DATE FILED: February 11, 2022 5:47 PM
FILING ID: 120FA01733E8D
CASE NUMBER: 2021CA1142

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' REPLY BRIEF	

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

It contains 5,690 words, which is not more than the 5,700 word limit.

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

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/ John J. Bursch
John J. Bursch

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Using the Colorado Anti-Discrimination Act (CADA), Colorado tried to punish Defendants Jack Phillips and Masterpiece Cakeshop (collectively, "Phillips") for living out their faith. Colorado lost at the U.S. Supreme Court. Disgruntled, Plaintiff Autumn Scardina targeted Phillips, brought a similar CADA charge against him, participated as a party in that proceeding, and also lost. Scardina could have but didn't appeal that result. Now, Scardina is trying to re-litigate those prior cases, rewrite CADA, obtain advisory opinions, and restrict Phillips's freedom—all to achieve what Colorado couldn't: punishing Phillips for holding religious beliefs the Supreme Court has called decent and honorable.

This attempt first fails because Scardina's CADA claim is procedurally barred. Scardina misreads CADA's exhaustion requirement as justification for not appealing the Colorado Civil Rights Commission's final order. But on this theory, the Commission could settle administrative suits or dismiss them with prejudice, yet still allow complainants to re-litigate their suits in district court. That theory ignores CADA's context, shreds CADA's text, and slights precedents requiring strict compliance with CADA conditions. Accepting this theory would also flood courts with duplicative lawsuits and punish successful defendants.

Scardina's CADA claim also fails substantively because it is moot, Scardina never proved a CADA violation, and the Constitution protects Phillips's religiously motivated decision not to speak. On Scardina's

logic, CADA plaintiffs can receive advisory opinions, speakers engage in status discrimination when they merely object to speaking certain messages for anyone, and the Constitution protects secular speakers but not religious ones. Phillips has been down this road before. This lawsuit is not about anything but punishing Phillips for his religious beliefs. This Court should reverse.

ARGUMENT

I. Scardina's CADA claim is procedurally barred.

A. Scardina did not exhaust CADA's available proceedings and remedies.

Scardina's CADA claim is procedurally barred. CADA provides four paths from administrative proceedings to district court. Scardina took none. Appellants' Opening Br. ("Opening Br.") 16-23. While Scardina claims to have satisfied CADA's exhaustion requirement by completing "*administrative* proceedings," Ms. Scardina's Answer Br. ("Answer Br.") 11 (emphasis added), Scardina failed to appeal the Commission's dismissal, and thus never exhausted the "proceedings and remedies available" under "part 3" of CADA, C.R.S. § 24-34-306(14); *see* C.R.S. 24-34-307(1)-(2). The district court lacked jurisdiction.

1. The Commission's dismissal was appealable.

Scardina responds that the dismissal was not appealable because it was not a "final order" and CADA forbids appeals from "refusal[s] to enter" such an order. Answer Br. 12, 13 n.2. Wrong on all counts.

Take the latter point first. CADA expressly allows appeals from "a final order of the commission, *including a refusal to issue an order*." C.R.S. § 24-34-307(1) (emphasis added). Scardina disregards that italicized text because, in Scardina's view, it would mean this Court wrongly decided *Demetry v. Colo. Civil Rights Comm'n*, 752 P.2d 1070 (Colo. App. 1988). Answer Br. 13 n.2. Not so. *Demetry* addressed the typical situation, where "the Commission cannot issue a final order [without] an evidentiary hearing or default." 752 P.2d at 1072. It did not consider when the Commission settles a matter or fails to issue a final order.

Indeed, this must be the correct reading of *Demetry*; otherwise it would contradict *Agnello v. Adolph Coors Co. ("Agnello I")*, 689 P.2d 1162 (Colo. App. 1984), where this Court reviewed a complainant's appeal even though she had received no evidentiary hearing below, CF 288-89. Even Scardina agrees that appeal was possible "without" the complainant having received "an evidentiary hearing." Answer Br. 15 n.3.

Scardina tries to reconcile *Demetry* and *Agnello I* by saying that complainants may only appeal final orders and that the Division resolved *Agnello I* with a final order on "the merits"—not through conciliation, but by some later "determination." Answer Br. 14, 15 n.3. But that ignores CADA's text (allowing appeals from refusals to enter final orders), misreads *Agnello I*, and misunderstands a final order.

Because CADA never defines "final order," this Court should use Colorado's Administrative Procedures Act ("APA") "as a gap filler."

Peabody Sage Creek Mining, LLC v. Colo. Dep't of Pub. Health & Env't, Water Quality Control Div., 484 P.3d 730, 734 (Colo. App. 2020). The APA defines "Order" as "the final disposition … by any agency…." C.R.S. § 24-4-102(10). A disposition is a "final settlement or determination."[1] *Disposition*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see Independence Coffee & Spice Co. v. Taylor*, 48 P.2d 798, 799 (Colo. 1935) (identifying "settlement" as type of "disposition"); *Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc.*, 355 P.2d 83, 92 (Colo. 1960) (Doyle, J., concurring) (same). This Court should interpret "final order" in C.R.S. § 24-34-307(1) to mean a final Commission settlement or determination.

This definition also fits this Court's views on final agency actions under the APA. Such actions (1) "mark the consummation of the agency's decision-making process" (i.e., the orders are not "merely tentative or interlocutory in nature"), and (2) "constitute an action by which rights or obligations have been determined or from which legal consequences will flow." *Peabody*, 484 P.3d at 735. So the Commission's decision was appealable.

Now, turn back to *Agnello I*. The *Agnello I* settlement order was final because it ended the Commission's administrative process and imposed legal consequences. Specifically, the discrimination dispute was

[1] For undefined statutory terms, this Court may "refer to dictionary definitions in determining the plain and ordinary meaning of the word." *Mendoza v. Pioneer Gen. Ins. Co.*, 365 P.3d 371, 376 (Colo. App. 2014).

resolved, the respondent would not face punishment, and the complainant could not sue in district court. *Chittenden v. Colo. Bd. of Social Work Examiners*, 292 P.3d 1138, 1143 (Colo. App. 2012); *Agnello v. Adolph Coors Co. ("Agnello II")*, 695 P.2d 311, 313 (Colo. App. 1984) (forbidding district-court suit).

The Division did not issue a "determination" in that case. Answer Br. 14. CADA forbids that. After finding probable cause, the Division may "endeavor to eliminate the [alleged discrimination] by conference, conciliation, and persuasion and by means of the compulsory mediation." C.R.S. § 24-34-306(2)(b)(II). That's all. Only the Commission may determine discrimination claims. C.R.S. § 24-34-306(4)-(10). This shows that the *Agnello* complainant necessarily appealed an order "approving a *settlement agreement*." 689 P.2d at 1163 (emphasis added). To be sure, the Division provided details on why it settled, but that does not mean the Division exceeded its authority or that the settlement was a determination in disguise. It was still just a "settlement" order. *Id.* at 1163; *see Agnello II*, 695 P.2d at 313 ("conciliation efforts were successful").

Likewise, the Commission's dismissal of Scardina's complaint with prejudice—arising from its settlement with Phillips, TR (03/23/21) 317:11-16; CF 231-32—is a final order. Indeed, that dismissal bears even more indicia of a final order than the *Agnello I* settlement order. Unlike in *Agnello I*, the Commission prosecuted Phillips. It filed a formal complaint and held a hearing. EX (Trial) 138. The Commission's dismissal

resolved that dispute. *Cf. Chittenden*, 292 P.3d at 1143 (escaping "discipline" a "legal consequence[]"). "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). Such a dismissal also constitutes an "adjudication on the merits." *Brock v. Weidner*, 93 P.3d 576, 579 (Colo. App. 2004) (citing *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534 (4th Cir.1991) (dismissal with prejudice "a complete adjudication on the merits")).[2]

Alternatively, the *Agnello I* settlement meant the Commission refused to enter a final order. This fits *Demetry*'s dicta that "the Commission cannot issue a final order [without] an evidentiary hearing or default." 752 P.2d at 1072. On this logic, once the Division finds probable cause, it incurs a duty to "endeavor to eliminate the discriminatory or unfair practice," C.R.S. § 24-34-306(2)(b)(II), and thus cannot dismiss charges "arbitrarily or with improper motive," 689 P.2d at 1165—which would unlawfully keep complainants from receiving final orders.

If so, Scardina had even greater justification to appeal. After the Commission issued a formal complaint against Phillips, CADA required it to hold a hearing and issue findings of fact and conclusions of law. C.R.S. § 24-34-306(4)-(10); C.R.S. § 24-4-105(2)(a). A failure to perform these duties is appealable. *Cf. Timus v. D.C. Dep't of Human Rights*, 633

[2] The *Demetry* complainant faced no such "determinative consequences." 752 P.2d at 1071.

A.2d 751, 757 (D.C. 1993); *State, Dep't of Fish & Game, Sport Fish Div. v. Meyer*, 906 P.2d 1365, 1370 (Alaska 1995). So, no matter whether the Commission issued a final order against Scardina or refused to enter that order, Scardina could have but chose not to appeal.

This framework best promotes CADA and protects the interests of all administrative parties. On Scardina's theory, complainants could relitigate claims resolved by administrative settlements or even dismissals with prejudice after an evidentiary hearing begins—subjecting respondents to "duplicative and possibly conflicting" resolutions. *Cont'l Title Co. v. Denver Dist. Ct.*, 645 P.2d 1310, 1316 (Colo. 1982). This result would also allow complainants to second-guess agency decisions on "matters within [their] expertise" and waste "judicial resources." *Colo. Dep't of Pub. Health & Env't v. Bethell*, 60 P.3d 779, 784 (Colo. App. 2002). And Scardina's theory *would narrow* complainants' rights, preventing them from appealing statutory or due process violations—issues the APA specifically deems reviewable errors. C.R.S. § 24-4-106(7)(b). This Court should preserve its ability to correct such abuse.

2. Scardina had standing to appeal the Commission's dismissal but chose not to.

Next, Scardina suggests that Scardina had no "standing" to appeal as an unaggrieved and "non-settling party." Answer Br. 13 n.2, 16. That is incorrect.

The Commission's dismissal "aggrieved" Scardina. C.R.S. § 24-34-307(1). An "aggrieved" party is someone whose "legal rights" have been "adversely affected" or who's upset due to "perceived unfair treatment." *Aggrieved*, BLACK'S LAW DICTIONARY (11th ed. 2019). Scardina suffered at least three adverse consequences from the Commission's dismissal: (1) Scardina's CADA complaint was resolved on the merits without punishing Phillips; (2) Scardina did not receive a required hearing; and (3) Scardina did not receive required findings of fact and conclusions of law. Section I.A.1 *supra*; *cf. Marks v. Gessler*, 350 P.3d 883, 900 (Colo App. 2013) (deprivation of hearing an "injury in fact"). Regardless, Scardina need not be *actually* aggrieved by the Commission's dismissal; CADA allows appeals from complainants even "*claiming* to be aggrieved" by such dismissals. C.R.S. § 24-34-307(1) (emphasis added).[3]

This is true no matter whether Scardina was a non-settling party. Like Scardina, the *Agnello I* complainant did not consent to the Commission's settlement order—asserting she "had not agreed to" it, *Agnello II*, 695 P.2d at 313—yet she had standing to appeal, *Agnello I*, 689 P.2d at 1163. In addition, while federal standing doctrine may sometimes prevent non-settling parties from appealing a co-party's settlement, Answer Br. 16, it *cannot* when the "settlement strips the [non-settling] party of

[3] Unlike the appellant in *C.W.B., Jr. v. A.S.*, Scardina "was denied some claim of right" and had a statutory right to both intervene in an adjudicatory proceeding *and* appeal. 410 P.3d 438, 443 (Colo. 2018).

a legal claim" or otherwise inflicts "legal prejudice," *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001)—as the Commission's dismissal did here. Colorado "is not bound by" this federal "standing precedent" anyway. *Marks*, 350 P.3d. at 900.

3. CADA's exhaustion rule is jurisdictional.

Finally, Scardina says that CADA's exhaustion requirement is a "[c]laim-processing rule," not a jurisdictional pre-requisite, and that Phillips failed to preserve this issue. Answer Br. 16. But under Colorado law, "the failure to exhaust administrative remedies … is a jurisdictional defect," *Kendal v. Cason*, 791 P.2d 1227, 1228 (Colo. App. 1990)—even for CADA claims, *Brooks v. Denver Pub. Sch.*, No. 17-cv-01968-REB-MEH, 2017 WL 5495793, at *7 n.9 (D. Colo. Nov. 16, 2017) ("[F]ailure to exhaust" under CADA "deprives the district court of … jurisdiction."); *Kane v. Honeywell Hommed, LLC*, No. 11-cv-03352-PAB-KLM, 2012 WL 4463701 (D. Colo. Sept. 26, 2012) (same). And Phillips timely objected to Scardina's failure to exhaust as both a jurisdictional defect and a claim-processing rule violation. CF 678, 4105, 4685, 4733.

B. Claim preclusion bars Scardina's CADA claim.

Claim preclusion also bars Scardina's CADA claim. Scardina responds only that the Commission's dismissal with prejudice was not a "final order." Answer Br. 18. Not so. Section I.A.1 *supra*.

In addition, because the Commission's dismissal came after an adjudicatory hearing began, that dismissal is akin to a voluntary or involuntary dismissal with prejudice, which satisfies finality despite containing no factual findings. *Cf. O'Done v. Shulman*, 238 P.2d 1117, 1118 (Colo. 1951); *Watlington v. Browne*, 791 F. App'x 720, 723-24 (10th Cir. 2019) (finality "not negated by" the "lack of express factual findings").

What's more, Scardina had a "full and fair opportunity" to litigate the CADA claim before the Commission. *Watlington*, 791 F. App'x at 724. The Commission's dismissal was "subject to direct judicial review." *Montoya v. City of Colo. Springs*, 770 P.2d 1358, 1365 (Colo. App. 1989); Section. I.A.1 *supra*. Scardina could have appealed and asked this Court to "remit the case" for factual development. C.R.S. § 24-34-307(5). Because Scardina refused to appeal—despite having "a good argument to raise"—Scardina cannot use that argument now "to negate the finality" of the Commission's "dismissal." *Watlington*, 791 F. App'x at 723 (citing *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981)).

II. Scardina's CADA claim is moot.

Phillips's offer of judgment moots the CADA claim. Scardina says this offer was insufficient because Phillips disclaimed liability, never tendered specific costs, and never offered the maximum fine. Answer Br. 19-25. Scardina also says mootness exceptions apply, *id.* at 25-27, and that the trial court did not abuse its discretion in denying Phillips's motion to deposit, *id.* at 27-28. These arguments are all incorrect.

A. Phillips tendered to Scardina more than Scardina could recover at trial.

Phillips's tender mooted Scardina's CADA claim because (1) Phillips tendered more than CADA's maximum fine, (2) a potential costs award is irrelevant, and (3) Phillips may disclaim liability.

1. Phillips offered more than the maximum fine.

To begin, Scardina says Phillips's tender failed because Scardina alleged two CADA violations, not one. Answer Br. 24-25. That's wrong. The amended complaint repeatedly refers to a single cake request and alleges one CADA violation. CF 317, 322, 323-24 (Am. Compl. ¶¶ 8, 37, 41-46.). And Scardina never alleged more than one act of discrimination in the administrative charge. EX (Trial) 46. So Scardina failed to exhaust administrative remedies for any other supposed incidents. *See Steele v. Stallion Rockies Ltd*, 106 F. Supp. 3d 1205, 1216 (D. Colo. 2015); *Lasser v. Charter Commc'ns, Inc.*, No. 19-cv-02045-RM-MEH, 2020 WL 2309506, at *6 (D. Colo. Feb. 10, 2020).

2. A potential costs award is irrelevant.

Next, Scardina says Phillips never tendered "recoverable costs." Answer Br. 21. That is irrelevant and incorrect.

First, CADA forbids Scardina from recovering costs. Unlike other CADA provisions that allow the recovery of costs and other remedies, *e.g.* C.R.S. § 24-34-602(b); C.R.S. § 24-34-405(5); C.R.S. § 24-34-505.6, the provision under which Scardina sues allows only one remedy: a

"fine." C.R.S. § 24-34-602(1)(a). That remedy is exclusive as "an alternative" to those available from the Commission. C.R.S. § 24-34-602(3).

Second, costs are not recoverable at trial. "A case may become moot when a plaintiff is offered the maximum amount recoverable *at trial*." *Rudnick v. Ferguson*, 179 P.3d 26, 29 (2007) (emphasis added). Any costs award "is a collateral matter," "does not involve the merits of the case," and "does not prevent [a] case from becoming moot." *Mackenzie v. Kindred Hosps. E., L.L.C.*, 276 F. Supp. 2d 1211, 1218 n.4 (M.D. Fla. 2003); *see Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-200 (1988); *Teague v. State of Colo., Dep't of Corr.*, No. 20-cv-01425-PAB-KMT, 2020 WL 6470194, at *3 (D. Colo. Oct. 8, 2020); *Cueto v. Dir., Bureau of Immigration & Customs Enf't*, 584 F. Supp. 2d 147, 150 (D.D.C. 2008).

The nonbinding and secondary authority that Scardina cites (Answer Br. 21-23) directly contradicts *Cresswell v. Prudential-Bache Securities*, 675 F. Supp. 106, 108 (S.D.N.Y. 1987), a case that *Rudnick* cites approvingly. In *Cresswell*, the defendant moved to deposit money for alleged "damages" and then to dismiss certain claims as moot. 675 F. Supp. at 108. The court granted that request because the offer "fully satisfie[d] the amount" the plaintiff "could recover if he were to prevail on the merits." *Id.* It then directed the defendant to submit a proposed "order directing it to pay into the court … the amount of [claimed damages], *plus costs*[.]" *Id.* (emphasis added). Other courts follow suit. *E.g.*, *Joiner v. SVM Mgmt, LLC*, 161 N.E.3d 923, 938 (Ill. 2020) (finding "no authority"

suggesting that defendants "must … know and include costs" in tender). This Court should too.

Third, Phillips's tender was sufficiently definite. Phillips tendered "$500.01" *and* "any court-approved court-costs." CF 3956-57. That tender is sufficient. *Joiner*, 161 N.E.3d at 932 (approving tender of claimed damages "in addition to … costs … as the Court may determine"). In the analogous context of statutory settlement offers, this Court has said it approves of nearly identical language: "the amount of $[X], plus costs accrued before this offer." *Mitchell v. Chengbo Xu*, 488 P.3d 1200, 1204 n.3 (Colo. App. 2021). And federal courts have likewise found this kind of language definite in that context. *E.g.*, *Vasconcelo v. Miami Auto Max, Inc.*, 981 F.3d 934, 943 (11th Cir. 2020) (approving offer of $3,500 "plus … reasonable … costs incurred to date"); *Herrington v. Cnty. of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993) (similar).

3. Phillips may disclaim liability.

Finally, Scardina says that Phillips's tender failed because he disclaimed liability and CADA requires a finding. Not so.

First, Scardina did not request a finding against Phillips in the amended complaint because Scardina "did not request declaratory relief." *Rudnick*, 179 P.3d at 32; *see* CF 325 (prayer for relief). Scardina's allegation that Scardina was suing "to vindicate her rights" is no such prayer. Answer Br. 19; CF 316 (Am. Compl. ¶4). That's decisive.

Second, CADA provides no finding remedy. The prefatory phrase, "Upon finding a violation…," ensures that defendants will receive due process before being punished; it does not entitle plaintiffs to advisory opinions. C.R.S. § 24-34-602(1)(a); *e.g. Joiner*, 161 N.E.3d at 938 (mooting suit without a finding, despite relevant statute having identical text); *cf.* Ill. Comp. Stat. § 715/2 ("… upon a finding….").

Third, Phillips need not admit liability to moot this suit. Scardina still clings to Justice Thomas' lone concurrence in *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016), to suggest otherwise. Answer Br. 20. But *Rudnick* controls and holds that defendants need not admit liability to "render a claim moot." 179 P.3d at 31.

CADA's purpose changes none of this. Every statutory violation triggers public policy concerns, but that does not mean plaintiffs are entitled to advisory opinions just because they allege one. *See W-470 Concerned Citizens v. W-470 Hwy. Auth.*, 809 P.2d 1041, 1043 (Colo. App. 1990). CADA claims are not immune to mootness.

B. No mootness exceptions apply.

Alternatively, Scardina says this Court should decide the CADA claim even if it's moot because the claim "involves a question of great public importance" and raises an issue "capable of repetition, yet evad[ing] review." Answer Br. 25. Those exceptions do not apply here.

As for the first point, Colorado courts "address constitutional issues only if necessary." *People v. Valdez*, 405 P.3d 413, 416 (Colo. App.

2017). Scardina's "interest" in (perhaps) obtaining some "emotional satisfaction" from a hoped-for "ruling" that Phillips was wrong cannot keep a moot suit alive. *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 (1977).

For the second, the "capable of repetition, yet evading review" doctrine applies only when (1) the challenged action is "too short to be fully litigated" and (2) there is "a reasonable expectation that the same … party [will face] the same action again." *Whitney v. Obama*, 845 F. Supp. 2d 136, 139 (D.D.C. 2012). This case satisfies neither prong.

Scardina seeks to punish Phillips's past decision not to create a cake. Such claims can be "fully litigated"—as Phillips's first case shows. *Id*. And there's no "reasonable expectation" that Scardina will allege "the same" claim and face the same mootness concern again. *Id*. at 140.

C. The trial court abused its discretion in denying Phillips's Rule 67 motion to deposit.

To finish, Scardina says the trial court did not abuse its discretion in denying Phillips's Rule 67 motion to deposit because it "did not hold that" such a deposit "could never moot a claim." Answer Br. 28. That is also incorrect. The trial court held that defendants can use Rule 67 "to relieve themselves of the responsibility for administering" funds but said "this would appear to be the limit of what can properly be achieved under" the rule. CF 1014-15. That holding "misapplies the law" and is an abuse of discretion. *Payan v. Nash Finch Co.*, 310 P.3d 212, 216 (Colo. App. 2012); *see Rudnick*, 179 P.3d at 31; Opening Br. 28-29.

III. Scardina did not prove a CADA violation.

Turning to the merits, Scardina argues that Phillips's decision not to create the custom cake celebrating a gender transition was because of Scardina's "transgender status" and that CADA has no offensiveness rule. Answer Br. 29, 31. That is wrong.

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

Scardina mistakes the standard and thus mistakes the analysis. While Scardina suggests that the "because of" standard requires only that a protected trait actually motivate the defendant's decision, Answer Br. 29, the trial court correctly held that the protected trait must "actually motivate[ ]" the defendant's decision *and* have a "determinative influence" on the outcome. CF 4829 (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). In other words, the protected trait must be the *decisive* factor in the defendant's decision. So while defendants may not "avoid liability just by citing some *other* factor" for their decision, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020), they can when that other factor—rather than the protected trait—is determinative.

The trial court erred by misapplying this standard and holding, as a matter of law, that Phillips's message-based decline constituted status-based discrimination. As for the first point, the trial court's misapplication of the correct legal standard to undisputed facts—even as to causation—is a legal rather than factual error. *Allen v. Martin*, 203 P.3d 546,

566 (Colo. App. 2008). Here, the court acknowledged that 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 fact shows that Scardina's status was not a factor—much less the *decisive* factor—in Phillips's decline. And while this decline was "exclusively 'message-based,'" Answer Br. 30, it need only be determinatively so for Phillips to avoid punishment. It was at least that.

For the second point, Scardina adopts the trial court's error equating Phillips's message-based decline with status-based discrimination. Answer Br. 31. Phillips serves everyone; he just cannot express every message through his custom creations. While courts sometimes blur distinctions between others' status and their conduct, Answer Br. 31, they refuse to do so when speakers distinguish between their speech and others' status, *see* Opening Br. 31. Scardina disregards this distinction. On Scardina's theory, a black artist's refusal to create a custom white-cross cake to celebrate an Aryan Nation Church event would violate CADA—not because being racist is "inextricably intertwined with being white," Answer Br. 31, but because objecting to this cake's message equates to objecting to the customer's religious status. That is not the law.

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

Scardina also tries to negate CADA's offensiveness rule. While the trial court disregarded "evidence that the Commission had actually

adopted" its offensiveness rule, Answer Br. 32, the U.S. Supreme Court based its prior ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* on this very fact—recognizing that while "[Colorado] law" allowed "storekeepers … to decline to create specific messages" they consider "*offensive*," the State denied this freedom to Phillips. 138 S. Ct. 1719, 1728 (2018) (emphasis added); *see* Opening Br. 32-33.

At root, the trial court believed the three prior cases upholding the expressive freedom of Colorado cake artists are "distinguishable from this case." Answer Br. 32. In its view, because Phillips would create "an identical-looking cake" to express a different message for Scardina or anyone else, Answer Br. 32, CADA's offensiveness rule does not apply. And while Justice Kagan said this may be a "proper basis for distinguishing … cases," *Masterpiece*, 138 S. Ct. at 1733 (Kagan, J., concurring), the majority did not, *id* at 1731. And for good reason. On this logic, the black cake artist who declines to create a white-cross cake celebrating an Aryan Nation Church event would face CADA liability because she would create an identical-looking cake to celebrate her local church's 50th anniversary. That is not the law.

As for deference, the Court "must give particular deference to the reasonable interpretations of the administrative agencies that are authorized to administer and enforce a particular statute." *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004); *see* Opening Br. 32-33. The even application of an offensiveness rule is "reasonable"

because it squares CADA's "public policy" of stopping status-based discrimination with the constitutions' "public policy" of protecting free speech and religious liberty. *Coffman*, 102 P.3d at 1005. The trial court erred by not deferring to the Commission's reasonable interpretation of CADA, consistent with constitutional mandates. And the court is responsible for its own discrimination. *Masterpiece*, 138 S. Ct. at 1731.

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

A. This Court independently reviews the facts before deciding constitutional claims.

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). This review does not require "undisputed" facts. Answer Br. 33. That would flatten full de novo review to de novo legal review, which this Court applies in ordinary appeals. *Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008). Scardina thus mistakes a case feature for a rule. In cases like this, appellate courts independently "review" a lower court's "finding of facts"—no matter whether they are disputed—to ensure that constitutional rights are sufficiently protected. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995).

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

Scardina says CADA may force Phillips to create a custom cake celebrating a gender transition because such a cake is not speech and CADA regulates only conduct. Answer Br. 34-40. Not so.

1. The requested cake is pure speech.

Scardina suggests that the requested cake is not pure speech because it is neither Phillips's "self-expression," nor "inherently expressive." Answer Br. 36-37. That is irrelevant and incorrect.

First, Scardina misstates the test for pure speech, which is whether the item (1) "communicate[s] ideas" and (2) is analogous to other protected speech. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). Here, no one contests that the requested cake expresses a message: "In context, … the requested cake … symbolized a transition from male to female." CF 4827. And Phillips's custom cakes are analogous to other forms of speech. Opening Br. 35-36. This is sufficient to show the requested cake was pure speech.

Second, even under Scardina's "self-expression" test, the requested cake is pure speech. The court in *Cressman v. Thompson*, held that while the "reproduction" of "a mass-produced image" may not constitute pure speech, the "creation" of original art does. 798 F.3d 938, 953-54 (10th Cir. 2015). A custom cake expressing a message is original art no matter whether Scardina suggested the design. *See Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015) ("[A]rtistic expression frequently

encompasses a sequence of acts by different parties….). Otherwise, commissioned art like the Mona Lisa would not be pure speech.

Third, the requested cake is "inherently expressive."[4] Answer Br. 37. Just as context "separates the physical activity of walking" from an inherently expressive "parade," *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale ("FNB")*, 901 F.3d 1235, 1241 (11th Cir. 2018), the "context" here separates a mere artistic cake from one that celebrates a gender transition, CF 4827. The requested cake need not have any "inherent meaning," Answer Br. 37; it must only express "some" message in context. *FNB*, 901 F.3d at 1242; *e.g. Hurley*, 515 U.S. at 569-70.

2. Alternatively, the cake is symbolic speech.

Next, Scardina says that the requested cake is not symbolic speech because third parties would not "understand" the cake's message or attribute it to Phillips. Answer Br. 37-38. That is incorrect.

Take the latter point first. Neither the symbolic-speech test nor the broader compelled-speech test considers whether third parties would attribute the message to the speaker. Opening Br. 36-38.

For the initial point, Scardina misses the key fact. The trial court found: "In context, … the requested cake … *symbolized* a transition from male to female." CF 4827 (emphasis added). The court even strongly

[4] This is not the test for pure speech, but rather a test for dividing speech from non-speech. *See Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 66 (2006) (holding that "conduct" is "inherently expressive" when it is "sufficiently expressive to warrant First Amendment protection").

justified this point based on the cultural "context" and Scardina's stated purpose and intended use for the cake, CF 4827-28—factors that courts weigh in deciding whether third parties would understand the symbolism, *see* Opening Br. 36.

Scardina suggests that this Court should disregard that context—or "additional speech," Answer Br. 39—because it shows that an "event … create[s] the message" instead of the cake "itself." *Id*. But on this logic, parades would be non-expressive because third parties cannot distinguish them from mere marching without viewing the activity in its context. *See FNB*, 901 F.3d at 1243-44. That is not the law.

Finally, Scardina argues that Phillips's distinction between "identical-looking" custom and pre-made cakes shows that no such cake is expressive. Answer Br. 37, 39. Not so. Both cakes are speech—assuming they require Phillips's "unique creative talents," *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (10th Cir. 2021)—yet only custom cakes trigger compelled-speech concerns because they invade Phillips's "individual freedom of mind." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); c*f. Associated Press v. United States*, 326 U.S. 1, 4, 20 n.18 (1945).

3. CADA compels Phillips's speech as applied.

Scardina then says that "CADA does not compel speech" because it regulates only "discriminatory" conduct and just "incidentally require[s] [Phillips] to engage in speech." Answer Br. 34. That is also incorrect.

No matter whether CADA typically regulates conduct, CADA violates free speech when it treats "speech itself [as] the public accommodation." *Hurley*, 515 U.S. at 572-73; *accord 303 Creative*, 6 F.4th at 1177 ("Colorado asserts that [CADA] only regulates … conduct," but "this argument is foreclosed by *Hurley*."). The trial court applied CADA to punish Phillips's decision not to speak. Opening Br. 34-38. And this application "directly and immediately" compels speech. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); *accord 303 Creative*, 6 F.4th at 1179.

4. CADA is content- and viewpoint-based.

Because Scardina wrongly believes CADA cannot compel speech, Answer Br. 34, Scardina disregards its content- and viewpoint-based application here. Opening Br. 38-39. When CADA "compels speech," it is "content-based." *303 Creative*, 6 F.4th at 1178. Indeed, CADA's "very purpose" is to eliminate "certain ideas or viewpoints from the public dialogue." *Id*. And for this reason, the test in *United States v. O'Brien*, 391 U.S. 367, 381-82 (1968), does not apply. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *accord Dale*, 530 U.S. at 641-42.

C. CADA punishes Phillips for his religious views.

Moving to free exercise, Scardina argues that CADA is generally applicable because it does not "treat different" cake artists "differently." Answer Br. 40. But officials cannot apply a looser legal test to secular objections than religious ones. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296

(2021) (per curiam). Here, CADA allows secular speakers to decline messages while requiring religious speakers to convey state-approved messages. The Constitution forbids this. Opening Br. 39-40.

Scardina also suggests that CADA is generally applicable because it protects religion in at least one way and only exempts discrimination on a non-discretionary basis. Answer Br. 40. But CADA aims to end discrimination generally. Exempting sex discrimination undermines that interest. Nothing explains why exempting this discrimination furthers CADA's goals while exempting Phillips's religious expression would not. The Constitution forbids this favoritism. Opening Br. 40.

Finally, Scardina defends the trial court's hostility against Phillips by highlighting the problem. Based on Phillips's decision not to use pronouns while addressing Scardina at trial, the court "infer[red]" that a customer's status is "important to" Phillips's "decision-making" at his shop. Answer Br. 41. This shows only that Phillips respects Scardina's view but cannot forsake his own. Yet the trial court held this against Phillips on the key issue of the case. That's hostility.

D. CADA's application cannot satisfy strict scrutiny.

Scardina does not engage Phillips's strict-scrutiny argument, instead citing the Tenth Circuit's decision in *303 Creative* that upheld a similar CADA application under strict scrutiny. Answer Br. 35. As that decision concedes however, Colorado's "compelling interest" in stopping discrimination "is not narrowly tailored" to generally justify compelled

speech. 6 F.4th at 1178-79. Instead, that decision says CADA was "narrowly tailored to" ensure "equal access" to an artist's "unique services." *Id.* at 1179-80. But uniqueness does not justify compelled access. *Hurley*, 515 U.S. at 577-78; *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). *303 Creative* never analyzed how these precedents rejected efforts to compel monopolies to create unique speech. And *303 Creative*'s logic would turn First Amendment protection upside-down—giving speech less protection the more unique it becomes.

CONCLUSION

This Court should reverse and enter judgment for Phillips.

Respectfully submitted this 11th day of February. 2022.

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I certify that I have on this 11th day of February, 2022, served a copy of the foregoing via the Colorado Courts E-Filing system on:

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