IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation, et al.,
Plaintiffs,
v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities, et al.,
Defendants.

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**STATE OFFICIALS' RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION**

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Defendants, collectively referred to as the State Officials, respond to Plaintiffs' motion for preliminary injunctive relief, Doc. 57, as follows.

## PRELIMINARY INJUNCTION STANDARD

Although Plaintiffs correctly articulate the four required elements for a preliminary injunction, Doc. 57, pp. 7-8, none is satisfied here. Because "a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Schrier v. Univ. Of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (quotation omitted). The plaintiff bears the burden of proof to demonstrate that *each* factor tips in his favor. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188–89 (10th Cir. 2003). The injunction requested here falls into two specifically disfavored categories. It both alters the status quo and is mandatory because it requires certain of the State Officials to halt their ongoing civil enforcement action against Plaintiffs. As a result, the motion "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Schrier*, 427 F.3d at 1259.

## ARGUMENT

### I. Plaintiffs do not have a substantial likelihood of success on the merits.

The State Officials' motion to dismiss, Doc. 64, exposed insurmountable jurisdictional hurdles requiring complete dismissal of the Amended Complaint, Doc. 51. This Court is thus unlikely to ever reach the merits of Plaintiffs' claims, let alone rule in their favor. But even if the Court reviews the merits, their claims are not substantially likely to succeed.

#### A. Plaintiffs' Free Exercise claim fails as a matter of law.

The Amended Complaint asserts an as-applied challenge against Colorado's Anti-discrimination Act, §§ 24-34-301 to –804, C.R.S. (2018) ("CADA"), under the Free Exercise Clause. Doc. 51, ¶ 354. Plaintiffs assert that the State Officials' interpretation and enforcement of § 24-34-601(2)(a) targets, shows hostility toward, and discriminates against them because of Mr. Phillips' religious beliefs. Doc. 51, ¶ 344. Plaintiffs' argument fails as a matter of law because CADA is a neutral law of general applicability. Nothing in the Supreme Court's earlier decision involving Plaintiffs suggests otherwise. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n* ("*Masterpiece I*"), 138 S. Ct. 1719 (2018).

##### 1. CADA is a neutral law of general applicability that satisfies rational basis review under the Free Exercise Clause.

The First Amendment's Free Exercise Clause does not inhibit the government from enforcing a "valid and neutral law of general applicability." *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 879 (1990) (quotations omitted). Even where such a law imposes a burden on the free exercise of religion, where that burden is "merely the incidental effect of a generally applicable and otherwise valid provision," the First Amendment is not

offended. *Id*. at 878. Were it otherwise, the government would be forced to grant religious exemptions "from civic obligations of almost every conceivable kind." *Id*. at 888. Every citizen would in effect "become a law unto himself." *Id*. at 879 (quotations omitted). This well-settled understanding of the Free Exercise Clause from *Smith* applies equally to religious persons operating a business as a public accommodation. *See Newman v. Piggie Park Enters*., 390 U.S. 400, 402 n.5 (1968) (describing a free-exercise objection to a public accommodations law as "patently frivolous").

CADA comfortably satisfies this standard—it is both neutral and generally applicable because it broadly applies to all places of public accommodation and seeks to eliminate discrimination regardless of motive. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542–43 (1993) ("[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."). Nowhere does CADA's text single out any religion, much less Mr. Phillips' particular religion, for unfavorable treatment. If anything, CADA treats religion *favorably* by exempting from its prohibition churches, synagogues, mosques, and any other place "principally used for religious purposes." § 24-34-601(1), C.R.S. (2018).

As a neutral and generally applicable law, CADA also satisfies First Amendment scrutiny. "A law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). CADA is rationally related to the legitimate government interest of eradicating discrimination in places of public accommodation. Laws like CADA serve not only legitimate interests but "*compelling* interests of the highest

order," including "protect[ing] the State's citizenry from a number of serious and personal harms," ensuring "individual dignity," and securing "wide participation in political, economic, and cultural life." *Roberts v. United States Jaycees*, 468 U.S. 609, 624–25 (1984) (emphasis added); *see also Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 293 (Colo. App. 2015) ("[W]e easily conclude that [CADA] is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation."), *rev'd on other grounds*, 138 S. Ct. 1719 (2018). Because CADA is rationally related to these indisputably legitimate purposes, it satisfies First Amendment scrutiny.

**2. The *Masterpiece I* decision does not help Plaintiffs in stating a Free Exercise claim.**

Plaintiffs' Free Exercise claim relies extensively on past administrative proceedings in *Masterpiece I*, which formed the basis for the U.S. Supreme Court's reversal of the differently-constituted Commission's decision in that civil enforcement action. Doc. 51, ¶¶ 5, 64–80, 141–180. Plaintiffs argue that the State Officials continue to apply CADA inconsistently to them as compared to other Colorado bakeries—a practice the U.S. Supreme Court criticized in *Masterpiece I*. Doc. 57, pp. 10–11. According to Plaintiffs, the State Officials have also acted contrary to the position they took in their U.S. Supreme Court briefing in *Masterpiece I*, namely that Colorado bakeries may legally decline to bake cakes with designs or symbols that their owners deem offensive. *Id.* at 10.

Plaintiffs' reliance on *Masterpiece I* is misplaced for at least four reasons. *First*, the Court in *Masterpiece I* did not abrogate *Smith* or otherwise endorse Plaintiffs' view that the Free Exercise Clause affords them a private right to ignore neutral and generally applicable public accommodations laws such as CADA. To the contrary, the Court explained that although

religious objections to gay marriage are "protected views," they "do not allow business owners … to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." 138 S. Ct. at 1727. This holding is consistent with the Court's long-established view of the Free Exercise Clause. *See United States v. Lee*, 455 U.S. 252, 261 (1982). Contrary to Plaintiffs' view, the *Masterpiece I* Court never intimated that CADA *itself* is anything other than neutral and generally applicable. Nor did the Court suggest that Plaintiffs are forever immune from CADA's reach in future cases. Rather, it foreshadowed the exact opposite. *See id*. at 1732 (stating the adjudication "[i]n this case … concerned a context that may well be different going forward" and that "later cases raising these or similar concerns" will be "resolved in the future").

*Second*, Plaintiffs wrongly presuppose that the State Officials will apply CADA with the same impermissible hostility that caused the differently-constituted Commission's decision in *Masterpiece I* to be set aside. In essence, Plaintiffs suggest that the State Officials may not learn from and improve based on the *Masterpiece I* decision. That is incorrect. A "presumption of legitimacy" is accorded to government officials' conduct. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004); *accord McGarry v. Sec. & Exch. Comm'n*, 147 F.2d 389, 393 (10th Cir. 1945). Yet Plaintiffs seek to apply the *opposite* presumption—that certain of the State Officials will necessarily act with impermissible hostility because his or her predecessors did so. That backwards presumption has no basis in law or fact. Indeed, even when there is a reversal and remand to the *same* trial-level adjudicator, the appellate courts presume that the adjudicator

will correctly and lawfully apply the appellate court's binding guidance on remand.[1] *See Chianelli v. Env't Prot. Agency*, 8 F. App'x 971, 979 (Fed. Cir. 2001) (concluding reassignment request was properly denied because appellant "failed to overcome the presumption of honesty and integrity that accompanies administrative adjudicators"); 73A C.J.S. Public Admin. Law & Procedure § 497 n.19 (courts must presume that administrative officials faithfully followed its remand instructions). The same presumption applies even more forcefully when the adjudicating body on remand is comprised of entirely *new* members, as here.

*Third*, the State Officials have not applied CADA unequally to Plaintiffs in this case or acted contrary to their U.S. Supreme Court briefing in *Masterpiece I*. Their belief otherwise—based on a single sentence quoted out of context from the Commission's *Masterpiece I* brief—is mistaken. Doc. 57, p. 10. The very next sentence in the Commission's brief stated, "But regardless of what messages [Phillips'] products and services might convey, he is not constitutionally entitled to deny a product or service based on a customer's sexual orientation, *when he will sell the same product or service to others*." Doc. 52-33, p. 35 (emphasis added). This is how public accommodations laws like CADA work. Regardless of what subjective message the baker of a two-color cake may learn that the customer wishes to convey, a bakery open to the public is not free to decline a cake order based on the customer's protected characteristics if it would sell an identical two-color cake to someone else. *See Masterpiece I*,

[1] Even if this Court presumes that the *former* Commission members might continue to exhibit hostility towards Plaintiffs in this or future cases—again, a presumption that has no basis in law—no such hostility can be imputed to the *new* slate of Commission members. *Cf. United States v. Sears, Roebuck & Co., Inc*., 785 F.2d 777, 781 (9th Cir. 1986) (stating that reassignment to a different district court judge on remand will advance the "appearance of justice and orderly administration" and cure original judge's improper condemnation of the prosecution); *United States v. Rodella*, 59 F. Supp. 3d 1331, 1335 (D. N.M. 2014) ("[O]ne attorney's bias is not imputed to an entire government agency").

138 S. Ct. at 1733 (Kagan, J., concurring). Here, the Amended Complaint does not allege that Plaintiffs would refuse to bake an identical blue and pink cake for, say, the birthday of a child whose favorite colors are blue and pink. For this reason, the Commission's treatment of Plaintiffs in this case is entirely consistent with its application of CADA in other cases, including the other Denver-area bakeries mentioned in *Masterpiece I.* The requested cakes in those cases included messages that *the bakeries* viewed as offensive to gay persons and which "they would not have made for any customer."[2] *Id.* (Kagan, J., concurring). Contrary to Plaintiffs' assertion, it was not the Commission who deemed the requested cakes offensive; it was the bakeries themselves. Plaintiffs have the same right to decline to bake a cake they deem offensive, such as those with Halloween images, Doc. 51, ¶¶ 114-15, *if they would not bake the same cake for anyone*.

Plaintiffs also insist that the State Officials have treated them differently from other bakeries by "dismiss[ing]" their willingness to sell other products to the complainant, Autumn Scardina. Doc. 57, pp. 10–11. That too is incorrect. As in all public accommodation cases, the Division and Commission considered Plaintiffs' willingness to sell other baked goods to Ms. Scardina to evaluate whether there had been a violation of CADA's "full and equal" service requirement and, if so, the scope of the violation. § 24-34-601(2)(a). A business's decision to withdraw a subset of its offered products from a customer based on his or her protected characteristics is just as much a CADA violation as a total withdrawal. *Cf. Katzenbach v.*

[2] The requested messages included "Homosexuality is a detestable sin," "God hates sin," and an image of two groomsmen holding hands "with a red 'X' over the image. Joint Appendix, pp. 233, 243, 252, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111). In all three cases, the bakeries would not bake cakes bearing such messages or images for anyone, regardless of the requestor's particular creed or other protected characteristics. *Id.* at 231, 240, 249.

*McClung*, 379 U.S. 294, 296 (1964) (applying the Civil Rights Act to a restaurant that allowed white customers to dine in but provided only "take-out service for [African Americans]").[3]

And *finally*, Plaintiffs attempt to import into this case certain parts of the *Masterpiece I* record that the Supreme Court relied on in setting aside the differently-constituted Commission's decision. That effort is improper. Each case must be evaluated on its own merits and without regard to the proceedings in a prior case involving different facts, a different complainant, and an entirely different slate of Commissioners. *See Reighley v. Int'l Playtex, Inc.*, 604 F. Supp. 1078, 1084 (D. Colo. 1985) ("Each case should be judged on its own merits."). The factual allegations in the Amended Complaint that are germane to *this* case fail to state a plausible claim for relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). As indicated, the only allegations involving any of the State Officials' conduct in *this* case center on (1) the Division Director's probable cause finding for Plaintiffs' alleged refusal to serve a transgender woman, and (2) the Commission's decision to set the matter for a de novo administrative hearing. Doc. 51, ¶¶ 182, 211–225, 228–239. But neither the Director's determination, nor the Commission's Notice of Hearing and Formal Complaint, displays any signs of hostility towards Mr. Phillips' religion. *See* Docs. 51-1, 51-2. Nowhere do they characterize, for example, Mr. Phillips' religious objection to baking a cake for Ms. Scardina as "despicable," mere "rhetoric," or the equivalent of "slavery and the Holocaust." *Masterpiece I*, 138 S. Ct. at 1729.

Nor are there more subtle evidences of hostility. The Director's determination makes clear that the probable cause finding was due solely to the bakery's refusal to provide a cake with

[3] Although the *Masterpiece I* Court found that the former Commissioners did not adequately explain their reasoning in distinguishing the other three Denver-area bakeries on this basis, it recognized that factual differences in the cases could require that they "ultimately be distinguished." 138 S. Ct. at 1730.

a blue exterior and pink interior "based on the Complainant's transgender status." Doc. 51-1, p. 4. The determination states that the bakery's employee "initially indicated that she was willing to assist the Complainant with this request." Doc. 51-2, p. 3. But upon learning that Ms. Scardina was transgender and that the birthday cake would be served at an event that also marked the anniversary of her coming out as transgender, the bakery refused her service. *Id.* at 3-4. Unlike the other Denver-area bakeries mentioned in *Masterpiece I*, there was probable cause to find that the denial of service here was based not on the design of the requested cake, but rather on Ms. Scardina's protected status. Indeed, the Amended Complaint admits that the bakery uses different colors to decorate cakes,[4] Doc. 51, ¶ 131, and fails to allege that Plaintiffs would decline to bake a blue and pink cake for a child's birthday party, an expectant mother's baby shower, or any other customer who just happens to request a blue and pink cake.

**3. Plaintiffs' hybrid rights theory does not save their Free Exercise claim.**

Plaintiffs attempt to remove their Free Exercise claim from the *Smith* framework by asserting a "hybrid rights" theory, Doc. 51, ¶ 350; Doc. 57, p. 13, but are not substantially likely to succeed on the merits of this theory. In *Smith*, the Court noted in dicta that it had previously invalidated laws in "hybrid situation[s]" that involve "the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881–82. Whether this announced a new species of constitutional claims is disputed. The hybrid rights doctrine has been described by circuit courts as "controversial," "not binding on lower courts," "illogical," and "untenable."

[4] Plaintiffs incorporate images from and refer to their website throughout the Amended Complaint, Doc. 51, ¶¶ 86, 270-71, 281, so this Court may take judicial notice of its contents. *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007). Several images posted on their website make clear that they will bake cakes in the requested blue and pink color combination. *See* Exhibit 1.

*Grace United Methodist Church*, 451 F.3d at 656 (collecting cases; quotations omitted). Attempting to make sense of the controversial doctrine, the Tenth Circuit has stated that it will apply the supposed hybrid-rights exception only if the plaintiff's independent companion claim possesses a "fair probability, or a likelihood," of success on the merits. *Id.* (quotations omitted). For example, an otherwise invalid Free Speech claim is not "convert[ed]" into a valid claim simply because it is coupled with a Free Exercise claim that *Smith* forecloses. *Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150, 171 (2002) (Scalia, J., concurring in the judgment). Simply put, two losing claims do not equal a winning one. Here, Plaintiffs' hybrid rights theory fails because, as explained below, each of their other constitutional claims fails to state a claim upon which relief can be granted. Their related argument—that the State Officials have created a system of "individualized exemptions" that relies on a subjective test—similarly fails. Doc. 57, pp. 12–13. As explained above, the Division and Commission enforce CADA by applying objective public accommodation principles. A commercial business is free to decline a customer's order that it views as offensive, but only if it would similarly decline the same order for all customers. *Masterpiece I*, 138 S. Ct. at 1733 (Kagan, J., concurring).

### B. Plaintiffs' Free Speech claims fail as a matter of law.

The Amended Complaint asserts a broad array of arguments and theories under the First Amendment's Free Speech Clause, but each fails to state a claim as a matter of law.

#### 1. CADA comports with the First Amendment because it regulates conduct, not speech.

The Free Speech Clause does not preclude Colorado from applying its century-old public accommodation law to forbid discriminatory conduct by businesses engaged in providing goods

and services to the public. *See N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 12–14 (1988); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625–29 (1984). Even if "a considerable amount" of protected First Amendment activity occurs at an establishment, it "does not afford the entity as a whole any constitutional immunity to practice discrimination." *N.Y. State Club Ass'n*, 487 U.S. at 12–13; *cf. Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (recognizing that although law firms engage in protected speech, they have no constitutional right to discriminate in partnership decisions). "[I]t has never been deemed an abridgment of freedom of speech…to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of [speech]." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Put another way, courts recognize that the analytical focus in a Free Speech case centers on what "is being regulated." *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139 (1969). Because it remains possible "to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), a distinction must be drawn between "restrictions on protected expression" and "restrictions on economic activity" or "nonexpressive conduct." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011). For example, if Colorado's law required all cakes to bear the image of the Colorado flag and the message "baked in Colorado," the statute would implicate compelled speech. But if what "is being regulated" is a "business or commercial practice[]," then freedom of speech is not infringed, even if the business of the regulated party implicates the First Amendment. *Citizen Publ'g Co.*, 394 U.S. at 139. That is why a ban on race-based hiring can require employers to remove signs declaring "White Applicants Only," *FAIR*, 547 U.S. at 62, a public health statute can force the closure of an adult

bookstore that is "used for prostitution," *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), and an "ordinance against outdoor fires" can forbid "burning a flag," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992).

Against this backdrop, it is unsurprising that the U.S. Supreme Court has repeatedly held that a business's refusal to sell goods or services based on a customer's protected characteristics is commercial conduct subject to prohibition. "The Constitution does not guarantee a right to choose customers…without restraint from the State. A shoekeeper has no constitutional right to deal only with persons of one sex." *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment); *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241, 259 (1964) ("[A]ppellant has no 'right' to select its guests as it sees fit, free from governmental regulation."). CADA's restriction on the discriminatory practice of refusing customers based on protected characteristics thus falls squarely into the category of a permissible regulation of economic activity. It applies equally to all Colorado businesses that open their doors to the public, whether they sell arguably "expressive" goods like family portraits or utilitarian items like office supplies. It regulates what businesses "must *do*—afford equal access [to customers]—not what they may or may not *say*." *FAIR*, 547 U.S. at 60. Accordingly, the first and second clauses of § 24-34-601(2)(a) regulate only conduct, not speech.

**2. Any message conveyed by a blue and pink cake is not attributable to the baker or bakery.**

Plaintiffs' Free Speech claim hinges on this Court accepting their allegation that baking a cake is expressive activity attributable to the baker or bakery. That allegation is not plausible in the retail context presented here, so there is no need for the Court to decide whether baking a cake might constitute attributable expression in *another* context. To garner First Amendment

protection, the speaker must intend to "convey a particularized message" and the likelihood must be "great" that the message will be "understood by those who view[] it." *Texas v. Johnson*, 491 U.S. 397, 405 (1989). Applying this principle, the U.S. Supreme Court has repeatedly held that the message conveyed must be reasonably attributable to the person seeking First Amendment protection. For example, the First Amendment was not implicated by: the speech of military recruiters at a law school that was not generally attributable to the school itself, *FAIR*, 547 U.S. at 64–65; the views of pamphleteers at a public shopping center that were "not likely [to] be identified with those of the [center] owner," *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); or the speech of a high school Christian group meeting on school grounds that was unlikely to be confused with the school's "state sponsorship of religion," *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1996).

Here, the same attribution principle applies. To the extent a blue and pink cake baked and sold by a retail bakery conveys any particularized message at all (the State Officials do not concede the point), it conveys only the message of the retail *customer* who purchased it, not the baker. Selling a wedding cake to a Muslim couple, for example, does not demonstrate the baker's endorsement of Islamic beliefs about marriage. *See Mergens*, 496 U.S. at 250 ("The proposition that schools do not endorse everything they fail to censor is not complicated."). So too here. No person viewing a blue and pink cake served at Ms. Scardina's birthday party would reasonably attribute Ms. Scardina's views on sex or gender identity to the baker or bakery. Courts routinely apply this uncontroversial mode of analysis to commercial mediums that are significantly more expressive than cake making. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 69

(N.M. 2013) (photography); *Nathanson v. Mass. Comm'n Against Discrimination*, 16 Mass. L. Rptr. 761, 2003 WL 22480688, *6 (Mass. Super. Sept. 16, 2003) (attorney advocacy).

**3. Even assuming CADA implicates the expressive aspects of baking cakes, the effect is incidental; CADA satisfies *O'Brien*.**

The first and second clauses of § 24-34-601(2)(a) do not trigger any level of First Amendment scrutiny because they regulate only commercial conduct, not speech, and any arguable speech is not attributable to Plaintiffs. *See FAIR*, 547 U.S. at 61–62, 66 (holding that an equal-access requirement, like an anti-discrimination law, does not implicate expressive conduct); *Arcara*, 478 U.S. at 707 (stating *O'Brien* has "no relevance" to statute imposing sanctions on "nonexpressive activity"). But even assuming § 24-34-601(2)(a)'s first and second clauses affect the expressive aspects of baking cakes, the effects are permissible because they are incidental to the goal of nondiscrimination. *See United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). Thus, the most demanding First Amendment scrutiny that may apply here is the four-prong test from *O'Brien*.[5] Each prong is satisfied here.

The first *O'Brien* prong asks whether the challenged law is "within the constitutional power of the Government." *Id.* at 377. The U.S. Supreme Court's decisions confirm that Colorado may forbid commercial entities from refusing to sell goods or services based on a

[5] As a result, Plaintiffs are wrong to suggest that strict scrutiny is the appropriate test. Doc. 57, pp. 19–22. But even assuming strict scrutiny could apply (it does not), that more demanding standard is also met. *See* Doc. 52-33 (Exhibit 31 to Plaintiffs' Motion for Preliminary Injunction), pp. 55–62.

customer's protected characteristics. *E.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995); *Roberts*, 468 U.S. at 625. The second prong asks whether the challenged law "furthers an important or substantial government interest." *O'Brien*, 391 U.S. at 377. Again, CADA furthers not just important or substantial interests but "compelling interests of the highest order" when applied to a discriminatory denial of service by a commercial entity. *Roberts*, 468 U.S. at 624; *accord Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). The third prong asks whether "the government interest is unrelated to the suppression of free expression." 391 U.S. at 377. A State's "commitment to eliminating discrimination and assuring…citizens equal access to publicly available goods and services…is unrelated to the suppression of expression." *Roberts*, 468 U.S. at 624. As such, when public accommodations laws are applied to a commercial entity's sale of goods and services, they are both content and viewpoint neutral. *E.g.*, *Hurley*, 515 U.S. at 572 (explaining that public accommodations laws do not regulate "on the basis of…content"); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (explaining that "federal and state antidiscrimination laws" are "permissible content-neutral regulation[s]"); *Duarte*, 481 U.S. at 549 (stating public accommodations laws "make[] no distinctions on the basis of [an] organization's viewpoint"). Finally, the fourth prong requires a tailoring inquiry. *O'Brien*, 391 U.S. at 381–82. It asks whether a law's objective would "be achieved less effectively absent the regulation." *FAIR*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The question is not whether other means of pursuing the objective "might be adequate," only whether the law "add[s] to the effectiveness" of the government's goal. *Id.* at 67–68. Allowing businesses to lawfully discriminate in selling goods and services to the public would greatly lessen CADA's

efficacy; here, it would single out transgender persons for *unfavorable* treatment, contravening CADA's goal of equal treatment in Colorado's marketplace.

**4. Plaintiffs' as-applied Free Speech challenges fail as a matter of law.**

Plaintiffs level as-applied challenges to all three clauses of § 24-34-601(2)(a). Doc. 51, ¶ 388. They seek preliminary relief under two as-applied theories: the State Officials' application of CADA allegedly (1) compels Plaintiffs to speak in violation of their religious beliefs, Doc. 57, pp. 13–22 ; and (2) amounts to content and viewpoint based discrimination, *id*. at 19–20. Both theories fail as a matter of law.

***Compelled Speech***. The compelled speech doctrine prevents the government from prescribing "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or forc[ing] citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The doctrine achieves this goal by both forbidding government actors from selecting a factual or ideological message and then forcing a person to speak or host it, *FAIR*, 547 U.S. at 62; *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988), and protecting private forums, like a newspaper, from being forced to disseminate the messages of a favored speaker. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

In this case, Plaintiffs seek to "stretch" the doctrine "well beyond the sort of activities [it] protect[s]." *FAIR*, 547 U.S. at 70. Neither CADA, nor the Division Director and Commission's actions, dictate what Plaintiffs must say through their cakes. As explained above, the first and second clauses of § 24-34-601(2)(a) regulate only commercial conduct, not speech. Plaintiffs remain free under CADA to bake and sell cakes with "anti-transgender" designs or inscriptions,

as well as to *decline* cake orders for "pro-transgender" designs or inscriptions. *See* Doc. 51, ¶¶ 67–68. But regardless of what messages they choose to express through cake, Plaintiffs are not legally entitled to deny a transgender woman the same blue and pink cake that they would bake and sell to someone else.

Plaintiffs' compelled speech argument also relies on *Hurley*, 515 U.S. 557, and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the only U.S. Supreme Court decisions that have invalidated the application of public accommodations laws on free speech grounds. But those cases are inapposite because neither arose in the public accommodation context presented here. In *Hurley*, Massachusetts' courts held that a private, non-commercial association, formed exclusively to organize a parade celebrating Boston's Irish heritage, was required under its public accommodations law to include in the parade another private, non-commercial association, the Irish-American Gay, Lesbian, and Bisexual Group of Boston, or "GLIB." 515 U.S. at 559–61, 570, 581. GLIB sought to "communicate its ideas as part of the existing parade, rather than staging one of its own," and it sought to be admitted "as its own parade unit carrying its own banner," communicating its message of "pride…as openly gay, lesbian, and bisexual individuals." *Id*. at 561, 570, 572.

The U.S. Supreme Court reversed, concluding that the First Amendment does not allow the "expressive content of [a] parade" to be altered in this way. *Id*. at 572–73. The Court explained that a parade is a "pristine" and "classic" form of core expression—a "public drama[] of social relations," comparable to "a speaker who takes to the street corner to express his views." *Id*. at 568–69, 579 (quotations omitted). Requiring inclusion of GLIB and its expressive message would require the private organizers to "alter the expressive contents of their parade,"

contrary to the First Amendment. *Id*. at 572–73. But the *Hurley* Court emphasized that its holding turned on the critical fact that the parade, its organizers, and their speech were part of a private organization, describing them as "private" at least seven times. *See id*. at 559, 566, 569, 572–74, 576, 580–81. The Court never once called into question the "focal point" of public accommodation laws in the commercial sphere; instead, it explicitly approved their application to prohibit "discrimination against individuals in the provision of publicly available goods, privileges, and services." 515 U.S. at 572, 528. Far from endorsing Plaintiffs' myopic view of CADA and other public accommodation laws, *Hurley* rejected it.

Their argument fares no better under *Dale*. There, the New Jersey Supreme Court applied its state public accommodations law to the Boy Scouts—a "private, nonprofit organization" whose mission is to "instill values in young people." 530 U.S. at 649 (quotations omitted). After the Boy Scouts excluded a gay man from a leadership role, the state court ordered the Boy Scouts to maintain him in that role. The U.S. Supreme Court reversed based on *Hurley*, reasoning that altering the Boy Scout's leadership decisions was akin to editing the message of a *private* parade organizer: "the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs." *Id*. at 654. But as with *Hurley*, the Court never called into question public accommodation laws as applied to "clearly commercial entities, such as restaurants, bars, and hotels." *Dale*, 530 U.S. at 657. Rather, the Court stressed that States have a "compelling interest in eliminating discrimination" in those types of commercial establishments. *Id*.

Together, *Hurley* and *Dale* teach that a public accommodations law may not be applied to a private, non-commercial expressive association to edit its speech or select its leadership. But

the same is not true when those laws prohibit the commercial act of refusing to sell goods or services because of a customer's protected characteristics. Here, Ms. Scardina did not seek to participate in a cultural event with Mr. Phillips or infiltrate the bakery's leadership; she simply wanted to purchase a product that the bakery routinely sells to the public—a cake with two colors of her choosing. In short, Mr. Phillips' decision to operate the bakery as a retail store that is open to the public forecloses a compelled speech claim and requires his compliance with CADA's anti-discrimination protections.

***Viewpoint and Content based Discrimination***. Hoping to trigger strict scrutiny, Plaintiffs also contend that the Division and Commission's enforcement of CADA discriminates based on content and viewpoint. Doc. 57, pp. 19–20, 23. These arguments fail as a matter of law for at least three reasons. *First*, CADA, as well as the Division and Commission's enforcement of it, are viewpoint and content neutral. *See Hurley*, 515 U.S. at 572; *Mitchell*, 508 U.S. at 487; *Duarte*, 481 U.S. at 549. As explained above, the State Officials are not in the business of regulating what cakes baked in Colorado must look like or say. The bakery is free to decline a cake featuring satanic imagery, for example, if it would not sell such a cake to any customer. But what the bakery may *not* do as a place of public accommodation subject to CADA is decline a customer's requested cake based on his or her protected characteristics when it would sell the same cake to another customer. A blue and pink cake falls squarely into that category. Colorado's evenhanded enforcement of its public accommodations law in this manner is justified by its compelling interest in eliminating discrimination, separate and apart from the content or viewpoints purportedly expressed by Plaintiffs' cakes. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is

deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

*Second*, the Amended Complaint fails to establish a plausible claim that any State Official has "targeted" Plaintiffs for CADA enforcement *because of* Mr. Phillips' religious beliefs. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 293 (3d Cir. 2009) (stating that a challenger seeking to establish a pattern of targeting must prove not just that the regulation's enforcement falls more heavily on those who advocate one viewpoint over another, but also that "such enforcement occurred *because* of the viewpoint expressed"). To the contrary, the Division and Commission enforce CADA against *all* places of public accommodation, regardless of their owner's religious beliefs or lack thereof. This is borne out by both the neutral wording of the Division Director's probable cause finding, which did not denigrate or otherwise characterize Mr. Phillips' religion, *see* Doc. 51-1, and the Division and Commission's enforcement of CADA to *protect* persons from discrimination based on their religious beliefs in similar contexts.[6]

*Third*, while § 24-34-601(2)(a)'s third clause limits speech that is incidental to prohibited conduct, it does so only narrowly by banning the equivalent of "White Applicants Only" signs. *See* § 24-34-601(2)(a) (restricting communications that indicate a person is "unwelcome, objectionable, unacceptable, or undesirable" because of his or her protected characteristics). This restriction is fully consistent with the First Amendment and is integral to CADA's prohibition of discrimination; it does not amount to content or viewpoint-based regulation of speech. *See FAIR*,

[6] For example, the Commission recently charged a housing provider with CADA violations for allegedly discriminating against a man who identifies as a Messianic Jew—a form of Christianity. *See Deffenbaugh v. Rodriguez*, Charge No. FH2018626960 (July 27, 2018). This charge dispels any notion that the Division and Commission are motivated by animosity toward religion. The Commission's publicly-available Notice of Hearing and Formal Complaint in *Deffenbaugh* is attached as Exhibit 2.

547 U.S. at 62 ("The fact that [Congress's civil rights legislation] will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."). At least fourteen other States have near-identical laws banning discriminatory statements by places of public accommodation.[7] Yet Plaintiffs' motion cites no case, and the State Officials are aware of none, striking down any of these statutes under the First Amendment.

**5. CADA's ban on discriminatory statements and advertising does not unlawfully restrict speech.**

Plaintiffs also assert facial challenges to CADA's ban on discriminatory statements and advertising, and seek preliminary relief based on those claims. Doc. 57, pp. 22–25 (citing §§ 24-34-601(2)(a) and 24-34-701). They argue that the third clause in § 24-34-601(2)(a)—which they refer to as the "publication ban"—is impermissibly overbroad, vague, and violates the unbridled discretion doctrine.[8] Doc. 57, p. 24. That clause provides that a person commits an unlawful discriminatory practice if he or she, *inter alia*, posts any communication or advertisement indicating "that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable" because of the individual's protected characteristics. § 24-34-601(2)(a); *see also* § 24-34-701 (similar).

[7] ALASKA STAT. § 18-80-230(a)(2)(B); DEL. CODE tit. 6 § 4504(b); D.C. CODE § 2-1402.31(a)(2); 775 ILL. COMP. STAT. 5/5-102(B); IOWA CODE § 216.7(1)(b); KY. REV. STAT. § 344.140; ME. REV. STAT. tit. 5, § 4592(2); MICH. COMP. LAWS § 37.1302(b); N.H. REV. STAT. § 354-A:17; N.Y. EXEC. LAW § 296(2)(a); N.D. CENT. CODE § 14-02.4-16; 43 PA. STAT. § 955(i)(2); R.I. GEN. LAWS § 11-24-2; W. VA. CODE § 5-11-9(6)(b); WIS. STAT. § 106.52(3)(a)(3); *see also* N.Y.C. ADMIN. CODE § 8-107(4)(a)(2)(b).

[8] Plaintiffs also argue that § 24-34-701's ban on discriminatory advertising is an impermissible content and viewpoint-based regulation of speech. For the same reasons discussed above in response to their identical challenges to § 24-34-601(2)(a), these arguments likewise fail as a matter of law.

Plaintiffs cannot demonstrate a substantial likelihood of success on the merits under any facial theory. A law may be invalidated as overbroad under the First Amendment only if a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quotations omitted). The facial overbreadth doctrine is therefore "strong medicine" that should be employed "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The void-for-vagueness doctrine similarly requires a rigorous showing from the challenger, especially in civil cases. To find a civil statute void for vagueness, the statute must be "so vague and indefinite as really to be no rule or standard at all." *Boutilier v. INS*, 387 U.S. 118, 124 (1967) (quotations omitted); *see also United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1988) (stating "regulatory statutes governing business activities may be less precise" than criminal statutes). Thus, even where the standards are "flexible" and afford implementing officials "considerable discretion," "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794.

Similar principles govern under the unbridled discretion doctrine. *See The Toll Box v. Ogden City Corp.*, 355 F.3d 1236, 1241 (10th Cir. 2004). Because no law can "anticipate every eventuality," it is often "the better part of wisdom" to speak in more general terms of the law's purpose than attempt to draft an unwieldly law that attempts to address every possible contingency. *Id.* at 1242. A law of general applicability, like a public accommodation law, carries "little danger" of violating the unbridled discretion doctrine. *Id.* (quotations omitted). "[T]he general application of the statute to areas unrelated to expression will provide the courts a

yardstick with which to measure the [government's] occasional speech-related decision." *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 761 (1988).

The U.S. Supreme Court has repeatedly upheld CADA-like laws against overbreadth and vagueness challenges. *See N.Y. State Club Ass'n*, 487 U.S. at 14 ("[W]e cannot conclude that the [New York] Law threatens to undermine the associational or expressive purposes of any club, let alone a substantial number of them."); *Roberts*, 468 U.S. at 629 ("We have little trouble concluding that these concerns [about overbreadth and vagueness] are not seriously implicated by the Minnesota Act, either on its face or as construed in this case."). And even if Plaintiffs assert that CADA's language differs from the statutory language previously considered by the Supreme Court, the end result does not change. As indicated above, the third clause in § 24-34-601(2)(a) and similar prohibition in § 24-34-701 are nearly identical to at least 14 other state public accommodations statutes. Plaintiffs cite no case, and the State Officials are aware of none, striking down this well-worn language as unconstitutional based on either overbreadth, vagueness, or unbridled discretion.[9] Courts have instead consistently rejected these theories when invoked to attack public accommodation laws. *See Telescope Media Group v. Lindsey*, 271 F. Supp. 3d 1090, 1120–21 (D. Minn. 2017) (rejecting unbridled discretion argument); *Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776, 794–99 (S.D. Iowa 2016) (rejecting overbreadth and vagueness challenges). This Court should do the same here.

[9] Plaintiffs erroneously rely on *Saxe v. State College Area Sch. Dist*., 240 F.3d 200 (3d Cir. 2001). Doc. 57, p. 24. That case involved a school's overly-broad anti-harassment policy, not a public accommodation statute regulating retail businesses. The school's policy went far beyond standard anti-discrimination laws that protect well-defined protected classes to proscribe harassment based on an expansive "catch-all" category that included clothing, hobbies, and social skills. *Id.* at 210. Moreover, the *Saxe* court recognized, consistent with the State Officials' argument, that the Supreme Court's precedent draws a distinction between permissible regulation of *conduct* that may incidentally burden speech and impermissible bans of *pure* speech. *Id.* at 207–08.

### C. Plaintiffs are not substantially likely to succeed on their Due Process claim.[10]

Plaintiffs are receiving constitutionally adequate, unbiased process and, thus, are unlikely to prevail on their Due Process claim. The Fourteenth Amendment proscribes state deprivation of life, liberty, or property without due process of law. *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994). The interests protected by the Due Process Clause are those found within the Constitution, and federal or state law. *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). Due process requires "an absence of actual bias" by a judge. *In re Murchison*, 349 U.S. 133, 136 (1955). Here, Plaintiffs' Due Process claim is based solely on scant allegations of subjective bias on the part of two current Commissioners. Such allegations face significant hurdles because, as discussed above, it must be presumed that the Commissioners have faithfully applied the law and will continue to do so. Plaintiffs' biased tribunal claims fail for four reasons.

*First*, as a matter of law, *Masterpiece I* did not immunize Plaintiffs from compliance with CADA, and did not bar the Division and Commission from considering any new discrimination charge against them. 138 S. Ct. at 1732. *Second*, and contrary to their argument, "Colorado" has not "launched [a] new prosecution" evidencing its alleged bias against Plaintiffs. Doc. 57, p. 26. Rather, Ms. Scardina filed a charge with the Division, which investigated it as required by § 24-34-306(2)(a). The Division Director then reviewed the investigative file and issued a probable

[10] Plaintiffs mention their Equal Protection claim only in passing in a footnote in their motion for preliminary relief. Doc. 57, p. 27 n.2. Their failure to meaningfully seek such relief with respect to that claim may be a tacit admission about its deficiencies. *See Abbott v. McCotter*, 13 F.3d 1439, 1441 (10th Cir. 1994) (upholding dismissal of conclusory equal protection claim for frivolousness). Indeed, the claim is highly unlikely to succeed because Plaintiffs fail to identify any similarly-situated bakers who were treated differently. As discussed above, Plaintiffs were not treated differently than the other Denver-area bakeries mentioned in *Masterpiece I*; those bakeries would not bake the requested cakes for *anyone*. Here, Plaintiffs do not allege that they would decline to bake a blue and pink cake for *everyone*.

cause determination letter in accordance with § 24-34-306(2)(b)(II). Doc. 51-1. The letter dispassionately set forth the applicable law, recited the facts alleged in Ms. Scardina's charge and in Plaintiffs' response, stated the standard of review, noted that Ms. Scardina is a member of two protected classes, and neutrally applied the law to the facts alleged in the charge. *Id.* Consistent with § 24-34-306(4), the Director reported that the parties' mediation efforts failed and the Commission decided to issue a Notice of Hearing and Formal Complaint requiring Plaintiffs to answer the charge at a formal hearing before an administrative law judge. Doc. 51-2. The Formal Complaint was similarly dispassionate in its recitation of the parties, alleged facts, and claims for relief. *See id.* Thus, as a matter of fact, the Division and Commission's official actions lacked the hallmarks of hostility and bias found in *Masterpiece I.*

*Third*, the *Williams* standard that Plaintiffs ask this Court to apply is an objective one: whether "the average [commissioner] in his [or her] position is 'likely' to be neutral, or whether there is an unconstitutional potential for bias." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009)). Yet in support of their Due Process claim, they offer only *subjective* reasons why two specific Commissioners are not likely to be neutral toward them. Specifically, Plaintiffs allege that a nearly six-year-old tweet by Commissioner Pocock evidences "hostility" tantamount to bias that disqualifies her from acting on the pending charge. Doc. 57, p. 26. Plaintiffs stretch too far. Commissioner Pocock's private speech long-predates her 2016 appointment to the Commission and Ms. Scardina's 2017 charge in this case. In considering whether prior campaign contributions fairly raised the specter of judicial bias, the Supreme Court has stated that the "temporal relationship" is "critical." *Caperton*, 556 U.S. at 886. The tweet here is stale and unrelated to the instant

charge that is to be decided by the Commission. It falls far short of the "exceptional case" and "extreme facts" presented in *Caperton*, where "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising [$3 million in] funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 884.

In support of their claims that the selection criteria for Commissioners in § 24-34-303(1)(b) are "discriminatory," Plaintiffs point to Commissioner Aragon's "represent[ation of] government interests, which in his case are pro-LGBT in nature since he serves as the LGBT Liaison to Denver's Mayor," as violating Due Process because it "will impermissibly tempt him to disregard neutrality." Docs. 57, p. 27 (quotation omitted); 52-11. But Plaintiffs cite no apposite authority for their legal conclusion that Commissioners "are chosen by discriminatory means." *Id.* Rather, they rely on the U.S. Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), holding that it is unconstitutional to strike "potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *See* Doc. 57, pp. 27-28 (also citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (similar holding for race-based juror exclusions); *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994) (similar holding for gender-based juror exclusions)). These cases held only that intentionally *excluding* members of protected classes from serving on fact-finding tribunals is unconstitutional; they did not address whether intentionally *including* such members offends the Constitution. Plaintiffs further fail to identify any authority for the proposition that they are entitled to a judge or jury that shares their same characteristics or beliefs. Binding precedent points in the opposite direction. *Cf. Batson*, 476 U.S. at 85 ("a

defendant has no right to a petit jury composed in whole or in part of persons of his own race." (quotation omitted)); *see also SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484–86 (9th Cir. 2014) (extending *Batson* to prohibit peremptory strikes based on sexual orientation).

*Fourth*, Plaintiffs wrongly rely on *Williams* to argue that it is unconstitutional for the same Commissioners who decided to issue a Notice of Hearing and Formal Complaint to also later decide the merits of Ms. Scardina's charge. Doc. 57, pp. 28-29. There, Philadelphia's district attorney approved the prosecution's decision to seek the death penalty against Williams and, after later becoming Pennsylvania's Supreme Court Chief Justice, joined an opinion—over an objection seeking recusal—reinstating the death penalty against Williams. Consistent with its long-standing view that "death is different," *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), the *Williams* Court vacated that decision based on Due Process principles. 136 S. Ct. at 1907-08. In doing so, it found that the Chief Justice had "significant, personal involvement in a critical trial decision" in his former capacity as the district attorney because "whether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make." *Id.* at 1907. Here, the Commission's decision to issue a Notice of Hearing and Formal Complaint against the bakery and Mr. Phillips, while most certainly quasi-prosecutorial acts, did not rise to anywhere near the same level of significance as the former district attorney-turned-Chief Justice's decision to seek the death penalty in *Williams*.

*Williams* is further distinguishable because its holding is limited to a capital criminal matter, not a civil administrative enforcement action like the one pending here. *See Commerce City Drug v. Bd. of Pharmacy*, 511 P.2d 935, 936 (Colo. App. 1973) ("an administrative hearing

to revoke or suspend a professional license is a disciplinary, not a criminal, proceeding"); *Horwitz v. State Bd. of Med. Examiners of State of Colo*., 822 F.2d 1508, 1515 (10th Cir. 1987) (noting without disapproving that medical board members perform both quasi-prosecutorial and quasi-judicial functions). Nothing in *Williams* suggests that its holding in the *death penalty* context was meant to displace the U.S. Supreme Court's long-standing precedent permitting executive branch agencies to fulfill both quasi-prosecutorial and quasi-judicial roles in the *administrative* context. *See Withrow v. Larkin*, 421 U.S. 35, 47-49, 53-55 (1975) ("Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make necessary adjudications."). This precedent is especially apposite where, as here, both CADA and the Commission's duly promulgated rules require that "[t]he case in support of the complaint shall be presented at the hearing by one of the commission's attorneys or agents, but no one presenting the case in support of the complaint shall counsel or advise the commission, commissioner, or administrative law judge who hears the case." § 24-34-306(8); 3 C.C.R. 708-1, Rule 10.8(A)(3). Accordingly, *Williams* does not control this Court's Due Process analysis.

## II. The remaining preliminary injunction factors weigh against Plaintiffs.

***Irreparable harm***. "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189 (quotation omitted). Where, as here, a plaintiff asserts the loss of First Amendment freedoms as their irreparable injury, a court must "consider the specific character of the First Amendment claim" to ascertain whether there "is [only] a minimal restriction in furtherance of the asserted government interests," such that the harm "is not 'great' or 'substantial.'" *Id.* at 1190 (quotation omitted). Here, the conduct that

Plaintiffs admittedly have engaged in and want to continue engaging in—namely, refusing to bake a blue and pink cake for Ms. Scardina even though Mr. Phillips advertises through the bakery's website that "If you can think it up, Jack can make it into a cake!" and "Choose from any of our many flavors, frostings, and fillings"—is *not* protected by the Free Speech or Free Exercise Clauses. Doc. 51, ¶ 191; Exhibit 1; http://masterpiececakes.com (last accessed Nov. 14, 2018); *Masterpiece I*, 138 S. Ct. at 1727; *Lee*, 455 U.S. at 261. As a result, Plaintiffs' claimed harm is not "great" or "substantial" enough to be irreparable.

Additionally, the Tenth Circuit has held that "delay in seeking preliminary relief cuts against finding irreparable injury." *Roda Drilling Co.v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009) (quotation omitted). Here, Plaintiffs delayed filing suit until August 14, 2018, which was over a year after they received notice of the Division's investigation of Ms. Scardina's charge in July 2017. *See* Doc. 1, ¶¶ 177, 192, p. 51. And despite requesting preliminary relief in their original Complaint, Plaintiffs delayed filing a motion actually seeking such relief for over two months. *Compare* Doc. 1, Prayer for Relief, ¶¶ 1-4, *with* Doc. 57, p. 31. Courts have denied preliminary relief where the delay was much shorter than here. *See Orson, Inc. v. Miramax Film Corp*., 836 F. Supp. 309, 312 (E.D. Penn. 1993) (50-day delay). For these reasons, the irreparable injury factor tips in favor of the State Officials.

***Balance of equities and public interest.*** As explained above, *Masterpiece I* did not invalidate CADA and therefore its protections are still valid and enforceable by the Division and Commission. Furthermore, this Court must extend CADA the presumption of constitutionality. *Eaton v. Jarvis Products Corp*., 965 F.2d 922, 929 (10th Cir. 1992) ("We must presume that a state statute is constitutional."). Where the plaintiffs' "claim of the public interest is largely a

restatement of their own constitutional interest, and the [State's] claim of public interest is largely a restatement of its own interest in regulating the conduct in question, the 'public interest' prong…is nothing more than a restatement of the 'balance of hardships' prong," and generally neither favors either party. *Heideman*, 348 F.3d at 1190-91. But the public interest in the protection and enforcement of civil rights laws like CADA generally weighs in favor of stopping alleged violations. *See ReMed Recovery Care Ctrs. v. Township of Willistown*, 36 F. Supp. 2d 676, 688 (E.D. Penn. 1999). These factors therefore also tip in favor of the State Officials.

**CONCLUSION**

The State Officials respectfully request that this Court deny Plaintiffs' motion for a preliminary injunction.

DATED: November 15, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 15, 2018, I served a true and complete copy of the **STATE OFFICIALS' RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION** upon counsel of record in this matter through ECF or as otherwise indicated below:

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*/s Leslie Bostwick*
Leslie Bostwick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation, et al.,
Plaintiffs,
v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities, et al.,
Defendants.

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**DECLARATION OF LESLIE BOSTWICK**

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I, Leslie Bostwick, pursuant to 28 U.S.C. § 1746, do depose and state as follows:

1. I am a Legal Assistant II in the State Services Section of the Colorado Attorney General's Office. I make this declaration upon my personal knowledge.

2. I have worked for the Colorado Attorney General's Office for over 3 ½ years.

3. I have reviewed the website of Masterpiece Cakeshop located at http://masterpiececakes.com/ on November 14, 2018. As of November 14, 2018, the following photographs are available to view on the Masterpiece Cakeshop website and are true and accurate copies of the photographs on that website:

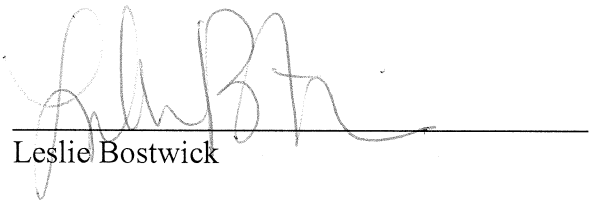

EXHIBIT 1

4. As of November 14, 2018, the language "If you can think it up, Jack can make it into a cake!" is found on the website and is a true and accurate copy of the language found on the website.

5. As of November 14, 2018, the language "Choose from any of our many flavors, frostings, and fillings," is found on the website and is a true and accurate copy of the language found on the website.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 15th day of November, 2018.



Leslie Bostwick



EXHIBIT 1

| | |
|---|---|
| STATE OF COLORADO<br>COLORADO CIVIL RIGHTS COMMISSION<br><br>JASON DEFFENBAUGH,<br>Complainant,<br><br>v.<br><br>JOSE M. RODRIGUEZ d/b/a INDEPENDENCE HOUSE FAMILY; JENNIFER REMACK; EMILY JACOBITZ; and STEVE GUTIERREZ,<br>Respondents. | ▲ COURT USE ONLY ▲<br><br>Case Number:<br><br>~~CR 20~~ FH2018626960 |

# NOTICE OF HEARING AND FORMAL COMPLAINT

**YOU ARE HEREBY NOTIFIED** pursuant to §§ 24-34-306(4) and 24-34-504(4.1), C.R.S. (2017), that a hearing will be held before an Administrative Law Judge at 9:00 a.m. on **Monday, November 19, 2018** on the fourth floor at the Office of Administrative Courts, 1525 Sherman Street, Denver, Colorado 80203, to determine whether Respondents violated § 24-34-502, C.R.S. (2017) when they refused to accommodate requests for religious accommodation by Complainant Jason Deffenbaugh.

Pursuant to the authority set forth in §§ 24-34-305(1)(d), 24-34-306(4) and 24-34-504(4.1) and (4.2), C.R.S. (2017), the Colorado Civil Rights Commission, having determined that the circumstances warrant a hearing, hereby charges and alleges:

1. Complainant Jason Deffenbaugh is an aggrieved person as defined by §24-34-501(1), C.R.S.

2. Respondent, Jose M. Rodriguez d/b/a Independence House Family, is the owner and operator of Independence House Fillmore (Independence House), located at 1479 Fillmore St. Denver, Colorado 80206.

3. Independence House is a 40 unit community corrections residential dual diagnosis treatment facility that provides housing and services to men transitioning out of prison institutions into the community. Independence House constitutes housing within the meaning of § 24-34-501(2), C.R.S.

4. Respondent Jennifer Remack is Independence House's Facility Director.

5. Respondent Emily Jacobitz is Independence House's Security Assistant Director.

6. Respondent Steve Gutierrez is employed by Independence House and is Complainant's case manager.

7. Each Respondent is a person as defined by § 24-34-501(3) and §24-34-301(5), C.R.S., and is therefore subject to the jurisdiction of the Colorado Civil Rights Commission.

8. Timeliness and all other jurisdictional and procedural requirements of title 24, article 34, parts 3 and 5, C.R.S. have been satisfied.

9. On September 27, 2016, Complainant was accepted and moved into Independence House.

10. Complainant's bona fide religious practice is Messianic Judaism.

11. Residents of Independence House were required to participate in a treatment tool called "PULL-UP" and "PUSH-UP." Respondents told residents, including Complainant, to be their "brother's keeper" and hold each other accountable through this treatment tool. Respondents required residents, including Complainant, to use the PULL-UP and PUSH UP method each week to recognize positive behaviors (PUSH-UP) and negative behaviors (PULL-UP).

12. On or about July 23, 2017, Complainant submitted a written request that he not be required to participate in "pull-ups" because it conflicted with his religious beliefs.

13. On July 26, 2017, Respondents unreasonably denied Complainant's request to be excused from participating in the weekly pull-up exercise stating that pull-ups were "part of the program" that required his participation.

14. On or about August 9, 2017, Complainant had to utilize the PULL-UP and PUSH-UP treatment, contrary to his religious beliefs.

15. By requiring that Complainant participate in the treatment without any discussion, Respondents failed to engage in an interactive process with Complainant concerning his requests for religious accommodation, and instead summarily denied his requests.

16. On August 23, 2017 Complainant requested Respondents transfer him to a different treatment facility or, in the alternative he return to jail since Respondents unreasonably refused to accommodate his sincerely held religious

beliefs.

17. On or around August 24, 2017, Respondent left the subject property and returned to the Denver City jail.

18. Respondents' denial of Complainant's religious accommodation requests was unreasonable and in violation of his rights protected by the Colorado Fair Housing Act, § 24-34-502(1)(a), C.R.S.

19. Respondents denied or attempted to deny or make housing unavailable to Complainant based on Complainant's religious beliefs in violation of the Colorado Fair Housing Act, §24-34-502(1)(a), C.R.S.

20. Complainant filed a charge of discrimination with the Colorado Civil Rights Division alleging that Respondents discriminated against him based on his religious beliefs. On January 31, 2018, following an investigation of the charge, an authorized designee of the Director of the Colorado Civil Rights Division found probable cause to believe that Respondents unreasonably denied Complainant's reasonable accommodation request in violation of the Colorado Fair Housing Act.

21. Efforts to resolve the charge through conciliation have been unsuccessful.

22. Upon information and belief, as a consequence of Respondents' actions, Complainant has suffered a violation of his religious freedom, embarrassment, emotional and spiritual distress, the expenditure of resources and other losses.

The Commission seeks the following relief:

1. That Respondents, their agents, employees, and successors, and all other persons in active concert or participation with them be ordered to cease and desist in their practice of discriminating against any person and unreasonably denying religious accommodation requests and to report to the Colorado Civil Rights Commission all remedial actions taken to eliminate discrimination and wrongful denial of requests for religious accommodation until such time that it is established such discriminatory practices have ceased.

2. That Respondents, their agents, employees, and successors, and all other persons in active concert or participation with them be permanently enjoined from discriminated against and unreasonably denying any request for an accommodation for individuals based on their protected status.

3. That Respondents, their agents, employees, and successors, and all other persons in active concert or participation with them be ordered to take such

affirmative actions as will ensure the future provision of housing to this and other similarly situated complainants on a non-discriminatory basis.

4. That Complainant be awarded such damages as would fully compensate him for injuries caused by Respondents' discriminatory conduct, including, but not limited to his emotional and spiritual distress, economic loss, interest, costs, attorney's fees, and all benefits, rights and privileges he would have received had his accommodation request not been unreasonably denied.

5. That a civil penalty be assessed against all Respondents commensurate with any prior discriminatory housing practices and in order to vindicate the public interest as provided by § 24-34-508(f), C.R.S.

6. That Respondents, their agents, employees, and successors, and all other persons in active concert or participation with them be ordered not to retaliate against Complainant in any way.

7. That Respondents be ordered to provide any other relief the Colorado Civil Rights Commission deems just and proper.

Respondents may file a verified answer prior to the date of the hearing. The hearing will be conducted pursuant to §§ 24-34-306 and 24-4-105, C.R.S. Failure to answer the Complaint at the hearing may result in an entry of default judgment against the Respondents.

Dated this 27th day of July, 2018.

BY THE COMMISSION:

Commissioner



EXHIBIT 2

## CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **NOTICE OF HEARING AND FORMAL COMPLAINT** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 30 day of July, 2018 addressed as follows:

Jason Deffenbaugh
14485 E. Fremont Ave.
Engelwood, CO 80112

Jose M. Rodriguez
1435 Kokai Circle
Denver, CO 80221

Jennifer Remack
1479 Fillmore St.
Denver, CO 80206

Emily Jakobitz
1479 Fillmore St.
Denver, CO 80206

Steve Gutierrez
1479 Fillmore St.
Denver, CO 80206

By interdepartmental mailing services, copies were sent to:

Matthew Azer, Director/Chief Administrative Law Judge
Office of Administrative Courts
1525 Sherman St, 4th Floor
Denver, CO 80203

Vincent Morscher, Senior Assistant Attorney General
Lucia Padilla, Assistant Attorney General
Counsel in Support of the Complaint
1300 Broadway, 10th Floor
Denver, CO 80203

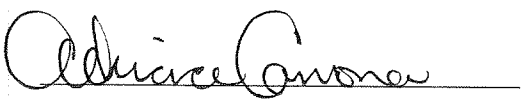




EXHIBIT 2