ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

June 25, 2021

VIA CM/ECF

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: Response to Supplemental Authority about *Fulton v. City of Philadelphia* for *303 Creative, et al. v. Elenis, et al.*, No. 19-1413

Dear Mr. Wolpert:

Appellants (collectively Lorie) file this response to Appellees' (Colorado's) notice of supplemental authority about *Fulton v. City of Philadelphia*, 2021 WL 2459253 (U.S. June 17, 2021). While at least five justices in *Fulton* questioned *Smith*'s validity, *id.* at *9-10 (Barrett, J., concurring); *id.* at *10-45 (Alito, J., concurring), the majority never reached that question. *Id.* at *4, *8. Beyond that, *Fulton* supports Lorie's arguments for two other reasons.

1. The policies in *Fulton* were not generally applicable because Philadelphia had created "a formal mechanism for granting exceptions," thereby "invit[ing] the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at *7 (cleaned-up). Colorado too has created (and applied) a formal system of "individualized assessments," requiring speakers with religious objections to provide certain services while exempting speakers with secular objections from doing so. Appellants' Opening Br. 49-51; Reply Br. 25-26. Colorado's law

also contains a written exception that allows public accommodations to restrict admission based on sex whenever doing so has "a bona fide relationship" to the accommodation's services. Reply Br. 26-27, 29. Creating these discretionary, secular exceptions while denying Lorie a religious exception makes Colorado's system not generally applicable under *Fulton*.

2. In its strict-scrutiny analysis, *Fulton* rejected Philadelphia's "interest in enforcing its non-discrimination policies generally" as being too "broadly formulated"; *Fulton* instead asked whether Philadelphia "has such an interest in denying an exception to [the plaintiff]." 2021 WL 2459253, at *8-9 (cleaned-up). And Philadelphia did not because it "fail[ed] to show that granting [plaintiff] an exception" would put its "goals [of ensuring access to foster families] at risk." *Id*. Nor did the interest in ensuring "equal treatment" suffice because Philadelphia's "system of exceptions … undermines [its] contention that its non-discrimination policies can brook no departures." *Id*. Likewise here, Colorado has no access or equal-treatment interest that justifies compelling Lorie because she does not discriminate, many other website designers provide services she cannot, and Colorado grants exceptions to others that undermine its alleged interests. Appellants' Opening Br. 53-57; Reply Br. 27-29.

In sum, *Fulton* supports Lorie's Free Exercise and strict-scrutiny arguments.

Sincerely,

s/ Jonathan Scruggs
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CERTIFICATE OF COMPLIANCE

I certify that the body of this letter contains 348 words and complies with Federal Rule of Appellate Procedure 28(j).

s/ Jonathan A. Scruggs
Jonathan A. Scruggs
Attorney for Appellants

Certificate of Service

I hereby certify that on June 25, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Jonathan A. Scruggs
Jonathan A. Scruggs
Attorney for Appellants