

A CAKE BY ANY OTHER NAME: AN ANALYSIS OF MASTERPIECE
CAKESHOP AND THE DELICATE BALANCE BETWEEN SEXUAL
AUTONOMY AND RELIGIOUS FREEDOM

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I. OVERVIEW

On May 4, 2017, President Donald J. Trump signed an Executive Order “Promoting Free Speech and Religious Liberty.”¹ The purpose of the order is to guide the executive branch, including all executive departments and agencies, to vigorously enforce Federal law’s robust protections for religious freedoms and to the greatest extent practicable and permitted by law, to respect and protect the freedom of persons and organizations to engage in religious and political speech.² Time will tell what actual legal effect this document will have – whether it creates a binding norm, or simply written as guidance for agencies is still unclear. What is clear is the agenda of the new Administration; to reestablish and highlight the importance of religious liberty transcribed in the Constitution. On October 6, 2017, as a response to the Executive Order, Attorney General, Jeff Sessions, issued government-wide legal guidance that urged sweeping protection for religious freedom in a twenty-five-page memo.³

The Executive Order presents a latent conflict with statutes that implicate Christian business owners of public accommodations.⁴ Within the Civil Rights Act of 1964, the U.S. Legislature prohibited discrimination and segregation in places of public accommodation; “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”⁵ Public accommodations are privately owned, for-profit

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¹ Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017).

² *Id.*

³ Jeff Sessions, Federal Law Protections for Religious Liberty, Memorandum for All Executive Departments and Agencies (Oct. 6, 2017).

⁴ *Id.*

⁵ 42 USCS § 2000a.

businesses open to the general public.⁶ Private clubs and non-profits are generally exempt under the Act.⁷

The Public Accommodation Act created a baseline for states to follow, and many states exercised their judgment to expand the discrimination coverage to other categories.⁸ One of the categories absent from the initial list, which gained particular attention, is sexual orientation.⁹

Currently there are twenty-two states with laws in place that ban discrimination based upon sexual orientation or gender identity.¹⁰ For instance, the New Mexico Human Rights Act, originally established in 1969, prohibits discrimination in broad terms by forbidding any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services because of sexual orientation.¹¹

Similarly, when state legislature is silent on the issue, counties may enact local ordinances that serve the same purpose. For example, in the state of Kentucky, Lexington-Fayette Urban County passed a local ordinance prohibiting discrimination against individuals based upon sexual orientation in public accommodations.¹²

The issue arises when the religious liberty highlighted in Trump's Executive Order is put to the test against the public accommodations statute prohibiting discrimination upon sexual orientation. The typical case involves a homosexual person and his or her partner coming to a religious business owner seeking services for their wedding ceremonies. The Religious business owner declines to provide services for the ceremonies based upon their religious belief that marriage is between a man and a woman. Ultimately, the courts determine which interest, sexual autonomy or religious liberty, should receive priority or attempt to strike a balance between the two paramount interests. Courts all across the country have been struggling with this line and most have been reluctant to decisively make a stand, derived from the fear of the repercussions the decision may have on the opposing side.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Curtis Schube, A New Era In The Battle Between Religious Liberty and Smith: SOGI Laws, Their Threat To Religious Liberty, And How To Combat Their Trend, 64 Drake L. Rev. 883 (2016).

¹¹ N.M. Stat. Ann. §28-1-7(F).

¹² Ky. Rev. Stat. Ann. § 344.120 (LexisNexis 1992).

The Supreme Court of the United States granted certiorari to decide upon the latest development in this conflict. Jack Phillips, the owner of Masterpiece Cakeshop, was sued for discrimination for the alleged wrongful refusal to make a wedding cake for a homosexual couple.¹³ In June of 2018, the Supreme Court decided for the religious Cakeshop Owner but used a form of Constitutional avoidance as the rationale for its decision.¹⁴ According to the Free Exercise Clause, a State has a duty not to base laws or regulations on hostility to a religion or a religious viewpoint.¹⁵ This Clause bars even subtle departures from neutrality when it comes to matters of religion. The Supreme Court ruled that since the Commissioner who initially heard the case expressed hostility towards Mr. Phillips and his religion based refusal, that these comments were inconsistent with the Free Exercise Clause, reversing the Commission's decision in favor of the Baker.¹⁶ The Supreme Court had the ability to balance the scale between religious freedom and sexual freedom permanently, but instead avoided the heart of the issue by deciding the case on a procedural fairness matter.

In May of 2017, the Court of Appeals of Kentucky, while trying to tiptoe between the two sides, alluded to a practical balance in its unpublished decision involving services for a Gay Pride Festival.¹⁷ The case was about a printing company who refused to print t-shirts designed with the words "Lexington Pride Festival," because the owner stated it went against his sincere religious beliefs.¹⁸ The Court ruled in favor of the Christian business and found that its denial of services did not violate the County's public accommodation ordinance. The Court states,

Nothing in the fairness ordinance prohibits [the printing company] . . . from engaging in viewpoint or message censorship. Thus, although the menu of services [the printing company] provides to the public is accordingly limited, and censor's certain points of view, it is the same limited menu [they]

¹³ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (U.S. 2017).

¹⁴ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

¹⁵ *Id.* at 1724.

¹⁶ *Id.*

¹⁷ *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc.*, 2017 Ky. App. Unpub. LEXIS 371 (May 12, 2017).

¹⁸ *Id.* at 4-6.

offer to every customer and is not, therefore, prohibited by the fairness ordinance.¹⁹

Essentially, a private business may censor the message or the product but may not discriminate the person. The Kentucky case ruled that to force the printing company to explicitly write words that went against their beliefs would be a violation of their First Amendment rights. This document attempts to highlight the Kentucky case's reasoning and argues that its analysis should have been used by the Supreme Court as the correct way to deal with these cases of two equal parties' Constitutional rights.

II. THE TRUMP ADMINISTRATION AND RELIGIOUS LIBERTY

During President Donald Trump's campaign and presidency, he made it adamantly clear that religious liberty would be an important goal for his administration.²⁰ For those unfamiliar, religious liberty simply means "freedom of religious opinion and worship."²¹ On May 4, 2017, President Trump signed an Executive Order titled "Promoting Free Speech and Religious Liberty."²² Deriving its legitimacy from the Constitution's First Amendment,²³ section one orders the executive branch to "vigorously enforce Federal law's robust protections for religious freedom."²⁴ The President continues by stating, "All executive departments and agencies shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech."²⁵ In section four, which helps to guide all agencies in complying with

¹⁹ *Id.* at 21.

²⁰ "Christians need support in our country (and around the world), their religious liberty is at stake! Obama has been horrible, I will be great" Donald J. Trump (@realDonaldTrump), Twitter (Sept. 19, 2015, 6:37 AM), <https://twitter.com/realdonaldtrump/status/645230169997881344>; "IN AMERICA WE DON'T WORSHIP GOVERNMENT – WE WORSHIP GOD!" Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 10:21 AM), <https://twitter.com/realdonaldtrump/status/890260758050856961?lang=en>

²¹ The Free Dictionary, Farlex Inc. (Jan. 10, 2018, 7:35 PM), <https://www.thefreedictionary.com/Religious+liberty>.

²² Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017).

²³ U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

²⁴ Exec. Order No. 13798, Sec. 1. *Policy* (May 4, 2017).

²⁵ Exec. Order No. 13798, Sec. 2. *Respecting Religious and Political Speech* (May 4, 2017).

relevant Federal law, the President states “the Attorney General shall issue guidance interpreting religious liberty protections in Federal law.”²⁶

Following the Order, Attorney General Jeff Sessions issued a government-wide legal guidance memorandum outlining religious liberty’s place in the current administration.²⁷ The twenty-five-page document is divided into three sections; Key Principles, Guidance for Implementation (this section is directed specifically at Federal Agencies and, therefore, will be omitted from this document) and an Appendix which summarizes select constitutional and federal statutory protections for religious liberty and sets forth their derived legal basis.

Of the twenty principles set out, the main points state as follows:

1. The freedom of religion is a fundamental right of paramount importance, expressly protected by federal law.
2. The free exercise of religion includes the right to *act* or *abstain from action* in accordance with one’s religious belief.
3. The freedom of religion extends to persons and organizations . . . including private associations and even businesses.²⁸

Considering the three main points, a logical conclusion would be that under the current administration, a business would be allowed to abstain from an action if the action was not in accordance with its beliefs. This is not an outlandish or even novel idea by any means. Essentially, the Executive Order and the following guidelines spring-boarded off of the Religious Freedom Restoration Act of 1993 which was signed by then President Bill Clinton.

III. RELIGIOUS FREEDOM RESTORATION ACT AND BUSINESS’ RIGHT TO REFUSAL

Under the Civil Rights Act of 1964, a place of public accommodation cannot deny services to customers based on race, color, religion, national origin or disability.²⁹ Some states and local ordinances have also extended that reach to cover sexual orientation and gender identity.³⁰ If there is an anti-discrimination

²⁶ Exec. Order No. 13798, Sec. 4. *Religious Liberty Guidance* (May 4, 2017).

²⁷ Jeff Sessions, Federal Law Protections for Religious Liberty, Memorandum for All Executive Departments and Agencies (Oct. 6, 2017).

²⁸ Sessions, at 1-2. (Oct. 6, 2017).

²⁹ 88 P.L. 352, 78 Stat. 241.

³⁰ *Id.*

law, a business may still be allowed to refuse service as long as the refusal is not arbitrary or only applicable to one protected group.³¹ To avoid being arbitrary, there must be a reason and the business owner must be consistent in implementing the reason for refusal.³²

Business standards of keeping rules consistent from person to person is an important practice that courts will look for when judging if an owner's act is discriminatory. Simply stating, "We reserve the right to refuse service to anyone," is vague and arbitrary. As displayed in the cases above, a business cannot randomly refuse to serve someone.³³

"No shoe, no shirt, no service" on the other hand, is a clear dress code that could also relate to health and safety issues.³⁴ Particularly prominent in beach towns, these rules have legitimate business reasons for enactment and are well within the owner's right to exclude based on a dress code. But even with rules that are not inherently discriminatory as a dress code, if the enactor of the rule, carries out the rule in a discriminatory way, then the rule can be unjust. For example, if a business owner has a dress code, but only enforces the dress code on a certain protected class, the owner can be in violation of the law. As long as the policy is applied to everyone equally, it likely will not violate any discrimination laws.³⁵

Laws may also be found illegal when although they are not discriminatory on their face but have a discriminatory effect or disparate impact through enactment. In the classic case in 1886, San Francisco passed an ordinance that made it unlawful to operate a laundromat without the consent of the Board of supervisors, except if the laundromat was in a brick or stone buildings. At the time, San Francisco recently experienced an influx of Chinese immigrants. Ultimately, the rule was only enforced on Chinese laundromat owners, because most of the immigrant laundromat businesses were run in wood buildings. Although the law was neutral on its face, the reality was that only laundromats run by Chinese immigrants were negatively impacted, which made the law, in practice, unconstitutional.³⁶

³¹ Jane Haskins, Esq., *The Right to Refuse Service: Can a Business Refuse Service to Someone?* (September 2007), <https://www.legalzoom.com/articles/the-right-to-refuse-service-can-a-business-refuse-service-to-someone-because-of-appearance>.

³² *Id.*

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

I will highlight cases that should be included in the present argument of Masterpiece Cakeshop, and I direct the reader to keep in mind the different types of discriminatory law in question and how the law is treated in each court.

IV. KENTUCKY FESTIVAL CASE

In Lexington-Fayette Urban County, a county located in the state of Kentucky, a Fairness Ordinance was passed which provides in relevant part:

[I]t is an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort, or amusement, as defined in KRS 344.130, on the ground of disability, race, color, religion, or national origin.³⁷

The Fairness Ordinance then adds to this language that this practice is also unlawful if it is based upon grounds of “age, forty and over,” “sexual orientation,” or “gender identity.”³⁸ Kentucky, like the other states, defines “public accommodation” broadly to include any private business that supplies goods or services to the general public, or which solicits or accepts the patronage or trade of the general public – even private business with goods and services that carry a specific ethnic or religious theme.³⁹

The public accommodation in question, is a Christian run printing company named “Hands On Originals” (HOO). HOO prints t-shirts, pens, mugs, and other accessories. Blaine Adamson, a devout Christian, owns and manages the business.⁴⁰

According to HOO’s policy and mission statement on their website, HOO reserves its right to refusal based on Blaine Adamson and the Company’s moral compass:

Hands On Originals both employs and conducts business with people of all genders, races, religions, sexual

³⁷ KY. REV. STAT. ANN. § 344.120 (LexisNexis 1992).

³⁸ *Id.*

³⁹ *Lexington Fayette Urban Cty. Human Rights Comm’n*, at 12.

⁴⁰ *Id.* at 3.

preferences, and national origins. However, due to the promotional nature of our products, it is the prerogative of Hands On Originals to refuse any order that would endorse positions that conflict with the convictions of the ownership.⁴¹

Throughout the company's existence, Mr. Adamson has refused service to many different customers because his religious affiliation has deemed it morally objectionable; Adamson has refused customers who wish to print obscene language as well as customers who requested to print a depiction of Jesus dressed as a pirate or selling Fried Chicken.⁴²

In a statement provided to Fox News, Mr. Adamson said, "I will work with any person, no matter who they are, no matter what their belief systems are. But when they present a message that conflicts with my religious beliefs, that's not something that I can print. That's the line for me."⁴³

The topic conflict arose, on March 8, 2012, when Don Lowe, a representative from the Gay and Lesbian Services Organization (GLSO), called Mr. Adamson's business to place a t-shirt order for the upcoming Lexington Gay and Lesbian Pride Festival. The t-shirt requested would bear a screen-printed design with the words "Lexington Pride Festival 2012," the number "5," signifying the fifth annual year, and a series of rainbow colored circles around the "5".⁴⁴ The GLSO intended to sell the t-shirts as a promotional tool for the Festival.⁴⁵

After a short conversation, Mr. Adamson informed the GLSO that because of his Christian beliefs, he could not fulfill the order; "[S]pecifically, it's the Lexington Pride Festival, the name and that its advocating pride in being gay and being homosexual and I can't promote that message. It's something that goes against my belief system."⁴⁶

⁴¹ *Hands On Originals, Schools; Terms of Service: Right to Refusal*, <http://schools.handsonoriginals.com/terms-service> (last visited Jan. 12, 2018).

⁴² *Lexington Fayette Urban Cty. Human Rights Comm'n*, at 3-4.

⁴³ Perry Chiramonte, LGBT Group taking gay pride T-shirt case to state Supreme Court, Fox News (May 16, 2017), <http://www.foxnews.com/us/2017/05/16/lgbt-group-taking-gay-pride-t-shirt-case-to-state-supreme-court.html>.

⁴⁴ *Lexington Fayette Urban Cty. Human Rights Comm'n*, at 4.

⁴⁵ *Id.*

⁴⁶ *Id.* at 6-7.

Shortly after the telephone conversation, the GLSO filed a complaint with the Lexington Fayette Urban County Human Rights Commission (Commission) alleging HOO had discriminated on the basis of sexual orientation and gender identity in violation of the County's Fairness Ordinance.⁴⁷

HOO argues that Mr. Adamson's objection to the printing of the t-shirt was not of the sexual orientation of the members of the GLSO, but because of the Pride Festival's advocacy of pride in being homosexual.⁴⁸ In other words, the refusal of service is not because of the person's sexual orientation; the refusal is an objection to making products contrary to his religion or belief system.

The Commission did not buy Mr. Adamson's argument and held that HOO violated the fairness ordinance because by refusing to print t-shirts requested by GLSO, HOO had either overtly discriminated on the basis of sexual orientation and gender identity or had effectively discriminated on the basis of sexual orientation and gender identity by discriminating against conduct engaged in exclusively or predominantly by gay, lesbian, bisexual, or transgendered persons.⁴⁹ HOO filed an appeal to the Fayette Circuit Court.⁵⁰

The Circuit Court ruled in favor of Mr. Adamson and Hands On Originals. The court stated the following:

[T]he "service" HOO offers is the promotion of messages. The "conduct" HOO chose not to promote was pure speech. There is no contention that HOO is a public forum in addition to a public accommodation. Nothing in the fairness ordinance prohibits HOO, a private business, from engaging in viewpoint or message censorship. Thus, although the menu of services HOO provides to the public is accordingly limited, and censor's certain points of view, it is the same limited menu HOO offers to every customer and is not, therefore, prohibited by the fairness ordinance . .

⁴⁷ *Id.* at 7-8.

⁴⁸ *Id.*

⁴⁹ *Id.* at 9.

⁵⁰ *Id.*

A contrary conclusion would result in
absurdity under the facts of this case.⁵¹

The Circuit Court drew a definitive line; a private business owner is permitted to refuse service to a protected class if the product ordered conveys an explicit message that conflicts with the business owner's beliefs. A t-shirt printing company takes a customer's message or idea and screen prints the message onto person-sized walking billboards. Protected in the First Amendment is freedom of speech, along with freedom of free exercise of religion, neither of which can be stifled or compelled. The Court notes, "[a] contrary conclusion would result in absurdity," because forcing the owner of HOO to print Pride Festival t-shirts would be forcing him to print a message, a form a speech, in which he does not believe in.⁵²

Using the same reasoning, a Colorado case came out similarly even though the parties of protected classes were flipped. Azucar Bakery refused to create two bible-shaped cakes inscribed with derogatory messages about homosexuals, including "Homosexuality is a detestable sin. Leviticus 18:2."⁵³ The customer, William Jack, did not state the specific purpose or event needing the unusual cake, but was adamant that the bakery was refusing his service based solely on his Christian creed. The Colorado Civil Rights Division found that the bakery did not refuse the patron's request because of his religion but refused based on the offensive nature of the requested message. The Court further found the evidence demonstrated that the bakery would deny such requests to any customer, regardless of creed.⁵⁴ Since the bakery did not refuse based on religion, but based on message, and would undoubtedly refuse a bible cake with anti-homosexual writing to any customer, the Division held the bakery did not violate the public accommodation statute.⁵⁵

The bottom line distinction can be illustrated using the following fictitious blind study: Let us pretend a test group was shown two different three-tier wedding cakes; the cakes have subtle differences in design and color scheme, but there are no symbol-like messages nor cake-toppers of any sort on either cake. The test group

⁵¹ *Id.* at 21.

⁵² *Id.*

⁵³ *Jack v. Azucar Bakery*, Charge No. P20140069X (Colorado Civil Rights Division, Mar. 24, 2015) (<https://perma.cc/5K6D-VV8U>).

⁵⁴ *Id.*

⁵⁵ *Id.*

is told one cake is for a wedding between a man and woman and the other cake is between two men and that their job is to properly label the cakes. Given this hypothetical situation and the relatively interchangeable wedding cakes, labelling one homosexual and one heterosexual is virtually impossible and any rationale for a labeling method would be arbitrary at best. If a baker was asked to create either of the above cakes, without any demarcations, the baker would have no right to refuse, regardless of the customer's orientation. Stated alternatively, if a baker would refuse a homosexual couple the exact same cake she would happily make a straight couple, then by definition, the baker is engaging in sexual orientation discrimination.

The religious business owner's grievance arises when they are asked to provide a wedding cake for a same-sex couple. Their claim is that they have no conflict when making a wedding cake for the general public, which could be bought for a same-sex wedding or a heterosexual wedding. The conflict arises, when before making the cake, they are aware of its final destination. To hammer it home; if a baker gets an order not knowing who the cake is for and fills the order, and if the baker rescinds fulfillment once she learns who the cake is for, discrimination is afoot.

A private business owner is allowed to censor messages and decide to rid certain products from his or her shop's supply menu for whatever reason but must only do so if the owner's censorship is consistent with every customer.⁵⁶

In another hypothetical, a baker, with sincere Christian based beliefs, decides she will not bake cakes that use, resemble, or are shaped like rainbows because of their symbolic representation and association with the LGBT community. The baker has taken a stand in congruence with her religious beliefs and will not make rainbow cakes in homosexual context. This rule, while disenfranchising all those who love rainbows, is within every right of the baker to do so. However, the implementation of this rule must be strict and certain. If a five-year-old child enters her bakery and wants more than anything to have a rainbow and unicorn birthday cake, the baker must uphold its anti-rainbow rule. The minute the baker creates exceptions to the rule, she will risk liability if she at any time denies a rainbow cake for an LGBT member.

⁵⁶ Zack Ford, *This Baker Refused To Bake An Anti-Gay Cake. Here's Why That's Not Discrimination*. Think Progress (Apr 6, 2015, 2:47 PM) <https://thinkprogress.org/this-baker-refused-to-bake-an-anti-gay-cake-heres-why-that-s-not-discrimination-bbfabf6e75e8/> (last visited Jan. 14, 2018).

In *Azucar Bakery*, the court deemed one of the most important facts of the case was that evidence had been established that the bakery regularly created cakes with Christian themes prior to the suit,⁵⁷ which signaled to the court, the bakery's rule was not ill-willed or arbitrary and capricious.⁵⁸ The Kentucky Court emphasized a similar point in the decision of HOO.⁵⁹

Although, a private company's past action is not fully indicative of its present or future action, courts often cite past behavior to decide the business owner's intent for refusal of service. Anti-discrimination law's primary function is to promote fairness and equality. However, a secondary function is to also provide a form of punishment for behavior that Congress deems unsuited for engagement by society. No one has said outright the secondary function, but the punishments for discrimination are more than a simple civil tort. Not only are discriminators expected to compensate their victims, but many times they are subject to public defamation and even punitive damages, much like a criminal offense.⁶⁰ With elevated punishments such as these, the courts want to know if the people are engaging in exclusive behavior and discriminating for the sake of discrimination, or if it's a by-product of a more moral reason. Both HOO and *Azucar Bakery* could substantially prove their sincerity with a past record of fair business, which many on-lookers believed attributed greatly to their favorable outcomes. While the judicial system spends a majority of its time separating good from evil before passing judgment, I do not believe a convoluted inquiry for intent should be the crux of discrimination. Regardless of intent, if a business owner discriminates based on a person's protected class, they should be found guilty.

⁵⁷ *Azucar Bakery*, *supra* note 4.

⁵⁸ "Conservatives seem to reject this . . . Pundit Michelle Malkin stoked the idea that [Azucar's] victory reflects a double standard against Christians, which several other pundits seemed to agree with . . . attempting to conflate the legitimacy of [the two] discriminations." See Zach Ford, *This Baker Refused to Bake an Anti-Gay Cake, Here's Why That's Not Discrimination*, Think Progress (April 6, 2015, 2:47 PM), <https://thinkprogress.org/this-baker-refused-to-bake-an-anti-gay-cake-heres-why-that-s-not-discrimination-bbfabf6e75e8/> (last visited Jan. 21, 2018).

⁵⁹ *Lexington Fayette Urban Cty. Human Rights Comm'n*, at 3-4.

⁶⁰ Ruth Mayhew, *What Are the Consequences of Discrimination on the Job*, Chron, *Small Business: Managing Employees*, <http://smallbusiness.chron.com/consequences-discrimination-job-1312.html> (last visited Jan 21, 2018).

V. WASHINGTON FLOWER CASE

The State of Washington bars discrimination in public accommodations on the basis of “sexual orientation.”⁶¹ In 2012, Washington also voted to recognize equal civil marriage rights for same-sex couples.⁶² In that same year, Curt Freed proposed marriage to Robert Ingersoll.⁶³ The couple decided to get their wedding flowers from “their florist”,⁶⁴ Barronelle Stutzman, who owns and operates Arlene’s Flowers Inc., a place of public accommodation.⁶⁵ Ingersoll had been a customer at Arlene’s Flowers for at least nine years, purchasing numerous floral arrangements during that time. Stutzman is an active member of the Southern Baptist church. The court states it is uncontested that her sincerely held religious beliefs include a belief that marriage can exist only between a man and a woman.⁶⁶ For this reason, Stutzman informed Ingersoll, her long-time customer whom she knew was gay, that she would be unable to provide flowers for the wedding because of her religious beliefs. Stutzman proceeded to give Ingersoll the name of other florists who might be willing to serve him and his betrothed.⁶⁷ When Ingersoll told his partner, Freed, of Stutzman’s refusal, Freed was so upset that he posted his displeasure on Facebook. Eventually, the story went viral and got the attention of media outlets, which caused threats to Stutzman’s business and prompted other florists to offer to provide the couple’s wedding flowers free of charge.⁶⁸

Prior to Ingersoll’s request, Arlene’s Flowers had never had a request to provide flowers for a same-sex wedding, and Stutzman had never refused to serve a customer before this present instance. The record showed that Stutzman had served gay and lesbian customers, including Ingersoll, many times in the past for other, non-wedding-related flower orders.⁶⁹ Stutzman stated in the record that she would even be happy to sell bulk flowers and “raw materials” to the couple, but believes that to create floral arrangements for the ceremony would be too intimate of a

⁶¹ WASH. REV. CODE § 49.60.215(1).

⁶² WASH. REV. CODE § 26.04.010(3) (2017).

⁶³ *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017).

⁶⁴ *Id.* at 549.

⁶⁵ *Id.* at 548.

⁶⁶ *Id.* at 549.

⁶⁷ *Id.*

⁶⁸ *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 549 (Wash. 2017).

⁶⁹ *Id.* at 549-50.

participation in the wedding.⁷⁰ The reason for refusal was not because the customer's sexual orientation, but because the ceremony to which the flowers would be displayed contradicted the owner's religious views.⁷¹ Although the business owner has proven her lack of discriminatory actions in the past, and clearly has no ill-will intent to discriminate, her reason for refusal still amounted to discrimination against the homosexual couple.⁷² A bouquet of flowers is not an expression in which she can circumvent discrimination as free speech; a bouquet of flowers is a simply a bunch of flowers. Since the flower order did not contain a direct message and could easily be ordered with the same specifications by any other couple or customer, the rationale for refusing can only be attributable to the sexual orientation of the customer which is unlawful discrimination.

When the State became aware of the refusal of service, the Attorney General's Office filed a complaint for injunctive that Arlene's Flowers violated the Washington Law Against Discrimination (WLAD).⁷³ The Trial Court entered judgement finding Stutzman personally liable for her decision. Stutzman appealed directly to the Washington Supreme Court. However, instead of ruling there was discrimination based on the fact that the product did not convey a direct message, the State Supreme court ruled that Stutzman and Arlene's Flowers were in violation of the WLAD because an exception allowing discrimination did not apply to her.⁷⁴

The WLAD contains an express exemption for religious organization. This exemption states, "No religious organization is required to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage."⁷⁵ The WLAD defines a religious organization as "entities whose principal purpose is the study, practice, or advancement of religion," such as "churches, mosques, synagogues, temples, etc."⁷⁶ Therefore, this exemption promoting religious freedom did not extend to Arlene's Flowers Inc, because of the statutory definition, making her always liable, regardless of product message conveyance, because her flower shop was not a

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Arlene's Flowers*, 389 P.3d at 550.

⁷⁴ *Id.* at 553.

⁷⁵ RCW § 1(5).

⁷⁶ RCW § 26.04.010(7)(b).

church or religious school. This ruling is problematic, because following this ruling strictly would mean that Stutzman could potentially be held liable if she refuses to sell flowers in an arrangement to look like the Sigil of Baphomet⁷⁷ because doing so would be discrimination of religious group, the Church of Satan.

The above example, forcing a devout Christian to create a Satanic symbol, would be a bizarre ruling for a court to make, and unlikely to happen, but there is no line made by the courts that states a refusal such as this would be lawful. The decision in *Arlene's Flowers* is correct in overlooking the business owner's previous history, but completely avoids the actual issue. Freedom of Speech should cover this refusal regardless of the customer, but rulings such as those made in the *Arlene's* are blurring a clear line. Case after case is being presented to courts all across the nation, begging for a fair balancing line to be drawn between religious freedom and sexual autonomy. Much like the majority of cases deciding this matter, the Washington Court finds a technicality to hang its hat on, instead of actually providing a solution for the issue. The *Masterpiece Cakeshop* decision had a real chance to make a difference and settle this matter once and for all, but much like the Court in Washington, the Supreme Court avoids the real issue altogether.

VI. THE UNITED STATES SUPREME COURT- MASTERPIECE CAKESHOP

The Facts

In July of 2012, Charlie Craig and David Mullins visited Masterpiece Cakeshop, a bakery in Colorado, owned by Jack C. Phillips, a devout Christian.⁷⁸ Craig and Mullins asked Phillips to design and create a cake to celebrate their same-sex wedding. Craig and Mullins planned to marry in Massachusetts and later celebrate with friends in Colorado, which at the time did not recognize same-sex marriage.⁷⁹ Phillips declined to create the cake because of his Christian views. More specifically, Phillips believes that decorating a cake is a form of art, that he honors God through his artistic

⁷⁷ The Sigil of Baphomet is the official insignia of the Church of Satan, which is a 5-point star with a picture of a goat in the middle. See Magus Peter H. Gilmore, *The Church of Satan, History*. <https://www.churchofsatan.com/history-sigil-of-baphomet.php> (last visited Dec. 11, 2017).

⁷⁸ *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. Ct. 2015).

⁷⁹ See Colo. Const. Art. 2, § 31; § 14-2-104(1)(b), C.R.S. 2014.

talents, and that he would displease God by creating cakes for same-sex marriages.⁸⁰

The couple filed charges of discrimination with the Colorado Civil Rights Division (Division), alleging discrimination based on sexual orientation under the Colorado Anti-Discrimination Act (CADA).⁸¹ After an investigation, the Division issued a notice of determination finding probable cause to credit the allegations. After both parties filed cross-motions for summary judgment, the Administration Law Judge (ALJ) issued a written order finding in favor of Craig and Mullins.⁸² The ALJ was affirmed by the Commission. The Commission Cease and Desist Order required Masterpiece take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA and to also file quarterly compliance reports for the next two years describing the remedial measures taken by Masterpiece to comply with CADA.⁸³ This order also mandated Phillips to document all patrons who were denied service and explain the reasons why the service was denied. All of this was overkill and strictly punitive.

Masterpiece and Phillips then appealed the Commission's Order to the Court of Appeals of Colorado. In the Court of Appeals analysis, the Court weighed Phillips's Constitutional right of Freedom of Speech, allowing him to discriminate as an artist against potential customers despite the Colorado Anti-Discrimination Act.⁸⁴

The Court of Appeals recognizes that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriages and in such cases, First Amendment speech protection would imply.⁸⁵ However, Phillips denied the couple's request without any discussion regarding the wedding cake's design or any possible written inscriptions.⁸⁶ Therefore, the rejection could not possibly be for any other reason other than that the cake will be for a same-sex wedding, which goes against CADA. If Phillips had discussed the design and limited his participation based on certain aspects of the cake, then the Court could entertain a First Amendment Free Speech claim.

⁸⁰ *Mullins*, 370 P.3d at 277 (Colo. App. Ct. 2015).

⁸¹ C.R.S. §§ 24-34-301 to -804 (2014).

⁸² *Mullins*, 370 P.3d at 277 (Colo. App. Ct. 2015).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. Ct. 2015).

Additionally, the Court of Appeals adamantly states that the public will not naturally presume that Masterpiece's abidance to CADA will mean that he shares or even condones the views of his customers.⁸⁷ If that is Phillip's true fear, CADA does not preclude Masterpiece from expressing its views on same-sex marriage, which includes religious opposition to it. The bakery remains free to disassociate itself from its customer's viewpoints preemptively which allows the customer to decide beforehand, knowing the views of the business, if they want a bakery with conflicting views to even make their wedding cake.⁸⁸ Ultimately, the Court of Appeals concluded the Commission's Order not to discriminate against potential customers because of sexual orientation does not force Masterpiece to engage in compelled expressive conduct in violation of the First Amendment.⁸⁹ On July 22, 2016, Masterpiece Cakeshop and, owner, Jack Phillips, filed a petition for a writ of certiorari to the Supreme Court, and were granted certiorari on June 26, 2017.⁹⁰

Arguments

Petitioner's Argument – Jack Phillips and Masterpiece Cakeshop

Jack Phillip's petition to the Supreme Court embodies a passionate and creative attempt to label himself as an artist.⁹¹ Phillips carefully chose the name Masterpiece Cakeshop to let his customers know that he believed this was not just another bakery, but an art gallery of cakes.⁹² The logo of Masterpiece Cakeshop depicts an artist's paint palette with a paintbrush and a French whip, a tool used for baking.⁹³ "Phillips specially crafts every wedding cake he creates"⁹⁴ and argues he is an artist using cake as his canvas and Masterpiece Cakeshop as his studio.⁹⁵

⁸⁷ *Id.*

⁸⁸ *Id.* (The Court does a very delicate job of allowing Masterpiece to express its views in a way that does not go against CADA, but also let the customer make an informed decision about where they want their wedding cake to be made.)

⁸⁹ *Id.*

⁹⁰ *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/> (last visited Feb. 16, 2018).

⁹¹ Brief for Petitioners at 1, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. 2017) ("Jack Phillip's love for art and design began at an early age. Discovering that he could blend his skills as a pastry chef, sculptor, and painter, he spent nearly two decades in bakeries.")

⁹² *Id.*

⁹³ *Id.* ("And for over a decade, a large picture has hung in the shop depicting Phillips painting at an easel.")

⁹⁴ *Id.* at 8.

⁹⁵ *Id.* at 1.

Whether deemed an artist or a master baker, Phillips' works are truly extraordinary and he "offers a level of detail and customization that is on an entirely different level."⁹⁶ From 2007 to 2009, Masterpiece Cakeshop won the "Best of Weddings" award from the wedding website The Knot.⁹⁷ In addition, when a Denver production company was hired to make commercials for the TLC show *Cake Boss*, Phillips was hired to make the cakes that appeared in the promos for the show.⁹⁸ Due to his renowned skill and ability, Phillips and Masterpiece Cakeshop garnered much attention, and received orders and requests from all over as it seemed everyone wanted a Masterpiece wedding cake.

Jack Phillips is a Christian who strives to honor God in all aspects of his life, including how he treats people and runs his business.⁹⁹ He states he gladly serves people from all walks of life including individuals of all races, faiths, and sexual orientations, but he contests he cannot design custom cakes that express ideas or celebrate events at odds with his religious beliefs.¹⁰⁰

Phillips has a strong history of refusing services and most refusals have been centered around and derived from his faith.¹⁰¹ Phillips will not design cakes that celebrate Halloween, express anti-family themes, such as a cake celebrating divorce, nor would he make cakes promoting racism, atheism or indecency.¹⁰² He even once turned down a customer who wanted him to make a cake disparaging his boss.¹⁰³ Throughout his years, Phillips has fielded multiple requests to make cakes with derogatory messages about homosexuality, but has refused every single one as mean and uncharitable.¹⁰⁴

⁹⁶ Mark Hemingway, *Is Cake an Artistic Medium?*, WKLY. STANDARD (Aug. 29, 2017), <http://www.weeklystandard.com/is-cake-an-artistic-medium-the-supreme-court-will-decide-this-fall./article/2009457> (last visited Feb. 2, 2018).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Brief for Petitioners at 8, Masterpiece Cakeshop (U.S. 2017) (No. 16-111). ("Phillips closes Masterpiece on Sundays so that he and his employees can attend religious services. And because of his faith, he pays his employees above the market rate and helps them with financial and personal need outside of work.")

¹⁰⁰ *Id.* at 9.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Mark Hemingway, *Is Cake an Artistic Medium?* WKLY. STANDARD (Aug. 29, 2017), <http://www.weeklystandard.com/is-cake-an-artistic-medium-the-supreme-court-will-decide-this-fall./article/2009457> (last visited Feb. 2, 2018).

¹⁰⁴ *Id.*

At the core of his faith and this case, Phillips believes that marriage is a sacred union between one man and one woman.¹⁰⁵ The wedding signifies that the two have become one flesh and the bond created is done so in the name of God representing the relationship between Jesus Christ and His Church. Regardless of whether Phillips's wedding clients plan to have an overtly religious event, he believes that all weddings are sacred and that they create an inherently religious relationship.¹⁰⁶ Because of this religious significance, Phillips believes it sacrilegious to express through his art an idea about marriage that conflicts with his religious beliefs, therefore, he will not design a custom cake that celebrates any form of marriage other than that between a man and woman.¹⁰⁷ However, Phillips's limitations on his custom works, such as wedding cakes, have no bearing on his premade baked items, which he sells to everyone, no questions asked.¹⁰⁸

Petitioner argues that Phillips's artistry in making a cake is a medium for expression and his cakes iconic presence at weddings declares an opinion that the couple's wedding should be celebrated.¹⁰⁹ This is a position that Phillips does not condone and argues that by forcing him to express such an opinion through his cakes is considered compelled speech, undermining his First Amendment right of Freedom of Speech.

The Compelled Speech Doctrine, enacted by the Supreme Court, 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.¹¹⁰ The Petitioner heavily relies on *Hurley v. Irish-American Gay*, a 1995 Supreme Court decision, which ruled states may not apply public accommodation laws, like CADA, to compel or otherwise interfere with expression.¹¹¹ *Hurley* establishes that states cannot force

¹⁰⁵ Brief for Petitioner at 9, *Masterpiece Cakeshop* (U.S. 2017) (No 16-111).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Brief for Petitioner at 19, *Masterpiece Cakeshop* (U.S. 2017) (No 16-111).

¹¹⁰ See, e.g., *Riley v. Nat'l Fed'n of the Blind of 26 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).

¹¹¹ *Hurley v. Irish-American Gay*, 515 U.S. 557 (1995) (A parade organizer invited members of the public to march in their St. Patrick's Day Parade. The

individuals engaged in expression to alter what they communicate, much less to celebrate something that they deem objectionable. The Compelled Speech Doctrine protects each individual's freedom to decide which ideas are worthy of expression and to refuse to convey contrary views.¹¹² Petitioner argues that his profession and work is a one of expression, and that the Colorado Civil Rights Commission is compelling him to convey a message contrary to his deeply held religious views.

Respondent's Argument – Craig, Mullins and the Civil Rights Commission

Craig and Mullins, joined and spearheaded by the Colorado Civil Rights Commission, argue that this case has nothing to do with the artistic merits of wedding cakes, but is simply about the integrity of a 150-year-old principle; when a business opens its doors to the public, it may not reject customers because of who they are.¹¹³ The Free Speech Clause of the First Amendment does not give businesses the right to discriminate. Respondents concede and “everyone agrees” that the government cannot force people or entities to speak, but argues that this case is not about speech and is merely a case of upholding state laws prohibiting discriminatory denials of service by businesses open to the public.¹¹⁴ The Commission argues, “If a retail bakery will offer a white, three-tiered cake to one customer, it has no constitutional right to refuse to sell the same cake to the next customer because he happens to be African-American, Jewish, or gay.”¹¹⁵

The Petitioners argue the Commission's public accommodation law is unconstitutional because of its disparate effect, compelling speech upon religious business owners. However, the Commission responds by stating the public accommodation law does not compel speech when it simply requires a business to observe all customers equally. “In essence, the Bakery seeks a constitutional right to hang

Massachusetts courts held that the parade organizer had engaged in unlawful discrimination when the organizer refused an LGBT group's request to march as a distinct contingent. The Supreme Court unanimously reversed stating that the state courts would require the parade organizers to alter the content of their expressions to accommodate any contingent of protected individuals with a message, which clearly violates the parade organizer's First Amendment right to choose the content of their own message during the parade.)

¹¹² Brief for Petitioner at 25. *Masterpiece Cakeshop* (U.S. 2017) (No 16-111).

¹¹³ Brief for Respondent, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (U.S. 2017).

¹¹⁴ *Id.* at 3.

¹¹⁵ *Id.*

a sign in its shop window proclaiming: ‘Wedding Cakes for Heterosexuals Only.’”¹¹⁶ The Respondent’s believe the lower courts decided correctly and found that the Bakery discriminated on the basis of sexual orientation because it refused to sell a product to a gay couple that it would have, and previously had, sold to heterosexual couples.¹¹⁷

The Commission’s Brief completely regards the question as to whether Jack Phillips is an artist as irrelevant. They adamantly state the Colorado law on discrimination in sales is entirely indifferent as to whether the product is artistic or expressive. If a business denies service to a customer because of his or her protected class, it should always be unlawful, whether the refusal was motivated by a religious belief, a desire to express a particular message, or bare animus.¹¹⁸ Respondent points out that precedence has been set and in every prior case when businesses open to the public have sought to avoid an anti-discrimination law by invoking the First Amendment, the Supreme Court has rejected all such claims.¹¹⁹ This case is just another routine application of a standard public accommodation law.¹²⁰

The United States Amicus Curiae Supporting Petitioners

Within the United States Department of Justice, the task of the Office of the Solicitor General is to supervise and conduct government litigation in the United States Supreme Court.¹²¹ The Trump administration, led by acting Solicitor General, Jeffrey B. Wall, wrote an amicus curiae brief supporting petitioner and his

¹¹⁶ *Id.* at 2.

¹¹⁷ *Id.* at 14.

¹¹⁸ Brief for Respondent at 13-14, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (U.S. 2017).

¹¹⁹ *Id.* at 13-14. (“[The Supreme Court] has . . . affirmed repeatedly the government’s ability to prohibit discriminatory conduct . . . of entities ranging from law firms, *Hishon*, 467 U.S. at 78, and labor unions, *Railway Mail Ass’n v. Corsi*, 326 U.S. 88, 93 (1945); to private schools, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976), and universities, *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983); to membership organizations open to the public, *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); to restaurants, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 402 n.5, and newspapers, *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 389 (1973).”)

¹²⁰ *Id.* at 13

¹²¹ THE UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF THE SOLICITOR GENERAL: HOME, *About the Office*, <https://www.justice.gov/osg/about-office-1> (last visited Feb. 4, 2018).

First Amendment rights.¹²² Amicus curiae literally translates to “friend of the court,” and is written by a non-party person or entity with a strong interest in the subject matter of the action to suggest a rationale consistent with its own views.¹²³ The amicus brief highlights two First Amendment principles at odds in this case; freedom of speech prohibits the government from telling people what they must say, and content-neutral laws targeting conduct do not violate the First Amendment.¹²⁴ Just as the petitioner argued, the amicus urges that the Supreme Court rule similarly to cases such as *Hurley*.

In the view of the United States, a . . .
First Amendment intrusion occurs
where a public accommodations law
compels someone to create expression
for a particular person or entity and to
participate, literally or figuratively, in
a ceremony or other expressive
event.¹²⁵

The law compels Phillips to design and create a custom wedding cake for a same-sex couple. In their opinion, a custom wedding cake is a form of expression, either pure speech or a product of expressive conduct. Therefore, forcing Phillips to create a form of expression,¹²⁶ such as his custom cakes, and to participate in a ceremony that violates his sincerely held religious beliefs invades his First Amendment rights.¹²⁷

The Solicitor General, Noel Francisco, during oral argument, joins the Petitioners in the distinction between customized cakes conveying artistic expression and those pre-made for general sale. Justice Kennedy asked Francisco if Phillips could put a sign in his

¹²² Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (U.S. 2017).

¹²³ *Amicus curiae*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2nd Ed. 2008), <https://legal-dictionary.thefreedictionary.com/-Amicus+brief> (last visited Feb. 4 2018).

¹²⁴ Brief for the United States as Amicus Curiae Supporting Petitioners at 9, *Masterpiece Cakeshop* (U.S. 2017) (No. 16-111).

¹²⁵ *Id.* at 8.

¹²⁶ *Id.* at 10. ([The Government] . . . may not compel the creation of expression . . . Accordingly, the government may not enact content-based laws commanding a speaker to engage in protected expression: An artist cannot be forced to paint, a musician cannot be forced to play, and a poet cannot be forced to write.)

¹²⁷ *Id.*

window saying, “We don’t bake cakes for gay wedding.¹²⁸” Francisco answered yes, as long as the cakes are custom made, because Phillips’s artistic expression in designing the singular cake would be covered under the First Amendment.¹²⁹ Francisco argues that Colorado forcing Phillips to bake a same-sex wedding cake would be akin to forcing an African American sculptor to make a cross for a Ku Klux Klan rally.¹³⁰

“When you force an African-American sculptor to sculpt a cross for a Klan service, you are transforming his message . . . [h]e may want his cross to send the message of peace and harmony. By forcing him to combine [his expressive product] with that expressive event, you force him to send a message of hate and division.”¹³¹

President Trump has not specifically tweeted on the matter, but when White House Press Secretary Sarah Huckabee Sanders was asked on his stance, she stated, “[t]he President certainly supports religious liberty and that’s something that he talked during his campaign and since upheld since taking office.”¹³²

The fact that the United States is writing an amicus brief favoring one constitutional right over another, shows the presence of the current administration in this matter. The President has adamantly upheld his intent to protect religious freedom at all cost.¹³³ One can only suppose which side the United States would

¹²⁸ Christianna Silva, *Can Business Ban LGBT People? Trump Lawyer Told Supreme Court It’s OK for Shops to Hang Anti-Gay Signs*, NEWSWEEK (Dec. 5, 2017), <http://www.newsweek.com/same-sex-wedding-cake-case-scotus-testimony-trump-lawyer-735692> (last visited Feb 5, 2018).

¹²⁹ *Id.*

¹³⁰ Tyler O’Neil, *Trump Lawyer Compares Masterpiece Cakeshop to Forcing a Black Sculptor to Make a KKK Cross*, PJ MEDIA (Dec. 5, 2017), <https://pjmedia.com/trending/trump-lawyer-compares-masterpiece-cakeshop-to-forcing-a-black-sculptor-to-make-a-kkk-cross/> (last visited Feb. 15, 2018).

¹³¹ *Id.*

¹³² Chris Johnson, *White House: Trump backs ‘religious liberty’ in Cakeshop Case*, WASHINGTON BLADE; AMERICA’S LGBT NEWS SOURCE (Dec. 5, 2017) <http://www.washingtonblade.com/2017/12/05/white-house-trump-backs-doj-in-masterpiece-cakeshop-arguments/> (last visited Feb. 4, 2018).

¹³³ Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017); Jeff Sessions, Federal Law Protections for Religious Liberty, Memorandum for All Executive Departments and Agencies (Oct. 6, 2017).

write for if this case had been appealed under the Obama administration.¹³⁴

The problem with the present administration's stance is that they equate a sculptor to a cake baker, which blurs the line of artistry and trade. An artist is protected for its purpose and primary function to convey messages. Therefore, artists may refuse an order based on any personal reason, because every work made by an artist is one of expression, usually open to interpretation and debate. But extending that reach of expression to public accommodations that make custom orders, would undermine Civil Rights legislature.

Supreme Court Hearing

The Justice's questioning at oral argument highlighted the difficulties in balancing the interests in the case. Seemingly, all sides were closely scrutinizing the questioned asked by Justice Anthony Kennedy, who may be the critical vote in what could be a split decision.¹³⁵ Justice Kennedy expressed concerns for the rights of the same-sex couple, but also noted that the commission had been "neither tolerant nor respectful of Phillip's religious beliefs."¹³⁶ Justice Samuel Alito, a major proponent for religious liberty stated that it was "disturbing" that the commission was apparently engaged in "a practice of discriminatory treatment based on viewpoint."¹³⁷

Justice Elena Kagan's question expressed concerns about the difficulties in drawing lines. "If a baker is allowed to refuse to bake a cake, would it not be true that make-up artists, hairstylists, tailors, caterers, florists, chefs, and the like could all refuse to provide services to same-sex couples planning their weddings?"¹³⁸

¹³⁴ President Obama's actions promoting the LGBT community: issuing directive on same-sex partner benefits supporting LGBT healthcare, repealing "Don't Ask, Don't Tell," abolishing the "Defense of Marriage Act" (recognizing all valid same-sex marriage), preventing Bullying and hate crimes against LGBT Americans (funding the "It Gets Better" campaign addressing LGBT youth). *FACT SHEET: Obama Administration's Record and the LGBT Community*, Obama White House: Office of the Press Secretary: Statements and Releases (June 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community> (last visited Feb. 4, 2018).

¹³⁵ Stephen A. Miller and Leigh Ann Benson, *Masterpiece Cakeshop v. CCRC: A Difficult Balance for Justices*, THE LEGAL INTELLIGENCER, (Jan 11, 2018, 1:31PM) <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2018/01/11/masterpiece-cakeshop-v-ccrv-a-difficult-balance-for-justices/?slreturn=20180011225803> (last visited Feb. 13, 2018).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

After hearing, Masterpiece’s justification for why his profession should be seen as an artist, Justice Kagan, who seemingly lands on the side for sexual autonomy, pushed back and inquired which side of the line chefs, florists, hairstylists, tailors, and makeup artists would fall. Justice Stephen Breyer expressed concern that this position would “undermine every civil rights law.”¹³⁹

Every single question asked highlights the toughest question in this case: Where do we draw the line? Speculators thought the Supreme Court would likely try to thread that needle by issuing a narrow decision that does not massively unsettle either First Amendment or anti-discrimination rights.¹⁴⁰

VII. THE WORST CASE SCENARIO

On June 4, 2018, the Supreme Court ruled in favor of Jack Phillips, the Baker.¹⁴¹ The Court ruled that Mr. Phillips’ religion freedom was being stifled. However, Mr. Phillips Constitutional right was not being hindered by the opposing party; the Supreme ruled in favor of Mr. Phillips, because he was treated unfairly by the Civil Rights Commissioner who oversaw his case.¹⁴²

Under the First Amendment’s Free Exercise clause, a State has a duty not to base laws or regulations on hostility to a religion or a religious viewpoint. The Free Exercise clause bars even subtle departures from neutrality on matters of religion. During the Commission’s hearing, the Commissioner’s lack of neutrality was less than subtle:

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. 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.¹⁴³

¹³⁹ *Id.*

¹⁴⁰ Miller and Benson, *supra* n. 121.

¹⁴¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

¹⁴² *Id.* at 1724.

¹⁴³ *Id.* at 1729.

Ultimately, (and rightfully so) the Supreme Court ruled the Commission's actions violated the Free Exercise Clause, having no choice but to reverse the decision in favor of Mr. Phillips.¹⁴⁴ The Supreme Court based their decision on a gross negligence of procedural fairness. However, the Court did not resolve the issue at the heart of the matter, which means this issue will inevitably come again. Essentially, the Supreme Court tabled the issue for another time. When that new issue arises, the Court sooner or later must make a final decision, but must do so delicately to not infringe on either Constitutional right.

If the Supreme Court of the United States rules in favor of sexual autonomy without creating a finite distinction similar to the ruling in *Hands On Originals* or *Azucar Bakery*, there is a legitimate fear that advocates for sexual autonomy will push too hard on religious freedom. Unfortunately, the Kentucky ruling in *HOO* is unpublished, for reasons currently unknown. Due to its lack of precedential value, I do not expect anyone to petition for its appeal, but an improper analysis of Masterpiece Cakeshop's or similar case's outcome could put its holding in jeopardy. The public could be skewed to think that the ruling in *HOO* is essentially overturned based on *Hands On Original's* refusal to serve a homosexual couple which has since been "outlawed" by the *future case's decision upholding discrimination against the religious shop owning*. Although *Azucar Bakery* was ruled by applying the same reasoning as *HOO*, it is likely that its opinion will not be in jeopardy due to its congruence with popular opinion that anti-gay rhetoric is unlawful and uncharitable.¹⁴⁵

On the other hand, *HOO* could be seen as a mistake and further criticized because it was not published. However, I sincerely

¹⁴⁴ *Id.* at 1724.

¹⁴⁵ "Many people of faith are convinced that their ability to believe, proclaim and practice their genuine faith convictions is in danger not just of ridicule but also of punishment. They hear themselves routinely — and unfairly — compared to racist bigots. They know that racial bigotry in the marketplace is illegal; indeed, they agree with the laws that make it so, such as the Civil Rights Act of 1964, and believe those laws are righteous and, more to the point, constitutional . . . [T]hey also believe that only Christians are targeted for refusal to celebrate same-sex unions . . . and they expect that, absent a new 'test' emerging from the [Masterpiece Cakeshop], their civil right of free exercise of religion will be erased, quietly and quickly, from the constitutional canon." Hugh Hewitt, *Why Christians will stick with Trump*, THE WASHINGTON POST (Oct. 5, 2017) https://www.washingtonpost.com/opinions/why-christians-will-stick-with-trump/2017-10/05/7d7d2bb6-a922-11e7-850e-2bdd1236be5d_story.html?utm_term=.d904b793abd9 (last visited Feb. 14, 2018).

believe, the Kentucky Court's ruling that a person may refuse based on explicit message should be emphasized and is worth noting in the Supreme Court's ultimate decision. The Supreme Court has stated in *Hurley*, "[T]he Constitution looks beyond written or spoken words as mediums of expression,"¹⁴⁶ but drawing the line at explicit messages is a clear line that best caters to both parties. Best-case scenario, the Supreme Court uses *HOO* as a distinguishable case based on explicit message while inevitably ruling in favor for the same-sex couple.

Equally bad and potentially detrimental to the sexual autonomy community would be any outcome in favor of the religious shop owner, not based on a procedural technicality. A ruling for religious shop owner would create an arbitrary line for the sake of line drawing. If the Supreme Court labels a baker an artist giving him permission to censor every bit of batter and frosting he begins to "sculpt," then the floodgates will open, causing sincere believers to cry out that the sanctity of their works of "art" must be protected. The Supreme Court will create a new and novel issue of what professions count as artists, which is utterly ridiculous based on the circumstances.¹⁴⁷ The Supreme Court would proceed profession by profession, deciding which jobs possess the aptitude of skill and artistry that should be allowed to discriminate against homosexuals and not participate in their same-sex wedding. In matter's such as *Masterpiece Cakeshop* when there are no distinct messages or differences in the product, the only logical choice is to side with couple asking for a cake or a bouquet for their wedding, but the decision must be done so carefully. I do believe that sincere faith holders will be sacrificing more in this compromise; Religious freedom for private business owners will be limited to literal words and phrases and must make stock structure products for all of their customers. Meanwhile, same sex couples may have to live with products where they will write their own messages and provide their own cake toppers.

¹⁴⁶ *Hurley v. Irish-American Gay*, 515 U.S. 557, 569 (1995); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002) (noting that the First Amendment protects expression with artistic value); *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).

¹⁴⁷ Justice Kagan expresses this concern in her questioning during the hearing and alludes that any line would be arbitrary at best. *Miller and Benson*, *supra* n. 121.

IX. CONCLUSION

Both sexual Autonomy and religious freedom deserve a place in today's society. A decision in Masterpiece Cakeshop should have been decided with a delicate compromise and dual respect for both protected classes.

The Supreme Court's lack of decision is perplexing, especially when The Court of Appeals of Colorado echoed the sentiments of HOO and the Washington Flower's case. Lines have been drawn, but the courts are standing firmly on those lines, swaying neither way for fear of either backlash or the overcorrection that will arise from their decision. Either way, the picture has been painted and just needs to be framed correctly.

The decision to serve or deny any protected group must never hinge on specific treatment based on viewpoint. Such discriminatory treatment is unlawful and should be enacted as such. Although, the Supreme Court has ruled, "the Constitution looks beyond written or spoken words as mediums of expression,"¹⁴⁸ a compromise must be drawn at explicit words or this delicate compromise will never be reached. Without explicit speech to the contrary in the form of a topper or writing on said cake, the maker can rest assured that his opinion of a same-sex union can neither be confirmed nor denied. At the end of the day, as long as the cake maker is not compelled to write a statement or engage in written commitment to a belief he deems in conflict with his religious beliefs, the cake he makes for a same-sex wedding is nothing more than another product in his store for sale. When it comes to products for sale in any public accommodation, a bouquet is just a bunch of flowers and a cake is just a cake.

¹⁴⁸ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (22); *Hurley v. Irish-American Gay*, 515 U.S. 557, 569 (1995).