No. _____

In the Supreme Court of the United States

CENTURA HEALTH CORPORATION, A COLORADO NON-PROFIT CORPORATION; AND CATHOLIC HEALTH INITIATIVES COLORADO D/B/A CENTURA HEALTH-ST. ANTHONY HOSPITAL, A COLORADO NON-PROFIT CORPORATION

Applicant,

v.

BARBARA MORRIS, M.D.,

Respondent.

APPLICATION TO THE HON. JUSTICE NEIL M. GORSUCH FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

ERIC S. BAXTER
Counsel of Record
ADÈLE A. KEIM
LAURA WOLK SLAVIS
JORDAN T. VARBERG*
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW, Suite 400
Washington, D.C. 20006
(202) 955-0095
ebaxter@becketlaw.org
Counsel for Petitioners

* Not admitted to the D.C. Bar; admitted only in Illinois. Supervised by licensed D.C. Bar members.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the undersigned counsel of record certifies that Petitioner Centura Health Corporation, a Colorado non-profit corporation and Catholic Health Initiatives Colorado d/b/a Centura Health-St. Anthony Hospital, a Colorado non-profit corporation are owned by CommonSpirit Health, a nonprofit corporation. No publicly held corporation owns 10 percent or more of the stock of Petitioner. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this case.

/s/ Eric S. Baxter

APPLICATION

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Pursuant to Supreme Court Rule 13(5), Centura Health Corporation and Catholic Health Initiatives Colorado d/b/a Centura Health-St. Anthony Hospital (collectively, "Applicant") move for an extension of time of sixty (60) days, up to and including May 17, 2024, for the filing of a petition for a writ of certiorari. Unless an extension is granted, Applicant's deadline for the filing of the petition will be March 18, 2024.[1] This application is submitted more than ten days prior to the filing deadline.

In support of this request, Applicant states as follows:

1. The Colorado Court of Appeals issued its opinion on April 13, 2023 (Exhibit 1). The Supreme Court of Colorado denied Applicant's petition for a writ of certiorari on December 18, 2023 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. § 1257(a).

2. The relevant facts in this case are not in dispute. Dr. Morris, a physician employed by a Catholic-sponsored hospital, protested her employer's policy forbidding its staff from participating in assisted suicide. After losing her internal protests, she recruited a dying patient of the hospital to join her in suing. In an affidavit attached to the complaint, Dr. Morris stated that she had evaluated the patient and that he qualified for assisted suicide. Dr. Morris's lawsuit sought a legal declaration that the hospital's policy against assisted suicide, based on the hospital's obligation to adhere

[1] The Supreme Court of Colorado denied Applicant's petition for a writ of certiorari on December 18, 2023. See Exhibit 2. Ninety days after that date is a Sunday (March 17, 2024), so the current deadline is March 18, 2024. See Sup. Ct. R. 30(1).

to the Ethical and Religious Directives for Catholic Health Care as a Catholic-sponsored hospital, violated Colorado public policy. Five days after Dr. Morris filed suit, which alerted the hospital to her misconduct, she was fired for violating the hospital's policies, which she had previously contracted to uphold.

3. The state trial court held that Dr. Morris was fired for cause because she violated her employment contract and the hospital's policy forbidding its employees from participating in assisted suicide. The Colorado Court of Appeals reversed and held that a jury should determine whether Dr. Morris's undisputed conduct in fact violated the hospital's policy and whether Dr. Morris was actually fired for violating that policy or whether the hospital was retaliating against her for seeking a declaratory judgment that the hospital's policy violated Colorado public policy.

4. This case thus involves two exceptionally important First Amendment questions:

> (1) Under the church-autonomy doctrine, can a jury determine whether a doctor violated her employer's policies, where the doctor's underlying conduct is undisputed and the employer has determined that such conduct violates its policies?
>
> (2) Under the church-autonomy doctrine, can a jury decide that an organization's reasons for firing an employee are pretextual where there are undisputed facts sufficient to support the organization's reasons?

5. Centura Health Corporation was recently the subject of a disaffiliation among CommonSpirit Health, AdventHealth and certain related entities such that it is fully

part of CommonSpirit Health. Further, as a result of disaffiliation, retirements and other transitions, all of Centura's in-house lawyers who handled this matter in the Colorado state courts are no longer with the organization. In addition, all appeals must now be approved by CommonSpirit Health, whose lawyers have only recently become familiar with the case and had an oppportunity to assess whether to move forward with a petition.

6. For these reasons, Applicant respectfully requests an extension of time for counsel to prepare a petition that fully addresses the important issues raised by the decision below and frames those issues in a manner that will be most helpful to the Court.

Respectfully submitted.

ERIC S. BAXTER
Counsel of Record
ADÈLE A. KEIM
LAURA WOLK SLAVIS
JORDAN T. VARBERG*
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave.
NW, Suite 400
Washington, D.C. 20006
(202) 955-0095
ebaxter@becketlaw.org
Counsel for Petitioners

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MARCH 2024

Exhibit 1

COLORADO COURT OF APPEALS

DATE FILED: April 13, 2023
CASE NUMBER: 2021CA1855

Court of Appeals Nos. 21CA1855 & 21CA1896
Arapahoe County District Court No. 19CV31980
Honorable Peter F. Michaelson, Judge

Barbara Morris, M.D.,

Plaintiff-Appellant,

v.

Centura Health Corporation, a Colorado non-profit corporation; and Catholic Health Initiatives Colorado, d/b/a Centura Health – St. Anthony Hospital, a Colorado non-profit corporation,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE KUHN
Grove and Vogt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 13, 2023

Foster Graham Milstein & Calisher, LLP, Steven J. Wienczkowski, Chip G. Schoneberger, Denver, Colorado; Rathod Mohamedbhai, LLC, Mathew J. Cron, Felipe Bohnet-Gomez, Denver, Colorado, for Plaintiff-Appellant

Hall Render Killian Heath & Lyman, P.C., Melvin B. Sabey, Denver, Colorado; Nussbaum Speir Gleason PLLC, L. Martin Nussbaum, Colorado Springs, Colorado; Covenant Law, PLLC, Ian Speir, Colorado Springs, Colorado, for Defendants-Appellees

Jones Day, Kristin K. Zinsmaster, Minneapolis, Minnesota, for Amici Curiae Little Sisters of the Poor and Catholic Benefits Association

Telios Law PLLC, Theresa Lynn Sidebotham, Daniel Geraghty, Dana DiDomenico, Monument, Colorado, for Amici Curiae Dr. Daniel Sulmasy, Dr. Ashley K. Fernandes, Dr. Brian Callister, Dr. Eugene Wesley Ely, Dr. Farr Curlin, Dr. Kevin Donovan, Dr. Laura Petrillo, Dr. Lauris Kaldjian, and Dr. Vincent D. Nguyen

Lewis Roca Rothgerber Christie LLP, Eric N. Kniffin, Colorado Springs, Colorado; Francesca M. Genova, John A. Meiser, Notre Dame, Indiana, for Amici Curiae Catholic Medical Association and Coptic Medical Association of North America

Illumine Legal LLC, J. Brad Bergford, Denver, Colorado; Alliance Defending Freedom, Bryan D. Neihart, Kevin H. Theriot, Scottsdale, Arizona, for Amicus Curiae Christian Medical and Dental Associations

McGuireWoods LLP, Michael Francisco, Washington, D.C., for Amicus Curiae Ryan T. Anderson

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Plaintiff, Barbara Morris, M.D., appeals the district court's grant of summary judgment in favor of defendants, Centura Health Corporation and Catholic Health Initiatives Colorado d/b/a Centura Health – St. Anthony Hospital (collectively, Centura), on her claims that Centura (1) breached her employment contract and (2) unlawfully terminated her employment under Colorado's Lawful Off-Duty Activities Statute (LODAS), § 24-34-402.5(1), C.R.S. 2022.[1] We reverse the grant of summary judgment on these claims.

I. Background

¶ 2 The undisputed facts before the district court showed the following.

A. Morris's Declaratory Relief Action and Termination

¶ 3 This case arose out of Morris's interactions with a terminally ill Centura patient, C.M., as well as a declaratory relief action they filed together related to C.M.'s desire for aid-in-dying medication.

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[1] The district court also granted summary judgment to Centura on Morris's claim under the Uniform Declaratory Judgment Law seeking a declaration that Centura wrongfully terminated her in violation of public policy. Morris does not appeal this ruling.

Both C.M. and Morris gave accounts of these interactions in affidavits attached to their complaint for declaratory relief.

¶ 4 According to C.M., he was diagnosed in June 2019 with an incurable type of terminal cancer. A doctor at Rocky Mountain Cancer Centers (RMCC) estimated that C.M.'s life expectancy was four months without treatment or fourteen months with treatment. Faced with the prospect of a "prolonged and painful death" — due to both the cancer and its complications — C.M. sought to "exercise [his] right to choose a more peaceful death" via aid in dying under Colorado's End-of-life Options Act (EOLOA), §§ 25-48-101 to -123, C.R.S. 2022.

¶ 5 C.M.'s RMCC doctor, however, informed him that "he would not [assist C.M. with aid in dying], and that no one from RMCC could assist [him]." C.M. also inquired about aid in dying with his nurse practitioner at a Centura facility, and he was told that he "would need to discuss [his] request with Dr. Morris." However, C.M. said that, when he met with Morris, she "informed [him] that Centura, the organization she works for, has adopted a policy forbidding its physicians from providing [aid in dying] to their patients," and that Morris "expressed [to him] that she personally

was supportive of [his] choice and would provide [aid in dying] but for Centura's prohibitive policy."

¶ 6 Centura's policy in question — titled "Colorado End-of-Life Options Act/Medical Aid in Dying" — states, in pertinent parts, as follows:

> Centura Health prohibits physicians and providers who are employed by Centura . . . from prescribing or dispensing medication intended to be used as Medical Aid-in-Dying Medication for patients of Centura Health Facilities.
>
> Physicians and providers providing services at Centura Health Facilities may discuss the range of available treatment options with patients to ensure patients are making informed decisions with respect to their care; provided, however, that physicians and providers providing services at Centura Health Facilities will not engage in any stage of qualifying a patient for use of Medical Aid in Dying Medication.
>
> Patients of any Centura Health Facility shall not use Medical Aid-in-Dying Medication while in Centura Health Facilities.
>
> . . . .
>
> If a patient at a Centura Health Facility requests Medical Aid-in-Dying Medication, the patient's physician or provider may assist the patient in transferring his or her care to a non-Centura Health facility.

¶ 7 Morris also spoke of her interactions with C.M. in her affidavit. There, she confirmed her support for EOLOA — explaining that she "hold[s] personal, moral, ethical and spiritual views which lead [her] to believe that a patient dying of a terminal illness should be able to choose how much suffering to endure before death." She said she evaluated C.M. in July 2019, during which time he "expressed a clear and certain desire for [aid in dying]." Morris then "determined that [C.M.] was neither cognitively impaired nor suffering from clinical depression." Her affidavit confirmed that she "believe[s] [C.M.'s] request was made based upon [his] own informed decision," and "[b]ased upon [her] knowledge, training, and experience, as well as [her] evaluations of [C.M.'s] situation, [he] qualifies for [aid in dying] under [EOLOA]."

¶ 8 Morris's affidavit, however, asserted that the policy "precludes all Centura physicians from providing [aid in dying] to any Centura patient (even if the patient intends to ingest [aid in dying] medication at home). The Centura policy is so broad it would even preclude [her] from determining if a patient qualifies for [aid in dying]." So, Morris's affidavit continued, when C.M. requested aid in dying, she "informed him of Centura's policy and told [him] that,

although [she] personally [is] supportive of [EOLOA] and providing [aid in dying] when appropriate, Centura's policy precluded [her] from providing [it]." Her affidavit also said that she "explained to [C.M.] that . . . in order to qualify for [aid in dying], a second physician would need to agree that he qualifies for [it]." Morris "advised [C.M.] that he could try to transfer his care to a different physician and facility which allows its physicians to provide [aid in dying]."

¶ 9 Morris and C.M. (who has since passed away) then filed suit for declaratory relief against Centura, attaching their affidavits. Citing sections 25-48-117(1) and -118(1), C.R.S. 2022, of EOLOA, they sought a declaration that — notwithstanding Centura's aid-in-dying policy — Centura "may not lawfully prohibit Dr. Morris from, or sanction or penalize Dr. Morris for, providing [aid-in-dying-]related services to [C.M.], including but not limited to, prescribing [aid-in-dying] medication to [him] for use somewhere other than at a Centura facility."

¶ 10 Five days after Morris and C.M. filed their declaratory relief action, Centura terminated Morris's employment without advance

notice. In a termination letter handed to Morris that day, Centura told her that

> [w]hen [she] signed [her] Physician Employment Agreement with Centura . . . , [she] agreed that [she] would neither provide any services nor perform any procedures in the Hospital that are in violation of the Ethical and Religious Directives for Catholic Health Care Services. As a matter of religious doctrine, those Directives declare that suicide and euthanasia are never morally acceptable options and prohibit participation or cooperation in any intentional hastening of a person's natural death.
>
> Rather than encouraging patient [C.M.] to receive care consistent with that doctrine or transferring care to other providers, [she] ha[s] encouraged a morally unacceptable option. It is our religious judgment that [her] conduct in relation to [C.M.] violates the religious principles upon which the Hospital operates and warrants the termination of [her] employment for cause, effective immediately . . . , pursuant to Sections 1.12 and 4.2.6 of [the] Agreement.

B. The Employment Agreement and the Ethical and Religious Directives

¶ 11 Morris's Physician Employment Agreement stated that she "shall be a full-time employee . . . performing the usual and customary duties of a physician in the practice of medicine . . . [and] shall render such services in such manner and at such times

and locations as are reasonably determined by Hospital." Section 4 of the Agreement contains terms governing the termination of the Agreement, including the particular provision — section 4.2.6 — that Centura cited in its termination letter:

> 4.1 *Termination Without Cause*. Either party may terminate this Agreement for any reason or no reason upon providing the other party with at least ninety (90) days' prior written notice. . . . Hospital may, in its discretion, terminate Physician's employment with less than ninety (90) days' notice and pay Physician in lieu of such notice an amount equal to what Physician would have received as compensation had Physician continued to perform services for the balance of such ninety (90) day notice period.
>
> . . . .
>
> 4.2 *Immediate Termination by Hospital for Cause*. This Agreement may be terminated by Hospital, immediately, without liability resulting from such termination, upon the occurrence of any one of the following events:
>
> . . . .
>
> 4.2.6 Physician is found by Hospital or Centura to have . . . violated any . . . Hospital policy.
>
> 4.3 *Termination For Cause After Notice*. This Agreement may be terminated by either party without liability to the terminating party resulting from such termination if either party commits any breach of the Agreement that has

> not been cured to non-breaching party's reasonable satisfaction following thirty (30) days' written notice, or that constitutes a breach of a type that the breaching party has already committed at least twice before, whether or not cured.

¶ 12 Section 1.12 of the Agreement — also referenced in Morris's termination letter — says that Morris "shall not provide any services to or perform any procedures in the Hospital that are in violation of the Ethical and Religious Directives for Catholic Health Care Services" (the ERDs).

¶ 13 The ERDs' stated purpose is to provide "authoritative [religious] guidance on certain moral issues that face Catholic health care today." One portion of these directives — titled "Issues in Care for the Seriously Ill and Dying" — says that "[s]uicide and euthanasia are never morally acceptable options." As a consequence, Catholic health care institutions may not condone or participate in euthanasia or assisted suicide:

> Persons in danger of death should be provided with whatever information is necessary to help them understand their condition and have the opportunity to discuss their condition with their family members and care providers. They should also be offered the appropriate medical information that would make it possible to

> address the morally legitimate choices available to them.
>
> . . . .
>
> Euthanasia is an action or omission that of itself or by intention causes death in order to alleviate suffering. *Catholic health care institutions may never condone or participate in euthanasia or assisted suicide in any way.* Dying patients who request euthanasia should receive loving care, psychological and spiritual support, and appropriate remedies for pain and other symptoms so that they can live with dignity until the time of natural death.
>
> . . . .
>
> Medicines capable of alleviating or suppressing pain may be given to a dying person, even if this therapy may indirectly shorten the person's life so long as the intent is not to hasten death.

(Emphasis added.)

C. Morris's Amended Complaint and Summary Judgment Proceedings

¶ 14 After her termination, Morris filed an amended complaint. As relevant here, she claimed that Centura breached the Agreement and violated LODAS by terminating her, without notice, for filing her declaratory relief action and expressing her support for aid-in-dying services in her pleadings.

¶ 15 Centura denied Morris's allegations and asserted that Morris "began the process of qualifying [C.M.] for the administration of [aid-in-dying] drugs," which "amounted to condoning, participating in, and/or cooperating with the intentional hastening of a patient's death in violation of the ERDs, [the] Agreement, and [the aid-in-dying policy]." Centura also sought a countervailing declaration that the Religion Clauses of the First Amendment[2] protected its decision to terminate Morris's employment without liability.

¶ 16 Centura moved for summary judgment on all of Morris's claims. The district court initially determined that Morris's LODAS claim under section 24-34-402.5 was subject to the administrative-exhaustion requirement of section 24-34-306(14), C.R.S. 2022. And because it was undisputed that Morris did not exhaust her administrative remedies, the court ruled that Morris's LODAS claim failed as a matter of law.

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[2] Centura's counterclaim specifically sought relief under the Free Exercise Clause and the Establishment Clause of the First Amendment, the First Amendment's protection of religious autonomy and expressive association, the Fourteenth Amendment's protection of fundamental rights and substantive due process, and associated case law.

¶ 17 For Morris's breach of contract claim, the court ruled that

> the ERDs prohibit Centura, and by inclusion in the Employment Agreement, Morris, from providing services and performing procedures and, [sic] or participating in or condoning euthanasia or assisted suicide in any way while acting as a Centura physician.
>
> . . . .
>
> [A] reasonable jury could not find other than that by meeting with, evaluating, and agreeing on July 22, 2019 to be [C.M.'s] primary care physician for the purpose of securing a second [aid-in-dying] physician opinion and thereafter filing the Complaint seeking "a judicial declaration that Centura may not lawfully prohibit Dr. Morris from, or sanction or penalize Dr. Morris for, providing [aid-in-dying-]related services to [C.M.]" Morris condoned [his] desire for [aid in dying] and in doing so violated the ERDs which formed an essential condition of her employment.

However, the court only granted summary judgment in part to Centura, and determined that, as a matter of law, Morris's "damages for breach of contract . . . are limited to the ninety-day formula in [section] 4.1 of the Employment Agreement."

¶ 18 In response, Centura moved for full summary judgment, arguing that the court's conclusions meant that it should prevail as a matter of law on Morris's breach of contract claim. The court

agreed and entered summary judgment in favor of Centura on this claim.

II. Summary Judgment on Morris's Claims

¶ 19 On appeal, Morris contends that the district court erred by granting summary judgment to Centura on her breach of contract and LODAS claims. We agree and reverse the court's judgment on these claims.

A. Standard of Review

¶ 20 Summary judgment is proper only if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 696 (Colo. 2009). The entry of "[s]ummary judgment is a drastic remedy, to be granted only when there is a clear showing that the applicable standards have been met." *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466 (Colo. 2003). In reviewing de novo whether summary judgment was proper here, we give Morris "the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts," and we resolve all doubts against Centura. *Id.* at 465-66.

¶ 21 We also review de novo questions of contract and statutory interpretation. *Copper Mountain*, 208 P.3d at 697; *Goodman v. Heritage Builders, Inc.*, 2017 CO 13, ¶ 5. In interpreting contracts or statutes, our objective is to effectuate the intent of the contracting parties or the General Assembly, respectively. *Copper Mountain*, 208 P.3d at 697; *Goodman*, ¶ 7.

B. Morris's Breach of Contract Claim

¶ 22 Despite how Centura framed this dispute in the district court and seems — along with its amici — to frame the dispute on appeal, the issue is not whether Centura can be "forced to employ or retain" Morris. Morris doesn't argue that Centura was required to continue employing her. Nor does she continue to defend her claim — the one she adopted in her original complaint for declaratory relief — that EOLOA prohibits Centura from taking adverse employment action against her for qualifying a patient under EOLOA and prescribing aid-in-dying medication if that patient then takes the aid-in-dying medication outside of Centura facilities.

¶ 23 At root, Morris does not contend that Centura breached the Agreement by merely terminating her. She doesn't dispute that the Agreement allows Centura to terminate her "for any reason" —

presumably including Centura's religious judgment concerning Morris's personal support for medical aid in dying. Morris doesn't even dispute on appeal that, under the Agreement, Centura could terminate her without liability under section 4.2.6 for violating the ERD clause.[3]

¶ 24 Instead, Morris contends that if she didn't violate the ERD clause or Centura's aid-in-dying policy — and if she was terminated solely for reasons outside the scope of section 4.2 of the Agreement — then she is entitled, under section 4.1, to the contractual bargain that Centura agreed to: "pay . . . equal to what [she] would have received as compensation had [she] continued to perform services for the . . . ninety (90) day . . . period" following her termination. The district court agreed that this ninety-day formula was the extent of Morris's damages for this claim, and neither party disputes this framing on appeal. The stakes for Morris's breach of

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[3] In the district court, Morris contended that a violation of an ERD is not a "violat[ion] [of] . . . a[] Hospital policy" within the meaning of the no-liability termination clause of section 4.2.6 of the Agreement. However, she also agreed in deposition testimony presented to the district court that, "in a Catholic hospital, the ERDs are adopted as policy." She does not reassert her contention on appeal, so we decline to consider it.

contract claim are thus *only* whether Centura owes Morris the additional ninety days of pay she would be entitled to if Centura was not permitted to terminate her without liability under section 4.2.6 of the Agreement. *See Adams v. Frontier Airlines Fed. Credit Union*, 691 P.2d 352, 354 (Colo. App. 1984) ("The general measure of damages for breach of contract is that sum which places the non-defaulting party in the position that party would have enjoyed had the breach not occurred.").

¶ 25 Morris's primary position is that Centura did not terminate her for violating Centura's aid-in-dying policy or the ERD clause, and that, instead, Centura terminated her because of her declaratory relief lawsuit. In her view, Centura asserted that she breached the Agreement as a pretext to cover up its real reason for her termination. Morris thus contends that there is a genuine issue of material fact that precluded a ruling that Centura properly terminated her under the no-liability clause of the Agreement. We agree with Morris.[4]

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[4] Because we agree with Morris that genuine issues of material fact precluded a grant of summary judgment in favor of Centura on her breach of contract claim, we do not address her contention that the

1. The Reason for Morris's Termination

¶ 26 As noted, Morris's main argument throughout this litigation has been that Centura terminated her solely in retaliation for filing a declaratory judgment action in which she publicly expressed her support for EOLOA and aid-in-dying services. Centura's position has been, at times, that it terminated her for violating Centura's aid-in-dying policy or, at other times, for breaching the ERD clause of the Agreement. We conclude that the reason Centura terminated Morris presented a triable issue of material fact that precluded a grant of summary judgment to Centura on Morris's breach of contract claim.[5]

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court erred by "grant[ing] summary judgment [on this claim] for a reason not raised by [Centura] . . . without first giving the parties notice and reasonable opportunity to argue the issue and present evidence relevant to the existence of a genuine issue of material fact." *Krol v. CF & I Steel*, 2013 COA 32, ¶ 38.

[5] Though this issue was not explicitly addressed by the district court, we disagree with Centura that Morris failed to preserve it. Centura is correct that she did not explicitly argue before the district court that Centura's reason for her termination presented a genuine issue of material fact precluding a grant of summary judgment. But Morris's core theory of her case was that Centura terminated her because of her lawsuit. And in her complaint and briefing on Centura's motion for summary judgment, she asserted — and presented some evidence showing — that Centura "offered

¶ 27 Centura's reason for terminating Morris matters. If Centura fired Morris because it concluded that her actions in the hospital violated hospital policy, that is one case. But if Centura fired her for filing a lawsuit to determine her rights under a state statute, that is quite another. And contrary to Centura's position on appeal, we don't think the summary judgment record so clearly resolves that question such that reasonable jurors could not take differing views of the answer.

¶ 28 As an initial matter, Morris continues to argue on appeal that she did not violate Centura's aid-in-dying policy or the ERD clause. At the very least, we're not convinced that there aren't triable issues of fact regarding whether she did so. For example, it's true that Morris's affidavit contained statements that, in isolation, support the conclusion that she violated Centura's aid-in-dying policy. She said that she explained to C.M. that "in order to qualify for [aid in

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varied and shifting justifications [for her termination] that reek of pretext." The district court even recognized, in its summary judgment order, that the parties disputed whether "Centura's termination of Dr. Morris was retaliatory," and the court ultimately ruled that Morris "condoned [C.M.'s] desire for [aid in dying]" in part by filing her declaratory relief suit. Under these circumstances, we conclude that this issue is properly before us.

dying], a second physician would need to agree that he qualifies for [aid in dying]." This statement suggests that she qualified C.M. under EOLOA. But two paragraphs earlier, Morris stated that "[t]he Centura policy is so broad that it would even preclude [her] from determining if a patient qualifies for [aid in dying.]" Giving Morris the benefit of any reasonable inferences from the undisputed evidence the parties presented to the district court, we cannot say that this evidence conclusively establishes that she violated Centura's aid-in-dying policy.

¶ 29 We are convinced, though, that the reason for Morris's termination is a triable issue of fact. Morris was terminated almost immediately after she filed her declaratory judgment suit. Centura's termination letter did not expressly identify what conduct by Morris violated the ERD clause of the Agreement. Instead, the letter merely claimed that Morris "encouraged a morally unacceptable option" for C.M. Later, in interrogatories in this litigation, Centura indicated that Morris was terminated because she both (1) allegedly qualified C.M. for aid-in-dying medication under EOLOA and thus "participat[ed] in . . . assisted suicide," and

(2) "request[ed] judicial permission to prescribe lethal drugs" to C.M.

¶ 30 However, as Morris argues, her seeking a judicial interpretation of the reach of a state statute cannot support a finding that she violated the ERD clause of the Agreement. This clause only unambiguously prohibits providers from providing services that violate the ERDs "in the Hospital." Thus, her declaratory judgment suit — which obviously was not an in-hospital service — was not a valid basis for Centura to terminate Morris without liability for breach of the ERD clause.

¶ 31 More importantly, the record contains evidence of Centura's public statements after Morris's termination — and they support a reasonable inference that Centura fired her because of her declaratory judgment suit. True, Centura's CEO (who participated in its termination decision) told a local news organization that "[i]n and of itself, filing a lawsuit did not violate [Morris's] employment agreement." But in Centura's other public statements, it claimed that Morris "was fired . . . because of what she said in [her lawsuit], that her values aren't the same as theirs." Centura's CEO also publicly claimed that Morris, "as part of [filing her declaratory relief

suit], publicly admit[ted] through an affidavit that *she expressed her disagreement with the [ERDs] and expressed her intent to violate the ERDs*." (Emphasis added.) This, according to Centura's CEO, is what "breached her employment agreement, and that is why [Centura] terminated her employment." Morris's mere intent to violate the ERD clause, however, is not terminable without liability under the plain terms of section 4.2 of the Agreement.

¶ 32 And this is where Centura's reason matters as the case is currently before us. Centura could, of course, terminate Morris for *any* legal reason, including that she was no longer aligned with Centura's values. To do so, it only had to honor its bargain to pay her the equivalent of ninety days' salary. But instead, Centura argues that Morris violated Centura's aid-in-dying policy and breached the ERD clause by qualifying C.M., and Morris argues that's a pretext to justify her termination.

¶ 33 The evidence described above and the reasonable inferences therefrom could support a conclusion that Centura's later-stated reasons for terminating Morris (her alleged violation of the ERDs or Centura's aid-in-dying policy) were pretextually advanced to hide Centura's actual, sole reason for terminating Morris (her

declaratory relief suit and statements therein). *See St. Croix v. Univ. of Colo. Health Scis. Ctr.*, 166 P.3d 230, 238 (Colo. App. 2007); *see Ritzert v. Bd. of Educ. of Acad. Sch. Dist. No. 20*, 2015 CO 66, ¶ 47 ("*Black's Law Dictionary* defines 'pretext' as a 'false or weak reason or motive advanced to hide the actual or strong reason or motive.'") (citation omitted); *Bodaghi v. Dep't of Nat. Res.*, 995 P.2d 288, 298 (Colo. 2000) (in unlawful discrimination context, noting that a fact finder's determination of an employer's true reason for termination "depends upon the evidence submitted to support the employer's assertion, which itself involves a credibility assessment").

¶ 34 And this factual issue is material to Morris's breach of contract claim. *See Delsas v. Centex Home Equity Co.*, 186 P.3d 141, 145 (Colo. App. 2008) ("A material fact is one that affects the case's outcome."). If Centura terminated Morris for violating Centura's aid-in-dying policy or breaching the ERD clause, in accordance with those policies, then it has no liability under section 4.2. If, on the other hand, Centura only terminated her for her out-of-hospital lawsuit and expressions of support for EOLOA therein, then Centura owed her ninety days of pay under the plain terms of section 4 of the Agreement.

¶ 35 Given all this, we conclude that this genuine issue of material fact precluded a grant of summary judgment on Morris's breach of contract claim.

2. Centura's First Amendment Defense

¶ 36 We further disagree with Centura that it is nonetheless entitled to summary judgment on Morris's breach of contract claim because "[t]he Religion Clauses [of the First Amendment] protect Centura's religious decision to end Dr. Morris's employment."

¶ 37 As noted, there's no question here that Centura could terminate Morris for any reason. And even assuming that Centura has a First Amendment right to terminate its employees for religious reasons *without liability*, Centura limited its own right to do so when it expressly agreed to pay Morris for an additional ninety days if it terminated her under section 4.1 of the Agreement. In other First Amendment contexts, our supreme court has noted that "[i]t is . . . well recognized that the First Amendment will not protect people who have contracted away their First Amendment rights. The United States Supreme Court, other courts, and th[e] [Colorado Supreme Court] have concluded that First Amendment rights are not absolute, and may be limited by contract."

Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859, 865 (Colo. 2004); *see Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999) ("Enforcement of the settlement agreement does not violate the First Amendment, but merely applies the law of contract in Colorado, which 'simply requires those making promises to keep them.'" (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991))).

¶ 38 We accordingly reject Centura's contention that it was entitled to summary judgment on Morris's breach of contract claim on First Amendment grounds.

¶ 39 In sum, we reverse the district court's grant of summary judgment on Morris's breach of contract claim.

C. Morris's LODAS Claim

¶ 40 We also agree with Morris that the district court erred by granting summary judgment to Centura on her LODAS claim under section 24-34-402.5.

1. Exhaustion of Administrative Remedies

¶ 41 We first conclude that the district court erred in ruling that section 24-34-306(14) required Morris to exhaust administrative remedies before filing her civil suit.

¶ 42 This statute says, with an exception not relevant here, that "[n]o person may file a civil action in a district court in this state based on an alleged discriminatory or unfair practice prohibited by parts 4 to 7 of this article without first exhausting the proceedings and remedies available to h[er] under this part 3." § 24-34-306(14); *see generally* § 24-34-306 (detailing administrative remedies from proceedings before the Colorado Civil Rights Commission).

¶ 43 It's true that section 24-34-402.5, contained in part 4 of the same article, prohibits one type of "discriminatory or unfair employment practice" specified by this exhaustion provision. However, section 24-34-402.5 also contains its own provision concerning remedies for those aggrieved by an alleged discriminatory or unfair employment practice. In particular, section 24-34-402.5(2)(a) says that, "[n]otwithstanding any other provisions of this article," the "sole remedy" for an individual so aggrieved is to "bring a civil action for damages in any district court of competent jurisdiction."

¶ 44 We agree with Morris that the plain meaning of this remedies provision reflects the General Assembly's intent to exclude — not include — the operation of the exhaustion requirement of section

24-34-306(14). *See Goodman*, ¶ 11 (citing *Theodore Roosevelt Agency, Inc. v. Gen. Motors Acceptance Corp.*, 156 Colo. 237, 240, 398 P.2d 965, 966 (1965)). Generally, the term "notwithstanding" in this context "means excluding, in opposition to, or in spite of" other statutes. *Lanahan v. Chi Psi Fraternity*, 175 P.3d 97, 102 (Colo. 2008).

¶ 45 We find support for our interpretation of these statutes in a decision by a division of this court in *Galvan v. Spanish Peaks Regional Health Center*, 98 P.3d 949 (Colo. App. 2004). Granted, the issue in that case specifically concerned whether "the six-month limitation period set forth in [section] 24-34-403[, C.R.S. 2004,] applies only to claims filed with the [Colorado Civil Rights] [C]ommission" or whether it also "appl[ies] to claims filed in a district court pursuant to [section] 24-34-402.5." *Id.* at 951. But in reaching its holding, the division stated that because "the sole remedy for a violation of [section] 24-34-402.5 is a suit for damages in district court, the administrative procedures set forth in [section] 24-34-306 are not applicable to a claim under [section] 24-34-402.5." *Id.* Even if this statement was dicta — as the district court here seemed to rule — we conclude that it was the correct

interpretation according to the plain language of section 24-34-402.5(2)(a). *Goodman*, ¶ 7 ("Where the language [of a statute] is clear, . . . [we] must enforce the clear statutory language as written.").

¶ 46 We accordingly conclude that the district court erred by ruling that Morris's LODAS claim failed as a matter of law because she failed to exhaust administrative remedies under section 24-34-306(14).

2. A Genuine Issue of Material Fact Precluded Summary Judgment

¶ 47 We further conclude that the same genuine issue of material fact we identified for Morris's breach of contract claim — the reason for her termination — also precluded summary judgment on her LODAS claim.

¶ 48 Section 24-34-402.5(1) says that

> [i]t shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:
>
> (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and

> responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
>
> (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

See also Coats v. Dish Network, LLC, 2015 CO 44, ¶ 1; § 24-34-401(3), C.R.S. 2022 (defining "employer").

¶ 49 We agree with Morris that a genuine factual issue regarding Centura's actual reason for Morris's termination is also material to her LODAS claim. After all, the statute prohibits employers from terminating employees "due to" their lawful out-of-work activities. If Centura terminated Morris solely due to her declaratory relief suit and her public statements relating to EOLOA therein — which are undisputedly lawful activities — then its termination fell squarely within this statute's prohibition unless one of the exceptions in paragraphs (a) or (b) applies.

¶ 50 Centura contends that the ERD clause of the Agreement imposed a lawful out-of-work restriction on Morris satisfying the exceptions in section 24-34-402.5(1). As we note above, we think there are genuine issues of material fact whether Morris breached her contract by violating Centura's aid-in-dying policy or the ERD

clause, as well as Centura's reason for terminating her employment. Given that the factual record is not developed in this regard, we need not answer this question yet.

¶ 51 Accordingly, we conclude that a genuine issue of material fact precluded a grant of summary judgment in favor of Centura on Morris's LODAS claim.

3. Centura's First Amendment Defense

¶ 52 For Morris's LODAS claim, Centura again argues generally that the "[t]he Religion Clauses [of the First Amendment] protect Centura's religious decision to end . . . Morris's employment."

¶ 53 However, Centura does not specifically assert (and did not specifically assert in the district court) that its rights under the Religion Clauses exempt it from liability under LODAS. Morris claims that Centura fired her for filing a declaratory judgment action to clarify her rights under state law. Centura claims that the record shows Morris's actions unquestionably violated the ERDs and Centura's aid-in-dying policy. In truth, as we note above, the record on summary judgment is not nearly as clear as either party argues. And the district court has not yet addressed Centura's First Amendment contentions. Under these circumstances, we

decline to address these issues for the first time on appeal without a developed factual record on which to rule. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000) ("[U]nnecessary or premature decisions of constitutional questions should be avoided . . . .").

¶ 54 In sum, we reverse the district court's grant of summary judgment on Morris's LODAS claim.

III. Appellate Attorney Fees

¶ 55 We deny Morris's request for her appellate attorney fees under C.A.R. 38(b) and section 13-17-102, C.R.S. 2022. We agree that it is improper to cross-appeal in order to seek an affirmance on alternative grounds. *Archangel Diamond Corp. v. Arkhangelskgeoldobycha*, 94 P.3d 1208, 1220 (Colo. App. 2004), *aff'd in part and rev'd in part sub nom. Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187 (Colo. 2005); *see also Blocker Expl. Co. v. Frontier Expl., Inc.*, 740 P.2d 983, 989 (Colo. 1987). And we note that our court previously dismissed Centura's cross-appeal with prejudice. Nonetheless, we do not think Centura's arguments lack substantial justification or needlessly expanded the proceedings under these circumstances.

IV. Disposition

¶ 56 The district court's orders entering summary judgment in favor of Centura and dismissing Morris's second claim for relief are reversed, and the case is remanded for further proceedings consistent with this opinion. Any orders not challenged on appeal remain undisturbed on remand.

JUDGE GROVE and JUDGE VOGT concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.

Exhibit 2

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 18, 2023 CASE NUMBER: 2023SC380
Certiorari to the Court of Appeals, 2021CA1896 & 2021CA1855 District Court, Arapahoe County, 2019CV31980	
Petitioners: Centura Health Corporation, a Colorado non-profit corporation and Catholic Health Initiatives Colorado d/b/a Centura Health-St. Anthony Hospital, a Colorado non-profit corporation, **v.** **Respondent:** Barbara Morris, M.D.	Supreme Court Case No: 2023SC380
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 18, 2023.