SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2021CA1142, Judges Schutz, Dunn, Grove DISTRICT COURT, COUNTY OF DENVER District Court Judge: The Hon. A. Bruce Jones District Court Case No. 19CV32214	
Petitioners: MASTERPIECE CAKESHOP INC., and JACK PHILLIPS, and Respondent: AUTUMN SCARDINA.	**▲COURT USE ONLY▲**
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PETITIONERS' REPLY BRIEF	

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CERTIFICATE OF COMPLIANCE	

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

It contains 5,685 words, which is not more than the 5,700 word limit.

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

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

/s/ Jacob P. Warner
Jacob P. Warner

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INTRODUCTION

Using the Colorado Anti-Discrimination Act (CADA), Colorado tried to punish Petitioners Jack Phillips and Masterpiece Cakeshop (collectively, "Phillips") for expressing only certain views on marriage. Colorado lost at the U.S. Supreme Court. Disgruntled, Respondent Autumn Scardina targeted Phillips, brought a parallel CADA charge against him, participated as a party in that proceeding, and also lost. Scardina could have but didn't appeal that result. Now, Scardina is trying to re-litigate those prior cases, rewrite CADA, and restrict Phillips' freedom—all to punish Phillips for his religious beliefs.

Scardina's CADA claim is procedurally barred. Scardina misreads CADA's exhaustion requirement as an excuse for not appealing the Colorado Civil Rights Commission's final order. But on this theory, the Commission could settle administrative suits or dismiss them with prejudice and complainants could then re-litigate their settled suits in district court. That theory shreds CADA's text, discourages administrative settlements, and subjects defendants to liability twice for the same alleged actions. CADA provided relief; Scardina didn't pursue it.

Scardina's CADA claim also fails substantively because Scardina never proved a CADA violation, and the Constitution protects Phillips' religiously motivated decision not to express a message. On Scardina's logic, artists engage in status discrimination when they decline to promote certain gender-related messages for anyone, but they exercise

expressive freedom when they refuse to convey religious views. Neither CADA nor the First Amendment tolerates such discrimination. Phillips has been down this road before. He won last time, and he should win this time. This Court should reverse.

RECORD DISCUSSION AND CLARIFICATION

This case boils down to a few settled facts. Scardina asked Phillips to create a custom cake, with a blue exterior and pink interior, that "symbolized a transition from male to female." Pet.App.13. Scardina conveyed the cake's message to Phillips during the request. Pet.App.08; Scardina's Answer Br. (Answer) 9; EX (Trial) 133. As the trial court found, this cake indisputably conveyed a message in context:

- 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.

Phillips declined because he cannot create custom cakes conveying this message "for anyone." Pet.App.10. Scardina mistakes this equal

treatment for discrimination because Scardina insists that Phillips would create "the same cake … for other customers." Answer 10. But as the trial court found, Phillips cannot "create a custom cake to celebrate a gender transition *for anyone (including someone who does not identify as transgender)*," though he will create "a *similar-looking* cake" for anyone—including those "*who identif[y] as transgender*"—if its message does "not violate his … beliefs." Pet.App.10 (emphasis added). A cake expressing a different message—even if similar looking—is a different cake.

That's the crux of this case. To be sure, like black armbands, not all custom cakes with a blue exterior and pink interior have an "inherent meaning." Pet.App.07. But in the "context" of this particular request, the requested cake concededly "*symbolized* a transition from male to female." Pet.App.13 (emphasis added); *cf. Spence v. State of Wash.*, 418 U.S. 405, 410 (1974) (wearing "black armbands" once "conveyed an unmistakable message about … the Vietnam [War]."). After all, Scardina explained the cake's message to Phillips when requesting it. Pet.App.08; Answer 9. If Scardina requested a "similar-looking cake" that expressed nothing or something Phillips believed, he would have created it. Pet.App.10. A custom cake's context "often determines" its "message." Pet.App.13.

Scardina rejects various factual findings. For example, Scardina says Phillips will not create "a rainbow cake" for LGBT+ people. Answer 6. Yet the trial court found that Phillips *would* create such a cake depending on its "message." Pet.App.13. While Phillips cannot create a

rainbow cake that celebrates "gay pride," he can create one symbolizing God's promise to Noah—*no matter who requests it*. Pet.App.13. Phillips serves all people while not expressing all messages. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995) (distinguishing discrimination from "disagreement" with a message).

Scardina also says Phillips objects to the "existence of LGBT+ people." Answer 43. Not true. The trial court found that Phillips welcomes all people, including "those who identify as LGBT." Pet.App.09. Take Mike Jones, a longtime "gay activist," who testified for Phillips. TR (03/23/21) 442:13. Jones visited Phillips after seeing him in the "news," *id.* at 445:21-22, told Phillips he was "gay," *id.* at 442:16-19, and Phillips gladly served him. Jones was so warmly received that he returned "about 25 times" for custom cakes and other items. *Id.* at 447:10-449:13. Phillips has likewise served others who identify as LGBT. Pet.App.09. He always decides whether to create a custom cake based on *what* the cake will express, not *who* requests it. TR (03/23/21) 350:3-352:5, 366:8-367:10.

Finally, Scardina says Phillips' expressive cakes are not "self-expression." Answer 5. Again, not true. The trial court found that Phillips creates those cakes "to express an intended message," and that Phillips often "seeks to communicate through his custom cakes." Pet.App.11. Indeed, when Phillips creates expressive cakes, he believes "he is 'agreeing with [their] message.'" Pet.App.11. In this way, Phillips acts like newspapers, parade organizers, and website designers—speakers who often

express themselves through content requested by others. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974); *Hurley*, 515 U.S. at 572-81; *303 Creative LLC v. Elenis*, 600 U.S. 570, 588 (2023). And Phillips doesn't just host another's speech; he creates the expression himself.

ARGUMENT

I. Scardina's CADA claim is procedurally barred.

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

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). Here, the Commission's dismissal is a final order or, at minimum, a refusal to issue a final order. Because Scardina did not exhaust CADA's procedures by appealing the Commission's order before suing in district court, the CADA claim is barred. This bar is jurisdictional. *Cont'l Title Co. v. Dist. Ct.*, 645 P.2d 1310, 1316 (Colo. 1982). Phillips timely objected to this failure. Opening Br. 13.

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

To determine whether an agency order is final, this Court considers its "legal effect," not its "form." *Levine v. Empire Sav. & Loan Ass'n*, 192 Colo. 188, 189 (Colo. 1976). 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); *accord* Answer

18 (endorsing this standard). Scardina insists that the Commission's dismissal is not a final order because it did not adjudicate the merits or determine legal claims. Answer 16. Not so. The Commission's dismissal did *both*. Regardless, the finality test is not so rigid.

Agencies can issue final orders without (i) holding hearings, *Indus. Claim Appeals Off. v. Orth*, 965 P.2d 1246, 1253 (Colo. 1998); (ii) issuing findings, *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), (iii) adjudicating complaints, *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 (iv) determining claims, *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); Opening Br. 16. The test is practical. Scardina addresses *none* of these cases that Phillips cited in his opening brief.

Nor does Scardina contest that the Commission's dismissal limited Phillips' liability, bound future agency action, and ensured Phillips would not face the same administrative claims again. Opening Br. 16. Accordingly, the dismissal 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 U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578

U.S. 590, 598 (2016) (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). Again, Scardina addresses *none* of these cases—despite arguing below that "federal" precedents are persuasive on this issue. Answer Br. 13, *Scardina v. Masterpiece Cakeshop Inc.*, 2021CA1142 (2022), Filing ID: 7C139A8525DA9; *see id.* at 1.

Instead, Scardina says Phillips never "raised this argument" before. Answer 18. But Phillips has repeatedly argued that the Commission's dismissal was a final order, CF 72-77, 268, 305-07; 356-58; 478-84; 496; 503; 1044; 4685-86; 4730; Appellants' Opening Br. 16-25, *Scardina v. Masterpiece Cakeshop Inc.*, 2021CA1142 (2022), Filing ID: 314C16356A392, including based on APA precedent, Appellants' Reply Br. 4-7, *Scardina v. Masterpiece Cakeshop Inc.*, 2021CA1142 (2022), Filing ID: 120FA01733E8D—*which Scardina believes control here*, Answer 18 (endorsing *Doe 1* standard). Like Scardina, Phillips cites more support on appeal because cases that were binding below do not control here, a practice that appellate courts endorse. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (allowing new "support" for claim on [appeal]); *Maslak v. Town of Vail*, 345 P.3d 972, 976 (Colo. App. 2015) (allowing "additional support for [appellant's] argument" on appeal).

Scardina then mistakes Phillips' argument as turning on the dismissal's "timing" rather than its "effect." Answer 16. Timing is relevant only insofar as CADA expressly permits suing without exhausting judicial review in three defined situations. If the Division issues a no-probable-cause determination, the complainant timely requests and receives a right-to-sue letter, or the Commission loses jurisdiction before starting a hearing—*none of which happened here*—then CADA allows complainants to sue in district court without first exhausting appellate review. C.R.S. § 24-34-306(2)(b)(I)(B), (11)-(15). This is why the *Continental Title* complainant could not appeal the Commission's "purported … closure letter." 645 P.2d at 1316. The letter wasn't the problem. *Contra* Answer 16. The Commission lost "jurisdiction" before issuing it. *Cont'l Title*, 645 P.2d at 1316. In such situations, CADA expressly permits complainants to sue in district court before seeking judicial review. Because Scardina satisfies none of these exceptions, Scardina could not skip review.

Finality turns instead on an order's effect. The Commission's dismissal had three legal effects. It limited Phillips' liability, bound future agency action, and ensured Phillips would not face the same administrative claims again. Opening Br. 16. Scardina says those effects are insufficient because that would mean no-probable-cause determinations are appealable. Answer 18. That's wrong. While litigation has begun when the Commission files a formal complaint, no litigation has begun when the Division issues a no-probable-cause determination; that merely

prepares for *future* litigation. Opening Br. 17. But once Commission litigation has begun, dismissing it with prejudice *resolves claims* and precludes the agency from relitigating them. *Id.* Such dismissals do more than simply end the agency process; they have the three legal effects just noted.

Three final points. First, Phillips does not argue that Scardina is bound by Phillips' settlement with the Commission. *Contra* Answer 19. The Commission's dismissal controls. As in other administrative contexts, that order "is equivalent to an award." *Orth*, 965 P.2d at 1253. And its effect does not turn on consent. *See* C.R.S. § 24-34-307(1); *Archibold v. Pub. Utils. Comm'n of the State of Colo.*, 933 P.2d 1323, 1326 (Colo. 1997); *Agnello v. Adolph Coors Co.*, 689 P.2d 1162, 1165 (Colo. App. 1984) (*Agnello I*). Second, Commission rules do not equate agency settlements with no-probable-cause determinations. *Contra* Answer 19. Those rules say complainants can appeal Division settlements to the Commission under the *same process* used to internally appeal no-probable-cause decisions. 3 CCR 708-1:10.5(D)(5). And third, Phillips cited cases showing that administrative dismissals with prejudice are appealable. Opening Br. 17 (*Green Aviation Mgmt. Co., LLC v. FAA*, 676 F.3d 200, 204 (D.C. Cir. 2012)); *id.* at 20-21 (*Jones v. Ill. Dep't of Hum. Rts.*, 515 N.E.2d 1255, 1256-57 (Ill. App. 1987)). Scardina just ignores those cases.

In sum, the Commission's dismissal after settlement "definitive[ly] resol[ved]" the CADA "proceedings" against Phillips, *Archibold*, 933 P.2d at 1326, and imposed legal consequences. It's a final order.

2. At minimum, the Commission's dismissal is a refusal to issue a final order.

Alternatively, the Commission's dismissal is "a refusal to issue an order," which is also appealable under C.R.S. § 24-34-307(1). Administrative parties are entitled to an order when a statute requires it. *O'Bryant v. Pub. Utils. Comm'n of State of Colo.*, 778 P.2d 648, 653 (Colo. 1989). After the Commission begins an adjudicatory hearing, CADA requires the agency to complete that hearing, C.R.S. § 24-34-306(8), and issue an order justifying its decision, *id.*; *see* C.R.S. § 24-4-105(2)(a). CADA removes the agency's discretion to eschew that process, and if Scardina was denied a required order, the Commission's "refusal" could have been appealed. C.R.S. § 24-34-307(1); Opening Br. 19-21.

Scardina raises two threshold objections. First, Scardina says this argument is "new." Answer 20. But Phillips repeatedly raised it below, Appellants' Opening Br. 22, *Scardina v. Masterpiece Cakeshop Inc.*, 2021CA1142 (2022), Filing ID: 314C16356A392, including based on "APA" principles, Appellants' Reply Br. 6-7, *Scardina v. Masterpiece Cakeshop Inc.*, 2021CA1142 (2022), Filing ID: 120FA01733E8D.

Second, Scardina invokes the invited-error doctrine. Answer 20. But that doctrine does not apply when a party has relied on "settled law"

that courts later reject. *United States v. Titties*, 852 F.3d 1257, 1264 n.5 (10th Cir. 2017). Following *Agnello I*, Phillips believed the Commission's dismissal would be a final order. § I.A.1; *cf. Agnello I*, 689 P.2d at 1163 (reviewing final order "approving a settlement agreement" between agency and respondent). Because courts below mistakenly rejected that precedent, the invited-error doctrine does not prevent Phillips from defending himself here on *alternative* grounds. And regardless, Scardina has waived this point by not raising it below. *See Antero Treatment LLC v. Veolia Water Tech., Inc.*, 2023 CO 59, ¶ 35 n.4.

Turning to CADA, Scardina says it "does not mandate a hearing." Answer 21. But Scardina does not contest that administrative "parties" "may be entitled to a hearing." *Id.*; *see* C.R.S. § 24-34-306(8); 24-4-105(2)(a) (administrative "parties are entitled to a hearing and decision in conformity with this section."). Scardina denies being a party. Answer 21. But C.R.S. § 24-4-102(11) defines "[p]arty" as "any person … named or admitted as a party … in any … agency proceeding," and Scardina specifically *intervened* in the Commission proceeding. EX (Trial) 139; *see Red Seal Potato Chip Co. v. Colo. C.R. Comm'n*, 618 P.2d 697, 701 (Colo. App. 1980). Because CADA requires the Commission to conduct a hearing "in accordance with [§] 24-4-105," it incorporates that law's hearing requirement, which tracks with CADA itself. Scardina could have sought a hearing but did not.

Scardina then raises two fears. First, Scardina says applying CADA's plain language would preclude settlements after administrative hearings begin. But the legislature is master of its own statute. And the rule makes sense because the Commission cannot begin litigation until settlement efforts collapse. C.R.S. § 24-34-306(4). Second, Scardina says it would "render a no-probable-cause" decision appealable. Answer 21. But to trigger C.R.S. § 24-34-307(1)'s refusal clause, the order denied must be final in character. Only those entitled to a final order can seek one. That right matures after the Commission files a formal complaint. Before then, parties deserve no final order because no litigation has begun. *See* C.R.S. § 24-34-306(4) ("*If the commission determines that the circumstances warrant*, it shall issue … a written notice and complaint." (emphasis added)).

Scardina next says C.R.S. § 24-34-307(1)'s refusal clause should cover only refusals to issue "certain orders as part of [a] final order." Answer 22. But that interpretation renders the clause superfluous. Complainants are aggrieved by the final order itself. And if complainants can appeal when *some* final orders are refused, they can appeal when *all* are refused (assuming one is deserved). The far better reading interprets the refusal clause to cover refusals to issue a final order—in whole or in part—that a party deserves. This also tracks with the APA, which allows appeals to "compel any agency action … that has been unlawfully withheld or unduly delayed." C.R.S. § 24-4-106(7)(b).

The Commission's dismissal is either a final order or a refusal to issue one. Either way, it's appealable.

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 standard was met. Opening Br. 21-23. Scardina denies this, saying CADA complainants have only an "incidental" interest in the Commission proceeding and suggesting this interest accrues only after a determination. Answer 23-24. But "incidental" interests count in the analysis. *Agnello I*, 689 P.2d at 1165. And complainants are aggrieved whenever their legal rights are violated—including by dismissal of claims or denial of process. *O'Bryant*, 778 P.2d at 652-54. Scardina was aggrieved by the dismissal.

4. CADA's exhaustion rule is just.

Scardina does not dispute that rejecting Phillips' arguments would deny future CADA complainants critical appeal rights. Opening Br. 25-27. Scardina responds that aggrieved complainants can just sue instead. Answer Br. 24-25. But not everyone wants or can afford to sue. Nor does CADA require it. And though Scardina says Phillips' interpretation would allow the Commission and respondents to resolve claims over the

complainant's objection, *id.*, complainants can always request a right-to-sue letter to prevent that, C.R.S. § 24-34-306(15). When complainants acquiesce to Commission resolution, they trade some control over the litigation for a chance at harsher punishment and a government-funded litigation process. If complainants are denied a remedy or process they deserve, they can appeal. Scardina refused CADA's relief before suing in district court. This Court should not reward that gamble by saddling future complainants with the debt.

B. Claim preclusion bars Scardina's CADA claim.

Claim preclusion also bars the CADA claim. Opening Br. 28-29. First, Scardina says the Commission's dismissal was not final because the Commission did not act in a "judicial capacity" or resolve "disputed issues of fact." Answer 25. But because the Commission resolved litigation, it acted in a judicial capacity. *See Douglas Cnty. Bd. of Comm'rs v. Pub. Utils. Comm'n of State of Colo.*, 829 P.2d 1303, 1307-08 (Colo. 1992). And just like court-ordered voluntary or involuntary dismissals with prejudice, the Commission's dismissal was final despite having no factual findings. *Cf. O'Done v. Shulman*, 238 P.2d 1117, 1118 (Colo. 1951); *Watlington v. Browne*, 791 F. App'x 720, 723-24 (10th Cir. 2019).

Second, Scardina denies being a party to the Commission proceeding. That's incorrect. § I.A.2. Though Scardina disputes having an opportunity to be heard before the Commission's dismissal, this opportunity

need only come "at a meaningful time and in a meaningful manner," Answer 25—that is, "before final judgment," *Fleming v. McFerson*, 28 P.2d 1013, 1015 (Colo. 1933). The Commission's dismissal became final when Scardina could no longer appeal it. *See* C.R.S. §§ 24-4-106(11); 24-34-307(12). Because Scardina was notified of the petition for closure, EX (Trial) 129, and the Commission's dismissal, EX (Trial) 140, and Scardina could have objected or sought judicial review before final judgment, § I.A, there was adequate notice and an opportunity to be heard, *see Mathews v. Eldridge*, 424 U.S. 319, 909-10 (1976). Again, Scardina didn't pursue it.

II. Scardina did not prove a CADA violation.

On the merits, Scardina says Phillips' decision not to create the custom cake celebrating a gender transition was due to transgender status and that CADA has no offensiveness rule. That's wrong twice over.

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

Scardina mistakes the standard and thus the analysis. Though Scardina says Title VII's "motivating factor" test should control, Answer 26, CADA varies from Title VII. Unlike Title VII, CADA does not allow proof that a protected trait "was a motivating factor" to trigger liability. 42 U.S.C.A. § 2000e-2(m). It uses only a "because of" trigger, C.R.S. § 24-34-601(2)(a), which tracks more closely with the ADEA, 29 U.S.C. § 623(a)(1). So to show CADA liability, plaintiffs must prove that a

protected trait had "a determinative influence" on the defendant's decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

On that point, 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 (emphasis added). This fact is the difference between equal and unequal treatment. Even under Scardina's facts—that Phillips would create the requested cake before Scardina revealed its message, that Phillips creates cakes expressing messages about gender he believes, that Phillips would create "an identical looking cake," and that Phillips does not believe someone can change from male to female, Answer 27-28—it's clear that Phillips declined the requested cake because of its message, not Scardina's status. Phillips treated Scardina like anyone else.

Scardina also says objecting to the requested cake's message is status-based discrimination. Answer 28-30. But the U.S. Supreme Court approves of distinctions between someone's *speech* and their *status*. *Hurley* held that declining to include people seeking to promote their sexual orientation was based on "disagreement" with a message, not some "intent to [unlawfully] exclude" anyone. 515 U.S. at 572. *303 Creative* agreed. 600 U.S. at 589, 594-95. Otherwise, government could compel "all manner of" speech." *Id.* at 589. And though Scardina would distinguish *303 Creative* based on "a stipulation," Answer 29, that stipulation wasn't binding because it embodied a legal conclusion, *Sanford's Est. v. Comm'r*

of Internal Revenue, 308 U.S. 39, 51 (1939). On Scardina's logic, CADA would punish a black artist's refusal to create a custom white-cross cake promoting racist views for the Aryan Nation Church, even though the artist might create the white-cross cake to express other messages. Opening Br. 30. *Scardina never disputes this*.

Phillips serves everyone but cannot create cakes expressing certain messages for anyone. CADA doesn't punish artists like Phillips.

B. CADA's offensiveness rule protects Phillips' decision not to express a message he doesn't believe.

Scardina argues that CADA's offensiveness rule doesn't exist. Answer 30-32. That rewrites history. Opening Br. 6, 32. Rather than prosecute three secular cake artists for refusing to create a cake conveying a message with religious text, the Commission said CADA does not punish artists who serve all people but decline "to create [certain] cakes for anyone." EX (Trial) 149, 150; *see* EX (Trial) 148, 151, 152, 153; *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 636 (2018). In Phillips' first case, the court of appeals accepted the rule but refused to apply it to Phillips. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. App. 2015). Now, as the U.S. Supreme Court's opinion establishes, this rule protects all artists. *Masterpiece*, 584 U.S. at 638-40.[1]

[1] Scardina says the trial court noted that Phillips "failed to present" evidence showing the Division has "endorsed" the "offensiveness rule." Answer 31. But that court improperly refused to judicially notice relevant

Worse, Scardina would distinguish the three examples above because "there was no evidence that the bakeries based their decisions on the [customer's] religion." Answer 32. But on Scardina's logic, "divorcing" a religious message from religious "status is impossible." Answer 30. Ignoring this, Scardina says this case is different because Phillips would create an "identical-looking cake" to express a message he believes. Answer 32. But while Justice Kagan said this may be a "proper basis for distinguishing … cases," *Masterpiece*, 584 U.S. at 641 (Kagan, J., concurring), the majority did not, *id.* at 638-39. Neither did the majority in *303 Creative*. 600 U.S. at 593; *see id*. at 629 (Sotomayor, J., dissenting).

For good reason. Again, on this logic, the black cake artist who declines to create a white-cross cake celebrating an Aryan Nation Church event would face CADA liability because she would create an identical-looking cake to celebrate her church's 50th anniversary. CADA doesn't command that.

III. The First Amendment protects Phillips' decision not to express a message that contradicts his beliefs.

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

Because the judgment below risks intruding on "free expression," this Court independently reviews *both* factual and legal determinations

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agency determinations. *Scardina v. Masterpiece Cakeshop, Inc.*, 528 P.3d 926, 938 (Colo. App. 2023). The appeals court noticed them. *Id.*

de novo. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *see Hurley*, 515 U.S. at 567-68. Review under this standard does not require "undisputed" facts, Answer 32, or else it would mean nothing.

B. CADA punishes Phillips' decision not to speak.

1. The requested cake is expressive.

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); Opening Br. 35. Despite Scardina's parsing, Answer 33-40, this test deciphers both pure *and* symbolic speech. Certain mediums so clearly "communicate ideas" that courts protect them without debate. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011); *accord Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (words, pictures, films, paintings, drawings, and engravings). Others require a closer look.

That test is met here. *See* Br. of Amici Curiae Arkansas & 22 Other States in Supp. of Defs. 6-18. The first prong is automatically satisfied in compelled-speech cases. *Cressman v. Thompson*, 719 F.3d 1139, 1154 n.15 (10th Cir. 2013) (*Cressman I*). Scardina does not dispute this.

As for the second, people viewing the cake—including Scardina—would know the design "symbolized" a gender transition. Pet.App.13. Phillips need not take a poll to prove this. Answer 37. Scardina's own

words suffice: when requesting the cake, Scardina told Phillips that its "color and theme" would symbolize and "celebrate [a] transition from male to female." EX (Trial) 133; *see* Pet.App.8. As Scardina admitted, "blue … represents male" and "pink … represents female," Pet.App.13; the blue exterior would convey how Scardina was viewed at "birth," *id.*; and the pink interior would "reflect[ ] who [Scardina is] … on the inside," *id.* In sum, Scardina *told* Phillips the *exact message* the cake would convey, and Phillips believed it. Pet.App.8. In cases like this, the *request*—not some future event, Answer 34-35, 37—provides the critical context, *Hurley*, 515 U.S. at 570 (citing requestor's expressed "intentions" to prove "expressive nature" of desired conduct).

To be sure, Scardina says "a pink cake with blue frosting has no inherent meaning." Answer 33-34. But neither does marching, *Hurley*, 515 U.S. at 568-70, saluting, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943), or wearing black armbands, *Spence*, 418 U.S. at 410. Yet all may convey a message in context. So too here. "In context," the requested cake "symbolized a transition from male to female." Pet.App.13. So it's speech. *See 303 Creative*, 600 U.S. at 587, 600-01 (protecting all "manner of speech," including "symbols").

2. Coercing Phillips affects his message.

By punishing Phillips' decision not to create the requested cake, CADA "alter[s]" Phillips' speech—"forcing" him to express something he

doesn't believe. *303 Creative*, 600 U.S. at 596 (cleaned up); *accord Hurley*, 515 U.S. at 578; *Rumsfeld v. Forum for Acad. & Inst'l Rts.*, 547 U.S. 47, 63 (2006). CADA can't do that. *303 Creative*, 600 U.S. at 596.

Scardina raises five objections. None suffice. First, Scardina says the requested cake is not Phillips' "self-expression." Answer 33. But the "creation" of original art is self-expression, *Cressman v. Thompson*, 798 F.3d 938, 953-54 (10th Cir. 2015) (*Cressman II*), even when the customer provides the design or submits the request, *303 Creative*, 600 U.S. at 593-94, 601; *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015). Phillips creates expressive cakes "to express an intended message." Pet.App.11. As its creator, he's "intimately connected with" the expression. *Hurley*, 515 U.S. at 576.

Second, Scardina says Phillips does not object to the requested design. Answer 36. But "context matters." *303 Creative*, 600 U.S. at 600 n.6; *cf. Spence*, 418 U.S. at 410 (symbol's "context may give [it] meaning"). The *Barnette* children did not object to performing salutes generally. Nor does the black artist above object to white-cross cakes. Yet Scardina insists that Phillips must "repurpose" a cake he "will create" with a message he "*does* endorse" to express an idea he "does *not*." *303 Creative*, 600 U.S. at 593. That alters Phillips' message. *See id.* at 589-90, 594.

Third, Scardina criticizes Phillips' distinction between custom and pre-made cakes. Answer 34. Both *can* be speech, assuming they express a message, § III.B.1—yet only custom expressive cakes trigger compelled-

speech concerns because they invade Phillips' "individual freedom of mind" by forcing him to express unwanted messages. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see Associated Press v. United States*, 326 U.S. 1, 4, 20 n.18 (1945) (distinguishing refusal to sell completed product from refusal to create and publish).

Fourth, this distinction shows that Phillips' decisions turn on what his custom cakes will express, not how they will be used. *Contra* Answer 36. Like selling off-the-shelf black armbands, *id.* at 38-39, Phillips' conscience is not implicated when he sells pre-made cakes, Pet.App.7. Any expression is already created. But when Phillips is asked to create a custom cake expressing a message he doesn't believe, even if the cake looks identical to one he's sold before, he declines. Far from "illogical," Answer 6, one compulsion alters the message Phillips is asked to create; the other doesn't. Phillips cares about a custom cake's message, not its use.

Fifth, misattribution is not relevant when government forces individuals to express a message themselves, but only when it compels them to host another person's speech. *See Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 6-7, 15 n.11 (1986); *Tornillo*, 418 U.S. at 256; *Hurley*, 515 U.S. at 577 (refusing to decide "significance of … misattribution"); Br. of Amici Curiae National Religious Broadcasters *et al.* 4-15; *contra* Answer 39-40. Again, stipulation or not, *303 Creative* flatly rejected this misattribution

argument. 600 U.S. at 588. Applying CADA here alters Phillips' expression.

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

CADA compels Phillips to express messages about gender he would not otherwise express, and it does so because of Phillips' prior speech. Opening Br. 38-39. Even Scardina accepts that because Phillips creates cakes promoting ideas about gender he believes, CADA compels him to create cakes expressing those he doesn't. *See* Answer 7. For this reason, and because the "very purpose" of CADA's application here is to eliminate "certain ideas or viewpoints from the public dialogue," *303 Creative v. Elenis*, 6 F.4th 1160, 1178 (10th Cir. 2021); *see 303 Creative*, 600 U.S. at 588, the test in *United States v. O'Brien*, 391 U.S. 367 (1968), does not apply, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (strict scrutiny applies if application "trigger[ed]" by "communicating a message"); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 641-42 (2000).

D. CADA punishes Phillips for his religious views.

Moving to free exercise, Scardina denies CADA's offensiveness rule, misreads *Agnello I*, and disregards C.R.S. § 24-34-601(3). First, CADA's offensiveness rule was key to Phillips' prior win. *Masterpiece*, 584 U.S. at 633; § II.B. Without it, he would have faced no "disparate consideration." *Masterpiece*, 584 U.S. at 639. The rule thus exists, and Scardina cannot distinguish its protection based on discriminatory grounds. § II.B. That

repeats past unconstitutional error. *Masterpiece*, 584 U.S. at 638-39. No matter whether this rule is kept in the future, it protects Phillips here because Scardina does not dispute that Phillips cannot be retroactively punished. Opening Br. 40-41.

Second, Scardina denies that Phillips faces disparate treatment on procedural grounds by insisting that the Division resolved *Agnello I* with a "merits determination." Answer 42. But CADA forbids that. After finding probable cause, the Division may "endeavor to eliminate the [alleged discrimination] by conference, conciliation, and persuasion and by means of the compulsory mediation." C.R.S. § 24-34-306(2)(b)(II). Only the Commission may decide claims. *Id.* § 24-34-306(4)-(10). In *Agnello I*, the court reviewed an order "approving a settlement." 689 P.2d at 1163; *Agnello v. Adolph Coors Co.*, 695 P.2d 311, 313 (Colo. App. 1984) ("conciliation efforts were successful") (*"Agnello II"*). By letting others appeal similar orders but saying Scardina need not here, the judiciary has applied its rules inconsistently. That conveys religious hostility toward Phillips' faith.

Third, just like the court below, Scardina disregards C.R.S. § 24-34-601(3). CADA aims to end discrimination generally. Exempting sex discrimination undermines that interest. Nothing explains why exempting this discrimination furthers CADA's goals while protecting Phillips' religious expression would not. The Constitution forbids prohibiting "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); *see* Opening Br. 41-42.

E. CADA's application cannot satisfy strict scrutiny.

Scardina does not engage Phillips' strict-scrutiny argument or even say that CADA satisfies that standard as applied because that demanding standard is not satisfied here. Opening Br. 42-43. The First Amendment protects Phillips' decision not to create a custom cake expressing a message he doesn't believe.

CONCLUSION

This Court should reverse and enter judgment for Phillips.

Respectfully submitted this 19th day of March, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 19th day of March, 2024, filed a copy of the foregoing reply brief via the Colorado Courts E-Filing system which effects service on all parties and/or their counsel of record.

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