

IN THE 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,*

v.

AUBREY ELENIS, Director of the Colorado Civil Rights  
Division, in her official capacity;  
SERGIO RAUDEL CORDOVA,  
CHARLES GARCIA,  
GETA ASFAW,  
MAYUKO FIEWEGER,  
CHERYLIN PENISTON 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.*

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

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Defendants Aubrey Elenis, Sergio Raudel Cordova, Charles Garcia, Geta Asfaw, Mayuko Fieweger, Cherylin Peniston, Daniel S. Ward, and Philip J. Weiser submit their response to Plaintiffs' brief supporting their proposed final judgment.

**I. Support for Paragraphs 1, 2, and 3 of Defendants' Proposed Order.**

The injunction this Court enters should be informed by the stipulated facts of the case because each court, including the United States Supreme Court, relied on

those facts to arrive at their respective rulings, including the ruling that Ms. Smith had standing to bring a pre-enforcement challenge seeking an injunction.

The crux of the parties' disagreement is the competing language for the scope of the injunction. Ms. Smith argues the injunction should enjoin Defendants from compelling her to "...otherwise express [] messages inconsistent with her beliefs." Defendants propose narrower language enjoining them from compelling Smith to "otherwise create or depict original, expressive, graphic and website designs inconsistent with her beliefs on same-sex marriage."

Ms. Smith's proposed language would greatly expand the Supreme Court's holding because she has not met the threshold requirements for an injunction for matters other than the subject of this lawsuit: same-sex wedding websites. Specifically, Ms. Smith did not allege, the parties did not litigate, and Ms. Smith did not demonstrate that she faced a credible threat that Defendants would invoke the Colorado Anti-Discrimination Act to force her to create any speech she does not believe or endorse – other than speech related to her beliefs about same-sex marriage. Conversely, Defendants' proposed language precisely aligns with the Supreme Court decision when one considers the stipulated facts and lower courts' reasoning that the Supreme Court identified and relied on.

**A. The Supreme Court's ruling considered standing only as to wedding websites.**

The Supreme Court adopted much of the Tenth Circuit analysis, including its analysis as to credible threat of injury should Ms. Smith act on her desire to

“design, create, and publish [wedding websites that] will promote and celebrate the unique beauty of God’s design for marriage between one man and one woman.”

Joint Statement of Stipulated Facts ¶79.

In fact, the Supreme Court opens its opinion framing the case as follows:

In that suit, she sought an injunction to prevent the State from forcing her to create wedding websites celebrating marriages that defy her beliefs. App. 303–305. To secure relief, Ms. Smith first had to establish her standing to sue. That required her to show “a credible threat” existed that Colorado would, in fact, seek to compel speech from her that she did not wish to produce. *Susan B. Anthony List v. Driehaus*, 573 U. S. 149, 159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). . . . In her lawsuit, Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse. 6 F. 4th 1160, 1173–1174 (CA10 2021). As evidence, Ms. Smith pointed to Colorado’s record of past enforcement actions under CADA, including one that worked its way to this Court five years ago. See *Masterpiece Cakeshop*, 584 U. S., at \_\_\_ (slip op., at 9); see also App. 25–155 (discussing Colorado’s other past enforcement actions).

*303 Creative LLC v. Elenis*, 600 U.S. 570, 580 (2023).

As the Court noted, to determine if a threatened enforcement of the law creates Article III injury giving rise to standing in a pre-enforcement context, “a plaintiff satisfies the injury-in-fact requirement where he alleges ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.’” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, (1979).

The Supreme Court then relied on the Tenth Circuit analysis that Ms. Smith had standing to sue stating, “In that court's judgment, she had established a credible threat that, if she follows through on her plans to offer wedding website services, Colorado will invoke CADA to force her to create speech she does not believe or endorse. The Court pointed to the fact that ‘Colorado has a history of past enforcement against nearly identical conduct—*i.e.*,’ . . . and that ‘Colorado [has] decline[d] to disavow future enforcement proceedings against her.’” *303 Creative LLC*, 600 U.S. at 583.

As such, the Supreme Court’s standing analysis pertained only as to the creation of wedding websites and thus, the resulting injunction should be confined to the same.

**B. The Supreme Court relied on the stipulated facts.**

In addition to the Supreme Court’s legal analysis being confined by the allegations of this case and the lower court’s “credible threat” analysis, it also pointed to specific stipulated facts, all related to wedding website design:

- Ms. Smith’s websites promise to contain “images, words, symbols, and other modes of expression.”
- Every website will be her “original, customized” creation.
- Ms. Smith will create these websites to communicate ideas—namely, to “celebrate and promote the couple’s wedding and unique love story” and to “celebrat[e] and promot[e]” what Ms. Smith understands to be a true marriage.

*303 Creative v. Elenis, et al.*, 600 U.S. at 587 (2023).

- She will produce a final story for each couple using her own words and her own “original artwork.”

*Id.*, at 588.

- “Each website 303 Creative designs and creates is an original, customized creation for each client.”
- Ms. Smith’s wedding websites “will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple’s wedding and unique love story.”

*Id.*, at 593-594.

The Supreme Court also agreed with the Tenth Circuit’s holding that Smith had standing to sue because she had established a credible threat that, if she follows through on her plans *to offer wedding website services*, Colorado would invoke CADA to force her to create speech she does not believe or endorse. *Id.*, at 583, emphasis added. The credible threat that gave Plaintiffs standing involved wedding website services.

Indeed, the Supreme Court decision is wholly predicated on creating wedding websites. Plaintiffs’ proposed language - “...or otherwise expressing messages inconsistent with her beliefs” – extends beyond the stipulated facts and the credible threat that the Supreme Court relied on to establish jurisdiction. Other beliefs – such as her beliefs about interracial marriage, or creating wedding websites for non-Christians, or interfaith couples – are unknown and were not litigated.

Plaintiffs argue that Stipulated Facts ¶¶ 66-69 justify expanding the injunction language beyond wedding website design. But none of the beliefs identified in those paragraphs were issues before the Court. Moreover, the

argument is belied by Plaintiffs' Complaint. Plaintiff devotes 61 paragraphs - ¶¶ 138-199 to allegations regarding creating wedding websites in Sections named, "303: Promoting God's Design for Marriage," "303: Suffering from CADA's Usurpation of Freedom," and "Expressive Businesses in Colorado Advocate for Same-Sex Marriage." ECF No. 1. The only belief that was litigated here is Ms. Smith's belief about same-sex marriage. The Supreme Court's holding is narrow; the injunction should reflect the Supreme Court's holding. "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Plaintiffs' proposed paragraph one would extend more relief than that to which she is entitled.

Lastly, Plaintiffs argue that the Court should accept their "...or otherwise expressing messages inconsistent with her beliefs" language based on *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 460, 481 (2007) and *Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 624 F. Supp. 3d 761 (W.D. Ky. 2022).

As a threshold matter, this case is not bound by a district court decision out of the Western District of Kentucky. And the *Wisconsin Right for Life* case supports Defendants' position that the scope of the relief is dictated by the Complaint. The court there held that the Bipartisan Campaign Reform Act of 2002, "is unconstitutional as applied to the advertisements at issue in these cases." 551 U.S. at 457. The plaintiff in *Wisconsin Right for Life* "alleged that [Bipartisan Campaign Reform Act of 2002]'s prohibition on the use of corporate treasury funds for

‘electioneering communication[s]’ as defined in the Act is unconstitutional as applied to . . . *any materially similar ads it might seek to run in the future.*” *Id.* at 460 (emphasis added). So even if the Supreme Court granted relief related to materially similar ads, it arguably did so only because plaintiff asked for such relief.

Here, Plaintiffs’ argument is frustrated by the third request for relief in the Complaint: “A preliminary injunction and permanent injunction to stop Defendants and any person acting in concert with them from enforcing the Compelled- Speech Provision to require Plaintiffs to create websites or graphics promoting events or ideas that violate their beliefs *that marriage should only be an institution between one man and one woman, such as websites promoting same-sex weddings.*” ECF No. 1 (emphasis added). Plaintiffs are entitled only to the injunction they requested, which is reflected in the Defendants’ Proposed Order.

## **II. Support for Paragraph 4 of Defendants’ Proposed Order.**

The extent of a plaintiff’s success is a crucial factor in determining the proper amount of an award of attorney’s fees under 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. *Id.* In *Hensley*, the Supreme Court observed:

Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers’ services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range

of possible success is vast. That the plaintiff is a “prevailing party” therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.

*Id.*, at 436.

Here, Plaintiffs brought five causes of action: 1) Violation of the First Amendment’s free speech and free press clauses – an as-applied challenge to CADA, 2) Violation of the first Amendment’s free exercise of religion clause – a facial challenge to CADA, 3) Violation of the Fourteenth Amendment’s Equal Protection clause, 4) Violation of the Fourteenth Amendment’s Due Process clause, and 5) Violation of the Fourteenth Amendment’s Substantive Due Process clause and Equal Protection Challenge to Denial of Religious Identity, Personal Dignity, Personal Autonomy, and Personal Liberty. Plaintiffs prevailed on only the first claim. Plaintiffs did not request the Supreme Court to review Claims 3, 4, and 5. The Supreme Court declined to consider the free exercise claim – the facial challenge to CADA. Defendants’ proposed Paragraph 4 therefore tracks the legal and procedural history of the case.

Accordingly, Defendants respectfully request that the Court enter their proposed order granting in part, and denying in part, Plaintiff’s Declaratory and Permanent Injunctive Relief.

Respectfully submitted January 29, 2024.

PHILIP J. WEISER  
Attorney General

*s/ Alison Faryl Kyles*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of January, 2024, I electronically filed the foregoing Defendants' Brief Supporting Their Proposed Final Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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Rachel A. Rouleau  
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*s/Linda Ruth Carter* \_\_\_\_\_  
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**UNITED STATES DISTRICT COURT  
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303 CREATIVE LLC, a limited liability company; and  
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vs.

AUBREY ELENIS, Director of the Colorado Civil Rights  
Division, in her official capacity;  
SERGIO R. CORDOVA,  
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GETA ASFAW,  
MAYUKO FIEWEGER, CHERYLIN ENISTON, 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.*

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

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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 create or depict original, expressive, graphic or website designs inconsistent with her beliefs regarding same-sex marriage.

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 regarding the effect of her beliefs on the expressive, graphic or website design services she offers 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(1)) to compel Smith to create custom websites celebrating or depicting same-sex weddings or otherwise to create or depict original, expressive, graphic or website designs inconsistent with her beliefs regarding same-sex marriage; 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 regarding the effect of her beliefs on the expressive, graphic or website design services she offers on her website and directly to prospective clients.

4. Smith is the prevailing party in this action under 42 U.S.C. § 1988(b) as to her as-applied First Amendment claim for which certiorari was granted. She and her counsel are entitled to recover their reasonable attorney's fees, costs, and expenses for work done pertaining to that claim 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.

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Philip A. Brimmer  
United States District Court Judge