2017

Section 1: Moot Court: Masterpiece Cakeshop, Ltd.

Institute of Bill of Rights Law at The College of William & Mary School of Law

I. Moot Court: *Masterpiece Cakeshop, Ltd.*

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

16-111

Ruling Below: *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo.App., 2015)

Cake shop and its owner sought review of the Civil Rights Commission's decision and issuance of cease and desist order, requiring shop and owner not to discriminate against potential customers because of their sexual orientation, in same-sex couple's action against shop and owner for discrimination based on sexual orientation under Anti-Discrimination Act, stemming from shop's refusal to sell couple wedding cake. The Colorado Court of Appeals, Taubman, J., affirmed, holding that: as a matter of first impression, adding owner as respondent to couple's formal complaint was permissible under relation back doctrine; owner's refusal to create cake for couple violated public accommodation provision of Act; cease and desist order did not compel shop to express celebratory message about same-sex marriage in violation of right to free speech; Act was neutral law of general applicability, and thus needed only to be rationally related to legitimate governmental interest to survive challenge under Free Exercise Clause; Free Exercise Clause of state constitution did not require neutral laws of general applicability to be reviewed under heightened, strict scrutiny; Act's proscription of sexual orientation discrimination by places of public accommodation was rationally related to state's interest in eliminating discrimination; and cease and desist order did not exceed scope of Commission's authority.

Question Presented: Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.

Charlie CRAIG and David Mullins, Petitioners–Appellees,
v.
MASTERPIECE CAKESHOP, INC., and any successor entity, and Jack C. Phillips, Respondents–Appellants,
and
Colorado Civil Rights Commission, Appellee.

Colorado Court of Appeals

Decided on August 13, 2015

[Excerpt; some citations and footnotes omitted]

Opinion by JUDGE TAUBMAN

This case juxtaposes the rights of complainants, Charlie Craig and David Mullins, under Colorado's public accommodations law to obtain a wedding cake to celebrate their same-sex marriage against the rights of respondents, Masterpiece Cakeshop, Inc., and its owner, Jack C. Phillips, who contend that requiring them to provide such a wedding cake violates their constitutional rights to freedom of speech and the free exercise of religion.

This appeal arises from an administrative decision by appellee, the Colorado Civil Rights Commission (Commission), which upheld the decision of an administrative law judge (ALJ), who ruled in favor of Craig and Mullins and against Masterpiece and Phillips on cross-motions for summary judgment. For the reasons discussed below, we affirm the Commission's decision.

I. Background

In July 2012, Craig and Mullins visited Masterpiece, a bakery in Lakewood, Colorado, and requested that Phillips design and create a cake to celebrate their same-sex wedding. Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but advising Craig and Mullins that he would be happy to make and sell them any other baked goods. Craig and Mullins promptly left Masterpiece without discussing with Phillips any details of their wedding cake. The following day, Craig's mother, Deborah Munn, called Phillips, who advised her that Masterpiece did not make wedding cakes for same-sex weddings because of his religious beliefs and because Colorado did not recognize same-sex marriages.

The ALJ found that Phillips has been a Christian for approximately thirty-five years and believes in Jesus Christ as his Lord and savior. Phillips believes that decorating cakes is a form of art, that he can honor God through his artistic talents, and that he would displease God by creating cakes for same-sex marriages.

Craig and Mullins had planned to marry in Massachusetts, where same-sex marriages were legal, and later celebrate with friends in Colorado, which at that time did not recognize same-sex marriages.

Craig and Mullins later filed charges of discrimination with the Colorado Civil Rights Division (Division), alleging discrimination based on sexual orientation under the Colorado Anti–Discrimination Act (CADA), §§ 24–34–301 to –804, C.R.S.2014. After an investigation, the Division issued a notice of determination finding probable cause to credit the allegations of discrimination. Craig and Mullins then filed a formal complaint with the Office of Administrative Courts alleging that Masterpiece had discriminated against them in a place of public accommodation because of their sexual orientation in violation of section 24–34–601(2), C.R.S.2014.

The parties did not dispute any material facts. Masterpiece and Phillips admitted that the bakery is a place of public accommodation and that they refused to sell Craig and Mullins a cake because of their intent to engage in a same-sex marriage ceremony. After the parties filed cross-motions for summary judgment, the ALJ issued a lengthy written order finding in favor of Craig and Mullins.

The ALJ's order was affirmed by the Commission. The Commission's final cease and desist order required that Masterpiece (1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.
Masterpiece and Phillips now appeal the Commission's order.

II. Motion to Dismiss

At the outset, Phillips and Masterpiece contend that the ALJ and the Commission erred in denying two motions to dismiss which they filed pursuant to C.R.C.P. 12(b)(1), (2), and (5). We disagree.

A. Standard of Review

We review the ALJ's ruling on a C.R.C.P. 12(b) motion to dismiss de novo.

B. First Motion to Dismiss—Lack of Jurisdiction Over Phillips

Phillips filed a motion to dismiss pursuant to C.R.C.P. 12(b) alleging that the Commission lacked jurisdiction to adjudicate the charges against him.

Specifically, he claimed that it lacked jurisdiction because Mullins named only "Masterpiece Cakeshop," and not Phillips personally, as the respondent in the initial charge of discrimination filed with the Commission.

The ALJ, applying the relation back doctrine of C.R.C.P. 15(c), denied the motion. He concluded that adding Phillips as a respondent to the formal complaint was permissible for several reasons. First, he noted that both the charge of discrimination and the formal complaint alleged identical conduct. He further noted that Phillips was aware from the beginning of the litigation that he was the person whose conduct was at issue. Finally, the ALJ found that Phillips should have known that, but for Mullins' oversight in not naming Phillips, he would have been named as a respondent in the charge of discrimination. We agree with the ALJ.

Although no Colorado appellate court has previously addressed this issue, we conclude that the omission of a party's name from a CADA charging document should be considered under the relation back doctrine. C.R.C.P. 15(c), which is nearly identical to Fed.R.Civ.P. 15(c)(1)(C), contains three requirements which, if met, allow for a claim in an amended complaint against a new party to relate back to the filing of the original: (1) the claim must have arisen out of the same transaction or conduct set forth in the original complaint; (2) the new party must have received notice of the action within the period provided by law for commencing the action; and (3) the new party must have known or reasonably should have known that, "but for a mistake concerning the identity of the proper party, the action would have been brought against him." "Many courts have liberally construed to find that amendments simply adding or dropping parties, as well as amendments that actually substitute defendants, fall within the ambit of the rule." Courts interpreting Fed.R.Civ.P. 15(c)(1)(C) have concluded that the pertinent question when amending any claim to add a new party is whether the party to be added, when viewed from the standpoint of a reasonably prudent person, should have expected that the original complaint might be altered to add the new party.

Here, the ALJ properly found that the three requirements for application of the relation back doctrine were satisfied. First, the claim against Phillips arose out of the same transaction as the original complaint against Masterpiece. Second, Phillips received timely notice of the original charge filed against Masterpiece. Indeed, he responded to it on behalf of Masterpiece. Third, Phillips knew or reasonably should have known that the original complaint should have named him as a respondent. The charging document frequently referred to Phillips by name and identified him as the owner of Masterpiece Cakeshop and the person who told Craig and Mullins that his standard business practice was to refuse to make wedding cakes for same-sex weddings. Consequently, Phillips

suffered no prejudice from not being named in the original complaint.

Based on these findings, we conclude that the ALJ did not err in applying C.R.C.P. 15(c)'s "relation back" rule. Accordingly, we conclude that the ALJ did not err when he denied Phillips' motion to dismiss.

C. Second Motion to Dismiss—Public Accommodation Charges

Phillips and Masterpiece jointly filed the second motion to dismiss. They alleged that the Commission lacked jurisdiction and failed to state a claim in its notice of determination as required by section 24–34–306(2)(b)(II), C.R.S.2014. We disagree.

Section 24–34–306(2)(b)(II) provides: "If the director or the director's designee determines that probable cause exists, the director or the director's designee shall serve the respondent with written notice stating with specificity the legal authority and jurisdiction of the commission and the matters of fact and law asserted."

The Division's letter of probable cause determination erroneously referenced section 24–34–402, C.R.S.2014, the employment practices section of CADA, and not section 24–34–601(2), the public accommodations section under which Craig and Mullins filed their complaint. According to Phillips and Masterpiece, this erroneous citation violated section 24–34–306(2)(b)(II)'s requirement that respondents be notified "with specificity" of the "legal authority and jurisdiction of the commission."

The ALJ denied the second motion to dismiss. He concluded that Masterpiece and Phillips could not have been misled by the error, because "[t]here is no dispute that this case does not involve either an allegation or evidence of discriminatory employment practices." Again, we agree with the ALJ.

The charge of discrimination and the notice of determination correctly referenced section 24–34–601, the public accommodations section of CADA, several times. Further, the director's designee who drafted the notice of determination with the incorrect citation signed an affidavit explaining that the reference to section 24–34–402 was a typographical error, and that the reference should have been to section 24–34–601. Because Masterpiece and Phillips could not have been misled about the legal basis for the Commission's findings, we perceive no error in the Commission's refusal to dismiss the charges against Masterpiece and Phillips because of a typographical error.

Accordingly, we conclude that the ALJ did not err when he denied Phillips' and Masterpiece's second motion to dismiss.

III. CADA Violation

Masterpiece contends that the ALJ erred in concluding that its refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation. Specifically, Masterpiece asserts that its refusal to create the cake was "because of" its opposition to same-sex marriage, not because of its opposition to their sexual orientation. We conclude that the act of same-sex marriage is closely correlated to Craig's and Mullins' sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece's refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation, in violation of CADA.

A. Standard of Review

Whether Masterpiece violated CADA is a question of law reviewed de novo.

B. Applicable Law

Section 24–34–601(2)(a), C.R.S.2014, reads, as relevant here:

It 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, services, facilities, privileges, advantages, or accommodations of a place of public accommodation....

In Tesmer v. Colorado High School Activities Association, 140 P.3d 249, 254 (Colo.App.2006), a division of this court concluded that to prevail on a discrimination claim under CADA, plaintiffs must prove that, "but for" their membership in an enumerated class, they would not have been denied the full privileges of a place of public accommodation. The division explained that plaintiffs need not establish that their membership in the enumerated class was the "sole" cause of the denial of services. Id. Rather, it is sufficient that they show that the discriminatory action was based in whole or in part on their membership in the protected class.

Further, a "place of public accommodation" is "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public." Finally, CADA defines "sexual orientation" as "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof."

C. Analysis

Masterpiece asserts that it did not decline to make Craig's and Mullins' wedding cake "because of" their sexual orientation. It argues that it does not object to or refuse to serve patrons because of their sexual orientation, and that it assured Craig and Mullins that it would design and create any other bakery product for them, just not a wedding cake. Masterpiece asserts that its decision was solely "because of" Craig's and Mullins' intended conduct—entering into marriage with a same-sex partner—and the celebratory message about same-sex marriage that baking a wedding cake would convey. Therefore, because its refusal to serve Craig and Mullins was not "because of" their sexual orientation, Masterpiece contends that it did not violate CADA. We disagree.

Masterpiece argues that the ALJ made two incorrect presumptions. First, it contends that the ALJ incorrectly presumed that opposing same-sex marriage is tantamount to opposing the rights of gays, lesbians, and bisexuals to the equal enjoyment of public accommodations. Second, it contends that the ALJ incorrectly presumed that only gay, lesbian, and bisexual couples engage in same-sex marriage.

Masterpiece thus distinguishes between discrimination based on a person's status and discrimination based on conduct closely correlated with that status. However, the United States Supreme Court has recognized that such distinctions are generally inappropriate.

Further, in Obergefell v. Hodges, the Supreme Court equated laws precluding same-sex marriage to discrimination on the basis of sexual orientation. The Court stated: "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation." "Were the

Court to stay its hand ... it still would deny gays and lesbians many rights and responsibilities intertwined with marriage."

In these decisions, the Supreme Court recognized that, in some cases, conduct cannot be divorced from status. This is so when the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status. We conclude that the act of same-sex marriage constitutes such conduct because it is "engaged in exclusively or predominantly" by gays, lesbians, and bisexuals. Masterpiece's distinction, therefore, is one without a difference. But for their sexual orientation, Craig and Mullins would not have sought to enter into a same-sex marriage, and but for their intent to do so, Masterpiece would not have denied them its services.

In Elane Photography, LLC v. Willock, the New Mexico Supreme Court rejected a similar argument raised by a wedding photographer. The court concluded that by prohibiting discrimination on the basis of sexual orientation, New Mexico's antidiscrimination law similarly protects "conduct that is inextricably tied to sexual orientation," including the act of same-sex marriage. The court observed that "[o]therwise, we would interpret [the New Mexico public accommodations law] as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation." We agree with the reasoning of the New Mexico Supreme Court.

Masterpiece relies on Bray v. Alexandria Women's Health Clinic, which declined to equate opposition to voluntary abortion with discrimination against women. As in Bray, it asks us to decline to equate opposition to same-sex marriage with discrimination against gays, lesbians, and bisexuals. Masterpiece's reliance on Bray is misplaced. Bray considered whether the defendants, several organizations that coordinated antiabortion demonstrations, could be subject to tort liability under 42 U.S.C. § 1985(3) (1988). Established precedent required that plaintiffs in section 1985(3) actions prove that "some ... class-based, invidiously discriminatory animus [lay] behind the [defendant's] actions." However, CADA requires no such showing of "animus."

Further, Masterpiece admits that it refused to serve Craig and Mullins "because of" its opposition to persons entering into same-sex marriages, conduct which we conclude is closely correlated with sexual orientation. Therefore, even if we assume that CADA requires plaintiffs to establish an intent to discriminate, as in section 1985(3) action, the ALJ reasonably could have inferred from Masterpiece's conduct an intent to discriminate against Craig and Mullins "because of" their sexual orientation.

We also note that although the Bray Court held that opposition to voluntary abortion did not equate to discrimination against women, it observed that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." The Court provided, by way of example, that "[a] tax on wearing yarmulkes is a tax on Jews." Likewise, discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation.

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 Craig and Mullins that it otherwise offers to the general public.

Finally, Masterpiece argues that the ALJ wrongly presumed that only same-sex couples engage in same-sex marriage. In support, it references the case of two heterosexual New Zealanders who married in connection with a radio talk show contest. However, as the Bray court explained, we do not distinguish between conduct and status where the targeted conduct is engaged in "predominantly by a particular class of people." An isolated example of two heterosexual men marrying does not persuade us that same-sex marriage is not predominantly, and almost exclusively, engaged in by gays, lesbians, and bisexuals. Therefore, we conclude that the ALJ did not err by concluding that Masterpiece refused to create a wedding cake for Craig and Mullins "because of" their sexual orientation. CADA prohibits places of public accommodations from basing their refusal to serve customers on their sexual orientation, and Masterpiece violated Colorado's public accommodations law by refusing to create a wedding cake for Craig's and Mullins' same-sex wedding celebration.

Having concluded that Masterpiece violated CADA, we next consider whether the Commission's application of the law under these circumstances violated Masterpiece's rights to freedom of speech and free exercise of religion protected by the United States and Colorado Constitutions.

IV. Compelled Expressive Conduct and Symbolic Speech

Masterpiece contends that the Commission's cease and desist order compels speech in violation of the First Amendment by requiring it to create wedding cakes for same-sex weddings. Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission's order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs. We disagree. We conclude that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections.

A. Standard of Review

Whether the Commission's order unconstitutionally infringes on Masterpiece's right to the freedom of expression protected by the First Amendment is a question of law that we review de novo.

B. Applicable Law

The First Amendment of the United States Constitution prohibits laws "abridging the freedom of speech." Article II, section 10 of the Colorado Constitution, which provides greater protection of free speech than does the First Amendment provides that "[n]o law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject."

The freedom of speech protected by the First Amendment includes the "right to refrain from speaking" and prohibits the government from telling people what they must say. This compelled speech doctrine, on which Masterpiece relies, was first articulated by the Supreme Court in West Virginia Board of

Education v. Barnette, and has been applied in two lines of cases.

The first line of cases prohibits the government from requiring that an individual "speak the government's message."
These cases establish that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" by forcing individuals to publicly disseminate its own ideological message. The government also cannot require "the dissemination of an ideological message by displaying it on [an individual's] private property in a manner and for the express purpose that it be observed and read by the public."

The second line of compelled speech cases establishes that the government may not require an individual "to host or accommodate another speaker's message." For example, in Miami Herald Publishing Co. v. Tornillo, the Supreme Court invalidated a Florida law which provided that, if a local newspaper criticized a candidate for public office, the candidate could demand that the newspaper publish his or her reply to the criticism free of charge. Similarly, in Pacific Gas & Electric Co. v. Public Utilities Commission of California, the Supreme Court struck down a California Public Utilities Commission regulation that permitted third-party intervenors in ratemaking proceedings to include messages in the utility's billing envelopes, which it distributed to customers. These cases establish that the government may not commandeer a private speaker's means of accessing its audience by requiring that the speaker disseminate a third-party's message.

The Supreme Court has also recognized that some forms of conduct are symbolic speech and deserve First Amendment protections. However, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," City of Dallas v. Stanglin, the Supreme Court has rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Rather, First Amendment protections extend only to conduct that is "inherently expressive."

In deciding whether conduct is "inherently expressive," we ask whether " '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " The message need not be "narrow," or "succinctly articulable." The Supreme Court has recognized expressive conduct in several cases.

However, other decisions have declined to recognize certain conduct as expressive.
Masterpiece's contentions involve claims of compelled expressive conduct. In such cases, the threshold question is whether the compelled conduct is sufficiently expressive to trigger First Amendment protections. The party asserting that conduct is expressive bears the burden of demonstrating that the First Amendment applies and the party must advance more than a mere "plausible contention" that its conduct is expressive.

Finally, a conclusion that the Commission's order compels expressive conduct does not necessarily mean that the order is unconstitutional. If it does compel such conduct, the question is then whether the government has sufficient justification for regulating the conduct. The Supreme Court has recognized that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms."

In other words, the government can regulate communicative conduct if it has an important interest unrelated to the suppression of the message and if the impact on the communication is no more than necessary to achieve the government's purpose.

C. Analysis

Masterpiece contends that wedding cakes inherently communicate a celebratory message about marriage and that, by forcing it to make cakes for same-sex weddings, the Commission's cease and desist order unconstitutionally compels it to express a celebratory message about same-sex marriage that it does not support. We disagree.

The ALJ rejected Masterpiece's argument that preparing a wedding cake for same-sex weddings necessarily involves expressive conduct. He recognized that baking and creating a wedding cake involves skill and artistry, but nonetheless concluded that, because Phillips refused to prepare a cake for Craig and Mullins before any discussion of the cake's design, the ALJ could not determine whether Craig's and Mullins' desired wedding cake would constitute symbolic speech subject to First Amendment protections.

Masterpiece argues that the ALJ wrongly considered whether the "conduct" of creating a cake is expressive, and not whether the product of that conduct, the wedding cake itself, constitutes symbolic expression. It asserts that the ALJ wrongly employed the test for expressive conduct instead of that for compelled speech. However, Masterpiece's argument mistakenly presumes that the legal doctrines involving compelled speech and expressive conduct are mutually exclusive. As noted, because the First Amendment only protects conduct that conveys a message, the threshold question in cases involving expressive conduct—or as here, compelled expressive conduct—is whether the conduct in question is sufficiently expressive so as to trigger First Amendment protections.

We begin by identifying the compelled conduct in question. As noted, the Commission's order requires that Masterpiece "cease and desist from discriminating against [Craig and Mullins] and other same-sex couples by refusing to sell them wedding cakes or any product [it] would sell to heterosexual couples." Therefore, the compelled conduct is the Colorado government's mandate that Masterpiece comport with CADA by not basing its decision to serve a potential client, at least in part, on the client's sexual orientation. This includes a requirement that Masterpiece sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner.

Next, we ask whether, by comporting with CADA and ceasing to discriminate against potential customers on the basis of their sexual orientation, Masterpiece conveys a particularized message celebrating same-sex marriage, and whether the likelihood is great that a reasonable observer would both understand the message and attribute that message to Masterpiece.

We conclude that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it. We further conclude that, to the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.

First, Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally. In FAIR, several law schools challenged a federal law that denied funding to institutions of higher education that either prohibit or prevent military recruiters from accessing their campuses. The law schools argued that, by forcing them to treat military and nonmilitary recruiters alike, the law compelled them to send "the message that they see nothing wrong with the military's policies [regarding gays in the military], when they do." The Court rejected this argument, observing that students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so."

As in FAIR, we conclude that, because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct. Rather, we conclude that a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs.

The Elane Photography court distinguished Wooley and Barnette, and similarly concluded that New Mexico's public accommodations law did not compel the photographer to convey any particularized message, but rather "only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation." It concluded that "[r]easonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events." We are persuaded by this reasoning and similarly conclude that CADA does not compel expressive conduct.

We do not suggest that Masterpiece's status as a for-profit bakery strips it of its First Amendment speech protections. However, we must consider the allegedly expressive conduct within "the context in which it occurred." The public recognizes that, as a for-profit bakery, Masterpiece charges its customers for its goods and services. The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product. Nothing in the record supports the conclusion that a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an endorsement of same-sex marriage, rather than a reflection of its desire to conduct business in accordance with Colorado's public accommodations law.

For the same reason, this case also differs from Hurley, on which Masterpiece relies. There, the Supreme Court concluded that Massachusetts' public accommodations statute could not require parade organizers to include among the marchers in a St. Patrick's Day parade a group imparting a message the organizers did not wish to convey. Central to the Court's conclusion was the "inherent expressiveness of marching to make a point," and its observation that a "parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." The Court concluded that spectators would likely attribute each marcher's message to the parade organizers as a whole.

In contrast, it is unlikely that the public would understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a

celebratory message about same-sex marriage.

By selling a wedding cake to a same-sex couple, Masterpiece does not necessarily lead an observer to conclude that the bakery supports its customer's conduct. The public has no way of knowing the reasons supporting Masterpiece's decision to serve or decline to serve a same-sex couple. Someone observing that a commercial bakery created a wedding cake for a straight couple or that it did not create one for a gay couple would have no way of deciphering whether the bakery's conduct took place because of its views on same-sex marriage or for some other reason.

We also find the Supreme Court's holding in Carrigan instructive. There, the Court concluded that legislators do not have a personal, First Amendment right to vote in the legislative body in which they serve, and that restrictions on legislators' voting imposed by a law requiring recusal in instances of conflicts of interest are not restrictions on their protected speech. The Court rejected the argument that the act of voting was expressive conduct subject to First Amendment protections. Although the Court recognized that voting "discloses ... that the legislator wishes (for whatever reason) that the proposition on the floor be adopted," it "symbolizes nothing" and is not "an act of communication" because it does not convey the legislator's reasons for the vote.

We recognize that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated. However, we need not reach this issue. We note, again, that Phillips denied Craig's and Mullins' request without any discussion regarding the wedding cake's design or any possible written inscriptions.

Finally, CADA does not preclude Masterpiece from expressing its views on same-sex marriage—including its religious opposition to it—and the bakery remains free to disassociate itself from its customers' viewpoints. We recognize that section 24–34–601(2)(a) of CADA prohibits Masterpiece from displaying or disseminating a notice stating that it will refuse to provide its services based on a customer's desire to engage in same-sex marriage or indicating that those engaging in same-sex marriage are unwelcome at the bakery. However, CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA. Masterpiece could also post or otherwise disseminate a message indicating that CADA requires it not to discriminate on the basis of sexual orientation and other protected characteristics. Such a message would likely have the effect of disassociating Masterpiece from its customers' conduct.

Therefore, we conclude that the Commission's order requiring Masterpiece not to discriminate against potential customers because of their sexual orientation does not force it to engage in compelled expressive conduct in violation of the First Amendment. Accordingly, because we conclude that the compelled conduct here is not expressive, the State need not show that it has an important interest in enforcing CADA.

V. First Amendment and Article II, Section 4—Free Exercise of Religion

Next, Masterpiece contends that the Commission's order unconstitutionally infringes on its right to the free exercise of religion guaranteed by the First Amendment of the United States Constitution and article II, section 4 of the Colorado Constitution. We conclude that CADA is a neutral law of general applicability and, therefore, offends neither the First Amendment nor article II, section 4.

A. Standard of Review

Whether the Commission's order unconstitutionally infringes on Masterpiece's free exercise rights, protected by the First Amendment and article II, section 4, is a question of law that we review de novo.

B. Applicable Law

The Free Exercise Clause of the First Amendment provides: "Congress shall make no law ... prohibiting the free exercise [of religion]." The First Amendment is binding on the States through incorporation by the Fourteenth Amendment. Article II, section 4 of the Colorado Constitution provides: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed."

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Free exercise of religion also involves the "performance of (or abstention from) physical acts."

Before the Supreme Court's decision in Smith, the Court consistently used a balancing test to determine whether a challenged government action violated the Free Exercise Clause of the First Amendment. That test considered whether the challenged government action imposed a substantial burden on the practice of religion, and, if so, whether that burden was justified by a compelling government interest.

In Smith, the Court disavowed Sherbert 's balancing test and concluded that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." The Court held that neutral laws of general applicability need only be rationally related to a legitimate governmental interest in order to survive a constitutional challenge. As a general rule, such laws do not offend the Free Exercise Clause.

However, if a law burdens a religious practice and is not neutral or not generally applicable, it "must be justified by a compelling government interest" and must be narrowly tailored to advance that interest.

C. Analysis

1. First Amendment Free Exercise

Masterpiece contends that its claim is not governed by Smith 's rational basis exception to general strict scrutiny review of free exercise claims for two reasons: (1) CADA is not "neutral and generally applicable" and (2) its claim is a "hybrid" that implicates both its free exercise and free expression rights. Again, we disagree.

First, we address Masterpiece's contention that CADA is not neutral and not generally applicable. A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." A law is not generally applicable when it imposes burdens on religiously motivated conduct while

permitting exceptions for secular conduct or for favored religions. The Supreme Court has explained that an improper intent to discriminate can be inferred where a law is a "religious gerrymander[ ]" that burdens religious conduct while exempting similar secular activity. If a law is either not neutral or not generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."

The Court has found only one law to be neither neutral nor generally applicable. In Church of Lukumi, the Court considered the constitutionality of a municipal ordinance prohibiting ritual animal sacrifice. The law applied to any individual or group that "kills, slaughters, or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animals is to be consumed."

Considering that the ordinance's terms such as "sacrifice" and "ritual" could be either secular or religious, the Court nevertheless concluded that the law was not neutral because its purpose was to impede certain practices of the Santeria religion. The Court further concluded that the law was not generally applicable because it exempted the killing of animals for several secular purposes, including the killing of animals in secular slaughterhouses, hunting, fishing, euthanasia of unwanted animals, and extermination of pests, as well as the killing of animals by some religions, including at kosher slaughterhouses.

a. Neutral Law of General Applicability

Masterpiece contends that, like the law in Church of Lukumi, CADA is neither neutral nor generally applicable. First, it argues that CADA is not generally applicable because it provides exemptions for "places principally used for religious purposes" such as churches, synagogues, and mosques, as well as places that restrict admission to one gender because of a bona fide relationship to its services. Second, it argues that the law is not neutral because it exempts "places principally used for religious purposes," but not Masterpiece.

We conclude that CADA is generally applicable, notwithstanding its exemptions. A law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct. CADA does not discriminate on the basis of religion; rather, it exempts certain public accommodations that are "principally used for religious purposes."

In this regard, CADA does not impede the free exercise of religion. Rather, its exemption for "places principally used for religious purposes" reflects an attempt by the General Assembly to reduce legal burdens on religious organizations and comport with the free exercise doctrine. Such exemptions are commonplace throughout Colorado law, and, in some cases, are constitutionally mandated. Further, CADA is generally applicable because it does not exempt secular conduct from its reach. In this respect, CADA's exemption for places that restrict admission to one gender because of a bona fide relationship to its services does not discriminate on the basis of religion. On its face, it applies equally to religious and nonreligious conduct, and therefore is generally applicable.

Second, we conclude that CADA is neutral.

Masterpiece asserts that CADA is not neutral because, although it exempts "places primarily used for religious purposes," Masterpiece is not exempt. However, Masterpiece does not contend that its bakery is primarily used for religious purposes.

CADA forbids all discrimination based on sexual orientation regardless of its motivation. Further, the existence of an exemption for religious entities undermines Masterpiece's contention that the law discriminates against its conduct because of its religious character.

Finally, we reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation. As one court observed in addressing a similar free exercise challenge to the 1964 Civil Rights Act:

> Undoubtedly defendant ... has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This Court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishment upon the ground that to do so would violate his sacred religious beliefs.

Likewise, Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same-sex marriage. However, if it wishes to operate as a public accommodation and conduct business within the State of Colorado, CADA prohibits it from picking and choosing customers based on their sexual orientation.

Therefore, we conclude that CADA was not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct. Accordingly, CADA is a neutral law of general applicability.

b. "Hybrid" Rights Claim

Next, we address Masterpiece's contention that its claim is not governed by Smith 's rational basis standard and that strict scrutiny review applies because its contention is a "hybrid" of both free exercise rights and free expression rights.

In Smith, the Supreme Court distinguished its holding from earlier cases applying strict scrutiny to laws infringing free exercise rights, explaining that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." Masterpiece argues that this language created an exception for "hybrid-rights" claims, holding that a party can still establish a violation of the Free Exercise Clause, even where the challenged law is neutral and generally applicable, by showing that the claim comprises both the right to free exercise of religion and an independent constitutional right.

We note that Colorado's appellate courts have not applied the "hybrid-rights" exception, and several decisions have cast doubt on its validity. Regardless, having concluded above that the Commission's order does not implicate Masterpiece's freedom of expression, even if we assume the "hybrid-rights" exception exists, it would not apply here.

Accordingly, we hold that CADA is a neutral law of general applicability, and does not offend the Free Exercise Clause of the First Amendment.

2. Article II, Section 4 Free Exercise of Religion

Masterpiece argues that, although neutral laws of general applicability do not violate the First Amendment, the Free Exercise Clause of the Colorado Constitution requires that we review such laws under heightened, strict scrutiny. We disagree.

Masterpiece gives two reasons supporting this assertion. First, it argues that Colorado appellate courts uniformly apply strict scrutiny to laws infringing fundamental rights. Second, it argues that the Colorado Constitution provides broader protections for individual rights than the United States Constitution.

We recognize that, with regard to some individual rights, the Colorado Constitution has been interpreted more broadly than the United States Constitution, and that we apply strict scrutiny to many infringements of fundamental rights. However, the Colorado Supreme Court has also recognized that article II, section 4 embodies "the same values of free exercise and governmental noninvolvement secured by the religious clauses of the First Amendment."

Colorado appellate courts have consistently analyzed similar free exercise claims under the United States and Colorado Constitutions, and have regularly relied on federal precedent in interpreting article II, section 4. Finally, the Colorado Supreme Court has never indicated that an alternative analysis should apply.

Given the consistency with which article II, section 4 has been interpreted using First Amendment case law—and in the absence of Colorado Supreme Court precedent suggesting otherwise—we hesitate to depart from First Amendment precedent in analyzing Masterpiece's claims. Therefore, we see no reason why Smith 's holding—that neutral laws of general applicability do not offend the Free Exercise Clause—is not equally applicable to claims under article II, section 4, and we reject Masterpiece's contention that the Colorado Constitution requires the application of a heightened scrutiny test.

3. Rational Basis Review

Having concluded that CADA is neutral and generally applicable, we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation. The Supreme Court has consistently recognized that states have a compelling interest in eliminating such discrimination and that statutes like CADA further that interest.

Without CADA, businesses could discriminate against potential patrons based on their sexual orientation. Such discrimination in places of public accommodation has measurable adverse economic effects. CADA creates a hospitable environment for all consumers by preventing discrimination on the basis of certain characteristics, including sexual orientation. In doing so, it prevents the economic and social balkanization prevalent when businesses decide to serve only their own "kind," and ensures that the goods and services provided by public accommodations are available to all of the state's citizens.

Therefore, CADA's proscription of sexual orientation discrimination by places of public accommodation is a reasonable regulation that does not offend the Free Exercise Clauses of the First Amendment and article II, section 4.

VI. Discovery Requests and Protective Order

We also disagree with Masterpiece's contention that the ALJ abused his discretion by denying it discovery as to the type of wedding cake Craig and Mullins intended to order and details of their wedding ceremony. We agree with the ALJ's conclusion that these subjects were not relevant in resolving the essential issues at trial. The only issues before the ALJ were (1) whether Masterpiece violated CADA by categorically refusing to serve Craig and Mullins because of its opposition to same-sex marriage and, if so, (2) whether CADA, as applied to Masterpiece, violated its rights to freedom of expression and free exercise of religion. Evidence pertaining to Craig's and Mullins' wedding ceremony—including the nature of the cake they served—had no bearing on the legality of Masterpiece's conduct. The decision to categorically deny service to Craig and Mullins was based only on their request for a wedding cake and Masterpiece's own beliefs about same-sex marriage. Because Craig and Mullins never conveyed any details of their desired cake to Masterpiece, evidence about their wedding cake and details of their wedding ceremony were not relevant.

Accordingly, we conclude that the ALJ did not abuse his discretion by denying Masterpiece's requested discovery.

VII. Commission's Cease and Desist Order

Finally, we reject Masterpiece's contention that the Commission's cease and desist order exceeded the scope of its statutory authority. Where the Commission finds that CADA has been violated, section 24–34–306(9) provides that it "shall issue and cause to be served upon the respondent an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such action as it may order" in accordance with the provisions of CADA.

Masterpiece argues that the Commission does not have the authority to issue a cease and desist order applicable to unidentified parties, but rather, it may only issue orders with respect to the specific complaint or alleged discriminatory conduct in each proceeding. We disagree with Masterpiece's reading of the statute.

First, individual remedies are "merely secondary and incidental" to CADA's primary purpose of eradicating discriminatory practices.

Further, Masterpiece admitted that its refusal to provide a wedding cake for Craig and Mullins was pursuant to the company's policy to decline orders for wedding cakes for same-sex weddings and marriage ceremonies. The record reflects that Masterpiece refused to make wedding cakes for several other same-sex couples. In this respect, the Commission's order was aimed at the specific "discriminatory or unfair practice" involved in Craig's and Mullins' complaint.

Accordingly, we conclude that the Commission's cease and desist order did not exceed the scope of its powers.

VIII. Conclusion

The Commission's order is affirmed.

CHIEF JUDGE LOEB and JUDGE BERGER concur.

"A baker refused to make a cake for a gay couple due to religious beliefs. Supreme Court will rule on the case in fall"

The Los Angeles Times

David G. Savage

June 26, 2017

The Supreme Court said Monday that it would hear a major religious liberties case that could grant new freedoms to businesses to discriminate against gays and lesbians — and potentially others — based on the faith of the owners.

The case involves the Christian owner of a Colorado bakery who refused to make a wedding cake for a same-sex couple.

The high-profile dispute pits the rights of religious individuals against gay rights, two issues that have been at the forefront of several recent Supreme Court decisions. Both are high priorities for Justice Anthony M. Kennedy, whose vote in this matter will probably be key.

In the past, Kennedy has been both a strong supporter of gay rights and a defender of religious liberty.

The Colorado case is likely to become one of the court's most contentious cases next term. It could decide whether business owners are allowed to cite their religious views as a reason for refusing to serve gay and lesbian couples. Potentially, it could sweep even more broadly, opening a religious exemption to civil rights laws that could allow discrimination against other groups.

The case, to be heard in the fall, could have a wide effect in states like California that prohibit discrimination against people based on their sexual orientation.

No federal law requires businesses to serve all customers without regard to their sexual orientation, but 21 states have "public accommodations" laws that prohibit discrimination against gays and lesbians.

States with such anti-discrimination laws are mostly in the West, East Coast and upper Midwest. No state in the South or on the Great Plains has such a law.

Supreme Court won't hear a California gun case, leaving in place the state's strict limits on concealed weapons

Colorado is one of the states whose laws protect gay couples, and Jack Phillips, the owner of the Masterpiece Cakeshop in Lakewood, Colo., was charged with violating it.

In 2012, he said he politely declined to make a wedding cake for Charles Craig and David Mullins, who had planned to marry in Massachusetts but then have a reception in their home state of Colorado. They lodged a complaint with the state civil rights commission.

The commission ruled that Phillips' refusal to make the wedding cake violated the provision in the state's anti-discrimination law that says businesses open to the public may not deny service to customers based on their race, religion, gender or sexual orientation. The panel ordered him to provide wedding cakes on an equal basis for same-sex couples.

Phillips appealed to the Supreme Court, arguing he deserved a religious exemption based on the 1st Amendment's guarantee of freedom of speech and free exercise of religion. His lawyers say he refused to comply with the commission ruling while his appeal proceeded.

They described Phillips as a "cake artist" who will "not create cakes celebrating any marriage that is contrary to his understanding of biblical teaching."

They also said he has refused to make cakes to celebrate Halloween or create baked goods that have "anti-American or anti-family themes" or carry profane messages.

"They said you have to create cakes for same-sex couples, so he removed himself from the market. He chose to stop making wedding cakes," said Jeremy Tedesco, a lawyer for the Alliance Defending Freedom, who appealed on Phillips' behalf.

Lawyers for the state commission and the American Civil Liberties Union urged the court to turn down the appeal in Masterpiece Cakeshop vs. Colorado Civil Rights Commission. They said it could open a "gaping hole" in civil rights laws if business owners could cite their religious beliefs as a valid basis for denying service to certain customers.

"This has always been about more than a cake," Mullins said in a statement. "Businesses should not be allowed to violate the law and discriminate against us because of who we are and who we love."

James Esseks, director of the ACLU's LGBT Project said the "law is squarely on David and Charlie's side because when businesses are open to the public, they're supposed to be open to everyone."

But Justice Kennedy, who wrote the court's opinion upholding same-sex marriages, has also joined the court's conservatives in upholding religious exemptions. He joined the 5-4 majority in the Hobby Lobby case, which said the Christian family who owned a chain of craft stores could refuse to provide their employees the full range of contraceptives called for by the federal healthcare law.

Public opinion polls show that most Americans support the rights of same-sex couples to marry and that support has steadily increased, even among groups who have been opposed in the past, notably evangelical Christians.

Advocates on the Christian right, however, say the government should not force believers to endorse marriages that conflict with their faith.

Two years ago, the justices turned down a similar appeal from a wedding photographer in New Mexico. Since then, the issue has arisen in several other states whose laws

forbid discrimination based on sexual orientation.

The appeal in the Colorado case has been pending since January, suggesting the justices were closely split on what to do. Justice Neil M. Gorsuch, a Colorado native and a well-known defender of religious liberty claims, joined the court in April.

It takes only four votes to hear the case, and on the last day before the summer recess, the justices announced they would hear the issue during the fall.

Separately Monday, the court in a 6-3 ruling struck down an Arkansas law regarding birth certificates that prevented adding the names of both parents in a same-sex union. The law called for including only the biological parent.

The court, in an unsigned opinion, said this rule denied the same-sex couple the same rights as opposite-sex couples and was therefore unconstitutional.

The court noted that in Arkansas if an opposite-sex couple used artificial insemination with an anonymous sperm donor to have a child, the mother's husband in such a case would be listed on the birth certificate.

Justices Clarence Thomas, Samuel A. Alito Jr. and Gorsuch dissented in that case, Pavan vs. Smith.

"A Supreme Court mystery: Has Roberts embraced same-sex marriage ruling?"

The Washington Post

Robert Barnes

July 16, 2017

A Supreme Court mystery: Has Chief Justice John G. Roberts Jr. embraced the court's same-sex marriage decision that he so passionately protested two years ago?

The "does-he-doesn't-he" question is prompted by a case that the court decided without oral arguments at the end of the recently completed term. The justices ruled in favor of same-sex couples, but did so in a way that has turned those who closely follow the court's actions into a debating society.

And the answer could be important for more than curiosity's sake. The court has accepted for its next term a case dealing with whether business owners must provide services for same-sex unions even if they are religiously opposed, and the nation's courts are filling with cases about how far the 2015 same-sex marriage ruling extends.

Usually, there is no question about where the justices stand. One of the Supreme Court's boasts about its transparency is that justices put their names on their work, joining the reasoning of a majority or dissenting opinion or writing their own.

"Except sometimes they don't," said Joshua Matz, a former clerk to Justice Anthony M. Kennedy and proprietor of the legal blog Take Care.

And one of the times they don't is when issuing a "per curiam" decision, an unsigned opinion that is filed on behalf of the court.

In Pavan v. Smith , the court summarily overruled a decision of the Arkansas Supreme Court and agreed with same-sex married couples who said the state treated them differently than heterosexual married couples when issuing birth certificates. The state automatically listed spouses of mothers on birth certificates when the spouse was a man, but not when she was a woman.

The per curiam decision said that Arkansas's justices had failed to properly apply the court's landmark decision that same-sex couples have a constitutional right to marry, Obergefell v. Hodges.

"Differential treatment infringes Obergefell's commitment to provide same-sex couples 'the constellation of benefits that the states have linked to marriage,' " the unsigned opinion said.

The court's three most conservative justices objected. Justices Clarence Thomas and Samuel A. Alito Jr. joined a dissent written by Justice Neil M. Gorsuch, which said the

court should have accepted the case for full briefing and argument because the outcome wasn't nearly as clear-cut as the majority claimed.

"Nothing in Obergefell spoke (let alone clearly) to the question" raised in the Arkansas case, Gorsuch wrote. (Parenthetically, the parenthetical in that line has been interpreted by some as a shot at Kennedy, who wrote the Obergefell ruling and for whom Gorsuch clerked on the Supreme Court.

Noticeably absent from the dissent was Roberts, who was on the losing side in Obergefell. He issued a strongly worded dissent and underlined his opposition by reading a summary of it from the bench — the first and only time he has taken such a step in more than a decade on the court.

Same-sex couples are justified in celebrating their newly found right, he said, but he added tartly that "the Constitution has nothing to do with it."

But if Roberts wasn't with the named dissenters in the recent Arkansas case, does that mean he was with the unnamed majority?

Constitutional scholar Erwin Chemerinsky said during a recent panel discussion at the University of California at Irvine Law School that the answer was yes and the vote should be seen as 6 to 3.

Law professor Leah Litman said she wasn't sure Chemerinsky could make such a claim. But another panelist, Alex Kozinski, the celebrated and conservative longtime judge on the U.S. Court of Appeals for the 9th Circuit, was definitive:

Yes, Roberts was in the majority.

When there is a published opinion and a justice does not note being in dissent, said Kozinski (yet another person who used to call Kennedy boss), the justice has signed on to the majority.

"No doubt about it," Kozinski said.

Will Baude, a University of Chicago law professor and former Roberts clerk who has closely studied the per curiam decisions, rulings on emergency filings and stay requests that collectively have been referred to as the court's "shadow docket," is skeptical of Kozinski's pronouncement.

"We don't know for sure, but I think he's probably wrong," Baude said.

Baude said it is clear that justices do not always note their dissents when it comes to dealing with emergency stay applications, for instance. And he said it seems likely that there are times when justices simply don't note their dissents.

Matz titled his commentary "No, the Chief Justice Did Not Just Embrace Obergefell" and said there could be several reasons for a justice to secretly dissent: "For instance, to conceal one's views from the public and thereby retain future flexibility; as a display of good will to the majority or the institution as a whole; or to avoid needlessly creating the appearance of conflict."

Perhaps Roberts didn't like Gorsuch's dissent. Perhaps the chief thought the Arkansas case not worth taking.

Because the five members of the Obergefell majority — Kennedy and Justices Ruth

Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan — remain, Roberts certainly knows there is no way of dislodging Obergefell as precedent, and perhaps he thought it covered the Arkansas case, whether he liked it or not.

Kozinski said during the University of California at Irvine panel that judges know when they are outnumbered and it is not worth taking up a case you are sure to lose. "It's a matter of arithmetic," he said.

But it doesn't dictate what a judge might do in the next case, he said, if circumstances — for instance, the court's membership — change.

"Gay Rights Groups Seek One More Win From Justice Kennedy"

The New York Times

Adam Liptak

July 17, 2017

Justice Anthony M. Kennedy, the greatest judicial champion of gay rights in the nation's history, will turn 81 on Sunday. Rumors that he would retire in June turned out to be wrong, but he will not be on the Supreme Court forever.

Gay rights groups hope to score one more victory before he leaves the court. The goal this time is nationwide protection against employment discrimination.

Justice Kennedy wrote the majority opinions in all four of the court's landmark gay rights rulings, culminating in the 2015 decision establishing a constitutional right to same-sex marriage. But there is more work to be done, said Suzanne B. Goldberg, a law professor at Columbia.

"Marriage equality did not bring an end to sexual-orientation discrimination in this country," she said.

The same-sex marriage decision left gay men and lesbians in a strange position, said David S. Cohen, a law professor at Drexel University.

"You can get married, put a picture on your desk from the wedding and then be fired because the boss sees the picture," he said.

"Marriage was certainly an important step, but it doesn't change the fact that there is no federal law protecting against sexual-orientation discrimination in employment or housing or education or public accommodations," Professor Cohen said. "Only about 20 states offer protection under their own state laws."

This month, the gay rights group Lambda Legal announced that it would ask the Supreme Court to hear a case that could prohibit employers from discriminating against gay and lesbian workers. The group argues that Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination based on sex, also bans discrimination based on sexual orientation.

Most federal appeals courts have rejected the theory. But in April, by an 8-to-3 vote, the United States Court of Appeals for the Seventh Circuit, in Chicago, said Title VII covered gay people. "It would require considerable calisthenics to remove the 'sex' from 'sexual orientation,'" Chief Judge Diane Wood wrote for the majority.

She relied on the language and logic of Title VII, and on Supreme Court precedents.

In 1989, for instance, the Supreme Court said discrimination against workers because they did not conform to gender stereotypes was a form of sex discrimination. Being a lesbian, Judge Wood wrote, "represents the ultimate

case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional)."

In dissent, Judge Diane S. Sykes said the majority had overreached. "It's understandable that the court is impatient to protect lesbians and gay men from workplace discrimination without waiting for Congress to act," she wrote. "Legislative change is arduous and can be slow to come. But we're not authorized to amend Title VII by interpretation."

The Seventh Circuit's ruling in April created a split among the federal appeals courts, and such disagreements often prompt the Supreme Court to step in. But the defendant in the case, an Indiana community college, quickly announced that it would not appeal.

Legal experts said it was only a matter of time until the Supreme Court addressed the issue.

"The odds that the Supreme Court grants review of this question in the near future are high," Joshua Matz wrote in April on Take Care, a legal blog. "It is no exaggeration to say that Title VII's application to gays and lesbians now ranks among the most important open questions in U.S. civil rights law."

The next case is now on the horizon. It concerns Jameka Evans, who says a Georgia hospital discriminated against her because she is a lesbian. In March, a divided three-judge panel of the 11th Circuit, in Atlanta, ruled that Title VII did not cover discrimination based on sexual orientation.

Gregory R. Nevins, a lawyer with Lambda Legal who represents Ms. Evans, chose his words carefully in discussing whether the odds of winning at the Supreme Court would dim if Justice Kennedy retired.

"We think we have good reasons for optimism with the current composition of the court," he said. "You always want the setup that you feel comfortable with, rather than any variation of it."

"Justice Kennedy has viewed the mistreatment of lesbian, gay and bisexual individuals with a jaundiced eye," Mr. Nevis added.

Legal scholars were more direct. "Kennedy is more sympathetic to gay rights than his replacement is likely to be," said Andrew M. Koppelman, a law professor at Northwestern who wrote a 1994 law review article called "Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination."

Professor Cohen, who agreed that Title VII should be read to cover sexual-orientation discrimination, said there was reason for gay rights groups to move quickly. "Certainly anything trying to protect people from discrimination in any form is going to fare better with Justice Kennedy on the court than with another Trump appointee," he said, "although I certainly don't think it's a slam dunk with Justice Kennedy."

Justice Kennedy has never embraced the theory that sexual-orientation discrimination is a form of sex discrimination. But he seemed intrigued by the question in 2013 when the Supreme Court heard arguments about Proposition 8, a referendum that banned same-sex marriage in California.

“Do you believe this can be treated as a gender-based classification?” Justice Kennedy asked a lawyer defending the ban.

He did not wait for an answer. “It’s a difficult question,” Justice Kennedy said. “I’ve been trying to wrestle with it.”

"Court Rules Baker Can't Refuse to Make Wedding Cake for Gay Couple"

The Wall Street Journal

Jacob Gershman and Tamara Audi

August 13, 2015

A Colorado appeals court on Thursday ruled that a Denver-area baker cannot refuse to make a wedding cake for a gay couple based on his religious belief.

The decision comes as religious conservatives opposed to gay marriage fight to carve out exemptions to same-sex marriage and antidiscrimination laws—especially in the wake of the U.S. Supreme Court ruling earlier this year legalizing same-sex marriage nationwide.

The Colorado Court of Appeals rejected the argument by lawyers for the cake-shop owner who argued that forcing him to create and sell a cake to a gay couple planning a wedding celebration violated his First Amendment rights.

The ruling is the latest to limit the rights of religious business owners involved in wedding services to turn away same-sex couples.

"There's a growing body of court decisions saying that while religion is central to what makes America America, religion can't be used as an excuse to discriminate," said James Esseks, the director of the American Civil Liberties Union LGBT project. The ACLU represented the couple in the case.

Religious conservatives said the ruling was a mistake. Lawyers for the bakery said they would consider appealing.

"Government has a duty to protect people's freedom to follow their beliefs personally and professionally rather than force them to adopt the government's views," said Jeremy Tedesco, senior counsel for Alliance Defending Freedom, who argued the Colorado case.

The dispute started in 2012, when Charlie Craig and David Mullins visited Masterpiece Cakeshop in Lakewood and requested a cake to celebrate their planned wedding. The couple had plans to marry in Massachusetts but wanted to celebrate with their friends in Colorado, which at the time didn't permit same-sex marriages.

Masterpiece owner Jack Phillips declined the couple's request, telling them he didn't create wedding cakes for same-sex weddings because of his religious beliefs, according to the opinion, which said he advised the two men that he would be happy to sell them other baked goods.

"Phillips believes that decorating cakes is a form of art, that he can honor God through his artistic talents, and that he would displease

God by creating cakes for same-sex marriages," the opinion said.

The couple then filed a complaint with the Colorado Civil Rights Commission, alleging discrimination based on sexual orientation under the Colorado Anti-Discrimination Act. After a commission judge ruled for the couple—a decision affirmed by the commission itself—Mr. Phillips took his case to the appellate court.

"Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally," the court said in its ruling Thursday.

Religious conservatives opposed to gay marriage have tried to soften their rhetoric about homosexuality and their approach to the LGBT community, while maintaining their opposition to same-sex marriage.

Some church leaders fear the Supreme Court ruling could result in discrimination against religious people, and have said they would continue to fight for exemptions for business owners and religiously affiliated organizations.

"What happens next is that states should respond with appropriate legislation that would prevent the government from penalizing or coercing anyone because they act on the belief that marriage is a union between one man and one woman," said Roger Severino, the director of the DeVos Center for Religion and Civil Society at the Heritage Foundation, a conservative think tank.

But civil-liberties groups say continuing legal fights aren't indicative of a larger cultural battle.

"There's a small number of conflicts and the courts are resolving them the same way every time," the ACLU's Mr. Esseks said.

Gay couples have won similar cases in other states. In 2013, the highest court in New Mexico ruled that the owners of an Albuquerque wedding-photography company can't deny services to same-sex couples.

Earlier this summer, the Oregon labor commissioner ordered the owners of "Sweetcakes by Melissa" bakery to pay a lesbian couple $135,000 in damages "for emotional and mental suffering resulting from" its refusal to bake them a wedding cake.

"Colorado baker wants U.S. Supreme Court to hear gay wedding cake case"

The Denver Post

Yesenia Robles

July 22, 2016

Masterpiece Cakeshop owner Jack Phillips is now asking the U.S. Supreme Court to hear his case after a lower court ruled he was wrong in refusing to make a wedding cake for a same-sex couple by citing his religious beliefs.

His attorneys filed the petition Friday.

"No one — not Jack or anyone else — should be forced by the government to further a message that they cannot in good conscience promote," said attorney Jeremy Tedesco in a statement released by the non-profit legal organization Alliance Defending Freedom. "And that's what this case is about."

Last month the Colorado Supreme Court decided it would not hear the case of the Lakewood baker.

Mark Silverstein, the legal director for American Civil Liberties Unit of Colorado, said the organization intends to file a response to the petition.

"As we've argued and the courts have consistently and correctly ruled in this case, everyone has a right to their religious beliefs," Silverstein said. "But business owners cannot rely on those beliefs as an excuse to discriminate against prospective customers."

In 2012, Charlie Craig and David Mullins were turned away by Phillips when they requested a custom wedding cake. Mullins and Craig planned to marry in Massachusetts and wanted a cake to celebrate in Colorado. Phillips refused, citing his religious beliefs.

In December 2013, administrative law Judge Robert N. Spencer said offering the same services to gay couples as heterosexual couples did not violate Phillips' rights to free speech and does not prevent him from exercising his religious freedom.

The appeals courts later upheld that ruling, stating that the Colorado Anti-Discrimination Act does not compel the cake shop owner to endorse any religious views. Instead, it prohibits Phillips from discriminating against customers based on sexual orientation.

Tedesco said Friday afternoon that many similar cases are circulating the lower courts throughout the country.

Tedesco said the only similar case that the U.S. Supreme Court has been asked to hear is one about a photographer in New Mexico

who refused to photograph a gay couple. The court did not take up that case, but Tedesco said that wasn't a surprise.

"Our view is it's only a matter of time before the Supreme Court takes one of these cases," Tedesco said. "It's a really crucial issue of First Amendment law.

“Opinion: The sleeper issue in the 'gay wedding cake' controversy”

Los Angeles Times

Michael McGough

August 17, 2015

Social conservatives have rallied behind bakers and photographers who don’t want to provide services for same-sex weddings. But the courts continue to be unsympathetic. The latest rebuff was a decision last week by the Colorado Court of Appeals in the case of Jack C. Phillips, a Christian baker who refused to create a wedding cake for a gay couple who planned to marry in Massachusetts but celebrate their union in Colorado.

The court’s opinion rejects arguments that forcing Phillips to supply a cake to Charlie Craig and David Mullins violated Phillips’ freedom of religion or his 1st Amendment right against being compelled to convey a “celebratory” message he doesn’t believe in.

But to reach those questions, the court had to reject another legal claim by Phillips that hasn’t received enough attention: that in refusing to provide the cake, he wasn’t engaging in anti-gay discrimination. Phillips noted that he was happy to provide Craig and Mullins with other baked goods. (Less persuasively, he floated the idea that heterosexual couples might also enter into a same-sex marriage.)

The appeals court was quick -- maybe too quick -- to accept the idea that refusal to bake a cake for a same-sex wedding is tantamount to discriminating against customers on the basis of their sexual orientation. The court ruled that “the act of same-sex marriage is closely correlated to Craig’s and Mullins’ sexual orientation.” Therefore, an administrative law judge hadn't erred in concluding that Phillips’ refusal to bake the cake was “because of” the couple’s sexual orientation.

The appeals court backed that conclusion with a citation from a 2010 U.S. Supreme Court decision. That case concerned a Christian group at the UC Hastings College of Law that required its leaders to affirm, and live by, the traditional view that sex is permissible only within heterosexual marriage.

The law school had refused to recognize the Christian Legal Society chapter because, it said, the group was in violation of a policy that membership and leadership positions in such groups must be open to “all comers.” Student groups, couldn’t discriminate on the basis of “race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.”

The Christian group argued that it excluded some students not because of their sexual orientation, but rather “on the basis of a conjunction of conduct and the belief that the conduct is not wrong.” In other words,

celibate gays who endorsed the group's Christian moral theology were welcome despite their sexual orientation.

Writing for the court, Justice Ruth Bader Ginsburg rejected that argument, noting that in gay rights cases, the court had "declined to distinguish between status and conduct."

To a lot of gay rights supporters, it's self-evident that a refusal to bake a cake for a same-sex wedding is discrimination on the basis of sexual orientation. But there are people, such as Phillips and the bishops of the Roman Catholic Church, who insist on a distinction between sexual orientation and sexual activity or participation in a same-sex marriage.

And here's another question raised by David French in the National Review: If discrimination on the basis of sexual orientation is interpreted in broad terms, would a similarly broad definition of racial discrimination require a baker to provide a Confederate-flag cake for a white supremacist group lest he be accused of bias against whites? (Phillips said he also objected to baking cakes that incorporate racist symbols.)

The decision in the Christian Legal Society case was 5 to 4. (One justice in the majority, John Paul Stevens, has since retired, but his successor, Elena Kagan, likely would rule the same way.) So it seems that bakers, wedding photographers and other merchants who live in jurisdictions that prohibit discrimination on the basis of sexual orientation won't be able to argue that "we're not anti-gay, we're just anti-gay-marriage."

That leaves arguments based on freedom of religion or freedom of speech, but those don't seem very promising either. A New Mexico wedding photographer who refused to take pictures of a same-sex celebration appealed a decision against her to the U.S. Supreme Court; last year the justices refused even to hear the case.

“Cake-bakers have the right to draw a line in the icing”

The New York Post

David Harsanyi

June 30, 2017

This week, the Supreme Court agreed to hear the case of Masterpiece Cakeshop owner Jack Phillips, the man who refused to create a specialty wedding cake for a same-sex couple in Colorado in 2012. Yet the stories that dominate coverage distort the public’s understanding of the case and its serious implications.

For one thing, no matter how many times people repeat it, the case isn’t about discrimination or challenging gay marriage. But when the news first broke, USA Today, for example, tweeted, “The Supreme Court has agreed to reopen the national debate over same-sex marriage.”

The headline (and story) on the Web site was worse; it read, “Supreme Court will hear religious liberty challenge to gay weddings.” Others similarly framed the case.

There is an impulse to frame every issue as a clash between the tolerant and the closed-minded. But the Masterpiece case doesn’t challenge, undermine or relitigate the issue of same-sex marriage. Gay marriage wasn’t even legal in Colorado when this incident occurred.

So, The Associated Press’ headline, “Supreme Court to Decide If Baker Can Refuse Gay Couple Wedding Cake,” and story are also wrong.

As is The New York Times headline “Justices to Hear Case on Baker’s Refusal to Serve Gay Couple,” which was later changed to the even worse headline “Justices to Hear Case on Religious Objections to Same-Sex Marriage.”

A person with only passing interest in this case might be led to believe that Phillips is fighting to hang a “No Gays Allowed” sign in his shop. In truth, he never refused to serve a gay couple. He didn’t even really refuse to sell David Mullins and Charlie Craig a wedding cake.

Everything in his shop was available to gays and straights and anyone else who walked in his door.

What Phillips did was refuse to use his skills to design and bake a unique cake for a gay wedding.

Like many other bakers, florists, photographers and musicians — and millions of other Christians — Phillips holds genuine longstanding religious convictions. If Mullins and Craig had demanded that Phillips create an erotic-themed cake, the baker would have similarly refused for religious reasons, just as he had with other customers.

If a couple had asked him to design a specialty cake that read "Congrats on the abortion, Jenny!" I'm certain he would have refused them as well, even though abortions are legal. It's not the people; it's the message.

In its tortured decision, the Colorado Court of Appeals admitted as much, contending that while Phillips didn't overtly discriminate against the couple, "the act of same-sex marriage is closely correlated to Craig's and Mullins' sexual orientation," so it could divine his real intentions.

In other words, the threshold for denying religious liberty and free expression is the presence of advocacy or a political opinion that conflates with faith. The court has effectively tasked itself with determining when religion is allowed to matter to you.

Or, in other words, if SCOTUS upholds the lower-court ruling, it will empower unelected civil-rights commissions — which are typically stacked with hard-left authoritarians — to decide when your religious actions are appropriate.

How could any honest person believe this was the Constitution's intent? There was a time, I'm told, when the state wouldn't substantially burden religious exercise and would use the least restrictive means to further compelling interests. Today, the state can substantially burden a Christian because he has hurt the wrong person's feelings.

Judging from the e-mails and social-media reactions I've gotten regarding this case, people are not only instinctively antagonistic because of the players involved but also because they don't understand the facts.

In this era of identity politics, some have been programmed to reflexively side with the person making accusations of status-based discrimination, all in an effort to empower the state to coerce a minority of people to see the world their way.

Well, not all people. In 2014, a Christian activist named William Jack went to a Colorado bakery and requested two cakes in the shape of a Bible, one to be decorated with the Bible verses "God hates sin. Psalm 45:7" and "Homosexuality is a detestable sin. Leviticus 18:22," and the other cake to be decorated with another passage.

The bakery refused. Even though Christians are a protected group, the Colorado Civil Rights Division threw out the case.

The American Civil Liberties Union called the passages "obscenities." I guess the Bible doesn't "correlate" closely enough with a Christian's identity.

Or perhaps we've finally established a state religion: It's run on the dogma of "social justice."

"Using 'free speech' as a cover for discrimination"

Boston Globe

July 6, 2017

Colorado cake maker Jack Phillips is devout about his artistry in icing and fondant. He's also devout about his Christian faith, so much so that he believes it would be deeply sinful to prepare a wedding cake for a same-sex couple. Last week, the US Supreme Court agreed to hear his case, and arguments in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission — one in a series of efforts to fence in the galloping acceptance of same-sex marriage — could come as soon as this fall.

Events were set in motion in 2012, when David Mullins and Charlie Craig, who planned to marry in Massachusetts, stopped into Masterpiece Cakeshop in Lakewood, Colo., to order a wedding cake. Phillips refused to serve them, even though Colorado law says businesses open to the public can't discriminate based on sexual orientation.

Phillips, of course, has a constitutionally protected First Amendment right to profess his faith. And he's made it clear there's no room for compromise, telling The New York Times: "I believe that the Bible teaches that homosexuality is wrong, and that to participate in a sin is wrong for me. For me to take part in it against my will is compelling me to make a statement that I don't want to make." But there's another right hanging in the balance, rooted in the 14th Amendment and codified by the Supreme Court in 2015: the right to same-sex marriage.

Historically, courts have tried to strike an equitable balance between expanded civil rights and religious expression. Since the Civil Rights Act was enacted, in 1964, lawmakers and the courts have allowed some exemptions but have tended to draw the line when claims of religious freedom are used to justify discrimination. As James Esseks, director of the ACLU LGBT project put it: "You have freedom to believe and to preach your faith, until your actions harm other people."

The Supreme Court's Obergefell v. Hodges decision two years ago was transformative, addressing vital claims to liberty and dignity for millions of gay Americans. Phillips's protest also comes at a time when national support for same-sex marriage is at an all-time high, according to a recent Pew Research Center poll. A majority of Americans surveyed — 62 percent — now support gay marriage, including two-thirds of Catholics and 68 percent of mainline Protestants. And while white evangelical Christians aren't exactly waving rainbow flags, support for same-sex marriage has grown from 27 percent in 2016 to 35 percent today, according to Pew.

There's a broader First Amendment principle at stake, however. The Phillips case is another alarming assault on freedom of speech, part of an effort by businesses large and small to turn that most essential constitutional right into an antiregulatory tool. This "compelled speech" doctrine is already making its way through Congress and the court system, most notably in a case involving business groups fighting a 2010 law that requires them to disclose whether their products contain minerals linked to warlords in the Democratic Republic of the Congo. In June, the US House passed the Financial CHOICE Act, which includes a pro-business provision to repeal the conflict-mineral disclosure. The US Senate should reject the bill, which also rolls back Dodd-Frank reforms. And the Supreme Court justices should recognize that the Masterpiece Cakeshop case is not about forcing speech, but about banning discriminatory conduct. The Colorado cakemaker should be free to worship as he pleases, but not to abrogate settled civil rights law under the guise of the First Amendment.