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 capacity, et al.,
Defendants.

STATE OFFICIALS' RESPONSE TO AMENDED MOTION FOR PRELIMINARY INJUNCTION

Defendants, collectively referred to as the State Officials, respond to Plaintiffs' amended motion for preliminary injunctive relief, Doc. 104, as follows.

PRELIMINARY INJUNCTION STANDARD

Although Plaintiffs correctly articulate the four required elements for a preliminary injunction, Doc. 104, p. 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 state administrative proceeding against Plaintiffs. *See LodgeWorks, L.P. v. C.F. Jordan Const., LLC*, 506 Fed. Appx. 747, 751 n.3 (10th Cir. 2012) (a party seeking to enjoin arbitration hearing is seeking a disfavored preliminary injunction). 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.

Plaintiffs' amended motion for a preliminary injunction seeks relief based on their Free Exercise, First Amendment, and Due Process claims. None is substantially likely to succeed.

A. Director Elenis and the Commissioners are absolutely immune from injunctive relief.

This Court has already recognized that Director Elenis and the Commissioners are absolutely immune in their quasi-prosecutorial roles. Doc. 94, pp. 35–41. Undeterred, the Plaintiffs seek to enjoin them from exercising their quasi-judicial function. But the Plaintiffs are not entitled to such relief. Director Elenis and the Commissioners also have absolute quasi-judicial immunity from injunctive relief.

In *Pulliam v. Allen*, 466 U.S. 522 (1984), the Supreme Court held that judicial immunity does not bar prospective injunctive relief against judicial officers for acts or omissions taken in a judicial capacity. But in response, Congress amended 42 U.S.C. § 1983 to abrogate *Pulliam's* holding regarding the scope of judicial immunity. After adopting the Federal Courts Improvement Act of 1996, § 1983 now prohibits injunctive relief against a judicial officer unless a declaratory decree was violated or declaratory relief is unavailable. 42 U.S.C. § 1983; *see also* Pub. L. No. 104-317, § 309(c), 110 Stat. 3847 (codified at 42 U.S.C. § 1983). Since these amendments, courts have recognized that judicial immunity typically bars claims for prospective injunctive relief against judicial officials acting in their judicial capacity. *See, e.g., Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000) (per curiam) (discussing amendment's purpose and effect).

It is equally well established that "officials in administrative hearings can claim the absolute immunity that flows to judicial officers if they are acting in a quasi-judicial fashion." *Guttman v. Khalsa*, 446 F.3d 1027, 1033 (10th Cir. 2006) (citing *Butz v. Economou*, 438 U.S. 478, 514 (1978)); *see also Churchill v. Univ. of Colo.*, 293 P.3d 16, 33 (Colo. App. 2010) (joining the "great weight of authority that has concluded that the term 'judicial officer' found in section 1983 extends to quasi-judicial actors—thereby barring claims for injunctive relief."). Lastly, judicial immunity "is not overcome by allegations of bad faith or malice…" *Mireles v. Waco*, 502 U.S. 9, 11 (1991).

This Court's prior reliance on *Wilhelm v. Continental Title Company*, 720 F.2d 1173 (10th Cir. 1983), was well placed. Doc. 94, p. 35. In *Wilhelm*, the Tenth Circuit held that the director of the Division was entitled to absolute immunity because "she is in a position in the state administrative process that is similar to that of a *judge*, hearing officer or prosecutor…The *adjudicatory* and prosecutorial nature of her responsibilities is clear." *Id*. at 1178 (emphasis added). Here, the analysis remains the same and applies equally to Director Elenis[1] and the Commissioners. This Court should deny Plaintiffs' request for a preliminary injunction because Director Elenis and the Commissioners are immune from such relief.

B. 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

[1] In any event, Director Elenis' role in the ongoing state administrative proceeding is now complete. Any claim for prospective injunctive relief would be moot.

§ 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.

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 compelling 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 state administrative proceeding. 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. 104, pp. 11–12. 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 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 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, appellate courts presume that the adjudicator will correctly and lawfully apply the appellate court's binding guidance on remand.[2] *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

[2] 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 or fact—no such hostility can 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").

instructions). The same presumption applies even more forcefully when the adjudicating body on remand is comprised of entirely *new* members, as here. Further, the Division has revised their procedures and practices in the wake of *Masterpiece I*. Exhibit A, ¶ 13. Plaintiffs have not alleged, much less demonstrated, an unequal application of CADA following *Masterpiece I*.

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*. Plaintiffs belief otherwise, which is based on a single sentence quoted out of context from the Commission's *Masterpiece I* brief, is mistaken. Doc. 104, p. 13. 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. 104-10, p. 35 (emphasis added). This is exactly 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*, 138 S. Ct. at 1733 (Kagan, J., concurring). Here, the Plaintiffs are unlikely to succeed in their claims precisely because they have admitted that they would bake an identical cake for some and refuse the same cake to others. Mr. Phillips admits that he would create a "custom cake with a blue exterior and pink interior [if] that customer's favorite colors are blue and pink." Doc. 83-1, ¶ 8. But he refused to create *an identical cake* for Ms. Scardina because she told him she intended to use the cake for celebrating her birthday which aligned with the anniversary of her gender transition. Doc. 104-5, pp. 2, 7.

In order to claim unequal treatment, Plaintiffs rely entirely on the other Denver-area bakeries mentioned in *Masterpiece I*. But in doing so, they conflate the *purpose* for which a customer orders a cake with the message expressed, if any, by the cake *itself*. In the other cases, the cake itself included messages that the bakeries viewed as offensive to gay persons and which "they would not have made for any customer."[3] *See Masterpiece I*, 138 S. Ct. at 1733 (Kagan, J., concurring). This is not same position staked out by Plaintiffs. Instead, Plaintiffs argue that they should be able to select who they create identical cakes for, based on the customer's stated purpose or motivation.

Plaintiffs' position is unworkable and contrary to law. As explained above, CADA is a neutral law of general applicability. In defiance of CADA, Plaintiffs seek to "become a law unto himself." *Smith*, 494 U.S. at 879 (quotations omitted). Plaintiffs contend that they can offer identical cakes, but only if Plaintiffs approve of the customer's beliefs, stated purpose, and intended use for the cake. Such discrimination is not protected. The Supreme Court has rejected a distinction between belief and status in this context. In *Christian Legal Soc. Chapter of the University of California, Hasting College of Law, v. Martinez*, a law school implemented an "all-comers" requirement for student groups in order to effect its non-discrimination policy. 561 U.S. 661, 689 (2010). A student group argued that membership exclusion based on belief, instead of

[3] 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 identical cakes bearing such messages or images for anyone, regardless of the requestor's particular creed or other protected characteristics. *Id.* at 231, 240, 249. Nor is there evidence that the bakeries initially indicated they would bake the requested cakes, but then asked William Jack why he wanted such a cake and refused service based on his answer.

status, was protected under the First Amendment. The Court rejected this method as unworkable because enforcement would require an investigation into the student group's *motivation* for membership exclusion. *Id*. at 688–89.

The State Officials' enforcement of CADA, like Hastings's all-comers requirement, is neutral and viewpoint agnostic.[4] A baker is only permitted to refuse a cake if they would refuse to bake such a cake for anyone. This neutral requirement does not—indeed cannot—ask what the customer's beliefs or motivations are. Such an application allows the State Officials to enforce CADA, without being burdened with the impossible task of "determining whether [a baker] cloaked prohibited status exclusion in belief-based garb[.]" *Id*. at 687.

Further, Plaintiffs' hairsplitting threatens to resurrect an unworkable distinction between status and conduct. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.") (emphasis added); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Plaintiffs are free to decline to bake a cake they deem offensive, such as a Halloween cake. *See* Doc. 51, ¶¶ 114–15. *But only if they would refuse to bake such a cake for anyone*. Plaintiffs are not free to bake some customers a Halloween cake but refuse an identical cake to others, contingent on the customer's beliefs or status.

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

[4] This is especially true following the Supreme Court's instruction in *Masterpiece I*. *See* Exhibit A, ¶ 13, 24; *see also Masterpiece I*, 138 S. Ct. at 1733 (Kagan, J., concurring).

Scardina. Doc. 104, pp. 11–12. 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. § 24-36-601(2)(a), C.R.S. 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.[5] *Cf. Katzenbach v. 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]").[6]

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."). As indicated, the only allegations involving any of the State Officials' conduct in *this* case center on (1) the Division

[5] Plaintiffs' alleged willingness to provide other baked goods to Ms. Scardina appears to represent a shift in store policy. On a prior occasion, Plaintiffs refused to sell a lesbian couple cupcakes for their family commitment ceremony, citing a policy of not selling baked goods to same-sex couples for such an event. *See* Exhibits B & C. Nothing indicates that Plaintiffs offered to provide other baked goods to the couple on that occasion.

[6] 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.

Director's probable cause finding for Plaintiffs' alleged refusal to serve a woman who is transgender, 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.[7] *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 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, Plaintiffs now admit that they would bake the *same* cake if the customer simply said blue and pink were their favorite colors. Doc. 83-1, ¶ 8. Such an admission is more than sufficient to justify a finding of probable cause that Plaintiffs refused Ms. Scadina service because of her protected status.

[7] The State Officials continue to maintain that Plaintiffs have failed to satisfy their heavy burden to overcome *Younger v. Harris*, 401 U.S. 37 (1971).

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. 104, p. 14–15, but Plaintiffs 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." *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 claims possess 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. 104, pp. 14–15. 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).

C. 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 none is substantially likely to succeed.

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, CADA only regulates 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, Plaintiffs' claim fails for two reasons. *First*, were Plaintiffs to create the cake requested by Ms. Scardina, it would not be expressive conduct. The blue and pink cake does not

convey a "particularized message," nor would a viewer reasonably understand that message. Mr. Phillips admits that he would make an *identical* cake for someone who tells him that blue and pink are their favorite colors, but not for Ms. Scardina when she explains her motivation for the same cake.[8] Doc. 83, ¶ 8–9. Plaintiffs' conduct in creating these identical cakes remains the same, yet Plaintiffs argue the cakes are imbued with different expressive meanings. This is not a "particularized message." *Johnson*, 491 U.S. at 405.[9] Further, anyone viewing the two identical cakes would be unable to discern if the Plaintiffs intended to express the different meanings through identical cakes. Under *Johnson*, the cake at issue here is not expressive conduct.

Second, to the extent a blue and pink cake baked and sold by a retail bakery conveys any particularized message at all, 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

[8] Given Plaintiffs' admission, it is not necessary to resolve whether State Officials "define[] the type of cake requested too generally." Doc. 94, p. 21. The dispute here centers on identical blue and pink cakes, which Plaintiffs refuse to sell to some, but not all, of their customers.

[9] Plaintiffs claim that *Hurley* erased the particularized message requirement. Doc. 104, p. 18. This is incorrect. *See Cressman v. Thompson*, 798 F.3d 938, 955–957 (10th Cir. 2015) (examining divergent post-*Hurley* approaches and concluding "[w]hile it is difficult to draw a common standard from their differing approaches, at a minimum they require that the display be of such a character that a viewer could draw an identifiable inference from it.").

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).

The attribution principle[10] applies with greater force given Mr. Phillips' concession that he would make the identical cake Ms. Scardina requested, but only if she had told him that it was because blue and pink were her favorite colors. Doc. 83-1, ¶ 8–9. This is strong evidence that a cake's meaning, to the extent is has any, is supplied by the customer, not Plaintiffs. Under Plaintiffs' unworkable theory, a baker can express meaning through a cake, but that meaning, expressed though identical cakes, is endlessly varied, moored only by the motivation and belief of the customer—yet it is the baker, not the customer, that is entitled to constitutional protection.

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), C.R.S. 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

[10] Although the Division's probable cause finding did not rely on this attribution principle, the State Officials are entitled to raise the argument in defense of Plaintiffs' claims. *Cf. U.S. ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1345 (E.D. Cal. 1995) (stating in an APA review of agency action that "[r]eview is not limited to the reasons or evidence relied upon by the agency at the time it arrived at the decision to move for dismissal.").

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*.[11] 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 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

[11] As a result, Plaintiffs are wrong to suggest that strict scrutiny is the appropriate test. Doc. 104, pp. 21–22. But even assuming strict scrutiny could apply (it does not), that more demanding standard is also met. *See* Doc. 104-12, pp. 55–62.

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]").

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), C.R.S. 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. 104, pp. 15–24; and (2) amounts to content and viewpoint based discrimination, *id.* at 21–22. 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 woman who is transgender the same blue and pink cake that they would admittedly 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.

Plaintiffs 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. 104, pp. 21–22. These arguments fail as a matter of law for at least two 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.2d 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 (1) 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; (2) the Division and Commission's enforcement of CADA to *protect* persons from discrimination based on their religious beliefs in similar contexts[12]; and (3) the Division's rate of finding of probable cause in public accommodation cases is consistent with other jurisdictions. *See* Exhibit E.

D. Plaintiffs are not substantially likely to succeed on their Due Process claim.

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

[12] 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 D.

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*, Plaintiffs' reliance on this Court's order denying in part and granting in part the State Officials' motion to dismiss is inappropriate. Doc. 104, p. 26. This Court assumed, as it must, that the allegations contained in the Amended Complaint were true. Such an assumption is not the same as a finding by this Court. *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1191–92 (10th Cir. 2009) (when deciding a motion to dismiss, a court does not ask "whether the allegations are likely to be true; the court must assume them to be true.").

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. 104, p. 27. 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. Doc. 103, ¶259. 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. Likewise, Commissioner Aragon's Facebook post expressed no animus or hostility towards Plaintiffs, and his membership in civic groups is irrelevant.[13] *See Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 660 (10th Cir. 2002) (group membership is presumed to be irrelevant and is insufficient to create the appearance of bias).

Prospective injunctive relief is especially inappropriate where, as here, Plaintiffs may seek recusal of allegedly biased Commissioners in the state proceeding under established APA procedures, but have failed to do so. § 24-4-105(3), C.R.S. Should Plaintiffs avail themselves of this procedural right, the Commissioners will consider and rule on their request in due course, which decision will be subject to state judicial review. § 24-4-106, C.R.S.

In support of their claims that the selection criteria for Commissioners in § 24-34-303(1)(b), C.R.S. are "discriminatory," Plaintiffs argue that people from groups *not* discriminated against are unfairly excluded from the Commission. Docs. 104, p. 28. But

[13] Commissioner Aragon's post only references *Masterpiece I* by identifying December 5, 2017—the date oral arguments were held before the Superme Court—as "an important day in our Nation's Capital." Doc. 104-29, p. 2. No doubt Mr. Phillips agrees; he traveled to Washington, D.C. to attend the argument. Adam Liptak, *Justices Sharply Divided in Gay Rights Case*, New York Times (Dec. 5, 2017), https://nyti.ms/2kok7fe.

Plaintiffs cite no apposite authority for their legal conclusion that Commissioners "are chosen by discriminatory criteria." *Id.* Rather, they rely on the U.S. Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), holding that the Equal Protection Clause prohibits a prosecutor from striking a potential juror solely on account of their race. Plaintiffs' argument fails at the outset because their amended motion for a preliminary injunction does not raise their Equal Protection claim as a ground supporting preliminary relief. But even if it did, Plaintiffs 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." (quotations omitted)).

Fourth, Plaintiffs wrongly rely on *Williams* to argue that the Commissioners who decided to issue a Notice of Hearing and Formal Complaint cannot later adjudicate the merits of Ms. Scardina's charge. Doc. 104, pp. 26–27. This Court already concluded the opposite. Doc. 94, p. 38-39. *Williams* is a death penalty case and the Supreme Court has long held that "death is different." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Nothing in *Williams* suggests that its holding in the death penalty context was meant to displace the Supreme Court's longstanding 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."); *see also Horwitz v. State Bd. of Med. Examiners of State of Colo.*, 822 F.2d 1508, 1515 (10th Cir. 1987) (noting without disapproval that medical board

members perform both quasi-prosecutorial and quasi-judicial functions). 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), C.R.S.; 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 (quotations 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 (quotations omitted). Here, the conduct that Plaintiffs have engaged in and want to continue engaging in—namely, refusing to bake cake for Ms. Scardina even though Mr. Phillips admits he would create an identical cake for others whose subjective message he approved of—is *not* protected by the Free Speech or Free Exercise Clauses. *See 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) (quotations 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 the original 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 it is 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' amended motion for a preliminary injunction.

DATED: February 8, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019, I served a true and complete copy of the **STATE OFFICIALS' RESPONSE TO AMENDED MOTION FOR PRELIMINARY INJUNCTION** upon counsel of record in this matter through ECF or as otherwise indicated below:

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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.

DECLARATION OF AUBREY ELENIS

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

1. I am the Director of the Colorado Civil Rights Division ("Division"), a position I have held since June 2016. Before becoming Director, I served as an investigator for the Division for 5 years; I also served as the Division's Alternative Dispute Resolution and Outreach Supervisor for 2.5 years. I have been a licensed Colorado attorney since October 25, 2010, and have experience working as a civil litigator at a large national law firm.

2. As Director of the Division, I am familiar with the statutes and regulations governing the Division, as well as the procedures and practices used by the Division when fulfilling its statutory duty of enforcing Colorado's anti-discrimination laws in the area of public accommodations.

3. As Director of the Division, I am familiar with the statutes and regulations governing the Commission, as well as the procedures and practices used by the Commission when fulfilling its statutory duty of enforcing Colorado's anti-discrimination laws in the area of public accommodations.

Summary of Standard Procedures of the Division and Commission

4. Below is a summary of the standard procedures and practices of the Division and Colorado Civil Rights Commission ("Commission") in a typical public accommodations case:

5. Any person who believes they have been aggrieved by a violation of Colorado's Anti-discrimination Act ("CADA") may file a charge of discrimination with the Division. If the charge meets CADA's jurisdictional requirements, the Division receives and investigates such charges upon the filing of a charge by a complainant; it does not seek out violations in the first instance or solicit charges for prospective complainants. Upon receipt of a complainant's charge, the Division serves a copy of the charge and a notice on all parties, including the respondent.

6. The Division may invite the parties to meet in an attempt to mediate and informally resolve the charge at any stage of the administrative process before the issuance of a determination of probable cause or no probable cause.

7. The Division conducts an investigation into the alleged facts underlying the charge. Such investigation may include requests for production from the parties; witness interviews; obtaining statements, testimony, information, documents, evidence, or inspections of places or things reasonably calculated to lead to the discovery of evidence relevant to the allegations or circumstances of the charge.

8. After the Division's investigation, the Division Director or her authorized designee determines whether probable cause for crediting the allegations in the charge exists. If it is determined, based upon the information gathered during the investigation, that probable cause for crediting the allegations of a charge does not exist, the Director or her designee dismisses the charge and notifies the parties of the determination. However, if it is determined

based upon the information gathered during the investigation that probable cause for crediting the allegations of a charge exists, the Director or her designee notifies the parties of such determination in writing and orders the parties to attempt to resolve the charge through conciliation (compulsory mediation); the notice also states the specific legal authority and jurisdiction of the Commission, the Division and the matters of fact and law asserted.

9. A third possibility also exists—the Director or her designee may, without deciding the merits of the alleged act of discrimination, dismiss a charge for other reasons, including but not limited to: voluntary withdrawal of the charge by the complainant, settlement, or a request for issuance of a right to sue notice from the complainant.

10. Regarding the conciliation process, it entails the negotiation of a mutual agreement between the parties by a mediator. The conciliation process is designed to result in a voluntary agreement that resolves the charge. The assigned mediator determines when conciliation efforts are unsuccessful and a voluntary agreement is not likely to result. The Division may also terminate its efforts to conciliate if the parties fail or refuse to make a good faith effort to resolve the dispute.

11. When the Director or her designee determines that further efforts at conciliation will be futile, he or she reports that fact to the Commission and makes a recommendation on whether the matter should be set for an administrative hearing. As part of its preparation to report to the Commission, the Division conducts an internal probable cause review by a three-member panel. After considering the information in the case file, the panel votes on whether to recommend to the Commission that the matter be set for an administrative hearing.

Masterpiece Cakeshop I

12. In 2012, Charlie Craig and David Mullins filed a discrimination charge against Masterpiece Cakeshop. The case reached the U.S. Supreme Court, which issued an opinion in 2018.

13. Following the Supreme Court's opinion, the Division revised its procedures and practices to comply with the Supreme Court's opinion. The Division adjusted the elements used to determine when there is probable cause to believe a claim of discriminatory denial of the full and equal enjoyment of goods, services, benefits or privileges of a place of public accommodation. These elements require the evidence to show:

a. the Complainant is a member of a protected class;

b. the Respondent is a place of public accommodation;

c. the Complainant sought goods, services, benefits or privileges from the Respondent;

d. the Respondent provides the goods, services, benefits or privileges sought by the Complainant to other persons;

e. the Respondent refused to provide Complainant the goods, services, benefits or privileges sought by Complainant; and

f. the circumstances give rise to an inference of unlawful discrimination based on a protected class.

The 2017 Scardina Charge

14. The administrative case of *Scardina v. Masterpiece Cakeshop, Inc.*, et al., Charge No. CP2018011310, is ongoing. The Division has followed its normal administrative process related to the charge by Ms. Scardina; to my knowledge, the Commission's normal administrative process has also been followed, although it is incomplete.

15. The Division received Autumn Scardina's charge of discrimination against Respondent Masterpiece Cakeshop, Inc. on or about July 20, 2017. The charge stated that Ms. Scardina was denied the full and equal enjoyment of a place of public accommodation (Masterpiece Cakeshop, Inc.) based on two protected characteristics—her sex and gender identity. Specifically, Ms. Scardina's charge stated that Respondent Masterpiece Cakeshop, Inc. refused to prepare her order for a cake with a pink interior and blue exterior, which she wanted to celebrate her birthday and the anniversary of her transition from male to female. The charge does not mention that Ms. Scardina made any request for a Satanic cake.

16. Although Division staff conducted an intake interview with Ms. Scardina on July 7, 2017, before the charge was ultimately filed, the Division did not request or solicit the discrimination charge from Ms. Scardina. Nor did Division staff suggest or request that Ms. Scardina place a cake order with Masterpiece Cakeshop, Inc., or otherwise coordinate with Ms. Scardina in any manner to develop the alleged facts underlying the charge.

17. Upon receipt of the charge, the Division served a copy of the charge on all parties, including the Respondents, Masterpiece Cakeshop, Inc. and its owner, Jack Phillips. The Division also requested that the Respondents provide certain information to aid in its investigation, including a written position statement in response to the charge, written statements from persons with direct knowledge of the issues raised in the charge or the reasons for Ms. Scardina's asserted denial of service, documents relied upon in making the service decision in question, and any other information the Respondents deemed relevant.

18. The Respondents responded in writing on September 19, 2017. Their 16-page response stated that the charging party requested a cake that was to be designed with a blue

exterior and a pink interior to celebrate a sex-change from male to female. The response explained that Mr. Phillips is unwilling to create artistic expression that addresses or promotes messages and viewpoints on the subject of sex-changes or gender transitions for any customer and, for that reason, the Respondents told the charging party that they could not fulfill the request. The response did not state that Respondents' business policy prevents them from making a cake with a blue exterior and a pink interior for other customers.

19. Upon receipt of Respondents' response, the Division requested a written Rebuttal from the complaining party, Ms. Scardina, which was provided on November 6, 2017.

20. Upon review of both sides' submissions and consistent with its standard procedures, I determined (through my authorized designee) based upon the information gathered during the Division's investigation that probable cause for crediting the allegations of the charge existed. Thus, on June 28, 2018, the Division notified the parties of such determination in writing and ordered the parties to attempt to resolve the charge through conciliation (compulsory mediation). Efforts at conciliation were ultimately unsuccessful.

21. The Division then proceeded to report to the Commission the unsuccessful result of the conciliation process and to make a recommendation on whether the matter should be set for an administrative hearing. As part of the Division's preparation to report to the Commission, the Division conducted an internal probable cause review by a three-member panel consisting of Division staff that included a manager, an investigator, and me. On September 26, 2018, the panel unanimously voted to recommend to the Commission that the matter be set for an administrative hearing.

22. On October 2, 2018, the Commission voted to set this case for an administrative hearing before an administrative law judge.

23. To date, Ms. Scardina has not requested a right to sue notice from the Division.

24. As outlined above, and consistent with CADA and the applicable regulations, the Division has followed its standard procedures and process when handling the *Scardina* charge. The Division's probable cause finding was consistent with the elements described above. The Division has not exercised bad faith, bias, animus, or hostility in handling the *Scardina* charge.

25. To my knowledge, the Respondents have not filed an affidavit seeking to recuse any Commissioner from making decisions regarding the *Scardina* charge.

26. I do not have any pecuniary interest in the *Scardina* charge.

27. Based upon reasonable inquiry, no Division staff has any pecuniary interest in the *Scardina* charge.

28. I do not have any familial relationships or close personal relationships with any person who has a pecuniary interest in the *Scardina* charge.

29. Based upon reasonable inquiry, no Division staff has any familial relationships or close personal relationships with any person who has a pecuniary interest in the *Scardina* charge.

30. I do not have a familial relationship or close personal relationship with Autumn Scardina, and only know her through her actions in filing the charge.

31. Based upon reasonable inquiry, no Division staff has a familial relationship or close personal relationship with Autumn Scardina.

32. The Division enforces CADA neutrally and without regard to the respondent's particular characteristics, such as religion or creed. The Division does not seek to punish any

respondent for exercising his or her religious beliefs. In fact, the opposite is true. For example, the Division has previously sought to enforce CADA to *protect* a complaining party from discrimination based on his or her religion or creed.

33. The Division enforces CADA neutrally and without regard to the respondent's history of successfully seeking judicial review of prior orders issued by the Division or Commission. The Division abides by binding court precedent regarding its enforcement of CADA's full and equal service requirement.

34. To the best of my knowledge, the 2017 *Scardina* charge is the only discrimination charge currently pending before either the Division or Commission against Masterpiece Cakeshop, Inc. or Jack Phillips. Other than the 2017 *Scardina* charge, the 2012 discrimination charge filed by Charlie Craig and David Mullins that reached the U.S. Supreme Court is the only other charge I am aware that has been brought against Masterpiece Cakeshop, Inc. or Jack Phillips.

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

Executed on this 8th day of February, 2019.

Aubrey Elenis
Director
Colorado Civil Rights Division

AFFIDAVIT OF STEPHANIE SCHMALZ

I, Stephanie Ricker Schmalz, hereby affirm under penalty of perjury that the following statements are true:

1. I am a resident of Littleton, Colorado.

2. I have been in a committed relationship with another woman, Jeanine Schmalz, since 2005. We are raising three children together.

3. After several years together, Jeanine and I decided to hold a Family Commitment Ceremony. We invited friends and family from several states to celebrate with us at a gathering in Littleton.

4. We decided to serve cupcakes at our Family Commitment Ceremony. On January 16, 2012, Jeanine and I visited Masterpiece Cakeshop's retail location in Denver for the purpose of tasting and potentially ordering cupcakes for our event.

5. At the Cakeshop, we met with a female representative and discussed with her our interest in placing a large cupcake order. This woman explained our options in terms of flavors, delivery, rental of various stands or displays, pricing, and so forth.

6. After we had spoken with her for several minutes, the woman said, "Wait, who is this for? Is it for the two of you?" Jeanine and I confirmed that yes, the celebration would be for the two of us. At that point, the woman said that she would not be able to take our order because of Cakeshop policy. She said this was because the Cakeshop owners believed in the Bible and that same-sex marriage was not legal in the state of Colorado.

7. We left Masterpiece Cakeshop without being able to place a cupcake order.

8. Reflecting on what had happened, I wondered if the woman we met with had the authority to speak for the business and if the discriminatory policy she stated was really the policy of Masterpiece Cakeshop. Later that same day, I called the Cakeshop to ask about this. The same woman we had spoken with before answered the phone and said that she was one of the Cakeshop owners.

9. On the phone, the woman said that the Cakeshop's policy that resulted in their being unable to take our order was based on the owners' reading of the word of God. I told her that the God I know loves me and my family and instructed all people to love one

0267

Exhibit B

another.

10. I was very sad and shocked that Masterpiece Cakeshop refused our business. I felt that Jeanine and I had been discriminated against because we are lesbians.

11. Shortly after this incident took place, I posted a review of Masterpiece Cakeshop on the website Yelp.com, in which I described my experience of discrimination there. Someone identifying himself as "Jack P. of Masterpiece Cakeshop" posted a reply to my review, in which he said that "...a wedding [for gays and lesbians] is something that, so far, not even the State of Colorado will allow". He did not dispute that the Cakeshop has a policy of refusing to sell cakes for gay and lesbian couples' weddings and celebrations.

12. I saw press coverage in July 2012 about Charlie Craig and Dave Mullins also having been being denied service at Masterpiece Cakeshop. At that point, I decided to try an experiment. I called Masterpiece Cakeshop again and spoke with Jack Phillips. I told Mr. Phillips that I was a dog breeder and was planning to host a celebration on the occasion of breeding one of my dogs with a neighbor's dog. I specified that for the "dog wedding" I wanted a cake large enough to serve about 20 people, in the shape of a dog bone, and lettered with the names Roscoe and Buffy. Mr. Phillips stated no objection to filling this order; he quoted me a price of $69.99 plus tax and asked when I needed the cake.

13. I then felt even more disgusted that the owners of Masterpiece Cakeshop were willing to take a cake order for a supposed wedding between two dogs, but were not willing to take an order for a celebration of the love and commitment between two women.

Dated: January 3, 2013

Signed: _____

Subscribed and sworn to or affirmed before me this 3rd day of January in the year 2013.

Notary Public: _____

(affix seal or stamp.)

0268

Exhibit B

Department of Regulatory Agencies

John W. Hickenlooper
Governor

Barbara J. Kelley
Executive
Director

Division of Civil Rights
Steven Chavez
Director of Division of Civil Rights

1560 Broadway, Suite 1050
Denver, CO 80202
(303) 894-2997
(303) 894-7830 (fax)
(800) 262-4845 (toll free)

200 West "B" Street, Suite 234
Pueblo, CO 81003
(719) 542-1298
(303) 869-0498 (fax)

222 S. 6th Street, Suite 301
Grand Junction, CO 81505
(970) 248-7303
(970) 248-7304
(970) 242-1262 (fax)

http://www.dora.state.co.us/civil-rights/

Charge No. P20130007X

David Mullins
1401 E. Girard Pl., #9-135
Englewood, CO 80113 Charging Party

Masterpiece Cakeshop
3355 S. Wadsworth Blvd.
Lakewood, CO 80227 Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is sufficient evidence to support the Charging Party's claim of denial of full and equal enjoyment of a place of public accommodation based on his sexual orientation. As such, a **Probable Cause** determination hereby is issued.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about July 19, 2012, the Respondent, a place of public accommodation, denied him the full and equal enjoyment of a place of accommodation on the basis of his sexual orientation (gay). The Respondent avers that its standard business practice is to deny service to same-sex couples based on religious beliefs.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery that provides cakes and baked goods to the public, and operates within the state of Colorado.

The Charging Party states that on or about July 19, 2012, he visited the Respondent's place of business for the purpose of ordering a wedding cake with his significant other, Charlie Craig ("Craig"), and his mother Deborah Munn ("Munn"). The Charging Party and his partner planned to travel to Massachusetts to marry and intended to have a wedding reception in Denver upon their return. The Charging Party and his significant other were attended to by the Respondent's Owner, Jack Phillips ("Phillips"). The Charging Party asserts that while viewing photos of the available wedding cakes, he informed the owner that the cake was for him and his significant other. The Charging Party states that in response, Phillips replied that his standard business practice is to deny service to same-sex couples based on his religious beliefs. The Charging Party states that based on Phillips response and refusal to provide service, the group left the Respondent's place of business.

The Charging Party states that on July 20, 2012, in an effort to obtain more information as to why her son was refused service, Munn telephoned Phillips. During this telephone conversation, Phillips stated that "because he is a Christian, he was opposed to making cakes for same-sex weddings for any same-sex couples."

The record reflects that Phillips subsequently commented to various news organizations, that he had turned approximately six same-sex couples away for this same reason. The Respondent has not argued that it is a business that is principally used for religious purposes.

Respondent Owner Jack Phillips ("Phillips") states that on July 19, 2012, the Charging Party, Craig, and Munn visited his bakery and stated that they wished to purchase a wedding cake. Phillips asserts that he informed the Charging Party that he does not create wedding cakes for same-sex weddings. According to Phillips, this interaction lasted no more than 20 seconds. Phillips states that the Charging Party, Craig, and Munn subsequently exited the Respondent's place of business. The Respondents avers that on July 20, 2012, during a conversation with Munn, he informed her that he refused to create a wedding cake for her son based on his religious beliefs and because Colorado does not recognize same-sex marriages.

The Respondent states that the aforementioned situation has occurred on approximately five or six past occasions. The Respondent contends that in those situations, he advised potential customers that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. He adds that he told the Charging Party and his partner that he "could

create birthday cakes, shower cakes, or any other cakes." The Respondent asserts that this decision rested in part based on the fact that the state of Colorado does not recognize same sex marriages.

In an affidavit provided by the Charging Party during the Division's investigation, Stephanie Schmalz ("S. Schmalz") states that on January 16, 2012, she and her partner Jeanine Schmalz ("J. Schmalz") visited the Respondent's place of business to purchase cupcakes for their family commitment ceremony. S. Schmalz states that when she confirmed that the cupcakes were to be part of a celebration for her and her partner, the Respondent's female representative stated that she would not be able to place the order because "the Respondent had a policy of not selling baked goods to same-sex couples for this type of event." Following her departure from the Respondent's place of business, S. Schmalz telephoned the Respondent to clarify its policies. During this telephone conversation, S. Schmalz learned that the female representative was an owner of the business and that it was the Respondent's stated policy not to provide cakes or other baked goods to same-sex couples for wedding-type celebrations.

S. Schmalz subsequently posted a review on the website Yelp describing her experiences with the Respondent. An individual identifying himself as "Jack P. of Masterpiece Cakeshop" posted a reply to Schmalz's review, in which he stated that "...a wedding for [gays and lesbians] is something that, so far, not even the State of Colorado will allow" and did not dispute that he refuses to serve gay and lesbian couples planning weddings or commitment celebrations.

S. Schmalz states that after learning of the Respondent's policy, she later contacted the Respondent's place of business and spoke to Phillips. During this conversation, S. Schmalz claimed to be a dog breeder and stated that she planned to host a "dog wedding" between one of her dogs and a neighbor's dog. Phillips did not object to preparing a cake for S. Schmalz's "dog wedding."

In an affidavit provided by the Charging Party during the Division's investigation, Samantha Saggio ("Saggio") states that on May 19, 2012, she visited the Respondent's place of business with her partner, Shana Chavez ("Chavez") to look at cakes for their planned commitment ceremony. Saggio states that upon learning that the cake would be for the two women, the Respondent's female representative stated that the Respondent would be unable to provide a cake because "according to the company, Saggio and Chavez were doing something 'illegal.'"

In an affidavit provided by the Charging Party during the Division's investigation, Katie Allen ("Allen") and Alison Sandlin ("Sandlin") state that on August 6, 2005, they visited the Respondent's place of business to taste cakes for their planned commitment ceremony. Allen states that upon learning of the women's intent to wed one another, the Respondent's female representative stated, "We can't do it then" and explained that the Respondent had established a policy of not taking cake orders for same-sex weddings, "because the owners believed in the word of Jesus."

Allen and Sandlin state that they later spoke directly with Phillips. During this conversation, Phillips stated that "he is not willing to make a cake for a same-sex commitment ceremony, just as he would not be willing to make a pedophile cake."

Discriminatory Denial of Full and Equal Enjoyment of Services – Sexual Orientation (gay)

To prevail on a claim of discriminatory denial of full and equal enjoyment of services, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought goods, services, benefits or privileges from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied a type of service usually offered by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his sexual orientation. The Charging Party visited the Respondent's place of business for the purpose of ordering a wedding cake for his wedding reception. The evidence indicates that the Charging Party and his partner were otherwise qualified to receive services or goods from the Respondent's bakery. During this visit, the Respondent informed the Charging Party that his standard business practice is to deny baking wedding cakes to same-sex couples based on his religious beliefs. The evidence shows that on multiple occasions, the Respondent turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. The Respondent's representatives stated that it would be unable to provide a cake because "according to the company, [the potential same-sex customers] were doing something 'illegal,'" and "because the owners believed in the word of Jesus." The Respondent indicates it will bake other goods for same sex couples such as birthday cakes, shower cakes or any other type of cake, but not a wedding cake. As such, the evidence shows that the Respondent refused to allow the Charging Party and his partner to patronize its business in order to purchase a wedding cake under circumstances that give rise to an inference of unlawful discrimination based on the Charging Party's sexual orientation.

Based on the evidence contained above, I determine that the Respondent has violated C.R.S. 24-34-402, as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(II), as re-enacted, the Parties hereby are ordered by the Director to proceed to attempt amicable resolution of these charges by compulsory mediation. The Parties will be contacted by the agency to schedule this process.

On Behalf of the Colorado Civil Rights Division

Jennifer McManus 3/5/2013

Steven Chavez, Director
or Authorized Designee

Date

Exhibit C

CERTIFICATE OF MAILING

This is to certify that on **March 7, 2013** a true and exact copy of the Closing Action of the above-referenced charge was deposited in the United States mail, postage prepaid, addressed to the parties listed below.

CCRD #
P20130007X

David Mullins
1401 E. Girard Pl, #9-135
ENGLEWOOD, CO 80113

Sara Rich
ACLU Foundation of Colorado
303 E. 17th Ave., Ste. 350
DENVER, CO 80203

Masterpiece Cakeshop
3355 S. Wadsworth Boulevard
LAKEWOOD, CO 80227

Nicolle Martin
7175 W. Jefferson Ave., Ste 4000
Lakewood, CO 80235

L Wilkins

Lauren Wilkins
Colorado Department of Regulatory Agencies
Division of Civil Rights
1560 Broadway, Suite 1050
Denver, CO 80202
P 303.894.2997
www.dora.state.co.us

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

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 D

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.

DECLARATION OF LESLIE BOSTWICK

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 four years.

3. I prepared the chart, included below, based on the information I obtained from sampling various city and state websites.

City/State	Commission/Division	Date	Probable Cause Determination	Location of Information in Materials	Link
California	Department of Fair Employment and Housing	2014 2015 2016 2017	.5% .5% .7% .7%	Pg. 20 Pg. 14 Pg. 15 Pg. 20	https://www.dfeh.ca.gov/about-us/annual-reports-and-statistics-2/
Chicago	Chicago Commission on Human Relations	2014 2015 2016	25% 4.5% (just public accommodation) 5% (just public accommodation)	Pg. 22 Pg. 8 Pg. 13	https://www.chicago.gov/city/en/depts/cchr/supp_info/CCHRAnnualReports.html
Connecticut	Commission on Human Rights and Opportunities	2014-15 2015-16 2016-17 2017-18	5.9% 5.5% 5.7% 5.2%	Pg. 2 Pg. 3 Pg. 3 Pg. 3	https://www.ct.gov/chro/cwp/view.asp?a=2523&Q=315780
Massachusetts	Massachusetts Commission Against Discrimination	2014 2015 2016 2017	10.5% 15.6% 12.9% 12.8%	Pg. 8 Pg. 12 Pg. 11 Pg. 12	https://www.mass.gov/lists/mcad-annual-reports
Minnesota	Minnesota Department of Human Rights	1/2014 7/2014 1/2015 7/2015 1/2016 7/2016 1/2017 7/2017 1/2018 7/2018	6.36% 5.24% 9.93% 10.66% 6.62% 5.6% 11% 5.06% 13% 2.77%	Pg. 1 Pg. 2 Pg. 2 Pg. 2 Pg. 2 Pg. 2 Pg. 2 Pg. 2 Pg. 2 Pg. 2	https://mn.gov/mdhr/news-community/reports/legislative-report.jsp
New York City	New York Commission on Human Rights	2015 2016 2017	8.5% 4.8% 4.7%	NA	https://www1.nyc.gov/site/cchr/about/by-the-numbers.page
U.S.	Equal Employment Opportunity Commission	2014 2015 2016 2017	2.8% 3% 2.7% 2.7%	Pg. 1 Pg. 1 Pg. 1 Pg. 1	https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm
U.S.	Fair Housing and Equal Opportunity Fair Housing Programs	2016	5.3%	Pg. 31-10	https://www.hud.gov/sites/documents/35-FAIRHSNGACTS.PDF

Exhibit E

4. As of January 29, 2019, the information included in the chart related to the State of California are available to view on the California Department of Fair Employment and Housing's website and are true and accurate depictions of the information available on the website.

5. As of January 29, 2019, the information included in the chart related to the City of Chicago are available to view on the Chicago Commission on Human Relations' website and are true and accurate depictions of the information available on the website.

6. As of January 29, 2019, the information included in the chart related to the State of Connecticut are available to view on the Connecticut Commission on Human Rights and Opportunities' website and are true and accurate depictions of the information available on the website.

7. As of January 29, 2019, the information included in the chart related to the State of California are available to view on the California Department of Fair Employment and Housing's website and are true and accurate depictions of the information available on the website.

8. As of January 29, 2019, the information included in the chart related to the State of Massachusetts are available to view on the Massachusetts Commission Against Discrimination's website and are true and accurate depictions of the information available on the website.

9. As of January 30, 2019, the information included in the chart related to the State of Minnesota are available to view on the Minnesota Department of Human Rights' website and are true and accurate depictions of the information available on the website.

10. As of January 29, 2019, the information included in the chart related to the State of New York are available to view on the New York Commission on Human Rights' website and are true and accurate depictions of the information available on the website.

11. As of January 29, 2019, the information included in the chart related to the U.S. Equal Employment Opportunity Commission (EEOC) are available to view on the EEOC's website and are true and accurate depictions of the information available on the website.

12. As of January 29, 2019, the information included in the chart related to the U.S. Department of Housing and Urban Development (HUD) are available to view on the HUD website and are true and accurate depictions of the information available on the website.

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

Executed on this 7th day of February, 2019.

Leslie Bostwick