IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:16-cv-00091-RM-MJW

TONYA SMITH, individually and as next friend and parent of K.S. and I.S., minor children;
JOSEPH SMITH, a/k/a RACHEL SMITH, individually and as next friend and parent of K.S. and I.S., minor children;
K.S., a minor child; and,
I.S., a minor child,

Plaintiffs,

vs.

DEEPIKA AVANTI,

Defendant.

PLAINTIFFS' UNOPPOSED MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 56.1, Plaintiffs Tonya Smith and Rachel Smith,[1] individually and as next friends and parents of K.S. and I.S., minor children ("Plaintiffs" or "the Smith family"), move for partial summary judgment that Deepika Avanti ("Defendant") is liable to Plaintiffs on all claims for relief. Plaintiffs do not seek summary judgment as to the amount of damages or the other relief to which they may be entitled.

Certificate of Conferral

Counsel for Plaintiffs have conferred with counsel for Defendant regarding this Motion. Defendant does not oppose this Motion.

[1] Although Plaintiff's legal name is Joseph Smith, she is known by and uses the name Rachel Smith in accordance with her female gender identity. Accordingly, this Motion refers to Plaintiff as Rachel and uses female pronouns to refer to her.

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I. INTRODUCTION

In April 2015, Tonya and Rachel—a loving, committed same-sex couple—were searching for a new place to call home with their two young children, K.S. and I.S. Tonya and Rachel are two women who have been married for six years. Rachel also is transgender.[2] For the Smith family, their ideal home was an affordable, cozy space for the four of them that was close to nature and near a small school that would provide the children with close attention and that matched Tonya and Rachel's educational philosophy.

On April 24, 2015, Tonya and Rachel found an advertisement for a rental property at 698 Dixon Road in Gold Hill, Colorado owned by Defendant that was perfect for them. After multiple emails, meeting Defendant, and seeing the dwellings she was offering for rent, Plaintiffs were excited to rent one of those dwellings. They were shocked, however, to learn that Defendant would not rent to them because of their "uniqueness" and Tonya and Rachel's "unique relationship." Specifically, Tonya and Rachel are "unique" because they are women married to each other, and not to men. Rachel is "unique" because she expresses her gender in a non-stereotypical fashion and her female gender identity does not conform to stereotypes about people designated male at birth. In sum, Defendant refused to rent to the Smith family because she believed that Tonya and Rachel's failure to conform to sex stereotypes, their sexual orientation, and Rachel's gender identity would jeopardize standing in the community.

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[2] Gender identity is an individual's internal sense of gender, which may be male, female, neither, both, or a combination of male and female, and which may be different from that individual's sex assigned at birth. The way an individual expresses gender identity is frequently called "gender expression," and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth. *See* GLAAD, *GLAAD Media Reference Guide - Transgender Issues*, *available at* http://www.glaad.org/reference/transgender (last accessed May 9, 2016).

Defendant also denied Plaintiffs the opportunity to rent one of her properties because of their children.

Plaintiffs now seek a judgment that Defendant violated the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended ("the Fair Housing Act" or "FHA"), 42 U.S.C. § 3604, and the Colorado Anti-Discrimination Act ("CADA"), C.R.S. § 24-34-502, by discriminating against them based on sex, sexual orientation, transgender status, and familial status. There are no material facts in dispute. Whether Defendant's denial of housing to Plaintiffs violated the FHA and CADA is a matter of law for the Court.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Tonya and Rachel Smith are two women in a loving, committed relationship. UF #1.[3] Rachel is also transgender. UF #2. Tonya and Rachel have been married for more than six years and are the parents of two minor sons, K.S. and I.S. UF #3-5. Plaintiffs were domiciled together and intended to be domiciled together at all times relevant to this case. UF # 16, 22-23, 26, 46, 48. Each member of the Smith family is a resident of Colorado. UF #6.

Defendant resides in Boulder County, Colorado and owns the property located at 698 Dixon Road, Gold Hill, Colorado. UF #7-8. There are three free-standing buildings on the property. UF #9. For all times relevant to the case at bar, one building was subdivided into two separate independent livings spaces (the "townhouses"); a second building contained three-bedrooms; and a third building had been converted into a fourth dwelling. UF #10.

In early 2015, Defendant posted several advertisements on the classified ad website Craigslist.org, where she listed for rent a townhouse, a three-bedroom house, and a four-bedroom

[3] Citations to "UF #[X]" refer to the numbered facts in the accompanying Separate Statement of Undisputed Facts.

house, all located at 698 Dixon Road, as well as a two-bedroom house in Gold Hill and a one-bedroom cottage on Dixon Road. UF #12-15. The townhouse was advertised as being approximately 900 square feet, including two bedrooms and one bathroom, located at 698 Dixon Road for $1100 per month. UF #17-18.

In April 2015, Tonya and Rachel began searching for a new home for their family when their then-landlord told them that the property where they lived was being sold. UF #16. On April 24, 2015, Tonya and Rachel found Defendant's rental advertisement for the 900 square foot unit, and Tonya promptly sent Defendant an email that expressed interest in the property, listed the Smith family members, and mentioned that Rachel is transgender. UF #21-23. Defendant responded by email that the two-bedroom townhouse was available for rent for $1,100 per month and that the three-bedroom house was also available to rent for $1,600 per month. UF #24. Defendant asked Tonya to "please send photos of all of you," and Tonya complied. UF #25-26. The parties arranged a meeting at the property for later that evening. UF #27.

At that meeting, the Smith family viewed both the two-bedroom unit and the three-bedroom unit, and they met the different-sex, cisgender[4] couple that lived in the unit adjoining the advertised two-bedroom townhouse. UF #28-29. At Defendant's request, Plaintiffs discussed the possibility of renting the three-bedroom unit, but informed her that they would have to have a friend live with them to share the higher rent. UF #30. At the end of the visit, Plaintiffs reiterated their interest in renting the smaller unit, and that they were willing to consider renting the larger unit if their friend was able to join them. UF #31.

[4] Cisgender is a term used to describe people who are not transgender. *See* GLAAD, *supra* note 2.

That night, however, Defendant emailed Tonya twice. UF #32. In the first email, Defendant informed Tonya that the Smith family was not welcome in the two-bedroom unit because of their children. UF #33. A few hours later, Defendant wrote Tonya a second email stating that, after speaking with her husband, Defendant decided that they had "kept a low profile and low attention for 30 years and want to continue it this way. But in a small town, like Gold Hill, this would not be possible." UF #36. She then refused to rent either residence to the Smith family because "we really need to continue [to keep a] low profile." UF #37. On April 25, 2015, Tonya responded to Defendant about her conversation with the potential roommate and wrote, "As far as keeping a low profile goes, I'm not quite sure what you mean? It sounded like a town where we would really fit in so I'm confused." UF #38.

On April 25, 2015, Defendant wrote to Tonya again and refused to rent either of the properties to the Smith family. UF #39. In her email, Defendant wrote, "Your unique relationship would become the town focus, in small towns everyone talks and gossips, all of us would be the most popular subject of town, in this way I could not be a low profile [sic]." UF #40. Defendant said she had consulted with her husband "who personally would not care but immediately gave [her] this feedback" and also with a psychic friend "who gave [her] the same feed back [sic] and has a transvestite friend herself." UF #43. She told Tonya that she did not want to "attract the town attention and there is no way to avoid this having the kids go to school, and I am not sure they would not be unincluded [sic] due to your uniqueness." UF #41. Defendant told Tonya that it would be "better" for them if they were in a "larger town" and emphasized that the Smith family's "uniqueness" would invite "everyone . . . into [Defendant's] business and it would

jeapardize [sic] what I have had [for] 30 years." UF #42. After refusing to rent to the Smith family, Defendant continued her attempts to rent her several dwellings. UF #44.

Plaintiffs searched for housing for several months but were unable to find a rental before they had to move out of their previous apartment. UF #45. As a result, Plaintiffs were forced to stay at Rachel's mother's house for a week, had to discard many possessions, and ultimately moved into an apartment in Aurora that did not meet their needs as well as Defendant's properties would have. UF #46-52.

III. ARGUMENT

Summary judgment is appropriate when "there is no genuine dispute as to any material fact [such that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, there are no material facts in dispute. Defendant's denial of housing to the Smith family violated the FHA's prohibition of housing discrimination on the basis of sex and familial status, 42 U.S.C. § 3604, and CADA's prohibition of housing discrimination on the basis of sex, sexual orientation, transgender status, and familial status, C.R.S. § 24-34-502. Having been injured by Defendant's discriminatory housing practices, each member of the Smith family has brought suit seeking redress for that discrimination, and each is entitled to judgment that Defendant is liable. *See* 42 U.S.C. §§ 3602(i), 3613; C.R.S. §§ 24-34-501(1), -505.6.

A. Defendant's Refusal to Rent to the Smiths Violated The Fair Housing Act's Prohibitions of Discrimination on the Bases of Sex and Familial Status.

Defendant's denial of housing to the Smith family runs afoul of the FHA, which makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . sex [or] familial status . . . ." 42 U.S.C. § 3604(a). The FHA also makes it illegal "[t]o

make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . sex . . . [or] familial status . . . or an intention to make any such preference, limitation, or discrimination." *Id*. at § 3604(c).

1. The FHA Applies To Defendant's Property.

The FHA applies to Defendant's properties because they are "dwellings," i.e., "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families," *id.* at § 3602(b),[5] and because they do not fall within any of the FHA's exemptions. *Id.* at § 3603. Defendant does not dispute that she owns and offered for rent as separate residences both (1) the two-bedroom townhouse and (2) the three-bedroom dwelling she eventually denied to the Smiths; that she owns and rented (3) the adjoining townhouse to another couple; and that she owns and offered for rent (4) the third freestanding structure. Because the properties Defendant denied to the Smith family were plainly intended by Defendant to be occupied as residences, the FHA's protections apply.

2. Defendant Violated the FHA by Discriminating Based on Sex Stereotypes.

The FHA forbids discrimination on the basis of sex stereotypes. Under the FHA, like under Title VII, discrimination "on the basis of sex" "encompasses both [discrimination based on] the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (ruling based on both Title VII and Equal Protection

[5] "[T]he FHA and the term 'dwelling' used in it have been generously construed by the courts." *Reynolds v. Quarter Circle Ranch, Inc.*, 280 F. Supp. 2d 1235, 1244 (D. Colo. 2003).

Clause);[6] *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (alteration and quotation omitted).

Discrimination based on stereotypes about the sex of the person to whom a woman should be attracted, whom she should marry, or with whom she should have children is discrimination on the basis of sex. Indisputably, attraction to men is a gender norm or stereotype about women, just as attraction to women is a gender norm or stereotype about men. As a result, discrimination on the basis of the sex of an individual's preferred partner necessarily implicates stereotypes relating to "proper" sex-specific roles in romantic, marital, and/or sexual relationships. *See Videckis v. Pepperdine Univ.*, --- F. Supp. 3d ---, 2015 WL 8916764, at *7 (C.D. Cal. Dec. 14, 2015) ("Stereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women—and the relationships between them."); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (complaint alleging the plaintiff's "sexual orientation is not consistent with the Defendant's perception of acceptable gender roles" stated a valid claim of sex discrimination); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to

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[6] Courts look to Title VII for guidance on interpreting the application of the FHA's anti-discrimination provisions. *See Mt. Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev. ex rel. VanLoozenoord*, 56 F.3d 1243 n. 7 (10th Cir. 1995); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995).

his failure to conform with sexual stereotypes about what 'real' men do or don't do."); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (crediting claim that female plaintiff faced sex discrimination because she did not conform to supervisor's stereotype "that a woman should be attracted to and date only men"); *see also* Andrew Koppelman, *Why Discrimination Against Lesbian and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 235 (1994) ("There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles.").

In short, discrimination against women like Tonya and Rachel Smith who defy sex stereotypes by having a female romantic and sexual partner is unlawfully "motivated by a desire to enforce heterosexually defined gender norms." *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *8 (E.E.O.C. July 16, 2015) (citation omitted). This is sex discrimination in violation of the FHA.

Likewise, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination . . . ." *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). Prevalent gender stereotypes dictate that someone who was assigned the sex of male at birth, like Rachel, should express a male gender and identify as male. "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. '[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.'" *Id.* at 1316 (quotation omitted); *see also Smith*, 378 F.3d at 573 (*Price Waterhouse* applies when an individual "fails to act and/or identify with his or her gender"); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("the logic and language of *Price Waterhouse*" requires application of sex discrimination

protections to "[m]ale-to-female transsexuals . . . whose outward behavior and inward identity did not meet social definitions of masculinity"); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("Because the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping."); *Kaeo-Tomaselli v. Pi'ikoi Recovery House for Women*, 2011 WL 5572603, at *3 (D. Haw. Nov. 16, 2011) (Under the FHA, "transgender individuals may state viable sex discrimination claims on the theory that the perpetrator was motivated by the victim's real or perceived failure to conform to socially-constructed gender norms.").

The Tenth Circuit has recognized that sex stereotyping claims by lesbian, gay, bisexual, and transgender (LGBT) people may be actionable under federal sex discrimination protections, even though it has held (erroneously) that discrimination on the basis of transgender status or sexual orientation does not constitute *per se* sex discrimination. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222-24 (10th Cir. 2007);[7] *Medina v. Income Support Div.*, 413 F.3d 1131, 1135

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[7]In *Etsitty*, the Tenth Circuit recognized that its conclusions regarding the availability of sex discrimination protections for transgender people may be altered by new research that "may someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female." 502 F.3d at 1222. Such research already exists. *See*, *e.g.*:

- M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 984, 1004 (2015) ("Many years of research have confirmed the importance and immutability of gender identity in sex determinations. . . . Sex is multifaceted, and of the multiple factors that determine sex, gender identity must be given primary weight, as the single most important *biological* determinant of sex." (emphasis in original));
- Navah C. Spero, *Transgendered Plaintiffs in Title VII Suits: Why the* Schroer v. Billington *Approach Makes Sense*, 9 Conn. Pub. Int. L.J. 387, 410 (2010) (noting that "the term sex must evolve as scientific understanding of what sex is evolves" and that "[g]ender identity is currently understood to be medically part of sex").

Given the evolution in current scientific and medical understanding, this court can and should reach its own resolution of this case. *Cf. Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1289-90 (M.D. Ala. 2012) (noting that prior

(10th Cir. 2005).[8] Though the Tenth Circuit has not precisely addressed the precise contours of when "failure to conform to sex stereotypes" constitutes "discrimination 'based on sex[,]'" *Deneffe v. Skywest, Inc.*, No. 14-cv-00348, 2016 WL 1643061, at *11 (D. Colo. Apr. 26, 2016), as discussed above, federal courts across the country have. There simply is no dispute that LGBT people may assert sex stereotyping claims, whether under Title VII or the FHA.

Any suggestion that the FHA's prohibition on sex-based discrimination does not apply to the discrimination experienced by Tonya and Rachel because of their sexual orientation and/or Rachel's transgender status fails "to fully evaluate the nature of claims based on sexual orientation [and gender identity] discrimination." *Videckis*, 2015 WL 8916764, at *6. "[F]ocusing on the actions or appearance of the alleged victim of discrimination rather than the bias of the alleged perpetrator asks the wrong question and compounds the harm." *Id.* That is, it would be wrong and contrary to the FHA's language and purpose to "superimpose classifications such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification." *Smith*, 378 F.3d at 574; *see also Fabian v. Hosp. of Cent. Conn.*, No. 12-cv-1154,

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decision by Eleventh Circuit could be revisited because such decision was based on "the state of medical knowledge and art at the time" and since then there had been "life-changing advances in HIV treatment").

[8] Several federal agencies have reached the opposite conclusion, agreeing that discrimination on the basis of gender identity is sex discrimination. *See Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012); U.S. Dep't of Educ. & U.S. Dep't of Justice, *Dear Colleague Letter on Transgender Students*, at 2 (May 13, 2016) , *available at* http://1.usa.gov/224DMvD; U.S. Att'y Gen., *Memorandum re Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, at 2 (Dec. 15, 2014), *available at* http://1.usa.gov/25yQ44V. Likewise, the EEOC has noted "that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations." *Baldwin*, 2015 WL 4397641, at *5.

To paraphrase *Videckis,* the error of *Etsitty* and *Medina* is that "[s]imply put, the line between sex discrimination[, gender identity discrimination,] and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct." 2015 WL 8916764, at *6.

2016 WL 1089178, at *10 (D. Conn. Mar. 18, 2016) ("because discrimination 'because of sex' reaches discrimination based on gender nonconformity, the *exclusion* of discrimination on the basis of transgender identity from the protective scope of Title VII would be to take a certain class of gender nonconformity and reclassify it as a nonprotected status solely in order to exclude it" (emphasis original)).

The Department of Housing and Urban Development's ("HUD") interpretation of the FHA also is consistent with the aforementioned principles: "Discrimination based on sex under the Fair Housing Act includes discrimination because of nonconformity with gender stereotypes." Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662-0, 5666 (Feb. 3, 2012). Hence, "[t]he Fair Housing Act does recognize discrimination against LGBT individuals when such discrimination is on the basis of sex, which is a protected characteristic, . . . which includes nonconformity with gender stereotypes." Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272-01, 42283 (July 16, 2015). This interpretation—that LGBT people are protected from discrimination on the basis of sex, including discrimination based on sex stereotypes under the FHA—is entitled to "considerable deference" because "HUD [is] the federal agency primarily assigned to implement and administer Title VIII." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979); *see also VanLoozenoord*, 56 F.3d at 1249; *N.A.A.C.P. v. Am. Fam. Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992). Consequently, other courts to have considered whether sex stereotyping claims by LGBT complainants are within the FHA's sex discrimination prohibition have deferred to HUD's interpretation. *See*, *e.g.*, *Thomas v. Osegueda*, No. 15-cv-42, 2015 WL 3751994, at *4 (N.D. Ala. June 16, 2015) (noting "the deference due by the court" to HUD's

interpretation of the FHA and concluding that HUD's recognition of discrimination against LGBT people as "gender stereotyping in its interpretation of the FHA is a permissible reading of 'sex.'"). This Court should also defer to HUD's reasonable interpretation of the term "sex" and hold that sex discrimination under the FHA includes discrimination because of nonconformity with gender stereotypes, including stereotypes about the sex of the person to whom a woman should be attracted, whom she should marry, or with whom she should have children, and about the gender expression (including how to appear and act) and gender identity a person assigned the sex of male at birth should have.

Applying these principles to the present case, Defendant unlawfully refused to rent, refused to negotiate for the rental of, and otherwise made unavailable and denied dwellings located at 698 Dixon Road to Plaintiffs, and also made, printed, and published statements respecting the rental of a dwelling that indicated a preference, limitation, and discrimination based on Tonya and Rachel's "unique relationship" and the Smith Family's "uniqueness." UF #41-43. The "uniqueness" of Tonya and Rachel's relationship is that they defy stereotypical gender roles. Tonya and Rachel are "unique" because they are women married to each other, and not to men. Rachel also is "unique" because, as a transgender woman, she expresses her gender in a non-stereotypical fashion and her gender identity does not conform to sex stereotypes.

Based on the undisputed facts of this case, Defendant's references to Tonya and Rachel's "uniqueness" and "unique relationship" leads only to two plausible interpretations: The first is that Defendant's reference to Tonya and Rachel's "uniqueness" and "unique relationship" demonstrates that Defendant considered Tonya and Rachel, two women, to have transgressed gender norms by having a romantic and sexual relationship with each other and Rachel to have

transgressed gender norms by expressing a gender identity that differed with the sex assigned to her at birth. *See Glenn*, 663 F.3d at 1316; *Videckis*, 2015 WL 8916764, at *7; *Centola*, 183 F. Supp. 2d at 410. Discrimination based on such anachronistic gender stereotypes constitutes illegal sex discrimination under the FHA.

The second is that Defendant erroneously viewed Rachel as a man who expressed "his" gender in a manner stereotypically associated with women. *See Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1302 (N.D. Ga. 2010) ("Plaintiff's desire to present as a woman at work did not comport with Brumby's stereotype of how a biological male should dress or behave."), *aff'd*, 663 F.3d at 1320-21 (testimony that the "decision to dismiss Glenn was based on his perception of Glenn as 'a man dressed as a woman and made up as a woman,' . . . support[ed] the district court's conclusion that Brumby acted on the basis of Glenn's gender non-conformity."). That Defendant felt the need to point out that she consulted a friend who "has a transvestite friend herself" bolsters the conclusion that Defendant viewed Tonya and Rachel as subversive of traditional gender norms. Though seemingly conflating Rachel's transgender status with simply dressing in a manner more commonly associated with a different gender, at their root, Defendant's comments reiterate Defendant's sense that Rachel defies sex stereotypes. Even under such erroneous perception by Defendant, her refusal to rent to the Smith Family was based on her view that Tonya and Rachel transgressed gender norms as a result of Rachel's gender expression. Discrimination on this basis violates the FHA's proscription of sex discrimination.

Defendant's explanation that she wanted to keep a low profile or avoid jeopardizing her standing within the community is inextricably linked to prohibited discrimination. Simply put, Tonya and Rachel's "uniqueness" (gender nonconformity) and their "unique relationship" (one

defying societally-defined gender norms) is precisely what would make them, in Defendant's estimation, stand out and not be accepted in a small town like Gold Hill, and what would jeopardize Defendant's position in the community. Defendant's intimation that K.S. and I.S. also would be discriminated against as a result of Tonya and Rachel's "uniqueness" and her concern that their presence in the school community would "attract the town attention," UF #41, underscores that Defendant's refusal to rent to the Smith family was rooted in their gender nonconformity.

Put simply, Defendant refused housing to the Smith Family because she did not want to have people who would stand out—because they defy sex stereotypes—living in her properties. This type of discrimination—"the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *Price Waterhouse*, 490 U.S. at 251—is precisely what the FHA was meant to prohibit. Because there are no material facts in dispute, this Court should find as a matter of law that Defendant is liable to Tonya and Rachel Smith for unlawful discrimination on the basis of sex in violation of the FHA.

3. Defendant Violated the FHA by Discriminating Based on Familial Status.

"'Familial status' means one or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or another person having legal custody of such individual or individuals . . . ." 42 U.S.C. § 3602(k). There is no dispute that Tonya and Rachel are the parents of K.S. and I.S., and that the Smith family was and intended to be domiciled together at all times relevant to this case. UF #5, 22-23, 26, 46, 48. Nor is there any dispute that Defendant refused to rent the two-bedroom townhouse to the Smiths because their children would be living with them and expressed a preference to have a couple without children live

there. UF #33-34 (Defendant "prefer[ed] the couple" without children live there.). Defendant's refusal to rent to the Smiths because of their children falls squarely within the FHA's prohibition of discrimination based on familial status. *See*, *e.g.*, *Morgan v. Sec'y of Hous. & Urban Dev.*, 985 F.2d 1451, 1457 (10th Cir. 1993) (upholding ALJ's finding that mobile home park owner violated § 3604 of the FHA by enforcing "adults only" policy and refusing to allow the sale of a mobile home to a family with a child); *Gorski v. Troy*, 929 F.2d 1183, 1189 (7th Cir. 1991) (landlord who expressed a preference for tenants without children held in violation of section 3604).

It is of no import that Defendant rooted her denial in concerns about the level of noise the children might make, even if ostensibly based on her other tenants' preference for silence. *See Iniestra v. Cliff Warren Investments, Inc.*, 886 F. Supp. 2d 1161, 1168 (C.D. Cal. 2012) (apartment complex's blanket restriction on children to address noise concerns violated the FHA); *Landesman v. Keys Condo. Owners Ass'n*, No. 04-cv-2685, 2004 WL 2370638, at *4 (N.D. Cal. Oct. 19, 2004) ("The desire for peace and quiet—while a worthy goal—is not a valid justification for denying access to common facilities on the basis of familial status."); *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 127 (Cal. 1982) (excluding children from property violated housing discrimination law, despite the fact that children are "rowdier, noisier, more mischievous and more boisterous than adults"). Nor does Defendant's initial willingness to rent a different dwelling to the Smith family alter the fact that she engaged in impermissible familial status discrimination. "[T]he issue is not whether any housing was made available to [the Smiths], but whether [they were] denied the housing [they] desired on impermissible grounds." *United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992).

Defendant impermissibly discriminated against the Smith Family because of their familial status, in writing, when she expressed her preference to rent to parties without children and explicitly refused to rent the townhouse to the Smith family because their children would be living with them. As there are no material facts in dispute, this Court should find as a matter of law that Defendant is liable to the Plaintiffs for unlawful discrimination on the basis of familial status in violation of Section 3604(a) and (c) of the FHA.

B. Defendant's Actions Violated CADA's Prohibitions on Discrimination on the Bases of Sex, Sexual Orientation, Transgender Status, and Familial Status.

Under CADA, it is an "unfair housing practice and unlawful . . . [f]or any person to refuse to . . . rent, or lease, . . . or otherwise make unavailable or deny or withhold from any person such housing because of . . . sex, sexual orientation, . . . [or] familial status . . . ." C.R.S. § 24-34-502(1)(a). It is also illegal for "any person . . . to cause to be made any written or oral inquiry or record concerning the . . . sex, sexual orientation, . . . [or] familial status . . . of a person seeking to purchase, rent, or lease any housing . . . ." *Id.* Discrimination based on transgender status is included within CADA's definition of sexual orientation discrimination. *See* C.R.S. § 24-34-301.

These prohibitions apply to the "building[s], structure[s], … or part[s] thereof" Defendant offered for rent, C.R.S. §§ 24-34-501(2), -301(4.1), and they apply to Defendant, who, as an owner of housing, is a "person" under CADA. C.R.S. § 24-34-501(3). Defendant does not dispute that she owns and offered for rent both (1) the two-bedroom unit and (2) the three-bedroom unit she eventually denied to the Smiths; that she owns and rented (3) the adjoining townhouse to another couple; and (4) that she owns and offered for rent the third freestanding structure as a four-bedroom house. Therefore, CADA's prohibitions apply here.

1. Defendant Violated CADA by Discriminating Based on Sex.

"Sex" is not defined in CADA, *see* C.R.S. §§ 24-34-301, -501, and no case has interpreted CADA's definition of sex. However, "federal cases interpreting the Federal Fair Housing Act are persuasive in interpreting" CADA's sex discrimination prohibition. *See May v. Colorado Civil Rights Comm'n*, 43 P.3d 750, 756 (Colo. App. 2002). As discussed *supra*, the FHA prohibits discrimination on the basis of sex stereotypes, including discrimination because of nonconformity with sex stereotypes about the sex of the person to whom a man or woman should be attracted to, marry, or have children with, and about the gender expression (including how to appear and act) and gender identity a person assigned the sex of male at birth should have. The Court should "liberally construe[]" CADA's prohibition against sex discrimination in line with HUD's interpretation and federal cases holding that discrimination based on sex stereotypes is sex discrimination. *See Colorado ex rel. Colo. Civil Rights Comm'n v. Adolph Coors Corp.*, 486 P.2d 43, 46 (Colo. App. 1971) (CADA "should be liberally construed").[9]

Defendant refused to rent, refused to lease, and otherwise denied, withheld, and made unavailable to Plaintiffs the housing she owned based on unlawful considerations about Tonya and Rachel's sex. Defendant violated CADA's proscription on sex discrimination for the same reasons that she violated the FHA's prohibition on sex discrimination, namely that Defendant refused housing to the Smith family because she did not want to have people that defy sex stereotypes living in her properties. *See* Part III.A.3, *supra*. Similarly, Defendant's email refusing to rent property to the Smith family because of their "uniqueness" and Tonya and Rachel's

[9] That CADA explicitly prohibits Defendant's discrimination based on Tonya and Rachel's sexual orientation and transgender status does not alter that Defendant's discrimination also independently relied on impermissible sex stereotypes. *See Fabian*, 2016 WL 1089178, at *14 n.12.

"unique relationship" constituted an illegal "written . . . record concerning the sex" of Tonya and Rachel, in violation of C.R.S. § 24-34-502(1)(a). This Court should find Defendant liable to Tonya and Rachel Smith for unlawful discrimination on the basis of sex in violation of CADA.

2. *Defendant Violated CADA by Discriminating Based on Sexual Orientation and Transgender Status.*

Under CADA, housing discrimination on the bases of sexual orientation and transgender status is explicitly unlawful. C.R.S. §§ 24-34-502(1)(a), -301(7). Defendant violated these protections when she refused to rent to Tonya and Rachel due to their "unique relationship" and the Smith family's "uniqueness." UF #40-42. The "uniqueness" referenced by these statements includes Tonya and Rachel's same-sex relationship and Rachel's female gender identity and expression. Not only does Defendant's focus on this "uniqueness" demonstrate her perception that Tonya and Rachel defy sex stereotypes, but also her perception that they have a lesbian sexual orientation and that Rachel is transgender, both of which are protected against discrimination under CADA. C.R.S. §§ 24-34-301(7), -502(1)(a). Though conflating Rachel's transgender identity with simply dressing and acting in a manner traditionally associated with a different sex, Defendant's disclosure that she decided to refuse housing to the Smiths after consulting a friend who "has a transvestite friend herself," UF #43, further highlighted her discrimination based on transgender status. Therefore, Defendant's actions constituted unlawful discrimination on the bases of sexual orientation and transgender status in violation of CADA. *See* C.R.S. §§ 24-34-301(7), -502(1)(a). Additionally, Defendant's email constitutes an illegal written record concerning Plaintiffs' sexual orientation and transgender status. *See* C.R.S. § 24-34-502(1)(a). Therefore, this Court should find as a matter of law that Defendant is liable to

Tonya and Rachel Smith for unlawful discrimination on the bases of sexual orientation and transgender status in violation of CADA.

3. Defendant Violated CADA By Discriminating Based on Familial Status.

CADA also prohibits housing discrimination based on "familial status," which is defined to include "one or more individuals, who have not attained eighteen years of age, being domiciled with a parent . . . ." C.R.S. § 24-34-502(1)(a); *id.* at § 24-34-501(1.6). For the same reasons she violated the FHA's prohibition on familial status discrimination, Defendant violated this provision when she discriminated against the Smith family because they have children. *See* Part III.A.3, *supra*. Defendant's email discussing the children in the Smith family and Defendant's refusal to allow children in the two-bedroom unit also constituted an illegal written record concerning Plaintiffs' familial status. *See* UF #33-34; C.R.S. § 24-34-502(1)(a). Therefore, as a matter of law Defendant is liable to Plaintiffs for unlawful discrimination on the basis of familial status in violation of CADA.

IV. CONCLUSION

There is no dispute as to any material fact. Therefore, Plaintiffs respectfully request that this Court enter an order granting summary judgment as to Defendant's liability only in Plaintiffs' favor on all claims asserted in the Complaint. (*See* Doc. 1).

Dated on this 16th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 16, 2016, I caused to be electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record, including as follows:

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