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' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

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COME NOW Defendants, by and through counsel, and pursuant to Fed. R. Civ. P. 56, who respond to Plaintiffs' motion for summary judgment (**# 48**) as follows.

The reason this litigation was initiated, and the target of Plaintiffs' ire, is a recent decision titled *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015). In *Masterpiece,* the Colorado Court of Appeals interpreted the public accommodations section of the Colorado Anti-discrimination Act (CADA) under similar facts and legal arguments that Plaintiffs raise here, and in lawsuits filed by the same Plaintiffs' counsel in numerous other jurisdictions. Plaintiffs' effort to blame Defendants[1] for the legal interpretation in *Masterpiece*, and their demand for federal court intervention to block the precedent established in *Masterpiece*, is the true purpose of this litigation. Like other jurisdictions that have considered and rejected challenges to similar anti-discrimination legislation, this Court should dismiss Plaintiffs' claims. In the alternative, this Court should defer to the Supreme Court and its consideration of the pending petition for certiorari in the *Masterpiece* case, which will decide the same issues raised in this litigation.

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[1] Plaintiffs continue to lump all Defendants together even though they have separate and unique statutory authority. This is contrary to fundamental pleading requirements articulated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Nevertheless, in order to be consistent in this response, and without waiving any argument, Defendants will be referred to as such, unless otherwise noted.

FACTS

All material facts are contained in the Joint Statement of Stipulated Facts **(# 49)**. Defendants object to Plaintiffs' "Statement of Facts" in "Plaintiffs' Motion for Summary Judgment and Memorandum in Support" **(# 48)** because it violates the Court's January 11, 2017 order. Defendants also object to Plaintiffs' inclusion of non-stipulated facts and the Appendix **(# 48-3)**, as violating the same order.

JURISDICTIONAL ARGUMENTS

A. Plaintiffs fail to allege Fed. R. Civ. P. 12(b)(1) jurisdiction over all claims.

1. Burden of proof and elements

Since this is a court of limited jurisdiction, it is presumed no jurisdiction exists absent an adequate showing it should be invoked. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs allege jurisdiction; therefore they must show it by a preponderance of the evidence. *Id.*

To establish Article III standing, Plaintiffs must show (i) an "injury in fact" that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (ii) the alleged injury must be fairly traceable to the challenged action of the defendant; and (iii) it must be likely, not merely speculative, that a favorable decision will redress the injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*

(TOC), Inc., 528 U.S. 167, 180-81 (2000).

2. Elements that cannot be proven by Plaintiffs

Elements (i) and (ii) – injury in fact traceable to Defendants' action:

Plaintiffs allege throughout their summary judgment motion that Defendants have "applied" CADA to Plaintiffs. (**# 48**). The stipulated facts do not support this. (**# 49**). Instead, Plaintiffs offer a speculative injury, based on a neutral law of general application, and a Colorado Court of Appeals decision interpreting that law. Before Plaintiffs could potentially suffer any injury, ten things must occur:

1. Plaintiffs offer their wedding website service to the public;
2. A person attempts to obtain the service;
3. Plaintiffs deny the service based on the person's sexual orientation;
4. The person denied service files a charge of discrimination with the Colorado Civil Rights Division;
5. The Division investigates the charge and the Director or her designee finds probable cause to credit the charge;
6. Mandatory conciliation is attempted and fails;
7. The Colorado Civil Rights Commission decides to notice the case for hearing;
8. An ALJ holds a hearing and rules against Plaintiffs;
9. The Commission affirms the decision and orders Plaintiffs to cease and desist the discriminatory practice; and;
10. Plaintiffs exhaust their state appellate remedies.

(**# 49, ¶¶ 6-17**); C.R.S. §§ 24-34-306, 307 (2016). Not one of these things has happened. Consequently, there is no injury.

The Supreme Court recently restated its reluctance "to endorse standing theories that require guesswork as to how independent decisionmakers will

exercise their judgment" because 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." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 and 1150 (2013). The Tenth Circuit has routinely applied the *Clapper* analysis to standing questions in First Amendment suits. *See*, *e.g., Cope v. Kansas State Bd. of Educ.*, 821 F.3d 1215, 1222-23 (10th Cir. 2016) (holding that standing did not exist where state education standards that had the potential to establish non-religious views about the cause and nature of life expressly preserved local school districts' authority to determine their own curricula and what curricula would be adopted was speculative, as was any resulting injury); *c.f. Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125-26 (10th Cir. 2013) (finding standing in religious challenge to the Affordable Care Act because failure to comply would result in "immediate tax penalties," but not addressing other grounds for standing based on "potential regulatory action" and "possible private lawsuits").

As to the first mandatory action that must occur, Plaintiffs argue they have not offered their services to the public for fear that Defendants would enforce CADA. (**# 49, ¶¶ 95-96**), Plaintiffs cannot, however, manufacture standing by self-inflicted harm, based on an unrealized fear of a hypothetical future injury that is not pending. *Clapper*, 133 S. Ct. at 1151-52.

Plaintiffs allege injury by presuming Defendants are determined to enforce CADA against them, absent any case ever being filed. On the contrary, Defendants

are statutorily prohibited from predetermining such an outcome. *See* C.R.S. § 24-34-305(3) ("In exercising the powers and performing the duties and functions under parts 3 to 7 of this article, the commission, the division, and the director shall presume that the conduct of any respondent is not unfair or discriminatory until proven otherwise.")

Plaintiffs also allege injury by arguing that Defendants have chilled their free speech rights. Because Defendants have taken no action here, Plaintiffs rely on the public accommodation provisions of CADA and the Colorado Court of Appeals *Masterpiece* decision (**# 49, ¶25**), which intercepted the law.

CADA's public accommodation statutes do not, on their face, prohibit or punish Plaintiffs from publishing a wedding website or posting a message stating that they will not provide the website services to same-sex couples due to Plaintiffs' religious beliefs. (**# 49, ¶¶1-3**). Because Plaintiffs readily admit they have no problem abiding by CADA's public accommodation provisions by providing service to anyone, regardless of their sexual orientation, (**# 49, ¶¶ 64-65**), the statute has not chilled Plaintiffs' speech.

Furthermore, CADA's public accommodations law is a neutral law of general applicability, so it 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 v. United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). Colorado has not only a

legitimate interest, but 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). Indeed, the recent Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) concretely establishes this point:

> [t]he principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . Our decision today provides no such shield. *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*.

Id. (italics added); *see also e.g., Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (religious motivation should not excuse compliance with laws); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group,* 515 U.S. 557, 572 (1995) (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...."); *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (government had a compelling interest in eliminating discrimination against women in places of public accommodation); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("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).

Plaintiffs' reliance on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) for the proposition that CADA's public accommodations law is neither neutral nor generally applicable is misplaced. That case involved an ordinance whose "object" was "suppression of the central element of the ... worship service" of a disfavored religion. *Id.* at 534. The Supreme Court's reasoning there has never been extended to suggest that a generally applicable public accommodations law like Colorado's – which "serves the State's compelling interest in eliminating discrimination," *Bd. of Dirs. Of Rotary Int'l*, 481 U.S. at 549 – cannot be applied to prevent discrimination against same-sex couples or any other identifiable group of customers.[2]

Further, CADA's public accommodations law protects everyone in Colorado from discrimination because of "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry . . ." (**# 49, ¶1**). CADA does

[2] Plaintiffs quote one Colorado Civil Rights Commissioner expressing the opinion that religion has been used to justify discrimination. **(# 48, at p.57; # 48-3**). The Court should disregard the statement for three reasons. First, relying on a statement contained in the Plaintiffs' Appendix violates the Court's January 11, 2017 Order because the statement is not a stipulated fact. Second, the statement did not reflect the views of all Commissioners, nor does it show that CADA, generally or as applied, singles out religious conduct for unfavorable treatment in contravention of *Lukumi*. Third, the statement was made during deliberation of a whether to grant a stay, not in deciding the merits of the case. (**# 49, ¶103, Exs. C, D, and F**).

not target religiously motivated conduct, so it is distinguishable from the ordinance in *Lukumi*.

Plaintiffs additionally seem to argue that Colorado's public accommodations law is not neutral nor generally applicable because Plaintiff Smith should be exempted from CADA's requirements like a church. They argue, she "objects to celebrating same-sex marriage on the same religious grounds as a church, yet the state denies her an exemption from CADA . . ." **(# 48, at pp. 59-60)**. The Colorado Court of Appeals rejected this argument in *Masterpiece.* The bakery admitted that it did not contend that the bakery was used for primarily religious purposes. *Masterpiece*, 370 P.3d at 290-92. Here, there are no stipulated facts to support any assertion that Plaintiff 303 Creative should be exempted from CADA because the business is used for principally religious purposes.[3]

Plaintiffs argue injury based on three non-binding Director's decisions involving three other bakeries that refused to create offensive messages on cakes. **(# 48, pp. 3, 5, 10, 11, 44, 59, 74; # 49)** *see also Masterpiece*, 370 P.3d at 282, n. 8. The Director found no probable cause and the Commission denied their appeals. **(# 49, ¶¶ 28, 103, Exhibits G-L)** Those decisions cannot presume that a different

[3] On February 16, 2017, the Washington Supreme Court unanimously rejected *en banc* the same types of challenges to the state's anti-discrimination laws Plaintiffs' counsel made concerning a florist who refused to provide flower arrangements for a same-sex couple's wedding. *See State of Washington v. Arlene's Flowers, Inc.*, 2017 Wash. LEXIS 216 at **36-40 (Wash. Feb. 16, 2017).

result would occur here, especially because the actions of the Director and Commission in those matters have no binding precedent or effect. *See AT&T Techs. Inc. v. Royston*, 772 P.2d 1182, 1186 (Colo. App. 1989) (Directors' probable cause findings are only administrative determinations and are not binding); *Demetry v. Colorado Civl Rights Comm'n*, 752 P.2d 1070, 1072 (Colo. App. 1988) (these preliminary proceedings are without legal effect until a suit is brought and Commission's denial does not constitute a final agency action subject to appeal).

Finally, Plaintiffs argue standing under *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014), *Cressman v. Thompson*, 719 F.3d 1139 (10th Cir. 2013) and *Ward v. Utah*, 321 F.3d 1263 (10th Cir. 2003). All three cases are distinguishable because the laws at issue in *Susan B. Anthony List , Cressman* and *Ward* explicitly prohibited specific types of speech, and subjected the speaker to criminal liability for violating those laws. CADA prohibits only conduct, i.e. businesses may not refuse to serve persons based on a person's protected class, or inform the public they will refuse service to persons based on a protected class. **(# 49, ¶¶1-3).** CADA does not prohibit or criminalize speech.

Element (iii) - favorable decision will address injury.

Pursuant to § 24-34-602(1)(a), C.R.S., any person denied a public accommodation may initiate their own independent civil action in state court without ever filing a charge with the Division. **(# 49, ¶¶4-5)**. If a person does so, he or she is prohibited from filing a charge of discrimination with the Commission.

See § 24-34-602(3) ("relief provided by this section is an alternative to that authorized by § 24-34-306(9), and a person who seeks redress under this section is not permitted to seek relief from the commission."). An injunction against Defendants will not prevent anyone from initiating an independent civil action against Plaintiffs to enforce CADA's public accommodation provisions regarding sexual orientation. No facts support a contrary result.

SUBSTANTIVE ELEMENTS THAT PLAINTIFFS CANNOT ESTABLISH

A. Plaintiffs fail to show CADA violates Plaintiffs' free speech rights

1. Burden of proof and elements

a. CADA does not compel or restrict Plaintiffs' speech.

Plaintiffs allege CADA forces them to create wedding websites for same-sex couples in opposition to Plaintiffs' personal religious beliefs or otherwise restricts them from being critical of same-sex marriage by punishing them for refusing to create such websites. Plaintiffs cannot succeed on the merits.

i. The Supreme Court recognizes two types of compelled speech.

The compelled speech doctrine first articulated in *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), applies in two scenarios. First, government is generally prohibited from requiring an individual "to speak the government's message." *See Rumsfeld v. Forum for Acad. & Institutional Rights,*

Inc., 547 U.S. 47, 63 (2006). Second, the government may not generally require an individual to "host or accommodate another speaker's message." *Id.* Neither scenario exists here.[4]

ii. CADA does not compel Plaintiffs to speak the government's message.

CADA does not compel Plaintiffs to speak in favor of or against same-sex weddings. CADA merely requires that Plaintiffs not discriminate against customers as it concerns the "full and equal enjoyment of the goods, services, facilities, privileges . . . of a place of public accommodation." *See* § 24-34-601(2)(a), C.R.S., (2016); *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.").

Contrary to *Barnette*, 319 U.S. at 642, and *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977), and as recognized in *Masterpiece,* CADA does not compel a vendor to convey a particular message for or against same-sex weddings; only, that it treat

[4] Plaintiffs' Motion, case citations, and arguments contained therein appear to focus on the second line of cases. However, Defendants will address the first scenario to the extent Plaintiffs are, indeed, raising a substantive issue with the first line of cases.

same-sex couples the same as opposite sex couples with the "full and equal enjoyment of the goods, services, facilities, privileges . . . of a place of public accommodation." *See* § 24-34-601(2)(a), C.R.S., (2016); *Masterpiece,* 370 P.3d. at 286; *see also e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53m, 64 (N.M. 2013) (New Mexico's anti-discrimination law "only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation."); *Brush & Nib Studio*, CV 2016-052251, (Superior Court of Arizona, Maricopa County, Sept. 16, 2016) (holding that the City of Phoenix's anti-discrimination law did not require plaintiffs to speak any message, nor did it prohibit plaintiffs from stating their religious views concerning same-sex marriage).

iii. CADA does not compel Plaintiffs to host or accommodate another speaker's message.

Plaintiffs rely on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), to support their position that Plaintiffs are entitled to choose the content of their own message and CADA cannot compel them to express an unwanted message. In *Hurley*, a private, non-profit group that organizes the Boston Saint Patrick's Day parade denied the Gay, Lesbian and Bisexual Group of Boston's (GLIB) application to march in the parade. *Id.* at 561. The Massachusetts courts concluded that the parade sponsors violated the state's law prohibiting discrimination in places of public accommodation. *Id.* at 561, 563-64. On review,

the Supreme Court first noted that public accommodation laws generally do not violate the First and Fourteenth Amendments, because the focal point of their prohibition is "on the act of discriminating against individuals," not to target speech. *Id.* at 572. It held, however, that because the parade sponsors were required to include GLIB, the state courts were effectively requiring them "to alter the expressive content of their parade," in violation of the First Amendment. *Id.* at 572-73. In other words, the Supreme Court found that the government improperly attempted to apply public accommodation law to "speech itself." *Id.* at 573.

Here, however, § 24-34-601(2)(a), applies only to Plaintiffs' business operation, and their decision to refuse to serve persons based on their sexual orientation. This type of statute does not fall under *Hurley's* purview. *See e.g., Elane Photography*, 309 P.3d at 68 (distinguishing *Hurley*, and stating, "Defendants cite no reported decision extending the holding of *Hurley* to commercial enterprise carrying on a commercial activity."); *Masterpiece*, 370 P.3d at 287 (distinguishing *Hurley*).

Similarly, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), do not support Plaintiffs' position. In both cases, the government required a speaker to disseminate a third-party message along with its own protected speech. *Tornillo*, 418 U.S. at 257-58 (rejecting law that compelled newspapers to print responses from political candidates who had been criticized in editorials);

Pacific Gas & Electric, 475 U.S. at 9-14 (rejecting law that compelled utility company to include copies of a specific environmentalist publication with bills sent to customers).

Both cases are inapplicable to the stipulated facts because CADA does not mandate a message in support of same-sex marriage or any message. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Supreme Court rejected arguments by law schools that a statue requiring them to provide access to military recruiters equal to other recruiters violated their freedom of speech by forcing them to accommodate or host another speaker's message. *Id.* at 52-60. Instead, the Court found that the statute regulated "what law schools must *do* . . . not what they may or may not say." *Id.* at 60 (emphasis in original); *see also e.g., 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.").

In *Elane Photography,* 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." 309 P.3d at 65-66. The court held that its public accommodations law did not compel the photographer to convey any particularized message, 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." *See* 309 P.3d at 64. The United States Supreme Court unanimously rejected the petition for writ of certiorari on April 7, 2014. *See Elane Photography, LLC v. Willock*, 134 S. Ct. 1787 (2014).

In, *Masterpiece*, the Colorado Court of Appeals held that § 24-34-601(2)(a), of CADA did not force the baker to host or accommodate any particular view on marriage. CADA required only that the baker offer the same services to its customers regardless of their sexual orientation. *Masterpiece*, 370 P.3d at 63 ("Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally."); *Rumsfield,* 547 U.S. at 64-65 (rejecting law school argument that forcing them to treat military and nonmilitary recruiters the same compels them 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.").

iv. Any message conveyed would be attributed to the party being married, not Plaintiffs.

Further, to the extent any message is conveyed at all, reasonable observers would attribute that message to the individuals being married, not Plaintiffs. *Masterpiece*, 370 P.3d at 286 ("[T]o the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message

is more likely to be attributed to the customer than to Masterpiece."); *Rumsfield,* 547 U.S. at 64-65; *Elane Photography*, 309 P.3d at 69-70 ("It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom."); *Arlene's Flowers, Inc.,* 2017 Wash. LEXIS 216 at **28-32 (holding that decision to provide or refuse to provide flowers for a wedding does not inherently express a message about a particular wedding).

Masterpiece recognized that because vendors like Plaintiffs charge for their services, it reduces "the likelihood that a reasonable observer will believe that [Plaintiffs] support the message expressed in [their] finished product." *Masterpiece*, 370 P.3d at 287. To this end, Plaintiffs' website design service is also not constitutionally protected speech. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends to thereby express an idea.").

Under Plaintiffs' logic, any number of persons providing services to the public, such as architects, chefs, hair stylists, baristas, etc., could refuse service to same-sex couples on the basis of their religious belief under the auspices that their services are artistic and creative. This is a slippery slope that has been rejected by a number of courts on the basis that antidiscrimination laws target conduct, not

speech. *See e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.").

b. CADA does not affect Plaintiffs' free press rights.

Plaintiffs' speech is not chilled, as they allege, and they are not required to espouse a particular viewpoint on same-sex marriage merely because the law requires service to same-sex and opposite sex couples equally. *Masterpiece* held that § 24-34-601(2)(a), of CADA does not prohibit a for-profit vendor from expressing its views on same-sex marriage; it does not prohibit a vendor from expressing its religious opposition to it; and a vendor remains free to disassociate itself from its customers' viewpoints. *Masterpiece,* 370 P.3d at 288.

Plaintiffs remain 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." *Id.*; *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 at 47 ("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 and opposite-sex customers alike). As such, there is no violation of the free press clause.

c. CADA does not affect Plaintiffs' rights of expressive association.

Plaintiffs also allege CADA forces them to violate their freedom of expressive association because it requires Plaintiff Smith to agree with a viewpoint contrary to her religious belief or to stop collaborating with individuals who share her view that marriage can be only between a man and a woman.

CADA does not prohibit, limit, or otherwise impinge Plaintiff Smith's right to associate with anyone who does or does not share her religious views. Indeed, Plaintiff Smith can attend any church, practice any form of religion, or belong to any group that wishes to espouse views against same-sex marriage, as she desires. Furthermore, even if there was the slightest infringement on Plaintiffs' expressive association, which there is not, Plaintiffs' rights would be justifiably curtailed because CADA serves the compelling interest of prohibiting discrimination, entirely unrelated to the suppression of ideas. *See e.g., Arlene's Flowers, Inc.*, 2017 Wash. LEXIS 216 at **54-55 (rejecting plaintiff's expressive association claim noting that "the Supreme Court has never held that a commercial enterprise, open to the general public, is an 'expressive association' for purposes of First Amendment protections.").

d. CADA does not violate the equal protection clause.

Plaintiffs' refer to three non-binding determinations resulting from charges of discrimination filed by a person alleging discrimination based on creed against bakeries that declined to produce cakes with specific messages. **(# 49, ¶ 28).** They claim an equal protection violation based on some of the Defendants actions in these cases, and their actions in the *Masterpiece*. The argument is unavailing for three reasons.

First, Plaintiffs have no idea how many determinations the Director or Commission have issued or reviewed, or what the facts and allegations of those charges were, since those matters are confidential and not subject to public disclosure. *See* C.R.S. § 24-34-306(3) (Commission and staff may not disclose filing of charge or actions on charges unless notice for public hearing). **(# 49, ¶ 103, J-L).**

Second, as discussed previously, Director's findings of probable cause or no probable cause are not quasi-judicial rulings and only non-binding administrative determinations reached without the benefit of a hearing. *AT&T Techs. Inc.*, 772 P.2d at 1186 (Colo. App. 1989). Since these decisions have no binding precedent or effect, Plaintiffs cannot show unequal treatment.

Third, the Colorado Court of Appeals distinguished the three bakeries in *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 containing derogatory, offensive messages. *Id.*

e. CADA survives strict scrutiny.

Plaintiffs claim that CADA does not survive strict scrutiny. However, as discussed above, CADA is a neutral law of general applicability, which is not subject to strict scrutiny. Even assuming, *arguendo*, that strict scrutiny applies to CADA, CADA would survive strict scrutiny because it furthers a compelling interest and is narrowly tailored to that interest. As discussed above, CADA serves a compelling state interest in eradicating discrimination in places of public accommodation. Moreover, CADA is narrowly tailored to achieve this purpose for the reasons discussed herein.

Plaintiffs argue that because there are other website designers who are willing to serve same-sex couples with wedding designs, Defendants do not have a compelling interest in CADA's public accommodations law because same-sex couples can go somewhere else to obtain those types of services. (**#48, pp. 72-73**). This same argument was made by Plaintiffs' counsel in the *Arlene's Flowers* case, and "emphatically" rejected by the Washington Supreme Court. *Arlene's Flowers, Inc.*, 2017 Wash. LEXIS 216 at *53.

Here, Plaintiffs' argument not only strains credulity, it devalues the purpose of Colorado's anti-discrimination laws, which the State has a compelling interest in eradicating discriminatory behaviors. *Id.* ("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.").

B. Plaintiffs fail to show CADA violates Plaintiffs' due process rights.

Plaintiffs argue that CADA violates their procedural due process rights because the terms "unwelcome, objectionable, unacceptable, or undesirable" in C.R.S. § 24-34-601(2)(a) are impermissible vague. Plaintiffs also argue that CADA violates Plaintiff's Smith's substantive due process rights because the statute deprives her to own and operate a business. Neither argument is correct for four reasons.

First, 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. Board of County 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)). As demonstrated throughout this response, Plaintiffs have not identified any action by the Defendants against Plaintiffs. Instead, any harm suffered by Plaintiffs is self-inflicted based on a misinterpretation of the *Masterpiece* decision. Thus, Plaintiffs do not satisfy this basic requirement of a due process claim.

Second, the "void for vagueness" doctrine applies where the government deprives a person of life or liberty under a law "so vague that if fails to give ordinary people fair notice of the conduct it punishes, or so standardless that in invites arbitrary enforcement." *Johnson v. United States*, 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").

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."[5]

[5] https://www.merriam-webster.com/dictionary.

Indeed, the United States District Court for the Southern District of Iowa recently rejected an identical argument by Plaintiffs' counsel regarding the terms "unwelcome, objectionable, not acceptable, or not solicited" as contained in Iowa's antidiscrimination laws. *Fort Des Moines Church of Christ v. Jackson*, 16-cv-00403-SMR-CFB, 2016 U.S. Dist. LEXIS 143677, *50 (S.D. Iowa Oct. 14, 2016) ("Though not perfect, the terms sufficiently describe messages of limited access to a public accommodation's good or services based on membership in a protected class."). [6]

Third, substantive due process only applies to fundamental interests. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 768 (10th Cir. 2008). There is no fundamental right to carry on a business. Fundamental rights include "the right to marry, to have children, to direct the education and raising of one's own children, to marital privacy, to use contraception and obtain abortions, and to bodily integrity. *Id.* at 770-71. While economic well-being may be protected by procedural due process, it is not a fundamental right. *Lambert v. Hartman*, 517 F.3d 433, 444 (6th Cir. 2008), cert. denied, 129 S. Ct. 905 (2009). Similarly, there is no fundamental right to practice a chosen profession. *Younger v. Colorado State Bd. of Law Exam'rs*, 625 F.2d 372, 377 n.3 (10th Cir. 1980). If there is no fundamental right to

[6] In contrast, Plaintiff's rely on and quote from the decision of *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001). However, in that case the Third Circuit did "not reach the merits of Saxe's vagueness claim." *Id.* at 40.

economic well-being or to practice a chosen profession, then there is no fundamental right to carry on a particular business, such as designing wedding websites. And, while practicing one's religion may be a fundamental right, the Defendants have not impinged on that right in the least.

Fourth, assuming that Plaintiffs' could identify a fundamental right, they cannot meet the standard for establishing a substantive due process violation. "[T]he standard for judging a substantive due process claim is whether the challenged government action would 'shock the conscience of federal judges.'" *Uhlrig v. Harder*, 64 F.3d 567, 573 (10th Cir. 1995) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 126, (1992)), cert. denied, 516 U.S. 1118 (1996). To satisfy this standard, "a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power." *Id.* at 574. Instead, Plaintiffs "must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Id.* As example, under these principals courts have found a violation when school officials paddle a nine-year-old until the paddle breaks and blood soaks through her clothes, but not when school officials force a mentally disabled ten-year-old to clean out a clogged toilet with his bare hands. *See Perry v. Taser Int'l Corp.*, 07-cv-00901-REB-MJW, 2008 WL 961559, *2 (D. Colo. April 8, 2008) (comparing various cases to address what rises to the level of a substantive due process violation). Here, there is no stipulated fact establishing that any of the

Defendants have engaged in conscience-shocking conduct.

PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF

A. Plaintiffs will not suffer irreparable harm if the injunction is denied.

1. Burden of proof and elements

"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). Irreparable harm is not harm that is "merely serious or substantial." *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). "Establishing irreparable harm is "not an easy burden to fulfill." *Greater Yellowstone Coal v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003).

"[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 U.S. Dist. LEXIS 58077, at *4 (D. Colo. May 2, 2016) (citation omitted). A preliminary injunction should not be granted "against something merely feared as liable to occur at some indefinite time in the future." *See e.g., Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931).

Plaintiffs' injury is speculative, vague, and does not satisfy the heightened legal standard. The Supreme Court recently restated its reluctance "to endorse standing theories that require guesswork as to how independent decisionmakers

will exercise their judgment" because 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." *Clapper*, 133 S. Ct. at 1148 and 1150.

Here, Plaintiffs fail to allege an injury that is certain, great, or actual by Defendants, and only speculates as to what may happen if numerous, theoretical facts occur. These ten mandatory facts, as listed previously, have not yet occurred. The failure of one of these steps to occur results in no injury to Plaintiffs.

B. The balance of equities and the public interest are against issuing an injunction.

Courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Port-a-Pour, Inc. v. Peak Innovations, Inc.*, 49 F. Supp. 3d 841, 873 (D. Colo. 2014) (citations omitted). Under the heightened standard of review, Plaintiffs must make a strong showing that their threatened injury outweighs the injury to the public under the preliminary injunction. *See Heideman*, 348 F.3d at 1190.

Here, Plaintiffs argue, in essence, that Defendants should be enjoined because Plaintiffs' religious belief, speech concerning same-sex marriage, and desire to refuse services to same-sex couples outweigh any interest the State of Colorado has in eliminating discrimination in places of public accommodation.

Plaintiffs' argument is unavailing, and counter to this country's lengthy civil

rights history. As previously mentioned, the United States Supreme Court has recognized, time and time again, that states have a compelling interest in eliminating discrimination, and statutes, like CADA, further that interest.

Furthermore, the Supreme Court has also held that using religion to perpetuate discrimination against individuals, and violate a state's laws, is inappropriate. *Reynolds*, 98 U.S. at 166-67 (noting that religious motivation should not excuse compliance with laws); *United States 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 while defendant had a constitutional right to espouse the religious views of his choosing, 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.") (citation omitted).

C. Plaintiffs cannot meet the heavy burden required for a disfavored injunction.

Plaintiffs' requested injunction would alter the status quo and is, as such, disfavored and subject to a heightened standard. "[T]he limited purpose of a preliminary injunction 'is merely to preserve the relative positions of the parties until a trial on the merits can be held.'" *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (quoting *O Centro Espirita v. Ashcroft*, 389 F.3d 973, 977 (10th Cir. 2004). Plaintiffs ask this Court to bar Defendants from enforcing Colorado's public accommodation law so that they can discriminate against same-sex couples on the basis of their religious beliefs.

When a movant asks for a disfavored 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." *Id.* (quoting *O Centro Espirita*, 389 F.3d at 975). In such cases, Plaintiffs "[h]ave a heightened burden of showing that the traditional four factors weigh heavily and compellingly in its favor before obtaining a preliminary injunction." *See 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) (noting that a movant must make a "strong showing" with

regard to likelihood of success on the merits and with regard to the balance of harms).

ABSTENTION ARGUMENT

A. Abstention mandates dismissal of this action.

1. Burden of proof and elements

Since this is a court of limited jurisdiction, it is presumed no jurisdiction exists. *United State ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Plaintiffs carry the burden to establish jurisdiction by a preponderance of the evidence. *Id.*

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). 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.*

2. Elements that cannot be proven by Plaintiffs

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.")

a. Comity.

As identified previously, the United States Supreme Court has held that states have a compelling interest in eliminating discrimination through use of public accommodation laws. Further, a federal court should not interfere with state officers in exercising their duties under such laws. See *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943).[7]

Pursuant to Colorado law, Plaintiffs' claims may be properly adjudicated in administrative forums and state courts. A federal court must presume that these state remedies are both adequate and a proper arena to settle federal constitutional questions. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)

[7] Colorado's compelling interest in enforcing CADA and not subjecting persons participating in the process to liability is reflected in state law which provides that Commissioners and persons "participating in good faith in the making of a complaint or a report or in any investigative or administrative proceeding" authorized by CADA, "shall be immune from liability in any civil action brought against him for acts occurring while acting in his capacity as a commission member or participant." §24-34-306(13), C.R.S.

("Accordingly, 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."). There is simply no reason to subject Colorado and its officers to federal jurisdiction where the issues raised herein, involving both state law and a compelling state interest, could be resolved through state proceedings.

b. Efficient federal judiciary.

Masterpiece involves identical claims to those here, it has not yet been fully adjudicated, and is pending before the United States Supreme Court on Plaintiff's counsels' request for certiorari review. Plaintiffs are essentially asking this Court to overrule *Masterpiece*, which is not appropriate relief from a district court and the court should abstain. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 412 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Further, addressing the same issues in multiple jurisdictions is not favored. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). Where separate actions seek similar declaratory relief, identity of parties is not necessary for abstention to apply. *Landis v. North America Co.*, 299 U.S. 248, 254 (1936) ("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 harm that may befall one plaintiff in one court 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.*

Importantly, should the Supreme Court grant certiorari in *Masterpiece*, any decision by this Court would become advisory. This alone counsels a stay. *See Pennzoil*, 481 U.S. at 11 n.9. ("In 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.").

CONCLUSION

Plaintiffs request to enjoin Defendants "and anyone acting in concert with them" from enforcing a neutral law of general application must be rejected. Defendants have never taken any action against Plaintiffs. The entirely of their dispute is with the interpretation of Colorado's public accommodation law by a Colorado appellate court. This forum is not the place to resolve that quarrel.

Defendants respectfully request that the Court deny all relief sought and dismiss this matter.

Respectfully submitted this 22nd day of February, 2017.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT 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 22nd day of February, 2017, addressed as follows:

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