Case No. 19-1413

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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303 CREATIVE LLC and **LORIE SMITH**,

Plaintiffs-Appellants,

v.

AUBREY ELENIS, et al.,

Defendants-Appellees,

On appeal from the United States District Court
for the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 1:16-cv-02372-MSK

APPELLANTS' OPENING BRIEF

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Oral Argument is Requested

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CORPORATE DISCLOSURE STATEMENT

Consistent with Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants 303 Creative LLC and Lorie Smith state that 303 Creative LLC is a limited liability company organized under Colorado law, and that it neither issues stock nor has a parent corporation.

STATEMENT OF RELATED APPEALS

Plaintiffs 303 Creative and Lorie Smith filed a previous appeal before this Court in this matter. *303 Creative v. Elenis*, No. 17-1344 (10th Cir. Dec. 18, 2017).

INTRODUCTION

The government should never force a Muslim artist to photograph pornography, a gay designer to create a website promoting one-man, one-woman marriage, or a Jewish PR professional to craft anti-Israel propaganda. Plaintiff-Appellant Lorie Smith[1] seeks the same freedom here.

Lorie is a talented website designer and small business owner who lives her faith in what she creates and publishes online. While Lorie gladly serves everyone no matter *who* they are, she cannot create all *content* requested—including content that demeans, incites violence, or promotes any conception of marriage other than between one man and one woman. Defendant-Appellees ("Colorado") concede that Lorie serves regardless of status, does not discriminate against LGBT persons, and makes only message-based referrals. Aplt. App. 2–322-23 (¶¶ 64-66, 69).[2]

Yet Colorado still deploys its public-accommodation law (the Colorado Anti-Discrimination Act, or CADA) to (1) force Lorie to create websites celebrating same-sex weddings and (2) ban Lorie from posting a statement explaining the content she can create. This attack on Lorie's faith and editorial freedom targets "the fundamental First Amendment rule"—that "a speaker has the autonomy to choose the content of [her] own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 558, 573 (1995).

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[1] Unless context indicates otherwise, "Lorie" includes 303 Creative.

[2] Lorie's record citations will appear as "Aplt. App. [Vol. #]–[Page #]."

Artists across the country have faced investigations, fines, financial ruin, and even jail for seeking the freedom Lorie wants. Colorado has prosecuted cake designer Jack Phillips *twice* under CADA—once to the U.S. Supreme Court—for exercising that same freedom. Phillips faced death threats, lost 40% of his income, and had to let go most of his staff.

Considering this, Lorie faces a substantial risk from CADA. She would be foolish to operate her business the way her faith compels her, risking both livelihood and liberty, in the hope Colorado will change its campaign against those who share her beliefs. So Lorie has reasonably stopped speaking to avoid punishment—not creating any wedding websites or posting her desired statement for three years.

The First Amendment prohibits Colorado's attempted compulsion and censorship. Courts routinely protect speakers' freedom to control what they say, including speakers who share Lorie's marriage beliefs in the exact same pre-enforcement posture as this litigation. *Telescope Media Grp. v. Lucero (TMG)*, 936 F.3d 740, 750-59 (8th Cir. 2019) (film studio); *Brush & Nib Studio, LC v. City of Phoenix (B&N)*, 448 P.3d 890, 902-17 (Ariz. 2019) (art studio).

As these cases illustrate, the district court incorrectly left Lorie exposed to Colorado's unjust prosecutions. This Court should reverse, grant Lorie summary judgment, and restore her freedom to choose what she says and what she celebrates online.

JURISDICTIONAL STATEMENT

The district court had jurisdiction to hear this case under 28 U.S.C. §§ 1331 and 1343 because Lorie raises First and Fourteenth Amendment claims. Aplt. App. 1–020 (¶¶ 16-19). This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered final judgment on September 26, 2019, and Lorie timely filed her appeal notice on October 25, 2019. Aplt. App. 3–760, -762.

STATEMENT OF THE ISSUES

Lorie Smith creates online content, like websites, for all clients. Her faith compels her to (i) create online content celebrating weddings between one man and one woman, and (ii) post a statement declining to create content inconsistent with this view. Colorado's public accommodation law (CADA) bans this statement and requires Lorie to create online content celebrating same-sex weddings if she does so for opposite-sex weddings. Lorie has not created any wedding content or posted her statement to avoid violating CADA. Meanwhile, Colorado has allowed secular speakers (three bakeries) to decline to create speech objectionable to them. The issues presented are:

1. Whether Lorie has standing to challenge the CADA provision forcing her to create online content celebrating same-sex weddings if she does so for opposite-sex weddings.

2. Whether CADA violates the First Amendment by forcing Lorie to create online content celebrating same-sex weddings if she does so for opposite-sex weddings.

3. Whether CADA violates the First Amendment by banning Lorie's statement explaining the online wedding content she can create consistent with her faith.

4. Whether a CADA provision is facially overbroad, vague, or allows unbridled discretion when it bans communications indicating someone is "unwelcome, objectionable, unacceptable, or undesirable" at public accommodations because of certain protected traits.

STATEMENT OF THE CASE

Lorie Smith and 303 Creative

Lorie Smith is a website and graphic designer, a Christian, and the owner of 303 Creative LLC. Aplt. App. 2–318-20 (¶¶ 29, 30, 39, 44). She discovered her love for creating very young and developed a talent for website and graphic design while working at corporate firms. *Id.* at 2–319-20 (¶¶ 40-41). But Lorie hungered for freedom to promote things she cared about—things like promoting small businesses, helping people, and supporting churches and nonprofits. *Id.* at 2–320, -324 (¶¶ 42, 72). So Lorie launched 303 Creative. *Id.* at 2–320 (¶ 42).

Lorie's dream has largely come true; she now has final say over what she creates. *Id.* at 2–320-21 (¶¶ 48, 58). Her designs are original, custom, and perfectly tailored to each client. *Id.* at 2–320, -325 (¶¶ 50, 81-82). She brands her sites "Designed by 303Creative.com" so that viewers know each design is her original artwork. *Id.* at 2–325-26 (¶¶ 83, 88). And everything she creates—each image, word, or symbol—conveys the exact message she desires. *Id.* at 2–320-22, -325-26 (¶¶ 45-46, 53, 59, 63, 81-82, 88).

To that end, Lorie only creates artwork consistent with her faith. *Id.* at 2–318-19 (¶¶ 30-39). She strives to live and operate 303 Creative to honor God. *Id.* at 2–322 (¶¶ 60-63). Lorie does this by sharing her faith through the celebratory messages she creates. *Id.* (¶¶ 60-61). She often

designs websites for religious and other organizations that promote values she shares. *Id*. at 2–324 (¶¶ 71-72).

Lorie selectively accepts projects, not clients. As Colorado stipulates, she does not discriminate against anyone when creating websites or graphics. *Id*. at 2–322 (¶¶ 64-65). She is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," including those who are "gay, lesbian, or bisexual…." *Id*. (¶ 64). But she cannot create websites or graphics that promote messages contrary to her faith *for anyone*, such as messages that "contradict[ ] biblical truth; demean[ ] or disparage[ ] others; promote[ ] sexual immorality; support[ ] the destruction of unborn children; incite[ ] violence; or promote[ ] any conception of marriage other than marriage between one man and one woman." *Id*. at 2–322-23 (¶¶ 65-66). Lorie tries to refer requests she cannot fulfill to another competent designer. *Id*. at 2–323 (¶ 69).

Lorie's custom wedding websites

As Lorie's business grew, so did her passion to promote her faith—particularly her beliefs about marriage. Aplt. App. 2–324 (¶ 71). Lorie saw our culture adopting new beliefs about marriage after *Obergefell v. Hodges* and felt compelled to promote what her faith teaches her is God's design for marriage: a lifelong union between one man and one woman.

Aplt. App. 2–324 (¶¶ 73-77). Lorie decided to expand her business to include wedding websites. *Id.* (¶ 78).

Lorie wants these websites to "celebrat[e] and promot[e]" her "religious belief that God designed marriage as an institution between one man and one woman" while she encourages couples with whom she collaborates to "commit to lifelong unity and devotion as man and wife." *Id.* at 2–325-26 (¶¶ 79-82, 88). These wedding websites contain Lorie's original artwork, are custom and tailored to each couple, and convey Lorie's particularized celebratory message about biblical marriage. *Id.* at 2–325-26 (¶¶ 79-82, 88-89). This intended message "will be unmistakable to the public." *Id.* at 2–326 (¶ 88).

Lorie also wants to be upfront about the messages she can promote. *Id.* (¶¶ 90). So when Lorie created a website addition announcing her wedding expansion, she also created a statement explaining her religious convictions and desire to create content consistent with them. *Id.* at 2–325-26, -333-61, -362-66 (¶¶ 84-87, 90-92, Exs. A, B).

Before Lorie could post that statement or publish any wedding websites, she discovered that Colorado interprets CADA to force her to create wedding websites celebrating same-sex marriage if she does so for opposite-sex weddings. *Id.* at 2–317-18, -327, -367-420 (¶¶ 24-28, 94-97, Exs. C-L); *see also* Appellees' Br. at 17, *303 Creative LLC v. Elenis*, No. 17-1344 (10th Cir. Feb. 1, 2018), Doc. No. 01019939442. She also discovered that Colorado reads CADA to ban her website statement. Aplt

App. 2–317-18, -327, -367-420 (¶¶ 24-28, 94-97, Exs. C-L). So although Lorie can immediately publish her statement and begin creating wedding websites, she has refrained to avoid punishment. *Id.* at 2–327 (¶¶ 94-97); *see also* Appellees' Br. at 17, *303 Creative LLC v. Elenis*, No. 17-1344 (10th Cir. Feb. 1, 2018), Doc. No. 01019939442.

The law and Colorado's enforcement of it

Because 303 Creative is a "public accommodation," Aplt. App. 2–327 (¶ 93), it is subject to CADA, which makes it:

> unlawful for a person, directly or indirectly, to 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"). CADA also makes it unlawful to:

> directly or indirectly … publish … any … communication … that indicates that the full and equal enjoyment of the … 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) ("Communication Clause").[3] Colorado enforces both clauses with fines up to $500 per violation, cease-and desist orders, reporting and reeducation requirements, and more. Aplt. App. 2–314, -316-17, -393-96 (¶¶ 5, 17, 25, Ex. F). Anyone can file CADA

[3] Lorie calls this entire clause the Communication Clause but calls the Clause's last part (banning communications indicating someone's patronage or presence is "unwelcome, objectionable, unacceptable, or undesirable" because of certain traits) the "Unwelcome Provision."

complaints with the Colorado Civil Rights Division or pursue civil actions in state court, and each named Appellee here can initiate complaints. *Id.* at 2–314-15 (¶¶ 4-5, 7). Complaints trigger mandatory investigation, including subpoenas, compelled witness testimony, compulsory mediation, hearings, appeals, and binding determinations and orders. *Id.* at 2–314-17, -367-96 (¶¶ 6-17, 25, Ex. C-F).

Colorado has already enforced CADA against those with Lorie's religious beliefs. In 2013, cake designer Jack Phillips declined to create a custom cake celebrating a same-sex wedding, and Colorado prosecuted him to the U.S. Supreme Court—costing Phillips 40% of his income and most of his employees. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n (Masterpiece I)*, 138 S. Ct. 1719 (2018); Br. for Pet'rs at 6, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762, at *6. The Supreme Court ruled for Phillips because Colorado violated the First Amendment by acting with "clear and impermissible hostility toward [his] … religious beliefs." 138 S. Ct. at 1721, 1729.

This hostility appeared in two ways. First, Colorado publicly demeaned Phillips' religious beliefs about marriage by calling them "despicable pieces of rhetoric," comparing them to ideas "used to justify … slavery … [and] the holocaust," and conveying that Phillips must "compromise" his beliefs if he wants to "do business in the state." *Id.* at 1729. Colorado never disavowed these statements. *Id.* at 1730, 1732.

Second, Colorado inconsistently enforced CADA—prosecuting Phillips for declining to create a cake celebrating a same-sex wedding but allowing three other bakeries to decline requests with religious texts critical of same-sex marriage. *Id*. at 1730. Although all four bakeries said they served protected-class members generally and would not create cakes they considered offensive, Colorado only prosecuted Phillips. *Id.*; Aplt. App. 2–367-420.

Colorado has not repented. After *Masterpiece I*, the Commission met publicly in June 2018 to discuss the opinion, and Commissioners affirmed the very statements *Masterpiece I* condemned. As Commissioner Lewis defiantly declared, "I support Commissioner Diann Rice and her comments. I don't think she said anything wrong. And if this was 1950s, it would have a whole different look. So I was very disappointed by the Supreme Court's decision." Aplt. App. 3–609.

Then, in October 2018, the Commission charged Phillips with violating CADA a *second time*—because Phillips declined to create a cake celebrating a lawyer's gender transition. Aplt. App. 3–765-73.[4]

[4] This Court may take judicial notice of these and other public records referenced throughout this brief. *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007). *See* Pls.' Mot. for Prelim. Inj., Ex. 1, *Masterpiece II*, No. 1:18-cv-02074-WYD-STV (D. Colo. Jan. 18, 2019), ECF No. 104-3; Pls.' Mot. for Prelim. Inj., Ex. 5, *Masterpiece II*, No. 1:18-cv-02074-WYD-STV (D. Colo. Jan. 18, 2019), ECF No. 104-7. Lorie has reproduced these public records in Appellants' Appendix.

After 18 months, Colorado eventually dismissed this second complaint, but only after Phillips sued in federal court, and that court found sufficient allegations of Colorado's continued religious hostility. Order, *Masterpiece Cakeshop Inc. v. Elenis (Masterpiece II)*, No. 1:18-cv-02074-WYD-STV (D. Colo. Jan. 4, 2019), ECF No. 94; Aplt. App. 3–774-78.[5]

To this day, Colorado has not disavowed its anti-religious actions or statements. Instead, it has doubled down on those statements here. Colorado has characterized Lorie's claims as an effort to "us[e] religion to perpetuate discrimination against individuals, and violate … state[ ] laws," Aplt. App. 2–455; labeled religious beliefs opposing same-sex marriage "derogatory, offensive messages," *id*. at 2–448; and asserted the right to regulate Lorie's religious speech because it finds that content "discriminat[ory]," *id.*

Colorado is not alone. Other governments have tried to use laws like CADA to force artists to convey messages that violate beliefs like Lorie's. *See TMG*, 936 F.3d 740*, B&N*, 448 P.3d 890; Pet. for Writ of Cert., *Arlene's Flowers, Inc. v. Washington*, No. 19-333 (U.S. Sept. 11, 2019).

All this animosity forced Lorie to file this lawsuit in 2016 to protect her First Amendment rights. Aplt. App. 1–017-112.

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[5] This document is a public record. *See* Defs.' Mot. to Dismiss, Ex. G, *Scardina v. Masterpiece Cakeshop Inc.*, No. 2019CV32214 (Colo. Dist. Ct. July 22, 2019), Filing ID No. 36F53B3CF4991.

Lorie's lawsuit and the district court's orders

Lorie sought a preliminary injunction to stop her ongoing First Amendment injuries. Aplt. App. 3–510. Colorado moved to dismiss, and the district court heard both motions in early 2017. Aplt. App. 3–510-11. At that hearing, the parties agreed no factual disputes existed, and the court ordered Lorie to seek summary judgment, consolidating that with the other pending motions. Aplt. App. 1–149-53 (Hr'g Tr. 9:8-13:2).

Then in September 2017, the court partially granted Colorado's motion to dismiss and denied Lorie's motions. It concluded Lorie had standing for her Communication Clause claims, dismissed her Accommodation Clause claims for lack of standing, and declined to resolve Lorie's Communication Clause claims until the Supreme Court decided *Masterpiece I*. Aplt. App. 3–509-21. Lorie filed an interlocutory appeal that this Court dismissed for insufficient jurisdiction because the district court lifted its stay after *Masterpiece I*. Order & Judgment at 3-6, *303 Creative LLC v. Elenis*, No. 17-1344 (10th Cir. Aug. 14, 2018), Doc. No. 010110037049.

In May 2019, the district court issued a second order. It denied Lorie's summary judgment motion for her Communication Clause claims and ordered her to explain why it shouldn't enter final judgment against her. It did so by first "assum[ing] the constitutionality of the Accommodation Clause"—that this Clause could constitutionally compel Lorie to

create online content—without analyzing that question. Aplt. App. 3–568.

The court then reasoned that the Communications Clause could legally ban Lorie's statement declining to create content celebrating same-sex weddings because the government can ban statements intending illegal conduct and the Accommodation Clause made it illegal to not create content celebrating same-sex weddings. *Id.* at 3–576-79.

In response, Lorie urged the district court not to bypass the critical question of the Accommodation Clause's constitutionality and thereby assume her activity was unprotected just because Colorado interpreted CADA that way. *Id.* at 3–589-93.

In September 2019, the district court issued its final order. *Id.* at 3–752-61. The court agreed it could not assume Lorie's statement intended illegal activity just because the Communication Clause banned it. But the court defended its assumption because it depended on "an entirely different statute," i.e., the Accommodation Clause, which Colorado interpreted as requiring Lorie to create online content celebrating same-sex weddings. *Id.* at 3–755.

SUMMARY OF ARGUMENT

For the same reasons Colorado cannot force LGBT designers to create websites criticizing same-sex marriage, Colorado cannot force Christian designers to create websites celebrating same-sex marriage. Colorado's public accommodation law, CADA, forces Lorie Smith to do the latter (via the Accommodation Clause) and stops her from publishing a statement explaining what she can create (via the Communication Clause). Both results violate the First Amendment.

The district court rejected Lorie's Accommodation Clause claims on standing grounds and her Communication Clause claims on the merits by assuming that Lorie discriminates. That was wrong and contradicts the stipulated facts and recent Supreme Court and other appellate decisions, bypassing the judiciary's core duty to analyze the parties' arguments. Lorie can challenge CADA for hindering her First Amendment rights, which protect her ability to speak consistent with her religious beliefs.

Standing. Lorie has standing to challenge the Accommodation Clause because it is intertwined with the Communication Clause. As the district court conceded, Lorie can challenge the Communication Clause because it bans her statement declining to create certain websites. But whether the Communication Clause can do so depends on whether the Accommodation Clause can constitutionally force Lorie to create the

websites discussed in her statement. When standing and the merits conceptually coalesce like this, courts address the underlying issue.

Lorie also has independent standing to challenge the Accommodation Clause because she faces a substantial risk from it. According to Colorado's own briefs, Lorie would violate the Accommodation Clause if she only created websites celebrating opposite-sex weddings. And Colorado has already enforced this Clause against others like Lorie. Lorie responded by not creating any wedding websites to avoid violating CADA. Courts don't require speakers to violate unconstitutional laws before challenging them.

Speech. CADA violates the First Amendment because it compels Lorie to speak—to design and publish websites (pure speech) conveying messages that violate her religious beliefs. Nor can Colorado infringe Lorie's editorial freedom by labeling it "discrimination." Lorie serves all people but cannot convey all messages. She chooses what she says, not who she serves. Other printers, publishers, writers, and internet companies do the same. Lorie deserves the same freedom.

Because Colorado cannot compel Lorie to create websites, it cannot ban her statement saying which websites she can create. That ban censors Lorie's statement based on content and viewpoint. One provision of CADA even fails facially because it vaguely and overbroadly bans any communication indicating someone is "unwelcome, objectionable,

unacceptable, or undesirable" at public accommodations because of certain traits.

Religious Animus. Only one year ago, the Supreme Court chastised Colorado for making religiously hostile comments and inconsistently enforcing CADA to target someone with religious beliefs like Lorie's. But Colorado has not changed or disavowed these actions. Colorado still allows secular speakers to choose what they create while forcing religious speakers to create speech that violates their religious beliefs. Colorado officials even affirmed the very comments the Supreme Court condemned and lobbed similar barbs at Lorie. Colorado's ad hoc system of enforcing CADA targets Lorie's beliefs, allows individualized assessments, infringes her hybrid rights, and contradicts our nation's history and tradition of religious tolerance. That too violates the First Amendment.

Interests. Colorado can still enforce CADA to stop actual status discrimination. Colorado can let speakers choose what to say while stopping businesses from choosing who they serve. In our pluralistic society where we disagree about so much, that's precisely the approach the First Amendment requires.

STANDARD OF REVIEW

This Court reviews summary judgment awards de novo, applying the same standard as district courts. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009). This Court also reviews standing questions and First Amendment claims de novo. *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 898 (10th Cir. 2016); *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1219 (10th Cir. 2007).

ARGUMENT

I. Lorie has standing to challenge CADA's Accommodation Clause.

Lorie cannot freely create online content because of CADA's Accommodation Clause, and she cannot publish a statement because of CADA's Communication Clause. While the district court held that Lorie had standing to challenge the latter, the court said she lacked it to challenge the former. But Lorie has standing to challenge the Accommodation Clause for two reasons: (A) these two Clauses are intertwined, and (B) the Accommodation Clause creates a substantial risk of harm.

A. Lorie has standing to challenge the Accommodation Clause because it is intertwined with her Communication Clause challenge.

Lorie's faith prohibits her from creating content celebrating same-sex weddings, and she has crafted a statement to explain her faith to the public. Yet the Accommodation Clause requires the former, and the Communications Clause bans the latter. But whether Lorie can constitutionally do the latter depends on whether she can constitutionally do the former. Everyone agrees Lorie may not post statements intending to do illegal, unprotected activities. But she *can* post statements intending to do constitutionally protected activities. Her ability to post depends on the constitutionality of what she's posting about, meaning her two challenges are intertwined. Because this Court must determine what Lorie can decline before deciding what statement she can post, Lorie has standing.

The district court recognized that Lorie's two challenges were intertwined, explaining that "the Communication Clause … survives constitutional scrutiny" if "the Accommodation Clause is constitutional" in compelling Lorie's speech. Aplt. App. 3–578. That's why the district court stayed Lorie's Communication Clause challenge to see how *Masterpiece I* addressed an Accommodation Clause challenge. *Id*. at 3–521.

Colorado agrees: "if [Jack Phillips's] compelled-speech theory is correct [i.e., the Accommodation Clause cannot compel him to create cakes celebrating same-sex weddings], he *must likewise* have the right to hang a sign on his bakery's door" declining to create such cakes. Br. of Resp't Colo. Civil Rights Comm'n at 34-35, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838416, at *35 (emphasis added). So too here.

These concessions are decisive because courts reach the merits when standing and the merits are intertwined. *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319 (1973) ("If applicants are correct on the merits they have standing," because "[t]he case in that posture is in the class of those where standing and the merits are inextricably intertwined."); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) (addressing constitutional challenge because "we could not resolve the question … [of] standing without addressing the constitutional issue"); *Kerr v. Polis*, 930 F.3d 1190, 1198-99 (10th Cir. 2019) (reaching merits because "[t]he

standing question and merit question here are not two separate and independent issues" but are "intertwined and inseparable") (citation omitted).

Two courts recently affirmed this principle, allowing speakers' pre-enforcement challenges to public accommodation laws for compelling their speech and banning statements like Lorie's. *TMG*, 936 F.3d 740 (wedding filmmakers), *B&N*, 448 P.3d 890 (wedding calligrapher and painter). As these cases explain, whether someone can publish statements declining to create speech turns on whether they can constitutionally decline that speech in the first place. *TMG*, 936 F.3d at 757, n.5 ("If creating videos were conduct that Minnesota could regulate, then the State could invoke the incidental-burden doctrine to forbid the Larsens from advertising their intent to engage in discriminatory conduct. But in this case, Minnesota cannot compel the Larsens to speak, so it cannot force them to remain silent either.") (cleaned up); *B&N*, 448 P.3d at 926 (art studio could post statement because its "intended refusal to make custom wedding invitations celebrating a same-sex wedding is legal activity").

Here, the district court took a different path. It refused to reach Lorie's Accommodation Clause challenge, *assumed* this Clause constitutionally compelled her speech, then rejected her Communication Clause challenge based on that assumption. Aplt. App. 3–568, -578. To its credit, the district court conceded that statutes cannot ban speech just

because they declare speech illegal. That would be circular and thus "error." *Id*. at 3–757 (citing various cases).

But the district court saw Lorie's case as different because an "entirely different statute" (the Accommodation Clause) made Lorie's speech illegal, not the Communication Clause itself. *Id*. at 3–755. That's incorrect. For one thing, the Accommodation and Communication Clauses appear in the very same provision of the very same statute. Colo. Rev. Stat. § 24-34-601(2)(a). For another, the circularity remains whether Colorado invokes one statute or two. Either way, Colorado is banning constitutionally protected speech. The Constitution forbids that. *Ragin v. New York Times Co.*, 923 F.2d 995, 1003 (2d Cir. 1991) (defending communication clause would be circular "if there were doubt about [the government's] power to prohibit speech" about the underlying activity).

Bigelow v. Virginia proves the point. 421 U.S. 809 (1975). There, Virginia banned advertisements in Virginia for abortion services legally provided in New York. *Id* at 811. *Bigelow* invalidated this ban primarily because "the activity advertised pertained to constitutional interests"—i.e. the activity described in the advertisement was constitutionally protected no matter what New York or Virginia declared. *Id*. at 822. *Accord Carey v. Population Servs., Int'l*, 431 U.S. 678, 700-01 (1977) (invalidating restriction on abortion advertisement because "the information suppressed by this statute related to activity with which, at least in some respects, the State could not interfere.") (cleaned up);

Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345-46 (1986), *abrogated by 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (interpreting *Carey* and *Bigelow* this way); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976) (same for *Bigelow*).

Contrary to the district court's conclusion, *Bigelow* does "require[ ]" courts "to separately assess the constitutionality" of laws *if necessary* to determine the constitutionality of banning speech. Aplt. App. 3–756. When legal issues are conceptually intertwined, courts do not assume legality and insulate unconstitutional actions; they take up the substantive question. *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1238-39 (11th Cir. 2017) (provision could not restrict advertisement when another provision declared advertisement term misleading because "[s]uch reasoning is self-evidently circular…").

Indeed, courts must examine both statutes or officials will use shell games to silence protected speech. Under the district court's theory, Virginia could ban all abortions in one statute, then ban promotion of illegal activities in another, thereby making all abortion advertisements illegal. Or Colorado could interpret CADA's Accommodation Clause to force freelance writers to accept requests to write books promoting every

religion, then punish any writer (or even any newspaper) for publishing advertisements to write books solely to promote Islam.[6]

As these examples show, free speech does not turn on statutory labels. It turns on substance. This Court should recognize Lorie's standing to raise her Accommodation Clause challenge.

B. Lorie can independently challenge the Accommodation Clause because she faces a substantial risk of harm from it.

Colorado promises to punish Lorie if she designs wedding websites only for opposite-sex weddings, and Lorie has reasonably stopped speaking to avoid punishment. This grants her independent standing to challenge the Accommodation Clause.

To establish Article III standing, a plaintiff must show an injury-in-fact, causation, and redressability. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014). Here, the district court only questioned Lorie's injury-in-fact. Aplt. App. 3–514-15. But Lorie need not "first expose [her]self to actual arrest or prosecution" to challenge laws deterring "the exercise of [her] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). And particularly so here, where Lorie suffers a "chilling effect" on her First Amendment freedoms; courts analyze standing most leniently. *Ward v. Utah*, 321 F.3d 1263, 1266-67 (10th Cir. 2003). To prove injury-in-fact in a pre-enforcement context, Lorie need only allege

[6] The Communication Clause restricts any "person" from publishing statements, including third-party publishers.

an intent to engage in a course of conduct arguably affected with a constitutional interest, conduct arguably proscribed by statute, and a credible threat of prosecution. *SBA List*, 573 U.S. at 159.

Lorie meets this test. She wants to exercise her First Amendment right to design and create wedding websites celebrating opposite-sex marriage exclusively. Aplt. App. 2–324-27 (¶¶ 71-97). Colorado's position is that the Accommodation Clause forbids this. *Id*. at 2–455 (arguing that Lorie seeks to "us[e] religion to perpetuate discrimination against individuals, and violate…state[ ] law[ ]").

And the threat of enforcement is not just credible, it's certain. Colorado has repeatedly enforced the Accommodation Clause to compel other speakers to promote same-sex weddings. *Id*. at 2–368-96, 3–769-73. *See SBA List*, 573 U.S. at 166 (standing supported when speaker "alleged an intent to engage in the same speech that was the subject of a prior enforcement proceeding…").

And Colorado has never disavowed its intent to compel Lorie. To the contrary, it has affirmed its intent to do so. Aplt. App. 3–526; *Sup. Ct. of N.M.,* 839 F.3d at 901 (credible threat generally exists when law proscribes desired conduct "on its face" and state "has not disavowed" enforcement intent) (cleaned up); *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009) (finding it "more than a little ironic that [government] would suggest Petitioners lack standing and then,

later in the same brief, label [Petitioners] as a prime example of ... the very problem the Rule was intended to address") (cleaned up).

Based on this, Lorie has reasonably stopped speaking and suffers ongoing harm. *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 414 n.5 (2013) (plaintiffs may "reasonably incur costs to mitigate or avoid" future harm).

The district court disagreed, reasoning that any harm rested on four contingencies: (1) Lorie creating wedding websites, (2) receiving an objectionable request, (3) declining, and (4) a complaint being filed. Aplt. App. 3–517. But the first three are not contingent. Lorie alone controls whether she creates wedding websites. And she would do so but for CADA. *Id*. at 1–041 (¶ 178) & 2–327 (¶ 96).

And as for objectionable requests, Lorie already received one. A prospective customer named "Stewart" contacted Lorie through her webpage, asking about custom graphics and a website to celebrate his wedding to his fiancé, "Mike." *Id*. at 2–260.

Now the district court dismissed this request as "imprecise," saying it did not "explicitly request" a website. *Id.* at 3–518. But the request asked about Lorie's website services and asked her to address those services. *Id.* at 2–260. Because Lorie is religiously obligated to "be honest and transparent about" her services (*Id*. at 1–039 (¶ 162)), she could only respond one way—saying she does not create what the request asked about: websites celebrating same-sex weddings. And even if Lorie had remained silent, she would still have violated the Accommodation

Clause, which forbids "indirectly … withhold[ing] … [or] deny[ing] … full and equal enjoyment of" services. Colo. Rev. Stat. § 24-34-601(2)(a). *Accord Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1041 n.4 (9th Cir. 2008) (person injured if merely "deterred from patronizing" public accommodation because ADA requires "full and equal enjoyment" of services).

The district court also disregarded the request because Stewart and Mike could be women. Aplt. App. 3–518. But according to Social Security Administration (SSA) data, only a nanoscopic number of women have been named Stewart or Mike since 1880. Lorie faces a 16 times greater chance of being struck by lightning than either name being female.[7] The circumstances clear the preponderance-of-the-evidence standard for standing, particularly taking reasonable inferences in Lorie's favor. *N. Laramie Range All. v. F.E.R.C.*, 733 F.3d 1030, 1034 (10th Cir. 2013).

As for whether anyone will file a complaint against Lorie, the district court already concluded this was likely because of "the public

[7] According to SSA data, 184,531,970 women born between 1880 and 2018 have registered for a social security card. SSA, https://bit.ly/35C7qiR, (last visited Jan. 21, 2020). Of those, 662 were named "Mike" (.000359%) and 78 "Stewart" (.000042%). Aplt. App. 3–779-82 (table created by Appellants summarizing data). The probability of a woman being named either "Mike" or "Stewart" in this data set is .000401%. In contrast, a woman has a 1/15,300 (.006536%) chance of being struck by lightning. Nat'l Weather Serv., https://bit.ly/36KAm9S (last visited Jan. 21, 2020). All of this data is judicially noticeable. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 (10th Cir. 2009) (judicially noticing information on government website).

interest in" cases like this. Aplt. App. 3–517. When a law chills speech, courts *assume* people will file complaints for statutory violations, particularly when, as here, private parties can file complaints. *SBA List*, 573 U.S. at 159. Reality bears this out. Private parties have filed multiple complaints against Jack Phillips for violating CADA by doing what Lorie wants to do. Aplt. App. 2–368-78, 3–765-68.

In sum, Lorie's standing does not rest on a "highly attenuated chain of possibilities." Aplt. App. 3–516. She faces a "substantial risk" of harm because of CADA's severe penalties, Colorado's enforcement history, its stated legal position, complaints filed against others, and the request Lorie already received. That is all Lorie needs to show.

Importantly, Lorie is not required to show a "literal[ ] certain[ty]" of future harm. *Clapper*, 568 U.S. at 414 n.5. "Preenforcement suits always involve a degree of uncertainty about future events." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012). *Accord Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019) (standing supported when plaintiff relies "on the predictable effect of Government action on the decisions of third parties"); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (physicians could challenge abortion restriction even though they could not violate law without request to perform abortion); *Sup. Ct. of N.M.*, 839 F.3d at 900, 902-903 (attorneys could challenge rule affecting their subpoena practices even though they could not identify "any particular subpoena that is presently at issue…").

Other circuits agree and have recognized standing despite much more "contingent" harm than here. *E.g.*, *N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 504-05 (D.C. Cir. 2019) (political party could challenge solicitation restriction on investment agents without identifying anyone who would donate through investment agents because the "single inference" that someone would donate through agent was "eminently reasonable" and not based on causal chain with "several links"); *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 363, 364 n.21 (3d Cir. 2014) (political party could challenge law allowing third parties to sometimes obtain court costs for objecting to ballot signatures—a harm contingent on "three links long" causal chain—because others had suffered harm in past); *Cutshall v. Sundquist*, 193 F.3d 466, 471-72 (6th Cir. 1999) (sex offender could challenge state law allowing disclosure of personal information if requested by local officials, even though offender did not identify any pending request).

Most significant, courts have *uniformly* found standing in the same factual and legal context as Lorie's case—where speakers brought pre-enforcement challenges to public accommodation laws for compelling them to create artwork celebrating same-sex weddings. *TMG*, 936 F.3d at 749-50 (standing because state had already enforced its public accommodation law in similar way against others); *B&N*, 448 P.3d at 899-902 (similar). This Court should not depart from this consensus. Lorie is reasonably likely to suffer harm if she only creates websites

celebrating opposite-sex weddings. She should not have to risk violating the law and suffering like Jack Phillips to vindicate her rights.

II. CADA's Accommodation and Communication Clauses violate Lorie's First Amendment rights to free speech and religious exercise.

Turning to the merits, CADA's Accommodation Clause compels Lorie to speak (§§ A-B below) and the Communication Clause silences her speech. (§ C). Colorado also applies these Clauses to target Lorie's religious views, treating her worse than others. (§ D.) These applications fail strict scrutiny. (§ E.) They therefore violate Lorie's rights to free speech and free exercise.

A. The Accommodation Clause compels Lorie to speak and infringes her editorial freedom by forcing her to design and publish websites that violate her faith.

The "First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796-97 (1988). This means a speaker has "the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. Central to this autonomy is a speaker's freedom to exercise "editorial control and judgment" over her message. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) ("[A]s a general matter, the Government may not interfere with the

editorial judgments of private speakers on issues of public concern ....”). But Colorado violates these principles by compelling Lorie to design and publish websites conveying messages that violate her faith.

According to this Court, a compelled speech claim has three elements: (1) speech, (2) that the speaker objects to, and (3) the government compels. *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015). *Accord Hurley*, 515 U.S. at 572-73 (applying same elements). Lorie satisfies each element, and that triggers strict scrutiny. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal. (PG&E)*, 475 U.S. 1, 19 (1986) (plurality) (applying strict scrutiny to law compelling speech).

1. Lorie's websites and graphics are pure speech that the First Amendment protects.

Lorie creates custom webpages and graphics that are “expressive in nature” in that they contain “images, words, [and] symbols” and “communicate a particular message.” Aplt. App. 2–320 (¶¶ 45-47). The same holds for her future wedding websites. As stipulated, all these wedding websites “will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story.” *Id.* at 2–325 (¶ 81). *See also id.* (¶ 84) (providing example).

These stipulations make Lorie's graphics and websites pure speech that the First Amendment protects. *Cressman*, 798 F.3d at 952 (pure speech includes written and spoken words, pictures, and drawings); *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) (“[P]ublishing

Netbuffs.com is undoubtedly an activity protected by the First Amendment.").

2. Lorie's faith requires her to object to the message conveyed by websites celebrating same-sex marriage.

As Colorado has stipulated, Lorie objects to creating custom websites for same-sex weddings because "by doing so, [Lorie and her studio] would be expressing a message celebrating and promoting a conception of marriage that they believe is contrary to God's design for marriage." Aplt. App. 2–327 (¶ 94). This concession makes sense.

Lorie's websites and graphics "communicate a particular message," and "[e]very aspect of" her graphics "contributes to the overall messages" Lorie conveys through her websites, and her wedding websites celebrate and promote the couple's wedding and unique love story. *Id*. at 2–320-21, -325 (¶¶ 45-47, 53, 81). By creating wedding websites and graphics about a same-sex wedding, Lorie would necessarily convey messages celebrating that same-sex wedding and marriage—messages that violate her faith. *Id*. at 2–323-24, -327 (¶¶ 66, 78, 94). *TMG*, 936 F.3d at 752-53 (forcing filmmakers to create films conveying "the same 'positive' message … about same-marriage as they do for opposite-sex marriage" compels speech).

Just because Lorie objects to this message does not mean she objects to any person because of their status. Colorado concedes that

Lorie serves regardless of status, does not discriminate against LGBT persons, and makes only message-based referrals. Aplt. App. 2–322-23 (¶¶ 64-66). But Lorie cannot create content that violates her faith *for anyone*, no matter who they are. *Id.* (¶¶ 65-66). Her objection always turns on the content of what's requested, not the orientation of who's requesting. Just as atheist graphic designers can decline to create websites promoting Christianity without discriminating against Christians, so too can Lorie decline to create websites promoting same-sex marriage without discriminating against anyone.

The Supreme Court drew the same message/status distinction in *Hurley*. There, the Court allowed parade organizers to decline a LGBT group's request to march with its banner in a parade because that decision turned on a "message [the organizers] disfavored" (i.e., the "unqualified social acceptance of gays and lesbians"), not anyone's sexual orientation. 515 U.S. at 572, 574-75 (organizers did not exclude "homosexuals as such" from parade). *Accord Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653-54 (2000) (affirming distinction).

As the Arizona Supreme Court recently said in a case like Lorie's, an artist's "message-based refusal" to celebrate same-sex weddings deserves protection; that refusal "is *not* based on a customer's sexual orientation." *B&N*, 448 P.3d at 910-11 (emphasis added); *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (distinguishing exclusion based on someone's views from exclusion based on status);

World Peace Movement of Am. v. Newspaper Agency Corp., 879 P.2d 253, 258 (Utah 1994) (newspaper did not commit status discrimination when declining to print religious group's advertisement because "it was the message itself that [the newspaper] rejected, not its proponents").

That's true for Lorie too. Colorado has so stipulated, Aplt. App. 2–322-23 (¶¶ 64-66), and these stipulations are decisive. They disprove the district court's assumption that Lorie discriminates. *Id.* at 3–578. And they prove she objects only to speaking particular messages. Nothing more.

3. Colorado compels Lorie to design and publish websites to which she objects.

Colorado has conceded that it compels Lorie to create websites celebrating same-sex weddings. For the past eight years, Colorado has interpreted CADA to require speakers (including Lorie) to create speech celebrating same-sex weddings if they do so for opposite-sex weddings. Aplt. App. 2–456 (claiming that Lorie seeks to "discriminate against same sex couples" in violation of CADA); Br. for Resp't Colo. Civil Rights Comm'n at 20, 24, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838416, at *20, *24 (interpreting CADA to compel cake designer to "add congratulatory" content on cakes with which he disagreed).

Colorado roots this interpretation in the Accommodation Clause—which requires public accommodations to provide "full and equal enjoyment of" its "services" regardless of sexual orientation. Colo. Rev.

Stat. § 24-34-601(2)(a). But Colorado goes beyond the text to require *equal messages*, i.e. creative professionals must speak the same message about same-sex marriage as about opposite-sex marriage. *Supra* Br. for Resp't Colo. Civil Rights Comm'n, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838416, at *20, *24. *See also TMG*, 936 F.3d at 748-49 (Minnesota adopting same interpretation of similar law).

And CADA's penalties demand compliance. Colorado punishes commissioned speakers who speak exclusively in favor of opposite-sex marriages with fines, cease-and-desist orders, mandatory staff re-education training, and reporting requirements. *See* Aplt. App. 2–316-17, -367-96 (¶¶ 17, 25, Ex. C-F). These penalties compel Lorie.

In response, Colorado says the Accommodation Clause regulates discriminatory business conduct, not speech. Aplt. App. 2–437. But this confuses facial and as-applied invalidity. The public accommodation law in *Hurley*, for example, did "not, on its face, target speech or discriminate on the basis of its content"; its "focal point" was stopping "the act of discriminating." 515 U.S. at 572. But the law still compelled speech because its "application … had the effect of declaring … speech itself [the parade] to be the public accommodation." *Id*. at 573. *Hurley* instructs courts to look beyond a law's text or purpose to whether it applies to speech. *Id*. at 572; *accord* TMG, 936 F.3d at 752, 758 (making this point); *B&N*, 448 P.3d at 913-14 (same). And here the law does. It applies to

Lorie's websites and graphics, compelling her to create them and infringing her editorial judgment.

Colorado says *Hurley*'s protection is limited to nonprofits. Aplt. App. 2–440. But *Hurley* rejected that very distinction. 515 U.S. at 574 (compelled speech protections "enjoyed by business corporations generally," including "professional publishers"). So have many other courts. *TMG*, 936 F.3d at 752, 758 (public accommodation could not compel for-profit film studio); *B&N*, 448 P.3d at 913-14 (same for art studio); *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 962 (9th Cir. 2010) (applying *Hurley* to protect newspaper); *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 999 (M.D. Tenn. 2012) (applying *Hurley* to protect television studio from non-discrimination law).

Public accommodation laws, including CADA, regularly apply to nonprofits. Colo. Rev. Stat. § 24-34-601(1) (public accommodations include "place of business" *and* "any [other] place offering services … to the public); *Hurley*, 515 U.S. at 572, 580 (citing cases allowing these laws to apply to nonprofits). That application is not "peculiar"; what's peculiar is when officials apply these laws to "speech itself." *Id.* at 558.

Finally, Colorado defends compelling Lorie by attributing any message in Lorie's websites to her clients. Aplt. App. 2–443-46 (arguing "reasonable observers" would do this). But this defense doesn't work. Colorado has already stipulated that (1) "[v]iewers" of Lorie's wedding websites "will know that the websites are [her] original artwork…";

(2) these websites "express Ms. Smith's and 303 Creative's message…"; and (3) "Plaintiffs' intended message of celebration … will be unmistakable to the public…" *See id.* at 2–325-26 (¶¶ 79, 83, 88).

The defense also fails legally. The government may not force someone to express "another speaker's message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). That's why the Supreme Court has found compelled speech in situations where no one would attribute speech to the objector. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (state's motto on license plate); *PG&E*, 475 U.S. at 6-7, 15 n.11 (newsletter attributed to someone besides objector). *Accord B&N*, 448 P.3d at 911-12 (rejecting misattribution argument).

Indeed, under Colorado's misattribution theory, the government could compel *any commissioned speaker* to express *any message* whatsoever—from freelance writers, lawyers, publishers, painters, printers, and graphic designers to advertising firms, newspapers, and internet companies. That has never been the law. *Lorie* creates the websites. They're her speech. Colorado may not compel it.

4. Lorie should enjoy the same editorial freedom other online speakers regularly exercise.

Lorie seeks the freedom to control what internet content she creates and publishes online. But this is not unusual. Large internet companies regularly exercise this editorial freedom and invoke compelled-speech principles to do so. Lorie deserves as much, if not more, freedom.

For example, in *Jian Zhang v. Baidu.com*, an internet company blocked certain webpages on its search engine, and some citizens sued, , attempting to use New York's public accommodation law to force the company to publish certain search results on its webpage. 10 F. Supp. 3d at 435-36. The court dismissed the lawsuit because it would violate the company's First Amendment right to exercise "editorial control." *Id.* at 439-40.

Companies like Google, Yahoo, Microsoft, and Facebook have won similar cases protecting their editorial freedom to control their website content. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007) (companies cannot be compelled to place advertisements on their webpages); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-CV-646-FtM-PAM-CM, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017) (Google cannot be compelled to place certain results in search engine); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (Facebook had "First Amendment right to decide what to publish and what not to publish on its platform.").

The Communication Decency Act confirms this editorial freedom. Congress enacted the CDA to stop lawsuits threatening "freedom of speech in the new and burgeoning Internet medium." *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 27-28 (2d Cir. 2015). The law provides tort immunity to "interactive computer service" providers when they act as "the publisher or speaker" of content provided by someone else. 47 U.S.C.

§ 230. And as CDA caselaw confirms, internet companies use "a publisher's traditional editorial functions" when they decide "whether to publish, withdraw, postpone or alter content" on its webpages. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Yet Colorado tries to force Lorie to do exactly that—publish certain content online. That infringes her traditional editorial function.[8]

This is not to say governments can never regulate these large internet companies. Perhaps some monopoly rationale would suffice. But if large companies have the freedom to control what their websites say, a small website designer like Lorie does too.

5. Compelling Lorie to speak creates a dangerous and limitless principle.

As just discussed, Lorie seeks freedoms others regularly exercise. But Colorado seeks a novel and limitless power—the power to compel commissioned speakers to speak any message the government wants.

This principle does not stop online or with debates about marriage. If Colorado can use CADA to compel Lorie to design and publish websites she disagrees with, then Colorado can also force:

[8] To be clear, the CDA does not immunize Lorie because she creates her own content rather than publishing someone else's. But CDA caselaw illuminates what constitutes editorial judgment online. If online publishers exercise editorial control when they publish someone's speech, then certainly online creators like Lorie exercise editorial control when they create and publish their own speech.

- a gay tattoo designer to ink "Homosexuality is an abomination. Leviticus 18:22" on a Mormon's arm;
- a LGBT-owned printing company to design t-shirts condemning bisexuality for the Westboro Baptist Church;
- a Muslim web designer to create websites promoting synagogues because the designer will do so for mosques;
- an Atheist singer to sing hymns at a Catholic Easter service; or
- a progressive bar association to publish statements promoting Israel.[9]

In fact, if Colorado can compel Lorie, nothing stops it from adding "political beliefs" as a protected class to CADA and then forcing speakers to convey political messages with which they disagree, such as forcing Democratic speechwriters to write speeches supporting Republican politicians. Some public accommodation laws already do this.[10] *TMG*, 936 F.3d at 756 (making this point).

As these examples show, free-speech protections transcend this case and any particular debate about marriage. These freedoms apply to all. Otherwise, they hinge on the views of who happens to hold office. In our pluralistic society, giving speakers that freedom is the better course—for everyone.

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[9] Eugene Volokh, *Court Allows Lawsuit Against Ideological Group for Discriminatory Rejection of Noncommercial Ad in Its Publication*, The Volokh Conspiracy (March 19, 2018), https://bit.ly/2VVZeH7.

[10] *E.g.*, Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B); Madison, Wisc. Code of Ordinances §§ 39.03(2), (5).

B. The Accommodation Clause compels Lorie to speak based on content and viewpoint.

While Lorie satisfies this Court's three-part test for compelled speech, the Accommodation Clause goes even further. It compels Lorie's speech based on content and viewpoint. That too triggers strict scrutiny. *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996) (strict scrutiny for such restrictions).

The Accommodation Clause regulates Lorie's speech based on content and viewpoint in three ways. First, the Clause compels Lorie to speak content that she would not otherwise convey. This "necessarily alters the content" of her expression and constitutes "a content-based regulation of speech." *Riley*, 487 U.S. at 795. *Accord Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2371 (2018) (same); *B&N*, 448 P.3d at 912-14 (same as to law forcing art studio to create invitations celebrating same-sex wedding).

Second, the Accommodation Clause only punishes Lorie because she conveys certain content elsewhere. If Lorie sticks to creating websites promoting clean energy or gun control, she is safe. Only if Lorie creates websites promoting opposite-sex marriage must she create websites promoting same-sex marriage.

In this way, the content of Lorie's prior speech triggers the Accommodation Clause's application. That makes the application content-based. *Tornillo*, 418 U.S. at 256 (statute "exacts a penalty on the basis of the content" because it required newspapers to print editorial

only if they printed editorial with particular content earlier); *PG&E*, 475 U.S. at 13-14 (plurality) (law regulates based on content if it "condition[s] [access] on any particular expression" conveyed); *TMG*, 936 F.3d at 753 (law applied in content-based way because it treated films on opposite-sex marriage "as a trigger for compelling [filmmakers] to talk about a topic they would rather avoid—same-sex marriages") (cleaned up).

Third, the Accommodation Clause mandates access only to particular viewpoints. If Lorie creates websites promoting opposite-sex marriage, the Clause does not require her to create websites advocating lower taxes, only websites promoting same-sex marriage.

Accordingly, the Accommodation Clause is viewpoint-based, awarding "access … only to those who disagree with [Lorie's] views." *PG&E*, 475 U.S. at 13-14 (law viewpoint-based because it did not award access to company's newsletter "to the public at large," only to those "who disagree with [the company's] views"); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 654 (1994) (law in *PG&E* "conferred benefits to speakers based on viewpoint"). Viewpoint- and content-based applications like these must overcome strict scrutiny.

C. The Communications Clause also restricts Lorie's speech based on its content and viewpoint.

Just as the government cannot compel speech without satisfying strict scrutiny, it cannot restrict speech based on "its ideas, its subject matter, or its content" without satisfying strict scrutiny. *Reed v. Town of*

Gilbert, 135 S. Ct. 2218, 2226 (2015) (citation omitted). A law restricts speech based on content if it facially draws distinctions based on a speaker's message or if it cannot be justified without reference to speech's content. *Id.* at 2227. A law restricts speech based on viewpoint when it "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Communication Clause fails all these tests. Facially, the Clause prohibits "any … communication" indicating that "services … will be refused" or that an individual "is unwelcome, objectionable, unacceptable, or undesirable" because of "sexual orientation." Colo. Rev. Stat. § 24-34-601(2)(a). This text forbids communications with certain content—denials related to sexual orientation. Statements saying "no photographs of animals" are allowed; statements (like Lorie's) saying "no websites of same-sex weddings" are forbidden. Aplt. App. 3–531. Even the district court agreed the Clause was content-based. *Id.* at 3–578.

The Clause is viewpoint-based too. It allows Lorie to post a statement supporting marriage generally, supporting same-sex *and* opposite-sex marriage, or indicating a willingness to create websites celebrating same-sex *and* opposite-sex marriages. She just cannot express views supporting *only* opposite-sex marriage or indicate a desire to *only* create websites celebrating those marriages. These restrictions favor "inclusive" views on the topic of marriage over others. That's

viewpoint discrimination. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (registration ban on just disparaging trademarks was viewpoint-based); *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996) (it was viewpoint discrimination for the government to ban a sign saying "gay marriage is a sin" but allowing a sign advocating "person's right to choose whatever mate he or she wishes").

To uphold the Clause's application to Lorie, the district court *assumed* Lorie's statement tried to commit illegal status discrimination—which was wrongly based on assuming that the Accommodation Clause was constitutional. Aplt. App. 3–576-79. But that assumption contradicts the stipulated facts and caselaw too. *See* § II.A.2. Of course, Colorado can restrict statements indicating an intent to do something illegal *and constitutionally unprotected*, like employment discrimination, fighting words, statements creating hostile work environments, and solicitation. Aplt. App. 3–576-80 (citing examples); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception,* 101 Cornell L. Rev. 981, 1011 (2016) (explaining this doctrine). But that does not mean Colorado can declare protected speech to be illegal conduct and ban statements about that speech willy-nilly. "Speech is not conduct just because the government says it is." *TMG*, 936 F.3d at 752.

Colorado can no more ban Lorie's statement than ban a group's statement indicating its intent to exclude certain messages from its parade. Or as the Eighth Circuit explained, banning a statement like

Lorie's "rests on a faulty premise." *TMG*, 936 F.3d at 757 n.5. "[I]n this case" Colorado "cannot compel [Lorie] to speak, so it cannot force [her] to remain silent either." *Id.* (film studio can post statement like Lorie's). *See also B&N*, 448 P.3d at 926 (art studio can post statement like Lorie's).

Finally, citing *Hurley*, the district court says Colorado can force speakers to affirm "non-discrimination objectives" in "the realm of commercial advertising." Aplt. App. 3–582. But this theory repeats the *Hurley*-only-protects-unpaid-speakers mistake. *See* § II.A.3 *supra.* (rejecting this interpretation). This theory also overlooks *Hurley*'s actual statement: that government can prescribe orthodoxy in commercial advertising by "requiring the dissemination of purely factual and uncontroversial information." 515 U.S. at 573 (cleaned up). But websites celebrating same-sex marriage are not purely factual or uncontroversial. *NIFLA*, 138 S. Ct. at 2372 (refusing to apply commercial disclosure doctrine to notices about "abortion, anything but an 'uncontroversial' topic"). And the Communication Clause does not *compel* disclosures anyway; it *restricts* speech, as the district court said. Aplt. App. 3–576.

Just as important, Lorie's desired statement is not commercial speech. It does more than propose a commercial transaction; it discusses her religious views. *Harris v. Quinn*, 573 U.S. 616 (2014) (defining commercial speech). At the very least, Lorie's statements contain religious speech "inextricably intertwined with" commercial speech and that triggers strict scrutiny. *Riley*, 487 U.S. at 796.

Even if couched as commercial speech, Lorie's statement would "advertise[] an activity itself protected by the First Amendment" (creating certain websites). *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983). And that still triggers greater scrutiny. *Id.*

In fact, because the Communications Clause regulates Lorie's speech based on viewpoint, the Clause triggers strict scrutiny regardless whether her speech is commercial. *Matal*, 137 S. Ct. at 1767-69 (five justices agreeing that lower scrutiny did not apply to viewpoint-based restrictions on commercial speech); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 39 (2d Cir. 2018) (interpreting *Matal* this way). *Accord R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."). So no matter how Colorado construes Lorie's speech, its decision to ban Lorie's statement triggers strict scrutiny.

D. The Accommodation and Communication Clauses punish Lorie for her religious views.

Like many other "reasonable and sincere people," Lorie holds the "decent and honorable religious" view that God ordained marriage as "a gender-differentiated union of man and woman." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2602 (2015); Aplt. App. 2–319, -324 (¶¶ 31, 73-74). Lorie's faith compels her to proclaim this view about marriage through her wedding websites and her desired statement, and her faith prohibits her from contradicting this view by creating websites celebrating same-

sex marriage. Aplt. App. 2–324-26 (¶¶ 71-80, 85-92). Yet CADA forces Lorie to celebrate views contrary to her religious beliefs and stay silent about her own views while giving this freedom to those with secular views. This violates the Free Exercise Clause in multiple ways.

1. The Accommodation and Communication Clauses are not generally applicable or neutral when applied to Lorie.

While generally applicable and neutral laws sometimes trigger minimal scrutiny, laws without these characteristics face greater hurdles. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (strict scrutiny); *Masterpiece I*, 138 S. Ct. at 1732 (per se invalidation of non-neutral application). CADA's application to Lorie falters for the same three reasons the Supreme Court condemned in *Masterpiece I* and *Lukumi*.

First, Colorado officials verbally indicated their hostility toward Lorie's religious beliefs. Commissioners initially did so during the *Masterpiece I* litigation, when they compared religious beliefs like Lorie's to beliefs causing slavery and the Holocaust. 138 S. Ct. at 1729-30. Colorado has not disavowed these statements and certainly not done so in a purposeful, public, and equally persuasive way as the initial inappropriate comments. *Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016) (setting this as test for state to remove taint of prior unconstitutional actions).

No matter, after *Masterpiece I*, Colorado officials affirmed the very comments the Supreme Court condemned. As one commissioner noted at a public meeting a few days after the *Masterpiece I* ruling: "I support Commissioner Diann Rice and her comments [about slavery and the Holocaust]. I don't think she said anything wrong. And if this was 1950s, it would have a whole different look. So I was very disappointed by the Supreme Court's decision." Aplt. App. 3–609. No commissioner disagreed.

Even during this litigation, Colorado has made statements that mirror those from *Masterpiece I*, accusing Lorie of using "her religious beliefs as a reason to discriminate," Aplt. App. 1–114, -118, and "using religion to perpetuate discrimination," *id*. at 1–134, 2–456. Colorado has even called Lorie's beliefs about marriage "derogatory" and "offensive" and compared them to beliefs justifying race discrimination. *Id*. at 1–128-30, 2–434-35. As these recent statements show, officials cannot possibly apply CADA fairly to Lorie.

Nor does this problem go away if Colorado passed CADA permissibly. While the district court focused on this factor alone (*id*. at 3–582-87), Colorado must pass *and apply* CADA in a neutral way. *Masterpiece I* proves this. It condemned CADA's hostile application without mentioning legislative history.

Second, setting comments aside, Colorado applies CADA more favorably to secular speakers who decline requests for secular reasons. The Supreme Court explained this point in *Masterpi*ece *I* after Colorado

exonerated three secular bakeries for declining requests to create religious messages objectionable to them but punished Jack Phillips for declining to create secular messages objectionable to his religion. 138 S. Ct. at 1730-31; Aplt. App. 2–317-18, -367-420 (¶¶ 24-28, Ex. C-L). Colorado still has not disavowed this selective "religious-speakers policy." The discriminatory policy remains in place.

In fact, Colorado has doubled down after *Masterpiece I*. Since then, Colorado tried to prosecute Jack Phillips for declining to create another cake objectionable to his religious beliefs. Order, *Masterpiece II*, No. 1:18-cv-02074-WYD-STV (D. Colo. January 4, 2019) (detailing these facts), ECF No. 94. Based on this incident, a federal district court identified enough allegations of Colorado's bad faith to keep the case because Colorado had continued its "disparate treatment" of prosecuting religiously motivated objections to secular messages while allowing secularly motivated objections to religious messages. *Id*. at 20-22.

Colorado's treatment of Lorie proves its "religious-speakers policy" still exists. For example, this policy operated by attributing religious objectors' speech to their clients and by ignoring how they served LGBT clients generally; yet Colorado reversed these presumptions for secular objectors—attributing their speech to them and emphasizing how they served religious persons generally. *Masterpiece I*, 138 S. Ct. at 1730-31. Colorado still uses the same analysis for religious speakers like Lorie, attributing their speech to their clients and ignoring how they serve

LGBT people generally. Aplt. App. 2–322-23 (¶¶ 64-66) & 2–443-46. *See also* Defs.' Resp. to Pls.' Am. Mot. for Prelim. Inj. 16-18, *Masterpiece II*, No. 1:18-cv-02074-WYD-STV (D. Colo. Feb. 8, 2019), ECF No. 116. This proves the "religious-speakers policy" remains.

The hostility behind Colorado's policy is even clearer when applied to Lorie. Unlike *Masterpiece I*, Colorado *concedes* that Lorie serves clients regardless of status, does not discriminate against LGBT persons, and makes message-based referrals. Aplt. App. 2–322-23 (¶¶ 64-66). Yet Colorado *still* seeks to punish her under CADA. This makes Lorie exactly like the secular bakeries in *Masterpiece I*—speakers who generally serve clients in protected classes but who decline to speak certain messages. Colorado allows these bakeries to decline creating objectionable messages. But Colorado compels Lorie. Only one thing explains this discrepancy: religious hostility.

Third, Colorado's "religious-speakers policy" allows individualized assessments and creates gerrymandered exemptions that disfavor religion. A system of individualized assessments requires "case-by-case inquiries" that use a "subjective test" that allows officials to selectively burden religious exercise—such as an administrative process that uses a vague, "good cause" standard. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297-98 (10th Cir. 2004) (cleaned up).

Colorado's "religious-speakers policy" fits this description to a tee. Colorado officials subjectively decide on a case-by-case basis when

speakers can decline to create speech. Secular speakers who generally serve religious clients can decline whenever they find a request "objectionable." *Masterpiece I*, 138 S. Ct. at 1730-31. Religious speakers like Lorie and Jack Phillips who generally serve LGBT clients cannot. This is not a "good cause" standard; it's a "Colorado-chooses" standard.

And religious persons fare poorly under it. Religious speakers must create speech inconsistent with their beliefs. Religious clients cannot ask creative professionals to create speech consistent with their beliefs. Secular speakers can decline to create speech when they choose. Secular clients can request whatever they want. There's just one constant. Religious people always lose. In sum, Colorado's case-by-case system produces categorically unequal results, exempting secular speakers for doing what religious speakers cannot. This is no surprise. The officials making the case-by-case judgments have declared their religious hostility many times. Biased officials mean biased applications.

In response, the district court dismissed Colorado's inconsistent treatment because Colorado exonerated the three secular bakeries in *Masterpiece I* under the Accommodation Clause, not the Communication Clause. Aplt. App. 3–571-72. But that does not fix the problem. The Accommodation Clause currently prohibits Lorie from speaking and Lorie has standing to challenge it. *Supra* § I. And Colorado's "religious-speakers" policy appears in the Communication Clause too: Colorado cannot decide if a speaker posts a valid statement declining to speak

unless Colorado uses its problematic "religious-speakers" policy to decide whether that decline is valid or invalid. *Supra* § I.A (discussing intertwinement).

That's not unusual. It's one of the many problems with a *system* of individualized assessments—a "pattern of ad hoc discretionary decisions" not confined to one "written policy" or law. *Axson-Flynn*, 356 F.3d at 1297-99. Because this system appears in both the Accommodation and Communication Clauses and because both Clauses affect Lorie, Colorado violates the First Amendment no matter what statutory subsection Colorado invoked.

2. The Accommodation and Communication Clauses violate Lorie's hybrid rights.

Like selective applications, applications that burden religious exercise and a companion constitutional right also trigger strict scrutiny. *Axson-Flynn*, 356 F.3d at 1295-97 (recognizing hybrid-rights doctrine). This doctrine applies when a companion constitutional claim is "colorable," meaning "a fair probability or likelihood, but not a certitude, of success on the merits." *Id.*

Lorie meets this test because CADA violates her speech rights. *See* § II.A-C. At the very least, CADA colorably infringes these rights, particularly since the Supreme Court considers compelling and restricting religious speakers paradigmatic hybrid-rights violations. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881-82

(1990) (citing historic examples). *Accord TMG*, 936 F.3d at 759 (confirming this principle).

This conclusion makes greatest sense here where Colorado concedes that Lorie creates protected speech. Aplt. App. 2–320 (¶¶ 45-47) (stipulating that websites are "expressive in nature" and "communicate a particular message"). If the hybrid-rights doctrine carries any weight, it at least justifies ratcheting from rational or intermediate to strict scrutiny when a law burdens protected speech—opposed to applications that burden no protected speech.

3. The Accommodation and Communication Clauses regulate Lorie contrary to our nation's history.

Setting these other problems aside, CADA also deserves strict scrutiny for burdening Lorie's religious exercise in ways inconsistent with our nation's history and tradition. Laws that do this must always overcome strict scrutiny. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) ("The contention that *Smith* forecloses recognition of" well-established historical precepts "rooted in the Religion Clauses has no merit"). And we know burdening Lorie falls outside this tradition because *Smith* itself recognized the historical anomaly of compelling and silencing religious speakers. *See* § II.D.2.

To the extent this Court interprets *Smith* differently, *Smith* should be overruled. While this Court cannot do that, Lorie preserves this issue

for appeal. *See Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring) (criticizing *Smith* because that decision "drastically cut back on the protection provided by the Free Exercise Clause" but noting that the case before the Court did not ask to revisit *Smith*).

E. The Accommodation and Communication Clauses fail strict scrutiny.

Because CADA violates Lorie's constitutional rights, CADA's application must satisfy strict scrutiny—the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To do so, Colorado must prove that CADA's application narrowly serves a compelling interest. *Reed*, 135 S. Ct. at 2226. Colorado can do neither.

Turning to compelling interest, the district court said that stopping discrimination justified regulating Lorie. Aplt. App. 3–586-87. But strict scrutiny "look[s] beyond broadly formulated interests" to consider "the asserted harm of granting specific exemptions to particular … claimants." *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 431 (2006). In other words, Colorado must identify an "actual problem in need of solving" and then limit its restriction only as "necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (cleaned up).

But compelling and silencing Lorie does not stop discrimination. Lorie does not discriminate against anyone. *See* II.C. She declines to convey messages she disagrees with while serving people regardless of their status. *Id*. And public accommodation laws have no "legitimate end" when they compel speakers like that. *Hurley*, 515 U.S. at 578. *Accord TMG*, 936 F.3d at 755 (reaching same conclusion about public accommodation law compelling films and silencing statement like Lorie's); *B&N*, 448 P.3d at 914-15 (same as to art studio). Colorado can curb discriminatory conduct without compelling or silencing Lorie.

Likewise, Colorado has not proved any actual problem. Colorado does not identify a single Colorado public accommodation that discriminates based on sexual orientation, much less one that declines to create websites promoting same-sex marriage. That's decisive. "[A]necdote and supposition" do not suffice; Colorado must prove an "actual problem … in this case." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822-23 (2000). In fact, the record proves the opposite of what Colorado must show: many other website designers are available to provide wedding websites. Aplt. App. 2–327-28 (¶¶ 99-101).[11] In this environment, forcing Lorie to create websites is unnecessary.

[11] *Gay + Lesbian Weddings*, The Knot, https://bit.ly/2Rl3vmo (last visited Jan. 21, 2020); *Top Five Wedding Website Builders (Updated for 2018)*, Wedding Lovely Blog (Aug. 27, 2018), https://bit.ly/2RhfJMY.

Overlooking this problem, the district court redefines the state's interest from ensuring access to "eradicating" certain practices "altogether." *Id.* at 3–587 (n.12). But this redefinition takes Colorado's "nondiscrimination purpose" as "overrid[ing] all conflicting individual rights and liberties." *B&N*, 448 P.3d at 923-24. In contrast, *Masterpiece I* "clearly contemplated that some exemptions … were permissible." *Id.* In other words, courts should balance the interests—not just consider those seeking websites but also consider Lorie because "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning…." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

As for narrow tailoring, Colorado falters here because compelling and silencing Lorie is not "the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). For one alternative, Colorado could interpret its law to allow message-based objections. Courts around the country already do this. *See* § II.A.2 (citing cases in Arizona, Utah, the Eighth Circuit, and elsewhere).

The federal government does this for its laws too. *E.g.*, 29 C.F.R. § 1604.2 (interpreting Title VII to allow production studios to make classifications when "necessary for the purpose of authenticity or genuineness…e.g., [selecting] an actor or actress"); Br. for the United States as Amicus Curiae Supporting Pet'rs at 22, *Masterpiece I*, 138 S. Ct. 1719 (2018) (No. 16-111) (interpreting First Amendment as Lorie does).

In fact, Colorado already *interprets* CADA this way sometimes—allowing secular bakeries to decline to convey messages objectionable to them. *See* II.D.2. Colorado cannot explain why it allows this, but it must force Lorie—who also serves everyone regardless of status—to promote same-sex marriage. This under-inclusivity undermines any basis for regulating Lorie. *Reed*, 135 S. Ct. at 2232 (law "cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited.") (cleaned up).

Next, Colorado could track the federal public accommodation law and not apply CADA to expressive businesses. 42 U.S.C. § 2000a(b) (defining public accommodations as hotels, restaurants, and theaters). Other states already do this. *See* Fla. Stat. § 760.02(11); S.C. Code Ann. § 45-9-10(B); *Hatheway v. Gannett Satellite Info. Network, Inc.*, 459 N.W.2d 873, 875-76 (Wis. Ct. App. 1990) (not applying public accommodation law to newspaper).

Or Colorado could follow cases that do not apply public accommodation laws to highly selective entities. *Vejo v. Portland Pub. Sch.*, 204 F. Supp. 3d 1149, 1168 (D. Or. 2016) (selective university program); *Cut 'N Dried Salon v. Dep't of Human Rights*, 713 N.E.2d 592, 595-96 (Ill. App. Ct. 1999) (selective insurance company).

Lastly, Colorado could exempt artists who speak about weddings. Mississippi already does this without any problems. Miss. Code. § 11-62-

5(5)(a). Any of these options would still achieve Colorado's goals while also respecting the First Amendment. Punishing Lorie does neither.

III. The Unwelcome Provision facially violates the First and Fourteenth Amendments because it is overbroad, vague, and grants unbridled discretion.

The Unwelcome Provision bans speech that indicates someone's "patronage or presence … is unwelcome, objectionable, unacceptable, or undesirable because of" protected characteristics. Colo. Rev. Stat. § 24-34-601(2)(a). This language is overbroad and vague and grants unbridled discretion to Colorado officials.

Overbreadth. A statute is overbroad when 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). The Unwelcome Provision is overbroad because terms like unwelcome, objectionable, unacceptable, or undesirable are elastic and ban too much speech. These terms could cover any critical statement related to protected classes on a public accommodation's website—statements like "Israel commits murder" or "Catholicism is wrong." And what about the statement, "God created marriage to be between a man and woman." Some might say that statement indicates LGBT people are unwelcome. If core political and religious speech like this is barred, the ban is simply too broad.

That is why other courts have invalidated the same language as overbroad. *B&N*, 418 P.3d at 442-43 (striking "unwelcome," "objectionable," "unacceptable," and "undesirable" language as overbroad); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (invalidating harassment policy as overbroad because it banned "any unwelcome verbal…conduct which offends…because of" protected characteristics); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 77-80 (D.D.C. 2001) (invalidating policy on "objectionable" appearance as overbroad). *Cf. Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 577-78 (6th Cir. 2013) (ban on advertisements that "discourage" certain protected classes would be overbroad).

Vagueness and unbridled discretion: To comply with the Fourteenth Amendment, laws must give people an understanding of what is prohibited and provide minimal guidelines for enforcement officials. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). These requirements are more stringent for speech restrictions. *Murphy v. Matheson,* 742 F.2d 564, 569 (10th Cir. 1984).

In a similar vein, the First Amendment forbids laws that "delegate overly broad … discretion" to government officials or "allow[] arbitrary application," because "such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

The Unwelcome Provision also fails these standards. CADA does not define "objectionable, unwelcome, unacceptable, or undesirable." Nor is it obvious what these terms ban. As the examples above illustrate, officials could take *any* critical statement related to protected classes on a public accommodation's website as indicating clients are unwelcome or objectionable or undesirable. Colorado officials are thus free to apply the law selectively to restrict views they dislike.

The district court countered that litigants may not facially challenge a law for vagueness if the law clearly applies to their own conduct. Aplt. App. 3–573. But the Supreme Court recently changed that principle. *Henry v. Spearman*, 899 F.3d 703, 708-09 (9th Cir. 2018) (surveying this change in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and relevant cases). And this principle does not bar challenges to laws that grant too much enforcement authority. *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 409-10 (D.C. Cir. 2017). The district court just misstated the law.

CONCLUSION

Colorado wants to force Lorie to promote online precisely that which violates her deepest faith convictions. What's more, Colorado seeks to silence Lori from sharing her religious views with others. While Colorado may commendably apply CADA sometimes, it does not do so here.

Fortunately, CADA, equality, and the First Amendment can co-exist. The path is simple. Allow speakers to choose the messages they speak, not the clients they serve. Lorie does this. Colorado concedes it. And other speakers do it too—in Colorado and across the country. Singling out Lorie makes no sense. There is a better way, and the First Amendment requires Colorado to take it.

Lorie therefore asks this Court to reverse the lower court and direct that summary judgment be entered in her favor, plus a permanent injunction protecting her constitutional freedoms.

ORAL ARGUMENT STATEMENT

Lorie respectfully requests oral argument. This case involves important and complex First Amendment issues that greatly affect Lorie's and others' constitutional freedoms. Oral argument will materially help this Court decide the issues.

Dated: January 22, 2020

Respectfully submitted,

s/ Jonathan A. Scruggs

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Date: January 22, 2020

s/ Jonathan A. Scruggs
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Date: January 22, 2020

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I hereby certify that on January 22, 2020, a true and accurate copy of this brief and addenda was electronically filed with the Court using the CM/ECF system, which will send notification of such filing to the following:

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