

FILED

United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 26, 2021

Christopher M. Wolpert
Clerk of Court

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

Plaintiffs - Appellants,

v.

No. 19-1413

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

Defendants - Appellees.

FOUNDATION FOR MORAL LAW;
CATO INSTITUTE; CENTER FOR
RELIGIOUS EXPRESSION;
CATHOLICVOTE.ORG EDUCATION
FUND; LAW AND ECONOMIC
SCHOLARS; TYNDALE HOUSE
PUBLISHERS; CROSSROADS
PRODUCTIONS, INC., d/b/a Catholic
Creatives; WHITAKER PORTRAIT
DESIGN, INC., d/b/a Christian
Professional Photographers; THE BRINER
INSTITUTE, INC.; STATE OF
ARIZONA; STATE OF ALABAMA;
STATE OF ALASKA; STATE OF
ARKANSAS; STATE OF KENTUCKY;
STATE OF LOUISIANA; STATE OF
MISSOURI; STATE OF MONTANA;
STATE OF NEBRASKA; STATE OF
OKLAHOMA; STATE OF SOUTH

CAROLINA; STATE OF TENNESSEE; STATE OF TEXAS; STATE OF WEST VIRGINIA; ROBERT P. GEORGE, Professor; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ANTI-DEFAMATION LEAGUE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; GLOBAL JUSTICE INSTITUTE, METROPOLITAN COMMUNITY CHURCHES; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HINDU AMERICAN FOUNDATION; INTERFAITH ALLIANCE FOUNDATION; INTERFAITH ALLIANCE OF COLORADO; MEN OF REFORM JUDAISM; PEOPLE FOR THE AMERICAN WAY FOUNDATION; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; SIKH COALITION; WOMEN OF REFORM JUDAISM; UNION FOR REFORM JUDAISM; STATE OF MASSACHUSETTS; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; LAW

PROFESSORS OF THE STATE OF COLORADO; LAW PROFESSORS FROM THE STATE OF KANSAS; LAW PROFESSORS FROM THE STATE OF NEW MEXICO; LAW PROFESSORS FROM THE STATE OF OKLAHOMA; LAW PROFESSORS FROM THE STATE OF UTAH; LAW PROFESSORS FROM THE STATE OF WYOMING; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; SOUTHERN POVERTY LAW CENTER; ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND; LATINOJUSTICE PRLDEF; LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS; NATIONAL ACTION NETWORK; THE CENTER FOR CONSTITUTIONAL RIGHTS; CENTER FOR CONSTITUTIONAL RIGHTS; FLOYD ABRAMS; ERWIN CHEMERINSKY; WALTER DELLINGER; KERMIT ROOSEVELT; AMANDA SHANOR; REBECCA TUSHNET; MAX H. BAZERMAN; MONICA C. BELL; ISSA KOHLER-HAUSMANN; DAVID LAIBSON; ADAM J. LEVITIN; MARY-HUNTER MCDONNELL; NEERU PAHARIA; NINA STROHMINGER; TOM R. TYLER; LAUREN E. WILLIS; LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.,

Amici Curiae.

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

Kristin K. Waggoner (Jonathan A. Scruggs and Katherine L. Anderson, Alliance Defending Freedom, Scottsdale, Arizona; David A. Cortman and John J. Bursch, Alliance

Defending Freedom, Washington, DC, with her on the briefs), Alliance Defending Freedom, Scottsdale, Arizona, appearing for Plaintiffs-Appellants.

Eric R. Olson, Solicitor General (Phillip J. Weiser, Colorado Attorney General; Billy Lee Seiber, First Assistant Attorney General; Jack D. Patten, III, Senior Assistant Attorney General; Vincent E. Morscher and Skippere S. Spear, with him on the brief), Colorado Department of Law, Denver, Colorado, appearing for Defendants-Appellees.

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

BRISCOE, Circuit Judge.

I. Introduction

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

As to our jurisdiction, we hold that Appellants have standing to challenge CADA. As to the merits, we hold that CADA satisfies strict scrutiny, and thus permissibly compels Appellants’ speech. We also hold that CADA is a neutral law of general applicability, and that it is not unconstitutionally vague or overbroad.

Accordingly, exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's grant of summary judgment in favor of Colorado.

II. Background

A. Factual Background

1. CADA

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

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

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

Colo. Rev. Stat. § 24-34-601(2)(a).

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

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

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