IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

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

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW Defendants, by and through counsel, and pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 8, in reply to Plaintiffs' Response to Defendants" Motion to Dismiss Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief **(# 43)**, as follows.

ARGUMENT

1. Plaintiffs fail to allege standing pursuant to Fed. R. Civ. P. 12(b)(1).

A. Burden of proof: Plaintiffs argue that the motion to dismiss is based on "misrepresentations of the facts" **(# 43 p. 1).** Admittedly, the parties disagree as to the existence of prerequisites to the enforcement of CADA, which relates to the injury element of standing **(Compare # 37 pp. 12-13 with # 43 p. 23).** The parties also disagree as to the enforcement power of each Defendant, which relates to the causality and redressability elements of standing **(Compare # 37 pp. 2-4 with # 43 p. 3).** Defendants dispute the characterization of these disputes as "misrepresentations," but the Defendants' assertions constitute a "factual" attack on the Court's jurisdiction and must be addressed under the preponderance of the evidence standard. *Ingram v. Faruque*, 728 F.3d1239, 1242 (10th Cir. 2013).

B. Elements: The parties do not dispute the basic elements of standing, derived from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (reaffirming the application of the *Lujan* standing elements in First Amendment cases);[1] *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223-24 (10th Cir. 2008) (same). Plaintiffs'

[1] Plaintiffs maintain that the Court in *Susan B. Anthony* disavowed the application of *Clapper v. Amnesty International USA* to the standing analysis for First Amendment Claims. To the contrary, the Court relied on and thrice cited Clapper in rendering its decision. *Susan B. Anthony*, 134 S. Ct. at 2341 and 45.

assertions regarding elements in addition to those contained in *Lujan* are argument, and Defendants address those arguments below.

C. Elements not supported by Complaint:

element (i) - injury: For standing purposes, claims of injury may not be speculative, subject to contingencies that may never occur. The cases cited by Plaintiff are not contrary, requiring a "credible threat" of enforcement before an injury is recognized. See, e.g., *Susan B. Anthony*, 134 S. Ct. at 2342 (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); *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); *see also Poe v. Ullman*, 367 U.S. 497, 507 (1961) ("[i]t is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting."). Plaintiffs' do not establish a "credible threat" of enforcement that would chill Ms. Smith from espousing her views.

First, CADA does not prohibit Plaintiffs from espousing any view. *See Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.2d 272, 291 (Colo. App. 2015) ("we

reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views. … Likewise, Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same sex marriage.")[2] Injury cannot be based on Plaintiffs' misunderstanding of CADA. 13 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3532.5 (3d ed. 2016) ("a plaintiff cannot make a ripe case by misreading a statute and claiming a need to assuage self-induced fears.").[3] Although Plaintiffs may face public backlash over espousing Ms. Smith's beliefs, social pressures do not amount to injury in fact. *Habecker*, 518 F.3d at 1226.

Second, any fear of enforcement chilling Ms. Smith's speech must be objectively reasonable, "allegations of a 'subjective' chill are not adequate." *Ward*, 321 F.3d at 1266; *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

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[2] Plaintiffs argue that "Defendants interpret CADA to bar [them] from both publishing her desired statement and entering the wedding website design business unless she is willing to create websites celebrating same-sex marriage. … Defendants do not contest this fact" **(# 43 p. 10).** To the contrary, Defendants dispute these allegations, which are contrary to the decision in *Masterpiece* . This is another example of the "factual" nature of Defendants' challenge to the Court's jurisdiction.

[3] Although this section of *Federal Practice and Procedure* is addressing ripeness, the same section also makes clear that the distinction between standing and ripeness "was all but obliterated" in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

might act unlawfully") (*quoting City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983)). Given that CADA does not prohibit Plaintiffs' from disseminating their views on homosexuality, any chilling of that dissemination is purely subjective.

Third, with regard to an enforcement action should Plaintiffs deny services to same-sex couples, which under *Masterpiece* is not entitled to First Amendment protection as speech, Plaintiffs do not address how the ten contingencies detailed in the motion to dismiss will first come to pass. In light of these unfulfilled contingences, there is no "credible threat" of enforcement.

element (ii) - action by Defendants: To establish causation, Plaintiffs must show that their injury, refraining from publishing a website based on fear of prosecution under CADA, is "fairly traceable" to Defendants' actions. *Habecker*, 518 F.3d at 1225. Here, however, Plaintiffs admit that Ms. Smith "alone controls" the publication of the website and, thus, any threat of injury **(# 43 p. 12).** Plaintiffs' self-induced injury does not create standing. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 n.9 (10th Cir. 2005) ("[a]t some point, standing may be denied because the injury seems solely - - or almost solely - - attributable to the plaintiff.") (quoting 13 *Federal Practice & Procedure* § 3531.5).

Further, the parties dispute the enforcement authority of each Defendant and what action they might take in the future. The specific authority of each Defendant must be addressed to establish causation. *See Cressman v. Thompson*, 719 F.3d 1139, (10th Cir. 2013) (holding that, for purposes of analyzing standing,

"the authority [of a hearing officer] to interpret and administer a statute is not the same as the authority to *enforce* a statute.") (emphasis in original). Plaintiffs fail to establish that authority.

Finally, any enforcement authority that each Defendant may have is subject to the ten contingencies. Plaintiffs dispute this assertion, but have not rebutted it. As such, Plaintiffs fail to establish an objectively reasonable credible threat of enforcement that is caused by Defendants. *See Lower Ark. Valley Water Conservancy Dist. v. United States*, 578 F. Supp. 2d 1315, 1326-27 (D. Colo. 2008) ("plaintiff does not satisfy its burden of demonstrating causation where speculative inferences are required to connect its injury to the challenged action.").

element (iii) - favorable decision will address injury: "Article III does not allow a plaintiff who wishes to challenge state legislation to do so simply by naming as a defendant anyone who, under appropriate circumstances, might conceivably have an occasion to file a suit … under the relevant state law at some future date." *Nova Health*, 416 F.3d at 1157-58. As applicable here, the holding in *Nova Health* is succinctly stated as: "a party lacks standing to seek an injunction against a nominally public defendant who has not threatened suit and who cannot be distinguished from the countless private litigants with identical enforcement powers." *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 904 (10th Cir. 2012). A favorable decision for Plaintiffs will not redress the alleged injury because private citizens would still have independent enforcement authority under CADA.

2. The Court should abstain from hearing Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(1).

A. Burden of proof: Plaintiffs do not dispute that they have the burden of proof under Rule 12(b)(1), but again attempt to distinguish Defendants' motion to dismiss as a facial challenge to the complaint. To the contrary, one of the central considerations before this Court is the similarity of this case and that of *Masterpiece Cakeshop*. The parties take very different positions on this issue, which is a question of fact **(Compare # 37 p. 11 with # 43 p. 28)** (Defendants stating the claims in *Masterpiece Cakeshop* were decided "on the same arguments made in the Complaint" and Plaintiffs stating that the claims in the Complaint are "distinct and unrelated to *Masterpiece Cakeshop*").

B. Elements: Abstention is known by several names – *Pullman*, *Burford*, *Younger*, *Rooker-Feldman*, *Colorado River* – based on the Supreme Court case where it was first applied to a particular set of facts. This "division is a mere organizational convenience." 17A Charles Alan Wright, et al., *Federal Practice & Procedure* § 4241 (3d ed. 2016). Because, however titled, "[c]onsiderations of federalism are at the heart of abstention," including: (i) comity - respect for the independence of the state governments, avoiding needless conflict with a state's administration of its own affairs, and avoiding federal resolution of unsettled questions of state law; and (ii) promotion of an efficient federal judiciary by avoiding duplicative litigation and the decision of federal constitutional questions.

Id. Dismissing, staying, or certifying a case based on abstention falls within the sound discretion of the district Court. *Id.*

C. Elements not supported by Complaint: In an effort to streamline these proceedings, Defendants address abstention generally, considering each principal of our federalism set forth above. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987) (addressing *Pullman*, *Younger*, and *Rooker-Feldman* abstention simultaneously because "the various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases.")

element (i): As demonstrated in the motion to dismiss, Colorado has a compelling interest in enforcing its public accommodation laws and, under state statute, Plaintiffs' claims may be properly adjudicated in administrative forums and state courts if a complaint is ever filed. The Court must presume that these State remedies are both adequate and a proper arena to settle the federal constitutional question asserted by Plaintiffs. *Pennzoil*, 481 U.S. at 15 ("[a]ccordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.").

element (ii): *Masterpiece Cakeshop* involves identical claims to those here, has not yet been fully adjudicated, and is pending before the United States Supreme Court on Plaintiff's counsels' certiorari review **(# 5)**. The Supreme Court

has approved staying a declaratory action in district court while another district court decides a similar request for declaratory relief, although brought by a different plaintiff. *Landis v. North America Co.*, 299 U.S. 248, 254 (1936). This rule applies with even more force when the first filed declaratory action is pending before the Supreme Court. Importantly, should the Supreme Court grant certiorari, any decision by this Court would become advisory. This alone counsels a stay. *See Pennzoil*, 481 U.S. at 11 n.9. ("[i]n some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised.").

Identity of parties: Plaintiffs argue that the parties in parallel litigation must be identical before abstention applies. The Supreme Court has expressly rejected this contention. *Landis*, 299 U.S. at 254 ("we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical"). Instead, any "formula" that would limit stays to matters where identical parties are involved "is too mechanical and narrow." *Id.* at 255. The potential harms that may befall one plaintiff while a second court decides the same issue raised by a second plaintiff "are counsels of moderation rather than limitations upon power" to enter a stay. *Id.* Given that Plaintiffs have not taken any concrete steps in furtherance of their website, a stay here will not cause any

harm.

3. Plaintiffs fail to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

A. Burden of proof: Plaintiffs argue for a lower standard of pleading in a § 1983 claim because they sued Defendants in their official, as opposed to individual, capacity **(#43, pp. 21-22)**. However, the standards set forth in *Iqbal/Twombly* must be met to plausibly plead a claim for relief, regardless of whether a lawsuit is brought against a defendant in either capacity. As a consequence, a "pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action" is insufficient; "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Elements: Undisputed.

C. Elements not supported by Complaint:

elements (i)-(iv): Plaintiffs fail to meet the *Iqbal/Twombly* standards and they do not demonstrate with particularity what each Defendant did to deprive Plaintiffs of a recognizable right beyond perfunctory recitals to the elements and conclusory, unsupported statements in the verified complaint. *Iqbal*, 556 U.S. at 678 (citation omitted). Instead, Plaintiffs' 62 page, 399 paragraph complaint, piecemeal together bits of each role a defendant may play in enforcing CADA to summarily claim that each Defendant is ultimately liable for a variety of actions they have no authority to take under CADA, to ultimately conclude a

violation of rights. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (courts should not waste valuable time and resources considering a matter when a plaintiff cannot state a claim for relief).

For example, Plaintiffs vaguely allege at the beginning of their complaint that Defendant Coffman has the "authority to enforce the law at issue" **(#1, ¶27)**.[4] Plaintiffs argue that by merely making this statement, and demonstrating "some connection" to CADA, they satisfy their pleading standard **(#43, pp. 23-24)**. This simply is not true, and would allow any plaintiff to avoid a motion to dismiss by "the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. 678. Here, Plaintiffs allege that Defendant Coffman has a slew of enforcement powers under CADA, including investigating charges of discrimination **(#1, ¶ 42)**; determining probable cause **(#1, ¶ 43)**; holding hearings on charges **(#1, ¶ 44)**; issuing subpoenas **(#1, ¶ 45)**; compelling mediation **(#1, ¶ 46)**; determining whether a person or business violates CADA **(#1, ¶ 47)**; issuing notices of a right to sue **(#1, ¶ 48)**; and issuing cease-and-desist orders **(#1, ¶ 49)**.

Yet, the Attorney General has no such legal authority for these powers under CADA. Nevertheless, Plaintiffs summarily claim that at all times relevant to their complaint "**each and all of the acts alleged [in the complaint] were attributed to**

[4] Plaintiffs mistakenly believe that because they recite this formulaic element, it somehow satisfies the pleading standard **(#43, p. 23)**. However, this bare bone recitation is the exact type of allegation that is insufficient under *Iqbal/Twombly*.

Defendants . . ." **(#1, ¶ 201)** (emphasis added). Plaintiffs not only misstate Defendant Coffman's CADA authority, but they fail to state allegations or claims for relief that plausibly suggest an entitlement to relief because Defendant Coffman's conduct, if hypothetically taken, cannot harm Plaintiffs. Plaintiffs cite *Wilson v. Stoker*, 819 F.2d 943, 945-46 (10th Cir. 1987) for the proposition that they can make general allegations against an official, without demonstrating particularities as to how a defendant is responsible for enforcing the law **(#43, pp. 21-22)**. However, this case is inapposite because the Attorney General in *Wilson* appeared to have actual authority to enforce the law issue, but chose not to (819 F.2d at 946); while here, Defendant Coffman has no authority to enforce CADA against Plaintiffs.

4. Plaintiffs have failed to state a claim under Fed. R. Civ. P. 8.

A. Burden of proof: Undisputed.

B. Elements: Plaintiffs do not dispute the express requirements of Rule 8. Instead, Plaintiffs assert that the requirements of Rule 8 need not be met so long as the complaint provides fair notice of the claims. Plaintiffs cite no Tenth Circuit authority in support.

C. Elements not supported by Complaint:

elements (i) and (ii) : Plaintiffs assert compliance with Rule 8 because Defendants have not picked through hundreds of paragraphs to identify redundancies. On the contrary, Rule 8 is intended to obviate the need to perform

such an exercise. In any event, and as example only, the following 47 paragraphs contain the redundant statement that Plaintiffs' god designed marriage as an institution between one man and one woman: 3, 4, 9, 10, 11, 12, 14, 59, 60, 65, 114, 138, 139, 144, 145, 146, 147, 160, 161, 163, 173, 174, 175, 177, 178, 179, 185, 209, 215, 216, 217, 218, 219, 229, 230, 235, 236, 246, 281, 282, 285, 290, 295, 321, 339, 383, and 387.

Some of the identified paragraphs qualify the statement that it is Plaintiffs' belief that their god designed marriage as an institution between one man and one woman, such as paragraph 9. Other paragraphs state the issue as a matter of fact, such as paragraph 3. Still others state such views are "traditional Christian beliefs," such as paragraph 339. Either way, the State should not be required to admit or deny such assertions.

Finally, Plaintiffs assert that Rule 8 should be limited to lengthy and redundant complaints filed by *pro se* litigants. To the contrary, the court construes *pro se* pleadings liberally, applying a less stringent standard than formal pleadings drafted by counsel. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

Respectfully submitted this 23rd day of November, 2016.

s/ Vincent Edward Morscher

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CERTIFICATE OF SERVICE

I certify that I served the foregoing DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF upon all parties herein by e-filing with the CM/ECF system maintained by the court or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 23rd day of November, 2016, addressed as follows:

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