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Let Them Eat Cake: Why Public Proprietors of Wedding Goods and Services Must Equally Serve All People

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LET THEM EAT CAKE: WHY PUBLIC PROPRIETORS OF WEDDING GOODS AND SERVICES MUST EQUALLY SERVE ALL PEOPLE

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I. INTRODUCTION

The United States' wedding industry has a total market size of approximately $72 billion.[1] Every year, about 6.9 out of every 1,000 individuals has a wedding.[2] In June 2015, the United States Supreme Court granted same-sex couples the right to marry.[3] Since then, tens of thousands of same-sex couples have chosen to declare their love by becoming legally married.[4] However, these couples continue to face obstacles accessing traditional wedding products and services.

When Charlie Craig and Dave Mullins went to purchase a wedding cake for their upcoming wedding, the baker, Jack Phillips, refused to make the couple's cake, citing religious objections. Craig and Mullins filed suit against Phillips for violating Colorado's Anti-Discrimination Act. The case eventually reached the United States

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1. Pamela N. Danziger, *Will a Booming Economy Bring a Wedding Market Boom? Not Likely*, FORBES (Feb. 17, 2018, 12:33 PM), https://www.forbes.com/sites/pamdanziger/2018/02/17/will-a-booming-economy-bring-a-wedding-market-boom-not-likely/#53bf41d34270.

2. *Id.*

3. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

4. Adam P. Romero, *Estimates of Marriages of Same-Sex Couples at the Two-Year Anniversary of* Obergefell v. Hodges, WILLIAMS INST., UCLA SCH. L. (June 2017), https://williamsinstitute.law.ucla.edu/experts/adam-romero/obergefell-effect/.

Supreme Court, which found in favor of the baker on the grounds that Colorado exhibited unconstitutional hostility to Phillips's case.[5] But, the larger First Amendment issues of free exercise of religion and free speech remained unresolved.

Since *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[6] was decided, other same-sex couples around the country have similarly been denied equal enjoyment of wedding products and services, and new cases have been filed.[7] This Comment discusses how the Supreme Court should address the free exercise of religion and free speech issues in these newly filed cases, given the likelihood that the issues will once again be before the Court. In Part II, we provide the factual and procedural background of *Masterpiece Cakeshop*. In Part III, we describe each of the opinions in the case. In Part IV, we discuss the free exercise of religion and free speech issues separately.

In our discussion, we conclude that First Amendment protections should not apply to services rendered in the wedding marketplace—such as baking a cake. An entire subset of the consumer population should not be limited in the goods and services they can access for their wedding. Same-sex couples should be encouraged to fully participate in one of America's largest markets.

II. STATEMENT OF THE CASE

A. Facts

Masterpiece Cakeshop in Lakewood, Colorado, is a bake shop selling a variety of baked goods, including custom-designed cakes for special events.[8] Jack Phillips, an expert baker, has owned and operated

5. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1721–23 (2018).

6. 138 S. Ct. 1719 (2018).

7. Joanna Allhands, *Allhands:* Masterpiece Cakeshop *Ruling Makes a Similar Phoenix Case More Important*, AZCENTRAL (June 5, 2018, 2:08 PM), https://www.azcentral.com/story/opinion/op-ed/joannaallhands/2018/06/04/masterpiece-cakeshop-ruling-effect-phoenix-brush-nib-case/670170002/; Nathan Heffel, *The 3 Court Cases That Could Pick Up Where* Masterpiece Cakeshop *Left Off*, COLO. PUB. RADIO (June 6, 2018), http://www.cpr.org/news/story/the-3-court-cases-that-could-pick-up-where-masterpiece-cakeshop-left-off; Andrew Koppelman, Masterpiece Cakeshop, *the Sequel: The Baker Is Back in Court*, AM. PROSPECT (Sept. 11, 2018), https://prospect.org/article/masterpiece-cakeshop-sequel-baker-back-court.

8. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

Masterpiece Cakeshop for twenty-four years.[9] Phillips, a devout Christian, has explained that his "'main goal in life is to be obedient to' Jesus Christ and Christ's 'teachings in all aspects of [his] life.'"[10] This extends to his work at Masterpiece Cakeshop as well.[11] Based on his Christian beliefs, Phillips believes that marriage is limited to the union of one man and one woman.[12] Throughout his case, Phillips was represented by several lawyers from the Alliance Defending Freedom, a conservative Christian organization.[13]

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1722. Alliance Defending Freedom has more than 3,000 lawyers advocating for "religious freedom, sanctity of life, and marriage and family." *About Us: Who We Are*, ALL. DEFENDING FREEDOM, https://www.adflegal.org/about-us (last visited Feb. 26, 2019). The Religious Right has long been a powerful political force. Peter Applebome, *Jerry Falwell, Moral Majority Founder, Dies at 73*, N.Y. TIMES (May 16, 2007), https://www.nytimes.com/2007/05/16/obituaries/16falwell.html; John Gallagher & Chris Bull, *Perfect Enemies: The Religious Right, the Gay Movement, and the Politics of the 1990s*, WASH. POST (1996), http://www.washingtonpost.com/wp-srv/style/longterm/books/chap1/perfectenemies.htm; Elizabeth Kolbert, *Politicians Find a Window Into the Heart of the Christian Right*, N.Y. TIMES (Nov. 1, 1995), https://www.nytimes.com/1995/11/01/us/politicians-find-a-window-into-the-heart-of-the-christian-right.html. Since the movement's rise to prominence in the 1970s, the Religious Right has positioned itself as the moral compass of America, advocating that, among other ideals, marriage be limited to the union of one man and one woman. Amelia Thomson-DeVeaux, *The Christian Right Has a New Strategy on Gay Marriage*, FIVETHIRTYEIGHT (Dec. 5, 2017, 6:00 AM), https://fivethirtyeight.com/features/the-christian-right-has-a-new-strategy-on-gay-marriage/. Until recently, that position generally tracked American public opinion. *Id.* As public opinion shifted at the turn of the century, and as states started to legalize same-sex marriage, the Religious Right felt itself move from a majority position to a minority position. *Id.* In 2015, the battle was seemingly over when the Supreme Court ruled same-sex marriage legal. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). The Religious Right is still a powerful political force, but its strategy has changed as it has adjusted to advocating in the marriage equality era. Katherine Stewart, *God's Red Army*, N.Y. TIMES (Nov. 2, 2018), https://www.nytimes.com/2018/11/02/opinion/midterms-christian-right-election-day.html?login=smartlock&auth=login-smartlock; Katherine Stewart, *The Christian Right Adopts a 50-State Strategy*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/opinion/christian-right-evangelicals-midterms.html; Thomson-DeVeaux, *supra*. In an ironic change of events, opponents of same-sex marriage now seek their own constitutional protection against what they perceive to be a forced acceptance of same-sex marriage and discrimination against their sincerely held religious beliefs. Jeremy W. Peters, *Fighting Gay Rights and Abortion with the First Amendment*, N.Y. TIMES (Nov. 22, 2017), https://www.nytimes.com/2017/11/22/us/politics/alliance-defending-freedom-gay-rights.html ("The First Amendment has become the most powerful weapon of social conservatives fighting to limit the separation of church and state and to roll back laws on same-sex marriage and abortion rights."). Specifically, opponents of same-sex marriage who work in businesses associated with the wedding industry are looking to the federal government to allow them to unequally serve same-sex couples based on their religious beliefs. *Masterpiece Cakeshop* is the first legal challenge under this new argument to reach the Supreme Court.

In 2012, Charlie Craig and Dave Mullins visited Masterpiece Cakeshop to order a cake for their upcoming wedding.[14] Craig and Mullins told Phillips that they were interested in ordering a cake for "our wedding," but did not mention the design of the cake they envisioned.[15] Phillips immediately refused to make the couple's wedding cake.[16] Phillips offered to make the couple other types of baked goods—birthday cakes, shower cakes, cookies, brownies—but explained that he "do[es not] make cakes for same-sex weddings."[17] Craig and Mullins left the shop empty-handed.[18]

The couple filed a complaint against Masterpiece Cakeshop and Phillips with the Colorado Civil Rights Commission ("Commission"), alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act (CADA).[19] CADA in relevant part provides:

> 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 disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .[20]

CADA defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services . . . to the public."[21]

B. Procedural History

Upon the filing of the complaint, the Colorado Civil Rights Division[22] opened an investigation into the claims, ultimately finding that on multiple occasions Phillips turned away potential customers on

14. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 1725–26.
20. COLO. REV. STAT. § 24-34-601(2)(a) (2018).
21. *Id.* § 24-34-601(1).
22. The Colorado Civil Rights Division is charged with enforcing Colorado's anti-discrimination laws in the areas of employment, housing, and public accommodations. *Civil Rights Division – Who We Are | Department of Regulatory Agencies*, STATE OF COLO., https://www.colorado.gov/pacific/dora/civil-rights/who-we-are (last visited Aug. 17, 2019).

the basis of their sexual orientation.[23] "Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission."[24]

"The Commission found it proper to conduct a formal hearing, and referred the case to" a Colorado State Administrative Law Judge (ALJ).[25] Phillips raised two constitutional claims: first, that applying CADA, and thereby requiring him to create a cake for a same-sex wedding, violated his First Amendment right to free speech and second, that requiring him to create cakes for same-sex weddings violated his right to the free exercise of religion.[26] The ALJ ruled in the couple's favor after reviewing cross-motions for summary judgment.[27]

"On May 30, 2014 the seven-member Commission convened publicly to consider Phillips' case."[28] During the meeting, some "commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain."[29] "One commissioner suggested that Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state," and a few moments later reiterated this point stating, "If a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."[30] At a subsequent public hearing, another commissioner made specific reference to, while expanding on, the previous meeting's discussion stating:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination.

23. *Masterpiece Cakeshop*, 138 S. Ct. at 1725.
24. *Id.* at 1726.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 1729.
29. *Id.*
30. *Id.* (quoting Transcript of Colorado Civil Rights Commission Meeting, May 30, 2014, 23, 30).

> And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[31]

The other commissioners did not object to these statements and the state courts subsequently reviewing the Commission's decision did not mention the comments.[32]

"The Commission affirmed the ALJ's decision in full . . . [and] ordered Phillips to 'cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples.'"[33] Phillips appealed the decision to the Colorado Court of Appeals, which affirmed.[34] The Colorado Supreme Court declined to hear the case and the United States Supreme Court granted certiorari.[35] Phillips again raised his claims under the Free Speech and Free Exercise Clauses of the First Amendment.[36]

III. REASONING OF THE COURT

In a 7–2 decision, the United States Supreme Court found in favor of Masterpiece Cakeshop and Phillips.[37] Although the Court found in Phillips's favor, the decision was narrowly decided and did not resolve the broader constitutional issues presented by the case.

A. Majority Opinion

Justice Anthony Kennedy wrote the majority opinion, in which Chief Justice John Roberts and Justices Stephen Breyer, Samuel Alito, Elena Kagan, and Neil Gorsuch joined.[38] The majority acknowledged the First Amendment issues raised by the case, however, resolution of the case did not turn on those issues.[39] Instead, the majority reversed the case on narrow grounds after finding the Commission exhibited hostility towards Phillips's sincerely held religious beliefs.[40]

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31. *Id.* (quoting Transcript of Colorado Civil Rights Commission Meeting, July 25, 2014, 11–12).
32. *Id.* at 1729–30.
33. *Id.* at 1726 (third alteration in original) (citations omitted) (quoting Joint Appendix, at 214, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111)).
34. *Id.*
35. *Id.* at 1727.
36. *Id.*
37. *Id.* at 1722, 1726, 1732.
38. *Id.* at 1722.
39. *Id.* at 1727–29.
40. *Id.* at 1729.

The majority found the Commission hostile towards Phillips in two respects. First, the majority found the commissioner's comments during public hearings "inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law."[41] These comments "cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips's case."[42]

Second, the majority found hostility evident by "the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission."[43] The Commission, the majority explained, ruled against Phillips in part because "any message the requested wedding cake [carried] would be attributed to the customer, not the baker."[44] However, this point was not addressed in the other cases of cakes depicting anti-gay marriage symbolism.[45] "In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections."[46]

Because Phillips was entitled to, but did not receive, the neutral and respectful consideration of his claims in all the circumstances of the case, the Court reversed.[47]

B. Concurrence—Justice Kagan

Justice Elena Kagan wrote a concurrence in which Justice Stephen Breyer joined.[48] Justice Kagan agreed with the majority opinion that the Commission did not give Phillips and his religious objections the kind of "neutral and respectful consideration" to which

41. *Id.*

42. *Id.* at 1730.

43. *Id.* ("On at least three other occasions the [Commission] considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the [Commission] found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the [Commission], the requested cake included 'wording and images [the baker] deemed derogatory,' featured 'language and images [the baker] deemed hateful,' or displayed a message the baker 'deemed as discriminatory' . . . . [T]he [Commission] found no violation of CADA in the other cases . . . .").

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1729, 1732. At the end of the majority opinion, the Court acknowledged that a case like the one at hand may come before the Court again and that those disputes "must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." *Id.* at 1732.

48. *Id.* at 1732 (Kagan, J., concurring).

he was entitled.[49] However, she wrote separately because she did not find the Commission hostile in its disparate consideration of those bakers who had declined to make cakes bearing messages that disparaged same-sex marriage because, in her view, that did not violate CADA.[50]

CADA makes it unlawful for a place of public accommodation to deny "full and equal enjoyment" of goods and services based on sexual orientation.[51] The three bakers who declined to make cakes with homophobic messages did not violate CADA because the bakers would not have made the requested cakes for any customer.[52] In refusing to bake the cakes, the bakers did not single out the customer "because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires."[53] In contrast, Craig and Mullins requested a wedding cake that Phillips would have made for a heterosexual couple and, by refusing that request, Phillips violated CADA's requirement that customers receive "the full and equal enjoyment" of public accommodations regardless of their sexual orientation.[54] Justice Kagan concluded that the different outcomes in the other cases and Phillips's case could be "justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief."[55]

C. Concurrence—Justice Gorsuch

Justice Neil Gorsuch joined the opinion in full and wrote separately to respond to Justice Ruth Bader Ginsburg's dissent and Justice Kagan's concurrence.[56] Justice Gorsuch recounted the facts of William Jack's attempt to purchase cakes bearing messaging against same-sex couples from three different bakers.[57] When the bakers had refused to make the requested cakes, Jack filed a complaint with the Commission under CADA.[58] The Commission declined to find a violation, "reasoning that the bakers didn't deny Mr. Jack service

49. *Id.*
50. *Id.* at 1732–33.
51. *Id.* at 1733.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 1734 (Gorsuch, J., concurring).
57. *Id.* at 1734–1735.
58. *Id.* at 1735.

because of his religious faith but because the cakes he sought were offensive to their own moral convictions."[59] Justice Gorsuch compared the facts of the two cases.[60] Finding no meaningful distinction in the two complaints to the Commission, Justice Gorsuch stated that the Commission "*presumed* that Mr. Phillip [sic] harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable."[61] He found the Commission did not neutrally apply CADA because it granted a more generous standard to a same-sex couple's petition.[62] Furthermore, he did not find that the Commission had a strong interest in justifying the disparate treatment.[63]

Justice Gorsuch also stated that Justice Ginsburg's specific view of the facts and Justice Kagan's general view of the facts created an arbitrary "Goldilocks rule" where the details of the product description determine the legal standard.[64] Justice Gorsuch found Justice Ginsburg's assertion that only cakes with words convey a message to be irrational.[65] Had the bakers been asked to create a cake that symbolically disparaged same-sex marriage, the bakers likely could have refused to bake it without the Commission finding a CADA violation.[66] Furthermore, wedding cakes certainly convey a message of celebration for the marriage and a wedding cake for a same-sex couple celebrates same-sex marriage.[67] Likewise, Justice Gorsuch found Justice Kagan's argument that all wedding cakes are the same to be too general of an assertion.[68] An individual's beliefs must determine the religious significance of an item such as a wedding cake, not the government or any judge.[69] However, Justice Gorsuch left

59. *Id.* (citing Joint Appendix at 237, 247, 255–56, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111)).

60. *Id.* at 1735–36. Phillips refused to sell a cake for same-sex marriage to a heterosexual, and the other bakers refused to sell a cake denigrating homosexuals to atheists. Phillips would sell baked goods to homosexuals, and the other bakers would sell cakes to the religious customer. *Id.*

61. *Id.* at 1736.

62. *Id.* at 1737.

63. *Id.*

64. *Id.* at 1737–38.

65. *Id.* at 1738.

66. *Id.*

67. *Id.*

68. *Id.*at 1738–39.

69. *Id.* at 1739–40.

open the opportunity for future lawmaking in which a "knowing" standard can be applied in a neutral manner but joins the Court in invalidating the Commission's current decision.[70]

D. Concurrence—Justice Thomas

Justice Clarence Thomas agreed with the majority opinion that the Commission's disparaging treatment of Phillips as compared to the other bakers sufficed to show hostility.[71] Justice Thomas wrote separately to address Phillips's freedom of speech claim.[72] The Colorado Court of Appeals described Phillips's conduct as a refusal to "design and create a cake to celebrate [a] same-sex wedding."[73] Thus, Justice Thomas examined what he believed to be the Commission's violation of Phillips's freedom of speech-compelling Phillips to create a wedding cake that expresses an endorsement of same-sex marriage.[74]

Justice Thomas discussed public accommodation and free speech jurisprudence to emphasize the principle that "[a]lthough public-accommodations laws generally regulate conduct, particular applications . . . can burden protected speech."[75] Conduct "intended to be communicative" and, which "in context, would reasonably be understood by the viewer to be communicative," qualifies as sufficiently expressive.[76] If the Court concluded that the conduct was expressive, the Constitution limits the government's restrictions on such conduct.[77]

Justice Thomas believed that "creating and designing custom wedding cakes" was expressive conduct.[78] He detailed Phillips's ordering and designing process and described the history of wedding cakes to support his finding.[79] Phillips's decision to create cakes must

70. *Id.* at 1740.

71. *Id.* (Thomas, J., concurring in part and concurring in the judgment).

72. *Id.*

73. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015); *see also id.*, at 286 ("designing and selling a wedding cake"); *id.* at 283 ("refusing to create a wedding cake").

74. *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring in part and concurring in the judgment).

75. *Id.* at 1741.

76. *Id.* at 1742 (quoting Clark v. Comty. for Creative Non-Violence, 468 U.S. 288, 294 (1984)).

77. *Id.*

78. *Id.* at 1743.

79. *Id.* at 1743.

be expressive, because Phillips routinely forgoes profits to create cakes in line with his Christian values.[80]

Justice Thomas also stated that the Colorado Court of Appeals' decision to compel Phillips in order to enforce the public-accommodations law was misguided because theoretically any law could restrict speech under the legislative authority of the Constitution.[81] He stated that the Commission must meet "the most exacting scrutiny," because it compelled the action due to the content of Phillips's message.[82] Although Justice Thomas did not determine whether CADA survives strict scrutiny, he emphasized that "[s]tates cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified."[83]

E. Dissent—Justice Ginsburg

Justice Ruth Bader Ginsburg, with whom Justice Sonia Sotomayor joined, dissented.[84] Justice Ginsburg first stated that the conduct Phillips faced did not rise to the level of hostility that the Court has previously found to be a free-exercise violation. She emphasized the lack of hostility by pointing out that there were four independent decision-making bodies, of which only one or two members of one body made comments that the court majority refers to as hostile.[85] Justice Ginsburg believed that the three bakeries that refused to serve William Jack because of the hateful message he requested on the cake were not similar to Phillips, who refused to serve Craig and Mullins a custom wedding cake. In her view, Phillips refused to sell Craig and Mullins a product because of their sexual orientation. Phillips refused to serve them a wedding cake, but would have sold a wedding cake to any heterosexual couple. The good refused was a wedding cake and, thus, Phillips's willingness to serve

80. *Id.* at 1745 ("He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries.").

81. *Id.* at 1744.

82. *Id.* at 1746 (quoting Texas v. Johnson, 491 U.S. 397, 412 (1989)).

83. *Id.*

84. *Id.* at 1748 (Ginsburg, J., dissenting). Justice Ginsburg's main concern with the majority was the outcome of the case. She stated, "I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case." *Id.*

85. *Id.* at 1748, 1751.

Craig and Mullins any other baked good was irrelevant.[86] Justice Ginsburg believed that the Colorado Court of Appeals held that Craig and Mullins were denied service based on an aspect of their identity, while Jack was denied service based on the message he requested on the cake.[87]

In a footnote, she also addressed Justice Thomas's free speech discussion.[88] She stated there is "no case in which this Court has suggested the provision of a baked good might be expressive conduct."[89]

IV. DISCUSSION

A. Free Exercise of Religion

Phillips argued "that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion . . . protected by the First Amendment."[90] The Free Exercise Clause, enshrined in the First Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[91] The Free Exercise Clause limits the government's authority to interfere with religious beliefs and practices.[92] The Free Exercise Clause is incorporated against the states through the Fourteenth Amendment.[93]

1. Belief vs. Conduct

Under the First Amendment, freedom to exercise one's religion embraces two concepts: freedom to believe, which is absolute, and freedom to act, which is subject to regulation for society's protection.[94] If a law regulates an individual's thought processes or mental conclusions, then the law is belief-centered and subject to

86. *Id.* "The cake requested was not a special 'cake celebrating same-sex marriage.' It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike." *Id.* at 1733 n.* (Kagan, J., concurring).

87. *Id.* at 1750 (Ginsburg, J., dissenting).

88. *Id.* at 1748 n.1.

89. *Id.*

90. *Id.* at 1726 (majority opinion).

91. U.S. CONST. amend. I.

92. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) ("Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority.").

93. Cruz v. Beto, 405 U.S. 319, 322 (1972); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

94. United States v. Grayson Cty. State Bank, 656 F.2d 1070, 1073 (5th Cir. 1981).

absolute prohibition under the Free Exercise Clause.[95] The leading case in this context is *West Virginia State Board of Education. v. Barnette*.[96]

In 1942, the West Virginia Board of Education required public schools to include salutes to the flag and recital of the Pledge of Allegiance by teachers and students as a mandatory part of school activities.[97] Refusal to salute the flag was regarded as an act of insubordination.[98] This insubordination was punished by expulsion, and readmission was denied until the student complied.[99] Meanwhile, the expelled student is considered "unlawfully absent" and juvenile delinquency proceedings could be initiated, and his or her parents could be subject to prosecution resulting in a fine and jail term.[100]

Plaintiffs, Jehovah's Witnesses, sued to enjoin the West Virginia law, arguing that compelling them to salute the flag and recite the Pledge violated their First Amendment right to freedom of religion.[101] The plaintiffs objected to the compelled flag salute and Pledge as contravening the Bible's Exodus, Chapter 20, verses 4 and 5, which read: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them."[102] Plaintiffs considered the flag an "image" within this command and for this reason refused to salute it.[103]

The Supreme Court overruled its previous decision in *Minersville School District v. Gobitis,*[104] holding that compelling public school children to salute the flag was an unconstitutional violation of their First Amendment right to freedom of religion.[105] Although saluting the flag and reciting the Pledge is seemingly conduct rather than belief, the Court interpreted the state law as compelling an affirmation of

95. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943).
96. *Id.*
97. *Id.* at 626.
98. *Id.*
99. *Id.* at 629.
100. *Id.*
101. *Id.* at 629–30.
102. *Id.* at 629 (quoting *Exodus* 20:4–5).
103. *Id.*
104. 310 U.S. 586 (1940) (upholding a mandatory flag salute against First and Fourteenth Amendment challenge).
105. *Barnette*, 319 U.S. at 642.

belief.[106] The First Amendment cannot enforce a unanimity of opinion on any topic.[107] Because the government cannot force an individual to affirm or disavow a belief, if a law is found to be directed at belief, it is deemed unconstitutional, regardless of any compelling government interest. However, the same is not true of laws directed at religiously motivated *conduct*.

If a law regulates external actions stemming from an individual's belief, then it affects that individual's religious conduct and is not subject to absolute prohibition. There are two types of laws that potentially infringe on religious conduct: laws that purposefully suppress religious conduct and laws that regulate nonreligious conduct, but nevertheless burden religious conduct. Depending on the type of law, a different level of scrutiny applies.

If a law regulates conduct specifically because of the conduct's religious nature or because it is engaged in for religious purposes, then there is a presumption of unconstitutionality and the government must demonstrate that the law advances a compelling interest through the least restrictive means possible. In other words, the government must satisfy strict scrutiny. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[108] the Church of the Lukumi Babalu Aye, Inc. ("Church") announced plans to establish a Santeria church in Hialeah, Florida.[109] In response, the Hialeah city council adopted several ordinances prohibiting the ritual or sacrificial killing of animals within city limits, a practice central to the Santeria religion.[110] The Church sued to enjoin enforcement of the ordinances on the ground that the ordinances violated the Free Exercise Clause.[111] The Court held that the ordinances were not neutral laws of general applicability, but rather were specifically targeted to suppress exercise of the Santeria religion.[112] Because the ordinances regulated conduct specifically due to its religious nature, the ordinances had to be justified by a compelling governmental interest and narrowly tailored to that interest.[113] The ordinances failed to meet the strict scrutiny test

106. *Id.* at 631.
107. *Id.* at 642.
108. 508 U.S. 520 (1993).
109. *Id.* at 525–26.
110. *Id.* at 527–28.
111. *Id.* at 528.
112. *Id.* at 534–38.
113. *Id.* at 531–32.

because they applied exclusively to the church, singling out the activities of the Santeria faith, and suppressed more religious conduct than was necessary to achieve their stated ends.[114] Thus, if a law regulates conduct specifically because of the conduct's religious nature or because it is engaged in for religious purposes, strict scrutiny applies. Unless the government can show that the law advances a compelling state interest through the least restrictive means possible, the law will be found unconstitutional.

Although religious exercise is generally protected under the First Amendment, this does not prevent the government from passing neutral laws that incidentally impact certain religious practices.[115] Strict scrutiny does not apply when a law is facially neutral from the perspective of the Free Exercise Clause, but nonetheless impacts some conduct of a religious nature. The most important case in this context is *Employment Division, Department of Human Resources of Oregon v. Smith*.[116] At issue in *Smith* was an Oregon statute that criminalized the possession of peyote, a hallucinogenic drug.[117] Ingesting peyote serves a sacramental purpose within the Native American Church.[118] Respondents "were fired from their jobs with a drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both [were] members."[119] Respondents then applied to the Oregon Employment Division of the Department of Human Resources ("Division") for unemployment compensation, but were deemed ineligible for benefits because they had been discharged for work-related "misconduct."[120] Respondents appealed, challenging the constitutionality of the statute.[121]

Justice Antonin Scalia, writing for the majority, held that an individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free

114. *Id.* at 542.

115. Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

116. 494 U.S. 872 (1990).

117. *Id.* at 874.

118. *Id.* at 903–04 (O'Connor, J., concurring).

119. *Id.* at 874 (majority opinion).

120. *Id.*

121. *See id.* at 876.

to regulate."[122] Allowing exceptions to every state law or regulation affecting religion "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[123] In instances where laws of general applicability burden religious exercise, state laws need only be tested under the rational basis review standard.[124]

Thus, currently, the Supreme Court interprets the Free Exercise Clause to mean that state governments may not pass laws that directly target the free exercise of religion without a compelling state interest, but state governments may pass neutral and generally applicable laws that indirectly burden religious practices under the less strenuous rational basis standard.

2. CADA Is a Neutral Law of General Applicability that Incidentally Burdened Phillips's Religious Conduct

In *Masterpiece Cakeshop*, the Court did not decide the case on the merits and thus never analyzed the case under a Free Exercise Clause analysis.[125] But, had the Court proceeded to the merits, the analysis should have proceeded as follows.

The law at issue in *Masterpiece Cakeshop* was the Colorado Anti-Discrimination Act.[126] CADA in relevant part provides:

> 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 disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .[127]

122. *Id.* at 878–79.

123. *Id.* at 888.

124. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("[T]he general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."); Am. Family Ass'n v. Fed. Commc'ns Comm'n, 365 F.3d 1156, 1171 (D.C. Cir. 2004) ("[T]he general rule is that laws and regulations that incidentally burden religion do not violate the free exercise clause.").

125. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018).

126. *Id.* at 1723.

127. COLO. REV. STAT. § 24-34-601(2)(a) (2018).

The question raised is whether CADA regulates religious belief or conduct and, if it does, whether CADA survive the applicable legal test. CADA does not regulate religious belief. Unlike *Barnette*, CADA does not compel Phillips, or any other individual, to affirm or disavow a belief. Those who own or operate a place of public accommodation are not compelled to subscribe to a belief, or disavow their own beliefs, in order to operate their business in compliance with CADA.[128]

After finding that CADA does not regulate belief, the Court would next need to determine whether CADA regulates religious conduct, either explicitly or via an incidental burden. "A law [will lack] facial neutrality if it refers to a religious practice without a secular meaning discernable from the language [of the law] or context."[129] On its face, CADA does not refer to any religion, religious belief, or religious practice and thus is facially neutral.

But, facial neutrality is not determinative—"The [Free Exercise] Clause 'forbids subtle departures from neutrality' and 'covert suppression of particular religious beliefs.'"[130] The administrative law judge who heard Phillips's case "determined that CADA is a 'valid and neutral law of general applicability' and therefore . . . applying it to Phillips . . . did not violate the Free Exercise Clause."[131] This determination is correct. This case is even clearer than *Employment Division, Department of Human Resources of Oregon v. Smith*, where an Oregon law specifically criminalized peyote possession and peyote ingestion which is itself religious conduct in the Native American Church.[132] Nonetheless, the Court determined that the law in question was neutral and generally applicable, and only incidentally burdened the respondents' religious practice, despite the importance of peyote in their religion.[133] In Phillips's case, he is a devout Christian. CADA

128. In other words, CADA does not require a business owner to renounce his or her beliefs in order to operate a public business in the state, nor does CADA require a business owner to subscribe to a certain belief in order to operate a public business in the state.

129. *Church of the Lukumi Babalu Aye*, 508 U.S. at 533.

130. *Id.* at 534 (citations omitted) (quoting Bowen v. Roy, 476 U.S. 693, 703 (1986); Gillette v. United States, 401 U.S. 437, 452 (1971)).

131. *Masterpiece Cakeshop*, 138 S. Ct. at 1726–27 (quoting Joint Appendix at 214, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111)) ("The Commission affirmed the ALJ's decision in full. . . . [T]he Colorado Court of Appeals . . . affirmed the Commission's legal determinations and remedial order.").

132. Emp't Div., Dep't of Human Res. of Or., v. Smith, 494 U.S. 872, 890 (1990).

133. *Id.* at 872.

in no way addresses the religious practices of the Christian faith, or any religious faith. Phillips's only remaining argument is that CADA incidentally burdens his Christian faith by requiring him to equally serve customers whose identity he religiously objects to.

The government can justify this incidental burden by satisfying the rational basis standard of review: whether the law is rationally related to a legitimate government interest. In this case, the test is easily met. The government, here the state of Colorado, has a legitimate interest in protecting certain classes of persons from discrimination in the marketplace. Colorado seeks to ensure that protected persons are not denied equal access to goods and services based on their identity. CADA is rationally related to that purpose because it prohibits places of public accommodation from discriminating against enumerated groups of persons. Should Phillips's case return to the Supreme Court, the Court should hold that Phillips's Free Exercise Clause rights were not violated.

In addition, the Supreme Court's public accommodation precedent also defeats Phillips's Free Exercise claim.[134] Phillips came before the Court as the proprietor of a storefront bakery selling to the general public, not as an individual seeking to express himself through his art or his worship.[135] "It is in this role that he is subject to the antidiscrimination laws, and it is well within a state's power to rid the public marketplace of discrimination . . . ."[136] CADA "defines 'public accommodation' broadly to include 'any place of business engaged in any sales to the public and any place offering services . . . to the public,' but excludes 'a church, synagogue, mosque, or other place that is principally used for religious purposes.'"[137] A bakery, like Masterpiece Cakeshop, falls squarely within this definition.

134. Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents at 2, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127312, at *2 (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964)) ("[C]ompelling governmental interests in preventing 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments' outweigh any incidental burdens on public-facing businesses."). Justice Kennedy, writing for the majority in *Masterpiece Cakeshop*, stated in dicta that "the Court's precedents make clear that [Phillips], in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws." *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

135. Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents, *supra* note 134, at 2.

136. *Id.* at 2.

137. *Masterpiece Cakeshop*, 138 S. Ct. at 1725 (quoting COLO. REV. STAT. § 24-34-601(1) (2018)).

The Supreme Court previously considered the issue of discrimination in places of public accommodation when the discrimination is due to a person's race. In *Newman v. Piggie Park Enterprises, Inc.*,[138] the Supreme Court unanimously held that a business owner's discriminatory conduct towards African American customers violated Title II of the Civil Rights Act and could not be excused by a Free Exercise Clause claim.[139]

The petitioners in *Piggie Park* brought a class action under Title II of the Civil Rights Act of 1964 to enjoin racial discrimination at five drive-in restaurants and a sandwich shop in South Carolina.[140] "The restaurant, Piggie Park, was owned by Maurice Bessinger, who was deeply religious and believed that serving Black customers or contributing to racial intermixing in any way "contravene[d] the will of God."[141] When African American customers attempted to patronize the restaurant, Bessinger denied them access.[142]

In deciding the case, the Supreme Court agreed with the district court and held that Bessinger's conduct violated Title II and that requiring Bessinger to comply with Title II and equally serve African Americans did not violate his rights under the Free Exercise Clause.[143] "[F]ree exercise of one's beliefs, . . . distinguished from the absolute right to a belief, . . . is subject to regulation when religious acts require accommodation to society."[144]

Like *Piggie Park*, Phillips's right to freely exercise his religion "must yield to an otherwise valid exercise of state power."[145] The facts of *Piggie Park* are similar to those of *Masterpiece Cakeshop*, the main difference being the class of persons discriminated against. Although the protected class is different, the fundamental principle remains the same.[146] In *Piggie Park*, a protected class of persons (African

138. (*Piggie Park*), 390 U.S. 400 (1968).

139. Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents at 3, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127302 (citing *Piggie Park*, 390 U.S. at 402–03).

140. *Piggie Park*, 390 U.S. at 400.

141. Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents, *supra* note 139, at 3 (alteration in original).

142. *Id.*

143. Newman v. Piggie Park Enters., 256 F. Supp. 941, 944–45 (D.S.C. 1966).

144. *Id.* at 945.

145. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).

146. Like African Americans, homosexuals have long faced discrimination based on an immutable characteristic. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) ("For much of the 20th century . . . homosexuality was treated as an illness. When the American Psychiatric

American customers) sought the same access to the restaurant goods and services Bessinger provided to white customers. In *Masterpiece Cakeshop*, a protected class of persons (same-sex couples) sought the same access to the baked goods and services Phillips provided to heterosexual couples. And, like Bessinger, Phillips's claim that the laws mandate that he equally serve same-sex couples contravenes his sincerely held religious beliefs. Because the facts and situation between these two cases are nearly identical, the conclusion reached in *Piggie Park* must also be applied to *Masterpiece Cakeshop*. But, to rule otherwise, and thereby ignore precedent, would sanction discrimination against not only sexual orientation, but other protected classes based on religious belief (i.e. race, religion, national origin).[147]

Masterpiece Cakeshop operates as a place of public accommodation, open to all who seek its goods and services. Jack Phillips, in his role as business owner and operator, cannot refuse to equally provide goods and services to those patronizing his bakery based on his religious beliefs. Compliance with the law does not yield to Phillips's sincerely held religious beliefs. As Justice Kennedy stated in *Obergefell v. Hodges*,[148] "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[149]

Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable."). In *Obergefell*, Justice Kennedy, writing for the majority, noted that injustice long experienced by a group of people may not be rectified until well beyond the time when much discrimination has been felt. *Id.* at 2598 ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.").

147. Additionally, an exception to CADA would lead to a slippery slope of discrimination. Justice Kennedy, writing for the majority, said as much in his opinion. While "[t]he First Amendment ensures that religious organizations and persons are given certain protections, . . . it is a general rule that . . . business owners and other actors in the economy and in society [may not] deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." If the door is opened to allow purveyors of goods and services in the wedding industry to deny gay persons equal access to those goods and services, "a community-wide stigma" would result and would be wholly "inconsistent with the history and dynamics of civil rights laws." *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

148. 135 S. Ct. 2584 (2015).

149. *Id.* at 2608.

B. Free Speech

In addition to his Free Exercise of Religion argument, Phillips claimed that the Commission violated his right to free of speech by *compelling* him to create his baked masterpieces. He claimed using his "artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation" had "a significant First Amendment speech component."[150] The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[151] The Supreme Court adopted a framework to analyze free speech claims. Typically, the Court first determines whether the conduct is speech and then applies a level of scrutiny to the government's action based on whether that restriction is content-based or content-neutral.[152]

1. Baking a Cake Is Not Expressive Conduct

To resolve the freedom of speech claim, the Court must first determine whether baking a wedding cake is symbolic speech or a product in the marketplace. The Supreme Court developed the Free Speech doctrine by testing the legal bounds on a variety of factual scenarios. The Free Speech Clause protects one's individual liberty to express a message. Expression can be "oral or written or symbolized by conduct."[153] However, as Justice Thomas stated in his concurrence, "conduct does not qualify as protected speech simply because 'the person engaging in [it] intends thereby to express an idea.'"[154] Speech is "conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."[155]

The Court has recognized a variety of conduct as expressive, including political contributions, nude dancing, wearing a jacket displaying "Fuck the Draft," burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in,

150. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.
151. U.S. CONST. amend. I.
152. United States v. O'Brien, 391 U.S. 367 (1968).
153. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).
154. *Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring in part and concurring in the judgment) (alteration in original) (quoting *O'Brien*, 391 U.S. at 376 (1968)).
155. *Clark*, 468 U.S. at 294.

refusing to salute the American flag, and flying a plain red flag.[156] In each of those scenarios, the Court found that the actor engaged in conduct to communicate a message that observers reasonably understood to be communicative. Conversely, the Court has held that certain conduct, such as shouting "fire" in a movie theater, mailing obscene circulars, burning a draft card, or advocating illegal drug use at a school-sponsored event, is not afforded First Amendment protection, because although they are intended to communicate, society has an overriding interest in regulating them.[157]

Justice Thomas believed that Phillips's conduct was expressive. He described Phillips's cake baking process as "sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding."[158] By this standard, a birthday cake would be the baker's message of best wishes on the birth of a child, and an anniversary cake would be the baker's message celebrating the couple's wedding anniversary.

However, the flaw in Justice Thomas's argument is that the message is not the baker's, but the customer's. The customer chooses the type of cake, the occasion, the color of the frosting, and the words on the cake. Thus, the customer's First Amendment rights are at issue. The baker is simply paid for a service and no observer reasonably understands a cake to be the baker's message.

Justices vary in their opinions on whether cake constitutes speech. Justice Thomas stated that Phillips believes "a wedding cake inherently communicates that 'a wedding has occurred, a marriage has begun, and the couple should be celebrated.'"[159] Justice Gorsuch stated that wedding cakes certainly convey a message of celebration for the wedding and a wedding cake for a same-sex couple celebrates

156. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565–66 (1991); Texas v. Johnson, 491 U.S. 397, 405–06 (1989); Spence v. Washington, 418 U.S. 405, 406, 409–11 (1974) (per curiam); Schacht v. United States, 398 U.S. 58, 62–63 (1970); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969); Brown v. Louisiana, 383 U.S. 131, 141–42 (1966); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1934); Stromberg v. California, 283 U.S. 359, 361, 369 (1931); Cohen v. California, 403 U.S. 15 (1971).

157. Morse v. Frederick, 551 U.S. 393 (2007); United States v. O'Brien, 391 U.S. 367 (1968); Roth v. United States, 354 U.S. 476 (1957); Schenck v. United States, 249 U.S. 47 (1919).

158. *Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring in part and concurring in the judgment).

159. *Id.* (quoting Joint Appendix, at 162, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111)).

same-sex marriage.[160] Justice Kagan argued that all wedding cakes are the same and simply convey a message of celebration for the wedding.[161] Conversely, Justice Ginsburg points out that in no case has the Court "suggested the provision of a baked good might be expressive conduct."[162] Justices spent significant time thinking and writing about what they believe a wedding cake conveys, but this discussion is irrelevant to the Free Speech issue at hand. If the Justices cannot understand or discern a communicative message, clearly selling or baking a cake is not an instance of speech worthy of constitutional protection.

Justice Thomas, citing a single law review article as his authority, stated that wedding cakes do communicate a message because "the cake is 'so standardised and inevitable a part of getting married that few ever think to question it,'" and "a whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards."[163] Again, by this logic, a wedding florist who creates the bouquet the bride carries down the aisle, holds throughout the ceremony, and tosses to her bridal party to symbolically pass on her wishes to the next bride amongst them should be given freedom of speech protection. Similar arguments can be made about a wedding planner's decoration vision or the musician's choice in music. While parades, flags, and sit-ins have traditionally been held as "a form of expression," wedding cakes have never been given this level of deference in our jurisprudence. An individual waving a flag or engaging is a sit-in is communicating his or her own views, while here, the baker is simply performing a retail service that reflects the purchaser's views.

Weddings are inherently emotional and symbolic for a variety of reasons, but an entire industry's commercial services cannot be protectable under the First Amendment. This protection has the potential to significantly broaden the scope of the Free Speech Clause to include any service or product with customization. The Court should be wary of opening the floodgates and establishing that any

160. *Id.* at 1733 n.* (Kagan, J., concurring).

161. *Id.* at 1733.

162. *Id.* at 1748 n.1 (Ginsburg, J., dissenting).

163. *Id.* at 1743 (Thomas, J., concurring in part and concurring in the judgment) (quoting Simon Charsley, *Interpretation and Custom: The Case of the Wedding Cake*, 22 MAN 93, 95 (1987)).

action could constitute symbolic speech. Allowing businesses to turn away customers under the guise of free speech could significantly limit the type and quality of goods and services available to distinct members of our society in the marketplace. This concern is what gave rise to Public Accommodation statutes, and thus, free speech attacks to this important legislation would uproot this essential protection.

Thus, the Court should find that baking a cake is not sufficiently expressive to trigger application of the First Amendment.

2. Public Accommodation Law Is Content-Neutral

Should the Court find that cake baking is expressive conduct, the Constitution limits the government's authority to restrict or compel it. Restrictions based on the content of speech are valid only if the government can pass the heightened scrutiny muster.[164] However, regulations on conduct that prove to be an incidental burden do not abridge the Freedom of Speech.[165] The key case in this context is *Sorrell v. IMS Health Inc*.[166]

In *Sorrell*, the Supreme Court held that a Vermont law was facially a content-based restriction on speech.[167] The law prohibited pharmacies from disclosing information to manufacturers if manufacturers intended to use that information in marketing.[168] The Court held that the law explicitly barred speech and did not agree with Vermont's argument that the law was simply a commercial regulation.[169] The speech restriction, along with other aspects of the statute, seemed to disfavor marketing and therefore, went "even beyond mere content discrimination, to actual viewpoint discrimination."[170] Under these circumstances, heightened scrutiny is warranted.

Here, CADA does not create a content-based restriction on its face. It simply disallows discriminatory practices against a person based on a protected classification. CADA defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services . . . to the

164. Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011).
165. *Id.* at 565.
166. 564 U.S. 552 (2011).
167. *Id.* at 563.
168. *Id.* at 564.
169. *Id.* at 566.
170. *Id.* (quoting R.A.V. v. St. Paul, 505 U. S. 377, 391 (1992)).

public."[171] The Vermont law in *Sorrell* disfavored marketing speech and the actual text of the statute restricted speech in certain scenarios.[172] In contrast, CADA does not restrict a particular message. In fact, CADA does not explicitly restrict speech at all. CADA simply prohibits any public place of business from denying services to a class of individuals on the basis of their protected status.

The Supreme Court previously discussed public accommodation law within the First Amendment context in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*[173] In *Hurley*, the Massachusetts state court agreed with the petitioners that the state's public accommodation law compelled the organizers of a St. Patrick's Day parade to include GLIB, an organization celebrating Irish American gay, lesbian, and bisexual individuals.[174] However, on appeal, although the Supreme Court found that a Massachusetts public accommodation law did not violate the First or Fourteenth Amendments, the Court held that the state court's *application* of the Massachusetts public accommodations law violated the First Amendment.[175] The public accommodation law "provisions are well within a legislature's power to enact when it has reason to believe that a given group is being discriminated against."[176] And the statute, like CADA, did not, on its face, target speech or discriminate on the basis of its content. However, by compelling the organizers of the parade to include individuals whose message they did not see as their own, the state court violated the organizers' rights under the Free Speech Clause.

In the instant matter, Justice Thomas argued that like *Hurley*, the Commission's application of CADA creates a content-based restriction. Hence, the statute had more than an incidental burden on free speech.[177] Since the Commission permitted other bakeries to

171. COLO. REV. STAT. § 24-34-601(1) (2018).
172. *Sorrell*, 564 U.S. at 564.
173. 515 U.S. 557, 572 (1995).
174. *Id.* at 561–62.
175. *Id.*
176. *Id.* at 558.
177. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas, citing to *Hurley*, seemed to indicate that this scenario is similar to that in *Hurley* where the public accommodation was in fact speech—participation in a parade. *Id.* (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. at 573) ("When a public-accommodations law 'ha[s] the effect of declaring . . . speech itself to be the public accommodation,' the First Amendment applies with full force."). While it is settled law that participation in a parade is expressive conduct

refuse service to customers ordering cakes with an anti-LGBTQ message, but found Phillips in violation of CADA for refusing service to customers ordering a cake celebrating a same-sex marriage, Justice Thomas stated that, as applied, CADA restricts speech based on the message. Justice Thomas thus endorsed the use of heightened scrutiny and not the content-neutral *O'Brien* test.[178] Justice Thomas stated, "Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage."[179] Justice Thomas's viewpoint is not supported by the underlying facts. Craig and Mullins were refused the sale of any wedding cake at all and were turned away before any specific cake design were discussed. In fact, it appeared that Phillips rarely produced wedding cakes with words on them—or at least did not advertise such cakes.[180] The Commission simply wanted Phillips to create a wedding cake for this couple as he would for heterosexual couples. The Commission would likely find Phillips in violation of the public-accommodation laws if he similarly refused to sell a wedding cake to an African American couple or an interracial couple.[181]

Although the Commission's disparate consideration between the bakeries *may* serve as evidence of a content-based restriction in this circumstance, as a standalone matter, the Commission's treatment of Phillips's actions is not a content-based restriction. In a not-so-hypothetical case likely to come before the Supreme Court, where a state actor prohibits a commercial bakery or any other business from refusing service to a customer, the Supreme Court should dismiss the business's argument that providing a service or selling a good in the marketplace triggers First Amendment protection. Such arguments

classified as speech, there is significant debate in the law whether or not baking a cake is speech. *See Hurley*, 515 U.S. at 573. Thus, the *Hurley* analysis does not apply in this context.

178. *Masterpiece Cakeshop*, 138 S. Ct. at 1746 ("Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien,* that test does not apply unless the government would have punished the conduct regardless of its expressive component."); *see, e.g.*, Barnes v. Glen Theater, Inc., 501 U.S. 560, 566–72 (1991).

179. *Masterpiece Cakeshop*, 138 S. Ct. at 1746.

180. *Id.* at 1751 n.5 (Ginsburg, J., dissenting) (citing Photo Gallery of Wedding Cakes, MASTERPIECE CAKESHOP, http://www.masterpiececakes.com/wedding-cakes (last visited Mar. 3, 2019)).

181. *See generally* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (holding that the commerce clause extends anti-discrimination provisions in the civil rights act of 1964 to hotels that host travelers from outside the state).

will uproot public accommodation laws nationwide and undermine the rights of the customer.

3. Public Accommodation Law Does Withstand Heightened Scrutiny

If the Supreme Court were to determine that a government restriction will be valid only if it passes heightened scrutiny, the government must then demonstrate a substantial government interest that is narrowly tailored to fit that interest.[182] Here, Colorado's interest was allowing a same-sex couple access to full and equal enjoyment of the goods provided by the bakery. The action was narrowly tailored to that interest as the Commission simply compelled Phillips to serve the couple with the same product he served in the normal course of his business to other members of the public.

The Supreme Court seemed to summarily determine that the Commission did not pass strict scrutiny because of its alleged hostility to Phillips's viewpoint. However, if the Supreme Court addressed the issue on its merits, it should have found that the Commission's decision to compel Phillips to serve Craig and Mullins was narrowly tailored if the Commission had also enforced the other customers' rights to purchase cakes with their preferred message. When this scenario inevitably reaches the Supreme Court again, the Court should find that a government's interest in ensuring all consumers have equal protection in and equal access to the marketplace is strong, and compelling commercial businesses to serve all regardless of their identify, as codified in most public accommodation laws, is narrowly tailored.

V. CONCLUSION

The questions presented in this case are far from resolved. And, since the resolution of *Masterpiece Cakeshop*, cases with similar issues have been filed in many jurisdictions and will continue to make their way through the courts.[183] Inevitably, one of these cases will demand Supreme Court review and resolution of the unanswered First Amendment questions. In cases with facts similar to *Masterpiece Cakeshop*, finding in favor of the religious business owner would allow for constitutionally sanctioned discrimination.

182. United States v. O'Brien, 391 U.S. 367, 377 (1968).
183. Koppelman, *supra* note 7; Allhands, *supra* note 7; Heffel, *supra* note 7.

In addition to following Supreme Court doctrine, the Court must consider the larger implications. Although the Court has allowed for same-sex marriage, restricting access to wedding goods and services significantly inhibits same-sex couples from fully enjoying their right to marriage. To rule otherwise would not only harm same-sex couples, but also enjoin free commerce within the billion-dollar wedding industry.