IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DEFENDING EDUCATION, *et al.*, *Plaintiffs*, v. AUBREY C. SULLIVAN, in her official capacity as the Director of the Colorado Civil Rights Division, *et al.*, *Defendants*.	Case No. 1:25-cv-01572

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

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INTRODUCTION

Anti-discrimination laws are important. Coloradans have a right to access public spaces, and the State of Colorado has a strong interest in protecting that right. Indeed, like many States, Colorado has long guaranteed that all persons shall have "full and equal" access to places of public accommodation. Colo. Rev. Stat. §24-34-601(2)(a). That law, the Colorado Anti-Discrimination Act, ensures that individuals are not denied access or goods based on their membership in a protected category.

But last Friday, Colorado adopted a new law—House Bill 25-1312—for an entirely different purpose. Unlike the Anti-Discrimination Act's existing prescriptions, which regulate *access* to public accommodations, the purpose of H.B. 25-1312 is to regulate *speech*. Specifically, the bill revises the definition of "gender expression," a protected category in Colorado law, and makes it unlawful for anyone who operates in a place of public accommodation to decline to use someone's "chosen name" or other terms by which they "choos[e] to be addressed," like preferred pronouns. *See* H.B. 25-1312 §8 (Compl. Ex. A).

Colorado's law as amended by H.B. 25-1312 is plainly unconstitutional. To be sure, States may prohibit acts of discrimination—denying access or service—but they may not regulate, let alone punish, the speech of those who operate in a place of public accommodation. *See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995) (States are "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one."); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019) ("[A]ntidiscrimination laws, as critically important as they are, must yield to the Constitution."). Yet Colorado law does exactly that. The new "gender expression" and "chosen name" definitions—along with Colorado's existing ban on published statements and communications that make individuals feel "unwelcome" in places of public

accommodation—violate the First and Fourteenth Amendments. They compel speech, they regulate based on content and viewpoint, they are overbroad, and they are impermissibly vague.

These laws have real-world consequences for many Coloradans, including Plaintiffs and their members. Lori Gimelshteyn and Erin Lee (who are members of Defending Education) and their respective organizations, CPAN and PKC, frequently host and attend events in places of public accommodation to express their views about the dangers of gender ideology. At those events and in their public statements, they want to use biologically accurate pronouns and names—what proponents of H.B. 25-1312 call "deadnaming" and "misgendering"—because they believe sex is fixed at birth and immutable. But Colorado law prohibits them from doing so. Similarly, Dr. Travis Morrell, a Colorado physician who is a member of Do No Harm, wants to use biologically accurate names and pronouns with his patients because he also believes sex is immutable and because he believes proper medical care requires recognizing biological realities. But because of Colorado law, he cannot use his desired speech. These restrictions on their speech are plainly unconstitutional.

Plaintiffs seek a preliminary injunction to protect their right to speak freely and to not be forced to parrot the State's views on matters of sex and gender. Plaintiffs are entitled to a preliminary injunction because they are likely to succeed on the merits, they will suffer irreparable harm without an injunction, and the balance of harms and public interest weigh in their favor. This Court should grant the motion and enjoin Defendants from enforcing the challenged provisions.

BACKGROUND

I. Colorado has a history of punishing protected speech.

The First Amendment protects an individual's right to speak freely, including "the decision of both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 797 (1988). Americans do not forfeit their First Amendment rights when they are in a place of public

accommodation. *303 Creative v. Elenis*, 600 U.S. 570, 592 (2023) ("[N]o public accommodations law is immune from the demands of the Constitution."). To the contrary, the Supreme Court has consistently affirmed that, "whatever state law may demand," business owners, event hosts, and others who operate in a place of public accommodation have "a First Amendment right to present their message undiluted by views they d[o] not share." *Id.* at 585-86 (citing *Hurley*, 515 U.S. at 572-73).

Unfortunately, Colorado has taken a different path. Colorado has repeatedly tried to use its public accommodation laws to coerce protected speech. Worse, it has done so specifically to silence views with which it disagrees, particularly on issues of sex and gender. The Colorado Civil Rights Commission, for example, declined to take action against bakeries that refuse to bake cakes expressing a religious message critical of same-sex marriage. *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 633-34 (2018). But it *did* issue a cease-and-desist order and a suite of other remedial measures against a Christian baker who declined to bake a cake endorsing same-sex marriage. *Id.* at 625-30. When the U.S. Supreme Court reviewed that case, it confirmed what should have been obvious: even if Colorado could punish a hypothetical baker who "refused to sell *any* goods" to a class of customers, it could not force a baker to "use his artistic skills to make an expressive statement" about the propriety of same-sex marriage. *Id.* at 631-33 (emphasis added).

Yet Colorado persisted. Just a few years later, the Commission was back at the Supreme Court, arguing that its public accommodation laws could force a wedding website designer to create websites for same-sex marriages even though the designer firmly believed that "marriage should be reserved to unions between one man and one woman." *303 Creative*, 600 U.S. at 580-83. But Colorado's effort to (again) coerce speech out of business owners, the Court explained, did "not respect the First Amendment." *Id.* at 592. Yes, the designer's business was a public accommodation, so she could not deny "'equal access'" to any class of customers. *Id.* at 590. But the designer was willing to work with any

customer regardless of sexual orientation or gender identity. *Id.* at 597-98. She simply did not want to use her artistic skills to express a message—i.e., a custom website design—with which she disagreed. Those customized designs were "'pure speech,'" and Colorado could not apply its public accommodation laws to coerce "'expressive activity'" out of the designer. *Id.* at 587-92.

II. Colorado adopts H.B. 25-1312 to punish dissenting views on sex and gender.

Unfortunately, Colorado still has not taken the Supreme Court's lessons to heart. On May 16, Governor Jared Polis signed into law H.B. 25-1312, which enacts a number of controversial policies designed to promote gender ideology, the notion that someone can change their gender and that others should adjust their conduct and language to "affirm" the person's self-professed "gender identity." Section 8 of H.B. 25-1312 amends Colorado's Anti-Discrimination Act to compel Coloradans to refer to transgender-identifying individuals using state-approved language. Two particular provisions in the amended Anti-Discrimination Act are relevant here.

A. The "gender expression" and "chosen name" definitions.

"Gender expression" is one of many protected categories under the Colorado Anti-Discrimination Act. Before H.B. 25-1312, its definition was limited to appearance and conduct: "an individual's way of reflecting and expressing the individual's gender to the outside world, typically demonstrated through appearance, dress, and behavior." Colo. Rev. Stat. §24-34-301(9) (eff. May 25, 2023). Thus, a business could not deny someone actual access or services because that person's dress or appearance did not conform to their biological sex. *See id.* §24-34-601(2)(a) (cannot "deny … full and equal enjoyment of … a place of public accommodation" based on "gender expression"); *cf. 303 Creative*, 600 U.S. at 594-95, 597-98.

H.B. 25-1312 amends that definition to include the use of a "chosen name" and "how the individual chooses to be addressed." *See* Colo. Rev. Stat. §24-34-301(9) (eff. May 16, 2025). And it

further defines "chosen name" to mean any "name that an individual requests to be known as in connection to" a protected category, including "gender identity" and "gender expression." *Id.* §24-34-301(3.5) (eff. May 16, 2025). In other words, in addition to liability for denying access or services, those who operate in a place of public accommodation are now liable if they refuse to "addres[s]" or refer to someone using their chosen name, preferred pronouns, or other gender-affirming terms. If the speaker instead addresses or refers to a transgender-identifying individual using biologically accurate pronouns, birth names, or other non-gender-affirming terms—i.e., if the speaker "deadnames" or "misgenders" them, as proponents of H.B. 25-1312 call it—they have denied the individual the "full and equal enjoyment" of a public accommodation based on the individual's "chosen name" and preferred form of "addres[s]." *Id.* §§24-34-301(9); 24-34-601(2)(a). H.B. 25-1312 thus expands the definition of "gender expression" to cover not just conduct but also *speech* based on sex and gender.

H.B. 25-1312 creates only a narrow carveout for these new speech requirements. Individuals need not speak using the name that "an individual requests to be known as" if and only if the requested name "contain[s] offensive language" or when the person is "requesting the name for frivolous purposes." Colo. Rev. Stat. §24-34-301(3.5) The law offers no exception to its blanket requirement that Coloradans speak using an individual's preferred pronouns or other forms of "address." *Id.*

B. The Unwelcome Provision.

Colorado's prohibitions on disfavored speech do not stop there. The Colorado Anti-Discrimination Act also includes an "Unwelcome Provision." Under that provision, it is unlawful for any person who operates in a place of public accommodation to "directly or indirectly … publish" or otherwise distribute "any written, electronic, or printed communication, notice, or advertisement that indicates … that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable" based on "gender expression" or any other

protected category. *Id.* §24-34-601(2)(a). The Unwelcome Provision does not define any of its key terms, but it "surely implies a subjective element on behalf of the person" who claims to feel unwelcome. *303 Creative v. Elenis*, 6. F.4th 1160, 1213-14 (10th Cir. 2021) (Tymkovich, C.J., dissenting), *rev'd*, 600 U.S. 570 (2023); *see, e.g.*, *Unwelcome*, Merriam-Webster Dictionary (archived May 11, 2025), perma.cc/X2KK-D5QJ ("not wanted"); *Objectionable*, Merriam-Webster Dictionary (archived May 11, 2025), perma.cc/94D7-2QVY ("offensive").

As amended by H.B. 25-1312, then, the Colorado Anti-Discrimination Act also prohibits anyone who operates in a public accommodation from distributing any communication that offends a transgender-identifying person or makes them feel "unwelcome" because the communication refers to such persons without using their "chosen name" or other terms by which they "choos[e] to be addressed." Colo. Rev. Stat. §§24-34-301(9); 24-34-601(2)(a). Such communications constitute a "discriminatory" and "unlawful" practice based on "gender expression." *Id.* §24-34-601(2)(a).

Anyone who violates Colorado's public accommodation laws—which, after H.B. 25-1312, means anyone who "deadnames" or "misgenders" someone in a public accommodation or who publishes statements that make transgender individuals feel "unwelcome"—is subject to investigations, injunctive orders, lawsuits, and fines. Violators are reported to the Civil Rights Commission, which can require "compulsory mediation," issue cease-and-desist letters, and order other equitable relief like participation in mandatory re-education programs. *Id.* §§24-34-306(1)(a)(I), (2)(a), (9), 24-34-605; *303 Creative*, 600 U.S. at 581. Violators can also be sued by "aggrieved" individuals and, upon a finding of liability, be forced to pay hefty fines. *Id.* §24-34-602(1)(a).

III. Plaintiffs file this lawsuit to protect their rights and their members' rights.

Plaintiffs are various non-profit organizations (Defending Education, Colorado Parent Advocacy Network, Protect Kids Colorado, and Do No Harm) and one individual (Dr. Travis Morrell).

- Defending Education is a nationwide, grassroots membership association whose members include parents, students, and others concerned about the state of education in America. Perry Decl. ¶3. In particular, the organization opposes the spread of harmful gender ideology among America's children and in America's schools and works to protect its members' First Amendment right to address individuals using biologically accurate pronouns, names, and terms. *Id.* ¶¶4-5. DE has members in Colorado who share its views, including Ms. Lori Gimelshteyn, the Executive Director of Colorado Parent Advocacy Network, and Ms. Erin Lee, the Executive Director of Protect Kids Colorado. *Id.* ¶6.

- Colorado Parent Advocacy Network is a statewide, grassroots organization comprised of parents, educators, and other concerned Colorado citizens. Gimelshteyn Decl. ¶4. The organization's mission is to secure parental rights and promote a rigorous, non-political educational experience. *Id.* ¶¶4-5. In line with that mission, CPAN opposes the spread of controversial gender ideologies. *Id.* ¶4. CPAN accomplishes its mission through, among other means, public advocacy and education. *Id.*

- Protect Kids Colorado is a statewide, grassroots organization supported by parents, educators, and other concerned Colorado citizens. Lee Decl. ¶4. The organization works to secure parents' rights to make decisions about their children's wellbeing and education, to raise awareness about the prevalence of gender ideologies and the dangers of gender-affirming treatments, and to oppose government attempts to allow biological males to compete in women's sports. *Id.* ¶¶4-5, 9. PKC furthers this mission through, among other means, public advocacy and education. *Id.* ¶4.

- Do No Harm is a nationwide, grassroots membership organization whose members include healthcare professionals, students, patients, and policymakers. Rasmussen Decl. ¶3. DNH works to ensure that medicine is driven by scientific evidence rather than politics. *Id.* To that end, it opposes divisive trends like youth-focused gender ideology and gender-affirming medical treatments. *Id.* ¶¶3-4. DNH has members in Colorado, including Dr. Travis Morrell, who share its views. *Id.* ¶6.

- Dr. Travis Morrell is a licensed physician and a double board-certified dermatologist and dermatopathologist with a medical practice in Grand Junction, CO. Morrell Decl. ¶¶3-4. Dr. Morrell treats many individual patients in his practice, including transgender-identifying individuals. *Id.* ¶6.

Plaintiffs and their members are harmed by Colorado's speech restrictions. CPAN, PKC, and their leadership (including Ms. Gimelshteyn and Ms. Lee) hold traditional views on matters of sex and gender identity. Gimelshteyn Decl. ¶6; Lee Decl. ¶6. They believe that sex is determined at birth and

immutable. *Id.* They believe that, if they were forced to affirm someone's non-biological "gender identity" or "gender expression," they would be affirming a lie. *Id.*

CPAN and PKC host events in places of public accommodation, and Ms. Gimelshteyn and Ms. Lee participate in these events. Gimelshteyn Decl. ¶10; Lee Decl. ¶10; *see Creek Red Nation v. Jeffco Midget Football Ass'n*, 175 F. Supp. 3d 1290, 1298 (D. Colo. 2016) ("organizations that conduct activities in facilities … that are open to the public" are subject to Colorado's public accommodation laws). In line with their beliefs, CPAN, PKC, Ms. Gimelshteyn, and Ms. Lee want to refer to individuals at these events using biological pronouns, birth names, and other biologically accurate terms, even if those pronouns, names, or terms conflict with an individual's self-professed gender identity or expression. Gimelshteyn Decl. ¶¶12-14; Lee Decl. ¶¶12-14. They do not want to be forced to use "gender-affirming" language like chosen names or preferred pronouns. Gimelshteyn Decl. ¶29; Lee Decl. ¶29. Transgender-identifying individuals have attended their events in the past, and Ms. Gimelshteyn and Ms. Lee anticipate that transgender-identifying individuals will attend their events in the future. Gimelshteyn Decl. ¶13; Lee Decl. ¶13. CPAN, PKC, Ms. Gimelshteyn, and Ms. Lee also want to publish materials and statements—for example, educational resources for parents, social media posts, flyers advertising their events, videos of their events, and other materials distributed at their events—that refer to transgender-identifying individuals using biologically accurate terms. *See, e.g.*, Gimelshteyn Decl., Ex. B (social media post calling a transgender individual a "man ridiculing girls"); Lee Decl., Ex. E (post referring to a Colorado state representative as "Brian Titone" and a "man," even though Rep. Titone identifies as a woman and goes by "Brianna").

Dr. Morrell similarly holds "scientific, objective, and reproducible views on matters of sex and gender identity." Morrell Decl. ¶5. Dr. Morrell believes that "affirming an individual's non-biological gender identity or gender expression is harmful to the individual because it encourages them to believe

a falsehood about themselves and discourages them from seeking proper care to address their gender dysphoria." *Id.* ¶9. Accordingly, Dr. Morrell does not want to be forced to use "chosen names" or "preferred pronouns" when addressing his patients. *Id.* ¶10. When Dr. Morrell treats patients in his medical practice, he wants to use biological pronouns, birth names, and other biologically accurate terms. *Id.* ¶¶10-12; *e.g.,* ¶10 ("Can you please perform a urine pregnancy test for Sarah" or "Let's send his penile biopsy specimen to the lab."). And when he writes or speaks publicly about issues of sex and gender (which he frequently does), he wants to refer to individuals using birth names and biologically accurate pronouns and other terms. *Id.* ¶¶14-16.

Because of H.B. 25-1312, however, CPAN, PKC, Ms. Gimelshteyn, Ms. Lee, and Dr. Morrell must stop addressing or referring to individuals in places of public accommodation (e.g., at CPAN and PKC events or in Dr. Morrell's medical practice) by their birth names (instead of "chosen name"), by their biological pronouns (instead of their "preferred pronouns"), and by other terms that are not gender-affirming. Gimelshteyn Decl. ¶25; Lee Decl. ¶25; Morrell Decl. ¶24. They also must now refrain from "publish[ing]" materials that refer to individuals using biologically accurate pronouns, birth names, and other terms inconsistent with their purported gender identity or gender expression. Gimelshteyn Decl. ¶¶25-26; Lee Decl. ¶25-26; Morrell Decl. ¶25. They self-censor because they fear that, if they engage in this type of speech, they will be investigated by the Colorado Civil Rights Commission, sued by individuals, and face financial or equitable penalties. Gimelshteyn Decl. ¶25; Lee Decl. ¶25; Morrell Decl. ¶24. Plaintiffs filed this lawsuit to restore their right to express their deeply held beliefs.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction because they are "likely to succeed on the merits" of their claims that Colorado's laws violate the First and Fourteenth Amendments. *Winter v.*

Natural Res. Def. Council, 555 U.S. 7, 20 (2008). In constitutional cases, like this one, that is usually "'the determinative factor.'" *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013). But Plaintiffs satisfy the other preliminary injunction factors as well: they are "likely to suffer irreparable harm in the absence of preliminary relief," the "balance of equities" favors an injunction, and "an injunction is in the public interest." *Winter*, 555 U.S. at 20. This Court should enter a preliminary injunction.

I. Plaintiffs are likely to prevail on the merits.

Plaintiffs are likely to prevail on the merits of their claims because the challenged definitions and the Unwelcome Provision violate the First and Fourteenth Amendments, both on their face and as applied.

A. H.B. 25-1312's "gender expression" and "chosen name" definitions violate the First and Fourteenth Amendments.

The "gender expression" and "chosen name" definitions violate the First Amendment in multiple ways: they compel speech, they discriminate based on content and viewpoint, and they are overbroad. The definitions also violate the Fourteenth Amendment because they are vague and thereby invite arbitrary enforcement.

1. The definitions violate the First Amendment.

Compelled Speech. The Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. AFSCME*, 585 U.S. 878, 892 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." *Janus*, 585 U.S. at 892.

Many Coloradans, including Plaintiffs and their members, believe that sex is fixed at birth and immutable. Perry Decl. ¶7; Gimelshteyn Decl. ¶6; Lee Decl. ¶6; Rasmussen Decl. ¶7; Morrell Decl. ¶5. They do not want to be forced to affirm that a biological male is actually a female (or vice versa) by referring to him or her using a chosen name or non-biological preferred pronouns. Gimelshteyn Decl. ¶¶6, 8; Lee Decl. ¶¶6, 8; Morrell Decl. ¶¶5, 9. Doing so would contradict their deeply held beliefs and, as they see it, harm the individual by encouraging him or her to believe a lie about themselves. Gimelshteyn Decl. ¶8; Lee Decl. ¶8; Morrell Decl. ¶9. But that is exactly what the definitions of "gender expression" and "chosen name" require. They force those who operate in a place of public accommodation to refer to individuals how they "choos[e] to be addressed"—with "chosen name[s]" and preferred pronouns rather than birth names and biological pronouns. Colo. Rev. Stat. §24-34-301(3.5), (9). If someone operating a public accommodation *doesn't* use the State's preferred language (i.e., if they "misgender" or "deadname" someone) they can be hit with investigations, cease-and-desist orders, and lawsuits. *Id.* §§24-34-306(1)(a)(I), (2)(a), (9), 24-34-602(1)(a), 24-34-605. As a consequence, the revised definitions compel Coloradans to "communicate" the "message" that "[p]eople can have a gender identity inconsistent with their sex." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021).

The Supreme Court's decision in *303 Creative* demands the conclusion that the revised definitions unconstitutionally compel speech. There, Colorado argued that its public accommodation laws could force a wedding website designer to create websites for same-sex marriages even though the designer firmly believed that "marriage should be reserved to unions between one man and one woman." 600 U.S. at 580-83. But that, said the Court, "would not respect the First Amendment." *Id.* at 592. Though the designer's business was a public accommodation, her custom website creations were "'pure speech,'" and Colorado could not apply its public accommodation laws to coerce "'expressive activity'" out of her. *Id.* at 587-92 (emphasis added). All the more so here. If anything is "pure speech,"

it is the actual words Coloradans use to address one another, especially when those words express a view about something as fundamental as sex and gender. *See Meriwether*, 992 F.3d at 508 ("Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.")

That the challenged definitions do not literally require Coloradans to speak is of no consequence. Even if speakers could avoid the Anti-Discrimination Act's penalties by holding their tongues, compelled silence is compelled speech. *Riley*, 487 U.S. at 796-97. Moreover, using pronouns and names is a "'virtual necessity'" for engaging in any conversation. *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1325 (M.D. Ala. 2019) (quoting *Wooley*, 430 U.S. at 715). It would be "impossible" for Coloradans to not "use any pronouns" or any names when discussing an individual. *Meriwether*, 992 F.3d at 517. In practice, then, the law forces Coloradans to "carr[y] the government['s] message" about sex and gender. *Doe 1*, 367 F. Supp. 3d at 1326.

Content Discrimination. H.B. 25-1312's new definitions also punish speech based on its content. A policy "is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). But governments have "'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* "Content-based regulations" are therefore "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and "any restriction based on the content of the speech must satisfy strict scrutiny," *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

The definitions of "gender expression" and "chosen name" are content-based on their face. They specifically cover—and *only* cover—speech that involves the use of terms by which an "individual chooses to be addressed." Colo. Rev. Stat. §24-34-301(9). And they require addressing an individual by their "chosen name" when that name is used "in connection to the individual's disability, race, creed, color, religion, sex, sexual orientation, gender identity, gender expression, marital status, familial

status, national origin, or ancestry." *Id.* §24-34-301(3.5). For example, a store owner violates the law if he calls a transgender individual by their birth name; but he does not violate the law if he calls an individual a pejorative name because of his weight, height, clothes, or other unlisted category. The definitions thus impermissibly impose "differential burdens upon speech on account of the topics discussed, and dra[w] facial distinctions" based on "any of a long list of characteristics." *Speech First v. Cartwright*, 32 F.4th 1110, 1126 (11th Cir. 2022) (cleaned up).

As content-based laws, the definitions must satisfy strict scrutiny. But Colorado cannot satisfy that test. *See Kennedy v. Bremerton School District*, 597 U.S. 507, 524 (2022) (burden is on the state to show a compelling interest and narrow tailoring). Though Colorado may have an interest in ensuring equal *access* to places of public accommodation, it has no compelling interest in suppressing speech on issues of significant public concern like sex and gender. *303 Creative*, 600 U.S. at 583-84, 588-89. Even if it did, H.B. 25-1312's definitions are not narrowly tailored. "In fact the only interest distinctively served by th[is] content limitation is that of displaying the [State's] special hostility towards" traditional views on sex and gender. *R.A.V.*, 505 U.S. at 396. Again, *303 Creative* is on point. There, the Supreme Court held that Colorado did not have a "'compelling interest'" sufficient to justify forcing a website designer to create websites for same-sex weddings. 600 U.S. at 588-92. That holding requires the same conclusion here.

Viewpoint Discrimination. Worse yet, the definitions punish the use of pronouns, names, and other gendered language based on the viewpoint expressed by the speaker. Viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger v. University of Virginia*, 515 U.S. 819, 829 (1995). "'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victim's Bd.*, 502 U.S. 105, 118 (1991).

While content-based restrictions "are subject to strict scrutiny," viewpoint-based restrictions are subject to "even more critical judicial treatment." *Church on the Rock v. Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996). Indeed, viewpoint-based restrictions are always "prohibited." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018); *see Cartwright*, 32 F.4th at 1126 ("Restrictions … based on viewpoint are prohibited, seemingly as a per se matter." (cleaned up))

H.B. 25-1312's viewpoint discrimination is apparent on its face. Its revised "chosen name" and "gender expression" definitions punish speech about transgender-identifying individuals when that speech uses *birth* names and *biological* pronouns, but not when it uses "chosen name[s]" or other terms by which "an individual chooses to be addressed." Colo. Rev. Stat. §24-34-301(9). But "refus[ing] to address" an individual with their chosen name or pronouns "advance[s] a viewpoint on gender identity." *Meriwether*, 992 F.3d at 509. It affirms that "sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." *Id.* Prohibiting that expression while allowing the opposite is classic viewpoint discrimination. In addition, Colorado requires speakers to use a chosen name only when it is "request[ed] … in connection to" a specific list of protected characteristics and only when the requested name is not "offensive" or "frivolous." Colo. Rev. Stat. §24-34-301(3.5). The State, in other words, "'disapprov[es] of'" a particular "'subset of messages it finds offensive.'" *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019).

Overbreadth. The First Amendment prohibits regulations of speech that "punish a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (cleaned up). This "expansive remedy" guards against the possibility that "an overbroad law may deter or 'chill' constitutionally protected speech." *Id.* The freedoms protected by First Amendment, in other words, "'need breathing space to survive,'" so the government may regulate speech "'only with narrow specificity.'" *Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

And a policy is overbroad "if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008).

As explained above, the "gender expression" and "chosen name" definitions are unconstitutional in a substantial number of applications because they compel speech and discriminate based on content and viewpoint. Consider, for example, a restaurant waiter who agrees to serve a biologically male customer who identifies as a woman, but addresses the person as "sir" rather than "ma'am" because the waiter believes sex is immutable. Or a doctor who uses biological pronouns when speaking about a transgender-identifying patient with colleagues. Or a store clerk who addresses a long-time customer as "Jack" even though the customer now identifies as "Jane." These are all examples of protected speech, *see Meriwether*, 992 F.3d at 511-12, but they are all prohibited because of the challenged definitions. Colo. Rev. Stat. §24-34-301(9).

But the definitions' unconstitutional applications aren't just substantial relative to any legitimate applications; they are substantial "in an absolute sense" too. *Williams*, 553 U.S. at 292. Because the pre-H.B. 25-1312 definition of "gender expression" already prohibited discriminatory conduct—a public accommodation could not deny access or services based on an individual's "dress" or "appearance"—the *main* function of the revised definitions is to compel (or punish) protected speech: the use of a chosen name as opposed to a birth name, or the use of preferred pronouns as opposed to biological pronouns.

In other words, coercing speech on "a sensitive topic of public concern," *Meriwether*, 992 F.3d at 508, is the law's "heartland applicatio[n]," *Moody v. NetChoice*, 603 U.S. 707, 744 (2024). Every time someone in a public accommodation addresses or speaks about another person, they have to either censor their speech or parrot the State's view about the mutability of sex and gender. That is a "heavy

weight for [Coloradans] to bear," *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 252 (3d Cir. 2010), and must be given "significant" weight in the overbreadth analysis, *NetChoice*, 603 U.S. at 744.

As Applied. Facial overbreadth aside, H.B. 25-1312's revised definitions are also unconstitutional as applied. Plaintiffs and their members operate in places of public accommodations. *See* Gimelshteyn Decl. ¶10; Lee Decl. ¶10; Morrell Decl. ¶4. And their speech is among the many examples of expression covered by the law. CPAN, PKC, Ms. Gimelshteyn, and Ms. Lee do not want to be forced to use "chosen names" or "preferred pronouns." *See* Gimelshteyn Decl. ¶¶7-18; Lee Decl. ¶¶7-18. In line with their mission and beliefs, they want to use birth names, biological pronouns, and other biologically accurate terms in their speech at their public events and in their writings about transgender individuals. *Id.* Dr. Morrell similarly does not want to be forced to use "chosen names" or "preferred pronouns" when addressing or referring to his transgender patients, Morrell Decl. ¶¶10-16, or when speaking publicly about transgender individuals, *id.* ¶15. Instead, Dr. Morrell wants to use birth names and biological pronouns in both his oral and written communications. *Id.* ¶¶10-16; *see, e.g., id.* ¶10 ("Can you please perform a urine pregnancy test for Sarah" or "Let's send his penile biopsy specimen to the lab").

Their speech is unquestionably "protected speech." *303 Creative*, 600 U.S. at 587; *see Meriwether*, 992 F.3d at 511-12. But their speech is unlawful under H.B. 25-1312's definition of discrimination based on "gender expression" and "chosen name[s]." Colo. Rev. Stat. §24-34-301(3.5), (9). As explained above, H.B. 25-1312 is unconstitutional as applied because it compels Plaintiffs' and their members' speech and punishes their speech based on its content and viewpoint.

2. The definitions are impermissibly vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This doctrine addresses

two concerns: it ensures that "'regulated parties know what is required of them so they may act accordingly,'" and it ensures that "'those enforcing the law do not act in an arbitrary or discriminatory way.'" *United States v. Lesh*, 107 F.4th 1239, 1247 (10th Cir. 2024); *see Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1311 (8th Cir. 1997) ("a central purpose of the vagueness doctrine" is to prevent "'arbitrary and discriminatory enforcement'").

The need for clarity is especially critical when First Amendment freedoms are at stake, as they are here. If a challenged law "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982).

H.B. 25-1312's definitions of "gender expression" and "chosen name" are vague on their face and as applied. The bill redefines "gender expression" to include the use of a "chosen name, and how the individual chooses to be addressed." Colo. Rev. Stat. §24-34-301(9). But the State has not explained what forms of "addres[s]" it will require Coloradans to honor. Likewise, the bill defines a "chosen name" to mean any "name that an individual requests to be known as … so long as the name does not contain offensive language and the individual is not requesting the name for frivolous purposes." *Id.* §24-34-301(3.5). But it offers no detail on what "language" the State considers "offensive" or what "purposes" it considers "frivolous."

The definitions "lac[k] the necessary precision and guidance" to ensure "those enforcing the law do not act in an arbitrary or discriminatory way." *Lesh*, 107 F.4th at 1247 (cleaned up). Instead, Coloradans who operate in places of public accommodation are left to guess as to how Defendants will choose to enforce these terms, which will "inevitably lead [Coloradans] to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109.

B. The Unwelcome Provision violates the First and Fourteenth Amendments.

Like H.B. 25-1312's new definitions, the Unwelcome Provision compels speech, discriminates based on content and viewpoint, and is overbroad. And its terms are, again, impermissibly vague in violation of the Fourteenth Amendment.

1. The Unwelcome Provision violates the First Amendment

The Unwelcome provision—which makes it unlawful to "directly or indirectly … publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates" that an individual's presence at a place of public accommodation is "unwelcome, objectionable, unacceptable, or undesirable" based on a protected characteristic, Colo. Rev. Stat. §24-34-601(2)(a)—violates the First Amendment.

Compelled Speech. To start, the provision compels speech. Because it bans unwelcome, objectionable, unacceptable, or undesirable speech, it effectively requires Coloradans who operate in a place of public accommodation to either (1) alter their publications and communications so that their speech does not offend listeners based on a protected characteristic or (2) refrain from making supposedly offensive statements altogether. But states cannot "compel [a] speaker to alter the[ir] message" to make it "more acceptable to others." *Hurley*, 515 U.S. at 581. Even if Colorado were merely requiring speakers to remove "offensive" language from their publications, that is still unconstitutional compulsion. The First Amendment prohibits *all* compulsion, whether the speech being compelled is "ideological" or not. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004). And Colorado surely cannot prohibit offensive speech altogether. *Riley*, 487 U.S. at 796-97 (compelled silence is compelled speech).

Viewpoint and Content Discrimination. The Unwelcome Provision also regulates speech based on its viewpoint and content. In particular, it punishes speech based on a listener's or recipient's

subjective reaction: if a statement makes an individual *feel* "unwelcome, objectionable, unacceptable, or undesirable," it is unlawful. Colo. Rev. Stat. §24-34-601(2)(a); *see 303 Creative*, 6. F.4th at 1213-14 (Tymkovich, C.J., dissenting) (the provision "surely implies a subjective element").

It is well-established that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *see also, e.g.*, *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 787 (9th Cir. 2008) ("If the statute … would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations."). Plus, because the Unwelcome Provision turns on membership in a protected category, it effectively prohibits statements critical of a named group while permitting supportive statements: a sign that speaks negatively about members of a particular "race," for example, is prohibited because it would make those individuals feel "unwelcome," but a sign expressing the opposite view—praising that race—is permitted. Colo. Rev. Stat. §24-34-601(2)(a). "'It is difficult to imagine'" a *less* viewpoint-neutral policy than one that allows "'laudatory'" speech "'while prohibiting a different point of view (negatively critical) on a particular subject matter.'" *Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1184 (D.N.M. 2014). And even if the law punished only those publications and communications that were *truly* offensive, "[g]iving offense is a viewpoint." *Matal v. Tam*, 582 U.S. 218, 243 (2017); see *Iancu*, 588 U.S. at 394 (same).

Because the provision discriminates on viewpoint, it is flatly prohibited. Even if it discriminated based only on content, it cannot satisfy strict scrutiny because, again, the State has no interest in suppressing speech as opposed to conduct. *303 Creative*, 600 U.S. at 583-84, 588-89. And even if it did, the provision is not narrowly tailored because it prohibits more speech than is "necessary" to ensure Coloradans are able to access and enjoy places of public accommodation. *Ashcroft v. ACLU*,

542 U.S. 656, 666 (2004). Instead, the provision thwarts *all* speech that displeases people who happen to fall within a protected category.

Overbreadth. The Unwelcome Provision *always* targets pure speech: it specifically prohibits "publish[ing]" or otherwise distributing "any written, electronic, or printed communication, notice, or advertisement." Colo. Rev. Stat. §24-34-601(2)(a). And as the above discussion shows, *most* of the speech it punishes is protected speech. When the provision forces a public accommodation to remove offensive language from its statements, it is compelling speech. When the provision imposes liability based on a listener's reaction to published statements, it is regulating based on content. And when it prohibits critical or offensive speech while allowing favorable or non-offensive speech, it is regulating based on viewpoint.

Take a retail business owner, for example, who posts a sign in his store saying, "Transgenderism Is A Mental Illness!" That is surely protected speech—it advances a view on whether an individual's non-biological gender identity should be affirmed or corrected, *Meriwether*, 992 F.3d at 509—but it just as surely could make a transgender individual feel "unwelcome" in the store based on their gender identity. Or consider a Christian-owned bookstore with a banner in its religious books section stating, "The Bible is the only true word of God." Again, that is protected speech, but it might make a Muslim imam feel that his presence is "undesirable" because of his religious creed. Or consider a Palestinian-born doctor who posts on social media that "Israel is an apartheid state!" That post expresses a view about a salient political issue, but a Jewish patient who reads the post might feel that his presence in the doctor's practice is "objectionable."

These are not mere "incidental" regulations of speech, either. *Telescope Media Grp.*, 936 F.3d at 757. The Unwelcome Provision does not simply prohibit statements indicating that an individual will actually be denied service or access because of a protected characteristic. *Id.* In fact, *another* provision

already does that. *See* Colo. Rev. Stat. §24-34-601(2)(a) (separately prohibiting statements "indicat[ing] that" an individual "will be refused"). The Unwelcome Provision goes beyond such incidental regulation and targets speech that has nothing to do with access. *See 303 Creative*, 600 U.S. at 587-92 (public accommodation laws may ensure equal access, but they may not target pure speech).

As Applied. The Unwelcome Provision is also unconstitutional as applied. Plaintiffs and their members want to refer to transgender-identifying individuals using biological pronouns and birth names rather than preferred pronouns and chosen names. And they want to speak out against the dangers of gender ideology and gender-affirming care. But the Unwelcome Provision prohibits them from publishing statements or sending communications expressing those views because that speech would "indicate" that an individual's presence would be "unwelcome, objectionable, unacceptable, or undesirable" based on their "gender expression." Colo. Rev. Stat. §24-34-601(2)(a).

CPAN, PKC, Ms. Gimelshteyn, and Ms. Lee want to "publish materials—for example, flyers advertising [their] events, videos and presentations from the events, social media posts, educational resources for parents, and other materials distributed at [their] events—that refer to individuals using biological pronouns and birth names." Gimelshteyn Decl. ¶15; Lee Decl. ¶15; *see, e.g.,* Lee Decl., Ex. E (opposing the policies of a transgender-identifying Colorado state representative who uses the chosen name "Brianna Titone" and instead referring to Titone as a "man" and "Brian"). They also "regularly publis[h] materials" that "inform … Coloradans about the prevalence of gender ideology … and the danger of so-called 'gender-affirming care.'" Gimelshteyn Decl. ¶16; Lee Decl. ¶16. These statements are "'pure'" and "protected speech." *303 Creative*, 600 U.S. at 587; *see Meriwether*, 992 F.3d at 509, 511-12. But because these statements would make someone feel, among other things, "unwelcome" at one of their events, their speech would be unlawful under the Unwelcome Provision. Colo. Rev. Stat. §24-34-601(2)(a).

Dr. Morrell is in a similar position. When Dr. Morrell writes comments about his patients in their medical records, he wants to refer to them using biologically accurate pronouns and birth names. Morrell Decl. ¶12; *see, e.g., id.* ("Her rash is most consistent with subacute cutaneous lupus erythematosus" or "Jennifer has been taking oral contraceptives for over one month."). Dr. Morrell wants to publish these notes on the patient's online portal and provide patients with a printed copy of them upon request. In addition, Dr. Morrell is active on social media, where—consistent with his belief that sex is immutable—he "regularly publish[es] content that opposes gender ideology and refers to transgender-identifying individuals using biological pronouns and birth names rather than preferred pronouns or chosen names." Morrell Decl. ¶16; *see, e.g.*, *id.* Ex. A (calling State Representative Titone "Brian" and referring to "his" lifestyle). Dr. Morrell also "write[s] on the issues of sex and gender as they relate to the medical profession" and publishes his writing in major outlets. *Id.* ¶14. In his writing, he "oppose[s] gender ideology … and raise[s] awareness about the dangers of gender-affirming care." *Id.* Dr. Morrell's statements are protected speech; they advance a viewpoint on sex, gender ideology, and the dangers of gender-affirming care. *See Meriwether*, 992 F.3d at 509, 511-12. But again, his speech is made unlawful by the Unwelcome Provision because a transgender-identifying individual who reads his content might feel, among other things, "unwelcome" in his medical practice.

Plaintiffs and their members must therefore adjust their speech to avoid offending individuals based on their gender identity and gender expression. The provision compels their speech because it forces them to endorse the State's view of sex and gender, *Janus*, 585 U.S. at 892, punishes them based on the content of their speech because it makes that speech unlawful based on the listener's reaction, *Forsyth County*, 505 U.S. at 134, and discriminates against them based on their viewpoint because it punishes "offens[ive]" language, *Matal*, 582 U.S. at 243.

2. The Provision is impermissibly vague.

The Unwelcome Provision is also impermissibly vague both on its face and as applied. Like the challenged "gender expression" and "chosen name" definitions, the Unwelcome Provision leaves many of its key terms undefined. It promises to punish statements that indicate an individual's presence is "unwelcome, objectionable, unacceptable, or undesirable," Colo. Rev. Stat. §24-34-601(2)(a), but it offers no detail as to what kind of statements Defendants consider unwelcoming, objectionable, unacceptable, or undesirable. Nor does it explain whether and how Defendants will consider a statement's context in making that determination. *See 303 Creative*, 6. F.4th at 1215 (Tymkovich, C.J., dissenting) (quoting Colorado's concession that application of the Unwelcome Provision "depend[s] on the context"). Likewise, the provision purports to cover not only the "direc[t]" publication or communication of unwelcoming statements, but also statements made "*in*directly." Colo. Rev. Stat. §24-34-601(2)(a) (emphasis added). Yet nowhere does the provision describe—nor have Defendants clarified—what kinds of "indirect" publication or communication the State will punish.

The provision gives no "'explicit standards'" to constrain Defendants' discretion in enforcing it. *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1239 (10th Cir. 2023). Rather, it "leav[es] to them the job of shaping [the provision's] contours through their enforcement decisions" on an "'*ad hoc* and subjective basis.'" *Sessions v. Dimaya*, 584 U.S. 148, 182 (2018) (Gorsuch, J., concurring). The "stringent vagueness test" for laws implicating speech—again, the Unwelcome Provision *always* regulates speech—demands much more than that. *Village of Hoffman Estates*, 455 U.S. at 499.

II. Plaintiffs satisfy the remaining preliminary-injunction criteria.

Because Plaintiffs are likely to prevail on its constitutional claims, they readily meet the other preliminary injunction criteria. *See, e.g.*, *Hobby Lobby Stores*, 723 F.3d at 1145.

Irreparable Harm: "[I]n the context of constitutional claims," the "likelihood of success on the merits" and "a demonstration of irreparable injury" collapse into a single inquiry. *Free the Nipple v. Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019). It is "well-settled law" that violating or threatening a constitutional right is always an irreparable harm. *Id.*; *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) (The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This case proves the point. Without a preliminary injunction, Plaintiffs and their members will be deprived of their First and Fourteenth Amendment rights, a harm for which there is no "[a]dequa[te]" or easily ascertainable "monetary remedy." *Free the Nipple*, 916 F.3d at 806.

Balance of Harms and Public Interest: "When a constitutional right hangs in the balance, … even a temporary loss usually trumps any harm to the defendant." *Id.* (cleaned up). Any interest Colorado has in enforcing its "likely unconstitutional" law therefore "do[es] not outweigh [Plaintiffs'] in having [their] constitutional rights protected." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012). And it is "'always in the public interest to prevent the violation of a party's constitutional rights.'" *Free the Nipple*, 916 F.3d at 807. These factors strongly favor a preliminary injunction here.

III. The Court should not require an injunction bond.

"[T]rial courts have wide discretion under Rule 65(c) in determining whether to require security" for a preliminary injunction. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (cleaned up); *see* Fed.R.Civ.P.65(c). No bond is needed here because Colorado will not incur any monetary loss as a result of the injunction and because courts often waive the bond requirement when constitutional rights are at stake. *See, e.g.*, *RoDa Drilling Co.*, 552 F.3d at 1215; *NetChoice v. Reyes*, 748 F. Supp. 3d 1105, 1132 (D. Utah 2024). Waiving the bond requirement is especially appropriate here because Plaintiffs are likely to succeed on the merits of their claims and Colorado will incur no damages from an injunction that simply stops it from violating the Constitution.

CONCLUSION

For these reasons, the Court should grant Plaintiffs' motion and enjoin Defendants from enforcing the "gender expression" and "chosen name" definitions, as amended by H.B. 25-1312, *see* Colo. Rev. Stat. §24-34-301(3.5), (9), and the Unwelcome Provision, *see* Colo. Rev. Stat. §24-34-601(2)(a), in full and as applied to Plaintiffs and their members.

Dated: May 20, 2025

Respectfully submitted,

/s/ J. Michael Connolly

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RULE 7.1(a) STATEMENT

Pursuant to Local Civil Rule 7.1(a), I hereby certify that on May 19, 2025, I contacted counsel for Defendants by email to notify them of Plaintiffs' intent to file the foregoing motion and to inquire as to Defendants' position. As of the filing of this motion, Defendants have not stated their position.

/s/ J. Michael Connolly
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on May 20, 2025, I electronically filed the foregoing motion with the Clerk of the Court using the Court's ECF system. In addition, the motion was served on all Defendants via certified mail, return receipt requested, and on opposing counsel via email, at the following addresses:

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