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

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Oral Argument is Requested

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. This Court has jurisdiction. 3

A. Lorie faces a substantial risk of harm from the Communication Clause. 3

B. Lorie's Communication and Accommodation Clause challenges are intertwined. 6

C. Lorie faces a substantial risk of harm from the Accommodation Clause. 7

D. Lorie's requested relief will redress the harm Colorado is causing. 11

E. The stipulated facts make Lorie's claims prudentially ripe. 12

II. CADA violates Lorie's free-speech and religious-exercise rights. 15

A. The Accommodation Clause compels Lorie's speech by forcing her to design and publish websites contrary to her faith. 15

1. Lorie objects to messages, not people. 16

2. CADA compels Lorie's speech, not conduct. 18

3. *Hurley* controls, not *Rumsfeld*. 21

B. The Accommodation Clause compels Lorie's speech based on its content and viewpoint. 22

C. The Communication Clause bans Lorie's desired statement based on content and viewpoint. 22

D. CADA punishes Lorie for her religious beliefs. 23

E. The Accommodation and Communication Clauses fail strict scrutiny. 26

III. The Unwelcome Provision is facially overbroad, vague, and grants unbridled enforcement authority. 29

CONCLUSION 31

CERTIFICATE OF COMPLIANCE with rule 32(a) 33

CERTIFICATE OF DIGITAL SUBMISSION 34

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

Cases

Adams v. Watson,
10 F.3d 915 (1st Cir. 1993) 9

Awad v. Ziriax,
670 F.3d 1111 (10th Cir. 2012) 12

Baur v. Veneman,
352 F.3d 625 (2d Cir. 2003) 10

Beaulieu v. City of Alabaster,
454 F.3d 1219 (11th Cir. 2006) 15

Board of Trustees of State University of New York v. Fox,
492 U.S. 469 (1989) 30

Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983) 23

Bronson v. Swensen,
500 F.3d 1099 (10th Cir. 2007) 11

Brush & Nib Studio, LC v. City of Phoenix,
448 P.3d 890 (Ariz. 2019) 2, 10, 13, 16, 18, 19, 20, 21, 22

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 24

Citizens for Responsible Government State PAC v. Davidson,
236 F.3d 1174 (10th Cir. 2000) 8

Clapper v. Amnesty International USA,
568 U.S. 398 (2013) 5

Consumer Data Industry Association v. King,
678 F.3d 898 (10th Cir. 2012) 11, 12

Craig v. Masterpiece Cakeshop, Inc.,
370 P.3d 272 (Colo. App. 2015) 20

Cressman v. Thompson,
798 F.3d 938 (10th Cir. 2015) 17

Crime Justice & America, Inc. v. Honea,
876 F.3d 966 (9th Cir. 2017) 28

Day v. Bond,
500 F.3d 1127 (10th Cir. 2007) 6

Elane Photography, LLC v. Willock,
309 P.3d 53 (N.M. 2013) 20

FEC v. Wisconsin Right to Life, Inc.,
551 U.S. 449 (2007) 26

Felix v. City of Bloomfield,
841 F.3d 848 (10th Cir. 2016) 25

Frudden v. Pilling,
742 F.3d 1199 (9th Cir. 2014) 19

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006) 27

Griswold v. Driscoll,
616 F.3d 53 (1st Cir. 2010) 6

Groswirt v. Columbus Dispatch,
238 F.3d 421 (6th Cir. 2000) 18

Hedges v. Obama,
724 F.3d 170 (2d Cir. 2013) 6, 8

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995) 17, 21, 27

Janus v. American Federation of State, County, & Municipal Employees, Council 31,
138 S. Ct. 2448 (2018) 18

Landmark Communications, Inc. v. Virginia,
435 U.S. 829 (1978) 27

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,
138 S. Ct. 1719 (2018) 16, 17, 21, 25, 28

Maya v. Centex Corp.,
658 F.3d 1060 (9th Cir. 2011) 4

McCullen v. Coakley,
573 U.S. 464 (2014) 27

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 2

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974) 9

Mink v. Suthers,
482 F.3d 1244 (10th Cir. 2007) 5

National Institute of Family & Life Advocates v. Becerra,
138 S. Ct. 2361 (2018) 28

National Organization for Marriage, Inc. v. Walsh,
714 F.3d 682 (2d Cir. 2013) 12

Petrella v. Brownback,
787 F.3d 1242 (10th Cir. 2015) 7

Pic-A-State Pa., Inc. v. Reno,
76 F.3d 1294 (3d Cir. 1996) 8, 9

PruneYard Shopping Center v. Robins,
447 U.S. 74 (1980) 21

Reno v. ACLU,
521 U.S. 844 (1997) 31

Riley v. National Federation of the Blind of North Carolina, Inc.,
487 U.S. 781 (1988) 19

Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,
547 U.S. 47 (2006) 21, 22

Scahill v. District of Columbia,
909 F.3d 1177 (D.C. Cir. 2018) 11

State v. Arlene's Flowers, Inc.,
441 P.3d 1203 (Wash. 2019) 20

Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,
559 U.S. 662 (2010) 12

Summum v. City of Ogden,
297 F.3d 995 (10th Cir. 2002) 24

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 3, 4, 5, 12

Telescope Media Group v. Lucero,
936 F.3d 740 (8th Cir. 2019) 2, 8, 10, 15, 17, 20, 22, 31

Texas v. United States,
945 F.3d 355 (5th Cir. 2019) 9

United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority,
163 F.3d 341 (6th Cir. 1998) 31

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000) 27

United States v. Supreme Court of New Mexico,
839 F.3d 888 (10th Cir. 2016) 3, 4, 14

United States v. Williams,
553 U.S. 285 (2008) 23

Warth v. Seldin,
422 U.S. 490 (1975) 6

Washington Post v. McManus,
944 F.3d 506 (4th Cir. 2019) 21

Washington State Grange v. Washington State Republican Party,
552 U.S. 442 (2008) 21

Welsh v. Boy Scouts of America,
993 F.2d 1267 (7th Cir. 1993) 29

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 2

Wilson v. Stocker,
819 F.2d 943 (10th Cir. 1987) 8

Regulations

3 C.C.R. § 708-1:10.2 7

3 C.C.R. § 708-1:10.8(A)(3) 11

Statutes

C.R.S. § 24-34-306 4

C.R.S. § 24-34-306(1) 10

C.R.S. § 24-34-306(1)(b) 7, 8

C.R.S. § 24-34-502(8) 26

C.R.S. § 24-34-601(2)(a) 30

C.R.S. § 24-34-601(3) 26, 27, 29

Miss. Code. § 11-62-1 29

Other Authorities

Colo. Office of the State Auditor, *Management of Civil Rights Discrimination Complaints: Performance Audit Report of the Colorado Civil Rights Commission and the Colorado Civil Rights Division* (Aug. 2019), https://perma.cc/CAK7-FTG8. 5

INTRODUCTION

Lorie Smith is a website designer who operates her business consistent with her faith. She serves everyone no matter who they are; she just can't design and publish websites conveying messages that violate her faith *for anyone*. None of this is in dispute. Colorado stipulated below that Lorie (1) creates speech, (2) serves clients regardless of status, and (3) declines to design websites because of their message, not the person requesting them. So this case has nothing to do with any purported right to discriminate. *Contra* Appellees' Br. 2-5.

Colorado presses two points on appeal. First, Colorado says Lorie lacks standing and this case is not ripe because she faces no risk of prosecution under the Colorado Anti-Discrimination Act's (CADA) Accommodation Clause (restricting which websites Lorie offers) or Communication Clause (restricting which statements she posts online). Not so. Colorado unjustly prosecuted Jack Phillips of Masterpiece Cakeshop *twice* for exercising the same editorial freedoms, erasing seven years of his life and 40% of his income. An activist has *twice* used and is still using CADA to target Jack for his religious beliefs in efforts to ruin his business. CADA allows officials to immediately prosecute Lorie when she posts her desired statement or offers her desired websites. And Colorado has repeatedly told Lorie her actions violate CADA.

Despite this hostile environment, Colorado demands that Lorie enter the wedding market, violate CADA, and pray she isn't prosecuted. But Lorie need not "bet the farm" to challenge Colorado's unconstitutional barriers. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). That is why courts routinely recognize standing and protect speakers like Lorie in indistinguishable situations. *E.g.*, *Telescope Media Grp. v. Lucero (Telescope)*, 936 F.3d 740 (8th Cir. 2019); *Brush & Nib Studio, LC v. City of Phoenix (Brush & Nib)*, 448 P.3d 890 (Ariz. 2019). This Court should too and give Lorie the clarity and freedom she so desperately needs.

Second, Colorado argues that Lorie's editorial freedom creates a slippery slope that will sanction discrimination. Again, not so. The only slope here leads to a valley without free speech or religious freedom for anyone. States that can compel Lorie to create messages that violate her faith can also force LGBT creatives to design websites condemning homosexuality and Latino writers to draft pamphlets promoting the Aryan Nation Church. "Our Constitution was designed to avoid these ends by avoiding these beginnings." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). "Even antidiscrimination laws, as critically important as they are, must yield to the Constitution." *Telescope*, 936 F.3d at 755.

ARGUMENT

I. This Court has jurisdiction.

A pre-enforcement plaintiff like Lorie proves standing by showing a "substantial risk" that harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59, 167 (2014). Here, Lorie does not post her desired statement or offer to create certain websites because she faces a substantial risk that Colorado will enforce the Communication and Accommodation Clauses against her.

In denying this risk, Colorado overlooks CADA's text, its own active enforcement history, its stated intent to prosecute Lorie, the efforts of private parties to target religious speakers like Lorie, the intertwined nature of the challenged CADA clauses, and the stipulated facts. These prove substantial risk, validate Lorie's self-censorship, and show this Court's jurisdiction.

A. Lorie faces a substantial risk of harm from the Communication Clause.

Lorie can challenge the Communication Clause because it "fac[ially] proscribes" her desired speech and Colorado "has not disavowed" enforcement. *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 901 (10th Cir. 2016).

Disputing only credible enforcement, Colorado lists nine "contingencies" that must occur before Lorie suffers harm. Appellees' Br. 27-29. The first two are certain; Lorie will immediately offer

wedding websites and post her desired statement "but for" the Communication Clause. *Sup. Ct. of N.M.*, 839 F.3d at 902 (cleaned-up). If self-chill alone creates contingency to negate standing, then chilled speakers could never sue. *Id.* (rejecting contingency argument in chilling context).

The fourth event is certain too. Colorado must investigate filed complaints, as it acknowledges. Appellees' Br. 12 ("would be required" to investigate); Aplt. App. 3—517 ("no discretion" on matter); C.R.S. § 24-34-306 (director "shall" investigate). And Colorado conceded below that someone would "certainly" have an argument that Lorie "is committing an illegal act by posting this [Lorie's] discriminatory language on a website." Aplt. App. 1—148. Colorado confirmed this by prosecuting Jack Phillips (*Id.* at 2—368-96, 3—769-73) and by declaring Lorie's statement illegal in this litigation. Appellees' Br. 3, 50-57 (statement "facilitate[s] illegal commercial conduct").

All that makes Colorado's five post-investigation steps irrelevant. The administrative process harms Lorie when it begins, not just when it ends. *Driehaus*, 573 U.S. at 165-66 ("Commission proceedings" alone can cause harm.). The penalty at the end just produces *another* harm that justifies standing, no matter how many perfunctory "links" Colorado identifies in its process; each link is still "plausible." *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (cleaned-up); *see also* Br. for Resp'ts, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014)

(No. 13-193), 2014 WL 1260424, at *36-37 (unsuccessfully challenging standing by citing eight-step process).

That only leaves Colorado's third step—someone reading Lorie's statement and complaining. Appellees' Br. 27-29. But of course, Lorie cannot identify someone who will read and object to *unpublished* material. For this certainty, Lorie would have to publish her internet statement, violate the law, and risk prosecution—in a state where the media spotlights those like Jack Phillips and where people filed almost 2,000 CADA complaints in 2019.[1]

No court has ever required so much for standing; it would make chill-based suits impossible. *Driehaus*, 573 U.S. at 164 (mere "risk" of future complaints justified standing; never considering if speaker could identify future reader or objector). And Colorado's cited cases don't say otherwise. They involved disavowed government action, *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007), or statutes authorizing international surveillance of non-parties, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). Here, CADA directly regulates Lorie (not third parties), applies domestically (not internationally), and proscribes her statement (not just authorizes investigations); and Colorado has enforced CADA against similar speakers and interpreted it to proscribe

[1] Colo. Office of the State Auditor, *Management of Civil Rights Discrimination Complaints: Performance Audit Report of the Colorado Civil Rights Commission and the Colorado Civil Rights Division* (Aug. 2019), https://perma.cc/CAK7-FTG8.

Lorie's actions. That justifies standing. *Hedges v. Obama*, 724 F.3d 170, 200-01 (2d Cir. 2013) (distinguishing *Clapper* on these grounds).

B. Lorie's Communication and Accommodation Clause challenges are intertwined.

Because Lorie can challenge the Communication Clause, which requires this Court to address the Accommodation Clause's validity, Lorie can also challenge the Accommodation Clause. Her challenges are intertwined. Amicus Br. Catholic Vote.Org 4-11. Colorado concedes this intertwinement. Appellees' Br. 24, 51. This is decisive.

At most, Colorado says these two clauses' *merits* are intertwined, not standing *and* the merits. Appellees' Br. 24. But that's the same thing. "[S]tanding is" a litigant's entitlement "to have the court decide the merits of … particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). So when this Court addresses the Communication Clause's merits and decides the Accommodation Clause's merits (as Colorado concedes it must), this Court has resolved the issue's merits and *by definition* awards standing.

That has been Lorie's point all along. When an "answer to [a merits] question would necessarily resolve the standing issue," courts award standing and resolve the merits. *Day v. Bond*, 500 F.3d 1127, 1137 (10th Cir. 2007). This Court should do the same. *Accord Griswold v. Driscoll*, 616 F.3d 53, 56 (1st Cir. 2010) (exercising jurisdiction because "the dispositive questions of standing and statement of

cognizable claim are difficult to disentangle"). *Cf. Petrella v. Brownback*, 787 F.3d 1242, 1255 (10th Cir. 2015) (pendent jurisdiction appropriate if "the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well") (cleaned-up).

C. Lorie faces a substantial risk of harm from the Accommodation Clause.

Lorie also has independent standing to challenge the Accommodation Clause because it creates a substantial risk by forcing her to offer websites that violate her faith or face prosecution. Colorado's contingency argument for this Clause fails for the same reasons as noted above. Eight of Colorado's nine "contingencies" are certain; either Lorie controls each step or Colorado does, and Colorado has already pledged to perform it's "contingencies." *See supra* § I.A.

That only leaves someone requesting a website Lorie cannot create and complaining. But Colorado can enforce CADA without this. CADA allows each named Appellee to initiate "on its own motion" a complaint "alleging a discriminatory or unfair practice" (C.R.S. § 24-34-306(1)(b)), defined as "one or more acts, practices, commissions or omissions prohibited by" CADA. 3 C.C.R. § 708-1:10.2. So Lorie's mere policy and practice of offering only certain websites violates CADA, and Colorado can file a complaint on that basis—no request or denial

necessary. *Telescope*, 936 F.3d at 768-71 (Kelly, J., concurring in part) (filmmakers' mere "business model" violated public accommodations law).

To be sure, officials can only file complaints when a practice "imposes a significant societal or community impact." C.R.S. § 24-34-306(1)(b). But Colorado has already trumpeted its compelling need to regulate Lorie to prevent widespread harm—no exceptions possible. Appellees' Br. 2-5, 49-50, 64-73 (regulating Lorie necessary because CADA's "uniform enforcement" serves its "compelling interest in eliminating discrimination"). Colorado's treatment of Jack Phillips bolsters this. It's far too late and too unbelievable for Colorado to argue (for the first time) that "small compan[ies] … would rarely" impose a community impact justifying Attorney General action. Appellees' Br. 31.

It's also irrelevant. Colorado's statement never mentions or binds other officials who can file complaints and never disavows the Attorney General doing so either. Such contradictory, "equivocating," non-binding, and litigation-driven statements don't negate reasonable chill. *Wilson v. Stocker*, 819 F.2d 943, 947 n.3 (10th Cir. 1987); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1192 (10th Cir. 2000) (government construction "insufficient to overcome the chilling effect of the statute's plain language"); *Hedges*, 724 F.3d at 199 (same for vague language); *Pic-A-State Pa., Inc. v. Reno*, 76 F.3d 1294,

1299 (3d Cir. 1996) (saying "prosecution is unlikely" insufficient because did not "expressly disavow[]" intent to prosecute).

Lastly, Lorie need not identify pending requests for standing. She faces a substantial risk of receiving a request because she wants to operate and solicit clients in the wedding market, and activists have already targeted religious speakers like her, sending speakers requests so they can be sued under CADA. Appellants' Br. 9-11 & n.5 (referencing *Masterpiece II* and *III* proceedings). In this seek-and-destroy environment for creative professionals, Lorie faces much more than a substantial risk of receiving a request; the risk is overwhelming —it is "predicated on actual market experience and *probable* market behavior." *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993); *Texas v. United States*, 945 F.3d 355, 386 n.30 (5th Cir. 2019) (plaintiffs can challenge law causing them to provide cost-incurring services without identifying individual who will use those services).

As such, Lorie would be foolish to do anything but chill her speech. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) ("right-of-access statute" caused newspapers to "avoid controversy" and chill speech *even before* third party could request access and trigger statutory obligations). Other speakers have faced much more tenuous threats than this and they still had standing. Appellants' Br. 27-28. Colorado never distinguishes these situations.

In fact, courts have consistently allowed creative professionals to challenge public accommodations laws threatening their editorial freedom. Appellants' Br. 28. Colorado objects that these cases involved officials actively enforcing laws, plaintiffs providing examples of their desired speech, or testers. Appellees' Br. 33-35. But Lorie has alleged more active and widespread enforcement than these other cases. Appellants' Br. 8-11; *supra* n.1. And she's provided a sample wedding website. Aplt. App. 2—333-61.

As for "testers," the cited cases either did not mention them, *Brush & Nib,* 448 P.3d at 899-902, or did not require them—instead relying more on other factors also present here. *Telescope*, 936 F.3d at 749-50 (emphasizing government's stated intent to enforce and past enforcement). No matter, Colorado encouraged and deputized everyone to be a tester by allowing private citizens and certain officials to file complaints. C.R.S. § 24-34-306(1). This makes Lorie's basis for standing stronger than these other cases.

To seal the matter, Lorie has already received a request for a wedding website that would violate her faith. Appellants' Br. 25-26. Unable to deny this, Colorado dismisses it for coming after litigation began. Appellees' Br. 28 n.2. But courts can consider "post-filing events" to "confirm that a plaintiff's fear of future harm is reasonable." *Baur v. Veneman*, 352 F.3d 625, 637 n.11 (2d Cir. 2003).

Beyond that, most courts read Supreme Court precedent as allowing them to consider post-complaint information supplemented into the record, like the request Lorie received here. *Scahill v. District of Columbia*, 909 F.3d 1177, 1183 (D.C. Cir. 2018) (surveying these cases). This Court should as well.[2]

D. Lorie's requested relief will redress the harm Colorado is causing.

Lorie can also prove causation and redressability.

For causation, Lorie need only show that named officials "possess authority to enforce the complained-of provision." *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007). And Colorado does not dispute the Commissioners' authority to enforce, only the Director's and Attorney General's. Appellees' Br. 30-31. But CADA empowers all these officials to file complaints and the Director to control CADA investigations. Aplt. App. 2—314-17 (¶¶ 4-23). The Attorney General's office also prosecutes people during Commission-enforcement hearings. 3 C.C.R. § 708-1:10.8(A)(3).

As for redressability, Lorie's relief need not "afford complete redress"; reducing the injury to "some extent" is enough. *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 905 (10th Cir. 2012) (cleaned-up). Here, an injunction would stop the very officials charged with

[2] While this Court takes the opposite view in this circuit split, Lorie wishes to preserve this argument for appeal.

CADA-enforcement. Lorie does not need to enjoin the world to obtain this relief. *Compare id.* at 901-02 (harm redressable despite private parties' ability to sue) *with* Appellees' Br. 32-33 (saying private lawsuits made harm unredressable).

E. The stipulated facts make Lorie's claims prudentially ripe.

Moving from standing, Colorado objects that insufficient facts make this case unripe under Article III. Appellees' Br. 35-37. But this objection is prudential, not jurisdictional. *Driehaus*, 573 U.S. at 167. And Colorado waived it by not raising it below. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (prudential ripeness objections waivable).

Lorie satisfies this requirement anyway. First, Lorie challenges the Unwelcome Clause facially, which requires no "[f]urther factual development." *Awad v. Ziriax*, 670 F.3d 1111, 1125-26 (10th Cir. 2012). Second, Lorie provided the exact statement she wants to publish (Aplt. App. 2—362-66) and Colorado says the Communication Clause forbids it. Appellees' Br. 3 (statement "advertise[s] [Lorie's] intention to deny services to customers based on…sexual orientation"), 50-57. No more facts are needed there. *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 691-92 (2d Cir. 2013) (sample advertisements made case ripe).

Third, the stipulated facts make Lorie's Accommodation Clause challenge ripe. Colorado has stipulated that *every* wedding website

Lorie creates is expressive, celebratory, and sends a particularized message promoting each couple's love story and wedding. Aplt. App. 2—320, 325 (¶¶ 46-47, 50, 80-83). So the particular wording Lorie uses in these websites does not matter. *Contra* Appellees' Br. 35-37. Forcing Lorie to design *any of these conceivable* websites about same-sex weddings automatically forces her to speak objectionable messages. *Brush & Nib,* 448 P.3d at 901 (same concession made case ripe as to wedding invitations).

Lorie has also provided a sample wedding website. Aplt. App. 2—333-61. Colorado never explains why it needs more than this.[3]

And Colorado's legal theory also makes additional facts unnecessary. Under this theory, Lorie must "provide the same commercial service" to both same-sex and opposite-sex weddings, even when content about the wedding or couple in these services changes (like names, dates, photographs, and celebratory language). Appellees' Br. 42-43 (giving examples and defining discrimination as denying "same service").

For example, because Lorie will publish affectionate photographs of the couple and write "celebrate our marriage," "Mrs. … Mr.," "The Bride … The Groom," "'…and they shall become one flesh'—Genesis

[3] While the stipulated facts make this unnecessary, this Court could tailor relief to protect only the wedding website in the record and materially similar websites. *Brush & Nib,* 448 P.3d at 901.

2:24," and "What therefore God has joined together, let no man separate" about opposite-sex weddings (Aplt. App. 2—335-36, 338, 356), Colorado's theory requires her to publish the same and similar photographs and phrases (i.e., "Mr. and Mr.") about same-sex weddings.

While Colorado may not require Lorie to create content about other subjects ("God is Dead," "Gay Pride," Appellees' Br. 42), it does require her to create *any* content describing the wedding, marriage, or marrying couple. For wedding content, Colorado thinks speakers *always* offer the "same service," whether for same-sex or opposite-sex weddings. That's why Colorado says photographers, calligraphers, and filmmakers must offer "the same wedding-related services" to both weddings or they engage in "discriminatory conduct." Appellees' Br. 48-49. Even though the wedding content in these services necessarily changes to reflect each wedding, Colorado compels it anyway.

Under Colorado's theory then, Lorie violates CADA *anytime* she offers to create *any* wedding content about opposite-sex weddings, couples, or marriages and not about same-sex weddings. And this covers everything Lorie wants to do. After all, those seeking wedding services "seek to celebrate their own weddings." Appellees' Br. 43. And Lorie's wedding websites always do just that—describe and celebrate particular weddings. Aplt. App. 2—325-26 (¶ 79-83, 88).

Because Colorado's legal theory blanketly requires her to do so, this case is ripe for review. *Sup. Ct. of N.M.*, 839 F.3d at 904 (case ripe

because contingencies did not "significantly advance" court's ability to resolve legal issues) (cleaned-up); *Telescope*, 936 F.3d at 768-771 (Kelly, J., concurring in part) (case ripe because filmmakers would violate public accommodations law by declining to offer any same-sex wedding film); *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1231 (11th Cir. 2006) (case ripe because government's views about ordinance in record).

II. CADA violates Lorie's free-speech and religious-exercise rights.

Colorado applies CADA to compel and censor Lorie's speech while targeting her religious beliefs for disfavored treatment. Because these applications trigger and fail strict scrutiny, they violate the First Amendment.

A. The Accommodation Clause compels Lorie's speech by forcing her to design and publish websites contrary to her faith.

As Lorie noted before, this Court uses a three-part test to identify compelled speech: (1) speech, (2) that the speaker objects to, and (3) the government compels. Appellants' Br. 30. Colorado never interacts with this test. Colorado also concedes that Lorie's websites are speech. Aplt. App. 2—320, 325 (¶¶ 46-47, 81). That only leaves whether Lorie objects to speech Colorado compels. She does.

1. Lorie objects to messages, not people.

Lorie already explained that she declines websites based on their content—not anyone's status. She cited precedent adopting this distinction, highlighted the stipulated facts applying this distinction, and repeated herself, again and again. Appellants' Br. 1, 6, 31-33. But Colorado never responds. It does not distinguish the cited cases or deny (or even discuss) these stipulations. Colorado simply assumes the key premise in its argument—that Lorie offers the "same service" to same-sex and opposite-sex couples, declines service to the former, and therefore discriminates based on status. *Supra* § I.E.

But in reality, Lories offers the same service to and conveys the same message for everyone: websites celebrating opposite-sex weddings. No other messages are on the menu. In other words, Lorie's websites are not "fungible products, like a hamburger or a pair of shoes." *Brush & Nib,* 448 P.3d at 901 (rejecting "same-service" argument). Each website contains unique content that conveys celebratory messages about each wedding. Aplt. App. 2—320, 325 (¶¶ 46-47, 50, 79-84). In compelling Lorie to design same-sex weddings websites then, Colorado is forcing her to add to her menu by designing website content she will not design for anyone.

Colorado's own cases prove the point. Because Lorie's websites convey celebratory messages about opposite-sex marriage, they are not "suitable" to describe "same-sex and opposite-sex weddings alike" but

are in fact different services conveying different messages. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n (Masterpiece I)*, 138 S. Ct. 1719, 1733 n.* (2018) (Kagan, J., concurring). So even under Colorado's own theory, Lorie does not discriminate.

This inconsistency underscores the flaw in Colorado's "same-service" test. It sets "the level of generality" too high for Lorie, but no one else. *Masterpiece I*, 138 S. Ct. at 1739 (Gorsuch, J., concurring). What matters is not whether Lorie offers websites generally, but whether Colorado compels her to design websites conveying messages she disagrees with—i.e., messages she does not convey for anyone. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) (focusing on message conveyed by group's banner, not whether organizers offered "parade services"); *Cressman v. Thompson*, 798 F.3d 938, 960-61 (10th Cir. 2015) (focusing on message conveyed by license plate).

And Colorado compels exactly this. Websites celebrating opposite-sex weddings "at a minimum will convey a different message than" those celebrating same-sex weddings. *Telescope*, 936 F.3d at 753. So Lorie can decline the latter based on the message without discriminating against anyone's status.

This message/status distinction protects others as well. Otherwise, Colorado's "same-service" test would—if applied consistently—force Muslim filmmakers to produce promotional films for synagogues

because they do so for mosques. Or LGBT printers to publish signs saying, "Trust the Westboro Baptist Church" because they would publish signs saying, "Trust the Unitarian Church." Or Catholic calligraphers to write tracts for Mosques saying, "Worship Allah" because they write tracts for churches saying, "Worship Jesus." As Colorado views it, that's all just the "same service." In our pluralistic society though, "[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (cleaned-up). That is why courts let speakers choose what they say, not the government.

2. CADA compels Lorie's speech, not conduct.

Colorado interprets CADA to force Lorie to design and publish websites conveying messages she disagrees with. That compels speech, not conduct.

Colorado counters that anti-discrimination laws *always* regulate commercial conduct. Appellees' Br. 37-39. Not true. While these laws typically regulate conduct, they still regulate speech when applied to alter expressive content. That's why courts regularly stop anti-discrimination laws from compelling speech. Appellants' Br. 35 (citing cases); *Groswirt v. Columbus Dispatch*, 238 F.3d 421, *2 (6th Cir. 2000) (unpublished) (anti-discrimination law could not force newspaper to

publish op-ed); *Brush & Nib,* 936 F.3d at 755 ("[A]s compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment.").

To avoid their import, Colorado tries to limit these cases to speakers who "craft[] the content of" their services "before making [them] available to the public," not afterward at the sale point. Appellees' Br. 41. But Lorie does exactly this. She offers custom (not off-the-shelf) websites and wants to exercise editorial discretion on the front-end by only offering to design websites celebrating opposite-sex weddings. Aplt. App. 2—325 (¶¶ 79-84).

Next, Colorado says it can compel Lorie's websites without forcing her to endorse anything because her websites convey only her clients' message. Appellees' Br. 43. But Lorie already explained why that's wrong; Colorado never responds. Appellants' Br. 35-36; *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 n.8 (1988) (law could not force professional fundraiser to speak client's requested message); *Frudden v. Pilling*, 742 F.3d 1199, 1204-05 (9th Cir. 2014) (rejecting endorsement argument).

Colorado does not even believe its own theory. Colorado identifies other website designers who do not speak for their clients. Appellees' Br. 42 (designer declining website with rainbow flag). But Colorado sacrifices consistency for good reason. Under its endorsement theory, the government could force any commissioned speaker to speak any

message requested by any client, such as forcing freelance writers to ghostwrite books promoting Donald Trump or Barack Obama. No court has sanctioned this.

Finally, Colorado cites various Supreme Court cases upholding anti-discrimination laws. Appellees' Br. 39, 48. But these cases involved conduct—hiring law partners, selling barbeque, renting hotel rooms, and accessing clubs; they never addressed compelled-speech claims. *Id.*; *Brush & Nib*, 448 P.3d at 899-902 (distinguishing same cases); *Telescope*, 936 F.3d at 749-50 (same). Here, everyone concedes Lorie's websites are speech.

Even Colorado's wedding cases support Lorie. They indicate officials cannot compel "forms of pure expression" like websites. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1227 n.19 (Wash. 2019) (cleaned-up); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015) (case different if cake contained "design" or "written inscriptions").

Only *Elane Photography, LLC v. Willock* says otherwise. 309 P.3d 53 (N.M. 2013) (compelling photographer). But *Elane* repeats Colorado's mistake: it confuses what anti-discrimination laws textually say with what they do when applied to alter expressive content. *Id.* at 68 (upholding law because it "applies not to Elane Photography's photographs but to its business operation"). As such, *Elane* contradicts *Hurley* and the many other cases stopping anti-discrimination laws

from compelling speech. Other courts agree. *Brush & Nib,* 448 P.3d at 916-17 (distinguishing *Elane*). This Court should too.

3. *Hurley* controls, not *Rumsfeld*.

Since Colorado is using a public accommodations law to compel speech, *Hurley* controls and condemns this attempt to "alter the expressive content" in Lorie's speech. 515 U.S. at 572-73.

Colorado can only counter that *Hurley* applies to non-profits. Appellees' Br. 47. But Lorie dismantled this distinction already. Appellants' Br. 35. *See Washington Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019) (applying *Hurley* to for-profit newspaper). Colorado's response? Silence.

Instead, Colorado invokes *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, since it upheld an equal-access regulation. 547 U.S. 47 (2006); Appellees' Br. 44-47. But that regulation forced schools to open their empty rooms to recruiters. And empty rooms (unlike websites) don't say anything; they aren't "inherently expressive." *Rumsfeld,* 547 U.S. at 64. *Compare PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (requiring access to empty space) *with Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008) (distinguishing *Rumsfeld* because laws requiring "[f]acilitation of speech" different from laws forcing someone to actually speak); *Masterpiece I*, 138 S. Ct. at 1745 (Thomas, J., concurring in part

and concurring in the judgment) (same); *Telescope*, 936 F.3d at 758 (same).

The *Rumsfeld* regulation did force schools to send emails with logistical information. 547 U.S. at 61-62. But those emails were incidental to hosting, i.e., speech necessary to effectuate *some other* conduct (hosting) the government could require. Here, Lorie is not physically hosting any weddings or engaging in any other conduct, only speech. So Colorado cannot force her to speak about weddings, much less speak celebratory messages she disagrees with about those weddings. *Telescope*, 936 F.3d at 758 (distinguishing *Rumsfeld* for this reason); *Brush & Nib,* 448 P.3d at 908-09 (same).

B. The Accommodation Clause compels Lorie's speech based on its content and viewpoint.

The Accommodations Clause not only compels speech, it does so based on content and viewpoint—it alters Lorie's website content, is triggered by what she says elsewhere, and provides access only to those expressing certain viewpoints. Appellants' Br. 40-41. Colorado never responds.

C. The Communication Clause bans Lorie's desired statement based on content and viewpoint.

Because the Accommodations Clause cannot compel Lorie to design same-sex wedding websites, the Communication Clause cannot

ban her desired website statement—Lorie can explain her right not to speak.

Colorado counters that it can ban statements facilitating illegal commercial conduct. Appellees' Br. 51-57. But Lorie does not engage in illegal action. *Supra* § II.A.1. So her statement does not facilitate it.

Raising commercial speech does not help Colorado either. Colorado can ban statements facilitating illegal conduct whether they are commercial speech or not. *United States v. Williams*, 553 U.S. 285, 298 (2008). But with no discrimination interest here, Colorado gives no other reason for restricting Lorie's speech. And any conceivable reason would regulate her speech because of its viewpoint and noncommercial content. Doing that always triggers strict scrutiny (Appellants' Br. 45)—a point Colorado ignores—and fails every scrutiny level. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) (no substantial interest when regulating speech for being offensive).

D. CADA punishes Lorie for her religious beliefs.

Lorie holds religious views about marriage that motivate her to avoid celebrating same-sex marriage and to post a statement giving others upfront clarity about her services. Aplt. App. 2—326 (¶¶ 87-92). By singling out these views for disfavored treatment, Colorado violates the Free Exercise Clause.

Colorado responds first by defending CADA's facial validity. Appellees' Br. 60-61. But that misses Lorie's as-applied arguments.

Nor can Colorado avoid its obligations because Lorie brought a pre-enforcement suit. Appellees' Br. 61-62. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the plaintiffs similarly won a pre-enforcement suit based on religious hostility. 508 U.S. 520, 528, 547 (1993).

Colorado also dismisses Lorie's hybrid-rights argument by assuming her free speech arguments fail. Appellees' Br. 63. Not so. *Supra* § II.A-C. And Lorie only needs to show fair probability for a hybrid claim, not definite success. Lorie clears this bar because of Colorado's many concessions and the cases protecting creatives in similar situations.

For the most part though, Colorado tries to undo the past, passing a resolution promising to obey *Masterpiece I*. Appellees' Br. 61-62. Way too little, much too late. Colorado has litigated Lorie's case for nearly four years, prosecuted Jack Phillips for seven, made shameful anti-religious comments, and re-affirmed *those exact same comments after the Supreme Court condemned them*. Appellants' Br. 9-11. Yet Colorado waited until after Lorie's opening brief in this appeal to pass its resolution. Last-minute maneuvers like this prove fear of accountability, nothing more. *Summum v. City of Ogden*, 297 F.3d 995, 1005 (10th Cir. 2002) (ignoring post-litigation policy changes).

The resolution's format and substance fall short too. No press release. No public statement. A stealth resolution buried in "a difficult-to-access legislative record" does not undo a seven-year crusade of open religious hostility. *Felix v. City of Bloomfield*, 841 F.3d 848, 863-64 (10th Cir. 2016).

Most important, the resolution's substance misses wide. No admission of wrongdoing. No new training. No new procedures. No reprimands whatsoever. The resolution identifies no concrete changes. It's all talk and no substance.

Colorado's post-resolution brief proves the point. According to this, speakers can decline to create websites outside the wedding context—such as those "featuring" anti-religious text like "God is Dead"—but Lorie must offer websites celebrating same-sex weddings, apparently because only Lorie's websites exclusively speak her clients' message. Appellees' Br. 42-43; *Masterpiece I*, 138 S. Ct. at 1730 (condemning same policy for inconsistent attribution logic).

Colorado even admits that other speakers can decline "a message it would decline to produce for any customer." Appellees' Br. 62. But Colorado still requires Lorie to create messages celebrating same-sex marriage that she would not create for anyone. The inconsistency is indisputable. But one consistency remains. Colorado continues to use the same policy to allow the same individualized assessments to

produce the same biased results—those with Lorie's religious beliefs always lose.

E. The Accommodation and Communication Clauses fail strict scrutiny.

Because Colorado uses CADA to target Lorie's speech and faith, Colorado must satisfy strict scrutiny, i.e., prove its application serves a narrowly tailored and compelling interest. Colorado fails this test.

Compelling interest. Colorado says it must regulate Lorie to eradicate discrimination. Appellees' Br. 65. But Lorie does not discriminate. So regulating her speech gets Colorado nowhere. Appellants' Br. 54. Again, no response.

Colorado does cite harms caused by discriminatory conduct. Appellees' Br. 65-67. And that might justify many CADA applications. But "a compelling interest [must] support[] *each application* of a statute restricting speech." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007). Yet Colorado never cites any evidence about anything, much less public accommodations or website designers. By definition, Colorado cannot prove a causal link between Lorie exercising her editorial freedom and any problem whatsoever.

Instead, Colorado cites cases saying access denials *always* cause harm. Appellees' Br. 67-68. But CADA undermines that defense by exempting some denials. C.R.S. § 24-34-502(8) (denials based on familial status by single-home owner and owner-occupied dwellings);

C.R.S. § 24-34-601(3) (denials based on sex by public accommodations if restriction has "bona fide relationship" to services). And just because officials proved harm elsewhere does not mean Colorado can manufacture harm here.

Just as important, those cases evaluated activities they considered conduct. Here, Lorie wants to control her speech. Her defense is not "go elsewhere" but "speak elsewhere"—something the First Amendment protects. *Hurley*, 515 U.S. at 578 (LGBT group could "obtain[] a parade permit of its own"). Rightfully so. Compelling speech causes incredible harm. Lorie's dignity matters too.

Narrowly tailored. In response to Lorie's proposed alternatives, Colorado expresses fear of widespread denials of "goods and services." Appellees' Br. 49-50, 69. But Colorado never proved that it tried or "considered" these alternatives "that other jurisdictions have found effective." *McCullen v. Coakley*, 573 U.S. 464, 494 (2014). That's fatal under intermediate scrutiny. *Id*. So it fails strict scrutiny too.

What's more, Colorado cites no evidence to prove its fears will occur. Colorado bears the burden "to prove that the alternative will be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). Mere "assertion and conjecture" do not suffice. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)

(dismissing slippery-slope concerns for insufficient proof); *Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 977 (9th Cir. 2017) (same).

Masterpiece I does not fill this evidentiary gap. *Contra* Appellees' Br. 69. While *Masterpiece I* worried about overbroad exemptions covering all wedding services, here "a narrower issue is presented": whether Lorie must "make an expressive statement" about weddings. 138 S. Ct. at 1727-28.

Moving on from Colorado's evidentiary failures, Lorie's alternatives still work.

First, Colorado complains it cannot identify message-based objections. Appellees' Br. 70. But courts have frequently done so without causing problems. Appellants' Br. 32-33. Protection only occurs when an expressive work conveys messages the speaker disagrees with, not when someone objects to the denial act itself. *Contra* Appellees' Br. 70. That makes Lorie's theory quite narrow. "[I]nnumerable goods" do not "implicate the First Amendment." *Masterpiece I*, 138 S. Ct. at 1728.

To Colorado's chagrin, Lorie's theory does require courts to distinguish speech and conduct. Appellees' Br. 49-50, 70-71. But "precedents have long drawn" this line, which "is long familiar to the bar." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (cleaned-up). And while judges may disagree about cakes, flowers, wedding dresses, and the like (Appellees' Br. 49-50, 71), no one

disagrees about websites. They're speech, as Colorado stipulated. Aplt. App. 2—320, 325 (¶¶ 46-47, 81)

Second, Colorado fears that protecting selective entities would cover too many businesses, including upscale bistros. Appellees' Br. 72. No. Bistros serve the general public. Very few entities offer services purposefully and necessarily tailored to small audiences. Courts can identify them. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1276-77 (7th Cir. 1993) (evaluating selectivity in public accommodations context). In fact, CADA already allows businesses to draw sex-based distinctions that have a "bona fide relationship" to their services. C.R.S. § 24-34-601(3). If Colorado can allow that, it can allow Lorie to exercise her freedoms.

And finally, Colorado thinks protecting wedding professionals would cover every wedding business, service, and objection. Appellees' Br. 72-73. But Lorie's alternative tracks a law that only covers individuals and small businesses that decline specified wedding services violating their sincere belief in one-man-one-woman marriage. Miss. Code. § 11-62-1 et. seq. Colorado never explains why it must go further. Colorado has failed to disprove this alternative, just like every other.

III. The Unwelcome Provision is facially overbroad, vague, and grants unbridled enforcement authority.

CADA's Unwelcome Provision fails facially because it vaguely restricts too much speech by banning any speech that indicates

someone's "patronage or presence" is "unwelcome, objectionable, unacceptable, or undesirable because of" protected characteristics. C.R.S. § 24-34-601(2)(a).

This problem extends well beyond commercial speech. *Contra* Appellees' Br. 57-59. Indeed, the Communication Clause's first part already bans statements denying service. So the Unwelcome Clause necessarily goes further. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989) (commercial-speech regulation could be challenged for non-commercial speech applications).

According to Colorado, the Unwelcome Provision only bans "statements of discriminatory preference" connected to a "commercial transaction." Appellees' Br. 59. But the provision never says that. The provision bans statements indicating someone's "presence" is unwelcome, not just their "patronage." This language goes far beyond statements deterring commercial transactions to statements deterring interactions between public accommodations and their customers. After all, any critical statement about protected classes or their actions could be taken to indicate their presence is unwelcome.

But even under Colorado's interpretation, the Clause is unconstitutional. Colorado already argued (incorrectly) that everything on Lorie's website is commercial speech. Appellees' Br. 56. So Colorado apparently considers everything on business websites to be connected to commercial transactions—including political statements like "I hate

Christians for meddling in politics" or "Divorce is wrong." A business website could not even say "I serve white racists but that is very difficult for me and I do so under protest." That statement indicates someone's patronage is "undesirable."

To make matters worse, Colorado already admitted that its Unwelcome Clause covers statements indicating someone's presence is "offensive," "unwanted," and "not pleasing." Aplt. App. 2—450. Courts routinely condemn similar language as overbroad and vague. *Reno v. ACLU*, 521 U.S. 844, 877-79 (1997) (ban on "patently offensive" communication transmissions to minors overbroad); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 360 (6th Cir. 1998) (ban on "aesthetically pleasing" signs vague). This Court should too.

CONCLUSION

Lorie wants only the freedom to choose what she says as she serves everyone, no matter who they are. "[W]hen, as here, [Colorado] seeks to regulate speech itself as a public accommodation, it has gone too far under *Hurley* and its interest must give way to the demands of the First Amendment." *Telescope*, 936 F.3d at 758.

Lorie respectfully asks this Court to reverse the district court's decision, grant her summary judgment, and allow her to speak freely.

Dated: May 28, 2020

Respectfully submitted,

s/ Jonathan A. Scruggs

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Date: May 28, 2020

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I hereby certify that on May 28, 2020, a true and accurate copy of this brief 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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