

Case No. 17-1344  
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,*

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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-CBS

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**PLAINTIFFS-APPELLANTS' RESPONSE TO DEFENDANTS-  
APPELLEES' MOTION TO DISMISS FOR LACK OF APPELLATE  
JURISDICTION PURSUANT TO 10TH CIR. R. 27.3(A)(1)(a)**

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## INTRODUCTION

Appellants Lorie Smith and 303 Creative filed a civil rights lawsuit to stop Appellees (“Colorado”) from enforcing Colo. Rev. Stat. § 24-34-601(2)(a) (“CADA”) to violate their First Amendment rights. Appellants intend to use their graphic and web design talents to design, create, and publish content for clients and for their own website. But if Appellants do this, CADA forces them to design, create, and publish content that violates their religious beliefs. Left with the impossible choice between violating those beliefs and government punishment, Appellants chilled their protected speech and refrained from publishing their desired websites despite their constitutional right to do so.

To stop this ongoing irreparable harm, Appellants sought a preliminary injunction the day they filed their Complaint. Appellants pressed the injunction throughout the litigation below. The district court held a hearing on Appellants’ motion and chose to rule on it together with motions for summary judgment and dismissal. When the court issued its Order deciding the motions together, it expressly denied Appellants’ preliminary injunction.

The district court then stayed Appellants' case until the U.S. Supreme Court rules on *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a ruling that will likely take another eight months.<sup>1</sup> Appellants have already waited thirteen months, and waiting for a *Masterpiece* ruling may not even help Appellants since *Masterpiece* involves different parties, different facts, and different legal theories. Yet, Appellants stand in limbo while their First Amendment rights are continuously violated with no recourse for thirteen months and counting.

Under these facts, the Order is immediately appealable under 28 U.S.C. § 1292(a)(1), both as an express denial of injunctive relief and as an order with the practical effect of denying injunctive relief. The remaining parts of the Order are also appealable under pendent appellate jurisdiction. Appellants can exercise their interlocutory appeal rights to vindicate their First Amendment freedoms before this Court.

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<sup>1</sup> *Masterpiece* involves a cake designer who has challenged the constitutionality of CADA's application to him on free speech and free exercise grounds. Brief for Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111, 2017 WL 3913762.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellants filed this case to preserve their constitutional right to determine the content of their messages free of government compulsion. Specifically, Appellants challenged (1) CADA's requirement that they design, create, and publish websites that violate their religious beliefs if they design, create, and publish their desired websites ("Speech Mandate") and (2) CADA's ban on publishing their desired statements on their own website, including a proposed statement that was attached to the Complaint ("Publication Ban"). V. Compl. for Declaratory and Injunctive Relief 59-60, ECF No. 1, Exhibit 1.

Both in their Complaint and in a separate Motion for Preliminary Injunction, Appellants requested a preliminary injunction. *Id.* at 59-60; Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. 4, 28, ECF No. 7, Exhibit 2. As the district court acknowledged, "[s]imultaneously with the Complaint, [Appellants] sought a preliminary injunction (#6) to restrain the [Colorado] from enforcing either statutory provision against them." Order Granting in Part and Denying in Part Mot. to Dismiss and Denying Mot. for Prelim. Inj. and Mot. for Summ. J., With Leave to Renew 2, ECF No. 52 (Sept. 1, 2017) ("Order").

Appellants fully briefed their motion and requested oral argument; in January 2017, the district court held a “non-evidentiary hearing on the Plaintiffs’ Motion for Preliminary Injunction.” Order, ECF No. 44 (Nov. 21, 2016), Exhibit 3.

At that hearing, Appellants’ counsel pressed for quick injunctive relief. Law and Motion Hearing 2:19-22, 10:5-7, 10:12-17, 11:3-7, ECF No. 47 (“Hr’g Tr.”), Exhibit 4 (“There’s irreparable harm going on right now with her chilling of her speech, so we would urge the Court to make a decision quickly.”). But the district court declined to rule immediately and instead ordered Appellants to file for summary judgment because there were no factual disputes between the parties and no need for discovery or an evidentiary hearing. Hr’g Tr. 9:8-14, 9:25-10:7. Based on these factors, the court chose to “rule on the motion for preliminary injunction, motion for summary judgment, and motion to dismiss [previously filed by Colorado] simultaneously.” Hr’g Tr. 12:23-13:2; *see also* Courtroom Minutes 2, ECF No. 46 (“Minutes”), Exhibit 5. Following the district court’s order, Appellants filed for summary judgment a month later. Pls.’ Mot. for Summ. J. and Mem. in Supp., ECF No. 48.

In September 2017, the district court ruled simultaneously on “Plaintiffs’ Motion for Preliminary Injunction . . . the Defendants’ Motion to Dismiss . . . and the Plaintiffs’ Motion for Summary Judgment.” Order 1. In that Order, the court dismissed Appellants’ Speech Mandate claims for lack of standing but found standing for Appellants’ Publication Ban claims. Order 5-11. The court then held that the “Preliminary Injunction Motion and Motion for Summary Judgment should be determined together,” expressly “denied” both motions, and stayed the case until the Supreme Court rules on *Masterpiece*. Order 12-13. The district court further explained that Appellants could renew both motions only after the *Masterpiece* ruling. *Id.*

Despite the fact that Appellants sought quick relief through a preliminary injunction, Colorado now seeks to eliminate the only forum left where Appellants can pursue their rights. This case is fully briefed and prepared for a final ruling on the merits. Appellants are not parties to *Masterpiece*, present different facts than *Masterpiece*, and, under the Order, cannot press their constitutional claims in any court until *Masterpiece* is resolved—which will likely take another eight months. In the meantime, Appellants cannot publish their desired website for fear

of punishment. Appellants are suffering ongoing, irreparable harm to their First Amendment rights. They therefore need and deserve quick review and relief from this Court.

## ARGUMENT

### **I. This Court has appellate jurisdiction to review the denial of a preliminary injunction under § 1292(a)(1).**

According to § 1292(a)(1), “the courts of appeals shall have jurisdiction of appeals from (1) interlocutory orders of the district courts . . . granting, continuing, modifying, **refusing**, or dissolving injunctions, or refusing to dissolve or modify injunctions . . . .” 28 U.S.C. § 1292(a)(1) (emphasis added).

The Tenth Circuit uses two separate “strands of analysis” to assess jurisdiction under § 1292(a)(1). *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1184-85 (10th Cir. 1999). One strand “applies to orders regarding ‘express motions for injunctive relief’ and the second applies to orders with the ‘practical effect’ of disposing of a request for injunctive relief.” *Id.* (citation omitted); *see also Southern Ute Indian Tribe v. Leavitt*, 564 F.3d 1198, 1205-09 (10th Cir. 2009) (recognizing and applying two strands analysis). For this appeal, this Court has jurisdiction under either strand.

**A. This Court has jurisdiction because the Order expressly denied a preliminary injunction.**

The Order expressly denies injunctive relief on its face. Order 12-13 (“[T]he Court denies the Motion[] for Preliminary Injunction.”; “The Plaintiffs’ Motion for Preliminary Injunction [is] DENIED . . . .”). That express denial alone establishes jurisdiction under § 1292(a)(1). That much is confirmed by this Court’s analysis in *Forest Guardians*, 174 F.3d at 1184-85, which is dispositive here.

As in the present case, this Court in *Forest Guardians* faced an interlocutory appeal from a district court order denying preliminary injunctive relief and staying a case. *Id.* at 1184. The plaintiffs filed a motion seeking immediate injunctive relief to protect the habitat of the silvery minnow. *Id.* at 1181-82. On appeal, the Tenth Circuit followed the two strand analysis and found that it could exercise § 1292(a)(1) jurisdiction under either strand. *Id.* at 1184-86.

In analyzing the first strand, this Court explained that “[t]he district court’s order denying [plaintiffs’] motion was an interlocutory order expressly denying . . . an injunction and it fits squarely within the plain language of § 1292(a)(1).” *Id.* at 1184-85 (quotation omitted). This holding is consistent among this Court’s cases. *See Westar Energy, Inc.*

*v. Lake*, 552 F.3d 1215, 1223 (10th Cir. 2009) (“Since the district court’s order expressly granted relief, it is immediately appealable . . . .”); *MAI Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978, 981 (10th Cir. 1992) (“[B]y the plain terms of § 1292(a), interlocutory orders granting ‘injunctions’ are appealable.”); *Tri-State Generation & Transmission Ass’n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989) (“[A]n interlocutory order expressly granting or denying injunctive relief fits squarely within the plain language of section 1292(a)(1).”).

Ignoring this clear precedent, Colorado says *Carson v. American Brands, Inc.* requires this Court to evaluate whether the Order has “serious, perhaps irreparable, consequence” and can be “effectually challenged” only by “immediate appeal.” Defs.’ Mot. To Dismiss For Lack of Appellate Jurisdiction Pursuant to 10th Cir. R. 27.3(A)(1)(a) 6, ECF No. 01019885030 (“MTD”), quoting *Carson*, 450 U.S. 79, 84 (1981). But this type of analysis is only necessary when an order has the “practical effect” of denying an injunction, not when an order expressly denies injunctive relief. *Forest Guardians*, 174 F.3d at 1184-85 (explaining the differing analysis under each of the two strands); *Hutchinson v. Pfeil*, 105 F.3d 566, 569 (10th Cir. 1997) (“An ‘order expressly granting or denying

injunctive relief fits squarely within the plain language of § 1292(a)(1)', and is reviewable on interlocutory appeal even without the showing of harm required by *Carson*." (citation omitted)).

When an order expressly denies an injunction, courts do not use the *Carson* analysis. *Westar Energy*, 552 F.3d at 1223 ("We decline to apply the *Carson* test to the facts of this case. While *Carson* applies in situations where orders have the practical effect of denying an injunction, orders which themselves grant or deny injunctive relief are appealable as injunctions under § 1292(a)(1) without the *Carson* showing."); *MAI Basic Four*, 962 F.2d at 981 ("[C]ertain orders are so clearly 'injunctions' within the meaning of the statute that no further inquiry is necessary.").

Much as Colorado cites *Carson* to no avail, Colorado also incorrectly relies on *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*. MTD 6-9, citing *Pimentel*, 477 F.3d 1151, 1153-54 (10th Cir. 2007). In *Pimentel*, this Court looked beyond the face of an order to determine whether it clarified or modified an injunction. *Id.* ("Whether an order *interprets or modifies* an injunction is determined by its actual, practical effect.") (emphasis added). The former is appealable; the latter is not. And often, the difference between the two is difficult to discern. 16 Charles A.

Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3924.2 (3d ed. 2017) (“The distinction between construction and modification of an injunction presents the most difficult conceptual question arising from the provision for appeal from modification orders.”).

But no such difficulty exists when an order flatly denies an injunction, like the Order below did. Order 12 (“[T]he Court denies the Motion[] for Preliminary Injunction . . . .”); *Id.* at 13 (“The Plaintiffs’ Motion for Preliminary Injunction . . . [is] Denied . . . .”). In this situation, there is no need to move beyond the face of the Order to determine jurisdiction. That denial is immediately appealable under § 1292(a)(1) without any further inquiry. Or as the Fifth Circuit noted, “the question here is whether the order entered by the district court . . . specifically denied an injunction. If it did, no more need be said . . . .” *E.E.O.C. v. Kerrville Bus Co.*, 925 F.2d 129, 132 (5th Cir. 1991); *see also New Mexico v. Trujillo*, 813 F.3d 1308, 1319 (10th Cir. 2016) (discussing the relevance of *Carson* and *Pimentel* and concluding that “[w]hen a litigant has requested injunctive relief and a district court has entered an interlocutory order expressly granting or denying such relief, we exercise jurisdiction under § 1292(a)(1) to review the order”).

**B. This Court has jurisdiction because the Order has the practical effect of denying a preliminary injunction.**

In addition to this Court having jurisdiction under § 1292(a)(1) to review the express denial of a preliminary injunction, this Court also has jurisdiction to review orders with the practical effect of denying injunctive relief. *Forest Guardians*, 174 F.3d at 1184-86 (finding jurisdiction based on the express denial of injunctive relief, and, in the alternative, because in practical effect the order denied injunctive relief).

Under *Carson* and its progeny, appellate courts can entertain interlocutory appeals absent an express ruling if the challenged order has “(1) the practical effect of refusing or granting an injunction, (2) threaten[s] a serious, perhaps irreparable, consequence, and [can] be (3) effectually challenged only by immediate appeal.” *Hutchinson*, 105 F.3d at 569 (quotations omitted).

The present appeal satisfies these three factors. First, the order below practically (and actually) denied a request for a preliminary injunction. Appellants filed a preliminary injunction motion, pressed for it, and suffer from never having obtained it. The district court ruled, denying the injunction by the express language in its Order. And the practical result is that Appellants cannot engage in their desired speech.

They cannot publish their desired websites right now, which was the entire purpose for seeking a preliminary injunction.

Second, refusing to grant the requested injunction causes serious and irreparable consequences, namely the loss of First Amendment freedoms. Without the requested injunction, Appellants cannot publish their desired websites or post their desired statements on their website because if they do, they will face investigation, prosecution, and punishment. *See* Hr’g Tr. 8:21-9:7 (defense counsel affirming that once a complaint is filed, prosecution ensues). This loss of First Amendment freedoms creates irreparable harm. *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (“[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

Third, the ongoing loss of First Amendment freedoms can only be remedied by immediate appeal. Every day for the past thirteen months and now for likely the next eight months, Appellants lose their right to speak. Future monetary relief will not remedy this loss. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1480 (6th Cir. 1995) (finding jurisdiction under *Carson* because loss of First

Amendment rights created irreparable harm only remedied by immediate appeal).

*Forest Guardians* merely underscores the basis for jurisdiction here. 174 F.3d at 1184-86. There, this Court found jurisdiction because an order expressly denied a preliminary injunction and, alternatively, because the order practically did so. *Id.* That order practically denied the injunctive relief because, if plaintiffs' motion had been granted, "an injunction would have issued." *Id.* at 1185. If the Court did not issue an injunction, the purpose of the injunction (protecting an endangered species) would not be achieved, thereby creating "serious, perhaps irreparable" injury that only immediate review could remedy. *Id.*

Like the appellants in *Forest Guardians*, Appellants filed their motion for preliminary injunction and pressed it. Granting the motion would have temporarily allowed Appellants to publish their desired websites. But without the requested injunction, Appellants suffer the ongoing irreparable harm of losing their First Amendment rights, which can only be remedied by immediate appeal. In this scenario, the Order practically denied the very thing Appellants explicitly sought—a

preliminary injunction. And therefore, this Court has jurisdiction to review it.

**C. This Court has jurisdiction even though the district court ruled on multiple motions simultaneously.**

This Court does not lose jurisdiction over an injunction denial merely because the district court decided multiple motions together. Colorado says otherwise, claiming that by seeking summary judgment Appellants abandoned their preliminary injunction motion and by ruling on both motions, the Court mooted any interlocutory appeal. MTD 7-8. But injunction denials cannot be so artfully insulated from appellate review. Colorado's arguments fail both factually and legally.

Factually, Appellants never abandoned their motion. They pursued injunctive relief at every opportunity. "Simultaneously with the Complaint, the [Appellants] sought a preliminary injunction . . . ." Order 2. They fully pressed their motion through briefing and oral argument and urged the district court to rule promptly to stop the chilling effect on Appellants' protected speech. *Id.* at 1; *see also* Hr'g Tr. 2:19-22, 10:5-7, 10:12-17, 11:3-7. Despite this, the district court chose to hold Appellants' preliminary injunction motion, ordered the filing of summary judgment, and ruled simultaneously on the motions. Hr'g Tr. 12:23-13:2; Minutes 2.

But that was not Appellants' decision, and Appellants cannot be blamed for it. The court's decision did not negate Appellants' effort to obtain a preliminary injunction. The court acknowledged this point. As the court recognized, Appellants' Motion for Preliminary Injunction was live and pending when the court expressly addressed and ruled on it. Order 1, 12-13.

Legally, Appellants did not abandon their preliminary injunction either. Parties abandon a motion when they expressly withdraw it or never pursue it at all. *Hutchinson*, 105 F. 3d at 570 (declining appellate jurisdiction because Hutchinson "never sought a preliminary injunction or other temporary relief of any kind"); *Enercon Indus. Corp. v. Pillar Corp.*, 105 F.3d 1437, 1440 (Fed. Cir. 1997) (declining jurisdiction because although the plaintiff requested preliminary injunction in its Amended Complaint, it never moved for preliminary injunction). Neither occurred here. When parties press a preliminary injunction motion, as Appellants did here, the denial of that motion is appealable. *Hutchinson*, 105 F. 3d at 570.

This conclusion holds even when a district court denies a preliminary injunction simultaneously with other motions. District

courts frequently rule on multiple motions together to save judicial resources. And this Court frequently hears appeals from such orders. *See Petrella v. Brownback*, 787 F.3d 1242, 1254 (10th Cir. 2015) (finding appellate jurisdiction over combined preliminary injunction motion to dismiss and summary judgment rulings because “it is well established that we have jurisdiction to review interlocutory orders expressly denying injunctive relief pursuant to 28 U.S.C. § 1292(a)(1)”); *Flood v. ClearOne Commc’ns, Inc.*, 618 F.3d 1110, 1115-17 (10th Cir. 2010) (finding same despite argument that the appeal was mooted by a summary judgment ruling); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1147 (10th Cir. 2011) (taking appeal from combined preliminary injunction and motion to dismiss rulings because “[o]rders granting or denying preliminary injunctions are among the types of interlocutory orders that are immediately appealable under 28 U.S.C. § 1292”).

Other Circuits agree. *See Operating Sys. Support, Inc. v. Wang Labs., Inc.*, 52 F. App'x 160, 164–65 (3d Cir. 2002) (hearing appeal from order granting preliminary injunction and partially granting summary judgment); *Am. Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1406 (9th Cir. 1995) (acknowledging jurisdiction to hear denial of summary judgment

“if the effect of the summary judgment is to deny a preliminary injunction”); *Data Cash Sys., Inc. v. JS&A Grp., Inc.*, 628 F.2d 1038, 1040 (7th Cir. 1980) (entertaining appeal from order denying preliminary injunction motion and partially granting summary judgment). As these cases show, a consolidated ruling does not merge or moot out an otherwise appealable denial of injunctive relief.

In fact, this Court confirmed this point in a fact pattern nearly identical to the present appeal. In *Flood*, appellees, like Colorado here, argued that a summary judgment ruling mooted a preliminary injunction appeal. 618 F.3d at 1115-17. But as then Judge Gorsuch explained, where “the district court has yet to enter any permanent injunction into which the preliminary injunction might have merged,” it cannot be said that “the ongoing district court proceedings . . . render[] [the] consolidated appeal moot.” *Id.* at 1116. The preliminary injunction remains live with “very real effect[s]” on the parties until an “intervening order or final judgment” is issued to change that. *Id.* Thus, this Court found jurisdiction for that interlocutory appeal. *Id.*

The same holds for the present appeal. The district court has not entered a permanent injunction or a final judgment. The denial of

preliminary injunctive relief has very real, practical effects on Appellants: they cannot publish their desired websites or post their desired statement on their current website. Because the district court has not issued any final order, Appellants have no avenue to pursue their constitutional rights absent an interlocutory appeal. In these circumstances, interlocutory review is proper.

**D. This Court has jurisdiction even though the district court stayed a final ruling pending a decision in *Masterpiece*.**

Just as a ruling on multiple motions does not negate this Court's jurisdiction, neither does a delay in a final judgment. Missing this point, Colorado denies jurisdiction because the Order has the "practical effect" of staying the case. MTD 9. But that conclusion lacks nuance. While parties may not appeal every stay, a stay does not negate jurisdiction over an injunction denial.

*Forest Guardians* illustrates this point. 174 F.3d at 1184-86. There, the district court stayed the case after denying preliminary injunctive relief, yet this Court found jurisdiction over the appeal. *Id.* That is exactly what happened here. The district court denied a preliminary injunction

request and then stayed entering a final ruling. Under *Forest Guardians*, that denial is appealable.

The U.S. Supreme Court agrees. That Court in the stay context has made clear that “[s]ection 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions . . .” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988); *Utah v. Kennecott Corp.*, 14 F.3d 1489, 1492-94 (10th Cir. 1994) (same).<sup>2</sup> This includes stay orders that expressly or in “practical effect” deny injunctive relief. *Id.*

Ignoring this law, Colorado cites *Parker Livestock, LLC v. Oklahoma National Stock Yards Co.* as alleged proof that stays negate jurisdiction over injunction denials. MTD 10, citing *Parker*, 590 F. App’x

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<sup>2</sup> *Gulfstream Aerospace* also affirmed the collateral order doctrine as another alternative source of jurisdiction. Under that doctrine, if an order “finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated,” it is appealable under 28 U.S.C. § 1291. 485 U.S. at 275-76 (citation omitted). The Order also satisfies this collateral order doctrine because the Order effectively prevented Appellants from receiving a final judgment protecting their constitutional freedoms.

737, 742 (10th Cir. 2014) (unpublished). But that unpublished decision offers Colorado no help. While *Parker* declined to hear an appeal from a stay, despite a pending preliminary injunction request, the district court's order did not expressly or in practical effect deny an injunction. *Id.*

The plaintiff in *Parker* did not press their preliminary injunction request and no hearing was held on it. *Id.* at 739. Instead, the district court stayed the case because the plaintiff was pressing his statutory claims in an administrative forum elsewhere, which would likely resolve the federal case. *Id.*

In contrast, Appellants fully briefed, pressed, and pursued their preliminary injunction motion. The district court held a hearing on and expressly denied that motion. Hr'g Tr. 2:19-22; Order 1, 12-13. And the practical effect of this ruling was to deny Appellants' requested injunction. *See supra* Section I.B. Colorado cannot invoke a case that never ruled on a preliminary injunction motion to justify dismissing an appeal from a preliminary injunction denial.

Even more important, the district court would have abused its discretion if it just ignored Appellants' preliminary injunction motion.

Unlike in *Parker*, Appellants pressed for a preliminary injunction to stop the ongoing irreparable harm of losing their First Amendment freedoms. The court therefore could not and did not hang Appellants' constitutional rights out in the wind. *Parker* meanwhile involved no constitutional rights and therefore no pressing need to rule on a preliminary injunction. The court in *Parker* did not rule on the preliminary injunction, nor was it required.

Moreover, unlike the plaintiff in *Parker*, Appellants are not litigating their rights in any other forum. Appellants are not parties to *Masterpiece* and cannot pursue their rights in that forum. Moreover, *Masterpiece* may not even resolve the issues presented in this case. So while the district court in *Parker* could and reasonably did stay the case without ruling on the preliminary motion, the district court did exactly what it had to do: rule on Appellants' preliminary injunction motion. By expressly ruling on and denying this motion, the court issued an appealable order under § 1292(a)(1).

**II. This Court also has jurisdiction to review the rulings on the motions to dismiss and for summary judgment under pendent appellate jurisdiction.**

While this Court has jurisdiction to hear the preliminary injunction denial under § 1292(a)(1), this Court also has jurisdiction to hear the motion to dismiss grant and the summary judgment denial under pendant appellate jurisdiction.

Parties typically cannot appeal a partial motion to dismiss or partial summary judgment ruling. This Court, however, can review what would otherwise be a “nonappealable” order under the pendent appellate jurisdiction doctrine if (1) the nonappealable order is “inextricably intertwined” with an appealable order or (2) “review of the nonappealable decision is necessary to ensure meaningful review of the appealable one.” *Crowe*, 640 F.3d at 1148. A decision is “inextricably intertwined” if it is “coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, where the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well.” *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1114 (10th Cir. 1999) (quotations omitted).

This issue arose in *Petrella* which concerned a similar consolidated order on motions to dismiss, preliminary injunction, and summary judgment. 787 F.3d at 1254-55. In *Petrella*, this Court quickly determined that it had jurisdiction over the express denial of the preliminary injunction motion. *Id.* The Court then asserted jurisdiction over the motion to dismiss because a critical issue (applicable level of scrutiny) impacted both the motion to dismiss and preliminary injunction rulings. *Id.* at 1255.

Following this same “inextricably intertwined” rule, other circuits have exercised jurisdiction over combined rulings on motions for preliminary injunction and summary judgment. *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 371-73 (2d Cir. 2004) (exercising pendent appellate jurisdiction over consolidated preliminary injunction and summary judgment rulings that were dismissed based on standing). This Court should do the same here. Because the motion to dismiss and summary judgment rulings are “inextricably intertwined” with the preliminary injunction ruling, this Court can and should hear all the rulings together.

**A. The Court has pendent appellate jurisdiction over the dismissal ruling.**

The court below both granted a motion to dismiss and denied the motion for preliminary injunction against the Speech Mandate on standing grounds. Order 5-12. In this respect, the motion to dismiss and motion for preliminary injunction completely overlap as to the Speech Mandate challenge. There is therefore no way for this Court to rule on the preliminary injunction motion against the Speech Mandate unless this Court first determines that Appellants have standing to challenge the Speech Mandate. Standing is a necessary prerequisite to proving likelihood of success on the merits. *See U.S. Ass'n of Importers of Textiles & Apparel v. U.S. Dep't of Commerce*, 413 F.3d 1344, 1348 (Fed. Cir. 2005) (“The question of jurisdiction closely affects the Association's likelihood of success on its motion for a preliminary injunction. Failing to consider [the jurisdiction arguments in a motion to dismiss] was legal error.”).

In light of this connection, the motion to dismiss based on standing and the preliminary injunction denied for lack of standing are “inextricably intertwined.” *Petrella*, 787 F.3d at 1254-55 (finding motions for preliminary injunction and dismissal “inextricably intertwined”

because the same issue determined them both); *Crowe*, 640 F.3d at 1148 (same). This makes the motion to dismiss immediately reviewable as part of the preliminary injunction appeal. *Id.*

**B. The Court has pendent appellate jurisdiction over the summary judgment ruling.**

For the same reason this Court can review the motion to dismiss, this Court can also review the summary judgment ruling. The two motions are intertwined, depending on the same facts and same legal analysis.

Indeed, upon the district court's request, the parties below agreed on stipulated facts, and the district court ruled on the summary judgment and preliminary injunction based on these facts. Order 1-5; Hr'g Tr. 12:3-13:2. The factual record is exactly the same for both motions. For this reason, the district court acknowledged that "the Preliminary Injunction Motion and Motion for Summary Judgment should be determined together in resolution of the matters in dispute on the merits." Order 12. This is further confirmed by the parties' agreement that the issues are fully briefed, no further discovery is needed, and no factual disputes exist. Hr'g Tr. 9:8-14, 9:25-10:7.

In light of this procedural posture, this Court need not rule on the preliminary injunction now and wait for the district court to rule on the summary judgment motion later. There are no factual disputes, discovery is over, and the record is set. The only remaining disputes are purely legal ones. As a matter of judicial economy, this Court can and should rule on the summary judgment motion now rather than wait to rule on exactly the same record later.

**III. This Court should exercise its jurisdiction in light of Appellants' need for immediate relief.**

Every day Appellants wait for an injunction, they suffer ongoing irreparable harm, losing their First Amendment rights. This loss has gone on for thirteen months and continues with no definite end. In staying the case, the district court ordered Appellants to forego their freedoms at least until the Supreme Court rules in *Masterpiece*. Order 12. That likely additional eight month delay is improper and unjust.

Even when the Court rules in *Masterpiece*, that ruling may not “guide determination” of this case. *Id.* While the two cases challenge the same statute, they involve different parties, different speech (custom wedding cakes versus custom websites), and different facts. The two

cases do not even present identical claims. *Masterpiece*, for example, does not challenge CADA's Publication Ban. Appellants do.

To be sure, a Supreme Court decision on the First Amendment may affect lower courts facing First Amendment issues in a general sense. But federal courts do not "hold [a plaintiff's] constitutional rights hostage to the outcome and timing" of another person's case. *Phelps v. Hamilton*, 59 F.3d 1058, 1069 (10th Cir. 1995). Where "[j]urisdiction exist[s]", the federal courts have a "virtually unflagging" duty "to hear and decide [the] case." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013). That is not changed "simply because a pending . . . proceeding involves the same subject matter." *Id.* at 588.

Because federal courts have an obligation to resolve federal issues and because Appellants need this Court to protect their First Amendment rights, this Court should exercise the jurisdiction given it under § 1292 to reverse an order causing irreparable harm.

## CONCLUSION

Appellants sought a preliminary injunction and the lower court denied that motion. If this Court cannot review that denial, Appellants cannot vindicate their First Amendment freedoms anywhere but must

wait nearly two years in limbo (if not more) as they suffer ongoing irreparable harm day after day after day. Jurisdictional rules are not so impractical or so callous to let this harm go unaddressed. Rather, § 1292 permits this Court to consider this appeal that denies a preliminary injunction and permits irreparable harm. Based on this, Appellants respectfully ask the Court deny Colorado's Motion to Dismiss.

Dated: October 23, 2017

Respectfully submitted,

s/ Jonathan A. Scruggs

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## CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this response contains 5,199 words, excluding the parts exempted under Fed. R. App. P. 32(f).

2. This response complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a 14-point proportionally spaced Century Schoolbook typeface using Microsoft Word 2013.

3. All required privacy redactions have been made pursuant to 10th Cir. R. 25.5.

4. Paper copies are not required for this response.

5. This response has been scanned for viruses with the most recent version of a commercial virus scanning program, Traps version 4.1 and Windows Defender Security Center version 4.11, and is free of viruses according to those programs.

Date: October 23, 2017

s/ Jonathan A. Scruggs  
Jonathan A. Scruggs

## CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2017, a true and accurate copy of the foregoing document 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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*Attorneys for Defendants-Appellees*

Date: October 23, 2017

s/ Jonathan A. Scruggs

Jonathan A. Scruggs

# **EXHIBIT 1**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_

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

*Plaintiffs,*

vs.

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

*Defendants.*

---

**VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

---

**INTRODUCTION**

1. Lorie Smith is the sole owner and operator of 303 Creative LLC, a company specializing in graphic and web design.
2. Lorie is also a Christian who believes that God has called her to use her talents and her company in a way that honors Him.
3. Because of her religious beliefs and her desire to affect the current cultural narrative regarding marriage that contradicts those beliefs, Lorie wants to use her talents and the

398. Accordingly, as applied to Lorie, CADA denies Lorie the right to make intimate choices that define her religious identity, personal dignity, personal autonomy, and personal liberty and instead stigmatizes Lorie and denies her equal dignity as a citizen in violation of the Fourteenth Amendment of the United States Constitution.

399. WHEREFORE, Plaintiffs respectfully ask that the Court grant the relief specified in the Prayer for Relief.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs ask this Court to enter judgment against Defendants and to provide the following relief:

1. A preliminary injunction and permanent injunction to stop Defendants and any person acting in concert with them from enforcing the Banned-Speech Provision facially, and as-applied to Plaintiffs' desired communications (a) promoting marriage exclusively as an institution between one man and one woman, (b) declining to create websites or graphics promoting events or ideas that violate their beliefs about marriage, such as websites for same-sex weddings, and (c) explaining their religious beliefs about what they can and cannot create;

2. A declaration that the Banned-Speech Provision violates the United States Constitution's Free Speech Clause, Free Press Clause, Free Exercise Clause, Equal Protection Clause, and Due Process Clause facially, and as-applied to Plaintiffs' desired communications (a) promoting marriage exclusively as an institution between one man and one woman, (b) declining to create websites or graphics promoting events or ideas that violate their beliefs about marriage, such as websites for same-sex weddings, and (c) explaining their religious beliefs about what they can and cannot create;

3. A preliminary injunction and permanent injunction to stop Defendants and any person acting in concert with them from enforcing the Compelled-Speech Provision to require Plaintiffs to create websites or graphics promoting events or ideas that violate their beliefs that marriage should only be an institution between one man and one woman, such as websites promoting same-sex weddings;

4. A declaration that the Compelled-Speech Provision violates the United States Constitution's Free Speech Clause, Free Exercise Clause, Equal Protection Clause, and Due Process Clause when the Compelled-Speech Provision is applied to force Plaintiffs to create websites or graphics promoting events or ideas that violate their beliefs that marriage should only be an institution between one man and one woman, such as websites promoting same-sex weddings;

5. That this Court adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy so that these declarations shall have the force and effect of a final judgment;

6. That this Court retain jurisdiction of this matter for the purpose of enforcing its orders;

7. That this Court award Plaintiffs' costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988;

8. That this Court issue the requested injunctive relief without a condition of bond or other security being required of Plaintiffs; and

9. That this Court grant any other relief that it deems equitable and just in the circumstances.

**EXHIBIT 2**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:16-cv-02372-CBS

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

*Plaintiffs,*

vs.

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

*Defendants.*

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY INJUNCTION**

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beliefs, or (2) speak out on the subject of marriage, exercise her right to create and publish the speech of her choosing, and incur investigations, re-education training, mandatory reporting, and fines of up to \$500 for each violation of CADA. Colo. Rev. Stat. §§ 24-34-306(2)(a), -306(9), -602(1)(a), -605; App. 15. No American should be forced to choose between her freedom of speech and such punishments. To prevent irreparable harm to their constitutional rights, Plaintiffs request a preliminary injunction enjoining Defendants from applying CADA to prevent them from (a) designing graphics and custom wedding webpages consistent with their religious beliefs about marriage and (b) publishing their desired statements about God’s design for marriage. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (“[T]hose who adhere to religious doctrines, may continue to advocate ... that, by divine precepts, same-sex marriage should not be condoned”).

### STATEMENT OF FACTS

Lorie Smith earned a degree from the University of Colorado Denver and worked for several years for traditional companies doing work in graphic design, website design, and marketing. Ver. Compl. ¶¶ 101-02. But she was never able to use her artistic abilities for a higher purpose in the way she always dreamed. Ver. Compl. ¶ 103. This troubled Lorie because her Christian faith teaches that every talent comes from God and should be used to honor Him. Ver. Compl. ¶¶ 95-100. So Lorie started her own small business, 303 Creative LLC, to have the freedom to incorporate her faith into her work. Ver. Compl. ¶ 103. She does so in many ways, including treating her customers with dignity and respect and being selective about the messages and events she creates and promotes—always ensuring they are consistent with her religious beliefs. Ver. Compl. ¶¶ 109, 113-17, 130.

and publish speech expressing the beauty of God’s design for marriage and join in expressive associations with persons who share her expressive purpose. Because “[v]indicating [Lorie’s] First Amendment freedoms is clearly in the public interest,” *id.* (quoting *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005)), all four prongs of the preliminary injunction standard weigh in Plaintiffs’ favor.

### CONCLUSION

This case is about speech and how much we value it. No matter how commendable their goals, Defendants cannot pursue them in an unconstitutional manner. Colorado may prohibit invidious discrimination without resorting to art manipulation, speech bans, and idea extraction. A preliminary injunction is warranted here to preserve Lorie’s First and Fourteenth Amendment rights. Plaintiffs respectfully request that the Court issue one as soon as possible.

Respectfully submitted this 20th day of September, 2016.

*s/ Jeremy D. Tedesco*

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Jonathan A. Scruggs (Arizona Bar No. 030505)  
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**EXHIBIT 3**

**From:** COD\_ENotice@cod.uscourts.gov  
**To:** [COD\\_NEF@cod.uscourts.gov](mailto:COD_NEF@cod.uscourts.gov)  
**Subject:** Activity in Case 1:16-cv-02372-MSK-CBS 303 Creative LLC et al v. Elenis et al Order  
**Date:** Monday, November 21, 2016 9:28:22 AM

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**U.S. District Court**

**District of Colorado**

### **Notice of Electronic Filing**

The following transaction was entered on 11/21/2016 at 9:26 AM MST and filed on 11/21/2016

**Case Name:** 303 Creative LLC et al v. Elenis et al

**Case Number:** [1:16-cv-02372-MSK-CBS](#)

**Filer:**

**Document Number:** 44(No document attached)

#### **Docket Text:**

**ORDER: The Court will conduct a non-evidentiary hearing on the Plaintiffs' Motion for Preliminary Injunction [6] on 1/11/2017 at 09:00 AM. The parties shall be prepared to address: (i) each Plaintiff's standing to request the various items of relief they seek; (ii) whether the facts pertinent to the Motion for Preliminary Injunction are disputed, such that an evidentiary hearing is necessary; (iii) if there are factual disputes, what facts are disputed; and (iv) how long of an evidentiary hearing is necessary and when that hearing should be scheduled. By Chief Judge Marcia S. Krieger on 11/21/16. Text Only Entry (msklc2, )**

**1:16-cv-02372-MSK-CBS Notice has been electronically mailed to:**

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**EXHIBIT 4**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-2372-MSK-CBS

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

Plaintiffs,

vs.

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

Defendants.

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REPORTER'S TRANSCRIPT  
(Law and Motion Hearing)  
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Proceedings before the HONORABLE MARCIA S. KRIEGER,  
Judge, United States District Court for the District of  
Colorado, commencing at 9:30 a.m., on the 11th day of  
January, 2017, in Courtroom A901, United States Courthouse,  
Denver, Colorado.

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APPEARANCES

KATHERINE L. ANDERSON and JEREMY D. TEDESCO, Alliance  
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MICHAEL L. FRANCISCO, MRDLaw, 3301 West Clyde Place,  
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VINCENT E. MORSCHER, Colorado Attorney General's  
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defendants.

MARY J. GEORGE, FCRR, CRR, RMR  
901 19th Street, Denver, Colorado 80294  
Proceedings Reported by Mechanical Stenography  
Transcription Produced via Computer

P R O C E E D I N G S

(Call to order of the court at 9:30 a.m.)

THE COURT: Court is convened today in case No. 16  
cv 2372. This is encaptioned 303 Creative LLC and Lorie  
Smith versus a number of defendants: Aubrey Elenis,  
Anthony Aragon, Ulysses Chaney, Miguel Elias, Carol  
Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock and  
Cynthia Coffman.

And the matter's set down for a law and motion  
hearing because there's been a motion for a preliminary  
injunction filed here, and there also has a pending motion  
to dismiss.

Could I have entries of appearance, please.

MS. ANDERSON: Yes. Kate Anderson here on behalf  
of plaintiffs. I'm joined by cocounsel Jeremy Tedesco and

1 Michael Francisco.

2 THE COURT: Thank you. And, counsel, you need to  
3 speak into the microphone. You have a soft voice and it  
4 kind of dissipates in the courtroom, so either pull that  
5 microphone toward you or go to the lectern, please.

6 MS. ANDERSON: All right.

7 THE COURT: Good morning and welcome to all of  
8 you.

9 MR. MORSCHER: Good morning, Your Honor. Vincent  
10 Morscher, Deputy Attorney General, representing all  
11 defendants in this matter.

12 THE COURT: Good morning and welcome to you as  
13 well.

14 MR. MORSCHER: Thank you.

15 THE COURT: Before setting this hearing down, I  
16 asked you to be prepared to -- or I said -- when I set it  
17 down, I asked you to be prepared to address a number of  
18 issues. And I've had an opportunity to review what you've  
19 filed. I think some of those issues may have clarified in  
20 the subsequent filings.

21 The purpose of our hearing here is to streamline  
22 what's going on and get a path forward. First of all, let  
23 me ask the plaintiffs why you named all of the defendants,  
24 Aragon through Pocock, as defendants when essentially all  
25 you're suing is the Colorado Civil Rights Division.

1 MS. ANDERSON: Your Honor, this is a case of  
2 pre-enforcement challenge, challenging the  
3 constitutionality of state statute.

4 THE COURT: I know that.

5 MS. ANDERSON: And the reason we named each of  
6 those defendants is following the history of *ex parte Young*  
7 and *Muskogee* in the Tenth Circuit and *Wilson v. Stocker*  
8 saying that the way to avoid sovereign immunity when you're  
9 challenging the constitutionality of a state statute is to  
10 sue the people with enforcement power. And what's required  
11 is some enforcement power. So each of those defendants has  
12 some enforcement power and that is why we named them.

13 THE COURT: They have enforcement power if they  
14 act as a unit and they direct the director, correct?

15 MS. ANDERSON: Their enforcement power, as we  
16 understand it, is to file complaints, to investigate, to  
17 order hearings, and on down the line.

18 THE COURT: Individually?

19 MS. ANDERSON: The -- the A.G. and the  
20 commissioners and the commission can all file complaints,  
21 which is part of the enforcement power.

22 THE COURT: All right. So the members of the  
23 commission can file complaints; that's -- that's their  
24 enforcement power that you're concerned about?

25 MS. ANDERSON: Yes.

1 THE COURT: All right. Then let me ask the  
2 defendant -- or counsel for the defendants: What I  
3 understand is that simply the posting of this website,  
4 notwithstanding the content, would not cause any  
5 prosecution; is that correct?

6 MR. MORSCHER: That's correct, Your Honor. Just  
7 by having this service out there, it still takes a number  
8 of steps by independent actors to actually get it before,  
9 initially, the division and then eventually the commission,  
10 assuming, you know, various things happen.

11 So, you know, only if someone approaches a  
12 website, seeks out the service, is denied the service based  
13 on, you know, presumably their sexual orientation, and then  
14 they file a charge, then it would be an issue. However, as  
15 we mentioned, the independent party can still go to state  
16 court on their own and completely bypass the filing with  
17 the division and they could seek relief in state court  
18 automatically.

19 THE COURT: All right. But we're not concerned  
20 about that. We're concerned about enforcement. And what I  
21 just heard you say comports with what I read, which is that  
22 the plaintiffs -- or plaintiffs here will not suffer any  
23 injury unless service is denied; is that correct? Because  
24 there will be no enforcement unless service is denied.

25 MR. MORSCHER: Well, that's correct. I mean,

1 they -- yes, they cannot take any action until facts  
2 happen, and service would have to be denied before they  
3 could take action and face --

4 THE COURT: All right. So what I understand  
5 you're saying is that the plaintiffs composed the website,  
6 there would be no enforcement taken simply because the  
7 website is posted.

8 MR. MORSCHER: I mean, that's correct. The --  
9 that's correct.

10 THE COURT: Okay. And that the only enforcement  
11 that would occur, if any, would be after someone has  
12 requested service and the plaintiffs have denied service;  
13 is that correct?

14 MR. MORSCHER: Well, I guess when you are talking  
15 enforcement, you know, what does that mean? Because they  
16 still -- there still needs to be an investigation, there  
17 still needs to be all these other steps before it's  
18 actually noticed for a hearing --

19 THE COURT: Well, we're not talking about that.  
20 We're talking about what is the triggering event? Is the  
21 triggering event the posting of the website or is the  
22 triggering of the -- triggering event the denial of  
23 service?

24 MR. MORSCHER: The -- as far as defendants are  
25 concerned, Your Honor?

1 THE COURT: Uhm-hum.

2 MR. MORSCHER: As far as defendants are concerned,  
3 the triggering event is when a charge is filed and probable  
4 cause is found.

5 THE COURT: Well, let me -- let me run down some  
6 concepts, then, here. Let's hypothetically say that the  
7 plaintiffs post the website and somebody complains about  
8 the language on the website. Would that constitute a  
9 complaint?

10 MR. MORSCHER: If they filed a charge alleging  
11 that?

12 THE COURT: Uhm-hum.

13 MR. MORSCHER: I -- that would be a complaint,  
14 correct.

15 THE COURT: And would the defendants take any  
16 action to investigate that?

17 MR. MORSCHER: If it was determined that they had  
18 jurisdiction, for instance, it was filed timely, and it  
19 fell under the statute, then the Civil Rights Division  
20 would initiate an investigation.

21 THE COURT: Okay. Do you understand what I'm  
22 really asking you? Because if it is, as you have listed in  
23 your pleadings, a requirement that service be denied, then  
24 the plaintiffs have no standing with regard to any claim  
25 based on free speech. But if you are saying that

1 enforcement could occur based on someone complaining about  
2 the language on the website, not the denial of service,  
3 then they may have standing.

4 MR. MORSCHER: Well, if they -- if you're going  
5 towards the issue of posting the information under that  
6 part of the statute that talks about a public accommodation  
7 and not putting that out there, then, yes, certainly I  
8 think someone would have an argument that they are not  
9 being denied service but someone is committing an illegal  
10 act by posting this discriminatory language on a website.

11 THE COURT: Well, there the injury that is alleged  
12 would be an injury based on a denial of free speech, a  
13 chilling effect. And if I understand the Government here,  
14 the State of Colorado, to say we're not going to prosecute  
15 simply because people put statements on their websites  
16 about what services they do and do not intend to render,  
17 we're going to wait until some service is denied before we  
18 begin prosecution, then there's very little chilling effect  
19 as to the speech; it is, indeed, conduct that is being  
20 prosecuted. So what is the State's position?

21 MR. MORSCHER: Well, the State's position is that  
22 a matter needs to be initiated before any prosecution is  
23 made. And that really depends on the independent actor  
24 looking at what is posted and filing a charge with the  
25 division. Or it could be that they're denied service. It

1 could be either one.

2 THE COURT: Okay. Sounds like the State exercises  
3 no discretion as to the complaints it pursues.

4 MR. MORSCHER: The only discretion it exercises is  
5 jurisdictional and -- yes, I mean, that's correct. It has  
6 no discretion whether it could accept a complaint as long  
7 as it is filed.

8 THE COURT: Okay. All right. Then let's turn to  
9 the motion for preliminary injunction. Have you discussed  
10 what facts are in dispute and whether or not you need an  
11 evidentiary hearing?

12 MR. MORSCHER: We did have a discussion, Your  
13 Honor. You know, we don't believe that any facts are in  
14 dispute in this matter. Certainly the facts that we think  
15 are material to this are defendants' business and their  
16 operations and their intent and their personal beliefs.  
17 Seeing as nothing has been filed or done here, we don't  
18 dispute that.

19 We certainly dispute their statement of what the  
20 law is and who has the authority and jurisdiction to take  
21 action. They -- they put all the defendants in one group,  
22 and all defendants have independent authority, so we  
23 don't -- you know, certainly we dispute that. But  
24 otherwise, there's no disputed facts here.

25 THE COURT: So you're prepared to resolve this on

1       briefs?

2               MR. MORSCHER: That's correct, Your Honor.

3               THE COURT: All right. Let me hear from the  
4       plaintiffs.

5               MS. ANDERSON: Your Honor, we agree that there's  
6       no need for an evidentiary hearing, there's no facts in  
7       dispute, and this could be decided on the briefs.

8               THE COURT: All right. Sounds to me like the  
9       relief that you're requesting in the motion for preliminary  
10      injunction is exactly the same relief that you're  
11      requesting on the merits, correct?

12              MS. ANDERSON: No, Your Honor. We are -- on the  
13      merits we also have a facial challenge asking for facial  
14      relief. On the motion for preliminary injunction we're  
15      only asking for as-applied relief, that she be able to  
16      speak freely on her website and that she be able to enter  
17      the industry and begin creating custom wedding websites --

18              THE COURT: What's the difference with regard to  
19      the evidence that would be considered?

20              MS. ANDERSON: There could -- probably none, Your  
21      Honor. There could be --

22              THE COURT: That's right.

23              MS. ANDERSON: Yeah.

24              THE COURT: All right. Then why shouldn't I just  
25      combine the determination of the motion for preliminary

1 injunction with the determination on the merits under Rule  
2 42(b)?

3 MS. ANDERSON: I think you could, Your Honor, as  
4 long as you decided promptly the issues. There's  
5 irreparable harm going on right now with her chilling of  
6 her speech, so we would urge the Court to make a decision  
7 quickly.

8 THE COURT: Well, I'm not inclined to make two  
9 rulings.

10 MS. ANDERSON: So what would Your Honor -- what is  
11 Your Honor thinking?

12 THE COURT: When are you going to be prepared to  
13 address your issues?

14 MS. ANDERSON: I'm sorry?

15 THE COURT: When are you going to be prepared to  
16 address your issues?

17 MS. ANDERSON: Could I take just a brief moment?

18 THE COURT: Sure.

19 MS. ANDERSON: Thank you.

20 Your Honor, we would propose, then, that we  
21 file -- on an expedited briefing schedule, that within  
22 about three weeks we file summary judgment.

23 THE COURT: How long will it take the State to  
24 respond?

25 MR. MORSCHER: Your Honor, we're fine with

1 whatever the Court decides. We can respond within 20 days  
2 of that.

3 THE COURT: All right. Then I'll set a deadline  
4 for filing of motion for summary judgment. There will need  
5 to be stipulated facts. Please understand if you do not  
6 stipulate to all the facts, I'll deny the motion  
7 outright --

8 MS. ANDERSON: Yes, Your Honor.

9 THE COURT: -- because that means we need to have  
10 a hearing. So you'll need to have stipulated facts.  
11 Please do not put those stipulated facts in your brief.  
12 Please list the stipulated facts that you agree to.

13 Motion for summary judgment will be filed three  
14 weeks from today. Ms. Glover, can you give us a deadline.

15 COURTROOM DEPUTY: Yes, I can. Three weeks from  
16 today is February 1st.

17 THE COURT: All right. The response will be filed  
18 three weeks from that date.

19 COURTROOM DEPUTY: Which would be February 22d.

20 THE COURT: All right. And the reply, if any,  
21 will be filed 14 days thereafter.

22 COURTROOM DEPUTY: March 8th.

23 THE COURT: Okay. Court withdraws the reference  
24 of the motion to dismiss docket No. 37 to Magistrate Judge  
25 Shaffer and will rule on the motion for preliminary

1 injunction, motion for summary judgment, and motion to  
2 dismiss simultaneously.

3 Any need for clarification, further explanation,  
4 anything else we need to do?

5 MR. TEDESCO: I have one point of clarification.

6 THE COURT: Would you speak into a microphone,  
7 please.

8 MR. TEDESCO: Thank you, Your Honor. I just  
9 wondered if the State was going to be filing a cross-motion  
10 for summary judgment. Right now --

11 THE COURT: Why would the State file a motion for  
12 cross -- a cross-motion for summary judgment?

13 MR. TEDESCO: I don't know if they intend to or  
14 not. And since we were figuring out the schedule --

15 THE COURT: Let me be real honest about motions  
16 for summary judgment. Cross-motions for summary judgment  
17 are not helpful. The only issue on a motion for summary  
18 judgment is whether or not we need a trial. If we do not  
19 need a trial, meaning there's no genuine dispute as to a  
20 material fact, then the Court can enter judgment to the  
21 party entitled as a matter of law. It does not matter who  
22 files the motion.

23 MR. TEDESCO: Thank you, Your Honor.

24 THE COURT: All right. Anything else we need to  
25 do today?

1 MS. ANDERSON: No, Your Honor.

2 MR. MORSCHER: Nothing from defendants, Your  
3 Honor.

4 THE COURT: All right. I have one last question  
5 for the plaintiffs, and that is whose website would this  
6 be? You have two plaintiffs here.

7 MS. ANDERSON: It's her business website, 303  
8 Creative.

9 THE COURT: Okay. So who owns -- would own the  
10 website and whose speech would be involved?

11 MS. ANDERSON: It would be both. She's the sole  
12 owner of the company --

13 THE COURT: Well, it doesn't work that way. Under  
14 *Hobby Lobby*, we know that entities can't have speech. So  
15 are you saying this is the speech of 303 Creative LLC, or  
16 are you saying that essentially this is Lorie Smith, not an  
17 LLC?

18 MS. ANDERSON: We are saying it is her speech  
19 through her company. So it's her company speech.

20 THE COURT: Okay. Then you may want to think  
21 about dismissing Lorie Smith from the caption of the  
22 action.

23 MS. ANDERSON: We will consider it, Your Honor.

24 THE COURT: Okay. Great. Thank you all very  
25 much. I look forward to receiving your briefs, and we will

1 take it from there.

2 MS. ANDERSON: Thank you, Your Honor.

3 MR. MORSCHER: Thank you, Your Honor.

4 THE COURT: We will stand in recess.

5 (Proceedings concluded at 9:49 a.m.)

6

7 \* \* \* \* \*

8 REPORTER'S CERTIFICATE

9

10 I certify that the foregoing is a correct transcript  
11 from the record of proceedings in the above-entitled  
12 matter.

13 Dated at Denver, Colorado, this 18th day of January,  
14 2017.

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MARY J. GEORGE, FCRR, CRR, RMR

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# **EXHIBIT 5**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
CHIEF JUDGE MARCIA S. KRIEGER**

Courtroom Deputy: Patricia Glover  
Court Reporter: Mary George

Date: January 11, 2017

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

Parties:

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

Plaintiffs,

Counsel Appearing:

Jeremy Tedesco  
Katherine Anderson  
Michael Francisco

v.

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

Vincent Morscher

Defendants.

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**COURTROOM MINUTES**

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HEARING: Law and Motion

**9:30 a.m. Court in session**

The Court addresses the issues outlined in its Order setting this hearing (Doc. #44)

Statements from counsel.

Courtroom Minutes  
Chief Judge Marcia S. Krieger  
Page 2

The parties agree that there is no need for an evidentiary hearing.

**ORDER:** Plaintiffs' motion for summary judgment will be filed by February 1, 2017; responses will be filed by February 22, 2017 and reply filed by March 8, 2017. The parties will also file a separate stipulation of facts.

**ORDER:** The reference of the Motion to Dismiss (**Doc. #37**) to Magistrate Judge Shaffer is withdrawn. The Court will rule on the motion(s) for preliminary injunction, summary judgment and dismissal simultaneously.

**9:49 a.m. Court in recess.**

**Total Time: 19 minutes.**  
**Hearing concluded.**