PRELIMINARY DRAFT ONLY

THE CAKE AND THE CONSTITUTION:

A SLICE OF CON-LAW FOR MASTER BAKERS

CLEVELAND COUNTY BAR ASSOCIATION

March 07, 2018

Prepared by:

Micheal Salem
Salem Law Offices
Norman, Oklahoma 73069
(405) 366-1234

I hope these are:
"THOROUGH, HIGH QUALITY, READABLE, AND CAREFULLY PREPARED WRITTEN MATERIALS"
Submitted in Compliance with MCLE Commission Regulations 3.3 and 4.1.6.

DISCLAIMERS

PLEASE NOTE: Thank you for the invitation to speak. First, some basic housekeeping rules. I want to avoid potential conflicts of interest so this lecture and the information contained within these materials is not legal advice. No confidential or attorney-client relationship is formed based upon your attendance at this lecture, even if you ask me a question either before, during, or after the meeting. If you do ask questions, I will offer the best answer I can which may be well-reasoned, but most like will be speculative or based on incorrect assumptions formed in a very short period of time. Because you or your employer would probably never hire me anyway, please understand that on behalf of a client and after further study, I may take a position opposite to any conjecture, supposition, comment, or remark (snide or otherwise) that I may make either in the lecture or materials. Since this is an area of recent change, some of this material is just my initial thoughts about these issues and the cases.

Remember, the Supreme Court has yet to rule on this case, so anything I say is a guess.

STEPHEN AMBROSE/DORIS KEARNS GOODWIN DISCLAIMER. Not all of this material is original. In fact some of these materials may consist of sections of Supreme Court decisions which are certainly not original to me. Other portions will include quotes from court cases or other secondary sources. I assembled this article from court cases, briefs, and articles that I collect on matters within my interests. It is possible that some of the quotation marks or references may have lost their way or that I may have cherry-picked an excerpt from a synopsis without attribution.

Sometimes I may use a summary from a later case of earlier holdings from the court rather than formulating my own explanation of a court's prior holding. Obviously a court's own understanding of its holdings is a valuable preferred source. I have tried to attribute those explanations to the later case when possible.

Some of this material may be copyrighted, yet still permissible to use in this context. For sure, nobody is making money off of this endeavor. See *Luther R. Campbell a/k/a Luke Skyywalker, et al., v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S.Ct. 1164 (1994) (Copyrighted material can be fair use subject of parody under Copyright Act of 1976, 17 U. S. C. § 107)

Any mistakes or errors including failure to include an attribution are solely mine. I am very appreciative of sharp-eyed readers who spot errors or who have a suggestion about content that was included, should have been included, or should have been omitted. You are invited and welcomed to contact me.

THE CAKE AND THE CONSTITUTION

A SLICE OF CONLAW FOR MASTER BAKERS

Public Accommodations versus the First Amendment

I. INTRODUCTION

Picking one of the more interesting constitutional law cases now pending before the Supreme Court in a Term of interesting cases is, to coin a phrase, a piece of cake. Certainly one slice off the top is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, *et al.*, No. 16-111,[1] an appeal from the Colorado Court of Appeals. ("*Masterpiece Cakeshop*").[2]

---

[1] See:

<https://www.supremecourt.gov/docket/docketfiles/html/public/16-111.html>(last visited 3/4/2018).

[2] Although certiorari was denied by the Colorado Supreme Court, most references will be to the decision of the Court of Appeals of Colorado. *See Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 2015 Colo. App. LEXIS 1217, 2015 COA 115 (Aug. 13, 2015) *cert. den. Masterpiece Cakeshop Inc. v. Colo. Civ. Rights Comm'n*, 2016 Colo. LEXIS 429, 2016 WL 1645027.

The decision of the Court of Appeals of Colorado can also be found at:

<http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-op-bel-colo-app.pdf> (last visited 3/4/2018).

The decisions of the Administrative Law Judge and the Colorado Civil Rights (continued...)

Masterpiece Cake bring the Nation's imperative of a(n) (aspirational) of a society free from discrimination squarely into conflict with the First Amendment, in particular, the Free Exercise and Free Speech Clauses. The Supreme Court will be called upon to make a choice which strikes a balance among the important political imperatives of protecting Free Exercise and Free Speech and the trend to protection of certain classes who have or continue to experience discrimination.

That these matters are of controversy is not to be doubted. The decision of the Colorado Court of Appeals attracted six amicus curia briefs representing numerous parties as well as the attention of the Colorado Attorney General. In the Supreme Court, after the grant of ceriorari, an astounding 95 different amici briefs were filed by a wide variety of organizations and individuals, including secular, religious, and law professors (hybrids).

The case also brings different heavyweight legal and social organizations to battle against each other. Seeking to affirm the State Court decision is the American Civil Liberties Union Foundation representing Charlie Craig and David Mullins, the complainants in the original administrative proceedings. The Colorado Attorney General is defending the decision of the Colorado Civil Rights Commission. Representing Cakeshop owner Jack C. Phillips in attacking the decision of the Colorado Court of Appeals is the Alliance Defending Freedom of Scottsdale, Arizona, one of several conservative Christian organizations patterned after the ACLU and

---

[2](...continued)
Commission are not reported, but included in the Petition for Certiorari by *Masterpiece Cakeshop*.

organized to protect religious liberty.

With such legal firepower on both sides of the aisle, one natural question may be, "Will good cakes make bad law."

II. FACTS AND PROCEDURAL HISTORY[3]

The facts of the case arise out of a very brief interaction in July, 2012 when Charlie Craig and David Mullins, accompanied by Craig's Mother, Deborah Munn, went to Masterpiece Cakeshop, Inc. and consulted with its owner, Jack C. Phillips.

What Happened at the Scene of the Cake?

Craig and Mullins, planning a same sex marriage, sought to have Masterpiece make a wedding cake for the nuptials. Craig and Mullins planned to legally marry in Massachusetts where same-sex marriages were legal and then celebrate with friends in Colorado.[4]

---

[3] The various court filings referenced here are available from this SCOTUSblog page: <http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/?wpmp_switcher=desktop> (last visited 3/5/2018).

[4] It should be noted that at the time of the scene at the Cakeshop on July 12, 2012, the U.S. Supreme Court had not yet considered *Obergefell v. Hodges*, 576 U.S. _____, 135 S.Ct. 2584, 192 L. Ed. 2d 609 (June 6, 2015). In fact, certiorari was not granted in *Obergefell* until January 16, 2015. The case was argued on April 28, 2015 and decided on June 26, 2015. In 2012 Colorado did not recognize same-sex weddings.

However, Colorado provided limited recognition of same-sex unions in the form of designated beneficiary agreements since July 1, 2009. Colorado approved civil unions after May 1, 2013.

Same-sex marriage was recognized on October 7, 2014 when the Colorado Attorney General, in light of other litigation, instructed all sixty-four county clerks in Colorado to begin issuing same-sex marriage licenses. *Masterpiece Cakeshop*, 370 P.3d at 272, ¶5 and fn. 1. This is the day after the Supreme Court denied cert in the same sex case from the Tenth Circuit, *Smith v. Bishop*, 135 S. Ct. 271, 190 L. Ed. 2d 139, (continued...)

It is unclear from the record whether Craig and Mullins sought a custom wedding cake within the special expertise of Jack Phillips, or a more nondescript cake for "our wedding." Resp. BIO, p. 2. The Court of Appeals of Colorado decision says that the couple, ". . . requested that Phillips design and create a cake to celebrate their same-sex wedding" and reflects that "Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs . . . "[5] *Masterpiece Cakeshop*, 370 P.3d at 276.

Phillips, citing his religious beliefs, offered them any of his other baked goods in the store.[6] Phillips contends he ". . . offered to make any other cake for them, *id.*,

---

[4](...continued)
(2014).

[5] In his Certiorari Petition, Phillips contended he is, ". . . also a Christian who strives to honor God in all aspects of his life, including his art. App. 274a, 281-283a, ¶¶ 7-8, 49-61. From Masterpiece's inception, Phillips has integrated his faith into his work." He observes Sunday closings and describes other personal interactions with his employees founded in his "religious beliefs." *Cert. Pet.*, p. 4.

[6] This apparent differential of selling other baked goods could have been a tactic later derived by counsel for Masterpiece after the litigation began and is not uncommon as facts are reviewed and fitted to the law.

Nevertheless, it is uncertain from some of the affidavits this was did not appear to be the policy at the time.

The Joint Appendix in the U. S. Supreme Court contains four Affidavits, including an Affidavit from Stephanie Schmalz. (J/A, p. 113-16). She described herself as in a committed relationship with another woman, Jeanine Schmaltz. They went to Masterpiece Cakeshop in 2012 to obtain cupcakes for their Family Commitment Ceremony. Once it became clear this was for a same sex ceremony, they were told by an employee that " . . . the Cakeshop owners believed in the Bible and that same-sex marriage was not legal in the state of Colorado."

Stephanie later had doubts about the authority of the employee, called back, talked to the same person she encountered in the Shop who affirmed her authority to make a decision because she was one of the Cakeshop owners.

Stephanie placed a negative review on the Yelp website which was answered by
(continued...)

¶79." *Cert. Pet.*, p. 6. The now unhappy couple (and apparently an equally unhappy Mother) left the store.

In light of Phillips' blanket refusal, there were no discussions about any details about the design of the cake. As the Administrative Law Judge in the Colorado administrative proceedings found, "[f]or all Phillips knew at the time, [Mullins and Craig] might have wanted a nondescript cake that would have been suitable for

---

[6](...continued)
"Jack P." who stated that such a wedding was not legal in Colorado. (J/A, p. 115).

Stephanie later called the shop, spoke to Phillips, said she wanted a cake for a pretend wedding between two dogs. The cake was to be in the shape of a bone. Phillips agreed to make such a cake and gave her a price. (J/A, p. 115).

A second Affidavit from Samantha Saggio also described a refusal by Masterpiece to provide a cake for a same-sex wedding. (J/A, p. 117-18). Two additional Affidavits described similar results with an additional explanation from Jack Phillips that he was ". . . not willing to make a cake for the commitment ceremony for a same-sex couple just as he would not be willing to make a pedophile cake." (J/A, p. 120, 122).

A statement in the record of "undisputed facts" from the Brief in Opposition to Complainants' Summary Judgment Motion references an Affidavit by Jack Phillips which states:

> 27. Jack told the two men, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." (Resp't Aff. ¶ 79).

J/A, p. 12.

It appears that Craig and Mullins accepted this version as uncontested despite suggested evidence to the contrary.

At oral argument, Counsel for Phillips (Kristen Waggoner) responded to a question from Justice Ginsburg and in a colloquy with Justice Kennedy and Chief Justice Roberts stated that a wedding cake purchased off the shelf for a same-sex wedding celebration would not be objectionable because it was not "compelled speech" by Phillips. (Tr. 4-10). Chief Justice Roberts asked if there was an objection to a pre-made cake being associated with a same-sex wedding and Waggoner said no, the speech was completed and therefore not compelled.

There were no followup questions such as what would be the case if Phillips was asked to write (in icing) the date of the wedding or the names of the parties.

consumption at any wedding." " Resp. BIO, p. 3 citing Pet. App. 75a.

Phillips claimed that his custom cakes were artistic endeavors of expression. The Joint Appendix in the Supreme Court contains examples of wedding cakes designed by Jack Phillips and sold by Masterpiece Cakes. Copies of some of these photos are attachments to this paper.

Unrequited Cake

But the happy day was not ruined as Craig and Mullins apparently found a cake elsewhere at no cost. *Cert. Pet.*, p. 4. In the meantime they filed a charge of sexual orientation discrimination with a Division of the Colorado Civil Rights Commission ("CCRC") relying upon the Colorado Anti-Discrimination Act ("CADA"), Colo. Rev. Stat. §§ 24-34-301 to 24-34-804 (2014) in particular the following provision which provides in relevant part as follows:

> 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 . . .

CADA, Section 24-34-601(2)(a), C.R.S. 2014.[7]

After a review the Division of the CCRC found probable cause for a violation of the statute. Craig and Mullins then initiated a formal complaint with the Office of Administrative Courts alleging discrimination because of sexual orientation in a place of public accommodation in violation of section 24-34-601(2). There were some

[7] The Court of Appeals noted that the "CADA also bars discrimination in places of public accommodation on the basis of disability, race, creed, color, sex, marital status, national origin, and ancestry." *Masterpiece Cakeshop*, 370 P.3d at 279.

procedural anomalies in not naming Jack Phillips and misstating the particular statute which were later dealt with and denied by the Court of Appeals.

As the Court of Appeals noted, there were no dispute of the material facts. Masterpiece and Phillips admitted the Cakeshop was a place of public accommodation, but stated they refused to sell the cake because of the intent to use it as part of a same-sex marriage ceremony. After cross-motions for summary judgment, the ALJ issued a long decision (66 pages) finding in favor of Craig and Mullins. This order was affirmed by the Commission. *Masterpiece Cakeshop*, 370 P.3d at 277.

In remediation of the discriminatory action, the ALJ required the following of Phillips and 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 Cakeshop, *id.*

Both Phillips and Masterpiece appealed.

III. WHAT DOES JACK PHILLIPS WANT? – IS A CAKE A PARADE?

Public accommodations laws have a long and important place in United History as instruments designed to protect against discrimination. Perhaps their most frequent use were to prevent acts of racial inequality by both public and private facilities. While an extended history is unnecessary, at the Federal level, these begin Title II of the

Civil Rights Act of 1964[8] which outlawed discrimination based on race, color, religion or national origin in public accommodations engaged in interstate commerce.

Title III of the *Americans with Disabilities Act of 1990*[9] added anti-discrimination provisions for disabled individuals. The Congress has not specifically added sexual orientation as an identified federally protected class for public accommodations.[10]

States have offered various public accommodation laws similar to Colorado since before the 1964 Civil Rights Act. Without comprehensive citation, generally State protected classes can vary from race, gender, ethnicity, religion, and age. Some states such as Colorado specifically protect sexual orientation and/or gender identity.[11]

Perhaps one of more vivid applications of public accommodation laws occurred early in *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n. 5 (1968). *Newman* imposed attorney fees against a barbecue establishment, Piggie Park, for excluding

---

[8] 42 U.S.C. §2000e, *et seq.*, Pub.L. 88–352, 78 Stat. 241, enacted July 2, 1964.

[9] Americans with Disabilities Act of 1990. 42 U.S.C. § 12101, et seq.

[10] This is to be distinguished from discrimination in employment based on sex which is covered by Title VII of the *Civil Rights Act of 1964*. There now appears to be a split in the Circuits as to whether discrimination based on sexual orientation is sexual discrimination. The Second Circuit recently held that it was in *Zarda v. Altitude Express*, 2018 U.S. App. LEXIS 4608, *en banc*. ("We now hold that sexual orientation discrimination constitutes a form of discrimination 'because of . . . sex,' in violation of Title VII. . ."). This apparently aligns the Second Circuit with the Seventh Circuit, but splits with the Eleventh Circuit. Perhaps we will get an answer to this question.

[11] See:

<https://en.wikipedia.org/wiki/Public_accommodations#cite_note-10> (last visited 3/5/2018).

customers on the basis of race. The Defendant raised numerous defenses including religious exercise as a defense to the original case as well as the claim for attorneys fees. The Supreme Court called these defenses "patently frivolous" in Footnote 5 which is very well known:

> Indeed, this is not even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable. Thus, for example, the
>
> > "fact that the defendants had discriminated both at [the] drive-ins and at [the sandwich shop] was . . . denied . . . [although] the defendants could not and did not undertake at the trial to support their denials. Includable in the same category are defendants' contention, twice pleaded after the decision in *Katzenbach v. McClung*, 379 U. S. 294 [(1964)], . . . that the Act was unconstitutional on the very grounds foreclosed by *McClung*, and defendants' contention that the Act was invalid because it 'contravenes the will of God" and constitutes an interference with the 'free exercise of the Defendant's religion.'"
>
> 377 F.2d 433, 437-438 (separate opinion of Judge Winter).

Since this language was not necessary to the outcome of the case, this iconic phrasing is only *dicta*, but illustrates the fervor which accompanied the enforcement of public accommodation law.[12]

---

[12] *Newman* is also illustrative of the fact that times can changed from behavior that can only be characterized from grossly offensive to bizarre.

According to a *New Yorker* article, the present owners of Piggie Park, three children of the original owner, Maurice Bessinger, apparently want nothing to do with the offensive and bigoted objections of their Father which spawned the litigation.

Bessinger raised Confederate flags over all his restaurants and was president of the National Association for the Preservation of White People. His original objection in the Supreme Court was based on religious principles. In his autobigraphy Bessinger wrote, "I have concluded that the civil rights movement is a Satanic attempt to make it easier for a global elite, a group of extremely wealthy men with no Constitutional or national or cultural loyalties, working at an international level to eventually seize

(continued...)

Balanced against this are the clear religious scruples of people like Jack Phillips for whom there is no doubt about the sincerity of his beliefs.[13] He implements these beliefs in his work:

> Because weddings and marriage have such religious significance to Phillips, he would consider it sacrilegious to express through his art an idea about marriage that conflicts with his religious beliefs. JA157-59. For this reason, he will not design custom cakes that celebrate any form of marriage other than between a husband and a wife.

Pet. Br. Merits, p. 9.

Phillips has two basic arguments: First, forcing Phillips to use his talents and

---

[12](...continued)
power in this country." *New Yorker*, "America's Most Political Food" (April 24, 2017). See:

<https://www.newyorker.com/magazine/2017/04/24/americas-most-political-food> (last visited 3/5/2018).

[13] Phillips brief on the merits in the Supreme Court identifies the interaction of his faith in his business:

> Phillips is a Christian who strives to honor God in all aspects of his life, including how he treats people and runs his business. JA157, 163. Phillips closes Masterpiece on Sundays so that he and his employees can attend religious services. JA164. And because of his faith, he pays his employees above the market rate and helps them with financial and personal needs outside of work.
>
> - - - - -
>
> But he cannot design custom cakes that express ideas or celebrate events at odds with his religious beliefs. JA158-59, 164-66. For example, Phillips will not design cakes that celebrate Halloween; express anti-family themes (such as a cake glorifying divorce); contain hateful, vulgar, or profane messages (such as a cake disparaging gays and lesbians); or promote atheism, racism, or indecency. JA165. These limitations on Phillips's custom work have no bearing on his premade baked items, which he sells to everyone, no questions asked.

Pet. Br. Merits, p. 8-9.

skills to prepare a cake for a same-sex wedding is "compelled expression" forbidden by the Free Speech Clause; Second, a public accommodation law that requires him to produce a cake for Craig and Mullins restricts his right of Free Exercise.

Free Speech

There is some nuance to Phillip's argument on Free Speech. First, he argues he must establish that his custom cakes are artistic expression. Second, he must show that the statute and the Commission's order requiring him to make a custom cake is "compelled speech." Third, if it is compelled speech, the Commission's order must satisfy "strict scrutiny." Fourth, the Order does not satisfy "strict scrutiny."

To answer the first question whether custom cakes "artistic expression," Phillips describes how the cakes are created and then relies upon decisions that the First Amendment protects artistic expression. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (accepting as a first principle that "artistic speech" qualifies for full First Amendment protection).

Phillips recites a wide variety of examples of such protected expression including pictures, films, paintings, drawing, engravings, video games, atonal music (that of Arnold Schoenberg), sexually explicit material, tattoos, custom-painted clothing, and stained glass windows. Pet. Br. Merits, p. 18, 19. Phillips contends his cakes are artistic even though he is using edible materials which are intended to be eaten. Pet. Br. Merits, p. 20. ("It does not matter that Phillips writes, paints, and sculpts using mostly edible materials like icing and fondant rather than ink and clay.").

He also likens his cakes to the parade in *Hurley v. Irish-American Gay, Lesbian*

& Bisexual Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). In *Hurley*, a public accommodation law could not be used to force participation by a gay rights group in the annual St. Patrick's Day parade. His cake is, in effect, like "a parade" and he cannot be required to include a message he does not intend to state.[14]

Phillips also contends there is an additional component to cakes and marriage as he defines it (Heterosexual marriage). His cakes "declare an opinion too: that the couple's wedding 'should be celebrated.'" Pet. Br. Merits, p. 19.

However, when one of Philip's noncustom cakes is purchased for use at a same-sex wedding, is this "misuse" compelled speech? It also declares an opinion. Phillips says "no." In such instance, a "cake" is just a "baked good."

Phillips also contends that alternatively, his cakes are protected as "expressive conduct" and is recognized as such under the Supreme Court's "two-pronged test:"

> That test considers, first, whether "[a]n intent to convey a particularized message was present," and second, whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Wash.*, 418 U.S. 405, 410-11 (1974)). *Hurley* modified that test at least for cases involving visual art, explaining that a "particularized message" is not a prerequisite for constitutional protection. 515 U.S. at 569.

Pet. Br. Merits, p. 23.

The apparent purpose of this argument is to draw his manufacturer of cakes into a broader category of expressive conduct rather than pure speech. He contends a

---

[14] The question raised by this argument is whether the "message" of the cake is that of Phillips', or that of the purchasers of the cake. Is Phillips any different from a newspaper that accepts advertising from a wide variety of advertisers? A reasonable person might understand the message is not that of the newspaper publisher.

custom cakes includes a celebratory message that would be understood by average viewers as expressing support for the marriage. Pet. Br. Merits, p. 24.

Finally, Phillips contends the requirements of the CADA and the Court of Appeals constitutes compelled speech on the part of Phillips which is forbidden by the Court's cases:

> . . . this Court has developed the compelled-speech doctrine, which forbids the government (1) from forcing citizens (or businesses) to express messages that they deem objectionable or (2) from punishing them for declining to convey such messages. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-801 (1988) (forbidding the state from requiring paid commercial fundraisers to disclose the percentage of money that they give to their clients); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 9-21 (1986) (plurality opinion) ("*PG&E*") (forbidding the state from requiring a business to include a third party's expression in its billing envelope); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (forbidding the state from requiring a newspaper to publish a third party's article).

Pet. Br. Merits, p. 25-6.

Besides *Hurley*, Phillips points out that the Supreme Court has refused to apply public-accommodation laws to compel or interfere with expression. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-59 (2000). In *Dale*, the Court held that applying a public accommodation law to readmit a gay scoutmaster would violate the Boy Scout's First Amendment right of expressive association. The application of a public accommodation law was intrusive into the group's internal affairs by forcing it to accept a member that it does not desire. This forced membership is unconstitutional when the person's presence affects the groups ability to advocate public or private viewpoints. However, *Dale* does establish that these expressive rights can be overridden by rules that serve a compelling state interest unrelated to the suppression

of ideas and which cannot be achieved through means significantly less restrictive of associational freedoms.

Free Exercise

Claims involving free exercise must first overcome the Supreme Court's holding in *Employment Div. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), *superseded on other grounds by statute as stated in Holt v. Hobbs*, 574 U.S. ___, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015). *Smith* arises out of a challenge to a denial of unemployment benefits to a drug counselor for partaking in an Indian religious ceremony involving peyote.

In *Smith*, Justice Scalia formulated a test that individuals may not contend their free exercise rights are burdened to the extent that excuses compliance when they confront a "valid and neutral law of general applicability." *Smith*, 494 U.S. at 879. Such laws need only be "rationally related to a legitimate government interest" to be constitutional. When a law is not neutral or generally applicable, a resort to the more restrictive "compelling governmental interest test" is required and the law must be "narrowly tailored" to advance that interest. *Masterpiece Cakeshop*, 370 P.3d at 287, ¶79, 80.

Phillips also argues that his free exercise right can be attributed to his family business under *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014). He contends that *Hobby Lobby* "protects the religious liberty of the humans who own and control" that family-owned company, which in this case is Phillips and his wife. Pet.

Br. Merits, p. 38, n. 5.

Phillips advances the argument that the CADA requirements as applied to him are neither neutral nor generally applicable and therefore must satisfy "strict scrutiny" because facial neutrality is not enough for an official action that targets specific religious conduct for distinctive treatment. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). Under the circumstances of this case CADA gives greater protection to LGBT customers than to those of religious belief. While other business are not required to provide goods with offensive messages, Phillips is required to provide expression and messages on his goods that are offensive to him.

As a final argument on rights, Phillips contends his claims involve a "hybrid" right involving both free-exercise and another constitutional right (expression) as illustrated in *Smith*. 494 U.S. at 881-82. The essential argument is that if neither free speech or free-exercise can be protected, a hybrid of these two may otherwise be protected.

In any of these scenarios, Phillips says CADA, as applied does not satisfy strict scrutiny and must be struck down.

Finally, the most remarkable assertion in Phillip's brief is a contention that the Commission can facilitate narrow tailoring by segregating public accommodations that cater to same-sex weddings:

> . . . Respondents also have expressed an interest in minimizing the instances in which an expressive professional like Phillips declines a same-sex couple's wedding-related request. But the market already provides existing means to address this, such as private websites

> apprising consumers of professionals in a geographical area who will celebrate same-sex weddings. *See* GayWeddings, http://gayweddings.com/ (last visited Aug. 29, 2017); *cf. Brown*, 564 U.S. at 803 (discussing the video-game industry's "rating system"). If the Commission thinks that more must be done, it could make similar resources available to the public. That would provide a ready alternative that protects the interests of all involved. Thus, the Commission's efforts to coerce and punish Phillips are neither necessary nor narrowly tailored.

Pet. Br. Merits, pp. 60-61.

There is a great deal of difference between reviews that rate video games and an action of the Commission in developing lists of same-sex friendly businesses so that businesses like Masterpiece Cakeshop need not be bothered.[15]

IV. THE DECISION OF THE COLORADO COURT OF APPEALS AFFIRMING THE COLORADO CIVIL RIGHTS COMMISSION.

The Court of Appeals affirmed the decision of the Colorado Civil Rights Commission. The standard of review, as typical with cases of undisputed facts on

---

[15] Such a suggestion has the unfortunate effect of institutionalizing on a government level the very discrimination CADA seeks to prevent. This suggestion of Phillips harkens back to the days of the *The Negro Motorist Green Book* used by African Americans to find restaurants and hotels that would accommodate them during travels. See:

<https://en.wikipedia.org/wiki/The_Negro_Motorist_Green_Book> (Last visited 3/5/2018).

Reasonably, it is logical to conclude that Respondent's interest in minimizing instances such as occurred in this case is for businesses to comply with the law and not to reinstate some state sponsored form of segregation, cyber or otherwise.

If Masterpiece supported such public lists, the most efficient method would be for it to voluntarily post a sign in its window setting out what goods are off limits when the topic of same-sex weddings are concerned. There would be fewer refusals and the public could judge in advance its patronage of the business. Unfortunately, such signs of exclusion are similar to the "badges of slavery" so common during the segregation era.

summary judgment motions is *de novo*.

Procedural Decisions of the Court of Appeals of Colorado and Practice Pointers.

The Court first considered the contention the ALJ and Commission erred in failing to grant two Motions to Dismiss filed by Phillips and Masterpiece. The first motion involved a failure to name Phillips in the original complaint which was later amended to include Phillips. Noting a similarity to Fed.R.Civ.P. 15(c)(1)(C),[16] the Court applied the relation back doctrine finding Phillips was on clear notice as to the charges and were identical as between Masterpiece and Phillips. The Court noted 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. *See Schiavone v. Fortune*, 477 U.S. 21, 31, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986) ("The linchpin is notice, and notice within the limitations period."); 6 Wright & Miller at § 1498.3 ("Relation back will be refused only if the court finds that there is no reason why the party to be added should have understood that it was not named due to mistake.").

Masterpiece Cakeshop, 370 P.3d at 272.

The second Motion to Dismiss also involved a procedural question of compliance with Colorado law involving the Commission's determination of probable cause that requires "stating with specificity the legal authority and jurisdiction of the commission

---

[16] There are three factors to be examined in a relation back claim under Fed.R.Civ.P. 15(c)(1)(C):

> (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."

and the matters of fact and law asserted." The Commission's determination erroneously stated a provision of the law involving employment discrimination instead of the provision involving "public accommodation." This Motion was also denied by the ALJ and affirmed by the Court since from the facts there was very little doubt the case involved public accommodation and not employment discrimination. There was no dispute Craig and Mullins were not seeking employment, but instead a public accommodation. The proper section was cited in the charge of discrimination and notice of determination and the improper citation was determined to be a scrivener's error.

Nor did the Court find that Phillips and Masterpiece were mislead by the error. *Masterpiece Cakeshop*, 370 P.3d at 272-3.

Turning to the merits under the CADA, Phillips and Masterpiece raised two issues involving (1) Free exercise of religion and (2) Free Speech arising under the First Amendment.

The Merits Decision of the Court of Appeals of Colorado

The Court stated 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. 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. *Tesmer v. Colorado High School Activities Association*, 140 P.3d 249, 254 (Colo. App. 2006).

Masterpiece Cakeshop, 370 P.3d at 280.

Discrimination for Conduct As Opposed to Sexual Orientation.

Phillips and Masterpiece contend they did not discriminate against Craig and Mullins because of their sexual orientation, but instead refused to make the cake because of an objection to same-sex marriage and Craig and Mullin's conduct in seeking to be married. It would otherwise serve Craig and Mullins for other goods or services and does not object to or refuse to service patrons because of sexual orientation. But the Court determined the act of same-sex marriage was closely correlated to Craig and Mullins' sexual orientation and thus the ALJ's determination there was a connection between the refusal to make a cake and the complainant's sexual orientation was appropriate. *Masterpiece Cakeshop*, 370 P.3d at 279-81. That is, the targeted conduct is engaged in "predominantly by a particular class of people. *Masterpiece Cakeshop*, 370 P.3d at 279, ¶32-35, 41.

Phillips and Masterpiece also asserted there was no animus in their actions. However, The CADA statutes required no showing of animus, only an intention to discriminate and that was present in this case. *Masterpiece Cakeshop*, 370 P.3d at 279, ¶37-39. The offer to sell other goods besides wedding cakes to Craig and Mullins was not a defense to the intent to discriminate. *Masterpiece Cakeshop*, 370 P.3d at 279, ¶40.

Compelled Speech That May Be Considered as Supportive of Same-Sex Marriage

The Court next address the question of whether the application of CADA in this instance compels expressive conduct or symbolic speech on the part of Phillips and Masterpiece in violation of the First Amendment. That is, by making a wedding cake, Phillips and Masterpiece are engaging in expressive conduct that inherently conveys

a celebratory message about same-sex marriage in conflict with religious beliefs. *Masterpiece Cakeshop*, 370 P.3d at 279, ¶44, 57.

The Court disagreed and concluded the only requirement was one of nondiscrimination and that even if nondiscrimination is compelled by the government, it is not sufficiently expressive to warrant First Amendment protection:

> 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.

Masterpiece Cakeshop, 370 P.3d at 285, ¶62.

It is this lack of expressive message that also isolates the case from the parade in *Hurley*:

> 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." *Id.* at 568, 577. The Court concluded that spectators would likely attribute each marcher's message to the parade organizers as a whole. *Id.* at 576-77.

Masterpiece Cakeshop, 370 P.3d at 286, ¶67.

The public would not see Phillips and Masterpiece preparation of a cake as sufficiently supportive of same-sex marriage to include a "celebratory message." *Masterpiece Cakeshop*, 370 P.3d at 286, ¶68. The effect of comparison to a parade is not the same:

> 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.

Masterpiece Cakeshop, 370 P.3d at 286, ¶69.

Moreover, Phillips and Masterpiece were free to post messages both in its shop and on the Internet or other advertisements to disassociate itself from any support of same-sex weddings even as it could not state a refusal to provide such goods or services for the same purpose. *Masterpiece Cakeshop*, 370 P.3d at 287, ¶72.

Burden on Free Exercise

In general the test of whether a law burdens a religious practice is governed by *Employment Div. v. Smith*, *supra.*, and its analysis of a "valid and neutral law of general applicability." *Smith*, 494 U.S. at 879. Such laws need only be rationally related to a legitimate government interest to be constitutional. When a law is not neutral or generally applicable, a resort to the more restrictive "compelling governmental interest test" is required and the law must be "narrowly tailored" to advance that interest. *Masterpiece Cakeshop*, 370 P.3d at 287, ¶79, 80.

Phillips and Masterpiece contend that because the law deals with discrimination on the basis of sexual orientation, it is not neutral and therefore subject to a compelling interest examination.[17]

[17] It is true the law is not neutral from Phillip's viewpoint, but that would not be a neutral observer and thus the argument is a bit forordained as well as arguably circular.

The Supreme Court has only found one otherwise neutral law unconstitutional as a burden on free exercise. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In *Lukumi*, the Supreme Court found a city ordinance that attempted to govern ritual sacrifice to not be neutral and to constitute a burden on religion. The law was intended to impede certain practices of the Santeria religion involving animal sacrifice. *Masterpiece Cakeshop*, 370 P.3d at 287, ¶83-84.

Phillips and Masterpiece also contend the CADA is not neutral or generally applicable because the statute provides for exemptions for "places principally used for religious purposes" as well as places that restrict admission to one gender because of a bonafide relationship to its services. Nor is the law neutral because while it exempted religious locations and organizations, it did not exempt Phillips and Masterpiece. *Masterpiece Cakeshop*, 370 P.3d at 289, ¶85.

But the Court concluded the statute was neutral despite exemptions because it did not regulate religiously motivated conduct, but instead provided exemptions to reduce legal burdens on religious organizations and to comport with the *Free Exercise Clause*. *Masterpiece Cakeshop*, 370 P.3d at 290-91, ¶86-87. An exemption is not a burden on a religious organization and generally applicable because it applies to all secular conduct. *Masterpiece Cakeshop*, 370 P.3d at 290-91, ¶86-87. An exemption for locations that restrict entrance based on gender is also neutral since it applied to both religious and nonreligious conduct. *Masterpiece Cakeshop*, 370 P.3d at 291, ¶88.

That it burdens Phillips and Masterpiece while exempting religious locations and organizations is not disabling because Phillips and Masterpiece have not

contended that Masterpiece is used primarily for religious purposes. *Masterpiece Cakeshop*, 370 P.3d at 291, ¶89.

Hybrid Rights of Free Exercise and Free Expression

Finally, as to Federal claims, Phillips and Masterpiece allege that the rational basis standard of *Smith* should not apply because its conduct is a "hybrid" of both free exercise rights and free speech rights for which the Court in *Smith* indicated was an exception entitled to strict scrutiny protection. *Masterpiece Cakeshop*, 370 P.3d at 291, ¶92-3. The Court noted that Colorado courts have not applied the hybrid-rights exception and there is little authority for its application or how it is applied. It has been criticized by some courts as a bit unworkeable:

> We note that Colorado's appellate courts have not applied the "hybrid-rights" exception, and several decisions have cast doubt on its validity. *See, e.g., Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006) ("The hybrid rights doctrine is controversial. It has been characterized as mere dicta not binding on lower courts, criticized as illogical, and dismissed as untenable." (citations omitted)). 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.

Masterpiece Cakeshop, 370 P.3d at 291, ¶94.

Finally, the Court rejected a challenge under a Free Exercise provision of the Colorado State Constitution. Colorado Courts have consistently applied the state Free Exercise provision in a similar fashion to that of federal law. *Masterpiece Cakeshop*, 370 P.3d at 292-3, ¶96-100.

The Court also rejected the challenges for error in discovery and specific provisions of the Commission's Cease and Desist Order. *Masterpiece Cakeshop*, 370

P.3d at 293-4, ¶104-11. The Colorado Supreme Court denied certiorari.

V. MASTERPIECE CAKE APPEALS TO THE SUPREME COURT

The contrast between the position of the parties is made apparent by how they stated the questions before the Supreme Court. Stating the questions is very important in getting the Court's attention and great detail must be given to both format and wording because Supreme Court Rule 14.1(a) specifies, "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Some brief printers offer "expertise" and assistance in wording questions as a part of their service.[18]

Masterpiece Cake included only two questions in its Certiorari Petition, but stated them in a single paragraph preceded by a rather lengthy preamble including a mini-statement of facts.[19] Here are the questions:

---

[18] Cockle Printing advertises on their website, "Unlike other printers, we review your Questions Presented to ensure that the issues you raise are properly framed for the Court." *See*:

<https://www.cocklelegalbriefs.com/supreme-court-briefs/questions-presented/> (Last visited 3/5/2018).

[19] Here is the preamble. This was omitted in the Brief in Chief, apparently since certiorari was already granted:

> Jack Phillips is a cake artist. The Colorado Civil Rights Commission ruled that he engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act ("CADA") when he declined to design and create a custom cake honoring a same-sex marriage because doing so conflicts with his sincerely held religious beliefs.
>
> The Colorado Court of Appeals found no violation of the Free Speech or Free Exercise Clauses because it deemed Phillips' speech to be mere conduct compelled by a neutral and generally applicable law. It
>
> (continued...)

> Whether applying Colorado's public accommodation law to compel artists to create expression that violates their sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

Brief Ch., p. I.

Meanwhile Craig and Mullins stated the questions in two categories:

> 1. Whether the Free Speech Clause provides a business that is open to the public with a defense to a claim that it engaged in discriminatory conduct prohibited by a content- and viewpoint-neutral state law that does not target speech?
>
> 2. Whether the Free Exercise Clause provides a business that is open to the public with a defense to a claim that it engaged in discriminatory conduct prohibited by a state law that is neutral and generally applicable?

The emphasis on these questions are the ordinariness of Phillips' artistic activities by failing to mention them and instead concentrates on the activity of an ordinary commercial business.

---

[19](...continued)
> reached this conclusion despite the artistry of Phillips' cakes and the Commission's exemption of other cake artists who declined to create custom cakes based on their message. This analysis (1) flouts this Court's controlling precedent, (2) conflicts with Ninth and Eleventh Circuit decisions regarding the free speech protection of art, (3) deepens an existing conflict between the Second, Third, Sixth, and Eleventh Circuits as to the proper test for identifying expressive conduct, and (4) conflicts with free exercise rulings by the Third, Sixth, and Tenth Circuits.

The implication is that Masterpiece wanted to immediately create a fact question opposite to that found below: Jack Phillips is an artist who designs cakes and is entitled to deference as an artist about the purposes and reasons he creates his art.

Such a lengthy preamble is a useful way to convey facts that might pique the interest of the Court, that is, this case involves imposition of a public accommodations statute which interferes with Phillips's religious sensibilities and free expression rights.

At Oral Argument

Copies of both the transcript[20] and audio[21] from the oral argument are available from SCOTUSBlog.[22]

Observers at SCOTUSBlog[23] think the conservative majority of the Court is leaning toward a ruling in favor of the Colorado Baker and it is likely that, as typical, Justice Kennedy will hold the key vote. The counting seems to find Chief Justice Roberts, Justice Alito, Justice Gorsuch siding with Masterpiece Cakeshop. Justice Thomas asked no questions. The questions reflected the many different views of the case. Is the Court willing to create an exception to a spreading nationwide policy of anti-discrimination by driving it through the First Amendment? The questions are difficult and interesting.

For example, Roberts asked Respondent's counsel if Catholic Legal Services could refuse a case involving same-sex marriage. If not, would the choice be to stop providing any legal services? (Tr. 47-51).

---

[20] The transcript is at:

<https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf> (last visited 3/5/2018).

[21] The audio link is to www.oyez.org:

<https://www.oyez.org/cases/2017/16-111> (last visited 3/5/2018).

[22] The link for SCOTUSBlog page for Masterpiece Cakeshop is found in Footnote 3.

[23] See:

<http://www.scotusblog.com/2017/12/argument-analysis-conservative-majority-leaning-toward-ruling-colorado-baker/> (last visited 3/5/2018).

Justice Alito also asked questions that identified Colorado's position that a baker could refuse to produce a cake opposing same-sex marriage, but that Phillips could not refuse to make a cake that celebrated same-sex marriage.

Justice Ginsburg challenged Kristin Waggoner, Phillips's counsel's reliance on *Hurley* in that the parade was the event or expression, but at a wedding ceremony, the speech is of the people who are marrying. Waggoner contended that the artist also "speaks." Ginsburg then asked if speech was compelled by the person who did the floral arrangements, or the person who designed the invitation or the menu for the dinner. In both instances, if required to do this, Waggoner contended that the speech was compelled. A jeweler who provides something for the wedding depends upon the context, but a hairdresser was not protected since there was no expression or protected speech in that context. (Tr. 10-12).

Kagan asked if a "makeup artist" would be subject to compelled speech and Waggoner said no, which was countered by Kagan in saying, "It's the makeup artist." drawing laughter from the audience. (Tr. 12).

The oral argument was intense and interesting.

VI. CONCLUSION

Meanwhile, "stay tuned." A decision is expected by June.