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<tr><td>Attorneys for Defendants/Appellants:
Jonathan A. Scruggs (Arizona Bar No. 030505)*
Jacob P. Warner (Arizona Bar No. 033894)*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
T. (480) 444-0020 F. (480) 444-0028
jscruggs@ADFlegal.org
jwarner@ADFlegal.org

John J. Bursch (Michigan Bar No. P57679)*
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
T. (202) 393-8690 F. (202) 202-347-3622
jbursch@adflegal.org

*Admission Pro Hac Vice

Samuel M. Ventola, Atty. Reg. #18030
1775 Sherman Street, Suite 1650
Denver, CO 80203
T. (303) 864-9797 F. (303) 496-6161
sam@sam-ventola.com</td><td>Case No. 2023SC00116

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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 9,380 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

Petitioners Jack Phillips and Masterpiece Cakeshop (collectively, "Phillips") create custom cake art. Phillips serves everyone; he decides to create custom cakes based on *what* they express, not *who* requests them. On the day the U.S. Supreme Court announced it would hear Phillips' prior case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), Respondent Autumn Scardina demanded that Phillips create a custom blue-and-pink designed cake celebrating a gender transition. Phillips politely declined because that cake's message contradicts his religious beliefs. Scardina then filed a 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. After a bench trial, the lower court ruled against Phillips, despite finding that the requested cake expressed a message Phillips cannot create for "for anyone." The appeals court affirmed. That decision presents three questions for review:

1. Whether Scardina's CADA claim is barred because Scardina did not appeal the Commission's dismissal of the administrative complaint before suing Masterpiece Cakeshop, Inc. and Phillips.

2. Whether the decision by Masterpiece Cakeshop, Inc. and Phillips not to create a cake that expressed a message celebrating a gender transition violated CADA's prohibition on transgender-status discrimination.

3. Whether the decision by Masterpiece Cakeshop, Inc. and Phillips not to create a cake that expressed a message celebrating a gender transition was protected by the First Amendment.

INTRODUCTION

Petitioners Jack Phillips and Masterpiece Cakeshop sketch, sculpt, and paint custom cakes that convey messages. As part of his religious calling to love others, Phillips creates cakes for everyone. His decisions always turn on *what* the cake will express, not *who* requests it. For exercising his faith this way, Colorado tried to punish Phillips twice, losing each time. That second time, Respondent Autumn Scardina intervened and also lost. Scardina seeks to continue that case here.

On the same day the U.S. Supreme Court said it would hear Phillips' first case, Scardina asked Phillips to create a custom blue-and-pink designed cake celebrating a gender transition. Scardina also asked Phillips to create a custom cake depicting Satan smoking marijuana. Phillips declined both because he cannot create a cake expressing those messages for anyone. So Scardina filed a charge with the Civil Rights Division accusing Phillips of violating CADA. The Commission filed a formal complaint against Phillips, Scardina intervened, and the Commission dismissed the case *with prejudice*.

Scardina did not like that result and should have appealed. Instead, Scardina filed this lawsuit, recycling the same CADA claim the Commission rejected. This case should have never happened. Scardina's CADA claim fails because: (1) it is procedurally barred; (2) Scardina failed to prove that Phillips would create the requested cake for someone else; and (3) the federal and state constitutions protect Phillips'

religiously motivated decision not to express a message. Yet the trial court punished Phillips anyway, and the appeals court affirmed.

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

BACKGROUND

Jack Phillips is a cake artist. He owns Masterpiece Cakeshop, where he creates cakes (like those below) that express messages and celebrate events. Pet.App.10-13. These cakes are his art. *Id.* Phillips creates them using common art tools—paint palettes, paintbrushes, palette knives, and sponges—"to express [a particular] message." Pet.App.11.

Phillips is also a follower of Jesus Christ. Pet.App.02. He believes everything he does should glorify God, which affects the cakes Phillips creates and how he treats others. Pet.App.02, 09-10. Phillips respectfully serves everyone; he decides whether to create a custom cake based on *what* it will express, not *who* requests it. TR (03/23/21) 350:3-10; 364:23-365:20. Doing otherwise would violate Phillips' faith. *Id.*; Pet.App.09-10.

Phillips declines many custom requests. Pet.App.09-10. He does not create Halloween cakes, cakes promoting racist or profane messages, or cakes disparaging anyone. Pet.App.10. Phillips also cannot create cakes promoting views of marriage he does not believe. He can't express messages that violate his faith "for anyone." Pet.App.10.

While Phillips' main work is creating custom cakes, Phillips also sells pre-made items like brownies, cookies, and generic cakes to anyone; he has never declined to sell them to anyone. CF 4816. TR (03/23/21) 484:9-11. *Id.* at 352:6-353:6.

Masterpiece I

In 2012, two men asked Phillips to create a custom cake celebrating a same-sex wedding. Pet.App.03. Phillips declined because that cake's message contradicts his religious beliefs, but Phillips offered to sell the men other items or to create another cake for them. *Id.* The men refused, then filed CADA charges alleging Phillips discriminated against them because of sexual orientation. The Division issued a probable-cause determination, and the Commission issued a formal complaint.

Meanwhile, a religious man asked three other cake shops to create cakes criticizing same-sex marriage. *Masterpiece*, 138 S. Ct. at 1730. The shops declined because they found this message offensive; the man filed CADA charges; but the Division found—and the Commission agreed—that the shops "lawfully" "refus[ed] service." *Id.* at 1730. The Division and Commission (collectively, "Colorado") interpreted CADA to have an offensiveness rule, which allows shops to decline "offensive" "messages," *id.* at 1728, 1731—a rule they refused to apply to Phillips.

The Commission punished Phillips; the appeals court affirmed. *Id.* at 1723, 1726-27. Then the U.S. Supreme Court reversed because Colorado acted with hostility toward Phillips' faith—treating Phillips worse than secular cake artists and disparaging his religious beliefs. This ruling vindicated Phillips' rights. But more trouble was brewing.

Masterpiece II

The same day the U.S. Supreme Court announced it would hear Phillips' case, Scardina called Phillips and demanded a custom cake with a "blue exterior and a pink interior" that would "celebrate" a "transition from male to female." EX (Trial) 133. Scardina later demanded another custom cake depicting Satan smoking marijuana. TR (03/22/21) 79:11-22. Phillips politely declined both because he cannot express those messages "for anyone." Pet.App.10. They violate his faith. CF 4824.

The next month, Scardina filed a charge with the Division, alleging Phillips had discriminated based on transgender status by declining to

create the custom gender-transition cake. EX (Trial) 46. Scardina admitted telling Phillips the requested cake expressed a celebratory message:

- 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.*

The request was a setup. Years before, 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. And as for the Satan cake, Scardina never intended to buy it. TR (03/22/21) at 80:9-14. Nor did Scardina believe Phillips would create it. *Id.* at 141:13-17. Scardina sought to "correct" the "errors of [Phillips'] thinking." *Id.* at 141:5-8.

Despite this, within days of the Supreme Court deciding *Masterpiece I*, the Division found probable cause that declining Scardina's request for a gender-transition cake violated CADA. The Division gave one reason for its decision: Phillips' 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." EX (Trial) 137-3.

Phillips then sued Colorado in federal court. EX (Trial) 163. With this federal suit pending, the Commission issued a formal complaint,

alleging Phillips had violated CADA despite accepting that (1) Scardina told Phillips the cake's "design was a reflection of the fact that [Scardina] had transitioned from male to female" and (2) Phillips declined the request "because [he] does not make cakes to celebrate a sex-change." EX (Trial) 138-2. The Commission also scheduled a formal hearing, which occurred February 4, 2019. *Id.* at 138-1.

Meanwhile, Colorado moved to dismiss Phillips' federal suit. The court denied this request—holding that Phillips had sufficiently alleged the State was prosecuting him in "bad faith" because of his "religion." *Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1241 (D. Colo. 2019). Two months later, after Phillips' attorneys uncovered new evidence of officials' ongoing hostility toward Phillips and his faith, Phillips and Colorado settled. TR (03/23/21) 317:11-16.

The Commission then "dismiss[ed] with prejudice" the administrative case against Phillips. EX (Trial) 141; *accord* EX (Trial) 167 (The "Commission unanimously entered an order dismissing with prejudice the administrative proceeding *Scardina v. Masterpiece Cakeshop*, Case No. CR 2018-0012, Charge No. CP2018011310."). On March 22, 2019, the Commission entered a closure order. EX (Trial) 140. Though Scardina intervened in that administrative case, EX (Trial) 139, Scardina did *not* appeal but instead filed this lawsuit. Pet.App.09.

Masterpiece III

This lawsuit mimics *Masterpiece II*. Scardina alleges an identical CADA claim based on Phillips' decision not to create the same custom cake. 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) (West 2019).

Phillips moved to dismiss, arguing the claim is procedurally barred. CF 327. No one may sue under CADA in district court "without first exhausting the proceedings and remedies available … under … part 3" of CADA, C.R.S. § 24-34-306(14) (West 2019)—which allows any complainant "claiming to be aggrieved by a final [Commission] order…, including a refusal to issue [one]," to seek judicial review. C.R.S. § 24-34-307(1).[1] Though Scardina never appealed the Commission's final order, the district court denied Phillips' motion to dismiss. CF 666.

The case went to trial, where Scardina repeatedly agreed that the cake's *design* expressed a message: it 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."). Scardina told Phillips this when requesting the cake. Pet.App.08. And

[1] This summer, the legislature amended C.R.S. § 24-34-306(14) to allow suits under C.R.S. § 24-34-601 in district court without first exhausting CADA procedures. 2023 Colo. Legis. Serv. Ch. 389 (S.B. 23-172) (West). This brief cites the prior CADA version applicable here.

Phillips testified that, while he serves everyone, he cannot create a custom cake expressing that message for anyone. TR (03/23/21) 350:3-352:5, 366:8-367:10.

The court entered judgment against Phillips. It again rejected his procedural argument. Pet.App.26. And it held that, while Phillips would not create the requested cake "for anyone," Pet.App.10—a cake that admittedly "*symbolized* a transition from male to female," Pet.App.13 (emphasis added)—Phillips violated CADA because the cake's message is "inextricably intertwined" with Scardina's status, Pet.App.19. Declining to express the message itself was the problem. And to the court, the requested cake's message was obvious:

- Scardina "explained that the design was a reflection of [the] transition from male-to-female…." Pet.App.13.
- "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 "further testified, 'the blue exterior … represents what society saw [Scardina] as on the time of [Scardina's] birth' and the 'pink interior was reflective of who [Scardina is] as a person on the inside.'" *Id.*
- "The symbolism of the [cake design] is also apparent given the context of gender-reveal cakes…." Pet.App.14.

While an identical-looking cake may have no "inherent" message in another context, Pet.App.23, as the trial court explained, the

requested cake can (and does) express a message in *this* "context," Pet.App.13. Phillips agrees. Pet.App.10.

Despite finding an obvious message, the court rejected Phillips' free-speech defense—believing "the cake design" lacked sufficient intricacy and did not convey "a message attributable" to Phillips. Pet.App.22. It then rejected Phillips' free-exercise defense—excusing CADA's unequal application to religious speakers and applying rational-basis review. Pet.App.25-26.

Phillips appealed, and the court of appeals affirmed—repeating the errors below. Pet.App.29-76. This Court granted review.

ARGUMENT SUMMARY

This Court should reverse because Scardina's CADA claim is procedurally barred, Scardina failed to prove a CADA violation, and the federal and state constitutions protect Phillips' religiously motivated decision not to express a message he does not believe.

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 failed to

do so. Scardina neither exhausted CADA's procedures and remedies nor satisfied CADA's conditions for suing in district court.

Second, 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. He would not create that cake "for anyone." CF 4824. Phillips does not violate CADA when he serves all people but declines to express for anyone messages he does not believe. This is true no matter whether the cake's message "closely correlate[s]" with the customer's protected status. CF 4831.

Third, the Constitution protects Phillips' 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 for three reasons: (I) Scardina's CADA claim is procedurally barred; (II) Scardina did not prove a CADA violation; and (III) the federal and state constitutions forbid Colorado from using CADA to punish Phillips' decision not to create a custom cake expressing a message he does not believe.

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 is reviewed de novo. *See Cont'l Title Co. v. Dist. Ct.*, 645 P.2d 1310, 1316 (Colo. 1982) (CADA's conditions are "prerequisites to district court jurisdiction."); *Thomas v. Fed. Deposit Ins. Corp.*, 255 P.3d 1073, 1077 (Colo. 2011). While such issues can be first raised on appeal, *Herr v. People*, 198 P.3d 108, 111 (Colo. 2008), Phillips preserved this issue below. CF 287-91, 356-58, 4684-86, 4840-41.

A. Scardina did not exhaust CADA's procedures and remedies before suing in district court.

CADA forbids district-court suits unless the plaintiff first exhausts the "proceedings and remedies available" under CADA. C.R.S. § 24-34-306(14). Under C.R.S. § 24-34-307(1)-(2), any "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." Though Scardina

never appealed the Commission's dismissal in *Masterpiece II*, the court below erred in excusing this failure.

1. The Commission's dismissal is a final order.

The Commission's dismissal is a final order. Because CADA never defines "final order," C.R.S. § 24-34-307(1), the Court should interpret this phrase according "to its plain meaning," *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 720 (Colo. 2010). A "final order" "dispos[es] of the entire case." *Order*, Black's Law Dictionary (11th ed. 2019). Colorado's Administrative Procedures Act (APA) similarly defines "order" as "the final disposition … by any agency in any matter other than rule-making," C.R.S. § 24-4-102(10); *cf. V Bar Ranch LLC v. Cotten*, 233 P.3d 1200, 1205 (Colo. 2010) (APA is a "gap-filler."); C.R.S. § 24-4-107. A disposition is a "final settlement or determination." *Disposition*, Black's Law Dictionary (11th ed. 2019). The Commission's dismissal "with prejudice," EX (Trial) 141; EX (Trial) 167, is a final order: it ended the administrative proceeding, leaving "nothing [more] to be resolved," *Foothills Meadow v. Myers*, 832 P.2d 1097, 1098 (Colo. App. 1992).

The court below rejected this logic, believing the Commission's dismissal lacked "indicia of a final order." Pet.App.43. It said an administrative "dismissal with prejudice" cannot be a "final order" because that "would always preclude" civil suits that C.R.S. § 24-34-306(14) "expressly" allows. Pet.App.44. But that begs the question. The court

assumed that administrative complainants cannot appeal such dismissals under C.R.S. § 24-34-307(1)-(2) and so exhaust CADA's procedures before suing in district court. It also assumed that all agency dismissals are with prejudice. Not so. The court then said the dismissal with prejudice followed "no hearing … on the merits," did not adjudicate the complaint, and made "no determination of the legal rights." Pet.App.42 (citing *Demetry v. Colo. C.R. Comm'n*, 752 P.2d 1070, 1072 (Colo. App. 1988)). The court below misapplied the test for final orders in addition to misapprehending what happened in *Masterpiece II*.

To determine whether agency action is a final order, this Court considers its "legal effect" rather than its "form." *Levine v. Empire Sav. & Loan Ass'n*, 192 Colo. 188, 189 (Colo. 1976); *accord United States v. Bell*, 724 P.2d 631, 646 (Colo. 1986); *Cyr v. Dist. Ct. In & For City & Cnty. of Denver*, 685 P.2d 769, 771 (Colo. 1984). A final order marks "the consummation of the agency's decision-making process" and either determines "rights or obligations" or imposes "legal consequences." *Doe 1 v. Colo. Dep't of Pub. Health & Env't*, 451 P.3d 851, 858-59 (Colo. 2019). This same test applies to determine when federal agency action is a final order consistent with 5 U.S.C. § 551(6), a provision identical to C.R.S. § 24-4-102(10). *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (recognizing this test); *Sw. Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016) (applying this test to determine whether agency action is a "final order" consistent with 5 U.S.C. § 551(6)).

This test is practical. *U.S. Army Corps of Engineers v Hawkes Co., Inc.*, 578 U.S. 590, 599 (2016). The court of appeals made it technical, elevating an order's "form" over its "effect." Agencies can issue final orders without holding a hearing, *e.g. Indus. Claim Appeals Off. v. Orth*, 965 P.2d 1246, 1253 (Colo. 1998); *Agnello v. Adolph Coors Co.*, 689 P.2d 1162, 1163 (Colo. App. 1984), issuing findings, *e.g. Thompson v. Gorman*, 939 N.E.2d 573, 576-77 (Ill. App. 2010); *One Way Liquors, Inc. v. Byrne*, 435 N.E.2d 144, 148-49 (Ill. App. 1982), adjudicating a complaint, *e.g. W. Colo. Motors, LLC v. Gen. Motors, LLC*, 411 P.3d 1068, 1077 (Colo. App. 2016); *Marks v. Gessler*, 350 P.3d 883, 893-95 (Colo. App. 2013), or determining claims, *e.g. Teen Challenge of Ky., Inc. v. Ky. Comm'n on Hum. Rts.*, 577 S.W.3d 472, 482-84 (Ky. App. 2019); *Timus v. D.C. Dep't of Hum. Rts.*, 633 A.2d 751, 757-58 (D.C. 1993). While the Commission's dismissal had many of these traits, its form mainly provides context for the test's ultimate goal—determining the order's *legal effect*.

Here, no one disputes that the Commission's dismissal "with prejudice" ended the administrative proceeding. EX (Trial) 141. It also imposed legal consequences. The Commission's dismissal ensured that Phillips would not face the same claims again or be subject to the penalties allowed in C.R.S. § 24-34-306(9). It limited Phillips' liability and bound future agency action, which both determined "legal rights" and "obligations" and imposed "legal consequences." *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162, 167-68 (6th Cir. 2017) ("actions that legally bind

an agency … from pursuing a particular course of action cause[s] legal consequences”); *accord Hawkes*, 578 U.S. at 598 (same for orders providing “safe harbor from … proceedings”); *Cactus Canyon Quarries, Inc. v. Fed. Mine Safety & Health Rev. Comm’n*, 820 F.3d 12, 18-19 (D.C. Cir. 2016) (same for orders protecting against penalties); *Am. Wild Horse Campaign v. Bernhardt*, 442 F. Supp. 3d 127, 149 (D.D.C. 2020).

The lower court said otherwise, invoking *Demetry*, yet the Commission in that case affirmed a no-probable-cause determination, 752 P.2d at 1071-72, merely preparing for some *future* litigation, *State, Dep’t of Fish & Game, Sport Fish Div. v. Meyer*, 906 P.2d 1365, 1372 (Alaska 1995) (“EEOC investigation is merely preparatory to [litigation].”); *cf. Ward v. EEOC*, 719 F.2d 311, 313 (9th Cir. 1983) (same). Here, the Commission *initiated litigation* against Phillips. It issued a formal complaint and started a hearing. The dismissal ended that litigation, and the parties are “not where they were before the [administrative] complaint was filed.” *Green Aviation Mgmt. Co., LLC v. FAA*, 676 F.3d 200, 204 (D.C. Cir. 2012) (cleaned up). Phillips is “protected” from penalties allowed in C.R.S. § 24-34-306(9), Scardina’s claim is dismissed, and the Commission cannot “re-file a complaint based on the same set of facts because the dismissal with prejudice” prevents it. *Id.* at 204-05; *see id.* at 205 (such dismissal “has *res judicata* effect”).

What’s more, the Commission’s dismissal followed an agency settlement with Phillips. Settlement is a type of “disposition.” *Indep. Coffee*

& Spice Co. v. Taylor, 48 P.2d 798, 799 (Colo. 1935). The parties agreed that Phillips would dismiss with prejudice his federal suit against the Commission if the Commission would dismiss with prejudice its administrative suit against Phillips. TR (03/23/21) 317:11-16; EX (Trial) 167. This settlement both relieved Phillips from CADA liability and required him to dismiss federal claims, some of which he could not litigate before the agency. So the Commission's dismissal triggered Phillips' obligation to dismiss his federal suit while serving as an "order approving a settlement"—which this Court considers a "final order." *Orth*, 965 P.2d at 1253; *see Archibold v. Pub. Utils. Comm'n of the State of Colo.*, 933 P.2d 1323, 1326 (Colo. 1997) (dismissal after settlement "definitive[ly] resol[ved]" administrative "proceedings").

These effects show that the Commission's dismissal ended the administrative proceeding and imposed legal consequences. Far from lacking indicia of finality, the dismissal with prejudice is both "a final judgment," *Foothills Meadow*, 832 P.2d at 1098, and "an adjudication on the merits," *O'Done v. Shulman*, 238 P.2d 1117, 1118 (Colo. 1951); *accord Lake Meredith Reservoir Co. v. Amity Mut. Irrigation Co.*, 698 P.2d 1340, 1343 n.4 (Colo. 1985) (Dismissal with prejudice "resolve[s a claim] on the merits and is a final judgment that may be appealed."). The dismissal also ended an adjudicatory hearing that had already begun. So the dismissal's *form* confirms its *effect*. It meant that Scardina must appeal the order to exhaust CADA's procedures *before* suing in district court. *See*

C.R.S. §§ 24-34-306(14), 24-34-307(1). Practically, this interpretation also ensures that the phrase "dismissal with prejudice" is "meaningful." *Green*, 676 F.3d at 205. The Commission's dismissal is a final order.

2. Alternatively, the Commission's dismissal is a refusal to issue an order.

The Commission's dismissal is a final order, but even on the lower court's logic, the dismissal is at least "a refusal to issue an order," which is also appealable under C.R.S. § 24-34-307(1) ("Any complainant … claiming to be aggrieved by … a refusal to issue an order, may obtain judicial review."). The court of appeals never addressed this argument.

Administrative parties are entitled to an order when a statute requires it. *See O'Bryant v. Pub. Utils. Comm'n of State of Colo.*, 778 P.2d 648, 653 (Colo. 1989) (holding reviewable agency action disregarding "statutory responsibilities"); *see Allen v. State, Dep't of Revenue, Child Supp. Enf't Div.*, 15 P.3d 743, 747 (Alaska 2000) (A "ruling that blocks access to" agency "process is an appealable decision."). After the Commission begins an adjudicatory hearing, CADA requires the agency to conduct the hearing "in accordance with [C.R.S. §] 24-4-105," C.R.S. § 24-34-306(8) ("The hearing *shall* be conducted…." (emphasis added)), and issue an order giving "the reasons" for its decision, *id.* ("[T]he decision shall also include a statement of the reasons why the findings of fact lead to the conclusions."); *see* C.R.S. § 24-4-105(2)(a) (Administrative "parties are entitled to a hearing and decision in conformity with this section.").

This order *must* go one of two ways. If after reviewing the evidence, the Commission provides "a statement of findings and conclusions in accordance with [C.R.S. §] 24-4-105, together with a statement of reasons for such conclusions, showing that [an administrative] respondent has [violated CADA], the [C]ommission *shall* issue … an order" imposing penalties. C.R.S. § 24-34-306(9) (emphasis added). But if after reviewing the evidence, the Commission provides "a statement of findings and conclusions in accordance with [C.R.S. §] 24-4-105, together with a statement of reasons for such conclusions, showing that a respondent has not [violated CADA], the [C]ommission *shall* issue … an order dismissing the complaint." C.R.S. § 24-34-306(10) (emphasis added). Because CADA uses mandatory text ("shall"), the Commission's path is binary.

After the Commission begins a hearing, CADA removes the agency's discretion to eschew this process. This rule is normal, and violations are reviewable. In *Dunlop v. Bachowski*, 421 U.S. 560 (1975), for example, the U.S. Supreme Court held reviewable a federal agency's decision not to pursue litigation because a statute "withdrew [such] discretion from the agency and provided guidelines" for how the agency should proceed. *Heckler v. Chaney*, 470 U.S. 821, 834 (1985). Many courts likewise hold reviewable agency action that evades statutory process, depriving complainants of orders they deserve. *E.g.*, *Meyer*, 906 P.2d at 1368-74 (reviewing dismissal when complainant had "statutory right" to decision "on the merits"); *Jones v. Ill. Dep't of Hum. Rts.*, 515 N.E.2d

1255, 1256-57 (Ill. App. 1987) (reviewing "dismiss[al] with prejudice" after agency did "not follow … statutory procedures"); *Teen Challenge*, 577 S.W.3d at 480-84 (reviewing "dismissal without prejudice" after agency refused to issue "probable cause determination" contrary to statute).

For this alternative argument, the Court can even assume that the Commission misapplied CADA. After starting the hearing, the Commission did not (a) complete the hearing in accordance with C.R.S. § 24-4-105, (b) issue findings and conclusions, or (c) provide reasons for its dismissal. *See* C.R.S. § 24-34-306(9)-(10). While CADA does not limit reviewability to orders that follow this process, *e.g. Agnello*, 689 P.2d 1162, 1163 (reviewing order approving settlement), because CADA requires the Commission to issue an order conforming to C.R.S. § 24-34-306(9)-(10) after a hearing begins, complainants become "entitled to" such an order, C.R.S. § 24-4-105(2)(a), and they can appeal when the agency refuses to issue one, C.R.S. § 24-34-307(1); *see O'Bryant*, 778 P.2d at 653. As the court below alluded, refusing this process "could deprive [complainants] of the right to present their claims." Pet.App.48. But CADA gives the solution: appeal the "refusal," C.R.S. § 24-34-307(1). Scardina didn't do that.

3. Scardina was aggrieved by the dismissal.

CADA allows "[a]ny complainant … claiming to be aggrieved by a final [Commission] order," or "a refusal to issue an order," to seek

"judicial review." C.R.S. § 24-34-307(1). To appeal, Scardina only had to "allege[] an actual injury from the" dismissal and show the "injury is to a legally protected or cognizable interest." *O'Bryant*, 778 P.2d at 652. That test is met. Scardina was the "[c]omplainant" in the Commission proceeding, EX (Trial) 138-1, and was aggrieved by its dismissal.

First, the Commission's dismissal injured Scardina. This standard is relaxed for "administrative action." *O'Bryant*, 778 P.2d at 653. Actual injury is not required; a threat is enough. *Id.* And the "alleged injury" need not be "severe"—only "sufficiently direct and palpable" for a court to fairly believe "there is an actual controversy proper for judicial" review. *Id.* Like other complainants whose CADA claim is dismissed after the Commission begins a hearing, Scardina lost the "opportunity to seek" a cease-and-desist order and "obligat[e]" Phillips to reporting and re-education requirements. *Id.*; *see* C.R.S. § 24-34-306(9). Scardina also lost the right "to require the" Commission "to conform its actions to" CADA's rules and "to ensure that the" Commission acts "consistent with [its] statutory responsibilities." *O'Bryant*, 778 P.2d at 653. These injuries are "direct" and significant.

Second, the Commission's dismissal "is an injury to [Scardina's] legal interest." *Id.* Scardina's CADA claim was dismissed with prejudice, ensuring Phillips would not face penalties allowed in C.R.S. § 24-34-306(9). § I.A.1. And because Colorado law "requires the" Commission "to enforce" CADA and "obey" its statutory duties, *id.*; *see* C.R.S. §§ 24-34-

305(1)(d), 24-34-306(8)-(9), C.R.S. § 24-4-105(2)(a) (Administrative "parties are entitled to a hearing and decision in conformity with this section."), Scardina had "a legally protected … interest in ensuring that" the Commission "complies with" its duties. *O'Bryant*, 778 P.2d at 654. Because the agency arguably failed to do so, § I.A.2, Scardina could have "challenge[d]" the "dismissal," but refused. *O'Bryant*, 778 P.2d at 654; *see G.W. v. Ringwood Bd. of Educ.*, 28 F.4th 465, 471 (3d Cir. 2022) (party "aggrieved … when they [can] challenge … basis" of order).

4. Scardina refused to appeal.

CADA protects aggrieved parties. C.R.S. § 24-34-307(2)-(3). Scardina should have "move[d] the court [of appeals] to remit the case," ordering the Commission to adduce "evidence" and provide "findings" supporting its decision, C.R.S. § 24-34-307(5), or to take *any* action the Commission "unlawfully withheld," C.R.S. § 24-4-106(7)(b). Then the court could have "set[ ] aside" the dismissal for *any* "just" reason, C.R.S. § 24-34-307(3), and "remand[ed] the case for further proceedings," C.R.S. § 24-4-106(7)(b). Again, this should surprise no one. Complainants routinely obtain such relief in Colorado, *e.g. Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc.*, 355 P.2d 83, 85 (Colo. 1960), and elsewhere, *e.g.*, *Madeja v. Whitehall Twp.*, 457 A.2d 603, 606-07 (Pa. Commw. Ct. 1983) (Where order lacks "findings and reasons, the remedy

is a remand to the agency to make [them]."); *One Way*, 435 N.E.2d at 148-49; *Thompson*, 939 N.E.2d at 574, 577. But Scardina didn't appeal.

That means Scardina didn't exhaust CADA's procedures. No one disputes that Scardina never satisfied the express exceptions to CADA's judicial review requirement. The Division issued a probable-cause determination, EX (Trial) 137; *see* C.R.S. § 24-34-306(2)(b)(I); Scardina never received a right-to-sue letter; CF 4823; *see* C.R.S. § 24-34-306(15); and the Commission never lost jurisdiction, Pet.App.46; *see* C.R.S. § 24-34-306(11). Instead, the Commission *exercised* its jurisdiction by dismissing its complaint with prejudice. When the Commission exercises its jurisdiction—whether by approving a settlement, *e.g.* C.R.S. § 24-34-306(2)(b)(II), or dismissing commenced litigation, C.R.S. § 24-34-306(4)-(10)—its order necessarily imposes legal consequences, either by concluding litigation, binding future party action, or resolving the dispute. § I.A.1. The Commission's dismissal did all that here.

To be sure, the Commission's dismissal said Scardina exhausted "*administrative* proceedings," EX (Trial) 140 (emphasis added), but Scardina never exhausted "*the proceedings and remedies available*" under CADA, C.R.S. § 24-34-306(14) (emphasis added), which include *judicial* review. C.R.S. § 24-34-307(1)-(2); *e.g. Agnello*, 689 P.2d at 1165; CF 614 (showing complainant appealed from Commission order saying she had "fulfilled the requirement for full pursuit of administrative remedies"). And though Scardina's objection to the Commission's settlement may

have been relevant *on* appeal, *e.g. O'Bryant*, 778 P.2d at 656; *but see* 3 CCR 708-1, Rule 10.5(D)(5) (allowing settlement over complainant objection), it wasn't *to obtain an* appeal, *e.g. Agnello*, 689 P.2d at 1165 (allowing appeal when complainant objected to agency settlement); *O'Bryant*, 778 P.2d at 652, 655 (same when complainant never participated in settlement); *see* § I.A.2-3. Scardina neglected available relief.

5. CADA's exhaustion rule is just.

Scardina's CADA claim is now barred. It's no answer to say Scardina "did not acquiesce" in the dismissal or settlement. Pet.App.44. That assumption about Scardina's acquiescence is incorrect, and it would not change the dismissal's *effect* in any event. § I.A.1-3.

CADA requires complainants to pursue one of two remedies. They can litigate before the Commission, seeking injunctive relief. C.R.S. § 24-34-306(8)-(9), or sue in district court, chasing a $500 fine. C.R.S. § 24-34-602(1)(a); *see* C.R.S. § 24-34-602(3) (describing these as "alternative" paths). At *any time*, Scardina could have requested a right-to-sue letter before the Commission issued its formal complaint. C.R.S. § 24-34-306(15). That request would have been *automatically* granted. *Id.* When the Commission issued its complaint, Scardina *acquiesced* to agency resolution unless the Commission missed a deadline. *See* C.R.S. § 24-34-306(11). The Commission never missed a deadline.

Scardina—at all times represented by seasoned counsel—*chose* the Commission. While Scardina had over 400 days to obtain a right-to-sue letter, Scardina did not request one. CF 4823. That was deliberate. The agency issued its probable-cause determination against Phillips mere days after he won at the U.S. Supreme Court. EX (Trial) 137-4. And CADA would *require* an injunction if Phillips lost before a hostile Commission. *See* C.R.S. § 24-34-306(9); *Masterpiece*, 138 S. Ct. at 1732 (noting Commission's "hostility" against Phillips). What's $500 when you could get an injunction? So Scardina *chose* the Commission, knowing that would mean less control over the litigation, 3 CCR 708-1, Rule 10.8(A)(5), but harsher punishment for Phillips. That gamble backfired. After new evidence emerged showing the Commission's ongoing hostility against Phillips, the complaint was dismissed.

Even then Scardina could have appealed. § I.A.1-3. But Scardina gambled *again*, suing in district court before exhausting CADA's procedures. Now Scardina wants a judicial bailout that would doubly punish Phillips and excuse future CADA complainants from appealing future Commission orders, including those denying due process. This Court should deny that injustice.

Imagine if Phillips had paid $1,000,000.00 to settle the administrative suit. On Scardina's theory, this would only buy Phillips more litigation. No respondent would settle with the Commission only to face new and more expensive litigation. Scardina's theory would also punish

future *complainants*, forbidding appeals when the Commission denies them hearings, findings, orders, and other important rights. Not everyone wants or can afford to sue. Indeed, Scardina's argument would feel very different if a different complainant had followed CADA's procedures and a respondent argued that this complainant had no right to appeal, must go to superior court, and must forgo her ability to obtain injunctive relief. More careful complainants should not suffer for Scardina's recklessness here.

Finally, CADA's exhaustion rule "conserv[es] judicial resources," allows the Commission "to correct[ ] its own errors," and respects the agency's "expertise." *Colo. Stormwater Council v. Water Quality Control Div. of the Colo. Dep't of Pub. Health & Env't*, 529 P.3d 134, 138 (Colo. App. 2023); *see City & Cnty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212-13 (Colo. 2000). It also avoids "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. If someone could seek relief from the Commission, participate in a hearing, receive an adverse dismissal, fail to object, decline to appeal, and then start over elsewhere, the Commission would become merely advisory and its closure orders invitations for needless litigation. That's a waste of resources. And CADA forbids it. Because Scardina didn't appeal the Commission's dismissal with prejudice, the CADA claim is barred.

B. Claim preclusion bars Scardina's CADA claim.

Claim preclusion applies when (1) the judgment in a prior proceeding was final, (2) the current and prior proceedings involve identical subject matter, (3) the proceedings involve identical claims, and (4) the parties are identical or in privity with one another. *Foster v. Plock*, 394 P.3d 1119, 1123 (Colo. 2017). Each element is met here.

First, the Commission entered a final order in the administrative case. § I.A. After the Commission voted to "dismiss with prejudice," EX (Trial) 141, the agency closed the case on March 22, 2019. EX (Trial) 140. Scardina had 49 days to appeal but refused. 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 subject matter identical to the administrative case. The Commission issued a formal complaint against Phillips concerning his decision not to create the exact custom gender-transition cake at issue here. CF 4822-23.

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, both suits 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." *K9Shrink, LLC v. Ridgewood Meadows Water & Homeowner's Ass'n*, 278 P.3d 372, 375

(Colo. App. 2011); *see* C.R.S. § 24-34-307(1)-(2). The Commission notified Scardina of its dismissal. EX (Trial) 140-2. And Scardina had an opportunity to appeal, § I.A, but Scardina didn't do so.

Scardina's CADA claim is barred. Scardina had one chance to sue Phillips; Scardina should not be given another.

II. Scardina did not prove a CADA violation.

To prove a CADA violation, Scardina must show that Phillips treated Scardina *differently* because of transgender *status*, and that CADA's "offensiveness" rule does not apply. *Masterpiece*, 138 S. Ct. at 1731. The court below wrongly held that Scardina met this burden because the cake's message closely correlated with Scardina's status. Pet.App.58. The Court reviews that legal conclusion de novo. *State Farm Mutual Auto. Ins. Co. v. Johnson*, 396 P.3d 651, 654 (Colo. 2017). Phillips preserved this issue below. Pet.App.58-59.

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. Pet.App.57. This means Scardina's transgender status had to be the *decisive* factor in Phillips' 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 Phillips was punished anyway.

The trial court found 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 finding shows that Scardina's status was not a factor—much less the *decisive* factor—in Phillips' decision. Yet the court below said Phillips violated CADA because the cake's message is "inextricably intertwined" with Scardina's status, Pet.App.58, which makes Phillips' message-based decision—evenly applied to all customers—status-based discrimination. Not so. That's like saying a black artist's refusal to create a custom white-cross cake promoting racist views for the Aryan Nation Church is religious discrimination. *See Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263, 276 (1st Cir. 2022) (rejecting Title VII claim when Whole Foods applied no-slogan policy to prevent employees from wearing "Black Lives Matter" masks).

To reach this flawed conclusion, the courts below misapplied federal precedents that rejected distinctions between *another's status* and *her conduct*—not distinctions between a person's own *speech* and *another's status*. No matter what courts say about the former, they approve the latter. *See Hurley v. Irish-Am Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995) (distinguishing objection to "homosexuals" from "disagreement" with message); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 760 (8th Cir. 2019); *Brush & Nib Studio, LC v. City of Phoenix*,

448 P.3d 890, 910 (Ariz. 2019); *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 258 n.8 (Utah 1994); *Domen v. Vimeo, Inc.*, No. 20-616-CV, 2021 WL 4352312, at *4 (2d Cir. Sept. 24, 2021). This distinction is critical to protecting free speech.

As in *303 Creative*, no one disputes that Phillips will "gladly create custom" cakes for anyone "so long as the custom" cakes do not promote messages that "violate [his] beliefs." *303 Creative LLC v. Elenis*, 600 U.S. 570, 594-95 (2023); *see* Pet.App.9-10 (finding Phillips cannot create "custom cakes that express messages [violating] his" beliefs for anyone). This evenly applied rule doesn't violate CADA. *303 Creative*, 600 U.S. at 594. Even Colorado *itself* has distinguished message-based decisions from "status-based discrimination" to protect other artists—just not Phillips. *Id.* at 595 n.3; *see Masterpiece*, 138 S. Ct. at 1728-30; EX (Trial) 148, 149, 150, 151, 152, 153. Phillips must be treated like other artists who serve everyone but cannot express every message. The court erred in failing to do so.

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

The Commission has applied CADA to protect speakers who decline to express messages that contradict their beliefs. *Masterpiece*, 138 S. Ct. at 1728-30; § II.A. For good reason. CADA cannot require what the Constitution forbids. Yet the court below would not apply that rule to

protect Phillips, repeating an error that the U.S. Supreme Court condemned in *Masterpiece*.

During Phillips' first suit, a religious man asked three other cake shops "to create cakes with images" and messages criticizing "same-sex marriage." *Masterpiece*, 138 S. Ct. at 1730. After the shops refused because they found the messages offensive, the man filed religious-discrimination charges. The Division deferred to the message-based objection of those cake shops, refused to consider third-party perceptions, and held "that [those shops] acted lawfully in refusing service." *Id.* The Commission agreed—establishing that Colorado applies CADA using an "offensiveness" rule that allows cake artists "to decline to create specific messages [they] consider[] offensive." *Id.* at 1728, 1731.

That rule protects Phillips here. This Court should "defer[ ] to the reasonable interpretations of the administrative agencies that … enforce a particular statute." *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004). Those interpretations come from agency "guidance, rules, and determinations"—like the no-probable-cause determinations noted above. *Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs of Summit Cnty.*, 199 P.3d 718, 731 (Colo. 2009). The "offensiveness rule" is reasonable—when evenly applied—because it ensures CADA complies "with the [federal and state] constitutions." C.R.S. § 2-4-201(1)(a). The courts below wrongly discriminated against Phillips *again*.

To avoid repeating this error, this Court should apply CADA's offensiveness rule to protect *all* creators of speech—including Phillips here.

III. The federal and state constitutions protect Phillips' religiously motivated decision not to convey a message.

The court below punished Phillips' religiously motivated decision not to express a message. Pet.App.63-75. That violates Phillips' 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); *see Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). Phillips preserved these issues below. CF 4689-95, 4733-38.

A. CADA punishes Phillips' 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 below ruled that CADA could compel Phillips to convey that message anyway. In its view, the cake wasn't speech because it had no inherent message, or at least one that third parties would attribute to Phillips. Pet.App.70-71. 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 compelled-speech protection.

The freedom from compelled speech applies when there is "(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); *accord Hurley*, 515 U.S. at 566-68; *303 Creative*, 600 U.S. at 587, 596. Because these elements were met, CADA's coercion is per se unconstitutional, *id.* at 592, or it must at least pass strict scrutiny, *see Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal. (PG&E)*, 475 U.S. 1, 13 (1986), which Scardina has never proved.

CADA may not "compel" Phillips—who engages in "nearly identical conduct" to other protected artists, *303 Creative*, 600 U.S. at 583—to create speech [he] does not believe." *Id.* at 597; *see id.* at 584-603.

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 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 U.S. Supreme Court has articulated a two-part inquiry to test for speech: (1) whether conduct "is intended to be communicative," and (2) "in context, would reasonably be understood by the viewer to be communicative." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *accord Texas v. Johnson*, 491 U.S. 397, 404 (1989). No "particularized" message is required. *Hurley*, 515 U.S. at 569; *Curious Theater Co. v. Colo. Dep't of Pub. Health & Env't*, 216 P.3d 71, 79-80 (Colo. App. 2008). Scardina's requested cake easily satisfies both parts.

The first prong is automatically satisfied in compelled-speech cases like this. *See Cressman v. Thompson*, 719 F.3d 1139, 1154 n.15 (10th Cir. 2013) (*Cressman I*). As for the second, people viewing the cake—including Scardina—would know that the design "symbolized" a gender transition. CF 4827. To determine this, the Court should consider cultural context, *Spence v. Wash.*, 418 U.S. 405, 410 (1974), the requester's stated purpose, *Hurley*, 515 U.S. at 570; *Cressman II*, 798 F.3d at 959, and its intended use, *Spence*, 418 U.S. at 410; *Johnson*, 491 U.S. at 405. For example, while no one thinks a black armband standing alone is inherently expressive on an average Sunday, that black armband worn during

the Vietnam War "conveyed an unmistakable message." *Spence*, 418 U.S. at 410.

That same logic applies here. The trial court said the "requested cake … *symbolized a transition from male to female*," Pet.App.13 (emphasis added). It amply justified this finding. The "color blue … represents male"; the "color pink … represents female." Pet.App.13. More specifically, the cake's blue exterior "represents" how "society" viewed Scardina at "birth," while its pink interior "reflect[s] who [Scardina is] … on the inside."' *Id.* Everyone knew this. When requesting the cake, Scardina explicitly told Phillips that this was the exact message the requested cake would convey, Pet.App.8. This context is decisive.

The court below wrongly applied a much stricter test, holding that the requested cake is not speech because its message "would not be attributed" to Phillips. Pet.App.71. But whether the cake is speech does not turn on whether others would attribute its message to Phillips. *See 303 Creative*, 600 U.S. at 588 ("[T]he wedding websites Ms. Smith seeks to create involve *her* speech" because she created them). Phillips' custom cake art is *his* "speech" even though it "may combine with the [customer's] in the final product." *Id.*

Accordingly, the requested cake is protected speech. *See 303 Creative*, 600 U.S. at 587, 600 (protecting "[a]ll manner of speech"—including "expressive conduct" like "symbols" created by cake artists); *cf. id.* at 590

(citing Creative Professionals amicus brief showing CADA's threat to cake artists).

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. He would not express this message "for anyone." CF 4824. This evenly applied message-based rule is constitutionally protected. *See 303 Creative*, 600 U.S. at 570, 594-95; *Hurley*, 515 U.S. at 572-73.

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 303 Creative*, 600 U.S. at 586, 596; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 243-46 (1974); *PG&E*, 475 U.S. 1, 15 n.11.

Here, Phillips serves everyone—including those who identify as LGBT. TR (03/22/21) 245:22-246:1; 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. The same goes for the requested cake here. CF 4824. Phillips objected to the cake's message, and his free speech rights protect his freedom to do so.

3. The government is punishing Phillips, so constitutional protections apply.

Scardina seeks "to enlist the" court to punish Phillips' decision not to express a message. *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 442 (S.D.N.Y. 2014). That kind of government action is 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). And it's prohibited.

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' 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 does so only because of Phillips' 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

"ideas" the government disagrees with. *Id*. So at least strict scrutiny applies. *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. 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 discriminating against "religious conduct." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004). When officials target religion, that's a per se constitutional violation. *Masterpiece*, 138 S. Ct. at 1731. CADA's application to Phillips here violates free exercise.

The court below wrongly held that CADA's offensiveness rule does not protect Phillips. In *Masterpiece*, the Court recognized that Colorado interprets CADA to contain an "offensiveness" rule, which allows cake artists to decline "messages" they find "offensive." 138 S. Ct. at 1728, 1731. As discussed, the State (including the appeals court) had interpreted this rule to protect three secular cake artists but wrongly denied its protection to Phillips. *Id.* at 1730-31. Because nothing shows the State has renounced this rule, it protects Phillips here. But the court below repeated its prior error, denying Phillips protection on a discriminatory basis.

The court below refused to apply CADA's offensiveness rule to protect Phillips because in its view the requested cake "expressed no message." Pet.App.62; *but see* Pet.App.68 (suggesting the cake "convey[ed] information"); Pet.App.13 (finding "the requested cake … symbolized a transition from male to female"). In so concluding, the court considered whether third parties would attribute the cake's message to Phillips, Pet.App.70-71, something it did not consider when secular artists refused cakes based on their message, *Masterpiece*, 138 S. Ct. at 1730. That unequal analysis, which is incorrect as a matter of free speech, *see* § III.A, reflects a "disparate consideration" that violates free exercise. *Masterpiece*, 138 S. Ct. at 1732.

It's no answer to say this rule doesn't exist now or shouldn't exist moving forward. It existed when Phillips declined to create Scardina's requested cake. *See id.* at 1728, 1731. *Masterpiece* requires the offensiveness rule to be applied evenly to everyone (including Phillips) at the time it was in effect. *E.g. Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261-63 (2020) (rejecting court's attempt to eliminate religious discrimination by erasing benefit for everyone). Due process ensures that this Court can't retroactively "sweep away settled expectations suddenly and without individualized consideration." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994). Phillips would have no "fair warning" of such a change. *Id.* at 267. The "legal effect" of his message-based decision

should be assessed "under the law that existed when" that decision was made. *Id.* at 265.

Phillips also faced unique CADA proceedings because of his faith. When beer companies face a CADA charge, settle without complainant's explicit consent, and are sued in district court before the complainant exhausts appeal, Colorado courts dismiss the suit for lack of jurisdiction. *See* § I; *Agnello v. Adolph Coors Co.*, 695 P.2d 311, 312 (Colo. App. 1984) (recognizing the trial court dismissed because plaintiff did not exhaust through "appellate conclusions"); *id.* at 313 (district court lacked "jurisdiction" because settlement "efforts were successful"). But when Phillips faces a CADA complaint, settles without complainant's explicit consent, and is sued without the complainant appealing, he's punished. The relevant difference: Phillips' faith. This discrimination violates free exercise. *Masterpiece*, 138 S. Ct. at 1732 (condemning such "disparate" treatment).

This unequal treatment shows that 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); *accord 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 distinctions while punishing Phillips' message-based distinctions. The court of appeals ignored this argument. And it excused the trial court's "impermissible

hostility" toward Phillips' faith, *Masterpiece*, 138 S. Ct. at 1729—the trial court wrongly inferred from Phillips' decision to avoid pronouns at trial that customers' backgrounds inform whether Phillips will serve them, Pet.App.74, when the trial court knew Phillips did so to respect Scardina while honoring his faith, CF 4236-47. The courts below thus punished Phillips for respectful speech the U.S. Constitution protects. *See Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

D. CADA's application cannot satisfy strict scrutiny.

Because this application of CADA violates Phillips' constitutional rights, it 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 serve no compelling interest when they compel speech, *303 Creative*, 600 U.S. at 592, or selectively punish religious conduct, *Fulton*, 141 S. Ct. at 1881-82. And punishing Phillips' 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, consistent with *303 Creative*. 600 U.S. at 602-03. Many courts already do this. § II.A (collecting cases). Even Colorado does this—sometimes. § II.B. And just as CADA already allows sex distinctions having "a bona fide relations to the goods" or "services" offered,

Colorado could allow message-based distinctions having a bona fide relationship to expressive services. The State could also 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 constitutional freedoms. Punishing Phillips does not.

CONCLUSION

Phillips has been in court over a decade defending his freedom—and the freedom of all Americans—to decline to express what they do not believe. And he's faced hostility at every turn. That must stop. People of faith—like anyone else—should be "fully welcome in Colorado's business community." *Masterpiece*, 138 S. Ct. at 1729. They should not be forced to choose between their faith and their livelihood. *Id.* Here, this Court can ensure that Colorado will be diverse and free for *all*. This Court should reverse the judgment below.

Respectfully submitted this 19th day of December, 2023.

By: */s/ Jacob P. Warner*

Samuel M. Ventola
1775 Sherman Street, Suite 1650
Denver, CO 80203
(303) 864-9797
(303) 496-6161 (facsimile)
sam@samventola.com
Colorado Bar No. 18030

John J. Bursch*
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001
(202) 393-8690
(202) 347-3622 (facsimile)
jbursch@adflegal.org
Michigan Bar No. P57679

Jonathan A. Scruggs*
Jacob P. Warner*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 (facsimile)
jscruggs@adflegal.org
jwarner@adflegal.org
Arizona Bar No. 030505
Arizona Bar No. 033894

**Admission Pro Hac Vice*

Attorneys for Plaintiffs/Appellants/Petitioners

CERTIFICATE OF SERVICE

I certify that I have on this 19th day of December, 2023, filed a copy of the foregoing opening brief via the Colorado Courts E-Filing system, which effects service on all parties and/or their counsel of record.

/s/ Jacob P. Warner
Jacob P. Warner