

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 Creative LLC, a limited liability
company, et. al.,

Plaintiffs - Appellants,

v.

Aubrey Elenis, Director of the
Colorado Civil Rights Division, in her
official capacity, et al.,

Defendants - Appellees.

19-1413

On Appeal from the United States District Court
For the District of Colorado
D.C. No. 16-cv-02372-MSK

DEFENDANTS - APPELLEES' SUPPLEMENTAL APPENDIX VOL. 1

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

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

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

Plaintiff

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a limited liability company

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Plaintiff

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Appellees' Supp Appendix 2

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Appellees' Supp Appendix 4

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Appellees' Supp Appendix 5

Defendant**Carol Fabrizio**

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Defendant

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

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

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

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

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

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

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

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

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

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

Defendants.

DEFENDANTS' MOTION TO DISMISS VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

COME NOW Defendants, by and through counsel, and pursuant to Fed. R.
Civ. P. 12(b)(1), 12(b)(6) and 8, who move to dismiss all claims asserted in
Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief (# 1) for lack of
subject matter jurisdiction and failure to state a claim.

Defendants certify, pursuant to D.C. Colo. L. Civ. R. 7.1(A), that undersigned counsel conferred with Plaintiff's counsel regarding the relief sought in this motion. Plaintiffs oppose the motion in its entirety.

INTRODUCTION

Plaintiffs seek the Court's permission to discriminate against same-sex couples in services provided to all other members of the general public. Based on a lack of subject matter jurisdiction, Plaintiffs' failure to state a claim and the Complaint's failure to abide by Fed. R. Civ. P. 8, the Court should decline to entertain this request and dismiss the Complaint.

FACTS

1. Colorado's Public Accommodation Law.

Colorado's statutes on public accommodation fall under the Colorado Anti-Discrimination Act (CADA) §§24-34-301 to -804, C.R.S. (2016). Under the law, it is a discriminatory practice and unlawful for a person to refuse, based on sexual orientation, "the full and equal enjoyment of the . . . services . . . of a place of public accommodation." § 24-34-601(2)(a), C.R.S. (# 1 ¶36).

People, who believe they were denied a public accommodation based on their protected class, may follow one of two different paths to seek a remedy. The first option is to bring a civil action against the person in a state court for the county in which the violation occurred. §24-34-602(1)(a), C.R.S. (# 1 ¶54). Either party has

the right to a jury trial and appeal of the final judgment. §24-34-603, C.R.S. *See also Arnold v. Anton Coop. Ass'n*, 293 P.3d 99, 103-104 (Colo. App. 2011) (holding that the county and district courts have concurrent jurisdiction over public accommodation claims). Those who follow this path may not seek any relief from the Colorado Civil Rights Commission (Commission). §24-34-602(3), C.R.S.

The other option is to file a charge of discrimination with the Colorado Civil Rights Division (Division) pursuant to §24-34-306(1)(a), C.R.S. The Commission, a Commissioner, or the Colorado Attorney General may also file a charge alleging a discriminatory or unfair practice when any of them determine that “the alleged discriminatory or unfair practice imposes a significant societal or community impact.” §24-34-306(1)(b), C.R.S. Once a charge is filed, the Division Director, with the assistance of staff, must conduct an investigation of the charge. §24-34-306(2)(a), C.R.S.

After an investigation, the Director or designee must determine “whether probable cause exists for crediting the allegations of the charge.” §24-34-306(2)(b), C.R.S. If she determines that probable cause does not exist, the Director dismisses the charge and provides notice that the charging party may either: (A) file an appeal to the Commission; or (B) file a civil action in district court. §24-34-306(2)(b)(I), C.R.S.

If the Director finds probable cause, she provides the parties a written notice of such finding, and commences compulsory mediation. §24-34-306(2)(b)(II), C.R.S.

If mediation fails, the Commission has the discretion to issue a notice and complaint to set a hearing before the Commission or an Administrative Law Judge, pursuant to §24-4-105, C.R.S. (the state Administrative Procedures Act). §24-34-305(d), §24-34-306(4) and (8), C.R.S. If it is found after hearing that a respondent engaged in a discriminatory practice, the Commission may order the respondent to cease and desist from the discriminatory practice, and “take such action as it may order in accordance with the provisions of” CADA. §24-34-306(9), C.R.S. (# 1 ¶¶49-50). Any party aggrieved by a final order of the Commission may seek judicial review in the Colorado Court of Appeals. §24-34-307(1) and (2), C.R.S.

2. The *Masterpiece Cakeshop* case.

Jack Phillips is a wedding cake baker who refused to bake a wedding cake for a same-sex couple based on his Christian beliefs and objection to same-sex marriage. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 277 (Colo. App. 2015); (# 1 ¶¶64-65). The couple filed a charge of discrimination with the Division alleging discrimination based on sexual orientation under CADA. *Id.* at 278. The Division investigated and issued a notice finding probable cause to credit the discrimination allegation. *Id.* A complaint was filed and an Administrative Law Judge found that Mr. Phillips’s refusal of service violated CADA. *Id.* On review, the Commission affirmed the order, and on appeal, the Colorado Court of Appeals affirmed the Commission’s decision. *Id.* at 277-78.

The Colorado Supreme Court denied certiorari on April 25, 2016. *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm’n*, No. 15SC738 (Apr. 25, 2016). On July 22, 2016, Phillips filed a petition for writ of certiorari with the United States Supreme Court. *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission, et al.*, No. 16-111. Phillips and Masterpiece Cakeshop are represented by Alliance Defending Freedom, the same firm representing Plaintiffs in the instant matter. (# 5).

3. 303 Creative LLC and Lorie Smith.

Plaintiff’s 303 Creative LLC and its owner, Lorie Smith, operate a business in Colorado that provides services to the public (# 1 ¶104). Plaintiffs would like to expand the business to design custom websites; however, that service is not yet available (# 1 ¶¶155-57). When the service is available to the public, Plaintiffs want to refuse this service to same-sex couples (# 1 ¶¶ 144, 172-175, 219). Plaintiffs’ do not allege that Defendants have taken any action against Plaintiffs (# 1 ¶¶ 1-399).

ARGUMENT

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

A. Burden of proof: Since this is a court of limited jurisdiction, it is presumed that no jurisdiction exists absent an adequate showing that federal jurisdiction should be invoked. *United State ex rel. Hafter v. Spectrum Emergency*

Care, Inc., 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs are claiming jurisdiction, therefore they carry the burden to show it by a preponderance of the evidence. *Id.*

B. Elements: In order to satisfy the requirements for Article III standing, Plaintiffs must show (i) an “injury in fact” that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (ii) the alleged injury must be fairly traceable to the challenged action of the defendant; (iii) it must be likely, not merely speculative, that a favorable decision will redress the injury. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000).

C. Elements not supported by Complaint:

element (i) - injury: The Complaint does not allege an actual injury caused by Defendants and only speculates as to what may happen *if* numerous facts occur. Specifically, those facts would have to be as follows: (1) Plaintiffs make their wedding website service available to the public; (2) a person attempts to obtain the service; (3) Plaintiffs’ deny the service based on the person’s sexual orientation; (4) the person denied service files a charge of discrimination with the Division; (5) the Division investigates the charge and the Director or designee finds that there is probable cause to credit the charge; (6) mandatory conciliation is attempted and fails; (7) the Commission decides to notice the case for hearing; (8) an ALJ holds a hearing and rules against Plaintiffs; (9) the

Commission affirms the decision and orders Plaintiffs to cease and desist the discriminatory practice; and (10) the Plaintiffs exhaust their state appellate remedies. None of these ten facts have yet occurred; and the failure of any one step to occur would result in no injury to Plaintiffs.

Indeed, the Supreme Court recently restated its reluctance “to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment” because a “theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1148 and 1150 (2013).

element (ii) - action by Defendants: Plaintiffs do not allege an injury traceable to an action by Defendants. Defendants have not made any decisions that caused harm to Plaintiffs.

element (iii) - favorable decision will address injury: Pursuant to §24-34-602(1)(a), C.R.S., any person who is denied a public accommodation may initiate their own independent civil action in state court without ever filing a charge with the Division. (# 1, ¶54). If a person does so, he or she is prohibited from filing a charge of discrimination with the Commission. *See* §24-34-602(3) (“relief provided by this section is an alternative to that authorized by section 24-34-306(9), and a person who seeks redress under this section is not permitted to seek relief from the commission.”). Therefore, an injunction against Defendants will not prevent

anyone from initiating an independent civil action against Plaintiffs to enforce CADA's public accommodation provisions with regard to sexual orientation.

2. The *Younger* doctrine merits abstention

A. Burden of proof: Since this is a court of limited jurisdiction, it is presumed that no jurisdiction exists absent an adequate showing that federal jurisdiction should be invoked. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs are claiming jurisdiction, therefore they carry the burden to show it by a preponderance of the evidence. *Id.*

B. Elements: The *Younger* doctrine, *Younger v. Harris*, 401 U.S. 37 (1971), provides "that federal courts not interfere with state court proceedings by granting equitable relief-such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings when such relief could adequately be sought before the state court." *See Rienhardt v. Kelley*, 164 F.3d 1296, 1302 (10th Cir. 1999). The Supreme Court has extended *Younger* abstention to include administrative proceedings to enforce state anti-discrimination laws. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625 (1986).

Under the *Younger* doctrine, federal courts must abstain from exercising jurisdiction when: (i) there is an ongoing state criminal, civil, or administrative proceeding, (ii) the state court provides an adequate forum to hear the claims

raised in the federal complaint, and (iii) the state proceedings “involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies.” *Amanatullah v. Colo. Bd. of Med. Exam’rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). If these conditions are met, abstention is nondiscretionary and must be invoked. *Id.*

C. Elements not supported by Complaint:

(i) – (iii): The Complaint relies on the *Masterpiece Cakeshop* case to allege that Defendants would harm Plaintiffs based on how that case was adjudicated (#1, ¶¶241, 256, 335, 340). *Masterpiece Cakeshop* has not yet been fully adjudicated, and is pending before the United States Supreme Court on certiorari review (# 5). Therefore, an ongoing proceeding exists for which Plaintiffs allege harm.

Colorado has a compelling interest in enforcing its public accommodation laws and, pursuant to state law, Plaintiffs’ claims may be properly adjudicated in administrative forums and state courts if a complaint is ever filed.¹ The United States Supreme Court has held that states have a compelling interest in

¹ Colorado’s compelling interest in enforcing CADA and not subjecting persons participating in the process to liability is reflected in state law which provides that Commissioners and persons “participating in good faith in the making of a complaint or a report or in any investigative or administrative proceeding” authorized by CADA, “shall be immune from liability in any civil action brought against him for acts occurring while acting in his capacity as a commission member or participant.” §24-34-306(13), C.R.S.

eliminating discrimination through use of public accommodation laws. *See e.g.*, *Hurley v. Irish-American*, 515 U.S. 557, 572 (1995) (public accommodation laws “are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination....”); *see also Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 549 (1987) (government had a compelling interest in eliminating discrimination against women in places of public accommodation); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (“acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (government had a compelling interest in eliminating racial discrimination in private education).

3. The *Rooker-Feldman* doctrine merits abstention.

A. Burden of proof: Since this is a court of limited jurisdiction, it is presumed that no jurisdiction exists absent an adequate showing that federal jurisdiction should be invoked. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs are claiming jurisdiction, therefore they carry the burden to show it by a preponderance of the evidence. *Id.*

B. Elements: The Tenth Circuit applies the *Rooker-Feldman* doctrine to federal claims actually decided by a state court, and federal claims inextricably intertwined with a state court judgment. To discern whether the “inextricably intertwined” standard of the doctrine applies, the Court asks whether (i) the injury alleged by the federal plaintiff has resulted from the state court judgment itself or is distinct from that judgment, and whether (ii) the state-court judgment has caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress. *Merrill Lynch Bus. Fin. Servs. v. Nudell*, 363 F.3d 1072, 1076 (10th Cir. 2004).

C. Elements not supported by Complaint:

elements (i) – (ii): The *Masterpiece Cakeshop* decision addressed the federal constitutional issues that are addressed in the Complaint. (# 1 ¶¶67-69; 72). Plaintiffs argue that they will suffer harm as a result of the decision. (#1, ¶¶241, 256, 335, 340). The Court should refuse to hear this case in light of this interest and the ongoing *Masterpiece Cakeshop* matter which was decided by the Colorado Court of Appeals on the same arguments made in the Complaint, and is currently pending before the United States Supreme Court on Plaintiffs’ counsel’s petition for writ of certiorari. (# 1 ¶¶63-72; # 5).

4. Colorado River doctrine merits abstention.

A. Burden of proof: Since this is a court of limited jurisdiction, it is presumed that no jurisdiction exists absent an adequate showing that federal jurisdiction should be invoked. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs are claiming jurisdiction, therefore they carry the burden to show it by a preponderance of the evidence. *Id.*

B. Elements: The *Colorado River* doctrine permits a federal court to dismiss or stay a federal action in deference to pending parallel state court proceedings, based on “considerations of wise judicial administration, giving regarding to consideration of judicial resources and comprehensive disposition of litigation.” *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976); *Fox v. Maulding*, 16 F.3d 1079, 1080 (10th Cir. 1994).

The Court must determine whether the state court suit and federal suit are parallel, meaning that substantially the same parties litigate substantially the same issues in different forums. *Id.* at 1081. The Tenth Circuit’s approach is to examine state proceedings as they actually exist to determine whether they are parallel to federal court proceedings. *Id.* Factors to consider include whether either court has assumed jurisdiction over property, desirability of avoiding piecemeal litigation, the order in which the courts obtained jurisdiction, the

progress of the two cases, which forum’s substantive law governs the merits of the litigation, and the adequacy of the state forum to protect the rights of parties. *Id.* at.1081-1082.

C. Elements not supported by Complaint:

element (i): As addressed above, the adequacy of the state courts and the *Masterpiece Cakeshop* case’s progress through consideration by the United States Supreme court, merits abstention.

5. Plaintiffs have failed to state a claim under Fed. R. Civ. P. 12(b)(6) as to Defendants’ authority and actions.

A. Burden of proof: In order to state a claim under 42 U.S.C. § 1983, the complaint must allege facts which, if assumed to be true, would demonstrate that a defendant deprived plaintiff of a right secured by the United States Constitution or federal law while acting under color of state law. *Gaines v. Stenseng*, 292 F.3d 1222, 1225 (10th Cir. 2002) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970) (“emphasizing that a § 1983 plaintiff must prove the defendant deprived him of a right secured by the Constitution and laws of the United States”). “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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must plead facts that allow “the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged.” *Id.* The allegations must “permit the court to infer more than the mere possibility of misconduct.” *Id.* at 679.

“Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* A complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

The 12(b)(6) analysis has two prongs. First, the court identifies and disregards “the allegations in the complaint that are not entitled to the assumption of truth,” that is, those allegations which are legal conclusion, bare assertions, or merely conclusory. *Iqbal*, 556 U.S. at 680. Otherwise, every motion to dismiss could be defeated by “an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 678. Second, the Court considers the remaining factual allegations “to determine if they plausibly suggest an entitlement to relief.” *Id.* at 681. Where a plaintiff cannot assert a valid claim for relief, a court should not waste its valuable time and resources considering the matter. *Twombly*, 550 U.S. at 558.

“Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.” *Schneider v. City of Grand Junction Police*

Dep't, 717 F.3d 760, 768 (10th Cir. 2013) (citing *Foote v. Speigel*, 118 F.3d 1416, 1423 (10th Cir. 1997)). More specifically, “[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676.

The *Iqbal* standard has “greater bite” in the “context of a § 1983 claim against individual government actors, because ‘they typically include complex claims against multiple defendants.’” *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011) (citations omitted). Where several government actors are named as defendants, “it is particularly important ... that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state.” *Robins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (emphasis in original). Further, “the plaintiff’s facile, passive-voice showing that his rights ‘were violated’ will not suffice. Likewise insufficient is a plaintiff’s more active-voice yet undifferentiated contention that ‘defendants’ infringed his rights. ... Rather, it is incumbent upon a plaintiff to identify *specific* actions taken by *particular* defendants” *Pahls v. Thomas*, 718 F.3d 1210, 1225-26 (10th Cir. 2013) (internal citations and quotation marks omitted, emphasis in original).

B. Elements: In order to establish a claim under 42 U.S.C. §1983, Plaintiffs must show: (i) there was a violation of rights protected by the federal Constitution or created by federal statute or regulation, (ii) proximately caused, (iii) by the conduct of a ‘person’ (iv) who acted under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.” *Sumnum v. City of Ogden*, 297 F.3d 995, 1001 (10th Cir. 2002).

C. Elements not supported by Complaint:

elements (i)-(iv): The Complaint inaccurately describes Defendants’ actual authority and power, and in doing so, fails to demonstrate that Defendants violated or will violate Plaintiffs’ rights.

The Complaint names three groups of Defendants: the Director of the Division, the Commission’s members, and the Attorney General. (# 1, ¶¶25-27). It alleges that the Director’s authority stems from §§24-34-302 and 306, C.R.S. (#1, ¶25), the Commission’s authority stems from §§24-34-305, 306 and 605, C.R.S. (# 1, ¶26), and the Attorney General’s authority stems from §24-34-306, C.R.S. (# 1, ¶27).

Despite the plain language of the statutes, Plaintiffs assert that all three groups of Defendants have the exact same authority under CADA, including: investigate charges of discrimination (# 1, ¶42), determine whether probable cause exists for crediting charges (# 1, ¶43), hold hearings (# 1, ¶44), issue subpoenas (# 1, ¶45), compel mediation (# 1, ¶46), determine whether the individual or business

under investigation violated CADA (#1, ¶47), issue notices of a right to sue (# 1, ¶48), issue cease and desist orders (# 1, ¶49), issue orders requiring parties to take specific actions (# 1, ¶50).

The Complaint misstates Defendants' legal authority by alleging that all Defendants either have certain enforcement powers or have taken specific actions based on their powers that have or will harm Plaintiffs (# 1 ¶¶ 227-229; 255-265; 276-278; 284; 289; 306-307; 309-314; 324-326; 333-337; 339-342; 353-355; 358; 360; 365-369; 397). Finally, the Prayer For Relief erroneously lumps all Defendants together based on their alleged authority (# 1 p.59, ¶¶1, 3).

Each Defendant has different, separate and unique obligations and/or options they may initiate under CADA, that are contrary to what is alleged in the Complaint. As a result, Defendants conduct has not harmed Plaintiffs.

The Director and Division staff investigates charges of discrimination, issue subpoenas to compel information, issue a determination of probable cause or no probable cause, and conduct mandatory conciliation if cause is found, or dismiss if no cause is found. §§24-34-306(1) and (2), C.R.S.; *Demetry v. Colorado Civil Rights Commission*, 752 P.2d 1070, 1071 (Colo. App. 1988). The Division's investigation is merely preparatory to further proceedings and if cause is found, rights and obligations of parties are fixed at a *de novo* proceeding. *Id.* at 1072. These preliminary proceedings are, therefore, without legal effect until suit is brought. *Id.* The sufficiency of an investigation or the evidence underlying an agency's

findings of discrimination cannot be challenged in the *de novo* hearing. *E.E.O.C. v. Keco Indust. Inc.*, 748 F.2d 1097 (6th Cir. 1984); *AT&T Technologies Inc. v. Royston*, 772 P.2d 1182, 1186 (Colo. App. 1989) (the Director’s findings of probable cause or no probable cause are not quasi-judicial rulings, only administrative determinations reached without the benefit of an adversarial hearing, and the rulings are not binding).

The Complaint alleges that actions taken by the Division Director in three different public accommodation cases caused harm to Plaintiffs for which they are entitled to relief. The Complaint references three charges of discrimination based on creed against bakeries that declined to produce cakes with religious messages and anti-same sex marriage messages (# 1 ¶¶ 73-84). The Complaint seeks relief based on a belief that decisions made in these matters harmed Plaintiffs (# 1 ¶¶ 241-242; 256-259; 313-314; 335; 340). These matters resulted in no-probable cause determinations by the Director and no further action was taken (# 1 ¶80).²

The Director’s finding of no probable cause in these matters was not a quasi-judicial ruling, only an administrative determination reached without the benefit of

² The Commission and Division are prohibited by law to disclose any information about matters, such as these, that have not been made public by noticing them for a hearing. §24-34-306(3), C.R.S. However, since the decisions were addressed in *Masterpiece Cakeshop*, 370 P.2d at 282, n.8, they are addressed for the limited purpose of this Motion.

an adversarial hearing, and it is not binding. *AT&T Technologies Inc.*, 772 P.2d at 1186. These decisions have no binding precedent or effect on other persons.

Contrary to Plaintiffs' allegations, the Director has no authority to take action against a person about whom a charge of discrimination is filed. She may only process the charge, investigate, make a finding and, if she finds cause, attempt conciliation. §§24-34-306(1) and (2), C.R.S. Since Plaintiffs' misstate the Director's authority to take the actions alleged in the Complaint, Plaintiffs cannot show any conduct by the Director to deprive Plaintiffs of any right.

The Commission's authority as it relates to the Complaint's allegations only comes into play after the Division's investigation, determination, and failure of conciliation, and only if, in its discretion, it decides to notice a case for hearing. §§ 24-34-305(d) and 24-34-306. The Commission is the quasi-judicial body that reviews evidence, considers arguments, and renders a decision under the administrative procedures act. §§24-4-105 and 24-34-306(9). The Commission has taken no action to deprive Plaintiffs of any right. Therefore, Plaintiffs fail to state a claim against the Commission members.

The Attorney General has very limited interaction with CADA's public accommodation provision. CADA's general section provides that the Attorney General may file a charge alleging a discriminatory or unfair practice when she determines "the alleged discriminatory or unfair practice imposes a significant societal or community impact." §24-34-306(1)(b). CADA's public accommodation

statute, §24-34-601, *et seq.*, does not mention the Attorney General at all.

Plaintiffs' misstate the Attorney General's authority to take the actions alleged in the Complaint. Therefore, they cannot show any conduct that has or will be taken by the Attorney General to deprive Plaintiffs of any right.

6. Plaintiffs have failed to state a claim under Fed. R. Civ. P. 8.

A. Burden of proof: A complaint must satisfy Rule 8 and a failure to do so can supply a basis for dismissal since Rule 41(b) specifically authorizes a district court to dismiss an action for failing to comply with any aspect of the Federal Rules of Civil Procedure. *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice Center*, 492 F.3d 1158, 1161 (10th Cir. 2007).

B. Elements: Fed. R. Civ. P. 8(a) states that a complaint shall contain (i) "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(d)(1) states that (ii) each "allegation must be simple, concise, and direct." When a complaint does not comply with Rule 8, the district court has the authority to dismiss the complaint. "A dismissal without prejudice under Rule 8 is within the sound discretion of the trial court." *Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197, 1203 (8th Cir. 1992) (citations omitted).

C. Elements not supported by Complaint:

elements (i) and (ii): Plaintiffs' Complaint is 61 pages long containing 399 paragraphs, many of which are redundant. The Complaint contains 15 paragraphs that reference the Bible or Bible passages, without ever referencing

which version of the Bible Plaintiffs are citing.³ See e.g., *Ellis v. State*, U.S. Dist. LEXIS 17131, 4-5 (N.D. Ill. Nov. 3, 1992) (noting that plaintiff's complaint violated Rule 8, in part, because it was "interspersed with religious pleas to defendants . . . and quotes from the Bible."), *Seehausen v. Gonzalez*, 2012 U.S. Dist. LEXIS 85022, 4-5 (C.D. Cal. May 8, 2012) (dismissing plaintiff's complaint in part for violating Rule 8 because it contained "disquisitions from the Bible."). Defendants should not be required to admit what an unidentified version of the Bible does or does not contain, and they certainly should not be required to either admit or deny the truth of what is said in the Bible.

Defendants request that the Complaint be dismissed for failure to abide by Fed. R. Civ. P. 8.

STAY OF PROCEEDINGS

If this Court denies Defendants' motion to dismiss, then it should stay these proceedings in light of the pending petition for certiorari in the *Masterpiece* case. The United States Supreme Court has expressed a strong preference to avoid a multiplicity of suits challenging the same law through requests for declaratory and injunctive relief. See *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). When multiple suits are filed addressing the same law, "actions in all but one jurisdiction might be stayed pending the conclusion of one proceeding." *Id.* at 155. "A court

³ See <https://www.bible.com/versions>, listing 49 English versions of the Bible and hundreds of other versions.

may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere.” *Id.* Further, if “a multiplicity of suits are undertaken in order to harass the Government or to delay enforcement, relief can be denied on this ground alone. *Id.*

The power to stay a proceeding “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Diamond v. Vickery*, 2013 U.S. Dist. LEXIS 20013, *2, 12-cv-01891-MSK (D. Colo. Feb. 14, 2013) (quoting *Landis v. North Am Co.*, 299 U.S. 248, 254 (1930)). “Federal courts have relied upon this principle to stay proceedings in which similar or identical litigation was simultaneously pursued in another court.” *Id.* (citing *In re Kozeny* 236 F.3d 615 (10th Cir. 2000); *Ventura v. David’s Bridal*, 248 F.3d 1139 (5th Cir. 2001); *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976).) Proceeding in this case before the Supreme Court rules on the ADL’s petition for certiorari in *Masterpiece* raises the possibility of this Court issuing an opinion that could be at odds with that of the Supreme Court, and thus advisory.

CONCLUSION

Plaintiffs lack standing to bring this action because they cannot show they suffered an injury in fact, based on Defendants’ actions, which an injunction would remedy. The only matter for which Plaintiffs could possibly allege to have some

impact on their rights in the future, *e.g.* enforcement of the *Masterpiece Cakeshop* decision, is pending certiorari review before the United States Supreme Court, and is not final. Moreover, the Complaint generalizes the enforcement powers of all Defendants, contrary to law. Plaintiffs have, therefore, failed to state claims against Defendants. Finally, the Complaint fails to meet the pleading requirements of Rule 8. Based on the arguments in this Motion, the Complaint should be dismissed.

Respectfully submitted this 19th day of October, 2016.

s/ Vincent Edward Morscher _____

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CERTIFICATE OF SERVICE

I certify that I served the foregoing DEFENDANTS' MOTION TO DISMISS VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF upon all parties herein by e-filing with the CM/ECF system maintained by the court or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 19th day of October, 2016, addressed as follows:

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**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' RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS'
VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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INTRODUCTION

Lorie Smith¹ seeks only to speak freely — to publicly express her religious beliefs about marriage and refrain from speaking messages about marriage that violate those beliefs — without fear of government punishment. Those rights are guaranteed by the First Amendment but ignored by the Defendants who interpret and enforce the Colorado Anti-Discrimination Act (CADA) to compel speech affirming same-sex marriage and punish speech opposing it. If this were not alarming enough, Defendants now ask this Court to dismiss Lorie’s case – granting them *carte blanche* to violate Lorie’s First Amendment rights.

Rather than asserting a legitimate reason to dismiss, Defendants claim every single one applies, with most having no basis in law or fact, such as all of their abstention arguments. Defendants’ standing, failure to state a claim, Rule 8, and stay arguments are similarly flawed, relying on misstatements of the law or misrepresentations of the facts. Defendants’ motion is nothing more than an attempt to throw every possible excuse against the wall with the hope that one will stick.

In the end, their motion boils down to three deeply flawed arguments. One, that to have standing to challenge the Defendants’ infringement of her First Amendment rights, Lorie must first violate the law she challenges, CADA, and then incur punishment after exhausting all possible appeals. Two, that once Defendants enforce CADA against someone else, the federal courts must abstain from Lorie’s federal case. Three, that Lorie should be forced to stand aside and relinquish her constitutional freedoms while Defendants wait for a possible grant of certiorari

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

from the Supreme Court in a separate case they brought under CADA against an unrelated third party.

These arguments reflect neither good law nor good policy. Binding precedent rejects all three. And if taken to their logical conclusions, the Defendants' arguments could bar all civil rights plaintiffs from federal court, strip the federal courts of jurisdiction to review all state statutes, and limit any judicial review of pressing constitutional matters to one court at a time. Defendants do not have such power to insulate their violation of Lorie's fundamental rights from judicial review.

Lorie's complaint is well-pled. It complies with the federal rules. It states claims upon which Lorie can seek relief and for which she has standing. This Court has jurisdiction. For all of these reasons, Defendants' Motion to Dismiss and to Stay should be denied.

STATEMENT OF FACTS

A. Lorie Smith and 303 Creative.

Lorie is a graphic, website, and marketing designer. Compl. for Decl. and Inj. Relief ¶¶ 101-104, ECF No. 1. She owns and operates 303 Creative LLC, a business through which she currently designs custom graphics, websites, and marketing material for web and print publication. *Id.* at ¶¶ 103-104. As with every creative professional whose business is her speech, Lorie asserts a First Amendment right to use her mind and artistic talents to design and create messages that align with her beliefs. Compl. ¶¶ 103-117. She similarly reserves the constitutional right not to be forced to design and create messages that violate her religious beliefs. *Id.* Defendants' application of the Colorado Anti-Discrimination Act ("CADA") threatens both. Compl. ¶¶ 165-180, 199.

Lorie's current business is to design and create custom websites for organizations and individuals. Compl. ¶ 104, 120-137. She would like to expand her business to design and create custom websites for engaged couples to celebrate their upcoming marriage. Compl. ¶¶ 138-148. Because of her religious convictions about marriage, Lorie cannot design websites celebrating any conception of marriage except those between one man and one woman, including same-sex marriage. Compl. ¶¶ 114, 162-163, 173-175. To notify the public about these beliefs, Lorie plans to post a statement on 303 Creative's website explaining those religious beliefs and their influence on her business and the messages she can design and create. Compl. ¶¶ 161-163. Lorie has not posted this statement yet or entered the wedding industry because she fears the Defendants' interpretation and enforcement of CADA — that CADA's ban on sexual orientation discrimination would subject her to complaints, investigations, and punishments if she declines to speak a message that promotes same-sex marriage. Compl. ¶¶ 177-180.

B. Defendants' enforcement of CADA.

The Defendants have done and said nothing to dispel Lorie's fears. Notably missing from their Motion to Dismiss is any statement disclaiming an intent to enforce CADA against Lorie. Defendants never say that CADA does not apply to 303 Creative or that the Defendants would not investigate and punish Lorie if she posts her desired statement or declines to create websites with messages celebrating same-sex marriage.

Instead, the Defendants twice detail each Defendants' enforcement power, confirming the corollary allegations in Lorie's Complaint. Mot. to Dismiss 3-4, 16-20, ECF No. 37; Compl. ¶¶ 25-28, 39-53. As the Defendants admit, "[t]he Commission, a Commissioner, or the Colorado Attorney General" can file a complaint under CADA, Mot. to Dismiss 3; investigation of every

complaint is mandatory; the Defendant Director conducts these mandatory investigations and has the power to dismiss or find probable cause for every filed complaint; the Defendant Director conducts mandatory mediation for all probable cause findings; the Defendant Civil Rights Commission (hereafter “Commission”) has the power to require a hearing before itself or an Administrative Law Judge (“ALJ”) and can issue punishments including “cease and desist orders” and other “such action as it may order in accordance with the provisions of CADA.” *Id.*

The Defendants then confirm the Commission’s prior enforcement of CADA in ways that favor speakers with certain views on marriage over others. They admit that the Commission investigated and aggressively prosecuted Jack Phillips and Masterpiece Cakeshop all the way to a pending petition for certiorari to the U.S. Supreme Court because Mr. Phillips, a cake artist, declined to create a cake celebrating a same-sex wedding. Mot. to Dismiss 4-5; Compl. ¶¶ 63-85. At the same time, the Defendants do not deny that the Commission simultaneously affirmed findings of no probable cause against three bakeries that refused to create cakes because they contained messages critical of same-sex marriage. Compl. ¶¶ 73-84. These admissions and omissions reveal that Defendants selectively interpret and enforce CADA and confirm the credible threat of enforcement Lorie faces.

ARGUMENT

I. Plaintiffs have standing and this Court has jurisdiction to hear Plaintiffs’ claims.

A. Burden of Proof:

Defendants’ misstate the burden of proof. They raise a facial Federal Rule of Civil Procedure 12(b)(1) (hereafter “12(b)(1)”) challenge to Plaintiffs’ complaint but cite the burden—preponderance of the evidence—for a factual 12(b)(1) challenge. *Holt v. U.S.*, 46 F.3d 1000, 1002

(10th Cir. 1995) (distinguishing facial and factual challenges); *Ingram v. Faruque*, 728 F.3d 1239, 1242 (10th Cir. 2013) (same). While it is the Plaintiff’s burden to establish jurisdiction, “the manner and degree of evidence required” is based on the “successive stage[] of the litigation.” *Ward v. Utah*, 321 F.3d 1263 (10th Cir. 2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). “When evaluating a plaintiffs’ standing at [the motion to dismiss] stage, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Cressman v. Thompson (Cressman I)*, 719 F.3d 1139, 1144 (10th Cir. 2013) (citing *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc)). The plaintiff’s “burden in establishing standing is lightened considerably” at the pleading stage. *Cressman I*, 719 F.3d at 1144 (citing *Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012)). A plaintiff who pleads “general factual allegations of injury resulting from the defendant’s conduct” establishes jurisdiction. *Lujan*, 504 U.S. at 561. Lorie has met this burden.

B. Elements:

Defendants correctly state the test for Article III standing under *Lujan* — “[t]o establish Article III standing, a plaintiff must establish (1) that he or she has ‘suffered an injury in fact’; (2) that the injury is ‘fairly traceable to the challenged action of the defendant’; and, (3) that it is ‘likely’ that ‘the injury will be redressed by a favorable decision.’” *Awad v. Ziriya*, 670 F.3d 1111, 1120 (10th Cir. 2012) (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011)); see Mot. to Dismiss 6. Merely citing this standard, however, ignores how the courts have applied it when evaluating pre-enforcement challenges to state laws alleging the unconstitutional

chilling of protected speech, like the case presented here. That precedent sets forth three binding principles that apply to Lorie’s case.

One, a First Amendment plaintiff does not have to violate the law before challenging it. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (“[I]t is not necessary that petitioner first expose [her]self to actual arrest or prosecution to be entitled to challenge a statute that [s]he claims deters the exercise of [her] constitutional rights.”); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (Plaintiffs “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.”); *Ward*, 321 F.3d at 1267 (“Plaintiffs may have standing even if they have never been prosecuted or actively threatened with prosecution.”); *Initiative and Referendum Inst.*, 450 F.3d at 1089 (“A plaintiff who alleges a chilling effect asserts that the very existence of some statute discourages, or even prevents, the exercise of his First Amendment rights. Such a plaintiff by definition does not—indeed, should not—have a present intention to engage in that speech....”). This principle is supported by a long line of pre-enforcement cases, including many cases hearing challenges to laws before they even took effect. *See, e.g., id.*; *Va. v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 392 (1988) (affirming booksellers’ standing to bring a pre-enforcement lawsuit challenging the constitutionality of a state statute prohibiting the display of sexually explicit materials accessible to juveniles.); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1153 (10th Cir. 1999) (affirming the ACLU’s standing to challenge the constitutionality of a state statute before the statute’s effective date.).

Two, courts apply standing requirements most leniently in the First Amendment context. *Ward*, 321 F.3d at 1266 (quoting *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)) (“Because of the significance of First Amendment rights, the Supreme Court ‘has

enunciated other concerns that justify a lessening of prudential limitations on standing.”); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (“[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing.”); *Dana’s R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1241 (11th Cir. 2015) (quoting *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1253-57 (11th Cir. 2010) (“When First Amendment protections are implicated, we apply ‘most loosely’ the injury-in-fact requirement ‘lest free speech be chilled.’”)); *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (“The leniency of the First Amendment standing manifests itself most commonly in the doctrine’s first element: injury in fact.”).

Three, in *Ward* — a case involving a prospective challenge by an animal rights activist who alleged the chilling of his constitutionally protected speech because he feared being prosecuted under a state statute — the Tenth Circuit set out two distinct tests for establishing “injury-in-fact” in First Amendment pre-enforcement cases like Lorie’s. *Ward*, 321 F.3d at 1266-69. Under the first test, “a plaintiff generally has standing if she alleges ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder.’” *Id.* at 1267 (quoting *Phelps v. Hamilton (Phelps II)*, 122 F.3d 1309, 1326 (10th Cir. 1997)). Under the second test, a plaintiff suffers “ongoing” injury-in-fact if she “‘faces a credible threat’ of future prosecution...resulting from the statute’s chilling effect on [her] desire to exercise [her] First Amendment rights.” *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987); *see also Initiative Referendum Inst.*, 450 F.3d at 1088 (“This Court has recognized that a chilling effect on the exercise of a plaintiff’s First Amendment rights may amount to a judicially cognizable injury in fact.”).

These tests provide separate paths to Article III standing for cases like Lorie's. They also recognize that First Amendment plaintiffs like Lorie suffer two distinct injuries when they are forced to self-censor lawful speech to avoid government punishment. Such a plaintiff suffers concrete injury both because of the threat of future enforcement and because of the "ongoing injury" from the "*chilling effect*" on her speech. *Ward*, 321 F.3d at 1267. Lorie suffers both injuries in this case.

Rather than address the above tests, the Defendants cite an inapplicable case, *Clapper*, to argue that Lorie's injuries are speculative. Mot. to Dismiss 7 (citing *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138 (2013)). They are not speculative. *Clapper* has little application outside its unique facts. *Clapper* confronted a statute that allowed government officials to ask the Foreign Intelligence Surveillance Court for permission to surveil people if certain conditions were met. *Id.* at 1144-45. This intelligence gathering and foreign affairs statute was completely discretionary. See 50 U.S.C. § 1881(a); *Clapper*, 133 S. Ct. at 1144 ("[T]he Attorney General and the Director of National Intelligence may authorize jointly..."). It also triggered an "especially rigorous" "standing inquiry" specific to the type of statute challenged. *Clapper*, 133 S. Ct. at 1143, 1147. In addition to this high standard, which has no application to Lorie's case, the statute in *Clapper* exempted the plaintiffs and those plaintiffs did not facially violate the statute. *Id.* at 1148. Even if they had, the statute mandated a five-step process before the alleged injury (surveillance) could occur. *Id.* For all of these reasons, the Court rejected the claim. *Id.* at 1155. As alleged in the Complaint and explained directly below, Lorie's desired speech violates Defendants' interpretation of CADA and the constitutional harm triggered by that violation is immediate, and

not reliant on a five-step process. Compl. ¶¶ 165-185. Therefore, the holdings of *Clapper* do not dictate Lorie's case.

Six months after *Clapper*, the Court issued *Susan B. Anthony List* reaffirming the less stringent test for injury in fact for pre-enforcement First Amendment challenges like Lorie's. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2432-33 (2014) (affirming the test and applying it to find injury in fact where speech was chilled.). This is the standard that applies to Lorie's case and she easily satisfies it.

C. Elements met:

1. **Element (i) – injury:**

a. **First *Ward* test.**

Lorie's complaint alleges sufficient facts to meet all elements of the first *Ward* test for injury in fact.

Element 1: Intent to engage in conduct arguably affected by a constitutional interest. Lorie pled her intention to engage in two different activities affected by a constitutional interest. First, she desires to publish a website that explains her religious motivation for designing, creating, and publishing custom wedding websites promoting marriages between one man and one woman and explaining her religious beliefs, which prevent her from promoting any other conception of marriage. Compl. ¶¶ 138-164. Second, she desires to immediately start creating wedding websites promoting marriage between one man and one woman while declining requests to create websites promoting a same-sex marriage. *Id.* Defendants' motion completely ignores the former activity. Mot. to Dismiss 6-7. Lorie has taken clear steps toward publishing her website and entering the custom wedding website marketplace. Compl. ¶¶ 154-164. She has prepared a sample website,

written the statement about marriage that she wishes to post, and prepared promotional materials to announce her entry into the custom wedding website field. *Id.* These activities, and her desire to avoid promoting unwanted messages about marriage, are pure speech entitled to full First Amendment protection. *See* Pls.’ Mot. for Prelim. Inj. 11 fn 4, ECF No. 7; *see also Cressman v. Thompson (Cressman II)*, 798 F.3d 938, 952 (10th Cir. 2015) (explaining that “[t]he concept of pure speech is fairly capacious” and citing examples). They are also proscribed by the Defendants’ interpretation of CADA. Compl. ¶¶ 165-180.

Element 2: Constitutional conduct is proscribed by statute. As Lorie pled, Defendants interpret CADA to bar her from both publishing her desired statement and entering the wedding website design business unless she is willing to create websites celebrating same-sex marriage. Compl. ¶¶ 165-180. Defendants do not contest this fact. Mot. to Dismiss; Resp. to Pls.’ Mot. for Prelim. Inj., ECF No. 38. Indeed Defendants’ aggressive enforcement against Masterpiece Cakeshop leaves little doubt about their application of CADA to compel expressive business owners to create speech celebrating same-sex marriages. Mot. to Dismiss 4-5; Compl. ¶¶ 63-72, 85. Like the owner of Masterpiece Cakeshop, Lorie is willing to serve all people, but she cannot create all messages. Compl. ¶¶ 70, 111-112. She intends to create custom wedding websites promoting marriages between one man and one woman, but will decline to create wedding websites promoting same-sex marriages. Compl. ¶¶ 175-176. As evidenced by the Defendants’ briefing and prior enforcement actions, they interpret CADA to bar Lorie from speaking and not speaking in the manner she desires.

Element 3: Credible threat of prosecution. When a plaintiff desires to engage in conduct proscribed by a statute, courts “assume a credible threat of prosecution in the absence of

compelling contrary evidence.” *Ward*, 321 F.3d at 1269; *see also Am. Booksellers Ass’n*, 484 U.S. at 393 (“The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise.”); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) (“[W]hether a First Amendment plaintiff faces a credible threat of prosecution, the evidentiary bar that must be met is extremely low.”). Here, Defendants have asserted no evidence to the contrary. They have made no statements suggesting they will not enforce CADA against Lorie if she posts her statement or begins creating wedding websites and declines to create websites promoting same-sex marriages. Mot. to Dismiss, Resp. to Prelim. Inj. Mot. Instead, they twice emphasized their enforcement power under CADA making it all the more clear they can and will enforce CADA to restrict and compel Lorie’s speech if she begins creating wedding websites. Mot. to Dismiss 3-4, 16-20. Their history of enforcement in Masterpiece Cakeshop makes this danger concrete. Compl. ¶¶ 63-72, 85. It is not speculative to believe they will do so again. Indeed, “past enforcement against the same conduct is good evidence that the threat of enforcement is not “chimerical.” *Susan B. Anthony List*, 134 S. Ct. at 2345 (citing *Steffel*, 415 U.S. at 459).

b. Second *Ward* test.

Lorie’s Complaint alleges sufficient facts to meet all elements of the second *Ward* test.

Elements 1 and 2: Credible threat of prosecution and chilling effect on desired speech.

As explained above, Lorie’s complaint establishes a credible threat of prosecution. Her complaint also alleges a chilling effect on her desired speech. Compl. ¶¶ 177-180. Because of her fear of prosecution, and only because of it, Lorie is chilling her speech. *Id.* She is chilling both the publication of her statement about marriage on her website and she is chilling her entry into the custom wedding website marketplace. *Id.* By chilling her First Amendment rights in this way,

Lorie incurs two separate “chilling effect” injuries. These injuries are current, ongoing, and irreparable under the law. *Ward*, 321 F.3d at 1267. Lorie has undoubtedly sustained “injury-in-fact.”

c. Defendants’ speculation arguments are misplaced.

Defendants do not address either *Ward* test. Instead they argue that Lorie lacks standing because her injuries are speculative or require further action by a third party. Mot. to Dismiss 6-8. Neither is accurate.

Lorie alone controls whether she posts her desired statement, and if she does post, she immediately violates CADA and opens herself to CADA’s harmful administrative process. *See Susan B. Anthony List*, 134 S. Ct. at 2345 (“We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review.”). It is this harmful administrative process, starting when the complaint is filed triggering a mandatory investigation, which has caused Lorie to self-censor. Compl. ¶¶ 39-53, 177-180. That is not speculative and it is not dependent on Defendants’ ten item list.

The second injury occurs as soon as Lorie declines to create a website for a same-sex wedding and Defendants begin enforcement action against her with a complaint and mandatory investigation. It also does not rely upon Defendants’ ten factors. Mot. to Compel 6-8. To be sure, this injury may not occur until a third party asks Lorie to create a website celebrating same-sex marriage. Yet, that third-party request is not a sufficient basis under the case law to reject standing. Courts have long affirmed pre-enforcement standing even if violation of the law depends on a likely third party action. *See Doe*, 410 U.S. at 188 (affirming physicians’ pre-enforcement

standing to challenge an abortion law even though the physicians could not violate the law until they received a third party request to perform an abortion.); *Johnson*, 194 F.3d at 1153 (confirming pre-enforcement standing before statute even took effect); *see also Am. Civil Liberties Union v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012) (recognizing that “[p]reenforcement suits always involve a degree of uncertainty about future events.”); *Brandt v. Vill. of Winnetka*, 612 F.3d 647, 649 (7th Cir. 2010) (“Any pre-enforcement suit entails some element of chance.”). It is enough that Lorie wants to operate in the wedding industry, a fact that makes receiving a request to celebrate a same-sex marriage exceedingly likely.

2. Element (ii) – harm is fairly traceable to Defendants:

Defendants say they have caused Lorie no harm, presumably because they have not yet prosecuted Lorie in all available state and administrative courts as they have the owner of Masterpiece Cakeshop. Mot. to Dismiss 7; Compl. ¶¶ 63-72, 85. But this again misrepresents the harm and their role in it. The danger Plaintiffs allege is “one of self-censorship; a harm that can be realized even without an actual prosecution.” *Am. Booksellers Ass’n*, 484 U.S. at 393. Defendants need not prosecute Lorie to injure her.

However, Defendants have interpreted and enforced CADA to proscribe Lorie’s protected expression. Compl. ¶¶ 63-72, 85. Moreover, they have admitted that each of them have enforcement power — whether to initiate a complaint, or participate in an investigation, or enforce CADA in some other way. Mot. to Dismiss 3-4, 16-20. These admissions, coupled with the complaint’s allegations affirming the same, Compl. ¶¶ 39-53, is enough to prove causation in the pre-enforcement context. *See Cressman I*, 719 F.3d at 1145 (“It is well-established that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory

provision, the causation element of standing requires the named defendants to possess authority to enforce the complained of provision.”); *Consumer Data Indus. Ass’n v. King*, 678 F.3d 898, 905 (10th Cir. 2012) (“Federal courts have consistently found a case or controversy in suits between state officials charged with enforcing a law and private parties potentially subject to enforcement.”). This is especially true given the procedural posture of the case, for on a motion to dismiss the facts alleged in Lorie’s complaint must be accepted as true and construed in her favor.

Lorie’s complaint alleges that the Defendants have enforcement authority in relationship to CADA. Compl. ¶¶ 25-28, 39-53. Defendants’ admissions in their motion to dismiss have confirmed this for each Defendant. Mot. to Dismiss 3-4, 16-20. She has thus fairly traced her injury to the Defendants.

3. Element (iii) – redressability:

In the third element of standing, Defendants argue that Lorie’s injuries are not redressable because an injunction would only stop the Defendants from violating her rights; private citizens could still file suit against Lorie and her business. Mot. to Dismiss 7-8. But the law does not demand that success in a lawsuit preclude all possible harm. *King*, 678 F.3d at 902. Redressability is satisfied if “the risk of harm ‘would be reduced *to some extent* if petitioners received the relief they seek.’” *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007)). “A plaintiff need only show that a favorable decision would redress ‘*an injury*,’ not ‘*every injury*’” to obtain standing. *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 243 (1982)) (emphasis in original); *see also Cressman I*, 719 F.3d 1139, 1146-47 (10th Cir. 2013).

A favorable decision in this Court would redress Lorie’s injury to a great extent. Compl. ¶ 180. Defendants would be barred from enforcing CADA to ban or compel Lorie’s speech. And a favorable outcome would significantly reduce if not eliminate the chances that a private plaintiff would file a lawsuit to try to compel her to create speech she does not want to create. Lorie has pled redressability.

Accordingly, Lorie meets all three elements of standing under *Lujan*. The Court should therefore deny Defendants’ 12(b)(1) motion to dismiss.

II. Abstention is not proper under *Younger*, *Rooker-Feldman*, or *Colorado River* because there is no pending state court proceeding.

A. Burden of Proof:

Defendants’ statement of the burden of proof again relates to factual challenges, not facial challenges, but more problematically suggests that Lorie must prove by a preponderance of the evidence that abstention does not apply. The Courts do not treat abstention that way. Rather, the Courts restrict abstention under all three doctrines, *Younger*, *Rooker-Feldman*, and *Colorado River*, to exceptional circumstances. *Sprint Commc’n, Inc. v. Jacobs*, 134 S. Ct. 584, 591-94 (2013); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994). All of these exceptional circumstances require the *same parties* to be litigating in a parallel proceeding in state court. Lorie is not a party to *any* state court proceeding. That fact alone is fatal to Defendants’ three abstention arguments.

Lorie has established jurisdiction by pleading “general factual allegations of injury resulting from the defendant’s conduct,” *Lujan*, 504 U.S. at 561. The Court “must accept the allegations in the complaint as true.” *Holt*, 46 F.3d at 1002. *See* Section I.A. Taking the complaint allegations as true, abstention is not warranted.

B. Younger elements:

In 2013, the Supreme Court clarified *Younger*'s scope. *Sprint Commc'n, Inc.*, 134 S. Ct. at 591-94. The Court explained that *Younger* only applies in “three ‘exceptional circumstances’”—(1) when federal jurisdiction would “intrud[e] into ongoing state criminal prosecutions,” (2) or on a “civil enforcement” that is “akin to a criminal prosecution,” or (3) when “civil proceedings involv[e] certain orders...uniquely in furtherance of the state courts’ ability to perform their judicial functions.” *Id.* at 591 (quoting *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 386 (1989)). All three require the same parties be litigating in the ongoing state case. *Id.* at 587; *see also Phelps v. Hamilton (Phelps I)*, 59 F.3d 1058, 1069 (1995) (stating that “it would be unfair to hold [a plaintiff’s] constitutional rights hostage to the outcome and timing” of another person’s state court proceeding.); *Steffel*, 415 U.S. at 462 (“[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.”). Notably, the Court distinguished the three part test the Defendants cite as not dispositive but rather as “*additional factors*” to consider if one of the “exceptional circumstances” applies. *Id.* at 593.

C. Younger elements not met:

Defendants argue that Lorie must be forced out of federal court because of a pending petition for certiorari to the U.S. Supreme Court in *Masterpiece Cakeshop*. Mot. to Dismiss 8-10. This is inapposite. Defendants apparently misapprehend Lorie’s reliance on the Masterpiece enforcement action as an attempt by her to interfere with that action. Mot. to Dismiss 9; Compl.

¶¶ 61-90. That is not the case. Rather, she cites the Masterpiece enforcement action as evidence of how Defendants interpret CADA and of the credible threat of enforcement she faces. She brings her own separate challenge to the constitutionality of CADA as it applies to her speech and her expressive business, 303 Creative. Compl. ¶¶ 165-180, 205-399. As the Court said in *Sprint Communications*, “[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter.” *Sprint Commc’n*, 134 S. Ct. at 588. Yet this is precisely the course of action Defendants propose here.

The Tenth Circuit has declined to apply *Younger* abstention under circumstances where there was a far closer connection between the litigants in state and federal cases. In *Phelps I*, the court considered abstention as to two plaintiffs. *Phelps I*, 59 F.3d at 1069. Phelps was a party to both a state court proceeding and a federal court proceeding. *Id.* His federal co-plaintiff, however, was a party only to the federal proceeding. *Id.* While the court abstained as to Phelps, it did not abstain as to his co-plaintiff, Engels, even while noting that the plaintiffs “share[d] the same political agenda.” *Phelps I*, 59 F.3d at 1069; *see also Robinson v. Stovall*, 646 F.2d 1087, 1092 (5th Cir. 1981) (“Neither a common interest in the outcome of federal litigation nor a common effort in pressing it requires abstention as to all plaintiffs.”). In doing so, the Tenth Circuit stated that “it would be unfair to hold [a plaintiff’s] constitutional rights hostage to the outcome and timing” of another plaintiff’s proceeding. *Phelps I*, 59 F.3d at 1069.

Unlike in *Phelps I*, there is no relationship whatsoever between Lorie Smith and 303 Creative and Jack Phillips and Masterpiece Cakeshop. They certainly are not co-plaintiffs in either federal or state court. Lorie has filed a separate, federal civil rights lawsuit to vindicate her First Amendment rights. She is not a party to the *Masterpiece Cakeshop* case or any other relevant

state court proceeding. *Younger* does not apply and her First Amendment case should proceed in federal court.

D. *Rooker-Feldman* elements:

The Supreme Court also recently, in 2005, narrowed *Rooker-Feldman* abstention. *Exxon Mobil Corp.*, 544 U.S. at 284. Defendants cite the standard only from a prior 2004 case. Mot. to Dismiss 11 (citing *Merrill Lynch Bus. Fin. Servs. v. Nudell*, 363 F.3d 1072, 1076 (10th Cir. 2004)).

In 2005, in *Exxon Mobil Corporation*, the Court stated that *Rooker-Feldman* may only be applied “to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp.*, 544 U.S. at 284 (further explaining that some circuits, although not specifying the Tenth Circuit, had applied the doctrine in a wider, and inappropriate fashion); *see also Guttman v. Khalsa*, 446 F.3d 1027, 1031-32 (10th Cir. 2006) (adopting the *Exxon Mobil* limitations to the *Rooker-Feldman* doctrine.). Accordingly, *Rooker-Feldman* in its proper form is akin to res judicata, employed only to prevent the losing state court litigant from a second bite at the apple in federal court. The doctrine applies only where the parties in the state and federal cases are the same and when the state court proceeding is final. *Johnson v. Rodrigues*, 226 F.3d 1103, 1108 (10th Cir. 2000) (refusing to abstain pursuant to *Rooker-Feldman*, because the plaintiff “was not a party to the state court...proceeding, a fact which makes the [*Rooker-Feldman*] doctrine inapplicable.”); *Guttman*, 446 F.3d at 1032. (“Under *Exxon Mobil*, *Rooker-Feldman* applies only to suits filed after state proceedings are final.”)

E. Rooker-Feldman elements not met:

As with the *Younger* doctrine, the fact that Lorie is not a party to any state court proceeding is fatal to *Rooker-Feldman* abstention. *Johnson*, 226 F.3d at 1108. In their analysis, Defendants again assert that Lorie claims “harm as a result of the decision” in *Masterpiece Cakeshop*, Mot. to Dismiss 11, but that is not true. Nowhere in Lorie’s complaint does she claim to be injured by that decision. She also does not seek to enjoin *Masterpiece Cakeshop*. And just as problematic for Defendants, *Masterpiece Cakeshop* is not final. It is pending on a petition for certiorari before the U.S. Supreme Court. Mot. to Dismiss 5. This is yet another fatal flaw precluding application of *Rooker-Feldman*. *Exxon Mobil Corp.*, 544 U.S. at 284.

The Defendants’ motion to abstain pursuant to *Rooker-Feldman* should be denied.

F. Colorado River elements:

Colorado River is at least as limited as *Younger* and *Rooker-Feldman*. *Colorado River Water Conservation Dist. v United States*, 96 S. Ct. 1236 (1976). Like *Younger*, it is confined to “exceptional circumstances” impacting “parallel” “state and federal proceedings.” *Fox*, 16 F.3d at 1081. In considering the doctrine, the Court must determine whether the state and federal proceedings are parallel, meaning “substantially the same parties litigate substantially the same issues in different forums.” *Id.* at 1081 (quoting *New Beckley Mining Corp. v. Int’l Union, UMWA*, 946 F.2d 1073 (4th Cir. 1991)). It is “a serious abuse of discretion” to apply *Colorado River* abstention if the “parallel state-court litigation” is not “an adequate vehicle for the complete and prompt resolution of the issue between the parties.” *Fox*, 16 F.3d at 1081 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983)).

G. Colorado River elements not met:

In support of their bid for abstention under *Colorado River*, Defendants provide a single sentence resting on the faulty premise that *Masterpiece Cakeshop* is a parallel state court proceeding. Mot. to Dismiss 13. It is not. Lorie is not a party to *Masterpiece Cakeshop*. It does not provide her any vehicle to resolve the issue she raises in the present case—the unconstitutional application of CADA to her speech and to her expressive business. Compl. ¶¶ 165-180, 205-399.

In addition to the fact that *Masterpiece Cakeshop* is not a parallel proceeding, the Tenth Circuit also considers several factors to determine whether “exceptional circumstances exist to warrant deference to parallel state court proceedings.” *Fox*, 16 F.3d at 1082. These include the circumstances Defendants reference but fail to analyze as to the present case —“(1) whether either court has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which the courts obtained jurisdiction” – as well as others. *Id.*; Mot. to Dismiss 12. “No single factor is dispositive” and “[r]ather than...a ‘mechanical checklist’, a court should engage in a ‘careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.’” *Id.* at 1082 (quoting *Moses H. Cone*, 460 U.S. at 15-16). None of these factors exist in this case. There is no property at stake, the federal forum is convenient, federal jurisdiction does not cause piecemeal litigation, and the federal case was filed when *Masterpiece Cakeshop* was on petition for writ of certiorari to the Supreme Court.

Indeed no exceptional circumstances can exist to force Lorie to relinquish her First Amendment rights, suffering ongoing harm, while the Defendants wait to see if the Supreme Court will grant certiorari in *Masterpiece Cakeshop*.

The Court should deny Defendants' motion to abstain under *Colorado River*.

III. Plaintiffs have stated a claim upon which relief can be granted.

A. Burden of Proof:

Defendants' statement of the burden of proof under Federal Rule of Civil Procedure 12(b)(6) (hereafter "12(b)(6)") and their analysis focuses entirely on the pleading standards applicable when a plaintiff sues a government official in their individual capacity. Mot. to Dismiss 13-20. Indeed, they discuss what must be pled to impose "[i]ndividual liability under § 1983" and note that "[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 14-15.

But these standards have nothing to do with Lorie's case because she has sued the Defendants *solely* in their official capacities. *See* Compl. ¶¶ 25-27. To avoid Colorado's invocation of Eleventh Amendment Sovereign Immunity, Lorie took the well-trodden path under *Ex parte Young*, 209 U.S. 123 (1908), of seeking prospective relief against state officials in their official capacities. *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012) (recognizing as an exception to Eleventh Amendment immunity a suit where "a plaintiff ... bring[s] suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief."). For example, in *Wilson v. Stoker* a plaintiff sued the Oklahoma Attorney General to challenge a statute criminalizing his distribution of campaign literature. *Wilson*, 819 F.2d at 945-46. Like the Defendants in this case, the Attorney General argued that the suit did not present "a case or controversy as to him" because his office had not arrested Wilson, did not intend to arrest him,

and did not directly threaten him. *Id.* at 946. The Tenth Circuit rejected that argument, finding that “the official represents the state whose statute is being challenged as the source of injury,” so by suing the state official in his official capacity, the plaintiff was effectively suing the state. *Id.* at 947. Accordingly, this court should assess Lorie’s statement of her claims under the standards applicable to official, not individual, capacity suits.

“At the motion-to-dismiss stage,” the court “must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.” *Cressman I*, 719 F.3d at 1152 (quoting *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007)). The “complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face,” where “plausibility...is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendants has acted unlawfully.” *Cressman I*, 719 F.3d at 1152 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

B. Elements:

A plaintiff establishes a claim under 42 U.S.C. 1983 by alleging “(1) a violation of rights protected by the federal Constitution or created by federal statute or regulation, (2) proximately caused (3) by the conduct of a ‘person’ (4) who acted under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia.” *Sumnum v. City of Ogden*, 297 F.3d 995, 1000 (10th Cir. 2002). Lorie has done this.

C. Elements met:

Lorie has pled a claim under 42 U.S.C. § 1983 and the Defendants admit the facts – each Defendant’s enforcement power – that prove the sufficiency of her claim against them.

Lorie pled a violation of her rights – the chilling of her speech about marriage and entry into custom wedding website marketplace, and prospectively that if she begins creating custom wedding websites she will be forced to create them for same-sex ceremonies, compelling her to speak a message promoting same-sex marriage in violation of her beliefs. Compl. ¶¶ 56-60, 165-180. Lorie pled that her right to speak and refrain from speaking is protected by the First Amendment such that it violates the Constitution for the government to compel her speech or to chill it. Compl. ¶¶ 205-291. Lorie pled that she has self-censored by not posting her views about marriage on 303 Creative’s website and by not starting to create custom wedding websites, because of the Defendants’ interpretation of CADA, which each of the Defendants have the power to enforce under color of state law. Compl. ¶¶ 31-60, 177.

Defendants do not challenge Lorie’s pleading of the violation of her First Amendment rights. Defendants only accuse Lorie of “inaccurately describ[ing] Defendants’ actual authority and power.” Mot. to Dismiss 16. Defendants’ complaint is that Lorie alleged that “Defendants” have the power to file a charge of discrimination, investigate charges, and take the other enforcement actions she pled, rather than pleading the enforcement power of each Defendant separately. Compl. ¶¶ 25-27, 39-53. Yet, Lorie affirmatively pled that each of the Defendants have “authority to enforce the law” with reference to the specific statutes conferring that power. Compl. ¶¶ 25-27. Defendants also admit that each of the Defendants have at least some of the enforcement powers Lorie pled. For example, they admit that: (1) the Commission, a Commissioner, or the Attorney General has the authority to file complaints under CADA, triggering a mandatory investigation, Mot. to Dismiss 3; *see also* Colo. Rev. Stat. 24-34-306(1)(b); (2) the Director is the party with the enforcement authority to “process charges,

investigate, make a finding, and, if she finds cause, attempt conciliation,” Mot. to Dismiss 19; *see also* Colo. Rev. Stat. 24-34-302; Colo. Rev. Stat. 24-34-306(2); and (3) the Commission has authority as a “quasi-judicial body that reviews evidence, considers arguments, and renders a decision under the administrative procedures act.” Mot. to Dismiss 19; *see also* Colo. Rev. Stat. 24-4-105 & 24-34-306(4)-(9).

Defendants are elevating form over substance. It is well-settled that when a plaintiff sues state officers for prospective relief under *Ex Parte Young*, she must merely allege that the official has “some connection” to the enforcement of the allegedly defective act.” *See Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 827-28 (10th Cir. 2007) (citation omitted). Here, Lorie pled that the Defendants have enforcement power under CADA. That is enough, especially under the deferential standards that apply at the motion to dismiss stage. Yet, in their motion to dismiss, the Defendants also admitted that each Defendant has “some connection” to the enforcement of CADA. Mot. to Dismiss 3-4, 19-20. By doing so, they effectively conceded the causation elements of pleading a claim under 42 U.S.C § 1983.

IV. Plaintiffs’ complaint complies with Fed. R. Civ. P. 8.

A. Burden of Proof:

Lorie’s complaint complies with all of the federal rules, including Federal Rule of Civil Procedure 8 (“Rule 8”). The Courts permit a broad range of pleadings and they do not dismiss pursuant to Rule 8 lightly. For example, the court in the case Defendants cite gave the plaintiff multiple chances to submit a compliant pleading, and dismissed only after receiving multiple unintelligible documents. *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice*

Center, 492 F.3d 1158, 1160 (10th Cir. 2007). The Tenth Circuit confirmed that even after dismissal, plaintiff could refile his claim. *Id.*

B. Elements:

Rule 8 calls for “short and plain statement[s]” of jurisdiction, of Plaintiffs’ claims, and of the relief sought. Fed. R. Civ. P. 8(a)(1). Yet, as the Tenth Circuit has recognized, this is “more aspirational than descriptive of pleading practice.” *Nasious*, 492 F.3d at 1160, 1163. As long as the complaint gives Defendants fair notice of the claims against them, it satisfies Rule 8. *Gardner v. First Am. Title Ins. Co.*, 294 F.3d 991, 994 (8th Cir. 2002) (“As defendants concede that the lengthy complaint gave them fair notice of plaintiffs’ RESPA claims, the complaint satisfied Rule 8(a) and should not have been dismissed”); *see also Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2010 WL 3702579, at *2 (S.D. Tex. Sept. 15, 2010) (“Defendant does not argue that the Complaint is confusing or fails to put the Defendant on notice of the claims against it. Such a showing is required for a pleading to be struck under Rule 8(a).”) (citation omitted).

C. Elements Met:

Defendants make no claim that they lack fair notice or that the complaint is confusing or unintelligible. Instead, they argue for dismissal because the Complaint is too long or perhaps because it is redundant. Mot. to Dismiss 20-21. The case law forecloses such a dismissal.

Short “is a relative term” and “must be calibrated to the number of claims and their character, since some require more explanation than others...” *Kadamovas v. Stevens*, 706 F.3d 843, 844 (7th Cir. 2013). “Length is not by itself a basis for dismissing a complaint based on Rule 8(a),” *Hearns v. San Bernardino Police Dep’t*, 530 F.3d 1124, 1131 (9th Cir. 2008), and must be distinguished from “unintelligibility” for this reason. *Kadamovas*, 706 F.3d at 844; *see also*

Stanard v. Nygren, 658 F.3d 792, 797 (7th Cir. 2011) (“[U]ndue length alone ordinarily does not justify the dismissal of an otherwise valid complaint.”). It is not unusual for “[o]ne-hundred page complaints [to] survive a motion to dismiss.” *Kadamovas*, 706 F.3d at 845.

Yet, despite the complex issues raised in this case, it is not a “one-hundred page complaint.” It is a sixty-page complaint alleging, on a pre-enforcement basis, five distinct constitutional challenges to a state public accommodation law. Compl. ¶¶ 200-399. It is not an ordinary case. Fair notice cannot be disposed of in a few pages. Rather, each paragraph was crafted to give Defendants fair notice of the claims against them. And it succeeded, as Defendants do not challenge fair notice.

Similarly, Defendants make a bare assertion that the Complaint should be dismissed because it is redundant. Mot. to Dismiss 20-21. It is not, which is highlighted by Defendants’ failure to specify any redundant paragraphs. But courts typically tolerate some redundancy. *Lewis v. Bay Indus., Inc.*, No. 12-C-1204, 2013 WL 817845, *1 (E.D. Wis. Mar. 5, 2013) (Rule 8 “is not a license for the court or opposing parties to act as editors...”). Even if some allegations were redundant, the proper solution is a motion to strike the redundant allegations, not to dismiss the complaint.

Lastly, Defendants complain that fifteen paragraphs in the Complaint contain citations to Bible passages. Mot. to Dismiss 20-21. Defendants state that they “should not be required to admit what an unidentified version of the Bible does or does not contain” and they “should not be required to either admit or deny the truth of what is said in the Bible.” *Id.* at 21. The Complaint requires neither of these things. Four paragraphs in the Complaint contain statements of Lorie’s beliefs with a citation to the Bible as the basis for her belief, *e.g.*, Compl. ¶¶ 95-97, 99. All

Defendants are asked to admit is whether Lorie believes those statements. There is no reason for an admission or denial of the truth of the Bible.

The cases Defendants cite on this point are inapplicable. They concern pro se litigants who filed hundreds upon hundreds of incomprehensible pages, some of which contained lengthy recitations from the Bible with no reference to a legal claim. *Seehausen v. Gonzalez*, 2:11-cv-10786-GW-RZ, 3 (C.D. Cal. filed May 8, 2012) (Pro se plaintiff filed a “rambling, ponderous and at times [an] incomprehensible pile of document” which included a 70-page complaint, 40 pages “in support of a motion ‘for an order to show cause...’”, an 11-page “Petition for Immediate Injunction” and over 500 pages of exhibits, “festooned” with “disquisitions from the Bible and ornate Latin...”); *Ellis v. State*, No. 91C8391, 1992 WL 332293, *2 (N.D. Ill. Nov. 6, 1992) (Pro se plaintiff filed a 16-page, single-spaced complaint that the Court described as “convoluted and nebulous...interspersed with religious pleas to defendants” and “general statements to the effect that defendants have violated federal law.”). These examples are a far cry from Lorie’s well-pled complaint.

V. Plaintiffs’ case should not be stayed.

Dismissal of this case based on Defendants’ abstention theories would work a patent injustice and leave Lorie to suffer irreparable harm with no recourse. A stay would do the same.

In the alternative of their Motion to Dismiss, Defendants urge this Court to take extraordinary action to stay Plaintiffs’ case because Defendants want to wait and see if the Supreme Court grants a petition for certiorari in a separate case they brought against another litigant. Mot. to Dismiss 21-23. Yet, as the Supreme Court has stated, “only in rare circumstances

will a litigant in one cause be compelled to stand aside while a litigant in another [case] settles the rule of law that will define the rights of both.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).

Ignoring that, Defendants urge a stay citing *Abbott Laboratories* and other cases that are distinguishable. *Abbott Laboratories* was an APA case that only mentioned the courts authority to stay cases as a possible solution to a prospective concern that the decision in the case might trigger a multiplicity of similar suits in various jurisdictions. *Abbott Labs. v. Gardner*, 387 U.S. 136, 154-55 (1967). That is not the scenario Lorie’s case presents. Lorie brings a claim that is distinct and unrelated to *Masterpiece Cakeshop*. Compl. ¶¶ 165-180. The two cases do not represent a flood of similar cases like the flood of cases contemplated in *Abbott Laboratories*. *Id.* Similarly, Defendants other cited cases, *Vickery*, *In re Kozeny*, *Ventura*, and *Colorado River*, all dealt with stays in unique circumstances that were necessary to avoid an injustice. *Diamond v. Vickery*, No. 1:12-cv-01891-MSK, 2 (D. Colo. filed Feb. 14, 2013) (staying one of two appeals because they presented overlapping issues, “based on the same facts, and aris[ing] from a single Judgment” entered by a US Bankruptcy Court); *In re Kozeny*, 236 F.3d 615, 618 (10th Cir. 2000) (concerning federal and international cases between the same parties raising the same claims); *Ventura v. David’s Bridal*, 248 F.3d 1139, *1 (5th Cir. 2001) (court briefly stayed the case because of a pending disbarment proceeding against the plaintiff’s attorney); *Colorado River*, 424 U.S. 800 (addressing abstention not stay).

None of Defendants’ cases address a motion for stay when the two proceedings are unrelated and involve unrelated litigants. Defendants’ cases also, critically, do not address a motion to stay where fundamental First Amendment rights are at stake.

Every day Lorie waits for a decision on this case, she suffers ongoing and irreparable harm. *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) (stating “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). She self-censors, chilling her speech about marriage on her website, and chilling her creation of custom wedding websites to avoid complaints, investigations, enforcement actions, and compliance orders from the Defendants. Compl. ¶¶ 31-60, 77. Now Defendants ask this Court to perpetuate those injuries while they wait to see if the Supreme Court will grant certiorari in an unrelated case.

Each term, the Supreme Court receives 7,000-8,000 petitions for certiorari and it grants review of around 80 cases. Supreme Court of the United States. *Frequently Asked Questions* (October 22, 2016), <https://www.supremecourt.gov/faq.aspx>. This means the statistical chances of the Supreme Court taking *Masterpiece Cakeshop* up on review are around 0.1% versus the 100% certainty that Lorie will sustain continuing irreparable harm if this Court stays her case. That is not the type of “rare circumstance” that warrants a stay.

When “[j]urisdiction exist[s],” as it does here, the federal courts have a “virtually unflagging” obligation to hear the case. *Sprint Commc’n*, 134 S. Ct. at 591; *Colorado River*, 424 U.S. at 817 (same). The Court should deny Defendants’ Motion to Stay and proceed to consider Plaintiffs’ Motion for Preliminary Injunction to end this harm.

CONCLUSION

Plaintiffs ask this Court to dismiss Defendants Motion to Dismiss.

Respectfully submitted this 9th day of November, 2016.

s/ Jeremy D. Tedesco

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2016, the foregoing was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

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

Defendants.

**DEFENDANTS’ REPLY IN SUPPORT OF THEIR MOTION TO DISMISS
VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

COME NOW Defendants, by and through counsel, and pursuant to Fed. R.
Civ. P. 12(b)(1), 12(b)(6) and 8, in reply to Plaintiffs’ Response to Defendants’
Motion to Dismiss Plaintiffs’ Verified Complaint for Declaratory and Injunctive
Relief (**# 43**), as follows.

ARGUMENT

1. Plaintiffs fail to allege standing pursuant to Fed. R. Civ. P. 12(b)(1).

A. Burden of proof: Plaintiffs argue that the motion to dismiss is based on “misrepresentations of the facts” (# 43 p. 1). Admittedly, the parties disagree as to the existence of prerequisites to the enforcement of CADA, which relates to the injury element of standing (Compare # 37 pp. 12-13 with # 43 p. 23). The parties also disagree as to the enforcement power of each Defendant, which relates to the causality and redressability elements of standing (Compare # 37 pp. 2-4 with # 43 p. 3). Defendants dispute the characterization of these disputes as “misrepresentations,” but the Defendants’ assertions constitute a “factual” attack on the Court’s jurisdiction and must be addressed under the preponderance of the evidence standard. *Ingram v. Faruque*, 728 F.3d1239, 1242 (10th Cir. 2013).

B. Elements: The parties do not dispute the basic elements of standing, derived from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (reaffirming the application of the *Lujan* standing elements in First Amendment cases);¹ *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223-24 (10th Cir. 2008) (same). Plaintiffs’

¹ Plaintiffs maintain that the Court in *Susan B. Anthony* disavowed the application of *Clapper v. Amnesty International USA* to the standing analysis for First Amendment Claims. To the contrary, the Court relied on and thrice cited *Clapper* in rendering its decision. *Susan B. Anthony*, 134 S. Ct. at 2341 and 45.

assertions regarding elements in addition to those contained in *Lujan* are argument, and Defendants address those arguments below.

C. Elements not supported by Complaint:

element (i) - injury: For standing purposes, claims of injury may not be speculative, subject to contingencies that may never occur. The cases cited by Plaintiff are not contrary, requiring a “credible threat” of enforcement before an injury is recognized. See, e.g., *Susan B. Anthony*, 134 S. Ct. at 2342 (requiring a “credible threat” so that the threatened enforcement is “sufficiently imminent” and holding that where a plaintiff was previously subject to an enforcement proceeding, the threat of a second proceeding based on the same conduct under the same statute was credible); *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003) (finding a credible threat where plaintiff was previously charged with a felony based on engaging in the same hate crimes proscribed by the same statute); see also *Poe v. Ullman*, 367 U.S. 497, 507 (1961) (“[i]t is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court’s adjudication of its constitutionality in proceedings brought against the State’s prosecuting officials if real threat of enforcement is wanting.”). Plaintiffs’ do not establish a “credible threat” of enforcement that would chill Ms. Smith from espousing her views.

First, CADA does not prohibit Plaintiffs from espousing any view. See *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.2d 272, 291 (Colo. App. 2015) (“we

reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views. ... Likewise, Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same sex marriage.”² Injury cannot be based on Plaintiffs’ misunderstanding of CADA. 13 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3532.5 (3d ed. 2016) (“a plaintiff cannot make a ripe case by misreading a statute and claiming a need to assuage self-induced fears.”).³ Although Plaintiffs may face public backlash over espousing Ms. Smith’s beliefs, social pressures do not amount to injury in fact. *Habecker*, 518 F.3d at 1226.

Second, any fear of enforcement chilling Ms. Smith’s speech must be objectively reasonable, “allegations of a ‘subjective’ chill are not adequate.” *Ward*, 321 F.3d at 1266; *see also Finstuen v. Crutcher*, 496 F.3d 1139, 1144 (10th Cir. 2007) (“[i]n a plea for injunctive relief, a plaintiff cannot maintain standing by asserting an injury based merely on ‘subjective apprehensions’ that the defendant

² Plaintiffs argue that “Defendants interpret CADA to bar [them] from both publishing her desired statement and entering the wedding website design business unless she is willing to create websites celebrating same-sex marriage. ... Defendants do not contest this fact” (**# 43 p. 10**). To the contrary, Defendants dispute these allegations, which are contrary to the decision in *Masterpiece*. This is another example of the “factual” nature of Defendants’ challenge to the Court’s jurisdiction.

³ Although this section of *Federal Practice and Procedure* is addressing ripeness, the same section also makes clear that the distinction between standing and ripeness “was all but obliterated” in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

might act unlawfully”) (*quoting City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983)). Given that CADA does not prohibit Plaintiffs’ from disseminating their views on homosexuality, any chilling of that dissemination is purely subjective.

Third, with regard to an enforcement action should Plaintiffs deny services to same-sex couples, which under *Masterpiece* is not entitled to First Amendment protection as speech, Plaintiffs do not address how the ten contingencies detailed in the motion to dismiss will first come to pass. In light of these unfulfilled contingences, there is no “credible threat” of enforcement.

element (ii) - action by Defendants: To establish causation, Plaintiffs must show that their injury, refraining from publishing a website based on fear of prosecution under CADA, is “fairly traceable” to Defendants’ actions. *Habecker*, 518 F.3d at 1225. Here, however, Plaintiffs admit that Ms. Smith “alone controls” the publication of the website and, thus, any threat of injury (**# 43 p. 12**). Plaintiffs’ self-induced injury does not create standing. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 n.9 (10th Cir. 2005) (“[a]t some point, standing may be denied because the injury seems solely - - or almost solely - - attributable to the plaintiff.”) (*quoting* 13 *Federal Practice & Procedure* § 3531.5).

Further, the parties dispute the enforcement authority of each Defendant and what action they might take in the future. The specific authority of each Defendant must be addressed to establish causation. *See Cressman v. Thompson*, 719 F.3d 1139, (10th Cir. 2013) (holding that, for purposes of analyzing standing,

“the authority [of a hearing officer] to interpret and administer a statute is not the same as the authority to *enforce* a statute.”) (emphasis in original). Plaintiffs fail to establish that authority.

Finally, any enforcement authority that each Defendant may have is subject to the ten contingencies. Plaintiffs dispute this assertion, but have not rebutted it. As such, Plaintiffs fail to establish an objectively reasonable credible threat of enforcement that is caused by Defendants. *See Lower Ark. Valley Water Conservancy Dist. v. United States*, 578 F. Supp. 2d 1315, 1326-27 (D. Colo. 2008) (“plaintiff does not satisfy its burden of demonstrating causation where speculative inferences are required to connect its injury to the challenged action.”).

element (iii) - favorable decision will address injury: “Article III does not allow a plaintiff who wishes to challenge state legislation to do so simply by naming as a defendant anyone who, under appropriate circumstances, might conceivably have an occasion to file a suit ... under the relevant state law at some future date.” *Nova Health*, 416 F.3d at 1157-58. As applicable here, the holding in *Nova Health* is succinctly stated as: “a party lacks standing to seek an injunction against a nominally public defendant who has not threatened suit and who cannot be distinguished from the countless private litigants with identical enforcement powers.” *Consumer Data Indus. Ass’n v. King*, 678 F.3d 898, 904 (10th Cir. 2012). A favorable decision for Plaintiffs will not redress the alleged injury because private citizens would still have independent enforcement authority under CADA.

2. The Court should abstain from hearing Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(1).

A. Burden of proof: Plaintiffs do not dispute that they have the burden of proof under Rule 12(b)(1), but again attempt to distinguish Defendants' motion to dismiss as a facial challenge to the complaint. To the contrary, one of the central considerations before this Court is the similarity of this case and that of *Masterpiece Cakeshop*. The parties take very different positions on this issue, which is a question of fact (**Compare # 37 p. 11 with # 43 p. 28**) (Defendants stating the claims in *Masterpiece Cakeshop* were decided "on the same arguments made in the Complaint" and Plaintiffs stating that the claims in the Complaint are "distinct and unrelated to *Masterpiece Cakeshop*").

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

Id. Dismissing, staying, or certifying a case based on abstention falls within the sound discretion of the district Court. *Id.*

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

element (i): As demonstrated in the motion to dismiss, Colorado has a compelling interest in enforcing its public accommodation laws and, under state statute, Plaintiffs’ claims may be properly adjudicated in administrative forums and state courts if a complaint is ever filed. The Court must presume that these State remedies are both adequate and a proper arena to settle the federal constitutional question asserted by Plaintiffs. *Pennzoil*, 481 U.S. at 15 (“[a]ccordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.”).

element (ii): *Masterpiece Cakeshop* involves identical claims to those here, has not yet been fully adjudicated, and is pending before the United States Supreme Court on Plaintiff’s counsels’ certiorari review (# 5). The Supreme Court

has approved staying a declaratory action in district court while another district court decides a similar request for declaratory relief, although brought by a different plaintiff. *Landis v. North America Co.*, 299 U.S. 248, 254 (1936). This rule applies with even more force when the first filed declaratory action is pending before the Supreme Court. Importantly, should the Supreme Court grant certiorari, any decision by this Court would become advisory. This alone counsels a stay. *See Pennzoil*, 481 U.S. at 11 n.9. (“[i]n some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised.”).

Identity of parties: Plaintiffs argue that the parties in parallel litigation must be identical before abstention applies. The Supreme Court has expressly rejected this contention. *Landis*, 299 U.S. at 254 (“we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical”). Instead, any “formula” that would limit stays to matters where identical parties are involved “is too mechanical and narrow.” *Id.* at 255. The potential harms that may befall one plaintiff while a second court decides the same issue raised by a second plaintiff “are counsels of moderation rather than limitations upon power” to enter a stay. *Id.* Given that Plaintiffs have not taken any concrete steps in furtherance of their website, a stay here will not cause any

harm.

3. Plaintiffs fail to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

A. Burden of proof: Plaintiffs argue for a lower standard of pleading in a § 1983 claim because they sued Defendants in their official, as opposed to individual, capacity (#43, pp. 21-22). However, the standards set forth in *Iqbal/Twombly* must be met to plausibly plead a claim for relief, regardless of whether a lawsuit is brought against a defendant in either capacity. As a consequence, a “pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action” is insufficient; “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Elements: Undisputed.

C. Elements not supported by Complaint:

elements (i)-(iv): Plaintiffs fail to meet the *Iqbal/Twombly* standards and they do not demonstrate with particularity what each Defendant did to deprive Plaintiffs of a recognizable right beyond perfunctory recitals to the elements and conclusory, unsupported statements in the verified complaint. *Iqbal*, 556 U.S. at 678 (citation omitted). Instead, Plaintiffs’ 62 page, 399 paragraph complaint, piecemeal together bits of each role a defendant may play in enforcing CADA to summarily claim that each Defendant is ultimately liable for a variety of actions they have no authority to take under CADA, to ultimately conclude a

violation of rights. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (courts should not waste valuable time and resources considering a matter when a plaintiff cannot state a claim for relief).

For example, Plaintiffs vaguely allege at the beginning of their complaint that Defendant Coffman has the “authority to enforce the law at issue” (#1, ¶27).⁴ Plaintiffs argue that by merely making this statement, and demonstrating “some connection” to CADA, they satisfy their pleading standard (#43, pp. 23-24). This simply is not true, and would allow any plaintiff to avoid a motion to dismiss by “the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. 678. Here, Plaintiffs allege that Defendant Coffman has a slew of enforcement powers under CADA, including investigating charges of discrimination (#1, ¶ 42); determining probable cause (#1, ¶ 43); holding hearings on charges (#1, ¶ 44); issuing subpoenas (#1, ¶ 45); compelling mediation (#1, ¶ 46); determining whether a person or business violates CADA (#1, ¶ 47); issuing notices of a right to sue (#1, ¶ 48); and issuing cease-and-desist orders (#1, ¶ 49).

Yet, the Attorney General has no such legal authority for these powers under CADA. Nevertheless, Plaintiffs summarily claim that at all times relevant to their complaint “**each and all of the acts alleged [in the complaint] were attributed to**

⁴ Plaintiffs mistakenly believe that because they recite this formulaic element, it somehow satisfies the pleading standard (#43, p. 23). However, this bare bone recitation is the exact type of allegation that is insufficient under *Iqbal/Twombly*.

Defendants . . .” (#1, ¶ 201) (emphasis added). Plaintiffs not only misstate Defendant Coffman’s CADA authority, but they fail to state allegations or claims for relief that plausibly suggest an entitlement to relief because Defendant Coffman’s conduct, if hypothetically taken, cannot harm Plaintiffs. Plaintiffs cite *Wilson v. Stoker*, 819 F.2d 943, 945-46 (10th Cir. 1987) for the proposition that they can make general allegations against an official, without demonstrating particularities as to how a defendant is responsible for enforcing the law (#43, pp. 21-22). However, this case is inapposite because the Attorney General in *Wilson* appeared to have actual authority to enforce the law issue, but chose not to (819 F.2d at 946); while here, Defendant Coffman has no authority to enforce CADA against Plaintiffs.

4. Plaintiffs have failed to state a claim under Fed. R. Civ. P. 8.

A. Burden of proof: Undisputed.

B. Elements: Plaintiffs do not dispute the express requirements of Rule 8. Instead, Plaintiffs assert that the requirements of Rule 8 need not be met so long as the complaint provides fair notice of the claims. Plaintiffs cite no Tenth Circuit authority in support.

C. Elements not supported by Complaint:

elements (i) and (ii) : Plaintiffs assert compliance with Rule 8 because Defendants have not picked through hundreds of paragraphs to identify redundancies. On the contrary, Rule 8 is intended to obviate the need to perform

such an exercise. In any event, and as example only, the following 47 paragraphs contain the redundant statement that Plaintiffs' god designed marriage as an institution between one man and one woman: 3, 4, 9, 10, 11, 12, 14, 59, 60, 65, 114, 138, 139, 144, 145, 146, 147, 160, 161, 163, 173, 174, 175, 177, 178, 179, 185, 209, 215, 216, 217, 218, 219, 229, 230, 235, 236, 246, 281, 282, 285, 290, 295, 321, 339, 383, and 387.

Some of the identified paragraphs qualify the statement that it is Plaintiffs' belief that their god designed marriage as an institution between one man and one woman, such as paragraph 9. Other paragraphs state the issue as a matter of fact, such as paragraph 3. Still others state such views are "traditional Christian beliefs," such as paragraph 339. Either way, the State should not be required to admit or deny such assertions.

Finally, Plaintiffs assert that Rule 8 should be limited to lengthy and redundant complaints filed by *pro se* litigants. To the contrary, the court construes *pro se* pleadings liberally, applying a less stringent standard than formal pleadings drafted by counsel. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

Respectfully submitted this 23rd day of November, 2016.

s/ Vincent Edward Morscher

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CERTIFICATE OF SERVICE

I certify that I served the foregoing DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF 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 23rd day of November, 2016, addressed as follows:

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COLORADO CIVIL RIGHTS COMMISSION

A RESOLUTION

WHEREAS, by an Act of the General Assembly of the State of Colorado, the Colorado Civil Rights Commission, was created, and by its very nature, stands for equal protection of the laws for all people; and

WHEREAS, the Colorado Civil Rights Commission has reviewed and considered the decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018); and

WHEREAS, the Colorado Civil Rights Commission is committed to fulfilling its statutory role, including presuming “that the conduct of any respondent is not unfair or discriminatory until proven otherwise.” (Section 24-34-305(3), C.R.S.); and

WHEREAS, the Colorado Civil Rights Commission honors the Colorado Civil Rights Division’s separate role of investigating allegations of discrimination and unfair practice to arrive at a finding of probable or no probable cause; and

WHEREAS, the Colorado Civil Rights Commission engages third-party administrative law judges to weigh evidence and assess facts at a hearing when appropriate in individual cases; and

WHEREAS, the Colorado Civil Rights Commission reserves any and all final adjudicatory decision-making until after any such initial decision is rendered by an administrative law judge.

NOW THEREFORE, BE IT RESOLVED that the Colorado Civil Rights Commission, with full understanding of its duties, obligations, and authorities, and with full understanding of the concerns expressed by the United States Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, will discharge its duties in a way respectful of all parties, in a way that presumes the conduct of any respondent is neither unfair nor discriminatory unless proven otherwise, and in a way that seeks to provide appropriate protections pursuant to Colorado’s anti-discrimination laws.

Passed by the Colorado Civil Rights Commission on this 28th day of February 2020 in Denver, Colorado.



Miguel Elias, Ph.D. Chair
Colorado Civil Rights Commission

CERTIFICATIONS

This is to certify that all privacy redactions have been made, and with the exception of those redactions, every document submitted in Digital Form or scanned PDF is an exact copy of the written document filed with the Court; and

The digital submission has been scanned for viruses with the most recent version of Crowdstrike Falcon, Version 5.26.10806.0, recently updated on 2/19/20, and according to the program is free of viruses.

Dated April 22, 2020

s/ Skip Spear _____
Skippere S. Spear
Senior Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within
DEFENDANTS-APPELLEES' SUPPLEMENTAL APPENDIX VOL. 1
upon all parties herein this 22nd day of April, 2020 by using the
CM/ECF system which will send notification of such filing to the
following:

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