

| | |
|---|---|
| DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO | |
| 1437 Bannock St., Denver, CO 80202 | DATE FILED: June 15, 2021 5:20 PM CASE NUMBER: 2019CV32214 |
| Plaintiff(s), AUTUMN SCARDINA | |
| v. | |
| Defendant(s), MASTERPIECE CAKESHOP INC et al. | |
| | ▲ COURT USE ONLY ▲ |
| | <hr/> Case Number: 19CV32214 Courtroom: 275 |
| Findings of Fact and Conclusions of Law | |

THIS MATTER comes before the Court following a bench trial on March 22-24, 2021. The Court, having reviewed the evidence presented, relevant legal authority, the parties’ post-trial submissions, and being otherwise fully advised, hereby makes the following findings of fact and conclusions of law.

Introduction

The sole claim remaining for trial was whether Defendants violated Colorado’s Anti-Discrimination Act (“CADA”), § 24-34-601, C.R.S., in refusing Plaintiff’s request for a birthday cake. The Court has organized this order under “findings of fact” and “conclusions of law.” In doing so, the Court has not attempted to distinguish between any mixed questions of law and fact.

Findings of Fact

I. The Parties

Plaintiff Ms. Autumn Scardina

1. Ms. Scardina is a resident of Arvada, Colorado. (TMO § II (“Stip. F.”) at ¶ a.) Ms. Scardina is a lawyer and a member of a law firm in Denver. (Stip. F. ¶¶ b, c.) Ms. Scardina is a transgender female. (Tr. 46:7-14.)

Defendants Masterpiece Cakeshop, Inc. and Mr. Jack Phillips

2. Defendant Masterpiece Cakeshop, Inc. (“the Bakery”) is a Colorado corporation with its principal place of business in Lakewood, Colorado. (Ex. 52 at ¶ 6.) The Bakery is co-owned by Defendant Jack Phillips and his wife, Debra Phillips. (Tr. 265:4-6.) The Bakery also employs their daughter, Lisa Eldfrick. (Tr. 480:25-481:1.)

3. The Bakery is “a business engaged in the sale of baked items to the public,” including cookies, brownies, birthday cakes, pre-made cakes (or “store cakes”) and special-order or custom cakes. (Ex. 52 at ¶ 6; Tr. 265:17-266:12.)

4. Mr. Phillips is a resident of Lakewood, Colorado, and the operator of the Bakery. (Stip. F. ¶ e.) Mr. Phillips is ultimately responsible for the Bakery’s decisions about which goods it will and will not sell and to whom. (Tr. 266:13-267:4.)

5. Mr. Phillips is a man of good faith religious convictions. (Tr. 349:18-22.) He is a devout Christian who seeks to operate the Bakery consistently with his religious beliefs. (Tr. 349:18-350:2.) Mr. Phillips sees himself as a “Christian witness.” He wants to live his life, do his business, and engage everyone in a way that honors Jesus Christ. (Tr. 364:23-365:11.) Mr. Phillips named the Bakery “Masterpiece” based on Jesus’ words in the Sermon on the Mount, where he said no man can serve two masters. (Tr. 330:18-331:5.)

6. At the same time, Mr. Phillips chose to incorporate his business as a for-profit entity providing goods and services to the public. While this choice does not take him outside the protections of the First Amendment, it does subject him and the Bakery to CADA. Whether there is a conflict between the former and the latter is the primary legal issue in this case.

II. Genesis of the Dispute: Defendants refused to provide a cake to a same-sex couple for their wedding.

7. In 2012, a same-sex couple entered the Bakery and requested a cake for their wedding; Mr. Phillips declined. (Tr. 290:9-15.) There was no discussion about the design of the cake or whether the couple would be satisfied with one of the pre-made store-cakes. (Tr. 416:18-418:14.) Instead, Mr. Phillips testified that he “knew immediately that [he] can’t create a cake for a same-sex wedding.” (Tr. 416:18-418:3.)

8. Mr. Phillips told the couple that he would make them birthday cakes, shower cakes, cookies, and brownies, but he cannot create a custom cake for a same-sex wedding. (Tr. 417:14-418:14.) According to Mr. Phillips, that cake would have expressed messages that contradict his religious beliefs.

9. Mr. Phillips’ decision led to a legal action brought by the Colorado Civil Rights Division (“CCRD”). (Tr. 290:9-19.) His decision and the case were covered extensively in the media and became part of a public debate about religious freedom and antidiscrimination laws. (Tr. 150:16-151:1.) Mr. Phillips was quoted in the media, gave TV interviews, and wrote op-eds seeking to explain his religious convictions. (Tr. 155:3-156:13, 160:5-162:14, 163:24-166:3, 167:24-168:14; Ex. 231 at 5-6.) Concurrently, there has been an ongoing national public debate and discussions on gender identity and antidiscrimination laws. (Tr. 150:19-151:14, 153:22-154:2.)

10. After the Colorado Court of Appeals affirmed an administrative law judge's finding that Defendants had violated CADA by declining to create a custom cake for a same-sex wedding, the U.S. Supreme Court granted review on June 26, 2017, and eventually overturned the decision of the Colorado Court of Appeals. (Tr. 372:2-4, 378:21-379:4); *see generally Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) ("*Masterpiece I*").

11. Ms. Scardina first learned about the Bakery from the media coverage of Mr. Phillips' refusal to make a cake for the same-sex couple's wedding. (Tr. 47:23-48:4, 58:4-12.) Ms. Scardina heard multiple statements attributed to Mr. Phillips that, while the Bakery would not make cakes for same-sex weddings, the Bakery would provide any other baked goods, including birthday cakes, to LGBT individuals. (Tr. 60:16-61:2, 193:13-19, 301:17-22, 302:8-14 ("I don't bake cakes for same-sex weddings, but I'd be happy to make you anything else you want."); Ex. 127 at 3 ("[H]e would make cakes for their birthdays and sell them cookies or brownies, but that he wouldn't make a cake for a same-sex wedding.").)

III. Ms. Scardina twice requested a birthday cake, which also reflected and celebrated her transgender identity.

12. On June 26, 2017, a few weeks before her birthday and after learning that the U.S. Supreme Court had agreed to review the Colorado Court of Appeals' decision against Mr. Phillips and the Bakery, Ms. Scardina called the Bakery; Mrs. Phillips answered the phone. (Tr. 59:10-13, 61:24-62:3, 170:13-20, 213:24-214:1.) Ms. Scardina asked if the Bakery could make a custom cake for her birthday for six to eight people. (Ex. 52 at ¶¶ 25-27; Tr. 63:1-63:16, 214:13-216:2.) Mrs. Phillips responded that the Bakery could make a cake in the time indicated for the amount of people requested. (Tr. 62:10-15, 215:3-216:2.)

13. The Bakery was unusually busy and chaotic that day. The press was there. There were many customers. And the shop received a high volume of phone calls. (Tr. 212:20-213:13, 223:22-23, 229:2-12, 378:21-379:6, 490:2-8.) As a result, Mrs. Phillips answered Ms. Scardina's initial call, instead of Mr. Phillips doing so. After discussing when the cake was needed and the cake's size and design, (Tr. 213:14-216:2), Ms. Scardina elaborated that she wanted a birthday cake with a pink interior and a blue exterior. She also "explained that the design was a reflection" of her "transition[]" from male-to-female." (Ex. 136 at 8.)

14. Based on her and her husband's religious convictions, Mrs. Phillips stated that "[the Bakery] probably could not make that cake because of the message." (Tr. 219:9-18, 220:13-21, 221:23-222:2, 235:22-25.) Ms. Scardina then asked Mrs. Phillips to repeat her statements so someone else could hear, at which point Mrs. Phillips believed something was wrong with the conversation and told the caller she would get Mr. Phillips on the phone. (Tr. 222:3-18.) Mrs. Phillips then went to get Mr. Phillips to take the call, but when he picked up the phone, the line was disconnected. (Tr. 385:23-386:2, 388:16-389:1.)

15. Ms. Scardina called back, and Lisa Eldfrick, who had witnessed her mother take the prior call, answered the phone. Ms. Eldfrick indicated that the caller had just been on the phone with her mother, that her mother had stated that the Bakery could not make the cake, and repeated that the requested cake "isn't a cake we could make." (Tr. 492:21-493:3.)

16. Defendants testified that they declined the requested cake based on the message they believed it would have conveyed—that a person can change genders and that a gender-transition should be celebrated. (Tr. 219:16-25, 220:17-25, 222:1-2, 249:19-250:1, 307:21-308:3, 311:17-21, 314:7-16, 394:24-395:5.) It would violate Mr. Phillips's religious beliefs to send a

message to anyone that he would celebrate a gender transition. It would not matter if the message only goes to one person. (Tr. 411:24-412:8, 414:8-15.)

17. The Court finds that Ms. Scardina initially asked if the Bakery could make a pink cake with blue frosting for 6 to 8 people and Mrs. Phillips agreed that the Bakery could make the requested cake. (Ex. 52 at ¶¶ 27-28.) On this issue, Ms. Scardina’s and Mrs. Phillips’ memory of the phone call was different. (*Contrast* Tr. 63:25-64:17 (Ms. Scardina) *with id.* at 216:7-12 (Mrs. Phillips).) The Court need not determine credibility to resolve this conflict, however, because Defendants admitted in their answer that Ms. Scardina’s version was accurate. (Ex. 52 at ¶ 28.); *Agnew v. Agnew*, 185 P. 259, 259 (Colo. 1919) (a defendant’s answer is a judicial admission that cannot be controverted).

18. This conflict is also a distinction without any effect because Mrs. Phillips confirmed that the Bakery would have made a pink cake with blue frosting if Ms. Scardina had not then shared her protected status and the meaning of the colors to her. (Tr. 239:11-15.) Only after Mrs. Phillips stated that the Bakery could make the requested item did Ms. Scardina then share that she had chosen those colors to reflect and celebrate her transition from a male to a female. (Tr. 64:18-66:8.)

19. When she was refused service by Defendants, Ms. Scardina stated it “stung”—she felt as if she was considered an undeserving, objectionable human and that she was not as valuable, worthy or important as other customers. (Tr. 91:3-10, 92:12-18.) The rejection felt like a strike at her dignity and at the LGBT community. (Tr. 92:1-3.)

20. Ms. Scardina was in Denver during the call. (Tr. 61:3-21.)

IV. Defendants would make an identical-looking item for other customers.

21. Mr. Phillips agreed that the Bakery would make the same cake requested by Ms. Scardina for other customers. (Tr. 315:23-316:9, 366:8-14.). In fact, the Bakery has made and

sold cakes that recognize the cisgender status of an individual, such as a pink cake for the birthday of a person who is identified as female at birth, or a blue birthday cake for a person who is identified as male at birth. (Tr. 267:12-14, 268:2-12.)

22. Mr. Phillips, however, has strong religious beliefs that it is not possible for a person to be transgender. (Tr. 307:21-308:1.) He and his wife do not believe that a person can transition from the gender assigned at birth. (Tr. 212:2-7, 307:21-308:1.) As a result, Mr. Phillips believes Ms. Scardina is a male and will not acknowledge her transgender status or that she is a female. (Tr. 307:10-12, 308:12-16.)

23. Defendants agree that a pink cake with blue frosting has no inherent meaning and does not express any message. (Tr. 221:1-8, 273:10-20; *see also id.* at 454:2-13.)

24. Defendants will accept a customer's representations about what the custom-made bakery item will reflect, and will sell that custom item as long as it comports with their religious beliefs. (Tr. 362:2-16, 238:16-239:15.) Defendants' custom cakes might not communicate any particular message unless the purchaser discloses to them what the item is intended to convey. (Tr. 281:17-22.) Defendants agree that if there was a pre-made pink and blue cake that Ms. Scardina wanted to purchase from the Bakery for a celebration of a birthday or a gender transition, they would not have objected to selling her that item even if she disclosed the meaning it had for her. (Tr. 352:19-353:6.)

25. Ms. Scardina was aware of the previous litigation involving the Bakery's refusal to sell a wedding cake to a gay couple and that Mr. Phillips had made public statements that he would sell any other baked goods to the LGBT community. (Tr. 60:13-61:2, 193:9-19.) It was her understanding that Mr. Phillips only objected to selling a wedding cake because of his religious beliefs concerning marriage. (Tr. 58:13-59:9, 60:13-61:2, 166:13-25.) Ms. Scardina

hoped that Mr. Phillips' statements about selling birthday cakes to members of the LGBT community were true and that he would make her the requested cake for her birthday. (Tr. 80:15-20, 93:5-94:7.)

26. The Court specifically finds that Ms. Scardina's request was a not "set-up" to initiate litigation. In making this finding, the Court has considered Ms. Scardina's other interactions with Defendants. The Court accepts her explanation for any rudeness, and relies not only on Ms. Scardina's testimony at trial, but her demeanor while testifying. Ms. Scardina credibly stated that she would have purchased the cake if Defendants had agreed to make it.

27. Ms. Scardina was seeking to "challenge the veracity" of Mr. Phillips' statements that he is willing to serve people who identify as LGBT and "call [his] bluff." (Tr. 92:24-93:4, 94:6-7, 169:8-14.) Ms. Scardina sequenced what was said on the call to try to prevent Mr. Phillips from arguing "it wasn't about who I was, but rather the message of what the cake was." (Tr. 184:11-185:13.) Instead of ordering a plain white cake and then telling the Bakery "I'm a transgender person," Ms. Scardina told the Bakery that the cake was to celebrate a transition from male to female and that the design reflected that transition. (Tr. 182:4-185:20, 188:12-189:4, 216:7-12, 219:2-4; Ex. 133; Ex. 136 at 8.)

V. Ms. Scardina timely brought this claim against Defendants.

28. Ms. Scardina filed a CADA discrimination charge against the Bakery with the CCRD on July 20, 2017 based on Defendants' decision not to create the pink and blue cake to celebrate a gender transition. (Tr. 74:24-75:6, 177:4-9; Ex. 46.) Both parties requested jurisdictional extensions of time, ultimately extending the CCRD's jurisdiction until October 13, 2018. (Tr. 432:18-434:19, 436:11-19.)

29. The CCRD issued a Probable Cause Determination against the Bakery on June 28, 2018. (Ex. 137; Tr. 508:12-16.)

30. The Colorado Civil Rights Commission issued its Notice of Hearing and Formal Complaint on October 9, 2018. (Ex. 138; Tr. 504:1-10.) Mr. Phillips was named a party to that complaint. (Ex. 138; Tr. 316:20-22, 317:2-3.)

31. The administrative case was closed on March 7, 2019 and the CCRD determined Ms. Scardina had exhausted her administrative remedies. (Ex. 140; Ex. 141; Tr. 504:1-10.)

32. The Commission issued a closure order and dismissed with prejudice the administrative complaint on March 22, 2019. (Ex. 140; Ex. 141; Tr. 504:1-10.)

33. Plaintiff did not appeal this dismissal or request and receive a right-to-sue letter. This suit was timely filed on June 5, 2019.

34. Defendants moved to deposit \$500.01 with the court registry to moot the CADA claim. Defendants later tendered a cashier's check for \$500.01 to Plaintiff on February 18, 2021 and also promised to pay court-ordered costs.

VI. Additional Findings regarding Defendants and LGBT Customers

35. Defendants regularly serve customers who identify as gay or lesbian. (Tr. 350:25-351:2.) Defendants also serve customers who identify as transgender. (Tr. 351:14-24, 486:1-10.)

36. Defendants' willingness to serve those who identify as LGBT includes the creation of custom cakes for them. (Tr. 350:20-351:2.) For instance, Defendants create a custom cake every year to celebrate the birthday of a lesbian couple's daughter. (Tr. 295:19-24, 485:13-25.) Mike Jones testified that he told Phillips he was gay on his first visit to the Bakery and has received custom cakes and other items many times over the course of his 25 or more visits. (Tr. 441:16-21, 442:16-19, 447:19-448:4, 450:4-12.) Defendants have never declined to serve Mr. Jones. (Tr. 442:20-22.) Mr. Jones has also not requested a gay-themed cake.

37. While Defendants generally are willing to serve anyone, Mr. Phillips claims his religious beliefs prevent him from creating custom cakes that express messages that would

violate his religious convictions. (Tr. 235:18-21, 351:21-352:11.) Defendants established this policy even before they opened the Bakery in 1993. Pursuant to this policy, Defendants have declined to create many types of cakes because of their religious convictions. (Tr. 355:6-9, 358:12-16.) These include cakes promoting Halloween, the “Day of the Dead,” cakes with Harry Potter and Game of Thrones themes, cakes celebrating same-sex weddings, and cakes demeaning LGBT individuals. (Tr. 304:9-305:12, 306:4-307:6, 354:24-355:22, 358:2-359:3, 359:22-360:15.)

38. Mr. Phillips also claims his religious beliefs prevent him from creating a custom cake celebrating a transition from male to female because expressing that message—that such a transition is possible and should be celebrated—would violate his religious convictions. (Tr. 314:7-315:14.) He and his wife believe that God designed people male and female, that a person’s gender is biologically determined, and that gender does not change based on an individual’s perception or feelings. (Tr. 212:2-7, 307:21-308:3, 394:24-395:5.) Mr. Phillips will not create a custom cake to celebrate a gender transition for anyone (including someone who does not identify as transgender). (Tr. 366:8-367:10.) While Mr. Phillips will not create the requested cake to celebrate a gender transition, he could create a similar-looking cake to celebrate the birthday of someone who identifies as transgender. That message would not violate his religious beliefs. (Tr. 366:8-367:10, 396:12-19.)

VII. Mr. Phillips and the “Art” of Custom Cakes

39. Mr. Phillips uses artistic techniques and tools when making bakery items, including both pre-made and special-order cakes, but particularly for the latter. (Tr. 334:6-15, 335:16-336:22, 398:3-14.) When they are purchased, pre-made and special-order cakes and other items are placed in boxes which display the Bakery’s logo. (Tr. 397:8-20.)

40. Mr. Phillips took a number of art classes in school. (Tr. 325:23-326:3, 327:2-10.) As he learned how to decorate cakes, Mr. Phillips realized that many of the same art techniques that he used in his art classes could be applied to creating cakes. (Tr. 329:9-25.) For instance, he uses watercolor skills he learned from art class on his cakes. (Tr. 333:19-334:24.) He also uses artistic tools when creating his cakes, such as paint palettes, paintbrushes of varying sizes and textures, palette knives, and sponges. (Tr. 335:21-336:22, 338:10-17; DX-2.) Reflecting the use of artistic tools and techniques, the Bakery's logo is a paint palette with a brush and whisk. (Tr. 331:8-20; Ex. 30.)

41. Mr. Phillips uses artistic techniques and tools to create intricate custom cakes, which convey the message of the cake not only through written words that may appear on the cake (such as "Happy Birthday," "Congratulations," etc.) but also by the design of the cake itself. (Tr. 344:19-345:8, 346:14-347:10.) He uses these skills to create cakes unique to a celebration and to express an intended message. (Tr. 414:22-415:23.) To reach this goal, Mr. Phillips may use his artistic skills for even simple tasks, such as selecting and applying colors. (Tr. 411:13-23.) Examples of Mr. Phillips' custom cakes are pictured in Trial Exhibits. (Ex. 2; Ex. 6; Ex. 41.)

42. As part of the process of creating a custom cake, Mr. Phillips envisions himself at the particular celebration. (Tr. 347:18-348:10.) He thinks of himself as a participant at the event he creates a cake to celebrate. (Tr. 348:6-14.) Mr. Phillips also seeks to communicate through his custom cakes. For example, when he creates a custom cake for a memorial service, through the design of the cake, Mr. Phillips seeks to communicate that he cares, that he feels the family's sorrow and their loss. (Tr. 348:15-349:10.) When he creates a cake, he feels he is "agreeing with the message and taking part in [the occasion]." (Tr. 395:11-16, 409:14-20.)

43. In each of his custom cakes, Mr. Phillips invests his “time and [his] talents and [his] energies to create something. And if that something contains a message or is to go to an event that [he] can’t participate in or disagree[s] with, then [he] can’t, in good conscience, create it.” (Tr. 408:13-21.) As the owner and lead cake artist, Mr. Phillips makes the final decisions on whether the Bakery will create requested custom cakes. (Tr. 241:16-19, 266:13-16, 483:22-24.)

44. Defendants often create custom cakes that convey messages through symbolism. For example, Defendants created a cake resembling a torch. (DX-4.) The torch symbolized the fact that a father was retiring and passing the family business on to his son. (Tr. 486:21-487:14.)

45. Somewhat paradoxically, Defendants’ policy based on their religious convictions applies only to custom cakes. When Mr. Phillips makes premade cakes, he may make six at a time and design them similarly. He produces them to look the same, and he can sell many of them. (Tr. 415:24-416:16.) Defendants sell premade cakes to anyone—even if they know it would be used for a celebration that could conflict with Mr. Phillips’ religious beliefs. (Tr. 352:19-24, 484:5-11.) For example, Defendants would sell a premade cake to a customer who would use it at a gender-transition celebration or for any other reason. (Tr. 352:25-353:6, 408:13-21.) Unlike premade cakes, Mr. Phillips creates each custom cake one at a time from scratch; he seeks to express himself through each of his custom cakes. (Tr. 167:9-19, 415:24-416:16.)

46. Defendants place all completed custom cakes in a box bearing the Bakery’s logo, phone number, and address. These details show that he made the cake. (Tr. 362:17-363:4.) Knowing that the customer and other people will see his cakes and realize they came from the Bakery, affects the cakes Mr. Phillips creates and the messages he promotes. (Tr. 365:2-20.) Mr. Phillips believes his custom cakes reflect him personally and the Bakery, and he wants his cakes to represent them well. (Tr. 364:17-22.)

47. Defendants assert that context often determines a custom cake's message and is an important factor that informs whether Mr. Phillips will create a custom cake. For example, while Mr. Phillips will not create a rainbow-colored cake to reflect gay pride, he would create a similar-looking cake for a Sunday school class discussing Noah's ark. (Tr. 365:21-366:7, 368:1-12, 406:9-20.) Likewise, while Mr. Phillips would create a cross-shaped cake for a church to celebrate Easter, he would not create a similar-looking cake for a racist group to reflect white supremacy. (Tr. 367:11-25.)

48. Ms. Scardina testified that the requested cake was to be used at a family celebration of her birthday and gender transition. (Tr. 62:16-23, 65:2-15, 80:21-81:7, 145:11-17, 149:25-150:5, 169:21-170:6, 187:10-12, 188:16-189:4, 189:16-20, 191:20-25.) In context, her concept of the requested cake, with a pink interior and blue exterior, symbolized a transition from male to female:

A. Ms. Scardina explained that the design was a reflection of her transition from male-to-female and that she had come out as transgender on her birthday. (Ex. 136 at 8.)

B. The color pink in the custom cake represents female or woman. (Tr. 145:24-146:1, 146:17-19, 488:16.) The color blue in the custom cake represents male or man. (Tr. 146:11-16, 488:16-17.)

C. Ms. Scardina testified that the requested cake design was "symbolic of the duplicity of [her] existence, to [her] transness." (Tr. 146:20-147:1.)

D. Ms. Scardina further testified, "the blue exterior ... represents what society saw [her] as on the time of [her] birth" and the "pink interior was reflective of who [she is] as a person on the inside." (Tr. 150:2-5.)

E. The symbolism of the requested design of the cake is also apparent given the context of gender-reveal cakes, which have become popular in at least the last six years. (Tr. 231:3-5, 488:1-489:4.) The interior of the cake is either pink (for a baby girl) or blue (for a baby boy); the exterior will be different colors so that the baby’s gender is only revealed when the parents cut into the cake. (Tr. 488:1-25.)

49. From the foregoing facts, the Court further finds as follows: (a) Ms. Scardina did not ask Defendants to have Mr. Phillips use his creative thought processes to create a cake with a particular message—Ms. Scardina had pre-determined the cake’s simple design of blue and pink; (b) Ms. Scardina also did not request that Mr. Phillips participate in her birthday or transition celebration, or even package her order in a Masterpiece container—she only asked him to supply a cake for that event; (c) Mr. Phillips may use his artistic skills for simple tasks such as selecting and applying colors, but that does not equate to creating a message in doing so—to the extent his testimony was intended to suggest otherwise, the Court did not find it persuasive or credible; (d) 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; and (e) instead, it was Ms. Scardina’s intended use of the cake—to celebrate her transition—that caused the refusal.

Conclusions of Law

1. To prove a violation of CADA, Plaintiff must show that, but for Ms. Scardina’s transgender status, Defendants would not have refused to provide the requested cake. C.R.S. § 24-34-601(2)(a); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 280 (Colo. App. 2015) (“[P]laintiffs must prove that, ‘but for’ their membership in an enumerated class, they would not have been denied” service.), *rev’d on other grounds*, 138 S.Ct. 1719 (2018). The but-for test

requires that Ms. Scardina prove the protected trait “actually motivated” Defendants’ decision and had a “determinative influence” on the outcome. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

2. The Colorado Constitution, Article II, Section 10, and the First Amendment to the U.S. Constitution protect a person’s decision not to express a message. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). These protections against compelled speech apply even though public-accommodation laws generally regulate conduct. *See Hurley*, 515 U.S. at 573 (public-accommodation law could not compel “speech”); *Brush & Nib Studio, LC v. City of Phoenix* (“*B&N*”), 448P.3d 890, 903-05 (Ariz. 2019) (same); *Telescope Media Grp. v. Lucero* (“*TMG*”), 936 F.3d 740, 752-56 (8th Cir. 2019) (same). And the protections may apply even when the customer is also a speaker. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (“As with all collaborative creative processes, both the [artist] and the person receiving the [art] are engaged in expressive activity.”); *B&N*, 448 P.3d at 911 (similar); *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) (similar); *TMG*, 936 F.3d at 758 (similar).

3. The Colorado Constitution, Article II, Section 4, and the First Amendment to the U.S. Constitution protect the “free exercise” of religion. Defendants may assert a free-exercise defense when government action burdens their “sincerely held religious beliefs.” *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass’n, Inc.*, 942 F.3d 1215, 1246 (11th Cir. 2019); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”). Religious beliefs need not be “acceptable, logical, consistent,

or comprehensible to others in order to merit First Amendment protection.” *Lukumi*, 508 U.S. at 531 (cleaned-up). Government may not “target[] religious conduct for distinctive treatment.” *Id.* at 546.

I. Legal issues before the Court.

4. The parties presented several issues for resolution at trial regarding whether Defendants violated CADA. First is whether the refusal to provide Ms. Scardina with goods and services offered by Defendants to the public was “because of” her status as a transgender female. If that issue is resolved in Ms. Scardina’s favor, Defendants raised the following challenges: (1) whether application of CADA in this context violates Defendants’ free expression and religious exercise rights; and (2) whether the claims against the Defendants are procedurally barred. The Court addresses each of these issues below.

II. Defendants refused Ms. Scardina’s requests because of her identity as a transgender woman.

5. Under CADA, “[i]t is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of ... sexual orientation ... the full and equal enjoyment of the goods[or] services ... of a place of public accommodation[.]” C.R.S. § 24-34-601(2)(a). Sexual orientation includes an individual’s transgender status or the perception thereof. C.R.S. § 24-34-301(7).

6. There is no dispute, and the Court finds, that the Bakery is a place of public accommodation. C.R.S. § 24-34-601(1). There is no dispute, and the Court finds, that Ms. Scardina falls within the class of individuals protected by CADA and informed Defendants of her transgender identity when placing her order. There is no dispute, and the Court finds, that Ms. Scardina requested “goods or services” from Defendants and her requests were denied. The only dispute is whether Defendants’ refusals were “because of” Ms. Scardina’s transgender

status. Ms. Scardina argues that Defendants' refusal to provide her the requested cake was based, at least in part, on her status as a transgender female. Defendants argue that they did not refuse the requests because of Ms. Scardina's identity, but because of the message the cake would have conveyed.

7. To meet the "because of" standard, Ms. Scardina need not establish that her transgender status was the "sole" cause of the denial of service. Rather, she need only show that the discriminatory action was based, in whole or in part, on her protected status. *Craig*, 2015 COA 115, ¶¶ 28-29. A "because of" test incorporates the 'simple' and 'traditional' standard of but-for causation ... [which] is established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock v. Clayton Cty., Ga.*, 140 S.Ct. 1731, 1739 (2020). This showing "need not be proven by direct evidence, but may be inferred from the circumstances." *Cunningham v. Dep't of Highways*, 823 P.2d 1377, 1381 (Colo. App. 1991).

8. CADA does not require Ms. Scardina to establish that "some class-based invidiously discriminatory animus lay behind the defendant's actions." *Craig*, 2015 COA 115, ¶ 37 (cleaned up) (citing *Tesmer v. Colo. High School Activities Ass'n*, 140 P.3d 249, 253 (Colo. App. 2006)). Discrimination that is based on conduct or attributes that are closely correlated to protected status is discrimination based upon that protected status. *Craig*, 2015 COA 115, ¶¶ 32-33 (collecting cases).

9. The Court concludes that Defendants denied Ms. Scardina goods and services because of her transgender status. Defendants admit that they were willing to make the requested cake until Ms. Scardina identified that she chose the colors to reflect and celebrate her identity as a transgender female. Defendants are, however, willing to make cakes for non-transgender

individuals that reflect that person's gender. And Defendants would "gladly" make an identical looking cake for other customers.

10. The Court finds the following testimony of Mr. Phillips particularly germane: when asked why the Bakery will not make any cake reflecting transgender status, Mr. Phillips testified that he believes that no one can change the gender assigned to them at birth and he will not "celebrate[] *somebody who thinks that they can.*" Mr. Phillips also confirmed that Defendants' decision not to provide Ms. Scardina with her requested cake was "based on [his] religious beliefs *concerning transgender status.*"

11. Defendants argue that they did not decline Ms. Scardina's request because of her transgender identity, but rather because of the cake's message—"that a person can in fact transition from male to female and such a transition is something to be celebrated." Defendants point to evidence that the Bakery has provided baked goods to other members of the LGBT community, including transgender individuals, and that they would not make any baked goods with the same message for a non-transgender person purchasing the cake for a transgender friend. These arguments are almost entirely beside the point.

12. CADA only requires Ms. Scardina to establish that Defendants refused to provide her goods and services because of her identity—it does not require her to show that Defendants refuse to provide baked goods to all LGBT individuals in all contexts. *Craig*, 2015 COA 115, ¶ 40 ("We reject Masterpiece's related argument that its willingness to sell birthday cakes, cookies, and other non-wedding cake products to gay and lesbian customers establishes that it did not violate CADA. Masterpiece's potential compliance with CADA in this respect does not permit it to refuse services to [plaintiffs] that it otherwise offers to the general public."); *see also*

id. ¶ 37 (CADA does not require a showing that “some class-based invidiously discriminatory animus lay behind the defendant’s actions.”) (cleaned up).

13. 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. Defendants’ willingness to serve the LGBT community in some circumstances is premised on a “limited menu” offering that courts have repeatedly rejected. *Craig*, 2015 COA 115, ¶ 40; *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (“[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.”).

14. That Defendants would not sell a cake which they believe reflected a transgender individual’s gender to anyone else, including a non-transgender individual, does not lead to a different conclusion. Even in Defendants’ hypothetical, the non-transgender person is purchasing the cake for the celebration of a transgender person. CADA forbids “directly *or indirectly*” withholding goods and services because of protected status. C.R.S. § 24-34-601(2)(a) (emphasis added).

15. Here, the refusal to provide the bakery item is inextricably intertwined with the refusal to recognize Ms. Scardina as a woman. *See Craig*, 2015 COA 115, ¶¶ 32-33. The concept that a business can decide whether to make the requested item depending on what information the customer provides would establish the equivalent of a “Don’t Ask, Don’t Tell” rule—LGBT individuals would be entitled to equal service only to the extent they do not request goods that reflect their identity as LGBT individuals (or at least do not inform Defendants of that reflection). As the New Mexico Supreme Court stated in a similar case, public accommodation laws do not apply “only to the extent that [same-gender couples] do not openly display their

same-gender sexual orientation.” *Elane Photography*, 309 P.3d at 62. So too here, CADA does not protect Plaintiff only to the extent she keeps her sexual identity to herself.

16. Finally, Defendants contend the Court should defer to an interpretation that CADA does not forbid “declining to create a custom cake with a message the creator considers offensive[.]” In support, Defendants point to three instances in which the CCRD found no probable cause. This Court, however, has not been presented any evidence establishing that the CCRD has officially endorsed such an interpretation of CADA. The Court does not take judicial notice of these prior cases because they are not relevant here. Further, the Court finds that the three instances cited by Defendants are distinguishable because the bakeries in those cases would not have made an identical cake with the same images and words for any customer. In this case, however, Defendants have admitted they would “gladly” make an identical-looking cake for other customers. *See Masterpiece I*, 138 S.Ct. at 1732-33 (Kagan, J., concurring) (distinguishing the cases relied on by Defendants from the prior wedding-cake case); *see also State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1217-18 (Wash. 2019) (finding that other enforcement decisions were not relevant where a court was acting as the adjudicatory body).

17. Alternatively, this Court has an independent obligation to construe the relevant statute and deference is not warranted where the “agency’s interpretation is contrary to the statute’s plain language.” *BP Am. Prod. Co. v. Colo. Dep’t of Rev.*, 2016 CO 23, ¶ 15; *see also Ansel v. Dep’t of Human Servs.*, 2020 COA 172M, ¶ 24 (Courts “need not defer to an agency’s interpretation unless a statutory term is reasonably susceptible to more than one interpretation, and the agency has employed its expertise to select a particular interpretation.”). Even if Defendants had established that the CCRD interprets CADA in the way Defendants claim, the Court would not defer to that interpretation.

III. Enforcing CADA does not violate Defendants’ First Amendment Rights.

18. Invoking both the Colorado and U.S. Constitutions, Defendants argue that application of CADA to them in this context would impermissibly compel them to speak and/or infringe on their religious exercise rights.

A. CADA does not compel Defendants’ speech.

19. CADA does not compel speech but only compels the Bakery to “comport with CADA by not basing its decision to serve a potential client, at least in part, on the client’s sexual orientation.” *Craig*, 2015 COA 115, ¶ 60; *see also Arlene’s Flowers*, 441 P.3d at 1225 (“We agree that the regulated activity at issue in this case—Stutzman’s sale of wedding floral arrangements—is not ‘speech’ in a literal sense and is thus properly characterized as conduct.”). And where the regulated activity is conduct, it does not matter if compliance might incidentally require Defendants to engage in speech. *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) (“*FAIR*”) (rejecting compelled speech argument because “[t]he compelled speech to which the [plaintiffs] point is plainly incidental to the [law’s] regulation of conduct”). Because CADA does not compel speech, but forbids discriminatory business practices, it does not punish Defendants based on the content or viewpoint of their speech.

20. Defendants, however, claim that application of CADA would compel speech because the “exercise of Defendants’ artistic talents and mind, are a form of expressive speech” and constitute “pure speech.” In so claiming, Defendants bear the burden to establish that the First Amendment applies. *Craig*, 2015 COA 115, ¶ 55 (Defendants “must advance more than a mere ‘plausible contention’ that [their] conduct is expressive.”).

21. As an initial matter, the pure speech doctrine requires Defendants to show that they are “genuinely and primarily engaged in *self-expression*.” *Cressman v. Thompson*, 798 F.3d

938, 953 (10th Cir. 2015) (“*Cressman II*”) (cleaned up, emphasis added); *id.* at 954 (“Pure-speech treatment is only warranted for those images whose creation is itself an act of self-expression.”). The evidence is that Defendants are engaged in the sale of baked goods to the public and are not “primarily engaged in self-expression[.]” Mr. Phillips may often use artistic techniques and tools to create baked goods. However, the fact that goods or services may involve some level of artistry or skill does not transform all such goods into “expressive speech.” *Id.* at 953.

22. Here, Defendants admit they use most if not all the same skills when creating pre-made goods and concede that those items are not expressive speech. Defendants also agree that to understand any message conveyed in a custom cake, you would “have to ask the customer.” Based on the evidence presented, the Court concludes that Defendants were not requested by Ms. Scardina to engage in self-expression. Perhaps the analysis would be different if the cake design had been more intricate, artistically involved, or overtly stated a message attributable to Defendants. *See, e.g., B&N*, 448 P.3d at 905-08 (custom wedding invitations featuring calligraphy and original artwork were pure speech); *Masterpiece I*, 138 S. Ct. at 1723 (“If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker’s creation can be protected, these details might make a difference.”).

23. As an alternative, Defendants argue that making the requested cake constitutes symbolic speech or inherently expressive conduct. To meet this standard, Defendants must establish that in making Plaintiff’s cake, the Bakery “conveys a particularized message” and “the likelihood is great that a reasonable observer would both understand the message and attribute

that message” to the Bakery. *Craig*, 2015 COA 115, ¶ 61 (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). Citing *Hurley*, Defendants dispute whether the message needs to be “particularized.” It is simply not settled what effect *Hurley* has on the “particularized message” element of the *Spence-Johnson* test. *Cressman II*, 798 F.3d at 955-56 (detailing a split among federal courts on this issue). Regardless, it is incumbent upon Defendants to identify some message that a reasonable observer both would perceive and attribute to them. *Id.* at 956.

24. Defendants’ expressive conduct argument fails because Defendants presented no evidence that a reasonable observer would attribute any message that was conveyed by the cake to Defendants. That special-order cakes are put into a box carrying the Bakery’s logo does not lead to a different conclusion. The Bakery’s pre-made items are placed into the same boxes with the same logo upon sale and Defendants agree that no message would be communicated by those items.

25. There is also no evidence in this case that a reasonable observer would understand the cake to convey any message attributed to Defendants. Defendants admitted that the requested cake “doesn’t have any particular inherent message[.]”

26. Defendants argue, however, that context matters and that there is an inherent message in the requested cake because of the type of event being celebrated. Mr. Jones testified that if he understood that a pink and blue cake was served at a party “to celebrate [a] friend’s transition from male to female” he would understand “what pink represents and what blue represents” “as a member of the LGBT community.” But if “additional speech would be required for an outside observer to understand” the claimed message, the conduct is not inherently expressive. *Arlene’s Flowers, Inc.*, 441 P.3d at 1226 (citing *FAIR*, 547 U.S. at 66). Here, the event would create the message, and not the product itself. Mr. Jones’ testimony thus confirms

that “additional speech” is required to understand the meaning ascribed by Defendants. Further, Defendants admitted that if an identical-looking cake was purchased as a pre-made cake and taken to an identical event, they would not be expressing any message.

27. At bottom, Defendants’ view of whether they are being compelled to speak turns on what they know about a cake’s specific intended use when they are asked to make it. That is not the test for, nor consistent with finding, expressive conduct. Moreover, as multiple courts have confirmed, providing a product for an event does not “inherently express a message about that” event. *Arlene’s Flowers*, 441 P.3d at 1226; *see also Craig*, 2015 COA 115, ¶ 63; *Elane Photography*, 309 P.3d at 64-65.

28. The Court concludes that a reasonable observer of the requested cake would not attribute any message to Defendants and would not understand the cake to convey the message claimed by Defendants, *i.e.*, endorsement of a gender transition. Therefore, Defendants have failed to carry their burden to show that providing the requested cake constituted any type of symbolic or expressive speech protected by the First Amendment.

29. Nor is the Court’s analysis altered by Ms. Scardina being the source of an intended message. Free speech protections still can apply where the customer is also a speaker. *See, e.g., TMG*, 936 F.3d at 753, 758. Although Ms. Scardina could be considered a speaker in this context, Defendants—as explained above—would not have joined in that speech by making the requested cake. This case is therefore different from *Hurley*, where the parade organizers were engaged in their own speech in the form of a parade. 515 U.S. at 568-70. Similarly, in *TMG*, the plaintiffs were engaged in their own speech in the form of film. 936 F.3d at 750-51. Such activities are inherently expressive, and application of the public accommodation laws in those cases had the effect of foisting a third-party’s message on another speaker. *Id.*; *TMG*, 936

F.3d at 753, 758. That is not a concern here, because the act of making a pink cake with blue frosting is not speech.

30. While Defendants also have invoked their freedom of speech rights under the Colorado Constitution, they have failed to present any argument or cite any authority that the outcome would be different under the Colorado Constitution. Therefore, Defendants have failed to show that their freedom of speech under either the U.S. or Colorado Constitutions would be violated by holding them liable for their violations of CADA. *Craig*, 2015 COA 115, ¶ 47 n.9.

B. CADA does not infringe on Defendants’ religious exercise.

31. CADA is a neutral law of general applicability. *Craig*, 2015 COA 115, ¶¶ 86-91.

32. Citing to *Masterpiece I*, Defendants contend that application of CADA here targets them for their religious exercise because an “offensiveness” rule was applied in other cases and, therefore, that CADA is being selectively enforced. *Masterpiece I*, however, held that “the adjudicatory body tasked with deciding a particular case must remain neutral; that is, the adjudicatory body must ‘give full and fair consideration’ to the dispute before it and avoid animus toward religion.” *Arlene’s Flowers*, 441 P.3d at 1209-10 (quoting *Masterpiece I*, 138 S. Ct. at 1732). Defendants’ have not claimed that this Court has failed to remain neutral. And this case is distinguishable from *Masterpiece I* because neither the CCRD nor the State of Colorado has any involvement in this litigation, which also precludes any claim of selective enforcement. *See Arlene’s Flowers*, 441 P.3d at 1217-19 (alleged selective-enforcement claim based on state’s conduct in another potential case “would not extend to” a private suit to enforce Washington’s public accommodation law). In this respect, the Court otherwise takes no position on the so-called “offensiveness” rule, or how CADA applies in other cases that were before the Commission.

33. Once more citing the so-called “offensiveness rule,” Defendants also claim that CADA permits a system of individualized exemptions. As previously explained, the Court does not interpret CADA to have, nor is it proper to apply, an “offensiveness” exemption.

34. Defendants also claim that strict scrutiny must apply because they have asserted a free exercise defense coupled with their free speech defense. Setting aside whether the hybrid rights doctrine even exists, *Craig*, 2015 COA 115, ¶ 94, because application of CADA does not implicate Defendants’ freedom of expression, the doctrine does not apply here. *Id.*; *Arlene’s Flowers*, 441.

IV. Ms. Scardina’s claims are procedurally proper and not moot.

35. Finally, Defendants have reasserted a series of procedural arguments claiming that Ms. Scardina’s claims are either moot or procedurally barred: (1) Ms. Scardina’s claim is moot either because of Defendants’ denied request to deposit funds or because of Defendants’ claimed tender of funds; (2) Ms. Scardina did not satisfy CADA’s conditions for bringing a private suit; (3) Ms. Scardina did not prove the Court has jurisdiction; (4) claim preclusion bars Ms. Scardina’s claim; and (5) Ms. Scardina has not proven venue. Except for the claim regarding mootness based on the alleged tender of funds, the Court has already rejected these arguments and, for the same reasons set forth in its prior orders, rejects them again.

36. As for the tender argument, the Court adopts its prior holding that it will not deem the CADA claim moot absent an admission of liability. To do otherwise would conflict with the purpose of CADA, which is to further the public policy of eliminating discriminatory practices. *See Colo. Springs v. Conners*, 993 P.2d 1167, 1174 (Colo. 2000); *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995). Because Defendants’ claimed tender is made with an explicit denial of liability, it is not a proper tender. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 170

(2016) (Thomas, J. concurring) (“[A] tender of the amount due [is] deemed ‘an admission of liability’ on the cause of action to which the tender is related, so any would-be defendant who tried to deny liability could not effectuate a tender.”) (collecting cases).

37. To the extent not specifically addressed above, the Court has considered Defendants’ other arguments and either finds them unpersuasive or unnecessary to resolve in light of the Court’s findings and conclusions as stated herein.

V. Imposition of Penalty/Judgment

38. CADA provides that “[a]ny person who violates section 24-34-601 shall be fined not less than fifty dollars nor more than five hundred dollars for each violation” payable to the aggrieved party. C.R.S. § 24-34-602(1)(a). As set forth above, Defendants violated CADA’s prohibition against discrimination in a place of public accommodation. In consideration of all of the facts of this case, the Court orders Defendants to pay Ms. Scardina \$500.00 as a penalty for their violations of CADA.

CONCLUSION

In arguing that they should prevail in this matter, Defendants quote the stirring words of Justice Jackson in *West Virginia State Board of Education v. Barnette*: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” 319 U.S. 624, 642 (1943). But as Defendants also argue, context matters. In *Barnette*, government officials insisted that the children of Jehovah’s Witnesses salute the flag—a basic form of compelled patriotism through symbolic speech. *Id.* at 627-30. That is quite different than preventing places of public accommodation from

discriminating against transgender persons. The anti-discrimination laws are intended to ensure that members of our society who have historically been treated unfairly, who have been deprived of even the every-day right to access businesses to buy products, are no longer treated as “others.” This case is about one such product—a pink and blue birthday cake—and not compelled speech.

DATED AND ORDERED: June 15, 2021.

BY THE COURT:

A handwritten signature in black ink, appearing to read "A. Bruce Jones", written over a light blue rectangular background.

Judge A. Bruce Jones
Denver District Court Judge