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COLORADO COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Appeal from: Denver District Court District Court Judge: The Hon. A. Bruce Jones District Court Case No. 2019CV32214	
Plaintiff-Appellee: AUTUMN SCARDINA, v. Defendants-Appellants: MASTERPIECE CAKESHOP INC. and JACK PHILLIPS.	**▲ COURT USE ONLY ▲**
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APPELLANTS' OPENING BRIEF

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CERTIFICATE OF COMPLIANCE	

I hereby certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32. Including:

It contains 9,491 words, which is not more than the 9,500-word limit.

The brief complies with the standard of service review requirements set forth in C.A.R. 28(a)(7)(A):

For each issue raised by the Appellants, the brief contains under a separate heading before the discussion of the issue, a concise statement (1) of the applicable standard of appellate review with citation to authority, and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Jacob P. Warner
Jacob P. Warner

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QUESTIONS PRESENTED

Defendants-Appellants Jack Phillips and Masterpiece Cakeshop (collectively, "Phillips") are master cake artists. Phillips serves everyone but cannot express every message through his custom cakes. On the same day that the U.S. Supreme Court announced that it would hear Phillips's prior case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), Plaintiff-Appellee Autumn Scardina asked Phillips to create a custom cake celebrating a gender transition to call his "bluff" that he served all customers, including LGBT clients. Phillips politely declined because that cake's message contradicts his religious beliefs. Scardina then filed an administrative charge under the Colorado Anti-Discrimination Act (CADA). The Colorado Civil Rights Commission dismissed the administrative complaint with prejudice. Scardina did not appeal but instead filed this suit—alleging an identical CADA claim. Following a bench trial, the lower court ruled against Phillips, despite finding that he would not create the requested cake "for anyone." That decision presents four questions for review:

1. Whether Scardina's CADA claim is barred by the Commission's final order dismissing Scardina's administrative complaint, either because Scardina's sole remedy under C.R.S. § 24-34-306(14) was to appeal that order to this Court, or due to claim preclusion.

2. Whether Phillips's offer to deposit $500.01 plus costs with the court or his tendering of a cashier's check to Scardina for $500.01 plus a promise to pay costs mooted Scardina's CADA claim where C.R.S. § 24-34-602 allowed Scardina to recover no more than a $500 fine at trial. *See Rudnick v. Ferguson*, 179 P.3d 26 (Colo. App. 2007) (case is moot when defendants tender to plaintiffs more than they can recover at trial).

3. Whether Phillips's decision not to create a custom cake celebrating a gender transition that he would not create "for anyone" violated CADA's prohibition on transgender-status discrimination.

4. Whether the First Amendment to the U.S. Constitution and Article II, Sections 4 and 10 of the Colorado Constitution forbid Colorado—acting through CADA—from punishing Phillips's decision not to create a custom cake that would express a message contrary to his religious beliefs.

INTRODUCTION

Defendants-Appellants Jack Phillips and Masterpiece Cakeshop sketch, sculpt, and paint custom cakes that convey messages. As part of his religious calling to love his neighbors, Phillips creates cakes for all people. But his religious beliefs prevent him from creating custom cakes that convey messages against his conscience. For exercising his faith this way, the State twice tried to punish Phillips using CADA and lost each time. That second time Plaintiff-Appellee Autumn Scardina intervened and also lost. Scardina now seeks to continue that case here.

In 2012, Phillips declined to create a custom cake celebrating a same-sex wedding. The State tried to punish him for violating CADA, which the Supreme Court stopped because of the State's hostility toward Phillips's religious beliefs. *Masterpiece*, 138 S. Ct. at 1729. Not long after media began covering that case, Scardina emailed Phillips twice, calling him a "bigot" and a "hypocrite." Then, on the day that the Supreme Court said it would hear Phillips's case, Scardina called and asked Phillips to create a custom cake celebrating a gender transition, followed by a request for another custom cake depicting Satan smoking marijuana.

Phillips declined because he would not create a cake expressing those messages for anyone. So Scardina filed a charge with the Colorado Civil Rights Division (Division) accusing Phillips of violating CADA. The Colorado Civil Rights Commission (Commission) then filed a formal complaint against Phillips, Scardina intervened, and the Commission

dismissed the case *with prejudice* in 2019—after Phillips's attorneys uncovered more evidence showing the Commission's ongoing hostility toward Phillips and his religious beliefs.

Scardina did not like that result and could have appealed. Instead, Scardina filed this lawsuit, recycling the same CADA claim the Commission had just rejected. This claim fails for many reasons: (1) Scardina did not satisfy the jurisdictional requirements to bring this claim in district court; (2) claim preclusion applies; (3) the claim became moot before trial; (4) Scardina failed to prove that Phillips would create the requested cake for another customer; and (5) the federal and state constitutions protect Phillips's religiously motivated decision not to express a message. But the trial court punished Phillips anyway.

Phillips has suffered enough. The State's past prosecutions generated death threats and vandalism and cost Phillips seven years of his life, a significant part of his business, and most of his employees—harms that endure even though he eventually won his legal fights. He's now been in courts defending his freedom nearly a decade. This crusade against Phillips should stop. He asks this Court to reverse.

BACKGROUND

Jack Phillips is an expert cake artist and owner of Masterpiece Cakeshop. He creates cakes that express messages and celebrate events. CF 4816. These cakes are Phillips's artwork. CF 4825. In creating them, Phillips uses art skills and tools—paint palettes, paintbrushes, palette knives, and sponges—"to express an intended message." *Id.* The pictures below show cakes that Phillips has created. EX (Trial) 135, 163–14-15.

Phillips is also a follower of Jesus Christ who bases his religious beliefs on the Bible. CF 4816. These beliefs are central to his life, his identity, and his understanding of truth. *Id.* Phillips believes everything he does—including how he runs his cake shop—should be done to glorify God. *Id.* Because of his faith, Phillips hosts Bible studies at his shop, welcomes the homeless, and closes his shop on Sundays.

This faith also informs which cakes Phillips can create. CF 4823-24. While Phillips serves everyone—no matter their personal background—he cannot express every message or celebrate every event through his custom cakes. *Id.* Phillips's decisions never turn on *who* the customer is, but on *what* the requested cake will express. TR (03/23/21) 350:3-10; 364:23-365:20. Phillips believes he would violate God's commands if he were to create custom cakes that express messages that contradict his religious beliefs. *Id.*; CF 4823-24.

For this reason, Phillips declines many cakes. CF 4824. He does not create Halloween cakes, cakes that promote racist or profane messages, or cakes that disparage people—including those who identify as LGBT. *Id.*; TR (03/23/21) 354:24-360:23; EX (Trial) 135-16, 163–17-19. Likewise, because Phillips believes that God designed marriage for one man and one woman and that God created people male or female, Phillips cannot create cakes that celebrate a different view of marriage or express that a person's sex can change "for anyone." CF 4824.

While Phillips's main work is creating custom cakes, Phillips also sells pre-made items like brownies, cookies, and generic cakes. CF 4816. He sells these items to anyone who wants them. TR (03/23/21) 484:9-11. Phillips has never declined to sell these items to anyone. *Id.* at 352:6-353:6. For example, Mike Jones is one of Phillips's clients who identifies as LGBT. *Id.* at 442:3-22. According to Jones, Phillips has always served and treated him with the utmost respect. *Id.* at 447:10-449:13.

Masterpiece I

In 2012, two men asked Phillips to create a custom cake celebrating a same-sex wedding. CF 4817. Phillips declined because that cake's message violates his religious beliefs, but he offered to sell the men other items or to create a different cake for them. *Id.* The men refused and filed discrimination charges; the Division issued a probable-cause determination; and the Commission issued a formal complaint. *Id.*

Meanwhile, a religious man asked three other cake shops to create cakes "that conveyed disapproval of same-sex marriage." *Masterpiece*, 138 S. Ct. at 1730. After the shops declined because they found this message offensive, the customer filed religious-discrimination charges. But the Division found—and the Commission agreed—that the shops "acted lawfully in refusing service." *Id.* at 1730. The Division and Commission (collectively, "Colorado") interpreted CADA to contain an "offensiveness" rule, which allows cake shops to decline "messages" they consider "offensive," *id.* at 1728, 1731—a rule they would not apply in Phillips's case.

The Commission punished Phillips, and this Court affirmed. *Id.* at 1723, 1726-27. But the U.S. Supreme Court reversed because Colorado had acted with hostility toward Phillips's faith—treating Phillips worse than secular cake artists and disparaging his religious beliefs. Indeed, officials had even suggested that people of faith were not "welcome in Colorado's business community" and called Phillips's plea for religious

freedom a "despicable piece[ ] of rhetoric." *Id.* at 1729-31. This rebuke vindicated Phillips's rights, but more trouble was already brewing.

Masterpiece II

On the same day the U.S. Supreme Court announced it would hear Phillips's case, Scardina called Masterpiece and requested a custom cake with a "blue exterior and a pink interior" that would "celebrate" a "transition from male to female." EX (Trial) 133. The shop declined because the request required Phillips to create messages contrary to his faith. CF 4824. Indeed, Phillips would not create this cake "for anyone." *Id.*

The next month, Scardina filed a discrimination charge with the Colorado Civil Rights Division. EX (Trial) 46. This charge confirmed that the requested cake would have celebrated a gender transition:

- The cake was to have a "pink interior and blue exterior, which I disclosed was intended for the celebration of my transition from male to female." *Id.*
- "I wanted my … cake to celebrate my transition by having a blue exterior and a pink interior." EX (Trial) 133.
- "I requested that [the cake's] color and theme celebrate my transition from male to female." *Id.*

This request was a setup. Five years earlier, after hearing about Phillips's first suit, Scardina emailed Phillips twice—calling him a "bigot" and a "hypocrite." EX (Trial) 43, 44. Scardina also emailed the

Commission, volunteering to become a complainant against Phillips in *Masterpiece I*. EX (Trial) 42.

This hostility resurfaced two months later. During the Division's investigation, Scardina called Phillips again, requesting a custom cake depicting Satan smoking marijuana. TR (03/22/21) 79:11-22. Scardina never intended to buy this cake. *Id.* at 80:9-14. Nor did Scardina believe Phillips would create it. *Id.* at 141:13-17. Instead, Scardina did this to "correct" the "errors of [Phillips's] thinking." *Id.* at 141:5-8.

Nine months later, the Supreme Court decided *Masterpiece I*. Within three weeks, the Division had found probable cause that Phillips violated CADA again—even though (1) Scardina told Masterpiece that the cake's "design [reflected] the fact that [Scardina] transitioned from male-to-female," and (2) Phillips recalled Scardina saying that the cake was "to celebrate a sex-change from male to female." EX (Trial) 137-2. The Division gave one reason for its decision: Phillips's faith keeps him from expressing through his art "the idea that a person's sex is anything other than an immutable God-given biological reality." *Id.* at 137-3.

Two months later, Phillips sued Colorado in federal court. EX (Trial) 163. With this federal suit pending, the Commission issued a formal complaint, alleging that Phillips violated CADA by declining Scardina's requested cake. EX (Trial) 138. This complaint recognized that (1) Scardina told Masterpiece that the cake's "design was a reflection of the fact that [Scardina] had transitioned from male to female" and

(2) Masterpiece declined the request "because it does not make cakes to celebrate a sex-change." *Id.* at 138-2. It also scheduled a formal hearing on the matter, which occurred February 4, 2019. *Id.* at 138-1.

Meanwhile, Colorado moved to dismiss Phillip's federal suit, but the court denied this request—holding that Phillips had sufficiently alleged that the State was "pursuing the … charges against Phillips in bad faith" because of his "religion." *Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1241 (D. Colo. 2019). Two months later, Phillips and Colorado agreed to settle the federal suit. TR (03/23/21) 317:11-16.

This settlement led to the Commission "dismiss[ing] with prejudice" the administrative case against Phillips. EX (Trial) 141. On March 22, 2019, the Commission entered a closure order. EX (Trial) 140. And while Scardina had intervened in the administrative case, EX (Trial) 139, Scardina did not appeal but instead filed this lawsuit. CF 4823.

Masterpiece III

This lawsuit mimics *Masterpiece II*. Scardina parrots an identical CADA claim based on Phillips's decision not to create the custom cake celebrating a gender transition. CF 315. Under CADA, a business may not refuse service "because of" a person's "sexual orientation" (including transgender status). C.R.S. § 24-34-601(2)(a); *see* C.R.S. § 24-34-301(7). The maximum penalty is a $500 fine. C.R.S. § 24-34-602(1)(a).

Phillips moved to dismiss—arguing that the CADA claim is procedurally barred. CF 327. Under C.R.S. § 24-34-306(14), no one may sue under CADA in district court "without first exhausting the proceedings and remedies available … under … part 3" of CADA—which allows "[a]ny complainant … claiming to be aggrieved by a final order of the [C]ommission, including a refusal to issue an order," to seek review in the "court of appeals." C.R.S. § 24-34-307(1)-(2). Scardina never appealed, but the court denied Phillips's motion anyway. CF 666.

The case proceeded. At the case management conference, the court addressed whether the parties must speak using preferred titles and pronouns, TR (09/18/20) 23:20-24:7—despite neither party having used other kinds of titles or pronouns in court. It held that a person's "preference … is to be respected," noting that a "court proceeding" is not "religious." *Id.* This rule applied if the term was not offensive. *Id.*

The parties then engaged in mediation. While these talks are typically confidential, Scardina revealed at trial that during this mediation Scardina promised Phillips that, were this suit dismissed, Scardina would call Phillips *the next day*, to request *another cake* and start *another lawsuit*. TR (03/22/21) 115:7-24; TR (03/23/21) 378:11-20.

Hoping to end a decade of litigation, Phillips moved to deposit $500 plus costs with the trial court to moot the CADA claim. CF 796. The court denied this motion, believing that C.R.C.P. 67 does not allow such deposits. CF 1014-15. Phillips then tendered a cashier's check to Scardina

under the same terms. CF 3946-60. But Scardina refused, and the court held that this tender did not moot the suit. CF 4840-41.

The case went to trial, where Scardina repeatedly said the cake's design would have "celebrate[d]" a gender "transition by having a blue exterior and pink interior." TR (03/22/21) 188:16-189:4; *see id.* at 187:7-12. ("[T]he [cake's] color coordination … reflect[ed] … my transgender history and celebrated that history."). And Phillips testified that, while he serves everyone, he would not create a cake expressing that message for anyone. TR (03/23/21) 350:3-352:5, 366:8-367:10.

At the close of Scardina's evidence, Phillips moved for dismissal under C.R.C.P. 41(b). He argued that the CADA claim was moot and procedurally barred, that Scardina did not prove a CADA violation, and that the Constitution protects his religiously-motivated decision not to express a message. CF 4681. The court denied this motion, TR (03/23/21) 429:9-13, and Phillips again moved for dismissal at the close of trial, *Id.* at 514:15-17. The court also denied that motion. *Id.* at 514:18-20.

During closing arguments, the court said it would draw an "inference" against Phillips because he did not use *any* pronouns when referencing Scardina at trial. TR (03/24/21) 556:9-22. This "makes a difference," the court said—not because it shows that Phillips lives consistently with his faith while respecting those he serves, but because it somehow shows that a person's background is key to Phillips's "decision-making" at the shop. *Id.* This error previewed the final judgment.

The court rejected Phillips's procedural arguments, citing its prior decisions. CF 4840. It then held that, while Phillips would not create the requested cake "for anyone," CF 4824, Phillips nonetheless violated CADA because the cake's message is "inextricably intertwined" with Scardina's status, CF 4833. In so doing, the court conceded that, "[i]n context, … the requested cake, with a pink interior and blue exterior, symbolized a transition from male to female." CF 4827. The court strongly justified this point and even stressed it:

- Scardina "explained that the design was a reflection of her transition from male-to-female…." *Id.*
- "The color pink in the custom cake represents female or woman. The color blue in the custom cake represents male or man." *Id.* (internal citations omitted).
- Scardina "testified that the requested cake design was 'symbolic of [Scardina's] transness.'" *Id.*
- Scardina "further testified, 'the blue exterior … represents what society saw [her] as on the time of [her] birth' and the 'pink interior was reflective of who [she is] as a person on the inside.'" *Id.*
- "The symbolism of the requested design of the cake is also apparent given the context of gender-reveal cakes…. The interior of the cake is either pink (for a baby girl) or blue (for a baby boy); the exterior will be different colors so that the baby's gender is only revealed when the parents cut into the cake." CF 4828 (internal citations omitted).

Yet the court rejected Phillips's compelled-speech defense—believing "the cake design" lacked sufficient intricacy and did not express "a

message attributable" to Phillips. CF 4836. Likewise, it rejected Phillips's free-exercise defense—shunning CADA's discriminatory application to religious speakers and applying rational-basis review. CF 4839.

The trial court entered judgment against Phillips for $500. CF 4841. Phillips filed a supersedeas bond, and the court stayed the execution of this judgment pending appeal. CF 5003. No issue remains pending at the lower court, and Phillips timely appealed. CF 5016.

ARGUMENT SUMMARY

This Court should reverse the judgment because Scardina's CADA claim is procedurally barred, it was moot before trial, Scardina failed to prove a violation, and the Constitution protects Phillips's religiously-motivated decision not to create a cake celebrating a gender transition.

First, the CADA claim is procedurally barred. Scardina filed a discrimination charge with the Civil Rights Division but never requested or received a right-to-sue letter. The Division issued a probable-cause determination, the Commission issued a formal complaint, and the suit was ultimately dismissed with prejudice. CADA required Scardina to appeal this dismissal before suing in district court, but Scardina refused. Scardina thus failed to exhaust CADA's procedures and remedies and did not satisfy CADA's conditions for suing in district court.

Second, the CADA claim was moot before trial. This Court has held that a case is moot when defendants tender to plaintiffs more than they

can recover at trial. *Rudnick*, 179 P.3d at 29-30. CADA allows plaintiffs like Scardina to recover no more than a $500 fine. Before trial, Phillips moved to deposit $500.01, plus costs with the court. He also moved for summary judgment, arguing this deposit moots the claim. The trial court denied both motions. Phillips then tendered a cashier's check to Scardina for $500.01 and promised to pay costs. This mooted the suit.

Third, Scardina failed to prove a CADA violation. Scardina asked Phillips to create a custom cake that celebrated and "symbolized a transition from male to female." CF 4827. Phillips politely declined because that cake's message violates his religious beliefs. Indeed, he would not create such a cake "for anyone." CF 4824. Phillips does not violate CADA when he serves people from all backgrounds but declines to express certain messages for anyone. This is true no matter whether the cake's message "closely correlate[s]" with the customer's protected status. CF 4831.

Fourth, the Constitution protects Phillips's religiously motivated decision not to create a custom cake celebrating a gender transition. CADA violates free speech because it punishes Phillips for declining to express a message. And it violates free exercise by discriminating against Phillips and his faith—allowing secular cake artists to decline to express messages that offend their beliefs but not religious speakers like Phillips. CADA's application cannot satisfy strict scrutiny.

ARGUMENT

This Court should reverse the lower court's judgment for four reasons: (I) Scardina's CADA claim is procedurally barred; (II) Phillips need not admit liability to use a tender to moot this case; (III) Scardina did not prove a CADA violation; and (IV) the federal and state constitutions forbid Colorado—acting through CADA—from punishing Phillips's decision not to create a custom cake celebrating a gender transition.

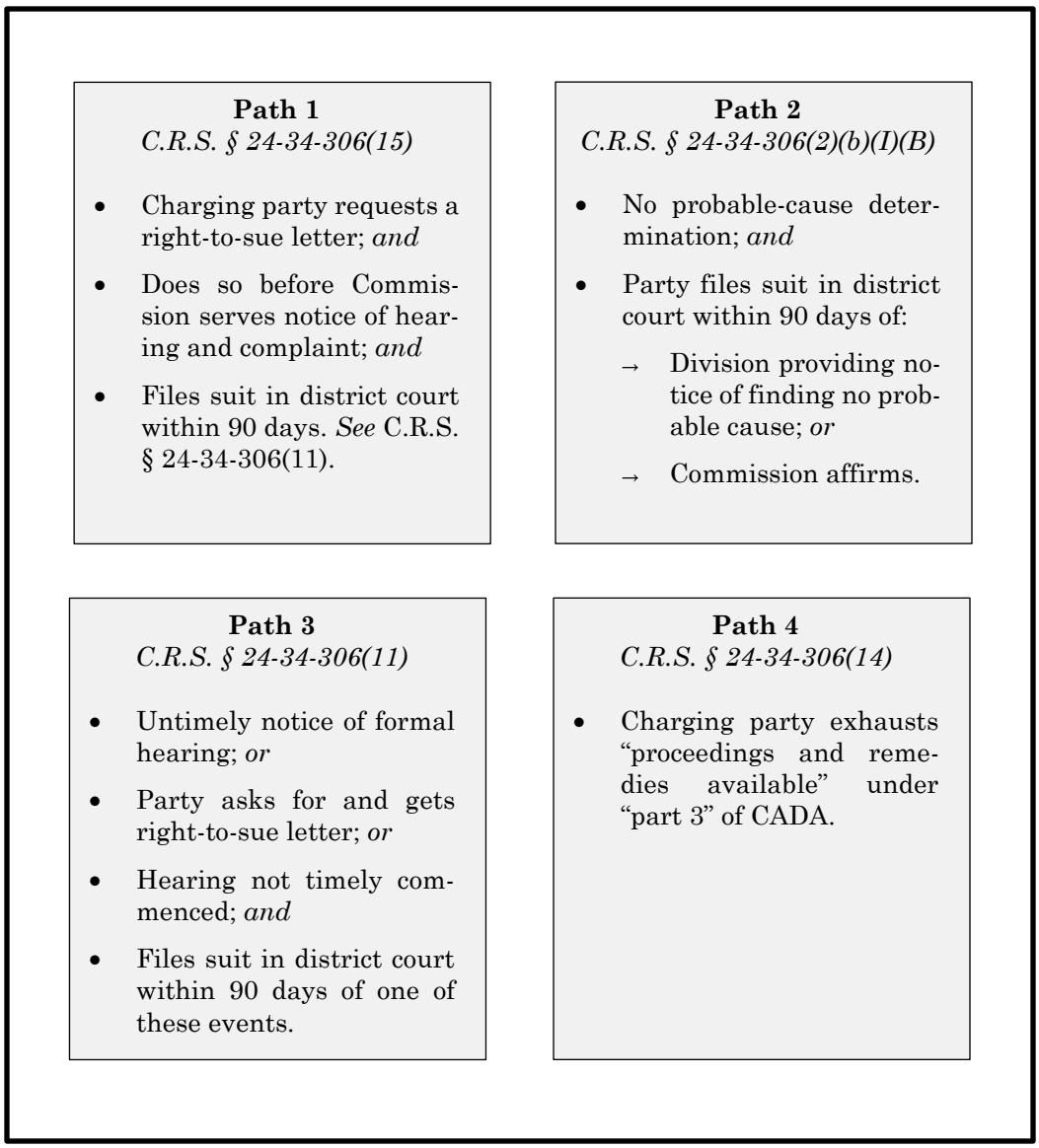
I. Scardina's CADA claim is procedurally barred.

The CADA claim is procedurally barred because Scardina did not exhaust CADA's procedures and remedies before suing in district court. This jurisdictional issue triggers de novo review. *See Cont'l Title Co. v. Dist. Ct.*, 645 P.2d 1310, 1316 (Colo. 1982) (CADA's conditions are "prerequisites to district court jurisdiction."); *Lee v. Banner Health*, 214 P.3d 589, 594 (Colo. App. 2009). While such issues can be raised for the first time on appeal, *Herr v. People*, 198 P.3d 108, 111 (Colo. 2008), Phillips preserved this issue below. CF 287-91, 356-58, 4684-86, 4840.

A. Scardina satisfies none of the conditions for filing a CADA claim in district court.

CADA forbids district-court suits unless (1) the plaintiff requested and received a right-to-sue letter under C.R.S. § 24-34-306(15), (2) the Division issued a no-probable-cause determination and the plaintiff sued within 90 days, C.R.S. § 24-34-306(2)(b)(I)(B), (3) the plaintiff satisfied the conditions in C.R.S. § 24-34-306(11), or (4) the plaintiff otherwise

exhausted "proceedings and remedies available" under CADA, C.R.S. § 24-34-306(14)—that is, follows them through "to their appellate conclusions," *Agnello v. Adolph Coors Co.* (*Agnello II*), 695 P.2d 311, 312 (Colo. App. 1984).[1] Scardina satisfies none of these conditions here.



[1] The fourth path also includes an ill-health exception that no one has argued for here. *See* C.R.S. § 24-34-306(14).

Scardina did not request or receive a right-to-sue letter, CF 4823, and the Division issued a probable-cause determination, CF 4822; EX (Trial) 137. That eliminates the first two paths to district court. Only two paths remain. Scardina must have satisfied the conditions in C.R.S. § 24-34-306(11) or exhausted CADA's procedures and remedies. Scardina did neither. But the trial court excused this failure—declaring C.R.S. § 24-34-306(11)'s express conditions merely illustrative and holding that the Commission's dismissal was not appealable. That ruling rewrites CADA, ignores precedent, and railroads Phillips.

1. Scardina satisfies none of the pre-filing conditions in C.R.S. § 24-34-306(11).

To trigger district court jurisdiction under C.R.S. § 24-34-306(11), Scardina must show that (a) the Commission did not serve its notice of formal hearing within 270 days after Scardina filed the charge, (b) Scardina requested and received a right-to-sue letter, or (c) the hearing was not commenced within 120 days after the Commission issued its notice of hearing. Scardina proved neither. Scardina has no right-to-sue letter, CF 4823, the Commission timely issued its notice of hearing, *compare* EX (Trial) 46 *with* EX (Trial) 138 (447-day gap), and the hearing met its 120-day deadline, *see* EX (Trial) 138 (118-day gap).[2] That's decisive.

[2] Under C.R.S. § 24-34-306(11), the parties consented to time extensions totaling 180 days—which extended the Commission's deadline to issue a notice of hearing to 450 days after Scardina filed the charge. CF 4822.

But the lower court improvised. It characterized these conditions as three of *many* "contemplated scenarios" in which the Commission can lose jurisdiction and thus trigger district-court jurisdiction. CF 289. That interpretation defies CADA's text—which sets the conditions *precedent* to *limit* the instances in which the Commission can lose jurisdiction:

> If written notice that a formal hearing will be held is not served within [270] days after the filing of the charge, if the complainant has requested and received a notice of right to sue pursuant to subsection (15) of this section, or if the hearing is not commenced within the [120]-day period prescribed by subsection (4) of this section, the jurisdiction of the commission over the complaint shall cease, and the complainant may … [file] a civil action in the district court.

C.R.S. § 24-34-306(11). CADA provides *no other way* the Commission can lose jurisdiction after probable cause is found. That's why this Court has held that district courts cannot "acquire jurisdiction under § 24-34-306(11)" after the Commission approves a settlement. *Agnello II*, 695 P.2d at 313. This statutory feature eliminates path three.

2. Scardina did not exhaust procedures and remedies available under CADA.

Finally, Scardina did not exhaust "proceedings and remedies available" under CADA. C.R.S. § 24-34-306(14). Under C.R.S. § 24-34-307(1)-(2), "[a]ny complainant … aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review" at the "court of appeals." Scardina never appealed the Commission's dismissal.

CF 4823. Yet the trial court excused this failure because it believed the dismissal was not appealable—emphasizing that it did not follow an evidentiary hearing and included "exhaustion" language. CF 289. That ruling contradicts precedent, confuses the dismissal, and rewrites CADA.

First, the ruling below contradicts precedent. This Court has heard and decided an appeal from a Commission order that did not follow an evidentiary hearing and included exhaustion language.

In *Agnello v. Adolph Coors Co.* (*Agnello I*), a complainant objected to a Commission-approved settlement and then appealed that settlement to this Court at an early stage in the administrative case—after the Division issued a probable-cause determination, but before the Commission had issued a notice of hearing and formal complaint, *and thus before an evidentiary hearing began*. 689 P.2d 1162, 1165 (Colo. App. 1984). She did this despite the Commission indicating "*she had fulfilled the requirement for full pursuit of administrative remedies*." CF 614 (emphasis added). This Court heard and decided that appeal.

But during that appeal, the complainant also brought the same CADA claim in district court, and that court dismissed the suit. *Agnello II*, 695 P.2d at 312. It did so in part because the complainant did not exhaust procedures and remedies under CADA—i.e., she did not follow them through "to their appellate conclusions." *Id*. To conclude this, the district court must have held that CADA not only *allowed* the complainant to appeal the Commission's order approving the settlement but

required that appeal for exhaustion. Significantly, this Court later affirmed the district court's dismissal. *Agnello II*, 695 P.2d at 314.

The trial court below dismissed these precedents, calling them "so inapposite as to not warrant discussion." CF 665. When asked to reconsider, the court said the *Agnello I* settlement was appealable because it somehow determined "the merits of the [discrimination] claim," and thus provided "a record to review." *Id.* But that ruling disregards the two facts the court found critical to its *earlier* ruling—that the complainant, like Scardina here, received *no evidentiary hearing* and was *notified that she had exhausted administrative remedies*. CF 288-89.

This ruling also overstates the *Agnello I* settlement and misreads this Court's review. No one adjudicated the settlement in *Agnello I*. As a condition to settle, the Division and respondent "agreed to be bound" by a "doctor's determination" about a medical issue. *Agnello II*, 695 P.2d at 313. Based on that medical call, the Division and respondent would either settle or abandon "further efforts at conciliation." *Id.* While the complainant objected—asserting she "had not agreed to" this arrangement—the Division and respondent eventually settled, and "the Commission issued its order approving the conciliation agreement." *Id.*

Predictably, on appeal, this Court never reviewed the Commission's findings of fact or conclusions of law—because there were none. It instead reviewed whether the Commission acted "arbitrarily or with improper motive when it approved the" settlement. *Agnello I*, 689 P.2d at

1165. And contrary to the trial court's suggestion, a modest record does not prevent this review. Indeed, it can bolster the complainant's appeal—possibly raising an inference that the Commission acted improperly or neglected its "statutory mandate." *Id.* Scardina could have argued this (and more) on appeal but refused.

Second, the trial court misinterpreted the Commission's dismissal order. Far from lacking "language signaling appeal," CF 289, the Commission's order is a dismissal "with prejudice." CF 305. That's adjudicative language. "A dismissal with prejudice is a final judgment; it ends the case and leaves nothing further to be resolved." *Foothills Meadow v. Myers*, 832 P.2d 1097, 1098 (Colo. App. 1992). And no matter whether Scardina exhausted "*administrative* proceedings," EX (Trial) 140 (emphasis added), Scardina never exhausted "*the proceedings and remedies available*" under CADA, C.R.S. § 24-34-306(14) (emphasis added)—which requires appealing to this Court. C.R.S. § 24-34-307(1)-(2).

Third, while the Commission's dismissal was in fact a final order, CADA even allows appeals when the Commission "refus[es] to issue an order." C.R.S. § 24-34-307(1). This means, no matter whether this Court views the Commission's dismissal as a final order or a refusal to enter a final order following a settlement, this Court should consider it an appealable order—just like the settlement in *Agnello I*. By refusing to appeal, Scardina shunned the final path to district court.

3. The lower court defied CADA's purpose by allowing this suit to proceed.

CADA provides two tracks to adjudicate claims. The complainant can either (1) proceed before the Commission, or (2) sue in district court—but only after satisfying one of the conditions described above. The statutory "purpose" "is to avoid duplicative and possibly conflicting attempts to pursue relief both in the district court and before the Commission." *Cont'l Title*, 645 P.2d at 1316. The lower court discredited that purpose here. If someone could seek relief from the Commission, participate in a hearing, receive an adverse dismissal, refuse to object, refuse to appeal, and then start over elsewhere, the Commission would become merely advisory and its closure orders invitations for needless litigation. That's both unjust and a waste of resources. And CADA forbids it.

B. Claim preclusion bars Scardina's CADA claim.

Claim preclusion protects parties from "perpetual re-litigation of the same claim or cause of action." *Foster v. Plock*, 394 P.3d 1119, 1122 (Colo. 2017). It applies when (1) the judgment in a prior proceeding was final, (2) the current and prior proceedings involve identical subject matter, (3) the current and prior proceedings involve identical claims, and (4) the parties to both proceedings are identical or in privity with one another. *Id.* at 1123. Each of these elements is met here.

First, contrary to the ruling below, the Commission entered a final order in the prior administrative case. Section I.A. On March 5, 2019,

the Commission voted to "dismiss with prejudice" the administrative complaint against Phillips. EX (Trial) 141. The Commission then closed the case on March 22, 2019. EX (Trial) 140. Scardina had 49 days to appeal but chose not to. CF 4823; C.R.S. § 24-34-307(2); C.R.S. § 24-4-106(11). So the dismissal became final no later than May 11, 2019.

Second, this case involves identical subject matter as the administrative case. The Commission issued a notice of hearing and formal complaint against Phillips on October 9, 2018. CF 4823. That complaint concerned Phillips's June 26, 2017 decision not to create a custom gender-transition cake. CF 4822-23. Scardina raises the same allegations here.

Third, this case raises the same CADA claim as the administrative case. *Compare* EX (Trial) 138-3 (seeking relief under "[C.R.S.] § 24-34-601(2)(a)") *with* CF 323 ("C.R.S. § 24-34-600 *et seq*.").

Fourth, this suit and the prior administrative suit involve the same parties—Phillips and Scardina. EX (Trial) 138; CF 4822. In the administrative suit, Scardina had "notice, standing, and an opportunity to be heard" before this Court. *K9Shrink, LLC v. Ridgewood Meadows Water & Homeowner's Ass'n*, 278 P.3d 372, 375 (Colo. App. 2011). The Commission notified Scardina of its dismissal. EX (Trial) 140-2. Scardina could have then appealed, C.R.S. § 24-34-307(1), moved this Court to "remit the case" for factual development, C.R.S. § 24-34-307(5), or challenged the proceeding's fairness, *see Agnello I*, 689 P.2d at 1165. But Scardina did none of this.

With all four elements met, Scardina's CADA claim is barred. Claim preclusion "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and … encourage[s] reliance on adjudication." *Foster*, 394 P.3d at 1122. Scardina had one chance to sue Phillips; this Court shouldn't give Scardina another.

II. Scardina's CADA claim is moot.

The CADA claim is also moot. A claim "is moot when a judgment … would have no practical legal effect upon the … controversy." *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990). Phillips tendered to Scardina $500.01, plus costs—more than Scardina could recover at trial. CF 3946-60. That mooted the claim. *See Rudnick*, 179 P.3d at 29. And Phillips tried to achieve this result earlier by moving to deposit funds under C.R.C.P. 67. But the trial court rejected both moves, holding that a tender cannot moot a CADA claim "absent an admission of liability." CF 1015, 4840. It also held that Rule 67 could not be used this way. CF 1014-15. Those rulings contradict precedent.

A. Phillips's tender mooted this suit.

Under CADA, Scardina cannot recover more than $500. Phillips tendered to Scardina $500.01, plus costs. That mooted this suit. But the trial court said it didn't and decided the merits anyway. CF 4684-85. The Court reviews such rulings de novo. *People ex rel. Rein v. Meagher*, 465 P.3d 554, 558 (Colo. 2020). Phillips preserved this issue. CF 3946-60.

1. Scardina cannot recover more than $500 under CADA at trial.

CADA allows one remedy in public-accommodation suits: a maximum fine of $500. C.R.S. § 24-34-602(1)(a); *see* C.R.S. § 24-34-306(11). Scardina has conceded this by admitting that CADA caps remedies "at $500," TR (04/09/2020) 29:23-24, admitting that injunctive relief is unavailable under CADA, *id.* at 31:21-24, and disclaiming "actual or economic damages," CF 890. These admissions are binding and conclusive. *E.g.*, *Kempter v. Hurd*, 713 P.2d 1274, 1279-80 (Colo. 1986).

2. This case became moot when Phillips tendered to Scardina $500.01, plus costs.

When Phillips tendered a cashier's check for $500.01 to Scardina, promising also to pay costs, this suit became moot because the tender exceeded "the maximum amount" Scardina could recover at trial. *Rudnick*, 179 P.3d at 29-30; *see Gray v. Univ. of Colo. Hosp. Auth.*, 284 P.3d 191, 196-97 (Colo. App. 2012). This tender ensured that any future order would have no "practical effect." *Rudnick*, 179 P.3d at 29. Yet the trial court rejected this tender because Phillips disclaimed liability. CF 4840. That ruling contradicts precedent and requires advisory opinions.

This Court has held that a tender need not "include an admission of liability" to "render a claim moot," where, as here, the defendant tenders "the maximum amount of recovery to which a plaintiff is entitled." *Rudnick*, 179 P.3d at 30-31. The trial court defied this rule—believing it

subverts CADA's purpose. CF 4840. But the legislature is master of its own statute. To accomplish its goals for CADA, the legislature set one remedy in CADA's public-accommodation provision—a fine. C.R.S. § 24-34-602(1)(a). When Phillips pays that fine, CADA is satisfied.

The court also disregarded this Court's precedent by citing Justice Thomas's concurrence in *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016), for the principle that tenders fail without an admission of liability. CF 4840-41. But that view contradicts *Rudnick*; it interprets only federal law; and the *Campbell-Ewald* majority addresses only whether defendants could offer judgment to moot a class action—not whether defendants can tender certified funds or deposit funds with the court to moot a non-class action. *See id.* at 156, 166. As the dissent stressed, even under "the majority's analysis," such distinctions should change the outcome. *Id.* at 184 (Roberts, Scalia, and Alito, JJ., dissenting).

Finally, CADA does not require advisory opinions. "A court is not required to render a judicial opinion on a matter that has become moot." *W-470 Concerned Citizens v. W-470 Hwy. Auth.*, 809 P.2d 1041, 1043 (Colo. App. 1990). Discrimination claims are not immune to mootness. *E.g.*, *Horner v. ELM Locating & Util. Servs.*, No. 13-1168, 2014 WL 7231654 (C.D. Ill. Dec. 16, 2014). Even cases involving "constitutional issues"—cases that often trigger significant public policy concerns—can (and often do) become moot. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990). Scardina is not entitled to an advisory opinion.

B. The lower court erred by denying Phillips's motion to deposit under C.R.C.P. 67.

In addition to tendering certified funds, Phillips was correct to use C.R.C.P. 67 to moot this suit. The trial court erred by denying his motion to deposit funds. CF 1014-15. This Court reviews the "application of" Rule 67 "de novo," *Premier Members Fed. Credit Union v. Block*, 312 P.3d 276, 278 (Colo. App. 2013), while it reviews the refusal to moot the suit based on Phillips's disclaiming liability for "an abuse of discretion," *Rudnick*, 179 P.3d at 30. A trial court "abuses its discretion" when it "misapplies the law." *Payan v. Nash Finch Co.*, 310 P.3d 212, 216 (Colo. App. 2012). Phillips preserved this issue below. CF 796-800.

1. Phillips may use C.R.C.P. 67 to moot this suit.

Under Rule 67(a), "a party, upon notice to every other party, and by leave of court, may deposit with the court" a "sum" of funds, "to be held" under conditions set by the court. Phillips sought to use this rule to moot this suit, CF 796-800, but the trial court said the rule cannot be used for this purpose, CF 1014-15 (Rule 67 "[may not] be used as a means of rendering a case or claims moot"). Yet this Court has held that such use of Rule 67 is entirely proper. *Rudnick*, 179 P.3d at 31.

2. The lower court abused its discretion by denying Phillips's motion to deposit.

Phillips moved to deposit $500.01, plus costs with the trial court to moot Scardina's CADA claim. CF 796. That proposed tender exceeded

"the maximum amount of recovery to which [Scardina was] entitled" and would have mooted the CADA claim. *Rudnick*, 179 P.3d at 31; *see* Section II.A. But the lower court denied Phillips's motion—holding that Phillips's tender could not moot the claim because Phillips disclaimed liability and CADA allows a "fine" instead of "damages." CF 1014. That holding misapplies state law and is an abuse of discretion. This Court allows parties to tender funds to moot claims while disclaiming liability. *See* Section II.A.2. And claims for fines are no exception.

As for that latter point, the trial court cited no authority to suggest that civil claims triggering fines cannot become moot. That makes sense because mootness turns on whether the plaintiff has received the *maximum recovery* possible—no matter its *form*. *See Rudnick*, 179 P.3d at 31 ("maximum recovery").[3] The term "recovery" means "the monetary amount … the plaintiff is entitled [to]." *Lanahan v. Chi Psi Fraternity*, 175 P.3d 97, 101 (Colo. 2008).[4] A fine is a monetary amount. CADA allows Scardina to recover no more than $500. Because Phillips's proposed tender exceeded that amount, the court misapplied the law and thus abused its discretion by denying Phillips's motion to deposit.

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[3] *Accord Bradshaw v. Nicolay*, 765 P.2d 630, 632 (Colo. App. 1988) ("maximum amount … recoverable"); *Gray*, 284 P.3d at 196 ("maximum amount recoverable at trial"); *Henisse v. First Transit, Inc.*, 220 P.3d 980, 991 (Colo. App. 2009) ("maximum amount of recovery").

[4] See also *Recovery*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An amount awarded in or collected from a judgment or decree.").

III. Scardina did not prove a CADA violation.

To prove a CADA claim, Scardina must show that Phillips treated Scardina *differently* because of Scardina's transgender *status* and that CADA's "offensiveness" rule does not apply. *Masterpiece*, 138 S. Ct. at 1731; CF 4730-33. The trial court incorrectly held that Scardina met this burden because the requested cake's message "closely correlated" with Scardina's status. CF 4831. This Court reviews that legal conclusion de novo. *Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008).

A. Phillips declined to create the requested cake because of its message, not because of the requestor's status.

To prove a CADA violation, Scardina had to show that, "but for" Scardina's transgender status, Phillips would have created the custom cake celebrating a gender transition. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 280 (Colo. App. 2015). This means Scardina's transgender status had to be the *decisive* factor in Phillips's decision. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("protected trait … [must] motivate[]" the decision and determine "the outcome"). Scardina did not prove this, but the trial court punished Phillips anyway.

The trial court erred by equating Phillips's message-based decision with status-based discrimination. Critically, the court acknowledged Phillips would "not create a custom cake to celebrate a gender transition for anyone (including someone who does not identify as transgender)." CF 4824. This shows that Scardina's status was not a factor—much less

the *decisive* factor—in Phillips's decline. Yet the court held that Phillips violated CADA because the requested cake's message is "inextricably intertwined" with Scardina's status, which somehow converts Phillips's message-based decision—evenly applied to all customers—into status-based discrimination. CF 4833. That's like saying a black artist's refusal to create a custom white-cross cake for an Aryan Nation Church member is based on the customer's white race—which is plainly wrong.

While courts sometimes blur distinctions between others' status and their conduct, CF 4831, they refuse to do so when speakers distinguish between their speech and others' status, *see Hurley v. Irish-Am Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995) (distinguishing an "intent to exclude homosexuals" from "disagreement" with a message).[5] Like the parade organizers in *Hurley*, Phillips serves everyone—including LGBT customers—but he cannot express every message through his custom cakes. Scardina did not prove that *but for Scardina's status*, Phillips would have created the cake.

[5] *See also Brush & Nib Studio, LC v. City of Phoenix (B&N)*, 448 P.3d 890, 910 (Ariz. 2019) (same); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 760 (8th Cir. 2019) (same); *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 258 n.8 (Utah 1994) (similar); *Domen v. Vimeo, Inc.*, No. 20-616-CV, 2021 WL 4352312, at *4 (2d Cir. Sept. 24, 2021) (similar); *Frith v. Whole Foods Mkt., Inc.*, 517 F. Supp. 3d 60, 71 (D. Mass. 2021) (similar).

B. CADA's offensiveness rule protects Phillips's decision not to express a message that contradicts his beliefs.

The Colorado Civil Rights Commission has applied CADA to protect speakers who decline to express messages that contradict their beliefs. *Masterpiece*, 138 S. Ct. at 1728-30.[6] That practice is reasonable, given that CADA cannot require what the Constitution forbids—compelled speech. Yet the trial court refused to judicially notice prior Commission decisions, rejected that the Commission had adopted this practice, and recited that it would not apply the rule to protect Phillips anyway. CF 4834. That animus is shocking—given the Supreme Court condemned such hostility in *Masterpiece*. 138 S. Ct. at 1730.

During Phillips's first suit, a religious man asked three other cake shops "to create cakes with images" and messages "that conveyed disapproval of same-sex marriage." *Id.* After the shops refused because they deemed the messages offensive, the man filed religious-discrimination charges. The Civil Rights Division deferred to the message-based objection of those cake shops, refused to consider third-party perceptions, and found "that [those shops] acted lawfully in refusing service." *Id.* The Commission agreed—establishing that Colorado applies CADA using an "offensiveness" rule, which allows cake artists "to decline to create specific messages [they] consider[] offensive." *Id.* at 1728, 1731.

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[6] *See* EX (Trial) 148, 149, 150, 151, 152, 153. These determinations are judicially noticeable. *One Hour Cleaners v. Indus. Claim Appeals Office of State of Colo.*, 914 P.2d 501, 504 (Colo. App. 1995).

That rule protects Phillips here. Colorado courts "must give particular deference to the reasonable interpretations of the administrative agencies that … administer and enforce a particular statute." *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004); *see Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs of Summit Cnty.*, 199 P.3d 718, 731 (Colo. 2009). Those interpretations come from agency "guidance, rules, and determinations"—like the no-probable-cause determinations in the cases above. *Colo. Mining Ass'n*, 199 P.3d at 731. The trial court should have yielded to the Commission and applied CADA's offensiveness rule to protect Phillips—*deferring* to Phillips's message-based objection and *refusing* to consider third-party perceptions. By not doing so, the lower court erred and discriminated against Phillips. Section IV.C.1 *infra*.

IV. The federal and state constitutions protect Phillips's religiously-motivated decision not to speak.

The trial court punished Phillips's religiously-motivated decision not to express a message. CF 4835-40. That violates Phillips's constitutional rights to free speech and to freely exercise his faith. Because the judgment below risks intruding on "free expression," this Court independently reviews *both* factual and legal determinations "de novo." *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 500 (Colo. App. 2010). Phillips preserved these issues below. CF 4689-95, 4733-38.

A. CADA punishes Phillips's decision not to speak.

Scardina asked Phillips to express a message. As the trial court found, the requested cake "symbolized a transition from male to female." CF 4827. But the court ruled that CADA could compel Phillips to express that message anyway. In its view, the requested cake was not speech because it had no "inherent message," or at least one that third parties would attribute to Phillips. CF 4808. That ruling is legally incorrect.

The Colorado Constitution, Article II, Section 10, and the First Amendment to the U.S. Constitution protect "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see Hurley*, 515 U.S. at 573 (speakers have "the autonomy to choose the content of [their] own message."). Phillips declined to create the requested cake because of its message. CF 4824; TR (03/22/21) 219:16-25; TR (03/23/21) 307:21-308:3, 314:7-16, 394:24-395:5, 493:9-13. That triggers the compelled-speech defense.

This defense has three elements: "(1) speech; (2) to which [defendant] objects; that is (3) compelled by some governmental action." *Cressman v. Thompson (Cressman II)*, 798 F.3d 938, 951 (10th Cir. 2015). Because each of these elements was met, Scardina had to satisfy strict scrutiny. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal. (PG&E)*, 475 U.S. 1, 13 (1986) (plurality). Scardina did not do so.

1. The requested cake is speech.

The trial court found that the requested cake expressed a message: "In context, … the requested cake, with a pink interior and blue exterior, symbolized a transition from male to female." CF 4827. The court amply supported this finding based on Scardina's own words and the cake's context. *Id.* For years, Scardina acknowledged that the requested cake celebrated a gender transition. EX (Trial) 46, 133; TR (03/22/21) 146:20-147:1; CF 4827. And the "symbolism of [its] design" fits the pattern for "gender-reveal cakes"—pink for female, and blue for male. CF 4828.

The requested cake is pure speech. "[T]he Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. Speech includes "pictures, … paintings, drawings, and engravings." *Cressman II*, 798 F.3d at 952. People commission such creations and pay extra for them precisely because of their expressive quality. The edible canvas does not alter the analysis: Free speech principles "'do not vary' when a new medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011).

In *Brown*, for instance, the Supreme Court affirmed a previously unrecognized form of pure speech after finding (1) that it "communicate[s] ideas," and (2) that it is analogous to other protected speech. *Id.* Here, no one contests that the requested cake expresses a message. TR (03/22/21) 146:20-147:1, 150:2-5; CF 4827; EX (Trial) 46, 133. And Phillips's custom cakes are analogous to other forms of speech. He designs,

paints, and sculpts them, using tactics that other artists (e.g. painters and sculptors) apply in their fields.

At a minimum, the requested cake is symbolic speech. The Supreme Court originally adopted a two-prong test for symbolic speech: (1) whether "[a]n intent to convey a particularized message was present"; and (2) whether "the message would [likely] be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). *Hurley* later erased the "particularized" message requirement. 515 U.S. at 569; *accord Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018). Both prongs are satisfied here.

The first prong is automatically satisfied in compelled-speech cases like this one. *See Cressman v. Thompson*, 719 F.3d 1139, 1154 n.15 (10th Cir. 2013) (*Cressman I*). As for the second prong, people viewing the cake—including Scardina—would know that the design "symbolized" a gender transition. CF 4827. To determine this, the Court should consider factors like the cultural context, *Spence v. Washington*, 418 U.S. 405, 410 (1974), the requester's stated purpose for the requested item, *Hurley*, 515 U.S. at 570; *Cressman II*, 798 F.3d at 959, and the requester's intended use, *Spence*, 418 U.S. at 410; *Johnson*, 491 U.S. at 405.

As the trial court found, the "requested cake … *symbolized* a transition from male to female." CF 4827 (emphasis added). Culturally, gender-reveal cakes typically bear a "blue" or "pink" design on the inside and "different colors" on the outside, to reveal a person's gender only

after viewers cut the cake. CF 4828. Scardina's requested cake fits this model: "the blue exterior … represent[ed] what society saw" Scardina as at "birth" and the "pink interior" reflected who Scardina is "on the inside." CF 4827. Both Phillips and Scardina understood this symbolism. TR (03/22/21) 146:20-147:1, 220:17-25; TR (03/23/21) 395:20-396:1. And third parties would too. TR (03/23/21) 454:14-455:7. The requested cake is at least symbolic speech. *See Cressman II*, 798 F.3d at 958-60.

2. Phillips objected to the cake's message.

Phillips declined to create the requested cake because he cannot create cakes celebrating gender changes. CF 4824; TR (03/22/21) 219:16-25; TR (03/23/21) 307:21-308:3, 314:7-16, 394:24-395:5, 493:9-13. Indeed, he would not express this message "for anyone." CF 4824. Objecting to this message while otherwise serving LGBT customers is constitutionally protected. *See Hurley*, 515 U.S. at 572-73; Section III.A *supra*.

Courts defer to the artist in this analysis. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); *Hurley*, 515 U.S. at 574. And they ensure the message-based objection is not pretextual by evaluating whether the artist serves protected class members generally, *Hurley*, 515 U.S. at 572; *B&N*, 448 P.3d at 911, and whether the artist consistently declines to express other types of messages, *Masterpiece*, 138 S. Ct. at 1723. But courts do *not* consider whether third parties would think that the artist

is speaking or approves the message. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 243-46 (1974); *PG&E*, 475 U.S. 1, 15 n.11.

Here, Phillips serves people from all backgrounds—including those who identify as LGBT. TR (03/22/21) 245:22-25; TR (03/23/21) 350:3-13; CF 4823-24. But Phillips cannot express every message. He routinely declines to create (for anyone) cakes that promote racist or profane messages, or cakes that disparage people—including those who identify as LGBT. TR (03/23/21) 305:3-12, 306:4-307:6, 354:24-360:23. And the same goes for the requested cake here. CF 4824. Phillips objected to the requested cake's message, not the status of the person requesting it.

3. The government is punishing Phillips.

Scardina seeks "to enlist the government—through the exercise of [judicial power]—to [penalize]" Phillips's decision not to express a message. *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 442 (S.D.N.Y. 2014). And the trial court obliged. That is government action subject to constitutional scrutiny. *See Hurley*, 515 U.S. at 568-81 (allowing First Amendment defense in civil action brought by private party); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (same).

B. CADA is content- and viewpoint-based as applied.

The Colorado Constitution, Article II, Section 10, and the First Amendment also protect Phillips from content-based laws. CADA's application to punish Phillips's decision not to create the requested cake is

content- and viewpoint-based. It "mandate[s] speech" about gender that Phillips "would not otherwise make." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). And it does so only because of Phillips's prior speech on the subject. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1178 (10th Cir. 2021). Indeed, CADA's "very purpose" is to eliminate "certain ideas or viewpoints from the public dialogue." *Id*. This triggers strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

C. CADA punishes Phillips for his religious views.

The Colorado Constitution, Article II, Section 4, and the First Amendment protect the "free exercise" of religion. Phillips's faith compels him to create artwork expressing messages that do not contradict his religious beliefs. Yet CADA forces Phillips to celebrate views contrary to his religious beliefs while giving expressive freedom to cake artists with secular views. That violates free exercise.

Government cannot "target[] religious conduct for distinctive treatment," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)—which includes imposing "[a] rule that" discriminates against "religious conduct." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004). When officials target religion, that creates a per se violation. *Masterpiece*, 138 S. Ct. at 1731. CADA's application to Phillips here violates this principle in three ways.

First, CADA applies more favorably to secular cake artists who decline requests for secular reasons. In *Masterpiece*, the Supreme Court held that CADA has an "offensiveness" rule that allows cake shops to decline to express "messages [they] consider[ ] offensive." 138 S. Ct. at 1728. Colorado applied that rule to protect three cake shops that declined "to create cakes with images that conveyed [religious] disapproval of same-sex marriage." *Id*. at 1730. But the state refused to apply that rule to Phillips. *Id*. at 1730-31. That violated the First Amendment. The trial court made the same mistake below. *See* Section III.B *supra*.

Second, CADA "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). CADA's offensiveness rule exemplifies this. By allowing secular cake artists to refuse to express views they find offensive while denying that same freedom to Phillips, CADA unconstitutionally plays favorites. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Likewise, CADA is not generally applicable because C.R.S. § 24-34-601(3) allows sex-based restrictions. Nothing explains why exempting this status-based discrimination furthers CADA's goals while exempting Phillips's religious expression would not. *Fulton* forbids this favoritism.

Third, the trial court showed "clear and impermissible hostility" toward Phillips's religious beliefs. *Masterpiece*, 138 S. Ct. at 1729. After suggesting that it would not force parties to use titles and pronouns that

are offensive, TR (09/18/20) 23:20-24:7, the court later said it would draw an "inference" against Phillips because he did not use *any* pronouns when referencing Scardina at trial, TR (03/24/21) 556:9-22. And the court did so knowing that Phillips applied this practice to respect Scardina while still honoring his religious beliefs. CF 4236-47. Such a bait-and-switch "cast[s] doubt on the fairness and impartiality" of the trial court's adjudication of this suit, *Masterpiece*, 138 S. Ct. at 1730, as does the trial court's repeated refusals to apply this Court's precedents if doing so would benefit Phillips, not to mention the conflation of Phillips's message-based decline with a status-based refusal.

D. CADA's application cannot satisfy strict scrutiny.

Because CADA violates Phillips's constitutional rights, CADA's application must satisfy strict scrutiny. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To do so, Scardina must prove that CADA's application narrowly serves a compelling interest. *Reed*, 135 S. Ct. at 2226. Scardina can do neither. Public-accommodation laws do not serve compelling interests when they compel speech, *Hurley*, 515 U.S. at 578-79, or selectively punish religion, *Fulton*, 141 S. Ct. at 1881-82. And punishing Phillips's expression is not "the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

As for that latter point, Colorado could interpret its law to allow message-based objections. Many courts already do this. Section III.A

(citing cases in Arizona, Utah, and the Eighth Circuit). As do Colorado officials, sometimes. Section III.B. Next, Colorado could track the federal public-accommodation law and not apply CADA to expressive businesses. 42 U.S.C. § 2000a(b). Or it could not apply CADA to highly selective entities. *E.g. Vejo v. Portland Pub. Sch.*, 204 F. Supp. 3d 1149, 1168 (D. Or. 2016). Any of these options would achieve CADA's goals while also respecting the constitution. Punishing Phillips does not.

CONCLUSION

The trial court punished Phillips for exercising a freedom that Colorado freely gives to secular cake artists. That judgment was wrong and unnecessary—because the court never had jurisdiction to begin with and the suit was moot. This Court should reverse and enter judgment for Phillips.

Respectfully submitted this 18th day of November, 2021.

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CERTIFICATE OF SERVICE

I certify that I have on this 18th day of November, 2021, served a copy of the foregoing via the Colorado Courts E-Filing system on:

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