No. 21-476

# In the Supreme Court of the United States

303 CREATIVE LLC, *et al.*,

*Petitioners*,

v.

AUBREY ELENIS, *et al.*,

*Respondents*.

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

## BRIEF OF AMICUS CURIAE YOUNG AMERICA'S FOUNDATION IN SUPPORT OF PETITIONERS AND REVERSAL

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## INTEREST OF AMICUS[1]

Young America's Foundation ("YAF") is a 501(c)(3) nonprofit educational organization whose mission is to educate and inspire increasing numbers of young Americans concerning the ideas of individual freedom, a strong national defense, free speech, free enterprise, and traditional values. YAF engages with students, parents, and teachers on campuses across the country and is a robust advocate for protecting First Amendment freedoms, giving it a strong interest in ensuring that citizens retain the ability to effectively vindicate those freedoms in court. YAF stands resolute as a strictly non-partisan organization dedicated to the ideas and principles of the American founding, providing an abiding, faithful guide for young Americans here in the 21st century and beyond.

## INTRODUCTION

The fundamental right to engage in "advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression. . . . No form of speech is entitled to greater constitutional protection." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). Yet Colorado law prevents Petitioners—Lorie Smith and her small website design business—from voicing their most deeply held religious and philosophical views. Ms. Smith wishes to expand her

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[1] Pursuant to SUP. CT. R. 37.3(a), amicus certifies that all parties have provided blanket consent to the filing of amicus briefs. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

business into the design and creation of custom wedding websites—a form of artistic expression that the court below correctly held to be "pure speech," Pet.App.20a—but her religious beliefs will not allow her to design websites for same-sex weddings. Because Respondents interpret that position as providing a public accommodation that discriminates on the bases of sexual orientation, they will not let her engage in that "pure speech"—unless she is *also* willing to craft websites speaking a message with which she profoundly disagrees. That restriction on speech violates our Nation's deepest constitutional commitments—and Respondent's contention that Ms. Smith does not even have standing to challenge it is clearly contrary to this Court's precedent.

Colorado's Anti-Discrimination Act ("CADA") contains two clauses that are relevant in this case. First, the "Accommodation Clause" makes it unlawful for any person to withhold the "services" of "a place of public accommodation" on the basis of "sexual orientation." COLO. REV. STAT. § 24-34-601(2)(a). Because Respondents interpret that language as forbidding creative professionals from declining to provide wedding-related services promoting same-sex weddings, Ms. Smith has refrained from entering the wedding-website design field out of fear of the following heads-I-win, tails-you-lose choice: either being forced to create websites expressing a message that she fundamentally disagrees with, or becoming the subject of an enforcement action by Respondents under the Accommodation Clause.

Second, CADA's "Publications Clause" bans a person from *even communicating the intent* to provide services in a way that violates the Accommodation

Clause. *Id.* Because of this Clause, Ms. Smith has refrained from *even announcing her desire* to create custom wedding websites—consistent with her religious principles—out of fear that her proposed announcement (which is in the record at Pet.App.196a–97a) will itself trigger an enforcement action under the Publications Clause. Working together, these two provisions of CADA have successfully silenced Ms. Smith, forcing her to refrain from expressing her deeply held views on an issue of "open and searching debate." *Obergefell v. Hodges*, 576 U.S. 644, 680 (2015).

Respondents attempt to defend both Clauses on the merits, but this brief focuses on their threshold argument: the claim that Petitioners lack standing to challenge them in the first place. The Court of Appeals rejected that argument, and it was right to do so. Petitioners easily meet the standards this Court has set out for preenforcement standing as to both the Publications Clause and the Accommodation Clause, since they face a credible risk of prosecution under each of them. And even if there were any doubt about Petitioners risk of prosecution under the Accommodation Clause, their standing to challenge both provisions of CADA would still be secure. For Petitioners' standing to challenge the Publications Clause is beyond reasonable dispute. And since that Clause does nothing more than provide an enforcement mechanism for the substantive limits of the Accommodation Clause, the imminent injury Petitioners face under the Publications Clause is also fairly traceable to—and would be redressed by a judgment invalidating—the Accommodation Clause, give them standing to challenge both provisions under this Court's settled precedent.

## SUMMARY OF THE ARGUMENT

I. Petitioners have standing to bring a preenforcement challenge to both CADA's Publications Clause and Accommodation Clause under this Court's precedent. There can be no question that Petitioners' proposed speech—both the wedding websites Ms. Smith wishes to create and her proposed announcement expressing her desire to create them—falls within the First Amendment's protective ambit.

Nor is there any serious doubt that Petitioners reasonably fear that this speech would violate CADA: the proposed wedding websites themselves, by "withhold[ing]" Petitioners' design services from prospective clients "because of" (as Respondents see it) their "sexual orientation;" and the announcement, by "publish[ing]" a "communication . . . that indicates" Petitioners' intent to withhold their services in this manner.

Finally, Petitioners also face a credible risk that both Clauses would be enforced against them if they engaged in the speech they wish to express. Respondents do not meaningfully dispute that there is a credible threat that the Publications Clause would be enforced against Petitioners if they published their proposed announcement expanding their business into the wedding context (and expressing their views of marriage). And there is also a credible threat of enforcement under the Accommodation Clause: Respondents have repeatedly sued other creative professionals who decline, because of faith, to offer their services to same-sex weddings; they have robustly defended the constitutionality of the Accommodation Claus's application to Petitioners throughout this

litigation; and they have pointedly refused to disclaim any intent to enforce the Clause against Petitioners.

II. Even if Petitioners did not have standing to challenge both the Accommodation and Publications Clauses *directly*, their challenge to both Clauses could still go forward under this Court's case law. As noted above, Respondents do not meaningfully dispute Petitioners' risk of prosecution under—and hence their standing to bring a preenforcement challenge against—the Publications Clause. And this imminent injury inflicted upon Petitioners by the Publications Clause *is also* fairly traceable to the Accommodation Clause. For the Publications Clause is nothing more than an implementing provision that provides an additional enforcement mechanism for the Accommodation Clause—barring a person from *communicating the intent* to engage in conduct that the substantive provisions of the Accommodation Clause make unlawful.

Petitioners risk of prosecution under the Publications Clause is also redressable by a judgment invalidating the Accommodation Clause. Respondents' only defense of the Publications Clause's constitutionality is that it bars speech incident to conduct made illegal by the Accommodation Clause. So if the Accommodation Clause itself cannot constitutionally make the withholding of services promoting same-sex weddings illegal, then the Publications Clause's bar on *communicating the intent* to withhold those services has no purpose and is itself obviously unconstitutional and invalid. The Publications Clause cannot constitutionally bar Petitioners from *saying* that they are going to engage in conduct that the Accommodation Clause cannot constitutionally bar them from *doing*.

CADA's two Clauses are thus inextricably intertwined, and Petitioners' standing to challenge one necessarily gives them standing to challenge both.

## ARGUMENT

Article III vests the federal courts with authority to decide all "cases" and "controversies" within their jurisdiction, U.S. CONST. art. III—a power that, this court has held, extends to those disputes where the plaintiff can (1) identify an "injury-in-fact"; (2) trace a "causal connection between the injury and the conduct complained of"; and (3) show that it is "likely, as opposed to merely speculative, that injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks omitted). So long as this "irreducible constitutional minimum of standing" is satisfied, *id.*, the federal courts labor under "the virtually unflagging obligation . . . to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Whatever the validity of its decision on the merits, the Tenth Circuit correctly held below that Petitioners have standing and that this "virtually unflagging obligation" thus requires the exercise of jurisdiction in this case.

### I. Petitioners have standing to challenge both of CADA's Clauses directly.

It has long been settled that Article III does not require a plaintiff to "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). For if an individual or company could only "test the validity" of a law by violating it first—and thereby

risking "enormous penalties" if "the court should decide that the law was valid"—the necessary result would "be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity." *Ex Parte Young*, 209 U.S. 123, 145–46 (1908). And such a "denial of any hearing" on the constitutionality of a law would be especially intolerable where First Amendment rights are at stake. For "[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). A law that forces a speaker who wishes to voice disfavored thoughts to do so only under the pall cast by the *threat* of prosecution would thus choke off speech nearly as effectively as prosecution itself—and "[s]ociety as a whole then would be the loser." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984).

Accordingly, where First Amendment rights are at stake, this Court has found injury-in-fact so long as the plaintiff "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quotation marks omitted). Petitioners' First Amendment challenge to both CADA's Publications Clause and Accommodation Clause easily clear all three of these hurdles.

### A. Petitioners' proposed speech is protected by the First Amendment.

Petitioners' proposed conduct is plainly "affected with a constitutional interest." *Id.* Given that a court

determining standing generally must "accept as valid the merits of [a party's] legal claims," *Federal Election Commission v. Ted Cruz for Senate*, 596 U.S. ---, 142 S. Ct. 1638, 1647 (2022), the burden here is not high, and Petitioners easily clear it. The announcement Ms. Smith seeks to post expanding her business into the creation of wedding websites—but indicating her intent not to design websites for same-sex couples—is pure speech, giving voice to her religious faith and her religious and philosophical commitments on an issue of "open and searching debate." *Obergefell*, 576 U.S. at 680. And the wedding website design services she seeks to provide are likewise protected by the First Amendment. Indeed, Respondents have expressly stipulated that all of Petitioners' "website designs are expressive in nature," that they use "words, symbols, and other modes of expression . . . to communicate a particular message," and that "[e]very aspect of the websites . . . contributes to the overall messages that [Petitioners] convey through the websites." Pet.App.181a–82a.

### B. Petitioners' proposed speech at least arguably would violate CADA.

Petitioners' proposed announcement, and substantive design services, are also at least "arguably proscribed" by CADA's Publications and Accommodation Clauses. *Susan B. Anthony List*, 573 U.S. at 162.

Begin with the Publications Clause. There is no guesswork about whether Petitioners wish to speak or what they want to say: Ms. Smith's proposed announcement expanding her business to include the design and creation of wedding websites has already been written and is in the record; and Respondents

admit that she wishes to publish it and that it will declare her policy of not "create[ing] websites for same-sex marriages or any other marriage that is not between one man and one woman," based on her "religious convictions" and belief that such websites would "contradict[ ] God's true story of marriage—the very story He is calling me to promote." Pet.App.187a–89a.

While a plaintiff need not "confess that he will in fact violate [the challenged] law" to have standing, *Susan B. Anthony List*, 573 U.S. at 163, Petitioners can hardly be faulted for concluding that the proposed announcement is at least "arguably proscribed" by the Publications Clause, *id.* at 162. After all, (1) that provision bars "any . . . communication … that indicates" that the party intends to violate the Accommodation Clause by "refus[ing] [services] . . . because of . . . sexual orientation," COLO. REV. STAT. § 24-34-601(2)(a); (2) declining to provide wedding services "for same-sex marriages," Pet.App.189a, would appear to violate this proscription (and Respondents have so interpreted it, *see Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1233–37 (D. Colo. 2019)); and (3) Respondents have taken the position *in this litigation* that they believe the proposed announcement would violate the Publications Clause, *see* Appellees' Br. 56–57 (10th Cir. April 23, 2020).

The website design services Petitioners seek to provide would likewise violate the Accommodation Clause, and for the same reasons. Indeed, as discussed below, the two Clauses are inextricably linked: the *announcement* of an intent to engage in a certain course of action violates the Publications Clause only if *the course of action itself* violates the Accommodation Clause. Based on the face of the law, Colorado's

previous enforcement efforts, the widespread interpretation of laws like these as proscribing Petitioners' proposed conduct,[2] and Respondents position in this case, Petitioners have "every reason to think" that Respondents would believe them to be in violation of CADA if they went forward with their plans to expand into the wedding website business. *Susan B. Anthony List*, 573 U.S. at 163.

### C. Petitioners face a credible risk of prosecution.

Finally, Petitioners' fears that the speech they wish to engage in would place them in the crosshairs of an enforcement action are plainly credible. Once again, that is true under both the Publications and the Accommodation Clauses.

1. The risk of prosecution under the Publications Clause is obviously credible, and Respondents do not seriously contend otherwise. Colorado has actively enforced CADA against other religious business owners who decline to provide wedding services for same-sex weddings. *See Masterpiece Cakeshop*, 445 F. Supp. 3d at 1233–37. Even if it did not, Petitioners would still need to fear civil prosecution by private citizens. *See* COLO. REV. STAT. § 24-34-602(1)(a). Moreover, Respondents have robustly defended the constitutionality of both Clauses in this litigation and have pointedly declined to bolster their standing argument by disclaiming any intent to prosecute Petitioners if they

[2] *See* Brief of Amici Curiae Massachusetts, et al. at 10–11, *Carpenter v. James*, No. 22-75 (2d Cir. May 16, 2022) (amicus brief of 19 States arguing that anti-discrimination laws like Colorado's bar creative wedding professionals from declining to promote same-sex weddings).

publish the announcement. This is not a case challenging some moth-eaten statute that has gone into desuetude.

These circumstances plainly establish pre-enforcement standing under this Court's precedent. In *Babbitt v. United Farm Workers National Union*, for instance, the Court upheld the standing of Arizona farmworkers who had previously engaged in consumer publicity campaigns and expressed an intent to "continue to engage in [similar] activities in that State." 442 U.S. 289, 301 (1979). A state statute imposed penalties for "encourag[ing] the ultimate consumer of any agricultural product to refrain from purchasing [the product] . . . by the use of dishonest, untruthful and deceptive publicity." *Id.* (quoting ARIZ. REV. STAT. ANN. §§ 23-1385(B)(8), 23-1392). There was no specific threat of enforcement against the plaintiffs; moreover, the challenged statute "ha[d] not yet been applied and may never be applied to . . . consumer publicity" speech of the kind they wished to engage in. *Id.* at 302. Nonetheless, because the statute's language plausibly applied to the plaintiffs' intended campaigns and "the State has not disavowed any intention" of enforcing it against them, the Court found that the statute created a "realistic danger of sustaining a direct injury" and accordingly presented "a case or controversy." *Id.* at 298, 302.

*Susan B. Anthony List* is to the same effect. The plaintiffs there were advocacy organizations that had previously been charged with making false statements in contravention of an Ohio statute. When the initial charges were withdrawn, plaintiffs brought both facial and as applied challenges to the statute, noting that they intended to engage in activities that

were "substantially similar" to their previous conduct. 573 U.S. at 161. Based on the government's "history of past enforcement," the fact that "any person" could enforce the statute through a private action, which alone imposed significant "burdens . . . on electoral speech," and the government's refusal to "disavow[ ] enforcement if petitioners make similar statements in the future," the Court found a credible risk of prosecution and, hence, standing. *Id.* at 164–65.

Petitioners have standing to challenge the Publications Clause under the very same reasoning.

2. Petitioners also face a clear and credible risk of prosecution under the Accommodation Clause, for much the same reasons. Again, the website design services Petitioners wish to offer appear to fall within the Accommodation Clause's scope on the face of that provision, and Respondents have prosecuted other creative professionals for engaging in quite similar conduct in the past. *Masterpiece Cakeshop*, 445 F. Supp. 3d at 1233–37; *cf. Wooley v. Maynard*, 430 U.S. 705, 712 n.9 (1977) (Plaintiff could seek injunctive relief against threatened prosecution based on past prosecutions of her "similarly situated" spouse). Like the Publications Clause, the Accommodation Clause is also enforceable through private citizen suits. COLO. REV. STAT. § 24-34-602(1)(a). And also like the Publications Clause, Respondents in this litigation have robustly defended the Accommodation Clause's constitutionality and have pointedly declined to foreswear enforcing it against Petitioners should they expand into the wedding website business as they wish. "On these facts, the prospect of future enforcement is far from imaginary or speculative." *Susan B. Anthony List*, 573 U.S. at 165 (quotation marks omitted).

Respondents attempt to resist this conclusion, but none of their arguments are persuasive. Their principal contention is that even if an enforcement action would certainly ensue once Petitioners decline to design a website for a same-sex wedding and the couple files a complaint, enforcement is nonetheless too speculative because "Colorado responds only to complaints brought to the Division's attention," and Petitioners have not yet "been asked to design a custom website for a same-sex wedding." BIO at 10, 13. The district court rejected Petitioners' standing to challenge the Accommodation Clause on similar grounds, reasoning that too many "conditions precedent" would need to be satisfied before enforcement could occur: "The [Petitioners] must offer to build wedding websites, a same-sex couple must request [Petitioners'] services, the [Petitioners] must decline, and then a complaint must be filed." Pet.App.165a; *see also Updegrove v. Herring*, 2021 WL 1206805, at *3 (E.D. Va. Mar. 30, 2021) (Cited in BIO at 9) (finding no standing because "Plaintiff has 'no reason to suspect that Defendant might attempt to penalize him using a statute he has never violated.' ").

This line of argument is flatly contrary to this Court's precedent. The chain of "conditions precedent" to prosecution was equally, if not more, "attenuated," Pet.App.165a, in *Davis v. Federal Election Commission*, for example, yet this Court easily found pre-enforcement standing. 554 U.S. 724, 734 (2008). In *Davis*, a self-funding candidate challenged a provision in the Bipartisan Campaign Reform Act ("BCRA") that asymmetrically raised the contribution limits for the supporters of the plaintiff's opponent when the plaintiff spent more than a certain amount of his personal

funds. When Davis filed suit, the application of this provision against him still depended on multiple "conditions precedent": "his opponent had not yet qualified for the asymmetrical limits," and even if he did, there was no guarantee that third-party donors *would make* contributions in the asymmetrically heightened amounts or that his opponent would *accept* them. *Id.* at 734. Indeed, in the event, "when his opponent did qualify to take advantage of [the asymmetrical] limits, he chose not to do so." *Id.*

This Court found standing nonetheless. Because Davis, at the point in time when he filed suit, "had declared his candidacy and his intent to spend more than $350,000 of personal funds" and "there was no indication that his opponent would forgo th[e] opportunity" to "receive contributions on more favorable terms," the Court concluded that Davis faced a threat of injury that was "real, immediate, and direct." *Id.* As in *Davis*, so too here. Petitioners have "declared . . . [their] intent" to offer wedding website design services, but for the challenged law, and to do so on a basis that would respectfully decline to offer those services to same-sex weddings. And like in *Davis*, "there [i]s no indication" that this course of action would not prompt a request by a same-sex couple and an ensuing complaint to Respondents. To the contrary, Petitioners have *already* received a request for a same-sex wedding website, Pet. at 5, and there is a clear history in Colorado of private complaints over alleged violations of CADA by creative professions who decline to provide wedding services to same-sex couples, Pet. at 6–7; *cf. Davis*, 554 U.S. at 735 ("[T]he record at summary judgment indicated that most candidates who

had the opportunity to receive expanded contributions had done so.").

Nor is it of any moment that the "sample website" in the record purportedly does not show "how the Company would facilitate a specific future client's website[,] what messages the website might contain[,] and to whom those messages might be attributed." BIO at 13. To the extend these things have any relevance at all, Respondent has *already stipulated* to them. It expressly stipulated that "[a]ll of [Petitioners'] website designs are expressive in nature," that "Ms. Smith's creative skills transform her clients' nascent ideas into pleasing, compelling, marketable graphics or websites conveying a message," and that viewers of each website "will know that the websites are [Petitioners'] original artwork." Pet.App.181a, 182a, 187a. The Court did not require the plaintiffs in *Babbitt* to come forward with the specific content of the "consumer publicity campaigns" they would have undertaken but for the challenged law, 442 U.S. at 301, and Article III does not require more here.

Respondents' remaining arguments are insubstantial. They make much of CADA's lack of "criminal penalties," BIO at 10, but "administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review." *Susan B. Anthony List*, 573 U.S. at 165; *see also Davis*, 554 U.S. at 734 (no risk of criminal penalties). And even on Respondents' telling, a plaintiff can bring a pre-enforcement challenge to a statute lacking criminal penalties if he "show[s] a credible threat of enforcement," BIO at 8—which Petitioners *have*.

Finally, Respondents argue that the availability of private enforcement suits under CADA does not support standing because Colorado does not "incentivize" such suits through the "award of attorney fees." BIO at 11. There is nothing to this. The "incentive" for private citizens—apart from any ideological motivation—is that they *receive the statutory fine* if they prevail. COLO. REV. STAT. § 24-34-601(2)(a). This Court did not bother to discuss whether Ohio's private-enforcement scheme in *Susan B. Anthony List* provided for attorneys' fees before concluding that the existence of private suits "bolstered" the "credibility of th[e] threat" of enforcement, 573 U.S. at 164, and this case should be no different.

Accordingly, the Tenth Circuit was clearly correct to conclude that Petitioners have "a credible fear that Colorado will enforce CADA against them." Pet.App.17a.

## II. Petitioners independently have standing to challenge the Accommodation Clause because their injury is fairly traceable to that provision.

Even if Petitioners were not *directly* injured by both the Publications and Accommodation Clauses (and they are), they would still have standing to challenge both provisions under settled legal principles. For the imminent injury inflicted upon Petitioners by the Publications Clause is clear and undisputed, and that injury is fairly traceable to the Accommodation Clause and would be redressed by a judgment invalidating it.

### A. A plaintiff injured by one provision that merely implements another has standing to challenge both provisions.

As noted above, a plaintiff has standing if he satisfies three elements: (1) an "injury in fact" that is either "actual or imminent," that (2) is "fairly traceable to the challenged action of the defendant," and that (3) would "likely . . . be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (cleaned up). In the simplest pre-enforcement challenge, of course, all three elements are satisfied based on the same statutory provision: the credible threat that the provision will be enforced against the plaintiff constitutes an imminent injury in fact, the injury is directly traceable to that provision, and a judgment invalidating that provision would eliminate the threat of enforcement and thereby redress the injury. The law has long recognized, however, that not all legal challenges are that simple, and that in some cases *multiple* legal provisions may *work together* to cause a plaintiff's injury, sometimes in complex ways.

This Court's decision in *Federal Election Commission v. Ted Cruz for Senate*, 142 S. Ct. 1638, provides the most recent example. In that case, Senator Ted Cruz challenged a provision of BCRA that capped, at $250,000, the amount of loans from a candidate to his own campaign committee that could be repaid by the committee with funds raised after the election. This statutory provision was implemented by a regulation promulgated by the FEC, which largely duplicated the statutory restriction but also added a few additional implementing details, including a rule requiring repayment within 20 days after the election of any portion of a candidate loan exceeding $250,000.

Senator Cruz challenged both the statute and its implementing regulation, but the FEC argued before this Court that Senator Cruz lacked standing to challenge the provision of BCRA because his injury-in-fact ($10,000 in unpaid candidate loans arising out of the 2018 election) was purportedly caused by the regulatory 20-day rule, *not* the restrictions in BCRA itself.

This Court rejected that argument and held that Senator Cruz had standing to challenge BCRA itself, not just the FEC's regulation, because his injury was fairly traceable to the statutory provision the regulation had been promulgated to implement. "The present inability of the Committee to repay and Cruz to recover the final $10,000 Cruz loaned his campaign," the Court explained "is . . . traceable to the operation of [BCRA] itself," "even if [the injury was] brought about by the agency's threatened enforcement of its regulation." *Id.* at 1649. After all, "[a]n agency's regulation cannot operate independently of the statute that authorized it"— such that "if [BCRA's statutory limit] is invalid and unenforceable . . . the agency's 20-day rule is as well." *Id.* (cleaned up). The $10,000 injury suffered by Senator Cruz was thus traceable to *both* the statutory *and* regulatory limits, and he had standing to challenge both the "implementing regulation" and "the statutory provision that, through the agency's regulation, is being enforced." *Id.* at 1650.

Many other cases reflect this principle that a plaintiff has standing to challenge not just the regulation or agency action that immediately caused their injury but the statutory provision that the agency action implements. In *Collins v. Yellen*, for example, the Court held that shareholders injured by agency action taken by the Federal Housing Finance Agency had

standing to challenge the constitutionality of the agency's structure, expressly concluding that "the traceability requirement is satisfied" even though "the shareholder's concrete injury flows directly from [the agency action]" rather than "the [statutory] removal restriction." 594 U.S. ---, 141 S. Ct. 1761, 1779 (2021).

Similarly, the Court found standing in *Clinton v. City of New York* to challenge the Line Item Veto Act even though the plaintiffs were immediately injured by the President's cancellation of certain tax benefits to which they were otherwise entitled, not the Act's general provision *authorizing* that cancellation, explaining that "traceability" was "easily satisfied" since their "injury is traceable to the President's cancellation of [the benefits]." 524 U.S. 417, 433 n.22 (1998). And in *MWAA v. Citizens for Abatement of Aircraft Noise, Inc.*, the Court allowed homeowners near Washington National Airport who alleged injury from the risk of "increased noise, pollution, and danger of accidents" posed by the "increased air traffic" that would result from a master plan imposed by the Metropolitan Washington Airports Authority ("MWAA") to challenge the constitutionality of the MWAA's composition, specifically rejecting the argument that the plaintiffs' "injuries are caused by factors independent of" the alleged constitutional violation. 501 U.S. 252, 264–65 (1991); *accord Whole Woman's Health v. Jackson*, 595 U.S. ---, 142 S. Ct. 522, 535–37 (2021) (finding standing to challenge limits on abortions based on the threat that "licensing official[s]" could "bring disciplinary actions" under "other laws that regulate abortion" (ellipses omitted)); *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003) (transfer student could challenge both the transfer admission policy and the freshman

admission policy because both policies implicated "the same set of concerns"); *see also Seila Law LLC v. CFPB*, 591 U.S. ---, 140 S. Ct. 2183, 2195-96 (2020); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *INS v. Chadha*, 462 U.S. 919, 936 (1983); *Buckley v. Valeo*, 424 U.S. 1, 12, 118 (1976).

Separation-of-powers challenges to the constitutionality of agency actions provide yet another instance where a plaintiff's injury is traceable to at least two separate provisions that are intertwined with one another. In the typical case, for example, where a party injured by agency action challenges the appointment or removal process of the official who promulgated it, it is the general statutory provision governing the official's appointment or removal, rather than the specific statutory provision being implemented, that is alleged to be invalid. Yet in these types of cases the Court has routinely proceeded directly to the merits of the constitutional challenge, because no one *even considered* arguing that the plaintiff's injury was not fairly traceable to the alleged constitutional violation. *See, e.g.*, *Financial Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. ---, 140 S. Ct. 1649 (2020); *Gundy v. United States*, 588 U.S. ---, 139 S. Ct. 2116 (2019); *DOT v. Association of Am. R.R.s*, 575 U.S. 43 (2015); *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

### B. Because the Publications Clause merely implements the Accommodation Clause, Petitioners' injury is fairly traceable to both provisions.

Under these principles, Petitioners' standing to challenge both the Publications Clause and the Accommodation Clause is clear—*even if* they faced no credible risk of prosecution under the latter. For the clear and undisputed threat that the Publications Clause would be enforced against them, if they expressed their prohibited views, is fairly traceable to, and would be redressed by a judgment invalidating, the Accommodation Clause.

1. Begin with traceability. The relevant subsection of CADA reads, in full, as follows:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or

> denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry.

COLO. REV. STAT. § 24-34-601(2)(a).

As in *Cruz* and the other cases discussed above, the imminent injury Petitioners have suffered under the Publications Clause is fairly traceable to the Accommodation Clause because the former is nothing more than an enforcement mechanism implementing the substantive limitations of the latter. The substantive conduct that, under the Publications Clause, a person cannot *say* they will do—deny "the full and equal enjoyment" of goods or services "of a place of public accommodation" because of race, sexual orientation, or one of the other prohibited bases—is the very conduct that the Accommodation Clause *forbids* them to do. And the sole purpose of preventing a person from publishing their *intent* to discriminate in one of the forbidden ways is to stop *the act of discrimination itself*. Indeed, prohibiting the communication of the intent to engage in such practices would be *utterly pointless* if the practices themselves were not prohibited by the Accommodation Clause. The substantive prohibition of the Accommodation Clause is thus the but-for cause of Petitioners' injury under the Publications Clause: if the former did not prohibit them from restricting their business to opposite-sex weddings, they plainly could not be sued under the latter for publishing their intent to do so.

Further, while "[p]roximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014), The Accommodation Clause *is the proximate cause* of Petitioners' injury. The whole reason the Publications Clause bars Petitioners from *saying* that they would decline to create websites for same-sex weddings is that the Accommodation Clause bars them from *declining* to create such websites in the first place. Thus, the only intermediate link in the chain of causation between Petitioners' injury and the Accommodation Clause is a provision that does no more than provide an additional mechanism for enforcing the Accommodation Clause's substantive restrictions. *See id.* at 133 (a single "intervening step … is not fatal to the showing of proximate causation").

2. Much the same reasoning shows that Petitioners' injury would also be redressable by a judgment invalidating the Accommodation Clause. For if the Accommodation Clause's substantive prohibition could not be enforced against Petitioners and used to bar them from declining to create websites for same sex weddings, then the Publications Clause plainly could not be enforced against their *communication* of the intent to run their business in accordance with their religious faith in this way.

That is evident from Respondents' defense of the Publications Clause. The beginning and end of their justification for the Publications Clause's ban on Petitioners' proposed announcement is that the clause "regulates speech that is unprotected because it is incidental to conduct made illegal by the anti-

discrimination provision," i.e., the Accommodation Clause. Appellees' Br. at 51 (10th Cir. April 23, 2020); *accord* BIO at 31–33. And if the Accommodation Clause cannot, consistent with the First Amendment, make Petitioners' proposed course of conduct "illegal," then the only conceivable justification for the Publications Clause's application in this case falls apart at the seams. *See* Pet.App.33a ("[Respondents] appear to acknowledge that their Accommodation Clause and Communication Clause challenges go hand in hand, at least to the extent the merits of those challenges are 'intertwined.' "). A judgment invalidating the Accommodation Clause's application to Petitioners *substantive conduct* would thus perforce render invalid any application of the Publications Clause to their *announcement* of that conduct.

3. Because both the causation and redressability prongs of standing allow Petitioners to challenge both the Accommodation Clause and Publications Clause—even if their only risk of prosecution were under the latter—this case is wholly unlike the Court's recent standing decision in *California v. Texas*, 593 U.S. ---, 141 S. Ct. 2104 (2021).

In *California*, several States (alongside two individuals) challenged Section 5000A(a) of the Affordable Care Act—the "minimum essential coverage requirement" (or "individual mandate")—as unconstitutional. But the alleged injuries that gave rise to their standing (as relevant here) were inflicted by "other provisions of the Act, not the minimum essential coverage provision." 141 S. Ct. at 2108, 2119. And as the Court repeatedly explained, the statutory provisions that had injured the State plaintiffs "*operate independently* of § 5000A(a)," and "[n]othing in the text" of

those provisions "suggests that they would not operate without § 5000A(a)." *Id.* at 2119, 2120 (emphasis added). Accordingly, "[t]o show that the minimum essential coverage requirement is unconstitutional would not show that enforcement of any of these other provisions violates the Constitution," and the States' injuries were thus "not fairly traceable to enforcement of the allegedly unlawful provision of which the plaintiffs complain—§ 5000A(a)." *Id.* at 2119 (quotation marks omitted).

Petitioners' claims in this case are crucially different from the claims in *California*—and they differ for *precisely* the reasons that the Court singled out as *depriving the State plaintiffs of standing* in that case. While *California* emphasized that the statutory provisions that had injured the State plaintiffs "operate independently" of the separate provision they challenged as unconstitutional, *id.* at 2120, here, as discussed above, the Publications Clause *cannot operate at all* apart from the Accommodation Clause. The key problem for the State plaintiffs in *California*, then, was that "[t]o show that the minimum essential coverage requirement is unconstitutional would not show that enforcement of any of these other provisions [causing the States' injuries] violates the Constitution." *Id.* at 2119. But here, the unconstitutionality of the Accommodation Clause would nullify the only conceivable justification for applying the Publications Clause, rendering the latter invalid and unenforceable as well.

*California* thus has no purchase here. Instead, the relationship between the two Clauses of CADA at issue is directly analogous to the provisions in *Cruz*, *Collins*, and the other cases discussed above. Like the

regulatory 20-day rule in *Cruz*, the Publications Clause merely provides a mechanism to enforce the substantive prohibitions of the Accommodation Clause. The Accommodation Clause is thus the but-for and proximate cause of the imminent injury Petitioners face under the Publications clause, and a judgment invalidating the latter would doom the application of the former. Under Article III, that is all Petitioners need to show.

## CONCLUSION

For the foregoing reasons, Petitioners have standing to challenge both CADA's Accommodation and Publications Clauses.

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Respectfully submitted,

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