

**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.*

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

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The parties agree on *which* three issues are disputed, but not on *how* to resolve them. The disagreements boil down to the scope of relief and Plaintiffs' (Smith) status as the prevailing party.

*First*, Colorado objects to the language about not compelling Smith to “otherwise express[] messages inconsistent with her beliefs” in paragraphs 1 and 3(a). Colorado says Smith’s complaint never asked for this relief. But Federal Rule of Civil Procedure 54(c) authorizes this Court to grant Smith relief she “has not demanded ... in [her] pleadings” so long as she is “entitled” to it. In another case like this one, a district court enjoined a city from enforcing its law to compel a photographer to “otherwise express messages inconsistent with [her] beliefs.” *Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov’t*, 624 F. Supp. 3d 761, 808 (W.D. Ky. 2022). The city never appealed the injunction’s scope. Colorado says this Court is not “bound” by that decision. Defs.’ Br. 6, ECF No. 120. Of course not. But Colorado never refutes its logic, persuasiveness, or applicability.

Smith deserves this same relief because it is “consistent with” her and Colorado’s “pleadings [and] proof.” *Reynolds v. Slaughter*, 541 F.2d 254, 256 (10th Cir. 1976). The logic and relevant facts relied on in the Supreme Court’s *303 Creative* decision apply to all of Smith’s custom websites based on the stipulated facts. *See* Pls.’ Br. 1–2, ECF No. 119. Colorado broadly claimed the authority to regulate Smith’s custom expression. *Id.* But the Supreme Court repeatedly held that Colorado’s public-accommodation law cannot compel any speech. *303 Creative LLC v. Elenis*, 600 U.S. 570, 588–90, 592, 596, 603 (2023). That all justifies relief beyond wedding websites because it shows Colorado cannot validly force Smith to create any custom website expressing a message against her beliefs.

Colorado’s broad litigation position, past enforcement, and dismissive

response to *303 Creative* confirm Smith’s standing. Pls.’ Br. 2–4. Colorado stipulated that 303 Creative is “a ‘place of public accommodation.’” Joint Statement of Stipulated Facts ¶ 93, ECF No. 49. The parties agreed and the Supreme Court’s logic confirms that all of Smith’s custom website designs are expressive. Pls.’ Br. 1–2. Smith only creates websites consistent with her beliefs. Joint Statement of Stipulated Facts ¶¶ 30–67. And Colorado interprets its law to require public accommodations—like 303 Creative—to create custom expressive works even if they consider the message objectionable. *See* Br. for Respondents 18–23, *303 Creative LLC v. Elenis*, 600 U.S. 570 (No. 21-476) (filed Aug. 12, 2022), 2022 WL 3597176. Putting this together, Smith has standing because her custom websites are “affected with a constitutional interest,” her message-based objections are arguably “proscribed by statute,” and she faces a “credible” enforcement threat—anyone can file suit and Colorado never disavowed but broadly defended its authority to compel Smith’s websites. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–66 (2014).

*Second*, Colorado now agrees that the “materially similar” language should be included in paragraphs 2 and 3(b). But Colorado inserts the phrase “regarding the effect of her beliefs on the expressive, graphic, or website design services she offers.” That phrase circumvents the stipulations. Colorado stipulated that Smith’s wedding websites are always expressive, graphic, and custom. Joint Statement of Stipulated Facts ¶¶ 46–59. Colorado’s phrase injects doubt into that stipulation by suggesting a subset of Smith’s wedding websites are not “expressive” or “graphic.” But the stipulations are binding and Colorado cannot retreat from them.

*Finally*, Smith should be named the prevailing party in paragraph 4. Colorado seeks to limit Smith’s designation and her fees and costs to the free speech claim. But Colorado confuses (1) prevailing party status and (2) the reasonableness

of fees and costs. Courts first make the “threshold determination” of whether a plaintiff is a prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Smith meets that “generous formulation” because she benefitted from this lawsuit. *Id.* (cleaned up). The final judgment should reflect that status without qualification.

Afterward, this Court can decide the reasonableness of Smith’s fees and costs with the benefit of full briefing and supporting information. *Id.* Smith’s success should be judged according to “the overall relief obtained” rather than “viewed as a series of discrete claims.” *Id.* The Tenth Circuit regularly rebuffs efforts like Colorado’s to isolate a plaintiff’s successful claim and then limit fee and cost recovery to that claim. *See Flitton v. Primary Residential Mortg., Inc.*, 614 F.3d 1173, 1178 (10th Cir. 2010); *Robinson v. City of Edmond*, 160 F.3d 1275, 1282–83 (10th Cir. 1998); *Jane L. v. Bangerter*, 61 F.3d 1505, 1511 (10th Cir. 1995). In *Flitton*, the defendant argued—like Colorado here—that the employee’s fee award should have been reduced because she prevailed on only one of five claims. 614 F.3d at 1178. The Tenth Circuit rejected this fixed-ratio argument because it failed to account for the employee’s “overall success.” *Id.* Though the employee only received “one percent” of the damages she requested, the district court rightly declined to proportionally reduce the fee award because her suit was still successful overall. *Id.*

Smith’s remarkable success here easily satisfies this “most critical factor” for fees and costs. *Hensley*, 461 U.S. at 436. She received the relief she sought: stopping Colorado from “forc[ing]” her to “defy her conscience.” *303 Creative LLC*, 600 U.S. at 603. Smith’s claims also involved common facts and legal theories. *Hensley*, 561 U.S. at 435. So Colorado’s proposed fee and cost partition is “legally indefensible” where Smith achieved extraordinary overall relief. *Robinson*, 160 F.3d at 1283.

Smith asks this Court to enter her proposed judgment and reject Colorado’s.

Respectfully submitted this 12th day of February, 2024.

By: *s/ Jonathan A. Scruggs*

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2024 the foregoing reply brief 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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