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June 18, 2021

VIA ELECTRONIC FILING

Christopher Wolpert
Clerk of Court
U.S. Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

Re: *303 Creative LLC, et al. v. Elenis, et al.*, No. 19-1413

Dear Mr. Wolpert:

Defendants-Appellees submit two decisions issued by the United States Supreme Court on June 17 under Federal Rule of Appellate Procedure 28(j).

Article III Standing

In *California v. Texas*, No. 19-840, the Court held that states and individuals did not have Article III standing to challenge the constitutionality of the Affordable Care Act because they could not show a substantial risk of threatened enforcement, much like the discussion on pages 22-37 of Defendants-Appellees' answer brief.

The Court reaffirmed "the need to assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future" and that "a plaintiff claiming standing must show that the likelihood of future enforcement is 'substantial'" Slip op. at 6 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014)). And the Court held that declaratory judgment actions, like the Company's here, "must satisfy Article III's case-or-controversy requirement." *Id.* at 8. The Company has not shown it can meet these requirements here.

Employment Division v. Smith

In *Fulton v. City of Philadelphia*, No. 19-123, the Court left the approach of *Employment Division v. Smith*, 494 U.S. 872 (1990), intact. Slip op. at 5 ("[W]e need not revisit that decision here"). The Court held the challenged regulation in *Fulton* was not "neutral and generally applicable"—and therefore that *Smith* did not

apply—because the regulation "incorporates a system of individual exemptions." *Id.* at 5-7.

Here, the Company does not claim that the Colorado Anti-Discrimination Act itself has any such exemption. Rather, it argues that this case falls outside *Smith* for three reasons, all of which differ from *Fulton*. Aplt. Br. 46-51. The Company's as-applied claims that Colorado has displayed hostility to religious speakers, failed to disavow earlier statements, and maintains an unwritten "religious speakers' policy" have no record support. Aplee. Br. 61-62. Under *Fulton*, because the Act is neutral and generally applicable, the Constitution does not require that Colorado exempt the Company from its anti-discrimination law.

We would appreciate it if you would circulate this letter to the panel at your earliest convenience.

Sincerely,

/s/ Eric R. Olson

Eric R. Olson
Solicitor General
Counsel for Defendants-Appellees

cc: all counsel of record (via ECF)