IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No.________________

DAVID PENDERY,

Plaintiff,

v.

WHISPERING PINES METROPOLITAN DISTRICT #1,

Defendant.

PLAINTIFF DAVID PENDERY'S MOTION FOR TEMPORARY RESTRIANING ORDER AND PRELIMINARY INJUNCTION

Plaintiff David Pendery moves for a temporary restraining order and preliminary injunction to enjoin Defendant Whispering Pines Metropolitan District No. 1 (the "Metro District") from enforcing two sections of its Design Guidelines, Rule 2.24 (the "Flag Regulation") and Rule 2.47 (the "Sign Regulation"), pending a final judgment in this lawsuit.[1]

INTRODUCTION

Mr. Pendery wishes to fly a Pride flag at his home to express his support for LGBTQ families like his, and a "We Believe" sign to affirm values of diversity, inclusion, and kindness. But the Metro District forbids Mr. Pendery to carry out this silent symbolic expression of solidarity and

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[1] On February 22, 2021, counsel for Mr. Pendery sent a copy of the Complaint in this case to Lisa Mayers, counsel for the Whispering Pines Metropolitan District #1. Counsel also conferred with Ms. Mayers about this motion for interim injunctive relief. Ms. Mayers stated that she did not have authority to consent to the relief requested. This Motion, along with the proposed order, Complaint, exhibits, and Declaration of David Pendery, are being sent to Ms. Mayers by email contemporaneously with the filing with this Court.

inclusiveness. The Metro District's restrictions on Mr. Pendery's right to convey to his neighbors his message of choice is an unconstitutional infringement of his freedom of speech under the First Amendment of the U.S. Constitution and Article II, Section 10 of the Colorado Constitution. Mr. Pendery facially challenges the two specific government regulations (the Flag and Sign Regulations) that are stifling his right to free speech at his home.

Mr. Pendery is entitled to an immediate injunctive relief. He has a high probability of success on the merits because the challenged regulations are unconstitutional content-based restrictions on speech. They allow flags and signs with some messages, while prohibiting flags and signs with other messages, unless the resident first obtains approval from a government committee that has unbridled discretion to approve or deny flags and signs based on their message. At the same time, an injunction is necessary to stop irreparable harm because "'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Thus, the Court should enter a temporary restraining order enjoining the Metro District from enforcing its Flag and Sign Regulations until it rules on the need for a preliminary injunction. The Court also should schedule a preliminary injunction hearing at its earliest convenience to decide whether to enjoin the challenged regulations pending the resolution of this lawsuit.

FACTUAL BACKGROUND

A. The Metro District and Whispering Pines Neighborhood.

The Whispering Pines neighborhood in which Mr. Pendery lives is a housing community composed of over 300 homes located in Arapahoe County, Colorado. Exhibit 1, Pendery Declaration

¶ 1. Whispering Pines Metropolitan District No. 1 (or "the Metro District"), is a government entity that oversees the Whispering Pines community.

Metropolitan districts exist separately from cities or counties. They are independent units of government that are formed to finance, construct, and operate public improvements. *See* Exhibit 2, Denver Post, *Colorado Metro Districts and developers create billions in debt*, Dec. 5, 2019. Metropolitan districts typically finance construction of public improvements through the sale of government bonds, and repay those bonds through taxes they levy on the future homeowners in the neighborhood or district built. *Id.*

The Colorado Special District Act, Colo. Rev. Stat. § 32-1-101, *et seq.*, makes clear that metropolitan districts, like the Metro District here, are political subdivisions of the State of Colorado. The statute defines a "metropolitan district" as a "special district that provides for the inhabitants thereof any two or more of the following services: (a) Fire protection; (b) Mosquito control; (c) Parks and recreation; (d) Safety protection; (e) Sanitation; (f) Solid waste disposal facilities or collection and transportation of solid waste; (g) Street improvement; (h) Television relay and translation; (i) Transportation; (j) Water." Colo. Rev. Stat. § 32-1-103(10). In turn, the statute defines a "special district" as "any quasi-municipal corporation and ***political subdivision*** organized or acting pursuant to the provisions of this article." Colo. Rev. Stat. § 32-1-103(20) (emphasis added).

The Flag and Sign Regulations challenged in this case appear in the Whispering Pines Design Guidelines & Residential Improvement Reference Guide (the "Design Guidelines"), which govern each resident's property. Exhibit 3, Design Guidelines.[2]

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[2] *Available at* https://tinyurl.com/1wffwaf1, on the Metro District's web site.

Despite their title, the Design Guidelines are not mere "guidelines." They are mandatory and carry the force of law, which the Design Guidelines themselves make clear. They state that residents who fail to comply may be "subject to fines or other legal action, to be determined by the District Board of Directors at its discretion." *Id.* at p. 3. If a resident fails to pay fines, the Metro District can put a lien on a home, impose late fees, interest, and penalties, and take "other actions as it may deem necessary and appropriate" to assure compliance with its restrictions. Exhibit 4, Feb 2018 Covenant Enforcement Resolution ¶¶ 6-9; Exhibit 5, Feb. 28, 2018 Board Resolution ¶¶ 1-4.[3]

B. The Flag Regulation.

The Flag Regulation is contained in Rule 2.24 of the Design Guidelines, titled "Flags and Flagpoles." Exhibit 3 Design Guidelines, § 2.24. The Flag Regulation distinguishes between flags that are automatically allowed and flags that are prohibited unless and until the resident obtains prior approval from the Metro District's Design Review Committee. *Id.* The distinction is based on the content or symbolic message of the flag.

Flags that are automatically allowed, without prior approval, are: a United States flag of a certain size, a flag communicating that a resident served in the armed forces during a time of armed conflict, a Colorado flag of a certain size, a sports team flag during a sporting event, or a holiday flag during a certain time period. All other flags, including Mr. Pendery's Pride flag, are prohibited unless and until prior approval is obtained from the Design Review Committee.

The full text of Rule 2.24 states:

> The display of the American flag or of a service flag bearing a star or denoting the service of the Owner or occupant of the Lot, or a member of the Owner's or

[3] *Available at* https://tinyurl.com/1qhwuy16 and https://tinyurl.com/yjjlojad, on the Metro District's web site.

> occupant's immediate family, in the active or reserve military service of the United States during a time of war or armed conflict, on a unit owner's property, in a window of the unit, or on a balcony of the unit is permitted provided the flag(s) do not exceed 5 square feet (pursuant to Section 106.5 of the Colorado Common Interest Ownership Act). Bracket holders are permitted without prior approval. One American flag and/or one Colorado flag are permitted to be displayed provided the flag(s) do not exceed 5' square feet. Approval is required for all other flags/banners. Sports teams' flags will be allowed during the duration of a single sporting event (not the entire sport season). Holiday flags will be allowed not more than 30 days prior to the holiday and must be removed within 15 days after the holiday. Flags must be kept/flown at all times in a neat and attractive condition.

Id.[4]

There are no written guidelines to ensure that the Metro District's decision to grant or deny approval is free from discrimination on the basis of the flag's communicative message. According to the Design Guidelines, "[a]ll submissions are considered based on their individual merit - approval or denial in one instance does not necessarily mean the same decision in a different submittal and/or set of circumstances." *Id.* at 2. The Design Review Committee typically meets once per month, and may take up to 45 days after submittal of an application to approve or deny it. *Id.* An application is considered denied if no response is provided within thirty days. *Id.* at 3 & 25.

C. The Sign Regulation.

The Sign Regulation is contained in Rule 2.47 of the Design Guidelines, entitled "Signs." Exhibit 3, Design Guidelines § 2.47. Like the Flag Regulation, the Sign Regulation distinguishes between signs that are automatically allowed and signs that are prohibited unless and until the resident obtains prior approval from the Metro District's Design Review Committee. *Id.* Again, the distinction is based on the message of the sign.

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[4] Mr. Pendery does not challenge the last sentence of the Flag Regulation, which states that "Flags must be kept/flown at all times in a neat and attractive condition."

Signs that are automatically allowed, without prior approval, are signs of a certain size providing notice that a particular property is for sale or lease. *Id.* According to the Rule, any other signs are prohibited until and unless prior approval is obtained. *Id.* As with the Flag Regulation, the Metro District has no written rules or guidance about when it will approve or deny other signs. It grants its Design Review Committee unbridled standardless discretion to decide which signs to allow and which to prohibit.

The Sign Regulation also discusses "political signs," but provides no definition of "political signs." "Political signs" are approved only if the message of the sign relates to a political office or ballot issue that is contested in a pending election and the sign is posted within a timeframe of 45 days before that election and 7 days after. *Id.*

The full text of Rule 2.47 states:

> Approval is required for all signs with the following exception:
>
> - One sign advertising the home for sale or for lease, not to exceed 4' in height and 3' x 2' in dimension. Sign shall be removed within 1 week after closing/transfer of property.
>
> Any political signs are restricted to the following:
>
> - May not be displayed earlier than 45 days before election and 7 days after.
> - One sign per political office or ballot issue that is contested in a pending election.
> - May not exceed 36" x 48" in size.
> - Must remain within Owner's property lines.
> - Political signs may NOT be placed on any common area.

Id.

D. The Metro District is prohibiting Mr. Pendery from displaying a Pride flag and "We Believe" sign at his home.

Plaintiff David Pendery, his husband, and their two young children moved to the Whispering Pines community in March 2020. Exhibit 1, Pendery Declaration ¶ 1. Near the end of August 2020, Mr. Pendery displayed the Pride flag shown below near the front door of his home.

Id. ¶¶ 2 & 8. Mr. Pendery believed that the Pride flag was an important way for him to express his support and solidarity for LGTBQ families like his. *Id.* ¶ 2.

Shortly after Mr. Pendery displayed the Pride flag, the Metro District asked him to remove it. On August 31, 2020, Mr. Pendery received an email from the Metro District's management company, stating that his Pride flag was being displayed at his residence in violation of the Flag Regulation, because the management company had "no record that pre-approval was sought." *Id.* ¶ 3 & Exhibit A. The email instructed Mr. Pendery to submit an application form for approval of his flag, and it stated the application must "include the purpose/symbolism of the flag." *Id.*

On the same day as he received the letter, Mr. Pendery completed the "violation response form," responding in part: "As an LGBTQ family living within the Whispering Pines Metro District,

we have elected to periodically display a Pride flag, with the full support of our neighbors, to show support and solidarity with families like ours, who face discrimination on a daily basis." *Id.* ¶ 4 & Exhibit B.

On September 8, 2020, the Metro District's management company sent Mr. Pendery an email with the subject line "Flag approval with conditions." *Id.* ¶ 5 & Exhibit C. The attachment to the email stated that Mr. Pendery's flag was approved only until December 31, 2020. It further stated that in order to fly the flag after that date, Mr. Pendery had to submit a new application and seek approval again. *Id.* The Metro District provided no explanation for why it cut off approval for his flag at year end. *Id.*

Mr. Pendery also wishes to display a "We Believe" sign in his yard with the following message that encourages diversity, inclusion, and kindness: "IN THIS HOUSE, WE BELIEVE BLACK LIVES MATTER, WOMEN'S RIGHTS ARE HUMAN RIGHTS, NO HUMAN IS ILLEGAL, SCIENCE IS REAL, LOVE IS LOVE, KINDNESS IS EVERYTHING." *Id.* ¶ 9. An image of this sign is below:

E. The chilling of Mr. Pendery's expression at home.

Mr. Pendery wants to fly a Pride flag again on his property, and he also wants to post the "We Believe" sign. He has refrained from doing so in order to comply with the Metro District's

rules and to avoid fines or other enforcement action. Exhibit 1, Pendery Declaration ¶ 10. Mr. Pendery has not sought approval to fly the Pride flag or "We Believe" sign because he does not want to submit his right to free speech to the whim of decisionmakers exercising unlimited, standardless discretion over whether to grant or deny sign or flag applications. *Id.* ¶ 11. The result is clear: The Metro District's Flag and Speech Regulations are stifling free expression at home for Mr. Pendery and other residents of the Whispering Pines community.

ARGUMENT

To prevail on a motion for a temporary restraining order or preliminary injunction, the plaintiff must show: (1) a substantial likelihood of success on the merits, (2) that he or she will suffer irreparable injury if the court denies the injunction, (3) that his or her threatened injury (without the injunction) outweighs the defendant's injury under the injunction, and (4) that the injunction is not adverse to the public interest. *See Free the Nipple v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019). For certain "disfavored" injunctions, the Plaintiff must meet a heightened standard by making a "strong showing" that the likelihood-of-success and balance-of-harms factors tilt in Plaintiff's favor. *Id*. This Court need not decide which standard applies here, as Plaintiff makes an overwhelmingly strong showing on all four factors and easily meets even the heightened standard. *Id.* at n.3.Accordingly, the Court should enjoin the Metro District from enforcing its Flag and Sign Regulations pending a final judgment in this lawsuit.

I. MR. PENDERY HAS A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS.

A. Mr. Pendery has standing for a facial challenge.

Mr. Pendery has standing to facially challenge the Flag and Sign Regulations because he is currently prohibited from displaying a Pride flag or posting a "We Believe" sign at his residence in Whispering Pines. Exhibit 1, Pendery Declaration ¶ 10.

The fact that Mr. Pendery has not applied in 2021 for permission to display a pride flag or sign, after his temporary permission expired on December 31, 2020, is not an obstacle to standing. The U.S. Supreme Court has made clear that when a "statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially ***without the necessity of first applying for, and being denied, a license***." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988) (emphasis added); *see also Acorn v. Tulsa*, 835 F. 2d 735, 738-40 (10th Cir. 1987) (plaintiff had standing to challenge ordinances without asking for permission under the ordinances and being denied by the city; "one need not seek a license in order to challenge an ordinance that impermissibly infringes upon first amendment activity").

B. The Metro District is a state actor that may not abridge freedom of speech.

The First Amendment states "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. AMEND. I. Although the First Amendment refers to Congressional laws, "the Fourteenth Amendment makes this limitation applicable to the States, *see Gitlow v. New York*, 268 U.S. 652 (1925), and to their political subdivisions, *see Lovell v. City of Griffin*, 303 U.S. 444 (1938)." *City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994).

The Metro District is a "political subdivision" subject to the First Amendment. It is a metropolitan district that is part of the State of Colorado, *see* Colo. Rev. Stat. § 32-1-103(10), which is defined by the Colorado Special Districts Act to constitute a "political subdivision organized or acting pursuant to the provisions of this article." Colo. Rev. Stat. § 32-1-103(20). Indeed, in its Design Guidelines, the Metro District describes itself as a "political subdivision of the State of Colorado." Exhibit 3, Design Guidelines at 2.

C. The Flag and Sign Regulations are unconstitutional content-based restrictions on free speech.

1. <u>The Flag and Sign Regulations are presumptively unconstitutional and subject to strict scrutiny because they restrict speech based on content.</u>

The ability to display a flag or sign at one's home is a vital form of speech protected by the First Amendment. As the U.S. Supreme Court has explained: "residential signs have long been an important and distinct medium of expression" and "a special respect for individual liberty in the home has long been part of our culture and our law." *City of Ladue*, 512 U.S. at 55. "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." *Id.* at 56. "A person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means." *Id.* at 57-58.

Under the First Amendment, "a government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional" and subject to strict

scrutiny review. *Id.*; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").

The Metro Districts' restrictions on flags and signs, by their plain terms, are content-based restrictions on speech. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576, U.S. at 163. Here, both regulations allow some speech and restrict other speech depending on the "idea or message expressed" by the flag or sign.

The Flag Regulation creates two classes of flags – one class which a resident is ***permitted*** to display at his or her home, and a second class which a resident is ***prohibited*** from displaying unless he or she seeks and obtains advance approval to display the flag. The permitted class of flags includes American flags, certain military service flags, Colorado flags, holiday flags, and sports flags. *See* Exhibit 3, Design Guidelines § 2.24. The prohibited class includes all other flags, including the Pride flag Mr. Pendery wants to display at his home, and other types of flags Mr. Pendery's neighbors might want to display.[5]

The Sign Regulation also creates disparate classes of signs depending on the message conveyed. The permitted class includes "for sale" or "for lease" signs and "political signs" within a certain timeframe before or after an election. *Id.* § 2.47. The prohibited class includes all other

[5] Plaintiffs who bring a challenge under the First Amendment are "entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981).

signs, including the "We Believe" sign Mr. Pendery would like to display, and other types of signs Mr. Pendery's neighbors might want to display.

The unconstitutionality of these disparate classes of flags and signs is shown by *City of Ladue v. Gileo*, 512 U.S. 43 (1994). There, the Supreme Court found the City of Ladue's ordinance, which prohibited homeowners from displaying all signs "except 'resident identification' signs, 'for sale' signs, and signs warning of safety hazards," was an unconstitutional content-based speech regulation. *Id.* at 45 & 53. The Court reasoned that "the exemptions from Ladue's ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City's esthetic interest in eliminating outdoor signs" while other signs (such as the plaintiff's anti-war "For Peace in the Gulf" sign) did not outweigh the City's esthetic interest and thus were prohibited. *Id.* at 53. The Court found the City of Ladue had engaged in viewpoint discrimination that impermissibly constrained the plaintiff's ability to speak from her home. *Id.* at 58.

As in *City of Ladue*, here, the Flag and Sign Regulations favor certain messages over others. For example, residents like Mr. Pendery may display a Denver Broncos flag to express solidarity for the local football team, but not a Pride flag to express solidarity with LGBTQ families. Or residents may display a "for sale" sign to convey a commercial message, but not a "We Believe" sign to convey support for diversity, inclusion, and kindness. This type of content-based speech restriction is presumptively unconstitutional and subject to strict scrutiny review (which the Metro District cannot satisfy). *See, e.g.*, *Reed*, 576 U.S. at 161 (regulation was content-based because it prohibited all signs except for discrete categories, each of which was subject to different rules); *Solantic*, *LLC v. City of Neptune Beach*, 410 F.3d 1250, 1264 (11th Cir. 2005) (sign code with exemption for "flags

and insignia only of a 'government, religious, charitable, fraternal, or other organization'" was a "content-based regulation of speech" that violated First Amendment); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248-49 & n.2 (9th Cir. 1988) (ordinance exempting "[f]lags of the national or state government" or "not more than three flags of nonprofit religious, charitable or fraternal organizations" drew "content-based distinctions" and violated First Amendment).[6]

2. The Metro District cannot satisfy its burden to show the Flag and Sign Regulations are narrowly tailored to serve a compelling state interest.

To satisfy strict scrutiny review, the Metro District bears the burden to show its Flag and Sign Regulations are "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *see also Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008) ("To survive strict scrutiny, [the state] has the burden of proving that [the challenged law] is narrowly tailored to serve a compelling state interest."). The Metro District cannot satisfy this exacting burden.

First, the Metro District cannot show the challenged regulations are justified by a compelling government interest. The only justification provided in the Design Guidelines is to "help preserve the inherent DRC [Design Review Committee] architectural and aesthetic quality of the Whispering Pines community." Exhibit 3, Design Guidelines § 1.1. But courts have repeatedly rejected aesthetics as a rationale that can justify content-based regulation of speech. *E.g.*, *City of Ladue*, 512 U.S. at 53 (aesthetic interest did not justify content-based sign restrictions); *Solantic*, 410 F.3d at

[6] The Metro District may argue its rationale for the challenged regulations is content-neutral. Even if that were true, it would not change the analysis under the First Amendment. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.*

1262 ("aesthetics and traffic safety" was "not a compelling state interest of the sort required to justify content-based regulation of noncommercial speech"); *Clark v. City of Williamsburg*, 388 F. Supp. 3d 1346, 1361 (D. Kan. 2019) ("[M]any courts have concluded that aesthetics and traffic safety are not compelling reasons to impose content-based restrictions on signs.").

Second, the Metro District cannot show that the challenged regulations are narrowly tailored to "aesthetics" or any other purported justification. If the Metro District's true justification were aesthetics, then it would need to restrict only the size, number, and quality of flags and signs on a property. There would be no reason to differentiate based on content, *i.e.*, permit certain messages on flags and signs (*e.g.*, American flags) while prohibiting others (*e.g.*, Pride flags) when the flags are of an equal size and quality. The difference between flags of an equal size and quality that are permitted and those that are prohibited is not aesthetics; it is the message they convey.

Reed v. Town of Gilbert, 576 U.S. 155 (2015), is instructive. In *Reed*, the Supreme Court found a sign ordinance with more stringent restrictions on "temporary directional" signs ("loosely defined as signs directing the public to a meeting of a nonprofit group") than "political" and "ideological" signs was an unconstitutional content-based speech restriction. *Reed,* 576 U.S. at 159. The Town of Gilbert argued that ordinance was narrowly tailored to "preserving the Town's aesthetic appeal and traffic safety." *Id.* at 171. The Supreme Court rejected this argument, explaining that the regulation was "hopelessly underinclusive," because "temporary directional signs are 'no greater an eyesore,' . . . than ideological or political ones," so "the Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem." *Id.* at 172; *see also Ladue*,

512 U.S. at 52 (City of Ladue's sign regulation was not narrowly tailored because it did not "impose[] a flat ban on signs because it has determined that at least some of them are too vital to be banned").

As in *Reed*, the Flag and Sign Regulations are "hopelessly underinclusive." The Metro District cannot credibly argue that aesthetics requires advance approval for Pride flags and "We Believe" signs but not other categories of flags and signs. As such, the Metro District cannot satisfy the second prong of strict scrutiny review.

3. <u>The Flag and Sign Regulations are unconstitutional prior restraints on speech because they lack "clear, objective, and definite" governing standards.</u>

The Flag and Sign Regulations also cannot pass constitutional scrutiny for an entirely separate reason: They are prior restraints on free speech with no standards for their enforcement or application, creating a danger that they will deter speech and result in censorship of flags and sign based on the messages they convey.

A prior restraint is a law or regulation that "restricts speech in advance" unless and until such speech is approved by government officials. *See Taylor v. Roswell Independent Sch. Dis.*, 713 F.3d 25 (10th Cir, 2013). The U.S. Supreme Court regards prior restraints "'as the most serious and the least tolerable infringement on First Amendment rights.'" *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any prior restraint on expression comes . . . with a 'heavy presumption' against its constitutional validity." *Id.* at 558 (quoting *Carroll v. Princess Anne*, 393 U. S. 175, 181 (1968)).

The Flag and Sign Regulations are both prior restraints on speech. They prohibit the display of many flags and signs unless the resident first applies for and obtains approval from the Design Review Committee. *See Brown v. Glines*, 444 U.S. 348, 364 (1980) (regulation requiring services members to "obtain approval from their commanders before circulating petitions on Air Force bases"

was an unconstitutional prior restraint). Therefore, this Court must start with a "heavy presumption" against the "constitutional validity" of the challenged regulations.

The U.S. Supreme Court has held a state actor defending a prior restraint can overcome this presumption only if the challenged law contains "'narrow, objective, and definite standards to guide the licensing authority.'" *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quoting *Shuttlesworth v. City of Birmingham. Ala.*, 394 U.S. 147, 150-51). If the law requires an "appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted." *Forsyth Cnty.*, 505 U.S. at 131 (quotations omitted). Indeed, the mere existence of the licensing authority's "unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood*, 486 U.S. at 783.

The Flag and Sign Regulations fail under this legal framework because they do not contain "narrow, objective, and definitive standards" to guide when flags and signs should be approved. To the contrary, they contain no standards at all, and merely state: "Approval is required for all other flags/banners" and "Approval is required for all signs with the following exception . . . ." *See* Exhibit 3, Design Guidelines §§ 2.24 & 2.47. In other words, the regulations leave it entirely up to the Design Review Committee (the licensing authority under the scheme here) to appraise the facts, exercise their judgment, and form an opinion as to whether they believe the flag or sign should be permitted – precisely the type of "unbridled discretion" the U.S. Supreme Court has found to infringe on First Amendment freedoms. *See Forsyth Cnty.*, 505 U.S. at 133.

The risk of viewpoint-based censorship created by this framework is real, and is confirmed by the Metro District's treatment of Mr. Pendery and other Whispering Pines residents. Last year, after asking Mr. Pendery to explain the "purpose" and "symbolism" of his Pride flag, the Metro District approved his Pride flag "with restrictions," permitting him to display the flag only until December 31, 2020, without any rationale or justification for the temporal limit. Exhibit 1, Pendery Declaration 5-6 & Exhibit C. And in August 2020, members of the Design Review Committee exchanged emails that proposed imposing durational limits on Pride and Black Lives Matter flags, but no durational limits on a "Snoopy / Peanuts" flag. *Id.* ¶ 6 & Exhibit C

While the Metro District may argue that, in practice or in this situation, it would apply its Flag and Sign Regulations in a content-neutral manner, that does change the analysis. "The success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *See Forsyth Cnty.*, 505 U.S. at 134 n. 10. The lack of written standards to govern how the Design Review Committee will approve or deny applications for flags and signs is itself sufficient grounds to strike down the challenged regulations. *See, e.g.*, *Forsyth County*, 505 U.S. at 134 (parade ordinance was unconstitutional because "the decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (licensing ordinance for theater was unconstitutional due to lack of enforcement standards regardless of whether "as a substantive matter, the [state's] standard for resolving that question was correct"); *City of Lakewood*, 486 U.S. at 770

(rejecting argument that non-written standards for a licensing ordinance for newsrack permits made it constitutional; "This Court will not write nonbinding limits into a silent state statute").

D. Mr. Pendery has a substantial likelihood of prevailing on his claim under the Colorado Constitution.

Because Mr. Pendery is likely to prevail on his claim for a violation of the First Amendment to the U.S. Constitution, he is also likely to prevail for a claim under Article II, Section 10 of the Colorado Constitution.

Article II, Section 10, of the Colorado Constitution, entitled "Freedom of speech and press," provides: "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty." The Colorado Supreme Court has firmly established that "the Colorado Constitution provides broader free speech protections than the Federal Constitution." *See Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002); *see also Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991) ("Colorado's tradition of ensuring a broader liberty of speech is long. For more than a century, this Court has held that Article II, *Section* 10 provides greater protection of free speech than does the First Amendment."). One reason for this difference is the First Amendment to the U.S. Constitution is expressed in the negative (*i.e.*, Congress shall pass "no law" restricting expression), while the Colorado Constitution is expressed in the affirmative (*i.e.*¸ "every person shall be free to speak, write, or publish whatever he will on any subject."). *See Tattered Covered*, 44 P.3d at 1054 & n. 19; *Bock*, 819 P.2d at 58.

II. MR. PENDERY SATISFIES THE OTHER REQUIREMENTS FOR A TEMPROARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

Having established that the challenged regulations violate the First Amendment and Colorado Constitution, Mr. Pendery easily satisfies the other requirements for interim injunctive relief. *See Citizens United v. Gessler*, 773 F.3d 200, 218, (10th Cir. 2014) ("Having determined that [the plaintiff's] First Amendment argument is valid, the remaining preliminary-injunction factors present little difficulty."); *Willson v. City of Bel-Nor*, 924 F.3d 995, 999 (8th Cir. 2019) ("When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.").

A. Mr. Pendery will suffer irreparable harm without interim injunctive relief.

"The Supreme Court has instructed that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Verlo*, 820 F.3d at 1127 (quoting *Elrod*, 427 U.S. at 373 (1976)). "Most courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Free the Nipple*, 916 F.3d at 805; *see also ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (affirming finding of irreparable injury based on "the curtailment of their constitutionally protected speech").

This is the case here. Every day that the Metro District can enforce its Flag and Sign Regulations is another day Mr. Pendery suffers irreparable injury due to not being able to convey his support for LGBTQ families, diversity, and inclusion by displaying a Pride flag and "We Believe" sign at his home. No amount of monetary damages can compensate Mr. Pendery after the fact for the loss of his constitutional right to free speech, an inherently unquantifiable harm.

B. Mr. Pendery's irreparable injury outweighs any injury the Metro District's claims it would suffer due to interim injunctive relief.

The balance of equities is one-sided and supports interim injunctive relief. On the one hand, Mr. Pendery and other residents of the Whispering Pines community will be deprived of their rights to free speech at home if the Metro District continues to enforce its Flag and Sign Regulations. On the other hand, the Metro District will suffer no harm if these regulations are enjoined while the lawsuit is pending, and any minor harm the Metro District identifies is vastly outweighed by the loss of First Amendment freedoms. *See Verlo*, 820 F.3d at 1127 ("it is always in the public interest to prevent the violation of a party's constitutional rights"); *Free the Nipple*, 916 F.3d at 806 ("When a constitutional right hangs in the balance, though, 'even a temporary loss' usually trumps any harm to the defendant") (quoting Wright & Miller, Federal Practice & Procedure § 2948 (3d ed. 2018)); *Johnson*, 194 F.3d at 1163 ("[T]he threatened injury to Plaintiffs' constitutionally protected speech outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute").

C. The public interest supports interim injunctive relief.

Finally, the public interest supports injunctive relief because it will protect Mr. Pendery and other Whispering Pines residents' constitutional rights to free speech while the lawsuit is pending. "Vindicating First Amendment freedoms is clearly in the public interest." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also Free the Nipple*, 916 F.3d at 807 (holding it is "always in the public interest to prevent the violation of a party's constitutional rights"); *Elam Constr. v. Reg. Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest . . . favors plaintiffs' assertion of their First Amendment rights").

III. NO SECURITY SHOULD BE REQUIRED

"Trial courts have wide discretion under Rule 65(c) in determining whether to require security," *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (quotations omitted), and may decline to require security in appropriate cases. *See, e.g.*, *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003) (no bond necessary where there was no showing of harm from injunction); *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (finding no bond necessary where plaintiff had strong likelihood of success on merits). Here, there is no reason for a bond because Mr. Pendery has a high likelihood of success on the merits, and the Metro District will suffer no harm from an interim injunction.

CONCLUSION

For these reasons, Mr. Pendery respectfully asks the Court to: (1) enter a temporary restraining order enjoining the Metro District from enforcing its Flag and Sign Regulations until the Court rules on the need for a preliminary injunction; and (2) after the Metro District has had an opportunity to respond to this motion, enter a preliminary injunction enjoining it from enforcing its Flag and Sign Regulations until a final judgment in this lawsuit.

Respectfully submitted this 23rd day of February, 2021.

s/ Mark Silverstein

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2021, a true and correct copy of the foregoing **PLAINTIFF DAVID PENDERY'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCITON** was electronically file with the Clerk of the Court using the CM/ECF system and served upon Defendant Whispering Pines Metropolitan District #1 through counsel for Defendant:

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s/ Nicole Loy

____
Paralegal, ACLU of Colorado