First Amendment Program Biographies

Richard Dolan is a co-founder of Schlam Stone & Dolan LLP and the co-head of its civil litigation department and practices complex commercial litigation. In a forty-year career, he has tried almost 100 jury and non-jury cases. Richard has also handled trials, arbitrations, and appeals involving antitrust, securities, telecommunications, bankruptcy, sports, and entertainment law. His clients include Fortune 500 corporations, family businesses, real estate consortiums and partnerships, and electronics manufacturers. Clients frequently seek his advice on strategically negotiating threatened transactional disputes.

Richard advises clients on corporate governance issues and on negotiating and drafting agreements in a wide variety of commercial contexts, including contracts and other business documents. He is currently defending the NYC Police Benevolent Association and enjoys taking on cases that other firms or lawyers reject as politically unpopular.

Before founding Schlam Stone & Dolan, Richard served as an Assistant United States Attorney, Civil Division, for the Eastern District of New York, and prosecuted matters relating to airplane crashes, government contract claims, antitrust actions, medical malpractice, environmental violations, and federal forfeiture. During his four years with the government, he litigated more than 25 cases before the Second Circuit Court of Appeals, including successfully arguing in defense of the constitutionality of numerous federal statutes and regulations.

Richard has been selected to the New York Metro Area list of Super Lawyers® in *Business Litigation, Appellate, and Antitrust Litigation.* Among his publications, he has co-authored the *New York Law Journal's* monthly Eastern District Roundup column since 1990.

Justice Saliann Scarpulla is a graduate of Boston University and Brooklyn Law School, cum laude.

After law school, Justice Scarpulla became Principal Court Attorney to the Hon. Alvin F. Klein. Justice Scarpulla then worked at Proskauer Rose Goetz & Mendelsohn as a litigation associate from 1988 to 1993. At Proskauer, she gained extensive experience in commercial litigation, accountants' liability, securities regulations, real estate, contracts and commercial torts.

In 1993, Justice Scarpulla joined the Federal Deposit Insurance Corporation as Senior Counsel in the New York Legal Services Office. While there, she represented the FDIC as receiver for numerous failed banks and litigated cases on banking and commercial issues, including ERISA and FIRREA. Justice Scarpulla then became Senior Vice Present and Bank Counsel to Hudson United Bank, where she was responsible for all litigation involving the bank, and also oversaw the banks' compliance with state and federal banking regulations.

Justice Scarpulla returned to the New York State court system in 1999, as Principal Court Attorney to the Hon. Eileen Bransten. She was elected to the Civil Court in 2001. While in Civil Court Justice Scarpulla presided over civil, commercial landlord-tenant, no-fault, pro se and small claims actions.

In 2009, Justice Scarpulla was appointed an Acting Justice of the Supreme Court, and initially presided over a City Part, handling civil litigation involving the City of New York as a party. Justice Scarpulla was then assigned to an IAS Part, in which she handled a wide variety of civil cases.

Justice Scarpulla was elected to the Supreme Court in 2012, and was assigned to an IAS part with an emphasis on complex asbestos litigation. In addition to her asbestos caseload, Justice Scarpulla handled construction injury/property damage cases, insurance coverage cases and general commercial litigation. Justice Scarpulla also presided over actions commenced pursuant to Mental Hygiene Law Article 9. Justice Scarpulla was assigned to the Commercial Division in February 2014.

Justice Scarpulla is a member of the Association of the Bar of the City of New York, Catholic Lawyers Guild, Columbian Lawyers Association, Jewish Lawyers Guild, Judges and Lawyers Breast Cancer Alert, the National Association of Italian American Women, the National Association of Women Judges, the New York County Lawyer Association, the New York State Bar Association and the New York Women's Bar Association. Justice Scarpulla is also a frequent lecturer at the Judicial Institute.

Erik Groothuis, a member of the Firm's management committee, has spent 25 years litigating complex commercial disputes in New York City. He focuses on three main areas:

1. Financial services litigation
2. Real estate litigation
3. Professional liability (legal and accounting malpractice) litigation

Erik also regularly represents clients in business divorce, breach of contract, corporate governance, defamation, insurance, investor and securities fraud, and business-torts litigation, as well as related appeals. He often litigates at home in the Commercial Divisions of New York's state courts and the United States District Courts for the Eastern and Southern Districts of New York, but has represented clients in courts throughout the United States, as well as in FINRA and AAA arbitrations. Erik has been retained as an expert witness in legal malpractice litigation.

Clients depend on Erik's counsel to resolve their issues and get on with their lives and businesses. Known for his ability to generate superior work product, Erik is tenacious, efficient, and always mindful of the client's bottom line.

Erik also negotiates employment and severance agreements and other commercial contracts such as licensing, purchase and sale, and services agreements.

In 2018, Erik launched Same-Day Justice, an innovative dispute resolution solution. He is certified as a Small Claims Court arbitrator in New York County and is a Mediator trained by the International Institute for Conflict Prevention and Resolution.

Rosalind Fink's first love was acting. After being rejected by the Mickey Mouse Club for being "overly hostile" (a long, true story), she went on to law school and Barrister's Union, making a name for herself as the Over the Top Witness Everyone Wanted. She was a founding member, and past president, of our Inn of Court, and helped to produce way too many Inn productions. After a hiatus, she's back on the boards, this time as a member of the First Amendment team. She's also continuing to practice employment law, as principal of the Law Office of Rosalind Fink (a not catchy, but accurate, title).

Herbert Eisenberg's practice is devoted to representation of employees in all aspects of employment law with a focus on litigation involving employment discrimination, sexual harassment and employment contracts. He has also arbitrated securities industry employment disputes and litigated employee benefit claims under ERISA, fraud claims in the employment context,union democracy matters and has handled both public and private sector union-side collective bargaining matters.

Mr. Eisenberg is a frequent speaker at conferences on various aspects of employment law. He has taught employment law as an adjunct professor at New York Law School. He is a member of the Executive Board of the National Employment Lawyers Association. He is most recent past president of the National Employment Lawyers Association, New York Chapter, and was a member of its Executive Board for seventeen years. He is also the Second Circuit Representative on the National Employment Lawyers Association national amicus advisory council. He is former co-chair of the Labor and Employment Law Committee of the New York County Lawyer's Association.

Mr. Eisenberg is a graduate of the State University of New York at Buffalo Law School (1983) and the State University of New York at Binghamton (1979).

The Honorable Robert S. Smith (Ret.) joined Friedman Kaplan following his retirement as Associate Judge of the New York State Court of Appeals, New York's highest court, where he served for more than a decade. During his time on the bench, he wrote scores of opinions and became well known for his judicial scholarship, insight, and intellectual rigor.
Prior to his time on the Court of Appeals, Judge Smith practiced law in New York City, and was a partner with Paul, Weiss, Rifkind, Wharton & Garrison for over 25 years. He has argued dozens of appeals before the federal and New York appellate courts, and two appeals before the

United States Supreme Court. His trial experience in complex commercial cases is also extensive. He is a Fellow of the American College of Trial Lawyers.
Since joining Friedman Kaplan, Judge Smith has been active primarily in appeals, trial-level commercial litigation, expert witness testimony (principally on New York law issues), and alternative dispute resolution. Judge Smith also maintains an independent practice, the Law Offices of Robert S. Smith.

John Moscow is well known and highly respected in the field of white collar criminal law, where he has spearheaded and been involved in some of the most complicated fraud cases of the past 25 years. Driven by the complex facts of the matters facing his clients and possessing the ability to manage unprecedented legal issues, John has led investigations and conducted prosecutions and defenses involving money laundering and theft by high-ranking corporate individuals and major financial institutions both domestically and throughout the world.

John spent 30 years with the New York County District Attorney's Office, where he prosecuted international economic crime, securities fraud and criminal violations of fiduciary duties. His knowledge and involvement in the investigation and prosecution of cases involving financial and corporate fraud led to the development of the theory of jurisdiction that has become widely adopted by lawyers prosecuting cases out of Manhattan.

In private practice he has handled forfeiture cases for a foreign government, for third party claimants and for defendants.

NO. _____

IN THE

Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

JONATHAN A. SCRUGGS
KATHERINE L. ANDERSON
BRYAN D. NEIHART
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

KRISTEN K. WAGGONER
Counsel of Record
JOHN J. BURSCH
ERIN M. HAWLEY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(571) 707-4655
kwaggoner@ADFlegal.org

Counsel for Petitioners

QUESTIONS PRESENTED

Artist Lorie Smith is a website designer who creates original, online content consistent with her faith. She plans to (1) design wedding websites promoting her understanding of marriage, and (2) post a statement explaining that she can only speak messages consistent with her faith. But the Colorado Anti-Discrimination Act (CADA) requires her to create custom websites celebrating same-sex marriage and prohibits her statement—even though Colorado stipulates that she "work[s] with all people regardless of … sexual orientation." App.53a, 184a.

The Tenth Circuit applied strict scrutiny and astonishingly concluded that the government may, based on content and viewpoint, *force* Lorie to convey messages that violate her religious beliefs and *restrict* her from explaining her faith. The court also upheld CADA under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), even though CADA creates a "gerrymander" where secular artists can decline to speak but religious artists cannot, meaning the government can compel its approved messages. The questions presented are:

1. Whether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First Amendment.

2. Whether a public-accommodation law that authorizes secular but not religious exemptions is generally applicable under *Smith*, and if so, whether this Court should overrule *Smith*.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner 303 Creative LLC is a single-member limited liability company owned by Petitioner Lorie Smith, a Colorado citizen. 303 Creative has no stock, and no parent or publicly held companies have any ownership interest in it.

Respondents are Aubrey Elenis, in her official capacity as Director of the Colorado Civil Rights Division; Sergio Raudel Cordova, Charles Garcia, Richard Lee Lewis Jr., Ajay Menon, Cherylin Peniston, and Meremy Ross, in their official capacities as members of the Colorado Civil Rights Commission; and Phil Weiser, in his official capacity as Attorney General for the State of Colorado.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit, No. 19-1413, *303 Creative LLC* v. *Elenis*, judgment entered July 26, 2021.

U.S. District Court for the District of Colorado, No. 1:16-cv-02372, final judgment entered September 26, 2019.

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STATEMENT OF JURISDICTION

The Tenth Circuit entered judgment on July 26, 2021. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV.

Relevant portions of the Colorado Anti-Discrimination Act appear at App.171a–172a.

INTRODUCTION

The Tenth Circuit below took the "remarkable" "stance that the government may force [an artist] to produce messages that violate her conscience." App.51a (Tymkovich, C.J., dissenting). What's more, the government may restrict speech based on content, even when that risks "excising certain ideas or viewpoints from the public dialogue." App.24a. Although dissenting Chief Judge Tymkovich was "loathe to reference Orwell, the majority's opinion endorses substantial government interference in matters of speech, religion, and conscience." App.51a. "It seems," he reflected, that "we have moved from 'live and let live' to 'you can't say that.'" App.51a–52a.

Lorie Smith is an artist and website designer who creates original content consistent with her faith. She plans to expand her business to design wedding websites that promote her understanding of marriage as between one man and one woman, and she would like to post an online statement explaining she can only speak messages that are consistent with her religious convictions. But Colorado's Anti-Discrimination Act (CADA) *requires* her to create websites celebrating same-sex marriage and *bans* her explanatory statement—even though Colorado officials stipulate that she works with anyone, regardless of sexual orientation. App.53a, 184a.

The Tenth Circuit agreed Lorie does not discriminate against LGBT persons and declines to create websites based solely on content. The Tenth Circuit also held that creating a wedding website is "speech" and recognized that CADA both compels and restricts speech based on content. That should have spelled the end of CADA's speech compulsion as applied to Lorie.

Instead, the Tenth Circuit adopted a novel, artists-are-monopolists theory and held that Colorado can "*force* [Lorie] to create custom websites that [she] otherwise would not" because CADA is narrowly tailored to the state's compelling interest in ensuring equal access *to Lorie's custom expression*. According to the lower court, Colorado has a compelling interest in ensuring access to websites created by Lorie. Further, the court held that Colorado may *prohibit* Lorie from publicizing her own understanding of marriage. As Chief Judge Tymkovich's dissent explained, this ruling is "unprecedented" and "staggering" in scope. App.80a. The decision empowers the government to force everyone to speak government-approved messages and "subverts our core understandings of the First Amendment." *Ibid.*

The decision also cements a three-way split over tensions between free speech and laws like CADA, pitting the Tenth Circuit and several state courts of last resort against the Eighth and Eleventh Circuits and the Arizona Supreme Court. At the same time, the opinion contradicts this Court's free-speech precedents, which have repeatedly declared as anathemas to the First Amendment all government attempts to compel speech, to regulate speech based on content, and to stamp out disfavored speech.

The Tenth Circuit's free-exercise analysis is also deeply flawed and creates a separate circuit split. The lower court upheld CADA despite the law's provision of secular but not religious exemptions, and despite agreeing that CADA restricts speech based on content, causing a viewpoint gerrymander. If such a law does not trigger strict scrutiny under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), then *Smith* should be overturned.

Lorie seeks only to speak "in a manner consistent with [her] religious beliefs; [she] does not seek to impose those beliefs on anyone else." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). This Court's review is urgently needed to reaffirm that the government cannot compel artists to speak government-approved messages or enforce "content-based restriction[s]" on speech designed to "excis[e] certain ideas or viewpoints from the public dialogue." App.24a. The petition should be granted.

STATEMENT OF THE CASE

A. Lorie Smith and 303 Creative

Lorie Smith is a graphic artist, website designer, and sole owner of her design firm, 303 Creative. App.181a. Lorie developed her design talents in corporate America but wanted more freedom to promote issues she cares about—advancing small businesses, helping people, and supporting churches and nonprofits. App.180a–181a. She started her own website-design business. App.181a.

Lorie has largely realized her dream. She designs original, customized websites and graphics for her clients, App.181a, using words, pictures, or other media and her own unique, creative talents, App.21a. Lorie seeks to bring glory to God by creating unique expression that shares her religious beliefs, including her faith's view that marriage is between one man and woman, and she cannot create messages inconsistent with her Christian faith. App.179a–180a.

For years, Lorie has planned to expand into wedding websites in large part to "promot[e]" her "religious belief that God designed marriage as an institution between one man and one woman" and to

encourage couples to "commit to lifelong unity and devotion as man and wife." App.187a–188a. Lorie will customize each website to each wedding and will "'celebrate and promote the couple's wedding and unique love story' by combining custom text, graphics, and other media." App.187a. The custom wedding websites will "express approval and celebration of the couple's marriage, which is itself often a particularly expressive event." App.20a; App.66a (sample marriage website Lorie will create). And Lorie plans to use each website to tell the couple's story in a way that shares her religious beliefs about marriage. App.186a. Lorie has final editorial control over every website. App.183a.

Lorie is willing to create custom websites for anyone, including those who identify as LGBT, provided their message does not conflict with her religious views. App.184a. As Colorado stipulates, she does not discriminate against anyone. App.54a, 184a. She is "willing to work with all people regardless of … race, creed, sexual orientation, and gender." App.184a. But she cannot create websites that promote messages contrary to her faith, such as messages that condone violence or promote sexual immorality, abortion, or same-sex marriage. App.184a. Lorie respectfully refers such requests to other website designers. App.185a.

Lorie has written a webpage announcing her expansion into the wedding business and explaining her reasons for the content she can and cannot create. App.188a–189a. But under CADA, Lorie cannot post her statement or offer her wedding websites because Colorado considers it illegal. CA10 Appellees' Answer Br. 3, 50–57. Yet Lorie still received a request for a same-sex-wedding website. CA10 Aplt.App.2-260.

B. CADA's targeting of Lorie and other religious artists

Under CADA, 303 Creative is a "public accommodation," App.171a, that may not "directly or indirectly … refuse … because of … sexual orientation … the full and equal enjoyment of the … services … [of a] public accommodation…" Colo. Rev. Stat. 24-34-601(2)(a) ("Accommodation Clause"), App.171a–72a.

CADA also makes it unlawful to "publish … any … communication … that indicates that services … [of a] public accommodation will be refused … or that an individual's patronage or presence … is unwelcome, objectionable, unacceptable, or undesirable because of … sexual orientation..." Colo. Rev. Stat. 24-34-601(2)(a) ("Publications Clause"), App.172a.

The Colorado Civil Rights Commission and its investigative arm, the Civil Rights Division, enforce CADA. App.175a–176a. Anyone can file complaints with the Division, including each named Respondent. App.174a–175a. The Division investigates, and the Commission adjudicates. App.175a–176a. Individuals can also file state-court lawsuits. App.174a. CADA penalizes violators with fines up to $500, cease-and-desist orders, and burdensome reporting and re-education conditions. App.175a, 177a.

CADA has two exemptions relevant here. It exempts business practices that "restrict admission" "to individuals of one sex if such restriction has a bona fide relationship to the … services" of that "accommodation." Colo. Rev. Stat. 24-34-601(3) ("Bona Fide Relationship Clause"), App.172a. It also implicitly allows for "message-based refusals" for works a business will not create for "any customer." App.54a–55a, 91a (Tymkovich, C.J., dissenting).

Colorado broadly interprets and aggressively enforces CADA against those like Lorie, including cake artist Jack Phillips. *E.g.*, *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018). So do Colorado private citizens and Colorado state courts. *E.g.*, *Scardina* v. *Masterpiece Cakeshop Inc.*, No. 19CV32214 (Colo. Dist. Ct. June 15, 2021) (holding Jack Phillips liable under CADA for declining to create a custom cake celebrating a gender transition, requested—coincidentally—the very same day certiorari was granted in the case that resulted in this Court's *Maseterpiece* decision).

C. Proceedings below

At the district court, Lorie sought a preliminary injunction and Colorado moved to dismiss. The court held the two motions and instructed Lorie to file for summary judgment, which she did based on stipulated facts. The district court then dismissed Lorie's Accommodation Clause challenge on standing and stayed the case until this Court decided *Masterpiece*. App.168a–170a. After *Masterpiece*, the district court granted summary judgment to Colorado on the Publications Clause. App.113a.

On appeal, the Tenth Circuit held that Lorie had standing to challenge both Clauses. The court also held that Lorie's wedding websites are "pure speech," and that "the result of the [Public] Accommodation Clause is that [Lorie is] forced to create custom websites [she] otherwise would not"—notwithstanding her sincere religious views on marriage. App.20a, 23a; *id.* at 22a (CADA compels Lorie "to create speech that celebrates same-sex marriages").

And "[b]ecause the Accommodation Clause compels speech in this case, it also works as a content-based restriction" that creates a "substantial risk of excising certain ideas or viewpoints from the public dialogue"—"[e]liminating such ideas is CADA's very purpose." App.23a–24a (cleaned up). Since CADA compels and restricts speech based on content, the court held that it must satisfy strict scrutiny. *Ibid.*

The majority said that CADA met this arduous test because Colorado had a compelling interest in ensuring access to Lorie's "*unique* services [which] are, by definition, unavailable elsewhere"—even while admitting that "LGBT consumers may be able to obtain wedding-website design services from other businesses." App.28a. The Tenth Circuit held that "for the same reason" Lorie's services are speech, they are "inherently not fungible," so the government may compel their provision. *Ibid.* And the court rejected Lorie's Publications Clause challenge, holding that her statement of beliefs expressed an intent to do what "the Accommodation Clause forbids and that the First Amendment does not protect." App.28a, 34a.

In its free-exercise analysis, the Tenth Circuit conceded that CADA contains exemptions, compels speech based on viewpoint, and creates a "pro-LGBT gerrymander" by requiring religious artists to celebrate same-sex marriage while allowing secular artists to decline to speak messages. App.40a. Yet the court still held CADA generally applicable—despite its message-based refusal exception—because none of the exemptions allowed conduct exactly like the religious conduct at issue, i.e., while the exception allows speakers to decline religious and other messages, none allow "secular-speakers" to decline requests celebrating same-sex marriage. App.41a.

Finally, the Tenth Circuit admitted that CADA allows public accommodations to deny access based on sex if doing so has a "bona fide relationship" to the accommodation's services. App.45a. But despite this Court's conclusion in *Fulton* v. *City of Philadelphia* that a "formal [exemption] mechanism" is problematic "regardless whether any exceptions have been given," 141 S. Ct. 1868, 1879 (2021), the court disregarded the exemption as not "entirely discretionary" and irrelevant without prior enforcement. App.45a.

In an acerbic dissent, Chief Judge Tymkovich recognized that the majority's opinion was "unprecedented." App.80a. He agreed that CADA compelled speech, restricted speech based on content and viewpoint, and triggered strict scrutiny, but he concluded that CADA flunked this test because "ensuring access to a *particular* person's unique, artistic product … is *not* a compelling state interest," App.77a, and because CADA compels and supresses Lorie's speech when "there are reasonable, practicable alternatives Colorado could implement to ensure market access while better protecting speech," App.78a.

Chief Judge Tymkovich also concluded that CADA violated Lorie's free-exercise rights. CADA allows secular but not religious artists to make "message-based refusals." App.91a. Colorado, he said, "presum[es] that Ms. Smith has discriminatory intent in her faith-based refusal while allowing other artists to refuse to convey messages contrary to their non-faith-based beliefs." App.92a–93a. "Colorado's treatment of Ms. Smith's religious beliefs must be rejected," he said. App.93a.

REASONS FOR GRANTING THE WRIT

The courts of appeal have now embraced three competing views over whether government may compel and restrict speech expressing certain views. The Tenth Circuit's decision deepens that entrenched conflict and flatly contradicts this Court's free-speech precedents six ways from Sunday.

The Tenth Circuit took the extreme position that the government may compel an artist—any artist—to create expressive content, even if that content violates her faith. The Oregon Court of Appeals largely agrees. These decisions conflict directly with the Eighth and Eleventh Circuits and the Arizona Supreme Court, all of which have held that the government may *not* compel speech in violation of a speaker's conscience. Other courts, including those in Colorado, New Mexico, and Washington, also bless the compulsion of creative content, but they do so by holding free-speech protections inapplicable, recharacterizing the creation of messages as mere conduct. This entrenched split cannot stand. It means that the First Amendment rights of artists depend on the state in which they live. And the decisions that give their imprimatur to governments who compel speech conflict starkly with this Court's decisions.

This Court should also grant certiorari to clarify *Smith* and hold that a law is not generally applicable when it authorizes secular but not religious exceptions. The decision below deepened a second circuit split and substantially narrowed *Fulton* by holding that the secular exemption must be nearly identical as the religious exemption requested. This Court should grant review on both questions presented.

I. The Tenth Circuit decision exacerbates a three-way split over free-speech defenses to public-accommodation laws.

In holding that a government may "compel speech," enforce "content-based restrictions" on speech that the government deems "unwelcoming," and "force[ ]" artists "to create custom websites they otherwise would not"—even where that speech conflicts with sincerely held religious beliefs—the Tenth Circuit deepened an existing conflict and disregarded this Court's free-speech precedents. Without correction, the decision will continue to erode essential free-speech protections and embolden government officials to punish speakers with whom they disagree.

A. The Tenth Circuit and Oregon Court of Appeals authorize compelled speech under heightened scrutiny.

The Tenth Circuit held that Lorie's wedding websites are "pure speech" because they "'celebrate and promote the couple's wedding and unique love story' by combining custom text, graphics, and other media." App.20a. The websites also "express approval and celebration of the couple's marriage, which is itself often a particularly expressive event." *Ibid.*

The Tenth Circuit recognized that CADA compels and limits speech in two ways. The Accommodation Clause "force[s] [Appellants] to create websites—and thus, speech—that they would otherwise refuse." App.22a–23a. And "it also works as a content-based restriction" aimed at "[e]liminating such ideas." App.23a–24a. As a result, Lorie may not "create websites celebrating opposite-sex marriages," unless she also creates messages "celebrating same-sex

marriages." App.23a. Because CADA both compels speech and operates as a content-based restriction, the Tenth Circuit held that it must satisfy strict scrutiny. So far, so good.

The Tenth Circuit then went off the rails, holding that CADA's speech compulsion and speech restriction somehow satisfy strict scrutiny. The court said that Colorado has a compelling interest in ensuring that marginalized groups have "access to the commercial marketplace." App.32a. And despite acknowledging that innumerable companies create custom wedding websites celebrating same-sex weddings, App.28a, the court held that CADA can compel speech because it is narrowly tailored to Colorado's interest in ensuring "equal access to publicly available goods and services." App.26a.

To get there, the court held that Lorie's expression is "unique" under the narrow-tailoring inquiry because the only person who makes websites that look like Lorie's is—Lorie herself. The Court then held that "[f]or the same reason that [Lorie's] custom and unique services are speech, those services are also inherently not fungible," so the government could forcibly compel their provision. App.28a.

The court's analysis likened custom art to a monopoly: "The product at issue is not merely 'custom-made wedding websites,' but rather 'custom-made wedding websites of the same quality and nature *as those made by [Lorie]*.'" App.29a (emphasis added). "In that market," the court continued, only Lorie's creative work exists. *Ibid.* Thus, Colorado's interest in "equal access" meant access to *Lorie's* personal voice, and there was no less intrusive way to provide access to Lorie's voice.

The Tenth Circuit's bizarre reasoning turns free-speech protections on their head. The more "unique" speech is, the more the government can compel it. App.30a n.5 ("To us, Appellants' services must either be unique for both [free-speech and strict-scrutiny] analyses, or fungible for both."). "[T]he scope of the majority's opinion is staggering," allowing the government to "regulate the messages communicated by *all* artists" App.80a (Tymkovich, C.J., dissenting).

In a similar case, the Oregon Court of Appeals upheld the government compulsion of a custom same-sex wedding cake under intermediate scrutiny. *Klein* v. *Or. Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017). The court acknowledged that free-speech concerns might exist but held that "any burden on … expressive activities is no greater than is essential to further Oregon's substantial interest in promoting the ability of its citizens to participate equally in the marketplace without regard to sexual orientation." *Id.* at 1065. Given the state's interest in preventing unequal treatment, the court would not permit any "special privilege" for free speech. *Id.* at 1074.

Thus, the Tenth Circuit became the second jurisdiction to hold that government efforts to compel creative speech on matters of conscience survive heightened scrutiny.

B. The Eighth and Eleventh Circuits and Arizona Supreme Court do not allow public-accommodation laws to compel or restrict speech under heightened scrutiny.

In *Telescope Media Group* v. *Lucero*, a case that the Tenth Circuit rightly understood to be "substantially similar" to this one, App.67a, the Eighth Circuit held that the government may *not* force a for-profit film studio to create films telling stories of same-sex marriages just because they create films celebrating opposite-sex marriages. 936 F.3d 740, 758–60 (8th Cir. 2019). That is because the government cannot compel a person "to talk about ... same-sex marriages" simply because she chooses "to talk about ... opposite-sex marriages." *Id*. at 753. To do so "is at odds with the 'cardinal constitutional command' against compelled speech." *Id.* at 752 (quoting *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council* 31, 138 S. Ct. 2448, 2463 (2018)). The compulsion also effects a content-based regulation because it "[m]andat[es] speech that a speaker would not otherwise make." *Id*. at 753 (quoting *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc*., 487 U.S. 781, 795 (1988)).

Like the Tenth Circuit, the Eighth Circuit applied strict scrutiny. But the Eighth Circuit reached the opposite result. It held that "regulating speech because it is discriminatory or offensive is *not* a compelling state interest." *Id*. at 755 (emphasis added). "Even antidiscrimination laws, as critically important as they are," the court concluded, "must yield to the Constitution." *Ibid*. If this were not so, the Eighth Circuit reasoned, the government could "force a Democratic speechwriter to provide the same services to a Republican," or "require a professional

entertainer to perform at rallies for both the Republican and Democratic candidates for the same office." *Id.* at 756.

Likewise, the Tenth Circuit acknowledged a split between its decision and *Brush & Nib Studio, LC* v. *City of Phoenix,* where the Arizona Supreme Court held that a public-accommodation law could not force an art studio to create custom wedding invitations or ban the studio's online statement of beliefs. 448 P.3d 890, 895 (Ariz. 2019). Since custom wedding invitations were "speech," requiring their creation for same-sex weddings would violate the "cardinal constitutional command" against compelled speech. *Id*. at 905 (quoting *Janus*, 138 S. Ct. at 2463). The court also held that the city's public-accommodation ordinance operated "as a content-based law" that "coerce[d]" individuals into "abandoning their convictions," and compelled them to communicate "celebratory messages" with which they disagree. *Id*. at 914.

Applying strict scrutiny, the Arizona Supreme Court rejected the argument that "a public accommodations law could justify compelling speech." *Id*. at 915 (citing *Hurley* v. *Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995)). There was no compelling state interest because "produc[ing] speakers free of … biases" is not a legitimate aim, but a "fatal objective." *Ibid.* (quoting *Hurley*, 515 U.S. at 578–79). The government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Ibid.*

Nor was the public-accommodation law narrowly tailored, despite the court's conclusion that the compelled speech at issue was "unique," custom, and "unlike most commercial products and services sold by public accommodations." *Id.* at 916. Accord *e.g.*, *Chelsey Nelson Photography LLC* v. *Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543, 559 (W.D. Ky. 2020) (J., Walker) (wedding photography is protected speech and no compelling interest requires artists "to modify the content of their expression").

Finally, the Eleventh Circuit adopted a similar no-compelled-speech rule when it accepted Amazon's free-speech defense against a Title II religious-discrimination claim. *Coral Ridge Ministries Media, Inc.* v. *Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021). There, Amazon claimed to have excluded a religious group from its Amazon-Smile program (where Amazon redirects money from customer purchases to eligible organizations) because of the group's views. The Eleventh Circuit held that exclusionary choice to be expressive, and that forcing Amazon to fund groups it opposed would unconstitutionally compel Amazon's speech. *Id.* at 1255–56.

Indeed, the Eleventh Circuit did not even get to a strict-scrutiny analysis because it held that Title II's compulsion of speech did not further *any* equal-access interest since it "modif[ied] the content of [Amazon's] expression," something *Hurley* forbids. *Ibid.* In addition, the law's compulsion of a monetary donation violated the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Id.* at 1254 (quoting *Harris* v. *Quinn*, 573 U.S. 616, 656 (2014)).

C. Other courts allow public-accommodation laws to compel speech—as conduct.

Other state courts of last resort allow governments to force artists to speak contrary to their faith by holding that the First Amendment offers no protection at all, characterizing artistic creations as mere conduct.

In *Elane Photography, LLC* v. *Willock*, for instance, the New Mexico Supreme Court compelled a photographer to create same-sex wedding photographs under a public-accommodation law. 309 P.3d 53, 64–66 (N.M. 2013). The court held that "[w]hile photography may be expressive, the *operation of a photography business* is not." *Id.* at 68 (emphasis added). In this commercial context, "[r]easonable observers" would not "interpret" someone's "photographs as an endorsement of the photographed events." *Id.* at 69. In fact, the court denied that a compelled-speech violation *ever* arises "from the application of antidiscrimination laws to a for-profit public accommodation"—even ones that "involve speech or other expressive services." *Id.* at 65.

The Washington Supreme followed suit. It applied *Elane*'s logic to force florist Barronelle Stutzman to create custom floral arrangements celebrating same-sex weddings. *State* v. *Arlene's Flowers, Inc.*, 441 P.3d 1203, 1226 (Wash. 2019). Like *Elane*, *Arlene's* compartmentalized "expressive conduct and commercial activity." *Id.* at 1227 n.18. Barronelle could not rely on the First Amendment, said the court, because "her store is the kind of public accommodation that has traditionally been subject to antidiscrimination laws." *Id.* at 1226. After all, "an outside observer" would not know why paid speakers declined

to create speech, much less think "providing flowers for a wedding" would "constitute an endorsement" of anything. *Ibid.* And the for-profit nature of Arlene's Flowers was dispositive: "[c]ourts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws." *Id.* at 1228 (citing *Elane*, 309 P.3d at 71).

The Colorado Court of Appeals agreed (and the Colorado Supreme Court declined review), requiring Jack Phillips to create custom wedding cakes under CADA. *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), overruled on other grounds, *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018). Echoing *Elane* and *Arlene's*, the Colorado court reasoned that when "an entity charges for its goods and services," that "reduces the likelihood that a reasonable observer will believe that [the entity] supports the message expressed in its finished product." *Id.* at 287.

An artist's freedom to speak according to her conscience thus depends entirely on her jurisdiction. In the Tenth Circuit (Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah), governments can force artists to speak contrary to their faith even when the artist does not discriminate based on status. In Arizona and the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota), governments *cannot* compel artists to speak contrary to their faith. Meanwhile, artists' work in New Mexico, Oregon, and Washington is not even considered "speech" but is instead labeled conduct if offered for purchase. It is long overdue for this entrenched conflict to be resolved.

D. The Tenth Circuit's decision contradicts this Court's free-speech precedents.

The Tenth Circuit's strict scrutiny analysis of CADA takes a bulldozer to this Court's free-speech precedents.

Compelled Speech. This Court consistently rejects compelled speech under strict scrutiny. For good reason. When officials compel speech, they inflict a "demeaning" injury that violates a "cardinal constitutional command," *Janus*, 138 S. Ct. at 2463–64, "the fundamental rule of protection under the First Amendment," *Hurley*, 515 U.S. at 573, and the principle that lies "[a]t the heart of the First Amendment," which grounds our very "political system and cultural life." *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 641 (1994). "Governments must not be allowed to force persons to express a message contrary to their deepest convictions." *Nat'l Inst. of Family & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2379 (2018) (*NIFLA*) (Kennedy, J., concurring). To the contrary, "[c]ompelling individuals to mouth support for views they find objectionable" on "controversial public issues" should be "universally condemned." *Janus*, 138 S. Ct. at 2463–64.

The Tenth Circuit did the opposite, forcing Lorie to "actively create" and publish online speech that violated her conscience. This slights what this Court has repeatedly declared sacred: "individual freedom of mind." *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943). And it dims the most "fixed star in our constitutional constellation": government cannot compel citizens to speak against their conscience. *Id.* at 642.

The Tenth Circuit placed weight on the commercial nature of Lorie's website-design business. App.32a n.6. But "a speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801; cf. *NIFLA*, 138 S. Ct. at 2371–72 ("Speech is not unprotected merely because it is uttered by 'professionals.'"). And this position conflicts with decisions of the Second, Sixth, Eighth, Ninth, and Eleventh Circuits, all of which have granted full speech protection to visual art sold for profit. *Bery* v. *City of N.Y.*, 97 F.3d 689, 695, 697 (2d Cir. 1996); *ETW Corp.* v. *Jireh Publ'g, Inc.*, 332 F.3d 915, 918, 924 (6th Cir. 2003); *Telescope Media Group* v. *Lucero*, 936 F.3d 740, 751–52 (8th Cir. 2019); *White* v. *City of Sparks*, 500 F.3d 953, 957 (9th Cir. 2007); *Buehrle* v. *City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015).

Idea suppression. This Court condemns governmental attempts to target certain ideas. "The government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2299 (2019). Accord, *e.g.*, *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (condemning utility commission's order because "it discriminates on the basis of the viewpoints of the selected speakers").

The Tenth Circuit admitted that CADA created "more than a 'substantial risk of excising certain ideas or viewpoints from the public dialogue.'" App.24a (cleaned up). The statute did so not just by compelling speech, but also by conditioning the expression of one view—"celebrating opposite-sex weddings"—on the proclamation of another—"celebrating same-sex weddings." App.23a.

But this Court repudiated a similar policy in *Miami Herald Publ'g Co.* v. *Tornillo*, that conditioned printing newspaper editorials on publishing those with opposing views. 418 U.S. 241 (1974). Under this policy, expressing one view "triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message." *Pac. Gas*, 475 U.S. at 10. And that in turn "inescapably 'dampens the vigor and limits the variety of public debate.'" *Ibid.* (cleaned up). Accord *Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 742 (2011) (invalidating campaign-funding regulation for violating *Tornillo* triggering principle).

This is no trivial matter. By upholding a statute with the effect and "very purpose" to "[e]liminate such ideas" about marriage in favor of others, App.24a, the Tenth Circuit authorized the government to take sides in a heated cultural debate—all in the name of "produc[ing] a society free of [ ] biases." *Hurley*, 515 U.S. at 578. This result cannot satisfy strict scrutiny. After all, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

Relevant Market. The Tenth Circuit's conclusion that Lorie's expressive works amount to a "monopoly" cannot be squared with this Court's free-speech precedents or common sense.

The Tenth Circuit limited the relevant market to Lorie's works. App.29a. ("In that market, only Appellants exist."). But this Court considers "the relevant medium," not singular expressive works or individual artistic styles. *E.g.*, *Turner*, 512 U.S. at 656 (newspapers lacked national monopoly because of "competing publications"). The *Hurley* Court, for example, held that, while the unique "success of petitioners' parade makes it an enviable vehicle for the dissemination" of opposing views, "that fact, without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators." 515 U.S. at 577–78.

The decision below also runs headlong into this Court's cases invalidating content-based attempts to compel *actual monopolies* to speak, such as *Tornillo*, 418 U.S. at 250–53 (local newspaper) and *Pac. Gas,* 475 U.S. at 17 n.14 (utility company). Accord, *e.g.*, *Turner*, 512 U.S. at 653–57 (upholding must-carry provisions against bottleneck monopolies because provisions were content neutral). And the decision leads to the upside-down rule that the more unique the speech, the greater the government's power to compel. App.28a ("[f]or the same reason that [Lorie's] custom and unique services are speech, those services are also inherently not fungible").

What do you call a rule that gives government officials the maximum power to compel speech based on the distinctiveness of the message? "[I]n a word, unprecedented." App.80a (Tymkovich, C.J., dissenting).

II. The Tenth Circuit's decision substantially narrows *Fulton* and underscores *Smith*'s inadequacies.

The Tenth Circuit's free-exercise analysis neuters *Fulton* and highlights *Smith*'s inadequacies.

The Tenth Circuit acknowledged that CADA contains exemptions, compels speech based on viewpoint, and creates a "pro-LGBT gerrymander" by requiring religious artists to celebrate same-sex marriage while allowing other artists to decline messages like "God is dead." App.38a, 40a. Yet the court upheld CADA as generally applicable under *Smith* because none of the exemptions allowed "secular-speakers" "to discriminate against LGBT consumers." App.41a. That decision exacerbates a (now) 4–3 split over the standard to determine when secular exemptions trigger strict scrutiny under the Free Exercise Clause.

The Sixth, Ninth, and Tenth Circuits require religious conduct to be almost exactly like exempted secular conduct for heightened scrutiny to apply. Meanwhile, the Second, Third, Fifth, and Eleventh Circuits apply strict scrutiny whenever the government exempts secular but not religious conduct that undermines the government's interests in a similar way. The four-circuit majority has it right. Religious liberty should not turn on the fortuity of religious plaintiffs finding secular doppelgangers.

A law that burdens religious exercise while allowing for exemptions for others is not generally applicable under *Smith*. *Fulton*, 141 S. Ct. at 1878. If the Tenth Circuit's analysis is correct, then *Fulton* means little, and this Court should overrule *Smith*.

A. The Tenth Circuit contradicts how four circuits assess statutes that allow exemptions yet burden religious exercise.

In *Fulton*, this Court reiterated that a law that burdens religion is not generally applicable under *Smith* "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542–46 (1993)). Appropriately, the Second, Third, Fifth, and Eleventh Circuits identify a law's *general* interest, compare regulated religious conduct to exempted conduct, then ask whether the latter undermines the law's interest. *Cent. Rabbinical Cong. of U.S. & Canada* v. *N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) (law banned Orthodox Jewish practice but not secular conduct posing same risks of viral infection); *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (fee provision applied to owning black bears but exempted circuses and zoos which equally undermined state's revenue and anti-captivity interests); *Islamic Ctr. of Miss., Inc.* v. *City of Starkville*, 840 F.2d 293, 299–303 (5th Cir. 1988) (zoning law exempted 25 churches but not Islamic center that risked same traffic concerns); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1233–34 (11th Cir. 2004) (law banned churches but exempted others undermining "retail synergy").[1]

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[1] The Eleventh Circuit analyzed this Religious Land Use and Institutionalized Persons Act issue under free-exercise precedents. *Midrash*, 366 F.3d at 1232–36.

In conflict, the Tenth Circuit follows the approach of the Sixth and Ninth Circuits, which fine-tune the state's "interest dial" so that government can conveniently ignore some secular exemptions. For example, in *Stormans, Inc.* v. *Wiesman*, the Ninth Circuit upheld a rule forcing pharmacists to stock and deliver emergency contraception. 794 F.3d 1064, 1071–75 (9th Cir. 2015). Although that rule allowed opt-outs for things like pharmacist non-expertise and many other non-religious objections, the Ninth Circuit discounted those as "allow[ing] pharmacies to operate in *the normal course* of business." *Id.* at 1080 (emphasis added). Thus, the Ninth Circuit could ignore those exemptions in its free-exercise analysis.

Similarly, in *Resurrection School* v. *Hertel*, the Sixth Circuit upheld a religious-school COVID-19 masking requirement. __ F.4th __, 2021 WL 3721475 (6th Cir. 2021). Although the requirement included many non-school exemptions, the panel held that the only necessary comparator was non-religious schools. *Id.* at *12–13.[2]

Now consider how the Tenth Circuit analyzed CADA's two exemptions: (1) an unwritten yet "formal" exemption, *Fulton*, 141 S. Ct. at 1878, that some

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[2] *Resurrection School* conflicts with another Sixth Circuit panel holding that analogous conduct depends not on "similar forms of activity" but, as in *Fulton*, the state's interest for "its restrictions." *Monclova Christian Acad.* v. *Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479–482 (6th Cir. 2020). The Seventh Circuit candidly admitted its confusion: "[i]t is difficult … to know the most appropriate comparisons for evaluating restrictions on religious activities." *Cassell* v. *Snyders*, 990 F.3d 539, 550 (7th Cir. 2021) (distinguishing comparators used less than a year prior in *Elim Romanian Pentecostal Church* v. *Pritzker*, 962 F.3d 341 (7th Cir. 2020)).

public accommodations can make "message-based refusals," declining to create works containing messages they will not create for "any customers," App.54a–55a, 91a (Tymkovich, C.J., dissenting), and (2) CADA's Bona Fide Relationship Clause, which allows certain public accommodations to "restrict admission … to individuals of one sex." Colo. Rev. Stat. 24-34-601(3), App.172a.

Message-Based Exemption. As the Tenth Circuit recognized, CADA's message-based exemption creates "content-based restrictions on speech." App.40a. Under that exemption, an artist that declines to speak a particular message for anyone is exempt. Such "message-based refusals do not violate CADA" because they "are unrelated to class-status." App.42a. Thus, the lower court recognized that "a business is not required to design a website proclaiming 'God is Dead' if it would decline such a design for any customer." App.38a. Nor must a business create works containing "offensive speech." App.26a; *Craig*, 370 P.3d at 282 n.8.

At the same time, the court held that Lorie "*must* design a website celebrating same-sex marriage, even though [she] would decline such a design for any customer." App.38a (emphasis added). Under that theory, a singer who sang a wedding song for an opposite-sex wedding two decades ago can be compelled to sing it for a same-sex wedding today. The Tenth Circuit acknowledged this anomalous result was viewpoint discrimination; CADA operates as a "content-based restriction[ ] on speech." App.40a. The court understood the resultant "pro-LGBT gerrymander" to be "inevitable" given CADA's purpose of protecting "the dignitary or material interests of LGBT consumers." *Ibid.*

Despite all that, the Tenth Circuit held that CADA is generally applicable for two reasons. First, the court said that CADA's message-based exemption was a defense rather than an exception. App.42a. But either way, the Tenth Circuit should have compared regulated religious messages to exempted secular message-based refusals and asked whether the latter undermines CADA's interests. They do.

Second, the Tenth Circuit justified CADA's content-based speech restrictions by "adjusting the" interest "dials *just right*." *Masterpiece*, 138 S. Ct. at 1739 (Gorsuch, J., concurring). The court defined CADA's purpose narrowly: protecting only "the dignitary or material interests of LGBT consumers," App.40a; the court thus required Lorie to identify differently treated secular comparators *who do not celebrate same-sex marriage*. That way, the court could say that CADA does not "permit secular conduct that undermines the government's asserted interests *in a similar way*" because Colorado does not allow "secularly-motivated objections" to speaking LGBT messages, App.40a–41a, even though Colorado allows secularly motivated objections to *religious* messages.

The problem is that the latter exemptions undermine Colorado's general goal—stopping differential treatment of each protected classification, including religion—in a "similar way." *Fulton*, 141 S. Ct. at 1877 (citing *Lukumi*, 508 U.S. at 542–46). By allowing a secular speaker to refuse to speak "Jesus loves me" while forcing Lorie to speak messages that violate her conscience, CADA unconstitutionally plays favorites. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("It is no answer that a State treats some comparable secular businesses or other activities as poorly as … religious exercise.").

The Bona Fide Relationship Clause. CADA's second exemption, the Bona Fide Relationship Clause, allows sex-based restrictions. Under that Clause, public accommodations can "restrict admission … to individuals of one sex" when the "restriction has a bona fide relationship" to the accommodation's "goods, services, [or] facilities." Colo. Rev. Stat. 24-34-601(3), App.172a. For example, if a Colorado women's club provides events only for women, then the club can exclude male patrons.

The Tenth Circuit excused this written, statutory exemption as somehow "promot[ing] open commerce" and thus irrelevant on a "pre-enforcement record." App.28a n.4, 45a. But the court did not explain why exempting some status discrimination "promote[s] open commerce" while exempting Lorie's religious expression would not. Nor does this problem go away on a "pre-enforcement record." This "formal [exemption] mechanism" is problematic "regardless whether any exceptions have been given." *Fulton*, 141 S. Ct. at 1879.

Without general applicability, laws make a "value judgment," allowing governments to favor secular motivation over religious ones. *Fraternal Ord. of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). And that's exactly what CADA does here. For example, CADA allows cake artists to decline writing religious verses on a client's custom cake. *Masterpiece*, 138 S. Ct. at 1730. CADA also allows clubs or other special organizations to exclude based on sex, while brooking no accommodation for a religious artist who can only speak messages consistent with her faith. *Fulton* forbids that favoritism.

B. If the Tenth Circuit correctly applied *Fulton*, then this Court should overrule *Smith*.

The Tenth Circuit upheld a law that targets religious speech and gives the government a marketplace monopoly over marriage views. If *Fulton* allows this, it is time for this Court to overrule *Smith*.

Despite this Court's unanimous decision in *Fulton*, the court below upheld a gerrymandered regime and an admittedly content-based restriction on speech. That ruling allows Colorado to force Lorie to celebrate same-sex marriages in violation of her faith—all while allowing secular artists to decline to promote religious messages and other businesses to discriminate based on sex.

This cannot be the outcome *Smith* envisioned when it articulated its rule for neutral and generally applicable laws. *Employment Div.* v. *Smith*, 494 U. 872, 882 (1990) (noting long-standing precedents against compelling religious adherents to speak); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1467-68 (1990) (explaining historical protections for religious objections to compelled oaths). If courts cannot apply *Smith* correctly on this record, then religious adherents have little hope. This failure underscores that *Smith* is "unworkable in practice." *Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring); *id.* at 1917–22 (Alito, J., concurring).

Smith's flaws are well-documented. *E.g.*, *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) ("[T]he textual and structural arguments against *Smith* are … compelling."); *id.* at 1883–1926 (Alito, J., concurring) (outlining historical, practical, and precedential objections). And this case offers an excellent chance to answer questions about what test should replace *Smith*, whether the Free Exercise's Clause text distinguishes between religious organizations and religiously motivated individuals and businesses, what forms of scrutiny should apply, and so on. This Court should reconsider *Smith*.

III. This case raises exceptionally important issues about free speech and religious liberty.

Public-accommodation laws and the First Amendment can be harmonized. But the Tenth Circuit's decision places them in untenable tension, emboldening officials to regulate speech based on its favored viewpoint, to enforce content-based speech restrictions, to eliminate dissenting opinions from the public square, and to compel speech in violation of conscience.

Public-accommodation laws now cover everything from non-profits, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 653 (2000), to newspapers, *World Peace Movement of Am.* v. *Newspaper Agency Corp.*, 879 P.2d 253, 257 (Utah 1994), to websites, *Jian Zhang* v. *Baidu.com Inc.*, 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014), such as an Etsy website where an individual markets her homemade, custom art. Such laws now ban sexual-orientation or gender-identity discrimination in 22 states and around 330 municipalities, with some jurisdictions interpreting sex discrimination to

cover these traits.[3] Some public-accommodation laws make everything from student status to political beliefs a protected classification. *E.g.*, Madison, Wisc. Code of Ordinances 39.03. And 19 state public-accommodation laws could easily ban someone's viewpoints or beliefs that may touch on a protected classification.[4]

The expanded scope of public-accommodation laws without First Amendment protections has produced conflict. For the last decade, Jack Phillips has faced lawsuit after lawsuit based on his refusal to create art that violated his conscience. After prevailing before this Court in *Masterpiece Cakeshop,* 138 S. Ct. 1719, he was sued for respectfully declining to create a custom cake celebrating a gender transition. He just lost his trial.[5] Barronelle Stutzman of Arlene's Flowers faces potential million-dollar-attorney-fee payments and losing all that she has.[6] The Elane Photography owners paid fines, faced "death threats," and eventually closed their studio.[7]

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[3] *Nondiscrimination Laws*, Movement Advancement Project, https://bit.ly/37PAjvA (last visited Aug. 16, 2021); *Local Nondiscrimination Ordinances*, Movement Advancement Project, https://bit.ly/3jWjl4k (last visited Aug. 16, 2021).

[4] Br. for Mass. et al. as Amici Curiae in Support of Defs. at 9 n.5, *303 Creative LLC* v. *Elenis*, No. 19-1413 (10th Cir. Apr. 29, 2020).

[5] *Scardina* v. *Masterpiece Cakeshop Inc.*, No. 19CV32214 (Colo. Dist. Ct. June 15, 2021).

[6] Pet. for Reh'g at 11, *Arlene's Flowers, Inc.* v. *Washington*, No. 19-333 (U.S. July 27, 2021).

[7] *Willock* v. *Elane Photography, LLC*, HRD No. 06-12-20-0685, at 20 (H.R. Comm'n of N.M. Apr. 9, 2008), https://bit.ly/3AEt6e3;

Oregon officials fined the owners of a cakeshop $135,000 for declining to create same-sex wedding cakes and tried to punish them for talking to the media.[8] The shop eventually closed.[9] Meanwhile, a Kentucky printer litigated for seven years after declining to print shirts promoting a gay pride parade, only to see the state supreme court dismiss the case on a technicality. *Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n* v. *Hands On Originals*, 592 S.W.3d 291, 294–95 (Ky. 2019). A California cakeshop was sued for declining to create custom cakes celebrating same-sex weddings. *Dep't of Fair Emp. and Hous.* v. *Miller*, No. BCV-17-102855, 2018 WL 747835, at *1 (Cal. Super. Feb. 05, 2018). A pro-life photographer needed litigation to confirm she could decline promotional photographs for Planned Parenthood.[10] And a family farm, ousted from an East Lansing farmer's market for posting its Catholic beliefs about marriage on Facebook, has endured four years of litigation and a recently concluded bench trial without yet knowing the scope of its First Amendment rights. *Country Mill Farms, LLC* v. *City of E. Lansing*, 280 F. Supp. 3d 1029, 1041–42 (W.D. Mich. 2017).

Richard Wolf, *Same-sex marriage foes stick together despite long odds*, USA Today (Nov. 15, 2017), https://bit.ly/3m2czwk.

[8] *Klein*, 410 P.3d at 1080-87.

[9] *Sweet Cakes by Melissa announces closure*, KGW8, https://bit.ly/2UHMANk (last updated Oct. 6, 2016).

[10] Compl., *Amy Lynn Photography Studio, LLC* v. *City of Madison*, No. 17-cv-000555 (Dane Cnty. Cir. Ct. Mar. 7, 2017), https://bit.ly/3yNS229.

In this toxic legal climate, nearly anyone involved with religious ceremonies faces realistic threats of prosecution for speaking consistently with their religious faith under laws that impose jailtime and up to $100,000 fines.[11]

Public-accommodation laws have harmed those with differing views, too. Someone targeted a lesbian cakebaker in Detroit, asking for a cake saying, "Homosexual acts are gravely evil."[12] And a progressive bar association had to litigate whether it could decline to publish a pro-Israeli advertisement. *Athenaeum* v. *Nat'l Lawyers Guild, Inc.*, No. 653668/16, 2018 WL 1172597 (N.Y. Sup. Ct. Mar. 06, 2018).

Public-accommodation laws have also threatened the First Amendment rights of churches,[13] homeless

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[11] *Telescope Media*, 936 F.3d at 747, 750 (videographers); *Brush & Nib*, 448 P.3d at 914 (calligraphers); Compl., *Emilee Carpenter, LLC* v. *James*, No. 6:21-cv-06303 (W.D.N.Y. Apr. 6, 2021) (photographer), https://bit.ly/3k1Vy2D; Compl., *Covenant Weddings LLC* v. *Cuyahoga Cnty.*, No. 1:20-cv-01622 (N.D. Ohio July 22, 2020) (officiant), https://bit.ly/3k2bHoO; Compl., *Knapp* v. *City of Coeur D'Alene*, No. 2:14-cv-00441 (D. Idaho Oct. 17, 2014) (ministers), https://bit.ly/3yU06hN.

[12] Sue Selasky, *Lesbian baker in Detroit got homophobic cake order: Why she made it anyway*, Detroit Free Press (Aug. 13, 2020), perma.cc/JS53-APD3.

[13] Compl., *Fort Des Moines Church of Christ* v. *Jackson*, No. 4:16-cv-00403 (S.D. Iowa July 4, 2016), https://bit.ly/3g6FWda; Compl., *Horizon Christian Fellowship* v. *Williamson*, No. 16-cv-12034 (D. Mass. Oct. 11, 2016), https://bit.ly/3lZzhFx; Compl., *Calvary Rd. Baptist Church* v. *Herring*, No. CL20006499 (Va. Cir. Ct. Loudon Cnty. Sept. 28, 2020), https://bit.ly/2Uedlea.

shelters,[14] Catholic schools,[15] Catholic hospitals,[16] gay-softball leagues,[17] and even beauty pageants.[18]

The decision here sanctions government-compelled speech and religious participation in all these situations and much more. As the dissent explains, the idea that someone's unique expression justifies compelling speech "leads to absurd results"—from forcing a "Muslim movie director to make a film with a Zionist message" to "requiring an atheist muralist to accept a commission celebrating Evangelical zeal." App.69a, 79a (Tymkovich, C.J., dissenting). Accord, *e.g.*, *Telescope Media*, 936 F.3d at 756 (public-accommodation laws can easily make political belief a protected trait and compel more speech). Under this theory, our greatest American artists like Georgia O'Keefe, Elvis Presley, and Ernest Hemingway would have the fewest First Amendment protections.

And though the Tenth Circuit purportedly limited its artists-are-monopolists theory to paid artists, laws like CADA often apply to non-profits. *Creek Red Nation, LLC* v. *Jeffco Midget Football Ass'n, Inc.*, 175 F. Supp. 3d 1290, 1296–98 (D. Colo. 2016) (applying CADA to nonprofit). And non-profits offer unique

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[14] Compl., *The Downtown Soup Kitchen* v. *Mun. of Anchorage*, No.3:21-cv-155 (D. Alaska July 1, 2021), https://bit.ly/3CP91Dw.

[15] Compl., *The Lyceum* v. *City of S. Euclid*, No. 1:19-cv-00731 (N.D. Ohio Apr. 3, 2019).

[16] Pet. for Writ of Cert., *Dignity Health* v. *Minton*, No. 20-1135 (U.S. Mar. 13, 2020).

[17] *Apilado* v. *N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1157-60 (W.D. Wash. 2011).

[18] *Green* v. *Miss United States of Am., LLC*, No. 3:19-CV-02048-MO, 2021 WL 1318665, at *1 (D. Or. Apr. 8, 2021).

expressive services too. See Tr. of Oral Arg. at 47–50, *Masterpiece*, 138 S. Ct. 1719 (2018) (No. 16-111), https://bit.ly/3xI32g9 (asking whether CADA could force Catholic Legal Services to take pro bono same-sex-marriage cases).

The court's monopoly rationale also extends well beyond the public-accommodation context. If governments can compel speech whenever artists convey unique expression, they have a blank check to compel not just every commissioned artist, small business, and nonprofit that speaks, but to "regulate the editorial decisions of Facebook and Google, of MSNBC and Fox, of NYTimes.com and WSJ.com, of YouTube and Twitter"—entities much more like monopolies than Lorie. *U.S. Telecom Ass'n* v. *F.C.C.*, 855 F.3d 381, 433 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J., dissenting from denial of reh'g en banc).

The decision below allows officials to compel speech in violation of religious conviction, to regulate speech based on content, and to enact laws that create a "substantial risk of excising certain ideas or viewpoints from the public dialogue" and have "[e]liminating such ideas [as their] very purpose." App.24a (cleaned-up). And this is not just hypothetical. As the above examples illustrate, government attempts to eliminate certain ideas from the public square are happening right now, with alarming frequency.

IV. This case is an ideal vehicle to resolve the questions presented.

This case offers an ideal vehicle to answer critical free-speech and free-exercise questions that "will keep coming until the Court … suppl[ies] an answer." *Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring).

To begin, Lorie has wanted to enter the wedding-website industry for years and has lost opportunities to create and speak because of how Colorado interprets CADA. She has already received a request to create a website celebrating a same-sex wedding, and Colorado continues to threaten prosecution. No one disputes "the extent" to which Lorie will decline to speak in violation of her faith, nor are there any missing "details" that "might make a difference." *Masterpiece*, 138 S. Ct. at 1723.

Next, it's undisputed that Lorie's wedding websites are "expressive in nature" and "celebrate and promote the couple's wedding and unique love story," and that CADA compels those websites and bans her explanatory statement yet exempts certain secular artists. App.187a. It's undisputed that Lorie does not discriminate based on protected-class status; she simply declines to create certain messages for anyone. And it's undisputed that other firms design wedding websites.[19]

Further, the Tenth Circuit's conclusion that a government may compel speech in violation of conscience—and the more unique speech is, the more interest the government has in compelling it—is

[19] There are more than 77,000 website-design firms in the United States. *Web Design Services in the US*, IBISWorld (September 28, 2020), https://bit.ly/3lJ87RC.

shocking. An artist's right to refrain from speaking contrary to her conscience depends on where she lives. In the Tenth Circuit's half-dozen states, as well as New Mexico, Oregon, and Washington, the government can force artists to speak contrary to their faith; in the Eighth Circuit's seven states and Arizona, the opposite is true.

What's more, the Tenth Circuit's narrow interpretation of *Fulton* establishes a blueprint for future litigants. The lower courts are in disarray over when a secular exception triggers heightened scrutiny, and the decision below will only embolden government officials and courts to afford fewer First Amendment protections to religious adherents.

The constitutional issues here have sufficiently percolated. Lawyers, law professors, litigants, and lower courts have already analyzed many cases like this one. And this Court was prepared to rule on them in *Masterpiece* more than three years ago. Delay might produce more opinions, articles, and victims, but not more insights.

The promises of free speech and free exercise that the First Amendment enshrines ensure the survival of our pluralistic society. There is a clear path where government can protect the rights of all citizens, recognizing the sharp line between status discrimination on the one hand, and message-based or participation declinations on the other. But until this Court does so, government officials will continue to harm those with opposing views, activists will continue to file (and re-file) cases designed to target those with deeply held religious beliefs, and courts will continue to face harassing litigation that lasts years on end. Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN A. SCRUGGS
KATHERINE L. ANDERSON
BRYAN D. NEIHART
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

KRISTEN K. WAGGONER
Counsel of Record
JOHN J. BURSCH
ERIN M. HAWLEY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(571) 707-4655
kwaggoner@ADFlegal.org

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APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

303 CREATIVE LLC, a limited liability company; LORIE SMITH, Plaintiffs – Appellants, v. AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER, Defendants – Appellees --- * * * * *	No. 19-1413

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:16-CV-02372-MSK-CBS)

* * * * *

Before **TMYKOVICH,** Chief Judge, **BRISCOE**, and **MURPHY**, Circuit Judges.

BRISCOE, Circuit Judge.

I. Introduction

Appellants Lorie Smith and her website design company 303 Creative, LLC (collectively, "Appellants") appeal the district court's grant of summary judgment in favor of Appellees Aubrey Elenis, Director of the Colorado Civil Rights Division (the "Director"), Anthony Aragon, Ulysses J. Chaney, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, and Jessica Pocock, members of the Colorado Civil Rights Commission (the "Commission"), and Phil Weiser, Colorado Attorney General (collectively, "Colorado"). Appellants challenge Colorado's Anti-Discrimination Act ("CADA") on free speech, free exercise, and vagueness and overbreadth grounds.

As to our jurisdiction, we hold that Appellants have standing to challenge CADA. As to the merits, we hold that CADA satisfies strict scrutiny, and thus permissibly compels Appellants' speech. We also hold that CADA is a neutral law of general applicability,

and that it is not unconstitutionally vague or overbroad. Accordingly, exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's grant of summary judgment in favor of Colorado.

II. Background

A. Factual Background

1. CADA

CADA restricts a public accommodation's ability to refuse to provide services based on a customer's identity. Specifically, CADA defines a public accommodation as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public." Colo. Rev. Stat. § 24-34-601(1). Exempted from CADA's definition of public accommodations are places that are "principally used for religious purposes." *Id.*

Under CADA's "Accommodation Clause," a public accommodation may not:

> directly or indirectly . . . refuse . . . to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

Colo. Rev. Stat. § 24-34-601(2)(a).

Under CADA's "Communication Clause," a public accommodation also may not:

> directly or indirectly . . . publish . . . any . . . communication . . . that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused . . . or that an individual's patronage . . . is unwelcome, objectionable, unacceptable, or undesirable because of . . . sexual orientation . . . .

Id.

CADA exempts certain sex-based restrictions from the Accommodation Clause and Communication Clause. Specifically, under CADA, "it is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation." Colo. Rev. Stat. § 24-34-601(3).

CADA provides several different means of enforcement. A person alleging a violation of CADA can bring a civil action in state court. The state court may levy a fine of "not less than fifty dollars nor more than five hundred dollars for each violation." Colo. Rev. Stat. § 24-34-602(1)(a). A complainant can also file charges alleging discrimination with the Colorado Civil Rights Division. The Commission, individual Commissioners, or the Colorado Attorney General may also independently file charges alleging discrimination "when they determine that the alleged discriminatory or unfair practice imposes a signifi-

cant societal or community impact." Aplts.' App. at 2-315, ¶ 7. The Director of the Civil Rights Division then investigates the allegations and determines whether the charge is supported by probable cause. If probable cause is found, the Director provides the parties with written notice and commences a compulsory mediation. If mediation fails, a hearing may be held before the Colorado Civil Rights Commission, a single Commissioner, or an administrative law judge. If a violation is found after a hearing, the Commission may issue a cease and desist order against the offending public accommodation.

In a different case, Colorado enforced CADA against a bakery that, because of its owner's religious beliefs, refused to provide custom cakes that celebrated same-sex marriages. That case eventually made its way up to the United States Supreme Court, where the Court ruled in favor of the baker. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). There, the Court held that Colorado violated the Free Exercise Clause by enforcing CADA in a manner "inconsistent with the State's obligation of religious neutrality." *Id.* at 1723. The Court relied, in part, on statements made by a Commissioner who disparaged the baker's religious beliefs when the Commission adjudicated that case. *Id.* at 1729. The Court also noted that, on at least three other occasions, Colorado declined to enforce CADA against other bakers who refused to create custom cakes that disparaged same-sex marriages. *Id.* at 1730.

At a public meeting held a few days after the Court's ruling in *Masterpiece Cakeshop*, a single Commissioner opined that, despite the Court's ruling,

the Commissioner who was referenced in *Masterpiece Cakeshop* did not say "anything wrong." Aplts.' App. at 3-609. Others at that hearing, however, including Director Elenis, voiced agreement with the Court's ruling and their commitment to follow that ruling. *See, e.g.*, *id.* at 3-606 (Director Elenis: "So in these cases going forward, Commissioners and ALJs and others, including the Staff at the Division, have to be careful how these issues are framed so that it's clear that full consideration was given to sincerely—what is termed as sincerely-held religious objections.").

2. Appellants

303 Creative is a for-profit, graphic and website design company; Ms. Smith is its founder and sole member-owner. Appellants are willing to work with all people regardless of sexual orientation. Appellants are also generally willing to create graphics or websites for lesbian, gay, bisexual, or transgender ("LGBT") customers. Ms. Smith sincerely believes, however, that same-sex marriage conflicts with God's will. Appellants do not yet offer wedding-related services but intend to do so in the future. Consistent with Ms. Smith's religious beliefs, Appellants intend to offer wedding websites that celebrate opposite-sex marriages but intend to refuse to create similar websites that celebrate same-sex marriages. Appellants' objection is based on the message of the specific website; Appellants will not create a website celebrating same-sex marriage regardless of whether the customer is the same-sex couple themselves, a heterosexual friend of the couple, or even a disinterested wedding planner requesting a mock-up. As part of the expansion, Appellants also intend to

publish a statement explaining Ms. Smith's religious objections (the "Proposed Statement"):

> 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.

Aplts.' App. at 2-326 (¶ 91).

Appellants have not yet offered wedding-related services, or published the Proposed Statement, because Appellants are unwilling to violate CADA.

B. Procedural Background

Appellants brought a pre-enforcement challenge to CADA in the United States District Court for the District of Colorado. Appellants alleged a variety of constitutional violations, including that CADA's Accommodation Clause and Communication Clause violated the Free Speech and Free Exercise Clauses of the First Amendment, and that CADA's Communication Clause violated the Due Process Clause of the Fourteenth Amendment because it was facially overbroad and vague. Colorado moved to dismiss. At a motions hearing, both parties agreed there were no

disputed material facts and that the matter should be resolved through summary judgment.

After summary judgment briefing had concluded, the district court found that Appellants only established standing to challenge the Communication Clause, and not the Accommodation Clause. The district court initially declined to rule on the merits of Appellants' Communication Clause challenges, however, because *Masterpiece Cakeshop* was then pending before the United States Supreme Court. After the Supreme Court's ruling in *Masterpiece Cakeshop*, the district court denied Appellants' summary judgment motion on its Communication Clause challenges. In doing so, the district court "assume[d] the constitutionality of the Accommodation Clause . . . ." *Id.* at 3-568. The district court also ordered Appellants to show cause why final judgment should not be granted in favor of Colorado. *Id.* at 3-588. After additional briefing, the district court granted summary judgment in favor of Colorado.

Appellants timely appealed the district court's final judgment. They assert that the district court erred (1) in determining that Appellants lack standing to challenge the Accommodation Clause; (2) in assuming the Accommodation Clause does not compel speech and in ruling that the Communication Clause does not compel speech; (3) in rejecting Appellants' Free Exercise challenges to both Clauses; and (4) in rejecting Appellants' overbreadth and vagueness challenges to the Communication Clause.

III. Analysis

A. Standard of Review

Summary judgment is warranted when the movant is entitled to "judgment as a matter of law" in the absence of a "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). We review the entry of summary judgment de novo, "applying the same standard for summary judgment that applied in the district court." *Sandoval v. Unum Life Ins. Co. of Am.*, 952 F.3d 1233, 1236 (10th Cir. 2020); *see also Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018) (stating that when reviewing summary judgment "we need not defer to factual findings rendered by the district court") (citation and internal quotation marks omitted). We view the evidence and draw all reasonable inferences in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where the activity in question is arguably protected by the First Amendment, the court has "an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1219 (10th Cir. 2007) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)).

B. Standing

"Standing is a jurisdictional issue that may be raised by the court at any time." *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 492 (10th Cir. 1998). Whether a party has standing is a question of law reviewed de novo. *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 447 (10th Cir. 1996).

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting U.S. Const. art. III, § 2). The doctrine of standing serves as "[o]ne of those landmarks" in identifying "the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Under Article III, standing requires at least three elements: injury in fact, causation, and redressability. *Id*. at 560–61.

1. Injury in Fact

An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc) (quoting *Lujan*, 504 U.S. at 560). In the context of a pre-enforcement challenge, to show an injury in fact, a party must allege "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." *SBA List*, 573 U.S. at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)); *see also Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016). Article III does not require the plaintiff to risk "an actual arrest, prosecution, or other enforcement action." *SBA List,* 573 U.S. at 158 (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

Reviewing the issue de novo, we conclude that Appellants have shown an injury in fact. Appellants

have sufficiently demonstrated both an intent to provide graphic and web design services to the public in a manner that exposes them to CADA liability, and a credible threat that Colorado will prosecute them under that statute.

Although not challenged by Colorado, *see* Colorado's Br. at 26, we are satisfied that Appellants have shown an "intention to engage in a course of conduct arguably affected with a constitutional interest." *SBA List*, 573 U.S. at 159. Although Appellants have not yet offered wedding website services, Ms. Smith has been employed as a graphic and web designer in the past. Appellants have also provided clear examples of the types of websites they intend to provide, as well as the intended changes to 303 Creative's webpage. And Ms. Smith holds a sincere religious belief that prevents her from creating websites that celebrate same-sex marriages.

We are also satisfied that Appellants' intended "course of conduct"[1] is at least "arguably . . . proscribed by [the] statute," i.e., CADA. *SBA List*, 573 U.S. at 162 (alterations in original). In briefing the merits of its claims, Appellants, somewhat contradictorily, assert that "Colorado concedes that [Appellants] serve[ ] regardless of status, do[ ] not discriminate against LGBT persons, and make[ ] only message-based referrals." Aplts.' Br. at 31–32. True enough, the parties stipulated to the district court that Appellants are "willing to work with all people

[1] We refer to Appellants' "course of conduct" in applying the standard under *SBA List* for determining Article III standing; our discussion as to standing does not indicate whether Appellants' "course of conduct" is speech or commercial conduct.

regardless of classifications such as race, creed, sexual orientation, and gender." Aplts.' App. at 2-322 (¶ 64). Thus, it might appear that Appellants have no exposure to liability under CADA. Although neither party presses this argument on appeal, we address it to assure ourselves of jurisdiction. *Buchwald*, 159 F.3d at 492.

To be sure, some of Appellants' intended course of conduct would not violate CADA, and thus would not give rise to standing. For example, Appellants are willing to "create custom graphics and websites for gay, lesbian, or bisexual clients . . . so long as the custom graphics and websites do not violate [Appellants'] religious beliefs, as is true for all customers." Aplts.' App. 2-322 (¶ 65). Thus, Appellants are not injured because CADA might "compel" them to create a website announcing a birthday party for a gay man; that is something Appellants would do willingly. Nor are Appellants injured because CADA might "compel" them to create a website announcing "God is Dead"; Colorado concedes CADA would not apply if Appellants would not produce such a website for any customers. *See* Colorado's Br. at 42. But, of course, neither birthday parties nor Nietzschean pronouncements are the focus of Appellants' challenge.

Setting aside other hypotheticals, we focus on what is to us the most obvious scenario: Appellants refuse a same-sex couple's request for a website celebrating their wedding but accept an opposite-sex couple's identical request for a website celebrating their wedding. Considering this scenario, Appellants' injury becomes clear. Although Appellants might comply with CADA in other circumstances, at least *some* of Appellants' intended course of conduct

arguably would "deny to an individual . . . because of . . . sexual orientation . . . the full and equal enjoyment of [goods and services]." Colo. Rev. Stat. § 24-34-601(2)(a).

A couple's request for a wedding website is, at least arguably, "inextricably bound up with" the couple's sexual orientation. *Bostock v. Clayton Cnty., Ga.,* 140 S. Ct. 1731, 1742 (2020). As the Supreme Court explained in *Bostock,* "[an] employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex." *Id.* So too here—although Appellants' "ultimate goal" might be to only discriminate against same-sex marriage, to do so Appellants might also discriminate against same-sex couples. As a result, Appellants' refusal may be "because of" the customers' sexual orientation, and thereby expose them to liability under CADA. *See also Lawrence v. Texas,* 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (anti-sodomy law does not target "conduct," but "is instead directed toward gay persons as a class"). We do not decide whether Appellants' (or any other businesses') conscience- or message-based objections are a defense against CADA; we only hold that such objections are at least "arguably . . . proscribed by [the] statute." *SBA List*, 573 U.S. at 162 (quoting *Babbitt*, 442 U.S. at 298) (alterations in original).

Colorado asserts that, even if Appellants have shown an intent to violate CADA, Appellants have not shown a credible threat of prosecution. Specifically, Colorado questions whether Appellants will "actually den[y] services based on a person's sexual orientation"

and whether such a person will "file[ ] a charge of discrimination." Colorado's Br. at 27; *see also id.* at 33–35. According to Colorado, Appellants' fear of prosecution is not credible because it requires the court to speculate about the actions of Appellants' would-be customers.

We disagree. Appellants have a credible fear of prosecution because Appellants' liability under CADA and Colorado's enforcement of CADA are both "sufficiently imminent." *SBA List,* 573 U.S. at 159. Appellants' potential liability is inherent in the manner they intend to operate—excluding customers who celebrate same-sex marriages. Thus, Appellants are rightfully wary of offering wedding-related services and may challenge CADA as chilling their speech. *See id.* at 163 ("Nothing in this Court's decisions require a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law."); *also Walker*, 450 F.3d at 1089 (pre-enforcement plaintiff need not show "a present intention to engage in [proscribed] speech at a specific time in the future").

Contrary to Colorado's assertion, Appellants' fears do not "rest[ ] on guesswork" or "a highly attenuated chain of possibilities." Colorado's Br. at 29. If anything, it is Colorado that invites this court to speculate. Assuming Appellants offer wedding-related services to the public as they say they will, there is no reason to then conclude that Appellants will fail to attract customers. Nor is there reason to conclude that only customers celebrating opposite-sex marriages will request Appellants' services. In short, we find nothing "imaginary or speculative" about Appellants' apprehensions that they may violate

CADA if they offer wedding-based services in the manner that they intend. *SBA List*, 573 U.S. at 165.

If Appellants violate CADA, it is also "sufficiently imminent" that Colorado will enforce that statute against Appellants. In *SBA List*, the Supreme Court described at least three factors to be used in determining a credible fear of prosecution: (1) whether the plaintiff showed "past enforcement against the same conduct"; (2) whether authority to initiate charges was "not limited to a prosecutor or an agency" and, instead, "any person" could file a complaint against the plaintiffs; and (3) whether the state disavowed future enforcement. *Id.* at 164–65.

All three factors indicate Appellants have a credible fear of prosecution. First, Colorado has a history of past enforcement against nearly identical conduct—i.e., *Masterpiece Cakeshop*, which, at the time Appellants filed their complaint, had been litigated through various state administrative and court proceedings for over two years. Aplts.' App. at 2-317 (¶ 25). Although Appellants create websites—not cakes—this distinction does not diminish Appellants' fear of prosecution; there is no indication that Colorado will enforce CADA differently against graphic designers than bakeries. Second, any (would be) customer who requests a website for a same-sex wedding and is refused may file a complaint and initiate a potentially burdensome administrative hearing against Appellants. Aplts.' App. at 2-314 (¶ 4). Thus, Appellants must fear not only charges brought by Colorado, but charges brought by any person who might request a website celebrating same-sex marriage. And third, Colorado declines to

disavow future enforcement against Appellants. Colorado's Br. at 29.

Colorado asks us to conclude that there is no "active enforcement by the state," because, aside from *Masterpiece Cakeshop,* Appellants only identify three similar cases, each of which ended with a "no probable cause" finding. Colorado's Br. at 33–34. Yet, those cases involved businesses that *supported* same-sex marriage. Considering all four cases collectively, Appellants have a credible fear that CADA will be enforced against businesses that object to same-sex marriage. Indeed, the Supreme Court has found that Colorado's non-enforcement against businesses that support same-sex marriage evinced a Free Exercise violation. *See Masterpiece Cakeshop*, 138 S. Ct. at 1730 ("Another indication of hostility is the difference in treatment between [Jack] Phillips' case [in *Masterpiece Cakeshop*] and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.").

Colorado also asserts that it "need not 'refute and eliminate all possible risk that the statute might be enforced' to demonstrate a lack of a case or controversy." Colorado's Br. at 29 (quoting *Mink v. Suthers,* 482 F.3d 1244, 1255 (10th Cir. 2007)). Although not dispositive, non-disavowal of future enforcement remains a relevant factor for courts to consider in determining standing. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (considering government's non-disavowal of future enforcement). Further, in the case upon which Colorado relies, the attorney general publicly disavowed enforcement against the plaintiff. *Mink,* 482 F.3d at 1255 n.8. Here, Attorney General Weiser has made no similar

promise to Appellants. Indeed, Colorado's strenuous assertion that it has a compelling interest in enforcing CADA indicates that enforcement is anything but speculative. *See* Colorado's Br. at 67 ("That other website designers are willing to serve the LGBT community is of no moment").[2]

In short, on the summary-judgment record presented, we conclude that Appellants show an injury in fact because they intend to discriminate in a manner that is arguably proscribed by CADA, and they show a credible fear that Colorado will enforce CADA against them.

2. Causation and Redressability

Colorado also challenges causation and redressability as to Director Elenis and Attorney General Weiser. Specifically, Colorado asserts that those defendants, unlike the Commission, lack "enforcement authority" under CADA, and thus do not cause and cannot redress Appellants' injuries. Colorado's Br. at 30.

"[T]he causation element of standing requires the named defendants to possess authority to enforce the

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[2] For similar reasons, Colorado's reliance on the Supreme Court's recent decision in *California v. Texas* is misplaced. 141 S. Ct. 2104 (2021). In that case, the Supreme Court found that plaintiffs lacked standing to challenge an Affordable Care Act provision that carried a penalty of $0, and thus had "no means of enforcement." *Id.* at 2114. By contrast, CADA imposes a minimum penalty of $50. Colo. Rev. Stat. § 24-34-602(1)(a). Colorado provides no indication that those statutory penalties are unenforceable. Colorado's repeated refutations of both actual and threatened enforcement are puzzling, to say the least.

complained-of provision." *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007). Causation does not require a plaintiff to limit a suit to only the most culpable defendants; rather, causation merely requires that the plaintiff's injury is "fairly traceable" to those defendants. *Id*. at 1109. Redressability requires "that a favorable judgment would meaningfully redress the alleged injury." *Walker*, 450 F.3d at 1098.

Here, Appellants' injury is not merely the risk of complaints filed by private customers—it also includes the burden of administrative proceedings before the Director and the prospect of litigation brought by the Attorney General. Those injuries are "fairly traceable" to Director Elenis and Attorney General Weiser. Colorado concedes that, under CADA, Director Elenis may "investigate[ ] charges of discrimination, issue[ ] subpoenas to compel information, issue[ ] a determination of probable cause or no probable cause, and conduct[ ] mandatory mediation if cause is found, or dismiss[ ] if no cause is found." Colorado's Br. at 30. Colorado also concedes that, under CADA, Attorney General Weiser has "limited" enforcement authority. *Id.* at 31. Thus, the traceability issues in this case differ from those in *Bronson*. There, the defendant was a county clerk who refused to issue a marriage license, but who had no authority to enforce the criminal statute at issue. 500 F.3d at 1111. Here, both Director Elenis and Attorney General Weiser have authority to enforce CADA.

Just as Appellants' injury is traceable to Director Elenis and Attorney General Weiser, enjoining Director Elenis and Attorney General Weiser from enforcing CADA would redress Appellants' fears that they may be subject to investigation, or face charges

brought by the Attorney General. Accordingly, we conclude that Appellants have established Article III standing.[3]

3. Ripeness

For the same reasons Appellants have established standing, we are satisfied that this case is ripe. *See SBA List*, 573 U.S. at 157 n.5 (acknowledging that, in pre-enforcement challenges, standing and ripeness often "boil down to the same question") (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)). Certainly, the record would be better developed, and the legal issues would be clearer, if Appellants had denied services to a customer, that customer filed a complaint, and that complaint was adjudicated through the appropriate administrative and judicial channels. Yet, as discussed above, Article III does not require a pre- enforcement plaintiff to risk arrest or actual prosecution before bringing claim in federal court. Any prudential considerations presented in this case do not prevent us from exercising our "virtually unflagging" obligation to hear cases within our jurisdiction. *SBA List*, 573 U.S. at 167 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)).

C. Free Speech

It is a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v.*

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[3] Because we conclude that Appellants have standing, we decline to address whether the district court could assume the constitutionality of the Accommodation Clause after first finding Appellants lacked standing to challenge that Clause.

Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 61 (2006) (recognizing the principle "that freedom of speech prohibits the government from telling people what they must say").

1. The Accommodation Clause

a. Compelled Speech

Appellants' creation of wedding websites is pure speech. The websites Appellants intend to offer "celebrate and promote the couple's wedding and unique love story" by combining custom text, graphics, and other media. Aplts.' App. at 2-325 (¶¶ 81, 84). The websites consequently express approval and celebration of the couple's marriage, which is itself often a particularly expressive event. *See Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (recognizing "untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms"). Appellants' custom websites are similar to wedding videos and invitations, both of which have also been found to be speech. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751–52 (8th Cir. 2019) (wedding videographers engaged in speech); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 908 (Ariz. 2019) (custom wedding invitations are pure speech).

Our analysis relies on the custom and unique nature of Appellants' services, rather than their chosen medium. As Colorado asserts, the mere fact that Appellants' trade is "in part initiated, evidenced, or carried out by means of language, either spoken,

written, or printed" is not sufficient to show a speech interest. Colorado's Br. at 44 (quoting *FAIR*, 547 U.S. at 62). In *FAIR,* the Supreme Court rejected arguments that the Solomon Amendment compelled speech by requiring law schools to accommodate military recruiters, including sending students emails on behalf of military recruiters or providing military recruiters with access to law school facilities. The Court noted that "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions . . . . [A] law school's decision to allow recruiters on campus is not inherently expressive." 547 U.S. at 64. In contrast, here, creating a website (whether through words, pictures, or other media) implicates Appellants' unique creative talents, and is thus inherently expressive.

Appellants' own speech is implicated even where their services are requested by a third-party. In *Hurley*, the Supreme Court recognized a parade organizer's Free Speech interests, despite the fact that the organizer lacked a "particularized message" or that the speech would be initially generated by the participants, and not the organizer. *Hurley*, 515 U.S. at 569–70. The speech element is even clearer here than in *Hurley* because Appellants actively create each website, rather than merely hosting customer-generated content on Appellants' online platform. *Compare Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 258 (1974) ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising."), *with FAIR,* 547 U.S. at 64 ("In this case, accommodating the military's message does not

affect the law school's speech, because the schools are not speaking when they host interviews and recruiting receptions."), *and PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 (1980) (shopping center may be forced to "use his property as a forum for the speech of others").

Nor does a profit motive transform Appellants' speech into "commercial conduct." *See* Colorado's Br. at 37. The First Amendment's protections against compelled speech are "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers." *Hurley,* 515 U.S. at 574. Thus, as the Supreme Court has recognized, for-profit businesses may bring compelled speech claims. *See, e.g.*, *Tornillo,* 418 U.S. at 254 (for-profit newspaper cannot be compelled to accommodate political candidates' "right of reply"); *Pac. Gas and Elec. Co. v. Public Utilities Comm'n of Cal.,* 475 U.S. 1, 9 (1986) (utility company cannot be compelled to include critic's speech in utility company's billing envelopes).

The Accommodation Clause also "compels" Appellants to create speech that celebrates same-sex marriages. Colorado asserts that the Accommodation Clause only regulates Appellants' conduct in picking customers and does not regulate Appellants' speech. *See* Colorado's Br. at 40. Yet, this argument is foreclosed by *Hurley*. As with the Massachusetts public accommodations law in *Hurley,* CADA has the effect "of declaring the sponsors' speech itself to be the public accommodation." *Hurley,* 515 U.S. at 573. By compelling Appellants to serve customers they would otherwise refuse, Appellants are forced to create

websites—and thus, speech—that they would otherwise refuse.

Colorado also asserts that the Accommodation Clause does not require a specific message or statement unrelated to regulating conduct. *See* Colorado's Br. at 46 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977) and *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). Yet, again, neither was a specific message or statement required in *Hurley*. Further, as the Supreme Court explained in *FAIR,* "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message." *FAIR*, 547 U.S. at 63. Relying on *Hurley*, the Court explained in *FAIR* that compelled speech may be found where "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* So here, the result of the Accommodation Clause is that Appellants are forced to create custom websites they otherwise would not.

Because the Accommodation Clause compels speech in this case, it also works as a content-based restriction. *See Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("By requiring petitioners to inform women how they can obtain state-subsidized abortions . . . the licensed notice plainly 'alters the content' of petitioners' speech.") (quoting *Riley v. Nat'l Fed. of Blind of N.C., Inc.,* 487 U.S. 781, 795 (1988)). Appellants cannot create websites celebrating opposite-sex marriages, unless they also agree to serve customers who request websites celebrating same-sex marriages. CADA's purpose and history also demonstrate how the statute is a content-based restriction. As Colorado makes clear, CADA is intended to remedy a long and

invidious history of discrimination based on sexual orientation. *See* Colorado's Br. at 65–66. Thus, there is more than a "substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). Eliminating such ideas is CADA's very purpose. For similar reasons, the Supreme Court in *Hurley* concluded that eliminating discriminatory bias was a "decidedly fatal objective" in light of a Free Speech challenge. *Hurley*, 515 U.S. at 579; *see also TMG*, 936 F.3d at 753 (Minnesota public accommodations law operates as a content-based restriction "by requiring the Larsens to convey 'positive' messages about same-sex weddings"); *B&N,* 448 P.3d at 914 (Arizona public accommodations law is facially neutral, but operates as a content-based restriction).

b. Strict Scrutiny

Whether viewed as compelling speech or as a content-based restriction, the Accommodation Clause must satisfy strict scrutiny—i.e., Colorado must show a compelling interest, and the Accommodation Clause must be narrowly tailored to satisfy that interest. *Reed v. Town of Gilbert, Ariz.,* 576 U.S. 155, 164 (2015).

Here, Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (Minnesota public accommodation law's goals of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the

highest order"). Colorado's interest in preventing both dignitary and material harms to LGBT people is well documented. Colorado has a unique interest in remedying its own discrimination against LGBT people. *See* Colorado's Br. at 65 (discussing *Romer v. Evans*, 517 U.S. 620, 630, 634 (1996) (holding that Colorado state constitutional amendment preventing protected status for LGBT people violated the Equal Protection Clause)). Even setting Colorado's history aside, Colorado, like many other states, has an interest in preventing ongoing discrimination against LGBT people. *See* Br. of Lambda Legal Defense and Education Fund as *amicus curiae*, at 15 (describing ongoing discrimination against LGBT people in Colorado); Br. of Mass., et al. as *amicus curiae* at 7–8 (describing laws in other states that address discrimination based on sexual orientation).

Nor do we construe Appellants' arguments as challenging Colorado's interest in combating discrimination generally. Rather, Appellants assert Colorado fails to establish a compelling interest because "[Appellants] do[ ] not discriminate against anyone," and because "Colorado can curb discriminatory conduct without compelling or silencing [Appellants]." Aplts.' Br. at 54; *see also* Aplts.' Reply at 26. Appellants do not appear to deny that, at least in other contexts, LGBT people may suffer discrimination, and Colorado may have an interest in remedying that harm. Thus, Appellants' arguments more appropriately address whether CADA is narrowly tailored—not whether CADA furthers a compelling interest.

The Accommodation Clause is not narrowly tailored to preventing dignitary harms. As the

Supreme Court has repeatedly made clear, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579; *see also Boy Scouts of Am. v. Dale,* 530 U.S. 640, 659 (2000) ("The state interests embodied in New Jersey's public accommodations law [prohibiting expulsion of a LGBT scoutmaster] do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."). So too here. As compelling as Colorado's interest in protecting the dignitary rights of LGBT people may be, Colorado may not enforce that interest by limiting offensive speech. Indeed, the First Amendment protects a wide range of arguably greater offenses to the dignitary interests of LGBT people. *See Snyder v. Phelps*, 562 U.S. 443 (2011) (extending First Amendment protections to funeral picketers).

The Accommodation Clause is, however, narrowly tailored to Colorado's interest in ensuring "equal access to publicly available goods and services." *U.S. Jaycees*, 468 U.S. at 624. When regulating commercial entities, like Appellants, public accommodations laws help ensure a free and open economy. Thus, although the commercial nature of Appellants' business does not diminish their speech interest, it does provide Colorado with a state interest absent when regulating non-commercial activity. *Compare id.*, 468 U.S. at 626 (recognizing "the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic

advancement and political and social integration that have historically plagued certain disadvantaged groups"), *with Dale,* 530 U.S. at 657 ("As the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.").

The Supreme Court's decision in *Heart of Atlanta Motel v. United States* illustrates the commercial consequences of public accommodation laws. 379 U.S. 241 (1964). In that case, the Court upheld Title II of the Civil Rights Act of 1964 under Congress's Commerce Clause powers. In doing so, the Court recognized the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." *Id.* at 257. The Court recited evidence of racial discrimination by hotels and motels, which was so pervasive that some travelers relied on a special guidebook listing non-discriminatory businesses. *Id.* at 253. Thus, the cumulative result of those discriminatory practices discouraged interstate commerce.

We do not define Colorado's interest as "ensuring access to a *particular* person's unique, artistic product [i.e., Appellants']." Dissent at 27 (emphasis in original); *see also id.* at 27 n.8. We recognize access to Appellants' services may be the *consequence* of enforcing CADA, but that is not to say it is CADA's purpose or Colorado's primary interest. For example, CADA does not apply only to public accommodations of a certain level of quality or artistic merit. In fact, CADA is silent as to these attributes, leaving their

appraisal to consumers. Nor does CADA conscript Appellants' services for some collective or redistributive end. CADA only applies here because Appellants intend to sell their unique services to the public. The question then becomes whether Colorado's interest in ensuring access to the marketplace *generally* still applies with the same force to Appellants' case *specifically*—i.e., "whether [Colorado] has such an interest in denying an exception to [Appellants]." *Fulton*, 141 S. Ct. at 1881.

Excepting Appellants from the Accommodation Clause would necessarily relegate LGBT consumers to an inferior market because Appellants' *unique* services are, by definition, unavailable elsewhere. As discussed above, our analysis emphasizes the custom and unique nature of Appellants' services. For the same reason that Appellants' custom and unique services are speech, those services are also inherently not fungible. To be sure, LGBT consumers may be able to obtain wedding-website design services from other businesses; yet, LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants offer. Thus, there are no less intrusive means of providing equal access to those types of services.[4]

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[4] The cumulative effect of discrimination also explains why other statutory exemptions, such as sex-based discrimination motivated by a "bona fide relationship," are permissible. *See* Aplts.' Reply at 26–27. Such exemptions promote open commerce as a whole and are consistent with Colorado's interest in ensuring access to the commercial marketplace. We do not decide whether the "bona fide relationship" exemption should apply to Appellants. *See infra*, III.D.1.b. We only hold

Amici dispute whether subjecting businesses to the Accommodation Clause ultimately chills commerce by discouraging businesses from entering the market, due to fears that they will be compelled to create objectionable products. *Compare* Br. of Law and Economics Scholars as *amicus curiae* at 4 (enforcing the Accommodation Clause will "either force unwilling associations or force the exit of a class of market participants"), *with* Br. of Scholars of Behavioral Science and Economics as *amicus curiae* at 9 (asserting "markets cannot always be counted on to 'self-correct' and produce a welfare-maximizing outcome"). With respect to amici, we find the dispute beside the point. This case does not present a competitive market. Rather, due to the unique nature of Appellants' services, this case is more similar to a monopoly. The product at issue is not merely "custom-made wedding websites," but rather "custom-made wedding websites of the same quality and nature as those made by Appellants." In that market, only Appellants exist. And, as amici apparently agree, monopolies present unique anti-discrimination concerns. *See* Br. of Law and Economics Scholars at 9 ("The only exception to this principle is a monopoly situation, in which consumers are faced with a sole supplier who could decide for all sorts of reasons, including invidious motives, to refuse to deal with a group of potential consumers.").

We are also unpersuaded by the Supreme Court of Arizona's analysis in *Brush & Nib*. There, the Supreme Court of Arizona concluded that custom

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that the existence of that exemption does not require us to craft new ones.

wedding invitations are speech because they are not fungible products, unlike a hamburger or pair of shoes. *B&N,* 448 P.3d at 910. With that much we agree—custom products often implicate speech. Yet, the Supreme Court of Arizona then held that exempting custom invitations from a public accommodation law would not undermine the law's purpose. *Id.* at 916. Thus, ostensibly, the *B&N* Court reasoned that any market harm was limited. We are unconvinced. It is not difficult to imagine the problems created where a wide range of custom-made services are available to a favored group of people, and a disfavored group is relegated to a narrower selection of generic services. Thus, unique goods and services are where public accommodation laws are most necessary to ensuring equal access.[5]

To be clear, we, like the Dissent, do not question Appellants' "sincere religious beliefs" or "good faith." Dissent at 1. Yet, we fail to see how Appellants'

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[5] Elsewhere, the Dissent endorses our view that Appellants' services are unique. *See* Dissent at 15 ("It is obvious to even the most casual viewer that Ms. Smith is creating a customized art product—which incorporates unique, expressive speech—for her customers."). In doing so, we think the Dissent commits the same error as the *B&N* court. The Dissent never explains how Appellants' services are unique when considering Appellants' speech interests, but fungible when considering Colorado's interest in preventing material harms to consumers. To us, Appellants' services must either be unique for both analyses, or fungible for both. Such consistency does not "cheapen" the artistic value of Appellants' services. Dissent at 29. It is precisely because Appellants' unique services *are* valuable that exclusion is harmful. It is the Dissent that cheapens Appellants' artistry by implying Appellants' services are no better than those available elsewhere.

sincerity or good faith should excuse them from CADA. Appellants' intent has no bearing on whether, as a consequence, same-sex couples have limited access to goods or services. For this reason, it is unclear to us why the Dissent places such repeated emphasis on Appellants' "good faith." *See, e.g.*, Dissent at 21 ("Nor is Ms. Smith's statement intended to be derogatory or malicious."); *id.* at 52 ("We must presume [Ms. Smith] has reached her beliefs 'based on decent and honorable religious or philosophical premises.'") (quoting *Obergefell*, 576 U.S. at 672). Further, as the Supreme Court has recently reaffirmed, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981)). To us, whether an exception limits market access depends upon the uniqueness of the public accommodation's goods and services—not the sincerity of the public accommodation's beliefs.

We also recognize that "compelled speech is deeply suspect in our jurisprudence—and rightly so, given the unique harms it presents." Dissent at 10. Yet, at the same time, "[t]he axiom that places of public accommodation are open to everyone is deeply rooted in the American legal system." *TMG*, 936 F.3d at 763 (Kelly, J., concurring in part and dissenting in part). Indeed, the Supreme Court has repeatedly emphasized public accommodation laws' vital importance—even against Constitutional challenges. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1728 ("It is unexceptional that Colorado law can protect gay

persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."); *Hurley*, 515 U.S. at 572 ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."); *Heart of Atlanta Motel*, 379 U.S. at 260 ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty."). We resolve the tension between these two lines of jurisprudence by holding that enforcing CADA as to Appellants' unique services is narrowly tailored to Colorado's interest in ensuring equal access to the commercial marketplace.[6]

2. The Communication Clause

Appellants also assert that the Communication Clause unconstitutionally abridges their Free Speech rights. Specifically, Appellants intend to publish a Proposed Statement on 303 Creative's website, stating Appellants "will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman." Aplts.' App. at 2-364. Colorado responds that the Communication Clause merely prohibits a public accommodation from

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[6] The Dissent implies that our holding applies to "*all* artists." Dissent at 30 (emphasis in original). As should be clear, our holding does not address how CADA might apply to non-commercial activity (such as commissioning a mural for some charitable purpose).

advertising what is already unlawful under the Accommodation Clause. Specifically, the Communication Clause makes it unlawful for a public accommodation to publish a statement indicating that service will be refused because of sexual orientation. Colo. Rev. Stat. § 24-34-601(2)(a).

The Communication Clause does not violate the Appellants' Free Speech rights. As the district court correctly held, Colorado may prohibit speech that promotes unlawful activity, including unlawful discrimination. Aplts.' App. at 3-577–78. In *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations,* the Supreme Court held that publishing employment advertisements in "sex-designated columns" was not protected by the First Amendment. 413 U.S. 376, 378 (1973). The Court reasoned that, because the underlying employment practice was illegal sex discrimination, there was no protected First Amendment interest. *Id.* at 389. In contrast, in *Bigelow v. Virginia,* 421 U.S. 809 (1975), the Supreme Court held that publishing advertisements for abortion services was protected by the First Amendment, so long as the underlying services were themselves legal. In that case, the Court held that, although the abortion services were illegal if offered in Virginia, Virginia had no interest in regulating advertisements for services offered in New York, where the services were legal. *Id.* at 828. Appellants appear to acknowledge that their Accommodation Clause and Communication Clause challenges go hand in hand, at least to the extent the merits of those challenges are "intertwined." Aplts.' Reply at 6; *see also* Aplts.' Br. at 53–57 (addressing both clauses simultaneously as to strict scrutiny).

Having concluded that the First Amendment does not protect Appellants' proposed denial of services, we also conclude that the First Amendment does not protect the Proposed Statement. Parts of the Proposed Statement might not violate the Accommodation Clause, such as those parts expressing Appellants' commitment to their clients or Ms. Smith's religious convictions. Yet, the Proposed Statement also expresses an intent to deny service based on sexual orientation—an activity that the Accommodation Clause forbids and that the First Amendment does not protect. Thus, the Proposed Statement itself is also not protected and Appellants' challenge to the Communication Clause fails. *See Pittsburgh Press*, 413 U.S. at 389 (commercial advertising is not protected where "the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity").[7]

D. Free Exercise

1. CADA is a Neutral Law of General Applicability

"[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton*, 141 S. Ct. at 1876

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[7] We presume the Dissent agrees that, under *Pittsburgh Press* and *Bigelow*, Appellants' Free Speech challenge to the Communication Clause must rise or fall with their challenge to the Accommodation Clause. We recognize the Dissent's disagreement with our analysis of the Accommodation Clause, and thus its implicit disagreement with our conclusion as to the Communication Clause.

(citing *Employment Div., Dep't of Hum. Resources of Or. v. Smith*, 494 U.S. 872, 878–82 (1990)); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

a. CADA is a Neutral Law

"Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices *because of their religious nature*." *Fulton*, 141 S. Ct. at 1877 (emphasis added); *see also Lukumi*, 508 U.S. at 533 ("[I]f the object of a law is to infringe upon or restrict practices *because of their religious motivation*, the law is not neutral[.]") (emphasis added). "Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 540).

In *Masterpiece Cakeshop*, the Court held that Colorado had enforced CADA against a baker (Jack Phillips) without "the religious neutrality that the Constitution requires." 138 S. Ct. at 1724. The Court relied, in part, on a Commissioner's statement describing the baker's religious objection as "one of the most despicable pieces of rhetoric that people can use." *Id.* at 1729. The Court explained that this

statement impermissibly disparaged Phillips' religion by "describing it as despicable, and also by characterizing it as something merely rhetorical." *Id.* The Court instructed the Commission that it "was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs." *Id.* at 1731.

Appellants provide no evidence that Colorado will ignore the Court's instruction in *Masterpiece Cakeshop*, and thus provide no evidence that Colorado will enforce CADA in a non-neutral fashion. Appellants rely on a comment from a public meeting held a few days after the Court's ruling in *Masterpiece Cakeshop*. At the public meeting, a different Commissioner voiced his "support" for the Commissioner whose comments that were at issue in *Masterpiece Cakeshop*, opining that the Commissioner discussed in *Masterpiece Cakeshop* did not say "anything wrong." Aplts.' App. at 3-609. The single Commissioner's statement at the public meeting, however, does not indicate Colorado will deviate from the Court's instruction in *Masterpiece Cakeshop*. In contrast to the single Commissioner's opinion, several others at the public meeting voiced their agreement with the Court's ruling, or their commitment to follow that ruling. *Id.* at 3-606 (Director Elenis: "So in these cases going forward, Commissioners and ALJs and others, including the Staff at the Division, have to be careful how these issues are framed so that it's clear that full consideration was given to sincerely—what is termed as sincerely-held religious objections."); *id.* 3-608 (Commissioner Carol Fabrizio: "[*Masterpiece Cakeshop*] was correctly decided from the outside, but I also hope that anything that is taken out of here or

listened to or—that we're open to being respectful of everybody's views."). In short, Appellants' pre-enforcement challenge is dissimilar to the post-enforcement challenge in *Masterpiece Cakeshop*.

b. CADA is Generally Applicable

A law is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

A law is also not generally applicable "if it 'invites' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884) (alteration omitted). "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* (quoting *Smith*, 494 U.S. at 884). In *Smith*, the Court explained that a "good

cause" exemption from requirements for unemployment compensation benefits "created a mechanism for individualized exemptions." *Smith*, 494 U.S. at 884 (citing *Bowen v. Roy*, 476 U.S. 693, 707 (1986)); *see also Sherbert v. Verner*, 374 U.S. 398, 401 n.4 (1963). And more recently, in *Fulton*, the Court explained that exemptions from contractual obligations made available at the "sole discretion" of a city commissioner trigger strict scrutiny. 141 S. Ct. at 1878.

Appellants assert that CADA is not generally applicable because Colorado enforces a "religious-speakers policy," under which religiously-motivated objections are viewed with greater scrutiny than secularly-motivated objections. *See* Aplts.' Br. at 48. For example, although Colorado admits that a business is not required to design a website proclaiming "God is Dead" if it would decline such a design for any customer, *see* Colorado's Br. at 42, Appellants must design a website celebrating same-sex marriage, even though it would decline such a design for any customer.

In support of their claim of a religious-speakers policy, Appellants also rely on the record in *Masterpiece Cakeshop*. In that case, Phillips asserted a disparity in treatment between his case and three other cases related to a customer named William Jack. In the Jack cases, bakers refused Jack's requests for cakes that "conveyed disapproval of same-sex marriage, along with religious text." *Masterpiece Cakeshop*, 138 S. Ct. 1719 at 1730. The Colorado Court of Appeals held that the three bakers lawfully refused Jack service "because of the offensive nature of the requested message." *Id.* at 1731 (quoting

Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 282 n.8 (Colo. App. 2015)).

The Supreme Court held that this difference in treatment was "[a]nother indication of hostility" toward Phillips' religious motivations. *Id.* at 1729. Contrary to the Colorado Court of Appeals, the Supreme Court held that the difference in treatment between the Phillips and Jack cases could not be based on "the government's own assessment of offensiveness." *Id.* at 1731. According to the Court, such reasoning "elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs." *Id.* The Supreme Court declined to address, however, "whether the cases should ultimately be distinguished." *Id.* at 1730. Rather, the Court's holding in *Masterpiece Cakeshop* was narrowly limited to the discriminatory enforcement in that particular case, and left open CADA's future enforcement against other objectors. *Id.* at 1732; *see also Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring) ("[A]ll that victory [in *Masterpiece Cakeshop*] assured Mr. Phillips was a new round of litigation—with officials now presumably more careful about admitting their motives.").

In concurring opinions, Justices Kagan and Gorsuch disagreed as to whether Colorado could apply CADA in the Phillips case, but not in the Jack cases. According to Justice Kagan, the bakers in the Jack cases did not discriminate against Jack's religion because the bakers would have refused *any* customer's request for cakes denigrating gay people and same-sex marriage. *Masterpiece Cakeshop*, 138 S. Ct. at 1733 (Kagan, J., concurring). In Justice Kagan's

view, "[t]he different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief." *Id.* (Kagan, J., concurring). According to Justice Gorsuch, however, the Jack cases and the Phillips case "share[d] all legally salient features." *Id.* at 1735 (Gorsuch, J., concurring). In Justice Gorsuch's view, Colorado could apply CADA in both cases, or in neither case, but "the one thing it can't do is apply a more generous legal test to secular objections than religious ones." *Id.* at 1737 (Gorsuch, J., concurring); *see also id.* at 1739 (Gorsuch, J., concurring) ("Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's backers but delivering a loss to Mr. Phillips.") (emphasis in original).

Although a gerrymander similar to the one identified by Justice Gorsuch may still exist, Appellants have only shown a gerrymander favoring LGBT consumers, as opposed to a gerrymander disfavoring religious-speakers. Indeed, a "pro-LGBT" gerrymander is likely inevitable given CADA's purpose and its content-based restrictions on speech. *See supra*, III.C.1.a. Appellants provide no evidence that Colorado permits secularly-motivated objections to serving LGBT consumers. Similarly, Appellants provide no evidence that Colorado enforces CADA against religiously-motivated objections that do not injure the dignitary or material interests of LGBT consumers. In short, Appellants fail to show that Colorado "permit[s] secular conduct that undermines

the government's asserted interests *in a similar way*." *Fulton*, 141 S. Ct. at 1877 (emphasis added).

The Supreme Court's recent cases addressing Free Exercise challenges to COVID-19 restrictions are instructive. In *Tandon v. Newsom*, the Court explained "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." 141 S. Ct. at 1296 (per curiam). Accordingly, the Court held that California could not restrict at-home religious exercise while permitting secular activities that posed similar risks of COVID-19 transmission. *Id.* at 1297. The Court reached a similar conclusion in *Roman Catholic Diocese of Brooklyn v. Cuomo*, holding that New York could not restrict access to houses of worship while permitting access to secular facilities with similar safety records regarding the spread of COVID-19. 141 S. Ct. 63, 66–67 (2020) (per curiam). Here, however, Appellants rely on comparators that injure LGBT consumers. For example, in the Jack cases, non-enforcement was consistent with Colorado's pro-LGBT gerrymander. Because Appellants provide no examples where Colorado permitted "secular-speakers" to discriminate against LGBT consumers, Appellants fail to show that Colorado disfavors similarly-situated "religious-speakers."[8]

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[8] The Dissent is correct that Colorado "has the burden to establish that the challenged law satisfies strict scrutiny." Dissent at 40 n.15 (quoting *Tandon*, 141 S. Ct. at 1296 (per curiam)). But that burden is irrelevant here because strict scrutiny does not apply to Appellants' Free Exercise claims. And it is Appellants' burden to show, at the very least, a triable issue of material fact that CADA is not neutral or generally-applicable. *Compare Axson-Flynn v. Johnson*, 356 F.3d 1277,

Colorado's recognition of message-based refusals also does not give rise to a system of "individualized exemptions." *See* Aplts.' Br. at 49. Message-based refusals are not an "exemption" from CADA's requirements; they are a defense. A public accommodation only violates CADA when it discriminates "because of" a consumer's membership in a protected class. Colo. Rev. Stat. § 24-34-601(2)(a). Ostensibly, message-based refusals are unrelated to class-status and fail to satisfy CADA's causation standard. Because message-based refusals do not violate CADA as an initial matter, there is nothing to "exempt" from the statute. *See* Exempt, Black's Law Dictionary (11th ed. 2019) ("Free or released from a duty or liability to which others are held.").

Message-based refusals are also not "individualized." "[A] system of individualized exemptions is one that gives rise to the application of a subjective test." *Axson-Flynn*, 356 F.3d at 1297 (internal quotation omitted). Conversely, an exemption is not "individualized" simply because it "contain[s] express exceptions for objectively defined categories of persons." *Id.* at 1298. As we explained in

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1299 (10th Cir. 2004) ("Because Axson-Flynn has raised a genuine issue of material fact as to whether Defendants maintained a discretionary system of case-by-case exemptions from curricular requirements, we hold that summary judgment on her free exercise 'individualized exemption' claim was improper."), *with Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 655 (10th Cir. 2006) ("[I]nconsistent with the requirements of *Axson-Flynn*, Grace United has not pointed to any evidence to support its conclusory allegation that the City specifically targeted religious groups or the Methodist denomination in its enforcement of the ordinance in this case.").

Axson-Flynn, "[w]hile of course it takes some degree of individualized inquiry to determine whether a person is eligible for even a strictly defined exemption, that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system envisioned by the *Smith* Court in its discussion of *Sherbert* and related cases." *Id.*

We are satisfied that message-based refusals may be objectively defined and are not the type of subjective test that triggers the individualized exemption exception. We need not decide how CADA's causation standard should apply to Appellants' message-based refusal. *See supra*, III.B.1. We also reiterate that, on a more developed record, Appellants might show that Colorado enforces that standard in a way that discriminates against religion, violating the Free Exercise Clause. Yet, whatever issues may be presented in a future case, it is clear to us that CADA's causation standard itself is qualitatively different from the broad, discretionary analyses presented in other individualized exemption cases. *See, e.g., Fulton*, 141 S. Ct. at 1878 (exemptions granted in city official's "sole discretion"); *Sherbert*, 374 U.S. at 401 n.4 (exemptions granted for "good cause"); *Axson-Flynn*, 356 F.3d at 1299 (exemptions granted through "pattern of ad hoc discretionary decisions").

The Dissent's discussion of the individualized exemption exception conflates an "individualized exemption" with "individualized adjudication." For example, the Dissent concludes that the individualized exemption exception should apply because "the entire CADA enforcement mechanism is structured to make case-by-case determinations."

Dissent at 36; *see also id.* at 43 ("By demonstrating that CADA sets up a case-by-case system for determining exceptions, Ms. Smith has shown CADA's application here must be reviewed with strict scrutiny with regard to the free exercise claims."). Accordingly, CADA does not grant "individualized exemptions" simply because causation is determined by the specific facts of each case. Were we to conclude otherwise, a wide range of criminal statutes would also become subject to Free Exercise challenges because courts adjudicate a defendant's guilt through "case-by-case determinations."

Although we hold that the "religious-speakers policy" identified by Appellants is not an "exemption," CADA provides for two exemptions that warrant closer attention. First, CADA exempts places that are "principally used for religious purposes" from its definition of public accommodations. Colo. Rev. Stat. 24-34-601(1). This exemption does not trigger strict scrutiny. To the extent a "religious-purpose" exemption is individualized, the exemption expressly *favors* religious exercise over places used for secular purposes.[9]

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[9] Indeed, an exemption for places "principally used for religious purposes" may, in at least some instances, be required by the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 190 (2012) (recognizing a "ministerial exception" to generally applicable employment laws). As Justice Alito noted in *Fulton*, the ministerial exemption is in "tension" with the *Smith* standard. *Fulton*, 141 S. Ct. 1916 n.77 (Alito, J., concurring). We need not resolve that tension here. We only note that, under the Supreme Court's precedent, CADA remains generally applicable despite exempting some religious exercise.

Second, CADA exempts sex-based discrimination "if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation." Colo. Rev. Stat. § 24-34-601(3). On the pre-enforcement record before us, Appellants have not shown the "bona fide relationship" exemption should trigger strict scrutiny. Like CADA's causation standard, a fact-finder may objectively determine whether a public accommodation's discriminatory practice is "related" to the public accommodation's goods or services. Whether such a relationship is "bona fide" seems closer to the type of discretionary standard subject to the individualized exemption exception. The statute is silent as to when a relationship is "bona fide," and the parties do not define that term in their briefing. Despite that ambiguity, however, the term is facially unlike the "entirely discretionary" exemption addressed in *Fulton*. 141 S. Ct. at 1878. Thus, we conclude that the mere existence of a "bona fide relationship" exemption does not, on its own, trigger strict scrutiny.

We pause because Colorado's *application* of the "bona fide relationship" exemption may trigger strict scrutiny on a post-enforcement record. For example, strict scrutiny would apply if Colorado "refuse[d] to accept religious reasons for [a bona fide relationship] on equal footing with secular reasons for [a bona fide relationship]." *Axson-Flynn*, 356 F.3d at 1298. And, if it did so, Colorado must offer a "compelling reason why it has a *particular interest* in denying an exception to [Appellants] while making [it] available to others." *Fulton*, 141 S. Ct. at 1882 (emphasis added). Thus, a future case may present the closer

questions of whether the "bona fide relationship" exemption should apply here, or, assuming Colorado denies such an exemption, whether such denial violates the Free Exercise Clause. On this pre-enforcement record, however, Appellants have not shown the exemption will be applied in an impermissible manner.

2. Appellants Cannot Assert a Hybrid Rights Claim

We apply heightened scrutiny to a hybrid-rights claim where a plaintiff brings a "colorable" companion claim, i.e., one with a "fair probability or likelihood, but not a certitude, of success on the merits." *Axson-Flynn*, 356 F.3d at 1297. Because Appellants' other constitutional claims either fail or were not raised on appeal, Appellants have no companion claim. Thus, there is no reason to apply heightened scrutiny under a hybrid-rights theory. In any event, CADA would satisfy heightened scrutiny for the same reasons that it satisfies strict scrutiny, as explained above.

E. Overbreadth and Vagueness

The Communication Clause not only prohibits statements indicating that goods or services "will be refused, withheld from, or denied an individual," but also prohibits statements indicating "that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of [protected status]." Colo. Rev. Stat. § 24-34-601(2)(a). Appellants challenge this latter restriction, which they term the "Unwelcome Provision," as unconstitutionally overbroad and vague. *See* Aplts.' Br. at 57.

1. The Communication Clause Is Not Unconstitutionally Overbroad

The Unwelcome Provision does not render the Communication Clause unconstitutionally overbroad, because the Communication Clause's "application to protected speech [is not] substantial . . . relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973)). Even assuming the Unwelcome Provision, when read alone, unconstitutionally restricts speech, the Communication Clause, when read as a whole, is primarily focused on access to goods and services. Thus, in a case like the one here, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615–16. We need not apply the Unwelcome Provision in this case because Appellants' Proposed Statement violates the Communication Clause's prohibition on statements indicating refusal of services. *See* Aplts.' App. at 2-364 (Proposed Statement that Appellants "will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman").

The Dissent concludes that the Unwelcome Provision is overbroad because it would punish numerous forms of protected speech. In support, the Dissent identifies several examples where a public accommodation might violate the Unwelcome Provision without violating the Communication Clause's separate prohibition on statements

indicating refusal of services. *See* Dissent at 48–49.[10] We are unconvinced that the Dissent's examples are "substantial . . . relative to the scope of the law's plainly legitimate applications." *Hicks*, 539 U.S. at 119–20. Aside from this case and *Masterpiece Cakeshop*, amici document numerous other cases where public accommodations communicated, either directly or indirectly, that a consumer's presence was unwelcome and that they would be refused access. *See, e.g.*, Br. of Law Professors from the States of Colo., et al., as *amicus curiae* at 22–24 (describing examples of discrimination against LGBT people in Colorado); Br. of Religious and Civil Rights Organizations as *amicus curiae* at 24–26 (describing examples of discrimination against religious minorities). To be clear, we express no opinion as to whether the Unwelcome Provision might violate the First Amendment in other contexts. We merely conclude that those violations are better addressed on their own facts, and do not warrant the "strong medicine" of the overbreadth doctrine. *Broadrick*, 413 U.S. at 613.

2. The Communication Clause Is Not Unconstitutionally Vague

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[10] As a preliminary matter, we question the Dissent's conclusion that those examples would, in fact, be "covered by . . . the Unwelcome Provision." Dissent at 50. Taking one of the Dissent's examples, it is unclear to us whether a store owner's sign stating "We honor God and His commandments here" necessarily "indicates" that an atheist customer is unwelcome. *See id.* at 48. Such a sign may cause the customer to subjectively *feel* unwelcome, even if the business does not intend any offensiveness. "Indicates" may have, under CADA, a narrower definition than the Dissent implies.

Appellants' vagueness challenge also fails because their Proposed Statement indicates a refusal of services. Appellants rely on *Johnson v. United States*, 576 U.S. 591 (2015), where the Supreme Court struck the Residual Clause of the Armed Career Criminals Act as void for vagueness. The Supreme Court held that the Residual Clause was unconstitutionally vague, even if "some conduct" might clearly be proscribed. *Id.* at 602. In doing so, the Court described the standard for determining whether a statute is, as a matter of law, unconstitutionally vague—not the standard for determining when a party may bring a vagueness challenge. Accordingly, the district court in this case correctly relied on *Expressions Hair Design v. Schneiderman*, a case decided after *Johnson*, in which the Supreme Court reaffirmed that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim." 137 S. Ct. 1144, 1151–52 (2017) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010)); *see also Humanitarian Law Project*, 561 U.S. at 21 ("Of course, the scope of the material-support statute may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail."). Because the Proposed Statement is clearly proscribed by the Communication Clause's prohibition on statements indicating refusal of services, Appellants cannot separately challenge the Unwelcome Provision as unconstitutionally vague.[11]

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[11] The Dissent's vagueness analysis suffers the same defects as its overbreadth analysis. What makes a consumer "feel"

IV. Conclusion

We agree with the Dissent that "the protection of minority viewpoints is not only essential to protecting speech and self-governance but also a good in and of itself." Dissent at 12. Yet, we must also consider the grave harms caused when public accommodations discriminate on the basis of race, religion, sex, or sexual orientation. Combatting such discrimination is, like individual autonomy, "essential" to our democratic ideals. And we agree with the Dissent that a diversity of faiths and religious exercise, including Appellants', "enriches" our society. Dissent at 44. Yet, a faith that enriches society in one way might also damage society in other, particularly when that faith would exclude others from unique goods or services. In short, Appellants' Free Speech and Free Exercise rights are, of course compelling. But so too is Colorado's interest in protecting its citizens from the harms of discrimination. And Colorado cannot defend that interest while also excepting Appellants from CADA.

For these reasons, we AFFIRM the district court's grant of summary judgment in favor of Colorado.

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unwelcome may be unduly vague. Yet, CADA only proscribes communications that "indicate" a consumer is unwelcome. Whether a communication indicates as such may entail a more objective standard than the Dissent implies. And, in any event, the Dissent never explains why Appellants may bring a vagueness claim when their Proposed Statement clearly indicates a refusal of services.

19-1413, *303 Creative v. Elenis*, Tymkovich, Chief Judge, dissenting.

If liberty means anything at all, it means the right to tell people what they do not want to hear.

– George Orwell

No one denies Lorie Smith's sincere religious beliefs, good faith, and her willingness to serve clients regardless of race, creed, ethnicity, or sexual orientation. But what she will not do is compromise her beliefs and produce a message at odds with them. The Constitution neither forces Ms. Smith to compromise her beliefs nor condones the government doing so. In fact, this case illustrates exactly why we have a First Amendment. Properly applied, the Constitution protects Ms. Smith from the government telling her what to say or do.

But the majority takes the remarkable—and novel—stance that the government may force Ms. Smith to produce messages that violate her conscience. In doing so, the majority concludes not only that Colorado has a compelling interest in forcing Ms. Smith to speak a government-approved message against her religious beliefs, but also that its public-accommodation law is the least restrictive means of accomplishing this goal. No case has ever gone so far. Though I am loathe to reference Orwell, the majority's opinion endorses substantial government interference in matters of speech, religion, and conscience. Indeed, this case represents another chapter in the growing disconnect between the Constitution's endorsement of pluralism of belief on the one hand and anti-discrimination laws' restrictions of religious-based speech in the marketplace on the other. It

seems we have moved from "live and let live" to "you can't say that." While everyone supports robust and vigorously enforced anti-discrimination laws, those laws need not and should not force a citizen to make a Hobson's choice over matters of conscience. Colorado is rightfully interested in protecting certain classes of persons from arbitrary and discriminatory treatment. But what Colorado cannot do is turn the tables on Ms. Smith and single out her speech and religious beliefs for discriminatory treatment under the aegis of anti-discrimination laws.

The Constitution is a shield against CADA's discriminatory treatment of Ms. Smith's sincerely held religious beliefs. The First Amendment prohibits states from "abridging the freedom of speech" or the "free exercise" of religion. U.S. Const. amend. I. And the freedom to speak necessarily guarantees the right to remain silent. So the majority ushers forth a brave new world when it acknowledges that CADA compels both speech and silence—yet finds this intrusion constitutionally permissible. CADA forces Ms. Smith to violate her faith on pain of sanction both by prohibiting religious-based business practices and by penalizing her if she does speak out on these matters in ways Colorado finds "unwelcome" or "undesirable."[1]

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[1] The Colorado Anti-Discrimination Act provides that, for places of public accommodation:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or

I agree with the majority that Ms. Smith has standing to bring her claims and that the case is ripe. But because I cannot agree that Colorado may force Ms. Smith to create messages or stay silent contrary to her beliefs, I respectfully dissent.

I. Free Speech

It is important to understand from the outset that Ms. Smith and Colorado *agree* that she will serve anyone, regardless of protected class status. In the district court, both she and Colorado stipulated that: (1) Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation and gender"; and (2) Ms. Smith

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> ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry.

Colo. Rev. Stat. § 24-34-601, *as amended by* H.B. 21-1108 (enacted May 20, 2021). CADA was amended in May 2021 to add "gender identity" and "gender expression" as protected class characteristics.

does "not object to and will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites do not violate [her] religious beliefs, as is true for all customers." Aplt. App. 2-322. Ms. Smith and Colorado also agree that she "will decline any request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman." *Id.* at 2-323. And counsel for Ms. Smith confirmed at oral argument that she would represent clients regardless of sexual orientation in creating websites that celebrate opposite-sex weddings.

In short, Colorado appears to agree that Ms. Smith does not distinguish between customers based on protected-class status and thus advances the aims of CADA.

But when *any* customer asks Ms. Smith to create expressive content that violates her sincerely held beliefs, she will decline the request.[2] Colorado claims to endorse this type of message-based refusal, asserting that "the Commission does not interpret

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[2] At oral argument, the following hypothetical was posed of Ms. Smith's counsel: imagine a heterosexual wedding planner approached Ms. Smith, asking her to design five mock-up wedding websites for the wedding planner to attract potential customers—four for opposite-sex weddings and one for a same-sex wedding. Ms. Smith's counsel confirmed that she would not make a same-sex wedding website for a heterosexual client.

[CADA] to require any business owner, regardless of religious beliefs, to produce a message it would decline to produce for any customer." Appellee Br. at 62. Yet Colorado and the majority argue that Ms. Smith must do exactly this: create expressive content celebrating same-sex weddings as long as she will create expressive content celebrating opposite-sex weddings. This is paradigmatic compelled speech.

A. Compelled Speech Provisions Are Subject to Strict Scrutiny

Government-compelled speech is antithetical to the First Amendment. Forcing an individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable . . . . 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Thus, the government cannot—for example—coerce affirmations of belief, compel unwanted expression, or force one speaker to host the message of another as a public accommodation. *See Barnette*, 319 U.S. at 633–34; *Wooley*, 430 U.S. at 714; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

The compelled speech doctrine was first articulated in 1943 in Justice Jackson's opinion in *Barnette*. In that case, Jehovah's Witness parents and schoolchildren sought to enjoin the enforcement of compulsory flag-salute laws, as the required salute and accompanying pledge of allegiance violated their religious beliefs. Justice Jackson concluded that the

First Amendment protected the schoolchildren's right to free speech, noting that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Barnette*, 319 U.S. at 634. Written against the backdrop of World War II, the opinion cautioned against the "[c]ompulsory unification of opinion" of the like sought by the "fast failing efforts of our present totalitarian enemies." *Id.* at 641. "[T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings"—namely, by preventing the government from coercing speech in the first instance. *Id.*

Over three decades later, the Court again confirmed that the government cannot compel an unwilling individual to speak or even passively display the government's ideological message, no matter its popularity. In 1977, the *Wooley* Court struck down New Hampshire regulations requiring the display of the state's "Live Free or Die" motto on license plates. *Wooley*, 430 U.S. at 714. The motto's wide acceptance was irrelevant because the "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* at 717. *Wooley* also expanded *Barnette*'s logic: just as the government cannot coerce affirmations of belief, it also cannot require an individual to be a "courier for [the State's] message," even when that message does not otherwise interfere with the individual's own speech. *Id.*

Nor can the government require a speaker to be a courier for another citizen's message. In *Hurley*, the Court unanimously held as unconstitutional the application of the Massachusetts public-accommodations statute to the organizers of Boston's St. Patrick's Day Parade. *Hurley*, 515 U.S. at 572–73. Forcing the organizers of the parade—which itself is protected expression—to allow the participation of the Irish-American Gay, Lesbian & Bisexual Group "had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573. "[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* Organizing the parade and selecting participants was expressive, so applying the public-accommodations law to force the organizers to include unwanted speech was an impermissible intrusion on the freedom to create that expression. *See id.* at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."). Indeed, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

And the autonomy to speak *necessarily* includes the freedom to remain silent. Because "'*all* speech inherently involves choices of what to say and what to leave unsaid,' . . . one important manifestation of the

principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* at 573 (quoting *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 11, 19 (1986)) (emphasis in original). The Supreme Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018) (internal quotation marks omitted). As the *Hurley* Court held, "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575. The rule that a "speaker has the right to tailor . . . speech[ ] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.* at 573; *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Gorsuch, J., concurring) ("Because the government cannot compel speech, it also cannot 'require speakers to affirm in one breath that which they deny in the next.'" (quoting *Pac. Gas & Elec. Co.*, 475 U.S. at 16)).

Key to the *Hurley* decision was the expressive nature of a parade. This crucial point distinguishes it from the Court's decision compelling college campuses to allow military recruiters in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). The Solomon Amendment, challenged in that case, required law schools to afford military recruiters access to campus facilities for interviews and promotional events, including access to school scheduling emails and announcements. *Id.* at 60. But the law schools were already providing these services

to other speakers, and the notification emails and posted notices were not considered the law schools' *expressive* speech. *Id.* at 61–63. The law schools' actions in sending out such notices were not "affected by the speech it was forced to accommodate" because the emails did not constitute expressive conduct. *Id.* at 63–64; *see also id.* at 64 ("Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive."). This is why, in *Hurley*, the Massachusetts public-accommodation law had "been applied in a peculiar way": it had made *expressive* speech the public accommodation and thereby changed its message. *Hurley*, 515 U.S. at 572. Nothing about the access afforded by the Solomon Amendment, in contrast, compromised the law schools' expressive beliefs.

In more recent cases, the Supreme Court has confirmed the First Amendment's antipathy toward government-compelled speech. The government may no more "prohibit the dissemination of ideas that it disfavors" than it can "compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). A state cannot compel pregnancy crisis centers—many of which are pro-life—to inform patients about the availability of abortions because it "alter[s] the content of their speech." *Nat'l Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2371 (2018) (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)) (alterations incorporated); *see also NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) ("This law is a paradigmatic example of the serious threat presented when

government seeks to impose its own message in the place of individual speech, thought, and expression."). Nor can a state force individuals to pay dues to subsidize a private organization's speech. *Janus*, 138 S. Ct. at 2464. And—until now—our own precedent has similarly taken a deeply skeptical approach to compelled speech. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1283 (10th Cir. 2004) (finding a genuine dispute of material fact as to whether university's compulsion of theater student's speech was pretextual); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (discussing the long prohibition on compelled speech); *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000) (noting that, in government-speech contexts, the "crucial question is whether, in speaking, the government is compelling others to espouse or to suppress certain ideas and beliefs"); *Semple v. Griswold*, 934 F.3d 1134, 1143 (10th Cir. 2019) (concluding that a Colorado state amendment raising standards for citizen ballot initiatives did not compel speech by requiring interactions with voters in all state senate districts).

Accordingly, compelled speech is deeply suspect in our jurisprudence—and rightly so, given the unique harms it presents. For one, the ability to choose what to say or not to say is central to a free and self-governing polity. As Justice Alito wrote in *Janus*:

> When speech is compelled, . . . additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always

> demeaning, and for this reason, . . . a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.

Id. (quoting *Barnette*, 319 U.S. at 634). The "[c]ompulsory unification of opinion" cautioned by Justice Jackson in *Barnette* is not only a social harm but a personal one. 319 U.S. at 641. The *choice* of what to say has value, regardless of what is said or not said; narrowing the field of permissible expression diminishes autonomy and free will.

Moreover, the government's ability to compel speech and silence would make hollow the promise of other First Amendment freedoms. Freedom of association means little without the ability to express the bonds of connection, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655–56 (2000), and the freedom to petition for redress of grievances is valueless unless one is protected from retribution for that speech. The freedom of the press is essentially coextensive with—and reliant on—the freedom of speech. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972). And the freedom to exercise one's religion necessitates the ability to speak, engage in expressive conduct, *and* conscientiously refuse to speak, in order to have meaningful protection at all. *See, e.g.*, *NIFLA*, 138 S. Ct. at 2379 ("Freedom of speech secures freedom of thought and belief.") (Kennedy, J., concurring).

It is axiomatic that freedom of speech properly keeps the power of the government in check and preserves democratic self-government. *See, e.g.*, *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940)

("The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government."). This is why, of course, electoral speech is essential to a free and functioning republic. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."). Stifling minority speech is the prototypical "slippery slope" toward authoritarianism, recognized in the first of the compelled speech cases: "As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity." *Barnette*, 319 U.S. at 640. To paraphrase Orwell, liberty must mean the right to tell others—especially the government—what it does not want to hear.

Furthermore, the protection of minority viewpoints is not only essential to protecting speech and self-governance but also a good in and of itself. *See, e.g.*, *Wooley*, 430 U.S. at 715 ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Indeed, the "point of all speech protection, . . . is to shield just those choices of content that in someone's eyes are

misguided, or even hurtful." *Hurley*, 515 U.S. at 574. The lack of minority viewpoints would impoverish the richness of conversation and impede the search for truth contemplated by the First Amendment. *See, e.g.*, *Thornhill*, 310 U.S. at 95 ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.").

Because of its existential threat to the most sacred freedoms, we are tasked with reviewing instances of compelled expressive speech with the utmost skepticism. The majority's endorsement of compelled speech directed at Ms. Smith turns away from these foundational principles.

B. CADA Compels Expressive Speech

The Supreme Court's repeated, emphatic disapprobation of compelled expressive speech leaves little room for other conclusions. So it is all the more troubling when, in a case where the parties have stipulated that Ms. Smith's work is expressive speech—"*[the] custom wedding websites will be expressive in nature*"—the majority decides that its compulsion is constitutional.[3]

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[3] Ms. Smith and Colorado stipulated that her "custom 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." Aplt. App. at 2-325. The parties also agree that "[a]ll of these expressive elements will be customized and tailored to the individual couple and their unique love story." *Id.* And the parties stipulate that "[v]iewers of the wedding websites will know that the websites are Plaintiffs' original artwork because all of the wedding websites will say 'Designed by 303Creative.com.'" *Id.*

Creating custom wedding websites is not merely conduct, or even expressive conduct. Ms. Smith's wedding websites as a whole—and the "text, graphics, and . . . videos" that comprise them—are pure speech. *See Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (pure speech includes the printed word, oral utterances, pictures, films, paintings, drawings, and engravings); *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011) (holding that books, plays, movies, and video games all communicate ideas, which "suffices to confer First Amendment protection"); *Cressman*, 798 F.3d at 953 (noting that "an artist's sale of his own original work is pure speech"). This is because the websites are greater than the sum of their parts: each custom website conveys Ms. Smith's message or interpretation of celebration of the couple's union. *See Cressman*, 798 F.3d at 952–53 (emphasizing that the "animating principle behind pure-speech protection" is "safeguarding self-expression"). The parties agree on this point, stipulating that "[b]y creating wedding websites, Ms. Smith and 303 Creative will collaborate with prospective brides and grooms in order to use their unique stories as source material to express Ms. Smith's and 303 Creative's message celebrating and promoting God's design for marriage as the lifelong union of one man and one woman." Aplt. App. at 2-325.

The fact that Ms. Smith sells her custom website designs does not reduce their value as speech. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801. The creative confluence of the text

and graphics in these original, individualized websites produce *expression*—which deserves the highest protection under the First Amendment.[4]

If anything, this is an easier case than those involving wedding cakes, *see Masterpiece*, 138 S. Ct. at 1723, wedding photographs, *see Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:19-CV-851-JRW, 2020 WL 4745771, at *10 (W.D. Ky. Aug. 14, 2020), *Updegrove v. Herring*, No. 1:20-CV-1141, 2021 WL 1206805, at *1 (E.D. Va. Mar. 30, 2021), and *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013), wedding videos, *see Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019), wedding floral arrangements, *see State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1225

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[4] Ms. Smith's custom websites are not commercial speech—or even *expressive* commercial speech. The Supreme Court has recognized that while advertising, for example, is purely commercial speech, *see Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 637 (1985), expressive art—including art created in exchange for money—is afforded First Amendment protection. *See, e.g., Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557–58 (1975) (theater production); *Hurley,* 515 U.S. at 569 (paintings, music, poetry, expressive parades); *Kaplan*, 413 U.S. at 119–20 (pure speech includes the printed word, oral utterances, pictures, films, paintings, drawings, and engravings). Jackson Pollock sold his paintings, Leonard Bernstein profited from his compositions, and Lewis Carroll published his works to sell—but their creations are "unquestionably shielded." *Hurley*, 515 U.S. at 569. Indeed, to hold that pure speech for sale is not deserving of First Amendment protection would be the exception that swallows the rule. Nearly all art and expressive speech has a commercial aspect in its creation because artists' and speakers' livelihoods often depend on its sale. But a paid speaker is still a speaker. *See Riley*, 487 U.S. at 801.

(Wash. 2019), *cert. denied*, (U.S. July 2, 2021) (No. 19-333), or even custom wedding invitations, *see Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 908 (Ariz. 2019). It is obvious to even the most casual viewer that Ms. Smith is creating a customized art product—which incorporates unique, expressive speech—for her customers.

Fig. 1 – A prototype of a wedding website page design by Ms. Smith.

Yet the majority does not afford Ms. Smith's pure speech any protection, endorsing CADA's compulsion of both speech and silence. If Ms. Smith creates wedding websites for opposite-sex couples, CADA compels her to create wedding websites for same-sex couples. She does not, for example, pre-design t-shirts and set a stack of them on a shelf, available to be

picked up by any customer who walks in the store. (If that were the case, CADA's application would be uncontroversial: Ms. Smith would be required to serve *every* customer wanting to buy the pre-designed t-shirt, regardless of protected class status.) Instead, Ms. Smith's wedding websites will be custom-made, conveying both the couple's message about their wedding *and* Ms. Smith's own beliefs about and interpretation of marriage. So the majority recognizes that CADA forces artists to create individualized, expressive artwork that conveys a message betraying their beliefs—yet finds this constitutionally permissible.[5]

This departs from the explanation of a case substantially similar to this one, *Telescope Media*. *See* 936 F.3d at 750. There, the Eighth Circuit recognized that wedding videographers made videos that, "[b]y design, . . . serve as a medium for the communication of ideas about marriage" and are thus "a form of speech that is entitled to First Amendment

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[5] As long as a public-accommodation law is applied neutrally and not to expression, it is a commendable—and constitutional—effort by a state to eliminate discriminatory treatment of protected classes. *See Hurley*, 515 U.S. at 572 ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."); *Masterpiece*, 138 S. Ct. at 1728 ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment.").

protection." *Id.* at 750–51 (internal quotation marks omitted). Indeed, the Eighth Circuit acknowledged, "once conduct crosses over to speech or other expression, the government's ability to regulate it is limited." *Id.* at 755. Because the public-accommodation law thus required the videographers "to speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage," it impermissibly compelled speech. *Id.* at 752. And the Arizona Supreme Court came to a similar conclusion about custom wedding invitations. *See Brush & Nib Studio*, 448 P.3d at 914–15 (holding that Arizona's public-accommodations law had compelled the pure speech of the custom wedding invitation designers). Another federal court agreed with regard to wedding photography. *See Chelsey Nelson Photography*, 2020 WL 4745771, at *10; *but see Elane Photography*, 309 P.3d at 59 (holding New Mexico's public-accommodations law did not compel speech when enforced against wedding photographer who refused to photograph same-sex weddings).

The majority instead concludes that Ms. Smith must either agree to propound messages accepting and celebrating same-sex marriage contrary to her deeply held principles or face financial penalties and remedial training under CADA.[6] This is not a

[6] These penalties include fines between $50 and $500 for each violation, compulsory mediation, orders to comply with CADA, and requirements that the charged party take other remedial actions, including required training, reports, and posting notices "setting forth the substantive rights of the public." Colo. Rev. Stat. §§ 24-34-602(1)(a), 24-34-306, 24-34-605. But I doubt any amount of training or struggle session would make Ms. Smith amenable to violating her conscience.

meaningful choice—nor is it one Colorado can or should force her to make. *See Hurley*, 515 U.S. at 573 (recognizing the rule that the government "may not compel affirmance of a belief with which the speaker disagrees").

This is the central lesson of *Hurley*. A state may not regulate speech itself as a public accommodation under anti-discrimination laws. But CADA does so here, making Ms. Smith's artistic talents the vehicle for a message anathema to her beliefs. The expansive view Colorado takes of CADA's reach would not stop with Ms. Smith's wedding websites. Indeed, the State could wield CADA as a sword, forcing an unwilling Muslim movie director to make a film with a Zionist message or requiring an atheist muralist to accept a commission celebrating Evangelical zeal. After all, the Muslim director would make films and the atheist muralist would paint murals for the general public with other messages. And that, Colorado contends, is all that is required to force them to accommodate a customer's request if it relates to the customer's protected class status:

> [CADA] requires commercial actors to offer specific goods and services to customers regardless of protected class status only 'if, and to the extent[,]' the merchant willingly provides those goods and services to the general public. . . . *That those goods and services may involve the vendor's creative or expressive skill does not change this analysis.*

Appellee Br. at 46 (emphasis added). The majority agrees, declaring that "unique goods and services are where public accommodation laws are most necessary to ensuring equal access." Maj. Op. at 31. It appears that the path to "coercive elimination of dissent" is steep—and short. *Barnette*, 319 U.S. at 641.

Moreover, CADA compels silence. Ms. Smith would like to post on her website an honest, straightforward message about why she will only make wedding websites for weddings involving one man and one woman.[7] Endorsing same-sex marriage is a

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[7] Ms. Smith's intended statement reads in full:

> I love weddings.
>
> Each wedding is a story in itself, the story of a couple and their special love for each other.
>
> I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding – from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together.
>
> 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

message Ms. Smith will not create for any client. But CADA prevents her from informing clients of this. The State of Colorado can—and will, given its arguments throughout this litigation and given its past actions—penalize her. *See, e.g.*, *Masterpiece*, 138 S. Ct. 1719, 1726 (2018) (discussing the penalties imposed on Masterpiece Cakeshop by the Commission); *Masterpiece Cakeshop Inc. v. Elenis* (*Masterpiece II*), No.1:18-cv-02074-WYD-STV (D. Colo. Jan. 4, 2019), ECF No. 94 (order on suit regarding Colorado's second enforcement action brought against Masterpiece Cakeshop for refusing to make a birthday cake celebrating a sex-change). This reality forces Ms. Smith to stay silent about her convictions.

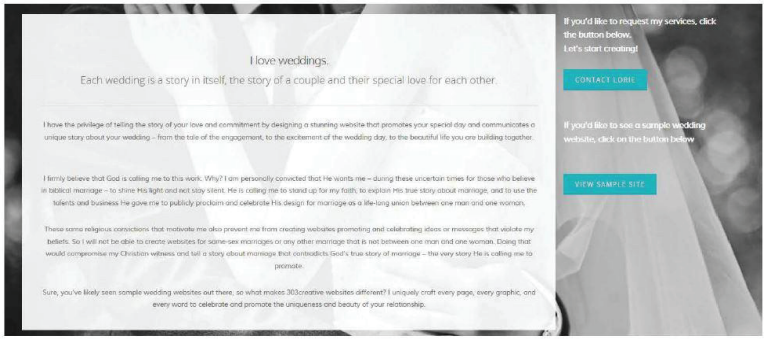

Fig. 2 – The statement Ms. Smith wishes to publish on her business's website.

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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.

Aplt. App. at 1-110.

Nor is Ms. Smith's statement intended to be derogatory or malicious. She forthrightly states her firm conviction—grounded in her Christian faith—that conscience requires her to create wedding websites only for marriages between one man and one woman. Doing otherwise, she states, would "compromise [her] Christian witness." Aplt. App. at 2-326.

Ms. Smith, like some other businesses that espouse religious sentiments, is simply informing the public that she operates her business in accordance with her faith. And as an artist, she will not create commissioned messages contrary to her beliefs. Her business is firmly nondiscriminatory. Her policy applies to *all* clients: as Ms. Smith's counsel explained at oral argument, she would not create a same-sex wedding website—even a prototype for a non-existent couple—for anyone, regardless of sexual orientation. Her statement simply informs potential clientele of the constraints of her faith, and the First Amendment protects Ms. Smith's right to do so.

C. Content- and Viewpoint-Based Restriction

Like laws that compel speech, laws that restrict speech based on content or viewpoint are also highly suspect. As applied to Ms. Smith, CADA does both.

A law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); *see also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992). This "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a

speaker conveys." *Reed*, 576 U.S. at 163 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)); *see also Aptive Env't., LLC v. Town of Castle Rock, Colo.*, 959 F.3d 961, 981–83 (10th Cir. 2020) (treating an ordinance that facially distinguished between commercial solicitation and other types of solicitation as content-based). Of course, "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* But "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163–64. Also subject to strict scrutiny are laws that are facially content-neutral but that "cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message the speech conveys.'" *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (alterations incorporated). All of these types of content-based regulations—which "target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163.

Furthermore, a law that discriminates based on viewpoint is an even more "blatant" violation of the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Because the government is regulating "speech based on 'the specific motivating ideology or the opinion or perspective of the speaker,'" it is a more "egregious

form of content discrimination." *Reed*, 576 U.S. at 168 (quoting *Rosenberger*, 515 U.S. at 829). Consequently, the "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The First Amendment thus "forbid[s] the State to exercise viewpoint discrimination," and such a regulation must undergo the strictest scrutiny. *Id.*

As the majority recognizes, CADA is indisputably a content- and viewpoint-based regulation. The "crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face." *Reed*, 576 U.S. at 165. Take, for example, the provision that requires an arbiter to—at the very least—read a challenged "communication, . . . notice, or advertisement" to determine whether it "indicates that the full and equal enjoyment" of the public accommodation "will be refused, withheld from, or denied an individual." Colo. Rev. Stat. § 24-34-601(2)(a). The permissibility of the communication depends on *what* it says—or, stated simply, its content.

Similarly, determining whether a person has been denied accommodation *because of* a protected class status requires, of course, an inquiry into the motivation behind the denial. (This is, in large part, why the Commission exists.) Because the *content* of the message determines the applicability of the statute and the *viewpoint* of the speaker determines the legality of the message, CADA is both content- and viewpoint-based. But both point to the same conclusion: "A law that is content-based on its face is subject to strict scrutiny regardless of the govern-

ment's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 576 U.S. at 165 (internal quotation marks omitted).

* * *

Whether CADA compels speech or regulates speech based on its content or discriminates against speech based on its viewpoint—or all three—one thing is clear, as the majority concedes: CADA must undergo strict scrutiny. Under a proper application of strict scrutiny, CADA fails to pass constitutional muster.

D. CADA Fails Strict Scrutiny

Although the majority properly finds CADA compels expressive speech, *see* Maj. Op. at 24, it resists the firm teaching of precedent that the resulting compulsion violates the Constitution. And even though the majority also agrees that CADA is a content-based restriction on speech, *see* Maj. Op. at 25, its permissive application of strict scrutiny is troubling. The majority tells us not to worry because Colorado has good reasons to violate Ms. Smith's conscience for the greater good. After all, she is only one person out of many. But this is misguided. *See Barnette*, 319 U.S. at 638 ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be

submitted to vote; they depend on the outcome of no elections.").

To be sure, the Supreme Court has warned that it "wish[es] to dispel the notion that strict scrutiny is strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (internal quotation marks omitted). But "it is the rare case in which a State demonstrates" that a provision passes strict scrutiny. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (internal quotation marks omitted). In the context of expressive speech, the stakes are high—so a rigorous application of strict scrutiny is vital.

As the majority acknowledges, strict scrutiny requires the government to demonstrate that the provision "is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown*, 564 U.S. at 799; *see also Pac. Gas & Elec. Co.*, 475 U.S. 1, 19 (1986) (holding that a law that compels speech is only valid if it is a "narrowly tailored means of serving a compelling state interest"). When determining whether a law is narrowly tailored, "the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). And in the free-speech context, "narrow" means the law must "avoid unnecessarily abridging speech." *See Williams-Yulee*, 575 U.S. at 444. It also means a law cannot be overinclusive, *see Brown*, 564 U.S. at 804, or underinclusive, *see Reed*, 576 U.S. at 171–72. The existence of administrable, reasonable alternatives indicate the law is not sufficiently narrow to survive the rigors of strict scrutiny. *See Ashcroft*, 542 U.S. at 666. Ultimately, the court's task

is to ensure that "speech is restricted no further than necessary to achieve the [government's] goal[.]" *Id.*

CADA is not narrowly tailored so as to survive its encroachment on First Amendment liberties. Eliminating discrimination in places of public accommodation is undeniably a compelling state interest. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent[.]"). And as a general proposition, "ensuring 'equal access to publicly available goods and services'" is also a compelling government interest. Maj. Op. at 28 (quoting *U.S. Jaycees*, 468 U.S. at 624). But ensuring access to a *particular* person's unique, artistic product—as the majority holds, *see* Maj. Op. at 33—is *not* a compelling state interest.[8] Nor does the majority

[8] In concluding that CADA is narrowly tailored, the majority appears to conflate the compelling-interest analysis with the narrow-tailoring analysis. The majority states that CADA is "narrowly tailored to Colorado's interest in ensuring access to the commercial marketplace." Maj. Op. at 33. Although the majority acknowledges that "the commercial nature of [Ms. Smith's] business does not diminish [her] speech interest," *id.* at 28, the opinion then states that this same commercial nature allows Colorado to regulate it.

But this statement—and the ensuing discussion—is not aimed at how narrowly CADA is or is not tailored; rather, it confuses the *means* (how a State accomplishes its compelling interest) with the *ends* (the State's compelling interest it seeks to further). Put differently, the majority appears to endorse the proposition that if the government's *compelling interest* is drawn narrowly enough, the government may use any means to further it. Other than pointing out how CADA is aimed at regulating commercial behavior, the majority says nothing about how

cite any case law to support this unconventional characterization of a compelling interest.

And in advancing its aims, Colorado has failed to narrowly tailor CADA so as to preserve vital speech protections. For one, CADA is overinclusive, intruding into protected speech both by compelling it and by suppressing it, as discussed above. For another, there are reasonable, practicable alternatives Colorado could implement to ensure market access while better protecting speech. Colorado could simply take seriously (and codify) its own statement that CADA allows for message-based exceptions. *See* Appellee Br. at 62 ("[T]he Commission does not interpret [CADA] to require any business owner, regardless of religious beliefs, to produce a message it would decline to produce for any customer."). This practicable alternative protects artists' speech interests while not harming the state's interest in ensuring market access. After all, the Commission claims to interpret CADA in this way already.

Alternatively, Colorado could allow artists—those who are engaged in making expressive, custom art—to select the messages they wish to create, free from fear of retribution. Or Colorado could exempt from CADA artists who create expressive speech about or for weddings, as Mississippi does. *See* Miss. Code Ann. § 11-62-5(5). Colorado could also modify its

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CADA uses the least restrictive means to accomplish its goal and "avoid[s] unnecessarily abridging speech." *See Williams-Yulee*, 575 U.S. at 444. The majority's discussion on this point merely reiterates Colorado's purportedly compelling interest in providing market access to Ms. Smith's website designs in particular.

definition of "place of public accommodation" by placing expressive businesses beyond its reach. *See* Colo. Rev. Stat. § 24-34-601(1). Indeed, CADA already excludes one type of expressive establishment: "places principally used for religious purposes." *Id.*

In any event, the majority overlooks these simple answers that would keep Colorado properly within the bounds of the Constitution. Instead, the majority allows the government to dictate what shall and shall not be said, impinging on the most vital First Amendment liberties. Rather than embracing the idea that creative, expressive works are even worthier of First Amendment protection by virtue of their originality and intrinsic worth, the majority comes to the *opposite* conclusion. It holds that "unique goods and services are where public accommodation laws are most necessary to ensuring equal access." Maj. Op. at 32. It premises this argument on the idea (novel to the First Amendment) of a "monopoly of one," characterizing the "product at issue [as] not merely 'custom-made wedding websites,' but rather 'custom-made wedding websites of the same quality and nature as those *made by [Ms. Smith]*.'" *Id.* at 30–31 (emphasis added). The majority then concludes that "monopolies present unique anti-discrimination concerns," justifying regulation of a market in which "only [Ms. Smith] exist[s]." *Id.* at 30.

But this reductive reasoning leads to absurd results. By describing custom artists as creating a monopoly of one, the majority uses the very quality that gives the art value—its expressive and singular nature—to cheapen it. In essence, the majority holds that the *more* unique a product, the more aggressively the government may regulate access to it—and thus

the *less* First Amendment protection it has.[9] This is, in a word, unprecedented. And this interpretation subverts our core understandings of the First Amendment. After all, if speech can be regulated by the government solely by reason of its novelty, nothing unique would be worth saying. And because essentially all artwork is inherently "not fungible," *id.* at 28, the scope of the majority's opinion is staggering. Taken to its logical end, the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government in the name of "ensuring access to the commercial marketplace."[10] *Id.* at 27.

In sum, I am persuaded by what Justice Jackson wrote nearly 80 years ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. These words are as true now as they were then.

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[9] This was not the conclusion reached by the *Hurley* Court. Consider what was at issue in that case: participation in the Boston St. Patrick's Day–Evacuation Day Parade. What could possibly be more unique and non-fungible than marching in this famous, storied parade? *See Hurley*, 515 U.S. at 560–61 (discussing the long history of the parade).

[10] The majority points out that its holding "does not address how CADA might apply to non-commercial activity (such as commissioning a mural for some charitable purpose)." Maj. Op. at 33 n.6. But this is surely cold comfort for the vast majority of artists, who make a living by selling their work. Artists should not have to choose to either disavow their beliefs or charitably create in order to have control over their own messages.

II. Free Exercise

The majority then turns to Ms. Smith's right to freely exercise her religious beliefs. State actions that infringe on this right enshrined in the First Amendment can range from extreme (and unconstitutional) to permissible. A short review of the legal framework demonstrates where CADA's application to Ms. Smith falls on this spectrum.

At one end of the spectrum are neutral laws that are generally applicable, which treat religious and secular entities the same. *See Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).[11] These laws are subject to rational basis

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[11] On June 17, 2021, the Supreme Court issued its opinion in *Fulton v. Philadelphia*, a case in which Philadelphia had ended its relationship with Catholic Social Services for approving foster parents because CSS's religious beliefs on marriage prevented it from approving same-sex couples. 141 S. Ct. at 1874. Although one of the issues presented was whether *Employment Division v. Smith* should be overturned, the Court held that "[t]his case falls outside *Smith*" because Philadelphia's policies were not "generally applicable." *Id.* at 1878.

Nevertheless, since *Smith*, several Supreme Court justices have written or joined in expressing doubt about *Smith*'s free exercise jurisprudence. *See, e.g.*, *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."); *Id.* at 1883 (Alito, J., concurring) (writing that "[*Smith*'s] severe holding is ripe for reexamination" and "correct[ion]"); *Id.* at 1926 (Gorsuch, J., concurring) ("*Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice."); *Kennedy v.*

review. A "law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006); *see also Smith*, 494 U.S. at 878–79. Furthermore, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (emphasis added). "[A]n individual's religious beliefs [do not] excuse him from compliance with an otherwise valid

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Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019), *denial of cert.* (Alito, J., concurring, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (writing that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause"); *City of Boerne v. Flores*, 521 U.S. 507, 548 (1997) (O'Connor, J., dissenting) (stating that "*Smith* is gravely at odds with our earlier free exercise precedents."); *id.* at 565 (Souter, J., dissenting) ("I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence."); *id.* at 566 (Breyer, J., dissenting); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment). And recent COVID-restriction-related opinions have cast doubt on *Smith*'s precedential value for cases in which a state's facially neutral regulations result in disparate treatment between secular and religious entities. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Roman Cath. Diocese of Brookyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam).

But because this case presents the "individualized exemptions" exception to *Smith*, we need not predict whether *Smith* has continued viability.

law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878–79.

But a state's discriminatory treatment—hidden in the guise of facial neutrality—may be less apparent. *See Lukumi Babalu Aye*, 508 U.S. at 534 ("Facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination."). A law may place certain secular activities in a favored category at the same time it places religious activities in a less favorable category—perhaps by denying them exemptions or excluding them from benefits or beneficial treatment. *See id.* at 537–38. But "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece*, 138 S. Ct. at 1731. As a result, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (emphasis in original); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (stating that because COVID-related capacity restrictions resulted in disparate treatment between houses of worship and some businesses, the restrictions were not neutral and generally applicable and thus subject to strict scrutiny).

The Supreme Court has identified at least two ways in which a law can lack general applicability, thereby triggering strict scrutiny review. One of these is "if [a law] prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."

Fulton, 141 S. Ct. at 1877. Such a law might be underinclusive, targeting only certain harms purportedly caused by religious conduct while permitting similar harms by others. *See Lukumi Babalu Aye*, 508 U.S. at 545–46.

The other manner in which a law may not be generally applicable is the individualized exemption exception. "A law is not generally applicable if it 'invites' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (quoting *Smith*, 494 U. S., at 884) (alterations incorporated); *see also Grace United Methodist Church*, 451 F.3d at 650. "[T]he individualized exemption exception inquiry can be summarized as follows: as long as a law remains exemptionless, it is considered generally applicable and religious groups cannot claim a right to exemption; however, when a law has secular exemptions, a challenge by a religious group becomes possible." *Grace United Methodist Church*, 451 F.3d at 650. Accordingly, this exception "is limited . . . to systems that are designed to make case-by-case determinations." *Axson-Flynn*, 356 F.3d at 1298 (finding that a university's treatment of an LDS student's right to free exercise of her religion was part of a system of individualized exemptions because it had granted an exception to a Jewish student). This is because such a system "permit[s] the government to grant exemptions based on the circumstances underlying each application" of the law. *Fulton*, 141 S. Ct. at 1877. Accordingly, "[t]o ensure that individuals do not suffer unfair treatment on the basis of religious animus, subjective assessment

systems that invite consideration of the particular circumstances behind an applicant's actions . . . trigger strict scrutiny." *Grace United Methodist Church*, 451 F.3d at 651 (internal quotation marks omitted).

At the far end of the spectrum, a state violates the right to free exercise when it expressly discriminates against—or demonstrates animus toward—religion. This type of action is subject to the "strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" (quoting *Lukumi Babalu Aye*, 508 U.S. at 533)). As Justice Kennedy wrote in another case involving CADA, "[T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece*, 138 S. Ct. at 1731. In other words, a statute that discriminates against religious beliefs or prohibits conduct *because* they are religious must pass strict scrutiny review. *Lukumi Babalu Aye*, 508 U.S. at 531–33, 546. This type of law is invalid unless it is narrowly tailored to accomplish the government's compelling interest. *See Grace United Methodist Church*, 451 F.3d at 649 ("[I]f a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise

Clause unless it is narrowly tailored to advance a compelling governmental interest.").

Given this legal framework, CADA clearly violates Ms. Smith's Free Exercise rights.

Colorado asserts that CADA is a neutral, generally applicable law because it purports to regulate only commercial conduct, or the "terms and conditions under which a business chooses to offer goods or services for sale to the public." Appellee Br. at 38. All that CADA requires of Ms. Smith, therefore, is that she "make that product or service available to all customers regardless of protected class status." Appellee Br. at 38. If CADA were enforced exactly in this even-handed manner, perhaps it would be neutral and generally applicable, and perhaps it would pass the resulting rational basis scrutiny.[12]

But this is not how CADA works. Colorado *has* allowed exceptions. In fact, the entire CADA enforcement mechanism is structured to make case-by-case determinations. *See* Maj. Op. at 6–7 (discussing investigative and adjudicative processes dictated by CADA). CADA deputizes *anyone* to file a complaint challenging a business practice, and the Commission is required to investigate and rule on each complaint individually. *Id.* There is no meaningful difference between the Commission's role in enforcing CADA here and the Commissioner's role in *Fulton* in parceling out exceptions for foster care contracts. In that case, Philadelphia's provision "incorporate[d] a system of individual exemptions, made available . . .

[12] As discussed above, 303 Creative does not deny website services based on sexual orientation.

at the sole discretion of the Commissioner." *Fulton*, 141 S. Ct. at 1878 (internal quotation marks omitted). And, as here, Philadelphia "made clear that the Commissioner 'ha[d] no intention of granting an exception'" to the Catholic charity. *Id.* (quoting the petition for certiorari). But in cases where this causes "religious hardship," held the Court, this "exception system" triggers strict scrutiny. *Id.* (quoting *Smith*, 494 U.S. at 884).

The Colorado Civil Rights Commission operates under exactly the same ad-hoc system as in *Fulton*. The Commission is the sole arbiter for handling complaints submitted to it—decreeing when a religious objection is valid[13] and when it is not, doling out punishment and reprieve based on its own standards. As the Supreme Court has made clear, "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of religious hardship without compelling reason.'" *Lukumi Babalu Aye*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884); *see also Fulton*, 141 S. Ct. at 1878; *Tandon*, 141 S. Ct. at 1296.[14] Because

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[13] Or, for that matter, whether a sex-related "restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation." Colo. Rev. Stat. § 24-34-601(3).

[14] The majority declines to apply heightened scrutiny under a hybrid-rights theory because it concludes that Ms. Smith's free speech claim fails. *See* Maj. Op. at 47. But because CADA employs case-by-case individualized exemptions, it triggers strict scrutiny, *see Lukumi Babalu Aye*, 508 U.S. at 537, not the "heightened scrutiny" required in the hybrid-rights context, *see Axson-Flynn*, 356 F.3d at 1295.

CADA's enforcement requires the Commission to make individualized assessments of complaints—

Moreover, jurists and scholars have expressed doubts as to the practical validity of *Smith*'s hybrid-rights doctrine, characterizing it as dicta, difficult to define, illogical, and untenable. *See, e.g.*, *Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J., concurring) ("And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*."); *Axson-Flynn*, 356 F.3d at 1301 ("We agree with the district court that the law regarding this controversial 'hybrid-rights' exception is not clearly established, and even this Court has recognized that '[i]t is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*.'" (quoting Swanson, 135 F.3d at 699)); *Kissinger v. Bd. of Trustees of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993) (criticizing the hybrid-rights doctrine as illogical and declining to apply it); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1122 (1990) ("[A] legal realist would tell us . . . that the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously."). And courts are "divided on the strength of the independent constitutional right claim that is required to assert a cognizable hybrid rights claim, with a number of courts, including this circuit, expressing the view that a litigant is required to assert at least a 'colorable' claim to an independent constitutional right to survive summary judgment." *Grace United Methodist Church*, 451 F.3d at 656.

Regardless, in a similar case on wedding videography, the Eighth Circuit acknowledged that the hybrid-rights doctrine supported a free speech claim that was intertwined with a free exercise claim. *See Telescope Media*, 936 F.3d at 758. But it may simply be a distinction without a difference, for as the *Telescope Media* panel stated, "it is not at all clear that the hybrid-rights doctrine will make any real difference in the end. After all, the [appellants'] free-speech claim already requires the application of strict scrutiny." *Id.* at 760. The same is true here.

which is *necessarily* structured to allow individualized exemptions for some and not for others—it must undergo strict scrutiny.

The arbitrary way in which Colorado has handed out exceptions to CADA is best demonstrated by a familiar case: *Masterpiece*. *See* 138 S. Ct. at 1730. There, the Court delivered a stinging rebuke to the Commission, declaring that its "treatment of [the baker's] case ha[d] some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729. Besides this remarkable reprimand, though, *Masterpiece* has additional relevance here with respect to the differential treatment of religious individuals. *Masterpiece*'s applicability is not, as the majority would have it, related to any animus (or lack thereof) of the Commission. Rather, it indicates how the CADA-created system of individualized exceptions is designed for—and *has already resulted in*—disparate treatment, particularly for religious speakers. For example, during the pendency of the *Masterpiece* litigation, a professing Christian man, William Jack, filed CADA complaints against three bakeries for refusing to make cakes that expressed opposition to same-sex marriage. Aplt. App. at 1-027–28; *see also Masterpiece Cakeshop*, 138 S. Ct. at 1728. But the Commission found that there was "no probable cause" to Mr. Jack's "creed" discrimination complaints because the bakeries would not have made cakes with those messages for any customer, regardless of creed. But around the same time, the Commission concluded that Masterpiece Cakeshop had violated CADA by refusing to make a cake because of the customer's status—that is, sexual

orientation. In other words, the Commission contended, the Jack cases were acceptable message-based refusals, while the Masterpiece case was an unacceptable status-based refusal.

But this evinces a failure to act neutrally toward religious belief. *Masterpiece*, 138 S. Ct. at 1730 ("Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission."). As Justice Gorsuch pointed out, the Commission "slid[ ] up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies" in coming to these inconsistent conclusions. *Id.* at 1737 (Gorsuch, J., concurring). Such "gerrymander[ing]" leads to unacceptable "results-driven reasoning" by civil authorities.[15] *Id.* at 1739. Stated more simply, the Commission cannot use different standards for

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[15] The majority disagrees, holding that Colorado may engage in "a gerrymander favoring LGBT customers, as opposed to a gerrymander disfavoring religious-speakers." Maj. Op. at 41. But in doing so, the majority places the burden on the wrong party. In a system of case-by-case adjudication *exactly like this one*—where the Commission would determine whether a person's objection to same-sex marriage is religiously motivated—strict scrutiny must apply. *See also Fulton*, 141 S. Ct. at 1878. As the Supreme Court has made clear, "the government has the burden to establish that the challenged law satisfies strict scrutiny." *Tandon*, 141 S. Ct. at 1296. The majority disregards this, stating that Ms. Smith "provide[s] no evidence that Colorado permits secularly-motivated objections to serving LGBT consumers." Maj. Op. at 41 (internal citations to *Lukumi Babalu Aye* omitted). Of course, it is the government's job to prove CADA passes muster—not Ms. Smith's.

religious individuals and non-religious individuals. *See id. at* 1737 ("But the one thing [the Commission] can't do is apply a more generous legal test to secular objections than religious ones."). This type of differential treatment is the most intolerable of the "individualized exemption" exception to *Smith*, as recognized in *Lukumi Babalu Aye.*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

And contrary to the majority's assertion, Colorado may not "gerrymander" CADA, *see* Maj. Op. at 39, to benefit a certain group when its practical effect is to violate the rights of another. *See Lukumi Babalu Aye*, 508 U.S. at 524 (invalidating ordinances where "the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs"); *id.* at 535 (determining the validity of the law by looking to the "ordinances' *operation*" (emphasis added)).

Despite all this, Colorado continues to profess that CADA allows for message-based refusals, stating: "[T]he Commission does not interpret [CADA] to require any business owner, regardless of religious beliefs, to produce a message it would decline to produce for any customer."[16] Appellee Br.

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[16] The majority states that "[m]essage-based refusals are not an 'exemption' from CADA's requirements; they are a defense." Maj. Op. at 43. This contradicts Colorado's own position that the Commission "interpret[s] [CADA]" to allow message-based refusals; if Colorado says it interprets the law this way, it provides guidance to business owners *before* a complaint is filed, not after. Such an interpretation gives notice to business owners that they may make message-based refusals without fear that they will be dragged before the Commission to present this

at 62. As Ms. Smith's counsel affirmed at oral argument, Ms. Smith would refuse to make any message celebrating same-sex marriage for *any* client, regardless of sexual orientation. This is exactly the type of refusal Colorado claims Ms. Smith can make: a message-based refusal not rooted in the identity or status of the client. But again, Colorado slides up and down the *mens rea* scale, presuming that Ms. Smith has discriminatory intent in her faith-based refusal while allowing other artists to refuse to convey messages contrary to their non-

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argument as a defense. And such an interpretation should prevent the Commission from seriously investigating any complaint based on a message-based refusal in the first instance—thus "free[ing] or releas[ing]" message-based refusals from liability under CADA. *See* Exempt, Black's Law Dictionary (11th ed. 2019).

But even assuming that the majority's characterization is correct, a defense available only to some and not others *based on protected class status* triggers strict scrutiny. The majority claims that "[o]stensibly, message-based refusals are unrelated to class-status," Maj. Op. at 43, but in CADA's enforcement history, they can and have been related to protected class status. It is precisely why the differential treatment between the secular bakeries' refusals and Jack Phillips's refusal in *Masterpiece* has enduring relevance here: because both were making a message-based refusal, Colorado demonstrated religious animus in crediting one and not the other. *Masterpiece*, 138 S. Ct. at 1731. Or imagine a Muslim muralist, contacted by a Jewish restaurant owner requesting a depiction of the Israeli flag with a Zionist message. The Muslim muralist might refuse to paint such a message—but the message is undeniably intertwined with the Jewish restaurant owner's protected religious class status. Even though "message-based refusals may be objectively defined," Maj. Op. at 44, Colorado can and does enforce its purported message-based-refusal rule in a subjective manner based on protected class status. This requires strict scrutiny review.

faith-based beliefs. Just because Ms. Smith's beliefs may seem to be a minority viewpoint to Colorado does not give it the right to presume ill-intent.[17] On the contrary, it is precisely *because* Ms. Smith's views may be in the minority that they must be afforded the greatest protection. *See Masterpiece*, 138 S. Ct. 1737 (Gorsuch, J., concurring) ("Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."); *Fulton*, 141 S. Ct. at 1925 (Alito, J., concurring) ("Suppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game."). This is the promise of the Free Exercise Clause, and it is why Colorado's treatment of Ms. Smith's religious beliefs must be rejected.

Indeed, we need only look at our own precedent. In *Axson-Flynn*, the University of Utah refused to exempt an LDS student from speaking profanity in her acting program—which she refused to do because of her religious beliefs—but *did* grant an exemption

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[17] As the Supreme Court made clear in *Obergefell*, individuals with religious convictions about marriage

> may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Obergefell v. Hodges, 576 U.S. 644, 679–80 (2015).

for a Jewish student who refused to perform on Yom Kippur. *Axson-Flynn*, 356 F.3d at 1298. Because this meant the University had a system of individualized exemptions, the panel concluded the LDS student had raised a genuine issue of material fact as to whether her case fell in the "individualized exemption" exception. In other words, the University "maintained a discretionary system of making individualized case-by-case determinations regarding who should receive exemptions from curricular requirements," indicating it was not demonstrating the requisite neutrality to the student's religious beliefs. *Id*. at 1299. Furthermore, the "'system of individualized exemptions' need not be a written policy, but rather the plaintiff may show a pattern of ad hoc discretionary decisions amounting to a 'system.'" *Id.*

By demonstrating that CADA sets up a case-by-case system for determining exceptions, Ms. Smith has shown CADA's application here must be reviewed with strict scrutiny with regard to the free exercise claims. *See Fulton*, 141 S. Ct. at 1878; *id.* at 1881 ("A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." (quoting *Lukumi*, 508 U. S. at 546)). "So long as [Colorado] can achieve its interests in a manner that does not burden religion, it must do so." *Id*. at 1881.

But for the same reasons CADA fails strict scrutiny with regard to Ms. Smith's free speech claims, it fails with regard to the free exercise claims. *See Grace United Methodist Church*, 451 F.3d at 649 ("[I]f a law that burdens a religious practice is not

neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest."). With regard to the compelling interest analysis, Colorado bears the burden of proving not that it "has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception" to Ms. Smith. *Fulton*, Slip Op. at 14. Colorado has not done so here. And with respect to the narrow tailoring analysis, Colorado must show CADA is not "the least restrictive means among available, effective alternatives." *Ashcroft*, 542 U.S. at 666. But, as discussed above, effective alternatives *do* exist. Colorado says it allows message-based refusals for religious beliefs. Given its infamous history in not administering these exceptions in a neutral way, *see Masterpiece*, 138 S. Ct. at 1729, perhaps Colorado can write this provision into CADA. Or perhaps it could exempt religious speakers when their refusal to provide a service or product is rooted in a sincerely held religious belief. Or again, Colorado could exempt faith-based artists who speak about weddings from the requirements of CADA.

When all is said and done, allowing business owners like Ms. Smith to operate in accordance with the tenets of their faiths does not damage society but enriches it. Indeed, "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." *Barnette*, 319 U.S. at 641. Religious liberty is among the purest forms of self-determination because it allows

believers to retain sovereignty of the soul. Because of this, the "Free Exercise Clause commits government itself to religious tolerance." *Lukumi Babalu Aye*, 508 U.S. at 547. Even though Colorado has not committed itself to respect this diversity, our First Amendment protects Ms. Smith.

III. Facial Challenge for Overbreadth and Vagueness

Finally, the majority fails to protect Ms. Smith from CADA's Orwellian diktat that regulates businesses based on the subjective experience of customers. CADA contains a breathtakingly broad and vague provision prohibiting "directly or indirectly" speaking in such a way that makes a customer feel "unwelcome, objectionable, unacceptable, or undesirable" because of a protected characteristic.[18] Colo. Rev. Stat. § 24-34-601(2)(a). Facially and as applied to Ms. Smith, this "Unwelcome Provision" easily flunks the requirement that fair notice be given to citizens about what can or cannot be said in exercising First Amendment rights. Like *Nineteen Eighty-Four*'s Winston Smith, CADA

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[18] It states:

> It is a discriminatory practice and unlawful for a person, . . . directly or indirectly, to [communicate] *that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable* because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry.

Colo. Rev. Stat. § 24-34-601(2)(a).

wants Lorie Smith to not only accept government approved speech but also to endorse it.

In the First Amendment context, a plaintiff may bring a facial challenge "whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010); *see also Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003) (holding that a "law's application to protected speech [must] be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications . . . before applying the 'strong medicine' of overbreadth invalidation" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). In *Stevens*, the Supreme Court held as constitutionally overbroad an animal cruelty ban that applied to any depiction in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." *Id.* at 474 (quoting the statute at issue). The Court picked through each of these words, one by one, determining whether any of these words made the statute's reach too broad. The words "wounded" and "killed" encompassed too much legal, protected conduct. *Id.* at 475–76. Even the statute's inclusion of the additional element of "accompanying acts of cruelty" did not work to contain the too-broad meaning of "wounded" and "killed." *Id.* at 474.

Nor may a statute be so impermissibly vague as to deprive a potential lawbreaker of due process. As the Supreme Court has explained:

> Vague laws offend several important values. First, because we assume that

> man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizen[s] to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (internal quotation marks omitted; alterations incorporated); *see also U.S. Jaycees*, 468 U.S. at 629 ("The void-for-vagueness doctrine reflects the principle that a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.")

(internal quotation marks omitted; alterations incorporated).

The void-for-vagueness doctrine also prevents arbitrary enforcement by government officials and properly maintains separation of powers. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring) ("Vague laws invite arbitrary power"); *id.* at 1205 ("Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions."). And when a law abridges First Amendment civil rights, it must be subjected to an especially "stringent vagueness test." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).

CADA's "do-not-offend provision" is both overbroad and vague. Begin with the provision's overbreadth. Analyzing any of the operative words—"unwelcome, objectionable, unacceptable, or undesirable"—is instructive. Take, for instance, "unwelcome." Merriam-Webster defines unwelcome as "not wanted." It surely implies a subjective element on behalf of the person who feels unwelcome. For example, an atheist who walked into a hardware store owned by a Christian might feel unwelcome if he saw a sign inside that said, "We honor God and His commandments here." This sign says nothing about the atheist's protected class status, and it certainly does not directly "indicate" that he is unwelcome. And the store's purveyors might not have hung the sign with that intent whatsoever—but the statute includes *indirect* as well as *direct* speech or conduct. This

otherwise completely innocent and lawful sign—indeed, a sign protected by the First Amendment—would fall within the provision's purview.

Or suppose a restaurant owner hung a Confederate flag outside his establishment. Given its controversial status, such a symbol might make potential patrons feel unwelcome in that restaurant, or perhaps make them feel as though the owner finds their business undesirable. But government regulation of displaying a flag as part of expressive or symbolic speech is surely subject to strict scrutiny under the First Amendment. *See Spence v. State of Washington*, 418 U.S. 405, 415 (1974) (holding the display of an United States flag upside down and with a peace sign taped on it was protected expression); *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (concluding that a man's "burning of the [United States] flag was conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment" (quoting *Spence*, 418 U.S. at 409)).

Or take "objectionable." Perhaps a Muslim shop owner hangs a sign that reads, "There is no God but Allah and Muhammad is His Prophet." A Christian who walked into the store may feel that the shopkeeper *objects* to his beliefs about Jesus Christ as his savior—which would make the sign an indirect statement that the Christian's views about Jesus Christ (or about Muhammad, for that matter) are *objectionable*. But the sign is, of course, protected speech. It takes little imagination to multiply these examples by dozens. The provision unyieldingly sweeps in substantial swaths of protected conduct and speech.

The majority's position that the Unwelcome Provision cannot be overbroad because it is couched within the Communication Clause's "primar[y] focus[] on access to goods and services," Maj. Op. at 48, is unpersuasive. For one, all of the examples above relate to access to goods and services within places of public accommodation and would be covered by both the Communication Clause and the Unwelcome Provision—yet the speech in each example is undoubtedly protected. For another, the Unwelcome Provision does not solely target *access* to goods and services: indeed, communication that an individual's mere *presence* at a place of public accommodation is unwelcome is swept into the law as well. Colo. Rev. Stat. § 24-34-601(2)(a) (prohibiting communication "that an individual's *patronage or presence* at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable" because of a protected class status (emphasis added)). Moreover, by its own terms, the Unwelcome Provision applies not only to direct but indirect communication. The majority fails to explain how its market-access theory will permissibly apply to *indirect* communication—communication that, in other words, may not even be aimed at an individual's access to a product or place of public accommodation. Is the monopolist-of-one artist required to silence herself?

As for vagueness, the examples discussed above make clear that the terms "unwelcome, objectionable, unacceptable, [and] undesirable" are too flexible in meaning to give proper notice to any reasonable person as to the provision's reach. Indeed, given the terms' subjective valence, their definitions could be nearly limitless. The Unwelcome Provision abuts

directly against "sensitive areas of basic First Amendment freedoms," thus "operat[ing] to inhibit the exercise of those freedoms." *Grayned*, 408 U.S. at 109. In verging on, or even overlapping with, protected speech, the provision has confusing and uncertain meanings that "inevitably lead citizen[s] to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id.* And given this wide latitude, Colorado state officials and courts can arbitrarily interpret the provision, parceling out punishment and mercy at whim.

Colorado says no harm, no foul. But its own statements in this litigation belie Colorado's willingness to distribute punishment inequitably. Colorado explained at oral argument that interpreting the provision would require case-by-case analysis—and that outcomes would "depend on the context." Oral Arg. at 31:50. Hanging a Confederate flag, for example, might be acceptable in "some circumstances" and not in others. *Id.* at 32:10. But Colorado offers no cognizable standard by which business owners, the Commission, or judges can determine which are which. And the provision itself does not give any clues for interpretation. Rather, the Unwelcome Provision

> leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue. Nor does the

> statute call for the application of some preexisting body of law familiar to the judicial power.

Sessions v. Dimaya, 138 S. Ct. at 1225 (Gorsuch, J., concurring). Without hints about how to apply these traditional methods of interpretation, the provision invites exactly the type of capricious enforcement prohibited by due process.

Because it cannot give proper and clear notice of what is lawful and what is not, this provision of CADA is unconstitutionally vague and overbroad.

IV. Conclusion

Lest it go unsaid in this case: We must presume Ms. Smith wants to live and speak by her faith, not discriminate against any particular group or person. We must presume she has reached her beliefs "based on decent and honorable religious or philosophical premises." *Obergefell*, 576 U.S. at 672. And we must presume that her beliefs are anything but trivial. So it is in protecting the right to hold these beliefs that we understand the true resilience of the First Amendment. The "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Barnette*, 319 U.S. at 642.

For these reasons, I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 16-cv-02372-MSK

303 CREATIVE LLC, and
LORIE SMITH,

Plaintiffs,

v.

AUBREY ELENIS,
CHARLES GARCIA,
AJAY MENON,
MIGUEL RENE ELIAS,
RICHARD LEWIS,
KENDRA ANDERSON,
SERGIO CORDOVA,
JESSICA POCOCK, and
PHIL WEISER,

Defendants.[1]

OPINION AND ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER comes before the Court pursuant to the Court's May 17, 2019 Opinion and Order Denying Motion for Summary Judgment **(# 72)**, and the Plaintiffs' brief in response **(# 74)**.

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[1] The caption of this action has been amended consistent with the Defendants' Notice of Substitution of Parties **(# 78)**.

The Court assumes the reader's familiar with the proceedings to date and the specific contents of the May 17, 2019 Order, which the Court deems incorporated herein by reference. In summary, Ms. Smith is the owner of 303 Creative, LLC ("303"),[2] and engaged in the business of creating customized wedding websites for her clients. Ms. Smith is a devout Christian, believes in "biblical marriage," and opposes the extension of marriage rights to same-sex couples. Thus, she intends to decline any request that a same-sex couple might make to her to create a wedding website. That policy would appear to violate C.R.S. § 24-34-601(2), which prohibits discrimination in the provision of goods and services on various bases, including on the basis of sexual orientation ("the Accommodations Clause"). Ms. Smith also wishes to post a statement ("the Statement") on 303's website, advising of her policy and the reasons therefor. The posting of such a statement would appear to violate a separate provision of C.R.S. § 24-34-601(2), which prohibits the publication of any communication that advises that goods or services will be refused to patrons on the basis of, among other things, sexual orientation ("the Communications Clause").

Before she posted her Statement and before any enforcement action was taken (or even threatened) against her, Ms. Smith and 303 commenced this action seeking a declaratory judgment that both the

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[2] For purposes of convenience, the Court will typically refer to both Plaintiffs jointly as either "Ms. Smith" or "303," except where it is necessary to specifically identify distinguish between them.

Accommodations Clause and the Communications Clause of C.R.S. § 24-34-601(2) violated her rights under the Free Speech and Free Exercise clauses of the First Amendment to the U.S. Constitution and the Equal Protection and Due Process clauses of the Fourteenth Amendment. This Court subsequently found that Ms. Smith could not demonstrate standing sufficient to support her challenge to the Accommodation Clause. Thus, the Court dismissed the claims directed at that clause, leaving only Ms. Smith's challenge to the Communications Clause.

Ms. Smith moved for summary judgment in her favor on her claims. In the May 17, 2019 Order, this Court denied Ms. Smith's motion. The Court further noted that, on the undisputed facts, it appeared that the Defendants were entitled to judgment in their favor on all of Ms. Smith's claims. Pursuant to Fed. R. Civ. P. 56(f), the Court advised Ms. Smith of its intention to grant summary judgment to the Defendants and invited her to submit any further briefing and evidence that she desired on the issues in the motion. Ms. Smith filed a brief **(# 74)** and certain additional factual material **(# 75)**, as well as two subsequent notices of supplemental authority **(# 76, 77)**. The Court has considered those filings and, for the reasons set forth in May 17, 2019 Order, as supplemented herein, finds that judgment in favor of the Defendants is appropriate.

The Court deems its discussion in the May 17, 2019 Order to be incorporated herein and will neither repeat nor summarize that analysis. The Court uses the instant order to address any new legal and factual arguments raised by Ms. Smith in her response brief.

Ms. Smith first argues that this Court should not assume the legality of the Accommodation Clause, and should instead analyze Ms. Smith's constitutional challenges to that statute as well when considering her Communication Clause challenges. The cases Ms. Smith cites in support of this proposition are inapposite. *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 651 n. 9 (6th Cir. 1991), involved a statute that prohibited the publication of real estate advertisements that indicate the advertiser's intention to discriminate among prospective clients and purchasers on the basis of (among others) race. A housing-oriented community group sued a newspaper under that law, arguing that the newspaper routinely published real estate advertisements that almost universally contained photos of white models (thus implicitly discouraging minorities from applying for housing). Noting in *Housing Opportunities* stands for the proposition that the court, in assessing the ban on discriminatory advertising, should not have assumed the legality of any other statute. Ms. Smith instead cites *Housing Opportunities* for a bit of dicta set forth in a footnote. After noting that the advertisements in question did not "relate[ ] to an illegal activity," the court proceeded to speculate about how its analysis might apply "if these advertisements were considered illegal." The court explained that "[w]hen analyzing the constitutional protections accorded a particular commercial message, a court starts with the content of the message and not the label given the message under the relevant statute." It goes on to state that "[s]tarting with the language of a statute would foreclose a court from ever considering the

constitutionality of particular commercial speech because the statute would label such speech illegal and thus unprotected by the first amendment. Constitutional review by a court is not so easily circumvented." 942 F.2d at 651 n. 9. But this footnote is referring to the court overlooking statutes that declare the advertisement itself to be illegal, not statutes that prohibit the conduct the advertisement is promoting. In other words, this Court does not deem Ms. Smith's Statement to propose an unlawful act simply because the Communications Clause declares the Statement to be unlawful. Consistent with *Housing Opportunities*, this Court looks past the Communications Clause's label and considers the content of the speech. But the content of Ms. Smith's speech is unlawful because it proposes an action made unlawful by an entirely different statute – the Accommodation Clause. Nothing in *Housing Opportunities* suggests that this Court should ignore the effect of an entirely different statutory provision when assessing the legality of Ms. Smith's Statement.

That principle is illustrated more clearly by *Bigelow v. Virginia*, 421 U.S. 809 (1975), the case upon which *Housing Opportunities* relies. In *Bigelow*, Virginia law prohibited the publication of any communication encouraging the procuring of an abortion. A newspaper publisher in Virginia ran an ad from a business in New York State that informed readers that "abortions are now legal in New York. There are no residency requirements. . . We will make all arrangements for you." Virginia prosecuted the publisher under its statute and the publisher, and the publisher appealed his conviction citing First Amendment protections. The Supreme Court

reversed the conviction, finding that the advertisement was commercial speech that enjoyed First Amendment protection. Addressing the argument that the advertisement forfeited First Amendment protection because it proposed an illegal act, the Supreme Court noted that abortion services were legal in New York at the time. Thus, it explained, a state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." 421 U.S. at 824-25. In other words, the Supreme Court ignored the superficial fact that Virginia law purported to declare the advertisement illegal, in the same way that this Court ignores the fact that the Communications Clause declares Ms. Smith's Statement illegal. Instead, the Supreme Court analyzed whether the content of the advertisement proposed an illegal act. In *Bigelow*, it did not because procuring an abortion was legal in New York. Here, however, Ms. Smith's Statement proposes to undertake an action that is made illegal by the Accommodation Clause, and thus, her statement forfeits First Amendment protection. More to the point however, nothing in *Bigelow* suggests that the court was required to separately assess the constitutionality of any law other than the law being enforced (the prohibition on advertising abortion services), and thus, *Bigelow* does not support Ms. Smith's contention that this Court must separately assess the constitutionality of the Accommodation Clause while it evaluates Ms. Smith's challenge to the Communications Clause.

Similarly, *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 506 (6th Cir, 2008), does not

stand for the proposition Ms. Smith asserts. There, the state passed a tax on telecommunications services, but prohibited providers from "separately stating the tax on [customers'] bill[s]." Providers challenged, on First Amendment grounds, the prohibition against advising customers of the tax as a separate line item on bills. The state defended the challenge in part by arguing that disclosing the tax on customer bills was not speech that enjoyed First Amendment protection because such speech was "illegal" – made so by the very statute the providers were challenging. "[T]hat contention simply chases the [state's] tail," the court explained, "[t]he lawfulness of the activity does not turn on the existence of the speech ban itself; otherwise, all commercial speech bans would all be constitutional." 542 F.3d at 506. Once again, *BellSouth* illustrates a principle distinct from the one that Ms. Smith is urging here. If this Court were to simply declare Ms. Smith's Statement to be devoid of First Amendment protection because the Communication Clause declared it unlawful, cases like *Bigelow* and *BellSouth* would expose that reasoning as error. But this Court has not done so. This Court finds that Ms. Smith's statement proposes an unlawful act because it proposes to do something – deny services to same-sex couples -- that a different statute, the Accommodations Clause, prohibits. Nothing in any of the cases Ms. Smith cites suggest that a party challenging an advertising ban can use that challenge to attack an entirely different statute as well (*e.g.* the providers in *BellSouth* using the advertising ban to challenge the telecommunications tax itself; the editor in *Bigelow*

using the advertising ban to challenge Virginia's ban on abortions).

As this Court has already found, Ms. Smith lacks the standing to bring a direct challenge to the Accommodations Clause. Allowing her to use a claim challenging the Communications Clause as a Trojan Horse to challenge the Accommodations clause indirectly would undermine the Court's prior finding with regard to standing. Accordingly, the Court rejects Ms. Smith's argument that this Court cannot assume the constitutionality of the Accommodations Clause when evaluating her Communications Clause claim.[3]

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[3] Because the legality of the Accommodations Clause lies outside the scope of this Court's review in this matter, Ms. Smith's reliance on *Telescope Media Group v. Lucero*, ___ F.3d ___, 2019 WL 3979621 (8th Cir., Aug. 23, 2019), is misplaced. *Telescope* involved a challenge by a film-making business and its principals who offered to create wedding videos for opposite-sex couples but whose principals opposed, on religious grounds, extending those services to same-sex couples. The plaintiffs challenge Minnesota's version of the Accommodations Clause and the 8th Circuit, in a divided opinion, reversed the District Court's dismissal of the plaintiffs' challenges. The 8th Circuit held that the creation of videos constituted First Amendment speech and that the state's interest in eradicating discrimination was not sufficiently compelling to overcome the burdens that the law placed on that speech.

Because *Telescope* dealt with a challenge to a version of the Accommodations Clause, not the Communications Clause, its analysis is not relevant here. If Ms. Smith had standing to pursue her Accommodations Clause claims, *Telescope* might be germane. But this Court has carefully limited itself to analyzing only the Communication Clause, and thus, *Telescope* provides no guidance. (In any event, to the extent that the 8th Circuit's analysis overlaps with certain portions of analysis in this Court's

Second, Ms. Smith argues that the Court's May 17, 2019 Order failed to fully consider her arguments in support of her Free Exercise claim. Specifically, she contends that the Court failed to consider "whether certain statements by members of the Colorado Civil Rights Commission . . . reveal hostility toward [Ms. Smith's] religious beliefs on marriage." (Ms. Smith is referring to the same comments that animated the Supreme Court's reasoning in *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 129-30 (2018).) But such comments are irrelevant to a pre-enforcement challenge like the one Ms. Smith brings here (as compared to a challenge to the circumstances under which the Accommodations Clause was actually enforced against Masterpiece Cake Shop). Whether the members of the Colorado Civil Rights Commission would be biased against Ms. Smith's religious beliefs or not, if Ms. Smith were cited for violating the Communications Clause, has no bearing on the question the Court considers at this time: whether Ms. Smith's Statement violates the Communications Clause as a matter of law.

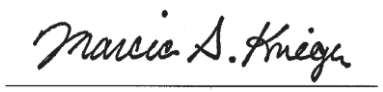
May 17, 2019 Order, this Court would simply disagree with the 8th Circuit's analysis, finding it unpersuasive.)

The Court notes that Ms. Smith appears to cite *Telescope*, in part, because it found that the plaintiffs there had standing to bring a pre-enforcement challenge to the Accommodation Clause-type statute., contrary to the finding made by this Court in this case. To the extent Ms. Smith intends her Notice of Supplemental Authority to request that the Court reconsider its September 1, 2017 Opinion and Order addressing Ms. Smith's standing to bring her Accommodation Clause challenge, the Court finds that Ms. Smith's simple citation to another case is not sufficient to meaningfully present a motion for reconsideration.

For the foregoing reasons, the Court finds that the Defendants are entitled to summary judgment on all of Ms. Smith's claims in this action. The Clerk of the Court shall enter judgment in favor of the Defendants on all claims and close this case.

Dated this 26th day of September, 2019.

BY THE COURT:



Marcia S. Krieger
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 16-cv-02372-MSK-CBS

303 CREATIVE LLC, and
LORIE SMITH,

Plaintiffs,

v.

AUBREY ELENIS,
ANTHONY ARAGON,
ULYSSES J. CHANEY,
MIGUEL RENE ELIAS,
CAROL FABRIZIO,
HEIDI HESS,
RITA LEWIS,
JESSICA POCOCK, and
PHIL WEISER,[1]

Defendants.

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR SUMMARY JUDGMENT

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[1] The Court *sua sponte* modifies the caption in this case to reflect the election of a new Colorado Attorney General since this action was commenced. Phil Wieser is substituted for Cynthia Coffman for purposes of the official capacity claims against the Colorado Attorney General.

THIS MATTER comes before the Court on the Plaintiffs' Motion for Preliminary Injunction **(# 6)** and the Plaintiffs' Motion for Summary Judgment **(# 48)**, the corresponding response and reply briefs, and the parties' recent supplemental briefing **(# 67, 68)**.

FACTS

Plaintiff Lorie Smith, through her wholly-owned company 303 Creative, LLC ("303"), is engaged generally in the fields of graphic design, website design, social media management and consultation, marketing, branding strategy, and website management training. This case concerns Ms. Smith's intention to expand 303's business into the design of custom websites for customers planning weddings – that is, websites to keep a couple's friends and family informed about the upcoming wedding.

Ms. Smith describes herself as a Christian and states that her religious beliefs are central to her identity. She believes that she must use her talents in a manner that glorifies God and that she must use her creative talents in operating 303 in a way that she believes will honor and please him. Consistent with those beliefs, Ms. Smith desire to limit the scope of her services. Although she is willing to work with all people regardless of their race, religion, gender, and sexual orientation, she "will decline any request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman." This restriction precludes

provision of wedding website services for same-sex couples.

Ms. Smith has prepared a proposed statement ("the Statement") that she intends to post on 303's website to explain 303's policies: It reads:

> I love weddings.
>
> Each wedding is a story in itself, the story of a couple and their special love for each other.
>
> I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding - from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together.
>
> 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.

Ms. Smith acknowledges that her intended website activities conflict with Colorado law, specifically C.R.S. § 24-34-601(2).[2] That statute provides:

> It is a discriminatory practice and unlawful for a person … directly or indirectly, to publish . . . any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of

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[2] An earlier iteration of Ms. Smith's claims also challenged a separate provision of C.R.S. § 24-34-601(2), insofar as that statute prohibits persons from refusing to provide services to an individual or group because of, among other things, sexual orientation (the "Accommodation Clause"). Claims relating to the Accommodation Clause were dismissed by this Court on standing grounds.

> public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of . . . sexual orientation. (Hereafter, the "Communication Clause")

Violations of the Communications Clauses are enforced administratively by the Colorado Civil Rights Commission ("CCRC") and may be independently prosecuted by the Colorado Attorney General.

Believing that these provisions of Colorado law abridge her rights under the U.S. Constitution, Ms. Smith commenced this action against the Defendants, the members of the CCRC (in their official capacities), and against Phil Weiser, Colorado's current Attorney General (also in his official capacity). At present, Ms. Smith asserts a challenge to the Communication Clause, contending that it violates the Free Speech, Free Press, and Free Exercise clauses of the First Amendment to the U.S. Constitution, and the Equal Protection and Due Process clauses of the Fourteenth Amendment. Because Ms. Smith has tendered the specific content of the Statement she intends to post, the Court treats her claims as asserting an as-applied challenge.[3]

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[3] The CCRC has not given any formal opinion regarding the legality of Ms. Smith's proposed Statement nor threatened her with prosecution if she posts it. In the wake of the Supreme Court's ruling and criticism of the CCRC in *Masterpiece*, it is unclear what, if any, enforcement action the CCRC would seek to take *if* Ms. Smith actually posted her statement. Prior to the Supreme Court's ruling in *Masterpiece*, the Court found **(# 52)** that Ms. Smith has standing to challenge the application of the Communications Clause to her proposed disclaimer. In the

Simultaneously with the Complaint, Ms. Smith sought a preliminary injunction **(#6)** to restrain the CCRC from enforcing the Communication Clause against her and 303. The parties eventually agreed that the Motion for Preliminary Injunction should be determined in conjunction with a determination on the merits through the mechanism of summary judgment. Consequently, the Plaintiffs filed their Motion for Summary Judgment **(#48)**, and the parties filed stipulated facts **(#49)**. Those facts are deemed incorporated herein and discussed in more detail below.

After briefing was completed, the United States Supreme Court granted certiorari in a case involving similar facts and legal issues and raising issues of the constitutionality of the Public Accommodation Statute. This Court deferred consideration of the issues in this case, anticipating a dispositive substantive ruling by the Supreme Court on the issues presented here. However, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*,, 138 S.Ct. 1719 (2018), the Supreme Court avoided a ruling on the merits, returning the case to the lower courts. In light of the *Masterpiece* decision (and other decisions by the Supreme Court during the same term), the parties filed supplemental briefs **(# 67, 68)**. The motions for preliminary injunction and summary judgment motions in this case are now ripe for determination.

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absence of the Defendants tendering additional facts that now call that ruling into question, the Court will continue to assume, without necessarily finding, that Ms. Smith's standing is sufficient to proceed.

For purposes of this ruling, the Court need only evaluate Ms. Smith's summary judgment motion.[4] That motion was filed prior to the Court's dismissal of any Accommodation Clause challenge, making it somewhat difficult to extract those remaining arguments that remain pertinent to the Communication Clause itself. It appears to the Court that Ms. Smith alleges that: (i) the CCRC's anticipated application of the Communication Clause to her Statement violates the Equal Protection clause of the 14th Amendment to the U.S. Constitution because the CCRC does not prosecute similarly-situated businesses expressing different religious beliefs; (ii) the Communication Clause violates the Substantive Due Process clause, in that it is vague and overbroad; (iii) the Communication Clause violates an otherwise unspecified constitutional right to "personal autonomy"; (iv) the Communication clause violates Ms. Smith's free speech rights in various ways, in violation of the First Amendment; and (iv) the Communication Clause constitutes a substantial burden on Ms. Smith's free exercise of religion, as guaranteed by the First Amendment, and does not survive strict scrutiny.

ANALYSIS

The Court begins by recognizing certain facts that are not in dispute. As is clear under the Public Accommodations Law, the Colorado legislature has determined that discrimination against persons on

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[4] Because the Court concludes that none of Ms. Smith's constitutional challenges have merit, it necessarily follows that she cannot establish a likelihood of success on the merits sufficient to support a preliminary injunction.

the basis of sexual orientation is contrary to the public interest and thus, is prohibited in this state. This case does not invite this Court to weigh in on whether that law reflects sound policy or not. Rather, it is simply a fact: it is an unlawful act for a person to discriminate against others on the basis of sexual orientation in Colorado in the circumstances covered by the Public Accommodations Law.

In addition, it appears to be undisputed that the act Ms. Smith wishes to engage in – posting the Statement on her website –would violate the Communication Clause. Ms. Smith concedes that the Statement "indicates that the full and equal enjoyment of the services" that 303 provides "will be withheld from [potential customers] because of sexual orientation" - specifically, that same-sex couples could not hire 303 to design a website for their wedding, even though opposite-sex couples could.

The Court also emphasizes that it is not deciding whether Ms. Smith has a colorable constitutional right to refuse to provide wedding website services to same-sex couples. That question implicates the Accommodation Clause of the Public Accommodations Law which is not challenged.[5] Instead, in this action the Court is limited to analyzing the constitutionality of the application of the Communication Clause. Thus, the analysis is extremely narrow. The Court assumes the constitutionality of the Accommodation Clause which prohibits discrimination against same-

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[5] The Court has already determined that Ms. Smith lacks standing to challenge anything other than the Communication Clause.

sex couples in the creation of wedding websites.[6] The only question presented at this juncture is whether the Communication Clause unconstitutionally prohibits Ms. Smith from posting the Statement, which promises (or, if one would prefer, threatens) prospective customers that she will refuse service to customers who wish her to create a wedding website for a same-sex wedding.

As to this issue the parties have stipulated to all pertinent facts, the Court applies the law to those facts to render a determination on the Plaintiffs' summary judgment motion. Fed. R. Civ. P. 56(a).

A. Summary judgment standard

Rule 56 of the Federal Rules of Civil Procedure facilitates the entry of a judgment only if no trial is necessary. *See White v. York Intern. Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary adjudication is authorized when there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Substantive law governs what facts are material and what issues must be determined. It also specifies the elements that must be proved for a given claim or defense, sets the standard of proof and identifies the party with the burden of proof. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565 (10th Cir.

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[6] Whether Ms. Smith would adhere to the representations in the Statement by refusing to actually provide website services to same-sex couples if requested is irrelevant. A violation of the Communication Clause occurs upon the posting of the offending notice or advertisement.

1989). A factual dispute is "genuine" and summary judgment is precluded if the evidence presented in support of and opposition to the motion is so contradictory that, if presented at trial, a judgment could enter for either party. *See Anderson*, 477 U.S. at 248. When considering a summary judgment motion, a court views all evidence in the light most favorable to the non-moving party, thereby favoring the right to a trial. *See Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

If the movant has the burden of proof on a claim or defense, the movant must establish every element of its claim or defense by sufficient, competent evidence. *See* Fed. R. Civ. P. 56(c)(1)(A). Once the moving party has met its burden, to avoid summary judgment the responding party must present sufficient, competent, contradictory evidence to establish a genuine factual dispute. *See Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991); *Perry v. Woodward*, 199 F.3d 1126, 1131 (10th Cir. 1999). If there is a genuine dispute as to a material fact, a trial is required. If there is no genuine dispute as to any material fact, no trial is required. The court then applies the law to the undisputed facts and enters judgment.

If the moving party does not have the burden of proof at trial, it must point to an absence of sufficient evidence to establish the claim or defense that the non-movant is obligated to prove. If the respondent comes forward with sufficient competent evidence to establish a *prima facie* claim or defense, a trial is required. If the respondent fails to produce sufficient competent evidence to establish its claim or defense, then the movant is entitled to judgment as a matter

of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Except as may be noted below, Ms. Smith generally bears the initial burden of making a *prima facie* showing that the Communication Clause infringes upon the various constitutional rights she invokes. In certain circumstances, such a showing shifts the burden of proof to the Defendants to defend the constitutionality of the statute.

B. Equal Protection Clause

The Equal Protection Clause of the 14th Amendment requires the state to treat similarly-situated persons similarly, or to provide a sufficient justification for any dissimilar treatment. As a result, an essential element of a claim of an Equal Protection violation is a showing that the plaintiff was similarly-situated to those persons that were treated more favorably. To be "similarly-situated," the plaintiff's position must be identical to the comparators "in all relevant respects," a particularly fact-intensive inquiry. *Grissom v. Roberts*, 902 F.3d 1162, 1173 (10th Cir. 2018).

Ms. Smith contends that the CCRC "ha[s] applied [the Communication Clause] only to expressive business owners like [herself] that disfavor messages promoting same-sex marriage," but, in contrast, has refused to cite business who refused requests by customers to produce products bearing a pro-religious message. Specifically, Ms. Smith points to:

• The fact that "the only business that [the CCRC has] prosecuted for declining to create speech

promoting an unwelcome message is a Christian Bakery" – that is, Masterpiece Cake Shop.

• That the CCRC refused to prosecute several complaints by a patron whose requests to "secular cake artists" to create cakes with messages criticizing same-sex marriage, promoting white supremacist messages, and denigrating the Koran were denied.

• That the CCRC "does not apply [the Communications Clause] to expressive business owners that strongly advocate the acceptance of same-sex marriage and whose messages directly or indirectly indicate that requests from religious customers with opposing beliefs would be unwelcome or denied." The evidence Ms. Smith cites in support of this contention is a website of a Colorado photographer whose webpage included photographs from a same-sex wedding, along with text that states that praises the couple involved and states that "it's just unfortunate government & religion has not always recognized [same-sex marriage]."

None of the situations identified by Ms. Smith in her briefing involve comparators who are "similarly-situated" to her in all of the pertinent respects. Her citations to the CCRC's prosecution of Masterpiece Cake Shop, and its refusal to prosecute other bakers who refused to bake particular cakes, do not implicate the Communication Clause, the sole portion of Colorado law that Ms. Smith challenges here. Situations in which a commercial entity actually refused service to a customer implicate the Accommodation Clause, but the Court has dismissed Ms. Smith's Accommodation Clause challenge. Ms. Smith's claims here are limited to challenges under

the Communication Clause, and she has not shown that the bakers she refers to "publish[ed]" any "notice or advertisement" like the Statement, indicating that certain classes of individuals would be denied the full enjoyment of those bakers' services. Thus, she is not similarly-situated to those bakers for purposes of an Equal Protection challenge to the Communication Clause.

She is also not similarly-situated to the photographer whose website promotes her willingness to photograph same-sex weddings. The photographer's website's praise of same-sex weddings gives no indication whatsoever that the photographer would refuse to photograph an opposite-sex wedding (or, for that matter, a wedding between two religious adherents).[7] Because the Communication Clause is only concerned with advertisements or messages that threaten to refuse services on discriminatory grounds, nothing in the photographer's website would violate the Communication Clause in any way. Ms. Smith's own proffered Statement is unambiguous in stating that Ms. Smith intends to refuse her services to same-sex couples: "I will not be able to create websites for same-sex marriages."[8] Thus, Ms. Smith is not

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[7] Although Ms. Smith's affidavit refers only to selected portions of the photographer's website highlighting same-sex weddings, a review of the photographer's "Portfolio" page shows that she has photographed the weddings of numerous opposite-sex couples.

[8] Because Ms. Smith brings this case as an as-applied challenge, the Court will not speculate as to whether the outcome might be different if Ms. Smith's proposed Statement limited itself to reciting her faith in general terms, without stating an express or implied intention to refuse service to certain categories of

similarly-situated to the photographer. In the absence of evidence that a similarly-situated comparator has received more favorable treatment than Ms. Smith anticipates, the Defendants are entitled to summary judgment on her Equal Protection claim.

C. Due Process Clause

Ms. Smith articulates two theories as to how the Communication Clause violates her rights under the Substantive Due Process Clause.[9]

The Court summarily rejects Ms. Smith's first challenge, which asserts that the Communication Clause is void for vagueness because its prohibition against notices or advertisements that indicate that a putative customer's patronage or presence "is unwelcome, objectionable, unacceptable, or undesirable" uses concepts that are so ill-defined as to invite the risk of arbitrary and discriminatory enforcement by the CCRC. Although the Court is unpersuaded by this argument, it need not reach it. Even if the Court were to agree that the quoted language in the Communication Clause were unconstitutionally vague and struck it, the remaining unchallenged portion of the Communication Clause would still suffice to render Ms. Smith's Statement unlawful. As noted above, Ms. Smith's Statement unambiguously states that she intends to deny

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individuals. The Court examines only the Statement in its entirety as tendered.

[9] Although her briefing refers to asserting Procedural Due Process claims as well, none of her theories fit squarely within that rubric. Thus, the Court has evaluated her arguments through the lens of the Substantive Due Process clause only.

certain services to individuals preparing for a same-sex wedding. Because unambiguous provisions of the Communication Clause clearly proscribe the message Ms. Smith seeks to convey, she cannot successfully challenge some other portion of the Communication Clause on vagueness grounds. *See Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144, 1151 (2017).

Ms. Smith's second argument is less well-defined, seemingly assembled from selective snippets extracted, without context, from various Supreme Court opinions. She asserts that she has a constitutionally-guaranteed "right to own and operate her own expressive business," and that the Communication Clause deprives her of that right. Her sources for such a claim are off-point. First, quoting *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), she argues that the Fourteenth Amendment confers upon her a constitutional right "to engage in any of the common occupations of life . . . and to worship God according to the dictates of [her] own conscience." The quoted passage is mere dicta, listing a variety of the rights that the Supreme Court has found to be secured by the concept of "liberty" guaranteed by the 14th Amendment; it also includes "the right of the individual to contract, . . . to acquire useful knowledge, to marry, establish a home and bring up children," and others. *Roth* certainly does not stand for the proposition that the 14th Amendment guarantees individuals the right to operate a business constrained only by their religious beliefs; rather, *Roth* held that a non-tenured university professor had no constitutionally-guaranteed interest in continued employment or renewal of his teaching contract,

absent a showing that the state had stigmatized him or restricted his ability to obtain other work.

She also cites *Reno v. Flores*, 507 U.S. 292, 301-02 (1993), for the proposition that "when the government infringes upon such liberty interests" – presumably the interest in engaging in an occupation and worshipping God – "courts apply strict scrutiny." *Flores* does state that strict scrutiny review applies to governmental infringements on "certain fundamental liberty interests," but the very next sentence of *Flores* is even more germane here. It emphasizes that a Substantive Due Process analysis "must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Id. Flores* refused to find that juvenile immigration detainees who lacked available relatives had a constitutionally-guaranteed right to be released to the custody of other private custodians, rather than being detained in state child-care institutions. It further noted that "the mere novelty of such a claim is reason enough to doubt that substantive due process sustains it." *Id.* at 303. Thus, to the extent *Flores* has some relevance to this case, it is not in support of Ms. Smith's vague invocation of a constitutional right to engage in a business that follows her religious beliefs instead of state law. Indeed, *Flores* suggests that the Court should exercise restraint in recognizing new constitutional rights worthy of protection under the Substantive Due Process clause. It is not enough to cobble together an asserted constitutional right from isolated sentences and clauses found scattered among various Supreme Court cases, and thus, the Court finds that Ms.

Smith's vaguely-defined Substantive Due Process claim invoking her right to operate an "expressive business" constrained only by "the dictates of her own conscience" fails.

D. "Personal autonomy"

Ms. Smith's briefing also detours into an ill-defined claim that the Communication Clause infringes upon a judicially-recognized "right of citizens to have dignity in their own distinct identity," citing *Obergefell v. Hodges*, 135 S.Ct. 2584, 2596 (2015). She argues that if cases like *Obergefell* can afford constitutional protection to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and belief," that same rationale should apply to protect "identity grounded in sincerely held religious beliefs" as well. The problem with this argument is that the Constitution already affords protections to religious beliefs pursuant to the Free Exercise and Establishment Clauses. There is little need to contort the principles underlying *Obergefell* – a case recognizing that the fundamental right to marry extends to same-sex marriages – into a new right protecting religious exercise when such protections exist within the First Amendment. Accordingly, to the extent any of Ms. Smith's claims invoke this claimed constitutional right to "personal autonomy" or "personal identity," they duplicate her other First Amendment challenges.

E. Free Speech

Ms. Smith offers several arguments as to why the Communication Clause violates the guarantee of Free Speech contained in the First Amendment. Several of

those arguments, proffered before the Court dismissed her challenge to the Accommodation Clause, are no longer viable. For example, her argument that Colorado law impermissibly compels her to speak when she would prefer to remain silent might have been cognizable as a challenge to the Accommodation Clause – that is, if a customer had actually asked her to create a same-sex wedding website and she refused – but one can hardly say that the Communication Clause compels her to speak. To the contrary, the Communication Clause prohibits Ms. Smith from engaging in the very speech she wishes to engage in: posting her Statement. Thus, the Court ignores Ms. Smith's arguments that are not germane to the Communication Clause. Similarly, Ms. Smith offers extensive argument as to whether her creation of wedding websites, like the creation of cakes in *Masterpiece*, is itself expressive conduct entitled to constitutional protection. Again, because this case has been narrowed to address only the Communication Clause, the Court does not reach that issue. The sole question before this Court concerns the Statement that Ms. Smith wishes to post on 303's website. Thus, the Court turns to those arguments by Ms. Smith that are germane to that limited issue.

1. Content-neutrality

Ms. Smith's first pertinent argument is that the Communication Clause acts as an impermissible content-related restriction on her proposed speech in the Statement. As a general rule, the government is prohibited from regulating speech based upon its content or the particular message it conveys. Such content-based restrictions are presumptively unconstitutional, and the government bears the

burden of showing that they are narrowly-tailored to serve compelling governmental interests. *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

However, the Supreme Court has recognized that the government may engage in a content-based restriction to prohibit speech that proposes an illegal act or transaction. In *Pittsburgh Press Co. v. Human Relations Commn.*, 413 U.S. 376 (1973), the City of Pittsburgh's Human Relations Ordinance prohibited, among other things, discrimination in employment on the basis of sex. In furtherance of that proscription, the city's Human Relations Commission promulgated an ordinance that prohibited employers from "publish[ing] or circulat[ing] any notice or advertisement relating to employment . . . which indicates any discrimination because of sex," and further prohibited any person from assisting an employer in doing any act that violated the ordinance. The Commission prosecuted a newspaper publisher that published "help wanted" classified ads that were categorized separately as jobs of "Male Interest" and "Female Interest" based on the employer's specifications. The newspaper challenged the ordinance as violating the First Amendment. *Id.* at 378-80.

The Supreme Court rejected the newspaper's First Amendment challenge. It stated that "we have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." It conceded that unlawful sex discrimination might be "less overt" than those examples, but no different in principle: such discrimination was prohibited by the ordinance

and the legality of such a prohibition was not subject to challenge in the case. The Court held that "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at 388-89.

More recently, the Supreme Court hinted that this same line of analysis remains viable (albeit under a somewhat different rubric). In *R.A.V.*, the Court implied that "sexually derogatory 'fighting words'" could be regulated by the government because they "may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." 505 U.S. at 389-90. *R.A.V.* suggested that such a regulation would be valid under the Court's "secondary effects" jurisprudence – that [w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.*

These cases suggest that the Communication Clause, although nominally content-based, nevertheless survives constitutional scrutiny (so long as the Accommodation Clause is constitutional, which this Court assumes it is for purposes of this ruling). Much as the extant law in *Pittsburgh Press* prohibited sex discrimination, it is undisputed here that Colorado law prohibits discrimination on the basis of sexual orientation in the provision of public accommodations like those provided by 303. Thus, Ms. Smith's Statement expressing her intention to

engage in such discrimination, like the newspaper's advertising of sex-segregated jobs, is a statement promoting an act that is illegal. *Pittsburgh Press* makes clear that the government's ability to regulate unlawful economic activity allows it to prohibit advertisements of this type, even if it must do so by defining the prohibited message based on its content. *R.A.V.* reinforces this idea: the government may prohibit speech that would violate duly enacted anti-discrimination laws, even if it does so by reference to the speech's content, because the government's target is not the speech's "expressive content" but rather its tendency to cause the prohibited discrimination. The same concerns clearly underlie the Communications Clause here: the CCRC is not targeting Ms. Smith because of the expressive content of her Statement – that is, her professed love of weddings or even her belief that God calls her to make wedding websites. It targets her because her express statement that she "will not . . . create websites for same-sex marriages" is a specific promise to engage in unlawful discrimination against customers based on their sexual orientation.[10] In such circumstances, the analysis of *Pittsburgh Press* (and the dicta of *R.A.V.*) make clear that the Communication Clause does not run afoul of the Free Speech clause of the First Amendment.

2. Overbreadth

Ms. Smith also makes a somewhat unclear argument that the Communication Clause is over-

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[10] Once again, this Court expresses no opinion as to whether a differently-worded Statement might be analyzed differently.

broad because it potentially applies to "newspapers, book publishers, printers, web designers, and other creative professionals who deal in pure speech." She argues that these types of businesses – presumably of which she considers 303 to be one – "have the constitutional right to (1) create speech that accords with their beliefs; (2) solicit the expressive work they desire, and (3) decline to create speech with which they disagree."

This argument fails to hit the Communication Clause target. The Communication Clause simply prohibits Ms. Smith from stating that she will not provide 303's wedding website services to same-sex couples. It does not prohibit her form "solicit[ing] expressive work" – presumably wedding websites – generally, nor does it appear to prohibit her from "creat[ing] speech that accords with" her love of God or her view of the significance of marriage. And, as noted above, noting in the Communication Clause compels her to "create" any speech that she might disagree with, it simply prevents her from stating her intention to unlawfully discriminate. As such, the Court sees no colorable overbreadth challenge that Ms. Smith can bring against the Communication Clause.

3. Free speech vs. Nondiscrimination laws

Finally, Ms. Smith argues that "where free speech and nondiscrimination laws come into conflict, free speech wins," and thus, the Court should strike down any anti-discrimination law, including the Communications Clause, that purports to prohibit or regulate otherwise expressive speech. Pithy as it may be, Ms.

Smith's argument is not an accurate statement of the law.

Cases like *Pittsburgh Press* make clear that the government's interest in eradicating unlawful discrimination trumps the free speech rights of a person who wishes to advertise their willingness to unlawfully discriminate. Similarly, statutes like Title VII may expose a speaker or employer to liability for engaging in discriminatory remarks or comments that could be argued to constitute protected First Amendment speech, yet no court has ever declared that Title VII must yield to a speaker's constitutional right to utter discriminatory speech in the workplace. In *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), an employer accused of discriminating against female candidates for partnership argued that Title VII's anti-discrimination policies violated its First Amendment right to freedom of association. The Supreme Court disagreed, explaining that "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *See also Baty v. Willamette Industries, Inc.*, 172 F.3d 1232, 1246 (10th Cir. 1999) (" Title VII, in general, does not contravene the First Amendment"); *R.A.V.*, *supra* (acknowledging that Title VII's anti-discrimination requirements might justify content-based restrictions on otherwise-protected speech).

To be sure, there have been occasions where First Amendment speech or associational rights have been found to prevail over the application of state anti-discrimination laws. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557

(1995), the Supreme Court weighed the tension between a state law requiring non-discrimination on the basis of sexual orientation in public accommodations and the free expression rights of the organizers of a St. Patrick's Day parade who refused to allow a unit of gay and lesbian marchers to participate. The trial court ruled in favor of the marchers, ordering the organizers to allow the marchers in the parade. On appeal, the Supreme Court reversed. It drew a careful distinction between the public accommodation of the parade itself – which gay and lesbian individuals could participate in as, say, members of marching bands or other social groups invited to march – and the organizers' message embodied by the parade as a whole. "The state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation," the Court explained, such that "any contingent of protected individuals with a message would have the right to participate in petitioners' speech." Doing so would deprive the organizers of the ability to choose the content of the message the parade was to convey. 515 U.S. at 573. The Court acknowledged that the anti-discrimination law in question served a valuable purpose in ensuring that gay and lesbian individuals would have equal access to public accommodations, but held that it could not be applied to expressive activity where "its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose." *Id.* at 578.

But *Hurley* acknowledges limits in application of its teachings. It notes that "the State may at time prescribe what shall be orthodox in commercial

advertising by requiring the dissemination of purely factual and uncontroversial information," expressly citing *Pittsburgh Press*, among others. 515 U.S. at 573. *Hurley* states that "outside that context" – commercial advertising – the government "may not compel affirmance of a belief with which the speaker disagrees," implicitly suggesting that within the realm of commercial advertising, the state may require a speaker to acknowledge the state's non-discrimination objectives (even if the speaker does not subjectively believe in them). *Id.* Here, the Communications Clause is expressly directed at advertising and other written promotional messages concerning public accommodations and services. Measured by the Supreme Court's reasoning, Ms. Smith's claims fall within the ambit of *Pittsburgh Press* analysis, rather than that found in *Hurley*. As explained above, *Pittsburgh Press* holds that an advertiser's speech rights must yield to the state's anti-discrimination interests. Because Ms. Smith's posting of the Statement occurs in the context of advertising or promoting the business of 303 (and not, say, in Ms. Smith's own private website or social media page), the same result applies. Thus, Ms. Smith's free speech challenge to the Communication Clause fails.

F. Free Exercise

Finally, the Court comes to that portion of the First Amendment that guarantees Ms. Smith the right to engage in the free exercise of her religious beliefs. The Court accepts as true that Ms. Smith's objections to same-sex marriage derive from her religious beliefs and are sincerely held. The Court will also assume (without necessarily finding) that the

Communication Clause's prohibition against Ms. Smith announcing the effects of her religious beliefs via 303's advertising constitutes a substantial burden on Ms. Smith's exercise of her religious beliefs.

The level of scrutiny applied to a state law like the Communications Clause depends on whether the law is one of general applicability whose burden on religious exercise is only incidental or whether the law is one that specifically seeks to regulate conduct because of that conduct's religious motivation. That distinction is aptly demonstrated by *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

In *Smith*, the plaintiff was an adherent of the Native American Church. He participated in rituals of that church that included followers ingesting peyote, a psychedelic plant that was regulated by federal and state law as a controlled substance. When his employer, a drug rehabilitation organization, learned of his peyote use, it terminated his employment. The plaintiff then applied for unemployment benefits from the State of Oregon, but the state found that his unlawful use of a controlled substance constituted "misconduct" that disqualified him from receiving such benefits. The plaintiff sued the state, arguing that denial of benefits violated his free exercise rights under the First Amendment. In assessing the interplay between the state law prohibiting the use of controlled substances and the plaintiff's use of peyote in exercise of his religious beliefs, the Supreme Court began by recognizing that a state would likely be violating the First Amendment if it prohibited certain acts – such as the use of a

particular substance – "only when they are engaged in for religious reasons or only because of the religious belief that they display." 494 U.S. at 877-78 (emphasis added). But it drew a distinction between that situation and a state law requiring "an individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious beliefs forbid (or requires)." *Id.* at 878. In the latter situation, the Court explained, "prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision." *Id.* Because the prohibition on the use of peyote was a law of general applicability, applying to all persons in Oregon and enacted for reasons unrelated to religious suppression, the Court affirmed the denial of benefits to Mr. Smith, even though the law had the incidental effect of suppressing his religious exercise. Put differently, the Court refused to grant Mr. Smith a religious exemption to an otherwise valid law of general applicability.

In *Lukumi*, the religion in question was Santeria, a faith whose rituals included the practice of animal sacrifice. When members of the church announced an intention to found a house of worship in the city of Hialeah, Florida, city officials expressed "concern . . . that certain religions may propose to engage in practices which are inconsistent with public morals, peace, and safety." Thereafter, the city enacted several ordinances that prohibited, among other things, the killing of an animal "in a public or private ritual or ceremony not for the primary purpose of food consumption." The church sued to overturn the ordinances as a violation of its free exercise rights.

The Supreme Court summarized its prior rule in *Smith* as stating that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." 508 U.S. at 531. But it held that a law that was not both "of general applicability" and "neutral" would be subject to strict scrutiny, requiring the government to demonstrate a compelling interest and narrow tailoring. The Court found that the ordinances in question were not "neutral," because they were specifically directed at animal sacrifices because of their religious motivation, hence the city's use of words like "ritual" and "sacrifice." The Court also found that the law was not one of "general applicability," because they were carefully drafted only to target religiously-motivated animal killings and not, say, animal killings resulting from sport fishing and the euthanizing of stray animals. Thus, the Court held that the ordinances should be subject to strict scrutiny and, upon such scrutiny, struck them down.

Here, there Communication Clause is both neutral and of general applicability. Unlike the ordinances in *Lukumi*, there is no suggestion that it is not neutral – that is, that it was specifically enacted in response to and with the purpose of frustrating anyone's religious exercise. In 2008, the Colorado legislature added sexual orientation as a prohibited basis for discrimination in Colorado's existing anti-discrimination framework governing public accommodations, housing, employment, club licensing, juror service, and various other incidents of daily life. 2008 Colo. Legis. Serv. Ch. 341 (S.B. 08-022). The parties

have not proffered any legislative history that addresses the reasons for the legislature's actions in 2008, although it is notable that Section 1 of S.B 08-200 provides that "the general assembly hereby finds, determines, and declares that nothing in this act is intended to impede or otherwise limit the protections contained in section 4 of article II of the state constitution concerning the free exercise and enjoyment of religious profession and worship," suggesting that the legislature's goal was not to suppress religious exercise.

Moreover, the Communications Clause has general applicability, regulating the statements that discriminate against same-sex couples regardless of whether such statements are based on religious or other beliefs. There is nothing inherent in discrimination on the basis of sexual orientation that suggests that such a practice is necessarily linked to a particular religion or with religion itself. The Communications Clause is equally applicable to sexual orientation discrimination that arises from purely secular prejudices – for example based on fears that homosexuals will transmit HIV/AIDS, will transmit homosexuality itself, will attempt to "convert" heterosexuals to a "gay lifestyle", will engage in pederasty or rape or other forms of sexual licentiousness, will cause society's extinction because they do nor reproduce, and so on. Such views can exist independently from any religious belief. Thus, a law that seeks to eradicate sexual orientation discrimination is not inherently a law that targets religious exercise; rather, it is a law of general applicability that only incidentally affects those whose opposition

to same-sex marriage springs from religious, not merely secular, objections.

Neutral laws of general applicability will be upheld against First Amendment challenge if the government demonstrates that the law is rationally related to a legitimate governmental interest. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006). Ms. Smith does not contend that the Communication Clause does not satisfy this deferential standard. Indeed, states have a paramount interest in protecting historically-disfavored groups from discrimination in the provision of public services.[11] *See e.g. R.A.V.*, 505 U.S. at 395 (stating that "we do not doubt" that the state interests in "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination . . . are compelling"); *Board of Directors of Rotary Intl. v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (recognizing compelling state interest in "eliminating discrimination against women"). If the state's interest in preventing discrimination on the basis of sexual orientation is compelling, it necessarily must follow that the state has a similarly-compelling interest in preventing persons or businesses from threatening to do that which the law prohibits. For example, the

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[11] Ms. Smith has not argued that the State of Colorado's decision to extend antidiscrimination protection on the basis of sexual orientation presents a less compelling governmental interest than does extending anti-discrimination protections to other protected classes. Cases like *Obergefell* and *Lawrence v. Texas*, 539 U.S. 558 (2003), make it abundantly clear that same-sex couples enjoy the same rights to equal protection of the laws as others.

state's interest in prohibiting businesses from engaging in racial discrimination would be rendered a mockery if businesses could nevertheless post a "WHITES ONLY" sign near the entrance to the business with the intent of discouraging patronage, even if the proprietors agreed to admit any minority individuals who dared to ignore the sign and seek entrance. Thus, the Court finds that the Communication Clause is supported by an important (indeed, compelling) state interest in discouraging discrimination against protected groups. For the same reasons, the Court also finds that the Communication Clause is rationally related to the state's interest in discouraging discrimination in the provision of public accommodations and business services.[12]

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[12] Were the Court to instead apply strict scrutiny analysis to the Communication Clause, as Ms. Smith proposes it should, its conclusion would remain the same. The state's interest in discouraging discrimination in public services is not only important, it is also compelling. Although the parties offer a minimal factual record on this point, the Court is hard-pressed to conceive of a less-restrictive means by which the state could serve that interest than by prohibiting business owners from advertising their intention to engage in acts of discrimination that are prohibited by law.

Ms. Smith proposes that Colorado could impose less-restrictive measures by, say, applying the Communication Clause only to threats by business owners to discriminate in providing employment, rather than other services. (Ms. Smith distinguishes between "the means by which citizens support their families" and "pure luxur[ies]" such as wedding websites.) But in doing so, she ignores the scope of the Accommodation Clause. The state's compelling interest in it is to ensure that citizens can access all types of public accommodations without discrimination. It makes no distinction between necessary and

Accordingly, Ms. Smith cannot show that the Communication Clause violates her free exercise rights under the First Amendment.

G. Order to Show Cause

Pursuant to Fed. R. Civ. P. 56(f), where consideration of a motion for summary judgment appears to indicate that not only should the motion be denied but that it may also be appropriate to enter judgment in favor of the non-movant, the Court should give the parties notice and an opportunity to be heard as to why such judgment should not be entered.

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luxury services. Because the Court must assume its constitutionality, and it is evident that the Communications Clause is designed to serve the same purposes, the measures that Ms. Smith suggests would be impermissibly narrow.

Ms. Smith also suggests that the state does not need a Communication Clause for industries where there are many competing providers and "powerful market forces weigh in favor" of those businesses providing services without discrimination. In short, Ms. Smith suggests that because there are many wedding website providers who don't discriminate on the basis of sexual orientation, same-sex couples would not be harmed if only she (and presumably like-minded website creators) were allowed to promote their intention to do so. As the Court explained in *Fulton v. City of Philadelphia*, ___ F.3d ___, 2019 WL 1758355 (3d. Cir. Apr. 22, 2019), "[t]he government's interest lies not in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do." Thus, exempting Ms. Smith from the Communication Clause simply because she is one of only a few business owners that wish to engage in unlawful discrimination is not a less-restrictive means of achieving the state's compelling interest in eradicating discrimination altogether.

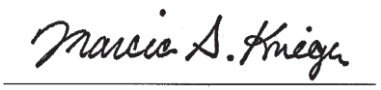
Here, the parties represented to the Court on January 11, 2017 that all of the pertinent evidence necessary for resolving the motions for injunctive relief and summary judgment were undisputed and that the matters could be decided entirely on briefs. Having now had the opportunity to consider the parties' stipulated facts, and in light of the analysis above, it would appear to the Court that it is appropriate to enter summary judgment in favor of the Defendants on all claims. Accordingly, within 21 days of this Order, the Plaintiffs shall show cause why summary judgment should not be entered in favor of the Defendants.

CONCLUSION

For the foregoing reasons, the Court **DENIES** the Plaintiffs' Motion for Preliminary Injunction **(# 6)** and Motion for Summary Judgment **(# 48)**.

Dated this 17th day of May, 2019.

BY THE COURT:



Marcia S. Krieger
Senior United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

August 14, 2018
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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303 CREATIVE LLC, a limited liability company; LORIE SMITH,

Plaintiffs – Appellants,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity; ANTHONY ARAGON, member of the Colorado Civil Rights Commission, in his official capacity; ULYSSES J. CHANEY, member of the Colorado Civil Rights Commission, in his official capacity; MIGUEL RENE ELIAS, member of the Colorado Civil Rights Commission, in his

No. 17-1344

(D.C. No. 1:16-cv-02372-MSK-CBS)

(D. Colo.)

official capacity; CAROL FABRIZIO, member of the Colorado Civil Rights Commission, in her official capacity; HEIDI HESS, member of the Colorado Civil Rights Commission, in her official capacity; RITA LEWIS, member of the Colorado Civil Rights Commission, in her official capacity; JESSICA POCOCK, member of the Colorado Civil Rights Commission, in her official capacity; CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity,

Defendants – Appellees

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ORDER AND JUDGMENT*

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument wouldn't materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

Before **McHUGH, KELLY** and **MORITZ**, Circuit Judges.

Plaintiffs 303 Creative LLC and Lorie Smith sued various Colorado officials (collectively, the state) to preempt them from enforcing certain parts of the Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. § 24-34-601. The plaintiffs say the CADA interferes with their plan to design wedding websites for opposite-sex—but not same-sex—couples. Although there are some pertinent differences, the facts and legal issues in this case overlap substantially with those in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), which the Supreme Court recently decided.

The plaintiffs in this case moved for a preliminary injunction below. The district court suggested it expedite the litigation by ruling on summary judgment in conjunction with the preliminary injunction based on stipulated facts. The parties agreed. The district court then issued an order dismissing several of the plaintiffs' claims for lack of standing. And it decided not to reach the merits of the plaintiffs' remaining claims while *Masterpiece Cakeshop* was pending before the Supreme Court. It explained:

> The parties have agreed that the case is at issue and that the Preliminary Injunction Motion and Motion for Summary Judgment should be determined together in resolution of the matters in dispute on the merits. Although the [p]laintiffs have standing to

> challenge [part of the CADA], the [c]ourt declines to rule on the merits due to the pendency of *Masterpiece Cakeshop* . . . before the United States Supreme Court. As noted, the factual and legal similarities between *Masterpiece Cakeshop* and this case are striking. It is likely that a determination by the Supreme Court will either guide determination of or eliminate the need for resolution of the issues in this case . . . .
>
> Further, the [c]ourt finds that the parties will not be prejudiced by delay in resolution of the issues in this case. The [p]laintiffs are not currently offering to build wedding websites, and no evidence has been presented to show that their financial viability is threatened if they do not begin offering to do so. Thus, the [c]ourt denies the Motions for Preliminary Injunction and Summary Judgment with leave to renew after ruling by the United States Supreme Court in *Masterpiece Cakeshop*.

App. vol. 3, 375.

The plaintiffs appealed this order. The state moved to dismiss this appeal for lack of appellate jurisdiction. We reserved judgment on that motion and the parties proceeded with their merits briefing. Then, while this appeal was pending, the Supreme Court announced its decision in *Masterpiece Cakeshop*. We ordered supplemental briefing on how that decision both affected our appellate jurisdiction and the merits of this appeal.

Meanwhile, the plaintiffs renewed their motions for a preliminary injunction and summary judgment in the district court, as the district court invited them to do in its original order. The district court also ordered supplemental briefing addressing *Masterpiece Cakeshop*. The parties submitted their supplemental briefs to the district court the same day they submitted their supplemental briefs to us.

In light of these developments, we now rule on the state's pending motion to dismiss.

Ordinarily, we only have jurisdiction to hear appeals from final orders in the district court. *See* 28 U.S.C. § 1291. But the plaintiffs argue we have jurisdiction in this case under 28 U.S.C. § 1292(a)(1), which grants us jurisdiction over certain interlocutory orders, including those that "refus[e] . . . injunctions." As they see it, the district court's order both expressly and effectively refused their preliminary-injunction request, so it's appealable under § 1292(a)(1). The state urges us to view the order as a temporary stay that isn't subject to appeal, especially now that the stay has expired.

Although we recognize that the district court used the word "denies" in reference to the plaintiffs' motion for a preliminary injunction, App. vol. 3, 375, we agree with the state that the order is properly characterized as a stay, *see Forest Guardians v. Babbitt*, 174 F.3d 1178, 1185 n.11 (10th Cir. 1999) ("The labels of the plaintiff and the district court cannot be dispositive of whether an injunction has been requested or denied."). After all, the district court expressly declined to reach the merits of the plaintiffs' arguments and granted the plaintiffs leave to renew

their motion once the Supreme Court decided *Masterpiece Cakeshop*. Nevertheless, the plaintiffs argue that we had appellate jurisdiction while the stay was in effect to the extent that the stay "had the 'practical effect' of refusing [the] plaintiffs' injunction." *Forest Guardians*, 174 F.3d at 1185 (quoting *Carson v. Am. Brands, Inc.* 450 U.S. 79, 84 (1981)). But even if this court initially had jurisdiction, the stay has since expired, and the appeal is now moot. *See Video Tutorial Servs., Inc. v. MCI Telecomm. Corp.*, 79 F.3d 3, 5 (2d Cir. 1996) ("An interlocutory appeal from a temporary stay no longer in effect . . . is the paradigm of a moot appeal.").

Moreover, even if we were to read the district court's order as refusing the injunction, the district court effectively vacated that order upon the Supreme Court's decision in *Masterpiece Cakeshop*, and it now appears ready to reconsider the plaintiffs' motion for a preliminary injunction. Thus, this appeal is moot regardless of how we interpret the district court's order. *See Primas v. City of Okla. City*, 958 F.2d 1506, 1513 (10th Cir. 1992) (dismissing interlocutory appeal as moot because district court vacated order appealed from). The plaintiffs' actions below in renewing their preliminary-injunction motion and filing supplemental briefing in support of it are inconsistent with any argument to the contrary. Accordingly, we conclude that we lack jurisdiction under § 1292(a)(1) to review the plaintiffs' preliminary-injunction motion.

The plaintiffs also seek to appeal the portion of the district court's order dismissing some of their

claims for lack of standing.[1] They argue we have pendent appellate jurisdiction over this part of the order. *See Berrey v. Asarco Inc.*, 439 F.3d 636, 647 (10th Cir. 2006) ("It is appropriate to exercise pendent appellate jurisdiction . . . where resolution of the appealable issue necessarily resolves the nonappealable issue, or where review of the nonappealable issue is necessary to ensure meaningful review of the appealable one."). But because we lack appellate jurisdiction over the portion of the order staying the preliminary-injunction motion, we cannot exercise pendent jurisdiction over any other part of the order. *See Shinault v. Cleveland Cty. Bd. of Cty. Comm'rs*, 82 F.3d 367, 371 (10th Cir. 1996). And because the plaintiffs don't assert an alternative basis for us to review the partial dismissal, we dismiss the plaintiffs' appeal in its entirety. *See EEOC v. PJ Utah, LLC*, 822 F.3d 536, 542 n.7 (10th Cir. 2016) (explaining appellant has burden of establishing appellate jurisdiction).

Therefore, even assuming we once had jurisdiction to hear this appeal, we conclude it is now moot. Accordingly, we grant the state's motion to dismiss this appeal for lack of jurisdiction.

Entered for the Court

Nancy L. Moritz
Circuit Judge

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[1] The plaintiffs initially appealed the portion of the district court's order denying (pending *Masterpiece Cakeshop*) summary judgment as well. But they abandoned this part of their appeal in their supplemental brief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 16-cv-02372-MSK-CBS

303 CREATIVE LLC, a limited liability company; LORIE SMITH,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity;
ANTHONY ARAGON, member of the Colorado Civil Rights Commission in his official capacity;
ULYSSES J. CHANEY, member of the Colorado Civil Rights Commission in his official capacity;
MIGUEL RENE ELIAS, "Michael" member of the Colorado Civil Rights Commission in his official capacity;
CAROL FABRIZIO, member of the Colorado Civil Rights Commission in her official capacity;
HEIDI HESS, member of the Colorado Civil Rights Commission in her official capacity;
RITA LEWIS, member of the Colorado Civil Rights Commission in her official capacity;
JESSICA POCOCK, member of the Colorado Civil Rights Commission in her official capacity;
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS and DENYING MOTION FOR PRELIMINARY INJUNCTION and MOTION FOR SUMMARY JUDGMENT, WITH LEAVE TO RENEW

THIS MATTER comes before the Court on the Plaintiffs' Motion for Preliminary Injunction **(#6)**, the Defendants' Response **(#38)**, and the Plaintiffs' Reply **(#40)**; the Defendants' Motion to Dismiss **(#37)**, the Plaintiffs' Response **(#43)**, and the Defendants' Reply **(#45)**; and the Plaintiffs' Motion for Summary Judgment **(#48)**, the Defendants' Response **(#50)**, and the Plaintiffs' Reply **(#51)**.

PROCEDURAL HISTORY

Plaintiffs 303 Creative LLC ("303") and Lorie Smith filed this action challenging the constitutionality of two clauses of Colorado Revised Statues § 24-34-601(2) ("Public Accommodation Statute"). The two clauses at issue are as follows:

The first clause ("Accommodation Clause") states,

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation

> The second clause ("Communication Clause") states,
>
> > It is a discriminatory practice and unlawful for a person … directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.
>
> Colo. Rev. Stat. § 24-34-601(2)(a).

The Complaint actually asserts five claims challenging the validity of the Communication Clause under several provisions of the United States Constitution: the (1) Free Speech Clause, (2) Free Press Clause, and (3) Free Exercise Clause of the First Amendment, and (4) the Equal Protection Clause and (5) Due Process Clause of the Fourteenth Amendment. The Complaint also asserts four claims challenging the validity of the Accommodation Clause under the (1) Free Speech Clause and (2) Free Exercise Clause of the First Amendment, and the (3) Equal Protection Clause and (4) Due Process Clause of the Fourteenth Amendment.

Simultaneously with the Complaint, the Plaintiffs sought a preliminary injunction **(#6)** to restrain the Defendants from enforcing either statutory provision against them. The Defendants then moved to dismiss the Plaintiffs' claims **(#37)**. At a hearing held on January 11, 2017, the parties agreed that (1) the Motion for Preliminary Injunction should be determined in conjunction with a determination on the merits; and (2) there were no disputed issues of material fact, no need for discovery, and this matter should be resolved through summary judgment. Consequently, the Plaintiffs filed their Motion for Summary Judgment **(#48)**, and the parties filed stipulated facts **(#49)**.

However, after briefing was completed on the Plaintiffs' Motion for Summary Judgment, the United States Supreme Court granted certiorari in a case involving similar facts and legal issues and raising issues of the constitutionality of the Public Accommodation Statute. In *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), *cert* granted, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 85 U.S.L.W. 3593 (U.S. June 26, 2017) (No. 16-111), a baker, citing religious objections, declined to bake a wedding cake for a same-sex couple and was prosecuted under the Public Accommodation Statute. The issues to be determined by the Supreme Court in that case are whether compelling the baker to provide services for a same-sex wedding under the Public Accommodation Statute violates the Free Speech Clause or Free Exercise Clause of the First Amendment, which are essentially identical to two of the issues presented in this action.

UNDISPUTED FACTS

The facts in this matter are not in dispute. The Court offers a brief summary of the pertinent facts here and elaborates as necessary in its analysis.

303 is a Colorado limited liability company that is wholly owned and operated by Ms. Smith. Defendant Aubrey Elenis is the Director of the Colorado Civil Rights Division. Defendants Anthony Aragon, Ulysses J. Chaney, Miguel "Michael" Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, and Jessica Pocock are members of the Colorado Civil Rights Commission ("Commission"). Defendant Cynthia H. Coffman is the Colorado Attorney General.

303 offers services to the general public, including graphic design, website design, social media management and consultation, marketing, branding strategy, and website management training. Ms. Smith provides these services for 303 without the assistance of employees or contractors.

Ms. Smith describes herself as a Christian and states that her religious beliefs are central to her identity. She believes that she must use her talents in a manner that glorifies God and that she must use her creative talents in operating 303 in a way that she believes will honor and please him.

Consistent with her beliefs, Ms. Smith limits the scope of services she is willing to provide to 303's customers. She is willing to work with all people regardless of their race, religion, gender, and sexual orientation, but she "will decline any request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others;

promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman."

Although 303 does not currently do so, Ms. Smith intends to expand its services by offering to build websites for couples who plan to marry. These websites would be intended to keep a couple's friends and family informed about the upcoming wedding. Ms. Smith desires to use the websites to "affect the current cultural narrative regarding marriage". Because she believes that marriage is ordained of God and should only be between one man and one woman, she intends to deny any request a same-sex couple may make for a wedding website.

Ms. Smith has prepared a Proposed Statement that she intends to post on 303's website to explain 303's policies with regard to wedding websites. It reads:

> I love weddings.
>
> Each wedding is a story in itself, the story of a couple and their special love for each other.
>
> I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding - from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together.
>
> 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.

According to Ms. Smith, the only reason why 303 has not begun offering to build wedding websites and she has not posted the Proposed Statement is that doing so would violate the Accommodation and Communication Clauses of the Public Accommodation Statute and expose her and 303 to penalties and civil liability.

ANALYSIS

A. Standing

The Defendants argue under Federal Rule of Civil Procedure 12(b)(1) in their Motion to Dismiss that the Plaintiffs lack standing to challenge the Public

Accommodation Statute and thus their claims must be dismissed.

Standing is a component of subject-matter jurisdiction and may be challenged in a motion to dismiss under Fed. R. Civ. P. 12(b)(1). The party asserting the existence of subject matter jurisdiction (here the Plaintiffs) bears the burden of proving such jurisdiction exists, including the burden of demonstrating standing. *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1144 (10th Cir. 2010); *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir.2002).

The jurisdiction of federal courts is limited to actual cases or controversies. U.S. Const. art. III, § 2 cl.1. To have a cognizable case or controversy, a plaintiff must have standing to sue. *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 543 (10th Cir. 2016). Whether a plaintiff has standing is determined as of the date that he or she files the action. *Nova Health Sys*, 416 F.3d at 1154. When a plaintiff asserts multiple claims, he or she may have standing as to some claims but not to others, and under such circumstances, the claims for which the plaintiff lacks standing must be dismissed. *See Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007).

To establish standing, the Plaintiffs must demonstrate three elements. First, the Plaintiffs must have suffered an "injury in fact". Such injury must be concrete, particularized, and actual or imminent but not conjectural or hypothetical. Second, the injury must be fairly traceable to the challenged actions of the defendant. Finally, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Bronson*, 500 F.3d

at 1106 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000)).

Working backwards through the elements listed above, the traceability and redressability elements can be addressed summarily. The Defendants claim that any injury to the Plaintiffs is not traceable to them, and that the Plaintiffs' injuries are not redressable because, even if the Court were to rule in the Plaintiffs' favor, private parties could bring an independent civil action against them for violations of the Public Accommodation Statute.

An injury in fact is fairly traceable to a defendant if the defendant is charged with the responsibility to enforce the statute. *See Nova Health Sys.*, 416 F.3d at 1158. Because it is undisputed that the Commission is charged with the responsibility to enforce the Public Accommodation Statute, any injury is traceable to it. The Court declines to address whether every Defendant is charged with enforcement of the statute.

Redressability concerns whether a court is empowered to redress an injury, not whether the lawsuit would result in an outcome that redresses every injury. If a named defendant has the authority to enforce a statute, a plaintiff's injury caused by enforcement of the statute is redressable even if a private person could also seek to enforce the statute through a civil lawsuit. *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 905 (10th Cir. 2012). Again, because the Commission is charged with enforcing the statute, and is named as a defendant, it does not matter that a private person could also seek to enforce the statute. The Court can redress the injury

traceable to enforcement of the statute by the governmental entities and actors.

The final standing element is whether the Plaintiffs have suffered an injury in fact. The Defendants argue that the Plaintiffs will not suffer any injury until they publically offer to build wedding websites, they receive a request for and then decline to build a website for a same-sex couple, the same-sex couple files a complaint against them, an administrative law judge finds that the Plaintiffs violated the Public Accommodation Statute and orders them to comply, and the Plaintiffs exhaust their state appellate remedies. The Plaintiffs respond that they are suffering two continuing constitutional injuries in so far as (1) they face a credible threat that the Defendants will enforce the Public Accommodation Statute and (2) the Public Accommodation Statue has a chilling effect on their ability to exercise their rights of free speech.

Plaintiffs are correct that it is not necessary that the Public Accommodation Statute be enforced against them in order for there to be an "injury in fact". An "injury in fact" is recognized if the Plaintiffs show that a threatened injury is certainly impending, or there is a substantial risk that a harm will occur. *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir.2004); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Bronson v. Swensen*, 500 F.3d 1099, 1107 (10th Cir. 2007); *U.S. v. Supreme Ct. of N.M.*, 839 F.3d 888, 901 (10th Cir. 2016); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1182 (10th Cir. 2010). For a threat of injury to equate to an injury in fact, the Plaintiffs must show that (1) they intend to engage in conduct arguably affected by a

constitutional interest, but proscribed by a statute, and (2) there exists a credible threat of enforcement of the statute for their conduct. *See Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016); *see also Supreme Ct. of N.M.*, 839 F.3d at 901. For a threat of enforcement to be credible, the injury cannot rest on a "highly attenuated chain of possibilities", but rather the Plaintiffs must demonstrate that "but for" their decision not to engage in conduct proscribed by statute, there is a substantial risk the statute would be enforced against them. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-11 (2013).

It is helpful for analytical purposes to distinguish between two actions which Plaintiffs intend but have refrained from taking due to fear that the Public Accommodation Statute will be enforced against them:

1. Publishing the Proposed Statement on 303's website.

2. Declining any request by a same-sex couple to build a wedding website.

The Communication Clause would appear to prohibit publishing the Proposed Statement because the Statement announces an intention to deny service to persons based on sexual orientation. The Accommodation Clause would appear to prohibit the second action – refusal to provide services to a person because of his or her sexual orientation.[1] Thus, both

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[1] Indeed, the Colorado Court of Appeals has determined that the refusal to provide goods or services for a same-sex wedding on religious grounds constitutes discrimination because

intended actions would appear to be proscribed by the Public Accommodation Statute.

The next question is whether there is a credible threat that the Public Accommodation Statute will be enforced. As to publishing the Proposed Statement, once the Plaintiffs post it to their website, they arguably will have violated the Communication Clause. If any person files a formal complaint with the Commission against the Plaintiffs pursuant to Colo. Rev. Stat. §§ 24-34-306(1)(a), the Commission has no discretion to not enforce the statute. This was confirmed by its counsel during the January 11 hearing. Given the public interest in and legal disagreement that is evident in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 16-111 (U.S. filed Jul. 22, 2016), it is not difficult to find it likely that a complaint will be filed if the Proposed Statement is posted. Because the only conditions precedent to enforcement are the posting of the Proposed Statement and the filing of a complaint, the Court finds that the Plaintiffs are subject to a credible threat of enforcement.

However, such is not the case with the Plaintiffs' intent to decline any same-sex couple's request to build wedding websites. For the Plaintiffs to violate the Accommodation Statute there are many conditions precedent to be satisfied. The Plaintiffs must offer to build wedding websites, a same-sex couple must request Plaintiffs' services, the Plaintiffs must decline, and then a complaint must be filed. This scenario is more attenuated and thus more

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of sexual orientation. *Masterpiece Cakeshop, Inc.*, 370 P.3d at 280-81.

speculative. If the Court assumes that the Plaintiffs would offer to build wedding websites, decline a request by a same-sex couple, and the unhappy customer filed a complaint, there remains the question of whether a same-sex couple would request Plaintiffs' services.

The parties have submitted stipulated facts as to the number of web design companies in Denver, Colorado and in the United States, but such general information does not provide details as to how many web design companies offer wedding websites, how many websites are built for weddings, or how many same-sex couples use such services. On this evidence, the Court cannot determine the imminent likelihood that anyone, much less a same-sex couple, will request Plaintiff's services. The Plaintiffs also direct the Court to an email that Ms. Smith received on September 21, 2016, after the Complaint in this matter was filed. Ostensibly in response to a prompt from 303's website asking "If your inquiry relates to a specific event, please describe the nature of the event and its purpose", the email states: "My wedding. My name is Stewart and my fiancee is Mike. We are getting married early next year and would love some design work done for our invites (sic.), place-names(sic.), etc. We might also stretch to a website." This evidence is too imprecise, as well. Assuming that it indicates a market for Plaintiffs' services, it is not clear that Stewart and Mike are a same-sex couple (as such names can be used by members of both sexes) and it does not explicitly request website services, without which there can be no refusal by Plaintiffs. Because the possibility of enforcement based on a refusal of services is attenuated and rests on the

satisfaction of multiple conditions precedent, the Court finds that the likelihood of enforcement is not credible.

Based on the record before the Court, the Plaintiffs have established an injury in fact sufficient for standing as to the intended posting of the Proposed Statement but not as to the intended denial of wedding website building services.

With regard to the speech related claims, the Plaintiffs also argue that their protected speech is currently being chilled by the threat of enforcement of the Public Accommodation Statute.[2] A statute has a chilling effect on speech if it causes plaintiffs to refrain from speaking based on "an objectively justified fear of real consequences". *Brammer-Hoelter*, 602 F.3d at 1182. A plaintiff can show a chilling effect with:

> (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action[3]; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech;

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[2] The Defendants argue that publishing the Proposed Statement and building websites constitutes conduct and not speech. Publishing a statement on a website is clearly speech. The Court need not resolve this issue, however, at this time. For purposes of the instant analysis, the Court will assume, without deciding, that building websites for another constitutes speech entitled to First Amendment protection.

[3] Evidence that they engaged in the type of speech affected in the past is not an indispensable element if other evidence sufficiently establishes that the Plaintiffs' fear of real consequences is not speculative.

> and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced.

Initiative & Referendum Institute, 450 F.3d at 1089.

Because the third element of this showing requires evidence of a credible threat that the statute will be enforced, the analysis duplicates that which is provided above. The evidence is sufficient to find a credible threat of enforcement of the Public Accommodation Statute only as to the posting of the Proposed Statement. With regard to the Proposed Statement, it is undisputed that it has been prepared and the sole impediment to its posting is enforcement of the Public Accommodation Statute. This is sufficient to show a chilling effect.

In summary, the Plaintiffs have standing only to pursue claims challenging the Communication Clause that arise from publication of the Proposed Statement. They lack standing to assert claims challenging the Accommodation Clause based on the possibility that they will decline all requests by same-sex couples to build wedding websites. Accordingly, such claims are dismissed for lack of subject-matter jurisdiction.

B. Denial of remaining motions

The parties have agreed that the case is at issue and that the Preliminary Injunction Motion and Motion for Summary Judgment should be determined together in resolution of the matters in dispute on the merits. Although the Plaintiffs have standing to challenge the Communication Clause of the Public Accommodation Statute, the Court declines to rule on

the merits due to the pendency of *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 16-111 (U.S. filed Jul. 22, 2016) before the United States Supreme Court. As noted, the factual and legal similarities between *Masterpiece Cakeshop* and this case are striking. It is likely that a determination by the Supreme Court will either guide determination of or eliminate the need for resolution of the issues in this case as to whether prosecuting the Plaintiffs for publishing the Proposed Statement would violate their rights guaranteed by the Free Speech and Free Exercise Clauses of the First Amendment.

Further, the Court finds that the parties will not be prejudiced by delay in resolution of the issues in this case. The Plaintiffs are not currently offering to build wedding websites, and no evidence has been presented to show that their financial viability is threatened if they do not begin offering to do so. Thus, the Court denies the Motions for Preliminary Injunction and Summary Judgment with leave to renew after ruling by the United States Supreme Court in *Masterpiece Cakeshop*.

CONCLUSION

Defendants' Motion to Dismiss **(#37)** is **GRANTED IN PART**, and **DENIED IN PART**. For the foregoing reasons, the Court **GRANTS** the motion and **DISMISSES** Plaintiffs' claims challenging the constitutional validity of the Accommodation Clause of the Public Accommodation Statute under the (1) Free Speech Clause, (2) Free Exercise Clause, (3) Equal Protection Clause, and (4) Due Process Clause of the First and Fourteenth Amendments of the United States Constitution for lack of standing. The

Motion is **DENIED** as to the Plaintiffs' five claims challenging the validity of the Communication Clause of the Public Accommodation Statute under the (1) Free Speech Clause, (2) Free Press Clause, (3) Free Exercise Clause, (4) Equal Protection Clause, and (5) Due Process Clause of the First and Fourteenth Amendments of the United States Constitution.

The Plaintiff's Motion for Preliminary Injunction and Motion for Summary Judgment **(#6)** and **(#48)** are **DENIED, WITH LEAVE TO RENEW** after a final ruling has been issued by the United States Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 16-111 (U.S. filed Jul. 22, 2016). Within 14 days of issuance of such ruling, the parties will advise this Court in writing of their desire to proceed (and if so whether they desire to refile or reopen their briefing on the Motion for Summary Judgment and Preliminary Injunction) or dismiss the action.

Dated this 1st day of September, 2017

BY THE COURT:

Marcia S. Krieger

Marcia S. Krieger
Chief United States District Judge

Colo. Rev. Stat. § 24-34-601
Discrimination in places of public accommodation

(1) As used in this part 6, "place of public accommodation" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor. "Place of public accommodation" shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.

(2)(a) It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges,

advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry.

(b) A claim brought pursuant to paragraph (a) of this subsection (2) that is based on disability is covered by the provisions of section 24-34-802.

(2.5) It is a discriminatory practice and unlawful for any person to discriminate against any individual or group because such person or group has opposed any practice made a discriminatory practice by this part 6 or because such person or group has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to this part 6.

(3) Notwithstanding any other provisions of this section, it is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02372-MSK-CBS

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;
ANTHONY ARAGON,
ULYSSES J. CHANEY,
MIGUEL "MICHAEL" RENE ELIAS,
CAROL FABRIZIO,
HEIDI HESS,
RITA LEWIS, and
JESSICA POCOCK, as members of the Colorado Civil Rights Commission in their official capacities, and
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity;

Defendants.

JOINT STATEMENT OF STIPULATED FACTS

The parties jointly submit the following stipulated facts:

1. Colorado's Anti-Discrimination Act ("CADA"), found at Colo. Rev. Stat. §§ 24-34-301, *et seq*. provides that "[i]t is a discriminatory practice and unlawful for

a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .” Colo. Rev. Stat. § 24-34-601(2)(a).

2. CADA defines a “place of public accommodation” to include “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public . . . .” Colo. Rev. Stat. § 24-34-601(1).

3. CADA also provides that it is unlawful for a person “directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual’s patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.” Colo. Rev. Stat. § 24-34-601(2)(a).

4. If a person believes that an individual or business has violated CADA, that person can seek redress by either filing a civil action in state court or by filing a charge alleging discrimination or unfair practice with

the Colorado Civil Rights Division ("Division"). Colo. Rev. Stat. §§ 24-34-306(1)(a), 24-34-602-603.

5. If a person files a civil action and the state court finds a violation of CADA, the court shall fine the individual or business between $50.00 and $500.00 for each violation. Colo. Rev. Stat. § 24-34-602(1)(a).

6. If a person files a charge alleging discrimination or unfair practice with the Division, the Director of the Division ("Director"), with the assistance of the Division's staff, shall make a prompt investigation of the charge. Colo. Rev. Stat. § 24-34-306(2)(a).

7. The Colorado Civil Rights Commission ("Commission"), individual Commissioners, or the Colorado Attorney General also have independent authority to file charges alleging discrimination or unfair practice when they determine that the alleged discriminatory or unfair practice imposes a significant societal or community impact. Colo. Rev. Stat. § 24-34-306(1)(b).

8. If the Commission, individual Commissioners or the Colorado Attorney General file a charge alleging discrimination or unfair practice, the Director, with the assistance of the Division's staff under the Director's supervision, shall make a prompt investigation of the charge. Colo. Rev. Stat. §§ 24-34-306(1)(b) and (2)(a).

9. The Director, with the assistance of the Division's staff, investigates all charges of discrimination or unfair practice received by the Division. Colo. Rev. Stat. § 24-34-306(2)(a).

10. The Director can issue subpoenas to witnesses and compel the testimony of witnesses. Colo. Rev. Stat. § 24-34-306(2)(a).

11. The Director, or the Director's designee, who shall be an employee of the Division, determines whether probable cause exists for crediting charges of discrimination or unfair practice. Colo. Rev. Stat. § 24-34-306 (2)(b).

12. If the Director or the Director's designee determines that probable cause does not exist, he or she shall dismiss the charge and provide notice to the charging party of their right to file an appeal of the dismissal to the Commission. Colo. Rev. Stat. § 24-34-306(2)(b)(I).

13. If the Director of the Division determines that probable cause does exist, the Director provides the parties a written notice of the finding and commences compulsory mediation. Colo. Rev. Stat. § 24-34-306(2)(b)(II).

14. The Commission hears appeals from the Director's findings. Colo. Rev. Stat. § 24-34-306(2)(b)(I).

15. The Commission can issue notices and complaints to set hearings either before the Commission, a Commissioner, or before an Administrative Law Judge. Colo. Rev. Stat. § 24-34-306(4).

16. After presentation of all the evidence at hearing, the Commission, Commissioner or Administrative Law Judge makes findings determining whether the individual or business engaged in any discriminatory or unfair practice as defined by CADA. Colo. Rev. Stat. § 24-34-306(9).

17. If either the Commission, a Commissioner or an Administrative Law Judge makes a finding that the individual or business under investigation violated CADA, the Commission has the power and authority under CADA to issue cease-and-desist orders to prevent violations of CADA and to issue orders requiring the charged party to "take such action" as the Commission, a Commissioner or an Administrative Law Judge may order. Colo. Rev. Stat. § 24-34-306(9).

18. Aubrey Elenis is the Director of the Division and is named as a Defendant in her official capacity only.

19. Ms. Elenis's authority in relation to CADA is specified in Colo. Rev. Stat. §§ 24-34-302, 24-34-306.

20. Commissioners Anthony Aragon, Ulysses J. Chaney, Miguel "Michael" Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, and Jessica Pocock are members of the Commission and are named as Defendants in their official capacities only.

21. Mr. Aragon's, Mr. Chaney's, Mr. Elias's, Ms. Fabrizio's, Ms. Hess's, Ms. Lewis's, and Ms. Pocock's authority to enforce CADA is specified in Colo. Rev. Stat. §§ 24-34-305, 24-34-306, 24-34-605.

22. Cynthia H. Coffman is the Colorado Attorney General and is named as a Defendant in her official capacity only.

23. Ms. Coffman's authority in relation to CADA is specified in Colo. Rev. Stat. § 24-34-306.

24. Prior to the filing of Plaintiffs' case, the Division received a charge of discrimination "because of" sexual orientation from a same-sex couple against a Colorado bakery, Masterpiece Cakeshop, Inc., a

public accommodation, which is owned and operated by Jack Phillips ("Phillips"), a Christian cake artist.

25. The facts and procedure of the Masterpiece Cakeshop case is found in the decision published by the Colorado Court of Appeals on August 13, 2015, titled *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc., and any successor entity, and Jack C. Phillips and Colorado Civil Rights Commission*, 2015 COA 115, for which the Court may take judicial notice, as well as the following documents: Colorado Civil Rights Division's Probable Cause Determination in *Charlie Craig v. Masterpiece Cakeshop, Inc.* dated March 5, 2013, attached as Exhibit C; Colorado Civil Rights Division's Probable Cause Determination in *David Mullins v. Masterpiece Cakeshop, Inc.* dated March 5, 2013, attached as Exhibit D; Administrative Law Judge's Initial Decision in *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc. and Jack C. Phillips* dated December 6, 2013, attached as Exhibit E; and Colorado Civil Rights Commission's Final Agency Order in *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc. and Jack C. Phillips* dated May 30, 2014, attached as Exhibit F.

26. Phillips and Masterpiece Cakeshop's petition for writ of certiorari to the Colorado Supreme Court was denied on April 25, 2016.

27. Phillips and Masterpiece Cakeshop's petition for writ of certiorari to the U.S. Supreme Court is currently pending.

28. During the pendency of Phillips and Masterpiece Cakeshop's case, the Division considered three claims of discrimination brought by William Jack ("Jack"), a professing Christian, against three Colorado

bakeries, all public accommodations: Azucar Bakery, Le Bakery Sensual, Inc., and Gateaux, Ltd. The facts and procedure of these matters are discussed in the following documents: Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Azucar Bakery* dated June 30, 2015, attached as Exhibit G; Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Gateaux, Ltd.* dated June 30, 2015, attached as Exhibit H; Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Le Bakery Sensual, Inc.* dated June 30, 2015, attached as Exhibit I; Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Azucar Bakery* dated March 24, 2015, attached as Exhibit J; Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Gateaux, Ltd.* dated March 24, 2015, attached as Exhibit K; and Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Le Bakery Sensual, Inc.* dated March 24, 2015, attached as Exhibit L.

29. Plaintiff Lorie Smith is a lifelong resident of the State of Colorado and a citizen of the United States of America.

30. Ms. Smith is a Christian.

31. Ms. Smith's religious beliefs, including her religious understanding about marriage as an institution between one man and one woman, are central to her identity, her understanding of existence, and her conception of her personal dignity and identity.

32. Ms. Smith's decision to speak and act consistently with her religious understanding of marriage defines her personal identity.

33. Ms. Smith believes that her life is not her own, but that it belongs to God, and that He has called her to live a life free from sin.

34. Ms. Smith believes that everything she does – personally and professionally –should be done in a manner that glorifies God.

35. Ms. Smith believes that what is sinful versus what is good is rooted in the Bible and her personal relationship with Jesus Christ.

36. Ms. Smith believes that she will one day give an account to God regarding the choices she made in life, both good and bad.

37. Ms. Smith believes that God instructs Christians to steward the gifts He has given them in a way that glorifies and honors Him.

38. Ms. Smith believes that she must use the creative talents God has given to her in a manner that honors God and that she must not use them in a way that displeases God.

39. Ms. Smith's creative talents include artistic talents in graphic design, website design, and marketing.

40. She developed these skills at the University of Colorado Denver, where she received a business degree with an emphasis in marketing.

41. She was then employed by other companies to do graphic and web design before starting her own company, 303 Creative.

42. Ms. Smith started 303 Creative because she desired the freedom to use her creative talents to honor God to a greater degree than was possible while working at other companies.

43. 303 Creative is a for-profit limited liability company organized under Colorado law with its principal place of business in Colorado.

44. Ms. Smith is the sole member-owner of Plaintiff 303 Creative LLC.

45. Through 303 Creative, Ms. Smith offers a variety of creative services to the public, including graphic design, and website design, and in concert with those design services, social media management and consultation services, marketing advice, branding strategy, training regarding website management, and innovative approaches for achieving client goals.

46. All of Plaintiffs' graphic designs are expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message.

47. All of Plaintiffs' website designs are expressive in nature, as they contain images, words, symbols, and other modes of expression that Plaintiffs use to communicate a particular message.

48. As the sole owner and operator of 303 Creative, Ms. Smith controls the scope, mission, priorities, creative services, and standards of 303 Creative.

49. Ms. Smith does not employ or contract work to any other individuals.

50. Each website 303 Creative designs and creates is an original, customized creation for each client.

51. In her website design work, Ms. Smith devotes considerable attention to color schemes, fonts, font sizes, positioning, harmony, balance, proportion, scale, space, interactivity, movement, navigability, and simplicity.

52. Ms. Smith also considers color, positioning, movement, angle, light, complexity, and other factors when designing graphics.

53. Every aspect of the websites and graphics Plaintiffs design contributes to the overall messages that Plaintiffs convey through the websites and graphics and the efficacy of those messages.

54. Ms. Smith personally devotes herself to her design work, drawing on her inspiration and sense of beauty to create websites and graphics that effectively communicate the intended messages.

55. As a seasoned designer, Ms. Smith helps clients implement the ideal websites and graphics—oftentimes by designing custom graphics and textual content for their unique needs — to enhance and effectively communicate a message.

56. Although clients often have a very basic idea of what they wish for in a graphic or a website and sometimes offer specific suggestions, Ms. Smith's creative skills transform her clients' nascent ideas into pleasing, compelling, marketable graphics or websites conveying a message.

57. When designing and creating graphics or websites, Ms. Smith is typically in close contact with her clients as they each share their ideas and collaborate to develop graphics or websites that

express a message in a way that is pleasing to both Ms. Smith and her clients.

58. Ms. Smith ultimately has the final say over what she does and does not create and over what designs she does and does not use for each website.

59. For each website 303 Creative makes, Ms. Smith typically creates and designs original text and graphics for that website and then combines that original artwork with text and graphics that Ms. Smith had created beforehand or that Ms. Smith receives from the client or from other sources. Ms. Smith then combines the original text and graphics she created with the already existing text and graphics to create an original website that is unique for each client.

60. As required by her sincerely held religious beliefs, Ms. Smith seeks to live and operate 303 Creative in accordance with the tenets of her Christian faith.

61. This means Ms. Smith seeks to use 303 Creative to bring glory to God and to share His truth with its clients and the community.

62. Ms. Smith strives to serve 303 Creative's customers with love, honesty, fairness, transparency, and excellence.

63. Ms. Smith designs unique visual and textual expression to promote the purposes, goals, services, products, organizations, events, causes, values, and messages of her clients insofar as they do not, in the sole discretion of Ms. Smith, (1) conflict with Plaintiffs' religious beliefs or (2) detract from Plaintiffs' goal of publicly honoring and glorifying God through the work they perform.

64. Plaintiffs are willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender.

65. Plaintiffs do not object to and will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites do not violate their religious beliefs, as is true for all customers.

66. Among other things, Plaintiffs will decline any request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman.

67. Therefore, Plaintiffs' "Contract for Services" includes the following provision:

> Consultant has determined that the artwork, graphics, and textual content Client has requested Consultant to produce either express messages that promote aspects of the Consultant's religious beliefs, or at least are not inconsistent with those beliefs. Consultant reserves the right to terminate this Agreement if Consultant subsequently determines, in her sole discretion, that Client desires Consultant to create artwork, graphics, or textual content that communicates ideas or messages, or promotes events, services, products, or organizations, that are inconsistent with Consultant's religious beliefs.

68. When considering a potential project, Ms. Smith will view the prospective client's website (if applicable) and ask questions of the prospective client to assist in the vetting process of determining whether the requested project conflicts with Plaintiffs' religious beliefs and whether it is a good fit given Plaintiffs' skills, schedule, preferences, and workload.

69. If Plaintiffs determine that they are unable to assist with a project promoting particular purposes, goals, services, products, organizations, events, causes, values, and messages they find objectionable, Plaintiffs endeavor to refer the prospective client to a different company that can assist them.

70. Even if Plaintiffs were to hire additional employees or contract out work, it would violate their sincerely held religious beliefs to have the employees or independent contractors do work for Plaintiffs that Plaintiffs cannot do themselves due to their religious beliefs.

71. Another purpose of 303 Creative is to develop and design unique visual and textual expression that promotes, celebrates, and conveys messages that promote aspects of Ms. Smith's Christian faith.

72. In furtherance of this end, 303 Creative regularly provides services to various religious and non-religious organizations that are advocating purposes, goals, services, events, causes, values, or messages that align with Plaintiffs' religious beliefs.

73. Ms. Smith believes that our cultural redefinition of marriage conflicts with God's design for marriage as a lifelong union between one man and one woman.

74. Ms. Smith believes that this is not only problematic because it violates God's will, but also because it harms society and children because marriage between one man and one woman is a fundamental building block of society and the ideal arrangement for the rearing of children.

75. Ms. Smith believes that our culture's movement away from God's design for marriage is particularly pronounced in the wake of the Supreme Court's *Obergefell v. Hodges* decision, which held that there is a constitutional right to same-sex marriage.

76. Ms. Smith is compelled by her religious beliefs to use the talents God has given her to promote God's design for marriage in a compelling way.

77. Ms. Smith is compelled by her religious beliefs to do this by expanding the scope of 303 Creative's services to include the design, creation, and publication of wedding websites.

78. Consistent with Plaintiffs' religious beliefs, the wedding websites that Plaintiffs wish to design, create, and publish will promote and celebrate the unique beauty of God's design for marriage between one man and one woman.

79. By creating wedding websites, Ms. Smith and 303 Creative will collaborate with prospective brides and grooms in order to use their unique stories as source material to express Ms. Smith's and 303 Creative's message celebrating and promoting God's design for marriage as the lifelong union of one man and one woman.

80. The collaboration between Plaintiffs and their clients who desire custom wedding websites will also

allow Plaintiffs to strengthen and encourage marriages by sharing biblical truths with their clients as they commit to lifelong unity and devotion as man and wife.

81. Plaintiffs' custom 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.

82. All of these expressive elements will be customized and tailored to the individual couple and their unique love story.

83. Viewers of the wedding websites will know that the websites are Plaintiffs' original artwork because all of the wedding websites will say "Designed by 303Creative.com."

84. An example of the type of wedding website that Plaintiffs desire to design for their prospective clients is attached as Exhibit A.[1]

85. Plaintiffs wish to immediately announce their services for the creation of wedding websites.

86. Plaintiffs have already designed an addition to 303 Creative's website announcing the expansion of their services to include custom wedding websites, but this addition is not yet viewable by the public.

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[1] Exhibit A is a compilation of captured images of the website that are modified in size and scope to enhance readability in printed form.

87. This addition to the website is attached as Exhibit B.[2]

88. Plaintiffs' intended message of celebration and promotion of their religious belief that God designed marriage as an institution between one man and one woman will be unmistakable to the public after viewing the addition to 303 Creative's webpage.

89. For example, the addition to 303 Creative's webpage states the following:

> 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.

90. As part of Plaintiffs' religious calling to celebrate God's design for marriage and due to their sincerely held religious belief that they must be honest and transparent about the services that they can and cannot provide, the webpage also states that their religious beliefs prevent them from creating websites celebrating same-sex marriages or any other marriage that contradicts God's design for marriage.

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[2] Exhibit B is a compilation of captured images of the website that are modified in size and scope to enhance readability in printed form.

91. For example, the addition to 303 Creative's webpage states the following:

> 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.

92. As part of their religiously-motivated speech, Plaintiffs desire to—and are prepared to—publish this webpage immediately.

93. As a Colorado place of business engaged in sales to the public and offering services to the public, 303 Creative is a "place of public accommodation" subject to CADA. Colo. Rev. Stat. § 24-34-601(1), (2)(a).

94. Plaintiffs believe it would violate Plaintiffs' sincerely held religious beliefs to create a wedding website for a same-sex wedding because, by doing so, Plaintiffs would be expressing a message celebrating and promoting a conception of marriage that they believe is contrary to God's design for marriage.

95. Unwilling to violate their sincerely held religious beliefs, but similarly unwilling to violate CADA and suffer the consequences, Plaintiffs are refraining from publishing the website referenced above and from designing, creating, and publishing wedding websites

that celebrate and promote marriages between one man and one woman.

96. If not for CADA, Plaintiffs would have already made the addition to 303 Creative's webpage referenced above viewable to the public and begun offering their creative services for the design, creation, and publication of wedding websites that celebrate and promote marriages between one man and one woman.

97. If Plaintiffs obtain the relief requested in the Complaint, they will immediately publish the addition to 303 Creative's webpage referenced above and begin work designing, creating, and publishing wedding websites.

98. There are numerous companies in the State of Colorado and across the nation that offer custom website design services, the areas of 303 Creative's specialization.

99. For example, the online directory http://sortfolio.com/ lists 245 web design companies in Denver alone and hundreds more nationwide.

100. Likewise, the online directory http://www.designfirms.org lists 114 web design companies in Colorado and 5,618 in the United States as a whole.

101. The online directory http://unitedstateswebdesigndirectory.com further lists 127 web design companies in Colorado and 4,097 countrywide.

102. Ms. Smith has a contact form on 303 Creative's webpage where the public can contact her to request her graphic and website design work.

103. The parties also stipulate to the admissibility of the following exhibits:

- Exhibit A – An example of the type of wedding website that Plaintiffs desire to design for their prospective clients. The attached exhibit is a compilation of captured images of the sample wedding website, modified in size and scope to enhance readability in printed form.
- Exhibit B - A compilation of captured images of Plaintiffs' desired addition to 303 Creative's website that are modified in size and scope to enhance readability in printed form.
- Exhibit C - Colorado Civil Rights Division's Probable Cause Determination in *Charlie Craig v. Masterpiece Cakeshop, Inc.* dated March 5, 2013.
- Exhibit D - Colorado Civil Rights Division's Probable Cause Determination in *David Mullins v. Masterpiece Cakeshop, Inc.* dated March 5, 2013.
- Exhibit E - Administrative Law Judge's Initial Decision in *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc. and Jack C. Phillips* dated December 6, 2013.
- Exhibit F - Colorado Civil Rights Commission's Final Agency Order in *Charlie Craig and David Mullins v. Masterpiece Cakeshop, Inc. and Jack C. Phillips* dated May 30, 2014.
- Exhibit G - Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Azucar Bakery* dated June 30, 2015.

- Exhibit H - Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Gateaux, Ltd.* dated June 30, 2015.
- Exhibit I - Colorado Civil Rights Commission's Final Agency Order in *William Jack v. Le Bakery Sensual, Inc.* dated June 30, 2015.
- Exhibit J - Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Azucar Bakery* dated March 24, 2015. Pursuant to Colo. Rev. Stat. § 24-34-306(3), Defendants are prohibited from disclosing information gathered during the Division's investigation of a charge unless the information is disclosed as a result of the Commission noticing the matter for public hearing. Exhibit J contains information covered by this prohibition. Since Exhibit J was not disclosed by Defendants, and was referenced in the Masterpiece Cakeshop decision, Defendants stipulate to its admissibility
- Exhibit K - Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Gateaux, Ltd.* dated March 24, 2015. Pursuant to Colo. Rev. Stat. § 24-34-306(3), Defendants are prohibited from disclosing information gathered during the Division's investigation of a charge unless the information is disclosed as a result of the Commission noticing the matter for public hearing. Exhibit K contains information covered by this prohibition. Since Exhibit K was not disclosed by Defendants, and was referenced in the

Masterpiece Cakeshop decision, Defendants stipulate to its admissibility

- Exhibit L - Colorado Civil Rights Division's No Probable Cause Determination in *William Jack v. Le Bakery Sensual, Inc.* dated March 24, 2015. Pursuant to Colo. Rev. Stat. § 24-34-306(3), Defendants are prohibited from disclosing information gathered during the Division's investigation of a charge unless the information is disclosed as a result of the Commission noticing the matter for public hearing. Exhibit L contains information covered by this prohibition. Since Exhibit L was not disclosed by Defendants, and was referenced in the Masterpiece Cakeshop decision, Defendants stipulate to its admissibility

Respectfully submitted this 1st day of February, 2016.

s/Jeremy D. Tedesco
Jeremy D. Tedesco
(Arizona Bar No. 023497)
Jonathan A. Scruggs
(Arizona Bar No. 030505)
Samuel D. Green
(Arizona Bar No. 032586)
Katherine L. Anderson
(Arizona Bar No. 033104)

s/ Vincent Edward Morscher
Vincent Edward Morscher
Deputy Attorney General
Civil Litigation and Employment Law Section
Colorado Department of Law
1300 Broadway, 10th Floor
Denver, CO 80203

ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 (facsimile)
jtedesco@ADFlegal.org
jscruggs@ADFlegal.org
sgreen@ADFlegal.org
kanderson@ADFlegal.org

David A. Cortman
(Georgia Bar No. 188810)
Rory T. Gray
(Georgia Bar No. 880715)
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road, NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
(770) 339-6744 (facsimile)
dcortman@ADFlegal.org
rgray@ADFlegal.org

Telephone: (720) 508-6588
Fax: (720) 508-6032
Vincent.morscher@coag.gov

Jack D. Patten, III
Assistant Attorney General
Civil Litigation and Employment Law Section
Colorado Department of Law
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6592
Fax: (720) 508-6032
jack.patten@coag.gov

Attorneys for Defendants Elenis and Coffman

Eric Maxfield
First Assistant Attorney General
Business and Licensing Section
Colorado Department of Law

Michael L. Francisco
(Colorado Bar No. 39111)
MRD Law
3301 West Clyde Place
Denver, CO 80211
(303) 325-7843
(303) 723-8679 (facsimile)
MFL@MRDlaw.com

Attorneys for Plaintiffs

1300 Broadway, 10th Floor
Denver, Colorado 80203
Telephone: (720) 508-6404
Fax: (720) 508-6037
eric.maxfield@coag.gov

Leanne B. De Vos
Senior Assistant Attorney General
Business and Licensing Section
Colorado Department of Law
1300 Broadway, 10th Floor
Denver, Colorado 80203
Telephone: (720) 508-6411
Fax: (720) 508-6037
Leanne.DeVos@coag.gov

Attorneys for Defendants Aragon, Chaney, Elias, Fabrizio, Hess, Lewis and Pocock

* * * * *

303 Creative Wedding Website
Announcement and Statement

I love weddings.

Each wedding is a story in itself, the story of a couple and their special love for each other

I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story about your wedding – from the tale of the engagement, to the excitement of the wedding day, to the beautiful life you are building together.

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 ideals 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.

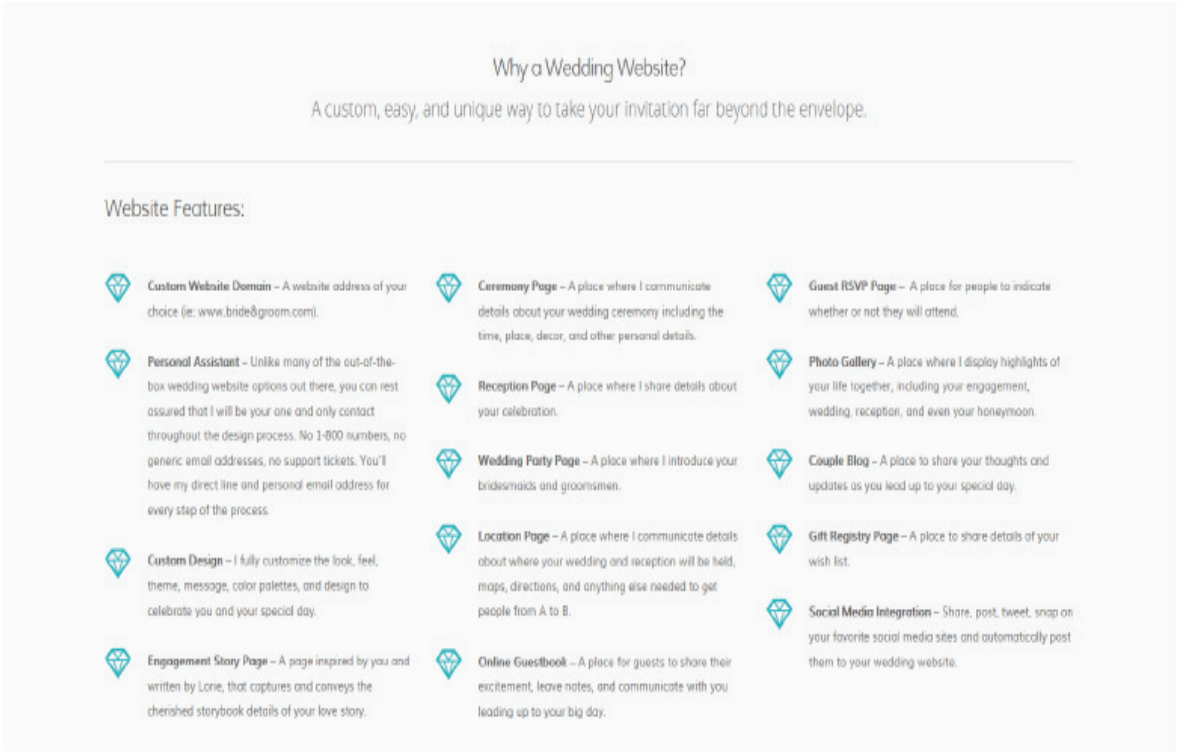
Sure, you've likely seen sample wedding websites out there, so what makes 30Screative websites different? I uniquely craft every page, every graphic, and every word to celebrate and promote the uniqueness and beauty of your relationship.

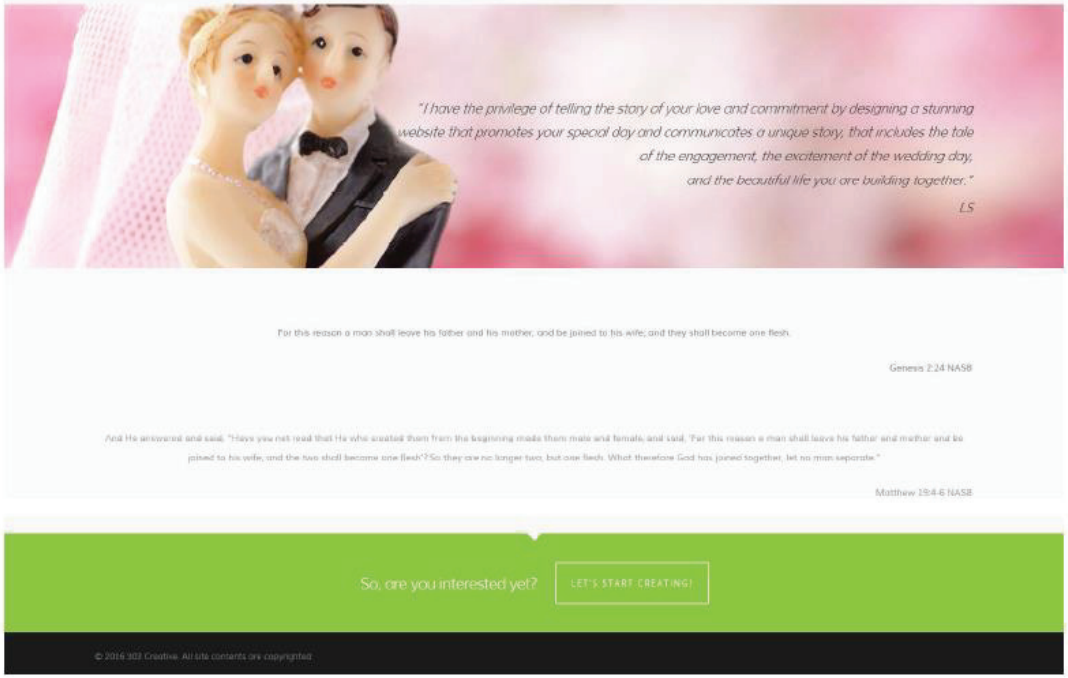
If you'd like to request my services, click the button below.
Let's start creating!

CONTACT LORIE

If you'd like to see a sample wedding website, click on the button below

VIEW SAMPLE SITE


Why a Wedding Website?
A custom, easy, and unique way to take your invitation far beyond the envelope.
Website Features:
Custom Website Domain – A website address of your choice (ie: www.bride&groom.com).
Personal Assistant – Unlike many of the out-of-the-box wedding website options out there, you can rest assured that I will be your one and only contact throughout the design process. No 1-800 numbers, no generic email addresses, no support tickets. You'll have my direct line and personal email address for every step of the process.
Custom Design – I fully customize the look, feel, theme, message, color palettes, and design to celebrate you and your special day.
Engagement Story Page – A page inspired by you and written by Lorie, that captures and conveys the cherished storybook details of your love story.
Ceremony Page – A place where I communicate details about your wedding ceremony including the time, place, decor, and other personal details.
Reception Page – A place where I share details about your celebration.
Wedding Party Page – A place where I introduce your bridesmaids and groomsmen.
Location Page – A place where I communicate details about where your wedding and reception will be held, maps, directions, and anything else needed to get people from A to B.
Online Guestbook – A place for guests to share their excitement, leave notes, and communicate with you leading up to your big day.
Guest RSVP Page – A place for people to indicate whether or not they will attend.
Photo Gallery – A place where I display highlights of your life together, including your engagement, wedding, reception, and even your honeymoon.
Couple Blog – A place to share your thoughts and updates as you lead up to your special day.
Gift Registry Page – A place to share details of your wish list.
Social Media Integration – Share, post, tweet, snap on your favorite social media sites and automatically post them to your wedding website.


"I have the privilege of telling the story of your love and commitment by designing a stunning website that promotes your special day and communicates a unique story, that includes the tale of the engagement, the excitement of the wedding day, and the beautiful life you are building together."
LS
For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh.
Genesis 2:24 NASB
And He answered and said, "Have you not read that He who created them from the beginning made them male and female, and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? So they are no longer two, but one flesh. What therefore God has joined together, let no man separate."
Matthew 19:4-6 NASB
So, are you interested yet?
LET'S START CREATING!
© 2016 303 Creative. All site contents are copyrighted.

NO. 21-476

In the
Supreme Court of the United States

303 CREATIVE LLC; LORIE SMITH,
Petitioners,
v.
AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

PHILIP J. WEISER
Attorney General

ERIC R. OLSON
Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Eric.Olson@coag.gov
(720) 508-6000

BILLY LEE SEIBER
First Assistant Attorney General

VINCENT E. MORSCHER
SKIPPERE S. SPEAR
JACK D. PATTEN, III
Senior Assistant Attorneys General

BIANCA E. MIYATA
Assistant Solicitor General

DANNY RHEINER
Assistant Attorney General

MELODY JOY FIELDS
Assistant Attorney General
Fellow

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether a commercial provider has standing, and its claim is ripe, when it has not entered the market, has no customers, has not created a product, and has not shown a credible threat of enforcement under the challenged law?

2. Whether a commercial provider can evade compliance with a neutral and generally applicable public accommodations law based on a sincerely held religious belief?

3. Whether this Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990)?

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INTRODUCTION

Certiorari is not appropriate because (1) this case is not justiciable, (2) there is no meaningful circuit split, (3) this case is not a good vehicle to reexamine *Employment Division v. Smith*, 494 U.S. 872 (1990), and (4) Colorado's Anti-Discrimination Act (the Act) is constitutional.

First, 303 Creative LLC and its owner (together, the Company) fail to show that it faces a credible threat of enforcement under the Act. Nor can it demonstrate that the case is fit for judicial review. The record contains no evidence that anyone has asked the Company to create a website for a same-sex wedding; that Colorado has threatened enforcement; or that any future wedding website would convey a message that would be attributed to the Company. The Company lacks standing, and this case is not ripe.

Second, the Company overstates the conflicts prior cases present. In arguing that there is a circuit split, it relies on a case that this Court vacated; other cases decided on narrow, fact-specific grounds; and a case about charitable donations by Amazon. And all the cases predate *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

Third, this is not the appropriate case to reconsider *Smith*. The Act has a religious purpose exception, and this pre-enforcement challenge on hypothetical facts will not allow this Court to reliably analyze that exception. The Act is neutral and generally applicable because it was not enacted to target any religious beliefs or practices and does not allow for individualized exemptions. Colorado also has enhanced free exercise protections since *Masterpiece* and

Fulton; these recent changes provide additional reason not to review the pre-enforcement challenge here, but to decide the future of *Smith* on a full record.

Finally, the Act is a straightforward regulation of commercial conduct. Like other public accommodations laws that apply to companies providing commercial goods and services, it satisfies constitutional requirements. Additionally, even if a business offers expressive products and services, the message communicated by those products and services is attributable to the customer, not the business.

For these reasons, certiorari should be denied.

STATEMENT OF THE CASE

The Company challenges two provisions of the Act. The "Public Accommodations Clause" prohibits businesses from denying service based on a person's protected class, and the "Communication Clause" prevents businesses from advertising that they will deny service based on a person's protected class. Colo. Rev. Stat. § 24-34-601(2)(a) (2021).

A. The Colorado Anti-Discrimination Act.

Colorado first enacted the predecessor to its Anti-Discrimination Act in 1957. In 2008, Colorado updated the law to prohibit discrimination by covered entities based on sexual orientation.

The Act has a straightforward enforcement process. Any person may file a charge of discrimination with the Colorado Civil Rights Division. Colo. Rev. Stat. § 24-34-306(1)(a). The Division then investigates to determine whether there is probable cause to conclude that a violation of the Act occurred. *Id.* at (2)(a)–(b). If so, the Division's Director issues a letter, notifying the parties of the Division's findings. *Id.* at (2)(b). The Division uses the same process to investigate all charges brought under the Act, including allegations of discrimination in housing, employment, and public accommodations. *Id.* at (2)(a).

The Colorado Civil Rights Commission, any Commissioner, and the Attorney General may also file a charge of discrimination. *Id.* at (1)(b). But they have never used that authority to bring a public accommodations case based on sexual orientation.

Since September 2016, individuals have filed 47 public accommodations complaints based on sexual

orientation discrimination. The Division found probable cause for only two of the complaints. And for one of those complaints, the probable cause finding ultimately arose from grounds other than sexual orientation discrimination. The Division dismissed 30 complaints for lack of probable cause and administratively closed 15 complaints. Administrative closure can result from settlements, voluntary withdrawals, no jurisdiction determinations, and right to sue notices.

If the Division determines there is no probable cause, the complainant can appeal the finding to the Commission. *Id.* at (2)(b)(I)(A). The Commission has never remanded a case back to the Division or overturned a no probable cause finding in a case involving a business denying services based on a customer's sexual orientation.

If the Division issues a finding of probable cause, it tries to resolve the dispute through compulsory mediation. *Id.* at (2)(b)(II). If the Division cannot resolve the dispute, it is referred to the Commission for a hearing determination. *Id.* at (4). In the past ten years, the Commission has set only ten public accommodations cases for hearing before an administrative law judge.

Since this Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Commission has not adjudicated a public accommodations case through a final hearing. Since then, all the cases that the Commission has referred for hearing have resulted in settlements, and no administrative law judge has issued a decision in a public accommodations case. For the same reason, the Commission has not issued a final agency order in

a public accommodations case since its revision to the Masterpiece order based on this Court's ruling.

None of the Commissioners who decided *Masterpiece* in 2014 remain on the Commission.

B. The Company sought pre-enforcement review of the Act.

The Company offers graphic and website design services to the public. Pet. App. 115a. It does not currently offer wedding website design services, but its owner, Lorie Smith, says she would like to expand the business to do so. *Id.* at 115a–16a, 159a. Due to Ms. Smith's religious beliefs about marriage, the Company says that it would decline any request it received from a same-sex couple to design a wedding website. *Id.* at 115a–16a. Besides hoping to enter the wedding website market, the Company also says that it wishes to post a statement on its website describing Ms. Smith's beliefs about marriage and a statement that the Company will not create wedding websites for same-sex marriages. *Id.* at 116a–17a.

The Company filed its complaint despite failing to identify any investigation into the Company's conduct or any complaint filed against the Company. *Id.* at 165a–67a. And no actual customer has requested the Company to design any specific wedding website. *Id.* at 166a. Rather, the Company sued seeking a broad declaration that the Act violates the Company's free speech and free exercise rights under the First Amendment. *Id.* at 7a.

C. The district court upheld the Act.

The district court partially granted Colorado's motion to dismiss. *Id.* at 169a–70a. It held that the Company had not suffered an injury-in-fact sufficient for standing to challenge the Public Accommodations Clause. *Id.* at 165a–67a. It concluded that the Company did not face a credible threat of enforcement because the possibility of enforcement was too "attenuated" and rested on "multiple conditions precedent," such as the Company offering to build wedding websites, a same-sex couple requesting a website, the Company declining the request, and a complaint being filed. *Id.* Because *Masterpiece* was pending before this Court, the district court stayed proceedings on all other outstanding issues. *Id.* at 170a.

After *Masterpiece*, the district court granted summary judgment for Colorado on the Company's Communication Clause challenge. *Id.* at 112a–13a, 146a. The district court held that the Communication Clause is a neutral law of general applicability and satisfies rational basis review. *Id.* at 141a–43a. The district court also held that the First Amendment permits Colorado to prohibit speech that proposes an act of illegal discrimination. *Id.* at 132a–34a. Finally, the district court rejected the Company's argument that the Communication Clause is vague and overly broad. *Id.* at 127a–28a, 135a.

D. The Tenth Circuit affirmed.

The Tenth Circuit affirmed the district court's grant of summary judgment. *Id.* at 3a. It held that the Company showed an injury-in-fact sufficient to challenge both the Accommodations and Communication Clauses. *Id.* at 17a–19a. The court further concluded

the Accommodations Clause was a content-based restriction on speech as applied to the Company's proposed wedding website design services. *Id.* at 23a–24a. Even so, the Accommodations Clause did not impermissibly compel speech because it merely required that should the Company decide to offer an expressive service to the public, it could not deny the service to members of the public based on their protected class. *Id.* at 24a–28a. The Accommodations Clause withstood strict scrutiny review because it was narrowly tailored to Colorado's compelling interest in ensuring equal access to publicly available goods and services. *Id.* at 26a–27a. The court emphasized that exempting the Company from the Accommodations Clause would deny customers full access to the market for goods and services based on their sexual orientation. *Id.* at 28a. It employed similar reasoning to conclude that the Communication Clause did not violate the Company's free speech rights. *Id.* at 34a.

The Tenth Circuit also applied *Fulton* and *Smith* to conclude that the Act is a neutral law of general applicability. *Id.* at 34a–46a. The court found that the Company provided no evidence that Colorado would enforce the Act in a non-neutral fashion after *Masterpiece*. *Id.* at 36a–37a. The court held that the Act's exemptions for religious organizations and sex-based restrictions with a bona fide relationship to public accommodations offerings did not alter the Act's general applicability. *Id.* at 44a–46a.

Chief Judge Tymkovich dissented from the panel opinion, concluding that the Act violated the Company's First Amendment rights.

REASONS FOR DENYING THE PETITION

I. Certiorari is not appropriate because this case is not justiciable.

The Company has never offered wedding website services to any customer. Nor has Colorado, or any person, challenged the Company's business practices. Rather, the Company seeks this Court's review on abstract facts about potential future customers and websites that it predicts will materialize. Because this case is not justiciable, certiorari should be denied.

A. The Company has not shown a credible threat of enforcement.

Because the Act has no criminal penalties; the Company has not entered the wedding website business; and Colorado, unlike other states, does not proactively enforce the Act; the Company has not shown it faces a credible threat of enforcement.

To have standing to bring a pre-enforcement challenge, a plaintiff must show that "there exists a credible threat of prosecution" under the statute. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). Where, as here, no criminal penalties attach to conduct, a plaintiff must show a credible threat of enforcement. *See Davis v. Federal Election Comm'n*, 554 U.S. 724, 733 (2008) (plaintiff had standing because the relief sought "would have removed the real threat that the FEC would pursue an enforcement action").

Several courts have considered whether business owners have standing to bring pre-enforcement challenges to antidiscrimination laws. All these courts have held that a state must take significant action to

enforce its statute for a plaintiff to face a credible threat of enforcement.

Applying the *Susan B. Anthony* factors, a court recently found no credible threat of enforcement in a similar pre-enforcement case brought by a photographer who did not wish to photograph same-sex weddings because of his religious beliefs. *Updegrove v. Herring,* No. 1:20-cv-1141, 2021 WL 1206805, at *1–3 (E.D. Va. Mar. 30, 2021). No one had approached the photographer to work at a same-sex wedding, nor had he stated his decision not to provide photography for same-sex weddings publicly. *Id.* at *3. So the photographer had "no reason to suspect that [the State] might attempt to penalize him using a statute he ha[d] never violated." *Id.*

That the photographer did not face the risk of criminal prosecution decreased the statute's potential chilling effect. *Id.* at *5. And in the almost nine months since the statute became effective, no complaint had been filed under it, diminishing the threat that it would be enforced against the photographer. *Id.* at *3.

In contrast, Minnesota's antidiscrimination law, challenged in *Telescope Media Group v. Lucero*, carried criminal penalties and was enforced by "'testers' to target noncompliant businesses." 936 F.3d 740, 750 (8th Cir. 2019). Videographers sought pre-enforcement review of the Minnesota law, claiming it was unconstitutional to require them to make same-sex wedding videos. *Id.* The court found that the potential criminal penalties, along with the state's use of testers, its public announcements that the law "require[d] all private businesses, including photographers, to

provide equal services for same- and opposite-sex weddings," and its recent "successful enforcement action against a wedding vendor who refused to rent a venue for a same-sex wedding" created enough of a threat to establish standing. *Id.*

Here, the Company has not shown a sufficiently credible threat of enforcement to have standing. The Company asserts, without record support, that "Colorado continues to threaten prosecution." Pet. 36. But Colorado cannot impose criminal penalties under the Act, so any suggestion of criminal prosecution is unfounded. At most, a business faces a $500 fine per violation under the Act. Colo. Rev. Stat. § 24-34-602(1)(a).

In contrast, the antidiscrimination provisions challenged in *Brush & Nib* and *Telescope Media* imposed criminal penalties. *See* Phx. Mun. Code § 18-7; Minn. Stat. § 363A.30, subdiv. 4; *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019). As a result, these provisions create much greater chilling effects than Colorado's Act. *See Brush & Nib*, 448, P.3d at 901–902; *Updegrove*, 2021 WL 1206805, at *5.

And the Company has received no threat of any kind that it faces civil enforcement. In the three and a half years since *Masterpiece*, Colorado has not imposed any civil penalties related to same-sex wedding services. Unlike Minnesota, Colorado does not use testers or other proactive efforts to target businesses. Rather, Colorado responds only to complaints brought to the Division's attention. And though the Commissioners and Attorney General may file a charge with the Division, they have never done so in any wedding case. Colo. Rev. Stat. § 24-34-306(1)(b). *Compare Telescope*, 936 F.3d at 750.

Nor does the Act incentivize suits by private individuals as it does not award attorney fees for successful cases. This feature distinguishes the Act from Minnesota's antidiscrimination law, which allows the prevailing party to recover a reasonable attorney fee as part of its costs. Minn. Stat. § 363A.33, subdiv. 7.

The Company's claim of threatened enforcement falls short on this record.

B. The Company has not established key factual assertions necessary to establish ripeness.

The Company's hypothetical wedding websites and theoretical future customers do not constitute a record fit for review. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation omitted). In considering pre-enforcement challenges to antidiscrimination laws, this Court and others have emphasized the importance of a fully developed record.

In *Masterpiece*, "the parties disagree[d] as to the extent of the baker's refusal to provide service." 138 S. Ct. at 1723. This Court explained that it would have benefitted from a more developed record, because the details and scope of the baker's refusal might be critical. *Id.*

In *Brush & Nib*, the owners of an art studio who would not make custom artwork for same-sex weddings because of their religious beliefs brought a pre-enforcement action challenging Phoenix's antidiscrimination law. 448 P.3d at 899. At the time, no same-sex

couple had asked the plaintiffs to create custom wedding products. *Id.* at 900. The Arizona Supreme Court held that the plaintiffs' "sweeping challenge" to the law "implicate[d] a multitude of possible factual scenarios too 'imaginary' or 'speculative' to be ripe." *Id.* at 901. It explained that "for most of Plaintiffs' products, the factual record [wa]s not sufficiently developed." *Id.*

The court allowed the plaintiffs to proceed only with a narrow challenge to the law as it applied to custom wedding invitations, the only type of services that plaintiffs had placed detailed examples of in the record. *Id.* The rest of the plaintiffs' claims—like all the Company's claims here—related to hypothetical future creations, and the court affirmed the dismissal of those counts. *Id.* at 902.

Telescope Media also highlights the problems posed by undeveloped records. After obtaining a preliminary injunction, the videographers sought dismissal of their case with prejudice before discovery concluded. In granting their motion, the district court noted that Minnesota had "been compelled to litigate what has likely been a smoke and mirrors case or controversy from the beginning, likely conjured up by Plaintiffs to establish binding First Amendment precedent rather than to allow them to craft wedding videos, of which they have made exactly two." *Telescope Media Group v. Lucero*, No. 16-4094 (JRT/LIB), 2021 WL 2525412, at *3 (D. Minn. April 21, 2021). By applying settled law on ripeness, courts can avoid such "smoke and mirrors" litigation.

Here, the Company asserts that it received a "request for a same-sex-wedding website," Pet. 5, 36; and that it has provided a "sample marriage website [the

Company] will create." *Id.* at 5. Neither of these assertions is sufficiently developed to render this dispute fit for judicial decision.

The Company's one sample website, made with no apparent customer input and reflecting only a website that the Company "desire[s] to design," does not allow this Court to understand how the Company would facilitate a specific future client's website; what messages the website might contain; and to whom those messages might be attributed. CA10 Aplt. App. 2-333–61; Pet. App. 187a. The Company suggests that it will work in "close contact" with clients to "collaborate" on websites. Pet. App. 182a. But the only example in the record is made up—it does not show how an actual collaboration with a real client would result in a message attributable to the Company instead of to the couple.

Nor does the Company's complaint allege that it has been asked to design a custom website for a same-sex wedding. Rather, the Company asserts that, after it sued, it received a "request for a same-sex-wedding website." Pet. 5.

But the "request" referred to by the Company was not a request for a website at all, but just a response to an online form asking about "invites" and "place-names," with a statement that the person "might also stretch to a website." Pet. App. 166a.

The Company did not respond. No full name for the person who submitted the form can be found in the record. Nor does the record show that the Company took any steps to verify that this was, in any way, an actual potential customer or a serious inquiry. The

record contains no suggestion that the Company's desire not to serve same-sex couples would ever matter in this inquiry. Reasons other than protected class status, such as price, responsiveness, or availability might well have turned away these alleged customers.

The Company's reliance on this lone, vague inquiry reveals why more facts are needed before an important and complicated constitutional dispute would be fit for this Court's resolution.

II. The Company overstates the conflicts in the courts.

On the merits, the Company overstates the conflicts in the pre-*Fulton* cases it relies on.

First, this Court vacated the Oregon decision the Company cites to support the alleged conflict, and no new opinion has issued. Pet. 11–13, 32 (discussing *Klein v. Oregon Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017), vacated by 139 S. Ct. 2713 (2019)). A decision this Court vacated cannot create a split.

Second, two of the cases the Company relies on heavily, *Telescope Media* and *Brush & Nib*, were decided on narrow, case-specific grounds under more stringent antidiscrimination laws.

The Eighth Circuit's opinion did not finally resolve *Telescope Media*. Rather, the case ended when, after remand, the videographers moved to dismiss the case with prejudice before discovery concluded. *Telescope Media*, 2021 WL 2525412, at *1. They said they had filmed just two weddings during the five-month period before COVID-19 restrictions limited live

events. *Id.* The district court granted the opposed motion, noting that the case had "likely been a smoke and mirrors case or controversy from the beginning." *Id.* at *1, *3. Minnesota obtained a final judgment in its favor, and the videographers never established any of their claims. The final judgment in *Telescope Media* does not conflict with this case.

The Arizona Supreme Court's holding in *Brush & Nib* was narrow and fact specific. The court's holding was "limited to Plaintiffs' creation of one product: custom wedding invitations that are materially similar to the invitations contained in the record." *Brush & Nib*, 448 P.3d at 916. The court denied Brush & Nib's remaining claims that mirror the Company's claims here, including the claim for "a blanket exemption from the Ordinance," and did not "reach the issue of whether Plaintiffs' creation of other wedding products may be exempt from the Ordinance." *Id.* at 895–96. Because *Brush & Nib* largely rejected the claims like those here, any split of authority it creates is minimal at best.

And a third case relied on by the Company, *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, did not involve wedding service providers or denials of service to customers. 6 F.4th 1247 (11th Cir. 2021). There, Amazon chose not to make Coral Ridge an eligible charity to receive donations because another organization had designated it a hate group. *Id.* at 1250–51. The Eleventh Circuit held that the public accommodations law at issue—Title II of the Civil Rights Act—did not apply to the charitable donations of a company. *Id.* at 1256. It then correctly held that forcing a company to donate to an organization it did not

wish to support violated the First Amendment. This case did not involve a denial of goods or services by a public accommodation.

Moreover, all these cases, including *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), and *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), were decided before *Fulton* and did not benefit from this Court's ruling there. If some tension remains among some of these courts' decisions, it would be premature for this Court to intervene before the lower courts have had a chance to consider these issues under *Fulton*.

Because the cases cited by the Company do not create a meaningful circuit split, and intervention would be premature, there is no need for this Court to grant certiorari here.

III. This is not the appropriate case to reconsider *Smith*.

Colorado's antidiscrimination law exempts a broader class of religious organizations than most states and does not permit discretionary exceptions. Colorado has also enhanced free-exercise protections since *Masterpiece*. These considerations make the Act unsuitable to reconsider *Smith*, particularly when the Company does not address the traditional factors justifying a departure from settled precedent.

A. Colorado has a religious exception to its public accommodations laws that may prevent review of the *Smith* question.

The Act excludes from definition of public accommodation "a church, synagogue, mosque or other place that is principally used for religious purposes." Colo.

Rev. Stat. § 24-34-601(1). This religious-use test applies to all types of potential public accommodations, not just schools, churches, or clergy.

Colorado's effort to accommodate religious free exercise by specifically exempting any place principally used for religious purposes may complicate any effort to reconsider *Smith* for two reasons.

First, other states have much narrower exclusions to accommodate free exercise in their public accommodations laws. And review of Colorado's law could affect federal laws with similar religious-use tests.

For example, Washington state's law—at issue in *Arlene's Flowers*—only excludes places that "by [their] nature [are] distinctly private" or any "educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution." Wash. Stat § 49.60.040.

Phoenix, at issue in *Brush & Nib*, exempts only "bona fide religious organizations" and affiliated "charitable" or "educational" organizations from "the prohibitions concerning marital status, sexual orientation, or gender identity or expression." Phx. Mun. Code § 18-4(A)(9); (B)(4)(a).

These approaches more narrowly accommodate the free exercise of religion than does Colorado.

Rather, Colorado's approach bears some similarity to how courts have construed the religious organization exception to Title VII of the Civil Rights Act. *See, e.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n,* 503 F.3d 217, 226 (3d Cir. 2007) (finding community center exempt from portions of Title VII because its "structure and purpose were primarily religious");

Garcia v. Salvation Army, 918 F.3d 997, 1003 (9th Cir. 2019) (applying statutory exemption when entity's "purpose and character are primarily religious" (quotation omitted)). Finding Colorado's approach impermissible under the Free Exercise Clause could have significant impacts on long-established law under Title VII.

Second, because the Company brought a pre-enforcement challenge, there has been no opportunity to see how the "principally used for religious purposes" exemption may apply here. Unlike the Washington or Phoenix laws, Colorado does not per se exclude the Company from this exception solely based on its corporate form.

This stylized case on hypothetical facts does not lend itself to reliable analysis of Colorado's religious exception. The Company makes no allegations one way or the other about this exclusion, and the stipulated facts do not address it. While it is improbable that an existing website designer seeking to add a new product line would ever be considered a place "principally used for religious purposes," some of the Company's assertions suggest that it perhaps believes otherwise. *See, e.g.*, Pet. 4 ("Lorie seeks to bring glory to God by creating unique expression that shares her religious beliefs.")

Because the Company has not developed facts to create an actual record, the role the Act's religious-use exception plays here remains uncertain. If the Company asks the Court to assume that the exception does not apply here, or in similar cases, such an assumption

would inadequately recognize the decision that Colorado has made to balance free exercise concerns with its public accommodations law.

And Colorado's choice to apply its use-based test—excluding places "principally used for religious purposes"—rather than some of the balancing tests suggested to replace *Smith* means that Colorado's statutory protection for religious liberty may, in some cases, provide more protection than whatever test this Court might develop to replace *Smith*. For example, if this Court adopts a test that looks to the legal form of the type of entity raising the objection, Colorado's law would likely provide more protection, because Colorado accounts for the religious use, regardless of the type of entity at issue. So an individual, charity, and corporation would all fall under the same test. *See, e.g.*, *Fulton*, 141 S. Ct. at 1883 ("Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals?" (Barrett, J., concurring)).

Because the Company has chosen not to develop facts to determine whether the Act's religious-use exemption applies, this case is not an appropriate vehicle to review the interplay between the First Amendment and public accommodations laws.

B. The Act meets the *Fulton* standard.

Because the Act is a neutral and generally applicable law under the standard from *Smith* and reaffirmed in *Fulton*, the Act is subject to rational basis analysis. *Smith*, 494 U.S. at 878–82. A neutral law of general applicability regulating conduct does not trigger strict scrutiny review, even if it incidentally burdens religion. *Id.*; *Fulton*, 141 S. Ct. at 1876. *Fulton*

clarified that individualized exemptions prevent a law from being a neutral law of general applicability. 141 S. Ct. at 1877. The Act here meets this demanding requirement.

First, the Act is neutral. Colorado has a long history of prohibiting discrimination in places of public accommodation. *Masterpiece*, 138 S. Ct. at 1724–25. And unlike in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, there is no claim that history shows the Act was enacted to target any religious beliefs or practice. 508 U.S. 520, 534–35 (1993). Nor does the Company allege Colorado added protections against discrimination based on sexual orientation in 2008 in order to target religious practice.

The Company's persistent claim that the Act is not neutral is baseless. The new Commission has not taken final action against any business that declined to provide services for a same-sex wedding for any reason, religious or secular. Because the Act is facially neutral and the Company has failed to establish a record of any lack of operational neutrality post-*Masterpiece*, the Act satisfies the *Smith* and *Fulton* requirements of neutrality.

Second, the Act is generally applicable. The Company, relying on the record in *Masterpiece*, alleges that Colorado enforces the Act through a series of individualized exemptions that it grants for secular, but not religious reasons. Pet. App. 38a–40a. The Company alleges that Colorado allowed three bakers to decline requests to create cakes with messages opposing same-sex marriage. *Id.* at 38a. But there is no factual basis for this recycled claim. The Commission found that those bakers' refusal to create cakes with a message

disparaging a group of people was consistent no matter who requested the message or whom was being targeted by the disparaging message. *Masterpiece*, 138 S. Ct. at 1730–31. Thus, the refusals were not based on protected class status. *Id.*

And bringing up allegations already before this Court in *Masterpiece* only emphasizes how little factual development the Company has chosen to undertake in this case. The Company's allegations about the importance of this case rest on news articles and untested statements in other complaints, not facts found in this record. Pet. 31–34.

The Commission recently modified its regulations—though not used and not complained about here—to ensure the Act is generally applicable under *Fulton*. The Commission removed a provision in its regulations that allowed a case to be closed "in the discretion of the director." 3 Colo. Code Regs. § 708-1, Rule 10.5(C)(3) (identified as 10.5(C)(1)(b) in posted proposed rule and will be reflected in final rule as 10.5(C)(3)). To Colorado's knowledge, no director has invoked this rule since its addition to the Division's rules in 2014. But the Commission still changed the rule to ensure the Commission's procedures fully comply with *Fulton* and make clear the Director lacks discretion to close a case. Because the Director lacks this discretion, Colorado law does not allow for individualized exemptions.

Nor is there a basis to argue that the Act treats a comparable secular activity more favorably than religious exercise such that it is not generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). The

Company points to the provision that allows public accommodations to restrict admission to "individuals of one sex" so long as such a "restriction has a bona fide relationship" to the offerings of the public accommodation. Pet. 28. But the Company has shown no way that this provision results in the more favorable treatment of a comparable secular activity than religious exercise. Nor could it, as the Company, by seeking to refuse service to same-sex couples, does not seek to provide services to "individuals of one sex." And this argument proves much too much, as it would cast doubt on the ability of schools to have separate locker rooms for children or colleges to have women's basketball teams.

C. Colorado has enhanced free exercise protections since *Masterpiece*.

Last year, the new Commissioners passed a resolution reaffirming the Commission's commitment to ensuring that it "discharge its duties in a way respectful of all parties." Resolution, Colo. Civil Rights Comm'n (Feb. 28, 2020), CA10 Supp. App. 96. After the *Masterpiece* decision, the Director of the Civil Rights Division made clear to the Commission that "decision-making must be consistent and objective with the guarantee that all laws are applied in a manner that is neutral towards religion." CA10 Aplt. App. 3-606–07. Since that time, the Commission has not issued final orders in any case about weddings or companies raising free exercise concerns. The Commission, through voluntary settlements, has resolved all issues with the baker in *Masterpiece*, with no fines or penalties imposed. And, as discussed above, the Commission has changed its rules to ensure compliance with *Fulton*.

The Company makes much of one pending private lawsuit against the baker brought by a customer who asked for a cake that Masterpiece Cakeshop declined to make. Pet. 7, 31. But the Commission dismissed the customer's complaint with prejudice, and that case has just begun its path through the appellate process. *See* Opening Br. 1, *Scardina v. Masterpiece Cakeshop, Inc.*, No. 21CA1142 (Colo. App. Nov. 18, 2021). And, to the Commission's knowledge, no other plaintiffs have filed cases under the Act that implicate free exercise. If this Court has concerns about that case, it is better to wait to address that case on a full record. There, the court found that actual customers asked the baker to make an actual cake, and he declined to do so. Findings of Fact and Conclusions of Law 5–6, *Scardina v. Masterpiece Cakeshop*, No. 19CV32214 (Denver Dist. Ct. June 15, 2021).

The Commission's focus on following this Court's free exercise rulings reinforces the prudence of deciding this important issue on a full record rather than the pre-enforcement record here.

D. The Company does not address the *stare decisis* factors.

The Company seeks to overturn *Smith* but has not met the high burden to disturb such settled precedent. "[E]ven in constitutional cases, a departure from precedent 'demands special justification.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (citation omitted).

Smith has governed the interplay between state statutes and free exercise concerns for over three decades. The Company offers just the bald claim that "this case offers an excellent chance" to overrule *Smith*

to justify departure from such settled precedent. Pet. 30. But departure from *stare decisis* requires more than cases that present good chances. Here, other than pointing to *Fulton* itself, the Company makes no effort to address the traditional *stare decisis* factors, such as "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quotation omitted). Its inability to do so strongly counsels against granting certiorari here.

IV. Colorado's antidiscrimination law satisfies constitutional requirements.

The Tenth Circuit affirmed the district court by relying on arguments Colorado did not advance below. Because the court's ultimate determination that the Act is constitutional is correct, and its decision on a pre-enforcement challenge imposes no obligations on anyone, Colorado focuses here on other reasons that support the constitutionality of the Act.

A. The antidiscrimination law is a straightforward regulation of commercial conduct.

Colorado's antidiscrimination law is an "unexceptional" regulation of commercial conduct. *Masterpiece*, 138 S. Ct. at 1728. "Like the regulation of wages and hours of work, the employment of minors, and the requirement that restaurants have flameproof draperies, [public accommodations] laws merely regulate a licensed business." *D.C. v. John R. Thompson Co., Inc.*, 346 U.S. 100, 116–17 (1953). In this sense, public accommodations laws serve as a modern regulatory counterpart to the common carrier principle adopted

at common law—requiring businesses to serve all comers. *See Interstate Commerce Comm'n v. Baltimore & Ohio Ry. Co.*, 145 U.S. 263, 275–76 (1892); *see also Biden v. Knight First Amendment Institute*, 141 S. Ct 1220, 1222 (2021) (Thomas, J. concurring) (recognizing that "common carriers" have a "general requirement to serve all comers").

Changing the nature of the sale—from goods to services—does not change this analysis. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (applying the ADA's public accommodations provision to require a dentist to serve a client with HIV); *see also Bell v. Maryland*, 378 U.S. 226, 297 n.17 (1964) (Goldberg, J., concurring) (quoting and discussing the common law rule that smiths must serve "all the king's subjects").

These laws have a long history and tradition in our country. *See, e.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985) (upholding age-based antidiscrimination statute in employment); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding gender-based minimum wage anti-discrimination statute). There is "nothing novel" about antidiscrimination laws that cover businesses. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 (1964).

And this Court recognized in *Masterpiece* that "[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." 138 S. Ct. at 1728.

The Company seems to claim that its religious motivation for turning away customers should exempt

it from the Act's commercial regulation. Pet. 30–33. But this Court has routinely upheld commercial regulations against free-exercise and free-association challenges even when those businesses had a religious affiliation or motivation. *See, e.g.*, *Hernandez v. C.I.R.*, 490 U.S. 680 (1989) (disallowing charitable tax deductions when the church provided religious training in exchange for the contributions); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (requiring members of the nonprofit be paid a wage for their labor, despite the impact on the nonprofit's ability to operate); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990) (permitting a sales and use tax on the company's sale of religious literature and videos).

The Company says it does not seek to discriminate against homosexual customers as a class, just that it cannot serve homosexual customers who wish to receive wedding services. Pet. 5. But this claimed distinction between protected status and conduct contradicts this Court's settled approach to antidiscrimination law. *See, e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (discrimination based on "affiliation and association" is class-based discrimination); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (discrimination against a subset of a class, women with young children, is gender-based discrimination).

Below, the Company argued that businesses can deny services for same-sex weddings because provid-

ing those services would show "unqualified social acceptance of gays and lesbians." CA10 Appellants' Br. 32 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574–75 (1995)).

For good reason, the Company appears to have stepped away from relying on *Hurley* and *Boy Scouts of America v. Dale* to support their conduct-based future refusal to serve same-sex couples. Although both the Boy Scouts and the parade organizers objected to being linked to messages advocating the rights of homosexuals, the unifying feature of these cases was not the parties' views on sexual orientation. Rather, the Court's holdings in both cases hinged on the organizations being "expressive association[s]" rather than "commercial entities" or "places where the public is invited." *Boy Scouts of America v. Dale*, 530 U.S. 640, 656–57 (2000) (recognizing that "[a]lthough we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here").

An expressive association's main purpose is to communicate a message. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The collective advocacy of such groups suggests that the messages individual members speak at organizational events are understood as messages communicated by the association itself. *See Hurley*, 515 U.S. at 573.

This distinction explains how the "venerable" tradition of public accommodation law was "applied in a peculiar way" to the parade council in *Hurley*. *Id.* at 571, 572–73. "[O]nce the expressive character of both the parade and the marching GLIB contingent [a gay

pride organization] is understood … the statute had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573. As applied to the expressive association, the public accommodations law was a "noncommercial speech restriction." *Id.* at 579. Similarly, because the Boy Scouts' mission is to "instill values in young people," and it chooses which values to instill and which to reject, the organization was designed to engage in "expressive activity." *Boy Scouts*, 530 U.S. at 649–50.

In contrast, this Court has consistently upheld the application of public accommodations laws to companies that provide commercial goods and services. *See, e.g.*, *Jaycees*, 468 U.S. at 625–26 (assuring equal access is not "limited to the provision of purely tangible goods and services," which "clearly furthers compelling state interests.").

As this Court has made clear, antidiscrimination laws appropriately apply to prohibit commercial actors from discriminating in commercial transactions, even though those commercial actors remain free to express their view on such laws in public discourse. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).

Fulton similarly interpreted antidiscrimination laws to apply to commercial actors that make goods and services available to the public. Because the initial screening for foster-care families was highly selective, the agency's services in that case were "not readily accessible to the public" and therefore not a public accommodation. 141 S. Ct. at 1880. In contrast,

because the Company seeks to sell commercial services, it is a public accommodation, and the Act is constitutional as applied to the Company.

B. A customer's message about their wedding is not attributed to the Company.

The Company asserts that the Act requires it to speak messages it disavows. Pet. 7. But since the Company has not actually offered wedding website design services to anyone and provides no examples of any websites developed with client input, it is impossible to discern the client's role in providing the expressive content of such a website. A company's services, even if they include expressive elements, do not automatically become messages attributable to the company because there is little likelihood that others will identify the resulting product as communicating the views of the company. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 86–87 (1980). A state "may adopt reasonable restrictions" on "a business establishment that is open to the public," including requiring the business to host the speech of others. *Id.* at 81.

This Court's description of speechwriters in another context provides a useful analogy. "Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said." *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 143 (2011). Similarly, a customer's message will likely not be attributable to the ancillary business when it "lack[s] the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Rumsfeld v. Forum for*

Acad. & Institutional Rights, Inc., 547 U.S. 47, 64 (2006). As the *Rumsfeld* Court noted when it rejected a First Amendment challenge to a law requiring that universities include military recruiters, a law school sending messages facilitating military recruitment is not reasonably viewed as condoning or approving the military recruiters' own expression *Id.* at 64–65. The case of an expressive association like the Boy Scouts, however, merits a different outcome. *Boy Scouts*, 530 U.S. at 649–50.

Laws have long required public accommodations, like the Company here, to provide equal access: "The long history in this country and in England of restricting the exclusion right of common carriers and places of public accommodation may save similar regulations today from triggering heightened scrutiny—especially where a restriction would not prohibit the company from speaking or force the company to endorse the speech." *Biden*, 141 S. Ct. at 1224 (Thomas, J., concurring).

The Company, on this record, cannot make any credible claim that creating wedding websites for others will force it to "endorse" any speech. The Company has complete control over what commissioned services it offers, but if it accepts commissions, it must do so on the same basis regardless of the commissioning couple's sexual orientation. Unlike a newsletter, parade, or editorial page that communicate the writers' or organizers' own expression, the Company's services help a couple announce the couple's wedding and tell the couple's story to encourage friends and family to join the couple's celebration. No one viewing one of the Company's proposed wedding websites would confuse

the couple's "unique love story" as that of the Company's. Pet. 5. Should a couple's story include a child conceived out of wedlock, for example, the Company would not be perceived as endorsing or condoning extramarital sex. The Company, of course, remains free to disclaim its customers' views. It also may explain its own views on its website so long as it does not communicate its plans to illegally discriminate when providing commercial goods and services.

Commercial public accommodations that choose to offer certain goods and services for sale to the public are distinguishable from individuals compelled to display a message on their license plates with which they disagree or say the Pledge of Allegiance while saluting the flag. *PruneYard Shopping*, 447 U.S. at 88 (business was "not … being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views").

For these reasons, requiring the Company to produce the same services for same-sex couples that it produces for opposite-sex couples does not require it to speak in favor of same-sex marriage.

C. The Act prohibits only speech that proposes illegal commercial activity.

The Company also contends that the Act's Communication Clause impermissibly restrains its speech by preventing it from publishing that it will not provide services to same-sex couples. Pet. 2. But prohibiting companies from displaying what would amount to "Straight Couples Only" messages is permissible because it restricts speech that proposes illegal activity and is therefore unprotected by the First Amendment.

See Pittsburgh Press, 413 U.S. at 389 (recognizing absence of First Amendment interest for advertising when "the commercial activity itself is illegal"); *Masterpiece*, 138 S. Ct. at 1728–29 (companies should not "be allowed to put up signs saying, 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons.").

The Act simply regulates speech which does "no more than propose a commercial transaction" by prohibiting speech that proposes an illegally discriminatory transaction. *Pittsburgh Press*, 413 U.S. at 385; *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 767 (1988). Speech that proposes illegal commercial activity does not garner First Amendment protections "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld*, 547 U.S. at 62 (citation omitted); *see also Cox v. Louisiana*, 379 U.S. 559, 563 (1965); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563–64 (1980). If businesses had a right to publish exclusionary messages, companies could effectively evade Colorado's antidiscrimination law, no matter if the denial of service was founded in a sincerely held belief or invidious discrimination.

Finally, this prohibition on communicating the intention to engage in illegal conduct parallels similar restrictions in longstanding federal and state antidiscrimination laws, such as the Fair Housing Act, 42 U.S.C. § 3604(c), the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(b), and the Age Discrimination in Employment Act, 29 U.S.C. § 623(e). Similar laws can

be found from Alaska to Virginia. *See, e.g.*, Alaska Stat. § 18.80.240(7) (prohibiting statements revealing a preference for housing applicants based on a range of protected characteristics); Va. Code Ann. § 36-96.3(A)(3) (same).

The Act, along with all these similar statutes, does not conflict with the First Amendment.

D. Even if strict scrutiny applies, the Act meets that standard here.

Even if Colorado's public accommodations law were subject to strict scrutiny, it is narrowly tailored to achieve its compelling interest. Eliminating "stigmatizing injury, and the denial of equal opportunities that accompanies it" provides a powerful basis for antidiscrimination laws. *Jaycees*, 468 U.S. at 625.

Colorado's antidiscrimination law was enacted to achieve its compelling interest in preventing the harm, both dignitary and economic, inflicted by denials of equal access to commercially available goods and services.

The Company asserts that granting it an exception from the Act would not inflict such harm because other wedding website services are available to same-sex couples. Pet. 36. In briefing below, the Company cited websites that list service providers who welcome same-sex couples as clients. CA10 Appellants' Br. 54 n.11 (noting "many other website designers are available" and citing a website directory for "Gay + Lesbian Weddings"); *see also* Senators' and Representatives' Amicus Br. 9–10. In *Heart of Atlanta*, this Court identified a similar guidebook identifying safe lodging for African-Americans at a time when some hotels denied them service. 379 U.S. at 253. But rather

than hold this guidebook up as acceptable alternatives to equal access, this Court recognized it as evidence of the harm discrimination wrought upon travelers. *Id.* Similarly, a new guidebook identifying welcoming same-sex wedding website providers makes plain the harm the Act seeks to prevent.

Colorado's law preventing discrimination based on whom a person marries is no less compelling and no more burdensome than the similar regulations this Court has already upheld. The Act exempts places "principally used for religious purposes" to ensure traditional areas of religious exercise are unimpeded in their practices. To offer individualized exceptions to commercial businesses without such a purpose, however, would "place beyond the law any act done under claim of religious sanction." *Cleveland v. United States*, 329 U.S. 14, 20 (1946).

This Court has already chastised Colorado for excluding gays and lesbians from public accommodations protections. *Romer v. Evans*, 517 U.S. 620, 633 (1996). Should Colorado now authorize exemptions to those laws, it would "impose restrictions and disabilities" on people who wish to marry someone of the same sex, resulting in the same "'[d]iscriminations of an unusual character'" this Court once rejected. *United States v. Windsor*, 570 U.S. 744, 768–70 (2013) (quoting *Romer*, 517 U.S. at 633). "[A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi Babalu Aye*, 508 U.S. at 547 (quotation omitted).

The Act does not require the Company itself to say any particular message or require it to endorse any

worldview, consistent with this Court's recognition that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

But what the Act does do is to remove the "the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.*; *see also Norwood v. Harrison*, 413 U.S. 455, 463 (1973). Exempting the Company because of its religious motivation would create the appearance that Colorado's imprimatur attaches to that exemption.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

ERIC R. OLSON
Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Eric.Olson@coag.gov
(720) 508-6000

BILLY LEE SEIBER
First Assistant Attorney General

VINCENT E. MORSCHER
SKIPPERE S. SPEAR
JACK D. PATTEN, III
Senior Assistant Attorneys General

BIANCA E. MIYATA
Assistant Solicitor General

DANNY RHEINER
Assistant Attorney General

MELODY JOY FIELDS
Assistant Attorney General
Fellow

Counsel for Respondents

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NO. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

JONATHAN A. SCRUGGS
KATHERINE L. ANDERSON
BRYAN D. NEIHART
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

KRISTEN K. WAGGONER
Counsel of Record
JOHN J. BURSCH
ERIN M. HAWLEY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(571) 707-4655
kwaggoner@ADFlegal.org

Counsel for Petitioners

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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REPLY ARGUMENT SUMMARY

Lorie Smith faces real and imminent harm. Five years after leaving her corporate position to open her own website-design business, she remains in limbo, unable to offer her design services for marriage celebrations—prohibited even from posting a statement about her marriage beliefs—and losing income.

Lorie has already received a request to design a website celebrating a same-sex wedding, and if past is prologue, Colorado will sue her, even sans a complaint. Colorado sought to enforce CADA against cake artist Jack Phillips less than a month after this Court decided *Masterpiece Cakeshop* and only stopped when recordings revealed Colorado officials were badmouthing this Court's decision and Jack's marriage beliefs. Tr. of 11th Monthly Meeting at 10, 30 (2018), https://perma.cc/2GTF-VKUR.

Colorado ignores the extensive, stipulated facts and proposes rules just as Orwellian as the Tenth Circuit's. Colorado even disavows that court's merits analysis—doubtless because this Court forbids officials from compelling and supressing speech based on content and viewpoint. Yet 19 states have already relied on the decision below to argue that officials may use public-accommodation laws to compel citizens to speak in violation of their conscience. Mass.Amici.Br. 19, 21, *Updegrove* v. *Herring*, No. 21-1506 (4th Cir. Aug. 27, 2021). The free-speech rights of nearly half the country are at stake.

And those stakes are dire. If left in place, the Tenth Circuit's decision will allow officials to compel democratic speechwriters to plug republican candidates and Muslim artists to create cartoon parodies of Allah. Certiorari is imperative.

ARGUMENT

I. The Tenth Circuit correctly held this case is justiciable.

Applying *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 157 (2014) [*SBA List*], the Tenth Circuit held that Lorie established injury-in-fact and ripeness. Pet.App.10a–19a. Colorado says the court got it wrong, but it is Colorado that is mistaken.

A. The Tenth Circuit rightly held that Lorie showed a credible enforcement threat.

The Tenth Circuit properly rejected Colorado's denial of a credible enforcement threat. Pet.App.14a–17a. Colorado stipulates that 303 Creative is subject to CADA, Pet.App.189a, and would create wedding websites but for CADA, Pet.App.186a. Colorado also says that Lorie violates CADA by seeking "permission to discriminate against same-sex couples." Defs.' Mot. to Dismiss at 2, *303 Creative LLC* v. *Elenis*, No. 16-cv-02372, 2016 WL 6677566. Indeed, CADA's "very purpose" is to "eliminat[e]" beliefs like Lorie's. Pet.App.24a.

Colorado has also prosecuted religious speakers like Lorie for the past decade because they cannot create messages that violate their faith. Pet.App.178a. Colorado says not to worry, it "has not imposed any civil penalties related to same-sex wedding services." Opp.10. But not for lack of trying. Colorado sought to enforce CADA against cake artist Jack Phillips less than a month after *Masterpiece Cakeshop*, stopping only after a federal district court found that the State continued to act with hostility toward Jack's marriage beliefs. *Masterpiece Cakeshop Inc.* v. *Elenis*, 445 F. Supp. 3d 1226, 1241 (D. Colo. 2019).

Finally, Colorado has never disavowed enforcement. As the Tenth Circuit found, "Colorado's strenuous assertion that it has a compelling interest in enforcing CADA indicates that enforcement is anything but speculative." Pet.App.17a.

Colorado tries to minimize any threat because CADA does not impose criminal penalties. Opp.9–10. But plaintiffs need not incur civil "liability" before challenging "threatened [government] action." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 128–29 (2007); accord *Free Enter. Fund* v. *Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010). The threat of onerous administrative proceedings—like CADA's—is sufficient. *SBA List*, 573 U.S. at 165.

Colorado's best cases bolster this conclusion. Standing in *Telescope Media Group* v. *Lucero* and *Brush & Nib Studio, LC* v. *City of Phoenix* turned on likely enforcement, not criminal penalties. *TMG*, 936 F.3d 740, 750 (8th Cir. 2019); *B&N*, 448 P.3d 890, 901–02 (Ariz. 2019). That's because "the fear of civil penalties" is just as serious as a "threatened criminal prosecution" in pre-enforcement, free-speech suits. *Vt. Right to Life Comm., Inc.* v. *Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000).

Colorado's final case, *Updegrove* v. *Herring*, 2021 WL 1206805 (E.D. Va. Mar. 30, 2021), conflicts with *SBA List* and turned on Virginia's representation (since recanted) that it had not "received, filed or investigated any complaints" under Virginia's version of CADA. Appellants' Br. 16–17, *Updegrove* v. *Herring*, No. 21-1506 (4th Cir. July 14, 2021). In contrast, Colorado receives hundreds of complaints annually, https://perma.cc/CAK7-FTG8, and acts on them. There is a credible enforcement threat.

B. Lorie's self-censorship creates an ongoing injury that Colorado fails to address.

Lorie left the corporate world to start 303 Creative "because she desired the freedom to use her creative talents to honor God." Pet.App.181a. She serves any customer but cannot create messages for anyone that violate her religious beliefs. Pet.App.184a, 189a. She is compelled by those beliefs "to promote God's design for marriage in a compelling way," Pet.App.186a, yet must self-censor under CADA, Pet.App.189a, twice over. Colorado ignores these two injuries.

First, the Accommodation Clause forbids her from even "indirectly … withhold[ing]" certain services, and CADA allows the state to initiate "on its own motion" complaints alleging a practice that CADA prohibits, including mere "omissions." Colo. Rev. Stat. 24-34-306(1)(b), 2(a); 3 Colo. Code Regs. 708:1-10.2. Lorie's mere practice of offering only websites for opposite-sex weddings would violate CADA, and CADA deters her from entering the wedding market.

Second, the Communications Clause forbids Lorie from publishing the statement she attached to her complaint. Pet.App.188a–89a. Lorie's self-censorship is objectively reasonable because Colorado considers her statement illegal. *E.g.*, Appellees' Br. 3, 50–57 (10th Cir. April 23, 2020). This harm is "one of self-censorship; a harm that can be realized even without an actual prosecution." *Virginia* v. *Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). Lorie can sue to challenge the Publications Clause because it chills her speech.

That second chilling injury is also caused by the Accommodation Clause. Whether Colorado can ban Lorie's statement depends on whether the Accommodation Clause can constitutionally compel Lorie to create websites that violate her religious beliefs. That's because the Accommodation Clause defines the alleged illegal behavior which is then enforced and harms Lorie through the Communications Clause. Opp.31. Because the two Clauses are intertwined, Lorie has standing to challenge both. See *Whole Woman's Health* v. *Jackson*, 2021 WL 5855551, at *8–9 (U.S. Dec. 10, 2021) (standing for licensing officials to challenge abortion law enforced through other statutes); *City of Revere* v. *Mass. Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) ("we could not resolve the question . . . [of] standing without addressing the constitutional issue").

C. The Tenth Circuit correctly held this case is ripe.

The Tenth Circuit was also "satisfied that this case is ripe." Pet.App.19a. After all, "Article III does not require a pre-enforcement plaintiff to risk [liability] before bringing claim in federal court." *Ibid.* Colorado's ripeness objections ignore that holding and the record.

Colorado questions how this Court can "understand" what "messages" Lorie's wedding websites might contain. Opp.13. But she provided a sample website. Pet.App.66a, 71a, 196a–199a. And Colorado stipulated that all her future wedding websites will celebrate and promote the couple's wedding and unique love story. Pet.App.186a–87a.

Similarly, Colorado wonders how Lorie would "facilitate a specific future client's website." Opp.13, 29. But Colorado stipulated what this collaborative process looks like—and to Lorie's final, editorial control. Pet.App.182a–84a, 186a–87a.

Colorado also questions "to whom" website "messages might be attributed." Opp.13. Again, that's stipulated. Viewers "will know that the websites are [Lorie's] original artwork." Pet.App.187a.

Finally, Colorado's claim—that a request from "Mike" and "Stewart" for a wedding website does not reflect a same-sex wedding request—blinks reality. Opp.13. And Lorie need not make that showing anyway; as discussed above, CADA bans her desired statement and forbids her "practice" of entering the market to offer only certain websites even if she receives no requests. Colo. Rev. Stat. 24-34-306(1)(b).

II. This Court should resolve the circuit split over the free-speech question and review the indefensible rule allowing the government to compel speech.

1. The lower courts are deeply divided over how to balance free speech and public-accommodation laws. Pet.9–15; Pet.App.30a–31a (disagreeing with *B&N* and *TMG*); *Chelsey Nelson Photography LLC* v. *Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543 (W.D. Ky. 2020) (agreeing with those two decisions); Ariz.Br.13–19 (examining cases and concluding that individuals' right against compelled speech depends "on where the individual lives"); Cato.Br.8–9 ("federal and state courts have provided … conflicting guidance"). Colorado's nitpicks about those cases do not negate that conflict.

Colorado first disregards *TMG* because the Eighth Circuit ruled at the pleading stage, and the plaintiffs later dismissed after remand because the COVID-19 pandemic affected their business. Opp.14–15. But "[c]ases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." Stephen M. Shapiro et al., *Supreme Court Practice* 479 (10th ed. 2013). That's the situation here.

Next, Colorado shuns *B&N* as limited to "custom wedding invitations." Opp.15. But that's because *B&N* provided "examples" of its intended creative works, 448 P.3d at 901, just like Lorie, Pet.App.196a–99a. The cases are identical. Lorie is *not* asking for a "blanket" CADA exemption. Contra Opp.15.

Colorado then spurns *Coral Ridge Ministries Media, Inc.* v. *Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021), for not involving a denial of goods or services. Opp.15–16. But the Eleventh Circuit there assumed a Title II violation—a denial of access to the AmazonSmile service. 6 F.4th at 1253–54.

Colorado also suggests that these cases—plus *State* v. *Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), and *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013)—might be viewed differently after *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021). But *Fulton* did not decide a free-speech issue and does not diminish the need for this Court to resolve one—the same question the Court granted certiorari for three years ago (but ultimately did not answer) in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

Notably, Colorado never addresses how the Tenth Circuit's decision contravenes this Court's free-speech decisions about compelled speech, idea suppression, and the relevant market. Pet.19–22; Tyndale.Br.12–19; Congress.Br.5–13; First.Am.Scholars.Br.13–14, 18–20. That conflict alone warrants certiorari.

2. Colorado also refuses to defend the Tenth Circuit's opinion and instead "focuses … on other reasons that support the constitutionality of" CADA. Opp.24. But Colorado's alternate arguments underscore the split and contradict this Court's precedents.

Colorado adopts the same merits theories as the government defendants in *Elane* and in the initial *Masterpiece* litigation: that government can always compel commercial speakers to create speech, Opp.24–29, and a commercial speaker's speech is attributed to customers, not the artist, Opp.29–31. But the Eighth Circuit and Arizona Supreme Court rejected those positions, Pet.14–16, as did the Tenth Circuit below, Pet.App.21a–22a. And many free-speech cases protect commercial speakers. Pet.20; Cato.Br.4–5; Tyndale.Br.8–9.

Relatedly, Colorado claims a compelling interest in "requiring businesses to serve all comers" despite religious objections. Opp.25–27. But its cited cases involved conduct, not speech. See *ibid.* And this Court has never found an interest compelling enough to justify speech compulsion. See *Hurley* v. *Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995) (government "may not compel affirmance of a belief with which the speaker disagrees," whether by "business corporations," "ordinary people," or "professional publishers").

III. This Court should resolve the circuit split on free-exercise comparability and overturn *Smith*.

CADA contains multiple exemptions and requires religious but not secular speakers to convey messages. Pet.App.38a. Yet the Tenth Circuit held CADA generally applicable. Colorado defends this ruling, but the Tenth Circuit's free-exercise analysis misreads *Fulton* and highlights *Smith*'s inadequacies.

Colorado does not deny that a circuit split exists between the Second, Third, Fifth, and Eleventh Circuits and the Sixth, Ninth, and Tenth Circuits over the standard used to determine when secular exemptions trigger strict scrutiny under the Free Exercise Clause. Pet.24–26. The split has deepened since Lorie filed her petition.

In *Does 1-6* v. *Mills*, the First Circuit upheld a vaccine regulation that prohibited religious exemptions while allowing medical exemptions, even though unvaccinated healthcare workers undermine public health goals whether a worker remains unvaccinated for religious or medical reasons. 16 F.4th 20, 30 (1st Cir. 2021). And the Second Circuit recently cited the decision below to require religious conduct to be *more* like secular conduct than it had pre-*Fulton*. Compare *We The Patriots USA, Inc.* v. *Hochul*, 17 F.4th 266, 289 (2d Cir.), opinion clarified, 17 F.4th 368 (2d Cir. 2021) (per curiam) (vaccine regulation that prohibited religious exemptions while allowing medical exemptions generally applicable), with *Cent. Rabbinical Cong. of U.S. & Canada* v. *N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) (law banning religious but not secular conduct not generally applicable).

Colorado argues CADA is generally applicable because it does not allow "discretionary exceptions" nor "secularly-motivated objections to serving LGBT consumers." Pet.App.40a. But officials cannot "apply a more generous legal test to secular objections than religious ones." *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring). Here, CADA allows secular speakers to decline messages while requiring religious speakers to convey state-approved messages. The Constitution prohibits this. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 543 (1993).

Colorado complains there is "little factual development." Opp.21. Not so. Colorado admits that CADA contains an exception for message-based refusals a business would decline to create for any customer. Pet.App.38a. And Colorado stipulated that Lorie does not discriminate but would refuse to create messages celebrating same-sex marriage for anyone. Pet.App.53a, 184a.

Colorado also argues that the Bona Fide Relationship Clause does not favor secular activity over religious activity because Lorie does not provide services to "individuals of one sex." Opp.22. But CADA's interest is to end discrimination generally. Exempting sex discrimination undermines that interest.

Colorado claims to have bolstered free-exercise protections since *Masterpiece*—by passing an unenforceable resolution about animus—but even those "enhanced" protections did not change CADA or the many exemptions at issue here. Promising to fix one constitutional error doesn't excuse CADA's other constitutional flaws.

Lastly, this case presents a clean vehicle to overrule *Smith*. To evade this Court's review, Colorado argues—for the first time—that CADA's religious-purpose exemption "may apply" and complicate the analysis. Opp.18. But Colorado has long insisted (and stipulated) that CADA and its Accommodation and Publication provisions apply here because Lorie operates a "place of public accommodation." Pet.App.189a.; Opp.18. The "place of public accommodation" definition *excludes* a place "principally used for religious purposes." Colo. Rev. Stat. 24-34-601(1). Colorado's last-minute about-face does not countermand five years of admissions.

IV. Colorado's response underscores the need for this Court's review.

The Tenth Circuit held that officials may compel or silence speech if it is "unique" and "arguably" implicates a suspect class. Pet.App.11a, 28a. This decision makes a monopolist of most every creative. The more unique, skilled, or innovative, the greater the state's interest in compelling speech. Speakers will be forced to conform to the generic which will decrease the market for unique art. Tyndale.Br.21–22. And everyone from publishers to editors to artists can be compelled to communicate messages antithetical to their beliefs. *Id.* at 6.

Further, in the Tenth Circuit's view, there is no constitutional problem with anti-discrimination statutes that have the purpose of "[e]liminating … ideas." Pet.App.24a. The inevitable diminution in the ability to speak will "reduce [the] ideas available to a free society—especially ideas that may deviate from the governmental or societal orthodoxy." Tyndale.Br.20.

Indeed, officials and lower courts now use this case to compel speech. In *Emilee Carpenter, LLC* v. *James*, the court followed the Tenth Circuit to require an artist to violate her conscience and create photographs and blogs celebrating same-sex weddings because her artwork was unique. 2021 WL 5879090, at *11 n.10, *15 (W.D.N.Y. Dec. 13, 2021). Similarly, 19 states relied on the decision below to argue that public-accommodation laws may compel speech. Mass.Amici.Br. 19, 21, *Updegrove* v. *Herring*, No. 21-1506 (4th Cir. Aug. 27, 2021). That the Tenth Circuit's decision has caused nearly half the states to endorse compelling speech is appalling.

And Colorado's response shows that officials will continue to use anti-discrimination laws to compel speech and punish religious dissenters. Colorado abandons the Tenth Circuit's uniqueness rationale, instead making the breathtaking claim that CADA allows it to compel *any* commissioned speaker. Opp.29. Colorado even posits—astonishingly—that speech writers may be compelled to write speeches that violates their conscience. *Ibid.* Thus, candidate Biden's PR firm could be compelled to create content for candidate Trump, and an Orthodox Jewish ad agency could be forced to create copy for pork producers.

Colorado's response also undermines conscience protections by advocating for the selective punishment of religious speakers. Opp.20–21. And other courts have already used the opinion below to dramatically narrow *Fulton*. See *We The Patriots*, 17 F.4th at 288.

The First Amendment's promises of free speech and religious liberty are bedrock principles. Yet over the past decade, those promises have been shattered: Elaine Photography and Sweet Cakes are out of business, Barronelle Stutzman was forced to retire, Emilee Carpenter (*supra*, p. 12) is risking jail, Bob Updegrove and Chelsey Nelson (*supra*, pp. 3 & 6) are in harm's way, and Jack Phillips is *still* in court, pursued by a private enforcer who wants to finish the job. Pet.7. This Court must act now or officials with enforcement power over nearly half the country's citizens will continue compelling artists to speak against their consciences while silencing them from explaining their beliefs. The solution is a neutral one that prohibits status discrimination while protecting constitutional rights. Pet.37. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

JONATHAN A. SCRUGGS
KATHERINE L. ANDERSON
BRYAN D. NEIHART
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

KRISTEN K. WAGGONER
Counsel of Record
JOHN J. BURSCH
ERIN M. HAWLEY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(571) 707-4655
kwaggoner@ADFlegal.org

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