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-RMR-MDB

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Nearly nine months ago, Colorado enacted new legislation (House Bill 25-1312) that changed the definition of "gender expression," a protected category in the Colorado Anti-Discrimination Act. Under the new law, it is now illegal for anyone who operates in a place of public accommodation to decline to use someone's chosen name or preferred pronouns or make someone feel unwelcome by opposing the use of such language. *See* PI.Mot. (Dkt.27) at 4-7. Unlike existing anti-discrimination laws that guarantee *access* to public accommodations, the new law regulates *speech*, punishing so-called misgendering and deadnaming. This prohibition on the commonplace use of biological pronouns and names is plainly unconstitutional; states may not punish speech (especially on politically salient topics like sex and gender) just because they disagree with its message. *See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995). So Plaintiffs, who believe that sex is fixed and want to use language consistent with that belief, promptly sought a preliminary injunction to protect their First Amendment rights.

In the face of that preliminary-injunction motion, Defendants—tellingly—offer no defense of the challenged laws on the merits. *See generally* PI.Opp. (Dkt.85); AG.MTD (Dkt.81); CCRD.MTD (Dkt.82). They do not dispute that the challenged laws, if applied to Plaintiffs' speech, would violate the First Amendment. Instead, Defendants devote all of their briefing to challenging Plaintiffs' standing. But standing for First Amendment claims at the preliminary-injunction stage is an "'extremely low'" bar, *Peck v. McCann*, 43 F.4th 1116, 1133 (10th Cir. 2022), and Plaintiffs easily surpass it. Plaintiffs want to refer to transgender-identifying individuals using biological pronouns and birth names, as they did

before H.B. 25-1312. But CADA now makes that illegal. Defendants agree that at least *some* acts of misgendering and deadnaming violate the law; they insist they have a "clear" interest in using CADA to stamp out such "discrimination," PI.Opp. 43-44; and they have prosecuted entities for similar language in the past.

That is a straightforward recipe for chilled speech. Which is why the Tenth Circuit, rejecting many of the same arguments Defendants try here, already found standing in another case raising the *same* kind of pre-enforcement challenge (First and Fourteenth Amendment claims) against the *same* law (CADA) to protect the *same* kind of speech (speech on sex and gender). *See 303 Creative v. Elenis*, 6 F.4th 1160, 1173 (10th Cir. 2021). The Supreme Court, in turn, not only found standing but *granted* the requested injunction. 600 U.S. 570, 583, 588, 602-03 (2023).

Defendants contort CADA's text (or ignore it entirely) to avoid reaching the same result here, but they cannot escape liability by rewriting the law mid-litigation. This Court should grant the preliminary injunction and deny the motions to dismiss.

ARGUMENT

Standing for a First Amendment pre-enforcement challenge is not a high bar. Because of the "'unique interests'" in "'the First Amendment context,'" courts "'apply the standing requirements somewhat more leniently, facilitating pre-enforcement suits.'" *Scott v. Allen*, 153 F.4th 1088, 1095 (10th Cir. 2025). Plaintiffs satisfy this lenient test because their speech is currently being chilled. *See id.* at 1094.

Defendants' arguments against standing get the law and the facts wrong. To start, they say that CPAN, PKC, and Dr. Morrell are not subject to CADA when they host events

in places of public accommodation. But CADA's text plainly regulates any "person" who operates "in" a place of public accommodation. Colo. Rev. Stat. §24-34-601. Next, they try to impose additional non-statutory elements onto CADA's misgendering and deadnaming bans to avoid applying them to Plaintiffs' speech. *See* Pl.Opp. 23 ("deadnaming and misgendering are not *per se* CADA violations"). But Defendants cannot rescue an unconstitutional statute by adding extra words to the text, *see Dean v. United States*, 556 U.S. 568, 572 (2009), and Plaintiffs' speech violates the law even on Defendants' exceedingly narrow reading. Finally, Defendants say Dr. Morrell and Dr. Leswing have nothing to fear because none of their patients have filed formal discrimination complaints before. But H.B. 25-1312 is a *new* law, and the doctors *have* been severely criticized for their speech in the past. *See 303 Creative*, 6 F.4th at 1173 ("potential liability is inherent in the manner they intend to operate").

Defendants' remaining arguments fare no better. Plaintiffs' claims are ripe for the same reasons they have standing. The Attorney General is a proper defendant in a pre-enforcement challenge to CADA, as judges in this district and the Tenth Circuit have confirmed. The equities favor an injunction because constitutional violations are *always* an irreparable injury and the State has no interest in enforcing an unconstitutional law. And the relief Plaintiffs seek is appropriately tailored to their injury. This Court can and should enter an injunction that bars Colorado from enforcing CADA in a manner that violates Plaintiffs' First and Fourteenth Amendment rights while allowing the State to enforce those laws to prevent *actual* denials of service.

I. Plaintiffs are entitled to a preliminary injunction because they are likely to succeed on the merits.

Plaintiffs likely have standing and are likely to prevail on their First and Fourteenth Amendment claims. Defendants' contrary arguments fail on both the law and the facts.

A. Defendants offer no defense of the challenged laws on the merits.

Most First Amendment preliminary-injunction cases turn on the merits, not standing. *Cf. Chiles v. Salazar*, 116 F.4th 1178, 1195 (10th Cir. 2024) ("Standing in the First Amendment context is assessed with some leniency."); *Planned Parenthood of Kansas v. Andersen*, 882 F.3d 1205, 1229 (10th Cir. 2018) (the "most important preliminary-injunction factor" is "the merits"). It is telling, then, that across 90 pages of consolidated briefing, Defendants make no effort to defend the constitutionality of Colorado's laws.

Defendants don't dispute that Plaintiffs' speech is constitutionally protected. Nor do they dispute that the challenged laws, if applied to that speech, would violate Plaintiffs' constitutional rights. In fact, Defendants don't even explain what the challenged laws *mean*, refusing to say whether Plaintiffs' speech is prohibited by CADA or what speech *would be* prohibited. *E.g.*, PI.Opp. 28 (claiming it is "context- and fact-dependent").

Defendants don't argue the merits for a reason: CADA as amended by H.B. 25-1312 is flagrantly unconstitutional. Using or refusing to use names and pronouns "advance[s] a viewpoint on gender identity," *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021), and the government cannot punish individuals for expressing their viewpoints, *Hurley*, 515 U.S. at 579. Nor can it punish speech based on a broad law whose terms nobody (not even the government) understands. *See Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) ("vagueness" has an "obvious chilling effect on free speech"). Yet that is exactly

what the new law does. It threatens legal penalties for those who use biologically accurate language, *see, e.g.*, Pls' App'x (PA) 805:20-807:14 (Division's agreement that a bartender who addresses a transgender patron using the patron's "birth name" and biologically accurate pronouns may violate CADA even if the customer otherwise "gets all the services that the restaurant offers"), and it vaguely prohibits all statements that "directly or indirectly" make someone feel "unwelcome" in a place of public accommodation based on their gender identity or expression, Colo. Rev. Stat. §§24-34-601(2)(a), 24-34-701(1)(c).

Defendants' refusal to engage the merits is fatal, especially in the First Amendment context. *See iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014) ("'[W]hen a law infringes on the exercise of First Amendment rights," the government "bears the burden of establishing its constitutionality.'"). To secure an injunction, Plaintiffs need only show that their speech is *arguably* covered by the law, that Defendants *might* enforce the law against them, and that such application *colorably* violates the First Amendment. *See SBA List v. Driehaus*, 573 U.S. 149, 162 (2014); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979); *Greater Philadelphia Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 132 (3d Cir. 2020). Plaintiffs have made that showing.

B. Plaintiffs have standing because their speech is being chilled right now.

Refusing to defend the challenged laws on the merits, Defendants instead try to attack Plaintiffs' standing. But Plaintiffs readily satisfy the "lenien[t]" test for pre-enforcement standing. *Scott*, 153 F.4th at 1095.

The Tenth Circuit and the Supreme Court have repeatedly explained the criteria for pre-enforcement standing. *See, e.g.*, *Scott*, 153 F.4th at 1094; *SBA List*, 573 U.S. at

159. "[A] plaintiff must show 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *Scott*, 153 F.4th at 1094. In speech cases, this test is satisfied when the plaintiff shows a "'chilling effect'" on the exercise of their First Amendment rights tied to a "'credible threat of future prosecution.'" *Id.* In turn, to establish a chilling effect, Plaintiffs need only show (1) "that in the past they have engaged in the type of speech affected by the challenged government action," (2) "a present desire, though no specific plans, to engage in such speech" again, and (3) "a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced" against them. *IRI v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006).

1. No one disputes that the first two elements are met here. Each Plaintiff has, on multiple occasions, referred to transgender-identifying individuals using biological pronouns and birth names that do not match those individuals' preferred terminology. *See, e.g.*, Gimelshteyn Decl. (Dkt.27-2) ¶¶12-17; Lee Decl. (Dkt.27-3) ¶¶12-17; Morrell Decl. (Dkt.27-5) ¶6; Leswing Decl. (Dkt.27-6) ¶7; PA 56-57, 91:3-93:20, 94:16-95:25, 129:8-139:14, 140:13-142:13, 144:2-145:8, 224:1-8, 286-330; Pls' Second Restricted App'x (PSRA) 9:11-16, 14:7-15:23, 17:12-22, 19:21-20:7, 23:14-25:7. And all Plaintiffs desire to do so in the future. *See* Gimelshteyn Decl. ¶¶7-9, 14-15, 18, 29; Lee Decl. ¶¶7-9, 14-15, 18, 29; Morrell Decl. ¶¶5, 7-13, 28; Leswing Decl. ¶¶6, 8-14, 26. This speech is certainly constitutionally protected. *See Meriwether*, 992 F.3d at 508, 511-12. And it is affected by CADA, which, as amended by H.B. 25-1312, prohibits language that (1) fails to use an individual's "chosen name" or other terms by which they "choos[e] to be addressed" or (2)

causes an individual, even indirectly, to feel unwelcome because they use a chosen name or other non-biological terms. Colo. Rev. Stat. §§24-34-301(9), 24-34-601(2)(a), 24-34-701; PI.Opp. 5-6 (agreeing that such language violates the law in at least some circumstances). In other words, Plaintiffs *have* engaged in and *want to* engage in so-called misgendering and deadnaming, but that speech is now subject to CADA.

2. Plaintiffs have also shown a credible threat of enforcement. This requirement "is not supposed to be a difficult bar for plaintiffs to clear in the First Amendment pre-enforcement context." *Peck*, 43 F.4th at 1133. "'[T]he evidentiary bar that must be met is extremely low.'" *Id.* The threat of enforcement is credible as long as "is not imaginary or wholly speculative." *Babbitt*, 442 U.S. at 302. And all of the factors that affect the likelihood of enforcement favor Plaintiffs here. *See SBA List*, 573 U.S. at 164-66. Most importantly, H.B. 25-1312 is a new law, and Defendants have not disavowed enforcement. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). Additionally, Defendants have a history of enforcing the law against similar conduct, and the fact that anyone can file a complaint alleging discrimination compounds the risk that Plaintiffs will be targeted. *See SBA List*, 573 U.S. at 164-66.

First, courts assume a likelihood of enforcement for new laws. *See Am. Booksellers*, 484 U.S. at 393 ("[W]e see no reason to assume" that a "newly enacted law will not be enforced."); *Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. 3d 1163, 1176 (D. Colo. 2023) (noting a "'strong presumption of enforcement'" for "new" laws); *Brown v. Herbert*, 850 F. Supp. 2d 1240, 1248 (D. Utah 2012) (same). H.B. 25-1312 is a brand-new law, enacted just *one* business day before Plaintiffs filed this lawsuit, and its

adoption was the subject of intense "public interest." *Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1256 (D. Colo. 2019). The Court is "entitled to assume that [state] agencies will not disregard such a recent," public, and forceful "expression of the legislature's will." *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 821 (5th Cir. 1979); *see also Antonyuk v. James*, 120 F.4th 941, 1016 (2d Cir. 2024) (similar).

Second, although they "have had ample opportunity to" do so, Defendants "notably" have not "disavow[ed] their intent to enforce" CADA against Plaintiffs. *Idaho Org. of Res. Councils v. Labrador*, 780 F. Supp. 3d 1013, 1035 (D. Idaho 2025); *see also SBA List*, 573 U.S. at 165. They have "made no … promise" that they will not enforce the law's speech prohibitions against Plaintiffs when they misgender, deadname, or use language that makes transgender-identifying people feel unwelcome in a place of public accommodation. *303 Creative*, 6 F.4th at 1174. To the contrary, when someone files a charge of discrimination, the Division is statutorily obligated to "make a prompt investigation of the charge." Colo. Rev. Stat. §24-34-306(2)(a); *see also* PA 739:12-25. And Colorado insists that it has "clear, longstanding," and "compelling" interests in enforcing CADA, both generally and specifically against misgendering and deadnaming. PI.Opp. 43-44; *see also 303 Creative*, 6 F.4th at 1174 ("Colorado's strenuous assertion that it has a compelling interest in enforcing CADA indicates that enforcement is anything but speculative.").

Refusal to disavow enforcement on its own establishes a credible threat of enforcement. *See Peace Ranch v. Bonta*, 93 F.4th 482, 490 (9th Cir. 2024) (pre-enforcement standing "often rises or falls with the enforcing authority's willingness to disavow enforcement"). It is dispositive even when the law at issue is a longstanding one, *see,*

e.g., *Peck*, 43 F.4th at 1124, 1127, 1132-33 (challenged statute existed for sixteen years), but it especially fatal here because H.B. 25-1312 is, again, a new piece of legislation, *see, e.g.*, *Koons v. Reynolds*, 649 F. Supp. 3d 14, 29 (D.N.J. 2023) ("Absent a concession by Defendants that they do not intend to enforce the newly enacted legislation, Plaintiffs have averred credible threats of prosecution."). And Defendants' non-disavowal has especially "heavy weight" here, as there is "nothing" else to guarantee that Plaintiffs will not be punished for violating CADA's speech rules. *Chiles*, 116 F.4th at 1198.

Third, the record shows that Defendants have used CADA in the past to punish alleged discrimination based on gender identity and gender expression. *See, e.g.*, Pls' Restricted App'x (PRA) 19-23, 167-76 (finding probable cause where establishments declined to allow transgender-identifying biological males in women's restroom); *cf. Fischer v. Thomas*, 52 F.4th 303, 308 (6th Cir. 2022) (finding a threat of enforcement where the defendant had previously launched investigations into "similar conduct"). Defendants have repeatedly tried to use CADA to coerce protected speech on issues of sex and gender. *See, e.g.*, PI.Mot. 3-4 (cataloguing the State's efforts to punish nonconforming speech on these issues); *Masterpiece Cakeshop v. CCRC*, 584 U.S. 617 (2018); *303 Creative v. Elenis*, 600 U.S. 570 (2023). And Defendants have enforced CADA to punish nonconforming speech on gender identity specifically. The Colorado Civil Rights Division, for example, "found probable cause that discrimination occurred" where a bakery refused to prepare a custom cake "to celebrate [a would-be customer's] gender transition and identity as a transgender woman." *Masterpiece Cakeshop v. Scardina*, 556 P.3d 1238, 1242 (Colo. 2024). That probable cause determination, as one judge found,

"demonstrated a willingness to enforce the statute," *Masterpiece Cakeshop*, 445 F. Supp. 3d at 1253, 1256, and Plaintiffs fear they will be similarly punished, *see* PA 168:18-170:25, 233:3-22, 234:7-19 (explaining that Plaintiffs fear they will be targeted because Masterpiece Cakeshop was targeted).

Indeed, the Division has repeatedly found probable cause based solely on a respondent's use of language that did not match a transgender individual's preferred pronouns or chosen name. *See, e.g.*, PRA 139-42 (finding probable cause where blood bank listed transgender-identifying biological male as "male" in donor profile); *id.* at 72-79, 101-10 (all likewise finding probable cause solely based on misgendering or deadnaming). That is the same speech in which Plaintiffs want to engage here, and it is precisely what H.B. 25-1312 now prohibits. *See* Colo. Rev. Stat. §§24-34-301(3.5), (9), 24-34-601(2)(a).

Finally, the threat of enforcement is "bolstered by the fact that authority to file a complaint" is "not limited" to the Division, the Commission, or the Attorney General. *SBA List*, 573 U.S. at 164. Instead, "any person" can file a charge alleging discrimination. Colo. Rev. Stat. §24-34-306(1)(a)(I). That means anyone who wishes to make use of Plaintiffs' services or attend one of their events but feels unwelcome due to Plaintiffs' use of biologically accurate language "may file a complaint and initiate a potentially burdensome administrative hearing against" Plaintiffs. *303 Creative*, 6 F.4th at 1174; *see also* PA 740:7-741:25 (respondents accused of discrimination must, for example, provide "financial information," "personnel files, "emails or text messages," and answer written questions under threat of subpoena). Thus, Plaintiffs "must fear not only charges brought by Colorado, but charges brought by any person who might" disagree with their speech. *Id.*

And the nature of Plaintiffs' activities makes this risk even more severe: as advocacy organizations and physicians with public-facing medical practices, they "are easy targets." *SBA List*, 573 U.S. at 164. Indeed, because their views on sex and gender are publicly known and "the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from" individuals who try to attend Plaintiffs' events or patronize their medical practices *because* of their views on sex and gender. *Id.*; *see, e.g.*, Gimelshteyn Decl. ¶24: Lee Decl. ¶24; PA 217:11-13, 223:17-25 ("anyone who googles [Dr. Morrell] could find out [his] personal beliefs on this subject"); PA 246:1-18 (explaining that Dr. Leswing has "been in this community for a long time" and "the community knows" her views, so it is "not at all inconceivable that [she] would be directly and actively targeted by somebody" who wanted to "mak[e] a stand for what they consider are trans rights"); PA 747:18-750:19 (noting the Division may entertain complaints filed by activist groups).

Nor is that risk hypothetical. Quite the opposite. Transgender individuals regularly attend CPAN's and PKC's events, and both Dr. Morrell and Dr. Leswing regularly treat transgender patients. *See* PA 107:22-109:21, 110:10-111:6, 143:2-3, 224:1-8, 239:17-23. And transgender individuals regularly file complaints with the Division alleging discrimination specifically—and sometimes solely—because they were misgendered or deadnamed. *E.g.*, PRA 127 (attorney called client by "dead name" and attorney's staff used the "wrong pronouns"); 24, 43-48, 59, 70-71, 80-81, 111-14, 125-26, 128, 130 (all similar). The Division, as noted above, has found probable cause in some of those cases. And others have filed complaints against medical providers who, like Dr. Leswing and

Dr. Morrell, refuse to provide so-called gender-affirming care or refer to patients using biologically accurate terms that do not correspond to the patient's gender identity. *E.g.*, *id.* at 25-26 (medical insurance provider declined to cover facial feminization surgery); 40-42 (surgeon misgendered complainant and refused to perform bilateral mastectomy).

Misgendering and deadnaming are, in fact, especially likely to invite controversy and complaints. As Defendants' own expert testified, transgender-identifying individuals take misgendering and deadnaming very seriously. PA 643:24-644:7. They perceive it as "hurt[ful]," "stigmatiz[ing]," and "upset[ting]." *Id.* at 640:16-642:5, 644:3-7. And they often feel "offended" because such language is, in their eyes, a rejection of their "identity." *Id*. at 644:3-4, 645:4-19; *see also id.* at 645:20-648:13 (discussing the "research" documenting transgender individuals' tendency to react negatively to misgendering and deadnaming). In Plaintiffs' experience, too, transgender individuals react very negatively when others refuse to use their chosen name or preferred pronouns. *See, e.g.*, PA 146:20-23, PSRA 15:6-23 (explaining that people get very "upset" when Plaintiffs use biological, rather than so-called gender-affirming, language). It is no great leap to fear that some of those individuals may file complaints.

C. Defendants' contrary standing arguments get the law and the facts wrong.

Defendants do not dispute that they have enforced CADA in the past to punish purported discrimination based on transgender identity. They don't dispute that anyone can file a complaint forcing Plaintiffs into the Division's "potentially burdensome administrative" process. *303 Creative*, 6 F.4th at 1174. And they pointedly do not disavow the authority to enforce CADA against Plaintiffs. Instead, they try to rewrite CADA to avoid

applying it to Plaintiffs' speech, and they selectively cite the record to downplay H.B. 25-1312's chilling effect.* But CADA's plain text squarely applies to Plaintiffs and their speech, and ample record evidence confirms that Plaintiffs have a credible fear of enforcement if they violate the law.

1. Plaintiffs are subject to CADA.

Defendants start by trying to dodge CADA altogether, at least as it applies to CPAN, PKC, and Dr. Morrell (during his speaking engagements). Of course, Defendants don't—and couldn't—disagree that CPAN, PKC, their supporters, and Dr. Morrell want to refer to transgender-identifying individuals using pronouns and names that reflect an individual's biology rather than their gender identity, in apparent violation of CADA's new "gender expression" and "chosen name" provisions. Colo. Rev. Stat. §24-34-301(3.5), (9); *see* PA 98:18-20, 119:16-19, 192:5-24, 198:9-199:8. Defendants don't dispute that CPAN, PKC, and Dr. Morrell want to express that speech in places of public accommodation, including hotels, restaurants, outdoor spaces, event spaces, and other public venues. *See, e.g.*, PA 20-38, 40-43 (cataloguing events in places of public accommodation);

* Defendants don't dispute that Plaintiffs Defending Education and Do No Harm have associational standing through their members. *See* PI.Opp. 26. Indeed, DE and DNH easily satisfy the requirements for associational standing. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Their members (including Lori Gimelshteyn, Erin Lee, Dr. Travis Morrell, Dr. Valeri Leswing, and Mountain Pediatrics) "would otherwise have standing to sue in their own right." *Id.* The First Amendment interests this lawsuit seeks to "protect are germane to [the associations'] purpose." *Id.*; *see also* Perry Decl. (Dkt.27-1) ¶¶3-4, 6-8; Rasmussen Decl. (Dkt.27-4) ¶¶3-4, 6-8. And "neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343; *see also United Food & Com. Workers Union Loc. 751 v. Brown Grp*, 517 U.S. 544, 546 (1996) ("'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members").

PA 85:22-86:1, 121:16-122:11, 123:12-21, 182:16-23, 195:1-25, 200:23-202:15, 268-85. And Defendants don't dispute that CPAN, PKC, and Dr. Morrell may be targeted and reported for their speech. Indeed, Plaintiffs have been harassed, accused of transphobia, and threatened with legal action for their refusal to affirm non-biological gender identities. *See, e.g.*, PA 45-52, 86:24-87:24, 100:22-102:5, 103:1-6, 104:7-12, 124:4-128:6, 146:20-155:23, 156:19-162:8, 203:2-206:6, 207:22-211:19, 213:21-214:20, 252-67.

Instead, Defendants argue that CADA does not apply to CPAN, PKC, or Dr. Morrell *at all* because they are not "places of public accommodation." PI.Opp. 19-22. In other words, in Defendants' view, only a literal place of public accommodation—and not the individual or entity who operates the public accommodation—is subject to CADA. That vision of CADA has no basis in the law's text and is not supported by any of the cases that have addressed the issue.

Start with the text. Defendants correctly note that CADA defines a "place of public accommodation" to include "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public." Colo. Rev. Stat. §24-34-600.3. The law then prohibits "[d]iscrimination in places of public accommodation." Colo. Rev. Stat. §24-34-601; *see also id.* §24-34-701. From this, Defendants argue that, to be subject to CADA's prohibitions, "the entity at issue must" itself *be* a place of public accommodation that "offers 'goods, services, facilities, privileges, advantages, or accommodations to the public." PI.Opp. 20.

That argument has no basis in law. CADA does not prohibit discrimination *by* a place of public accommodation—it prohibits discrimination by "persons" who are *in* a

place of public accommodation. Section 601 of CADA is titled "Discrimination *in* places of public accommodation." It says (in truncated form) that "[i]t is a discriminatory practice and unlawful for *a person* … to … deny to an individual or a grou[p] because of … gender identity … the full and equal enjoyment of the … facilities … of a place of public accommodation or … to publish … any … communication … that indicates that the full and equal enjoyment of the … facilities … of a place of public accommodation will be … denied … or that an individual's … presence at a place of public accommodation is unwelcome, objectionable, or undesirable because of … gender identity." Colo. Rev. Stat. §24-34-601(2)(a) (emphasis added). Part 7 likewise says that "[a] *person* that is the … lessee … of any place of public accommodation … shall not … publish … any communication" that discriminates in various ways based on gender identity. *Id.* §24-34-701(1) (emphasis added). The statute, in other words, does not regulate the physical place of public accommodation; it regulates the person operating in the place of public accommodation. And the term "person," per CADA's own definitions, includes "individuals, limited liability companies, partnerships, associations, corporations," or their "legal representatives." *Id.* §24-34-301(15)(a). It certainly does not exclude "advocacy organizations" or individuals from its coverage. *Contra* PI.Opp. 21; *see* PA 757:12-21 (Division's agreement that an entity otherwise subject to CADA is not exempted merely because it is "also engaged in issue advocacy"); PRA 27-39 (finding probable cause that a non-profit violated CADA).

Caselaw agrees. Colorado courts generally read CADA to have the same scope as equivalent federal laws. *See, e.g.*, *Stalder v. Colo. Mesa University*, 551 P.3d 679, 683 (Colo. Ct. App. 2024) (reading CADA "consistently with" the Americans with Disabilities

Act). This court does the same. *Henry v. Wellpath LLC*, 2024 WL 5323679, at *11 (D. Colo. Jan. 16, 2024). And those federal anti-discrimination laws *do* apply to entities—including otherwise private organizations—who host events in places of public accommodation. *See, e.g.*, *PGA Tour v. Martin*, 532 U.S. 661, 677 (2001) (An "even[t]" hosted by a private organization is "comfortably within the coverage" of the ADA when it is hosted in "a public accommodation."). Although such entities are not themselves public accommodations, they are liable if they "discriminate against any 'individual' in the 'full and equal enjoyment of'" the "'accommodations.'" *Id.* Federal regulations read anti-discrimination law the same way: "An entity that is not in and of itself a public accommodation … may become a public accommodation when," for example, "it leases space for a conference … at a hotel [or] convention center." 28 C.F.R. Part 36, App. C. Accordingly, because CPAN, PKC, and Dr. Morrell regularly conduct events in places of public accommodation, they are subject to CADA's rules governing "[d]iscrimination *in* places of public accommodation." Colo. Rev. Stat. §24-34-601 (emphasis added).

Defendants' insistence that CADA applies only to actual "places of public accommodation" changes nothing. "[A] state cannot insulate unconstitutional laws from legal challenges simply by making a nonbinding promise [during litigation] to enforce such laws in ways wholly divorced from their text and plain meaning." *United States v. Texas*, 144 F.4th 632, 683 (5th Cir. 2025).

In any event, Defendants' actions belie their argument. The Division's enforcement history proves that CADA's prohibitions extend to those who operate in a place of public accommodation. The Division has filed formal complaints against individuals whose

conduct allegedly denied others equal access to a place of public accommodation. *See, e.g.*, *Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 278 (Colo. Ct. App. 2015) (naming the owner "personally," in addition to the place of public accommodation itself, was proper because, among other reasons, "he was the person whose conduct was at issue").

Finally, even if Defendants were correct that CADA imposes liability only on literal places of public accommodation, Plaintiffs would *still* have standing. Even on Defendants' theory, public venues like hotels and restaurants are subject to CADA and can violate the law if they refuse to respect an individual's chosen name or preferred pronouns. *See* PA 789:15-795:15, 805:20-807:14. Those venues are unlikely to lease space to CPAN, PKC, and Dr. Morrell out of fear that their practice of deadnaming and misgendering will incur liability for the venue itself. And that injury is an independent basis for standing. *See FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 384-85 (2024) ("[G]overnment regulation of a third-party individual or business may be likely to cause injury in fact to an unregulated plaintiff."). It is also a very *real* injury for CPAN, PKC, and Dr. Morrell, all of whom have hosted events where the venue has received complaints from members of the public regarding their stance on gender identity issues. *See, e.g.*, Gimelshteyn Decl. ¶28; Lee Decl. ¶18; PA 99:12-16, 103:1-2, 127:3-8, 211:20-212:11, 259-60.

2. CADA as amended by H.B. 25-1312 prohibits misgendering and deadnaming.

Next, Defendants suggest that even if Plaintiffs *are* subject to CADA, they needn't fear enforcement because "deadnaming and misgendering are not *per se* CADA violations." PI.Opp. 23; CCRD.MTD 20. But CADA prohibits all deadnaming and misgendering, and Defendants cannot rewrite the statute mid-litigation to avoid a pre-enforcement

challenge. Besides, even if Defendants' reading of CADA were correct, Plaintiffs' desire to intentionally and repeatedly misgender and deadname would still violate the law.

CADA makes it unlawful to "directly or indirectly" deny a person "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation" based on "gender expression." Colo. Rev. Stat. §24-34-601(2)(a). It is also unlawful to publish or circulate written, electronic, or printed materials that indicate such enjoyment will be denied or that an individual's presence is "unwelcome," "objectionable," "unacceptable," "undesirable," or not "solicited" because of their "gender expression." *Id.* §§24-34-601(2)(a), 24-34-701. In turn, CADA (as amended by H.B. 25-1312) defines "gender expression" to include a "chosen name" and "how the individual chooses to be addressed." *Id.* §24-34-301(9).

Under CADA's plain text, in other words, it is illegal to misgender or deadname someone—full stop. Speakers may not make someone feel "unwelcome" or deny them equal enjoyment of a public accommodation by refusing to use their "chosen name" or other terms by which they "choos[e] to be addressed." *Id.* §§24-34-301(9), 24-34-601(2)(a). That is what it *means* to "deadname" or "misgender" someone. *See* Pl.Opp. 1 n.2; PA 767:1-12. And that is what Plaintiffs want to do. *See* Gimelshteyn Decl. ¶¶7, 12, 14-15, 18; Lee Decl. ¶¶7, 12, 14-15, 18; Morrell Decl. ¶¶6-12; Leswing Decl. ¶¶7-13. The law requires nothing more for a violation to occur. Proving the point, the Sixth Circuit, evaluating a similar Michigan law, held that refusal to "use a transgender [person's] preferred pronouns … arguably den[ies] to transgender individuals the privilege, enjoyed by cisgender individuals, of using pronouns … in accordance with their gender identity."

Christian Healthcare Ctrs., Inc. v. Nessel, 117 F.4th 826, 845 (6th Cir. 2024); *see* Mich. Comp. Laws. § 37.2302.

Resisting this straightforward conclusion, Defendants conjure additional elements that are not present in the law's text. But litigants cannot "'rea[d] words or elements into a statute that do not appear on its face.'" *Dean*, 556 U.S. at 572. Specifically, Defendants say misgendering and deadnaming are unlawful only if the speech was "subjectively" and "objectively" discriminatory. PI.Opp. 19. Elsewhere, they say that misgendering and deadnaming must be intentional, repeated, or hostile to violate CADA. *See* PI.Opp. 42; CCRD.MTD 28; PA 6, 11, 761:7-16, 770:25-771:23. CADA, however, contains no such limitations. The law prohibits speech that fails to respect a "chosen name" or other forms of "addres[s]," not speech that fails to respect them intentionally, repeatedly, or with hostility. Colo. Rev. Stat. §24-34-301(9). Those words are nowhere in the statute.

Even if CADA were somehow ambiguous on this point, Plaintiffs would still have a credible fear that the law will be applied to their speech. "A well-founded fear of enforcement may be based in part on a plaintiff's reasonable interpretation of what conduct is proscribed," even "if a narrower reading of the statute is available." *San Francisco v. Trump*, 783 F. Supp. 3d 1148, 1181 (N.D. Cal. 2025); *see also Schirmer v. Nagode*, 621 F.3d 581, 586 (7th Cir. 2010) ("[W]hen an ambiguous statute arguably prohibits certain protected speech, a reasonable fear of prosecution can provide standing for a First Amendment challenge."). So, because at least "*some*" of Plaintiffs' speech "arguably" violates the law, they have standing. *303 Creative*, 6 F.4th at 1173. Defendants cannot overcome that presumption merely by adopting an exceedingly narrow reading of the law.

See SisterSong Women of Color Reprod. Just. Collective v. Kemp, 410 F. Supp. 3d 1327, 1339 (N.D. Ga. 2019).

Nor can Defendants defeat Plaintiffs' standing simply by promising not to enforce the statute unless their non-textual requirements are met. *See supra* 16. "Mid-litigation assurances are all too easy to make and all too hard to enforce, which probably explains why the Supreme Court has refused to accept them." *West Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310, 1328 (11th Cir. 2018) (citing *Stenberg v. Carhart*, 530 U.S. 914, 940-41 (2000)). "The First Amendment," in other words, "does not leave [Plaintiffs] at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). And a defendant's "lack of enthusiasm or initiative does not rebut the presumption 'that the government will enforce the law,'" particularly when, as here, the challenged law is a "'recent'" one. *Antonyuk*, 120 F.4th at 1016.

Finally, even if Defendants were *right* that CADA punishes misgendering or deadnaming only when it is done intentionally, repeatedly, or in a "hostile" manner, Plaintiffs would still have standing because their speech easily violates the law even on that narrow interpretation. Plaintiffs certainly do not misgender or deadname on accident; they do so on purpose because they believe biological pronouns and birth names reflect reality and because they believe it is harmful to affirm the falsehood that someone can have a gender different from their sex. Gimelshteyn Decl. ¶¶6-8; Lee Decl. ¶¶6-8; Morrell Decl. ¶¶5, 9; Leswing Decl. ¶¶6, 10; *see also* PA 765:3-10 (Division's testimony that a CADA violation can occur when someone is "intentionally deadnamed or misgendered"). When they use biologically accurate language to refer to transgender-identifying individuals, they do so

repeatedly, even after being asked to use language that reflects an individual's non-biological gender identity instead. *See* PA 101:24-103:5, 817:7-818:3, 103:18-25, 144:13-145:8, 192:19-24, 240:23-241:6; PSRA 39-41, 9:11-16, 14:1-15:23, 17:12-22, 23:14-25:7.

In discovery, the Division agreed this kind of speech violates CADA. "A reasonable person," they acknowledge, could "conclude that the intentional deadnaming of a transgender-identifying person [is] objectively hostile, intimidating, or offensive." PA 775:13-25. Even a "single instance of misgendering or deadnaming" may rise "to the level of harassment." *Id.* at 821:24-822:6; *see also id.* at 823:16-24. Their own expert agreed that transgender people usually and "reasonabl[y]" perceive such speech to be "hostile." *Id.* at 709:25-711:14. Indeed, the Division couldn't "imagine a scenario" where it *wouldn't* be "objectively hostile" to intentionally misgender or deadname "in a place of public accommodation." *Id.* at 824:25-825:17. And the "subjective" element is satisfied whenever a complainant "assert[s]" that it was. *Id.* at 767:13-768:5. In the Division's eyes, for example, someone can violate CADA by "misgendering and deadnaming individuals" in a hotel, "repeatedly" deadnaming a restaurant patron and "refer[ring] to [them] by he/him pronouns," or "repeatedly" and "purposefully" "misgendering and deadnaming … patients" in a medical practice. *Id.* at 789:15-795:15, 802:11-804:4, 805:20-807:14. Plaintiffs, who engage in exactly that kind of speech, rightly fear that CADA will be used against them.

3. Dr. Morrell and Dr. Leswing face a credible threat of enforcement.

Finally, Defendants make light of the chilling effect on Dr. Morrell's and Dr. Leswing's speech in their medical practices. Defendants agree that the doctors' speech may violate CADA, PA 802:11, but say any resulting chill is minimal because it is not certain

that their patients will file a charge of discrimination against them, PI.Opp. 22-26. But a "plaintiff need not demonstrate to a certainty that [they] will be prosecuted, only that [they] ha[ve] an actual and well-founded fear that the law will be enforced against [them]." *Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1192 (10th Cir. 2000) (cleaned up). Dr. Morrell and Dr. Leswing plainly satisfy this standard.

Contra Defendants, it is "guaranteed" that Dr. Morrell and Dr. Leswing would deadname and misgender patients but for H.B. 25-1312. PI.Opp. 23. Both doctors have seen and continue to see transgender patients. Morrell Decl. ¶6; Leswing Decl. ¶7. Both have misgendered and deadnamed in the past. Morrell Decl. ¶6; Leswing Decl. ¶7. And both would deadname and misgender in the future if Colorado law did not make that speech illegal. Morrell Decl. ¶¶5-12, 28; Leswing Decl. ¶¶6-14, 26; PA 56-57, 77 ¶6. Indeed, pronouns and names are common in everyday speech, and both doctors have explained that they *want* to use biologically accurate terms with transgender individuals because it is important for those who struggle with their gender identity to hear their biological sex affirmed. *See, e.g.*, Morrell Decl. ¶¶9, 17; Leswing Decl. ¶¶10, 16; PA 183:1-187:8, 188:1-190:20, 193:2-194:20, 227:9-228:7; PSRA 20:2-4, 26:9-21. Even if Dr. Morrell or Dr. Leswing wanted to avoid gendered language, that would be impossible, as they cannot treat patients *without* using pronouns and names or otherwise referencing a patient's sex. *See* PA 218:24-219:12 (explaining that, "at a certain point you're going to use pronouns and people's name in a visit"); *id.* at 215:16-216:11, 226:2-24 (similar); *id.* at 242:25-243:25 ("the biological gender is always relevant"); *Meriwether*, 992 F.3d at 499, 517 (it is "impossible" to not "use any pronouns or sex-based terms at all").

Both Dr. Morrell and Dr. Leswing, moreover, have been strongly condemned for their speech. Multiple patients of Dr. Leswing have complained to her about her use of biological pronouns and/or birth names. *See* PSRA 1-3. And at least "5-10 families have left her practice after explicitly complaining that [she] does not provide so-called gender-affirming care." PA 57; *see also* PSRA 7:3-18:23, 19:12-27:8. Dr. Morrell, who in addition to his medical practice also writes and speaks extensively on the topic of gender identity, has likewise been the target of "aggressive and threatening messages from individuals because of [his] speech." Morrell Decl. ¶23; *see also* PA 176:1-180:4, 181:19-182:23. He has been protested; activists have successfully campaigned to withdraw Continuing Medical Education accreditation for his speaking engagements; and multiple individuals have left negative Google reviews for his medical practice complaining, among other things, that he is supposedly "[n]ot a safe physician for lgbt patients." Morrell Decl. ¶23 & Ex. C; *see also* PA 199:24-200:10, 211:20-212:21.

Defendants don't deny that Dr. Morrell and Dr. Lewing have faced criticism and complaints for their views, but note that their patients have not yet filed formal charges of discrimination against them with the Division. *See* PI.Opp. 23, 25. But that is not surprising. Before H.B. 25-1312, CADA did not prohibit their speech. And since H.B. 25-1312, they have stayed silent because of the new law. *See* PA 225:24-226:1-3 ("Following 1312," Dr. Morrell is "definitely going to avoid" "us[ing] biologically appropriate pronouns and birth names with [his] patients" "for fear of the Civil Rights Commission or other lawsuits."); *id.* at 220:20-222:9 (describing "fears regarding 1312" and potential liability for his practice); *id.* at 244:19-245:18 ("Since [HB 25-1312], I've felt compelled not to use …

names or pronouns" because, "in the State of Colorado, people have been targeted for their views on trans issues."); *id.* at 246:24-247:9 ("I feel now forced to refer to [patients] androgynously … so that the family doesn't have the ability to seek punitive legal action.").

In any event, that Dr. Morrell and Dr. Leswing have not yet faced formal complaints of discrimination does nothing to diminish their fear of future enforcement. They want to misgender and deadname, which can invite negative reactions and complaints. *See* PA 643:21-644:13, 709:13-710:16, 713:3-22 (Defendants' expert explaining that transgender individuals feel mistreated and frequently object to misgendering and deadnaming); *303 Creative*, 6 F.4th at 1173 ("[Plaintiffs'] potential liability is inherent in the manner they intend to operate."). If they *had* been the target of formal complaints before, that would certainly bolster their fear of enforcement, but "such evidence is [not] *necessary* to make out an injury in fact." *Vitagliano v. County of Westchester*, 71 F.4th 130, 139 (2d Cir. 2023); *see Chiles*, 116 F.4th at 1191 (finding a credible threat of enforcement where "Colorado ha[d] never disavowed" enforcement, even though the State had "never actually enforced the" law); *Peck*, 43 F.4th at 1132-33 (same).

For good reason. If Defendants were correct that Dr. Morrell and Dr. Leswing have standing only when formal "complaints have been filed against [them]," PI.Opp. 23, then that would mean that *no one* has standing to bring a pre-enforcement challenge. Potential plaintiffs would have to wait until someone has formally accused them of discrimination. But that can't be right. "[A] plaintiff need not first expose himself to actual … prosecution to be entitled to challenge the statute." *Babbitt*, 442 U.S. at 302 (cleaned up). "[R]equiring an overt threat to enforce would run afoul of the Supreme Court's admonition" and "put

the challenger to the choice between abandoning his rights or risking prosecution." *Vitagliano*, 71 F.4th at 139 (cleaned up). The Constitution imposes no such dilemma.

Finally, Defendants argue that Dr. Leswing has no standing to challenge CADA's application to statements that she wishes to publish on her website expressing her opposition to the use of preferred pronouns and chosen names. Such publications would fall within CADA's scope. *See* Colo. Rev. Stat. §§24-34-601(2)(a), 24-34-701 (prohibiting publications that make an individual feel "unwelcome" or indicate that an individual will be denied equal enjoyment of a place of public accommodation). But because she considered posting them *before* H.B. 25-1312 as well, Defendants say that "any chill she purportedly incurred is the product of her own fear of controversy and not of a credible fear of enforcement under H.B. 25-1312." PI.Opp. 24-25. Not so. While Dr. Leswing has considered posting such statements for some time, she ultimately decided against it only "after the law was passed." PA 248:6-250:3. And it only makes sense that Dr. Leswing's desire to publish these statements is greater now, "because [her] desire to publish the statement[s] is partly the product of recent events," including H.B. 25-1312's passage. *Masterpiece Cakeshop*, 445 F. Supp. 3d at 1257; *see also* PA 78-79 ¶10.

D. The Attorney General is a proper defendant.

Defendants raise two jurisdictional arguments unique to the Attorney General. First, they argue that Plaintiffs lack standing against him in particular because he has yet to exercise his statutory authority to file a charge of discrimination. *See* PI.Opp. 32-33; AG.MTD 12-14. Second, they say he is protected by sovereign immunity. *See* PI.Opp. 35-40; AG.MTD 6-12. Both arguments fail.

1. Plaintiffs have standing to sue the Attorney General for the same reasons they have standing to sue the Commission and Division Defendants: they want to engage in speech (including misgendering and deadnaming) that CADA (as amended by H.B. 25-1312) prohibits, and they credibly fear that Defendants will enforce the law against them. H.B. 25-1312 was passed recently, Defendants (including the Attorney General) have not disavowed enforcement, and Defendants in fact *have* used CADA to punish similar speech and conduct before. *See supra* 7-12.

The Attorney General makes just one argument in response, arguing that he has not yet exercised his statutory authority to file charges of discrimination with the Division. *See* PI.Opp. 32; AG.MTD 13. But this response fails for two reasons. First, the Attorney General has enforced CADA in other ways. Per CADA and Commission regulations, the Attorney General prosecutes charges of discrimination on the Division's behalf at administrative hearings. *See* 3 C.C.R. 708-1:10.8(A)(3) (the "case in support of the complaint shall be presented … by the attorney general's office"); Colo. Rev. Stat. §24-34-306(8); *see also* AG.MTD 9-10 (agreeing that "lawyers employed by the Attorney General's office represent the Commission … in furtherance of its goals and interests"). The Attorney General also enforces subpoenas issued by the Division to entities accused of discrimination. *See* PA 742:6-15. Those functions show past enforcement even apart from the Attorney General's authority to file charges of discrimination. *See Chamber of Commerce v. Edmondson*, 594 F.3d 742, 757-58 (10th Cir. 2010) (performing functions "for [other] state officials upon request" and representing "state agencies" in litigation "demonstrate[s] standing to seek a preliminary injunction").

Second, the Attorney General's argument focuses entirely on a single non-dispositive factor. Although "past enforcement" is "good evidence" of future enforcement, *SBA List*, 573 U.S. at 164, it is not required it to establish standing, *see, e.g.*, *Roy*, 699 F. Supp. 3d at 1176 ("Even if this factor weighed against a finding of" a credible threat of enforcement, "that would not torpedo Plaintiff's claims."). To the contrary, as explained above, courts in this circuit regularly find a credible threat of enforcement in cases where defendants have not previously enforced the challenged law. *Supra* 8-9,24-25; *see also, e.g.*, *Chiles*, 116 F.4th at 1198; *Peck*, 43 F.4th at 1132-33; *Scott v. Hiller*, 2022 WL 4726038, at *6 (D. Colo. Oct. 3, 2022). That is because refusal to disavow *future* enforcement, rather than past enforcement itself, is usually the dispositive factor. *See Bonta*, 93 F.4th at 490 (the test "often rises or falls with the enforcing authority's willingness to disavow enforcement"). And the Attorney General has not disavowed enforcement here.

In any event, this Court does not have to tread new ground. The Tenth Circuit has already held that the Attorney General is a proper defendant in pre-enforcement challenges to CADA. *See 303 Creative*, 6 F.4th at 1175. In *303 Creative*, the Attorney General raised the same standing arguments he makes here, insisting that the plaintiffs lacked standing against him because his power to file charges of discrimination was, in his view, only a "limited enforcement authority" and he exercised that authority only "rarely." Appellee's Br. at 31, No. 19-1413 (filed Apr. 23, 2020). The Tenth Circuit rejected that argument, holding that the Attorney General's "authority to enforce CADA" by filing "'charges'" of discrimination, even if "'limited,'" made him a proper defendant. 6 F.4th at 1175; *see also* Gimelshteyn Decl. ¶22; Lee Decl. ¶22; Morrell Decl. ¶21; Leswing Decl. ¶20 (all

expressing concern that the "Attorney General … can institute investigations on [his] own, without a report"). The Commission and Division Defendants may have *greater* enforcement authority, of course, but Article III does not "limit a suit to only the most culpable defendants; rather, causation merely requires that the plaintiff's injury is 'fairly traceable' to [each] defendan[t]." 6 F.4th at 1175.

The Attorney General doesn't dispute that *303 Creative* resolved the question of standing against the Attorney General. Instead, he attacks the decision's logic, claiming that the Tenth Circuit "treated all defendants equivalently in assessing whether there was a credible threat of enforcement." PI.Opp. 32 n.5. But he's wrong: the decision evaluated standing against each defendant separately and held that "the prospect of … charges brought by the Attorney General" meant that the plaintiffs' injuries were "'fairly traceable'" to him and an injunction against him would "redress" the plaintiffs' fears. 6 F.4th at 1175.

2. The Attorney General's sovereign immunity argument largely rehashes his standing argument and fails for the same reasons. *See Book People, Inc. v. Wong*, 91 F.4th 318, 335 (5th Cir. 2024) ("The Article III standing analysis and *Ex parte Young* analysis significantly overlap, such that a finding of standing tends toward a finding that a plaintiff may sue the official under the *Ex parte Young* exception." (cleaned up)). As the Attorney General agrees, *Ex parte Young* allows lawsuits against state officers in their official capacity when the officer has "some connection with the enforcement of the challenged statute," even if he has no "special" responsibility for enforcing the law. *Free Speech Coalition v. Anderson*, 119 F.4th 732, 736 (10th Cir. 2024) (cleaned up). Here,

the Attorney General has the authority to enforce CADA, and he has "demonstrated" a "willingness to exercise" that authority. *Id.* (cleaned up).

Again, the Attorney General has the authority to enforce CADA in at least two ways: he can file charges of discrimination, and he prosecutes charges filed by others when those charges are set for administrative hearings. Either authority is sufficient to overcome the Attorney General's sovereign immunity. *See Edmondson*, 594 F.3d at 758, 760 (the "authority to 'initiate or appear in [an] action'" satisfies *Ex parte Young*); *Masterpiece Cakeshop*, 445 F. Supp. 3d at 1253 (the Attorney General "has a duty to enforce" CADA because he "must represent the Commission at a hearing in support of the complaint"). The Attorney General replies that his responsibility for prosecuting charges comes only after the Commission chooses to hold a hearing in the first place, *see* AG.MTD 9-10, but duties performed "for [other] state officials upon request" still satisfy the *Ex parte Young* exception. *Edmondson*, 594 F.3d at 758, 760.

The Attorney General has also demonstrated a willingness to exercise his authority. He doesn't dispute that he regularly prosecutes charges of discrimination at hearings. *See Masterpiece Cakeshop*, 445 F. Supp. 3d at 1253 ("The Attorney General has demonstrated a willingness" to "represent[t] the Commission in proceedings to enforce [CADA]," so he is "a proper defendant."). And, although he has not previously exercised his power to file a charge of discrimination on his own initiative, he has not disavowed that authority. *See Deep South Today v. Murrill*, 779 F. Supp. 3d 782, 808, 812 (M.D. La. 2025) ("[P]rior enforcement is not a requirement [for *Ex parte Young*], only that Defendants have a duty and willingness to enforce the Act, have refused to disavow enforcement, and have the

power to enforce the law."). Instead, he joins the Commission and Division Defendants in claiming a "compelling" interest in enforcing the law. PI.Opp. 43.

E. Plaintiffs' claims are ripe

Defendants conclude with a perfunctory ripeness argument. *See* PI.Opp. 33-34; CCRD.MTD 29-30; AG.MTD 12. But standing and ripeness, as Defendants acknowledge, generally "'boil down to the same question.'" PI.Opp. 34 (quoting *SBA List*, 573 U.S. at 157 n.5). And Defendants' ripeness argument merely repeats their standing argument. *Id.* (acknowledging that their "ripeness" and "standing" arguments rely on "the same reasons"). So it fails for all the same reasons.

"The ripeness challenge fails here because the Plaintiffs' alleged injury is already occurring." *Walker*, 450 F.3d at 1098. CADA as amended by H.B. 25-1312 currently "chills the exercise of the Plaintiffs' First Amendment rights." *Id.* Plaintiffs are subject to CADA's prohibitions on misgendering and deadnaming, *supra* 6-7, 13-17, their use of biological pronouns and birth names would violate those prohibitions, *supra* 17-21, and they credibly fear that they will be accused of discrimination—and forced through a potentially burdensome administrative process—if they engage in such speech, *supra* 7-12. "Assuming for the moment that the Plaintiffs' legal theory is correct," which we must at the motion-to-dismiss stage, this "alleged injury does not depend on any uncertain, contingent future events, and the courts would gain nothing by allowing the issues in the case to develop further. Accordingly, the controversy is ripe for adjudication." *Walker*, 450 F.3d at 1098.

II. The remaining factors favor a preliminary injunction.

In First Amendment cases, the likelihood of success on the merits is generally "the determinative factor." *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir.

2013). So, because Plaintiffs are likely to succeed on their constitutional claims, "the remaining preliminary-injunction factors present little difficulty." *Citizens United v. Gessler*, 773 F.3d 200, 218 (10th Cir. 2014).

Irreparable Harm. It is a "well-settled" rule that constitutional violations are always an irreparable injury. *Free the Nipple v. Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019); *see also Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 128 (10th Cir. 2024) ("Most courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury."). And Plaintiffs are likely to succeed on their First and Fourteenth Amendment claims (which, again, Defendants do not dispute), so they have established irreparable harm as well. *See Free the Nipple*, 916 F.3d at 806 (these inquiries "collaps[e]" together for "constitutional claims").

Defendants' irreparable harm arguments largely repackage their standing arguments, which, as explained above, are without merit. To start, Defendants accuse Plaintiffs of "delay," PI.Opp. 41, but Plaintiffs filed this lawsuit as quickly as possible: just one business day after H.B. 25-1312 was signed into law. To circumvent that straightforward conclusion, Defendants suggest that Plaintiffs could have sought an earlier injunction against one of the Commission's harassment regulations, which the Division interprets to prohibit some instances of misgendering and deadnaming. *See* 3 C.C.R. 708-1:81.6. But that argument fails for at least three reasons.

First, the regulation has a different scope than H.B. 25-1312. It covers "harassment" specifically and punishes only "severe or pervasive conduct that creates an environment that is subjectively and objectively hostile, intimidating, or offensive," *id.*; *cf.*

Adefila v. Select Specialty Hospital, 28 F. Supp. 3d 517, 525 (M.D.N.C. 2014) ("'the severe or pervasive test'" is a "'high bar'"), it has an exhaustion requirement forcing aggrieved parties to "take advantage" of the offending entity's "remedial measures" before filing a complaint with the Division, 3 C.C.R. 708-1:81.6(B), and the Division has never relied on the regulation as a basis for liability outside of the employment context, *see* PA 780:19-784:3, 785:14-786:9; PRA 101-10, 115-24. By contrast, H.B. 25-1312 dramatically expanded CADA to prohibit not just severe or pervasive harassment but *all* refusals to use someone's "chosen name" or other terms by which they "choos[e] to be addressed." Colo. Rev. Stat. §24-34-301(9); PA 788:12-19 (Division's agreement that "harassment" is just one "type of discrimination that can occur under CADA"). It also has no exhaustion requirement and covers public accommodations in addition to employers. *See* Colo. Rev. Stat. §24-34-601. As the Division says, the regulation and CADA are "two different" things. PA 760:9-13; *see also id.* at 772:21-773:2 (agreeing that the regulation's extra requirements are "not in the Colorado Anti-Discrimination Act"). And whatever the regulations say, Defendants are "charged with enforcing CADA." *Id.* at 808:18-20.

Second, given the considerable "public interest" surrounding H.B. 25-1312's recent passage, it is "not difficult to find it likely" that members of the public will be eager to enforce it. *Masterpiece Cakeshop*, 445 F. Supp. 3d at 1256. And third, even assuming Plaintiffs could have sought relief sooner, "'tardiness is not particularly probative in the context of ongoing, worsening injuries" like chilled speech. *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019). "Each instance in which" Plaintiffs "restrain" their "speech contribute[s] to the constitutional injury [they] suffer." *Id.* An injunction, no matter how late

in the day, will prevent that injury from compounding further. That is why "'courts are loath to withhold relief solely on th[e] ground'" of "'delay.'" *Id.* (emphasis omitted).

Defendants also dismiss Plaintiffs' allegations of chilled speech as "hypothetical." PI.Opp. 42. But the record shows that Plaintiffs' speech rights are being injured *right now*. They have all been forced to "chang[e] their practices" out of fear that they will be punished for nonconforming speech. *Contra* PI.Opp. 42. For example, Erin Lee and Lori Gimelshteyn (the executive directors of PKC and CPAN, respectively) "often speak about" specific transgender individuals at their events and feel it is "really important" to use biologically accurate language when discussing them. PA 164:9-10; *see also id.* at 120:21-23, 94:25-95:2, 96:22-97:8, 98:10-13. Before H.B. 25-1312, they "felt comfortable" doing so. *Id.* at 166:15-20; *see also id.* at 112:8-17. But since H.B. 25-1312 was passed, Ms. Lee and Ms. Gimelshteyn have been forced to "do mental gymnastics" to "avoid using [the] names" of those individuals or referring to them with gendered language. *Id.* at 163:16-165:5; *see also id.* at 113:1-114:15. CPAN, moreover, has cancelled at least one event for fear of running afoul of the law. *See id.* at 72-72 ¶¶5-9, 89:14-90:11.

Dr. Morrell and Dr. Leswing likewise now feel compelled to address patients using gender-neutral language where they would normally use (and would prefer to keep using) biological pronouns. *See supra* 22-23; PA 191:15-18, 209:15 ("[P]rior to … 1312, it was typical for me to" use "biological pronouns."); *id.* at 244:19-247:9, 251:714 ("I feel now forced to refer to [patients] androgynously … so that the family doesn't have the ability to seek punitive legal action."). And Dr. Leswing has avoided posting statements about her beliefs on her website, not because she is worried about "provoking controversy in her

community," *contra* PI.Opp. 42, but because she is worried that posting controversial statements about gender identity will cause "people who disagree" with her to get "upset" and potentially report her for discrimination, PA 78-79 ¶10, 248:11-23; Leswing Decl. ¶24.

Plaintiffs' fears are justified. Though Defendants claim "the Division has not found probable cause in any case based on misgendering and deadnaming," PI.Opp. 42, the record shows otherwise. Even under the heightened "harassment" standard embodied in the Commission's existing regulations, the Division has found probable cause in at least two cases based solely on misgendering or deadnaming. *See supra* 10; PRA 2-3 ¶3 (acknowledging a finding of probable cause for alleged misgendering and/or deadnaming).

Balance of Harms and the Public Interest. As with irreparable harm, that Plaintiffs' constitutional rights are being violated tips the remaining factors in Plaintiffs' favor. "[E]ven a temporary loss" of constitutional rights outweighs any harm that a preliminary injunction might cause to a defendant. *Free the Nipple*, 916 F.3d at 806. And it is "'always in the public interest to prevent the violation of a party's constitutional rights.'" *Id.* at 807.

Defendants complain that the requested injunction would create a "draconian limitation on antidiscrimination enforcement." PI.Opp. 43. Not so. The Constitution does not force Colorado—or this Court—to decide between violating Plaintiffs' constitutional rights and allowing discrimination to run rampant in Colorado. Instead, the Court can take the much more constitutionally sound path and enter an injunction that bars Defendants from enforcing CADA in a manner that violates Plaintiffs' First and Fourteenth Amendment rights while allowing them to enforce the law to prohibit *actual* denials of service. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019) ("[T]he government

may prohibit 'the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services,'" but it may not "'declare another's speech itself to be a public accommodation.'" (cleaned up)). The State's general interest in "'eliminating discrimination'" does not entitle it to run roughshod over Plaintiffs' constitutional rights. *See Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) ("[W]hen the law [at issue] is likely unconstitutional," there is no state interest that outweighs a plaintiff's interest "in having [their] constitutional rights protected.").

Defendants also claim a special interest in punishing the use of biological pronouns and birth names because, they say, transgender individuals take great offense at misgendering and deadnaming and face a greater risk of emotional harm as a result. *See* PI.Opp. 43-44. But this contention suffers from the same flaw: *no* state interest justifies applying an unconstitutional law in a manner that violates Coloradans' speech rights, *Awad*, 670 F.3d at 1131, and a "heckler's veto" definitely doesn't justify it, *Flanagan v. Munger*, 890 F.2d 1557, 1566 (10th Cir. 1989) (The State "cannot justify" speech restrictions "simply because some members of the public find plaintiffs' speech offensive."). It also relies on a faulty premise: The studies cited by Defendants and their expert fail to establish any causal relationship between misgendering or deadnaming and negative mental health outcomes. *See, e.g.*, PA 668:8-25 ("it is … true to say they did not prove causal associations"); *see also id.* at 684:18-23, 690:5-18, 692:14-18, 695:4-13. In fact, many of those studies found *no* connection—causal or otherwise—between misgendering and deadnaming and more serious health consequences like suicide. *See, e.g.*, *id.* at 666:6-13, 667:19-23, 677:6-680:1, 108:15-21. More to the point, Defendants do not cite

any study that specifically evaluates the effect that misgendering and deadnaming in places of public accommodation has on health outcomes for transgender individuals. *See id.* at 703:6-706:11. But that is the only speech at issue here.

On the other hand, if Defendants are correct that transgender individuals find misgendering and deadnaming to be a uniquely upsetting experience, then that shows why Plaintiffs need a preliminary injunction. If transgender individuals generally perceive misgendering and deadnaming to be "hostile" and "discriminatory" and that reaction is "reasonable," then they are likely to file complaints against those, like Plaintiffs, who use such speech. *Id.* at 643:21-644:13, 709:13-710:16, 713:3-22; *see also supra* 12, 21.

III. A preliminary injunction is appropriate here.

Sensing the weakness of their arguments on the merits *and* standing, Defendants try a series of grab-bag arguments challenging the supposedly "broad" nature of Plaintiffs' requested relief. PI.Opp. 44-45; *see also id.* at 16-17. All of those objections fail.

A. The requested injunction is appropriately tailored.

First, Defendants challenge the scope of the requested relief. They oppose an injunction that would provide relief for any member of Defending Education or Do No Harm beyond those named in the complaint. PI.Opp. 45. But Defendants unsurprisingly cite no law to support this argument. When an association seeks relief on behalf of its members, as Defending Education and Do No Harm do here, the "traditional approach" is to afford "preliminary injunctive relief to" all "the members of [the] plaintiff organizations." *Kansas v. DOE*, 739 F. Supp. 3d 902, 934 (D. Kan. 2024) (cleaned up); *see id.* at 934-35 (granting a "broad" preliminary injunction to associations "with members all over the country"). Defendants correctly note that Plaintiffs' complaint "only presents facts regarding the named

Plaintiffs," PI.Opp. 45, but that's how associational standing is *supposed* to work: "[I]f even one member of the association would have had standing to sue in his or her own right, that is sufficient" for all members to secure relief. *Utah Ass'n of Counties. v. Bush*, 455 F.3d 1094, 1099 (10th Cir. 2006).

Defendants also invoke the Supreme Court's recent decision in *Trump v. CASA*, which held that federal courts lack the authority to impose so-called "universal injunctions" that prohibit enforcing the law "against *anyone*, anywhere." 606 U.S. 831, 837 n.1 (2025). The decision clarified, however, that federal courts do have the authority to enter—and *should* enter—injunctions that "provide complete relief to each plaintiff with standing to sue." *Id.* at 861. And as courts that have evaluated preliminary-injunction requests after *CASA* have explained, providing complete relief to plaintiffs may in some cases require injunctions that "control in a statewide fashion." *Jackson Federation of Teachers. v. Fitch*, 799 F.Supp.3d 571, 585 (S.D. Miss. 2025). First Amendment overbreadth challenges like this one, for instance, require enjoining "*all* enforcement" to avert harms to "society as a whole." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

Even if a statewide injunction is inappropriate here, Plaintiffs are entitled to a preliminary injunction that protects at least the named Plaintiffs and the Plaintiff associations' members. *See* Compl. (Dkt.1) at 56-57 (requesting, in part, a "preliminary … injunction barring Defendants from enforcing" CADA "as applied" to Plaintiffs' speech).

B. The requested injunction is not disfavored.

Next, Colorado says the requested injunction is "disfavored" because it would "upset the existing status quo" and give Plaintiffs "all the relief they could recover after a full trial on the merits." Pl.Opp. 16-17. Not so.

The "status quo" is a "tricky metric," *United States v. Texas*, 144 S. Ct. 797, 798 n.2 (2024), and it is impossible to apply "in a principled way across all cases," *Labrador v. Poe*, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurring). That's why courts do not apply a "blanket rule of 'preserving the status quo.'" *Id.* Instead, the "essential factor" for a preliminary injunction is "likelihood of success on the merits," where Plaintiffs clearly prevail. *Id.*; *see also United Food & Com. Workers Union, Local 1099 v. Sw. Ohio Regional Transit Authority*, 163 F.3d 341, 348 (6th Cir. 1998) ("'[T]he focus always must be on prevention of injury …, not merely on preservation of the status quo.'").

But if the status quo does matter, it favors Plaintiffs, not Defendants. Properly understood, the "status quo" is "'the last peaceable uncontested status existing between the parties before the dispute developed.'" *Free the Nipple*, 916 F.3d at 798 n.3. And this dispute developed when Colorado passed H.B. 25-1312, amending CADA to prohibit constitutionally protected speech (including the use of biological pronouns and birth names) in which Plaintiffs had previously engaged and want to continue engaging. *See supra* 6-7, 31-33. The relevant status quo is therefore "the status existing *before* [Colorado] enacted" H.B. 25-1312. *Free the Nipple*, 916 F.3d at 798 n.3. Defendants respond (again) that, although H.B. 25-1312 is new, the Commission's harassment regulation already prohibited some forms of misgendering and deadnaming and the challenged "'unwelcome'

provisions" have been part of CADA for years. *See* Pl.Opp. 16. But that response (again) fails: H.B. 25-1312 expanded CADA to punish *all* refusals to use someone's "chosen name" or other forms of "addres[s]," Colo. Rev. Stat. §24-34-301(9), stretching liability far beyond the more limited category of speech implicated by the harassment regulation and adding to the kind of speech that can violate the Unwelcome Provisions. *See supra* 31-32; Pl.Mot. 6, 22-25. Simply put, H.B. 25-1312 changed the game.

The requested injunction also would not give Plaintiffs "all the relief" that a full trial would give them. *Contra* Pl.Opp. 17. A "preliminary injunction falls into the all-the-relief category only if its effect, once complied with, cannot be undone." *Free the Nipple*, 916 F.3d at 798 n.3 (cleaned up). That is not the case here. If Plaintiffs "lose on the merits after a trial," then the Court can "put the toothpaste back in the tube" by lifting the injunction and allowing Colorado to "fully enforce its" laws. *Id.*

IV. Defendants' motions to dismiss fail for the same reasons.

Defendants also filed two motions to dismiss. *See* Dkts. 81, 82. But those motions just repeat—largely verbatim—the same standing, ripeness, and sovereign-immunity arguments that Defendants make in their preliminary-injunction opposition. The motions to dismiss should be denied for all the reasons explained above.

If anything, Defendants' jurisdictional arguments are even *weaker* for their motions to dismiss. "[T]he manner and degree of evidence required" to establish standing varies "at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). And the threshold for standing is lower at the motion-to-dismiss stage than at the preliminary-injunction stage. *See, e.g.*, *Do No Harm v. Pfizer Inc.*, 126 F.4th 109, 113-

14 (2d Cir. 2025) ("The burden for establishing standing at the dismissal stage is lower" than the "burden for establishing Article III standing for the purposes of a motion for a preliminary injunction."); *Action NC v. Strach*, 216 F. Supp. 3d 597, 628 (M.D.N.C. 2016) ("[T]he standard for determining whether Article III standing exists at the preliminary injunction stage carries a higher burden" than the "motion to dismiss stage.").

In other words, because Plaintiffs' likelihood of standing is sufficient to satisfy the requirements for "entry of a preliminary injunction," it is *necessarily* "sufficient to survive a motion to dismiss." *Spicer v. Biden*, 2022 WL 2663823, at *1 (D.D.C. July 11, 2022); *see also Principle Homecare, LLC v. McDonald*, 2025 WL 622876, at *17 (S.D.N.Y. Feb. 26, 2025); *Taylor v. Siegelman*, 230 F. Supp. 2d 1284, 1288 n.7 (N.D. Ala. 2002).

CONCLUSION

For these reasons, the Court should grant Plaintiffs' motion for a preliminary injunction and deny Defendants' motions to dismiss.

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Respectfully submitted,

/s/ J. Michael Connolly

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CERTIFICATE OF SERVICE

I certify that on February 11, 2026, I e-filed the foregoing brief with the Clerk of the Court using the Court's ECF system., which will email everyone requiring notice.

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