

**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

**PLAINTIFFS' OBJECTIONS TO THE REPORT & RECOMMENDATION**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii  
INTRODUCTION ..... 1  
ARGUMENT ..... 2  
    I. CPAN and PKC have standing because they are arguably subject to CADA ..... 2  
    II. DE has associational standing because its members have standing ..... 9  
CONCLUSION ..... 10

## TABLE OF AUTHORITIES

### Cases

<i>303 Creative v. Elenis</i> , 6 F.4th 1160 (10th Cir. 2021) .....	1, 8
<i>Am. Encore v. Fontes</i> , 152 F.4th 1097 (9th Cir. 2025) .....	3
<i>Babbitt v. United Farm Workers</i> , 442 U.S. 289 (1979) .....	8
<i>Brown v. Kemp</i> , 86 F.4th 745 (7th Cir. 2023) .....	3
<i>Chiles v. Salazar</i> , 146 S. Ct. 1010 (2026) .....	1
<i>Christian Healthcare Centers v. Nessel</i> , 117 F.4th 826 (6th Cir. 2024) .....	4-5
<i>Craig v. Masterpiece Cakeshop</i> , 370 P.3d 272 (Colo. Ct. App. 2015) .....	7, 10
<i>Creek Red Nation v. Jeffco Midget Football Ass'n</i> , 175 F. Supp. 3d 1290 (D. Colo. 2016) .....	6
<i>FEC v. Cruz</i> , 596 U.S. 289 (2022) .....	7
<i>Gays Against Groomers v. Garcia</i> , 169 F.4th 981 (10th Cir. 2026) .....	1
<i>Henry v. Wellpath LLC</i> , 2024 WL 5323679 (D. Colo. Jan. 16, 2024) .....	6
<i>Hunt v. Washington State Apple Advertising Comm'n</i> , 432 U.S. 333 (1977) .....	9
<i>Nat'l Org. for Marriage v. Walsh</i> , 714 F.3d 682 (2d Cir. 2013) .....	3-4
<i>New Jersey Bankers Ass'n v. Att'y Gen. of New Jersey</i> , 49 F.4th 849 (3d Cir. 2022) .....	3
<i>Peace Ranch, LLC v. Bonta</i> , 93 F.4th 482 (9th Cir. 2024) .....	4
<i>Peck v. McCann</i> , 43 F.4th 1116 (11th Cir. 2022) .....	2
<i>PGA Tour v. Martin</i> , 532 U.S. 661 (2001) .....	6

<i>SBA List v. Driehaus</i> , 573 U.S. 149 (2014) .....	3
<i>Scott v. Allen</i> , 153 F.4th 1088 (10th Cir. 2025) .....	1-3, 5, 10
<i>SisterSong Women of Color Reprod. Just. Collective v. Kemp</i> , 410 F. Supp. 3d 1327 (N.D. Ga. 2019) .....	7
<i>Stalder v. Colo. Mesa University</i> , 551 P.3d 679 (Colo. Ct. App. 2024) .....	6
<i>Turtle Island Foods, S.P.C. v. Strain</i> , 65 F.4th 211 (5th Cir. 2023) .....	3
<i>Vitagliano v. County of Westchester</i> , 71 F.4th 130 (2d Cir. 2023) .....	9
<i>Woodlands Pride v. Paxton</i> , 168 F.4th 293 (5th Cir. 2026) .....	9
<b>Statutes &amp; Regulations</b>	
28 C.F.R. Part 36, App. C .....	6
Colo. Rev. Stat. §24-34-301 .....	5
Colo. Rev. Stat. §24-34-600.3 .....	6
Colo. Rev. Stat. §24-34-601 .....	1, 5, 9

## INTRODUCTION

The Report and Recommendation gets a lot right. It agrees that Plaintiffs' speech is arguably proscribed by CADA as amended by H.B. 25-1312. See R&R (Dkt. 125) at 18. And it agrees that Plaintiffs (or at least most of them) face a credible threat of enforcement because Defendants have not disavowed the authority to punish them for so-called misgendering and deadnaming. See *id.* at 22. These conclusions are in line with a string of recent precedent confirming that pre-enforcement standing in First Amendment challenges is not a high bar, especially for speech about sex and gender. *E.g.*, *303 Creative v. Elenis*, 6 F.4th 1160, 1171-76 (10th Cir. 2021); *Gays Against Groomers v. Garcia*, 169 F.4th 981, 990-91 (10th Cir. 2026); *Chiles v. Salazar*, 146 S. Ct. 1010, 1019 n.\* (2026).

Unfortunately, the R&R gets two things wrong. First, it finds that Colorado Parent Advocacy Network and Protect Kids Colorado lack standing because, the R&R says, they are not "public accommodations." But CADA does not regulate public accommodations directly; rather, it regulates "a person" who operates "in places of public accommodation." C.R.S. §24-34-601. And CPAN and PKC regularly host events in places of public accommodation, so they are subject to the law. Caselaw confirms that conclusion. Plus, Defendants have never promised that they won't punish CPAN or PKC if they run afoul of the law. At the very least, Plaintiffs' interpretation of CADA is *arguable*, and that is all that is required for standing. See *Scott v. Allen*, 153 F.4th 1088, 1096 (10th Cir. 2025).

Second, the R&R errs in concluding that Defending Education lacks associational standing. DE's members include the leaders of both CPAN and PKC, who have standing for the same reasons CPAN and PKC have standing. And Defendants have, again, never

disavowed the authority to punish them for CADA violations. The Court should reject this portion of the R&R and deny the motions to dismiss in full.

### **ARGUMENT**

The Tenth Circuit applies standing requirements “leniently” in “the First Amendment context” to “facilitat[e] pre-enforcement suits.” *Peck v. McCann*, 43 F.4th 1116, 1129 (11th Cir. 2022). CPAN and PKC have satisfied that lenient test because they are at least “arguably” subject to CADA. *Scott*, 153 F.4th at 1096. And DE has associational standing because its members include CPAN’s and PKC’s leaders.

#### **I. CPAN and PKC have standing because they are arguably subject to CADA.**

The R&R does not question that, like the other Plaintiffs, CPAN and PKC want “to [misgender and deadname] on an ongoing basis” and that such “conduct is arguably proscribed by CADA.” R&R at 18. Nor does it question that their speech is chilled by “a credible threat of prosecution.” *Id.* at 23. It also does not dispute that CPAN and PKC are regularly targeted by transgender individuals and activists for their speech, see PI.Reply (Dkt.98) at 11, 17, or that any one of those individuals could “file a complaint and initiate enforcement proceedings” against them, R&R at 20, 22-23 (cleaned up). That should be enough to show standing. In pre-enforcement actions, “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.” PI.Reply at 5.

Yet the R&R finds that CPAN and PKC do not have standing because, on its reading of the law, “advocacy organizations like CPAN and PKC” are not “public accommodation[s]” and are therefore not subject to CADA. R&R at 24-25. But that conclusion applies the wrong test for pre-enforcement First Amendment standing, has no basis in the law’s

text, and ignores the weight of the caselaw supporting Plaintiffs' position.

**A.** To start, the R&R fails to grapple with the relaxed test for standing in the First Amendment pre-enforcement context. Again, to have standing, CPAN and PKC need only show that their speech is “arguably” proscribed by CADA. *SBA List v. Driehaus*, 573 U.S. 149, 159 (2014). And “arguably proscribed” is “not a stringent test.” *New Jersey Bankers Ass’n v. Att’y Gen. of New Jersey*, 49 F.4th 849, 855 (3d Cir. 2022); *cf. Scott*, 153 F.4th at 1096 (the “*bar that must be met is extremely low*”). Thus, when standing turns on competing interpretations of a challenged statute, plaintiffs have standing as long as their reading of the statute is plausible, even if it is “not ... the *best* interpretation.” *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 218 (5th Cir. 2023); *see also* PI.Reply at 19.

In other words, it does not matter if Plaintiffs' reading of CADA—including whether it applies to CPAN and PKC—is not persuasive enough to “win on the merits of their constitutional claims.” *Brown v. Kemp*, 86 F.4th 745, 761 (7th Cir. 2023). Nor does it matter if CPAN or PKC, “in actual prosecutions,” could argue that they fall outside of the law’s scope. *Id.* at 764. At this stage, the test is different (and easier): “for the purposes of standing,” this Court should “accept Plaintiffs’ interpretation of [CADA] so long as it is an arguable interpretation.” *Am. Encore v. Fontes*, 152 F.4th 1097, 1116 (9th Cir. 2025).

To that end, federal courts regularly find standing in pre-enforcement cases where plaintiffs plausibly allege they are covered by a challenged law. In *National Organization for Marriage v. Walsh*, for example, a group that supported traditional views on marriage challenged New York laws that regulated commercials sponsored by “political committees.” 714 F.3d 682, 686-87 (2d Cir. 2013). The State argued that the group was not

necessarily a “political committee” under the law. *Id.* But the Second Circuit, applying the “relaxed standing ... rules” for “pre-enforcement First Amendment claims,” found standing because the group “plausibly contend[ed] that it would have been a ‘political committee’ under New York law if it had aired its commercials.” *Id.* at 689-90; see *id.* at 690 (“We thus give credence to [the organization’s] assertion that it ‘fears it is a political committee under New York law,’ which ‘chills [it] from proceeding with its speech.’”).

Likewise, in *Peace Ranch, LLC v. Bonta*, the Ninth Circuit considered a California law that imposed rent controls on certain “mobilehome park[s]” whose property stretches across “two or more incorporated cities.” 93 F.4th 482, 485 (9th Cir. 2024). The plaintiff alleged that it was a single mobilehome park spread across two cities and thus subject to the law but, in the alternative, also alleged that it comprised two separate parks in two separate cities. *Id.* at 489. In response, California argued that the plaintiff lacked standing because, based on its alternative allegation, the challenged “statute [did] not apply to” it. *Id.* The Ninth Circuit rejected that argument, holding that the park had standing because it “plausibly alleged” that it feared the State would try to enforce the law against it. *Id.* Allowing the State to “defeat standing by conceding that the law does *not* apply,” the Ninth Circuit explained, would “unavoidably tangle standing with the merits.” *Id.*

Finally, in *Christian Healthcare Centers v. Nessel*, religious organizations “challenged aspects of Michigan’s antidiscrimination laws,” including (as here) provisions that required public accommodations to use preferred pronouns and other transgender-affirming language. 117 F.4th 826, 836, 839-41 (6th Cir. 2024). The Sixth Circuit allowed the challenge to proceed because “each Plaintiff” was “*arguably* covered by the public-

accommodation laws.” *Id.* at 844-46 (emphasis added). The Sixth Circuit rejected Michigan’s argument that religious exemptions in its antidiscrimination laws meant they did not apply to the plaintiffs. *Id.* at 847-48. Because those exemptions did not “*certainly exempt*” Plaintiffs, “as is necessary to defeat standing,” the plaintiffs’ interpretation was at least “arguable” and sufficient for pre-enforcement standing. *Id.* (emphasis added).

The R&R neglects this analysis. Because it fails to consider whether CPAN and PKC at least “arguably” fall under CADA’s coverage, it risks “confus[ing] ... the elements of standing” with the ultimate merits analysis. *Scott*, 153 F.4th at 1096. For standing purposes, CPAN and PKC “need not prove each element of the statute.” *Id.* They need only show that they “*arguably*” fall within the law’s scope. *Id.*

**B.** Plaintiffs plainly satisfy that lenient standard. The R&R, for its part, concluded that CPAN and PKC are not subject to CADA because they are not themselves public accommodations that offer goods, services, or facilities to the public. See R&R at 24-25. But as Plaintiffs’ briefing explained, CADA does not regulate places of public accommodation directly. See PI.Reply at 14-15. Instead, it regulates “persons” who are *in* a place of public accommodation. *Id.*; see C.R.S. §24-34-601 (titled “Discrimination in places of public accommodation”). It makes it unlawful for “a *person*” to deny someone “the full and equal enjoyment of ... a place of public accommodation.” *Id.* §24-34-601(2)(a) (emphasis added). The statute, in other words, “does not regulate the physical place of public accommodation; it regulates the person,” including an advocacy organization or its leaders, who operates “in the place of public accommodation.” PI.Reply at 15; see C.R.S. §24-34-301(15)(a) (“person” includes “partnerships, associations, corporations,” and their “legal

representatives”). And CPAN and PKC regularly operate in places of public accommodation. See, e.g., Gimelshteyn Decl. ¶¶10-11; Lee Decl. ¶¶10-11; Pls’ App’x at 20-39.

The R&R does not meaningfully engage this aspect of CADA’s text. See R&R at 24 (noting without further discussion that CADA §601 is titled “[d]iscrimination *in* places of public accommodation”). Instead, the R&R simply repeats CADA’s definition of “public accommodation” and insists that neither CPAN nor PKC meet that definition. See *id.* (quoting C.R.S. §24-34-600.3(1)(a)). But this ignores Plaintiffs’ textual arguments and repeats Defendants’ error: Whether CPAN and PKC satisfy the definition of “public accommodation” is irrelevant because CADA punishes “person[s],” not public accommodations.

Caselaw confirms that conclusion. In *Creek Red Nation v. Jeffco Midget Football Association*, for example, this Court held that “organizations that conduct activities in facilities ... that are open to the public” are subject to CADA even if they are not themselves public accommodations. 175 F. Supp. 3d 1290, 1298 (D. Colo. 2016); see PI.Mot. (Dkt.27) at 8. Courts, moreover, consistently read Colorado’s antidiscrimination laws to mirror similar federal laws. See PI.Reply at 15-16 (citing, e.g., *Henry v. Wellpath LLC*, 2024 WL 5323679, at \*11 (D. Colo. Jan. 16, 2024); *Stalder v. Colo. Mesa University*, 551 P.3d 679, 683 (Colo. Ct. App. 2024)). And federal antidiscrimination laws *do* apply to entities that host events in public accommodations. *E.g.*, *PGA Tour v. Martin*, 532 U.S. 661, 677 (2001); 28 C.F.R. Part 36, App. C (“An entity that is not in and of itself a public accommodation ... may become a public accommodation when... it leases space for a conference ... at a hotel [or] convention center.”); see PI.Reply at 16. And in *Craig v. Masterpiece Cakeshop*, the Colorado Civil Rights Division pursued charges against a

cakeshop owner “personally” because “he was the person whose conduct was at issue.” 370 P.3d 272, 278 (Colo. Ct. App. 2015); see PI.Reply at 17 (discussing *Masterpiece*).

On the other side of the ledger, neither Defendants nor the R&R cite *any* authorities purporting to limit CADA to literal places of public accommodation. See CCRD.MTD (Dkt.82) at 17-19; R&R at 24-25. Because the caselaw, if anything, cuts *in favor* of Plaintiffs’ position, it is at least arguable that CPAN and PKC are covered by CADA.

Finally, the R&R claims that CCRD Director Sullivan “has disavowed” a construction of CADA that would apply to CPAN and PKC. R&R at 24 n.8. Not so. Though Defendants offer a *statutory interpretation* argument about CADA’s scope, that is not the same as a disavowal. See *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 410 F. Supp. 3d 1327, 1339 (N.D. Ga. 2019) (rejecting the State’s “mid-litigation assurances” that they would “narrowly interpret” the challenged law (cleaned up)). Indeed, Defendants in pre-enforcement cases regularly make such arguments, and courts regularly reject them. *E.g.*, *FEC v. Cruz*, 596 U.S. 289, 299-300 (2022) (finding standing where “the Government argu[ed] that” the plaintiff’s conduct “would *not* violate the statute” and the plaintiff “argu[ed] that they would”). Even the R&R itself elsewhere recognizes that “Defendant Sullivan’s assurances” are “not the kind of clear and definitive commitments courts recognize as sufficient at the motion to dismiss stage.” R&R at 21-22.

**C.** Even if the R&R were correct that CPAN and PKC are not themselves subject to CADA, they “would still have standing” because no one disputes that “public venues like hotels and restaurants *are* subject to CADA” and may be “unlikely to lease space” to CPAN or PKC “out of fear that their practice of deadnaming and misgendering will incur

liability for the venue itself.” PI.Reply at 17.

The R&R dismisses this argument in a footnote because, it says, there is no “evidence that any public accommodation has actually refused, or is likely to refuse, to host their events.” R&R at 25 n.9. But that conclusion fails for at least three reasons. First, CPAN and PKC *have* offered evidence that “venue[s] ha[ve] received complaints from members of the public regarding their stance on gender identity issues.” PI.Reply at 17. And the leaders of both CPAN and PKC testified that, “in [their] experience, venues will be less willing to host [their] public events if” CPAN or PKC “is branded a ‘discriminatory’ organization.” Gimelshteyn Decl. (Dkt.27-2) ¶28; Lee Decl. (Dkt.27-3) ¶28. It is “anything but speculative” to conclude that venues that receive hostile messages or fear being associated with discriminatory groups might refuse to host CPAN or PKC events in the future to avoid CADA liability. *303 Creative*, 6 F.4th at 1174.

Second, even if no venue has specifically refused space to CPAN and PKC for fear of running afoul of CADA’s new misgendering and deadnaming provisions, that is unsurprising because, before H.B. 25-1312, CADA did not prohibit such speech. “And since H.B. 25-1312,” CPAN and PKC “have stayed silent because of the new law.” PI.Reply at 23. CPAN and PKC have also had to cancel at least some of their planned events on their own, for fear of violating the law. See Pls’ App’x (Dkt.98-1) at 72-73.

Third, CPAN and PKC need not wait until a venue has “actually refused” to host their events before they have standing to sue. *Contra* R&R at 25 n.9. Plaintiffs bringing a pre-enforcement action do not have to first incur injuries “to be entitled to challenge the statute.” *Babbitt v. United Farm Workers*, 442 U.S. 289, 302 (1979) (cleaned up).

The R&R, however, would require CPAN and PKC to “expose [themselves] to actual” injury before allowing them to sue. *Id.* By requiring them to both trust that Defendants will abide by their non-binding argument that CADA does not regulate entities like CPAN and PKC *and* hope that venues will not deny them space on account of their speech, the R&R puts them “to the choice between abandoning [their] rights or risking” injury. *Vitagliano v. County of Westchester*, 71 F.4th 130, 139 (2d Cir. 2023).

**II. DE has associational standing because its members have standing.**

In a one-paragraph analysis, the R&R concludes that Defending Education lacks associational standing. R&R at 26. The only associational standing factor in dispute is whether DE’s members “would otherwise have standing to sue in their own right.” *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977); see CCRD.MTD at 23; Pl.Reply at 13 n.\*; R&R at 26. And DE satisfies that test.

“PKC’s executive director, Erin Lee, and CPAN’s executive director, Lori Gimelshteyn,” are both “DE members.” R&R at 26. And both would have standing to sue on their own. Like their organizations, Ms. Gimelshteyn and Ms. Lee operate in places of public accommodation whenever they host CPAN and PKC events in hotels, restaurants, conference centers, and other venues. See, e.g., Gimelshteyn Decl. ¶¶10-11; Lee Decl. ¶¶10-11; Pls’ App’x at 20-39. That brings them within the ambit of CADA, which threatens to punish any “person” who, when operating “in” a place of public accommodation, “directly or indirectly ... den[ies]” someone “the full and equal enjoyment of” that “place of public accommodation.” C.R.S. §24-34-601(2)(a); see *Woodlands Pride v. Paxton*, 168 F.4th 293, 303, 305 (5th Cir. 2026) (holding that a plaintiff “drag production company” that

booked space in a restaurant to host drag performances was, for the purposes of standing, “*arguably*” subject to a law that regulated those who “contro[l] the premises of a commercial enterprise” because the company “control[led]” the space during events and “decide[d] who enters”). Indeed, it *must* be true that individuals like Ms. Gimelshteyn and Ms. Lee are subject to CADA because Colorado has already brought at least one enforcement action against an individual who operated in a place of public accommodation. See *Masterpiece Cakeshop*, 370 P.3d at 278 (naming the owner “personally”).\*

In other words, Ms. Gimelshteyn and Ms. Lee are at least “arguably” subject to CADA, and therefore would have standing, for all the same reasons that CPAN and PKC are arguably subject to CADA. *Scott*, 153 F.4th at 1096. That’s why they “fear that,” in addition to enforcement actions against their organizations, they will be targeted “personally” for “refusing to ‘address’ an individual using their ‘chosen name’ or other preferred terms.” Gimelshteyn Decl. ¶25; Lee Decl. ¶25. And, because they are members of DE, that is enough to establish associational standing.

### CONCLUSION

The Court should reject the portion of the R&R concluding that DE, CPAN, and PKC do not have standing and deny the motions to dismiss.

---

\* The R&R faults Plaintiffs for supposedly “conclusory” arguments on DE’s associational standing. R&R at 26. But Plaintiffs’ briefing clearly explained that DE has associational standing through Ms. Gimelshteyn and Ms. Lee. PI.Reply at 13 n.\*. If Plaintiffs’ argument was brief, that is because *Defendants* failed to raise any specific challenge to Ms. Gimelshteyn’s or Ms. Lee’s standing. Rather, Defendants made only a one-sentence, non-specific assertion that, “[b]ecause ... DE’s members—i.e., the other plaintiffs addressed above—have no standing, ... DE likewise lack[s] standing.” CCRD.MTD at 23.

Dated: May 22, 2026

Respectfully submitted,

/s/ J. Michael Connolly

J. Michael Connolly

Cameron T. Norris

Paul R. Draper

CONSOVOY MCCARTHY PLLC

1600 Wilson Blvd., Suite 700

Arlington, VA 22209

(703) 243-9423

mike@consovoymccarthy.com

cam@consovoymccarthy.com

paul@consovoymccarthy.com

*Counsel for Plaintiffs*

### **CERTIFICATE OF SERVICE**

I certify that on May 22, 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.

/s/ J. Michael Connolly

Counsel for Plaintiffs