. McNally
CERTIFIED TRANSCRIBER
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www.az-reporting.com Phoenix, AZ

1 BE IT REMEMBERED that a Monthly Meeting was held
2 at the Civic Center Plaza, Conference Room 110-D, 1560
3 Broadway, Denver, Colorado, commencing on the 22nd day
4 of June, 2018.

5

6 BEFORE: ANTHONY ARAGON, Chairman
7 RITA LEWIS, Commissioner
8 CHARLES GARCIA, Commissioner
9 CAROL FABRIZIO, Commissioner
10 JESSICA POCOCK, Commissioner
11 DR. MIGUEL ELIAS, Commissioner

12

13 APPEARANCES:

14

15 For the Colorado Civil Rights Commission:

16

17 Adriana Carmona, Coordinator

18

19 Aubrey Elenis, Director

20

21 Billy Seiber, Attorney General's Office

22

23 Katherine Aidala, Attorney General's Office

24

25

1 (Commencement of audio recording file labeled
2 6.22.18 1st Public Session at 00:00:00.)

3 CHAIR ARAGON: -- to order the 11th monthly
4 meeting of the Colorado Civil Rights Commission. If we
5 could all go around the room and introduce ourselves,
6 please, starting with Commissioner Lewis from Denver.

7 MS. LEWIS: Rita Lewis from Denver.

8 MR. GARCIA: Charlie Garcia, Denver.

9 MS. FABRIZIO: Commissioner Carol Fabrizio,
10 Denver.

11 MS. POCOCK: Jessie Pockock, Colorado Springs.

12 CHAIR ARAGON: Good morning, Commissioner
13 Aragon, Chair of the Commission, from Denver.

14 And Commissioner --

15 DR. ELIAS: Dr. Miguel Elias (indiscernible)
16 Commissioner from Pueblo.

17 MS. CARMONA: Adriana Carmona, with the
18 Division.

19 MS. ELENIS: Aubrey Elenis, with the Division.

20 MR. SEIBER: Billy Seiber, counsel to the
21 Commission.

22 MS. AIDALA: I'm Katherine Aidala from the
23 Attorney General's Office, counsel to the -- for the
24 Division and sitting in for Vince Morscher today.

25 CHAIR ARAGON: Good morning. Welcome.

1 Okay. The first item on the agenda -- or
2 second, I should say -- is the approval of the public
3 session minutes of May 24, 2018. Do I have a motion?

4 FEMALE SPEAKER: I move to approve.

5 DR. ELIAS: I'll make a motion.

6 CHAIR ARAGON: Motion. Okay. Thank you,
7 Commissioner Elias. Second?

8 FEMALE SPEAKER: Second.

9 CHAIR ARAGON: Second. Any discussion?
10 All those in favor, signify by saying aye.
11 (A chorus of ayes.)

12 CHAIR ARAGON: Opposed? Abstentions?
13 That motion carries. Thank you.

14 COM. FABRIZIO: I'll abstain.

15 CHAIR ARAGON: Oh, Commissioner Fabrizio,
16 abstention? Abstain?

17 COM. FABRIZIO: Yeah.

18 CHAIR ARAGON: Okay. That's still okay. We
19 still have four. Okay. Great.

20 Director's report.

21 MS. ELENIS: So I thought that this would be a
22 really good time to talk a little bit about the
23 Masterpiece Cakeshop finding that came out a couple of
24 weeks ago. And rather than just read the statement that
25 we posted on our web site, on the CCRD web site, there

1 was a presentation that I had prepared for one of the
2 Staff meetings upstairs. So I'm going to talk about a
3 few points from that.

4 COM. LEWIS: Commissioner Elias, can you put
5 your phone on mute?

6 DR. ELIAS: I beg your pardon?

7 COM. LEWIS: Could you put your phone on mute so
8 we can hear the Director?

9 DR. ELIAS: (Indiscernible.) Yeah. I'm going
10 to move my dog. I'll be back. Okay.

11 CHAIR ARAGON: Okay.

12 MS. ELENIS: Thank you.

13 So on June 4th, 2018, the Supreme Court ruled
14 that the Colorado Civil Rights Commission was neither
15 tolerant nor respectful of Mr. Phillips' sincerely-held
16 religious beliefs in this particular case.

17 Based on a Commissioner's statements, the Court
18 found that the proceedings did not honor the State's
19 solemn responsibility of fair and neutral enforcement of
20 Colorado's antidiscrimination laws. In the Court's
21 decision, the Justices found that while handling the
22 claims against the cakeshop, the Commission had shown --

23 CHAIR ARAGON: Hold on. Aubrey, hold on.

24 So Commissioner Elias --

25 DR. ELIAS: I'm going to another room.

1 CHAIR ARAGON: Yeah. Or just mute your phone.

2 COM. LEWIS: Could you just mute your phone?

3 CHAIR ARAGON: If you could mute your phone that
4 would be ideal. Sorry, Aubrey.

5 MS. ELENIS: I don't mind.

6 CHAIR ARAGON: Thank you.

7 COM. ELIAS: You bet.

8 MS. ELENIS: You think we're good?

9 CHAIR ARAGON: Yeah.

10 MS. ELENIS: Okay. So in the Court's
11 decision -- I'll try to talk a little bit louder too. I
12 know I have a small voice.

13 In the Court's decision, the Justices found that
14 while handling the claims against the cakeshop, the
15 Commission had shown hostility towards the baker's
16 religious beliefs, and in doing so violated his
17 religious rights under the First Amendment.

18 So while this was disappointing for us at the
19 Division, one of the important things to remember was
20 that the opinion was very narrow. So the Court made its
21 decision based on a specific set of facts and left open
22 many legal questions. So what's going to happen is
23 unfortunately those questions are going to have to be
24 decided in future litigation.

25 And the Court didn't answer the larger question

1 on whether businesses can use religious views to exempt
2 themselves from antidiscrimination laws. And so that's
3 a question that's likely to come up again in front of
4 the Supreme Court pretty soon; right?

5 So what we know at this point is that the
6 Colorado antidiscrimination laws -- they've remained
7 unaffected. So the Court made clear in its finding that
8 states like Colorado will continue to protect the LGBTQ
9 community.

10 The general rule was, before the finding, and
11 still is, that the First Amendment does not allow
12 business owners to deny members of the community equal
13 access to business services. So that means that the law
14 still protects members of the LGBTQ community who visit
15 places of public accommodation.

16 So what now in looking at the analysis of these
17 cases going forward? So in these cases going forward,
18 Commissioners and ALJs and others, including the Staff
19 at the Division, have to be careful how these issues are
20 framed so that it's clear that full consideration was
21 given to sincerely -- what is termed as sincerely-held
22 religious objections.

23 So the Court is basically sending a signal to
24 administrative bodies that that decision-making must be
25 consistent and objective with the guarantee that all

1 laws are applied in a manner that is neutral towards
2 religion.

3 So for us, that's a bit interesting, because
4 there aren't any real tools for analysis of what a
5 sincerely-held religious objection means and how to
6 measure that, so we are going to just rely on really
7 adding analysis to those cases when they come in. And
8 we're also going to be running stuff through our
9 wonderful AG's as well.

10 So basically, keep fighting the good fight
11 because the laws haven't changed. It's still the same.

12 COM. GARCIA: Where did that statement come from
13 what you read?

14 MS. ELENIS: Me.

15 COM. GARCIA: Okay. Well done.

16 MS. ELENIS: Thank you.

17 FEMALE SPEAKER: Yep.

18 CHAIR ARAGON: Is the Division noticing a number
19 of additional claims now? Or has there been an uptick,
20 in terms --

21 MS. ELENIS: Not -- not thus far.

22 CHAIR ARAGON: Okay.

23 MS. ELENIS: But it's pretty -- still pretty
24 new, so I anticipate that there would be because people
25 are going to still continue to experience the same

1 thing. And because the question wasn't answered, I
2 think they're going to want answers.

3 COM. FABRIZIO: I think -- thank you for --

4 MS. ELENIS: You're welcome.

5 COM. FABRIZIO: -- reading that. I would say
6 I -- you know, I've had a couple of reactions to the
7 holding. Just that -- even though it's narrow, I've
8 also, of course, think that people will use that, and
9 you know, continue to see things like religious freedom
10 restoration acts, you know, come into conflict with a
11 number of civil rights pieces of legislation.

12 So I'm a little worried about what that kind of
13 lets -- kind of allows in the future, as far as, like,
14 giving people some momentum in taking that forward.

15 And then I would say the other thing -- I wasn't
16 on the Commission when -- so I have no idea what
17 happened then. But I would also say, you know, I felt a
18 little bit like even though I think they -- it was
19 correctly decided from the outside, but I also hope that
20 anything that is taken out of here or listened to or --
21 that we're open to being respectful of everybody's
22 views.

23 And so I kind of thought just about that in a --
24 as one, like, key takeaway to make sure, even sometimes
25 when we have a case that seems really obvious and easy,

1 to make sure we're being respectful of things that show
2 up here, so --

3 FEMALE SPEAKER: Absolutely.

4 CHAIR ARAGON: Commissioner Lewis.

5 COM. LEWIS: I support Commissioner Diann Rice
6 and her comments. I don't think she said anything
7 wrong. And if this was 1950s, it would have a whole
8 different look. So I was very disappointed by the
9 Supreme Court's decision.

10 COM. GARCIA: Even for one thought the -- I
11 agree with the opinion, but I also agree a lot with the
12 dissent. And the dissent was very clear; they agreed
13 with the opinion. They were disappointed that the Court
14 didn't go ahead and resolve the real issues. So I
15 thought the dissent was right on.

16 CHAIR ARAGON: A process question, though. So
17 if the case were being discussed, I guess where were
18 Commissioner Rice's comments publicly released? If
19 those -- if the case was being discussed in executive
20 session, was there -- did it go -- and I don't recall
21 the steps it took -- was there another process where
22 that information or her opinion was shared that then
23 became a key piece of the case? Do you --

24 MR. SEIBER: I can answer, if you don't know.

25 MS. ELENIS: You can answer.

1 MR. SEIBER: I've read the transcript. And what
2 had come before the Commission was a request to stay
3 enforcement until, you know, the next phase. The --
4 that was the legal question before the Commission.
5 There was a motion to stay. Stay what exactly, I can't
6 tell you, but there was a motion to stay.

7 In the process of the motion to deny the request
8 to stay and the second, there was some discussion. And
9 that was when Commissioner Rita -- Commissioner Rice
10 made that -- I'm sorry -- Commissioner Rice -- made --

11 COM. LEWIS: Commissioner Rita? No.

12 MR. SEIBER: -- made that -- made that
13 statement. So it wasn't in the review of the facts; it
14 wasn't in executive session; it wasn't anywhere else.
15 It wasn't even in the review of the initial decision
16 from the Administrative Law Judge. It was simply
17 discussion surrounding motion to stay.

18 I don't know the answer, whether the recording
19 came from the Division or if it came from someone in the
20 room. It was --

21 MS. ELENIS: Someone from the Alliance Defending
22 Freedom was present during that meeting and recorded and
23 then released that recording.

24 CHAIR ARAGON: Okay.

25 MR. SEIBER: And, of course, there's no

1 restriction on recording of meetings, surreptitiously or
2 otherwise, as far as I'm aware. Attorneys can't make
3 recordings without warning the other people that they're
4 doing the -- making the recording under Colorado law. I
5 don't know who that person was; I don't know what source
6 of background is there. But at any point in time anyone
7 in a room could be recording the entire meeting.

8 CHAIR ARAGON: If it's in public session; right?

9 MR. SEIBER: Including -- in public session.

10 CHAIR ARAGON: Yeah.

11 MR. SEIBER: Including by video, you know, they
12 could bring a video camera in, so --

13 CHAIR ARAGON: Okay. And then I just have one
14 other sort of process question.

15 So I had e-mailed you the day that it came out
16 to find out what -- what should we, as Commissioners, be
17 doing. And you said that -- I think in your e-mail, you
18 said that you were going to be sending a press release
19 or information to us on what we should and shouldn't be
20 doing. I never saw that. So --

21 MS. ELENIS: So I didn't send anything to the
22 Commission themselves. What we ended up doing is just
23 doing a general press release and releasing it to the
24 public. And then in terms of, like, any media requests
25 or anything like that, the directive would have still

1 been the same, to contact me so that I could forward the
2 stuff to Rebecca Laurie.

3 CHAIR ARAGON: Right.

4 MS. ELENIS: She's our Director of
5 Communications in our PIO.

6 But in terms of, you know, making public
7 statements to the media or anything like that, there
8 wasn't really anything that we could tell you to do
9 because we didn't really have any further guidance, and
10 we were still reading through the 56-page opinion at
11 that point.

12 CHAIR ARAGON: Okay. But I -- I mean, so I got
13 a couple of questions. And at least because I reached
14 out to you, I knew the answer.

15 MS. ELENIS: Um-hmm.

16 CHAIR ARAGON: But I think in fairness to the
17 Commission as a whole, I think it's really important
18 that even if it is a press release or we're going to
19 just put this up on the --

20 MS. ELENIS: That you know where it's coming
21 from?

22 CHAIR ARAGON: -- web site, it would have been
23 good to know that something --

24 MS. ELENIS: Yes.

25 CHAIR ARAGON: -- happened or -- because again,

1 when it was -- really, it was all the Colorado Civil
2 Rights Commission was the -- you know, involved in the
3 case, then, of course, you know, well, you're on the
4 Commission, what's going on?

5 MS. ELENIS: Um-hmm.

6 CHAIR ARAGON: I'm, like, I'm not able to answer
7 that. But at least because I reached out that morning,
8 I knew that what you said to me was that, you know, if
9 it's anything related to the Division, it goes Division.
10 If it's you as a Commissioner, that it's -- you're going
11 to -- if it goes to the Governor's Office.

12 But I mean, to your point, you were contacted
13 several times. And I just think it would have been
14 beneficial to even know that there was a statement on
15 the web site. I mean, it's just I feel like there was a
16 lack of communication for the Commission.

17 MS. ELENIS: So going -- going forward, I'll
18 make sure that --

19 CHAIR ARAGON: Yeah.

20 MS. ELENIS: -- if there's any information, that
21 it'll be shared with you guys right away.

22 CHAIR ARAGON: Yeah.

23 MS. ELENIS: Even if it's going to be posted,
24 I'll send you an e-mail --

25 CHAIR ARAGON: Yeah. That would be -- yeah.

1 MS. ELENIS: -- saying please check the web
2 site. And I apologize for that.

3 CHAIR ARAGON: Because then we could use that
4 too to be a resource. Yeah.

5 MS. ELENIS: Um-hmm. Exactly.

6 COM. POCOCK: Interestingly, I was contacted by
7 a member of the public who found my cell phone number
8 too, just asking for help with their case, in which it
9 was, like, I -- you know, I directed them to come to the
10 Division, and, you know, ask for clarification and never
11 ended up (indiscernible), but --

12 MS. ELENIS: Okay.

13 COM. POCOCK: -- which is generally how I --
14 unless someone's calling to tell me, you know, maybe
15 they need help with the process, and I can direct them
16 to the right people. But --

17 MS. ELENIS: Right.

18 COM. POCOCK: -- that's the first time that
19 happened. I have received e-mails before.

20 MS. ELENIS: Okay. And you've been really
21 awesome about forwarding those along too. All of you
22 have, when you receive something, so that's great. But
23 yeah, noted.

24 CHAIR ARAGON: Okay.

25 MS. ELENIS: Going forward, we'll definitely --

1 I'll make sure to reach out and share that stuff right
2 away.

3 CHAIR ARAGON: Yeah. And the community is
4 interested. I was at a public forum yesterday with
5 National Gay and Lesbian Real Estate Professionals, and
6 we were with One Colorado and the Gill Foundation. And
7 some -- somebody asked me a question about the
8 Masterpiece. I said, you know, I said, I'm here as
9 Anthony. I'm not here representing the Commission. I
10 don't feel comfortable answering your question.

11 MS. ELENIS: Right.

12 CHAIR ARAGON: But then Daniel was there, and he
13 could at least help -- he was able to speak about it.

14 MS. ELENIS: Perfect.

15 CHAIR ARAGON: You know, the appointment process
16 moving forward with the legislation. But, yeah, I'm
17 just very mindful to (indiscernible).

18 COM. GARCIA: Well, I would assume that, as with
19 any other Commission similar to this one, when they ask
20 those kind of questions, you simply do what you do
21 (indiscernible). The first thing you say is, I'm not
22 speaking on behalf of the Commission; and I'm speaking
23 on behalf of Anthony Aragon, and here I go.

24 CHAIR ARAGON: Yeah. Well, even then, I'm
25 like -- I don't do that.

1 Commissioner Lewis, did you have
2 (indiscernible)?

3 COM. LEWIS: Yes. I think it would be a good
4 idea if you did release your statement to the media
5 outlets because they're still talking about it.

6 MS. ELENIS: Oh, we have.

7 COM. LEWIS: (Indiscernible) you have?

8 MS. ELENIS: Yes.

9 COM. LEWIS: Okay.

10 MS. ELENIS: We released it on the date, the day
11 of, that one on the 4th.

12 COM. LEWIS: Okay. I haven't heard much about
13 it.

14 MS. ELENIS: There's been quite a few news
15 articles, not necessarily about the statement that we
16 released. But we've been getting kind of pings every
17 morning about the number of media articles that are
18 released. There's been a fair amount of commentary on
19 both sides about it.

20 COM. LEWIS: Um-hmm. And would you be
21 comfortable giving us a copy of your statement --

22 MS. ELENIS: Of course, yes, yes.

23 COM. LEWIS: -- so that we can send it to our
24 outlets?

25 MS. ELENIS: Yes. I'll send that out right

1 after this as well. Yes.

2 CHAIR ARAGON: Great.

3 COM. LEWIS: Great.

4 CHAIR ARAGON: Okay. Any other --

5 MR. SEIBER: I just (indiscernible) and, of
6 course, always you carry the Division's phone number
7 cards in your wallet. And if you are asked specific
8 questions, direct them to the Division. I think your
9 point of "I don't speak for the Commission" is really
10 salient.

11 MS. ELENIS: Right.

12 MR. SEIBER: But here is a Division person,
13 public information officer, so on and so forth.

14 CHAIR ARAGON: I did tell them after, I said, I
15 felt like -- that felt like such a political response.
16 I said, and I apologize. But it just -- it's the nature
17 of the work that we do, and what we can and can't say,
18 sorry.

19 Okay. Great. Anything else (indiscernible)?

20 MS. ELENIS: That's it.

21 CHAIR ARAGON: Okay. Wonderful.

22 MS. ELENIS: Thank you.

23 CHAIR ARAGON: Thank you.

24 Attorney General's report?

25 MS. AIDALA: Good morning. I have two cases

1 here. The first is Denise Fulkerson v. Wonderland at
2 Centerra. It was a housing discrimination case that was
3 filed at OAC. And pursuant to statute, the respondents
4 have elected to have the charge removed to state
5 district court.

6 So I would ask -- and they're, you know,
7 authorized by statute to do that -- ask for a motion to
8 dismiss the case from OAC and remove it to state court.

9 MALE SPEAKER: So moved.

10 COM. LEWIS: Second.

11 CHAIR ARAGON: Okay. Any discussion?

12 All those in favor signify by saying aye.

13 (A chorus of ayes.)

14 CHAIR ARAGON: Opposed? Abstention? That
15 motion carries.

16 MS. AIDALA: Great. Thank you.

17 And then the second case is Jayme Seybold and
18 Candy Harman v. Regulator Industries, LLC. This case
19 was presented at the Commission's meeting in March, and
20 the settlement was approved.

21 So at this point, I would just ask for a motion
22 to close the case.

23 COM. LEWIS: So moved.

24 CHAIR ARAGON: A motion by Commissioner Lewis.

25 Second?

1 FEMALE SPEAKER: Second.

2 CHAIR ARAGON: Second. Any discussion?

3 All those in favor, signify by saying aye.

4 (A chorus of ayes.)

5 CHAIR ARAGON: Opposed? Abstention? All right.

6 That motion carries.

7 MS. AIDALA: Great. Thank you.

8 CHAIR ARAGON: Great. And you'll have me sign

9 those? Okay.

10 Audience, audience participation. I think we
11 have one person that wanted to share this morning.

12 Good morning, if you'd introduce yourself for
13 the Commission that would be great. Thank you.

14 MALE SPEAKER: Members of the Commission, my
15 name is Jim Katin [phonetic]. I'm a resident of the
16 city and county of Denver. Ten years ago I suffered a
17 severe traumatic brain injury. Today I'm sharing
18 information about traumatic brain injury in Colorado.

19 The Colorado Department of Human Services says
20 that every year there are approximately 950 deaths,
21 5,200 hospitalizations, and 27,000 emergency room visits
22 related to traumatic brain injury.

23 According to research performed by Denver-based
24 Craig Rehabilitation Hospital, approximately 500,000
25 Coloradans have sustained some sort of brain injury in

1 their lifetime.

2 My message today is twofold. One, the
3 population of Coloradans living with a traumatic brain
4 injury is growing; and my second point is that as a
5 growing population, we are often subject to unfair and
6 unequal treatment, including discriminatory practices.
7 Thank you.

8 CHAIR ARAGON: I know you've come to the
9 Commission to speak before.

10 Did we ever connect you with -- is it Billy?
11 I'm always drawing a blank on his name. I apologize.
12 Our outreach person.

13 FEMALE SPEAKER: Sam, yes.

14 CHAIR ARAGON: Sam. Did you get to sort of
15 connect with him at the Division, who does outreach, to
16 determine sort of if there's an opportunity for
17 partnership or for education purposes? I was just
18 wondering.

19 I know that Senator Hernandez had come in as
20 well as the woman with her young son. So I was just
21 curious if there's been any movement on that front.

22 MALE SPEAKER: This is Jim Katin again. No, I
23 haven't received any communication since that gathering.

24 CHAIR ARAGON: Okay.

25 MALE SPEAKER: You know, and I think it -- from

1 my perspective, my purpose is really to share
2 information about this growing population. I think it's
3 part of the disabled community that's often forgotten.

4 CHAIR ARAGON: Um-hmm. Okay.

5 MALE SPEAKER: So whatever connection we could
6 make, that would be great. If not, I understand. And
7 you know, in light of the time of year, it's an election
8 cycle, all that kind of stuff. You know, whenever they
9 have time, feel free to reach out to me.

10 CHAIR ARAGON: Okay.

11 MS. ELENIS: Can we have Tracy speak to that?

12 CHAIR ARAGON: Sure.

13 MS. ELENIS: Tracy, can you kind of give an
14 update on what's going on --

15 TRACY: Sure.

16 MS. ELENIS: -- since that last visit.

17 TRACY: So --

18 MS. ELENIS: Thank you.

19 TRACY: Sam Anderson has reached out to folks
20 over at Robert Hernandez, and has been in contact with
21 him and with Maureen --

22 (Indiscernible - simultaneous speech.)

23 TRACY: Maureen Welch on several occasions, as
24 well as they've come into our office. So --

25 CHAIR ARAGON: Okay.

1 TRACY: -- we have been in contact with them on
2 multiple occasions, so --

3 CHAIR ARAGON: Great. Okay. All right. Well,
4 I appreciate you coming in and speaking with the
5 Commission this morning.

6 MALE SPEAKER: Thanks for the time.

7 CHAIR ARAGON: All right. Thank you, sir.

8 Other business, Division's outreach and
9 education update?

10 Oh, Commissioner Lewis.

11 COM. LEWIS: I have a comment. I'm very
12 disappointed that Juneteenth is not listed. Juneteenth
13 is a 30-year-old tradition here in Colorado. And for
14 people that don't know what Juneteenth is, it's a
15 celebration of descendents of slaves that found out --
16 the slaves found out two years later in Texas that they
17 were freed.

18 So I hope going forward that you will list
19 Juneteenth. And Juneteenth is actually -- it was the
20 16th. So please put that on the calendar going forward.

21 MS. ELENIS: We actually had an internal
22 discussion a couple of days ago, based on some of our
23 disappointment that we didn't --

24 COM. LEWIS: Okay.

25 MS. ELENIS: -- participate this year. So next

1 year, we most definitely will be there, as well.

2 CHAIR ARAGON: Again, I believe the Division did
3 last year, though, didn't they not?

4 MS. ELENIS: Yes. Last year we did.

5 CHAIR ARAGON: Yes, they did. Okay. Yeah.

6 MS. ELENIS: Not this year.

7 COM. LEWIS: (Indiscernible.)

8 CHAIR ARAGON: Okay.

9 FEMALE SPEAKER: And also they will be at the
10 Blackhawks Festival coming up.

11 MS. ELENIS: Yes.

12 COM. LEWIS: Okay. Good. Thank you.

13 CHAIR ARAGON: Okay. Any question -- I do
14 believe everybody saw in the report that Sam included in
15 the outreach, everybody saw that (indiscernible).

16 MS. ELENIS: And Sam isn't here today. He took
17 a day of leave. So --

18 CHAIR ARAGON: Yeah. This is very helpful.
19 Thank you for that.

20 FEMALE SPEAKER: Awesome.

21 CHAIR ARAGON: I know that was something we
22 requested, so thank you for that.

23 COM. LEWIS: And real quick, are you going to do
24 this every month, the outreach events?

25 MS. ELENIS: Yes.

1 COM. GARCIA: The calendar is very helpful
2 (indiscernible).

3 MS. ELENIS: Good.

4 CHAIR ARAGON: Yeah. Great. Thank you.

5 COM. GARCIA: (Indiscernible.)

6 CHAIR ARAGON: So the next item on the agenda is
7 the process and decision-making regarding
8 Rule 10.6(b)(2).

9 And what I'd like to do is entertain a motion to
10 go into executive session to obtain legal counsel and
11 discuss the policy. And then once we discuss the policy
12 and asked our questions, we will go out of executive
13 session. And then any further discussion that we do
14 have in terms of drafting or moving the policy forward
15 will be done in public session.

16 But I think that for all of us to ask questions
17 and to get legal counsel that I would like to approach
18 it that way -- if people are comfortable with that
19 approach -- keeping in mind that any decisions that we
20 do reach after our questions are answered, we will do in
21 public session.

22 Is everybody comfortable with that?

23 FEMALE SPEAKER: Sure.

24 CHAIR ARAGON: Okay. So do you want to move it?

25 FEMALE SPEAKER: Sure. I move that we go into

1 executive session to receive legal advice regarding the
2 process and decision-making regarding Rule 10.6(b)(2).

3 FEMALE SPEAKER: Second.

4 CHAIR ARAGON: Second?

5 Any discussion?

6 MR. SEIBER: Could I modify that a little bit?

7 CHAIR ARAGON: Oh.

8 FEMALE SPEAKER: Um-hmm.

9 MR. SEIBER: Pursuant to
10 Section 24-6-4023(a)(II) CRS?

11 CHAIR ARAGON: Yeah.

12 FEMALE SPEAKER: The last one?

13 MR. SEIBER: Yeah.

14 FEMALE SPEAKER: Okay. For the purpose of
15 receiving legal advice pursuant to Sections
16 24-6-4023(a)(II) CRS.

17 CHAIR ARAGON: Commission Lewis, second?

18 COM. LEWIS: Thank you. Second.

19 CHAIR ARAGON: Second. Okay. Any discussion?
20 All those in favor, signify by saying aye.

21 (A chorus of ayes.)

22 CHAIR ARAGON: Opposed? Okay.

23 So any audience members that are not part of the
24 Division or the Commission will need to exit the room.

25 FEMALE SPEAKER: Does that include the teenager

1 over there?

2 CHAIR ARAGON: I think so, yes.

3 FEMALE SPEAKER: Yes.

4 CHAIR ARAGON: Yes, it does.

5 FEMALE SPEAKER: We're not --

6 CHAIR ARAGON: Unfortunately. But it's her
7 fault, not mine. And then when we're done, we'll bring
8 you back up.

9 FEMALE SPEAKER: (Indiscernible) Welcome Center.

10 FEMALE SPEAKER: Okay.

11 FEMALE SPEAKER: (Indiscernible.)

12 FEMALE SPEAKER: And then she'll come back.

13 CHAIR ARAGON: Okay. Great. Thank you. Okay.
14 And then we are now in executive session.

15 MR. SEIBER: Great. Do we have a separate
16 recording for this?

17 (Conclusion of audio recording file labeled
18 6.22.18 1st Public Session at 00:23:05.)

19 (Executive session held, but not transcribed.)

20 (Commencement of audio recording file labeled
21 6.22.18 2nd Public Session at 00:00:00.)

22 CHAIR ARAGON: So we're back in public session
23 to discuss the process of decision-making regarding
24 Rule 10.6(b)(2).

25 And at this time, I think that -- why don't we

1 open it up for discussion.

2 So the Commission has been discussing this rule.
3 And we think that it is a good idea to establish a
4 working group of a couple of Commissioners, or however
5 many would like to be involved, in sort of creating new
6 language that helps clarify this rule further.

7 And again, we want to determine, you know, do
8 both parties need to be present? And confidentiality?

9 So if someone would like -- do we need a -- we
10 probably need a motion to create a working group for
11 this purpose?

12 MR. SEIBER: I think it shores it up. Sure.
13 Yeah.

14 CHAIR ARAGON: So I'll entertain a motion.

15 COM. FABRIZIO: Yeah. I'll move to create a
16 working group to further clarify the Rule 10.6(b)(2).

17 CHAIR ARAGON: Great. And a second?

18 COM. GARCIA: Second.

19 CHAIR ARAGON: Second. Okay. Discussion.

20 So who from the Commission would like to be a
21 part of this process? Commissioner Lewis, Commissioner
22 Garcia, Commissioner Elias, any interest?

23 COM. ELIAS: Yeah.

24 CHAIR ARAGON: Commissioner Elias. And I will
25 as well. Okay. So -- and Commissioner Aragon. So that

1 will be the four of us.

2 So then do we -- does the Division then reach
3 out to, This is an Adriana "herd the cat" sort of
4 scenario, where you kind of send an e-mail, you find a
5 time that's convenient for all of us to meet? Great.
6 Okay.

7 COM. FABRIZIO: Can I just say one more thing on
8 the surface?

9 CHAIR ARAGON: Go ahead. Yeah.

10 COM. FABRIZIO: I do think we -- we talked about
11 a couple of things I think are worth resaying in the
12 discussion.

13 CHAIR ARAGON: Yeah.

14 COM. FABRIZIO: One is the concern -- there's
15 substantive concerns with the rule and how it affects
16 the Commission, and then there's some logistical
17 concerns about how it's implemented and how it might
18 conflict with other rules.

19 I am personally fully supportive of figuring out
20 the logistical concerns and making sure that works.

21 I also just want to touch on something about how
22 when -- you know, the more kind of open argument we
23 have -- not that I -- totally valid concerns that we
24 talked about from counsel. But I also, you know, I
25 do -- thinking about the Masterpiece case, I would say,

1 as much as -- as much as I kind of took to heart the
2 opinion and what it said, I also very much stand behind
3 Commissioner Rice's statements. And as much -- I
4 wouldn't want to be in that position. But I also --
5 there is a transparency there that I was actually proud
6 of what she said, and I agree with her.

7 And from the kind of transparency perspective, I
8 would hate to personally be used in a case, but also
9 would rather have it be that than have it be kind of in
10 secret that it couldn't come out. There's -- there's a
11 part of me that's, like, whether or not the case is
12 right or I'm personally under scrutiny or candidly any
13 of you are under scrutiny for your thing, the thing I
14 like that there is a little bit of transparency there,
15 you know, as long as we're -- if we are being
16 respectful -- and I think she was.

17 And so I do -- you know, I think -- I almost
18 think of it in kind of the other conclusion, which is
19 that this was like a situation that was tough and her
20 comments got used publicly. And I think that's okay.
21 I'm almost glad that something the Commissioner said
22 ended up public and used, because I think it was the
23 right thing.

24 So there's part of me on this rule that's
25 thinking the kind of same substantive concerns, but I

1 come out on the other side. So I just -- I wanted to
2 say that.

3 CHAIR ARAGON: Great. And I think if this is
4 the rule in its entirety that there needs to -- we need
5 to make sure that there's language in here that this
6 is -- this is discussed in public session, so that if
7 it's not included in there, I think that as much
8 information as we can provide to the Complainant that if
9 you -- if you're requesting oral argument, that these
10 are the steps that have -- you have to take. And so
11 that there's sort of even a -- almost a checklist.

12 COM. FABRIZIO: Right.

13 CHAIR ARAGON: You know, you have to sign the
14 confidentiality waiver; both parties have to agree to be
15 present; you know, that just as much information -- you
16 know, inform -- the discussion will occur in public
17 session; and even to the point of what they may and may
18 not present, I think is also of importance.

19 COM. FABRIZIO: Um-hmm.

20 CHAIR ARAGON: If we're going to -- if we're
21 going to sort of travel down this road of really
22 clarifying what this rule is, so that it's clear moving
23 forward, that we just -- I think the more information we
24 include in the rule --

25 COM. FABRIZIO: Right.

1 CHAIR ARAGON: -- that I think transparent --
2 again, to your point of transparency --

3 COM. FABRIZIO: Right.

4 CHAIR ARAGON: -- that there's not, well, no,
5 that's not what -- that's what we thought this was going
6 to (indiscernible) you clearly -- you reviewed the
7 checklist.

8 Okay. Is it realistic to think that we can have
9 a new policy in place by the next Commission meeting in
10 July, with it being summer? Or do we want to --

11 MR. SEIBER: Well, you're going to have to --
12 you'll have to bring that back for the Commission to
13 vote on.

14 CHAIR ARAGON: Well, right. We have to -- we
15 have to create it first, yeah.

16 MR. SEIBER: Oh.

17 CHAIR ARAGON: Yeah.

18 MR. SEIBER: For the Committee to create it,
19 yeah.

20 CHAIR ARAGON: Yeah. For the Committee to
21 create or pre -- so what the process would be is the
22 Committee will meet to create a new rule; right; or an
23 amended rule?

24 MR. SEIBER: Or a -- well, a rule -- I think the
25 Committee is going to sort of flesh out what the options

1 are.

2 CHAIR ARAGON: Okay, uh-uh.

3 MR. SEIBER: Do we need to amend the rule? Can
4 we create a policy from within the rule? Or you know,
5 what -- what is the Committee thing that needs to happen
6 here?

7 CHAIR ARAGON: Got it. Okay. So to the
8 Committee that are involved, do we think within 30 --
9 within the next 30 days that we -- we can have at least
10 one -- I mean, we may need more than one meeting.

11 FEMALE SPEAKER: One draft (indiscernible).

12 COM. GARCIA: I would defer to the AG.

13 CHAIR ARAGON: Yeah. You're out to be a part of
14 this too; right?

15 (Indiscernible - simultaneous speech.)

16 MR. SEIBER: Yeah. Well, I think -- I'm trying
17 to think. This is -- do I -- do you want me to be part
18 of your meetings? And -- or do you want to put
19 together -- does the Committee want to put together
20 something, ship it off to the AG's office --

21 COM. LEWIS: Yes.

22 MR. SEIBER: -- for review? And maybe you could
23 have it to me by July. And then --

24 CHAIR ARAGON: Okay. Let's do that. I think --

25 COM. LEWIS: Yes. That makes more sense.

1 CHAIR ARAGON: I think -- what is it, somebody
2 said slow is -- slow is better or something?

3 COM. LEWIS: Yes.

4 CHAIR ARAGON: What is it? There's a phrase
5 somewhere that -- do it right, not fast.

6 COM. LEWIS: Right.

7 CHAIR ARAGON: That's what it was, yes. So --

8 COM. LEWIS: We might end up having some drafts,
9 you know.

10 CHAIR ARAGON: Yeah. Exactly. Okay. So I
11 think that -- I will -- the plan would be to have one
12 Committee meeting before the next Commission meeting,
13 which is July the 27th, I believe.

14 And then possibly have a draft to the Attorney
15 General's Office for review. And then the Commission
16 could vote -- the full Commission would vote on the new
17 rule, or the amended rule, at the August Commission
18 meeting.

19 MR. SEIBER: The policy.

20 CHAIR ARAGON: The policy.

21 MR. SEIBER: Yeah.

22 CHAIR ARAGON: Yeah. The policy. I keep saying
23 the rule. Sorry.

24 MR. SEIBER: We're not (indiscernible).

25 CHAIR ARAGON: Yeah. Policy, yeah. Okay.

1 MR. SEIBER: I just realize we have public that
2 we never let back in. I don't know who that --

3 FEMALE SPEAKER: Oh.

4 MR. SEIBER: -- one lady was.

5 FEMALE SPEAKER: You know, she's a Staff.

6 MR. SEIBER: Oh, she's a Staff.

7 CHAIR ARAGON: Oh. And then Rita's son.

8 COM. LEWIS: Yeah.

9 CHAIR ARAGON: Okay.

10 COM. LEWIS: If he wants to come back,
11 (indiscernible).

12 CHAIR ARAGON: Yeah. Okay.

13 FEMALE SPEAKER: She said he doesn't have to
14 come back.

15 MR. SEIBER: Oh, he doesn't have to come back?

16 FEMALE SPEAKER: Yeah.

17 CHAIR ARAGON: Okay. Any further discussion?

18 FEMALE SPEAKER: I just texted him. I'm sorry.

19 CHAIR ARAGON: Any further discussion?

20 FEMALE SPEAKER: No.

21 CHAIR ARAGON: Okay. All those in favor signify
22 by saying aye.

23 (A chorus of ayes.)

24 CHAIR ARAGON: Opposed? Abstention? Okay.
25 That motion carries.

1 FEMALE SPEAKER: Did -- was there a motion?

2 CHAIR ARAGON: Yeah.

3 FEMALE SPEAKER: First and second?

4 CHAIR ARAGON: Yes.

5 FEMALE SPEAKER: Was it? Sorry.

6 CHAIR ARAGON: Commissioner Fabrizio made the
7 motion.

8 FEMALE SPEAKER: Yes.

9 CHAIR ARAGON: And I forget -- Commissioner
10 Pocock seconded.

11 It'll be on the tape too.

12 No. And then the other item for discussion that
13 I want to just mention in public session -- and this is
14 sort of a question or just a comment of Billy is that
15 you'll -- the Commission has requested that the Attorney
16 General's Office review if we can have -- if the
17 Commission can have emergency Commission meetings if
18 oral arguments are presented so that we don't delay the
19 time frame of the Commission or the Division losing
20 jurisdiction. So I think that was the other sort of ask
21 that we -- that came out of our discussion is that it
22 would be beneficial to know, so that it's not a 30 days
23 and (indiscernible).

24 MALE SPEAKER: Right.

25 CHAIR ARAGON: Okay. Okay. All right. Any

1 other questions, comments on that process moving
2 forward?

3 COM. GARCIA: On that, I -- from your response,
4 if there's not a way for possibility, that it's -- that
5 number is set for us and not for the parties.

6 MR. SEIBER: Yeah. And I'll get the --

7 COM. GARCIA: And I would ask you to just take a
8 look --

9 MR. SEIBER: I'll get that and bring you the
10 exact language.

11 COM. GARCIA: Okay.

12 CHAIR ARAGON: Okay.

13 Next on the item is executive session.

14 FEMALE SPEAKER: I move that the Commission
15 enter into executive session at this time in order to
16 consider the following matters:

17 To address the following cases on the June 22nd,
18 2018, agenda for appeal or review, hearing worthiness
19 consideration, and settlements which are required to be
20 kept confidential pursuant to Sections 24-34-3063 and
21 24-6-4023 (a)(III) CRS, CP 218-272543, CH 2018-738266,
22 FE 2017-705809, FE 2018-502704, FE 2018-467368, FE
23 2018-334251, FH 2018-58 through 289, FH 2018-888481, FE
24 2017-887555, and FE 2017-298703. And for the purposes
25 of receiving legal advice pursuant to Sections 24-6-4023

1 (a)(II) Colorado Revised Statutes.

2 CHAIR ARAGON: Okay.

3 FEMALE SPEAKER: So second.

4 CHAIR ARAGON: Oh, second.

5 FEMALE SPEAKER: I'll second.

6 CHAIR ARAGON: Second? Any discussion?

7 Discussion?

8 Okay. We're now in the -- oh, all those in
9 favor, signify by saying aye.

10 (A chorus of ayes.)

11 CHAIR ARAGON: Okay. We're now in executive
12 session. So --

13 (Conclusion of audio recording file labeled
14 6.22.18 2nd Public Session at 00:09:56.)

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1 C E R T I F I C A T E

2

3 I, Katherine McNally, Certified
4 Transcriptionist, do hereby certify that the foregoing
5 pages 1 to 38 constitute a full, true, and accurate
6 transcript, from electronic recording, of the
7 proceedings had in the foregoing matter, all done to the
8 best of my skill and ability.

9

10 SIGNED and dated this 4th day of March 2019.

11

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Katherine McNally
Certified Electronic Transcriber
CET**D-323

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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.

**AUDIO RECORDING OF THE PROCEEDINGS OF THE
ELEVENTH (2017-2018) MONTHLY MEETING BEFORE THE
COLORADO CIVIL RIGHTS COMMISSION WHICH TOOK
PLACE ON JUNE 22, 2018**

**EXHIBIT B TO PLAINTIFFS 303 CREATIVE LLC AND LORIE
SMITH’S RESPONSE TO SHOW CAUSE ORDER**

(filed conventionally)

**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.

**PUBLIC SESSION MINUTES FROM THE ELEVENTH
(2017-2018) MONTHLY MEETING OF THE COLORADO CIVIL
RIGHTS COMMISSION WHICH TOOK PLACE ON
JUNE 22, 2018**

**EXHIBIT C TO PLAINTIFFS 303 CREATIVE LLC AND LORIE
SMITH’S RESPONSE TO SHOW CAUSE ORDER**

PUBLIC SESSION MINUTES
ELEVENTH (2017-2018) MONTHLY MEETING
of the
COLORADO CIVIL RIGHTS COMMISSION

Friday, June 22, 2018
Civic Center Plaza
Conference Room 110-D
1560 Broadway
Denver, CO 80202

Convened: 10:00am

Public Session

The eleventh 2017-2018 Monthly Public Session of the Colorado Civil Rights Commission was held Friday, June 22, 2018, at the Civic Center Plaza Conference Room 110-D, 1560 Broadway Denver CO 80202 at 10:00am. Commissioner Anthony Aragon, Chair presiding.

Commissioners present were: Anthony Aragon, Chair, Jessie Pocock, Vice Chair, Carol Fabrizio, Rita Lewis, and Charles Garcia. Via telephone Dr. Miguel Elias.

Present from the Civil Rights Division:

Aubrey Elenis, Director
Adriana Carmona, Commission Liaison
Traci Green, Manager
Wes Fry, Investigator
Jennifer Ambacher, Investigator
Jaclyn Kjellsen, Investigator
Luke Pears-Dickson, Investigator
Rebecca Laurie, Director of Communications

Present from the Colorado Office of the Attorney General:

Counsel for the Commission, First Assistant Attorney General, Billy Seiber
Counsel for the Division, Assistant Attorney General, Kate Aidala

Members of the Public present:

Jim Tatten.

CALL TO ORDER

Commissioner Aragon called the meeting to order and asked the Commissioners present to read their names into the record for the purpose of establishing a quorum. Also present were attorneys from the Colorado Office of the Attorney General, staff from the Colorado Civil Rights Division and members of the public.

APPROVAL OF PUBLIC SESSION MINUTES

May 24, 2018 Minutes

Commissioner Elias moved to approve the minutes of the Public Session, Commissioner Pocock seconded, Commissioner Fabrizio abstained, and the motion passed.

DIRECTOR'S REPORT

Director Elenis discussed and highlighted items from the Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission ruling by the Supreme Court of the United States. Commissioners asked questions regarding the ruling and voiced their opinion.

ATTORNEY GENERAL'S REPORT

-Denise Fulkerson v. Wonderland at Centerra, LLC and Michael Davidson –

Discussion about election to remove case.

Commissioner Garcia motioned to accept the case be moved to a state court, Commissioner Lewis seconded, and the motion passed.

-Jayme Seybold and Candy Harman v. Regulator Industries, LLC et al – Closure Order

Commissioner Lewis motioned to accept the closure order, Commissioner Pocock seconded, and the motion passed.

AUDIENCE PARTICIPATION

Jim Tatten shared information regarding traumatic brain injury in Colorado.

Other Business

Director Elenis provided an update regarding the Division's Outreach and Education for the past month. Commissioners Lewis inquired about the Division's participation in the Juneteenth celebration next year.

Process and Decision making regarding Rule 10.6 (b)(2):

Commissioner Pocock made the following motion, Commissioner Lewis seconded, and the motion passed: I move that the Commission enter into Executive Session at this time for the purpose of receiving legal advice, regarding Rule 10.6 (b)(2) and pursuant to Section 24-6-402(3)(a)(II), C.R.S.

At 10:49am the Commission returned to Public Session.

Chair Aragon announced that the Commission had been in discussion regarding rule 10.6(b)(2) and decided to create a working group to clarify such rule. Commissioner Fabrizio motioned to create a working group to clarify rule 10.6(b)(2), Commissioner Garcia seconded, and the motion passed. Commissioner Lewis, Garcia, Elias, and Aragon volunteered to be part of the working group. The group will meet before the July 27, 2018 scheduled Commission meeting in order to present their recommendations.

EXECUTIVE SESSION

Commissioner Pocock made the following motion, Commissioner Fabrizio seconded, and the motion passed:

I move that the Commission enter into Executive Session at this time in order to consider the following matters: To address the following cases on the June 22, 2018 consent agenda, hearing worthy review cases, and settlements: CP2018272543, CH2018738266, FE2017705809, FE2018502704, FE2018467368, FE2018334251, FH2018583389, FH2018888481, FE2017887555, FE2017298703, and for the purpose of receiving legal advice, pursuant to Section 24-6-402(3)(a)(II), C.R.S.

Commission returned to Public Session at 11:23am.

Next Meeting July 27, 2018 in Denver Colorado

ADJOURNMENT
Commission Public Meeting adjourned

**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
PHIL WEISER, Colorado Attorney General,
in his official capacity;

Defendants.

**PLAINTIFFS 303 CREATIVE LLC AND LORIE SMITH’S NOTICE OF
SUPPLEMENTAL AUTHORITY**

Plaintiffs Lorie Smith and 303 Creative LLC (collectively Lorie) submit this notice of supplemental authority about *Telescope Media Group v. Lucero*, ___ F.3d ___, 2019 WL 3979621 (8th Cir. Aug. 23, 2019), attached as Exhibit A.

In *Telescope*, a film studio and its owners (Carl and Angel Larsen) gladly work with all people but wanted to decline requests to create films expressing messages that violate their religious beliefs. 2019 WL 3979621, at *1. This includes films that, in their view, “contradict

biblical truth.” *Id.* They wanted to create films promoting their view of marriage as a “sacrificial covenant between one man and one woman.” *Id.* They also wanted to post a statement on their website explaining that they could not promote films celebrating same-sex weddings. *Id.* at *8 n.5.

But Minnesota interpreted its public accommodation law to forbid the Larsens’ desired statement and to require “the Larsens to produce both opposite-sex- and same-sex-wedding videos, or none at all.” *Id.* at *2, *8 n.5. The Larsens brought a pre-enforcement challenge to these regulations and argued that “wedding videos are speech and they have a First Amendment right to make them for only opposite-sex weddings.” *Id.* at *3. Minnesota countered that the Larsens lacked standing, that its law regulated “conduct, not [] speech,” that intermediate scrutiny applied, and that it could satisfy strict scrutiny. *Id.* at *2-10. The Eighth Circuit rejected all these arguments and held that the Larsens stated a valid compelled and restricted speech claim because Minnesota was unconstitutionally forcing them to produce films celebrating same-sex wedding ceremonies. *Id.*

Lorie’s Response to Show Cause Order is currently pending before this Court, ECF No. 74. *Telescope* addresses at least six arguments relevant to this order and to Lorie’s case.

First, the Eighth Circuit found that the Larsens had standing to bring a pre-enforcement challenge to a public accommodation law that threatened to compel speech, much as Colorado’s law does here. 2019 WL 3979621, at *3 (concluding that the Larsens had alleged a credible threat of enforcement because Minnesota announced that its law requires businesses to provide equal services for same- and opposite-sex weddings).

Second, the Eighth Circuit recognized the Larsens’ right to post their desired statement—which is very similar to Lorie’s desired statement—was intertwined with and turned on whether they could constitutionally decline to create films celebrating same-sex weddings. 2019 WL 3979621, at *8 n.5 (“If creating videos were conduct that Minnesota could regulate, then the State could invoke the incidental-burden doctrine to forbid the Larsens from advertising their intent to engage in discriminatory conduct. But in this case, Minnesota cannot compel the Larsens to speak, so it cannot force them to remain silent either.”) (citation omitted). So, even though Minnesota maintained that the Larsens’ desired statement was illegal under Minnesota law, the Larsens still had a constitutional right to post that statement.

In reaching this conclusion, the Eighth Circuit rejected arguments (like those Colorado made here) that the Larsens’ desired statement was speech incidental to conduct, merely economic conduct, or akin to a “White Applicants Only” sign. 2019 WL 3979621, at *8 n.5 (“[T]he theory that ‘telling potential customers that a business will discriminate ... is part of the act of ... discrimination itself’ ... rests on a faulty premise. . . . Minnesota cannot compel the Larsens to speak, so it cannot force them to remain silent either.”) (cleaned up); *id.* at *8 (rejecting argument that law regulated only commercial conduct and economic activity because “[t]he ‘commercial conduct’ and ‘economic activity’ ... is the making of the videos themselves, which ... are speech”) (cleaned up); *id.* (distinguishing laws that ban a “White Applicants Only” sign because those “laws target the *activities* of hiring employees and providing food,” whereas Minnesota’s law “is targeting speech itself,” *i.e.* the creation of films and statement about those films) (emphasis in original).

Third, the Eighth Circuit found that Minnesota’s public accommodation law compelled the Larsens’ speech. In so ruling, the Eighth Circuit held that public accommodation laws regulate speech, not conduct, when they force speakers (like Lorie) who serve everyone—including those in the LGBT community—to create speech conveying messages they cannot speak for anyone. 2019 WL 3979621, at *1, 4-10 (noting that the Larsens “work with all people” and rejecting the argument that the public accommodation law regulated conduct when it compelled wedding films).

Fourth, the Eighth Circuit held that the application of Minnesota’s public accommodation law was content-based because it required the Larsens to speak a message they did not want to and because application of the law was triggered by the content the Larsens wanted to convey. *Id.* at *5-10 (finding law’s application content-based because that application “[m]andat[es] speech that a speaker would not otherwise make” and because it treated “the Larsens’ choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages”) (cleaned up).

Fifth, the Eighth Circuit found that the application of Minnesota’s law to wedding films and to the Larsens’ desired statement triggered strict scrutiny because that application compelled speech, regulated speech based on content, and regulated a hybrid of speech and free exercise rights. *See id.* at *6 (applying strict scrutiny because “[l]aws that compel speech or regulate it based on its content are subject to strict scrutiny”); *id.* at *10 (declining to apply rational basis because Minnesota’s law “burdens [the Larsens’] religiously motivated *speech*, not their religious *conduct*”) (emphasis in original).

Sixth, the Eighth Circuit held that the application of Minnesota’s public accommodation law to compel and ban speech failed strict scrutiny. 2019 WL 3979621, at *7 (“Even antidiscrimination laws, as critically important as they are, must yield to the Constitution. . . . [S]peech is treated differently under the First Amendment.”); *id.* (“[E]ven if the government may prohibit . . . discriminati[on] . . . in the provision of publicly available goods, . . . it may not ‘declare another’s speech itself to be a public accommodation’”) (cleaned up); *id.* (“[R]egulating speech because it is discriminatory or offensive is not a compelling state interest”).

In sum, *Telescope* deserves careful consideration because it addresses many of the arguments pending before this Court.

Respectfully submitted this 30th day of August, 2019.

s/ Katherine L. Anderson

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, the foregoing was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record.

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EXHIBIT A

2019 WL 3979621

Only the Westlaw citation is currently available.
United States Court of Appeals, Eighth Circuit.

[TELESCOPE MEDIA GROUP](#), a Minnesota corporation; Carl Larsen; Angel Larsen, the founders and owners of Telescope Media Group Plaintiffs - Appellants

v.

Rebecca LUCERO, in her official capacity as Commissioner of the Minnesota Department of Human Rights; Keith Ellison, in his official capacity as Attorney General of Minnesota Defendants - Appellees


Foundation for Moral Law; Center for Constitutional Jurisprudence; [Sherif Girgis](#); Cato Institute; 11 Legal Scholars; Ryan T. Anderson, Ph.D.; African-American and Civil Rights Leaders; State of Alabama; State of Arkansas; State of Kansas; State of Louisiana; State of Missouri; State of Nebraska; State of Oklahoma; State of South Carolina; State of Texas; State of West Virginia Amici on Behalf of Appellants American Civil Liberties Union; [American Civil Liberties Union of Minnesota](#); District of Columbia; State of California; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Massachusetts; State of New Jersey; State of New Mexico; State of New York; State of Oregon; State of Pennsylvania; State of Rhode Island; State of Vermont; State of Virginia; State of Washington; Americans United For Separation of Church and State; Anti-Defamation League; Bend the Arc, [A Jewish Partnership for Justice](#); Central Conference of American Rabbis; [Interfaith Alliance Foundation](#); Lambda Legal Defense and Education Fund; Muslim Advocates; National Council of Jewish Women; People for the American Way Foundation; Union for Reform Judaism; Women of Reform Judaism Amici on Behalf of Appellees

No. 17-3352

Submitted: October 16, 2018

|
Filed: August 23, 2019

Synopsis

Background: Wedding videographers brought pre-enforcement challenge to ban on sexual orientation discrimination in public accommodations and contracting in Minnesota Human Rights Act (MHRA) against state attorney general and Commissioner of Minnesota Human Rights Department (MHRD), alleging that MHRA's requirement that they serve same-sex couples seeking wedding video services violated their First and Fourteenth Amendment rights to free speech, expressive association, free exercise, equal protection, and due process. The United States District Court for the District of Minnesota, John R. Tunheim, Chief Judge,  [271 F.Supp.3d 1090](#), dismissed action. Videographers appealed.

Holdings: The Court of Appeals, [Stras](#), Circuit Judge, held that:

- [1] videographers suffered injury in fact from ban, as required to have standing to bring action;
- [2] videographers had First Amendment right under free speech clause to make videos for only opposite-sex weddings;
- [3] Minnesota's interpretation of MHRA to compel videographers to speak favorably about same-sex marriage if they chose to speak favorably about opposite-sex marriage in their videos compelled them to use their own creative skills to speak in way they found morally objectionable in interference with their right under First Amendment to free speech;
- [4] Minnesota's interpretation of MHRA operated as content-based regulation of speech;
- [5] strict scrutiny, rather than intermediate scrutiny, applied to Minnesota's interpretation of MHRA;
- [6] videographers could use their free exercise clause concerns to reinforce their free-speech claim to state hybrid-rights claim;
- [7] Minnesota's interpretation of MHRA did not violate videographers' equal protection rights; and

[8] MHRA, as applied to videographers, was not unconstitutionally vague.

Affirmed in part, reversed in part, and remanded.

Kelly, Circuit Judge, filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (47)

[1] Civil Rights



Minnesota Attorney General had enough of connection to enforcement of Minnesota Human Rights Act that wedding videographers could seek injunction against him, in pre-enforcement challenge to ban on sexual orientation discrimination in public accommodations and contracting in Minnesota Human Rights Act (MHRA). Minn. Stat. Ann. § 363A.11(1)(a) (1).

[Cases that cite this headnote](#)

[2] Federal Courts



Wedding videographers suffered injury in fact from ban on sexual orientation discrimination in public accommodations and contracting in Minnesota Human Rights Act (MHRA), as required to have standing to bring pre-enforcement challenge against Minnesota attorney general and Commissioner of Minnesota Human Rights Department (MHRD) under First and Fourteenth Amendments, since videographers desired to engage in course of conduct that included declining any requests for their services that conflicted with their religious beliefs and Minnesota had made clear that it would view that conduct as unlawfully discriminating against prospective customers because of their sexual orientation. [U.S. Const. art. 3, § 2, cl. 1](#); [U.S. Const. Amends. 1](#),

14; Minn. Stat. Ann. §§ 363A.11(1)(a)(1), 363A.17(3), 363A.30(4).

[Cases that cite this headnote](#)

[3] Federal Courts



On appeal of a dismissal for failure to state a claim upon which relief can be granted, the Court of Appeals assumes the allegations in the complaint are true and view them in the light most favorable to the appellant. [Fed. R. Civ. P. 12\(b\)\(6\)](#).

[Cases that cite this headnote](#)

[4] Federal Courts



To have standing, a plaintiff must establish (1) an injury in fact; (2) a causal connection between the injury and the challenged law; and (3) that a favorable decision is likely to redress their injury. [U.S. Const. art. 3, § 2, cl. 1](#).

[Cases that cite this headnote](#)

[5] Federal Courts



Although a harm must be actual or imminent, not conjectural or hypothetical, to constitute an injury in fact, a plaintiff need not wait for an actual prosecution or enforcement action before challenging a law's constitutionality; in fact, all a plaintiff must do at the motion-to-dismiss stage is allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and that there exists a credible threat of prosecution thereunder. [U.S. Const. art. 3, § 2, cl. 1](#).

[Cases that cite this headnote](#)

[6] Constitutional Law



The Free Speech Clause of the First Amendment covers films. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[7] **Constitutional Law**



Wedding videos were form of speech, and videographers had First Amendment right under free speech clause to make them for only opposite-sex weddings; although videographers were expressing their views through for-profit enterprise, for-profit expression was protected, videos to be produced would convey message designed to affect public attitudes and behavior, videographers would tell healthy stories of sacrificial love and commitment between man and woman, depict marriage as divinely ordained covenant, and oppose current cultural narratives about marriage with which they disagreed, they would exercise substantial editorial control and judgment, and activities that would come together to produce finished videos were not mere conduct that could be regulated without violating free speech clause. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[8] **Federal Courts**



On appeal of a dismissal for failure to state a claim upon which relief can be granted, the task of the Court of Appeals is to review the complaint de novo to determine whether it alleges one or more actionable claims. [Fed. R. Civ. P. 12\(b\)\(6\)](#).

[Cases that cite this headnote](#)

[9] **Constitutional Law**



The First Amendment, which applies to the states through the Fourteenth Amendment, prohibits laws abridging the freedom of speech. [U.S. Const. Amends. 1, 14](#).

[Cases that cite this headnote](#)

[10] **Constitutional Law**



The First Amendment free speech clause promotes the free exchange of ideas by allowing people to speak in many forms and convey a variety of messages, including those that invite dispute and are provocative and challenging. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[11] **Constitutional Law**



The First Amendment free speech clause prevents the government from compelling individuals to mouth support for views they find objectionable. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[12] **Constitutional Law**



Motion pictures are a significant medium for the communication of ideas under the free speech clause of the First Amendment; they can affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[13] **Constitutional Law**



The free speech clause of the First Amendment does not allow the government to compel an artist to paint, demand that the editors of a newspaper publish a response piece, or require the organizers of a parade to allow everyone to participate. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[14] **Constitutional Law**



Minnesota's interpretation of Minnesota Human Rights Act (MHRA) to compel videographers

to speak favorably about same-sex marriage if they chose to speak favorably about opposite-sex marriage in their videos compelled them to use their own creative skills to speak in way they found morally objectionable in interference with their right under First Amendment to free speech; even if videographers' desire to selectively speak was provocative and stirred people to anger, Minnesota could not coerce them into betraying their convictions and promoting ideas they found objectionable. [U.S. Const. Amend. 1](#); [Minn. Stat. Ann. §§ 363A.11\(1\)\(a\)\(1\), 363A.17\(3\), 363A.30\(4\)](#).

[Cases that cite this headnote](#)

[15] **Constitutional Law**



The First Amendment is relevant whenever the government compels speech, regardless of who writes the script. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[16] **Constitutional Law**



Minnesota's interpretation of Minnesota Human Rights Act (MHRA) to compel videographers to convey "positive" messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos operated as content-based regulation of speech in interference with their right under First Amendment to free speech; even if MHRA did not, on its face, aim at suppression of speech, treating videographers' choice to talk about opposite-sex marriages as trigger for compelling them to talk favorably about same-sex marriages compelled speech and suppressed speech, and avoiding wedding-video business altogether, as compelled self-censorship, would have dampened vigor and limited variety of public debate. [U.S. Const. Amend. 1](#); [Minn. Stat. Ann. §§ 363A.11\(1\)\(a\)\(1\), 363A.30\(4\)](#).

[Cases that cite this headnote](#)

[17] **Constitutional Law**



Under the First Amendment, a content-based regulation mandates speech that a speaker otherwise would not make or exacts a penalty on the basis of the content of speech. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[18] **Constitutional Law**



Even if a regulation that requires speech does not directly prevent speakers from saying anything they wish, it still exacts a penalty in violation of the First Amendment free speech clause. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[19] **Constitutional Law**



Laws that compel speech or regulate it based on its content are subject to strict scrutiny. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[20] **Constitutional Law**



Strict scrutiny requires the government, at a minimum, to prove that the application of the regulation is narrowly tailored to serve a compelling state interest.

[Cases that cite this headnote](#)

[21] **Constitutional Law**



In an as-applied challenge under the free speech clause of the First Amendment, the focus of the strict-scrutiny test is on the actual speech being regulated, rather than how the law might affect others who are not before the court. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[22] Constitutional Law



Any interest Minnesota had under Minnesota Human Rights Act (MHRA) in seeking to regulate speech itself as public accommodation by compelling videographers to convey “positive” messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos had to give way to demands of First Amendment free speech clause.

U.S. Const. Amend. 1; Minn. Stat. Ann. §§ 363A.11(1)(a)(1), 363A.17(3), 363A.30(4).

[Cases that cite this headnote](#)

[23] Constitutional Law



Even antidiscrimination laws, as critically important as they are, must yield to the Constitution.

[Cases that cite this headnote](#)

[24] Constitutional Law



As compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment. U.S. Const. Amend. 1.

[Cases that cite this headnote](#)

[25] Constitutional Law



The government may be prevented under the First Amendment from requiring speech to serve as a public accommodation for others. U.S. Const. Amend. 1.

[Cases that cite this headnote](#)

[26] Constitutional Law



Once conduct crosses over to speech or other expression, the government’s ability to regulate it is limited. U.S. Const. Amend. 1.

[Cases that cite this headnote](#)

[27] Constitutional Law



Regulating speech under the First Amendment because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be. U.S. Const. Amend. 1.

[Cases that cite this headnote](#)

[28] Constitutional Law



Under the First Amendment, the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. U.S. Const. Amend. 1.

[Cases that cite this headnote](#)

[29] Constitutional Law



Antidiscrimination laws can regulate conduct, but not expression under the First Amendment. U.S. Const. Amend. 1.

[Cases that cite this headnote](#)

[30] Constitutional Law



Strict scrutiny, rather than intermediate scrutiny, applied to Minnesota’s interpretation of Minnesota Human Rights Act (MHRA) to compel videographers to convey “positive” messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos, since MHRA was not content neutral in that Minnesota did not actually seek to regulate non-speech activity, “commercial conduct” and “economic activity” to which Minnesota referred was making of videos themselves, which were speech, and disclaimer would be inadequate because videographers’ videos would carry their own

message and MHRA interfered with their message by requiring them to say something they otherwise would not. [U.S. Const. Amend. 1](#); [Minn. Stat. Ann. §§ 363A.11\(1\)\(a\)\(1\), 363A.17\(3\)](#).

[Cases that cite this headnote](#)

[31] Constitutional Law



When speech under the First Amendment and non-speech elements are combined in the same course of conduct and the government seeks to neutrally regulate the non-speech element, intermediate scrutiny applies under the incidental-burden doctrine. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[32] Constitutional Law



An employment-discrimination law can require an employer to take down a sign reading “White Applicants Only” without violating the free speech clause of the First Amendment. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[33] Constitutional Law



A public-accommodation law requiring a restaurant to serve people of all races, genders, and sexual orientations will have the incidental effect of requiring servers to speak to customers to take their orders, but these consequences are incidental because the relevant laws target the activities of hiring employees and providing food, neither of which typically constitutes speech under the First Amendment. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[34] Constitutional Law



Wedding videographers' plan to post language on their website stating that they would not create wedding videos for same-sex couples was protected by First Amendment; Minnesota could not interpret Minnesota Human Rights Act (MHRA) to compel videographers to convey “positive” messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos, and it could not force them to remain silent either. [U.S. Const. Amend. 1](#); [Minn. Stat. Ann. §§ 363A.11\(1\)\(a\)\(1\), 363A.17\(3\)](#).

[Cases that cite this headnote](#)

[35] Constitutional Law



The protection of a speaker’s freedom of speech under the First Amendment would be empty if the government could require speakers to affirm in one breath that which they deny in the next. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[36] Constitutional Law



Videographers could use their free exercise clause concerns to reinforce their free-speech claim to state hybrid-rights claim on allegations that Minnesota interpreted Minnesota Human Rights Act (MHRA) to compel videographers to convey “positive” messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos and that interpretation burdened their religiously-motivated speech because they either would have to show support for same-sex marriage, even though they objected to it on religious grounds, or refrain from making wedding videos at all. [U.S. Const. Amend. 1](#); [Minn. Stat. Ann. §§ 363A.11\(1\)\(a\)\(1\), 363A.17\(3\)](#).

[Cases that cite this headnote](#)

[37] Constitutional Law



Neutral, generally applicable laws that incidentally burden a particular religious practice do not have to be justified by a compelling governmental interest to not violate the Free Exercise Clause of the First Amendment. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[38] Constitutional Law



The free exercise clause in conjunction with other constitutional protections, such as freedom of speech under the First Amendment, can bar application of a neutral, generally applicable law. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[39] Constitutional Law



The right to expressive association under the First Amendment protects groups from being forced to accept members they do not desire. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[40] Constitutional Law



Minnesota's interpretation of Minnesota Human Rights Act (MHRA) to compel videographers to convey "positive" messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos did not violate videographers' First Amendment right to association, since such interpretation only required videographers to interact with same-sex couples and that interaction would not affect videographers' ability to advocate public or private viewpoints. [U.S. Const. Amend. 1](#); [Minn. Stat. Ann. §§ 363A.11\(1\)\(a\)\(1\), 363A.17\(3\)](#).

[Cases that cite this headnote](#)

[41] Constitutional Law



Minnesota's interpretation of Minnesota Human Rights Act (MHRA) to compel videographers to convey "positive" messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos did not violate videographers' equal protection rights; although videographers were dissatisfied with that interpretation, it did not classify people based on their views about marriage. [U.S. Const. Amend. 14](#); [Minn. Stat. Ann. §§ 363A.11\(1\)\(a\)\(1\), 363A.17\(3\)](#).

[Cases that cite this headnote](#)

[42] Constitutional Law



Minnesota Human Rights Act (MHRA), as applied to videographers to compel them to convey "positive" messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos, was not unconstitutionally vague, since videographers alleged in their complaint that MHRA prohibited them from creating only opposite-sex-wedding videos and that Minnesota had categorically declared that their religious objections were not legitimate business purpose. [U.S. Const. Amend. 14](#); [Minn. Stat. Ann. § 363A.17\(3\)](#).

[Cases that cite this headnote](#)

[43] Constitutional Law



A court considers whether a statute is vague as applied to the particular facts at issue, for a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[44] Constitutional Law



Legitimate-business-purpose exception in Minnesota Human Rights Act (MHRA) did not give unbridled discretion to state officials, and therefore Minnesota's interpretation of MHRA to compel videographers to convey "positive" messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos did not violate videographers' equal protection rights, since phrase "legitimate business purpose" was not so open-ended that it authorized or encouraged seriously discriminatory enforcement and there was no discrimination in enforcement of exception. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[45] **Constitutional Law**



Minnesota's interpretation of MHRA to compel videographers to convey "positive" messages about same-sex weddings if they chose to speak favorably about opposite-sex marriage in their videos did not violate unconstitutional-conditions doctrine, since Minnesota did not withhold benefits, such as tax exemptions, unemployment benefits, or welfare payments from videographers. [Minn. Stat. Ann. §§ 363A.11\(1\)\(a\)\(1\), 363A.17\(3\)](#).

[Cases that cite this headnote](#)

[46] **Constitutional Law**



The unconstitutional-conditions doctrine prevents the government from denying a benefit to a person because of constitutionally protected activity.

[Cases that cite this headnote](#)

[47] **Injunction**



When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary

injunction generally are deemed to have been satisfied. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

West Codenotes

Unconstitutional as Applied

[Minn. Stat. Ann. § 363A.11\(1\)\(a\)\(1\)](#), [Minn. Stat. Ann. § 363A.17\(3\)](#)

Appeal from United States District Court for the District of Minnesota - Minneapolis

Attorneys and Law Firms

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Before [SHEPHERD, KELLY](#), and [STRAS](#), Circuit Judges.

Opinion

[STRAS](#), Circuit Judge.

*1 Carl and Angel Larsen wish to make wedding videos. Can Minnesota require them to produce videos of same-sex weddings, even if the message would conflict with their own beliefs? The district court concluded that it could and dismissed the Larsens’ constitutional challenge to Minnesota’s antidiscrimination law. Because the First Amendment allows the Larsens to choose when to speak and what to say, we reverse the dismissal of two of their claims and remand with instructions to consider whether they are entitled to a preliminary injunction.

I.


The Larsens, who own and operate Telescope Media Group, use their “unique skill[s] to identify and tell compelling stories through video,” including commercials, short films, and live-event productions. They exercise creative control over the videos they produce and make “editorial judgments” about “what events to take on, what video content to use, what audio content to use, what text to use ..., the order in which to present content, [and] whether to use voiceovers.”

The Larsens “gladly work with all people—regardless of their race, sexual orientation, sex, religious beliefs, or any other classification.” But because they “are Christians who believe that God has called them to use their talents and their company to ... honor God,” the Larsens decline any requests for their services that conflict with their religious beliefs. This includes any that, in their view, “contradict biblical truth; promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman.”

The Larsens now wish to make films that promote their view of marriage as a “sacrificial covenant between one man and one woman.” To do so, they want to begin producing wedding videos, but only of opposite-sex weddings. According to the Larsens, these videos will “capture the background stories of the couples’ love leading to commitment, the [couples’] joy[,] ... the sacredness of their sacrificial vows at the altar, and even the following chapters of the couples’ lives.” The Larsens believe that the videos, which they intend to post and share online, will allow them to reach “a broader audience to achieve maximum cultural impact” and “affect the cultural narrative regarding marriage.”

[1] Minnesota has a different idea.¹ Relying on two provisions of the Minnesota Human Rights Act (“MHRA”), it claims that a decision to produce *any* wedding videos requires the Larsens to make them for everyone, regardless of the Larsens’ beliefs and the message they wish to convey. The first provision states:

It is an unfair discriminatory practice ... to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of ... sexual orientation.

 [Minn. Stat. § 363A.11, subdiv. 1\(a\)\(1\)](#). The second provides:

It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service ... to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's ... sexual orientation ..., unless the alleged refusal or discrimination is because of a legitimate business purpose.

*2 *Id.* § 363A.17(3).

Minnesota reads these two provisions as requiring the Larsens to produce both opposite-sex- and same-sex-wedding videos, or none at all. According to Minnesota, the Larsens' duty does not end there. If the Larsens enter the wedding-video business, their videos must depict same- and opposite-sex weddings in an equally "positive" light. Oral Argument at 26:08–27:15. If they do not, Minnesota has made clear that the Larsens will have unlawfully discriminated against prospective customers "because of" their sexual orientation.


The Larsens have sued Minnesota in federal district court seeking injunctive relief preventing Minnesota from enforcing the MHRA against them. Their principal theory is that it is unconstitutional under the Free Speech Clause of the First Amendment to require them to make same-sex-wedding videos. They also raise free-exercise, associational-freedom, equal-protection, and unconstitutional-conditions claims, as well as an argument that the MHRA is unconstitutionally vague.





At this juncture, all that is before us are the allegations of the Larsens' complaint. Early on, the district court granted Minnesota's motion to dismiss for failure to state a claim. *See Fed. R. Civ. P. 12(b)(6)*. It also denied the Larsens' request for a preliminary injunction, but only because it had already decided to dismiss their lawsuit. According to the court, the Larsens' free-speech claim failed as a matter of law because the MHRA serves an important governmental interest—preventing discrimination—without limiting more speech than necessary to accomplish this goal. It also ruled


that the MHRA did not violate any of the other constitutional rights identified by the Larsens.



II.


[2] [3] Before addressing the merits, we must determine whether the Larsens have standing. At this stage, we assume the allegations in the complaint are true and view them in the light most favorable to the Larsens. *See Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 933 n.4 (8th Cir. 2012).

[4] To have standing, the Larsens must establish (1) an injury in fact; (2) a causal connection between the injury and the challenged law; and (3) that a favorable decision is likely to redress their injury.  *Spokeo, Inc. v. Robins*, — U.S. —, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). There is no doubt that the Larsens' allegations satisfy the second and third requirements: any injury would be traceable to the MHRA and would be redressed by a judicial decision enjoining Minnesota from enforcing the law against them. The only real question is whether the Larsens have suffered an injury in fact.

*3 [5] Although a harm must be "actual or imminent, not conjectural or hypothetical," to constitute an injury in fact,  *id.* at 1548 (citation omitted), a plaintiff need not wait for an actual prosecution or enforcement action before challenging a law's constitutionality, *see*  *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). In fact, all a plaintiff must do at the motion-to-dismiss stage is allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder."  *Id.* at 159, 134 S.Ct. 2334 (citation omitted); *see also*  *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (explaining that even "[s]elf-censorship can ... constitute injury in fact" for a free-speech claim when a plaintiff reasonably decides "to chill his speech in light of the challenged statute").

[6] The Larsens' constitutional claims meet this test. The Free Speech Clause of the First Amendment covers films, *see*  *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), so the videos the Larsens intend to make are "affected with a constitutional interest,"


 *Susan B. Anthony List*, 573 U.S. at 159, 134 S.Ct. 2334 (citation omitted). The Larsens’ desire “to engage in a course of conduct” that includes the production of videos means that their other claims are affected with a constitutional interest too, regardless of the precise legal theory.  *Id.* (citation omitted).



Moreover, the Larsens have adequately alleged a “credible threat of enforcement.”  *Id.*; cf. Minn. Stat. § 363A.30, subdiv. 4 (establishing criminal penalties for certain violations). If the Larsens enter the wedding-video business and refuse to film same-sex weddings, Minnesota has made clear that it will view their actions as a violation of the MHRA. Indeed, Minnesota has publicly announced that the MHRA requires all private businesses, including photographers, to provide equal services for same- and opposite-sex weddings. It has even employed “testers” to target noncompliant businesses, and it has already pursued a successful enforcement action against a wedding vendor who refused to rent a venue for a same-sex wedding. Minnesota’s active enforcement of the MHRA leaves us with little doubt that the Larsens will face legal consequences if they decide to start making wedding videos.²

III.






[7] [8] Having determined that the Larsens have standing, we now address their principal claim, which is that the wedding videos are speech and they have a First Amendment right to make them for only opposite-sex weddings. At this stage, our task is to review the complaint de novo to determine whether it alleges one or more actionable claims. *United States ex rel. Raynor v. Nat’l Rural Utils. Co-op. Fin., Corp.*, 690 F.3d 951, 955 (8th Cir. 2012).





A.

[9] [10] [11] The First Amendment, which applies to the states through the Fourteenth Amendment, prohibits laws “abridging the freedom of speech.” U.S. Const. amend. I. It promotes the free exchange of ideas by allowing people to speak in many forms and convey a variety of messages, including those that “invite dispute” and are “provocative and challenging.”  *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). It also prevents the

government from “[c]ompelling individuals to mouth support for views they find objectionable.”  *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, — U.S. —, 138 S. Ct. 2448, 2463, 201 L.Ed.2d 924 (2018). As the Supreme Court has made clear, “[t]here is no room under our Constitution for a more restrictive” approach because “the alternative would lead to standardization of ideas ... by legislatures, courts, or dominant political or community groups.”  *Terminiello*, 337 U.S. at 4–5, 69 S.Ct. 894.

*4 [12] The Larsens’ videos are a form of speech that is entitled to First Amendment protection. The Supreme Court long ago recognized that “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”

 *Joseph Burstyn*, 343 U.S. at 502, 72 S.Ct. 777; see also   *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). Indeed, “[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas.”  *Joseph Burstyn*, 343 U.S. at 501, 72 S.Ct. 777. “They [can] affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”  *Id.*

Although the Larsens do not plan to make feature films, the videos they do wish to produce will convey a message designed to “affect public attitudes and behavior.”  *Id.* According to their complaint, they will tell “healthy stories of sacrificial love and commitment between a man and a woman,” depict marriage as a divinely ordained covenant, and oppose the “current cultural narratives about marriage with which [the Larsens] disagree.” By design, they will serve as a “medium for the communication of ideas” about marriage.  *Id.*; cf.  *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, — U.S. —, 138 S. Ct. 1719, 1727, 201 L.Ed.2d 35 (2018) (“[R]eligious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.”). And like the creators of other types of films, such as full-length documentaries, the Larsens will exercise substantial “editorial control and judgment,”  *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), including making decisions about the footage and

dialogue to include, the order in which to present content, and whether to set parts of the film to music. The videos themselves are, in a word, speech.

The dissent reaches the opposite conclusion, but only by recasting or ignoring the allegations in the Larsens' complaint,³ which at this stage we must accept as true. See *Miller*, 688 F.3d at 933 n.4. The complaint makes clear that the Larsens' videos will not just be simple recordings, the product of planting a video camera at the end of the aisle and pressing record. Rather, they intend to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage. Even if their customers have some say over the finished product, the complaint itself is clear that the Larsens retain ultimate editorial judgment and control.

It also does not make any difference that the Larsens are expressing their views through a for-profit enterprise. See *post* at —. In fact, in holding that motion pictures are protected by the First Amendment, the Supreme Court explicitly rejected the idea that films do not “fall within the First Amendment’s aegis [simply] because” they are often produced by “large-scale business[es] conducted for private profit.” *Joseph Burstyn*, 343 U.S. at 501, 72 S.Ct. 777; see also *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring) (“[T]his Court has repeatedly rejected the notion that a speaker’s profit motive gives the government a freer hand in compelling speech.”). Other commercial and corporate entities, including utility companies and newspapers, have received First Amendment protection too. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) (collecting cases); *Tornillo*, 418 U.S. at 258, 94 S.Ct. 2831; see also *Citizens United v. FEC*, 558 U.S. 310, 342, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (collecting cases). The reason, the Court has said, is that they “contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster” no less than individuals do. *Pac. Gas*, 475 U.S. at 8, 106 S.Ct. 903 (plurality opinion) (internal quotation marks and citation omitted).

*5 Minnesota’s position is that it is regulating the Larsens’ conduct, not their speech. To be sure, producing a video requires several actions that, individually, might be mere conduct: positioning a camera, setting up microphones, and


clicking and dragging files on a computer screen. But what matters for our analysis is that these activities come together to produce finished videos that are “medi[a] for the communication of ideas.” *Joseph Burstyn*, 343 U.S. at 501, 72 S.Ct. 777; see also *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 n.1, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (“Whether government regulation applies to creating, distributing, or consuming speech makes no difference.”).






[13] If we were to accept Minnesota’s invitation to evaluate each of the Larsens’ acts individually, then wide swaths of protected speech would be subject to regulation by the government. The government could argue, for example, that painting is not speech because it involves the physical movements of a brush. Or it could claim that publishing a newspaper is conduct because it depends on the mechanical operation of a printing press. It could even declare that a parade is conduct because it involves walking. Yet there is no question that the government cannot compel an artist to paint, demand that the editors of a newspaper publish a response piece, or require the organizers of a parade to allow everyone to participate. See, e.g., *Tornillo*, 418 U.S. at 256–58, 94 S.Ct. 2831; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 572–73, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). Speech is not conduct just because the government says it is.

B.




[14] Minnesota’s interpretation of the MHRA interferes with the Larsens’ speech in two overlapping ways. First, it compels the Larsens to speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage. Second, it operates as a content-based regulation of their speech.





The Supreme Court has “held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.” *Janus*, 138 S. Ct. at 2463 (internal quotation marks and citation omitted). As *Janus* recognized, the latter is perhaps the more sacred of the two rights. See *id.* at 2463–64. After all, the “choice of a speaker not to propound a particular point of view ... is presumed to lie beyond the government’s power to control.”





 *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (citation omitted).





To apply the MHRA to the Larsens in the manner Minnesota threatens is at odds with the “cardinal constitutional command” against compelled speech.  *Janus*, 138 S. Ct. at 2463. The Larsens do not want to make videos celebrating same-sex marriage, which they find objectionable. Instead, they wish to actively promote opposite-sex weddings through their videos, which at a minimum will convey a different message than the videos the MHRA would require them to make. Even if the Larsens’ desire to selectively speak is “provocative” and “stirs people to anger,”  *Terminiello*, 337 U.S. at 4, 69 S.Ct. 894, Minnesota cannot “coerce[them] into betraying their convictions” and promoting “ideas they find objectionable,”  *Janus*, 138 S. Ct. at 2464. Compelling speech in this manner, as the Supreme Court made clear in  *Janus*, “is always demeaning.”  *Id.* This is especially true here, because Minnesota insists that the Larsens *must* be willing to convey the same “positive” message in their videos about same-sex marriage as they do for opposite-sex marriage.

Minnesota attempts to downplay this injury by pointing out that the MHRA would not require the Larsens to convey any specific message in their videos. Even if the Larsens must be willing to produce “positive” videos about same-sex marriage, Minnesota argues, they need not actually do so unless a customer requests a film with this point of view.

*6 Even aside from its implausibility—for it seems unlikely that any same-sex couple would request a video condemning their marriage—this argument does not get Minnesota far under First Amendment doctrine. The Supreme Court has recognized that the government still compels speech when it passes a law that has the effect of foisting a third party’s message on a speaker. In  *Hurley*, for example, it held that Massachusetts could not use its public-accommodation law to require the sponsors of a private parade to include a group of gay, lesbian, and bisexual individuals who wished to march while “carrying [their] own banner.”  515 U.S. at 572–73, 115 S.Ct. 2338. The Court explained that compelling the inclusion of others impermissibly “declar[ed] the sponsors’ speech itself to be [a] public accommodation” in a way that “alter[ed] the expressive content of their parade.”  *Id.*

[15] Similarly, in  *Tornillo*, the Supreme Court addressed a Florida statute that required newspapers that published attacks on the “personal character or official record” of political candidates to publish the candidates’ responses too, free of cost.  418 U.S. at 244, 94 S.Ct. 2831. Forced inclusion, the Court reasoned, “fail[ed] to clear the barriers of the First Amendment” because it impermissibly “intru[ded] into the function of the editors.”  *Id.* at 258, 94 S.Ct. 2831. The lesson from  *Tornillo* is that the First Amendment is relevant whenever the government compels speech, regardless of who writes the script.

[16] [17] The MHRA also operates in this case as a content-based regulation of the Larsens’ speech, even if, as the Supreme Court has recognized, the MHRA does not, “[o]n its face, ... aim at the suppression of speech.”  *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). A content-based regulation “[m]andat[es] speech that a speaker would not otherwise make” or “exact[s] a penalty on the basis of the content of” speech.  *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (quoting  *Tornillo*, 418 U.S. at 256, 94 S.Ct. 2831). By treating the Larsens’ choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages—the MHRA does both at once. In fact, by requiring the Larsens to convey “positive” messages about same-sex weddings, it even goes a step further. Cf.  *Reed v. Town of Gilbert*, — U.S. —, 135 S. Ct. 2218, 2227, 192 L.Ed.2d 236 (2015) (describing content-based regulations as those that operate based on “the topic discussed or the idea or message expressed”).

[18] The Supreme Court’s decision in  *Tornillo* highlights the problems with content-based regulations. Even if a regulation that requires speech does not directly “prevent[speakers] from saying anything [they] wish[],” it still exacts a penalty.  *Tornillo*, 418 U.S. at 256, 94 S.Ct. 2831 (citation omitted). In  *Tornillo*, the penalty threatened to drive “editors [to] conclude that the safe course [was] to avoid controversy” and to simply not “publish[] news or commentary arguably within the reach of the ... statute.”  *Id.* at 257, 94 S.Ct. 2831. Here, “the safe course” for the Larsens would be to avoid the wedding-

video business altogether. Yet this type of compelled self-censorship, a byproduct of regulating speech based on its content, unquestionably “dampens the vigor and limits the variety of public debate.”⁴ *Id.* (citation omitted).

C.

[19] [20] [21] Laws that compel speech or regulate it based on its content are subject to strict scrutiny, which will require Minnesota, at a minimum, to prove that the application of the MHRA to the Larsens is “narrowly tailored to serve [a] compelling state interest[].” *Reed*, 135 S. Ct. at 2226; *see also, e.g., Dale*, 530 U.S. at 654, 120 S.Ct. 2446 (“[T]he choice of a speaker not to propound a particular point of view ... is presumed to lie beyond the government’s power to control.” (citation omitted)); *Hurley*, 515 U.S. at 573, 115 S.Ct. 2338 (“[T]he fundamental rule of protection under the First Amendment[is] that a speaker has the autonomy to choose the content of his own message.”); *cf. Janus*, 138 S. Ct. at 2464 (suggesting that “a law commanding ‘involuntary affirmation’ of objected-to beliefs would require ‘even more immediate and urgent grounds’ than a law demanding silence” (emphasis added) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943))); *Gralike v. Cook*, 191 F.3d 911, 919–20 (8th Cir. 1999) (applying strict scrutiny to a law forcing candidates to speak about term limits). In an as-applied challenge like this one, the focus of the strict-scrutiny test is on the actual speech being regulated, rather than how the law might affect others who are not before the court. *See Phelps-Roper v. Ricketts*, 867 F.3d 883, 896 (8th Cir. 2017).

1.

*7 [22] The State asserts an interest in ensuring “that all people in Minnesota [are] entitled to full and equal enjoyment of public accommodations and services.” (internal quotation marks and citation omitted). This interest has a substantial constitutional pedigree and, generally speaking, we have no doubt that it is compelling. For example, the Supreme Court has said that antidiscrimination laws typically “are well within the State’s ... power to enact when a legislature has reason to believe that a given group is the target

of discrimination.” *Hurley*, 515 U.S. at 572, 115 S.Ct. 2338. Indeed, the MHRA itself withstood a constitutional challenge after Minnesota applied it to compel a “large and basically unselective” social club to accept female members.

Roberts, 468 U.S. at 621–22, 626–27, 104 S.Ct. 3244. And like the dissent, we have little doubt that Minnesota had powerful reasons for extending the MHRA to protect its citizens against sexual-orientation discrimination. *See post at* _____.

[23] [24] But that is not the point. Even antidiscrimination laws, as critically important as they are, must yield to the Constitution. And as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment. *See Hurley*, 515 U.S. at 579, 115 S.Ct. 2338 (“While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”). As the Supreme Court has explained, even if the government may prohibit “the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services,” it may not “declar[e] [another’s] speech itself to be [a] public accommodation” or grant “protected individuals ... the right to participate in [another’s] speech.” *Id.* at 572–73, 115 S.Ct. 2338 (emphasis added).

[25] *Hurley* is particularly instructive. When Massachusetts forced the organizers of a private parade to include a group that wished “to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals,” *id.* at 560–61, 115 S.Ct. 2338, the Supreme Court concluded that applying the State’s public-accommodation law in this way violated the organizers’ freedom of speech, *id.* at 566, 115 S.Ct. 2338. Although antidiscrimination laws are generally constitutional, the Court reasoned, a “peculiar” application that required speakers “to alter the[ir] *expressive content*” was not. *Id.* at 572–73, 115 S.Ct. 2338 (emphasis added). In short, the Court drew the line exactly where the Larsens ask us to here: to prevent the government from requiring their speech to serve as a public accommodation for others.

[26] Similarly, in *Dale*, the Supreme Court held that the Boy Scouts had the right to expel a gay-rights activist, despite a New Jersey antidiscrimination law that otherwise prohibited the action. 530 U.S. at 644, 120 S.Ct. 2446. The reason, the Court said, was that the Boy Scouts' opposition to homosexuality was expressive and "the forced inclusion of [the activist] would [have] significantly affect[ed] its expression." *Id.* at 650–52, 656, 120 S.Ct. 2446; see also *id.* at 659, 120 S.Ct. 2446 ("[T]he First Amendment prohibits the State from imposing [an inclusion] requirement through the application of its public accommodations law."). Like *Hurley*, *Dale* makes clear that once conduct crosses over to speech or other expression, the government's ability to regulate it is limited.

[27] [28] As these cases demonstrate, regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be. It is a "bedrock principle ... that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); see also *Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("[I]t is not ... the role of the State or its officials to prescribe what shall be offensive."). After all, the Westboro Baptist Church could carry highly inflammatory signs at military funerals, see *Snyder v. Phelps*, 562 U.S. 443, 448–49, 460–61, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011), the Nazis could march in areas heavily populated by Jewish residents, see *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam), and an activist could burn the American flag as a form of political protest, see *Johnson*, 491 U.S. at 399, 109 S.Ct. 2533.

*8 [29] The cases relied upon by Minnesota and the dissent are not to the contrary. In *Roberts*, for example, the Supreme Court emphasized that an all-male social club had failed to show that a law requiring the admission of female members "impose[d] any serious burdens on the male members' freedom of expressive association" or "impede[d] the organization's ability to engage in ... protected activities or to disseminate its preferred views." 468 U.S. at 626–27, 104 S.Ct. 3244; see also *id.* at 627, 104 S.Ct. 3244 (highlighting that the law "impose[d] no restrictions


on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members"). So too in *Hishon v. King & Spalding*, in which the Court emphasized that a law firm "ha[d] not shown how its ability to [exercise its expressive and associational rights] would be inhibited by a requirement that it consider [a woman] for partnership on her merits." 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). The unmistakable message is that antidiscrimination laws can regulate conduct, but not expression.



Indeed, if Minnesota were correct, there is no reason it would have to stop with the Larsens. In theory, it could use the MHRA to require a Muslim tattoo artist to inscribe "My religion is the only true religion" on the body of a Christian if he or she would do the same for a fellow Muslim, or it could demand that an atheist musician perform at an evangelical church service. In fact, if Minnesota were to do what other jurisdictions have done and declare political affiliation or ideology to be a protected characteristic, then it could force a Democratic speechwriter to provide the same services to a Republican, or it could require a professional entertainer to perform at rallies for both the Republican and Democratic candidates for the same office. See, e.g., D.C. Code § 2-1402.31; Seattle, Wash., Mun. Code §§ 14.06.010, .020(L), 030(B); cf. *Hurley*, 515 U.S. at 571–72, 115 S.Ct. 2338 (recognizing that states have the power to create additional protected classes).



2.


[30] [31] Even so, Minnesota argues that we should apply intermediate scrutiny based on a theory that, once again, turns on the distinction between conduct and speech. Specifically, when " 'speech' and 'nonspeech' elements are combined in the same course of conduct" and the government seeks to neutrally regulate the non-speech element, intermediate scrutiny applies under the incidental-burden doctrine. *Johnson*, 491 U.S. at 407, 109 S.Ct. 2533 (quoting *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)); see also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) (explaining that a regulation must be content-neutral under this doctrine). According to Minnesota, the MHRA only incidentally burdens speech





because it neutrally regulates “commercial conduct and economic activity” and requires the Larsens to do nothing more than provide “services to customers regardless of their sexual orientation.”







The problem with this theory, even aside from the fact that the MHRA is not content neutral, *see supra* Part III.B, is that Minnesota does not actually seek to regulate non-speech activity, *see*  [Humanitarian Law Project](#), 561 U.S. at 26–27, 130 S.Ct. 2705. The “commercial conduct” and “economic activity” to which Minnesota refers is the making of the videos themselves, which, as we have already explained, are speech. Indeed, Minnesota cannot specifically identify *anything* else, meaning that this is just a repackaging of its theory that making the videos is conduct, not speech. *See supra* Part III.A.

[32] [33] [34] Importantly, the fact that Minnesota is not shy about its belief that it can regulate the videos themselves distinguishes this case from other applications of antidiscrimination laws that actually *do* target conduct, which are generally constitutional even when they incidentally affect speech. *Cf.*  [Hurley](#), 515 U.S. at 572–73, 115 S.Ct. 2338 (declaring a “peculiar” application of an antidiscrimination law to be unconstitutional). An employment-discrimination law, for example, can unquestionably “require an employer to take down a sign reading ‘White Applicants Only.’ ”  [Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. \(F.A.I.R.\)](#), 547 U.S. 47, 62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). And a public-accommodation law requiring a restaurant to serve people of all races, genders, and sexual orientations will have the incidental effect of requiring servers to speak to customers to take their orders. But these consequences are incidental because the relevant laws target the *activities* of hiring employees and providing food, neither of which typically constitutes speech. Here, by contrast, Minnesota is targeting speech itself.⁵

*9 [35] Minnesota also suggests that a lesser form of scrutiny is appropriate because the Larsens can say that they disapprove of same-sex marriage in some other way. But just like New Hampshire could not “require [drivers] to display the state motto” Live Free or Die on their license plates,  [Wooley v. Maynard](#), 430 U.S. 705, 717, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), even if they could disavow the motto through “a conspicuous bumper sticker,”  *id.* at 722, 97 S.Ct. 1428 (Rehnquist, J., dissenting), so too

would a disclaimer here be inadequate. The reason is that the constitutional “protection of a speaker’s freedom would be empty” if “the government could require speakers to affirm in one breath that which they deny in the next.”  [Hurley](#), 515 U.S. at 576, 115 S.Ct. 2338 (brackets and citation omitted).

To be sure, the Supreme Court has suggested that the opportunity to provide a disclaimer can make a difference when a law requires an otherwise-silent party to provide a forum for the speech of others. One example is  [PruneYard Shopping Center v. Robins](#), which upheld a requirement compelling the owner of a shopping mall to allow private individuals to distribute political pamphlets on the premises.  447 U.S. 74, 77–78, 88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). The Court emphasized that the owner could “expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers st[ood].”  *Id.* at 87, 100 S.Ct. 2035. “Notably absent,” however, “was any concern that access to [the mall] might affect the shopping center owner’s exercise of his own right to speak” or any allegation that the owner “objected to the content of the pamphlets.”  [Pac. Gas](#), 475 U.S. at 12, 106 S.Ct. 903 (plurality opinion). Here, of course, the Larsens strenuously object to what Minnesota would have them say.

Minnesota’s reliance on  [F.A.I.R.](#) is similarly flawed.  [F.A.I.R.](#) was also about the availability of a forum, but this time for legal recruiters. Law schools, which invited and hosted recruiters of all types, objected to hosting the military because of a disagreement with policies that excluded gays and lesbians from serving.  [F.A.I.R.](#), 547 U.S. at 51–52, 126 S.Ct. 1297. Federal law, however, required the schools to give equal access to military recruiters or risk losing federal funding.  *Id.* The schools sued, claiming that they had a First Amendment right to exclude military recruiters from campus.  *Id.* at 52–53, 126 S.Ct. 1297. The Supreme Court disagreed, even if the schools had to “send e-mails [and] post notices on bulletin boards on [the recruiters’] behalf”—both “elements of speech.”  *Id.* at 61, 126 S.Ct. 1297.

The Supreme Court upheld the law because it did not interfere with the law schools’ expression or coopt their speech. Simply hosting recruiters was not speech, according to the Court, so the “accommodation of a military recruiter’s message” did not “sufficiently interfere with any message

of the school[s].” *Id.* at 64, 126 S.Ct. 1297. Besides, just like the mall owner in *PruneYard*, the schools “remain[ed] free ... to express whatever views they may have [had] on the military’s congressionally mandated employment policy.” *Id.* at 60, 126 S.Ct. 1297. Cases like *Hurley*, by contrast, involved unconstitutionally compelled speech because “the complaining speaker’s own message was affected by the speech it was forced to accommodate.” *Id.* at 63, 126 S.Ct. 1297.

The facts of the case, as pleaded by the Larsens, are much closer to *Hurley* than to *PruneYard* or *F.A.I.R.* Rather than serving as a forum for the speech of others, the Larsens’ videos will carry their “own message.” *Id.* The MHRA interferes with their message by requiring them to say something they otherwise would not. See *id.* at 64, 126 S.Ct. 1297. The Larsens, then, lose “the autonomy to choose the content of [their] own message,” *id.* (quoting *Hurley*, 515 U.S. at 573, 115 S.Ct. 2338), which violates the “cardinal constitutional command” against compelled speech, *Janus*, 138 S. Ct. at 2463.

*10

Consistent with the Supreme Court’s instruction that antidiscrimination laws “do not, as a general matter, violate the First ... Amendment[],” *Hurley*, 515 U.S. at 572, 115 S.Ct. 2338, our holding leaves intact other applications of the MHRA that do not regulate speech based on its content or otherwise compel an individual to speak. But when, as here, Minnesota seeks to regulate speech itself as a public accommodation, it has gone too far under *Hurley* and its interest must give way to the demands of the First Amendment.

IV.

The district court also ruled that the Larsens could not seek relief on various other constitutional theories. We largely agree that these claims fail. But one—the free-exercise claim—can proceed because it is intertwined with their free-speech



claim. Accordingly, the Larsens are free to pursue their so-called “hybrid rights” claim on remand.







A.






[36] The basic premise of the Larsens’ free-exercise claim is that the MHRA, as interpreted by Minnesota, prevents them from freely exercising their religious beliefs. It does so, the Larsens say, because they will have to either show support for same-sex marriage, even though they object to it on religious grounds, or refrain from making wedding videos at all. This is not a typical free-exercise claim.



[37] Those seeking relief under the Free Exercise Clause of the First Amendment will ordinarily argue that their religion requires them to engage in conduct that the government forbids or forbids certain conduct that the government requires. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (evaluating whether those who practice Santeria could perform animal sacrifice, the religion’s “central element,” even though it was illegal); *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 874, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (deciding whether members of the Native American Church should be allowed to use peyote, a controlled substance, for “sacramental purposes”); *Gillette v. United States*, 401 U.S. 437, 461, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (considering a claim that conscientious objectors should have been able to avoid military conscription during the Vietnam War). If the Larsens’ claim fell into one of those two categories, then we would simply apply the rule that neutral, generally applicable laws that incidentally burden “a particular religious practice” do not have to be “justified by a compelling governmental interest.” *Church of the Lukumi*, 508 U.S. at 531, 113 S.Ct. 2217; see also *Smith*, 494 U.S. at 878–79, 110 S.Ct. 1595 (“We have 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.” (emphasis added)).


[38] But the Larsens have alleged that the MHRA burdens their religiously motivated *speech*, not their religious *conduct*. So their claim falls into the class of “hybrid situation[s]” in which “the Free Exercise Clause *in conjunction* with other constitutional protections, such as freedom of speech,”


can “bar[] application of a neutral, generally applicable law.”  *Smith*, 494 U.S. at 881–82, 110 S.Ct. 1595 (emphasis added). Because the Larsens’ free-exercise claim is “[]connected with [their] communicative activity,” in other words, the Larsens may use their “Free Exercise Clause concerns” to “reinforce[]” their free-speech claim.  *Id.* at 882, 110 S.Ct. 1595.

*11 Minnesota, the district court, and the dissent seem to think that we can simply ignore the hybrid-rights discussion from  *Smith* because it was dicta. For two reasons, it cannot be dismissed so easily. First, we applied the hybrid-rights doctrine post- *Smith* in  *Cornerstone Bible Church v. City of Hastings*, which rejected a church’s stand-alone free-exercise claim but recognized that the church’s other constitutional claims “breathe[d] life back into [its] ‘hybrid rights’ claim.”  948 F.2d 464, 472–73 (8th Cir. 1991). Because this aspect of  *Cornerstone Bible Church* resurrected a claim that had been left for dead by the district court, our application of the hybrid-rights theory was part of the holding because it was “essential to the judgment in that case.”  *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544, 550 (8th Cir. 1990) (distinguishing between holdings and dicta).

Second, we do not agree with the premise that  *Smith*’s analysis of the hybrid-rights doctrine was dicta.  *Smith* upheld a “neutral, generally applicable law” that interfered with the sacramental use of peyote.  494 U.S. at 881–82, 110 S.Ct. 1595. To reach this conclusion, however, the Supreme Court had to grapple with a long line of cases that had treated the Free Exercise Clause as a shield against laws burdening religious practices. See  *id.* (collecting cases). Rather than overrule these decisions, the Court explained that they involved “hybrid situation[s]” in which a free-exercise challenge was intertwined with another constitutional right.  *Id.* at 882, 110 S.Ct. 1595.





This means that  *Smith* did more than simply speculate about how to treat a hybrid claim in some hypothetical future case. Rather, it described the operation of an *existing* doctrine, one that it then applied to the parties. See  *id.* (highlighting that “[t]here [was] no contention that Oregon’s drug law

represent[ed] an attempt to regulate ... the *communication* of religious beliefs” (emphasis added)). Although the claimants did not prevail under the hybrid-rights doctrine in  *Smith*, the Court’s discussion of it was far from dicta.

Of course, it is not at all clear that the hybrid-rights doctrine will make any real difference in the end. After all, the Larsen’s free-speech claim already requires the application of strict scrutiny. As a practical matter, then, the fact that the videos also have religious significance may not move the needle much. But because the Larsens have adequately alleged a hybrid-rights claim in their complaint, the district court must allow them to develop it on remand. See  *Cornerstone Bible Church*, 948 F.2d at 473.

B.




The Larsens cannot prevail on any of their remaining claims, beginning with their allegation that the MHRA violates their associational-freedom rights. Their theory is that the law forces them “to join together and speak with those who wish to express an opposing message about marriage,” which unconstitutionally “impairs their ability to express their views, and only those views.” (internal quotation marks, brackets, and citation omitted).


[39] [40] Although the Larsens call it associational freedom, this is really a disguised free-speech claim. The right to expressive association protects groups from being forced “to accept members [they do] not desire.”  *F.A.I.R.*, 547 U.S. at 69, 126 S.Ct. 1297 (citation omitted). But requiring the Larsens to produce same-sex-wedding videos would not force them to accept same-sex couples as “members” of their company or of some other group to which they belong. Rather, they would simply have to “ ‘associate’ with [same-sex couples] in the sense that they [would need to] interact with them.”  *Id.* Standing alone, these interactions would not affect their “ability to advocate public or private viewpoints.”  *Dale*, 530 U.S. at 648, 120 S.Ct. 2446. It is only when these interactions require the Larsens to speak in a certain way that the MHRA “impair[s] the[ir] ability ... to express th[eir] views.”  *Id.*


*12 Indeed, the Larsens’ allegations all but doom their associational-freedom claim. The complaint stresses that the Larsens will “gladly work with all people—regardless of



their ... sexual orientation”—as long as the message of any video they are asked to make fits with their religious beliefs. The Larsens’ counsel reinforced this point at oral argument, explaining that they would have no problem making other types of videos for gay or lesbian customers. It is clear, then, that serving, speaking to, and otherwise associating with gay and lesbian customers is not the harm they seek to remedy. Their real objection is to the message of the videos themselves, which is just another way of saying that the MHRA violates their free-speech rights.

C.


[41] The Larsens have also brought a claim alleging a violation of the Equal Protection Clause of the Fourteenth Amendment. Their argument begins with the uncontroversial premise that free speech and the free exercise of religion are fundamental constitutional rights. See  *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570–71, 62 S.Ct. 766, 86 L.Ed. 1031 (1942);  *Cantwell v. Connecticut*, 310 U.S. 296, 303, 307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The MHRA treats people differently in the exercise of these fundamental rights, they say, because “[f]ilmmakers who support same-sex marriage are free to create and sell wedding films that align with their views on marriage,” while those who oppose it are not. So this “classification[] affecting fundamental rights” merits strict scrutiny—a standard that the MHRA cannot satisfy.  *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988).


The problem with the Larsens’ logic lies in the middle step: the classification that they believe they have identified. The MHRA does not classify anyone based on their views about marriage. Rather, under Minnesota’s interpretation, *every* wedding-video business must be willing to film both opposite-sex and same-sex weddings. The point, in other words, is that the law applies equally. Cf.  *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (“The Fourteenth Amendment guarantees equal laws, not equal results.”).

To be sure, the Larsens, and others like them, are unhappy with the MHRA’s requirements, but dissatisfaction with the law is not itself a classification. Cf.  *id.* at 271–72, 99 S.Ct. 2282 (explaining that “many [laws] affect certain groups unevenly, even though the law itself treats them no differently

from all other members of the class described by the law”). Indeed, by the Larsens’ logic, any rule that affects religiously motivated conduct would be subject to strict scrutiny because it would create two groups of people: those who are happy to follow the law and those who are not. But we know from  *Smith* that the government has the power to enact neutral, generally applicable laws that burden religious conduct.  494 U.S. at 878–80, 110 S.Ct. 1595. We accordingly reject the Larsens’ attempt to manufacture a legal classification that does not exist.

D.

[42] The Larsens further allege that the MHRA “is vague and allows unbridled discretion.” They focus on  *Minn. Stat. § 363A.17(3)*, which forbids discrimination “unless the alleged refusal or discrimination is because of a *legitimate business purpose*.” (Emphasis added). According to the Larsens, this exception creates “uncertainty” about the scope of the law and allows Minnesota to enforce the law however it wishes, including more aggressively against those with whom it disagrees.

[43] The MHRA, as applied to the Larsens, is not unconstitutionally vague. “We consider whether a statute is vague as applied to *the particular facts at issue*, for a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.”  *Humanitarian Law Project*, 561 U.S. at 18–19, 130 S.Ct. 2705 (emphasis added) (internal quotation marks, brackets, and citation omitted). The allegations in the complaint once again doom the Larsens’ argument, this time because they insist that “the MHRA prohibits them from [creating only opposite-sex-wedding videos]” and that Minnesota has “categorically declared” that their religious objections are not a “legitimate business purpose.” So their argument that they are somehow left in legal limbo rings hollow.

*13 [44] They also cannot explain how the legitimate-business-purpose exception gives unbridled discretion to state officials. The Larsens fail to cite even a single example of discrimination in enforcement of this exception, much less show that Minnesota has a pattern of discriminatory enforcement. Nor is the phrase “legitimate business purpose,” which mirrors language routinely used elsewhere in

antidiscrimination law, *see, e.g.*, [McDonnell Douglas Corp. v. Green](#), 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (explaining that an employer may rebut a charge of discrimination by pointing to “some legitimate, nondiscriminatory reason” for a hiring decision), so open-ended “that it authorizes or encourages seriously discriminatory enforcement,” [Humanitarian Law Project](#), 561 U.S. at 18, 130 S.Ct. 2705 (citation omitted).

E.

[45] Finally, the Larsens’ complaint also alleges a violation of the unconstitutional-conditions doctrine. They reason that the MHRA “conditions [their] right to promote their religious views about marriage ... on their willingness to forfeit their rights to be free from government-compelled speech, to freely exercise their religion, and to equal protection of the laws.”

[46] This argument is just a replay of their other claims, once again under an ill-fitting legal framework. The unconstitutional-conditions doctrine prevents the government from “deny[ing] a *benefit* to a person” because of “constitutionally protected [activity].” [Perry v. Sindermann](#), 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (emphasis added). This case, however, involves “direct[]” regulation, not the withholding of benefits, such as “tax exemptions,” “unemployment benefits,” or “welfare payments.” [Id.](#) (citation omitted). We accordingly treat this claim for what it is: three miscast, freestanding constitutional claims.

V.

[47] We affirm the district court’s judgment in part, reverse it in part, and remand for further proceedings. On remand, the district court must consider in the first instance whether the Larsens are entitled to a preliminary injunction, keeping in mind the principle that, “[w]hen a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.” [Minn. Citizens Concerned for Life, Inc. v. Swanson](#), 692 F.3d 864, 870 (8th Cir.2012) (en banc) (citation omitted).

KELLY, Circuit Judge, concurring in part and dissenting in part.

The Larsens want to expand their videography business to provide wedding-video services, but they do not want to supply these services for same-sex weddings. Minnesota has enacted a general antidiscrimination statute that prohibits businesses from discriminating against individuals based on certain protected characteristics, including sexual orientation. The Larsens filed this lawsuit to obtain an exemption that would allow them to deny service to same-sex couples. The court today correctly rejects many of the Larsens’ arguments as to why they are entitled to such an exemption. It nonetheless concludes that the First Amendment’s protections for free speech and free exercise of religion likely entitle them to relief. From this holding, I must respectfully dissent.






No court has ever afforded “affirmative constitutional protections” to private discrimination. [Norwood v. Harrison](#), 413 U.S. 455, 469–70, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). Indeed, caselaw has long recognized that generally applicable laws like Minnesota’s may limit the First Amendment rights of an individual in his capacity as the owner of a business serving the public. [Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n](#), — U.S. —, 138 S. Ct. 1719, 1723–24, 201 L.Ed.2d 35 (2018). Although religious and philosophical objections to same-sex marriage are protected by the First Amendment, “such objections do not allow business owners ... to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” [Id.](#) at 1727. That well-established principle should have easily disposed of this case.

*14 Instead, the court tries to recharacterize Minnesota’s law as a content-based regulation of speech, asserting that it forces the Larsens to speak and to convey a message with which they disagree. Neither is true. The Larsens remain free to communicate any message they desire—about same-sex marriage or any other topic—or no message at all. What they cannot do is operate a public accommodation that serves customers of one sexual orientation but not others. And make no mistake, that is what today’s decision affords them license to do. The Larsens concede that they want to operate a public accommodation that serves only opposite-sex couples. Minnesota’s law prohibits that conduct just as it would prohibit any hotel from denying its services to an individual based on race, any store from refusing to sell goods

to a person based on religion, or any restaurant from charging higher prices to women than to men. That the service the Larsens want to make available to the public is expressive does not transform Minnesota's law into a content-based regulation, nor should it empower the Larsens to discriminate against prospective customers based on sexual orientation.

I



A



The axiom that places of public accommodation are open to everyone is deeply rooted in the American legal system. Since at least the sixteenth century, the common law recognized that innkeepers and common carriers were obligated to serve all potential customers. See  [Lombard v. Louisiana](#), 373 U.S. 267, 276–77 & n.6, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963) (Douglas, J., concurring); see also  [Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.](#), 515 U.S. 557, 571, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995);  [Bell v. Maryland](#), 378 U.S. 226, 296–99, 84 S.Ct. 1814, 12 L.Ed.2d 822 (1964) (Goldberg, J., concurring). After the Civil War, states began codifying those protections through public accommodations statutes to protect African Americans from discrimination.  [Hurley](#), 515 U.S. at 571, 115 S.Ct. 2338 (discussing Massachusetts's adoption of the first public accommodations law in 1865); see also [State Public Accommodation Laws](#), Nat'l Conf. St. Legislatures, <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> (last updated April 8, 2019) (indicating that all but five states have such laws). The federal government followed suit with the Civil Rights Act of 1875 and later the Civil Rights Act of 1964, Title II of which contains the current requirement: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation ... without discrimination or segregation on the ground of race, color, religion, or national origin."  42 U.S.C. § 2000a(a).

Public accommodations laws enforce the basic and fundamental right to be treated as an equal in American society. Private discrimination "sap[s] the moral fiber of the Nation," 110 Cong. Rec. 7379 (1964) (statement of Sen. Kennedy), and "mars the atmosphere of a united and

classless society in which this Nation rose to greatness," 110 Cong. Rec. 7399 (1964) (statement of Sen. Magnuson) (quoting President John F. Kennedy, Feb. 28, 1963). Title II and laws like it "send[] a clear message to ... places of public accommodations" that they may not deny historically disadvantaged groups the "equally effective and meaningful opportunity to benefit from all aspects of life in America." 135 Cong. Rec. 8506 (1989) (statement of Sen. Harkin) (discussing the Americans with Disabilities Act).





In that vein, Minnesota enacted the Minnesota Human Rights Act (MHRA) more than 130 years ago. The MHRA originally provided that all persons "of every race and color" shall be "entitled to the full and equal enjoyment of" public accommodations within the state. An Act To Protect All Citizens in Their Civil and Legal Rights, ch. 224, sec. 1, 1885 Minn. Laws 295, 296. Like other states, Minnesota eventually broadened the scope of the law's protections to cover a wider swath of businesses and a larger number of protected classes.

See  [U.S. Jaycees v. McClure](#), 305 N.W.2d 764, 766–68 (Minn. 1981) (discussing the law's history). The current law defines a place of public accommodation as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public."  Minn. Stat. § 363A.03 subd. 34 (2018).

*15 The current MHRA contains two antidiscrimination provisions at issue here. The Public Accommodations Provision prohibits denying anyone the "full and equal enjoyment" of the goods or services of a place of public accommodation because of "race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex." *Id.*  § 363A.11 subd. 1(a)(1). The Business Discrimination Provision makes it an "unfair discriminatory practice" for a business "to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose." *Id.*  § 363A.17(3).

Minnesota's decision to add sexual orientation to the list of protected characteristics was driven by substantial evidence of sexual-orientation discrimination, particularly in rural

areas. In April 1990, Minnesota Governor Rudy Perpich appointed a task force to determine whether gay and lesbian Minnesotans were suffering from discrimination and to make policy recommendations. See Report of the Governor's Task Force on Lesbian and Gay Minnesotans (Mar. 22, 1991) [hereinafter Task Force Report], J.A. 325–461. The task force heard forty hours of public and private testimony on a range of issues affecting gay and lesbian communities in various parts of the state. Id., J.A. 330. It concluded that there remains “substantial societal hostility” toward homosexuality, which is “damaging to gay men and lesbians and ultimately ... society as a whole.” Id. Discrimination is “wide-spread,” but it is “perhaps worse” in the state’s rural areas, where there is greater evidence that gays and lesbians fear losing their jobs and housing on account of sexual orientation. Id., J.A. 333. The task force noted that “an underlying theme” to all of its public hearings and briefings “was the need to add gays and lesbians as a protected class under the Minnesota Human Rights Act” to combat the “considerable discrimination” faced by those individuals. Id., J.A. 332. In particular, the task force highlighted the need to include protections for public accommodations because “[s]everal people testified that they had been denied motel or hotel rooms when the inn-keepers discovered they were gay, remarking, ‘We don’t want your kind here.’ ” Id.

This evidence is consistent with the well-documented history of discrimination against gays and lesbians in this country. “[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral.”  Lawrence v. Texas, 539 U.S. 558, 571, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Homosexuality was treated as an illness for much of the twentieth century, and until recently, same-sex intimacy was criminalized by many states.  Obergefell v. Hodges, — U.S. —, 135 S. Ct. 2584, 2596, 192 L.Ed.2d 609 (2015); see also  Lawrence, 539 U.S. at 578, 123 S.Ct. 2472. “Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”  Obergefell, 135 S. Ct. at 2596.

It was in light of this history that Minnesota amended the MHRA to prohibit various forms of discrimination based on sexual orientation. The amendments sought to ensure that “sexual orientation cannot be used to deny some Minnesotans the basic rights to a place to live, employment and other public accommodations which should be enjoyed by all citizens.” Letter from Hubert H. Humphrey III,

Att’y Gen., to Hon. Alan Spear, Chair, Senate Judiciary Comm. (Mar. 1, 1993) [hereinafter Humphrey Letter], J.A. 477. As relevant here, the law added sexual orientation to the list of protected characteristics included in the Public Accommodations Provision and the Business Discrimination Provision, see Act of April 2, 1993, ch. 22, sec. 10, 1993 Minn. Laws 121, 131–32; id. sec. 15, 1993 Minn. Laws at 140, thereby recognizing that “the right to public accommodations, public services and freedom from personal harm, should be guaranteed to all,” Humphrey Letter, J.A. 478.

*16 Minnesota is not alone in making sexual orientation a protected characteristic or in prohibiting sexual-orientation discrimination in places of public accommodation. Approximately half the states in the Union, along with the District of Columbia, provide similar protections.⁶ In the remaining states, more than 100 local jurisdictions have adopted laws or ordinances prohibiting discrimination on the basis of sexual orientation in places of public accommodation. See Br. of Amici Curiae Massachusetts et al. 3a–8a. In all, more than half of all Americans live in a jurisdiction that prohibits this type of discrimination. See id. at 9–10 & n.6.

Numerous religious groups supported the inclusion of sexual orientation as a protected characteristic under the MHRA. See, e.g., Joint Religious Legislative Coal., JRLC Position on Human Rights with Regard to Sexual Orientation (Mar. 4, 1993), J.A. 463–71; Statement from James D. Habiger, Exec. Dir., Minn. Catholic Conference (Mar. 1, 1993), J.A. 473–75; Task Force Report, J.A. 376–86 (excerpting endorsements from forty-seven religious denominations or institutions). To accommodate religious views, the legislature added a broad exemption to the MHRA for religious nonprofits. As originally enacted, the amendment provided that nothing within the MHRA

prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from:

- (1) limiting admission to or giving preference to persons of the same religion or denomination; or
- (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the

religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized.

*17 Act of April 2, 1993, ch. 22, sec. 6, 1993 Minn. Laws at 125–26 (now codified at [Minn. Stat. § 363A.26](#)). When Minnesota amended its laws in 2013 to authorize same-sex marriages, it added a third paragraph to the exception:

(3) taking any action with respect to the provision of goods, services, facilities, or accommodations directly related to the solemnization or celebration of a civil marriage that is in violation of its religious beliefs.

Act of May 14, 2013, ch. 74, sec. 1, 2013 Minn. Laws 1 (now codified at [Minn. Stat. § 363A.26](#)). The 1993 amendments also exempted from the Public Accommodations Provision




employees or volunteers of a nonpublic service organization whose primary function is providing occasional services to minors, such as youth sports organizations, scouting organizations, boys’ or girls’ clubs, programs providing friends, counselors, or role models for minors, youth theater, dance, music or artistic organizations, agricultural organizations for minors, and other youth organizations, with respect to qualifications based on sexual orientation.

Act of April 2, 1993, ch. 22, sec. 5, 1993 Minn. Laws at 125 (now codified at [Minn. Stat. § 363A.24 subdiv. 1](#)).



B

The Larsens have sincere views about marriage rooted in their deeply held religious beliefs. They are “Christians who base their beliefs on the Bible.” Am. Compl. ¶ 21. In particular, the Larsens “disagree with the view and message that same-

sex marriage is morally equivalent to the historic, biblically-orthodox definition of marriage as between one man and one woman.” *Id.* ¶ 116. Their religious and philosophical objections to same-sex marriage are entitled to respect, and “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”

 [Hernandez v. Comm’r](#), 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). “For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.”  [Lawrence](#), 539 U.S. at 571, 123 S.Ct. 2472. The First Amendment undoubtedly protects the Larsens’ ability to “advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”  [Obergefell](#), 135 S. Ct. at 2607.

But this case is not about the Larsens’ rights as individual citizens to worship freely or to speak openly about their faith or political views. It is about their rights as owners of Telescope Media Group (TMG), a Minnesota for-profit corporation. TMG provides a variety of video and media production services to the public, including short films and commercials. TMG does not currently make wedding videos, but the Larsens want to expand TMG to include this service. The Larsens aver that they “desire to use their unique storytelling and promotional talents to convey messages that promote aspects of their sincerely-held religious beliefs.” Am. Compl. ¶ 93. To that end, the Larsens want to offer wedding-video services, but they do not want to provide those services to same-sex couples.

The Larsens concede that, by offering wedding-video services to the general public, TMG qualifies as a place of public accommodation under the MHRA’s definition. *Id.* ¶ 81. As a for-profit corporation, it falls outside the exemptions included in the law for religious and secular nonprofits. See [Minn. Stat. §§ 363A.24 subdiv. 1, 363A.26](#). The Public Accommodations Provision therefore prohibits TMG from denying anyone the “full and equal enjoyment” of its services based on sexual orientation,  [id.](#) § 363A.11 subdiv. 1(a)(1), and the Business Discrimination Provision prohibits it from discriminating in terms of a contract based on a person’s sexual orientation unless it is because of a legitimate business purpose, [id.](#)  § 363A.17(3). Minnesota has issued guidance stating that these provisions mean that “a business that provides wedding

services ... may not deny services to a same-sex couple based on their sexual orientation.” Am. Compl. ¶ 61.

*18 The Larsens also express a desire to create a website that includes the following disclaimer against providing services to same-sex weddings: “Because of TMG’s owners’ religious beliefs and expressive purposes, it cannot make films promoting any conception of marriage that contradicts its religious beliefs that marriage is between one man and one woman, including films celebrating same-sex marriages.” *Id.* ¶ 158. They also intend to require every couple that uses their services to sign a contract that requires TMG to publicly promote the couple’s wedding video on TMG’s website and social media. Thus, if required to provide wedding-video services for all couples, the Larsens assert that their own contract would force them to promote a pro-same-sex-marriage viewpoint that they do not endorse.

The Larsens brought this lawsuit seeking to enjoin application of the MHRA as to TMG, thus providing them an exemption from the Public Accommodations Provision and Business Discrimination Provision. They assert causes of action under the First Amendment’s protections for free speech, expressive association, and the free exercise of religion, as well as under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

II

Before addressing the Larsens’ various claims, it is necessary to say a few words about the justiciability of their allegations. Both standing and ripeness are limitations on our judicial power “and must be considered even if not raised by the parties.” *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 n.5 (8th Cir. 1997); see *281 Care Comm. v. Arneson*, 766 F.3d 774, 780 (8th Cir. 2014). “To decide ripeness, courts consider: ‘(1) the hardship to the plaintiff caused by delayed review; (2) the extent to which judicial intervention would interfere with administrative action; and (3) whether the court would benefit from further factual development.’ ” *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 796–97 (8th Cir. 2016) (quoting *Nat’l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 692–93 (8th Cir. 2003)). “The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention.” *Parrish v. Dayton*, 761 F.3d 873,

875 (8th Cir. 2014) (cleaned up). Similarly, to have standing to bring a pre-enforcement First Amendment challenge to a statute that provides criminal penalties, there must be a “credible threat of present or future prosecution.” *Minn. Citizens*, 113 F.3d at 131 (quoting *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996)).

Whether the Larsens’ claims are justiciable at this juncture hinges on whether their intended course of conduct is arguably proscribed by the MHRA. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). To violate either of the MHRA provisions at issue here, a business must do two things. First, it must treat a person differently than it would treat someone else—either by denying the person the “full and equal enjoyment” of its goods and services or by engaging in one of several forms of business discrimination. Second, that difference in treatment must be “because of” one of the protected characteristics enumerated in the MHRA. As applied to the Larsens and TMG, whether their business model violates this test depends on exactly what “service” they generally provide to the public and whether they are denying that service because of a protected characteristic. For example, a bakery that does not make cakes does not violate the MHRA by declining to bake a wedding cake for a same-sex couple, because it is not treating that couple differently than it would anyone else.

Because we are at the pleading stage, our only guidance about how to define TMG’s service comes from the complaint. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007))). TMG currently offers “a wide variety of video and media production related services to the public,” but it does not offer wedding-video services. Am. Compl. ¶ 80. So, if a same-sex couple approached the Larsens today seeking a wedding video, the Larsens’ refusal to serve them would not violate the MHRA because the Larsens do not currently make that service available to the public. But the complaint alleges that the Larsens want to expand TMG to offer “wedding-related services,” *id.* ¶ 139, specifically the creation of “wedding videos,” *id.* ¶¶ 136, 138, 254. A couple seeking this service would pay the Larsens to film their wedding and produce

a video of the event. *Id.* ¶¶ 131–33, 147. The Larsens are “the master[s] of [their] own complaint,” so we must accept that this is the service that they want TMG to provide. *In re SuperValu, Inc.*, 925 F.3d 955, 965 (8th Cir. 2019).

*19 With this understanding, there is little doubt that offering to film weddings of heterosexual couples but refusing to film weddings of homosexual couples—purely because they are homosexual—would violate both the Public Accommodations Provision and the Business Discrimination Provision of the MHRA. The Larsens concede as much in their complaint, alleging that they want to expand TMG to offer wedding-video services to only opposite-sex couples but that “the MHRA prohibits them from doing so.” Am. Compl. ¶ 160.

The court’s opinion attempts to cast some doubt about whether the plain text of the MHRA would require TMG to provide wedding-video services for same-sex weddings if it offers those services to heterosexual couples. The implication is that the MHRA would only proscribe the Larsens’ conduct because “Minnesota reads” the law that way. *Supra* at —. For their part, the Larsens argue that they “would not create a film celebrating same-sex marriage no matter who requested it.” This argument appears to be premised on the idea that the service that TMG would provide is not “wedding videos”—which is how it is phrased in the complaint—but “opposite-sex wedding videos.” So long as the Larsens are willing to offer *that* service to anyone, the argument goes, they do not violate the law.

This argument fails. Under the MHRA, a business cannot define its services in such a way as to incorporate a discriminatory characteristic. The Larsens cannot define their service as “opposite-sex wedding videos” any more than a hotel can recast its services as “whites-only lodgings.” That is because the MHRA does not merely prohibit TMG from treating customers differently based on the *customer’s* sexual orientation. It prohibits “deny[ing] *any person* the full and equal enjoyment” of its services “because of ... sexual orientation,” Minn. Stat. § 363A.11 subdiv. 1(a) (1) (emphasis added), or discriminating in business “because of *a person’s* ... sexual orientation,” *id.* § 363A.17(3) (emphasis added). In a nutshell, if the reason for treating a customer differently is because of sexual orientation, race, or another protected characteristic, that differential treatment is prohibited. See *Abdull v. Lovaas Inst. for Early Intervention Midwest*, 819 F.3d 430, 433–34 (8th Cir. 2016)

(reading Minn. Stat. § 363A.11 to require the plaintiff to demonstrate that the protected characteristic “ ‘more likely than not motivated’ the defendant”).

To conclude otherwise would redefine discrimination to no longer encompass a host of actions universally understood to be discriminatory. If a white store owner refuses to sell goods to a white patron because the patron entered the store accompanied by someone of another race, that is still discrimination “because of” race. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 605, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) (“[D]ecisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination.”). If a male basketball coach is retaliated against for complaining about unequal funding for the girls’ basketball team, that retaliation is “on the basis of sex.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176–77, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). Likewise, regardless of who asks TMG to create the wedding video, if the Larsens refuse to provide the service because of the sexual orientation of the video’s subjects, that is discrimination “because of” sexual orientation.

Moreover, it is well established that some protected characteristics are so intertwined with particular conduct that discrimination against the conduct becomes discrimination against the protected class. *Christian Legal Soc’y Chapter v. Martinez*, 561 U.S. 661, 688–89, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010); see also *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”). The Supreme Court has repeatedly connected certain conduct with sexual orientation as a protected characteristic. *Christian Legal*, 561 U.S. at 689, 130 S.Ct. 2971; see *Lawrence*, 539 U.S. at 575, 123 S.Ct. 2472 (“When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination both in the public and in the private spheres.” (emphases added)); *Romer v. Evans*, 517 U.S. 620, 624, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (characterizing a Colorado constitutional amendment prohibiting antidiscrimination laws from including protections for “homosexual, lesbian or bisexual orientation, *conduct, practices or relationships*” as discriminating against homosexual persons as a class (emphasis added)). Same-sex marriage has been described

as a fundamental expression of an individual's sexual orientation. See [!\[\]\(50f3d3014208fde44ab94411d4209e8f_img.jpg\) Obergefell, 135 S. Ct. at 2604](#) (holding that laws prohibiting same-sex marriage “impos[e] [a] disability on gays and lesbians”); [!\[\]\(e0c76f5e494e3c1a7bae4af982fd870d_img.jpg\) United States v. Windsor, 570 U.S. 744, 775, 133 S.Ct. 2675, 186 L.Ed.2d 808 \(2013\)](#) (“DOMA singles out a *class of persons* deemed by a State entitled to recognition and protection to enhance their own liberty.” (emphasis added)).

*20 Accordingly, intentionally refusing to provide services for a wedding because it involves a same-sex couple *is* prohibited sexual-orientation discrimination under the MHRA. The Larsens have made clear that they would refuse service to *any* same-sex wedding and that the only reason that they would do so would be “because of” the sexual orientation of the couple involved. That conduct is clearly prohibited by the MHRA, as the Larsens acknowledge in their complaint and as the court recognizes in its rejection of their vagueness challenge. See *supra* at — (“The allegations in the complaint ... doom the Larsens’ argument ... because they insist that ‘the MHRA prohibits them from [creating only opposite-sex-wedding videos]’” (alteration in original)).

The MHRA also requires that the services offered to same-sex couples be the same as those offered to opposite-sex couples. The Business Discrimination Provision prohibits a business from “discriminat[ing] in the basic terms, conditions, or performance of the contract” because of a person’s sexual orientation or other protected characteristic. [!\[\]\(71c2c473019abe4e04868d03d3587900_img.jpg\) Minn. Stat. § 363A.17\(3\)](#). Thus, TMG cannot avoid violating the MHRA by providing other types of non-wedding services to gay and lesbian clients, nor can it provide services to same-sex couples that are inferior to those that it provides to heterosexual couples. Courts have long rejected the notion that the provision of “separate but equal” services is anything but discrimination by another name. [!\[\]\(8d14e33c6fe2d3a22ce1a9354e7eaa18_img.jpg\) Brown v. Bd. of Ed., 347 U.S. 483, 495, 74 S.Ct. 686, 98 L.Ed. 873 \(1954\)](#); see also [!\[\]\(a966ff166c1f49395d6450df01380d0b_img.jpg\) Katzenbach v. McClung, 379 U.S. 294, 296–99, 85 S.Ct. 377, 13 L.Ed.2d 290 \(1964\)](#) (concluding that a restaurant that provided “a take-out service for Negroes” but “refused to serve Negroes in its dining accommodations” violated Title II’s public accommodations provision). Otherwise, public accommodations laws would be completely ineffective at “vindicat[ing] the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” [!\[\]\(b5c5b1aecb76e6dd950b9e9e8622c640_img.jpg\) Heart of Atlanta Motel](#)

[Inc. v. United States, 379 U.S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258 \(1964\)](#).

I recognize that the complaint alleges that the *reason* for the Larsens’ differential treatment of same-sex couples is not because of prejudice against homosexuals, but because they disagree with the message that a video of a same-sex marriage would convey. But that does not make their intended conduct nondiscriminatory under the law. They want TMG to offer different services to customers based on sexual orientation, running afoul of the MHRA. Whatever the Larsens’ motivations, the premise of this lawsuit is that TMG would violate the MHRA if it engages in the conduct described in the complaint.

In its First Amendment analysis, the court focuses on a question that is not before us today: whether the MHRA could be applied to require a business to express a specific message to which it objects, such as writing a racial slur on a cake or tattooing a religious message on someone’s skin. It is not at all clear that a business violates the MHRA by refusing to express such a message if that is not a service that it would provide to a different type of customer. See

[!\[\]\(896bce64017ec65e427384935eb4bcba_img.jpg\) Masterpiece Cakeshop, 138 S. Ct. at 1733](#) (Kagan, J., concurring) (suggesting that a baker who refuses to inscribe a cake with a message that he “would not have made for any customer” does not engage in unlawful discrimination based on a protected characteristic). At oral argument, Minnesota represented that it would not view such a denial of service as violating the MHRA because it is not discrimination “because of” protected status. Oral Arg. at 31:15–31:42. If such a case were to arise, further factual development would be necessary to understand the exact scope of the business’s services and the precise nature of the refusal of service. See [!\[\]\(3867273399e0c3411de94ba09d4cd073_img.jpg\) Masterpiece Cakeshop, 138 S. Ct. at 1723](#) (“If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker’s creation can be protected, these details might make a difference.”). Such factual development could only occur in the context of a live controversy in which Minnesota was actually attempting to enforce the MHRA. We need not decide whether application of the MHRA to such a circumstance would comport with the Constitution because the Larsens concede that they want to deny their services to *all* same-sex weddings regardless of what particular messages the same-sex couples want to express in their videos.

*21 Because the Larsens aver that they want to offer wedding-video services only to couples of one sexual orientation and not others, they have standing, and this case is ripe for judicial decision. Accepting the complaint's allegations as true, no "further factual development" is needed to determine whether the Larsens could be prosecuted for violating the MHRA. [Iowa League of Cities v. EPA](#), 711 F.3d 844, 867 (8th Cir. 2013) (quoting [Pub. Water Supply Dist. No. 10 v. City of Peculiar](#), 345 F.3d 570, 573 (8th Cir. 2003)). The only issue before us is a question of law: whether the Constitution compels Minnesota to exempt TMG from the MHRA's provisions.

III

It is well established that videos are a form of speech protected by the First Amendment. See [Joseph Burstyn, Inc. v. Wilson](#), 343 U.S. 495, 502, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). But the First Amendment's right of free speech is "not unlimited." [District of Columbia v. Heller](#), 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); see [Roberts v. U.S. Jaycees](#), 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); [Joseph Burstyn](#), 343 U.S. at 502, 72 S.Ct. 777. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." [Sorrell v. IMS Health Inc.](#), 564 U.S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). Such restrictions on speech are valid, "provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." [Ward v. Rock Against Racism](#), 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (cleaned up).

A

Courts draw a clear line "between content-based and content-neutral regulations of speech." [Nat'l Inst. of Family & Life Advocates v. Becerra \(NIFLA\)](#), — U.S. —, 138 S. Ct. 2361, 2371, 201 L.Ed.2d 835 (2018). "Government

regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." [Reed v. Town of Gilbert](#), — U.S. —, 135 S. Ct. 2218, 2227, 192 L.Ed.2d 236 (2015). A content-based law "'on its face' draws distinctions based on the message a speaker conveys," [id.](#) (quoting [Sorrell](#), 564 U.S. at 566, 131 S.Ct. 2653), or has the purpose of suppressing speech "because of disagreement with the message it conveys," [Sorrell](#), 564 U.S. at 566, 131 S.Ct. 2653 (quoting [Ward](#), 491 U.S. at 791, 109 S.Ct. 2746). Regulations that "target speech based on its communicative content ... are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." [Reed](#), 135 S. Ct. at 2226. Similarly, when the government compels an individual to engage in speech the individual otherwise would find objectionable, this ordinarily constitutes a content-based regulation triggering strict scrutiny. [NIFLA](#), 138 S. Ct. at 2371; see also [Janus v. AFSCME](#), — U.S. —, 138 S. Ct. 2448, 2463–64, 201 L.Ed.2d 924 (2018).

By contrast, a law is content neutral if it "serves purposes unrelated to the content of expression ... even if it has an incidental effect on some speakers or messages but not others." [Ward](#), 491 U.S. at 791, 109 S.Ct. 2746. "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.' " [Id.](#) (quoting [Clark v. Cmty. for Creative Non-Violence](#), 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). A content-neutral regulation is subject to intermediate scrutiny, meaning it must merely be "narrowly tailored to serve a significant governmental interest." [Packingham v. North Carolina](#), — U.S. —, 137 S. Ct. 1730, 1736, 198 L.Ed.2d 273 (2017) (quoting [McCullen v. Coakley](#), 573 U.S. 464, 134 S. Ct. 2518, 2534, 189 L.Ed.2d 502 (2014)). In general, statutes "directed at commerce or conduct" do not violate the First Amendment, even if they impose "incidental burdens" on speech or inherently expressive conduct. [Sorrell](#), 564 U.S. at 567, 131 S.Ct. 2653.

*22 The MHRA neither compels speech nor targets speech based on its content. In fact, the law says nothing about speech at all. The Public Accommodations Provision prohibits “deny[ing]” individuals the full and equal enjoyment of goods and services, [Minn. Stat. § 363A.11 subdiv. 1\(a\)\(1\)](#); the Business Accommodation Provision speaks of “refus[ing] to do business with” or “discriminat[ing]” against persons based on a protected characteristic, [id.](#) [§ 363A.17\(3\)](#). Neither provision “on its face” regulates speech or draws distinctions based on a speaker’s message. [Reed](#), 135 S. Ct. at 2227; see [supra](#) at — (“The MHRA does not classify anyone based on their views about marriage.”). Instead, the law “regulates conduct, not speech.” [Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.](#), 547 U.S. 47, 60, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). “It affects what [businesses] must *do*—afford equal [treatment] to [customers]—not what they may or may not *say*.” [Id.](#)

The Supreme Court has repeatedly reaffirmed the view that laws targeting discrimination “do[] not, on [their] face, target speech or discriminate on the basis of its content.” [Hurley](#), 515 U.S. at 572, 115 S.Ct. 2338. Indeed, it has done so specifically regarding the MHRA’s Public Accommodations Provision. More than thirty years ago, the Supreme Court rejected an expressive association claim brought by the U.S. Jaycees nonprofit, which sought to exclude women members but was prevented from doing so by operation of the MHRA. The Court held that, “[o]n its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria.” [Roberts](#), 468 U.S. at 623, 104 S.Ct. 3244. There is also no evidence that Minnesota enacted the MHRA to support or suppress any particular message; the MHRA’s goals are “unrelated to the suppression of expression.” [Id.](#) at 624, 104 S.Ct. 3244. Applying [Roberts](#), the MHRA is a content-neutral statute and subject to intermediate scrutiny.

2

Dismissing [Roberts](#), the court today concludes that the MHRA operates as a content-based regulation of speech. By the court’s logic, because the MHRA prohibits the Larsens

from operating their public accommodation to provide only services to opposite-sex couples, it “compel[s] them to talk about a topic they would rather avoid—same-sex marriages.”⁷ [Supra](#) at — — —. The court attempts to analogize the MHRA to the statute challenged in [Miami Herald Publishing Co. v. Tornillo](#), 418 U.S. 241, 244, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), a law that required newspapers to print a free reply to any candidate “assailed” by the paper. But that analogy fails from the start. That a law regulating the *content* of a *newspaper* was deemed a content-based regulation of speech has no bearing on whether a law regulating *discrimination* in places of *public accommodation* also so qualifies.

The court’s opinion relies extensively on [Hurley](#), which dealt with application of Massachusetts’s public accommodations law to a privately organized parade. But the court’s discussion of [Hurley](#) omits a few crucial details. In [Hurley](#), the Supreme Court made clear that a public accommodations law “does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.” [Hurley](#), 515 U.S. at 572, 115 S.Ct. 2338. Citing [Roberts](#), the Court also stated that public accommodations 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, and they do not, as a general matter, violate the First or Fourteenth Amendments.” [Id.](#) Of course, if public accommodations laws were content-based regulations of speech, they would not “as a general matter” be constitutional. Instead, they would be “presumptively unconstitutional.” [Reed](#), 135 S. Ct. at 2226.

*23 The Supreme Court ultimately concluded that applying the public accommodations law to the parade in [Hurley](#) did not withstand constitutional scrutiny. But it did so because Massachusetts was attempting to apply the law “in a peculiar way.” [Id.](#) 515 U.S. at 572, 115 S.Ct. 2338. A parade is, by definition, an expressive association. [Id.](#) at 568, 115 S.Ct. 2338. That a parade’s participants “are making some sort of collective point, not just to each other but to bystanders along the way,” is what distinguishes a parade from a mere

stroll down the street. [Id.](#) The issue in [Hurley](#) was not whether gay and lesbian individuals could march in the parade—they were welcome to do so—but whether a particular gay and lesbian organization would be permitted to march in the parade with a banner that organizers felt contravened the parade’s message. Applying the statute to require the parade sponsors to allow the banner made a public accommodation out of “the sponsors’ speech itself,” [id.](#) at 573, 115 S.Ct. 2338, and treated the sponsors’ exclusion of the message as discrimination against a class. By applying the law in a way that “alter[ed] the expressive content of their parade,” Massachusetts violated the parade sponsors’ autonomy as speakers. [Id.](#) at 572–73, 115 S.Ct. 2338.

[Hurley](#) thus stands for the proposition that a facially neutral law may be subject to strict scrutiny if it is *applied* in a way that materially burdens the speaker’s “autonomy to choose the content of *his own* message.” [Id.](#) at 573, 115 S.Ct. 2338 (emphasis added). In [Boy Scouts of America v. Dale](#), the Supreme Court similarly applied strict scrutiny to a facially neutral New Jersey antidiscrimination statute that required the Boy Scouts to retain a gay scoutmaster because doing so “would significantly burden the organization’s right to oppose or disfavor homosexual conduct,” [530 U.S. 640, 659, 120 S.Ct. 2446, 147 L.Ed.2d 554 \(2000\)](#), which was one of “the ideas that the organization sought to express,” [id.](#) at 657, 120 S.Ct. 2446. In cases where the law’s application did not significantly impair the ability of the speaker to convey his chosen message—such as when the expressive association’s basic goals are unrelated to the desired exclusion—the Court has found no First Amendment violation. For example, in [Roberts](#), the Supreme Court declined to hold the MHRA invalid because “the Jaycees ... failed to demonstrate that the Act imposes any serious burdens on the male members’ freedom of expressive association.” [468 U.S. at 626, 104 S.Ct. 3244](#); accord [Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte](#), 481 U.S. 537, 548, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987) (“[T]he evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes.”). In each case finding a compelled-speech violation, the violation “resulted from the fact that the complaining speaker’s *own message* was affected by the

speech it was forced to accommodate.” [Rumsfeld](#), 547 U.S. at 63, 126 S.Ct. 1297 (emphasis added).

Here, taking the complaint as true, the Larsens cannot show that viewers of TMG’s wedding videos would be likely to understand them to be expressions of *the Larsens’* “particularized message” about marriage. [Texas v. Johnson](#), 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting [Spence v. Washington](#), 418 U.S. 405, 411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (per curiam)). The complaint alleges that the Larsens want to be for-profit wedding videographers, not independent filmmakers. Although an artistic endeavor, wedding videos—like other expressive wedding services—do not primarily reflect the views of the videographer, but of the couple getting married. See [Masterpiece Cakeshop](#), 138 S. Ct. at 1750 (Ginsburg, J., dissenting) (“When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings”). “[TMG] sells its expressive services to the public. It may be that [TMG] expresses its clients’ messages in its [videos], but only because it is hired to do so.” [Elane Photography, LLC v. Willock](#), 309 P.3d 53, 66 (N.M. 2013).

The Larsens acknowledge as much in their complaint: “When an engaged couple asks the Larsens to help them celebrate their marriage, the Larsens want to tell a story of *their* love and commitment” Am. Compl. ¶ 131 (emphasis added). Although the Larsens may exercise editorial control over TMG’s services, it is still ultimately the couple’s story that is being told, not that of the Larsens. “[R]easonable observers would not perceive [the Larsens’] provision of ... services for a same-sex wedding ceremony as an endorsement of same-sex marriage.” [Gifford v. McCarthy](#), 137 A.D.3d 30, 42, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016). By selling its services to the public, TMG “functions, in essence, as a conduit for the speech of others,” necessarily subordinating the Larsens’ own messages to those of their customers. [Turner Broad. Sys., Inc. v. FCC](#), 512 U.S. 622, 629, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). For better or worse, “[o]nce [TMG] enters the marketplace of commerce ... it loses the complete control over its [speech] that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.” [Roberts](#), 468 U.S. at 636, 104 S.Ct. 3244 (O’Connor, J., concurring). Whereas the application of Massachusetts’s law

in [Hurley](#) improperly transformed the parade sponsors' speech into a public accommodation, here it is the Larsens who are affirmatively declaring their speech to be a public accommodation by selling their videography services on the open market.

*24 Admittedly, the Larsens take great pains to portray themselves more like independent artists telling their own story than messengers acting on behalf of others. At oral argument, their counsel compared them to "Steven Spielberg, edit[ing] the film[s] to express messages" consistent with their personal and religious views. Oral Arg. at 0:00–1:05. But Steven Spielberg is not a public accommodation; he does not make his filmmaking services generally "available to the public." [Minn. Stat. § 363A.03 subdiv. 34](#). He is thus free to use his talents as he pleases without regard for laws like the MHRA. If the Larsens truly were artists speaking their own message, then TMG similarly would not qualify as a place of public accommodation and this entire lawsuit would be unnecessary.

Therefore, just because the Larsens want to sell services that are in some manner "expressive" does not mean that Minnesota's content-neutral regulation of those services suddenly becomes content based. "[I]t has never been deemed an abridgement 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." [Giboney v. Empire Storage & Ice Co.](#), 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949). After all, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." [City of Dallas v. Stanglin](#), 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). Conduct does not become protected speech simply because "the person engaging in the conduct intends thereby to express an idea." [United States v. O'Brien](#), 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Likewise, a regulation of conduct does not become a regulation of content just because there are "incidental" effects on expression. [Sorrell](#), 564 U.S. at 567, 131 S.Ct. 2653. That is true even if one of the incidental effects of regulating conduct is the compulsion of speech. [Rumsfeld](#), 547 U.S. at 62, 126 S.Ct. 1297. Laws with

such incidental effects are "simply not the same as" laws that require individuals to advocate a particular, government-sanctioned message, such as "forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'" [Id.](#) Laws with merely incidental effects on expression are subject to intermediate scrutiny. See [O'Brien](#), 391 U.S. at 376–77, 88 S.Ct. 1673.








The court's opinion warns, *supra* at —, that applying intermediate scrutiny to the MHRA would invite government regulation of "wide swaths of protected speech." Hardly. A law telling an independent artist what pictures to paint or a newspaper what articles to publish would still be subject to strict scrutiny. See [Rumsfeld](#), 547 U.S. at 62, 126 S.Ct. 1297. But an independent artist who chooses what to paint and then sells the finished product is not the same as a boardwalk cartoonist who offers his services to any passing beachgoer. If the cartoonist refuses to paint the portrait of an interracial couple or a woman in a hijab, the state's regulation of that expressive *conduct* via a content-neutral statute does not trigger strict scrutiny. [O'Brien](#), 391 U.S. at 376–77, 88 S.Ct. 1673; see [Roberts](#), 468 U.S. at 634, 104 S.Ct. 3244 (O'Connor, J., concurring) ("The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."). The Larsens are free to use their talents to create independent films about marriage that express any message they choose, and they are free to sell those films to the public. But if they offer wedding-video *services* to the public, they must abide by public accommodations laws like the MHRA.

*25 Because the MHRA is content neutral and is not being applied in a manner that substantially burdens the Larsens' right to express their own message, it is subject to intermediate scrutiny.

B

Although intermediate scrutiny is the applicable standard, the MHRA would survive even strict scrutiny. To satisfy intermediate scrutiny, the MHRA must be narrowly tailored to serve governmental interests that are merely "significant," [Packingham](#), 137 S. Ct. at 1736, as opposed to "compelling," [Reed](#), 135 S. Ct. at 2226. Even if the MHRA


is held to the higher standard of strict scrutiny, the Supreme Court has already told us that it is constitutional.


In general, public accommodations laws further compelling state interests of eradicating discrimination and ensuring residents have equal access to publicly available goods and services.  [Roberts](#), 468 U.S. at 623, 104 S.Ct. 3244; see also  [Boy Scouts of Am.](#), 530 U.S. at 657, 120 S.Ct. 2446;  [Bd. of Dirs. of Rotary Int'l](#), 481 U.S. at 549, 107 S.Ct. 1940. “[A]cts 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[,] ... [and] such practices are entitled to no constitutional protection.”  [Roberts](#), 468 U.S. at 628, 104 S.Ct. 3244. Specifically, in  [Roberts](#), the Supreme Court held that the MHRA serves “Minnesota’s compelling interest in eradicating discrimination against its female citizens,”  [id.](#) at 623, 104 S.Ct. 3244, which it characterized as a “compelling state interest[] of the highest order,”  [id.](#) at 624, 104 S.Ct. 3244.



If eradicating discrimination based on race or sex is a compelling state interest, then so is Minnesota’s interest in eradicating discrimination based on sexual orientation. Minnesota’s decision to extend the MHRA’s protections to cover sexual orientation was driven by considerable evidence of discrimination against the state’s gays and lesbians. [Task Force Report](#), J.A. 332. The task force that precipitated the law’s amendment specifically identified the need to protect against sexual-orientation discrimination in places of public accommodation due to evidence that gays and lesbians were being denied access to goods and services. [Id.](#) It also noted that discrimination appeared more prevalent in the state’s rural areas. [Id.](#), J.A. 333.

The Larsens argue that no compelling interest is served by applying the MHRA to TMG because plenty of other businesses are happy to provide wedding-video services to same-sex couples. The argument that victims of discrimination are free to go elsewhere carries little force. Antidiscrimination laws like Title II and the MHRA were not passed to ensure that members of historically discriminated groups had access to *some* places of public accommodation. They were passed to guarantee equal access to *all* goods and services otherwise available to the public. “Discrimination is not simply dollars and cents, hamburgers and movies; it is




the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.”






 [Heart of Atlanta Motel](#), 379 U.S. at 292, 85 S.Ct. 348 (Goldberg, J., concurring) (quoting [S. Rep. No. 88-872](#), at 16 (1964), as reprinted in 1964 U.S.C.C.A.N. 2355, 2370). Even accepting the premise of the Larsens’ argument, applying the MHRA to wedding-related services across Minnesota would still further the state’s compelling interest in eradicating sexual-orientation discrimination in Minnesota’s rural areas. Although many alternative wedding venues and services may be available in larger cities, the same may not be true in small towns. The pain of discrimination is undoubtedly more severe when it comes from the only videography service in the area.



*26 The court’s opinion asserts that while regulating discriminatory conduct may be a compelling state interest, regulating the content of the Larsens’ speech is not. [Supra](#) at ———. But the MHRA regulates only discriminatory conduct; the sole reason that the Larsens’ expression is even tangentially affected by the law is because the Larsens make their speech available as a service for other members of the public to hire. When the government requires those services to be available to everyone, it is not forcing them to speak. Likewise, it is not an abridgment of the Larsens’ freedom of speech to prohibit them from posting messages on TMG’s website stating that they do not serve same-sex weddings.  [Rumsfeld](#), 547 U.S. at 62, 126 S.Ct. 1297 (“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.”).




The MHRA is also narrowly tailored to serve the state’s interest in eradicating discrimination. Again, it targets only conduct, not speech. The MHRA “therefore ‘responds precisely to the substantive problem which legitimately concerns’ the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose.”  [Roberts](#), 468 U.S. at 629, 104 S.Ct. 3244 (quoting  [Members of City Council of L.A. v. Taxpayers for Vincent](#), 466 U.S. 789, 810, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). Thus, the MHRA survives any level of scrutiny, and the district court properly dismissed the Larsens’ free speech claim.


IV





The Larsens' free exercise claim fares no better than their free speech claim. The First Amendment, as applied to the states through the Fourteenth, prevents states from passing laws that prohibit the free exercise of religion.  [Cantwell v. Connecticut](#), 310 U.S. 296, 303–04, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.”  [Emp’t Div., Dep’t of Human Res. of Or. v. Smith](#), 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). Accordingly, neither the federal government nor the states may dictate religious beliefs.  [Id.](#)


But although the “freedom to believe” is absolute, the “freedom to act” is not.  [Cantwell](#), 310 U.S. at 303–04, 60 S.Ct. 900. “Conduct remains subject to regulation for the protection of society.”  [Id.](#) at 304, 60 S.Ct. 900. “[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.”  [Smith](#), 494 U.S. at 879, 110 S.Ct. 1595 (cleaned up). “[I]f prohibiting the exercise of religion ... is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”  [Id.](#) at 878, 110 S.Ct. 1595. “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.”  [United States v. Lee](#), 455 U.S. 252, 261, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982).





Just as the MHRA does not target speech, neither does it target religion. The Public Accommodations Provision and the Business Discrimination Provision make no facial reference to religious practice, see  [Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah](#), 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), and do not “single out the religious for disfavored treatment,”  [Trinity Lutheran Church of Columbia, Inc. v. Comer](#), — U.S. —, 137 S. Ct. 2012, 2020, 198 L.Ed.2d 551 (2017). Likewise, the object of the MHRA is not “to infringe upon or restrict practices because of their religious motivation,”

 [Church of the Lukumi Babalu Aye](#), 508 U.S. at 533, 113 S.Ct. 2217, but to combat discrimination, regardless of the motivation. Indeed, the law incorporates carefully-crafted exceptions for places of religious worship and secular nonprofits. The MHRA therefore qualifies as “a neutral, generally applicable regulatory law” that does not trigger heightened scrutiny.  [Smith](#), 494 U.S. at 880, 110 S.Ct. 1595; see  [Masterpiece Cakeshop](#), 138 S. Ct. at 1727.

*27 The Larsens argue that the MHRA is not neutral because the Business Discrimination Provision’s “legitimate business purpose” exception is vague and allows the state to arbitrarily provide individualized exemptions to non-religious businesses. This argument fails. In  [McDonnell Douglas Corp. v. Green](#), 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court explained that a difference in treatment based on a “legitimate, nondiscriminatory reason” is not prohibited discrimination at all. Courts are familiar with this standard, and there is no indication that it has proved difficult to administer. The complaint contains no plausible allegation that Minnesota has actually applied this exception in an unequal fashion to target religious individuals.

The Larsens also argue that the MHRA should be subject to heightened scrutiny because, even if facially neutral, the law “substantially burdens” their religious exercise. But the Supreme Court rejected that argument in  [Smith](#), holding that “an across-the-board criminal prohibition on a particular form of conduct” need not be justified by a compelling government interest just because it applies in some cases to religious conduct.  494 U.S. at 884–85, 110 S.Ct. 1595. Regardless, courts have consistently rejected the argument that compliance with antidiscrimination statutes imposes a substantial burden on religion, see, e.g.,  [Newman v. Piggie Park Enters., Inc.](#), 390 U.S. 400, 402 n.5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (dismissing as “patently frivolous” the argument that Title II of the Civil Rights Act of 1964 violated respondents’ right to free exercise), and have repeatedly held that public accommodations laws satisfy strict scrutiny, see  [Roberts](#), 468 U.S. at 623, 104 S.Ct. 3244.

The court today allows the Larsens’ free exercise claim to move forward, on the theory that it is intertwined with their free speech claim. This theory derives from dicta in  [Smith](#)

that suggested that a neutral, generally applicable law may be subject to heightened scrutiny under the Free Exercise Clause when the claim operates “in conjunction with other constitutional protections, such as freedom of speech and of the press,” thereby creating a “hybrid situation.”  494 U.S. at 881–82, 110 S.Ct. 1595. Contrary to the court’s assertion today, *supra* at —, we have never endorsed the hybrid-rights doctrine, nor have we ever articulated a framework for analyzing such claims. In a single sentence of  [Cornerstone Bible Church v. City of Hastings](#), we noted the *possibility* that such a claim could exist based on  [Smith](#)’s dicta but remanded to the district court to “consider” whether such a claim was viable in the first instance.  948 F.2d 464, 473 (8th Cir. 1991). But even if the court is right that this was a “holding,” we need not resolve the viability of the theory in this case because the Larsens do not have a valid free speech claim.




None of the Larsens’ remaining claims are viable, as the court explains, *supra* at — – —. Accordingly, I would affirm the judgment of the district court dismissing their complaint for failure to state a claim upon which relief can be granted.

V

By ruling that, under the Larsens’ allegations, the MHRA is subject to and fails strict scrutiny, the court carves out an exception of staggering breadth. Under its logic, any time that a state’s regulation of discriminatory conduct requires a person to provide services that “express” something that they dislike, the law is invalid. That ruling cannot be easily limited. Innumerable companies and individuals sell products and services that are in some shape or form expressive. The court provides no way to distinguish whether its holding applies to all, or only some, of those industries. It might be easy to conclude that some services are sufficiently similar to videography as to warrant the same treatment as the Larsens get today—photography, for example, or other forms of visual art. But what about bakers, fashion designers, florists, graphic designers, tattoo artists, calligraphers, jewelers, chefs, tailors, or musicians? Are all of those businesses allowed to refuse service to gays and lesbians whenever doing so would conflict with the business owner’s personal religious or philosophical beliefs? What about more traditional public accommodations, like hotels? Can an inn-keeper deny a same-sex couple access to the honeymoon suite because handing over the

keys would “express” an endorsement of their marriage? See [Task Force Report](#), J.A. 332 (recounting precisely this form of discrimination). To these questions the court gives us no answers. Today’s opinion invites a flood of litigation that will require courts to grapple with difficult questions about whether this or that service is sufficiently creative or expressive to merit a similar exemption.

***28** The court’s opinion is similarly not limited based on the fact that sexual orientation happens to be the protected characteristic at issue in this case. Its logic would apply with equal force to any business that desires to treat customers differently based on any protected characteristic, including sex, race, religion, or disability. And what may start in the wedding business—“we don’t do interracial weddings,” “we don’t film Jewish ceremonies,” and so on—likely will not end there. Nothing stops a business owner from using today’s decision to justify new forms of discrimination tomorrow. In this country’s long and difficult journey to combat all forms of discrimination, the court’s ruling represents a major step backward.

It is unremarkable that the Constitution and the laws of the various states “can, and in some instances must,” protect same-sex couples in the exercise of their civil rights.  [Masterpiece Cakeshop](#), 138 S. Ct. at 1727. Minnesota has chosen to do so through the MHRA’s Public Accommodations and Business Discrimination Provisions. Like all antidiscrimination laws, the MHRA targets conduct, not speech or ideas. The Supreme Court has already held that the MHRA is constitutional, in the process rejecting many of the same arguments that the court adopts today. Just recently, it reaffirmed that, although “religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”  [Id.](#) The Supreme Court is free to revise or overturn its precedents; we are not. See  [MKB Mgmt. Corp. v. Stenehjem](#), 795 F.3d 768, 772 (8th Cir. 2015). Rather than disturb bedrock principles of law, I would affirm the district court’s order in full.

All Citations

--- F.3d ----, 2019 WL 3979621

Footnotes

- 1 We use the term “Minnesota” to refer collectively to the Commissioner of the Minnesota Department of Human Rights and the Attorney General of Minnesota, who are the named defendants in this case. See generally [Ex parte Young](#), 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The district court ruled, over the Attorney General’s objection, that the Attorney General had enough of a connection to the enforcement of the Minnesota Human Rights Act that the Larsens could seek an injunction against him. We agree that the connection here is “strong enough” to make the Attorney General a “proper defendant.” [281 Care Comm. v. Arneson](#), 638 F.3d 621, 632–33 (8th Cir. 2011) (applying [Ex Parte Young](#), 209 U.S. 123, 28 S.Ct. 441).
- 2 Treating it as an independent claim, the district court separately concluded that the Larsens lacked standing to argue that the MHRA may eventually require them to post all of their wedding videos online, not just the ones that are consistent with their views on marriage. Our take is different. This allegation is simply an example of one of the harms that the Larsens may eventually suffer if they are required to make both opposite-sex- and same-sex-wedding videos. Developing individual allegations like this one will be a part of proving the Larsens’ First Amendment claim.
- 3 The dissent is a moving target. At certain points, it seems to assume that the Larsens’ speech is protected, at least in some form. See *post* at —; [United States v. O’Brien](#), 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First amendment freedoms.”). At others, the dissent suggests that the videos are not speech at all, primarily because the Larsens are telling someone else’s story as part of a for-profit service. See *post* at — — —. The dissent’s scattershot approach may be due to the fact that neither of these theories (or any of its others) finds support in Supreme Court precedent or opinions of this court.
- 4 The allegations here may well be more troubling from a First Amendment perspective than the facts of [Tornillo](#). In that case, all the newspaper had to do was reproduce verbatim an opinion piece written by someone else. See [Tornillo](#), 418 U.S. at 244, 94 S.Ct. 2831. The MHRA, in contrast, would require the Larsens to use their own creative skills to speak in a way they find morally objectionable.
- 5 In fact, Minnesota’s position intrudes on the Larsens’ speech in yet another way. In its view, the MHRA would not allow the Larsens to even advertise what they have in mind for their wedding videos. The district court upheld this limitation on the theory that “telling potential customers that a business will discriminate ... is part of the act of ... discrimination itself.” This analysis, however, rests on a faulty premise. If creating videos were conduct that Minnesota could regulate, then the State could invoke the incidental-burden doctrine to forbid the Larsens from advertising their intent to engage in discriminatory conduct. See [F.A.I.R.](#), 547 U.S. at 62, 126 S.Ct. 1297. But in this case, Minnesota cannot compel the Larsens to speak, so it cannot force them to remain silent either. See [Wooley](#), 430 U.S. at 714, 97 S.Ct. 1428.
- 6 See [Cal. Civ. Code § 51\(b\)](#) (West 2016); [Colo. Rev. Stat. Ann. § 24-34-601\(2\)\(a\)](#) (West 2014); [Conn. Gen. Stat. Ann. § 46a-81d\(a\)](#) (West 2012); [Del. Code Ann. tit. 6, § 4504\(a\)\(1\)](#) (West 2018); [D.C. Code Ann. § 2-1402.31\(a\)\(1\)](#) (West 2012); [Haw. Rev. Stat. Ann. § 489-3](#) (West 2019); [775 Ill. Comp. Stat. Ann. 5/1-103\(Q\), 5-102\(A\)](#) (West 2019); [Iowa Code Ann. § 216.7\(1\)](#) (West 2019); [Me. Rev. Stat. Ann. tit. 5, § 4591](#) (2005); [Md. Code Ann., State Gov’t § 20-304](#) (West 2014); [Mass. Gen. Laws Ann. ch. 272, § 98](#) (West 2016); [Nev. Rev. Stat. Ann. § 651.070](#) (West 2011); [N.H. Rev. Stat. Ann. § 354-A:17](#) (2018); [N.J. Stat. Ann. § 10:5-12\(f\)\(1\)](#) (West 2018); [N.M. Stat. Ann. § 28-1-7\(F\)](#) (West 2019); [N.Y. Civ. Rights Law § 40-c\(2\)](#) (McKinney 2019); [Or. Rev. Stat. Ann. § 659A.403](#) (West 2016); [11 R.I. Gen. Laws Ann. § 11-24-2](#) (West 2001); [Vt. Stat. Ann. tit. 9, § 4502\(a\)](#) (West 2015); [Wash. Rev. Code Ann. § 49.60.215](#) (West 2019); [Wis. Stat. Ann. § 106.52\(3\)\(a\)\(1\)](#) (West 2016). At least two other states interpret laws prohibiting sex discrimination as also prohibiting sexual-orientation discrimination. See *Interpretive Statement on Meaning of “Sex” in Elliott-Larsen Civil Rights Act*, Mich. C.R. Commission (May 21, 2018), https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf; *Guidance on Discrimination on the Basis of Sex*

Under the Pennsylvania Human Relations Act, Penn. Hum. Rel. Commission (Aug. 2, 2018), [https://www.phrc.pa.gov/About-Us/Publications/Documents/General Publications/APPROVED Sex Discrimination Guidance PHRA.pdf](https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf).

7 The idea that the Larsens “would rather avoid” talking about same-sex marriage is belied by their own allegations. The complaint asserts that the Larsens want to expand TMG into the wedding-video business precisely to “affect the cultural narrative regarding marriage.” Am. Compl. ¶ 137. To that end, they desire to create a website and promotional materials that affirmatively state that TMG will not make films celebrating same-sex marriages. *Id.* ¶¶ 157–58.

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

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

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

Plaintiffs,

vs.

AUBREY ELENIS, Director of the Colorado Civil Rights
Division, in her official capacity;
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
PHIL WEISER, Colorado Attorney General,
in his official capacity;

Defendants.

**PLAINTIFFS 303 CREATIVE LLC AND LORIE SMITH’S SECOND NOTICE OF
SUPPLEMENTAL AUTHORITY**

Plaintiffs Lorie Smith and 303 Creative LLC (collectively “Lorie”) submit this notice of supplemental authority about *Brush & Nib Studio, LC v. City of Phoenix (Brush & Nib)*, No. CV-18-0176-PR, 2019 WL 4400328 (Ariz. Sept. 16, 2019), attached as Exhibit A, in support of Lorie’s pending Response to Show Cause Order, ECF No. 74.

This case involved two artists and their for-profit art studio (collectively “Brush & Nib”) that use calligraphy and painting to “create custom artwork for, and sell pre-made artwork to,

any customers regardless of their sexual orientation.” *Id.* at *2-4. But because of their beliefs, these artists cannot create artwork promoting various messages, including “a custom wedding invitation that conveys a message celebrating same-sex marriage.” *Id.* at *4. Brush & Nib also wanted to post a statement on its website explaining that it does not create custom artwork celebrating any marriage except marriage between one man and one woman. *Id.* at *5.

But Phoenix interpreted its public accommodation law to require Brush & Nib to create custom wedding invitations celebrating same-sex wedding ceremonies and to ban Brush & Nib from posting its statement. 2019 WL 4400328, at *1, *5. Invoking the Arizona Constitution’s Free Speech Clause and Arizona’s Free Exercise of Religion Act (“FERA”), Brush & Nib brought a pre-enforcement challenge to this law, arguing that its application compelled speech, restricted speech, and burdened their religious beliefs. *Id.* at *5. Phoenix countered that Brush & Nib lacked standing, its law regulated conduct, rational basis scrutiny applied, its law did not burden the artists’ religious beliefs, and its law satisfied strict scrutiny. *Id.* at *5, *6, *19, *21, *27.

The Arizona Supreme Court rejected all these arguments and ruled that Phoenix could not compel Brush & Nib to create custom wedding invitations celebrating same-sex weddings or prohibit Brush & Nib from posting the website statement. 2019 WL 4400328, at *32-33. In so doing, the court considered “First Amendment jurisprudence” when analyzing the state law claims. *Id.* at *9.

The *Brush & Nib* decision made at least seven conclusions relevant to this Court’s Show Cause Order and to Lorie’s case.

First, Brush & Nib has standing to bring a pre-enforcement challenge to stop Phoenix’s public accommodation law from compelling the studio to create custom wedding invitations—a challenge nearly identical to Lorie’s. 2019 WL 4400328, at *8. The court did so because—as is true here—Brush & Nib provided examples of its wedding invitations, Phoenix conceded its law would compel creating those invitations, and the law therefore chilled Brush & Nib’s free speech and free exercise rights. *Id.* at *3 (noting examples of artwork as “hand-drawn images and paintings, custom lettering and calligraphy, as well as their original artwork”); *id.* at *7 (“Duka and Koski face a real threat of being prosecuted for violating the Ordinance by refusing to create such invitations for a same-sex wedding.”); *id.* (“[G]iven the City’s assertion that it can apply the Ordinance to Plaintiffs’ custom wedding invitations, ... Plaintiffs have suffered an injury through the chilling of their free speech and free exercise rights.”). Notably, the court found standing without relying on “any specific request that Brush & Nib prepare invitations or other artwork for a same-sex wedding.” *Id.* at *37 (Bales, J., dissenting).

Second, the court concluded that Brush & Nib’s right to post a statement declining to create wedding invitations depended solely on whether Phoenix could constitutionally compel the studio to create those invitations. 2019 WL 4400328, at *33. So, even though Phoenix considered this statement to be illegal under Phoenix’s duly enacted anti-discrimination law, and even though the studio wanted to post this statement on its business website, the studio was still “entitled” to do so because the studio’s “intended refusal to make custom wedding invitations celebrating a same-sex wedding *is legal activity under Arizona’s free speech clause and FERA.*” *Id.* (emphasis added). The statement’s constitutional legality trumped its statutory legality or its commercial context.

Third, the court concluded that Brush & Nib engages in “pure speech” when it creates custom wedding invitations, 2019 WL 4400328, at *11-13 (citing *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015)), and the studio has a constitutional right to decline to create those invitations because doing so was a “message-based refusal,” not a refusal “based on a customer’s sexual orientation,” *id.* at *16-17. *See also id.* (noting that business protected when it declines to create speech “based on [its] *message*, not [the] *status*” of the requester); *id.* at *2, *15, *20, *29 (emphasizing that studio did not engage in illegal status discrimination).

In reaching this conclusion, the court rejected arguments (like Colorado’s here) that (1) Phoenix’s law regulates Brush & Nib’s discriminatory commercial conduct, not speech, when applied to compel the studio to create wedding invitations for paying clients, 2019 WL 4400328, at *18; (2) Brush & Nib’s free speech rights must yield to Phoenix’s law because the studio is a public accommodation, *id.* at *18, *21-22; and (3) the rationale of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572-73 (1995) should be limited to “privately organized” entities and cannot extend to “for-profit public accommodation[s],” *id.* at *21.

Fourth, the court concluded that Phoenix’s law, although “facially content-neutral,” was content-based when applied to compel Brush & Nib’s speech. *Id.* at *20. This application was content-based because forcing Brush & Nib’s artists to create invitations celebrating same-sex weddings forced them to alter the content in their invitations, i.e. “to write celebratory messages with which they disagree, such as ‘come celebrate the wedding of Jim and Jim,’ or ‘share in the joy of the wedding of Sarah and Jane.’” *Id.* *See also id.* (“When a facially content-neutral law is applied by the government to compel speech, it operates as a content-based law.”).

Fifth, the court concluded that Phoenix’s law triggered strict scrutiny when applied to compel Brush & Nib to create wedding invitations because that application compelled and regulated speech based on content. 2019 WL 4400328, at *21. *See also id.* (“Accordingly, because the Ordinance ‘necessarily alters the content’ of Plaintiffs’ speech by forcing them to engage in speech they ‘would not otherwise make,’ it must survive strict scrutiny.” (quoting *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 795 (1988))).

Sixth, the court concluded that when applied to compel Brush & Nib’s speech, Phoenix’s law failed strict scrutiny. 2019 WL 4400328, at *22. As the court noted, “the compelling interest of ensuring equal access ... is not sufficiently overriding as to justify compelling Plaintiffs’ speech by commandeering their creation of custom wedding invitations” *Id.* at *21. *See also id.* at *22 (“[B]ecause the purpose of the Ordinance is to regulate conduct, not speech, regulating Plaintiffs’ speech is not narrowly tailored to accomplish this goal.”); *id.* at *31 (noting that Phoenix failed to satisfy strict scrutiny because it provided no evidence that protecting Brush & Nib would “undercut the effectiveness of” its public accommodation law).

Seventh, the court concluded that the ruling for Brush & Nib will not “undermine the antidiscrimination purpose of the Ordinance” nor “encourage other businesses to use free speech as a pretext to discriminate against protected groups” because its rationale is limited to the creation of “pure speech,” as opposed to businesses denying “access to goods or services to customers based on their sexual orientation or other protected status.” 2019 WL 4400328, at *22. The same rationale applies to Lorie’s case because the court looked to First Amendment cases to conclude that the application of Phoenix’s law violated Arizona’s Constitution. *Id.*

In sum, *Brush & Nib* deserves careful consideration because it addresses many of the arguments pending before this Court.

Respectfully submitted this 23rd day of September, 2019.

s/ Katherine L. Anderson

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CERTIFICATE OF SERVICE

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EXHIBIT A

2019 WL 4400328

Only the Westlaw citation is currently available.
Supreme Court of Arizona.

BRUSH & NIB STUDIO, LC, et al.,
Plaintiffs/Appellants/Cross-Appellees,
v.
CITY OF PHOENIX, Defendant/
Appellee/Cross-Appellant.

No. CV-18-0176-PR

|
Filed September 16, 2019

Synopsis

Background: Designers of custom wedding invitations brought action against city for declaratory and injunctive relief, alleging that ordinance, precluding discrimination on basis of sexual orientation, violated designers' right to free speech and their free exercise right under Free Exercise of Religion Act (FERA). The Superior Court, Maricopa County, No. CV2016-052251, [Karen A. Mullins](#), J., denied city's motion to dismiss but granted summary judgment to city. The Court of Appeals, 244 Ariz. 59418 P.3d 426, affirmed both denial of motion to dismiss and grant of summary judgment but struck down portion of ordinance.

Holdings: After grant of review, the Supreme Court, [Gould](#), J., held that:

- [\[1\]](#) claims were ripe;
- [\[2\]](#) custom invitations constituted pure speech entitled to full First Amendment protection;
- [\[3\]](#) ordinance was subject to strict scrutiny in compelled speech claim;
- [\[4\]](#) any governmental interest furthered by ordinance was insufficient to justify compelling speech;
- [\[5\]](#) ordinance substantially burdened free exercise of religion, as would support FERA claim; and
- [\[6\]](#) ordinance was not least restrictive means of furthering asserted governmental interest.

Court of Appeals opinion vacated in part; trial court ruling reversed.

[Bolick](#), J., filed concurring opinion.

[Bales](#), J., filed dissenting opinion in which [Timmer](#), V.C.J., and [Staring](#), J., joined.

[Timmer](#), V.C.J., filed dissenting opinion.

[Staring](#), J., filed dissenting opinion.

Procedural Posture(s): On Appeal; Petition for Discretionary Review; Motion for Declaratory Judgment; Motion to Dismiss; Motion for Permanent Injunction.

West Headnotes (52)

[\[1\]](#) **Appeal and Error**



Supreme Court reviews trial court's ruling on motion for summary judgment de novo.

[Cases that cite this headnote](#)

[\[2\]](#) **Appeal and Error**



Supreme Court reviews statutory, constitutional, and mixed questions of law and fact de novo.

[Cases that cite this headnote](#)

[\[3\]](#) **Action**



Claims for declaratory and injunctive relief as to whether, under state constitution's free speech provision and Free Exercise of Religion Act (FERA), city could apply its anti-discrimination ordinance to force designers of custom wedding invitations to create such invitations for same-sex wedding ceremonies were ripe, even though there was no threatened enforcement of ordinance against designers, where record was fully developed with respect to the content of invitations, relief sought was limited to

invitations materially similar to those contained in record, and city asserted it could apply ordinance to invitations. [Ariz. Const. art. 2, § 6](#); [Ariz. Rev. Stat. Ann. §§ 12-1832, 41-1493.01](#).

[Cases that cite this headnote](#)

[4] Appeal and Error



Ordinarily, trial court's ruling on a motion to dismiss is reviewed for abuse of discretion, but questions of standing and ripeness are reviewed de novo.

[Cases that cite this headnote](#)

[5] Action



Although state constitution does not have a case or controversy requirement like the federal constitution, state court does apply the doctrines of standing and ripeness as a matter of sound judicial policy. [U.S.C.A. Const. Art. 3, § 2, cl. 1](#).

[Cases that cite this headnote](#)

[6] Action



Ripeness is a prudential doctrine that prevents a court from rendering a premature decision on an issue that may never arise.

[Cases that cite this headnote](#)

[7] Action



Though federal justiciability jurisprudence is not binding on state courts, the factors federal courts use to determine whether a case is justiciable are instructive.

[Cases that cite this headnote](#)

[8] Action



As a general matter, if the plaintiff has incurred an injury, the case is ripe.

[Cases that cite this headnote](#)

[9] Action



A case is ripe if there is an actual controversy between the parties.

[Cases that cite this headnote](#)

[10] Constitutional Law



Generally, court will not reach a constitutional question if a case can be fairly decided on non-constitutional grounds.

[Cases that cite this headnote](#)

[11] Constitutional Law



When constitutional and non-constitutional issues are intertwined in a case, court must address the constitutional issue.

[Cases that cite this headnote](#)

[12] Constitutional Law



Whereas the federal First Amendment is phrased as constraint on government, state free speech provision, by contrast, is a guarantee of the individual right to freely speak, write, and publish, subject only to constraint for abuse of that right. [U.S. Const. Amend. 1](#); [Ariz. Const. art. 2, § 6](#).

[Cases that cite this headnote](#)

[13] Constitutional Law



State constitution provides broader protections for free speech than the First Amendment. [U.S. Const. Amend. 1](#); [Ariz. Const. art. 2, § 6](#).

[Cases that cite this headnote](#)

[14] Constitutional Law



A violation of First Amendment principles necessarily implies a violation of the broader free speech protections of state constitution. [U.S. Const. Amend. 1](#); [Ariz. Const. art. 2, § 6](#).

[Cases that cite this headnote](#)

[15] Constitutional Law



Compelled speech doctrine is grounded on principle that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[16] Constitutional Law



Custom wedding invitations, and the creation of those invitations, constituted pure speech entitled to full First Amendment protection, in invitation designers' action for declaratory and injunctive relief to preclude application of city's anti-discrimination ordinance to force designers to create custom invitations for same-sex weddings, where each custom invitation contained designers' hand-drawn words, images, and calligraphy, as well as their hand-painted images and original artwork, designers retained artistic control over the ideas and messages contained in invitations, and every invitation contained language celebratory of wedding. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[17] Constitutional Law



Pure speech is protected under both the state constitution and First Amendment and includes written and spoken words, as well as other media such as paintings, music, and film that predominantly serve to express thoughts, emotions, or ideas. [U.S. Const. Amend. 1](#); [Ariz. Const. art. 2, § 6](#).

[Cases that cite this headnote](#)

[18] Constitutional Law



Pure speech, as entitled to protection under state constitution and First Amendment, includes original artwork. [U.S. Const. Amend. 1](#); [Ariz. Const. art. 2, § 6](#).

[Cases that cite this headnote](#)

[19] Constitutional Law



Protection for pure speech is not solely based on the medium itself; rather, words, pictures, paintings, and films qualify as pure speech when they are used by a person as a means of self-expression. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[20] Constitutional Law



In addition to pure speech, the First Amendment also protects conduct that is sufficiently imbued with elements of communication. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[21] Constitutional Law



Test for whether conduct contains an expressive element, as required to constitute protected speech, does not apply to pure speech. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[22] Constitutional Law



Generally, there is no free speech protection for non-expressive business activities. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

[23] Constitutional Law

Some businesses, like tattoo studios and video game companies, do create and sell products that are protected free speech; for such products, both the finished product and the process of creating that product are protected speech. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[24] Constitutional Law

A business does not forfeit the protections of the First Amendment because it sells its speech for profit. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[25] Constitutional Law

Simply because a business creates or sells speech does not mean that it is entitled to blanket First Amendment protection for all its business activities. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[26] Constitutional Law

The process of creating and selling pure speech, which involves decisions about what to create and what not to create, is protected by the First Amendment. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[27] Constitutional Law

Whether a third party is able to discern any articulable message in pure speech, especially artwork, is irrelevant in terms of whether it is protected under the First Amendment. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[28] Constitutional Law

The essence of free speech protection is a person's autonomy over what to say and when to say it. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[29] Constitutional Law

City ordinance precluding discrimination on basis of sexual orientation operated as content-based law and thus was subject to strict scrutiny, in compelled speech claim by designers of custom wedding invitations, who alleged that ordinance, if applied to require designers to create custom invitations celebrating same-sex weddings, would violate designers' religious beliefs, even if purpose of ordinance was not to regulate speech; due to its onerous penalties, including criminal prosecution, jail, and fines, ordinance coerced designers into abandoning their convictions and compelled them to write celebratory message with which they disagreed. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[30] Constitutional Law

Laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based and thus are subject to strict scrutiny under the First Amendment. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[31] Constitutional Law

A law may be content-based, and thus subject to strict scrutiny under First Amendment, if its manifest purpose is to regulate speech because of the message it conveys. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[32] Constitutional Law

In a claim under the First Amendment, content-based laws must satisfy strict scrutiny and are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[33] Constitutional Law

Content-neutral laws that regulate non-expressive conduct, and not speech, are subject to the rational basis test in a First Amendment claim. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[34] Constitutional Law

Content-neutral regulations that impose an incidental burden on speech are subject to intermediate scrutiny in a First Amendment claim. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[35] Constitutional Law

Under intermediate scrutiny of a First Amendment claim, a law is justified if: (1) it furthers an important or substantial governmental interest, (2) the governmental interest is unrelated to the suppression of free expression, and (3) any restriction on speech is incidental and no greater than is essential to further the government interest. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[36] Constitutional Law

A facially content-neutral law may, as applied to a particular plaintiff, operate as a content-based

law and thus be subject to strict scrutiny under First Amendment. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[37] Constitutional Law

Under strict scrutiny test for constitutionality of an ordinance, defendant has burden of showing that ordinance (1) furthers a compelling government interest, and (2) is narrowly tailored to achieve that interest. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[38] Constitutional Law

Any governmental interest furthered by ordinance precluding discrimination on basis of sexual orientation was insufficient to justify compelling speech by designers of custom wedding invitations so as to require designers to create invitations with celebratory messages for same-sex weddings, supporting designers' compelled speech claim against city; ordinance commandeered designers' speech as means of eradicating society of biases. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[39] Constitutional Law

Government regulation of speech must be measured in minimums, not maximums. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[40] Constitutional Law

In seeking to promote a valid government interest, government regulation of speech should avoid adopting a prophylactic rule of compelled speech that is unduly burdensome and not narrowly tailored. [U.S. Const. Amend. 1.](#)

[Cases that cite this headnote](#)

[41] Civil Rights



Although the Religious Freedom Restoration Act (RFRA) remains operative as to the federal government, it was declared unconstitutional as to state laws, and thus no state law claim is available under the RFRA. Religious Freedom Restoration Act of 1993 § 2, 42 U.S.C.A. § 2000bb et seq.

[Cases that cite this headnote](#)

[42] Civil Rights



A free exercise claim under state's Free Exercise of Religion Act (FERA) must be based on a religious belief. *Ariz. Rev. Stat. Ann.* § 41-1493(2).

[Cases that cite this headnote](#)

[43] Civil Rights



For a free exercise claim to be based on religious belief, as required by state's Free Exercise of Religion Act (FERA), claimant need not prove that a belief is a central tenet of her faith. *Ariz. Rev. Stat. Ann.* § 41-1493(2).

[Cases that cite this headnote](#)

[44] Civil Rights



In a claim under state's Free Exercise of Religion Act (FERA), once a court determines that a party has a sincere religious belief, it must examine whether the government's regulation imposes a substantial burden on the party's free exercise of that belief. *Ariz. Rev. Stat. Ann.* §§ 41-1493(2), 1493.01(B).

[Cases that cite this headnote](#)

[45] Civil Rights



Ordinance precluding discrimination on basis of sexual orientation, as applied to designers' custom wedding invitations with celebratory messages for weddings, substantially burdened free exercise of designers' religious belief that marriages could only exist between one man and one woman, as would support designers' claim against city under state's Free Exercise of Religion Act (FERA); ordinance compelled designers to express a message celebrating same-sex marriage, in violation of religious belief, and if they violated ordinance, designers faced threat of severe criminal and civil sanctions. *Ariz. Rev. Stat. Ann.* § 41-1493(2).

[Cases that cite this headnote](#)

[46] Civil Rights



Courts may not, under the guise of conducting a substantial burden analysis in a claim under state's Free Exercise of Religion Act (FERA), examine the reasonableness of a person's religious belief. *Ariz. Rev. Stat. Ann.* § 41-1493(2).

[Cases that cite this headnote](#)

[47] Constitutional Law



Ordinance precluding discrimination on basis of sexual orientation was not the least restrictive means of furthering asserted governmental interest, as could support finding that application of ordinance to designers of custom wedding invitations, which contained celebratory messages of wedding, to require designers to design same-sex wedding invitations violated state's Free Exercise of Religion Act (FERA), where city neither showed nor argued that allowing religious exemption for designers would undercut effectiveness of ordinance. *Ariz. Rev. Stat. Ann.* § 41-1493.01(C).

[Cases that cite this headnote](#)

[48] Civil Rights

Under the least restrictive means test, in a claim under state's Free Exercise of Religion Act (FERA) the government must show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party. [Ariz. Rev. Stat. Ann. § 41-1493.01\(C\)](#).

[Cases that cite this headnote](#)

[49] Civil Rights

To prove that a burden on free exercise of religious beliefs is the least restrictive means to further compelling interest, in response to a claim under state's Free Exercise of Religion Act (FERA), government is not required to show that no less restrictive means is conceivable, but only that the proposed alternatives are ineffective or impractical; this is a focused inquiry, requiring government to establish that applying the law in the particular circumstances is the least restrictive means. [Ariz. Rev. Stat. Ann. § 41-1493.01\(C\)](#).

[Cases that cite this headnote](#)

[50] Civil Rights

As part of analysis of whether a burden on free exercise of religious beliefs is the least restrictive means to further compelling interest, in response to a claim under state's Free Exercise of Religion Act (FERA), court must scrutinize the asserted harm of granting specific exemptions to particular religious claimants; this includes considering the harm an exemption may have on benefits the law confers on third parties. [Ariz. Rev. Stat. Ann. § 41-1493.01\(C\)](#).

[Cases that cite this headnote](#)

[51] Constitutional Law

It is the duty of the judiciary to enforce the text of constitution and statutes and the fundamental rights protected within them.


[Cases that cite this headnote](#)

[52] Constitutional Law

While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government. [U.S. Const. Amend. 1](#).

[Cases that cite this headnote](#)

Appeal from the Superior Court in Maricopa County, The Honorable Karen A. Mullins, Judge, No. CV2016-052251.
REVERSED IN PART

Opinion of the Court of Appeals, Division One,  [244 Ariz. 59, 418 P.3d 426 \(App. 2018\)](#). **VACATED IN PART**

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JUSTICE GOULD authored the opinion of the Court, in which JUSTICES BOLICK, LOPEZ, and PELANDER (Retired) joined. JUSTICE BOLICK filed a concurring opinion. JUSTICE BALES (Retired), joined by VICE CHIEF JUSTICE TIMMER and JUDGE STARING, * dissented. VICE CHIEF JUSTICE TIMMER filed a dissenting opinion. JUDGE STARING filed a dissenting opinion.

Opinion

JUSTICE GOULD, opinion of the Court:



*1 ¶1 The rights of free speech and free exercise, so precious to this nation since its founding, are not limited to soft murmurings behind the doors of a person's home or church, or private conversations with like-minded friends and family. These guarantees protect the right of every American to express their beliefs in public. This includes the right to create and sell words, paintings, and art that express a person's sincere religious beliefs.


¶2 With these fundamental principles in mind, today we hold that the City of Phoenix (the "City") cannot apply its Human Relations Ordinance (the "Ordinance") to force Joanna Duka and Breanna Koski, owners of Brush & Nib Studios, LC ("Brush & Nib"), to create custom wedding invitations celebrating same-sex wedding ceremonies in violation of their sincerely held religious beliefs. Duka, Koski, and Brush & Nib ("Plaintiffs") have the right to refuse to express such messages under [article 2, section 6 of the Arizona Constitution](#), as well as Arizona's Free Exercise of Religion Act ("FERA"), [A.R.S. § 41-1493.01](#).

¶3 Our holding is limited to Plaintiffs' creation of custom wedding invitations that are materially similar to those contained in the record. *See* Appendix 1. We do not recognize a blanket exemption from the Ordinance for all of Plaintiffs' business operations. Likewise, we do not, on jurisprudential


grounds, reach the issue of whether Plaintiffs' creation of other wedding products may be exempt from the Ordinance. *See* Appendix 2.

¶4 Duka and Koski's beliefs about same-sex marriage may seem old-fashioned, or even offensive to some. But the guarantees of free speech and freedom of religion are not only for those who are deemed sufficiently enlightened, advanced, or progressive. They are for everyone. After all, while our own ideas may be popular today, they may not be tomorrow. Indeed, "[w]e can have intellectual individualism" and "rich cultural diversities ... only at the price" of allowing others to express beliefs that we may find offensive or irrational.


 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641–42, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). This "freedom to differ is not limited to things that do not matter much ... [t]he test of its substance is the right to differ as to things that touch the heart of the existing order."  *Id.* at 642, 63 S.Ct. 1178.

¶5 Given this reality, the government "must not be allowed to force persons to express a message contrary to their deepest convictions."  *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, — U.S. —, 138 S. Ct. 2361, 2379, 201 L.Ed.2d 835 (2018) (Kennedy, J., concurring). Rather, Plaintiffs are entitled to


continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.


*2  *Obergefell v. Hodges*, — U.S. —, 135 S. Ct. 2584, 2607, 192 L.Ed.2d 609 (2015).

¶6 Although this case is about freedom of speech and religion, it suits the preferred analysis of our dissenting

colleagues to reframe it as one involving discriminatory conduct based on a customer's sexual orientation. This mischaracterization reflects neither Plaintiffs' position nor our holding. Literally none of the examples of invidious, status-based discrimination the dissent invokes, *see infra* ¶ 217-18, would even be remotely permitted under our holding today. Plaintiffs must, and they do, serve all customers regardless of their sexual orientation. However, by focusing solely on the anti-discrimination purpose of the Ordinance, the dissent engages in a one-sided analysis that effectively deprives Plaintiffs of their fundamental right to express their beliefs. But no law, including a public accommodations law, is immune from the protections of free speech and free exercise. Rather, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."  *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178.


¶7 The enduring strength of the First Amendment is that it allows people to speak their minds and express their beliefs without government interference. But here, the City effectively cuts off Plaintiffs' right to express their beliefs about same-sex marriage by telling them what they can and cannot say. And to justify this action, both the City and the primary dissent claim that if we dare to allow Plaintiffs to express their beliefs, we, in essence, run the risk of resurrecting the Jim Crow laws of the Old South.

¶8 But casting Plaintiffs' free speech and exercise rights in such a cynical light does grave harm to a society. As Justice Jackson observed in  *Barnette*, "[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men," but, inevitably "those bent on its accomplishment must resort to an ever-increasing severity."

 *Barnette*, 319 U.S. at 640, 63 S.Ct. 1178. We would be wise to heed his warning about government efforts to compel uniformity of beliefs and ideas:

[a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Ultimate futility of such attempts to compel coherence is the lesson of every such effort

from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

 *Id.* at 641, 63 S.Ct. 1178.

I.

¶9 Duka and Koski are the sole member-owners of Brush & Nib, a for-profit limited liability company. Duka and Koski operate Brush & Nib as an “art studio” specializing in creating custom artwork for weddings, events, special occasions, home décor, and businesses. Duka and Koski work out of Koski’s home and personally design and create their products. In addition to custom-designed products, Brush & Nib sells some pre-made products. Duka and Koski do not maintain Brush & Nib as a brick-and-mortar store but instead sell their products online through various media platforms.

*3 ¶10 Apart from Plaintiffs’ custom wedding invitations, the record contains only a few examples of their products. In contrast, there are numerous examples of Plaintiffs’ custom wedding invitations. *See* Appendix 1. All these custom invitations feature Plaintiffs’ hand-drawn images and paintings, custom lettering and calligraphy, as well as their original artwork. Additionally, the names of a female bride and a male groom are prominently displayed in every custom invitation.

¶11 The City concedes that “[a]ll the custom wedding invitations Brush & Nib creates include language that is celebratory of the wedding.” Specifically, Plaintiffs create and write celebratory statements in every custom invitation, including such statements as “[the couple or their parents] request the pleasure of your company at the *celebration* of their marriage,” “request the *honor* of your presence,” “invite

you to the *celebration* of their marriage,” or “invite you to share in the *joy* of their marriage.” (Emphasis added.)

¶12 Plaintiffs closely collaborate with each client in creating their custom wedding invitations. The client provides the names of the bride and groom, as well as the location and date of the wedding. A client may also share preferences regarding the colors and style of the invitation. Plaintiffs, in turn, propose their artistic ideas for the invitation, including colors, artwork, text, and phrasing. As part of this process, Plaintiffs “frequently suggest the particular words to use” in the invitation.

¶13 Once a client signs a contract for their services, Plaintiffs design and create the invitations. Although a client may ultimately reject Plaintiffs’ work, the contract states that Brush & Nib “retains complete artistic freedom with respect to every aspect of the design’s and artwork’s creation.” The contract provides that the client’s requested design and artwork must “express[] messages that promote [Brush & Nib’s] religious or artistic beliefs, or at least are not inconsistent with these beliefs.” Further, Brush & Nib “reserves the right to terminate” the contract if it subsequently determines, in its “sole discretion, that the requested design or artwork communicates ideas or messages ... that are inconsistent with [Brush & Nib’s] religious or artistic beliefs.”

¶14 Duka and Koski are Christians. Based on their faith, they do not believe they can do anything, either in their business or personal lives, that “violates their religious beliefs or dishonors God.” Thus, in addition to making a profit, Duka and Koski seek to operate Brush & Nib consistent with their religious beliefs. For example, Brush & Nib’s Operating Agreement (the “Agreement”) states that Brush & Nib is a “for-profit limited liability company” that “is owned solely by Christian artists who operate [Brush & Nib] as an extension of and in accordance with their artistic and religious beliefs.” The Agreement sets forth Brush & Nib’s “Core Beliefs” and provides that “Brush & Nib is unwilling to use its artistic process” or “create art” that contradicts its religious “beliefs and message.” The Agreement further provides that Brush & Nib “reserves the right to deny any request for action or artwork that violates its artistic and religious beliefs.” As examples of such objectionable artwork, the Agreement states that Brush & Nib will refuse to create “custom artwork that communicates ideas or messages ... that contradict biblical truth, demean others, endorse racism, incite violence, or promote any marriage besides marriage between one man and one woman, such as same-sex marriage.”

*4 ¶15 Duka and Koski hold traditional Christian beliefs about marriage. They believe that “God created two distinct genders in His image,” and that only a man and a woman can be joined in marriage. This belief is based on the Bible; thus, for example, Plaintiffs cite Matthew 19:4–5, which states that God “made them male and female, and said, [f]or this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one.” (Internal quotation marks omitted.) Duka testified that she believes that marriage reflects God’s glory and presents a picture of “Christ and his love for the church.”

¶16 As a tenet of their faith, Duka and Koski do not believe that two people of the same sex can be married. Plaintiffs stress that they will create custom artwork for, and sell pre-made artwork to, any customers regardless of their sexual orientation. However, they believe that creating a custom wedding invitation that conveys a message celebrating same-sex marriage, for any customer regardless of sexual orientation, violates their sincerely held religious convictions.

A. The Ordinance

¶17 The City of Phoenix’s Ordinance, as amended in 2013, prohibits public accommodations from discriminating against persons based on their status in a “protected” group, which includes a person’s sexual orientation. Phx., Ariz., City Code (“PCC”) § 18-4(B). In contrast, neither Arizona’s public accommodations law nor the federal civil rights public accommodations statute lists sexual orientation as a legally protected status. See [A.R.S. § 41-1442\(A\)](#); [42 U.S.C. § 2000a\(a\)](#).

¶18 Under the Ordinance, public accommodations include “all establishments offering their services, facilities or goods to or soliciting patronage from the members of the general public.” PCC § 18-3. Section 18-4(B)(2) makes it unlawful for any business operating as a public accommodation to “directly or indirectly[] refuse, withhold from, or deny to any person ... accommodations, advantages, facilities or privileges ... because of” a person’s status in a protected group. Additionally, the Ordinance forbids such businesses from making any “distinction ... with respect to any person based on” status with respect to “the price or quality of any item, goods or services offered.” PCC § 18-4(B)(2).

¶19 Section 18-4(B)(3) also makes it unlawful for a public accommodation “to directly or indirectly display, circulate, publicize or mail any advertisement, notice or communication which states or implies that any facility or service shall be refused or restricted because of” a person’s status. This subsection also prohibits displays or publications that state or imply that based on a person’s status they “would be unwelcome, objectionable, unacceptable, undesirable or not solicited.” *Id.*

¶20 Complaints regarding violations of the Ordinance are initially handled by the City’s Equal Opportunity Department (the “Department”). PCC § 18-5(A). If the Department determines that there is reasonable cause to believe that a violation has occurred, it must first attempt to resolve the violation through “informal methods,” such as conciliation and mediation. *Id.* § 18-5(D)(2), (E), (G). However, if the Department finds no reasonable cause, the complainant may “request that the City Attorney file a criminal complaint.” *Id.* § 18-5(D)(1). Further, if the business owner refuses to correct the violation through informal means, the Department may refer the matter to the City Attorney for criminal prosecution. *Id.* § 18-6.

¶21 Pursuant to § 18-7(A), any person convicted of violating the Ordinance is guilty of a class 1 misdemeanor. As punishment, a violator may be ordered to serve up to six months in jail or three years’ probation, or pay a maximum fine of \$2,500, or any combination of jail, fines, and probation. *Id.* § 1-5. Section 1-5 also provides that “[e]ach day any violation” continues “shall constitute a separate offense.” Continuing violations may also “be deemed a public nuisance” and “abated as provided by law.” *Id.*


B. Procedural Background



*5 ¶22 To date, the City has not cited Plaintiffs for violating the Ordinance. Plaintiffs filed this action to enjoin the City from enforcing the Ordinance against them in the future, as well as to obtain a declaration that the Ordinance violates their right to free speech under [article 2, section 6 of the Arizona Constitution](#), and their free exercise right under FERA, [§ 41-1493.01](#). As part of their requested declaratory relief, Plaintiffs request an order allowing them to post a proposed statement (the “Statement”) on Brush & Nib’s website announcing their intention to refuse requests to create custom artwork for same-sex weddings. The Statement explains that Brush & Nib will

not “create any artwork that violates our vision as defined by our religious and artistic beliefs and identity.” It lists several examples of objectionable artwork, including artwork promoting businesses that “exploit women or sexually objectify the female body,” exploits the environment, or “any custom artwork that demeans others, endorses racism, incites violence, contradicts our Christian faith, or promotes any marriage except marriage between one man and one woman,” such as “wedding invitations[] for same-sex wedding ceremonies.”

¶23 The City filed a motion to dismiss, arguing that Plaintiffs lacked standing to bring this action. Specifically, the City asserted that Plaintiffs had not yet refused to create any products for a same-sex wedding and therefore had not violated the Ordinance. The trial court denied the motion.

¶24 After an evidentiary hearing, the court denied Plaintiffs’ motion for a preliminary injunction. Following the hearing, each party moved for summary judgment. The trial court denied Plaintiffs’ motion but granted the City’s motion. In its ruling, the court concluded that the Ordinance did not violate Plaintiffs’ rights to free speech or free exercise of religion under FERA.


¶25 The court of appeals affirmed both the trial court’s denial of the City’s motion to dismiss and its grant of summary judgment in favor of the City.  *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 68–69 ¶ 16, 78 ¶ 55, 418 P.3d 426, 435–36 (App. 2018). The court held that the Ordinance did not violate Plaintiffs’ freedom of speech or substantially burden their free exercise rights under FERA.

 *Id.* at 72 ¶ 29, 73 ¶ 32, 77 ¶ 49, 418 P.3d at 439, 440, 444. However, the court struck down as unconstitutionally vague the provision in § 18-4(B)(3) prohibiting displays or publications stating or implying that a person in a protected group “would be unwelcome, objectionable, unacceptable, undesirable or not solicited.”  *Id.* at 75–76 ¶¶ 43–45 & n.12, 418 P.3d at 442–43. The court severed this provision from the Ordinance, concluding that the remainder of § 18-4(B)(3) “operates independently and is enforceable.” *Id.* at 76 ¶ 44, 418 P.3d at 443.

¶26 We granted review because this case involves constitutional and statutory issues of statewide importance. We have jurisdiction pursuant to [article 6, section 5\(3\) of the Arizona Constitution](#).

II.

¶27 Plaintiffs contest the trial court’s denial of their motion for a preliminary injunction, as well as the court’s denial of their motion for summary judgment and grant of summary judgment in favor of the City. However, we need not review the trial court’s denial of Plaintiffs’ motion for a preliminary injunction because its rulings on the parties’ summary judgment motions are dispositive here.

[1] [2] ¶28 We review the trial court’s rulings on the motions for summary judgment de novo. *Jackson v. Eagle KMC L.L.C.*, 245 Ariz. 544, 545 ¶ 7, 431 P.3d 1197, 1198 (2019). We review statutory, constitutional, and mixed questions of law and fact de novo. *City of Surprise v. Ariz. Corp. Comm’n*, 246 Ariz. 206, 210 ¶ 10, 437 P.3d 865, 869 (2019) (statutes); *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 8, 336 P.3d 717, 720 (2014) (constitutional questions);  *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366 ¶ 10, 982 P.2d 1277, 1280 (1999) (mixed questions of law and fact).

¶29 Plaintiffs concede Brush & Nib is a public accommodation as defined by PCC § 18-3. However, they argue that the Ordinance, as applied by the City, compels them to use their artistic talents and personal expression to create custom invitations celebrating same-sex weddings in violation of their free speech rights under [article 2, section 6 of the Arizona Constitution](#) and their free exercise rights under FERA. Plaintiffs assert they will serve all customers, regardless of their sexual orientation. However, they refuse to create or express certain messages, regardless of *who* makes the request. This includes creating custom invitations that celebrate a same-sex marriage ceremony.

*6 ¶30 The City concedes that the Ordinance does not require Duka and Koski to express any messages condoning or celebrating same-sex marriage. Thus, for example, the City agrees that the Ordinance does not require Duka and Koski to create a custom invitation containing the statement, “support gay marriage,” or symbols, such as the equal sign of the Human Rights Campaign, that would be recognized by a third-party observer as expressly endorsing same-sex marriage. The City argues, however, that the Ordinance, as applied to Plaintiffs’ custom wedding invitations, regulates conduct, not speech. Thus, by refusing to create or sell such invitations for use in same-sex weddings, the City contends that Plaintiffs are engaging in discriminatory conduct prohibited by the Ordinance.

¶31 For their remedy, Plaintiffs generally seek relief permitting them to (1) refuse requests to create custom-made wedding products for same-sex weddings, and (2) post their Statement regarding their intention to refuse such services. Alternatively, Plaintiffs seek partial relief limited to their creation of custom wedding invitations that are “materially similar” to the invitations contained in the record.

¶32 Plaintiffs originally raised both facial and as-applied challenges to the constitutionality of the Ordinance. However, because Plaintiffs’ facial challenge was limited to the provision struck down by the court of appeals (a ruling neither party challenges here), only Plaintiffs’ as-applied challenge remains. See *Brush & Nib*, 244 Ariz. at 75–76 ¶¶ 43–45 & n.12, 418 P.3d at 442–43. Thus, we need not consider the general validity of the Ordinance or the Ordinance’s application to other individuals or businesses that are not before this Court. See *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (stating that “a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity ... is beyond question,” and that “in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual’s exercise of those rights”).

III.

[3] ¶33 The City argues the trial court erred in denying its motion to dismiss based on Plaintiffs’ lack of standing. Specifically, the City asserts that because Plaintiffs filed this action “before any same-sex couple had requested custom wedding products,” their lawsuit is based on speculative claims about how the Ordinance might apply to hypothetical customer requests involving Plaintiffs’ entire range of custom products. Because none of these abstract legal claims may ever arise, the City contends that Plaintiffs’ action challenging PCC § 18-4(B)(2) is not ripe and should be dismissed.

[4] ¶34 We ordinarily review a trial court’s ruling on a motion to dismiss for an abuse of discretion, *Legacy Foundation Action Fund v. Citizens Clean Elections Commission*, 243 Ariz. 404, 405 ¶ 6, 408 P.3d 828, 829 (2018), but questions of standing and ripeness are reviewed de novo, *In re Estate of*

Stewart, 230 Ariz. 480, 483–84 ¶ 11, 286 P.3d 1089, 1092–93 (App. 2012) (ripeness); *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 562 ¶ 16, 81 P.3d 1016, 1021 (App. 2003) (standing).

[5] ¶35 Although the Arizona Constitution does not have a case or controversy requirement like the Federal Constitution, we do apply the doctrines of standing and ripeness “as a matter of sound judicial policy.” *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16, 81 P.3d 311, 315 (2003). Because in this case the underlying concerns for standing and ripeness are the same, we simply use the term “ripeness” to apply to both doctrines here. See *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (“The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing’s injury in fact prong.”); *Town of Gilbert v. Maricopa Cty.*, 213 Ariz. 241, 244 ¶ 8, 141 P.3d 416, 419 (App. 2006) (stating that “[r]ipeness is analogous to standing”).

*7 [6] [7] [8] [9] ¶36 Ripeness is a prudential doctrine that prevents a court from rendering a premature decision on an issue that may never arise. *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997). Though federal justiciability jurisprudence is not binding on Arizona courts, the factors federal courts use to determine whether a case is justiciable are instructive. See *Bennett*, 206 Ariz. at 525 ¶ 22, 81 P.3d at 316. Thus, as a general matter, if the plaintiff has incurred an injury, the case is ripe. See *Brewer v. Burns*, 222 Ariz. 234, 238 ¶ 15, 213 P.3d 671, 675 (2009). A case is also ripe if there is an actual controversy between the parties. *Estate of Stewart*, 230 Ariz. at 484 ¶ 12, 286 P.3d at 1093; see *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 312–13, 497 P.2d 534 (1972) (stating that challengers of statute forbidding abortions under certain circumstances were not required to wait for criminal prosecution because that statute allegedly chilled their constitutional rights and therefore constituted an actual controversy).

¶37 Here, we need not speculate about how the Ordinance might apply to customer requests for Plaintiffs’ custom wedding invitations. While it is true that, for most of Plaintiffs’ products, the factual record is not sufficiently developed, that is not the case with respect to the custom

invitations. The record, as reflected by the exhibits contained in Appendix 1, contains numerous examples of Plaintiffs' custom wedding invitations. All of these invitations contain detailed examples of Plaintiffs' words, drawings, paintings, and original artwork, and Duka and Koski have testified about their process of designing and creating these custom invitations. *Supra* ¶¶ 9–14. Additionally, in their briefs, the parties have analyzed, in detail, the legal claims and arguments based on these custom invitations.

¶38 Finally, because Plaintiffs have specifically asked this Court, as an alternative form of relief, to limit our decision to custom wedding invitations that are materially similar to the invitations contained in the record, *supra* ¶ 31, we may limit our analysis and holding to Plaintiffs' creation of this specific product. See A.R.S. § 41-1493.01(D) (permitting FERA claimants to “obtain *appropriate relief* against a government” (emphasis added)); *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (stating that “the scope of injunctive relief is dictated by the extent of the violation established”).

¶39 Thus, we conclude there is an actual case and controversy that exists regarding Plaintiffs' creation of custom wedding invitations that are materially similar to those in the record. Duka and Koski face a real threat of being prosecuted for violating the Ordinance by refusing to create such invitations for a same-sex wedding. See *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 300–01, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (finding standing despite the lack of a concrete factual situation or criminal enforcement of the statute against the challenger because the threshold issue, whether the challengers' activity was protected as free speech, was justiciable); see also A.R.S. § 12-1832 (authorizing any person “whose rights ... are affected by a ... municipal ordinance” to seek declaratory relief on the validity of the ordinance and “obtain a declaration of rights, status or other legal relations thereunder”). In contrast, Plaintiffs' sweeping challenge to the Ordinance as applied to all of Brush & Nib's remaining custom wedding products (as reflected in Appendix 2) implicates a multitude of possible factual scenarios too “imaginary” or “speculative” to be ripe. *Thomas*, 220 F.3d at 1139 (quoting *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301).

¶40 Additionally, given the City's assertion that it can apply the Ordinance to Plaintiffs' custom wedding invitations, which includes the threat of criminal prosecution and

significant penalties, Plaintiffs have suffered an injury through the chilling of their free speech and free exercise rights. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (holding there was an injury to challenger's speech rights prior to a challenged criminal statute becoming effective, where the state never stated it would not enforce the statute).





*8 ¶41 Accordingly, we agree with the trial court and the court of appeals that, to the extent Plaintiffs' action is based on their custom wedding invitations, it is justiciable. We therefore affirm the trial court and the court of appeals' denial of the City's motion to dismiss as to Plaintiffs' custom wedding invitations. *Brush & Nib*, 244 Ariz. at 68–69 ¶ 16, 418 P.3d at 435–36. However, Plaintiffs' claims based on their remaining custom products are not ripe, and we therefore reverse and grant the City's motion to dismiss as to these products.






IV.

¶42 Plaintiffs allege that the Ordinance, as applied by the City, compels them to create custom wedding invitations celebrating same-sex marriage in violation of Arizona's free speech clause. See *Ariz. Const. art. 2, § 6* (stating that “[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right”).



[10] [11] ¶43 Generally, “[w]e will not reach a constitutional question if a case can be fairly decided on non[-]constitutional grounds.” *R.L. Augustine Constr. Co., Inc. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368, 370, 936 P.2d 554, 556 (1997). However, when constitutional and non-constitutional issues are intertwined in a case, we must address the constitutional issue. See *State v. Church*, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973); *Katherine S. v. Foreman ex rel. County of Maricopa*, 197 Ariz. 371, 378 ¶ 16, 4 P.3d 426, 433 (App. 1999) (deciding constitutional issue because the issue was “intertwined” with non-constitutional issue and citing *Church* for the proposition that the “fact that constitutional and non-constitutional issues are interwoven justifies addressing all issues”).



¶44 Here, because Plaintiffs' FERA claim is closely intertwined with their free speech claim, we find it necessary

to address the constitutional issue in this case.  *Katherine S.*, 197 Ariz. at 378 ¶ 16, 4 P.3d at 433; *see also*  *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 160-69, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (discussing both freedom of speech and free exercise as the plaintiff’s exercise of both rights were affected by challenged law); *cf.*  *Employment Div. v. Smith*, 494 U.S. 872, 881-82, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (collecting cases analyzing both freedom of speech and free exercise);  *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, — U.S. —, 138 S. Ct. 1719, 1740–48, 201 L.Ed.2d 35 (2018) (Thomas, J., concurring) (analyzing free speech issue despite concluding that challengers’ free exercise rights were violated). The legal and factual questions underlying Plaintiffs’ free speech and FERA claims require us to address the same basic issues: (1) whether the Ordinance, as applied by the City, compels Plaintiffs to express a message that violates their religious convictions, and (2) if so, whether Plaintiffs have a protected right to refuse to express that message in the operation of their business.


[12] [13] ¶45 In examining the text of Arizona’s free speech clause, we first observe that whereas the First Amendment is phrased as a constraint on government, *U.S. Const. amend. I* (“Congress shall make no law ... abridging the freedom of speech.”), our state’s provision, by contrast, is a guarantee of the individual right to “freely speak, write, and publish,” subject only to constraint for the abuse of that right. *See*  *State v. Stummer*, 219 Ariz. 137, 142 ¶ 14, 194 P.3d 1043, 1048 (2008); *see also*  *id.* ¶ 15 (“The encompassing text of [a]rticle 2, [s]ection 6 indicates the Arizona framers’ intent to rigorously protect freedom of speech.”). Thus, by its terms, the Arizona Constitution provides broader protections for free speech than the First Amendment. *See, e.g.,*  *Coleman v. City of Mesa*, 230 Ariz. 352, 361 ¶ 36 n.5, 284 P.3d 863, 872 (2012) (stating that *article 2, section 6* “is in some respects more protective of free speech rights than the First Amendment”);  *Stummer*, 219 Ariz. at 143 ¶ 17, 194 P.3d at 1049 (“We have also stated that [a]rticle 2, [s]ection 6 has ‘greater scope than the [F]irst [A]mendment.’ ” (citation omitted));  *Mountain States Tel. & Tel., Co. v. Ariz. Corp. Comm’n*, 160 Ariz. 350, 356, 773 P.2d 455, 461 (1989) (“[W]e apply here the broader freedom of speech clause of the Arizona Constitution.”).

*9 ¶46 However, although *article 2, section 6* does, by its terms, provide greater speech protection than the First Amendment, we have rarely explored the contours of that right. Rather, we have often relied on federal case law in addressing free speech claims under the Arizona Constitution.

 *Stummer*, 219 Ariz. at 142 ¶ 16, 194 P.3d at 1048 (stating that “Arizona courts have had few opportunities to develop Arizona’s free speech jurisprudence,” and in “construing [a]rticle 2, [s]ection 6 have followed federal interpretations of the United States Constitution”);  *Mountain States*, 160 Ariz. at 358, 773 P.2d at 463 (looking to First Amendment precedent in determining that a government regulation violated Arizona’s free speech clause). Here, while Plaintiffs generally assert that their compelled speech claim, *see infra* Section IV(A)–(D), is based on the Arizona Constitution, in arguing that claim they rely almost exclusively on federal cases construing the First Amendment.

[14] ¶47 This, however, presents no difficulty for us in resolving Plaintiffs’ compelled speech claim. Specifically, because federal precedent conclusively resolves Plaintiffs’ claim, we can adequately address it under First Amendment principles “necessarily implies” a violation of the broader protections of *article 2, section 6 of the Arizona Constitution*, by applying First Amendment jurisprudence, we therefore address Plaintiffs’ state claim.  *Coleman*, 230 Ariz. at 361 ¶ 36 n.5, 284 P.3d at 872 (noting that because plaintiffs had adequately stated a claim under the First Amendment, this “necessarily implie[d] that they ha[d] also stated claims under [a]rticle 2, [s]ection 6 of Arizona’s Constitution,” and thus there was no need to address whether Arizona’s free speech clause “might afford greater protection ... than applies under the First Amendment”); *see also*  *Mountain States*, 160 Ariz. at 358, 773 P.2d at 463 (“As we have already determined that ‘narrow specificity’ is a requirement of a time, place, and manner regulation under the [F]irst [A]mendment, we must hold the same under the more stringent protections of the Arizona Constitution.”).

A. Compelled Speech

[15] ¶48 The compelled speech doctrine is grounded on the principle that freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.”  *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct.

1428, 51 L.Ed.2d 752 (1977); *see also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (“[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.” (citation and internal quotation marks omitted)); *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796–97, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (stating that the First Amendment guarantee of free speech necessarily includes the freedom of deciding “both what to say and what *not* to say”).









¶49 The compelled speech doctrine was first articulated in *Barnette*. There, the Supreme Court addressed a state law requiring a child who was a Jehovah’s Witness to salute the American flag. 319 U.S. at 626–29, 63 S.Ct. 1178. For both the child and his parents, saluting the flag violated their religious beliefs. *Id.* at 629, 63 S.Ct. 1178. The Court struck down the law as violating the First Amendment, stating that the government cannot compel any individual “to utter what is not in his mind,” *id.* at 634, 63 S.Ct. 1178, and that all citizens have autonomy over their “opinion[s] and personal attitude[s],” *id.* at 631, 636, 63 S.Ct. 1178; *see also* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (stating that “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence,” and that any “[g]overnment action that ... requires the utterance of a particular message favored by the Government[] contravenes this essential right”).





*10 ¶50 There are, generally speaking, two lines of cases addressing compelled speech. The first involves regulations requiring an individual to express a prescribed government message. For example, in *Wooley*, the Court held that a law was unconstitutional because it forced a Jehovah’s Witness, in violation of his religious beliefs, to display the state motto “Live Free or Die” on his license plate. 430 U.S. at 707–08, 717, 97 S.Ct. 1428; *see also* *NIFLA*, 138 S. Ct. at 2368–69, 2378 (holding that plaintiffs were likely to succeed in their claim that a state law unconstitutionally compelled speech by requiring crisis pregnancy centers, which were established to prevent abortions, to disseminate prescribed government notices about public funding for abortion services).


¶51 A second line of compelled speech cases involves a government regulation that compels a person to host or accommodate another’s message. *See, e.g.*, *Hurley*, 515 U.S. at 572–73, 581, 115 S.Ct. 2338 (holding that a state public accommodations law could not be used to compel a parade sponsor to host or accommodate messages from parade participants the sponsor found to be objectionable). This line of cases includes government regulations compelling a person to engage in self-censorship to avoid hosting another’s message, as well as regulations forcing a person to respond to another’s speech when they would prefer to remain silent. *See* *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 5–7, 16–17, 21, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) (holding that a regulation requiring a privately-owned utility to include, along with its monthly bills, an editorial newsletter published by a consumer group that was critical of its ratemaking practices violated the utility’s free speech rights because the utility might “feel compelled to respond to arguments and allegations made by [the consumer group]”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 244, 256–58, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (holding that a statute granting political candidates the right to reply to unfavorable newspaper articles violated the First Amendment because it forced newspapers to either respond to the candidates’ replies or engage in compelled self-censorship by forgoing printing any articles criticizing a candidate).




¶52 The fundamental principle underlying both lines of compelled speech cases is that an individual has autonomy over his or her speech and thus may not be forced to speak a message he or she does not wish to say. *Hurley* is instructive on this point. There, a private group of veterans (the “Council”) was granted a permit by the City of Boston to sponsor a St. Patrick’s Day parade. *Hurley*, 515 U.S. at 560, 115 S.Ct. 2338. However, the Council refused to allow a group of gay, lesbian, and bisexual descendants of Irish immigrants (“GLIB”) to march “behind a shamrock-strewn banner” stating, “Irish American Gay, Lesbian and Bisexual Group of Boston.” *Id.* at 561, 570, 115 S.Ct. 2338. The Supreme Judicial Court of Massachusetts subsequently determined that the Council’s refusal violated the state public accommodations law. *Id.* at 563–64, 115 S.Ct. 2338.

¶53 The United States Supreme Court reversed, holding that because the parade was a form of protected speech




under the First Amendment, the public accommodations law could not be used to compel the Council to host GLIB's message.  *Id.* at 568–69, 573, 115 S.Ct. 2338. The Court stated that “whatever the [Council’s] reason” for keeping GLIB’s message out of the parade, “it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.”  *Id.* at 575, 115 S.Ct. 2338. The Court held that compelling the Council to host GLIB’s message “violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”  *Id.* at 573, 115 S.Ct. 2338.  *Hurley* further emphasized that “when dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”  *Id.* at 576, 115 S.Ct. 2338; *see also*  *Wooley*, 430 U.S. at 715, 97 S.Ct. 1428 (“Here, as in  *Barnette*, we are faced with a state measure which forces an individual ... to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State ‘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.’ ” (quoting  *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178)).

*11 ¶54 The importance of protecting an individual’s autonomy over his or her speech was most recently addressed in  *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, — U.S. —, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018). There, Janus, a nonunion employee, objected to paying “agency fees” to a union.  *Id.* at 2461–62. The union claimed the agency fees were based on collective bargaining activities benefiting both union and nonunion employees. *See*  *id.* at 2461. However, Janus objected to paying any fees to the union because he disagreed with its collective bargaining position, which he believed was having a negative effect on the state’s “fiscal crises.”  *Id.* at 2461–62.

¶55 The Supreme Court concluded that requiring Janus to pay the agency fees violated his free speech rights because it compelled him to subsidize the union’s speech.  *Id.* at


2466, 2486. The Court stated that “[c]ompelling individuals to mouth support for views they find objectionable violates” the “cardinal constitutional command” that individuals have autonomy over their speech.  *Id.* at 2463. The Court explained that “[f]ree speech serves many ends,” and “[w]henver the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.”  *Id.* at 2464. The Court further explained that “[w]hen speech is compelled ... additional damage is done” because it “forc[es] free and independent individuals to endorse ideas they find objectionable[, which] is always demeaning,” and coerces individuals “into betraying their convictions.”  *Id.*

B. Protected Speech

[16] ¶56 To prevail on their compelled speech claim, Plaintiffs first must show that their custom wedding invitations are protected speech under the First Amendment. *See*  *Hurley*, 515 U.S. at 568–70, 115 S.Ct. 2338 (examining whether, as a threshold matter, a parade involves protected speech); *see also*  *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 64, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (determining, as an initial matter, that access to law school interview rooms did not involve protected speech);  *Coleman*, 230 Ariz. at 357 ¶ 18, 284 P.3d at 868 (“To determine if the Colemans have stated a claim for a violation of their free speech rights, we must determine whether tattooing is constitutionally protected expression.”).

¶57 Plaintiffs assert that their custom invitations are “pure speech,” and therefore fully protected. The City, however, contends that Plaintiffs’ invitations contain no constitutionally relevant speech component. Rather, according to the City, applying the Ordinance to require Duka and Koski to create custom invitations for same-sex weddings purely involves conduct, without implicating speech.

1. Pure Speech

[17] ¶58 Pure speech is protected under both the Arizona Constitution and the First Amendment.  *Coleman*, 230 Ariz. at 357–58 ¶¶ 18–19, 361 ¶ 36 n.5, 284 P.3d at 868–69,

872; see also *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010). Pure speech includes written and spoken words, as well as other media such as paintings, music, and film “that predominantly serve to express thoughts, emotions, or ideas.” *Coleman*, 230 Ariz. at 358 ¶ 18, 284 P.3d at 869; see also *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (stating that books, plays, films, and video games are protected pure speech); *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (stating that music, painting, and poetry are examples of speech that are “unquestionably shielded” under the First Amendment); *Kaplan v. California*, 413 U.S. 115, 119–20, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973) (stating that “pictures, films, paintings, drawings, and engravings” enjoy First Amendment protection). Additionally, this Court has concluded that tattoos are pure speech. *Coleman*, 230 Ariz. at 358–59 ¶ 23, 284 P.3d at 869–70 (citing *Anderson*, 621 F.3d at 1059–60 (holding that tattoos are pure speech and thus “entitled to full First Amendment protection”)).

*12 [18] ¶59 Pure speech also includes original artwork. See *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (holding that paintings, drawings, and original artwork are protected pure speech); *White v. City of Sparks*, 500 F.3d 953, 955–56 (9th Cir. 2007) (stating that original artwork is protected speech); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (same); *Bery v. City of New York*, 97 F.3d 689, 694–96 (2d Cir. 1996) (same). As one court has stated, the First Amendment protects “art for art’s sake.” *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 628 (7th Cir. 1985); see also *Jucha v. City of North Chicago*, 63 F. Supp. 3d 820, 825 (N.D. Ill. 2014) (“There is no doubt that the First Amendment protects artistic expression.”).

[19] ¶60 Protection for pure speech is not solely based on the medium itself. See *Coleman*, 230 Ariz. at 359 ¶ 24, 284 P.3d at 870 (stating that “whether or not something is ‘speech’ protected by the First Amendment cannot focus upon the medium chosen for its expression” (citation and internal quotation marks omitted)). Rather, words, pictures, paintings, and films qualify as pure speech when they are used by a person as a means of self-expression. See *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (stating that self-expression exists where the speaker is “intimately connected with the

communication advanced”); *Cressman*, 798 F.3d at 954 (“Pure-speech treatment is only warranted for those images whose creation is itself an act of self-expression.”); *Jucha*, 63 F. Supp. 3d at 827 (stating that pure speech involves self-expression through art and other forms of “expressive media”). Thus, for example, a painting is pure speech when an artist paints it to express his personal “vision of movement and color.” *White*, 500 F.3d at 956.

[20] ¶61 In addition to pure speech, the First Amendment also protects conduct that is “sufficiently imbued with elements of communication.” *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)); see *Coleman*, 230 Ariz. at 358 ¶ 19, 284 P.3d 863. However, because “an apparently limitless variety of conduct can be labeled ‘speech,’ ” *United States v. O’Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), an “interpretive step” is necessary to determine whether conduct contains an expressive element. *Anderson*, 621 F.3d at 1061. To make this determination, the Supreme Court has formulated a two-part test (referred to as the “*Spence-Johnson* test”): (1) whether the speaker intends for the conduct to convey a “particularized message,” and (2) the “likelihood [is] great” that a reasonable third-party observer would understand the message. *Spence*, 418 U.S. at 410–11, 94 S.Ct. 2727; see *Johnson*, 491 U.S. at 404, 109 S.Ct. 2533; *Coleman*, 230 Ariz. at 358 ¶ 19, 284 P.3d at 869 (discussing the *Spence-Johnson* test).

[21] ¶62 Courts do not apply the *Spence-Johnson* test to pure speech. For example, in *Hurley*, the Court stated that “a narrow, succinctly articulable message is not a condition of constitutional protection” for expression such as the “painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” 515 U.S. at 569, 115 S.Ct. 2338; see also *Anderson*, 621 F.3d at 1060 (citing *Hurley* for the proposition that the *Spence-Johnson* test does not apply to pure speech); *Coleman*, 230 Ariz. at 359 ¶ 27, 284 P.3d at 870 (citing *Hurley* for the proposition that the *Spence-Johnson*

test “does not apply to paintings and music”); *Klein v. Or. Bureau of Labor & Indus.*, 289 Or.App. 507, 410 P.3d 1051, 1069–70 (2017) (citing *Hurley* for the proposition that “a particularized, discernible message is not a prerequisite for First Amendment protection” for various forms of pure speech, such as art, music, and video games), *vacated and remanded for further consideration*, — U.S. —, 139 S. Ct. 2713, — L.Ed.2d — (2019) (mem.).

*13 ¶63 Likewise, in *Coleman*, we stated that “purely expressive activity,” or pure speech, “is entitled to full First Amendment protection,” but “conduct with an expressive component” is only protected if it satisfies the *Spence-Johnson* test. *Coleman*, 230 Ariz. at 358 ¶ 19, 284 P.3d at 869 (quoting *Anderson*, 621 F.3d at 1059); *see also* *Anderson*, 621 F.3d at 1060 (holding that pure speech is protected “without relying on the *Spence-Johnson* test”); *Jucha*, 63 F. Supp. 3d at 827 (holding that “where the case involves purely expressive works of art or other expressive media, it is not appropriate to apply *Spence*”); *cf.* *Klein*, 410 P.3d at 1070 n.8 (stating that “as we understand the Supreme Court to have held[], because the creation of artwork and other inherently expressive acts are unquestionably undertaken for an expressive purpose, they need not express an articulable message to enjoy First Amendment protection”).

2. Business Activity

[22] ¶64 Generally, there is no free speech protection for non-expressive business activities. *See Coleman*, 230 Ariz. at 360 ¶ 31, 284 P.3d at 871 (stating that “generally applicable laws, such as taxes, health regulations, or nuisance ordinances, may apply to” expressive businesses); *see also* *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 139–40, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969) (holding that there is no First Amendment protection for newspaper publishing companies that engage in specific monopolistic commercial practices that violate antitrust laws); *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 192–93, 66 S.Ct. 494, 90 L.Ed. 614 (1946) (holding that the Fair Labor Standards Act applies to all business and that there is no First Amendment

exemption from the Act for newspaper publishing and distribution companies).

[23] ¶65 However, some businesses, like tattoo studios and video game companies, do create and sell products that are protected free speech. *Brown*, 564 U.S. at 790, 131 S.Ct. 2729 (video games); *Coleman*, 230 Ariz. at 355 ¶ 2, 284 P.3d at 866 (tattoos). For such products, both the finished product and the process of creating that product are protected speech. *Coleman*, 230 Ariz. at 360 ¶ 26, 284 P.3d at 871 (holding that “the process of tattooing is expressive activity”).

[24] ¶66 A business does not forfeit the protections of the First Amendment because it sells its speech for profit. As we stated in *Coleman*, the “degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away.” *Coleman*, 230 Ariz. at 360 ¶ 31, 284 P.3d at 871 (alteration in original) (quoting *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 756 n.5, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)).

Likewise, the Supreme Court stressed in *Riley* that “a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.” *Riley*, 487 U.S. at 801, 108 S.Ct. 2667; *see also* *Hurley*, 515 U.S. at 573–74, 115 S.Ct. 2338 (stating the right to autonomy of speech and freedom from compelled speech is “enjoyed by business corporations generally,” including “professional publishers”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) (holding that motion picture companies that operate for profit are “a form of expression whose liberty is safeguarded by the First Amendment”).

[25] ¶67 However, simply because a business creates or sells speech does not mean that it is entitled to a blanket exemption for all its business activities. Like other organizations and associations, no business “is likely ever to be exclusively engaged in expressive activities,” and even the most expressive business will be engaged in non-expressive business activities. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 635, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (O’Connor, J., concurring in part and in the judgment).

Thus, for example, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385–88,

390–91, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973), the Supreme Court held that while the First Amendment protected the content of articles published by a newspaper, it did not protect the newspaper’s facilitation of illegal hiring practices by publishing gender-specific employment advertisements. *See also* *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698–99, 705–06 & n.3, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (holding that adult bookstore owner, who allowed prostitution to be solicited on his business premises, was engaged in “ ‘nonspeech’ conduct” that “manifest[ed] absolutely no element of protected expression,” and stating that “First Amendment values may not be invoked by merely linking the words ‘sex’ and ‘books’ ”); *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (stating that while law firms may engage in free speech and freedom of association, there is no free speech protection to engage in discriminatory employment practices).

3. Plaintiffs’ Custom Wedding Invitations

*14 ¶68 Here, the First Amendment does not protect all of Plaintiffs’ business activities or products simply because they operate Brush & Nib as an “art studio.” However, Plaintiffs’ custom wedding invitations, and the process of creating them, are protected by the First Amendment because they are pure speech. Each custom invitation created by Duka and Koski contains their hand-drawn words, images, and calligraphy, as well as their hand-painted images and original artwork. Additionally, Duka and Koski are intimately connected with the words and artwork contained in their invitations. *See* *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (stating that protected speech involves communications that are “intimately connected” with the speaker). For each invitation, Duka and Koski spend many hours designing and painting custom paintings, writing words and phrases, and drawing images and calligraphy. Moreover, they insist on retaining artistic control over the ideas and messages contained in the invitations to ensure they are consistent with their religious beliefs.

¶69 In short, here, like tattoos and the process of tattooing in *Coleman*, Plaintiffs’ custom wedding invitations, and the creation of those invitations, constitute pure speech entitled to full First Amendment protection. 230 Ariz. at 359 ¶¶ 23, 26, 284 P.3d at 870.

¶70 The City argues, however, that Plaintiffs’ custom invitations do not implicate pure speech protection because they often only convey “logistical” information (such as date, time, and location) about a wedding. Thus, like the scheduling emails in *FAIR*, the City contends that Plaintiffs’ custom invitations do not implicate speech in a constitutionally relevant way.

¶71 We disagree. The City concedes that every custom invitation contains “language that is celebratory of the wedding.” Moreover, viewing the invitations as a whole, it is clear that Plaintiffs’ artwork, calligraphy, and hand-lettering is designed to express a celebratory message about each wedding. *See* *Riley*, 487 U.S. at 795–96, 108 S.Ct. 2667 (stating that courts view the expressive content of speech as a whole, and do not separately analyze each word and phrase); *cf.* *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338 (stating that a parade, as a form of expression, must be viewed as a whole, and cannot be reduced to “just motion” or simply the observable fact that it involves a group of people marching from one destination to another). Moreover, Plaintiffs’ inclusion of original artwork and celebratory words and phrases has an emotive impact on the overall message of the invitations. *See* *Cohen v. California*, 403 U.S. 15, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (stating that in analyzing speech, words “are often chosen as much for their emotive as their cognitive force,” and the emotional force “may often be the more important element of the overall message sought to be communicated”).

¶72 The City’s comparison of this case to *FAIR* is inapt. In *FAIR*, an association of law schools and law faculties challenged the constitutionality of the Solomon Amendment. 547 U.S. at 52–53, 126 S.Ct. 1297. That law required the Department of Defense to deny federal funding to any institution of higher education, including law schools, that prohibited military recruiters from gaining access to campuses. *Id.* at 51–53, 126 S.Ct. 1297. Because Congress had adopted a “Don’t Ask, Don’t Tell” policy excluding gays and lesbians from serving in the military, *FAIR* objected, on free speech grounds, to providing the military access to their campuses for recruiting purposes. *See* *id.* at 52–53 & n.1, 126 S.Ct. 1297.

¶73 The Court rejected FAIR's free speech claim. Specifically, it concluded that FAIR's actions in denying or granting access to their campuses involved conduct, not speech. *Id.* at 62, 126 S.Ct. 1297. Additionally, the Court stated that the emails and notices FAIR sent to students advising them about the dates, times, and locations the military was on campus were "plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* Simply because FAIR used words "either spoken, written, or printed" as a means to grant access to their campuses did not transform FAIR's conduct into personal expression. See *id.* (citation omitted).

*15 ¶74 At bottom, the Court recognized that FAIR could not identify any personal expression or speech intimately connected with permitting access to a room on a law school campus. See *id.* at 63–65, 126 S.Ct. 1297; see also *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (holding that protected speech exists when the speaker is "intimately connected with the communication advanced"). The Court concluded that "the schools are not speaking when they host interviews and recruiting receptions" and that "a law school's decision to allow recruiters on campus is not inherently expressive." *FAIR*, 547 U.S. at 64, 126 S.Ct. 1297; see *Telescope Media Group v. Lucero*, 2019 WL 3979621 at *9 (8th Cir. Aug. 23, 2019) (stating that *FAIR* "was [] about the availability of a forum," and that the "Supreme Court upheld the law because it did not interfere with the law schools' expression or coopt their speech" because "[s]imply hosting recruiters was not speech"); see also *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76–78, 87–88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (rejecting compelled speech claim where the owner of a shopping center failed to identify any personal expression intimately connected with the shopping center and the challenged law merely required him to open his property to speakers without forcing him to speak).

¶75 This case bears no resemblance to *FAIR*. Here, Plaintiffs' custom wedding invitations, and the creation of those invitations, constitute pure speech; Plaintiffs use their original artwork, paintings, hand-drawn images, words, and calligraphy as a means of personal expression. In contrast, FAIR was not "intimately connected" with the empty interview rooms on their campuses, nor was it compelled

to create emails containing words, phrases, and artwork celebrating the military's presence on campus.

¶76 The City claims, however, that Plaintiffs' refusal is not really based on speech, but rather discriminatory conduct directed at a customer's sexual orientation. The dissent similarly, but incorrectly, asserts that Plaintiffs seek to decline products or services based merely on Plaintiffs disfavoring or disapproving of certain customers. But these arguments misstate Plaintiffs' position and are not supported by the record. Duka and Koski neither testified nor argue that their faith prohibits them from serving a customer based on their sexual orientation. Rather, Duka and Koski have testified that they are willing to serve any customer, regardless of status, and no contrary evidence has been presented. Additionally, the record contains no complaints against Plaintiffs for discriminating against customers based on their sexual orientation.

¶77 Nonetheless, the City argues that Plaintiffs' discriminatory intent is shown by the fact that, apart from one name, a custom invitation for a same-sex couple is identical to one for a heterosexual couple. We reject this rather myopic view of the invitations, which defies the very nature of speech and art. Speech must be viewed as a whole, and even one word or brush stroke can change its entire meaning. See *Cohen*, 403 U.S. at 26, 91 S.Ct. 1780; see also *Telescope Media Group*, 2019 WL 3979621 at *4 (stating that owners of wedding videography business did not create "simple recordings, the product of planting a video camera at the end of the aisle and pressing record. Rather, they intend to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage"). For example, in *Hurley*, the Supreme Court determined that one banner in a parade of 20,000 participants changed the expressive content of the entire parade. 515 U.S. at 560–61, 572–75, 115 S.Ct. 2338. Thus, for Duka and Koski, writing the names of two men or two women (even when the names could refer to either a male or female) clearly *does* alter the overall expressive content of their wedding invitations. Cf. *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) (stating that, in the context of expressive conduct, "[w]edding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community").

*16 ¶78 Ultimately, the City's analysis is based on the flawed assumption that Plaintiffs' custom wedding invitations are fungible products, like a hamburger or a pair of shoes.

They are not. Plaintiffs do not sell “identical” invitations to anyone; every custom invitation is different and unique. For each invitation, Duka and Koski create different celebratory messages, paintings and drawings; they also personally write, in calligraphy or custom hand-lettering, the names of the specific bride and groom who are getting married. In short, Plaintiffs do not create the same wedding invitation for *any* couple, regardless of whether the wedding involves a man and a woman *or* a same-sex couple.

[26] ¶79 Next, both the City and the dissent contend that while the custom invitations themselves may contain protected speech, Plaintiffs’ refusal to create them for, and sell them to, a customer for a same-sex wedding does not implicate speech. We disagree. The process of creating and selling pure speech, which undeniably involves decisions about what to create and what not to create, is protected by the First Amendment. [Coleman](#), 230 Ariz. at 359 ¶ 26, 360 ¶ 31, 284 P.3d at 870, 871 (holding that “the process of tattooing is expressive activity” and expressly rejecting a distinction between a business and the speech it creates); see [Brown](#), 564 U.S. at 792 n.1, 131 S.Ct. 2729 (stating that with respect to protection of free speech, “[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference.”); [Telescope Media](#), 2019 WL 3979621 at *5, 8 (rejecting the state’s argument that a public accommodation law only regulated wedding videography owners’ conduct, not their speech, and concluding that although “producing a video requires several actions, that, individually, might be mere conduct,” what was relevant for its free speech analysis “is that these activities come together to produce finished videos that are medi[a] for the communication of ideas.”) (internal quotations omitted); [Anderson](#), 621 F.3d at 1060, 1062–63 (holding that like the tattoo itself, both the process and business of tattooing are protected under the First Amendment); [White](#), 500 F.3d at 954 (holding that “an artist’s sale of his original artwork constitutes speech protected under the First Amendment” (emphasis added)); see also [Riley](#), 487 U.S. at 795–96, 108 S.Ct. 2667 (holding that both the contributions subsidizing free speech and the professional fundraiser’s solicitation efforts in raising those contributions must be examined “as a whole,” and, as a result, the test for “fully protected expression” must be applied to both); cf. [Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.](#), 502 U.S. 105, 108, 123, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (holding that a statute regulating

the income generated from books and other media by those accused or convicted of a crime constituted an impermissible regulation of speech).

¶80 The City also argues that because Plaintiffs’ refusal affects only same-sex couples, their refusal is essentially a proxy for discrimination based on sexual orientation. We disagree. The fact that Plaintiffs’ message-based refusal primarily impacts customers with certain sexual orientations does not deprive Plaintiffs of First Amendment protection.

For example, in [Hurley](#), the Council’s decision to exclude GLIB’s banner effectively excluded any other parade participants who may have wanted to express their pride in their sexual orientation by marching behind similar banners. But because the impact was based on *message*, not *status*, it was protected. See [Hurley](#), 515 U.S. at 572–76, 580–81, 115 S.Ct. 2338; see also [Boy Scouts of Am. v. Dale](#), 530 U.S. 640, 653–54, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (discussing [Hurley](#) and stating “that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner”); cf. [Masterpiece Cakeshop](#), 138 S. Ct. at 1723 (stating that if a wedding cake baker “refused to design a special cake with words or images celebrating the marriage ... that might be different from a refusal to sell any cake at all” and that “these details might make a difference”).

*17 ¶81 The City’s reliance on [Christian Legal Society v. Martinez](#), 561 U.S. 661, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010), and [Lawrence v. Texas](#), 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), is misplaced. Those cases stand for the proposition that a governmental regulation targeting a person’s sexual conduct is, in effect, a law that discriminates based on a person’s sexual orientation. See [Christian Legal Soc’y](#), 561 U.S. at 672, 675, 689, 130 S.Ct. 2971 (relying on [Lawrence](#) and concluding that there was no difference between an organization’s exclusion of individuals who engage in “unrepentant homosexual conduct” and exclusion of persons based on their sexual orientation); [Lawrence](#), 539 U.S. at 583, 123 S.Ct. 2472 (O’Connor, J., concurring in the judgment) (reasoning that “there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal” (citation omitted)).

¶82 Here, Plaintiffs' objection is based on neither a customer's sexual orientation nor the sexual conduct that defines certain customers as a class. Plaintiffs will make custom artwork for any customers, regardless of their sexual orientation, but will not, regardless of the customer, make custom wedding invitations celebrating a same-sex marriage ceremony. Thus, although Plaintiffs' refusal may, like *Hurley*, primarily impact same-sex couples, their decision is protected because it is not based on a customer's sexual orientation.

¶83 The City also claims that the invitations are the customer's speech, not Plaintiffs' speech. According to the City, because Plaintiffs include the information requested by the customer, they merely serve as a scribe, or conduit, for the customer's speech.

¶84 This argument is not supported by the record. Duka and Koski are involved in every aspect of designing and creating the invitations, and they retain substantial (if not complete) artistic control over the messages that are expressed in the invitations. See *supra* ¶¶ 9–14. Clearly, Duka and Koski are more than a “scribe” for the customer.


¶85 But more importantly, the fact that the invitations may contain the speech of both Plaintiffs and their customers does not mean that Plaintiffs' speech is unprotected. In *Hurley*, the Court rejected the government's argument that the parade did not include the personal expression of the Council because it incorporated speech originally created by others. See 515 U.S. at 569–70, 115 S.Ct. 2338. The Court stated that “First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication.” *Id.* at 570, 115 S.Ct. 2338; see also *Riley*, 487 U.S. at 794 n.8, 108 S.Ct. 2667 (stating that even though “the fund-raiser, not the charity, [was] the object of the regulation[, f]ining the fund-raiser” for its solicitation efforts to subsidize “speech for the charity has an obvious and direct relation to [not only] the charity's speech,” but also the fundraiser, who “has an independent First Amendment interest in the speech”).

¶86 Likewise, in *Coleman*, we recognized that “a tattoo reflects not only the work of the tattoo artist but also the self-expression of the person displaying the tattoo's relatively permanent image.” 230 Ariz. at 359 ¶ 25, 284 P.3d at 870.

Thus, we concluded that a tattoo is the protected speech of both the customer and the artist, even when the artist uses a standard message or design to create the tattoo. *Id.* at 358 ¶ 23, 360 ¶ 30, 284 P.3d at 869, 871; see also *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) (holding that tattoos display the message of both the artists and the customer); *Anderson*, 621 F.3d at 1062 (holding that “[a]s with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in expressive activity”).

*18 [27] ¶87 The City and the dissent make several other arguments, none of which is persuasive. For example, both the City and the dissent claim that, to an objective observer, the custom invitations do not necessarily convey a message which they describe as “endorsing” same-sex marriage. This argument, however, erroneously applies the *Spence-Johnson* test for expressive conduct to pure speech. See *supra* ¶¶ 61–63. Whether a third party is able to discern any articulable “message” in pure speech, especially artwork, is simply irrelevant in terms of whether it is protected under the First Amendment. Nothing illustrates this principle more clearly than *Coleman*. There, we held that tattoos are protected pure speech, even though, as a practical matter, the message or meaning of many tattoos may well be indecipherable to an objective observer. But, because the tattoos contained the personal expression of the *artist*, we held the tattoos were protected pure speech. 230 Ariz. at 358–59, 360 ¶¶ 18, 23–26, 30, 284 P.3d at 869–70, 871; see *supra* ¶¶ 63, 85–86.


¶88 In a related argument, the City and the dissent claim that if Plaintiffs have any protected speech rights in their invitations, it is limited to statements expressly “endorsing” or “supporting” same-sex marriage. This argument simply ignores Plaintiffs' right to refuse to create messages that “celebrate” a same-sex wedding. Possibly the dissent ignores this right because, as the City concedes, *every* custom invitation Plaintiffs create contains “language that is celebratory of the wedding.” *Supra* ¶ 11. And, of course, there is no legal justification for holding that free speech only protects messages that “endorse” or “support” same-sex weddings but not messages celebrating such weddings. Indeed, as the Supreme Court has stated, the right to free speech includes any “medium for the communication of ideas” that “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political



or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”  *Burstyn*, 343 U.S. at 501, 72 S.Ct. 777.

¶89 The City also argues that because the invitations are sold for profit, they are a form of commercial activity, not speech. But the fact that Plaintiffs sell the custom invitations for profit has no bearing on their First Amendment protection.

¶90 In a similar vein, the dissent claims that because Plaintiffs operate Brush & Nib as a public accommodation, their free speech rights must give way to the Ordinance. However, as we explain, *infra* ¶¶ 107, 153–54, public accommodation laws are not immune to the First Amendment.


[28] ¶91 The remaining arguments raised by the dissent are equally unavailing. For example, the dissent claims that there is no compelled speech because “nothing requires Brush & Nib to identify itself as the supplier of an invitation or precludes it from disclaiming that its sales constitute an endorsement of the beliefs of its customers.” *Infra* ¶ 201. However, the essence of free speech protection is a person’s autonomy over what to say and when to say it.

See  *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (stating that “protection of a speaker’s freedom would be empty” if “the government could require speakers to affirm in one breath that which they deny in the next.”) (brackets and citation omitted); *Telescope Media*, 2019 WL 3979621 at *9 (same). We fail to see how Plaintiffs’ autonomy over their speech is protected by requiring them to conceal their identity as artists and to disclaim any responsibility for creating artwork that contradicts their religious beliefs.

¶92 Additionally, by claiming that we “implausibly characterize[] [Plaintiffs’] commercially prepared wedding invitation as ‘pure speech,’ ” *infra* ¶ 183, the dissent creates a confusing and arbitrary line. For example, if, as we concluded in  *Coleman*, a business tattooing images such as skulls, snakes, and barbed wire fences on a person’s skin is creating pure speech (even if these images are based on standard designs and patterns), how is Plaintiffs’ creation of original paintings, artwork, and celebratory messages for their custom invitations not pure speech? See  230 Ariz. at 360 ¶ 30, 284 P.3d at 871.

*19 ¶93 Accordingly, we conclude that Plaintiffs’ custom wedding invitations, and the creation of those invitations, constitute protected pure speech.


C. Level of Scrutiny




[29] ¶94 Because the custom invitations are protected pure speech, we must determine whether the Ordinance violates Plaintiffs’ free speech rights. To make this determination, we must first decide what level of scrutiny applies to the Ordinance. This requires us to examine whether the Ordinance is a content-neutral or content-based regulation of speech, or merely a regulation of conduct.  *Turner Broad.*, 512 U.S. at 637, 642, 114 S.Ct. 2445 (stating that, after concluding cable programmers and operators were engaged in protected speech activities, a court must then decide whether the law regulates speech in a content-neutral or content-based way, which determines the appropriate level of scrutiny).



¶95 Plaintiffs assert that the Ordinance, as applied by the City, is content-based because it compels them to create custom invitations expressing messages that celebrate same-sex marriage. As a result, Plaintiffs contend the Ordinance is subject to strict scrutiny. In contrast, the City argues the Ordinance purely regulates discriminatory conduct, not speech, and therefore is subject to the rational basis test.

[30] [31] [32] ¶96 First, “laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”

 *Turner Broad.*, 512 U.S. at 643, 114 S.Ct. 2445; *see also*

 *Reed v. Town of Gilbert*, — U.S. —, 135 S. Ct. 2218, 2227, 192 L.Ed.2d 236 (2015). A law may also be content-based “if its manifest purpose is to regulate speech because

of the message it conveys.”  *Turner Broad.*, 512 U.S. at 645, 114 S.Ct. 2445. Content-based laws must satisfy strict scrutiny.  *Reed*, 135 S. Ct. at 2227. Thus, such laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”  *Id.* at 2226.

[33] ¶97 Second, content-neutral laws that regulate non-expressive conduct, and not speech, are subject to the rational basis test. See  *Coleman*, 230 Ariz. at 358 ¶ 19, 284 P.3d at 869 (stating that “if the conduct is not ‘sufficiently imbued with elements of communication,’ then the regulation need only be rationally related to a legitimate governmental interest” (quoting  *Anderson*, 621 F. 3d at 1059)).

[34] [35] ¶98 Third, content-neutral regulations “that impose an incidental burden on speech” are subject to intermediate scrutiny. *Turner Broad.*, 512 U.S. at 662, 114 S.Ct. 2445. Under intermediate scrutiny, a law is justified if: (1) “it furthers an important or substantial governmental interest,” (2) “the governmental interest is unrelated to the suppression of free expression,” and (3) any restriction on speech is incidental and “no greater than is essential” to further the government interest. *Id.* (quoting *O’Brien*, 391 U.S. at 377, 88 S.Ct. 1673).

[36] ¶99 Finally, a facially content-neutral law may, as applied to a particular plaintiff, operate as a content-based law. For example, in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010), a facially content-neutral statute that “generally function[ed] as a regulation of conduct” was, as applied to plaintiffs, a content-based statute because “the conduct triggering coverage under the statute consist[ed] of communicating a message.” See also *Masterpiece Cakeshop*, 138 S. Ct. at 1741 (Thomas, J., concurring) (stating that “[a]lthough public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech”); cf. *Dale*, 530 U.S. at 644, 120 S.Ct. 2446 (holding that a public accommodations law that was applied to force the Boy Scouts, in violation of their organizational values, to admit a gay man, who was a gay and lesbian rights advocate, violated their freedom of association under the First Amendment).

*20 ¶100 When a facially content-neutral law is applied by the government to compel speech, it operates as a content-based law. Thus, laws that “[m]andate[d] speech that a speaker would not otherwise make necessarily alters the content of the speech” and are therefore considered “content-based regulation[s] of speech.” *Riley*, 487 U.S. at 795, 108 S.Ct. 2667; see *Telescope Media*, 2019 WL 3979621 at *6 (stating that “[l]aws that compel speech or regulate it based on its content are subject to strict scrutiny”).

¶101 *Hurley* is instructive on this issue. In *Hurley*, the Court addressed a public accommodations law that did “not, on its face, target speech or discriminate on the basis of its content,” but focused on prohibiting “the act of discriminating against individuals in the provision of publicly available goods, privileges, and services.” 515 U.S. at

572, 115 S.Ct. 2338. However, the Court observed that the public accommodations law had been applied “in a peculiar way.” *Id.* Specifically, the law was not being applied to “address any dispute about the participation of openly gay, lesbian, or bisexual individuals” in the parade. *Id.* Indeed, like Plaintiffs here, the Council “disclaim[ed] any intent to exclude homosexuals as such, and no individual member of GLIB claim[ed] to have been excluded from parading as a member of any group that the Council ha[d] approved to march.” *Id.* Rather, because GLIB’s banner affected the expressive content of their parade, *Hurley* concluded that the “application of the statute produced an order essentially requiring [the Council] to alter the expressive content of their parade,” and therefore “had the effect of declaring the sponsors’ speech itself to be the public accommodation.” *Id.* at 572–73, 115 S.Ct. 2338. As a result, the Court held that the public accommodations law, as applied to the Council’s parade, was unconstitutional because it compelled the Council “to modify the content of their expression.” *Id.* at 578, 115 S.Ct. 2338; see also *Riley*, 487 U.S. at 795, 108 S.Ct. 2667 (holding that law was content-based because it “[m]andate[d] speech that a speaker would not otherwise make”); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (holding that city’s public accommodations law as applied to plaintiffs compelled speech in violation of the First Amendment); cf. *Klein*, 410 P.3d at 1069 (recognizing public accommodation law may be “subject to strict scrutiny” if it was applied “to require the creation of pure speech or art”).

¶102 Here, the Ordinance, like other public accommodations laws, prohibits businesses from denying access to equal goods and services to certain protected groups. Thus, by its terms, the Ordinance is a facially content-neutral law that generally targets discriminatory conduct, not speech. See *Hurley*, 515 U.S. at 572, 115 S.Ct. 2338; see also *Masterpiece Cakeshop*, 138 S. Ct. at 1741 (Thomas, J., concurring) (stating that “public-accommodations laws generally regulate conduct”). Additionally, there is no evidence that the purpose of the Ordinance is to regulate speech.

¶103 However, the Ordinance, as applied to Plaintiffs’ custom wedding invitations, operates as a content-based law. Under the City’s application of the Ordinance, Duka and Koski face the threat of criminal prosecution, jail, fines, or closure

of their business if they refuse to create custom invitations celebrating same-sex weddings. Thus, based on its onerous penalties, the Ordinance coerces Plaintiffs into abandoning their convictions, and compels them to write celebratory messages with which they disagree, such as “come celebrate the wedding of Jim and Jim,” or “share in the joy of the wedding of Sarah and Jane.” See *Telescope Media*, 2019 WL 3979621 at *6 (holding that state public accommodations law operated as a content-based regulation of owners’ wedding video business “[b]y treating the [owners’] choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages”). In short, like *Hurley*, the City’s application of the Ordinance in this case essentially declares Plaintiffs’ “speech itself to be the public accommodation.”

Hurley, 515 U.S. at 572–73, 115 S.Ct. 2338.

*21 ¶104 Accordingly, because the Ordinance “necessarily alters the content” of Plaintiffs’ speech by forcing them to engage in speech they “would not otherwise make,” it must survive strict scrutiny. *Riley*, 487 U.S. at 795, 108 S.Ct. 2667.

D. Applying Strict Scrutiny

[37] [38] ¶105 Under the strict scrutiny test, the City has the burden of showing that the Ordinance (1) furthers a compelling government interest and (2) is narrowly tailored to achieve that interest. *NIFLA*, 138 S. Ct. at 2371.






¶106 The Ordinance generally serves the compelling interest of ensuring equal access to publicly available goods and services for all citizens, regardless of their status. See *Jaycees*, 468 U.S. at 624, 104 S.Ct. 3244 (holding that the state’s “strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services ... plainly serves compelling state interests of the highest order”). However, that interest is not sufficiently overriding as to justify compelling Plaintiffs’ speech by commandeering their creation of custom wedding invitations, each of which expresses a celebratory message, as the means of eradicating society of biases.





¶107 In *Hurley*, the Supreme Court rejected any suggestion that a public accommodations law could justify

compelling speech. The Court explained that although the government may prohibit “the act of discriminating against individuals in the provision of publicly available goods, privileges, and services,” it may not “declar[e] [another’s] speech itself to be [a] public accommodation” or grant “protected individuals ... the right to participate in [another’s] speech.” 515 U.S. at 572–73, 115 S.Ct. 2338. The Court observed that it may be argued “that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases,” and therefore “[r]equiring access to a speaker’s message would thus be not an end in itself, but a means to produce speakers free of the biases.” *Id.* at 578–79, 115 S.Ct. 2338. The Court concluded, however, that “if this indeed is the point of applying the [public accommodations] law to expressive conduct, it is a decidedly fatal objective,” because “[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Id.* at 579, 115 S.Ct. 2338; see *Telescope Media*, 2019 WL 3979621 at *7 (stating that “[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution. And as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment”).



¶108 Accordingly, like *Hurley*, the City has failed to demonstrate that the Ordinance, as applied to Plaintiffs’ creation of custom wedding invitations, furthers a compelling governmental interest.

¶109 The dissent claims, however, that *Hurley* is “inapposite” because the compelled speech violation there involved the application of a public accommodations law to a privately organized parade, not a for-profit public accommodation like Brush & Nib. But *Hurley* made no such distinction. To the contrary, the Court stated that the right to autonomy of speech and freedom from compelled speech is “enjoyed by business corporations generally,” including “professional publishers.” *Hurley*, 515 U.S. at 573–74, 115 S.Ct. 2338. Indeed, as noted above, *supra* ¶ 101, what the Court considered “peculiar” was not the application of the public accommodations law to a privately organized parade, but application of the law to compel speech. 515 U.S. at 572–73, 115 S.Ct. 2338. Consistent







with  *Hurley*, the Supreme Court has never limited the compelled speech doctrine to non-profit organizations and has, on many occasions, applied that doctrine to for-profit businesses. See  *Pac. Gas & Elec. Co.*, 475 U.S. at 6–7, 16–17, 106 S.Ct. 903 (applying the compelled speech doctrine to a for-profit, privately-owned utility);  *Miami Herald Publ'g Co.*, 418 U.S. at 244, 256–58, 94 S.Ct. 2831 (applying the compelled speech doctrine to a newspaper company); see also  *Coleman*, 230 Ariz. at 360 ¶ 31, 284 P.3d at 871 (“[T]he degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away.” (alterations in original) (quoting  *Plain Dealer Publ'g*, 486 U.S. at 756 n.5, 108 S.Ct. 2138)); *Telescope Media*, 2019 WL 3979621 at *5–9 (applying the compelled speech doctrine to a for-profit, privately owned wedding video business operating as a public accommodation).

*22 [39] [40] ¶110 Additionally, because the purpose of the Ordinance is to regulate conduct, not speech, regulating Plaintiffs’ speech is not narrowly tailored to accomplish this goal. As the Court stated in  *Riley*, “government regulation of speech must be measured in minimums, not maximums,” and that in seeking to promote a valid government interest, it should avoid adopting “a prophylactic rule of compelled speech” that is “unduly burdensome and not narrowly tailored.”  487 U.S. at 790, 798, 108 S.Ct. 2667; see also  *Pac. Gas & Elec. Co.*, 475 U.S. at 19, 106 S.Ct. 903 (holding that a regulation was not “a narrowly tailored means of serving a compelling state interest” because, although “[t]he State’s interest in fair and effective utility regulation may be compelling[,] ... the State can serve that interest through means that would not violate appellant’s First Amendment rights”);  *NAACP v. Button*, 371 U.S. 415, 433, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (“Because First Amendment freedoms need breathing space to survive, ... [b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” (citations omitted)).

¶111 We therefore conclude that because the Ordinance as applied to Plaintiffs’ creation of custom wedding invitations cannot survive strict scrutiny, the Ordinance runs afoul of the First Amendment, which “necessarily implies” a violation of

Plaintiffs’ broader free speech right under [article 2, section 6 of the Arizona Constitution](#).  *Coleman*, 230 Ariz. at 361 ¶ 36 n.5, 284 P.3d at 872; see also  *Mountain States*, 160 Ariz. at 358, 773 P.2d at 463.

¶112 The City’s concern that our decision will undermine the antidiscrimination purpose of the Ordinance, or that it will encourage other businesses to use free speech as a pretext to discriminate against protected groups, is unwarranted. Our holding today is limited to Plaintiffs’ creation of one product: custom wedding invitations that are materially similar to the invitations contained in the record. *Supra* ¶ 3. These invitations, unlike most commercial products and services sold by public accommodations, are unique because they consist of protected pure speech.

¶113 Nothing in our holding today allows a business to deny access to goods or services to customers based on their sexual orientation or other protected status. See *Telescope Media*, 2019 WL 3979621 at *10 (holding that, although the state public accommodations law must give way to the owners’ free speech rights to refuse to create videos celebrating same-sex marriage, this holding “leaves intact other applications of the [law] that do not regulate speech based on its content or otherwise compel an individual to speak.”). Additionally, the dissent’s claim that our holding conflicts with cases such as  *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964), and  *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941 (D. S.C. 1966), *aff’d in part and rev’d in part on other grounds*,  377 F.2d 433 (4th Cir. 1967), *aff’d as modified on other grounds*,  390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (per curiam), is incorrect. Those cases did not involve compelled speech, but rather business owners who refused to serve African-Americans based solely on their race, a practice Plaintiffs expressly condemn, and that our holding clearly neither permits nor condones. See  *Heart of Atlanta*, 379 U.S. at 244, 261–62, 85 S.Ct. 348 (upholding constitutionality of Title II of the Civil Rights Act as applied to hotels and motels, against challenges under the commerce, due process, and takings clauses and the Thirteenth Amendment);  *Newman*, 256 F. Supp. at 944 (holding that Title II of the Civil Rights Act prohibited an owner of a restaurant from refusing to serve African-Americans).

E. Other Jurisdictions

¶114 Finally, the City claims that several decisions from other jurisdictions support its application of the Ordinance. These decisions, however, are either distinguishable or not persuasive.

¶115 For example, in *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59–60 ¶ 7 (N.M. 2013), the owners of a commercial photography business refused, on religious grounds, to provide photography services for a same-sex wedding. But there, the court determined that the public accommodations law was not being applied to speech, but solely to the owners' conduct in operating their photography business. *Id.* at 66 ¶¶ 34–35, 68 ¶¶ 41–43. However, we have—as has the United States Supreme Court—expressly rejected this distinction between a business and the speech that it creates. *Coleman*, 230 Ariz. at 360 ¶ 31, 284 P.3d at 871; *supra* ¶ 65.

*23 ¶116 *Elane Photography* also held that the compelled speech doctrine did not apply to the owners because they operated their business as a public accommodation that sold their photographs for profit. 309 P.3d at 65–66 ¶ 33. Specifically, the court stated that “[t]he United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation,” and that the Court has limited the doctrine cases where the “states have applied their public accommodation laws to free-speech events such as privately organized parades, and private membership organizations.” *Id.* at 65–66. However, as noted above, the Supreme Court has never limited the compelled speech doctrine to non-profit organizations, nor has it held that public accommodation laws are immune from the First Amendment. *See supra* ¶ 107.

¶117 The City's reliance on *Gifford v. McCarthy*, 137 A.D.3d 30, 23 N.Y.S.3d 422 (2016), is also misplaced. There, the owners of a wedding venue (a farm) refused to rent it to a same-sex couple for their wedding ceremony. *Id.* at 426. Thus, unlike this case, *Gifford* did not address compelled pure speech, but rather conduct in denying access to a location. And, like *FAIR*, the owners could not identify

any personal expression intimately connected with permitting access to the buildings and open fields on their farm. *Id.* at 431–32.

¶118 *State v. Arlene's Flowers, Inc.*, 187 Wash.2d 804, 389 P.3d 543 (2017), *vacated and remanded*, *Arlene's Flowers, Inc. v. Washington*, — U.S. —, 138 S. Ct. 2671, 201 L.Ed.2d 1067 (2018) (mem.)¹, and *Klein*, 410 P.3d 1051, are distinguishable. In those cases, the owners' activities arguably implicated the expressive conduct doctrine, not pure speech. *Klein*, 410 P.3d at 1065, 1074 (cakes); *Arlene's Flowers*, 389 P.3d at 557–59 ¶¶ 41–47 & n.13 (floral arrangements). And, consistent with our conclusion, both cases acknowledged, at least impliedly, that words and paintings are forms of pure speech that cannot be compelled. *Klein*, 410 P.3d at 1069–70 (stating that the public accommodations law may have been subject to strict scrutiny if the owners had been creating pure speech, such as music, poetry, sculpture, and art); *Arlene's Flowers*, 389 P.3d at 559 ¶ 47 n.13 (stating that plaintiff's floral arrangements do not implicate free expression rights associated with other “forms of pure expression” like tattoos).

¶119 Finally, another case cited by the City, *Telescope Media Group v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017), was, with respect to the issues relevant here, recently reversed in part by the Eighth Circuit Court of Appeals. *Telescope Media Group*, 2019 WL 3979621.

¶120 In sum, these decisions from other jurisdictions regarding wedding vendors are either distinguishable or unpersuasive. We therefore hold that the Ordinance's application to Plaintiffs' custom wedding invitations violates article 2, section 6 of the Arizona Constitution. Accordingly, as to Plaintiffs' creation of that particular product, the trial court erred in granting summary judgment in favor of the City and denying Plaintiffs' motion for summary judgment on that claim.

IV.

*24 ¶121 In conjunction with their free speech claim, Plaintiffs also allege a free exercise claim under FERA, A.R.S. § 41-1493.01. Like their free speech claim, Plaintiffs' FERA claim is based on compelling a message with which

they disagree. As Christians, Plaintiffs seek to freely exercise their religion by expressing messages that are consistent with their faith, as well as refusing to express messages that are inconsistent with their faith. However, according to Plaintiffs, the Ordinance violates their free exercise protection under FERA because it forces them to create custom wedding invitations celebrating same-sex marriages, in contradiction of their religious belief that marriage can only be between one man and one woman.

¶122 In analyzing Plaintiffs' free exercise claim, it is important to understand the history of FERA. Prior to the United States Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court assessed, on a case-by-case basis, the burdens that generally applicable laws placed on a person's free exercise of religion in cases such as *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). See *Smith*, 494 U.S. at 881–82, 884–85, 110 S.Ct. 1595; see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). *Smith*, however, changed the Court's free exercise framework by holding that "the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws." *O Centro*, 546 U.S. at 424, 126 S.Ct. 1211.

¶123 In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4). See *O Centro*, 546 U.S. at 424, 126 S.Ct. 1211. Congress found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* at 439, 126 S.Ct. 1211 (quoting § 2000bb(a)(2)). As a result, RFRA provides that the government may not substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." *Id.* at 424, 126 S.Ct. 1211 (quoting § 2000bb-1(a)).

[41] ¶124 Although RFRA remains operative as to the federal government, see *Guam v. Guerrero*, 290 F.3d 1210, 1220–22 (9th Cir. 2002), it was declared unconstitutional as to state laws; as a result, no state law claim is available under RFRA. See *City of Boerne v. Flores*, 521 U.S. 507, 534–36, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); see also *State v. Hardesty*, 222 Ariz. 363, 365 ¶ 7 n.6, 214 P.3d 1004, 1006 (2009). Thus, following the Supreme Court's decision in *Boerne*, in 1999, the Arizona Legislature passed FERA "to protect Arizona citizens' right to exercise their religious beliefs free from undue governmental interference." *Hardesty*, 222 Ariz. at 365 ¶ 8, 214 P.3d at 1006; see 1999 Ariz. Sess. Laws, ch. 332, § 2 (1st Reg. Sess.) [hereinafter FERA Sess. Law].

¶125 Like RFRA, FERA created a rule based on the Supreme Court's pre-*Smith* framework. See FERA Sess. Law § 2(A)(6) (stating the test "as set forth in the federal cases of *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), is a workable test for striking sensible balances between religious liberty and competing government interests"). Consistent with this pre-*Smith* framework, FERA provides that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." § 41-1493.01(B); see also *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007; cf. *Yoder*, 406 U.S. at 220, 92 S.Ct. 1526 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

*25 ¶126 Here, Plaintiffs concede the Ordinance is a facially neutral law of general applicability. See *Hardesty*, 222 Ariz. at 365 ¶ 7 n.6, 214 P.3d at 1006; see also *Smith*, 494 U.S. at 881–82, 110 S.Ct. 1595. As a result, their free exercise claim is based solely on FERA.

A. FERA Analysis

¶127 FERA establishes a two-step process. First, the party raising a free exercise claim must prove that: (1) their action

or refusal to act is motivated by a religious belief, (2) the religious belief is sincerely held, and (3) the government's regulation substantially burdens the free exercise of their religious beliefs. *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007; see also A.R.S. § 41-1493(2); § 41-1493.01(B). If the claimant proves these elements, then the burden shifts to the government to show that the law (1) furthers a compelling governmental interest and (2) is the "least restrictive means of furthering that compelling governmental interest." § 41-1493.01(C)(1)–(2); see also *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007. Because the text and requirements of FERA and RFRA are nearly identical, we rely on cases interpreting RFRA as persuasive authority in construing the requirements of FERA. *Hardesty*, 222 Ariz. at 367 ¶ 13 n.7, 214 P.3d at 1008.

1. Religious Belief

[42] [43] ¶128 A free exercise claim under FERA must be based on a religious belief. A.R.S. § 41-1493(2) (defining the "[e]xercise of religion" as "the ability to act or refusal to act in a manner substantially motivated by a religious belief"); *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007; cf. *Yoder*, 406 U.S. at 215, 92 S.Ct. 1526 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation ... if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."). To satisfy this element, a claimant need not prove that a belief is a central tenet of her faith. § 41-1493(2) (stating that under FERA, a claimant is not required to show that one's religious exercise "is compulsory or central to a larger system of religious belief").

¶129 Here, it is undisputed that Plaintiffs' "refusal to act," that is, declining to express messages in their custom invitations celebrating same-sex weddings, is substantially motivated by Duka and Koski's religious belief that marriage is only between a man and a woman.

2. Sincerity of Belief

¶130 The City also concedes that Duka and Koski's religious beliefs about same-sex marriage are sincere. Duka and Koski base their beliefs on the Bible and the shared traditions and practices of Christians. Cf. *Yoder*, 406 U.S. at 216, 92 S.Ct.

1526 ("[T]he traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world.'").

3. Substantial Burden

[44] [45] ¶131 Once a court determines that a party has a sincere religious belief, it must examine whether the government's regulation imposes a substantial burden on the party's free exercise of that belief. *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007; see also A.R.S. §§ 41-1493(2), -1493.01(B). Not every burden is substantial; FERA provides that "trivial, technical or de minimis infractions" do not substantially burden a person's free exercise of religion. § 41-1493.01(E); see *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008) (stating that under RFRA, a government regulation that merely offends a person's "religious sensibilities" is not a substantial burden of free exercise of religion). Thus, under the pre-*Smith* framework adopted by FERA, a substantial burden exists only when government action "forces" individuals "to choose between following the precepts of [their] religion" and receiving a government benefit, *Sherbert*, 374 U.S. at 404, 83 S.Ct. 1790, or it "compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs," *Yoder*, 406 U.S. at 218, 92 S.Ct. 1526; see also *Navajo Nation*, 535 F.3d at 1069–70 (applying the substantial burden framework set forth in *Yoder* and *Sherbert* to RFRA, and observing that a threat of civil sanctions may also constitute a substantial burden).

*26 ¶132 *Yoder* is instructive on this issue. In *Yoder*, members of the Old Order Amish were convicted of violating Wisconsin's compulsory school attendance law because they refused to send their children to high school after completing eighth grade. *Yoder*, 406 U.S. at 207–08, 92 S.Ct. 1526. The Amish parents believed that sending their children to a public high school "was contrary to the Amish religion

and way of life.” *Id.* at 209, 92 S.Ct. 1526. The Supreme Court concluded that the statute placed a substantial burden on the parents’ free exercise of religion. *Id.* at 218, 92 S.Ct. 1526. The Court reasoned that the statute “affirmatively compel[led] [Amish parents], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.” *Id.*; see also *id.* at 237, 92 S.Ct. 1526 (Stewart, J., concurring) (“This case involves the constitutionality of imposing criminal punishment upon Amish parents for their religiously based refusal to compel their children to attend public high schools. Wisconsin has sought to brand these parents as criminals for following their religious beliefs, and the Court today rightly holds that Wisconsin cannot constitutionally do so.”); cf. *Smith*, 494 U.S. at 898, 110 S.Ct. 1595 (O’Connor, J., concurring in the judgment) (“A State that makes criminal an individual’s religiously motivated conduct burdens that individual’s free exercise of religion in the severest manner possible, for it ‘results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.’” (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961))).

¶133 Similarly, in *Hobby Lobby*, the Supreme Court addressed whether a Health and Human Services (“HHS”) regulation substantially burdened the free exercise of religion under RFRA for the owners of three for-profit corporations. *Id.* 573 U.S. at 688–91, 134 S.Ct. 2751. The owners, who opposed abortion on religious grounds, objected to the regulation because it required them to provide employee health care coverage for certain methods of birth control. *Id.* at 691, 134 S.Ct. 2751. Because the owners viewed these birth control procedures as a form of abortion, they refused to comply with the regulation. *Id.* at 691, 701, 134 S.Ct. 2751. However, by violating the regulation, the owners faced severe financial penalties and assessments which, in some instances, totaled hundreds of millions of dollars. *Id.* at 720, 134 S.Ct. 2751.





¶134 The Court concluded that these financial sanctions and penalties clearly imposed a substantial burden on the owners’ exercise of their religious beliefs. *Id.* at 726, 134 S.Ct. 2751. Indeed, although the owners were not required to actively participate in the objectionable procedures (all






of those decisions were made independently by a female employee upon consulting with her physician), the Court held that “[b]ecause the contraceptive mandate forces them to pay an enormous sum of money ... if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.” *Id.*; cf. *Holt v. Hobbs*, 574 U.S. 352, 135 S.Ct. 853, 860, 862–63, 190 L.Ed.2d 747 (2015) (holding that under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which “mirrors” RFRA in the context of free exercise claims made by prisoners, the Department of Corrections’ grooming policy, which threatened a prisoner with disciplinary action if he grew a beard as dictated by his Muslim faith, substantially burdened the prisoner’s free exercise of religion).

¶135 Here, the coercion the Ordinance places on Plaintiffs to abandon their religious belief is unmistakable. The Ordinance, as applied by the City, presents Plaintiffs with a stark choice. On one hand, they can choose to forsake their religious convictions and create wedding invitations celebrating same-sex marriage. But, on the other hand, if they choose to remain faithful to their beliefs and violate the Ordinance by refusing to make such invitations, they face severe civil and criminal sanctions. Indeed, for every *day* Duka and Koski are in violation of the Ordinance, they may be ordered to serve up to six months in jail. *See* §§ 1-5; 18-4(B); 18-7(A). Thus, for example, if Plaintiffs post their proposed Statement on their website for a month, Duka and Koski could face up to *fifteen years* in jail. *See id.* Even if placed on probation, Plaintiffs face a possible fine of \$2,500; for a continuing violation, the fine could be tens of thousands of dollars. *Id.* §§ 1-5, 18-4(B). Alternatively, the City has the authority under the Ordinance’s nuisance provision to simply shut down Duka and Koski’s business altogether. *See id.* § 1-5.


*27 ¶136 Despite the clear coercive effect of the Ordinance, the City claims that requiring Duka and Koski to create custom invitations for same-sex weddings does not place any burden on their exercise of their religious beliefs. Specifically, the City argues that Duka and Koski’s “religion says nothing about making wedding invitations,” and the act of creating a wedding invitation is too attenuated from their beliefs about marriage to place any burden, much less a substantial burden, on their free exercise of religion.



¶137 This argument is neither novel nor new. The United States Supreme Court rejected precisely the same argument



in  *Hobby Lobby*. There, in addressing the owners' RFRA claim, the Court stated that the government's main argument was "that the connection between what the [owners] must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated."  573 U.S. at 723, 134 S.Ct. 2751. The Court stated, however, that "[t]his argument dodges the question" of whether the regulation imposed "a substantial burden on the ability of the [owners] to conduct business in accordance with *their religious beliefs*."  *Id.* at 724, 134 S.Ct. 2751. Rather, the Court observed that the government's argument raised "a very different question that the federal courts have no business addressing": "whether the religious belief asserted in a RFRA case is reasonable."  *Id.*

¶138 In rejecting this "reasonableness" argument, the Court focused on the fact that the owners "believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage."  *Id.* The Court stressed that in addressing whether the regulation posed a substantial burden on the owners' religious beliefs, its "narrow function" was not to determine whether the owners' beliefs were "flawed," but whether "the line drawn [by the owners] reflects 'an honest conviction.'"  *Id.* at 724–25, 134 S.Ct. 2751 (alteration in original) (citation omitted). Thus, with this framework in mind, the Court concluded that the regulation imposed a substantial burden on the owners' free exercise of religion because they "sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial."  *Id.* at 725, 134 S.Ct. 2751; cf.  *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (stating that the government is "obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of" a person's religious beliefs, and "[i]t hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for [a person's] conscience-based objection is legitimate or illegitimate"); cf.  *Dale*, 530 U.S. at 651, 653, 120 S.Ct. 2446 (stating that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally


inconsistent," and therefore, "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression").


¶139 Thus, based on  *Hobby Lobby*, we reject the City's invitation to assess the reasonableness of Duka and Koski's sincerely held religious beliefs. This is not a proper consideration in determining whether the Ordinance places a substantial burden on their right to free exercise of religion.


*28 [46] ¶140 By adhering to  *Hobby Lobby*, we do not, as the dissent claims, eliminate the substantial burden element from the FERA analysis. Rather, we follow the well-established rule that courts may not, under the guise of conducting a substantial burden analysis, examine the reasonableness of a person's belief.  573 U.S. at 724, 134 S.Ct. 2751. This deference does not, of course, dispose of the court's legal duty under FERA to determine whether a law places a substantial burden on a person's religious belief. As we note above, that element is satisfied here because the Ordinance coerces Plaintiffs into violating their belief. *Supra* ¶¶ 131–35.

¶141 However, the dissent seeks to evade the coercive effect of the Ordinance by attempting to refocus the substantial burden analysis on whether Plaintiffs' *belief* is substantial. This argument, however, is nothing more than a repackaging of the City's reasonableness argument. For example, the dissent contends that Plaintiffs' adherence to their belief is flawed and inconsistent. *Infra* ¶¶ 208–09. However, by making this argument the dissent crosses the line drawn by  *Hobby Lobby*, which prohibits a court from examining the alleged flaws or inconsistencies of a person's beliefs while engaging in a substantial burden analysis.  573 U.S. at 724–25, 134 S.Ct. 2751.

¶142 The dissent also asserts that Plaintiffs have failed to identify any "fundamental tenet" of their faith prohibiting them from creating the subject invitations. Of course, under FERA, Plaintiffs are not required to show that their belief is a "fundamental" tenet of their faith. A.R.S. § 41-1493(2). Moreover, this argument ignores the record, which clearly shows that Plaintiffs *do* have a fundamental, sincere belief that they cannot, consistent with their faith, create custom wedding invitations celebrating a same-sex marriage. *See supra* ¶¶ 15–16.

¶143 Next, citing  *Hobby Lobby* as authority, the dissent claims that no substantial burden exists here because the Ordinance does not require Plaintiffs to participate in same-sex weddings. *Infra* ¶ 226, 228 (Timmer, J., dissenting).

However, the dissent's reliance on  *Hobby Lobby* is misplaced. There, the HHS regulation did not require the owners to actually attend or perform an abortion, nor did it require them to approve or be involved in an employee's decision to undergo such a procedure; rather, the Court determined that simply providing insurance coverage for these procedures was sufficient to impose a substantial burden. *See supra* ¶ 134. Here, by comparison, the Ordinance compels similar, if not greater "participation" from Plaintiffs in a same-sex wedding. For example, the Ordinance forces Plaintiffs to *personally* write, paint and create artwork celebrating a same-sex wedding. Additionally, it requires them to design and create invitations that enable and facilitate the attendance of guests at a same-sex wedding. *Cf.*

 *Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring in part and in the judgment) ("Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message he believes his faith forbids.").

¶144 Finally, the dissent argues that the Ordinance "itself" does not place a substantial burden on Plaintiffs' belief. *Infra* ¶ 223 (Timmer, J., dissenting). Specifically, the dissent claims that the Ordinance does not prohibit Plaintiffs from expressing their religious beliefs about same-sex marriage, and, therefore, the penalty provisions of the Ordinance are irrelevant to the substantial burden analysis. *Id.*





*29 ¶145 This argument simply reasserts the dissent's position that the Ordinance only applies to discriminatory conduct, not speech. We disagree. The Ordinance, as applied by the City, compels Plaintiffs to express a message celebrating same-sex marriage that violates their religious belief. If they refuse to abandon their belief, they violate the Ordinance and face the threat of severe criminal and civil sanctions. This is the very definition of a substantial burden.

¶146 Accordingly, as applied to Plaintiffs' custom wedding invitations, the Ordinance substantially burdens the free exercise of Duka and Koski's religious beliefs.

B. City's Burden

[47] ¶147 Because Plaintiffs have satisfied their burden under FERA, the City bears the burden of showing that the Ordinance (1) furthers a compelling governmental interest, and (2) is the least restrictive means to further that compelling interest. A.R.S. § 41-1493.01(C); *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007.

¶148 As noted above, the Ordinance generally serves the compelling purpose of eradicating discrimination in the provision of publicly available goods and services. *Supra* ¶ 106. However, like Plaintiffs' rights to free speech, that interest is not sufficiently overriding to force Plaintiffs to create custom wedding invitations celebrating same-sex marriage in violation of their sincerely held religious beliefs.

[48] [49] [50] ¶149 We also conclude that the Ordinance's application to Plaintiffs in this case is not the least restrictive means of furthering its asserted governmental interest. Under the least restrictive means test, the government must "show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]."  *Hobby Lobby*, 573 U.S. at 728, 134 S.Ct. 2751. To prove this element, the government is not required to show that no less restrictive means is "conceivable," but only that the proposed alternatives are "ineffective or impractical." *Hardesty*, 222 Ariz. at 368 ¶ 21, 214 P.3d at 1009. This is a focused inquiry, requiring the government to "establish that applying the law in the particular circumstances is the least restrictive means." *Id.* at 367 ¶ 14, 214 P.3d at 1008 (emphasis added). As part of this analysis, a court must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."  *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211; *see also*  *Holt*, 135 S. Ct. at 864 (stating that under RFRA, the government must prove that denying a religious "exemption is the least restrictive means of furthering a compelling governmental interest"). This includes considering the harm an exemption may have on benefits the law confers on third parties.  *Hobby Lobby*, 573 U.S. at 729 n.37, 134 S.Ct. 2751.

¶150 The City has not carried its heavy burden. Applying the Ordinance to regulate Duka and Koski's personal expression of their religious beliefs in their custom wedding invitations

is not the least restrictive means to accomplish the goal of the Ordinance. Rather, as we have noted above, the purpose of the Ordinance is properly served by permitting a narrow exemption for Plaintiff's creation of the single product we consider in this case—Plaintiffs' custom wedding invitations.

¶151 Both the City and the dissent argue, however, that to effectively deter discriminatory conduct, the Ordinance must be uniformly applied to all businesses and all products. According to the dissent, this goal cannot be achieved by allowing “ad hoc exemptions for businesses based on their owners' beliefs.” *Infra* ¶ 211.

*30 ¶152 In considering a possible exemption for Plaintiffs' invitations, the City and the dissent employ an incorrect, one-sided least restrictive means analysis. As the dissent correctly notes, *Hobby Lobby* states that, in considering an exemption, a court must consider the impact of granting an exemption on third parties. *Id.* 573 U.S. at 729 n.37, 134 S.Ct. 2751. But the dissent mistakenly suggests that *Hobby Lobby* granted an exemption *only* because it had zero impact on affected third parties—specifically, female employees of the owners' companies. See *Hobby Lobby*, 573 U.S. at 693, 134 S.Ct. 2751. Rather, the Court simply noted that, in weighing the government's compelling interest against the free exercise rights of the owners, it considered the economic impact on female employees. *Id.* at 692–93, 728–32 & n.37, 134 S.Ct. 2751. Of course, no one could argue that the impact of granting the exemption in *Hobby Lobby* was “zero”; after all, granting the exemption effectively forced any female employee who wished to obtain health care coverage for certain birth control procedures to obtain their own private insurance. Moreover, logically speaking, if the least restrictive means test only permits exemptions that have “zero” impact on the government's compelling interest, it is difficult, if not impossible, to conceive of any exemption that could satisfy the test.

¶153 But the more fundamental flaw in the dissent's approach is that, by focusing exclusively on the impact an exemption might have on same-sex couples, it ignores the court's duty under FERA to balance the free exercise rights of an individual against the government's compelling interest. See 1999 Sess. Laws at 1770, § 2(A)(6) (stating that FERA adopted the pre-*Smith* framework, in part, because it provides “a workable test for striking

sensible balances between religious liberty and competing government interests”). Indeed, in applying RFRA, *Hobby Lobby* used the same balancing approach in determining whether the owners were entitled to an exemption. See *id.*, 573 U.S. at 728–32, 735–36, 134 S.Ct. 2751; see also *O Centro*, 546 U.S. at 434, 435–36, 126 S.Ct. 1211 (stating that under RFRA, courts must consider whether religious exemptions are required for generally applicable laws).

¶154 Here, under the dissent's least restrictive means test, the City's nondiscrimination purpose simply overrides all conflicting individual rights and liberties. That, of course, is not the law. As *Hobby Lobby* noted, “[e]ven a compelling interest may be outweighed in some circumstances by another even weightier consideration.” *Id.* at 727, 134 S.Ct. 2751. Likewise, *Masterpiece Cakeshop* did not hold that public accommodations laws were *immune* from free exercise exemptions; rather, it clearly contemplated that *some* exemptions, if narrowly confined, were permissible. *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24, 1727–29. And while we must, in determining whether Plaintiffs' invitations are entitled to an exemption from the Ordinance, consider the impact on the City's nondiscrimination purpose, we must also consider the effect of compelling Plaintiffs to create these invitations. See *Janus*, 138 S. Ct. at 2464 (stating that “[w]hen speech is compelled ... additional damage is done” because it forces “free and independent individuals to endorse ideas they find objectionable[, which] is always demeaning,” and coerces individuals “into betraying their convictions.”).

¶155 Additionally, if it is true, as the City and the dissent claim, that uniform application of the Ordinance is necessary to achieve its nondiscrimination goal, then no business or organization should be exempt from its provisions. However, pursuant to § 18-4(B)(4)(a), the Ordinance's prohibitions regarding discrimination based on sexual orientation “shall not apply to bona fide religious organizations” or “be construed to prohibit or prevent” them “from taking any action which is calculated by the organization to promote the religious principles for which it is established or maintained.” In short, the Ordinance allows some organizations, based on their religious beliefs, to discriminate against individuals based on their sexual orientation, the very thing the Ordinance seeks to eliminate. See *Reed*, 135 S. Ct. at 2232 (stating

that a law does not further a compelling state interest when it permits exemptions that “leave[] appreciable damage to that supposedly vital interest unprohibited” (citation omitted)); *cf.*

O Centro, 546 U.S. at 423, 432–37, 126 S.Ct. 1211 (stating that the existence of a religious exemption for the sacramental use of peyote, a prohibited drug, belied the government’s contention that exempting a religious sect’s sacramental use of hoasca would undermine the effectiveness of federal drugs laws).

*31 ¶156 Here, the City has neither shown nor argued that allowing an exemption for religious organizations has undercut the effectiveness of the Ordinance. Of course, the City could “demonstrate a compelling interest in uniform application” of the Ordinance “by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.”

O Centro, 546 U.S. at 435, 126 S.Ct. 1211. But the City has made no effort to do so here. Rather, it simply asserts, with no evidence, that granting an exemption for Plaintiffs’ custom invitations would encourage other businesses to use FERA as a tool to discriminate against customers based on their sexual orientation, race and gender.²

¶157 The City’s speculation about what might happen is not evidence. Indeed, such “slippery slope” arguments not grounded in fact were rejected in *Hobby Lobby*. There, the government similarly argued that granting a religious exemption to the business owners “will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions.” *Hobby Lobby*, 573 U.S. at 732, 134 S.Ct. 2751. Rejecting that argument, the Court stated that the government “made no effort to substantiate this prediction,” and there was no “evidence that any significant number of employers sought exemption, on religious grounds, from any of [the] coverage requirements other than the contraceptive mandate.” *Id.* at 732–33, 134 S.Ct. 2751.

¶158 Like *Hobby Lobby*, we find the same lack of evidence here. It is not our role to speculate about whether exempting Duka and Koski’s creation of custom wedding invitations would cause other businesses to seek a religious exemption from the Ordinance. We have no evidence in the record to make a conclusion one way or another. Absent such evidence, all we can do is enforce FERA as written, under the standards

it provides. *Cf.* *id.* at 735–36, 134 S.Ct. 2751 (“The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business.... The wisdom of Congress’s judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes....”).

¶159 Here, like the religious organizations exempt under the Ordinance, Brush & Nib was established, and is operated, to promote certain religious principles. Although Plaintiffs operate Brush & Nib for profit, this does not mean that they cannot, like a religious organization or church, also further their “religious objectives as well.” *Id.* at 712, 134 S.Ct. 2751. And the fact Plaintiffs operate for profit has no bearing on their protection under FERA. FERA, by its terms, makes no such distinction, nor does it limit its protections to churches and other nonprofit religious organizations. *Id.* at 691–92, 705–06, 718–19, 134 S.Ct. 2751 (refusing to exclude closely-held corporations from RFRA protections because of their for-profit nature). The purpose of the exemption under the Ordinance is to allow religious organizations “to promote the religious principles for which it is established or maintained.” § 18-4(B)(4)(a).

¶160 Although the dissent claims our decision sanctions status-based discrimination, that mischaracterizes our analysis and our holding. Our decision today is limited to one, very unique product (Plaintiffs’ custom wedding invitations), and the protection afforded this product is based solely on the celebratory messages Plaintiffs convey (or refuse to convey), not the race, gender or sexual orientation of the customer. *Supra* ¶¶ 14, 16, 76. Indeed, Plaintiffs have never asserted that their faith precludes them from serving same-sex couples, or that it requires them to refuse service to a customer based on their sexual orientation. Rather, as noted above, Plaintiffs consistently testified that they are willing to serve all customers, regardless of their status. But what they refuse to do is violate their religious convictions by creating a message for *anyone* that celebrates same-sex marriage.

*32 ¶161 Finally, FERA itself creates several barriers to any business owners seeking to use their religious beliefs to engage in status-based discrimination. For example, such an owner would have to prove that his religious belief is sincere, and not simply a pretext for engaging in illegal discrimination based on status. Our courts are well-equipped to address

questionable or frivolous assertions of religious beliefs where the evidence shows that such a belief is being used for purely pretextual purposes. Cf. *Hobby Lobby*, 573 U.S. at 718, 134 S.Ct. 2751 (stating that “the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims”); *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (stating that RLUIPA “does not preclude inquiry into the sincerity of a prisoner’s professed religiosity”).

¶162 More importantly, even if a business owner could somehow prove that his status-based religious belief is sincere, and that the regulation imposed a substantial burden on that belief, FERA allows the City to show that any burden on such a belief is justified by the anti-discrimination purpose of the Ordinance. And, because an exemption based on status-based discrimination directly undermines the purpose of the Ordinance, uniform prohibition of such business practices would be the least restrictive means to prevent discrimination. See *Hardesty*, 222 Ariz. at 364 ¶¶ 1, 3, 368–69 ¶¶ 19–23, 214 P.3d 1004 (denying defendant’s request for an exemption from a statute making use of marijuana illegal, because based on defendant’s asserted religious belief in unlimited use of marijuana, including using marijuana while driving, granting an exemption would undermine the public safety purpose of the statute); cf. *Masterpiece Cakeshop*, 138 S. Ct. at 1727–28 (stating that under the Colorado public accommodations law “religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression,” but that “it is a general rule that such objections do not allow business owners and other actors ... to deny protected persons equal access to goods and services”).

¶163 We therefore conclude that the Ordinance, as applied to Plaintiffs’ creation of their custom wedding invitations, places a substantial burden on their right to free exercise of religion. Additionally, the City has failed to show that applying the Ordinance to Plaintiffs’ invitations is the least restrictive means to achieve its asserted compelling interest. Thus, the trial court erred in denying Plaintiffs’ motion for summary judgment on their FERA claim and instead granting summary judgment in favor of the City on that claim.

Conclusion

¶164 Freedom of speech and religion requires tolerance of different beliefs and points of view. In a diverse, pluralistic

society such as ours, tolerance of another’s beliefs and point of view is indispensable to the survival and growth of our democracy. See *Palko v. Connecticut*, 302 U.S. 319, 326–27, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (stating that freedom of thought and expression “is the matrix, the indispensable condition, of nearly every other form of freedom”), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). For this reason, we have always recoiled at those governments and societies that repress or compel ideas or religious beliefs. See *Thomas v. Collins*, 323 U.S. 516, 545, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (Jackson, J., concurring) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.”).

[51] [52] ¶165 It is the duty of the judiciary to enforce the text of our constitution and statutes and the fundamental rights protected within them. Enforcing and protecting these rights preserves “individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.” *Barnette*, 319 U.S. at 637, 63 S.Ct. 1178. And while our dissenting colleagues may view a result contrary to our holding today as more progressive, “it is not forward thinking to force individuals to ‘be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.’ ” *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (alteration in original) (quoting *Wooley*, 430 U.S. at 715, 97 S.Ct. 1428). After all, “[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Hurley*, 515 U.S. at 579, 115 S.Ct. 2338.

*33 ¶166 To conclude, we hold that the Ordinance, as applied to Plaintiffs’ custom wedding invitations, and the creation of those invitations, unconstitutionally compels speech in violation of the Arizona Constitution’s free speech clause. See Appendix 1. We further conclude that the Ordinance, as applied to Plaintiffs’ creation of custom wedding invitations, substantially burdens Plaintiffs’ free exercise of religion, and that the City has not demonstrated that its application of the Ordinance to Plaintiffs in this way is the least restrictive means of achieving its

asserted interest in eradicating discrimination. *Id.* Thus, the application of the Ordinance in this case violates Plaintiffs' free exercise rights under FERA, § 41-1493.01. Finally, because Plaintiffs' intended refusal to make custom wedding invitations celebrating a same-sex wedding is legal activity under Arizona's free speech clause and FERA, Plaintiffs are entitled to post a statement, consistent with our holding today, indicating this choice.

¶167 We therefore vacate the court of appeals' opinion except for paragraphs 33 through 45 and 51 through 53, reverse the trial court's rulings on summary judgment, and direct entry of summary judgment in favor of Plaintiffs with respect to the creation of custom wedding invitations that are materially similar to the invitations in the record. *See* Appendix 1. further, because Plaintiffs have prevailed against the City on their FERA claim, upon compliance with [ARCAP 21](#), they are entitled to a mandatory award of attorney fees under [A.R.S. § 41-1493.01\(D\)](#) only as to those fees incurred in this Court. *Id.* ("A party who prevails in any action to enforce this article against a government shall recover attorney fees and costs."). We deny Plaintiffs' remaining fee requests.

[BOLICK](#), J., concurring.

¶168 I join the Court's analysis and write separately to further examine the state constitutional provision under which this challenge was brought.

¶169 [Article 2, section 6 of the Arizona Constitution](#) provides in full: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." That language is majestic in its sweep, and we have consistently found that it provides greater protection for speech than the First Amendment. *See, e.g.,* [Coleman v. City of Mesa](#), 230 Ariz. 352, 361 ¶ 36 n.5, 284 P.3d 863 (2012) ("Article 2, Section 6 of Arizona's Constitution ... is in some respects more protective of free speech rights than the First Amendment."); [State v. Stummer](#), 219 Ariz. 137, 141, 143 ¶ 17, 194 P.3d 1043, 1047, 1049 (2008) ("We have also stated that Article 2, Section 6 has 'greater scope than the first amendment.' " (citation omitted)); [Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n](#), 160 Ariz. 350, 356, 773 P.2d 455, 461 (1989) ("[W]e apply here the broader freedom of speech clause of the Arizona Constitution."). Even when the parties do not fully develop their argument on the Arizona constitutional provision, where it constitutes a question on which we granted review, we are duty-bound to

construe it. [Ariz. Const. art. 2, § 32](#) ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."); [Stummer](#), 219 Ariz. at 140 ¶ 1, 142 ¶ 14, 194 P.3d at 1046, 1048; [Mountain States](#), 160 Ariz. at 354, 773 P.2d at 459 ("Because the parties explicitly invoked Arizona's constitution, we must implement whatever protection it extends.").

¶170 As ours is the forty-eighth state, the framers of our constitution had abundant lessons from which to draw in framing its provisions. Former Chief Justice Rebecca Berch explained that our constitution's framers "had the opportunity to ponder more than 100 years of United States history before penning their own constitution, allowing them to adopt or adjust provisions employed by the federal government or other states to meet Arizona's needs." Rebecca White Berch et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 468 (2012). As our constitution's framers chose to secure free speech with language different and more protective than the First Amendment, our constitutional oath requires us to invest those words with their fully intended meaning.

*34 ¶171 In applying state constitutional provisions, federal constitutional jurisprudence addressing the issue at hand is always relevant because the United States Constitution sets the base-line for the protection of individual liberties.

[Petersen v. City of Mesa](#), 207 Ariz. 35, 37 ¶ 8 n.3, 83 P.3d 35, 37 (2004); [State v. Sieyes](#), 168 Wash.2d 276, 225 P.3d 995, 1003 ¶ 28 (2010); *see* [City of Mesquite v. Aladdin's Castle, Inc.](#), 455 U.S. 283, 293, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); [PruneYard Shopping Ctr. v. Robins](#), 447 U.S. 74, 81, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). But "a state court is entirely free to read its own State's constitution more broadly than th[e] United States Supreme Court reads the Federal Constitution." [City of Mesquite](#), 455 U.S. at 293, 102 S.Ct. 1070. The U.S. Constitution "sets a floor for the protection of individual rights.... Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution." [American Legion v. American Humanist Ass'n](#), — U.S. —, 139 S.Ct. 2067, 2094, 204 L.Ed.2d 452 (2019) (Kavanaugh, J., concurring) (citing J. Sutton, *51 Imperfect Solutions* (2018); Brennan, "State Constitutions and the Protection of Individual Rights, 90 *Harv. L. Rev.* 489 (1977)).

¶172 Where the language of a state constitutional provision is identical or similar to its federal counterpart, we should examine how the provision was interpreted by the federal courts at the time it was adopted by the State of Arizona to determine its meaning. See *Turken v. Gordon*, 223 Ariz. 342, 346 ¶ 10, 224 P.3d 158, 162 (2010); *Moore v. Chilson*, 26 Ariz. 244, 255, 224 P. 818 (1924) (applying prior-construction canon); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322–23 (2012) (discussing prior-construction canon). But where the language is different, we must presume it was intended to have a different meaning from its federal counterpart and determine how the different language affects the constitutional provision’s meaning. Cf. *State v. Marcus*, 104 Ariz. 231, 233–34, 450 P.2d 689 (1969) (noting “it is a general principle that the most recent Act controls over the earlier Act” when laws are inconsistent); Scalia & Garner, *supra*, at 256 (“[A] change in the language of a prior statute presumably connotes a change in meaning.”).




¶173 In so doing, if the meaning of the language is clear, we should enforce it without resorting to secondary interpretative methods. *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). Where the meaning is unclear, we should seek to determine the intent of the framers as best we can from the records of our constitution and other reliable historical sources. *Brewer v. Burns*, 222 Ariz. 234, 244, 213 P.3d 671, 681 (2009); *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 595, 790 P.2d 242, 250 (1990); *Boswell v. Phx. Newspapers, Inc.*, 152 Ariz. 9, 12, 730 P.2d 186, 189 (1986); *McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290, 645 P.2d 801, 805 (1982). Finally, where our provision is similar to provisions in other state constitutions, we may look to court decisions and other historical records from those other states prior to our constitution’s ratification to help determine the framers’ intent in adopting them. See, e.g., *Turken*, 223 Ariz. at 345–46 ¶¶ 10–11, 224 P.3d at 161–62; *Mountain States*, 160 Ariz. at 355, 773 P.2d at 460. In construing the provisions of our Declaration of Rights, we always must be mindful of the admonition that government is “established to protect and maintain individual rights.” Ariz. Const. art. 2, § 2.



¶174 The words of article 2, section 6 and the First Amendment are very different. The First Amendment


provides in relevant part that “Congress shall make no law ... abridging the freedom of speech....” It is phrased as a constraint on government power and is applied through the Fourteenth Amendment to the states. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) (incorporating Free Speech Clause of First Amendment); *Stummer*, 219 Ariz. at 142 ¶ 14, 194 P.3d at 1048 (noting the First Amendment is only a constraint on government). Our provision, by contrast, is a categorical guarantee of the individual right to freely speak, write, and publish, subject only to constraint for the abuse of that right. See *Stummer*, 219 Ariz. at 142 ¶ 14, 194 P.3d at 1048; see also *id.* ¶ 15 (“The encompassing text of Article 2, Section 6 indicates the Arizona framers’ intent to rigorously protect freedom of speech.”). In fact, as this Court has stated, “[t]he right of every person to freely speak, write[,] and publish may not be limited.” *Id.* ¶ 15 (citation omitted).

*35 ¶175 Although this Court has consistently held that article 2, section 6 provides greater speech protection than the First Amendment, it has never fully explored the contours of the right. This case involves a straightforward application of the plain language of article 2, section 6. Unlike cases in other jurisdictions involving such activities as photography or custom cake design, the entirety of Plaintiffs’ business, to the extent it is at issue here, comprises custom writing. As such, it is at the core of our constitutional protection.

¶176 The ordinance, as applied to Plaintiffs, requires them under threat of severe criminal penalties or loss of their livelihood to write words for purposes with which they profoundly disagree. This application of the ordinance directly implicates the speech protections of the Arizona Constitution. See *Coleman*, 230 Ariz. at 359–61 ¶¶ 24–26, 30, 36 & n.5, 284 P.3d at 870–72 (holding tattoos, even when comprised of only “standard designs or patterns,” and the creative process of tattooing are subject to protection under the Arizona Constitution’s free speech guarantee). When they have no choice to refuse to write a message with which they disagree, Plaintiffs are not “freely” writing. See *Freely*, Webster’s Third New International Dictionary (3d ed. 2002) (defining “freely” as “of one’s own accord”). Indeed, in concluding that a law that compelled speech violated the California Constitution’s similarly-worded free speech guarantee, the California Supreme Court declared, “[o]ne does not speak freely when one is restrained from speaking. But neither does one speak freely when one is compelled to

speak.”   *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 101 Cal.Rptr.2d 470, 12 P.3d 720, 750 (2000). The City has not suggested any way, such as libel, in which Plaintiffs have abused that right, *see, e.g.*,  *Stummer*, 219 Ariz. at 142–43 ¶ 16, 194 P.3d at 1048–49.

¶177 Regardless of the circumstances under which compelled speech may be tolerated under United States Supreme Court precedent, *see, e.g.*,  *Williams-Yulee v. Fla. Bar*, — U.S. —, 135 S. Ct. 1656, 1662, 191 L.Ed.2d 570 (2015), our state constitution categorically protects an individual’s freedom to write free from compulsion, being responsible only for the abuse of that right. *See*  *Stummer*, 219 Ariz. at 142 ¶ 15, 194 P.3d at 1048 (“[T]he words of Arizona’s free speech provision ‘are too plain for equivocation.’” (citation omitted)). This case does not require us to determine the complete scope of that right, such as the extent to which it protects other speech-related activities. Nor does our decision extend to anti-discrimination laws that do not by their application require individuals to speak, write, or publish.

¶178 The dissenters engage in unfortunate hyperbole when they invoke shameful historical examples of discrimination. *Infra* ¶¶ 217–18 (Bales, J. (Ret.), dissenting). Plaintiffs do not seek to employ the coercive apparatus of government to impose disabilities on others. They do not discriminate against patrons based on their sexual orientation (indeed, it remains unlawful for them to do so), but instead object to conveying certain messages regardless of who the patron is. Plaintiffs seek merely to vindicate their right not to engage in speech that offends their deeply held religious beliefs, a right not only protected by the Arizona Constitution and the Free Exercise of Religion Act, but also one of our nation’s most cherished civil liberties—one that, as Justice Robert H. Jackson declared, is “beyond the reach of majorities and officials.”  *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629, 638, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (striking down law that required Jehovah’s Witnesses to salute the American flag). As the Court’s opinion abundantly illustrates, that right does not evaporate upon enactment of a public accommodations law, no matter how beneficently inspired.

*36 ¶179 There is a reciprocity and universality to these rights of speech and conscience that give us all a direct stake in protecting them regardless of the circumstances of a particular case. For instance, Phoenix could lawfully prohibit a gay

calligrapher from discriminating against Christian patrons whatever their beliefs but could not force the calligrapher to create a program for a church that preached against same-sex marriage. Likewise, if Michelangelo were alive, the City could require that he sell his sculptures free from discrimination but could not compel him to paint a chapel ceiling in a way he deemed blasphemous. That distinction is the fair accommodation required in a pluralistic society bounded by constitutional protections of individual rights.


BALES, J. (Ret.), joined by TIMMER, V.C.J., and STARING, J., dissenting.

¶180 Can a business selling custom wedding invitations and other wedding products discriminate against same-sex couples because its owners, based on their sincerely held religious beliefs, disapprove of same-sex marriage, itself a constitutionally protected right? We thus are faced with a tension between our fundamental values of liberty and equality, because any legal prohibition on discrimination—that is, any guarantee of equal treatment—necessarily constrains the choices of those who prefer to treat some people differently.

¶181 Because the interest in preventing discrimination is compelling, equality prevails when we are dealing with public accommodations such as businesses serving the public. Vendors can freely choose which products or services they offer but they cannot refuse to sell them to groups of customers whom they disfavor. A baker, for example, might choose to sell only special-order Easter cakes decorated with the symbol of a cross, but having made that choice, the baker cannot refuse to sell those cakes to non-Christians. Similarly, a professional photographer may or may not choose to take children’s photos, but a photographer who chooses to do so cannot, based on his or her religious beliefs, refuse to photograph mixed-race children.




¶182 Brush & Nib and its owners argue that creating custom wedding products, which may include painting or calligraphy, implicates their freedom of expression and their choice to refuse to sell such products to same-sex couples is protected by the Arizona Constitution’s free speech clause and FERA. The majority accepts these arguments at least for certain “custom” wedding invitations, *supra* ¶¶ 3, 38, reasoning that barring Brush & Nib from discriminating against same-sex customers would compel its owners to engage in “pure speech” conveying a message of approval of same-sex


marriage and impermissibly burden their exercise of religion. *Supra* ¶ 2.

¶183 Our constitutions and laws do not entitle a business to discriminate among customers based on its owners' disapproval of certain groups, even if that disapproval is based on sincerely held religious beliefs. In holding otherwise, the majority implausibly characterizes a commercially prepared wedding invitation as "pure speech" on the part of the business selling the product and discounts the compelling public interest in preventing discrimination against disfavored customers by businesses and other public accommodations. Contrary to the majority, *supra* ¶¶ 7–8, requiring businesses to treat customers equally is in no way comparable to compelling public-school children to salute the flag, the issue in  *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). With respect for my colleagues, I dissent.


A.

¶184 Our analysis should begin by recognizing how this case implicates the compelling interest in preventing discrimination in public accommodations. "[A]cts 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...."


 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see also*  *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987);  *Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983).

*37 ¶185 As relevant here, the Phoenix Ordinance ("Ordinance") provides that a public accommodation may not refuse service "because of ... sexual orientation." Phx., Ariz., City Code ("PCC") § 18-4(B)(2). Brush & Nib offers goods and services to the general public and, as it concedes, is a public accommodation. Thus, the Ordinance requires Brush & Nib to "perform the same services for a same-sex couple as it would for an opposite-sex couple."  *Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 ¶ 35 (N.M. 2013).

¶186 The Ordinance is content neutral and does not purport to regulate speech, but rather conduct. And the United States Supreme Court has stated that public accommodations 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, and they do not, as a general matter, violate the First or Fourteenth Amendments."  *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 571–72, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).

¶187 Brush & Nib sells premade and made-to-order wedding products, including save-the-date cards, invitations, programs, vows, marriage certificates, place cards, escort cards, menus, and maps. The wedding invitations contained in the record identify the names of the couple to be wed, provide logistical details, and usually—but not always—expressly invite the recipient to join in the celebration of the couple's wedding. *See* Appendix 1. Some invitations do not refer to "celebration" but instead ask guests to "share in the joy of the marriage" or merely "[r]equest the honor of [the guest's] presence." *Id.* The invitations also include various colors as a background or floral designs around the border. Illustrative copies of two such invitations and Brush & Nib's other made-to-order products are attached as Appendix 2; Appendix 1 includes copies of other invitations in the record referenced by the majority.

¶188 Brush & Nib and its owners seek to refuse to provide services based on the same-sex status of the marrying couple rather than the content of the company's made-to-order products. Notably, this case does not involve any specific request that Brush & Nib prepare invitations or other artwork for a same-sex wedding, and the City acknowledges that the Ordinance does not require Brush & Nib to include any particular message (such as a statement praising marriage equality) in the items it sells. Moreover, consistent with the court of appeals' holding (unchallenged by the City), Brush & Nib is free to express on its website the owners' religious belief that marriage is between a man and a woman. *See*  *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 72–73 ¶ 31, 418 P.3d 426, 439–40 (App. 2018).

¶189 Brush & Nib claims it can refuse to prepare any custom products for a same-sex wedding, even if they do not identify the gender of the two people marrying or, for items such as table place cards, even refer to the couple. At bottom, Brush & Nib argues that its owners' choosing among customers based on their sexual orientation—as distinct from identifying the content of invitations or other custom products—itself constitutes a legally protected exercise of the freedom of speech or religion.

¶190 This case does not concern the content of the made-to-order wedding products, but instead the identity of the customer and end user. Such a refusal constitutes discrimination based on sexual orientation. This fact is not altered by Plaintiffs' assertion that they want to refuse to provide custom wedding products for a same-sex wedding whether the marrying couple or someone else buys them. Refusing to sell to the latter—for example, a parent—does not make it any less discriminatory for the business to refuse to sell to the couple, and because the refusal is based on the marriage involving a same-sex couple, it is based on sexual orientation. *See* PCC § 18-4(B) (prohibiting both directly and indirectly refusing accommodations based on sexual orientation).

*38 ¶191 Unfortunately, the majority sanctions discrimination in this manner, concluding that Brush & Nib can refuse to prepare custom wedding invitations for Jordan and Alexis who share the same sex even though it would sell identical invitations to an opposite-sex couple with the same names. Moreover, although the majority limits its holding to wedding invitations like the exemplars in the record, *supra* ¶¶ 38, 112, the majority leaves open the prospect that vendors can otherwise refuse to prepare custom wedding items that “celebrate” a same-sex wedding. *Supra* ¶ 160. Today's decision is also deeply troubling because its reasoning cannot be limited to discrimination related to same-sex marriage or based on the beliefs of any one religion, but instead extends more broadly to other claims of a “right” by businesses to deny services to disfavored customers.

¶192 We should instead recognize that the City's interest in this case is compelling and narrowly tailored to enforce “rights of public access on behalf of [] citizens” as well as protect against deprivation of “individual dignity” and “the benefits of wide participation in political, economic, and social life.” *Jaycees*, 468 U.S. at 625, 104 S.Ct. 3244. As the court of appeals cogently observed, “[t]he least restrictive way to eliminate discrimination in places of public accommodation is to expressly prohibit such places from discriminating.” *Brush & Nib*, 244 Ariz. at 78 ¶ 50, 418 P.3d at 445.

B.

¶193 Arizona's free speech clause does not entitle Brush & Nib or its owners to refuse to provide goods and services for same-sex couples that it otherwise provides to opposite-sex couples.

¶194 As an initial matter, because the majority has decided the case on statutory grounds, it should not reach the constitutional issue—a point we have repeatedly emphasized. *See Stanwitz v. Reagan*, 245 Ariz. 344, 348 ¶ 12, 429 P.3d 1138, 1142 (2018); *State v. Gomez*, 212 Ariz. 55, 61 ¶ 31, 127 P.3d 873, 879 (2006). Exercising such restraint is especially appropriate here, where the analysis of the free speech claim in no way depends on the statutory claim under FERA. Moreover, although Arizona's constitution provides greater protections for speech than does the First Amendment in some contexts, I agree with the majority that we should rely on First Amendment case law in analyzing the claim under Arizona's free speech clause.

¶195 In construing article 2, section 6, Arizona courts generally “have followed ... interpretations of the United States Constitution.” *State v. Stummer*, 219 Ariz. 137, 142 ¶ 16, 194 P.3d 1043, 1048, 1059 (2008). The parties below couched their arguments solely in terms of First Amendment case law, and they have identified no reason for the Court here to give greater protections under the state constitution. *See State v. Jean*, 243 Ariz. 331, 342 ¶ 39, 407 P.3d 524, 535 (2018) (“Merely referring to the Arizona Constitution without developing an argument is insufficient to preserve a claim that it offers greater protection than the Fourth Amendment.”). Finally, nothing in the text of our constitution or its history suggests that it should be read to give greater protection for discriminatory conduct by businesses or other public accommodations than does the Federal Constitution.

¶196 The Ordinance is content neutral and does not compel a vendor of publicly available goods or services to speak about anything. Rather, it ensures that once a vendor decides to offer a good or service, a vendor must not refuse to provide such goods or services to a protected class that it would otherwise provide to the public. Although the creation of wedding invitations may be expressive, the operation of a business catering to the public is not. Furthermore, we recognized in *Coleman v. City of Mesa* that a business engaged in expressive activity is still subject to generally applicable laws. *230 Ariz. 352, 360 ¶ 31, 284 P.3d 863, 871 (2012); see also id. at 357 ¶ 16, 284 P.3d at 868 (noting that*

“[t]he City is not attempting to impose a generally applicable law ... to the on-going operations of businesses engaged in protected speech.”). *Coleman* concerned a city’s barring a tattoo studio from operating at a particular location; it did not address whether a business choosing to sell items with expressive content can refuse to sell things to some customers that it willingly provides to others.

*39 ¶197 Because the Ordinance regulates conduct, and not speech, any burden on speech is incidental. “[A]n incidental burden on speech ... is permissible ... so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.* (“FAIR”), 547 U.S. 47, 67, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). In *FAIR*, the United States Supreme Court upheld a requirement that universities, as a condition for federal funding, provide military recruiters the same access to students through university communications and meeting rooms as allowed other prospective employers. *Id.* at 55, 70, 126 S.Ct. 1297. The communications between the universities and their students were undoubtedly speech (even “pure” speech), but the Court recognized, citing public accommodations cases, that the First Amendment does not protect discriminatory conduct, even if such conduct is accomplished through speech. See *id.* at 62–63, 126 S.Ct. 1297.

¶198 Here the conduct prohibited by the Ordinance is a vendor’s refusing to sell to same-sex couples the same goods or services offered to others. Such a refusal is the very definition of discrimination by a public accommodation. That complying with the public accommodations law may require the vendor to engage in “speech” does not mean that discriminatory conduct is constitutionally protected. See, e.g., *FAIR*, 547 U.S. at 62, 126 S.Ct. 1297 (“[I]t has never been deemed an abridgement 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.” (citation omitted)).

¶199 *Hurley*, on which the majority relies, is inapposite. That case involved a “peculiar” application of a public accommodations law to a privately organized parade that the Supreme Court described as “inherent[ly] expressive[].”

515 U.S. at 568, 572, 115 S.Ct. 2338. The Court held that the parade organizer could not be compelled to include groups whose views the organizer did not share. *Id.* at 566, 115 S.Ct. 2338. *Hurley* distinguished this situation from the generally permissible application of public accommodations laws to businesses. *Id.* at 578, 115 S.Ct. 2338; see also *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1059–60 (N.D. Cal. 2007) (noting absence of a “reported decision extending the holding of *Hurley* to a commercial enterprise carrying on a commercial activity”). To the extent a parade analogy is apt, this case is more like a supplier of banners refusing to sell to a disfavored group than a parade-organizer being compelled to include groups with objectionable views. Brush & Nib and its owners are like the suppliers, not the parade-organizers. The organizers would be the marrying couple and forcing them to include particular messages in their wedding would be more analogous to *Hurley*.

¶200 The majority also argues that the *Spence*- *Johnson* test for determining whether conduct contains an expressive element is inapplicable here, because the wedding invitations in the record constitute “pure speech.” *Supra* ¶ 87. The majority goes even further and holds that whether a message is attributed to a speaker is irrelevant in this case. *Supra* ¶ 87. But *Hurley* itself considered attribution relevant, and it remains a part of a free speech analysis. See *Hurley*, 515 U.S. at 575–77, 115 S.Ct. 2338; see also *FAIR*, 547 U.S. at 65, 126 S.Ct. 1297 (noting that misattribution was not likely and did not warrant exempting universities from complying with Solomon Amendment). Thus, our analysis of the issues should consider whether others would view Brush & Nib’s creation of custom invitations as expressing its owners’ endorsement of same-sex marriage.

¶201 The majority’s conclusion that requiring Brush & Nib to provide wedding invitations on a non-discriminatory basis would compel “pure speech” by the owners endorsing same-sex marriage is strained and implausible. The exemplar invitations do not suggest that they reflect the views of the business preparing them. See Appendix 1. Invitations to attend and celebrate a wedding are no more a “celebration” on the part of the business preparing them than is the wedding cake provided by a caterer or pictures taken by a wedding photographer. Contrary to the majority’s conclusion that an

invitation constitutes “pure speech” reflecting that Brush & Nib endorses same-sex marriage, *supra* ¶ 68, the expression of a wedding invitation, as “perceived by spectators as part of the whole” is that of the marrying couple. See *Hurley*, 515 U.S. at 577, 115 S.Ct. 2338; cf. *Coleman*, 230 Ariz. at 359 ¶ 25, 284 P.3d at 870 (noting that “a tattoo reflects not only the work of the tattoo artist but also the self-expression of the person displaying the tattoo’s relatively permanent image”). Of course, nothing requires Brush & Nib to identify itself as the supplier of an invitation or precludes it from disclaiming that its sales constitute an endorsement of the beliefs of its customers. Cf. *FAIR*, 547 U.S. at 49, 126 S.Ct. 1297 (“Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what they may say about the military’s policies.”).

*40 ¶202 Even if the Ordinance burdens speech, it is a constitutionally permissible burden because the Ordinance is content neutral, serves a compelling governmental interest, and there is no less restrictive alternative. Long-settled law recognizes that a business cannot, based on its owner’s beliefs, refuse to serve customers who belong to a racial minority. See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (describing such a claim as “patently frivolous”). Similarly, a business, even one organized as a partnership, cannot justify sex-based discrimination in its hiring by contending that its conduct reflects the freedom of association protected by the First Amendment. See *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). And although the majority suggests that cases such as *Heart of Atlanta Motel* are not relevant because they did not address the First Amendment, *supra* ¶ 113, there is no reason to think that the Supreme Court would address such cases differently if that ground were argued as an excuse for discriminatory conduct. In *Hurley*, the Court specifically cited to *Heart of Atlanta Motel* while noting that public accommodations laws do not generally violate the First or Fourteenth Amendments. *Hurley*, 515 U.S. at 572, 115 S.Ct. 2338; cf. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, — U.S. —, 138 S. Ct. 1719, 1727, 201 L.Ed.2d 35 (2018) (citing *Piggie Park* in noting that “it is a general rule that [religious and philosophical objections to same-sex marriage] do not allow business owners and

other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”).

¶203 The majority’s analysis turns on labeling the conduct at issue “pure speech,” but this legal formalism harbors two pernicious ideas: one is that a vendor’s refusal to sell to certain customers is itself protected expression, the other is that the public interest in preventing discrimination does not suffice to require a vendor to serve all equally if the items sold involve expression by the vendor. One would think—indeed fervently hope—that we are long past the notion that businesses operating as public accommodations have a “right” to tell certain customers that they do not serve their kind and so they should take their patronage elsewhere. Although the majority baldly asserts that its holding will not allow “invidious, status-based discrimination,” *supra* ¶ 6, its reasoning suggests that any business offering made-to-order goods and services with expressive content—an open universe that includes printing, painting, tattoos, videography, and other “art” broadly defined—can selectively refuse to sell to groups of customers whom the business disfavors. Free speech jurisprudence does not dictate such a result, nor the result in this case.

C.

¶204 FERA does not allow Plaintiffs to refuse services for a same-sex wedding that it would provide for an opposite-sex wedding. FERA generally protects an individual’s exercise of religion from substantial governmental burdens, but that protection is not unlimited. See A.R.S. § 41-1493.01(B), (E).

¶205 To prevail on their claim under FERA, Brush & Nib’s owners must show that refusing to provide same-sex couples with the same services they would provide to opposite-sex couples: (1) is motivated by their religious beliefs; (2) their beliefs are sincerely held; and (3) the government action—here, requiring equal treatment of all customers without regard to sexual orientation—substantially burdens the exercise of those beliefs. See *State v. Hardesty*, 222 Ariz. 363, 366 ¶ 10, 214 P.3d 1004, 1007 (2009). Even if these elements are established, the prohibition on discrimination will be upheld if the government meets its burden of showing that it both furthers a compelling governmental interest and is the least restrictive means of furthering that interest. See *id.*

¶206 On this record, there is no dispute that Brush & Nib's owners, in seeking to refuse to create made-to-order invitations and other custom wedding products for same-sex couples, are motivated by religious beliefs that they sincerely hold. But the City does dispute their assertion that complying with the Ordinance would substantially burden the exercise of their religious beliefs.

¶207 FERA itself does not define what constitutes a "substantial burden." It does, however, observe that the term "is intended solely to ensure that this article is not triggered by trivial, technical, or de minimis infractions." § 41-1493.01(E). The majority concludes that a substantial burden is imposed when state action forces someone to choose between following the precepts of their religion and receiving a government benefit, or when it compels them under threat of criminal sanction to perform acts undeniably at odds with fundamental tenets of their religious beliefs. *Supra* ¶ 131; see also *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (adopting similar standard for federal Religious Freedom Restoration Act (RFRA)).

*41 ¶208 In terms of a substantial burden, the issue here is whether the Ordinance compels Brush & Nib's owners to perform acts undeniably at odds with fundamental tenets of their religious beliefs. The City notes that Brush & Nib's owners are willing to sell prepackaged wedding products for use in same-sex weddings. The owners have also acknowledged that they are willing to sell made-to-order products to opposite-sex couples who engage in conduct they find objectionable on religious grounds. The City also observes that the owners have not identified any tenet of their faith that requires them to sell wedding products to certain customers or forbids them from selling them to others.

¶209 Because the owners do not object to selling some items for use in same-sex marriages or selling custom items for other weddings raising religious concerns, the City infers that requiring them to sell custom items for same-sex weddings does not substantially burden the exercise of their religious beliefs. The majority frames the City's argument as declaring the owners' religious beliefs "unreasonable," and contends that such reasoning is foreclosed by *Hobby Lobby*. *Supra* ¶¶ 137–38. The majority errs on both points. The City has not argued that the owners' beliefs are unreasonable; nor was such reasoning adopted by the court of appeals. See *Brush & Nib*, 244 Ariz. at 77 ¶ 49, 418 P.3d at 444. Moreover, while *Hobby Lobby* recognizes that it is not the role of courts to

gauge the reasonableness of a claimant's religious belief, both RFRA and FERA by their terms require a court to consider whether a burden is substantial, itself a legal conclusion. On the latter point, *Hobby Lobby* does not suggest a court must accept a claimant's assertion that a substantial burden exists.

See, e.g., *Real Alts., Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 356–58 (3d Cir. 2017).

¶210 Even if we assume that the Ordinance places a substantial burden on the owners' exercise of their religious beliefs, they cannot prevail on their FERA claim because the City has a compelling interest in preventing discrimination and has done so through the least restrictive means. That interest would be thwarted if businesses can discriminate based on their owners' views. See *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (noting that allowing vendors of wedding goods and services to refuse similar services for gay persons would result in "a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations"); *State v. Arlene's Flowers, Inc.*, 193 Wash.2d 469, 441 P.3d 1203, 1235 ¶ 107 (2019). The issue is not whether the City might have authorized less severe sanctions for violations of the Ordinance, but instead whether the goal of preventing discrimination could otherwise be achieved. See *Tyms-Bey v. State*, 69 N.E.3d 488, 491 (Ind. Ct. App. 2017).

¶211 The goal of equal access cannot be achieved allowing ad hoc exemptions for businesses based on their owners' beliefs, even if they are sincerely held. The "fundamental object" of public accommodation laws is to prevent the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel*, 379 U.S. at 250, 85 S.Ct. 348 (quoting S. Rep. No. 88-872, at 16 (1964)). Allowing businesses to refuse services to groups they disfavor, and to publicly advertise those practices, is inherently unequal. This point is not undermined by the City's excepting "bona fide religious organizations" from the Ordinance, as the issue is not whether the Ordinance has proscribed discriminatory conduct by every entity, but instead whether allowing a broader exception for businesses under FERA would undermine the statutory goal. Cf. *Hardesty*, 222 Ariz. at 368–69 ¶ 23, 214 P.3d at 1009–10 (rejecting argument that religious-use defense for possession of peyote supported also recognizing FERA-based defense for possession of marijuana and noting "disparate magnitudes" of respective uses).

*42 ¶212 In concluding that the City has not shown the Ordinance is the least restrictive means of preventing discrimination, the majority mistakenly relies on *Hobby Lobby*, 573 U.S. 682, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014), and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). *Supra* ¶¶ 155–58. Neither of those cases involved a RFRA-based claim for an exemption from a public accommodations law, much less questioned the compelling interest in preventing discrimination by businesses. *Cf. Hardesty*, 222 Ariz. at 368 ¶ 19, 214 P.3d at 1009 (recognizing that analysis of least restrictive means depends on compelling interest involved). In fact, *Hobby Lobby* recognized that considering impacts on third parties from a requested exemption should inform analysis of the government’s compelling interest and the availability of a less-restrictive means. *See* 573 U.S. at 729 n.37, 134 S.Ct. 2751; *id.* at 739, 134 S.Ct. 2751 (Kennedy, J., concurring) (noting that religious accommodation may not “unduly restrict other persons ... in protecting their own interests”). In granting a religious accommodation to the closely held corporations under RFRA, the Court noted that doing so would have “precisely zero” effect on the interests of others. *Id.* at 693, 134 S.Ct. 2751. *O Centro* rejected the contention that the government’s interest in uniformly enforcing the Controlled Substances Act (CSA) was sufficiently compelling to deny a religious exemption for the use of hoasca, a ceremonial tea containing a proscribed hallucinogen, noting that the CSA itself contains an exemption for the religious use of peyote. 546 U.S. at 423, 425, 126 S.Ct. 1211. But *O Centro* itself recognized that “there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA.” *Id.* at 436, 126 S.Ct. 1211.

¶213 The “less restrictive means” contemplated by the majority—allowing businesses selectively to discriminate based on their owners’ beliefs—enables the very conduct the Ordinance legitimately seeks to prohibit. Unlike *Hobby Lobby* or *O Centro*, granting ad hoc exemptions to the Ordinance imposes discrete and identifiable harms on those subjected to discrimination. It is no answer to say that today’s holding is limited to “custom” wedding invitations or that same-sex couples may obtain wedding-related services

from other vendors. The prohibition on discrimination not only promotes equal access, but also serves to eradicate discrimination and the attendant humiliation and stigma that result if businesses can selectively treat some customers as second-class citizens. *See, e.g., Jaycees*, 468 U.S. at 625, 104 S.Ct. 3244 (noting that public accommodations laws “vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments’” (quoting *Heart of Atlanta Motel*, 379 U.S. at 250, 85 S.Ct. 348)).

¶214 The majority’s outcome is even more peculiar considering that, in 2014, the legislature attempted to pass SB 1062, which would have amended the definition of “person” under FERA to include “any individual, association, partnership, corporation, church, religious assembly or institution, or other business organization,” thus giving businesses an explicit right to invoke FERA as a defense to refusing to comply with, among other things, public accommodation laws. S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/237882>. Due to concerns of discrimination against minority groups, the bill was vetoed by the governor. *See* Bill Chappell & Mark Memmott, *Arizona Gov. Brewer Vetoes Controversial Bill*, NPR (Feb. 26, 2014), <https://www.npr.org/sections/thetwoway/2014/02/25/282507942/arizona-gov-brewer-vetoes-controversial-bill>; *cf. J.D. v. Hegyi*, 236 Ariz. 39, 43 ¶ 21, 335 P.3d 1118, 1122 (2014) (rejecting court of appeals’ statutory interpretation in part as in tension with statutory purpose, when legislature considered and rejected proposed amendment).

¶215 The majority errs in concluding that the City has not met its burden under FERA. The majority is likewise unpersuasive in asserting that its holding is narrow with limited consequences. *Supra* ¶¶ 3, 112. Saying that today’s decision applies only to custom wedding invitations that are “materially similar” to those in the record, *supra* ¶ 3, does not delimit the ruling even as to wedding-related products, as the majority does not identify the salient characteristics of the invitations in the record; observes that every invitation is “different and unique,” *supra* ¶ 78; and disclaims addressing whether Brush & Nib can refuse to provide other custom products for same-sex weddings. *Supra* ¶ 3. More broadly, if religious beliefs can allow discriminatory refusals of service to same-sex couples, there is no principled reason why FERA

will not also protect discriminatory denials of goods or services in other contexts to other protected groups.

D.

*43 ¶216 This case is not about the government compelling individuals to create art or pure speech expressing a message with which they disagree. Instead, it involves a business, undisputedly a public accommodation, whose owners wish to deny the same goods and services for a same-sex wedding that they would provide for an opposite-sex wedding. Barring those who choose to offer goods and services to the public from discriminating does not impermissibly compel speech. A vendor may no doubt engage in a form of expression by refusing to sell things to customers it disfavors. But expression through such discriminatory conduct, even if motivated by sincerely held religious beliefs, is not legally protected.



¶217 Beyond the injury to particular customers who are denied goods or services, today's holding threatens a more general harm. It could portend a marketplace in which vendors—regardless of their religious beliefs—who make items with expressive content can openly proclaim their refusal to sell to customers whom they disfavor, as can vendors—whether or not they sell items with expressive content—who, based on their religious beliefs, object to selling things to some customers that they offer to others. This prospect diminishes our defining statement that all are created equal and can only dismay those who believe that this ideal should be “constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence.” Abraham Lincoln, *Speech at Springfield, Illinois (June 26, 1857)*, in Abraham Lincoln: Speeches and Writings 1832–1858 398 (1989).

¶218 Over our history, Arizonans have been denied access to housing, employment, and public accommodations based on invidious discrimination. Phoenix's early history includes shopkeepers placing “No Mexicans Allowed” signs in their shop windows, landowners inserting restrictions against people of Chinese descent in property deeds, widespread refusals to serve black Arizonans in restaurants, and hotel operators refusing to accommodate Jewish guests. Bradford Luckingham, *Minorities in Phoenix* 40, 116, 148 (1994); Hon. Elizabeth Finn, *The Struggle for Civil Rights in Arizona*, 34 *Ariz. Att'y* 24, 27 (July 1998). Through years of hard work

and perseverance, protections like the Ordinance have been put in place to ensure that we do not repeat the denials of access and opportunity that plagued our state in its infancy.

¶219 This case, sadly, illustrates that our progress toward equality has been tortuous and incomplete. Despite today's mistaken holding, our constitutions and laws should not entitle a business to discriminatorily refuse to provide goods or services to customers whom the business disfavors.

TIMMER, V.C.J., dissenting.

¶220 I respect and admire people who not only profess religious faith but attempt to live by their religious principles. Nevertheless, in an ordered society of many beliefs, “every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.”  *United States v. Lee*, 455 U.S. 252, 261, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). When people of faith, like Plaintiffs, choose to engage in commercial activities, “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.”  *Id.* The Ordinance, which binds businesses in the City, similarly binds Plaintiffs, and neither Arizona's free speech provision nor FERA provides an exemption. Although I agree wholeheartedly with Justice Bales' dissent, the alarming consequences of today's decision spur me to emphasize some points. I also write separately to express disagreement with the majority's “substantial burden” analysis under FERA.

*44 ¶221 First, the majority errs by concluding that the Ordinance compels Plaintiffs to express messages supporting same-sex marriages, “cuts off the Plaintiffs' right to express their beliefs about same-sex marriage,” and attempts to coerce “uniformity of beliefs and ideas” by “telling [Plaintiffs] what they can and cannot say.” *See supra* ¶¶ 7-8, 103. The Ordinance regulates conduct, not speech. It only requires Plaintiffs to sell the same products equally to all customers, regardless of sexual orientation. Plaintiffs retain control over the type of products they sell, their style and design, and the specific messages written. Thus, if Plaintiffs would not design a wedding invitation with a pink triangle or a rainbow flag for an opposite-sex couple, the Ordinance cannot compel them to do so for a same-sex couple. If they always include language in wedding invitations for opposite-sex couples describing marriage as a union only between men and women,

they can insist on doing so in same-sex wedding invitations without penalty. They can freely publish views opposing same-sex marriages or say nothing at all about marriages. But because Plaintiffs design and sell custom invitations expressing customers'—not Plaintiffs'—requests for guests to “share the joy,” “celebrate,” or simply attend weddings, Plaintiffs cannot refuse to do so for same-sex couples.

¶222 Relatedly, the majority mistakenly contends that requiring Plaintiffs to sell custom wedding products intended for same-sex weddings compels them to endorse same-sex marriages in violation of their beliefs. *See supra* ¶ 103. I disagree. A wedding invitation invites attendees to celebrate a particular couple's wedding; it does not endorse the idea of opposite-sex marriages or same-sex marriages. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, — U.S. —, 138 S. Ct. 2448, 2463–64, 201 L.Ed.2d 924 (2018) (“[c]ompelling individuals to mouth support for views they find objectionable” generally violates First Amendment principles). The meaning of these expressions—invitations to attend a wedding—does not change as the sexual orientation of customers varies. And it defies common sense to think that a wedding invitation expresses a commercial artist's endorsement of the subject wedding whether it involves, for example, a same-sex couple, an opposite-sex couple in an abusive relationship, or a loveless match. *Cf. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64–65, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (rejecting law schools' argument that allowing the military to recruit at the schools evidences the schools' agreement with military policies).

¶223 Second, the majority misapplies FERA's “substantial burden” requirement by failing to consider how the Ordinance itself—before considering penalties for violations—substantially burdens Plaintiffs' exercise of their beliefs. A.R.S. § 41-1493.01(B), (E) (providing that FERA is triggered only if government laws, rules, or other actions “substantially burden a person's exercise of religion,” which excludes “trivial, technical or de minimis infractions”). If the Ordinance's proscription of discrimination in public accommodation does not substantially burden Plaintiffs' free exercise of religion in the first instance, there is no need to consider the potential penalties for violating the Ordinance. So how does requiring Plaintiffs to sell the same type of wedding products to opposite-sex and same-sex couples burden Plaintiffs' exercise of their sincerely held religious beliefs? And what makes any burden “substantial” and not

“trivial, technical or de minimis”? The majority does not say. Instead, it incorrectly focuses only on the penalties for violating the Ordinance, finding a substantial burden exists here because if Plaintiffs adhere to their sincerely held religious beliefs and refuse to sell custom wedding invitations for same-sex weddings, they could suffer “severe civil and criminal sanctions.” *See supra* ¶ 135.

¶224 The majority's misapplication of FERA's “substantial burden” requirement effectively eliminates it. Under the FERA paradigm announced today, a claimant need only demonstrate that exercise of a sincerely held religious belief conflicts with a law, which could result in a penalty. The claimant has no need to demonstrate that the law itself substantially burdens the claimant's exercise of religion—a requirement intended to remove trivial and de minimis infringements from FERA's protection. Thus, as the City predicts, a Phoenix taxi-cab owner with a religious belief that women should only travel with men and who therefore refuses to accept unaccompanied women riders can show a substantial burden under FERA just by demonstrating the sincerity of his beliefs and pointing to the potential penalties for violating the Ordinance. It is not difficult to imagine similarly discriminatory scenarios involving race, color, religion, sex, national origin, marital status, and disability, all of which the Ordinance proscribes. *See Phx., Ariz., City Code* § 18-4(B).

*45 ¶225 In my view, whether a “substantial burden” on the exercise of religion exists under FERA is a legal question for the courts rather than a factual question determined by the sincerity of a person's religious beliefs and the existence of penalties for exercising those beliefs in a manner that violates a law. *See Pennsylvania v. President United States*, 930 F.3d 543, 572 n. 28 (3d Cir. 2019); *Real Alts., Inc. v. Sec'y Dep't of Health and Human Servs.*, 867 F.3d 338, 356 (3d Cir. 2017). Thus, “[w]hile the Supreme Court reinforced in *Hobby Lobby* that [courts] should defer to the *reasonableness* of the [RFRA claimant's] religious beliefs, this does not bar our objective evaluation of the *nature* of the claimed burden and *substantiality* of that burden on the [claimant's] religious exercise.” *Real Alts.*, 867 F.3d at 356 (alterations in original and added) (citation omitted); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014) (characterizing the RFRA issue as whether the government imposed a substantial burden on the parties to conduct business in accordance with their religious beliefs and not whether those beliefs are

reasonable); [Mahoney v. Doe](#), 642 F.3d 1112, 1121 (D.C. Cir. 2011) (“[T]o make religious motivation the critical focus is ... to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement.” (citation omitted)).

¶226 Relying on [Hobby Lobby](#), the majority asserts it cannot decide whether the Ordinance itself substantially burdens Plaintiffs’ exercise of their sincerely held religious belief that marriage occurs only between a man and a woman because doing so would require the Court to decide the reasonableness of Plaintiffs’ religious views, which is nonjusticiable. *See supra* ¶¶ 136–40. I recognize that some language in [Hobby Lobby](#) supports the majority’s position.

See [Hobby Lobby](#), 573 U.S. at 725, 134 S.Ct. 2751 (stating that plaintiffs “sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our ‘narrow function ... in this context is to determine’ whether the line drawn reflects ‘an honest conviction’ ”).

But the Court in [Hobby Lobby](#) did not address whether a sincere religious belief alone would suffice under RFRA when a business is compelled by a public accommodation law to provide goods and services equally to customers, as opposed to funding morally objectionable acts, and it may well address the issue differently in that context. *Cf.*

[Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n](#), — U.S. —, 138 S. Ct. 1719, 1727, 201 L.Ed.2d 35 (2018) (noting that while religious objections to same-sex marriage are constitutionally protected, “it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law”); *id.* (stating that although objecting clergy cannot be compelled to perform a same-sex wedding ceremony, “if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations”). Regardless, although instructive,



[Hobby Lobby](#) is not binding on our interpretation of FERA any more than RFRA is binding on the City.

¶227 A “substantial burden” under FERA occurs only if the Ordinance (1) compels claimants “to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept work, on the other hand,”

[Sherbert v. Verner](#), 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), or (2) threatens claimants with criminal sanctions unless they “perform acts undeniably at odds with fundamental tenets of their religious beliefs.” [Wisconsin v. Yoder](#), 406 U.S. 205, 218, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). A court’s inquiry should focus on “the nexus between religious practice and religious tenet: whether the regulation at issue forced plaintiffs to engage in conduct that their religion forbids or prevents them from engaging in conduct their religion requires.” [Mahoney](#), 642 F.3d at 1121 (interlineations accepted) (citation omitted).

*46 ¶228 Plaintiffs have not shown that the Ordinance substantially burdens the exercise of their religious beliefs. The Ordinance does not compel them to express approval of same-sex marriages, and they would not be penalized for refusing to design wedding products expressing such approval. *See* [Sherbert](#), 374 U.S. at 404, 83 S.Ct. 1790. Plaintiffs do not claim that “fundamental tenets of their religious beliefs,” *see* [Yoder](#), 406 U.S. at 218, 92 S.Ct. 1526, require them to refrain from selling custom wedding products (as opposed to non-custom goods) related to same-sex weddings. *See supra* ¶ 160 (“Plaintiffs have never asserted that their faith precludes them from serving same-sex couples, or that it requires them to refuse service to a customer based on their sexual orientation.”). Nor does selling custom wedding products for same-sex weddings make Plaintiffs participants in such weddings as such items do not themselves “enabl[e] or facilitat[e]” weddings any more than would the artistically created but non-custom wedding products Plaintiffs willingly sell for use in same-sex weddings. *See* [Hobby Lobby](#), 573 U.S. at 724, 134 S.Ct. 2751.

¶229 Selling custom wedding products for same-sex weddings may “decrease[] the spirituality, the fervor, or the satisfaction” with which Plaintiffs practice their religion. *See* [Navajo Nation v. U.S. Forest Serv.](#), 535 F.3d 1058, 1063 (9th Cir. 2008) (stating that such impacts do not constitute a “substantial burden” under RFRA). But they have not shown that selling the same custom items to customers for use in opposite-sex and same-sex weddings forces Plaintiffs to

choose between running their business and following their faith, *see*  [Sherbert](#), 374 U.S. at 404, 83 S.Ct. 1790, or is “undeniably at odds with fundamental tenets of their religious beliefs.” *See*  [Yoder](#), 406 U.S. at 218, 92 S.Ct. 1526.



¶230 Despite the majority’s unfounded assertion, *see supra* ¶¶ 141-42, I fully embrace that Plaintiffs’ religious beliefs are sincere and substantial. Nevertheless, deference to Plaintiffs’ sincere religious beliefs should not require deference to their assertion that the Ordinance substantially burdens their exercise of those beliefs. It is our role as jurists to decide whether they proved FERA’s substantial burden requirement. On this record, like the trial court, I conclude they have only shown a de minimis burden and so FERA is not triggered. *See* § 41-1493.01(E).


¶231 Third, the majority ignores Plaintiffs’ request to be relieved from designing other custom wedding-related items for same-sex marriages, such as wedding invitations that do not include celebratory messages, “save the date” notices, table numbers, menus, and “welcome” signs. Samples of those items are in the record, so no reason exists not to address them. *See* Appendix 2. The majority possibly ignores the request because, for example, it is difficult to understand how a menu proclaiming that guests are having beef tenderloin for dinner communicates anything other than what meal guests will be served. That message remains the same whether those guests are attending an opposite-sex wedding or a same-sex wedding. And it is difficult to discern how designing and selling such items substantially burdens Plaintiffs’ exercise of their religious beliefs in violation of FERA. Putting aside whether requiring Plaintiffs to design custom wedding invitations expressing messages of “celebration” or “joy” for same-sex weddings is compelled speech and violates FERA, the majority missteps by neglecting to tell Plaintiffs they must at least design and sell wedding invitations lacking celebratory language and items like table numbers, menus, and welcome signs equally for both same-sex weddings and opposite-sex weddings. As a result, the City, Plaintiffs, like-minded businesses, and the lower courts are left with incomplete guidance.



¶232 I greatly respect my colleagues in the majority. Regardless, in my view, their analysis is flawed, it leaves issues unresolved, and, most distressingly, it unduly hinders public accommodation laws seeking to ensure that businesses serve persons equally regardless of their status, including sexual orientation. I dissent.

STARING, J., dissenting.

*47 ¶233 I respectfully dissent, joining Justice Bales’s dissent. I write separately to briefly address the following points.

¶234 For “custom wedding invitations that are materially similar to the invitations contained in the record,” *supra* ¶ 112, the majority finds an exception to the general enforceability of public accommodation laws, *see*  [Masterpiece Cakeshop](#), 138 S. Ct. at 1727 (importance of limiting exceptions to public accommodation laws);  [Hurley](#), 515 U.S. at 572, 115 S.Ct. 2338 (public accommodation laws “do not, as a general matter, violate the First or Fourteenth Amendments”). I am, however, very skeptical concerning the effectiveness of the majority’s expressions of limitation. It is hardly difficult to envision objections to providing public accommodations involving other forms of artistic expression no less substantial

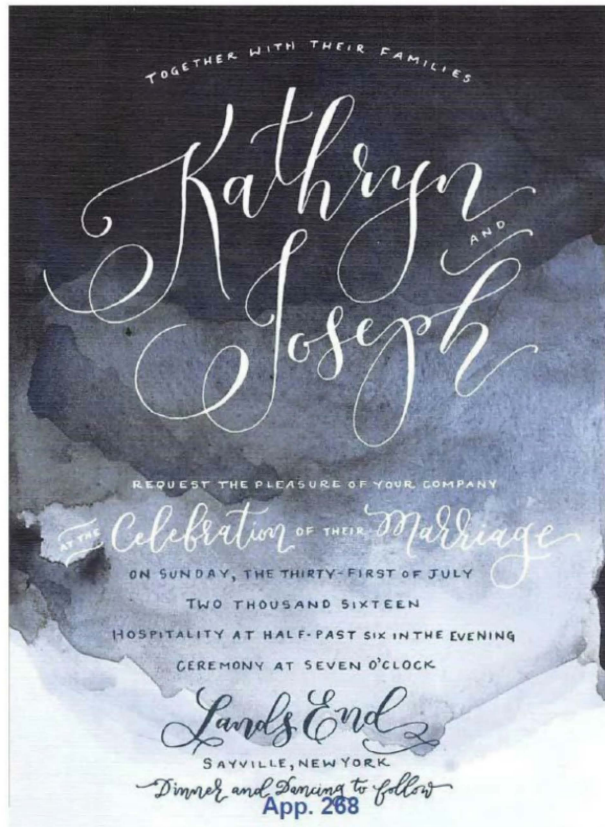
than the custom wedding invitations here. *See*  [Masterpiece Cakeshop](#), 138 S. Ct. at 1723 (“examples of possibilities that seem all but endless”). Is there, for example, a meaningful difference between drawings and lettering on cardstock and the same drawings and lettering on a cake? Must the baker use the piping bag to provide exactly the same message for the very same wedding the calligrapher may refuse to employ the pen? Our state’s lower courts—one of which I sit on—will struggle with limiting today’s holding when confronted with circumstances that are not meaningfully distinct. This case will sweep much more broadly than the majority expresses.

¶235 Among other things, I am concerned that, ironically, today’s holding could be relied on to discriminate against individuals based on their religion and religious beliefs, notwithstanding the fact that both Arizona and Phoenix include religion as a basis for protection in their public accommodation laws. *See* A.R.S. § 41-1442(A); PCC § 18-4(B). This concern is partially premised on the fact that, based on the plain language of A.R.S. § 41-1493.01(E), the holding in  [Hobby Lobby](#), and the axiomatic constitutional proscription against government evaluation of the validity of religious beliefs, *see*  [Masterpiece Cakeshop](#), 138 S. Ct. at 1731, the task of showing a substantial burdening of sincerely held religious beliefs under FERA may be accomplished with relative ease. In fact, in light of these authorities, I generally agree with the majority’s conclusion—although not with all facets of its analysis—that Brush & Nib has established

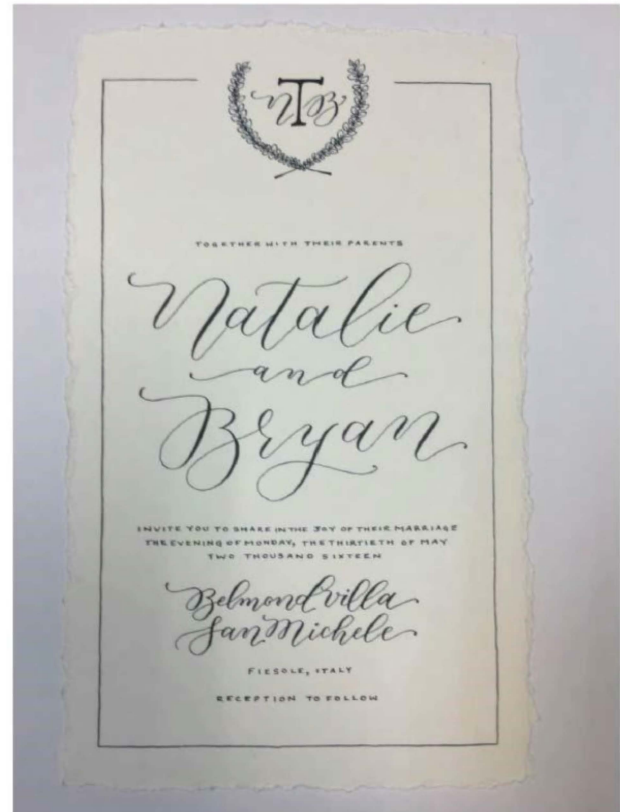
that PCC § 18-4(B) substantially burdens its owners' free exercise of religion. But the ease with which a party may establish a substantial burden places a premium on correctly analyzing the compelling state interest and least restrictive means elements of FERA, particularly in a circumstance like considering whether to grant an exception to public accommodation laws. Justice Bales correctly analyzes those elements in his dissent, which, as noted, I join.

APPENDIX 1



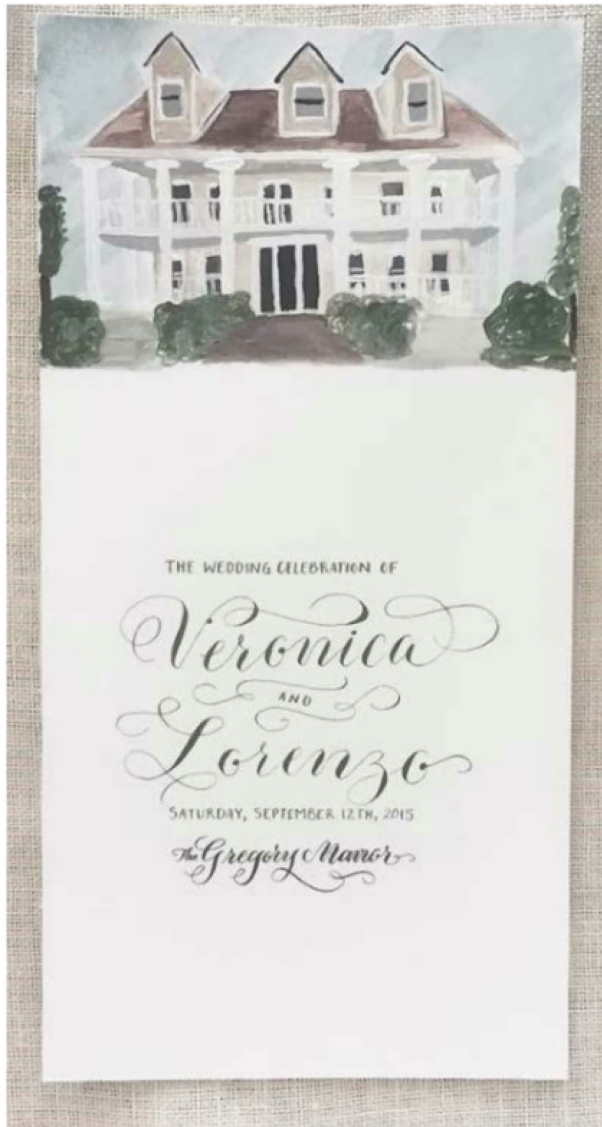


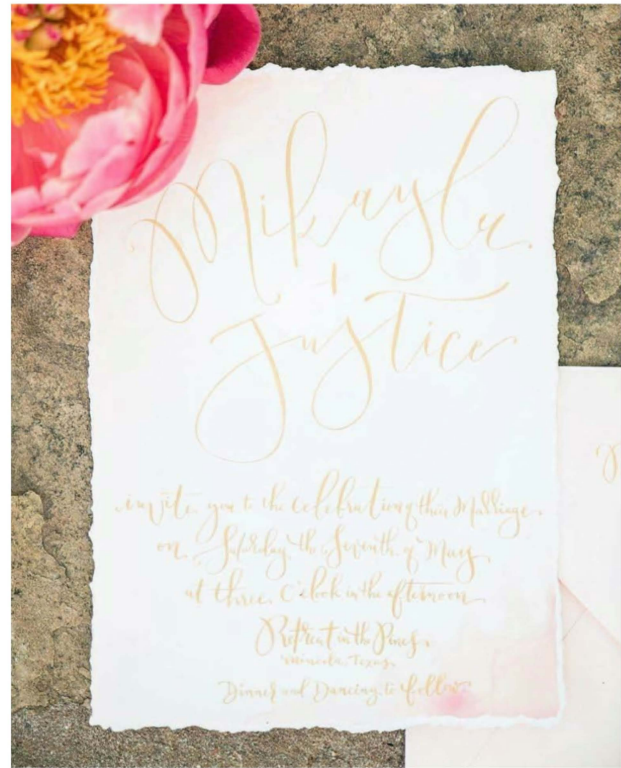
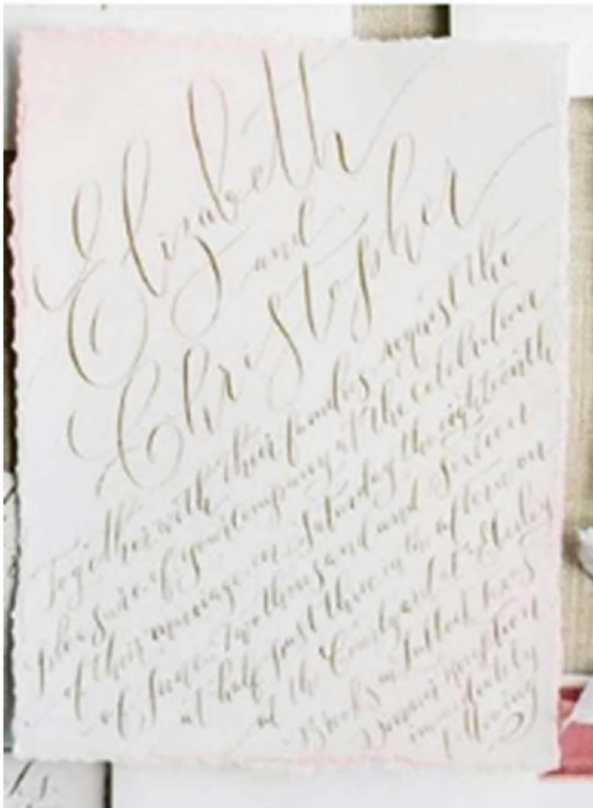
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App. 272









APPENDIX 2






All Citations

--- P.3d ----, 2019 WL 4400328

Footnotes

- * Chief Justice Robert M. Brutinel has recused himself from this case. Pursuant to [article 6, section 3 of the Arizona Constitution](#), the Honorable Christopher P. Staring, Judge of the Arizona Court of Appeals, Division Two, was designated to sit in this matter.
- 1 We note that on June 6, 2019, the Washington Supreme Court issued its opinion after the United States Supreme Court remanded in light of [Masterpiece Cakeshop, — U.S. —, 138 S. Ct. 1719, 201 L.Ed.2d 35](#). [State v. Arlene's Flowers, Inc., 193 Wash.2d 469, 441 P.3d 1203 \(2019\)](#). The court once again affirmed, concluding that "the courts resolved this dispute with tolerance" and thus did not run afoul of the First Amendment's requirement that courts must adjudicate such claims with religious neutrality. [Id. at 1237 ¶ 120](#); see [Masterpiece Cakeshop, 138 S. Ct. at 1732](#).

The court affirmed its previous holding that the state public accommodations law as applied to the flower shop owner did not violate the owner's free speech rights, and its reasoning did not materially differ.  [Arlene's Flowers](#), 441 P.3d at 1237–38 ¶ 120. Thus, the 2019 decision does not affect our analysis here.

2 We note that the Ordinance's exemption could not be used even by a bona fide religious organization, let alone a business owner, to refuse service based on "race, color, religion, sex, national origin ... or disability"; the exemption, by its terms, only applies to marital status, sexual orientation, and gender identity or expression. See PCC § 18-4(B)(2), 18-4(B)(4).

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

Civil Action No. 16-cv-02372-MSK

**303 CREATIVE LLC, and
LORIE SMITH,**

Plaintiffs,

v.

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

Defendants.¹

OPINION AND ORDER GRANTING SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 26th day of September, 2019.

BY THE COURT:

A handwritten signature in black ink, reading "Marcia S. Krieger", written in a cursive style. The signature is positioned above a horizontal line.

Marcia S. Krieger
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02372-MSK

303 CREATIVE LLC, and
LORIE SMITH,

Plaintiffs,

v.

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

Defendants.

FINAL JUDGMENT

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

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

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

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

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

s/ Robert R. Keech

Robert R. Keech,
Deputy Clerk

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

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

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

Plaintiffs,

vs.

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

Defendants.

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

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

Respectfully submitted this 25th day of October, 2019.

s/ Katherine L. Anderson

Kristen K. Waggoner (Arizona Bar. No. 032382)*

Jeremy D. Tedesco (Arizona Bar No. 023497)*

Jonathan A. Scruggs (Arizona Bar No. 030505)*

Katherine L. Anderson (Arizona Bar No. 033104)*

ALLIANCE DEFENDING FREEDOM

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Attorneys for Plaintiffs

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

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, I electronically filed the foregoing Notice of Appeal with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Skipper Spear
Senior Assistant Attorney General
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1300 Broadway, 10th Floor
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Attorneys for Defendants

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COLORADO

Department of
Regulatory Agencies

Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

REQUEST FOR INFORMATION

Please submit the following specific, written information and/or documentation by the deadline indicated. Your failure to do so may result in our issuing a finding based on the available evidence.

Please be advised that you are expected to provide a complete response to each question. If you, or your representative, believe that a question is impermissible, is not relevant, or is overly broad in scope, do not simply object and/or decline to answer. Rather, contact the assigned investigator to discuss your concerns. Failure to do so will be viewed as a refusal to cooperate. The investigator is always willing to discuss the scope of the request, and in most instances, can narrow, modify and/or clarify it to ensure that only information essential to the specific facts and allegations of your case is required.

SUBPOENA POWER NOTICE: You should be aware that the State of Colorado's Anti-Discrimination statute grants the Director of the Colorado Civil Rights Division the authority to subpoena witnesses and to compel the production of books, papers and records relevant to the charge [C.R.S. 24-34-306(2)(a)]. Such subpoena is enforceable in the district court in which the alleged discriminatory practice occurred. Subpoena authority is exercised only when, in the judgment of the Director, the Respondent's failure to voluntarily cooperate makes it necessary.

1. Written Position Statement in response to the Charge of Discrimination to include:
 - a. a specific response to the action complained of and the specific and detailed sequence of events that led to the alleged denial of the goods, services, benefits, or privileges offered.
 - b. General nature of your business or organization and the service it provides.
 - c. Your response should contain the name, job/position title; the comparative protected class information (e.g. if the Charging Party is



- alleging racial discrimination, indicate race) of the official(s) who made the business decision which is the basis of this complaint.
- d. Also, identify by job/position title and any other employee(s) who was/were involved in this business decision and provide the protected class information for these individuals.
 - e. Provide supporting documentation substantiating the reason(s) for the business decision.
2. Provide written statements from any individual who has personal, direct knowledge of either the issues raised in the administrative complaint; and/or the reason(s) for Charging Party's asserted denial of the goods, services, benefits or privileges offered. *For each witness*, give their full and complete name (correct spelling or more fully identify if needed), organization position/title, if applicable, mailing address, telephone number and protected class identification:
- a. *If a person named above is no longer a member/employee*, provide the above requested identifying information, the affiliation separation date and a brief reason for the separation.
3. Copies of any documents, records, reports, policies, etc. relied upon in making the decision(s) in question including, but not limited policies/procedures concerning the reason for allegedly denying the Charging Party goods, services, benefits or privileges offered. *If not available in written form*, please provide a written explanation of how such situations have been handled in the past.
4. Provide any other information/documentation/witnesses you deem relevant to the merits of this complaint or which you believe will support your position.
5. Note if the Charging Party is currently welcome at your place of business or to become affiliated with your organization? If not, why not? If yes, but only if certain conditions are met or only under certain conditions, what are those conditions?
6. Provide a list of any individuals you have denied goods, services, benefits, or privileges to in the past. Provide the protected class information for the individuals listed and briefly state the reason for each denial.



COLORADO DIVISION

JUL 20 2017

OF CIVIL RIGHTS

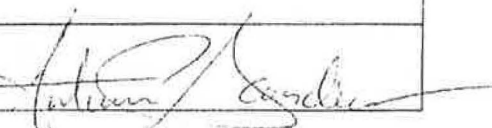
CHARGE OF DISCRIMINATION		CCRD Charge No. CP2018011310
The Privacy Act of 1974 affects this form. See Privacy Act Statement before completing this form.		
COLORADO CIVIL RIGHTS DIVISION		
Name (Charging Party) Autumn Scardina	(Area Code) Telephone (818) 205-5560	
Street Address 7779 Everett Way	City, State, and Zip Code Arvada, CO 80005	County Jefferson
Name of Place of Public Accommodation (Respondent) Masterpiece Cakeshop Incorporated	(Area Code) Telephone (303) 763-5754	
Street Address 3355 S. Wadsworth Blvd	City, State, and Zip Code Lakewood, CO 80227	County Jefferson
Discrimination Based on: Sex (Female); Transgender (Gender Identity)	Date Most Recent Discrimination Occurred June 26, 2017	
<p>I. Jurisdiction: The Colorado Civil Rights Division has jurisdiction over the subject matter of this charge; that each named Respondent is subject to the jurisdiction of the Colorado Civil Rights Division and is covered by the provisions of the Colorado Revised Statutes (C.R.S. 1973, 24-34-301, et. seq.), as reenacted.</p> <p>II. Personal Harm: That on or about June 26, 2017, I was denied full and equal enjoyment of a place of public accommodation based on my sex (female) and/or transgender (gender identity).</p> <p>III. Respondent's Position: N/A</p> <p>IV. Discrimination Statement: I believe I was unlawfully discriminated against because: of my protected class (es) in violation of the Colorado Anti-Discrimination Act (CADA). 1.) On or about June 26, 2017, I was denied full and equal enjoyment of a place of public accommodation. Specifically, the Respondent refused to prepare my order for a cake with pink interior and blue exterior, which I disclosed was intended for the celebration of my transition from male to female. Furthermore, the Respondent indicated to me that to prepare such a cake would be against their religious beliefs. 2.) I believe I was discriminated against because of my protected class (es).</p> <p>V. WHEREFORE: The Charging Party prays that the Colorado Civil Rights Division grant such relief as may exist within the Division's power and which the Division may deem necessary and proper.</p>		
I declare under penalty of perjury that the foregoing is true and correct.		
Date 7/20/17	Charging Party/Complainant (Signature) 	

EXHIBIT 1

Aplt. App. 3-767

Statement of Discrimination

First Date of Occurrence

Why you think the incident or action taken was discriminatory (e.g. "This incident shows that I was denied service because of my age").

On June 26, 2017, I contacted Masterpiece Cakeshop to request that they prepare a birthday cake to celebrate my upcoming birthday. They asked what I wanted the cake to look like, and I explained I was celebrating my birthday on July 6, 2017 and that it would also be the 7th year anniversary of my transition from male to female. When I explained I am a transexual and that I wanted my birthday cake to celebrate my transition by having a blue exterior and a pink interior, they told me they will not make the cake based on their religious beliefs. I was stunned and asked for the woman's name. The phone was disconnected. I called back and explained we got disconnected and believe I was hung up on. I called again and asked that they give me the employees name, and I was hung up on again.

Was anyone treated more favorably than you? Who? Provide information related to their protected classes (e.g., if you are alleging race discrimination, what is the person's race? If age discrimination, what was the person's age?)

I believe so. I cannot be sure because I am not a part of all their sales, but the woman on the phone did not object to my request for a birthday cake until I told her I was celebrating my transition from male to female. I believe that other people who request birthday cakes get to select the color and theme of the cake. I believe that I was not allowed to order a birthday cake because I requested that its color and theme celebrate my transition from male to female. The woman on the phone told me they do not make cakes celebrating gender changes.

STATE OF COLORADO COLORADO CIVIL RIGHTS COMMISSION	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>AUTUMN SCARDINA, Complainant,</p> <p>v.</p> <p>MASTERPIECE CAKESHOP INCORPORATED and JACK PHILLIPS, Respondents.</p>	
<p>Charge No. CP2018011310</p> <p>Case Number: CR 2018_____</p>	
<p>NOTICE OF HEARING AND FORMAL COMPLAINT</p>	

YOU ARE HEREBY NOTIFIED pursuant to § 24-34-306(4) C.R.S., that a hearing will be held before an Administrative Law Judge at 9:00 a.m. on **Monday February 4, 2019** on the fourth floor at the Office of Administrative Courts, 1525 Sherman Street, Denver, Colorado 80203, to determine whether Respondents violated § 24-34-601 *et seq.*, C.R.S. (2018) by denying Complainant Autumn Scardina (Scardina) the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations at its place of public accommodation because of Scardina's sexual orientation (transgender status).

Pursuant to the authority set forth in §§ 24-34-305(1)(d) and 24-34-306(4), C.R.S. (2018), the Colorado Civil Rights Commission (Commission), having determined that the circumstances warrant a hearing, hereby charges and alleges as follows:

1. Respondent, Masterpiece Cakeshop Incorporated (Masterpiece or "the bakery"), is a bakery that engages in sales of goods and services to the public. Masterpiece is a place of public accommodation as defined by § 24-34-601(1), C.R.S., and is therefore subject to the jurisdiction of the Commission.
2. Respondent, Jack Phillips (Phillips) is the owner and operator of Masterpiece, and is a person as defined by §24-34-301(5)(a), C.R.S. As Masterpiece's owner, Phillips is responsible for providing the full and equal enjoyment of its goods and services to the public regardless of protected class, and is therefore subject to the jurisdiction of the Commission.

3. Timeliness and all other jurisdictional and procedural requirements of title 24, article 34, parts 3 and 4 have been satisfied.

4. Upon information and belief, on June 26, 2017, Scardina contacted Masterpiece by telephone to order a cake to celebrate her birthday. Scardina asked if the bakery sold made-to-order birthday cakes. The individual on the phone answered in the affirmative and asked for the date of her birthday. Scardina responded that it was on July 6th and asked if that would be enough time to make the cake. Masterpiece's representative indicated that the bakery could accommodate that timing.

5. Upon information and belief, Scardina requested a cake with a blue exterior and a pink interior, and indicated that she would need a cake big enough to serve 6-8 people.

6. Upon information and belief, Masterpiece's representative stated that the bakery would make the cake as requested by Scardina. Scardina then mentioned that the design was a reflection of the fact that she had transitioned from male to female and that she had come out as transgender on her birthday. Masterpiece's representative then stated that the bakery would not make the cake as requested by Scardina because it does not make cakes to celebrate a sex-change and terminated the call.

7. Upon information and belief, Scardina called Masterpiece back and spoke to a different individual about the exchange that took place during her initial call and confirmed that the cake she had ordered was to celebrate her birthday. Masterpiece's representative responded that the bakery would not make a cake for Scardina and terminated the call.

8. On July 20, 2017, Scardina filed a charge of discrimination with the Colorado Civil Rights Division alleging that Respondents discriminated against her in a place of public accommodation based on her sex (female) and/or sexual orientation (transgender status).

9. During the Colorado Civil Rights Division's investigation of the charge, Phillips affirmed his employees' decision to not fulfill Scardina's order, and cited his religious beliefs as the reason why the bakery would not do so.

10. Upon information and belief, the bakery sells made-to-order birthday cakes to non-transgendered individuals.

11. On June 28, 2018, following the investigation, the Division Director's authorized designee found probable cause for crediting the allegations of the charge

that Masterpiece discriminated against Scardina in a place of public accommodation based on her sexual orientation (transgender status).

12. As required by § 24-34-306(2)(b)(II), C.R.S. (2018), the Division Director's authorized designee ordered the parties to attempt amicable resolution of the charge by compulsory mediation.

13. Upon information and belief, efforts to resolve the matter amicably through the ordered mediation have been unsuccessful.

14. On October 2, 2018, the Commission voted to notice this matter for a hearing and to file this formal complaint.

15. The Commission alleges that Masterpiece denied service to Scardina based on her sexual orientation (transgender status), as defined by § 24-34-301(7), C.R.S. (2018), in a violation of § 24-34-601(2)(a), C.R.S. (2018).

16. The Commission further alleges that Masterpiece is not a place that is principally used for religious purposes, as contemplated by § 24-34-601(1), C.R.S. (2018).

The Commission seeks the following relief:

1. That Masterpiece and Phillips be ordered to allow Scardina and all customers that seek goods and services from the bakery, the full use and enjoyment of the goods, services, facilities, privileges, advantages, and/or accommodations of this place of public accommodation, regardless of their sexual orientation.

2. That Masterpiece and Phillips be ordered to cease and desist their practices of discriminating against persons based on their sexual orientation and to immediately discontinue their policy and practice of refusing to provide goods and services to persons due to their sexual orientation.

3. That Masterpiece and Phillips be ordered to adopt a corrective policy which will allow Scardina and other similarly situated persons the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations provided by the bakery regardless of their sexual orientation.

4. That Masterpiece and Phillips be ordered to report to the Commission all remedial action taken to eliminate the discriminatory practices until such time as it has been established that all discriminatory practices have ceased.


5. That Masterpiece and Phillips be ordered not to retaliate against Scardina in any way.

6. That Masterpiece and Phillips be ordered to provide any other relief which may be available to Scardina by virtue of operation of law and any other relief the Commission deems just and proper.

Masterpiece and Phillips may file a verified answer prior to the date of the hearing. The hearing will be conducted pursuant to sections 24-34-306 and 24-4-105, C.R.S. (2018). Failure to answer the complaint at hearing may result in entry of default judgment against Masterpiece and Phillips.

Dated this 9th day of October, 2018.

BY THE COMMISSION:


COMMISSIONER

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **NOTICE OF HEARING AND FORMAL COMPLAINT** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 9 day of October, 2018 addressed as follows:

Autumn Scardina
7779 Everett Way
Arvada, CO 80005

John McHugh
Reilly Pozner LLP
1700 Lincoln Street, Suite 3400
Denver, CO 80203

Masterpiece Cakeshop, Incorporated
3355 S. Wadsworth Blvd., H-117
Lakewood, CO 80227

Jacob Warner, Esq.
Alliance Defending Freedom
15100 N. 90th St.
Scottsdale, AZ 85260

By interdepartmental mailing services, copies were sent to:

Matthew Azer
Director/Chief ALJ
Office of Administrative Courts
1525 Sherman St, 4th Floor
Denver, CO 80203

Michelle Brissette Miller
First Assistant Attorney General
Employment/Personnel & Civil Rights Unit
Civil Litigation & Employment Law Section
1300 Broadway, 10th Floor
Denver, CO 80203

By Hand Delivery for filing on October 9, 2018:

Office of Administrative Courts
1525 Sherman St, 4th Floor
Denver, CO 80203

Adriana Camona

COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES	
AUTUMN SCARDINA, Complainant, v. MASTERPIECE CAKESHOP INCORPORATED and JACK PHILLIPS, Respondents.	<div style="text-align: center;">▲ COURT USE ONLY ▲</div> Charge No. CP2018011310 OAC Case No: CR 2018-0012
CLOSURE ORDER	

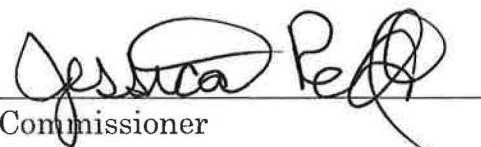
This matter came before the Colorado Civil Rights Commission at a meeting on March 5, 2019, at which time the Commission members present unanimously voted to dismiss the Notice of Hearing and Formal Complaint in OAC Case No. CR 2018-0012. The Commission instructed its counsel to direct counsel in support of the complaint to file an Order of Administrative Closure, which was done that same day.

On March 7, 2019, the presiding Administrative Law Judge entered the Order of Administrative Closure and vacated the hearing set for August 28-30, 2019. That Order, which is now included in and made part of the Commission file, is attached hereto.

The Commission hereby **ORDERS** that Charge No. CP2018011310 is now formally closed and all administrative proceedings under part 3 of article 34 of title 24, C.R.S. have been exhausted.

Dated: March 22, 2019.

BY THE COLORADO CIVIL
RIGHTS COMMISSION


 Commissioner

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **CLOSURE ORDER** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 26 day of March, 2019 addressed as follows:

John M. McHugh
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Denver, CO 80203
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jscruggs@ADFlegal.org



STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, Denver, CO 80203	▲ COURT USE ONLY ▲
Autumn Scardina Complainant, vs. Respondent.	
NOTICE OF ORDER ISSUANCE	

The attached Order of Administrative Closure was issued March 07, 2019 in the above referenced case.

Dated: March 7, 2019

/s/ Nicole Quarles

Nicole Quarles
Court Clerk

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	▲ COURT USE ONLY ▲
AUTUMN SCARDINA, Complainant, vs. MASTERPIECE CAKESHOP INCORPORATED and JACK PHILLIPS, Respondents.	
ORDER OF ADMINISTRATIVE CLOSURE	

This matter comes before Administrative Law Judge Michelle A. Norcross on the Notice of Dismissal and Petition for Administrative Closure, filed by Counsel in Support of the Complaint on March 5, 2019. The petition indicates that the Colorado Civil Rights Commission voted at an emergency meeting on March 5, 2019 to dismiss with prejudice the Formal Complainant filed in this proceeding on October 9, 2019. There is thus no need for any further proceedings before the Office of Administrative Courts.

Accordingly, it is hereby ordered that:

1. This matter is administratively closed before the Office of Administrative Courts.
2. The hearing scheduled in this matter for August 28 to 30, 2019 is vacated.

Dated this 7th day of March, 2019.

/s/ MICHELLE A. NORCROSS
 Supervising Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **ORDER OF ADMINISTRATIVE CLOSURE** was served by email transmission on:

John M. McHugh, Esq.
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jmchugh@rplaw.com

Paula Greisen, Esq.
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griesen@kinggreisen.com

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Jack.Patten@coag.gov

Lucia Padilla, Assistant Attorney General
Civil Litigation & Employment Law Section
Lucia.padilla@coag.gov

On this 7th day of March, 2019.

/s/Nicole Q _____
Office of Administrative Courts

Summary of Voluminous Social Security Administration Data

The Social Security Administration has published data that lists (1) the names of individuals, born between 1880 and 2018, who have registered with the SSA, (2) the frequency that a particular name appears, and (3) the biological sex of individuals with a particular name. For the Court's convenience, the chart below summarizes the SSA records that contain this data as to women named "Mike" or "Stewart."

You can access this data by first visiting the SSA website at this link: <https://www.ssa.gov/oact/babynames/limits.html>. Once there, click "National data," and then click "Open," which downloads files with the relevant data, divided by year, into a folder on your computer. Alternatively, you can access the same data by clicking this link, <https://www.ssa.gov/oact/babynames/names.zip>, which equates to clicking "National data" in the process above. You would then just click "Open" to view the files with the relevant data.

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1942	11	5
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1963	20	
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1965	22	5
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1967	10	
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1970	24	5
1971	10	
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TOTAL	662	78
	Mike	Stewart