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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On appeal from: Colorado Court of Appeals Judges: T. Schutz, S. Dunn, M. Grove Case No.: 2021CA1142 Denver District Court Judge: The Hon. A. Bruce Jones Case No.: 2019CV32214	
Petitioners: MASTERPIECE CAKESHOP INC., and JACK PHILLIPS, and **Respondent:** AUTUMN SCARDINA.	**↑ COURT USE ONLY ↑**
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MS. SCARDINA'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 9,310 words; this brief does not exceed 9,500 words.

This brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7) and/or C.A.R. 28(b). In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether the appellee agrees with appellant's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that this 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 M. McHugh

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ISSUES PRESENTED

Ms. Scardina requested a simple pink cake with blue icing for her birthday. Defendants refused to serve her after learning that Ms. Scardina is transgender and that the colors reflected that identity. Ms. Scardina filed a complaint with the Colorado Civil Rights Commission. After Defendants filed a lawsuit against the Commission, the Commission and Defendants entered into a settlement without Ms. Scardina's knowledge or participation. Based on the settlement, the agency proceeding was dismissed with a finding that Ms. Scardina had exhausted administrative proceedings.

Ms. Scardina then filed this action. After a trial, the court found that Defendants refused to serve Ms. Scardina "because of" her transgender status. The Court of Appeals affirmed. This Court then granted review on the following issues:

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

2. [REFRAMED] Whether the decision by Masterpiece Cakeshop, Inc. and Phillips not to create a pink cake with blue frosting that was to be used to celebrate a gender transition violated CADA's prohibition on transgender-status discrimination.

3. [REFRAMED] Whether the decision by Masterpiece Cakeshop, Inc. and Phillips not to create a pink cake with blue frosting that was to be used to celebrate a gender transition was protected by the First Amendment.

Defendants' Opening Brief ("DB") fails to present questions two and three as reframed by this Court. DB 2; *see* 10/3/23 Order. Defendants do not explain or justify that decision.

INTRODUCTION

"It is unexceptional that Colorado law can protect [LGBT+] persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 632 (2018) (*Masterpiece I*). Defendants have a history of discriminating against LGBT+ customers on the basis of their LGBT+ identity. Indeed, Defendants have a religious objection to recognizing LGBT+ people as who they are—LGBT+ people.

In response to a prior discrimination charge filed against them by a gay couple, Defendants publicly and repeatedly claimed that they would be "happy" to provide a birthday cake for LGBT+ people. Sincerely believing them, Ms. Scardina requested a simple pink cake with blue frosting for her birthday. Initially, Defendants agreed to provide the cake. Ms. Scardina then explained that, to her, the colors reflected her identity as a transgender female. Defendants then refused to provide the requested cake because of their beliefs "concerning transgender status." Defendants, however, admitted that they would "gladly" make an identical looking cake for other customers. They also admitted that they frequently make cakes for cisgender individuals that reflect gender identity.

Ms. Scardina filed a complaint with the Colorado Civil Rights Division, which found probable cause that Defendants had violated the Colorado Anti-Discrimination Act in refusing Ms. Scardina's request for a birthday cake. After conciliation efforts failed, Defendants sued the Commission in federal court, alleging the proceedings against them were tainted by religious animus. As part of those efforts, Defendants publicized Ms. Scardina's name and place of employment, foreseeably producing death threats to Ms. Scardina and harassment of her, her colleagues, and her firm.

As part of their federal case, Defendants sought an injunction against the Commission proceeding with the administrative action. When Ms. Scardina attempted to intervene to address that limited issue, Defendants successfully opposed intervention. In doing so, Defendants argued that any interest Ms. Scardina had in the administrative proceeding was "merely incidental" and wholly inadequate to justify intervention.

After the federal court denied Ms. Scardina's request to intervene, the Defendants and the Commission entered into a settlement agreement without the knowledge of, or input from, Ms. Scardina. As a condition of that agreement, the Commission secured a closure order terminating the administrative proceedings.

The closure order did not address the merits of Ms. Scardina's charge but did hold that she had exhausted the administrative proceedings.

Under this Court's precedents and a plain reading of the statute, Ms. Scardina could not appeal the Commission's closure order and her only recourse was to bring her claim in district court. Ms. Scardina timely did so and, after a trial, the court found that Defendants refused to provide her a cake because of her transgender status. The Court also determined that Defendants had failed to establish that providing Ms. Scardina a simple pink cake with blue frosting was "speech" or that their religious beliefs exempted them from CADA.

Defendants' arguments on appeal ignores the applicable law and those findings of fact. Ms. Scardina asks the Court to affirm the decision and uphold the enforcement of Colorado's anti-discrimination laws in places of public accommodations.

BACKGROUND

I. Defendants offer a "limited menu" to LGBT+ customers.

Jack and Debra Phillips own and operate the Bakery as a place of public accommodation. Pet. App. 2, 16. Defendants' business is "the sale of baked goods to the public" and not "self-expression[.]" Pet. App. 22. Defendants sell both pre-

made and special-order cakes and use the same artistic techniques and tools to bake and decorate both. Pet. App. 10.

Nonetheless, Defendants draw an illogical distinction between cakes that are specially ordered by a customer and pre-made cakes. Though they control all aspects of their design, Defendants admit pre-made cakes are not speech. Pet. App. 22. And while Defendants contend that special-order cakes are expressive speech, they admit that to understand any message purportedly conveyed by these baked goods, you would "have to ask the customer." Pet. App. 22; R.Tr. (3/23/21) 269:3-272:4. In Defendants' view, special order cakes do not communicate any message unless the purchaser discloses to Defendants what message the item is intended to convey. Pet. App. 7.

Defendants have a religious objection to the existence of LGBT+ people as LGBT+ people and will not make any cake that they believe will be used to reflect that identity "including cakes that recognize same-sex relationships, cakes that recognize gay pride, or cakes that recognize transgender status." Pet. App. 19. Defendants also will not make cakes that reflect LGBT+ people as parents. R.Tr. (3/23/21) 296:19-297:11.

Defendants only offer a "limited menu" of their services to LGBT+ people. Pet. App. 19. For example, Defendants will make a rainbow cake for non-LGBT+

customers, but not for LGBT+ people. Pet. App. 13. And while they will make cakes for cisgender people that reflect their gender identity, they will not do so for transgender people. Pet. App. 6-7. Defendants do not publicly disclose these restrictions. R.Tr. (3/23/21) 282:5-25. Instead, they have repeatedly claimed to the public that they would provide any baked goods for LGBT+ customers other than wedding cakes. Pet. App. 6-7.

II. Defendants refused to provide any cake for a same-sex wedding.

In 2012, a gay couple requested a cake from Defendants for their wedding. Pet. App. 3. Defendants falsely claim that the request was for a "custom cake." DB 5. Though Defendants have repeated this falsehood for over a decade, at trial, Mr. Phillips admitted that Defendants actually refused to provide the couple any cake before there was any discussion "about the design of the cake or whether the couple would be satisfied with one of the pre-made store cakes." Pet. App. 3. In light of that admission, Defendants' refusal clearly violated CADA. *Masterpiece I*, 584 U.S. at 634 (businesses cannot "be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,'" because it "would impose a serious stigma on gay persons"); at 624 ("One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images

celebrating the marriage … that might be different from a refusal to sell any cake at all.")[1]

The couple filed a claim with the Division which determined there was probable cause that discrimination occurred. After an administrative trial, the ALJ found Defendants violated CADA and the Court of Appeals affirmed. *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 42, *rev'd on other grounds*, 584 U.S. at 640. On appeal, the U.S. Supreme Court stated that although religious and philosophical beliefs are protected, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece I*, 584 U.S. at 631. Nevertheless, the Court reversed, finding that the "neutral and respectful consideration to which Phillips was entitled was compromised" by an expression of hostility by the Commission. *Id.* at 634.

III. Ms. Scardina twice requested a birthday cake from Defendants and Defendants twice refused to provide a cake to her that they would make for other customers.

Ms. Scardina learned of the Bakery through media coverage. Pet. App. 4. She repeatedly heard Defendants insist that they would be "happy" to provide

[1] Unless otherwise indicated, all emphasis is added.

"baked goods, including birthday cakes, to LGBT individuals." Pet. App. 4. Ms. Scardina understood from those statements that Defendants only objected to selling a wedding cake because of the religious significance of marriage. Pet. App. 7. Ms. Scardina is herself a Christian. R.Tr. (3/22/21) 95:9-18. She hoped Defendants' claims about selling birthday cakes to members of the LGBT+ community were true and that Defendants would make her a birthday cake. Pet. App. 7-8.

A few weeks before her birthday, Ms. Scardina called the Bakery to request a pink cake with blue frosting for 6-8 people. Pet. App. 4, 6. Mrs. Phillips answered and agreed that the Bakery could make the requested cake. Pet. App. 4, 6. Ms. Scardina then explained that the colors were "a reflection" of her transgender identity. Pet. App. 5. At that point, Defendants refused to make the requested cake. Pet. App. 5-6. At trial, "Mrs. Philips confirmed that the Bakery would have made a pink cake with blue frosting if Ms. Scardina had not shared her protected status and the meaning of the colors to her." Pet. App. 6.

The call was terminated and Ms. Scardina called back. The phone was answered by Ms. Eldfrick, the Phillips' daughter. Pet. App. 5. Ms. Scardina again requested the cake and Ms. Eldfrick stated the Bakery would not make the cake. Pet. App. 5. The Bakery's rejections of Ms. Scardina "stung" and "she felt as if she

was considered an undeserving, objectionable human and that she was not as valuable, worthy or important as other customers." Pet. App. 6.[2]

Defendants agree that a pink cake with blue frosting does not express any message. Pet. App. 7. Thus, Defendants claim that if Ms. Scardina had not disclosed that the colors reflected her transgender status or had purchased a pre-made pink cake with blue frosting, Defendants' conduct in making the cake would not be expressive. Pet. App. 7. Defendants would also have made the same cake requested by Ms. Scardina for other customers. Pet. App. 6. And Defendants frequently make special-order cakes for cisgender individuals that recognize their gender. Pet. App. 6-7.

Ms. Scardina timely filed a discrimination charge against Defendants. Pet. App. 8. On June 28, 2018, the Division issued a Probable Cause Determination against Defendants. Pet. App. 8.

IV. The Commission closed the matter without a final order as part of a separate settlement with Defendants.

Defendants subsequently filed a lawsuit against the Commission. R.Ex. 162. Ms. Scardina attempted to intervene in that lawsuit but Defendants objected,

[2] Defendants falsely claim that Ms. Scardina's "request was a setup." DB 7. On the contrary, the trial court found that "Ms. Scardina's request was not a 'set-up'" and that Ms. Scardina "would have purchased the cake if Defendants had agreed to make it." Pet. App. 8.

emphatically arguing "any interest [Ms.] Scardina may have in the Commission proceeding … are [sic] '*merely incidental*.'" *Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074-WYD-STV (*Masterpiece II*) (Doc. #123 at 6) *available at* 2019 WL 2117768 (quoting *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995)). The federal court denied Ms. Scardina's motion. *Masterpiece II*, 2019 WL 9514601, at *4 (D. Colo. Feb. 28, 2019).

Defendants and the Commission then reached a settlement requiring dismissal of the administrative proceedings without any findings on the merits. R.CF 0289. Ms. Scardina was not included in the settlement discussions and was not informed of the settlement until after the administrative case was closed. R.Tr. (3/23/21) 320:22-321:5. In its closure order, the Commission "determined that Ms. Scardina had exhausted her administrative remedies." Pet. App. 9.

Ms. Scardina subsequently brought this suit in district court. After a three-day trial, the court found that Defendants' conduct violated CADA by refusing to provide Ms. Scardina a cake because of her transgender status. The Court also rejected Defendants' procedural and First Amendment arguments. R.CF 4836-4838. The Court of Appeals affirmed.

ARGUMENT SUMMARY

This Court should affirm the decision below. The trial court's determinations are based on an extensive factual record that Defendants do not challenge. Defendants cannot close off Ms. Scardina's right to seek a merits-based determination of her claims by entering into a secret settlement with the Commission. Under this Court's precedent, the closure order was not a "final order" and Ms. Scardina was entitled to pursue her claims in the district court. The trial court's finding that Defendants' refusal to provide Ms. Scardina a birthday cake "because of" her transgender status is well supported by the factual record that Defendants do not challenge. And the First Amendment has never been understood to protect discrimination.

First, the lower courts properly determined the Commission's closure order did not constitute a "final order" triggering appellate review. For an agency determination to be a final order, the agency has to act in a judicial capacity, resolve disputed issues of fact, and adjudicate the merits of the claim. Because the Commission did not adjudicate the merits of the charge nor determine the legal claims and defenses asserted by the parties, Ms. Scardina could not seek judicial review of the closure order. Thus, Ms. Scardina properly filed a claim in district court having exhausted her administrative proceedings and remedies. Defendants'

contrary arguments misconstrue the relevant statutes and case law and would require absurd results contrary to the purpose of CADA.

Second, Ms. Scardina more than adequately proved that Defendants' refused to sell her a cake they would "gladly" make for other customers "because of" her transgender status. Defendants' contrary arguments proceed exclusively by ignoring the trial court's extensive factual findings on this topic. And Defendants' claimed "offensiveness" rule simply does not exist and has never existed.

Finally, Defendants' discrimination is not protected by the First Amendment. Defendants failed to carry their evidentiary burden to prove their refusal to sell Ms. Scardina a cake they admitted conveys no message constitutes expressive conduct. Indeed, Defendants' admissions preclude such a finding. As to their "free exercise" claim, both the trial court and the Court of Appeals provided Defendants with a neutral and respectful consideration of their claims. But the First Amendment does not require the courts to agree with Defendants' meritless legal arguments.

ARGUMENT

I. The closure order was not a "final order" that could have been appealed.

A. Ms. Scardina exhausted all administrative proceedings and remedies.

CADA permits a complainant to file a civil action after exhausting her administrative remedies. C.R.S. § 24-34-306(14).[3] Exhaustion is not jurisdictional. *Contrast id.* with C.R.S. § 24-34-306(2)(b)(I)(C) (specifying timing requirement is jurisdictional); *Jones v. Williams*, 2019 CO 61, ¶ 17 ("legislature must make the limitation on the court's jurisdiction explicit"). Factual findings are reviewed for clear error and legal conclusions de novo. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 2017 CO 68, ¶ 12. This issue was preserved.

Defendants claim Ms. Scardina failed to exhaust her administrative remedies because she did not appeal the dismissal of the administrative proceedings triggered by the settlement between the Commission and Defendants. This argument fails.

[3] C.R.S. § 24-34-306 was amended in May 2023 to eliminate any exhaustion requirement for public accommodation claims. Ms. Scardina's citations are to the version in effect at the relevant time.

1. CADA does not permit Ms. Scardina to appeal the closure order because it is not a "final order."

A party "aggrieved by a final order … may obtain judicial review thereof[.]" C.R.S. § 24-34-307(1). If the order is not "final," however, the party is free to bring claims in state court. *See Demetry v. Colo. Civil Rights Comm'n*, 752 P.2d 1070, 1072 (Colo. App. 1988). A final order is "one which ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved." *D.H. v. People*, 561 P.2d 5, 6 (Colo. 1977) (cleaned up). This Court has noted that in order to trigger issue or claim preclusion, an agency has to have "acted in a judicial capacity and resolved disputed issues of fact[.]" *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 32 (Colo. 2006) (cleaned up). The only element of claim and issue preclusion that could depend on such a determination is the "final order" requirement. *Id.* (identifying elements of issue and claim preclusion).

A "final order" under section 24-34-307(1), thus "must have some determinative consequences for the party to the proceeding … [and] must establish the rights and obligations of the parties." *Demetry*, at 1071 (citing *ITT v. Elec. Workers*, 419 U.S. 428 (1975)); *Colo. Health Facilities Rev. Council v. Dist. Court*, 689 P.2d 617 (Colo. 1984)). Courts looks to whether there "has been [a] hearing on, or adjudication of the merits of the charge, [and] a determination of the

legal rights of the" complainant and respondent. *Id.* at 1072; *see also Cont'l Title Co. v. Dist. Court*, 645 P.2d 1310, 1316, 1319 (Colo. 1982) (holding petition for judicial review of closure order should have been dismissed because an administrative closure order did not constitute a "legally significant action which [complainant] could appeal").

Applying the standard from *D.H.* and *Demetry*, the courts below determined that the dismissal of the administrative proceedings was not final as to Ms. Scardina because there was no hearing on or adjudication of the merits of her charge and no "determination of the legal claims asserted by [Ms.] Scardina or the important constitutional defenses asserted" by Defendants. Pet. App. 44.

Defendants do not contend that the administrative closure order was a final order under *D.H.* or *Demetry*. Instead, they attempt to distinguish *Demetry* on the grounds that "the Commission in [*Demetry*] affirmed a no-probable-cause determination," while the Commission here initiated litigation against Defendants. DB 17. In other words, Defendants believe that the finality of an order depends on the procedural timing of its issuance, not the "legal effect" of the order. *But see*, DB at 14 (conceding that the "legal effect" of an order determines its finality).

Selectively quoting phrases out of order, Defendants inaccurately contend that the Court of Appeals "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." DB 14. Any serious review of the opinion reveals that argument is made entirely of straw. Instead, the Court of Appeals rejected Defendants' contention that the mere use of the phrase "with prejudice" in the dismissal order conclusively determined its finality. Pet. App. 44.

Defendants continue to cite to the language "with prejudice" as evidence of the closure order's finality. DB 16-17. Tellingly, however, Defendants rely exclusively on cases evaluating when a court order is final, not administrative proceedings. *See Foothills Meadow v. Myers*, 832 P.2d 1097, 1098 (Colo. App. 1992); *Lake Meredith Reservoir Co. v. Amity Mut. Irrigation Co.*, 698 P.2d 1340, 1343 n.4 (Colo. 1985); *O'Done v. Shulman,* 238 P.2d 1117, 1118 (Colo. 1951). Unlike trial court proceedings, when a proceeding before the Commission terminates without a merit-based determination, the complainant may pursue her claims in court. C.R.S. § 24-34-306(14). In court, however, when a dismissal is "with prejudice," the litigants have nowhere to go but up to the appellate courts.

2. The closure order did not violate CADA or the APA.

Abandoning their arguments raised at the district and appellate courts, Defendants try a new tack—arguing that the closure order was final under C.R.S. § 24-4-102(10) and cases interpreting it and the federal APA. DB 15-19.

Defendants have not raised this argument before and cannot do so now. *Antero Treatment LLC v. Veolia Water Techs., Inc.*, 2023 CO 59, ¶ 35, n.4.[4]

Under section 24-4-102(10), the closure order is still not "final." As an initial matter, the test under the APA is the test applied in *Demetry*. *Compare Doe 1 v. Colo. Dep't of Pub. Health & Env't*, 2019 CO 92, ¶ 38 (a final agency action must "constitute an action by which rights and obligations have been determined or from which legal consequences will flow") *with Demetry*, 752 P.2d at 1071-72 (a final order "must have some determinative consequences for the party to the proceeding[,]" "must establish the rights and obligations of the parties[,]" and must "determin[e] of the legal rights of the employer and employee").

Defendants nonetheless contend that the closure order is final because it ends the administrative proceeding and cuts off the remedies exclusively available under those proceedings. DB at 16-19. Under that logic, a no-probable-cause determination would constitute a final order as it also ends the administrative proceedings and precludes its unique remedies. C.R.S. § 24-34-306(2)(b)(I). But even Defendants concede a no-probable-cause finding is not a final order. DB at

[4] Defendants may argue that they are not limited to the precise arguments made below. However, this liberality only applies to federal claims and not state law appellate procedures. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992); *Bulger v. State Bd. of Ret.*, 951 N.E.2d 56, at *2 n.8 (Mass. App. 2011) (rejecting new argument that was not properly preserved where it applied to state law).

17. Like a no-probable-cause determination, the closure order did not determine the "rights or obligations" of Ms. Scardina nor the merits of her claim.

Defendants also point to the fact that the closure order was part of a settlement between Defendants and the Commission as evidence of its finality. DB 17-18. Undoubtedly, that settlement binds the parties to it, but it does not bind third parties like Ms. Scardina. *E.g.*, *N.A. Rugby Union LLC v. U.S.A. Rugby Football Union*, 2019 CO 56 ¶ 21 (non-signatories to an agreement are not generally bound by it). Had Defendants wanted to preclude Ms. Scardina's claims and the remedies available to her under CADA, they could have settled with her.

And far from supporting Defendants, the Civil Rights Commission Rules and Regulations reinforce that CADA does not permit an appeal under section 24-34-307 when a matter is closed based on a settlement without the consent or participation of the complainant. That rule makes clear such settlements are not binding on the complainant and, instead, are treated like "determinations of no probable cause" which entitle the complainant to pursue claims in district court. 3 CCR 708-1:10.5(D)(5); C.R.S. § 24-34-306(2)(b)(I)(B).

Ms. Scardina is not aware of, and Defendants do not cite, a single case from any jurisdiction holding that a person is bound by a settlement agreement they were not aware of, did not participate in, and did not join.

3. Defendants misconstrue CADA in a way that would require an appeal of all orders, final or not, and render their own settlement illegal.

Next, Defendants misconstrue CADA and the APA to contend that, alternatively, the closure order "is at least a 'refusal to issue an order' which is also appealable[.]" DB 19. For the first time in these proceedings, Defendants argue that the closure order did not comply with CADA and the APA. DB 19-21. That argument is new and has been waived. *Antero Treatment,* 2023 CO 59, ¶ 35, n.4. Further, any argument that the closure order was improper cannot be raised by Defendants as they sought and secured that order. *Horton v. Suthers,* 43 P.3d 611, 618 (Colo. 2002) (The invited error doctrine "prevents a party from inducing an inappropriate or erroneous ruling and then later seeking to profit from that error.") (citation omitted). Defendants' argument also fails on the merits.

Defendants' argument arises exclusively from a very aggressive use of ellipses and brackets. DB 19. To start, Defendants contend a "refusal to issue an order" is independently appealable from a final order by quoting C.R.S. § 24-34-307(1) as: "'Any complainant … claiming to be aggrieved by … a refusal to issue an order, may obtain judicial review.'" DB 19. The actual phrase is "claiming to be aggrieved by a final order of the commission, including a refusal to issue an order[.]" C.R.S. 24-34-307(1). Next, Defendants' claim that CADA requires a

merits hearing by quoting section 24-34-306(8) as saying, "'The hearing *shall* be conducted ….'" DB 19 (emphasis and ellipses in original). Those ellipses hide the following language: "in accordance with section 24-4-105[.]" In other words, that statute proscribes the procedures for a hearing—it does not mandate a hearing. And while the "parties" to the proceeding may be entitled to a hearing, C.R.S. § 24-4-105(2)(a), Ms. Scardina was not a party and the actual parties waived any such entitlement by entering into a settlement. Sections 24-34-306(9) and (10) are similarly no help as both are only applicable "if" there is a hearing and subsequent findings. Neither require a hearing and findings.

Defendants' (mis)interpretation of CADA and the APA would preclude the Commission, complainant and respondent from ever reaching a settlement or even a stipulated dismissal, once a proceeding has been initiated. Under this interpretation, the settlement reached by the Commission and Defendants was illegal. In addition, Defendants' reading would render a no-probable-cause finding appealable because the commission would be refusing to issue an order. As the only way Defendants reach this interpretation is to butcher the plain language of the statute, the Court should not endorse such a non-sensical reading.

Instead, the sensible interpretation of "aggrieved by a final order of the commission, including a refusal to issue an order[,]" is one that harmonizes the

legislatures' choice to distinguish between "final order" and "a refusal to issue an order[.]" *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008) ("we do not presume that the legislature used language idly and with no intent that meaning should be given to its language") (cleaned up). In determining the meaning of a statute, the "language at issue must be read in the context of the statute as a whole and the context of the entire statutory scheme." *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). This means that the Court must give "consistent, harmonious, and sensible effect" to all its parts. *People v. A.S.M.*, 2022 CO 47, ¶ 22 (cleaned up).

CADA requires or empowers the Commission to issue certain orders as part of its final order. *See, e.g.*, C.R.S. §§ 24-34-306(9) (if the Commission finds discrimination, "the commission shall issue … an order requiring such respondent to cease and desist"); 24-34-405(2)(a) ("the commission or the court may order affirmative relief … including" reinstatement, back pay and or front pay); 24-34-508(1) ("commission may order" relief in addition to that provided under 306(9)); 24-34-605 (same); 24-34-707 (same). Under the proper interpretation of section 24-34-307(1), "aggrieved by a final order … including a refusal to issue an order" merely makes clear that, for example, where the commission has found discriminatory employment practices, the complainant can be "aggrieved" by that

final order (and thus appeal) if the commission "refus[ed] to issue an order" for reinstatement or backpay.

Here, there was no "refusal" to issue an order—there was an (undisclosed) agreement between Defendants and the Commission that required dismissal of the matter. Defendants now want their proverbial cake and to eat it too—they want this Court to enforce their secret agreement by finding that agreement resulted in an illegal dismissal of Ms. Scardina's claims. DB 20-21.

4. Ms. Scardina never had the right to pursue remedies provided by subsection 306(9) and so was not aggrieved by the closure order.

"Any benefits to the individual obtained by the [Commission] are merely incidental[,]" *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995), because CADA "was not intended to provide relief to individual claimants." *Red Seal Potato Chip Co. v. Colo. Civil Rights Comm'n*, 618 P.2d 697, 700 (Colo. App. 1980). Thus Ms. Scardina is "only an incidental beneficiary of any determination" by the Commission. *See Agnello v. Adolph Coors Co.*, 689 P.2d 1162, 1164 (Colo. App. 1984). Indeed, Defendants previously argued this "merely incidental" interest in the Commission proceeding was insufficient to entitle Ms. Scardina to intervene in the federal proceeding in which Defendants sought to terminate the administrative proceeding. 2019 WL 2117768.

Now, however, Defendants contend that Ms. Scardina had a "direct and palpable interest" in the remedies only available in the administrative proceeding and, thus, was "aggrieved" by the closure order. DB 21-22. On the contrary, Ms. Scardina's rights after the closure order were the same prior to (and what they would have been, for example, with a no-probable-cause determination), CADA permits her to individually pursue her claims and seek individual remedies.

Because the closure order was not "final" and Ms. Scardina was not "aggrieved" by its issuance, CADA does not permit her to appeal. C.R.S. § 24-34-307(1); *Cont'l Title Co.*, 645 P.2d at 1316. The cases cited by Defendants provide them no succor. *See, e.g., Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc.*, 355 P.2d 83, 84 (Colo. 1960) (appeal of a settlement made after the Commission made a merits determination).

B. CADA's purpose is only furthered by a determination of Ms. Scardina's claim on the merits.

In interpreting CADA, this Court seeks to "ascertain and give effect to the General Assembly's intent." *Elder v. Williams*, 2020 CO 88, ¶ 18. The "primary purpose" of CADA is "eradicating discriminatory practices[.]" *Brooke*, 906 P.2d at 69. This purpose is only furthered by an interpretation of "final order" to require a merits-based determination. As evidenced here, Defendants' interpretation would allow the Commission and the respondent to subvert CADA's purpose by initiating

proceedings and then entering into a settlement without the consent or participation of the complainant. According to Defendants, such an action precludes the claims from being adjudicated on the merits in the agency and in district court. And while Defendants complain that no respondent would settle with the Commission only to face new and more expensive litigation, this outcome could have been avoided by including Ms. Scardina in the settlement.

C. Claim preclusion does not bar Ms. Scardina's claim.

With respect to agency action, claim preclusion can only arise if the agency "acted in a judicial capacity and resolved disputed issues of fact[.]" *Gallegos*, 147 P.3d at 32. Because the Commission did not do so here, claim preclusion cannot apply. In addition, Ms. Scardina was not a party to the agency proceeding and did not have an opportunity to be heard "prior to" the issuance of the closure order, which "is absolutely essential[.]" *Fleming v. McFerson*, 28 P.2d 1013, 1015 (Colo. 1933); *see also Whiteside v. Smith*, 67 P.3d 1240, 1248 (Colo. 2003) (opportunity to be heard must be "at a meaningful time and in a meaningful manner") (cleaned up). The requirement of an opportunity to be heard before entry of a final judgment is not satisfied by a right to appeal. *Rubins v. Plummer*, 813 P.2d 778, 780 (Colo. App. 1990) (court cannot dismiss a complaint without notice and an opportunity to be heard prior to dismissal).

II. The court's finding that Defendants refused to provide a birthday cake to Ms. Scardina because of her status as a transgender woman is well supported by the record.

"[C]ausation is a question of fact[.]" *Hall v. Walter*, 969 P.2d 224, 236 (Colo. 1998). And factual determinations are reviewed for clear error. *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2019 CO 51, ¶ 18. CADA uses a "because of" causal trigger, C.R.S. § 24-34-601(2)(a), which is equivalent to a "but for" standard and is satisfied here because the Bakery refused to provide a cake to Ms. Scardina it would "gladly" sell to cisgender customers based in whole or in part on her transgender status. Pet. App. 18; *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 253 (Colo. App. 2006); *Craig*, 2015 COA 115, ¶ 28. This issue was preserved.

Citing to *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), Defendants erroneously argue that Ms. Scardina's status must have been "the decisive factor" in their decision. DB 29. *Hazen Paper*, however, interpreted the causation standard applicable to the Age Discrimination in Employment Act ("ADEA") which is different than the standard applied in Title VII cases. *See Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 350-351 (2013) (explaining that the "but for" standard under Title VII only requires that discrimination was a motivating factor, and is less demanding than the ADEA causation standard).

Colorado follows the standards applicable in Title VII cases when interpreting CADA. *See Colo. Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 399 (Colo. 1997), *as modified on denial of reh'g* (July 28, 1997); *St. Croix v. Univ. of Colo. Health Scis. Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007). The "but for" test does not require a plaintiff to prove that the discriminatory reason was the "sole" or primary cause. *Tesmer*, 140 P.3d at 253; *see also Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 665 (2020).

A. The trial court properly based its causal findings on the evidence presented.

After three days of trial, the trial court concluded "Defendants denied Ms. Scardina goods and services because of her transgender status." Pet. App. 17. In making that finding, the trial court relied on the following facts: Defendants (1) agreed to make the cake for Ms. Scardina until they learned that, to her, it reflected her transgender identity; (2) make cakes for cisgender individuals that reflect their gender identity; and (3) "would 'gladly' make an identical looking cake for other customers." R.CF 4831-2. The court found "particularly germane" Defendants' admission "when asked why [they] will not make any cake reflecting transgender status" that Defendants "believe[] that no one can change the gender assigned to them at birth and [they] will not 'celebrate *somebody who thinks that they can*.'" Pet. App. 18 (cleaned up, emphasis in original). "Mr. Phillips also

confirmed that Defendants' decision … was 'based on his religious beliefs *concerning transgender status*.'" *Id.* (same). This testimony directly ties Defendants' decision to Ms. Scardina's transgender identity. That is more than adequate to establish "but for" causation.

Defendants do not challenge these factual determinations nor explain how they are insufficient. Instead, they pretend the only relevant fact was Mr. Phillips' testimony that he would "not create a custom cake to celebrate a gender transition for anyone (including someone who does not identify as transgender.)." DB 30-31. In light of the trial court's extensive factual findings supporting its ruling, this additional fact is irrelevant. *Bostock*, 590 U.S. at 655 (under a "but-for" standard, a defendant "cannot avoid liability just by citing some *other* factor that contributed" to its decision) (emphasis in original); *Tesmer*, 140 P.3d at 253 (to show violation of CADA, a party "need not establish that the disability was the 'sole' cause" of the decision).

The trial court also correctly rejected Defendants' argument that a refusal to sell cakes reflecting transgender identity is not discrimination against transgender people. DB 30; Pet. App. 18. Defendants' argument is like contending a tax on yarmulkes is not discriminatory because it applies to anyone wearing a yarmulke,

not just Jews. *But see, Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

Finally, Defendants' reliance on dicta from *303 Creative* is also unavailing. DB 31. There, the only evidence of causation was a stipulation about Ms. Smith's claimed willingness to serve the LGBT+ public. *303 Creative LLC v. Elenis*, 600 U.S. 570, 594-95 (2023). Because she filed suit without receiving any actual request to make such a website, there could not be any evidence that any particular denial of service was actually motivated by the customer's identity. In this case, the trial court had direct and substantial evidence that this specific denial of service was "because of" Ms. Scardina's transgender identity.

To the extent that *303 Creative*'s dicta on this point can be interpreted to endorse a "limited menu offering" defense—i.e. that a business may refuse to provide full access to its good and services to LGBT+ individuals so long as it provides some good and services to them, this Court should reject such an interpretation of state law just as the U.S. Supreme Court has rejected such an interpretation of federal law. *See Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964) (restaurant that served black people through "take-out" but refused to "serve [them] in its dining accommodations" violated Title II); *see also Craig*, 2015 COA 115, ¶ 40 (rejecting argument that the Bakery's "willingness to sell"

some goods to LGBT+ people "establishes that it did not violate CADA"); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 ("[I]f a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers."). And, of course, any interpretation of CADA by the U.S. Supreme Court is not controlling—this Court is the final authority on the interpretation of Colorado statutes. *See, e.g. Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 617 n.11 (Colo. 1999).

As the trial court's findings make clear, the causation standard urged by Defendants would result in broad discrimination against the LGBT+ community. Defendants have "a religious objection to making cakes that reflect the identity of LGBT people—as LGBT people—including cakes that recognize same-sex relationships, cakes that recognize gay pride, or cakes that recognize transgender status." Pet. App. 19. They also have a religious objection to the existence of LGBT+ people as parents. R.Tr. (3/23/21) 296:19-297:11. Thus the "message" to which Defendants object is the message that LGBT+ people exist. And divorcing that "message" from status is impossible.

B. CADA does not have an "offensiveness" rule.

While enforcement proceedings in *Masterpiece I* were ongoing, Willie Jack requested cakes with words and images derogating the LGBT+ community. Pet.

App. 60-61. When multiple bakeries refused to provide the cakes, the Division found that "the baker[ies] did not discriminate based on Jack's religious beliefs, 'but instead refused to create cakes for anyone, regardless of creed, where a customer requests derogatory language or imagery.'" Pet. App. 61.

Unfortunately, the Court of Appeals short-handed the Commission's neutral decision as turning on "the offensive nature of the requested message." *Craig*, 2015 COA 115, ¶ 40 n.8. The U.S. Supreme Court criticized that language, noting that a "principled rationale for the difference in treatment … cannot be based on the government's own assessment of offensiveness." *Masterpiece I*, 584 U.S. at 638. Significantly, however, the U.S. Supreme Court did not interpret CADA to include an offensiveness standard. Instead, it declined to address "whether the cases should ultimately be distinguished." *Id*. at 637. As the trial court noted, Defendants have failed to present "any evidence establishing that the CCRD has officially endorsed" an offensiveness rule. CF 4834. Because the Commission has never adopted an offensiveness rule, there can be no deference to that interpretation.[5]

[5] Even if the Commission had adopted such an interpretation, it would not warrant deference as it is unsupported by the language of the statute. *BP Am. Prod. Co. v. Colo. Dep't of Rev.*, 2016 CO 23, ¶ 15.

Distinguishing this matter from Mr. Jack's claims is easy. As the Court of Appeals noted, "there was no evidence that the bakeries based their decisions on the patron's religion[.]" *Craig*, 2015 COA 115, ¶ 40 n.8. Indeed, the Division found that the bakeries would not have made identical-looking cakes for any customer, regardless of religion. Pet. App. 20. Here, Defendants admit they would make an identical-looking cake for other customers. Pet. App. 20, 62. More than sufficient evidence ties Defendants' decision to Ms. Scardina's transgender status.

III. Defendants' discrimination against Ms. Scardina is not protected by the First Amendment.

The Court reviews "evidentiary factual findings for an abuse of discretion and the legal conclusions de novo." *Johnson*, 2017 CO 68, ¶ 12. De novo review of both facts and legal conclusions only occurs when "the underlying facts are undisputed." *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 500 (Colo. App. 2010). The underlying facts here were heavily disputed. Pet. App. 3-14. This issue was preserved.

As an initial matter, though Defendants repeatedly invoke the free speech and free exercise clauses of the Colorado Constitution, they provide no analysis of those provisions, instead relying exclusively on federal authorities interpreting the First Amendment. DB 33-38. They have, therefore, waived any argument that the Colorado Constitutional provisions should be analyzed differently than the First

Amendment rights. *E.g.*, *People v. Landis*, 2021 COA 92, ¶ 36; *see also Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't*, 220 P.3d 544, 551 (Colo. 2009) ("We have, however, rarely, if ever, construed article II, section 10 to circumscribe more narrowly than the First Amendment the regulatory powers of the government."). In any event, the Court did not grant review of any claim under the Colorado Constitution.

A. Defendants' admissions establish that their refusal to make and sell a pink cake with blue frosting to Ms. Scardina is not protected speech.

1. Defendants presented no evidence that they were engaged in self-expression.

Defendants do not contend that application of CADA to them implicates "pure speech" protections. Instead, Defendants appear to have farmed out any pure speech argument to their amici. Br. of Kleins at 3 (Kleins' pure speech analysis was provided "[d]ue to briefing constraints" on Defendants). That is not permitted. *Gorman v. Tucker by and through Edwards*, 961 P.2d 1126, 1131 (Colo. 1998).

"Pure-speech treatment is only warranted for those images whose creation is itself an act of self-expression." *Cressman v. Thompson*, 798 F.3d 938, 954 (10th Cir. 2015) (*Cressman II*). The trial court found that the creation of the cake was not an act of "self-expression," (Pet. App. 22), and Defendants do not challenge that determination. Nor could they. Defendants testified that a pink cake with blue

frosting has no inherent meaning and the only meaning it could have would depend on what meaning the customer ascribed to the cake, not on Defendants' self-expression. Pet. App. 7, 22-23. Further, Defendants' admission that the cake does not convey any message outside the context of Ms. Scardina's birthday party, (Pet. App. 10), forecloses a pure speech finding. *See, e.g.* Br. of Kleins at 7 (pure speech "always communicate[s] some idea or concept") (quoting *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996)).

Even when Defendants exert unfettered editorial control over a "pre-made cake," they concede such a cake is not speech. Pet. App. 12. This is true even though Defendants use the same artistic techniques and tools as for cakes specially ordered by customers. *Id.* And any utilization of artistic techniques is irrelevant both because factually it was not the basis for the denial of service and because legally it does not impact the pure speech analysis. *Cressman II*, 798 F.3d at 953.

Thus Defendants' reliance on *303 Creative* and similar cases involving "pure speech" is misplaced. Here, Defendants cannot show that their own, independent speech would be altered by providing the cake to Ms. Scardina. *303 Creative*, 600 U.S. at 588; *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 572-573 (1995).

2. Baking and selling a pink cake with blue frosting is not expressive conduct.

Having eschewed any pure-speech analysis, Defendants instead rely on the *Spence-Johnson* test to argue that providing the requested cake would be expressive conduct. DB 35. To succeed on that claim, Defendants had to introduce evidence showing that in making Ms. Scardina's cake, they would convey a message and "the likelihood is great that a reasonable observer would both understand the message and attribute that message" to them. *Craig*, 2015 COA 115, ¶ 61 (citing *Spence v. State of Wash.*, 418 U.S. 405, 410-411 (1974)); *see also Cressman v. Thompson*, 719 F.3d 1139, 1154-55 (10th Cir. 2013) ("*Cressman I*") (discussing the evidentiary burden).

The U.S. Supreme Court has provided guidance in evaluating speech claims related to baked goods—the court should look at the "details," specifically the "design" of the cake including whether it involves "words or images[.]" *Masterpiece I*, 584 U.S. at 624. Notably, the U.S. Supreme Court did not direct courts to look at the type of event for which the cake was to be used or the significance of the colors of the cake to the purchaser. Nonetheless, Defendants and their amici contend that it is Ms. Scardina's subsequent party that transformed the cake into speech. *E.g.*, DB 35; Br. of Catholicvote.org at 4 (claiming that requesting a cake "for a specific occasion" necessarily renders the cake speech

regardless of the design). The U.S. Supreme Court explicitly rejected this argument. *Masterpiece I,* 584 U.S. at 634 (businesses cannot "be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,'" because it "would impose a serious stigma on gay persons").

Here, the trial court found "the design of the cake—if the colors pink and blue even rise to the level of being a 'design'—was not the reason Defendants refused to make the cake[.]" Pet. App. 14. Again, Defendants do not challenge this factual determination, nor could they. "Defendants would 'gladly' make an identical looking cake for other customers." Pet. App. 18. Defendants agreed that a pink cake with blue frosting does not have any "inherent meaning and does not express any message[.]" Pet. App. 7. They also agreed that making and selling the exact same cake to Ms. Scardina would not constitute speech if (1) the cake was "pre-made;" or (2) if they did not know what the colors meant to Ms. Scardina. Pet. App. 7.[6] "At bottom, Defendants view of whether they are being compelled to speak turns on what they know about the cake's specific intended use when they

[6] Arkansas suggests that the disparate views regarding pre-made and custom cakes can be explained by Defendants' different "intent" in making them. Br. of Ark. at 13-15. But of course, whether conduct is expressive turns on the conduct, not the intent. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968).

are asked to make it. That is not the test for, nor consistent with, finding expressive conduct." Pet. App. 24.

As to whether a reasonable observer would understand the message, Defendants' sole evidence was a witness who testified that a pink cake with blue frosting wouldn't "indicate anything to me." R.Tr. (3/23/21) 454:2-13. But if the cake was served at a party "to celebrate a friend's transition from male to female he would understand what pinks represents as a member of the LGBT+ community." Pet. App. 23 (cleaned up). Judge Jones correctly discounted that evidence because it required "additional speech … for an outside observer to understand" the claimed message. *Id.* (quoting *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1226 (Wash 2019)); *see also Rumsfeld v. Foundation for Acad. & Institutional Rts., Inc.* ("*FAIR*"), 547 U.S. 47, 66 (2006). In that hypothetical, the Court correctly noted that the "event would create the message, and not the product itself." Pet. App. 23.

Nonetheless, Defendants claim that the subsequent "context" of Ms. Scardina's birthday party transforms their conduct into compelled speech. DB 35-36. But in order to show compelled speech, Defendants have to show <u>their conduct</u> is expressive. *E.g.*, *303 Creative*, 600 U.S. at 600 ("the First Amendment extends to all persons <u>engaged in</u> expressive conduct"). Defendants do not cite, and Ms.

Scardina is not aware of, any authority that holds that subsequent events determine whether prior conduct is expressive.

Even Defendants' amici concede that where the "observer of the would-be communication would enter the picture only far removed" and "there would be effectively no audience to the actual conduct at issue, the alleged expressive component of [the party's] actions would be non-existent." Br. of Mt. States Legal Found. at 9-10 (cleaned up); Br. of Rep. Lamborn at 11 ("The First Amendment protects expressive conduct which *in context* would reasonably be understood by a viewer to be communicative.") (cleaned up, emphasis in original). That is precisely the case here. Defendants not only failed to introduce any evidence that an observer would understand any message from their conduct, their only witness on this topic testified that he would not understand any message at all from Defendants' conduct.

While Defendants are fond of citing to John and Mary Beth Tinker wearing black armbands to protest the Vietnam war, actual consideration of that case underlines the absurdity of Defendants' "context" argument. In *Tinker*, the Court looked to the "circumstances" of the Tinkers' conduct to determine if it was expressive. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969). But Defendants are not John or Mary Beth Tinker in this story. They are, at

best, whoever made the armbands being worn. The Tinkers' subsequent conduct, however, cannot transform the making of a black armband into speech. Nor would anyone reasonably believe the making of the black armband communicated views about the Vietnam war. To the extent a pink cake with blue icing communicated anything in the "context" of Ms. Scardina's party, such a message is wholly divorced from Defendants' conduct.

Finally, Defendants claim that the attribution requirement applied by the courts below is contrary to law. DB 35-36. Not so. The U.S. Supreme Court has repeatedly rejected compelled speech claims due to a lack of attribution. *E.g.*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 565 (2005) (the record contained no evidence "that individual beef advertisements were attributed to respondents"); *PruneYard Shopping Cntr. V. Robins*, 447 U.S. 74, 87 (1980) (distinguishing the case from *Wooley v. Maynard*, 430 U.S. 705 (1977) because the "views expressed by the members of the public" in a privately owned shopping mall "will not likely be identified with those of the owner"); *see also Hurley*, 515 U.S. at 572 (holding that the LGBT+ organizations message will likely be attributed to the parades organizer's since "every participating unit" in a parade "affects the [overall] message"); *FAIR*, 547 U.S. at 65 (nothing about having military recruiters on campus "suggest that law schools agree with any speech by recruiters"); *see also*

Br. of First Amend. Scholars in Support of Pet'rs. at 15 (recognizing the requirement of attribution but ignoring the lack of factual evidence here).

Defendants' sole citation for the proposition that attribution is not required depends on, again, an inaccurate quotation. In *303 Creative*, the Court did not find that the websites at issue involved Ms. Smith's speech "because she created them," (DB 36), but rather because the parties stipulated that it was speech, agreeing that she "will produce a final story for each couple using her own words and her own original artwork." 600 U.S. at 588 (cleaned up).

B. CADA is not content or viewpoint based.

CADA is a neutral law with general applicability. *See Masterpiece I*, 584 U.S. at 634. With zero analysis, Defendants argue that "as applied," CADA is "content- and viewpoint-based." DB 38-9. The court should decline to take up this undeveloped, conclusory argument. *People v. Cuellar*, 2023 COA 20, ¶ 44. Indeed, this "argument" by Defendants does not cite a single piece of evidence in support. Instead, it consists entirely of conclusory assertions selectively quoting from various cases without explaining any application to this case.

Of course, on the merits it fails as well as the application of CADA only compels Defendants to provide to Ms. Scardina the exact same cake they would "gladly" make for other customers. Defendants have failed to carry their

evidentiary burden to establish that CADA compels speech, either pure or expressive conduct. *Supra* § III.A.1. Therefore, only rational basis, not strict scrutiny, applies and CADA "easily" survives. *Craig*, 2015 COA 115, ¶¶ 101-103. And even if application of CADA here incidentally required Defendants to engage in speech, only the *O'Brien* test would apply, *FAIR*, 547 U.S. 65-67; *O'Brien*, 391 U.S. at 381-82. Again, CADA easily passes. Forbidding discrimination on the basis of LGBT+ status is within Colorado's constitutional power, *303 Creative*, 600 U.S. at 591, and Defendants do not contend CADA fails under this test.

C. Legal determinations are not evidence of bias or discrimination against Defendants' religious beliefs.

Finally, Defendants claim that the rulings below violated their right to "free exercise" of religion because: (1) the courts did not apply Defendants' claimed "offensiveness" rule; (2) the courts did not agree with Defendants' interpretation of case law; and (3) the trial court questioned Defendants' claim that Ms. Scardina's gender "doesn't make any difference" to them. DB 39-42. Both this Court and the U.S. Supreme Court have firmly rejected attempts (like Defendants') to claim bias based on nothing more than adverse rulings and judicial comments on evidence. *In re People in Interest of A.P.*, 2022 CO 24, ¶ 32; *Liteky v. U.S.*, 510 U.S. 540, 555 (1994). And, of course, Defendants' religion does not exempt them from CADA. *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S 872, 879 (1990).

On the first claim, the U.S. Supreme Court never recognized an "offensiveness" rule and no such rule has ever existed. *Supra* § III.B. Further, the trial court found that Defendants refusal was "because of [Ms. Scardina's] transgender status" and Defendants do not challenge those factual findings. Pet. App. 17. In other words, even if an offensiveness rule existed, it would not protect Defendants because their disagreement with the "message" of the cake did not cause their refusal. Their disagreement with Ms. Scardina's existence as a transgender woman did. Pet. App. 18.

Similarly, both the trial court and the Court of Appeals cogently explained why Defendants' interpretation of *Agnello* was wrong. R.CF. 665; Pet. App. 45-46. Before this Court, Defendants have abandoned their argument that the outcome in *Agnello* required dismissal of Ms. Scardina's claim, yet they baldly assert that the only "relevant difference" between *Agnello* and this case is "Phillips' faith." Of course, *Agnello* involved a settlement in which the complainant participated and resulted in a merits determination of her claim. *Agnello*, 689 P.2d at 1164 (Complainant agreed "to cooperate and participate" in the settlement and afterwards the "director found that [the respondent's] actions and agreement reflected [its] *compliance*" with CADA and the claimant sought "review of the commission's affirmation of the Division's ruling."). Given those substantial

factual differences between this case and *Agnello*, Defendants' claim that their "faith" was the only "relevant difference" beggars belief.

In the end, Defendants are really making a rather remarkable and dangerous "free exercise" claim. They cannot point to any evidence that the courts discriminated against them on the basis of their religion. And so they ask this Court to assume religious bias merely because Defendants are religious.

CONCLUSION

Defendants have spent the last decade attempting to gut CADA to allow them free rein to discriminate against the LGBT+ public because they object to the existence of LGBT+ people. In that decade, no court has found Defendants' refusal to provide baked goods legally permitted. This Court should join that chorus and reaffirm that the law does not recognize a right to discriminate.

Dated this 27th day of February, 2024.

Respectfully Submitted,

s/ John M. McHugh

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served to all counsel of record and *amici curiae* via the Colorado Courts E-Filing System on this 27th day of February, 2024:

s/ John M. McHugh
John M. McHugh