No. 17-1344

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC, a limited liability company, et al.,

Plaintiffs - Appellants,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
For the District of Colorado

The Honorable Craig B. Shaffer
United States Magistrate Judge

D.C. No. 16-cv-02372-MSK-CBS

APPELLEES' BRIEF

CYNTHIA H. COFFMAN
Colorado Attorney General

s/ *Skip Spear*
*Skippere S. Spear**
Senior Assistant Attorney General

*Vincent E. Morscher**
Deputy Attorney General

*Jack D. Patten, III**
Assistant Attorney General

Colorado Department of Law
Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
(720) 508-6635
**Counsel of Record*

STATEMENT REGARDING ORAL ARGUMENT

Counsel does not request oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC, a limited liability company, et al., Plaintiffs - Appellants, v. AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity, et al., Defendants - Appellees.	No. 17-1344

On Appeal from the United States District Court
for the District of Colorado
D.C. No. 16-cv-02372-MSK-CBS

APPELLEES' BRIEF

Appellees Aubrey Elenis, Anthony Aragon, Ulysses Chaney, Miguel Rene Elias, Carol Fabrizio, Heidi Hess, Rita Lewis, Jessica Pocock, and Cynthia Coffman (collectively "Colorado"), respectfully submit this Brief for the Court's consideration.

As explained herein, the Tenth Circuit does not have appellate jurisdiction over this matter and, therefore, oral argument is not requested.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CONSTITUTIONS

STATUTES

RULES

OTHER AUTHORITIES

CODES

STATEMENT OF RELATED CASES

There are no prior or related appeals.

INTRODUCTION

Appellants assert a pre-enforcement challenge to Colorado's Anti-Discrimination Act, arguing that it compels them to provide business services to the LBGT community in violation of their religious beliefs. Appellants seek a declaration that the Act is unconstitutional, and an injunction prohibiting Colorado from enforcing the Act. The parties filed several motions below, which the district court merged into a motion to dismiss and a motion for summary judgment based on stipulated facts.

The district court granted the motion to dismiss, in part, finding that Appellants lacked standing to pursue several claims. With regard to the remaining claims, the district court stayed its consideration on the merits until the Supreme Court issues an opinion in another case, *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*, No. 16-111 (filed July 25, 2016). In that case, a different business seeks a declaration that the Act is unconstitutional because it forces businesses to serve the LGBT community in violation of the same religious beliefs

asserted by Appellants here. The Alliance Defending Freedom represents the complaining parties in both cases.

The Supreme Court heard oral arguments in *Masterpiece* on December 5, 2017. Appellants admit that an opinion in *Masterpiece* may issue before this Court hears oral arguments, and the opinion may resolve this lawsuit.

Instead of proceeding with their remaining claims in the district court after the stay is lifted, Appellants ask this Court to decide their pending motion for summary judgment in the first instance. If the *Masterpiece* opinion is not issued before this appeal is decided, this Court will decide the same legal issues pending before the Supreme Court and may issue a decision contrary to the Supreme Court's eventual opinion.

To the extent this Court considers Appellants' substantive claims, those claims fail on the merits. Colorado has taken no action against Appellants. As of the filing of this brief, no charge of discrimination has been filed against Appellants, which would precipitate an action by Colorado. Because a charge must be filed, Appellants entire lawsuit is

based on what *might* happen *if* a charge was filed, based on decisions already made by the Colorado Court of Appeals in *Masterpiece*.

ISSUES PRESENTED FOR REVIEW

Colorado disagrees with Appellants' statement of the issues presented for review, and submits the following alternative statement of the issues:

I. Does the Tenth Circuit have jurisdiction to review a district court's interlocutory order that stays the proceedings before it but does not otherwise refuse a request for injunctive relief?

II. Did the district court abuse its discretion by staying these proceedings until the Supreme Court issues an opinion the district court found "will either guide determination of, or eliminate the need for resolution of the issues in this case?"

III. Assuming that appellate jurisdiction exists and the district court abused its discretion in staying these proceedings, are Appellants entitled to a mandatory preliminary injunction where they cannot show the elements required for such an injunction?

IV. Assuming the district court abused its discretion and this Court issues a preliminary injunction, should this Court also exercise

pendent jurisdiction to consider a summary judgment motion that was not ruled on below and grant a permanent injunction where Appellants cannot show actual success on the merits?

V. Assuming the district court abused its discretion and this Court issues a preliminary injunction, should this Court also exercise pendent jurisdiction to consider the district court's partial dismissal of Appellants' claims for lack of standing?

JURISDICTION

Appellants are appealing a 13-page order that dismissed several claims based on standing but otherwise stayed proceedings pending the forthcoming opinion in *Masterpiece*. Despite the limited and non-final nature of that order, Appellants ask this Court to rule on the entire case de novo, and grant all the relief requested in their complaint. Appellants assert jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), based on a motion for preliminary injunction that they previously asserted, but then agreed should be merged with the merits of the case.

On October 12, 2017, Colorado moved to dismiss this appeal for lack of jurisdiction. On October 24, the Tenth Circuit entered an Order referring the jurisdictional issues to this panel. Colorado renews its

motion to dismiss and addresses the absence of jurisdiction in the Argument section of this brief.

STATEMENT OF THE CASE

Colorado's Public Accommodation Law Prohibits Discrimination.

For more than 100 years, Colorado has enforced its law prohibiting discrimination in places of public accommodation. 1885 Colo. Sess. Laws at 132-33. The 1885 law guaranteed "all citizens … regardless of race, color or previous condition of servitude … full and equal enjoyment" of specified public facilities. *Id*. Colorado's efforts to combat discrimination have evolved over the past 120 years. In its current form, the Colorado Anti-Discrimination Act, § 24-34-301, *et seq*. C.R.S. (CADA), prohibits places of public accommodation from denying service to a person based on that person's protected characteristics, including sexual orientation. § 24-34-601(2)(a) (the "Accommodation Clause"). The law also prohibits a place of public accommodation from publicly communicating that it will refuse service to persons based on a protected characteristic. *Id.* (the "Communication Clause").

Public accommodation laws operate to "eliminate[e] discrimination and assur[e] citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). Because they "plainly serve[ ] compelling state interests of the highest order," *id*., these laws have repeatedly survived First Amendment challenge. "Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548–49 (1987); *Roberts*, 468 U.S. at 625; *cf. Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 259–60 (1964).

Colorado Has Taken No Action Against Appellants.

If anyone believes they have been denied service in a place of public accommodation, they may seek redress by filing a civil action in state court or by filing a charge with the Colorado Civil Rights Division, asserting a violation of CADA. §§ 24-34-306 (1)(a), 24-34-602

– 603, C.R.S. If the person files a civil action, they may not file a charge with the Division. § 24-34-602(3).

If a charge is filed, the Division's Director and staff shall make a prompt investigation. § 24-34-306(2)(a), C.R.S. After investigating, the Director, or her designee, makes a determination of whether probable cause exists for crediting the charge. § 24-34-306(2)(b). If probable cause is not found, the charge must be dismissed and the charging party may appeal to the Colorado Civil Rights Commission. § 24-34-306(2)(b)(I).

If probable cause is found, the Director notifies the parties and commences compulsory mediation. § 24-34-306(2)(b)(II). If mediation fails, the Commission decides whether to notice the case for hearing before the Commission, a single Commissioner, or an Administrative Law Judge. § 24-34-306(4). If a case is noticed for hearing, an evidentiary trial is held, a decision is issued, and either party may appeal the decision to the Colorado Court of Appeals. § 24-34-307.

Here, no person filed a charge against Appellants. There was no investigation, no determination of probable cause, and no action by

Colorado. The only "action" that Appellants claim may affect their business, is the prior litigation and decisions in *Masterpiece*.

The Masterpiece lawsuit.

Masterpiece began when Jack Phillips refused to bake a wedding cake for a same-sex couple based on his religious beliefs. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 277 (Colo. App. 2015). The couple filed a charge with the Division alleging discrimination in a place of public accommodation based on sexual orientation. *Id.* at 278.

The Division investigated and issued a finding of probable cause to credit the charge. *Id.* A complaint was filed, and an Administrative Law Judge issued a decision finding that Mr. Phillips violated CADA. *Id.* On review, the Commission affirmed the order, and on appeal, the Colorado Court of Appeals also affirmed. *Id.* at 277-78.

The Colorado Supreme Court denied Phillips' writ of certiorari on April 25, 2016. *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, No. 15SC738 (Colo. Apr. 25, 2016). On July 22, 2016, Phillips filed a petition for writ of certiorari with the United States Supreme Court, which was granted.

The question presented in the Brief for Petitioners filed with the Supreme Court is: "Whether applying Colorado's public accommodation law to compel artists to create expression that violates their sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment." Aplee. Supp. App. at 48.

In *Masterpiece* and this case, the constitutionality of CADA as applied to the provision of services for same-sex weddings is challenged. Although Appellants argue that the district court's stay based on *Masterpiece* was improper, they repeatedly cite to and rely on *Masterpiece* in making their arguments. Aplt. Opening Br. at pp. 2, 9, 10, 12, 13, 15, 23, 25, 26, 28, 29, 45, 46, 47, and 50; *see also* Aplee. Supp. App. at 53 and 56-57 (comparing the position taken by Colorado in this lawsuit with its position in the *Masterpiece* case).

Appellants admit that "Colorado treats Lorie just like Masterpiece." Aplt. Opening Br. p. 40. Further, very similar positions are asserted in this case as in *Masterpiece*. The following are but a few examples of the similar arguments in both cases:

- Appellants argue that "[b]ecause of her religious views on marriage, [Lorie] cannot proclaim or celebrate any vision of marriage other than one between one man and one woman." Aplt. Opening Br. p. 12. Phillips argues that "[b]ecause weddings and

marriage have such religious significance to Phillips … he will not design custom cakes that celebrate any form of marriage other than between a husband and a wife." Aplee. Supp. App. at 51.

- Appellants argue that "under Colorado's theory, CADA could compel … an African American sculptor to create crosses for an Aryan Nation Church rally." Aplt. Opening Br. p. 40. Phillips argues that "African American sculptors who have designed Latin-cross-shaped sculptures for Lutheran churches would know that those same items express different messages if created for an Aryan Nations Church event." Aplee. Supp. App. at 61.

- Appellants argue that "Colorado artists who support same-sex marriage may decline to oppose it, while those who oppose same sex marriage must support it." Aplt. Opening Br. p. 46. Phillips argues that "Cake artists who support same-sex marriage may decline to oppose it, while those who oppose same-sex marriage must support it." Aplee. Supp. App. at 54-55.[1]

Procedural background.

The complaint requests a declaration that CADA is unconstitutional and a permanent injunction precluding CADA's enforcement. Aplt. App. at 71-72. Appellants separately moved for a preliminary injunction precluding the enforcement of CADA until a decision is issued on the merits. Aplt. App. at 7 and 11.

---

[1] For addition examples, *compare* Aplt. Opening Br. pp. 6-7 *with* Aplee. Supp. App. at 49; Aplt. Opening Br. p. 33 *with* Aplee. Supp. App. at 59; Aplt. Opening Br. p. 6 *with* Aplee. Supp. App. at 49-50; Aplt. Opening Br. p. 32 *with* Aplee. Supp. App. at 52; Aplt. Opening Br. p. 52 *with* Aplee. Supp. App. at 58.

Colorado responded to the preliminary injunction motion and moved to dismiss the complaint for, inter alia, lack of jurisdiction based on standing. Colorado also asked the district court to stay these proceedings until the Supreme Court decides *Masterpiece*. Aplee. Supp. App. at 4-28.

At a non-evidentiary hearing on January 11, 2017, the district court asked, "why shouldn't I just combine the determination of the motion for preliminary injunction with the determination of the merits …?" Aplt. App. at 185-86. Appellants' counsel responded: "I think you could, Your Honor … we would propose, then, that we file -- on an expedited briefing schedule, that within about three weeks we file summary judgment." Aplt. App. at 186. The district court agreed to this proposal, Aplt. App. 187, and Appellants filed their motion for summary judgment. Aplt. App. 11.[2]

[2] In agreeing to determine the case on the merits, the district court instructed Appellants that she would deny the motion for summary judgment outright if the parties did not stipulate to "all the facts." Aplt. App. at 187. Despite the district court's order, Appellants filed two affidavits and numerous exhibits in support of their motion for summary judgment that Appellees did not stipulate to. *Id.* at 11 and 191-255. Appellees objected to the submission of this additional information, thereby preserving the objection for appeal. Aplee. Supp. App. at 42.

In their briefs, Appellants requested a permanent injunction precluding Colorado from enforcing CADA. Aplee. Supp. App. at 38-39. Appellants analyzed the elements required for a permanent injunction, and distinguished cases concerning preliminary injunctions as inapplicable. Aplee. Supp. App. at 44-46. Nowhere in their summary judgment briefs do Appellants request a preliminary injunction.

On September 1, 2017, the district court entered the order that is the subject of this appeal, captioned "Order Granting in Part and Denying in Part Motion to Dismiss and Denying Motion for Preliminary Injunction and Motion for Summary Judgment, with Leave to Renew." The district court begins its order by recognizing that the issues in *Masterpiece* "are essentially identical to two of the issues presented in this action." Aplt. App. at 366.

After a brief discussion of the underlying facts, the district court analyzed Appellants' standing for jurisdictional purposes. Aplt. App. at 368-74. The district court determined that Appellants met the elements for standing, except for an injury in fact related to their intended refusal to provide wedding services to same-sex couples. Aplt App. at 373-74.

In contrast, the district court only devoted two paragraphs to Appellants' motion for summary judgment, including the requested injunction. The district court first recognized that the parties "agreed that the case is at issue and that the Preliminary Injunction Motion and Motion for Summary Judgment should be determined together in resolution of the matters in dispute on the merits." Aplt. App. at 375. However, the district court declined to rule on the merits based on *Masterpiece*, finding that "the factual and legal similarities" between the two cases "are striking" and that "a determination by the Supreme Court will either guide determination of, or eliminate the need for resolution of the issues in this case …." *Id.*

In declining to rule on the merits, the district court expressly found that the parties "will not be prejudiced by delay in resolution" because Appellants "are not currently offering to build wedding websites, and no evidence has been presented to show that their financial viability is threated if they do not begin offering to do so." *Id.* Therefore, the district court granted Appellants leave to refile their motions after the Supreme Court rules in *Masterpiece*. *Id.* This appeal followed.

SUMMARY OF THE ARGUMENT

Appellants characterize the district court's order as an interlocutory refusal of a preliminary injunction and argue that the Tenth Circuit has jurisdiction over this entire case pursuant to 28 U.S.C. § 1292(a)(1). To the contrary, appellate jurisdiction does not exist and this matter should be remanded to the district court for further proceedings.

In the district court, Appellants filed a motion for summary judgment on stipulated facts and requested a declaration that CADA is unconstitutional and a permanent injunction prohibiting further enforcement of CADA. Appellants' motion for a preliminary injunction, which was pending at the time, merged into their request for a permanent injunction on the merits pursuant to Fed. R. Civ. P. 65(a)(2).

The district court stayed consideration of Appellants' request for a declaratory relief and a permanent injunction pending the Supreme Court's opinion in *Masterpiece*, another action requesting a declaration that CADA is unconstitutional and unenforceable as it relates to providing services to same-sex couples.

Orders staying proceedings, and orders denying summary judgment, only delay consideration of a case. These types of orders do not substantively address the merits of a request for an injunction, they do not "refuse" an injunction, and they are not subject to immediate appeal under § 1292(a)(1). *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988); *Switzerland Cheese Ass'n v. Horne's Market, Inc.*, 385 U.S. 23, 24-25 (1966).

Further, and as a practical matter, Appellants admit that the Supreme Court may decide the *Masterpiece* case before this Court has the opportunity to hear oral arguments. Once the *Masterpiece* opinion is issued, the stay will be lifted and the district court could proceed on the merits—but for this appeal.

The district court's decision to stay the proceedings before it while the Supreme Court decides issues that "are essentially identical to two of the issues presented in this action," was completely within the district court's sound discretion. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Further, the district court's stay is moderate in duration because, as Appellants admit, the Supreme Court's opinion in *Masterpiece* is forthcoming.

If the Tenth Circuit does exercise jurisdiction to decide the merits of this case in the first instance, Appellants are not entitled to the declaratory and injunctive relief they request because: (1) CADA, both the Accommodation and Communication Clause, is constitutional under any standard of review; (2) requiring Appellants to serve all Colorado citizens, irrespective of sexual orientation, does not constitute irreparable harm; (3) Colorado's interest in eradicating discrimination, which is clearly compelling, outweighs Appellants' desire to discriminate against same-sex couples; and (4) the public has a strong interest to see that all people are treated equally regardless of their sexual orientation.

In a line of cases, the United States Supreme Court has ruled that public accommodation laws are generally constitutional. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995); *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992); *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548–49 (1987); *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). This is because such laws serve a compelling public interest of

the highest order – eliminating discrimination. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

Further, the Accommodation Clause does not compel Appellants to speak in favor of same-sex marriage, it merely requires Appellants to provide the same services to opposite- and same-sex couples. The Supreme Court has held that this type of regulation, concerning what a business must do as opposed to what a business must say, is constitutional. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006).

Moreover, the clear and unambiguous language of the Communication Clause does not restrict Appellants' desire to publish a statement against same-sex marriage. However, Appellants may not publish a statement that they will not serve customers based on their sexual orientation—because that is conduct, although carried out through language, which is not constitutionally protected. *Rumsfeld*, 547 U.S. at 62; *Giboney*, 336 U.S. at 502.

This case is but one of many that the Alliance Defending Freedom has filed across the country seeking to challenge public accommodation laws as unconstitutional because they require businesses to provide

equal treatment to homosexuals. Time and again, these challenges have been rejected. Now, the United States Supreme Court is considering the issue in *Masterpiece*. It would be nonsensical for the district court, or this Court, to weigh-in before the Supreme Court issues its opinion.

Finally, should this Court exercise pendent jurisdiction over Colorado's motion to dismiss, the district court was correct in finding that Appellants have not suffered an injury in fact for standing. Specifically, there is no credible threat that Colorado will enforce the Accommodation Clause against Appellants until a host of events first occurs, starting with Appellants offering to build wedding websites. Without a credible threat of enforcement, even the district court did not have jurisdiction over Appellants' claims. *See Susan B. Anthony List v. Driehause*, 134 S. Ct. 2334, 2342 (2014); *Clapper v. Amensty Int'l USA*, 568 U.S. 398, 410 (2013).

ARGUMENT

I. There is no appellate jurisdiction over the district court's order because the order merely stays the proceedings and does not refuse injunctive relief.

Appellants assert jurisdiction over the district court's order as an interlocutory refusal of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). As stated below, § 1292(a)(1) does not create jurisdiction and this appeal must be dismissed. *See Franklin Sav. Corp. v. U.S.*, 385 F.3d 1279, 1286 (10th Cir. 2004) ("Jurisdictional issues must be addressed first and, if they are resolved against jurisdiction, the case is at an end.").

A. Section 1292(a)(1) creates a limited exception to the final judgment rule.

"Federal courts are courts of limited jurisdiction; they must have a statutory basis for their jurisdiction." *Morris v. Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994). Appellants assert that the Tenth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292.

Congress enacted § 1292(a)(1) as an exception to "the general principle that only *final* decisions of the federal district courts would be reviewable on appeal." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83

(1981) (emphasis in original). This exception creates jurisdiction over interlocutory orders "refusing" an injunction. 28 U.S.C. § 1292(a)(1). However, because "federal law expresses the policy against piecemeal appeals," appellate courts must approach § 1292(a)(1) "somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Switzerland Cheese Ass'n v. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966) (citations omitted). "An order by a federal court that relates only to the conduct or progress of litigation before that court," staying proceedings or denying summary judgment, "ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988).

B. The district court only stayed consideration of a request for a permanent injunction.

At the January 11, 2017 non-evidentiary hearing, the district court stated that it would "rule on the motion for preliminary injunction, motion for summary judgment, and motion to dismiss simultaneously." Aplt. App. 187-88. The district court found this procedure proper because "[t]he parties agree that there is no need for an evidentiary hearing," Aplt. App. 175, and because Appellants stated

that "we would propose, then, that we file … summary judgment." Aplt. App. at 186. The clear intent of the district court was to consolidate Appellants' motion for a preliminary injunction with their request for a permanent injunction pursuant to Fed. R. Civ. P. 65(a)(2).

Appellants' subsequent briefing demonstrates their understanding and agreement with this procedure. Specifically, when Appellants moved for summary judgment they requested a permanent, not preliminary, injunction to preclude enforcement of CADA. Aplee. Supp. App. at 38-39. Similarly, in their reply brief, Appellants criticized Colorado for relying on cases that "deal with preliminary, rather than permanent, injunction standards," because such cases "have no application to Lorie's case." Aplee. Supp. App. at 44-45.

Appellants rely on the district court's language stating that the motion for preliminary injunction is denied to establish jurisdiction, but they cannot escape that part of the order that also denies their motion for summary judgment seeking a permanent injunction. The denial of Appellants' original motion for a preliminary injunction is not appealable because "[a]n order granting or denying an interlocutory or preliminary injunction is merged in a decree granting or denying a

permanent injunction and when both orders are appealed from, the former will be dismissed." *Atomic Oil Co. of Okla., Inc. v. Bardahl Oil Co.*, 419 F.2d 1097, 1102 n.9 (10th Cir. 1969); *see also Peterson v. Bhd. of Locomotive Firemen & Enginemen*, 268 F.2d 567, 568 (7th Cir. 1959) ("There is a long line of cases holding that an order granting or denying an interlocutory or preliminary injunction is merged in a decree or order granting or denying the permanent injunction, and that when both orders are appealed from, the appeal from the former will be dismissed.") (collecting cases). Thus, Appellants' challenge to the purported denial of injunctive relief is limited to their request for a permanent injunction.

The general rule is that denial of a summary judgment motion seeking injunctive relief is not appealable under § 1292(a)(1) because it "does not settle or even tentatively decide anything about the merits of the claim." *Switzerland Cheese Ass'n,* 385 U.S. at 25. Stated differently, the denial of a summary judgment motion requesting a permanent injunction does not "refuse an injunction" under § 1292(a)(1), but only decides how the case should proceed. *Heron v. Denver*, 317 F.2d 309, 311 (10th Cir. 1963); *see also United Keetoowah Band of Cherokee*

Indians in Okla. v. U.S., 247 Fed. Appx. 150, 154 (10th Cir. 2007) (holding that order denying summary judgment motion that included a request to vacate an existing injunction as moot was not appealable under § 1292(a)(1) because the district court was "effectively postponing its ruling on the motions" and jurisdiction did not exist under "settled law precluding piecemeal appeals") (unpublished). Here, however, the district court did not even substantively deny Appellants' motion for summary judgment, it merely stayed consideration on the merits.

C. An order staying consideration of a permanent injunction does not fall under the exception to the final judgment rule.

The district court addresses Appellants' pending motions in a mere two paragraphs. Aplt. App. at 375. The order does not analyze the elements involved in refusing injunctive relief on an interlocutory basis. *See*, *e.g.*, Fed. R. Civ. P. 52(a)(2) ("In granting or refusing an interlocutory injunction, the court must … state the findings and conclusions that support its action."). Such an order is not immediately appealable. *Switzerland Cheese Ass'n*, 385 U.S. at 25 ("Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of §

1292(a)(1). We see no other way to protect the integrity of the congressional policy against piecemeal appeals."); *see also* 11A Charles Alan Wright, et al., *Fed. Prac. & Pro.* § 2962 (3d ed. 2017) ("More generally, an order that does not involve any ruling on the propriety of injunctive relief is not immediately appealable simply because it arises in the context of an injunction suit.")

By its express terms, the district court's order only acts as a "delay in resolution of the issues in this case," Aplt. App. at 375, and this Court has consistently held that a stay is not appealable. *See Crystal Clear Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 415 F.3d 1171, 1176 (10th Cir. 2005) ("If a stay merely delays litigation and does not effectively terminate proceedings it is not considered a final decision."); *In re Kozeny*, 236 F.3d 615, 619-20 (10th Cir. 2000) ("If the stay merely delays the federal litigation, courts have generally held the stay orders not to be appealable."); *U.S. v. Section 17 Twp. 23 N., Range 22 E. of the IBM, Del. Cty., Okla.*, 40 F.3d 320, 321 (10th Cir. 1994) (holding that a "stay order is neither final under 28 U.S.C. § 1291 nor immediately appealable under § 1292(a)(1)."). *See also* 19 James Wm. Moore, et al., *Moore's Fed. Prac.* § 203.10[6][b][i] (3d ed. 2015) ("Generally speaking, a

stay of proceedings in an action does not involve a determination of substantive issue, and therefore is not appealable as an injunction pursuant to § 1292(a)(1).").

Appellants do not analyze this Court's jurisdiction to review a stay, and instead argue that the district court's order is immediately appealable under § 1292(a)(1) based on the caption and the district court's statement that the original motion for preliminary injunction is denied with leave to refile. "Such a superficial analysis of this Court's appellate jurisdiction, however, is insufficient." *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151, 1153 (10th Cir. 2007); *see also N.M. v. Trujillo*, 813 F.3d 1308, 1319 (10th Cir. 2016) ("When determining whether an order expressly grants a request for an injunction, we consider the substance rather than the form of the motion and order.") (collecting cases). Instead, the question is whether the district court substantively refused Appellants' request for injunctive relief. *See Mo. ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1107 (8th Cir. 1999) ("Although the court's written order recited that the State's request for a preliminary injunction was denied, it contained no findings of fact and conclusions of law supporting the

denial of an injunction, as Rule 52 requires. We conclude that the court intended simply to transfer a pending injunction motion, not to deny an injunction on the merits. Therefore, its transfer order is not appealable under 28 U.S.C. § 1292(a)(1).").

D. The district court's order does not otherwise refuse Appellants' request for a permanent injunction.

If the district court's order is something other than a stay, appellate jurisdiction does not exist because the order does not expressly address a permanent injunction. Where a summary judgment order does not address injunctive relief sought in the complaint, the party asserting appellate jurisdiction must satisfy the test set forth by the Supreme Court in *Carson v. American Brands, Inc.*, and show that the challenged order: (1) has the practical effect of refusing an injunction; (2) threatens serious, perhaps irreparable, consequences; and (3) can only be effectually challenged by immediate appeal. *Hutchinson v. Pfeil*, 105 F.3d 566, 569 (10th Cir. 1997); *see also* 19 James Wm. Moore, et al., *Moore's Fed. Prac.* § 203.10[3][b] (3d ed. 2015) ("If a plaintiff moves for summary judgment on a claim seeking injunctive relief, a denial of the summary judgment motion is not in itself appealable as the denial of an injunction, unless the plaintiff can

show a threat of serious or irreparable consequences."). Appellants do not meet these requirements.

As shown previously, the district court's order merely stays consideration of Appellants' claims until *Masterpiece* is decided. The order does not address the merits of Appellants' request for injunctive relief and does not have the practical effect of refusing that request. Thus, Appellants fail the first element of *Carson*.

Neither does the order threaten serious, perhaps irreparable, consequences. To the contrary, the district court expressly found that neither party will be prejudiced by awaiting the *Masterpiece* decision. Moreover, "denials of a permanent injunctions will warrant interlocutory review only in unusual circumstances." *Hutchinson*, 105 F.3d at 570 (quoting *E.E.O.C. v. Kerrville Bus Co., Inc.*, 925 F.2d 129, 134 (5th Cir. 1991). Appellants fail the second element of *Carson*.

Finally, appeal is not necessary to "effectually challenge" the district court's order. Appellants admit that the "Supreme Court may issue its ruling in *Masterpiece* before this Court hears oral arguments and decides Lorie's case." Aplt. Opening Br. p. 29. Thus, by the time this appeal is ripe for decision the district court's stay may have

expired. The district court and this Court will be in the same position to rule on Appellants' motion for summary judgment. Appellants cite no authority for a court of appeals to substantively rule on a motion for summary judgment in the first instance.

E. Appellants' argument that this Court has a "virtually unflagging" duty to hear this appeal is misplaced.

Finally, Appellants broadly argue that this appeal should proceed because federal courts have a "virtually unflagging" obligation to hear cases where jurisdiction exists. Aplt. Opening Br. p. 26. This language originates with the Supreme Court's *Colorado River* decision. *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976) ("This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the *virtually unflagging obligation* of the federal courts to exercise the jurisdiction given them.") (emphasis added). However, as the Supreme Court subsequently clarified, the "virtually unflagging" language "underscores our conviction that a district court should exercise its discretion with this factor in mind, but it in no way undermines the conclusion … that the decision whether to defer … is, in the last analysis, a matter committed to the district court's discretion." *Will v.*

Calvert Fire Ins. Co., 437 U.S. 655, 664 (1978). Further, the "virtually unflagging" duty to exercise jurisdiction does not apply in declaratory actions like this one. *Sinclair Oil Corp. v. Amoco Prod. Co.*, 982 F.2d 437, 440 (10th Cir. 1992) ("Thus, unlike coercive actions, declaratory actions do not invoke the federal judiciary's 'virtually unflagging obligation' to exercise its jurisdiction. Accordingly, federal courts have wide discretion in refusing to hear duplicative declaratory proceedings."). Because this is a declaratory action, the district court had discretion to stay proceedings until *Masterpiece* is decided. The inclusion of a request for injunctive relief does not change this analysis.[3]

[3] Under Appellants' approach, any pre-trial order addressing a substantive claim that requests injunctive relief would be appealable pursuant to § 1292(a)(1). Such an approach is untenable. *See*, *e.g.*, *E.E.O.C.*, 925 F.2d at 132 ("[i]t would unduly expand the exception created by § 1292(a)(1) to hold that any order dismissing or denying a claim that seeks equitable relief is immediately appealable"); *Shirey v. Bensalem Twp.*, 663 F.2d 472, 477 (3d Cir. 1981) ("the mere fact that injunctive relief has been requested and is therefore encompassed within the ruling made by the court on other grounds does not transform the ruling into one denying an injunction").

II. The stay of these proceedings was an appropriate exercise of the district court's discretion.

"It is well settled that the district court has the power to stay proceedings pending before it and to control its docket for the purpose of 'economy of time and effort for itself, for counsel, and for litigants.'" *Pet Milk Co. v. Ritter*, 323 F.2d 586, (10th Cir. 1963) (*quoting Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "The granting of the stay ordinarily lies within the discretion of the district court." *Id.* It is a "weighty burden" to show that the district court abused its discretion. *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983).

Appellants argue, "Colorado treats Lorie just like Masterpiece" and rely on *Masterpiece* to support their arguments throughout their opening brief. Similarly, Appellants present arguments to this Court that are identical to arguments that Masterpiece is presenting to the Supreme Court. Undoubtedly, a decision by the Supreme Court regarding the constitutionality of CADA will expedite this matter.

Instead of addressing these discretionary considerations, Appellants argue that a stay was improper based on inapplicable

requirements for abstention,[4] injunctions precluding related suits,[5] and even a prisoner's request for a stay, not of litigation but of his execution.[6] However, many of these same arguments were rejected by the Supreme Court in *Landis*:

- Appellants argue that stays are only appropriate where parallel cases involve identical litigants, but "[s]uch a formula … is too mechanical and narrow." *Id.*; *see also Commodity Futures Trading Comm'n*, 713 F.2d at 1484-85 ("In *Landis*, the Supreme Court rejected the argument that a court's authority to stay proceedings before it in favor of proceedings in another court is limited to those instances when the parties and issues in the several cases are identical.").

- Appellants argue that *Masterpiece* may not resolve every issue in this case, but a stay is still appropriate where "a decision in the cause then pending … may not settle every question of fact and law in suits by other[s] …, but in all likelihood it will settle many and simplify them all." *Landis*, 299 U.S. at 256.

- Appellants argue that Colorado must show a clear case of hardship or inequity if there is even a fair possibility that the stay will damage their interests, but such potential damages

---

[4] *Spring Commc'n, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (*Younger* abstention); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (*Rooker-Feldman* abstention); *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994) (*Colorado River* abstention); *D.L v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1230-31 (10th Cir. 2004) (*Younger* abstention); *Phelps v. Hamilton*, 59 F.3d 1058, 1069 (10th Cir. 1995) (*Younger* abstention).

[5] *Span-Eng Assocs. v. Weidner*, 771 F.2d 464, 467 (10th Cir. 1985) (injunction precluding plaintiffs from prosecuting related cases in separate jurisdictions).

[6] *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004).

> "are counsels of moderation rather than limitations upon power" to grant a stay. *Id.* at 254.

The issue is whether the district court abused its discretion in issuing a stay, not some other order.

A district court abuses its discretion in granting a stay only if the "stay was not kept within the bounds of moderation." *Id.* at 256. Appellants admit that the Supreme Court may issue its ruling before this Court hears oral argument. Aplt. Opening Br. p. 29. The district court's stay is well within "bounds of moderation" and does not constitute an abuse of discretion.

A stay of this case is particularly compelling given the competing interests of Smith's religious beliefs and the right of all Colorado citizens to be free from discrimination because "in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Landis*, 299 U.S. at 255. The stay in this case should be affirmed and this matter remanded to the district court for further proceedings after the decision in *Masterpiece*.

III. If this Court has jurisdiction to review Appellants' request for a preliminary injunction, it should deny that request.

A. Standard of review.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The "right to relief must be clear and unequivocal." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009). Mandatory preliminary injunctions, which alter the status quo, are disfavored. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd and remanded*, 546 U.S. 418 (2006). When a party seeks this type of injunction, it "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Schrier v. Univ. of Colo.,* 427 F.3d 1253, 1259 (10th Cir. 2005) (quoting *O Centro Espirita*, 389 F.3d at 975).

To obtain a preliminary injunction, Appellants must establish: (1) a likelihood of success on the merits; (2) a likelihood that Appellants will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in Appellants' favor; and (4) that the injunction is in the public interest. *See Roda Drilling v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). Because they seek a mandatory preliminary injunction, Appellants "[h]ave a heightened burden of showing that the traditional four factors weigh heavily and compellingly in its favor before obtaining a preliminary injunction." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012) (internal quotations and citations omitted); *see also Awad v. Ziriax*, 670 F.3d 1111, 1126 (10th Cir. 2012) (a movant must make a "strong showing" with regard to likelihood of success on the merits and with regard to the balance of harms).[7]

The "denial of a preliminary injunction is reviewed for abuse of discretion." *Petrella v. Brownback*, 787 F.3d 1242, 1256 (10th Cir. 2015). "A district court abuses its discretion when it commits an error of law or

[7] Contrary to Appellants' statement that they are seeking to preserve the status quo, Aplt. Opening Br. p. 30, n. 3, they are actually seeking to alter CADA's status quo, which prohibits discrimination based on sexual orientation in places of public accommodation.

makes clearly erroneous factual findings." *Beltronics*, 562 F.3d at 1070 (citation omitted); *see also e.g., Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 822 (10th Cir. 2007) ("A district court abuses its discretion when it issues an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.") (internal citation omitted).

When considering the denial of preliminary injunctions in First Amendment cases, where there is no final order, the Tenth Circuit reviews legal determinations de novo and factual findings for clear error. *Citizens United v. Gessler*, 773 F.3d 200, 208-09 (10th Cir. 2014); *see also Schrier*, 427 F.3d at 1258 (examining denial of preliminary injunction involving First Amendment freedom of speech claim).[8]

B. Appellants do not meet the four elements required for a mandatory preliminary injunction.

[8] Appellants reliance on *Citizens for Peace in Space v. City of Colorado Spring*s, 477 F.3d 1212, 1219 (10th Cir. 2007) for the proposition that the standard of review of legal conclusions *and* facts is de novo under these circumstances is inapposite because that case dealt with a final judgment following a bench trial. Here, there is no final judgment, order, or the like. Legal determinations should be reviewed de novo while factual determinations should be reviewed for clear error.

As shown below, Appellants fail to establish the four elements required for a mandatory preliminary injunction and their request should be denied.

1. First element: likelihood of success on the merits.

a. CADA regulates commercial conduct and does not compel or restrict speech.

i. CADA regulates commercial conduct.

CADA prohibits discrimination against customers as it concerns the "full and equal enjoyment of the goods, services, facilities, privileges . . . of a place of public accommodation." § 24-34-601(2)(a), C.R.S., (2016). Public accommodation laws that regulate commercial conduct in an effort to prohibit discrimination are generally permissible even if they have an incidental burden on otherwise protected speech. *See U.S. v. O'Brien*, 391 U.S. 367, 376 (1968); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."); *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct."); *Giboney v. Empire Storage & Ice Co.,* 336

U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). The cases relied on by Appellants in support of their arguments do not compel a contrary result here.

ii. CADA does not compel speech.

Section 24-34-601(2)(a), the Accommodation Clause, applies to Appellants' business operation and their refusal to offer services to same-sex couples. It does not address speech outside of the commercial context. *Masterpiece*, 370 P.3d at 283 and 291 ("We conclude that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA . . . ." and "[w]e reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation.") Appellants cite *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* asking this Court to reach a contrary result. Appellants' reliance on *Hurley* is misplaced.

In *Hurley*, a private, non-profit organization that sponsored the Boston St. Patrick's Day parade denied the application of a LGBT group to march. *Hurley*, 515 U.S. at 561. The organization was not a business that made sales to the public. However, Massachusetts state courts still concluded that the denial was a violation of the state's public accommodation law. *Id.* at 561, 563-64.

On review, the Supreme Court first noted that such laws generally do not violate the constitution, because the focal point of their prohibition is "on the act of discriminating against individuals," not speech. *Id.* at 572. It held, however, that because the non-profit was required to include the LGBT group, Massachusetts was effectively requiring them "to alter the expressive content of their parade," in violation of the First Amendment. *Id.* at 572-73. The Supreme Court held that Massachusetts improperly attempted to apply public accommodation law to "speech itself." *Id.* at 573.

Hurley does not apply here because Appellants are seeking to operate a public business and CADA does not compel them to endorse a third party's speech. In *Elane Photography, LLC v. Willock*, the New Mexico Supreme Court stated that the "United States Supreme Court

has never found a compelled-speech violation arising from the application of anti-discrimination laws to a for-profit public accommodation. In fact, it has suggested that public accommodation laws are generally constitutional." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 65-66 (N.M. 2013). The court distinguished *Hurley*, stating that "Defendants cite no reported decision extending the holding of *Hurley* to a commercial enterprise carrying on a commercial activity." *Id.* at 68. The court held that New Mexico's public accommodations law did not compel a photography business to endorse same-sex weddings by providing services to them, but rather "only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation." *Id.* at 64. The Supreme Court denied a petition for writ of certiorari. *Elane Photography*, *LLC v. Willock*, 134 S. Ct. 1787 (2014).

Appellants cite *Miami Herald Publishing Co. v. Tornillo* and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, for the contrary argument that the Supreme Court protects businesses against compelled speech. In those cases, the government required businesses that were not otherwise open for public participation, except

for advertisements, to disseminate an express third-party message. *Tornillo*, 418 U.S. 241, 257-58 (1974) (compelling newspapers to print responses from political candidates who had been criticized in editorials); *Pac. Gas & Elec.*, 475 U.S. 1, 9-14 (1986) (compelling utility company to include copies of a specific environmentalist publication with bills sent to customers). Neither decision applies because § 24-34-601(2)(a) does not require Appellants to disseminate a message supporting same-sex marriage.

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court rejected arguments that a statue requiring schools to provide equal access to military recruiters violated freedom of speech by forcing the schools to accommodate or host the military's message. 547 U.S. 47, 52-60 (2006). Instead, the Court found that the statute regulated what "schools must *do* . . . not what they may or may not *say*." *Id.* at 60 (emphasis in original); *see also e.g., R.A.V.*, 505 U.S. at 389 ("[W]ords can in some circumstances violate laws directed not against speech but against conduct.").

CADA does not force Appellants to disseminate a particular view on marriage; only that they offer the same services to all customers

regardless of sexual orientation. *Masterpiece*, 370 P.3d at 288 ("Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally."); *Rumsfeld*, 547 U.S. at 64-65 (requiring the accommodation of military recruiters does not compel schools to send "the message that they see nothing wrong with the military's policies [against gays in the military], when they do," because students "can appreciate the difference between speech a school sponsors and speech the school permits because it is legally required to do so.").

iii. CADA does not restrict speech.

CADA does not restrict Appellants' desire to publish a statement on same-sex marriage. Appellants are free to post disclaimers "in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA." *Masterpiece,* 370 P.3d at 288; *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) ("[S]igns, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law."); *Elane Photography*, 309 P.3d 53, 70 (N.M. 2013) ("Elane Photography is free

to disavow, implicitly or explicitly, any message that it believes the photographs convey" and it is unlikely that reasonable observers will interpret Elane Photography as sending a message that it supports same-sex marriage by merely treating same-sex customers equally).[9]

However, posting language on a website that tells potential customers a business will discriminate against them is conduct, carried out through language, and not protected by the First Amendment. *See e.g. Rumsfeld*, 547 U.S. at 62 (using an example that an employer who must take down a sign reading "'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."); *Giboney,* 336 U.S. at 502 ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

[9] The brief of *Amicus Curiae* Center for Constitutional Jurisprudence raises the same arguments as Appellants regarding compelled speech. As discussed above, they should be rejected.

b. CADA does not violate the Equal Protection or Free Exercise Clause.[10]

i. CADA is a neutral law of generally applicability.

CADA is a neutral law of general applicability, which is not subject to strict scrutiny. "A law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006).

Appellants argue that CADA is not neutral based on a single statement made by one individual in the *Masterpiece* case, who expressed the view that religion has been used to justify discrimination and religious objections to legal requirements should not be used to justify harming others. Aplt. Opening Br. p. 47. There are four problems with this argument.

---

[10] Appellants did not seek a preliminary injunction on their free exercise claim, and cannot pursue one now. Aplee. Supp. App. at 31-33 ("While Lorie pled a free exercise claim, she did not offer it as a basis for the present motion for preliminary injunction."); Aplee. Supp. App. at 30 (Appellants explicitly stating that only the First Amendment, Unconstitutional Conditions doctrine, and Equal Protection Clause claims are being raised in preliminary injunction). Notwithstanding this waiver, Appellees address it as it concerns Appellants' request for a permanent injunction based on their summary judgment motion.

First, this was not an argument substantively raised at the district court and it should not be considered now. *See e.g., Verlo v. Martinez*, 820 F.3d 1113, 1125–26 (10th Cir. 2016) (waiving argument not raised in district court).

Second, Appellants' cite to a transcript (Aplt. App. 243-255) that was not stipulated and that Colorado objected to as violating the Court's January 11, 2017 Order. Aplee. Supp. App. at 41.

Third, the statement was made by Diann Rice, a former Commissioner who is no longer on the Commission, and is not a defendant in this case. The cited statement does not demonstrate that Phillips was singled out because of his beliefs, instead it is general in nature regarding the historical use of religious beliefs to support discrimination.

Finally, statements made on the record in one particular administrative proceeding are not evidence in a putative administrative proceeding, especially one that has not yet been commenced. Any statement made in the *Masterpiece* case does not demonstrate Appellees' animus as suggested. Instead, it was intended to reiterate

what the Commission said in a hearing, that religious objections are not a valid basis to defeat CADA.

ii. CADA is not content or viewpoint based.

Appellants argue that CADA deserves strict scrutiny because it is content and viewpoint based. Appellants' cite three charges of discrimination against bakeries that declined to produce cakes with derogatory, offensive messages. This effort is unavailing for several reasons.

First, the three charges resulted in no-probable cause determinations by the Director and no further action was taken. Aplt. App. 346-363. Findings of no probable cause are only non-binding administrative determinations reached without a hearing. *AT&T Techs. Inc. v. Royston*, 772 P.2d 1182, 1186 (Colo. App. 1989). Since these decisions have no binding precedent or effect, Appellants' cannot show unequal treatment.

Second, the Colorado Court of Appeals previously rejected these same arguments. See *Masterpiece*, 370 P.3d at 282, n. 8. Notably, Masterpiece refused to make a wedding cake for a same-sex couple *because of their sexual orientation* based on the owner's religious belief;

while the three bakeries refused to make a cake for a patron that would say "Homosexuality is a detestable sin. Leviticus 18:2" because of the derogatory, offensive message, not because of the patron's creed. *Id*. Here, Appellants admit they are "in the exact same position" as Masterpiece, because they intend to refuse service to same-sex couples *only because of their sexual orientation*. Aplee. Supp. App. at 2-3.[11]

As further evidence of the dissimilarity between the three bakeries and Appellants' intent to refuse service to same-sex couples, one needs to look no further than their opening brief. For example, Appellants argue that the names "Stewart" and "Mike" are male gender only names, and the district court erred when it did not find a request from "Stewart" and "Mike" to be a request from a same-sex couple. Aplt. Opening Br. p. 22. Appellants implicitly convey that the message or content of a request has nothing to do with whether they will serve individuals, only the sexual orientation of the couples. Additionally, Appellants argue that they should not be required to write "You're Invited. Bill and Luke" versus "You're Invited. Luke and Lily." Aplt.

[11] Appellants' argument concerning the three other bakeries was raised in the petition for writ of certiorari in *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission, et al.*, No. 16-111, briefed, and heard during oral argument.

Opening Br. p. 41. Appellants are focused on the sexual orientation of individuals, not just their message, which is never mentioned.

iii. The hybrid-rights doctrine does not apply.

For the first time on appeal, Appellants argue that CADA triggers strict scrutiny under the "hybrid-rights doctrine," which is waived on appeal. *See e.g., Verlo,* 820 F.3d at 1125–26. Notwithstanding their waiver, this theory is disputed. *Grace United Methodist Church*, 451 F.3d at 656 (describing the hybrid-rights doctrine as "illogical" and "untenable"). The United States Supreme Court has repeatedly declined to review the validity of hybrid-rights claims. *See e.g., Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 555 U.S. 815 (2008); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007). Regardless, for the reasons set forth above, a business that refuses to serve customers because of their sexual orientation is not immune from CADA by the Free Speech or Free Exercise Clause.

iv. CADA survives strict scrutiny.

Assuming strict scrutiny applies, CADA survives because it is narrowly tailored to serve a compelling interest.

CADA is narrowly tailored because it aims to erase discrimination in the public commercial market, and it only regulates conduct, refusal to serve individuals, not speech. *See* § 24-34-601(2)(a), C.R.S. Appellants argue that CADA is not narrowly tailored because there are other designers willing to create websites for same-sex couples, so they should not be required to do so. Aplt. Opening Br. p. 52. However, this argument was "emphatically" rejected when a florist refused to make bouquets for same-sex marriages in violation of Washington's public accommodation law. *State of Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 566 (Wash. 2017) ("emphatically" rejecting the same argument noting that every court to address the question has concluded that public accommodations laws "do not simply guarantee access to goods or services," but instead "they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace.").

Colorado has a compelling interest in erasing discrimination against its citizens. *Masterpiece*, 370 P.3d at 293 (concluding that CADA

is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."); *Reynolds v. U.S.*, 98 U.S. 145, 166-67 (1878) (noting that religious motivation should not excuse compliance with laws). The Supreme Court has consistently held that eradicating discrimination through state law serves a compelling interest. *See Hurley*, 515 U.S. at 572 (public accommodation laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination...."); *see also Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549 (government had a compelling interest in eliminating discrimination against women in places of public accommodation); *Roberts*, 468 U.S. at 628 ("acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983)

(government had a compelling interest in eliminating racial discrimination in private education).

c. Courts have unanimously rejected near identical claims.

Appellants are not likely to succeed on the merits because a number of courts have rejected near identical First Amendment challenges finding that public accommodation laws trump a business owner's right to refuse wedding services to same-sex couples. *Telescope Media Grp. v. Lindsay*, 2017 WL 4179899 (D. Minn. 2017) (wedding videographers), appeal pending, No. 17-3352 (8th Cir); *Brush & Nib Studio, LC v. Phoenix*, CV 2016-052251 (Ariz. Sup. Ct. Sept. 16, 2016) (wedding invitation vendor), *appeal pending* Case No. 1 CA-CV 16-0602 (Ariz. Ct. of App.) ;*Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (wedding photographer), *cert. denied* 134 S. Ct. 1787 (2014); *Gifford v. McCarthy*, 137 A.D. 3d 30 (N.Y. App. Div. 2016) (wedding venue owner); *Arlene's Flowers,* 389 P.3d at 543 (wedding

florist), *cert. pending Arlene's Flowers, Inc. v. Washington,* No. 17-108 (U.S.).[12]

d. CADA does not force Appellants to forego their First Amendment rights in order to operate a business.

Appellants claim that Colorado is chilling their First Amendment rights by forcing them to design wedding websites for same-sex couples, thereby violating the unconstitutional conditions doctrine as-applied to them. Aplt. Opening Br. p. 50. This is inaccurate for two reasons.

First, Appellants do not allege the denial of a government benefit, therefore the unconstitutional conditions doctrine is not applicable. *See e.g., Perry v. Sindermann*, 408 U.S. 593, 596-98 (1972) (benefit of government employment); *Rust v. Sullivan*, 500 U.S. 173, 197-200 (1991) (benefit of government funds); *Agency for Intern. Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2329-32 (2013) (benefit of government funds).

Second, as discussed above, any burden placed on Appellants' First Amendment rights is incidental to Colorado's interest in

[12] Appellants' and Masterpiece's counsel, the Alliance Defending Freedom, represented the parties challenging the public accommodation law in all of these cases.

eliminating discrimination in places of public accommodation. *See O'Brien*, 391 U.S. at 376; *see also Sorrell*, 564 U.S. at 567 ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

e. CADA's Communication Clause does not violate due process.

Appellants' argue that CADA's publication provision violates procedural due process because the terms "unwelcome, objectionable, unacceptable, or undesirable" are impermissibly vague, overbroad, or otherwise provide unbridled discretion for arbitrary enforcement. Appellants' arguments are incorrect and fail for four reasons.

First, in the district court, Appellants only claimed that the publication provision is vague, Aplee. Supp. App. at 34-37, and Appellants have waived arguments concerning overbreadth and unbridled discretion on appeal. *See e.g., U.S. v. Windrix*, 405 F.3d 1146, 1156 (10th Cir. 2005); *Prairie Band*, 253 F.3d at 1247 n.4 (10th Cir. 2001).

Second, to "prevail on either a procedural or substantive due process claim under 42 U.S.C. § 1983, 'a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectable …

interest.'" *Nichols v. Bd. of Cty. Comm'rs*, 506 F.3d 962, 969 (10th Cir. 2007) (quoting *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000)). Appellants do not identify any action by Colorado against them. Instead, any alleged harm is self-inflicted based on a misinterpretation of the *Masterpiece* decision.

Third, the "void for vagueness" doctrine applies where the government deprives a person of life or liberty under a law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that in invites arbitrary enforcement." *Johnson v. U.S.*, 135 S. Ct. 2552, 2556 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). However, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Hence, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (rejecting facial challenge to statute even though standards were "undoubtedly flexible, and the officials implementing them w[ould] exercise considerable discretion").

Finally, the language used here – "unwelcome, objectionable, unacceptable, or undesirable" – is not so vague as to be constitutionally infirm and is subject to ready definition by reference to any dictionary, such as Merriam-Webster:

- "Unwelcome" means "not wanted or welcome."
- "Objectionable means "undesirable" or "offensive."
- "Unacceptable" means "not acceptable," "not pleasing," or "unwelcome."
- "Undesirable" means "not desirable" or "unwanted."

https://www.merriam-webster.com/dictionary.

These terms "sufficiently describe messages of limited access to a public accommodation's good or services based on membership in a protected class." *Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776, 799 (S.D. Iowa 2016) (rejecting identical challenge to public accommodation law containing the terms "unwelcome, objectionable, not acceptable, or not solicited").

2. Second element: imminent, irreparable harm in the absence of injunctive relief.

"[A] party seeking preliminary injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *See Faircloth v. Colo. Dep't of Corr.*, No. 16-cv-00908-GPG, 2016 WL 2343456, *2 (D. Colo. May 2, 2016) (emphasis in original). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citation omitted). Irreparable harm is more than "merely serious or substantial." *See Prairie Band*, 253 F.3d at 1250. Establishing irreparable harm is "not an easy burden to fulfill." *Greater Yellowstone Coal v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003).

Smith alleges that she suffers ongoing irreparable harm because CADA is "chilling her constitutional rights." However, the district court found that Smith's evidence was too imprecise and speculative to demonstrate imminent harm because it did not establish: (1) whether other companies design wedding websites for same-sex couples; (2) how many same-sex couples use such services; (3) whether the single request received by Appellants, which did not request wedding website services,

was from a same sex-couple[13]; (4) that Appellants are currently offering to build wedding websites; (5) whether Appellants' financial viability is threatened if they do not design wedding websites; or (6) that enforcement based on a denial of services, which rests on the satisfaction of multiple conditions precedent that Appellants did not address, would actually occur. *See* Aplt. App. at 373 and 375.

3. Third and fourth elements: weighing the equities and the public interest.

Courts must balance the competing claims of injury and must consider the effect of granting injunctive relief on each party. *See e.g., Port-a-Pour, Inc. v. Peak Innovations, Inc.*, 49 F. Supp. 3d 841, 873 (D. Colo. 2014) (citations omitted). Under the heightened standard for mandatory injunctions, Appellants must make a strong showing that their threatened injury outweighs the injury to the public. *See Heideman*, 348 F.3d at 1190.

---

[13] For the first time on appeal, Appellants' reference evidence purporting to be from the Social Security Administration concerning name popularity to demonstrate that "Stewart" and "Mike" are only male names. Aplt. Opening Br. p. 22. This new evidence was never stipulated to, and fails to demonstrate that the individuals who made the actual request were both males. Similarly, Appellees never stipulated to facts or exhibits set forth in Aplt. App. 191-255, and argued that the inclusion of these matters violated the Court's January 11, 2017 order. Aplee. Supp. App. at 41.

Appellants argue that Smith's religious beliefs, speech concerning same-sex marriage, and desire to refuse services to same-sex couples outweigh any interest that Colorado has in eliminating discrimination in places of public accommodation. However, as previously stated, the Supreme Court has recognized a state's compelling interest in eliminating discrimination, and public accommodation statutes further that interest. *See e.g., Hurley*, 515 U.S. at 572; *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 549; *Roberts*, 468 U.S. at 628; *Bob Jones Univ.*, 461 U.S. at 604.

Further, the Supreme Court has also held that religion may not be used to perpetuate discrimination against individuals. *Reynolds*, 98 U.S. at 166-67 (noting that religious motivation should not excuse compliance with laws); *U.S. v. Lee*, 455 U.S. 252, 261 (1982) (rejecting religious exercise challenge to law requiring employers to pay social security tax for employees stating, "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."); *Newman v. Piggie Park Enters., Inc.*, 256 F.

Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968) (finding that defendant had a right to espouse his religious views, but he did not have "a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."); *see also e.g., Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional relief."). As such, the equities do not favor Appellants and the public has a significant interest in seeing that anti-discrimination laws are enforced.

IV. **This Court should not exercise pendent jurisdiction to consider Appellants' motion for summary judgment or, alternatively, should deny Appellants' request for a permanent injunction.**

If this Court finds that § 1292(a)(1) creates jurisdiction to revive and review Appellants' motion for a preliminary injunction, pendent jurisdiction should not be exercised to review Appellants' motion for summary judgment.

Pendent appellate jurisdiction "generally should not be exercised over otherwise interlocutory appeals." *United Transp. Union Loc. 1745 v. Albuquerque*, 178 F.3d 1109, 1114 (10th Cir. 1999) (quoting *Armijo v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1264 (10th Cir. 1998)). Otherwise, "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay … collateral orders into multi-issue interlocutory appeal tickets." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 49-50 (1995). Further, it is well settled that federal "appellate courts typically do not have jurisdiction to review denials of summary judgment motions." *Sema v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1150 (10th Cir. 2006).

Here, Appellants assert that the denial of their motion for summary judgment is "inextricably intertwined" with their motion for a preliminary injunction. Aplt. Opening Br. p. 58. However, because "a decision as to the likelihood of success is tentative in nature," the resolution of a preliminary injunction "does not necessarily resolve [a] summary judgment motion, nor is review of the latter necessary to ensure meaningful review of the former." *Petrella v. Brownback*, 787

F.3d 1242, 1255 (10th Cir. 2015) (*quoting Homans v. Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004)).

If the Court exercises pendent jurisdiction to review Appellants' motion for summary judgment, the standard is well defined. Summary judgment is only appropriate when there is no genuine dispute of material fact taking all reasonable inferences from the record in the light most favorable to Colorado – even if the Court employs a more rigorous review of the record because of the First Amendment issues. *See e.g., Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1283 (10th Cir. 2002). To prevail on their request for a permanent injunction, Appellants must establish all of the elements required for a preliminary injunction and actual success on the merits. *Prairie Band Potawatomi Nation*, 476 F.3d at 822. In this case, because Appellants fail to establish a likelihood of success, they cannot demonstrate actual success.

V. **This Court should not exercise jurisdiction to review the district court's partial grant of Colorado's motion to dismiss.**

A. Jurisdiction.

This Court may exercise pendent jurisdiction over the dismissal of Appellants' challenges to the Accommodation Clause only if resolution of the appealable decisions are "inextricably intertwined" with, and necessarily resolve, the dismissal of the Communication Clause claims. *United Transp. Union Loc. 1745*, 178 F.3d at 1114.[14] Reversing the district court's stay and granting injunctive relief will not resolve the dismissal of Appellants' Accommodation Clause claims for lack of standing because both of those issues can be resolved solely on Appellants' Communication Clause claims.

B. Standard of Review.

Appellants, "as the party seeking to invoke federal jurisdiction, bear the burden of establishing standing." *Petrella v. Brownback,* 787 F.3d 1285, 1292 (10th Cir. 2012). "When evaluating a plaintiff's standing at [the motion to dismiss] stage, both the trial and reviewing courts must accept as true all material allegations of the complaint, and

[14] Pendent jurisdiction may also be appropriate where review of the nonappealable decision is necessary to ensure meaningful review of the appealable decision. *United Transp. Union Local 1745*, 178 F.3d at 1114. Appellants do not assert this basis for pendent jurisdiction.

must construe the complaint in favor of the complaining party." *Initiative & Referendum Inst. v. Walker,* 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc).

C. Analysis.

The district court found that Appellants generally meet the requirements of standing, but that any injury in fact was "attenuated" and "speculative" because there is no credible threat that Colorado will enforce the Accommodation Clause against them. Aplt. App. at 372. The district court based this conclusion on the number of events that must occur before CADA applies. Appellants must (1) offer to build wedding websites; (2) a same-sex couple must request Appellants' services; (3) Appellants must decline that request; and (4) a complaint based on that denial must be filed. *Id.* The district court's analysis is correct.

All the authorities require a "credible threat" of enforcement before an injury is recognized for standing, whether or not the litigation involves First Amendment claims. *See*, *e.g.*, *Susan B. Anthony List v. Driehause*, 134 S. Ct. 2334, 2342 (2014) (requiring a "credible threat" so that the threatened enforcement is "sufficiently imminent" and holding that where a plaintiff was previously subject to an enforcement

proceeding, the threat of a second proceeding based on the same conduct under the same statute was credible); *Clapper v. Amensty Int'l USA*, 568 U.S. 398, 410 (2013) (holding that a "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending"). *See also Cressman v. Thompson*, 719 F.3d 1139, 1144-45 (10th Cir. 2013) (finding a credible threat where plaintiff had previously purchased specialized license plates to avoid displaying standard license plates that conveyed a message he objected to); *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003) (finding a credible threat where plaintiff was previously charged with a felony based on engaging in the same hate crimes proscribed by the same statute).

Appellants assert that this Court must assume the existence of a credible threat unless "the state defendants clearly deny an intent to enforce the law against an individual plaintiff." Aplt. Opening Brief at p. 19. The cases that Appellants rely on for this proposition state the exact opposite. *Mink v. Suthers*, 482 F.3d 1244, 1255 (10th Cir. 2007) (holding that "the 'possibility' of future enforcement need not be 'reduced to zero' to defeat standing" and that it is "'not necessary for

defendants [ ] to refute and eliminate all possible risk that the statute might be enforced' to demonstrate a lack of a case or controversy.") (alterations in original) (*quoting Winsness v. Yocom,* 433 F.3d 727, 733 (10th Cir. 2006)); *Ward v. Utah*, 321 F.3d 1263, 1268 (10th Cir. 2003) ("an explicit declaration by the prosecutor that a challenged statute is inapplicable to a plaintiff's behavior is not necessary to defeat standing").

A credible threat cannot be based on Appellants' subjective beliefs, but must be objectively reasonable. *Ward*, 321 F.3d at 1266 ("allegations of a 'subjective' chill are not adequate"); *see also Finstuen v. Crutcher*, 496 F.3d 1139, 1144 (10th Cir. 2007) ("[i]n a plea for injunctive relief, a plaintiff cannot maintain standing by asserting an injury based merely on 'subjective apprehensions' that the defendant might act unlawfully") (*quoting Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983)). Given the attenuated chain of events that must occur before Colorado would take action against Appellants, the alleged threat is not objectively credible.

CONCLUSION

For the reasons stated herein, Colorado respectfully requests that the Court dismiss this appeal and remand this matter to the district court for further proceedings after the Supreme Court issues its opinion in *Masterpiece*.

Respectfully submitted this 1st day of February, 2018.

CYNTHIA H. COFFMAN
Colorado Attorney General

s/ *Skip Spear*

VINCENT E. MORSCHER*
Deputy Attorney General
(720) 508-6588
vincent.morscher@coag.gov

SKIPPERE S. SPEAR*
Senior Assistant Attorney General
(720) 508-6635
skip.spear@coag.gov

JACK D. PATTEN, III*
Assistant Attorney General
(720) 508-6592
jack.patten@coag.gov

Colorado Department of Law
Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203

*Counsel of Record

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,285 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook.

Dated February 1, 2018

s/ Skip Spear

Skippere S. Spear
Senior Assistant Attorney General
Colorado Department of Law
Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
(720) 508-6635
skip.spear@coag.gov

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

This is to certify that all privacy redactions have been made, and with the exception of those redactions, every document submitted in digital form or scanned PDF is an exact copy of the written document filed with the Court.

The digital submission has been scanned for viruses with the most recent version of System Center Endpoint Protection; Version 1.261.627.0, recently updated on February 1, 2018, and according to the program is free of viruses.

s/ Skip Spear

Skippere S. Spear
Senior Assistant Attorney General
Colorado Department of Law
Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
(720) 508-6635
skip.spear@coag.gov

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **APPELLEES' BRIEF** upon all parties herein this 1st day of February, 2018, by using the CM/EFC system which will send notification of such filing to the following:

David Andrew Cortman
Rory Thomas Gray
Alliance Defending Freedom–Lawrenceville
1000 Hurricane Shoals Road, NE
Suite D–1100
Lawrenceville, GA 30043
Telephone: (770) 339–0774
Fax: (770) 339–6744
Email: dcortman@ADFlegal.org
Email: rgray@adflegal.org

Jeremy David Tedesco
Samuel David Green
Kristin K. Waggoner
Katherine Leone Anderson
Jonathan Andrew Scruggs
Alliance Defending Freedom–Scottsdale
15100 North 90th Street
Suite 165
Scottsdale, AZ 85260
Telephone: (480) 444–0020
Fax: (480) 444–0028
Email: jtedesco@ADFlegal.org
Email: sgreen@ADFlegal.org

Email: kwaggoner@ADFlegal.org
Email: kanderson@ADFlegal.org
Email: jscruggs@ADFlegal.org

Michael L. Francisco
MRD Law
3301 West Clyde Place
Denver, CO 80211
Telephone: (303) 325-7843
Fax: (303) 723-8679
Email: michael.francisco@mrd.law

s/ *Denise Munger*