

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

Civil Action No. 1:16-cv-02372-PAB

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;
SERGIO RAUDEL CORDOVA,
CHARLES GARCIA,
GETA ASFAW,
MAYUKO FIEWEGER,
CHERYLIN PENISTON,
JEREMY ROSS, and
DANIEL S. WARD, as members of the Colorado Civil Rights
Commission, in their official capacities, and
PHILIP J. WEISER, Colorado Attorney General,
in his official capacity,

Defendants.

**PLAINTIFFS' BRIEF SUPPORTING THEIR PROPOSED FINAL
JUDGMENT**

A final judgment “should grant the relief to which” a “party is entitled, even if the party has not demanded that relief in its pleadings.” Fed. R. Civ. P. 54(c). The parties here agree that the final judgment should include a declaration and permanent injunction. But they disagree on three points. This Court should adopt 303 Creative LLC and Lorie Smith (Smith)’s proposal because it alone gives her the “complete relief” needed. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

First, Smith’s language ensures Colorado cannot compel her “to create custom websites celebrating or depicting same-sex weddings *or otherwise expressing messages inconsistent with her beliefs*.” While Colorado objects to the italicized phrase, it tracks the holding in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

There, the Supreme Court held that Smith’s “wedding websites” qualify as “pure speech” because they “contain ‘images, words, symbols, and other modes of expression,’” are “original, customized” creations, and “communicate ideas.” 600 U.S. at 587. Next, the Court held that Colorado could not compel Smith’s speech by forcing her to create custom wedding websites promoting a view of marriage that contradicts her beliefs. *Id.* at 588–89. For the latter holding, the Supreme Court emphasized that the First Amendment isn’t limited to wedding websites—it applies to all speech. *Id.* at 589–90, 592, 595, 601, 603. To summarize: When they “collide,” the First Amendment “prevail[s]” over a “public accommodations law.” *Id.* at 592.

That same logic extends to Smith’s other custom websites. The parties stipulated that *all* those websites “contain images words, symbols, and other modes of expression,” are “original, customized” creations, and “communicate a particular message.” Joint Statement of Stipulated Facts ¶¶ 46–50, ECF No. 49. In the Supreme Court’s words, those websites are “pure speech” too—just like her custom wedding websites. And for the same reasons Colorado cannot force Smith to design

websites promoting messages about marriage she disagrees with, the State cannot force her to create other objectionable website content. And there are many messages Smith cannot express consistent with her faith. *Id.* at ¶¶ 66–69.

What’s more, Colorado’s legal position justifies relief beyond wedding websites. From beginning to end, Colorado pushed a broad view of its authority and a narrow view of the First Amendment. Colorado argued that “website design service is ... not constitutionally protected speech.” Defs.’ Resp. to Prelim. Inj. Mot. 14, ECF No. 38; Defs.’ Resp. to Mot. Summ. J. 24, ECF No. 50. On appeal, Colorado claimed that it could dictate the content of any public accommodation’s expression even if it “involve[d] the vendor’s creative or expressive skill.” Appellees’ Answer Br. at 39, 43, 46, *303 Creative LLC v. Elenis*, No. 010110337681 (10th Cir. Apr. 23, 2020), 2020 WL 1983554. Colorado argued that its law only regulated conduct, not speech. Defs.’ Resp. to Mot. Summ. J. 9, 14–16; Appellees’ Answer Br. at 46–49; Br. for Respondents 13–14, *303 Creative LLC v. Elenis*, 600 U.S. 570 (No. 21-476) (filed Aug. 12, 2022), 2022 WL 3597176. And Colorado maintained that Smith’s custom websites were not constitutionally protected speech. *Id.* 20–23. *Cf.* *303 Creative*, 600 U.S. at 589 (rejecting “Colorado’s logic” empowering officials to “compel anyone who speaks for pay on a given topic to accept all commissions on that same topic”).

Put differently, Colorado consistently claimed the authority to compel Smith to provide the “same services”—i.e., custom-designed websites—for anyone regardless of the message. *E.g.*, Br. for Respondents at 20. The parties’ briefs addressed this broader legal theory *and* its application to Smith’s custom websites. Because Colorado’s broad theory “was inherent under the pleadings and issues as framed thereby,” Colorado had the “full opportunity to adjudicate that issue.” *Carter Oil Co. v. McCasland*, 190 F.2d 887, 893 (10th Cir. 1951) (applying Rule 54(c) to

enter judgment holding defendant liable for conversion in declaratory action over contract terms). The Supreme Court rejected Colorado's theory by holding that laws like Colorado's cannot compel speech regardless of the topic. *303 Creative*, 600 U.S. at 589–90, 592, 595, 601, 603. Based on this broad rejection of Colorado's broad argument, broad relief is appropriate. See 10 Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure* § 2664 (4th ed.) (noting Rule 54(c)'s "liberal application"). Cf. *Citizens United v. FEC*, 558 U.S. 310, 331, (2010) (awarding broad, unrequested relief that was "necessary to resolve a claim that has been preserved.").

Smith's proposed language tracks similar judgments in similar cases. In one recent case involving similar arguments and a similar law, a district court enjoined a city from compelling a photographer "to provide her wedding photography services for same-sex wedding ceremonies *or otherwise express messages inconsistent with [her] beliefs*." *Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 624 F. Supp. 3d 761, 782–800, 808 (W.D. Ky. 2022) (emphasis added).

Smith's proposal is also appropriate because of Colorado's history. Consider Jack Phillips and Masterpiece Cakeshop. The Supreme Court held that Colorado treated Phillips with "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection" to creating a custom wedding cake celebrating a same-sex wedding. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018). The Court reached that conclusion because Colorado's officials publicly "disparage[d] Phillips' beliefs" and treated Phillips worse than secular cake artists by allowing them to raise message-based objections to requests. *Id.* at 1729–31. But just a few days after that decision, Colorado prosecuted Phillips again for declining to create a cake that contradicted his beliefs. *Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1236–38 (D. Colo. 2019). Phillips

then had to defend himself in another administrative process and also file a separate lawsuit in federal court, alleging that Colorado was “pursuing the discrimination charges against [him] in bad faith.” *Id.* at 1241. Colorado quickly settled that case after Phillips uncovered new evidence: Colorado officials disagreed with the Supreme Court’s prior decision, proclaimed they did nothing wrong, and doubled down on their hostile statements. *See* Tr. Of Proceedings 10, 29–31 (June 22, 2018), <https://bit.ly/3vpmoLM>.

Likewise after this case, Attorney General Weiser stated “[w]e will be working hard to *limit the impact* of the Supreme Court’s ruling in *303 Creative*.” Phil Weiser (@pweiser), Twitter (July 9, 2023, 3:00 PM), <https://perma.cc/JMU8-7BNV>. He reiterated, “[o]n the legal front, we are going to do all we can to work to limit the impact of this decision, and, ultimately, to overturn this decision. ... This decision is not what our Constitution ... stands for.” 9News.com, *Colorado AG Phil Weiser responds to Supreme Court decision on Christian web designer*, at 19:28–19:45 (June 20, 2023), <https://perma.cc/4G54-L7AX>. Later, he said that the decision “will and must be overturned.” *Id.* at 26:18–19. Given this background, broad relief is necessary to protect Smith. Colorado has no basis to argue otherwise.

Second, Smith’s proposed language would allow her to post the statement in Complaint Exhibit B (ECF No. 1–2) or “materially similar statements.” Colorado objected to the “materially similar” language. But the pleadings and legal theories justify it. Smith’s complaint specifically requested that Colorado be prevented from forbidding her from “explaining [her] religious beliefs about what [she] can and cannot create.” Compl. at 59, ECF No. 1. That makes sense. Smith should not be forced to come to court anytime she wants to change minor wording on her website.

303 Creative also entitles her to this relief. As the Supreme Court explained,

Colorado’s “Communication Clause ... prohibits any speech inconsistent with the Accommodation Clause.” *303 Creative*, 600 U.S. at 581 n.1. Colorado “concede[d] that its authority to apply the Communication Clause to [Smith] stands or falls with its authority to apply the Accommodation Clause.” *Id.* The Supreme Court held that Colorado cannot use the Accommodation Clause to compel Smith to create custom wedding websites promoting same-sex marriages. *E.g., id.* at 588–89. Logically, then, Smith can explain publicly why she only creates wedding websites consistent with her religious beliefs. Just as Colorado cannot misuse the Accommodation Clause to compel Smith’s speech on marriage, neither can it misapply the Communication Clause to silence her speech on that subject, and it matters not whether she uses her exact statement in Exhibit B or materially similar language. *Id.* at 581 n.1.

That protection also mimics how other courts resolve pre-enforcement lawsuits where laws prohibit parties from publishing specific statements. *See FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 460, 481 (2007) (noting jurisdiction over specific ads and “materially similar” ones); *Chelsey Nelson Photography, LLC*, 624 F. Supp. 3d at 808 (enjoining enforcement against “similar statements”).

Third, the final judgment should name Smith as the prevailing party. While Colorado has objected to this designation (Notice of Filing Ex. A, ECF No. 101–1) as premature, Smith now qualifies as the prevailing party. With the entry of judgment, she will obtain the relief she sought—to prevent Colorado from compelling her speak views she disagrees with and from restricting her speech explaining her beliefs. *See Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (defining “prevailing party”); Compl. 59–60 (seeking this relief).

For these reasons, Smith asks this Court to enter her proposed judgment.

Respectfully submitted this 8th day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2024 the foregoing motion was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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DANIEL S. WARD, as members of the Colorado Civil Rights
Commission, in their official capacities, and
PHILIP J. WEISER, Colorado Attorney General,
in his official capacity,

Defendants.

**[PROPOSED] Order Granting in Part and Denying in Part Plaintiffs'
Declaratory and Permanent Injunctive Relief**

This case is before the Court on remand from the U.S. Court of Appeals for the Tenth Circuit “for further proceedings consistent with the Supreme Court’s decision” in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). *See* Order and Judgment, ECF No. 100. Consistent with that opinion, the U.S. Supreme Court’s June 30, 2023 judgment, and the U.S. Court of Appeals for the Tenth Circuit’s August 9, 2023 order, August 31, 2023 order and judgment, and September 22, 2023

mandate, the Court hereby GRANTS in part and DENIES in part Plaintiffs 303 Creative LLC and Lorie Smith's (collectively "Smith") motion for summary judgment (ECF No. 48) and their request for a permanent injunction and a declaration. The Court enters that permanent injunction and declaration as set out below. *See* Fed. R. Civ. P. 54; Fed. R. Civ. P. 65(d); 28 U.S. Code § 2202.

1. The Court declares that the First Amendment's Free Speech Clause prohibits Colorado from enforcing the Accommodation Clause (C.R.S. § 24-34-601(2)(a)) of Colorado's Anti-Discrimination Act ("CADA") to compel Smith to create custom websites celebrating or depicting same-sex weddings or otherwise expressing messages inconsistent with her beliefs.

2. The Court declares that the First Amendment's Free Speech Clause prohibits Colorado from enforcing CADA's Communication Clause (C.R.S. § 24-34-601(2)(a)) to prevent Smith from posting the following statement on her website or from making materially similar statements on her website and directly to prospective clients:

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

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

3. The Court permanently enjoins Defendants, their officers, agents, servants, employees, attorneys, and those acting in active concert or participation with them who receive actual notice of this order from enforcing:

- a. CADA's Accommodations Clause (C.R.S. § 24-34-601(2)(a)) to compel Smith to create custom websites celebrating or depicting same-sex weddings or otherwise expressing messages inconsistent with her beliefs; and
- b. CADA's Communication Clause (C.R.S. § 24-34-601(2)(a)) to prevent Smith from posting the statement referenced in paragraph 2 above on her website and from making materially similar statements on her website and directly to prospective clients.

4. Smith is the prevailing party in this action under 42 U.S.C. § 1988(b). She and her counsel are entitled to recover their reasonable attorney's fees, costs, and expenses for work done at all stages of this litigation.

5. Smith and Defendants shall engage in good faith settlement negotiations with respect to the amount of attorney's fees, costs, and expenses to be recovered by Smith. If the parties cannot reach a settlement, Smith shall file her bill of costs and motion for attorney's fees and nontaxable expenses within 90 days after the entry of this Order. Time shall be computed consistent with Federal Rule of Civil Procedure 6.

6. The Court will retain jurisdiction over this action for purposes of enforcing the provisions of this final order and judgment, and, if necessary, determining and entering an award for attorney's fees and costs.

7. All relief not expressly granted herein is DENIED.

SO ORDERED.

Done this _____ day of _____, 2024.

PHILIP A. BRIMMER
UNITED STATES DISTRICT JUDGE