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# Discrimination at Places of Public Accommodation After MASTERPIECE CAKESHOP LTD v. COLORADO CIVIL RIGHTS COMMISSION

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# DISCRIMINATION AT PLACES OF PUBLIC ACCOMMODATION AFTER *MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION*

***by***

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The recent decision in *Obergefell v Hodges* [1] provided members of the LGBT community with much needed forward momentum towards equality. In that opinion, the Supreme Court extended the fundamental right of marriage to same-sex couples. Therefore, when the court announced it would review the case *Masterpiece Cakeshop Ltd. v Colorado Civil Rights Commission*, many assumed it would also advance gay rights another step. Given the circumstances of the case, such a perspective was not unrealistic. The case involved two gay men in Colorado who were refused a wedding cake for their marriage ceremony by a Denver bakery. It was exactly this type of blatant discrimination that Colorado's anti-

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discrimination statute (Colorado Anti-discrimination Act also known as CADA) [2]was supposed to prevent. Despite statutory protection, however, similar types of discrimination occur regularly. In its *amicus* brief, for example, the Lambda Legal Defense Fund noted "With disturbing frequency, LGBT people are confronted by 'we don't serve your kind' refusals and other unequal treatment in a wide range of public accommodations contexts." [3] Thus, the Supreme Court had an opportunity to send a message that discrimination at place of public accommodation would not be tolerated.

Therefore, it came as a disappointment to many that the *Masterpiece Cakeshop* decision did not rule in favor of the gay men or protect this class of individuals. Instead, the court chose a very narrow ruling focused on an error in the administrative-level process. The decision missed an important opportunity to establish precedent to protect the LGBT community from discrimination.

## *HISTORY OF THE CASE*

The controversy began in 2012 when David Mullins and Charlie Craig, along with Craig's mother, went shopping for a wedding cake in Colorado. Although they could not get married in that state, they planned a ceremony in Massachusetts with the reception to follow in Colorado. The trio visited a bakery, Masterpiece Cakeshop, Ltd. owned by Jack Phillips. There, they looked at a book of cake designs that Phillips had created. As the discussion ensued, and it became evident to Phillips that the men were talking about a wedding for themselves, he refused to continue the discussion, explaining that the Company had a policy of not creating wedding cakes for same-sex couples. He offered to make them

any other kind of cake, but could not, based on his religious beliefs, make a cake that supported gay marriage.

Significantly, the entire discussion about the wedding cake took less than twenty seconds. There was no discussion of what words, symbols or designs the couple might want. As far as the baker Jack Phillips knew, the cake ultimately requested by the couple could have been a plain white one. But the discussion never reached that point as Phillips ended it as soon as he learned that the men were gay.

Ultimately the men did marry and celebrated with a wedding cake baked by another store in Colorado. But understandably, they did not forget the rejection and discrimination they endured. Subsequently, they filed a discrimination claim with the Colorado Civil Rights Division.

Colorado's anti-discrimination statute states:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.[4]

The complaint process began by filing with the state's civil rights division, which then investigated and decided whether probable cause existed. Here, after probable cause was determined, Phillips appealed, thus moving the case before the Colorado Civil Rights Commission, an administrative board composed of seven people. During those hearings, which took place over a number of days, the Commission heard testimony from the men and from Phillips about what had transpired at

the bakery. This caused one member of the Commission to make the following statement:

> 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. 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.[5]

This statement later served as an important lynchpin when the case was appealed to the Supreme Court. It formed the basis for Justice Anthony Kennedy's majority opinion because it showed such disdain for religion thereby precluding a fair review of free exercise arguments.

The Commission went on to affirm the findings of the Division and held that Phillips violated CADA. It ordered Phillips to design wedding cakes for both same-sex and opposite-sex couples and to train his staff about compliance with the discrimination law. The cake shop appealed that decision to the Colorado Court of Appeals where it was again upheld [6] and then to the United States Supreme Court, which granted *certiorari*. By now, the case had attracted national attention. Many organizations weighed in on a variety of constitutional issues. Over 100 amicus briefs were filed by organizations ranging from the Cato Institute and Foundation for Moral Law to the Transgender Law Center and National Women's Law Center, First Amendment advocates, law professors and a multitude of religious organizations.

***PETITIONER PHILLIP'S BRIEF***

Phillip's suddenly underwent a complete transformation, from a mere baker to a "cake artist." In the Petition for Certiorari, his attorneys described him as, "Designing and creating specially commissioned cakes…(as) a form of art and creative expression, the pinnacle of which is wedding cakes. Phillips pours himself into their design and creation, marshaling his time, energy, and creative talents to make a one-of-a-kind creation celebrating the couple's special day and reflecting his artistic interpretation of their special bond."[7]

"Coupled with the Petitioner's artistry: they continued, "is the source of his abilities: his deep and abiding religious beliefs. Phillips believes that he …honors God through his work by declining to use his creative talents to design and create cakes that violate his religious beliefs. This includes cakes with offensive written messages and cakes celebrating events or ideas …celebrating Halloween (a decision that costs him significant revenue), anti-American or antifamily themes, atheism, racism, or indecency." [8]

By characterizing Jack Phillips as a creative artist and a deeply religious man, the stage was set for the legal arguments which included three themes. First, that being forced to make a cake for a same-sex wedding violated Phillip's freedom of religion; second that forcing him to make the cake interfered with his free exercise rights; and third, that forcing him to make the cake was in effect making him speak in favor of gay marriage. Because the cake would be seen in public and everyone would know he made it, he was being forced to portray gay marriage positively. In short, the state was coerced or compelled his speech.

***The Free Exercise Argument***

Scholars may differ on whether or not making a cake is an artistic endeavor protected by the First Amendment. But assuming that it is, then historically, public accommodation laws like Colorado's anti-discrimination statute have withstood First Amendment challenges. If this were not so, then discrimination laws would always be subject to a Free Exercise Clause argument. For example, a store owner could deny selling to African Americans on the basis of religious beliefs or refuse to sell goods to women.

The precedent for this is an opinion written by Justice Scalia in *Employment Division v. Smith*. [9] Two men were fired from their jobs for smoking peyote. They claimed smoking was part of their religious expression. Since the law prohibiting peyote "was generally applicable to the public" and did not signal out a particular religion, it did not violate the free exercise clause. "Generally applicable to the public" is the salient feature when determining if a state statute is discriminatory on the basis of religion. Since the Colorado statute was generally applicable to the public and did not single out a particular religion, then the free exercise argument would fail, as the statute trumped the free exercise argument.

***The Coerced Speech Argument***

Just as free speech protects the right to *make* pronouncements, so too it protects people from being forced to say anything. Forcing people to make speech in favor of the government is known as coerced speech.

Coerced speech is the opposite of 'free speech.' The idea is that the government uses the actor to make pronouncements he/she would not ordinarily make to advance a cause of the state. Thus, by ordering the cake maker to comply with the Colorado anti-discrimination statute and make cakes for same-

sex couples, the state is arguably forcing him to speak in favor of same-sex marriage. Is it within the power of the government to compel a private citizen "to utter what is not in his mind"?

The parameters of coerced speech have been well-defined by the court in three cases. In *West Virginia State Board of Education v. Barnett*[10] the State of West Virginia mandated that all students state the pledge of allegiance each morning in school. Students who refused to conform were deemed insubordinate and faced possible expulsion while their parents were subjected to fines and possible jail time. Jehovah's Witnesses brought a lawsuit against West Virginia for violating their First Amendment rights because as part of their religious beliefs, the flag is an "image" and saluting the flag a "graven image" in violation of the Bible's Exodus Chapter 20. Mandating that all students recite the pledge was therefore "a compulsion to declare a belief." [11]The Supreme Court agreed holding that

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. [12]

Similarly, in *Wooley v Maynard*,[13] Jehovah's Witnesses opposed a New Hampshire statute requiring cars to display a license plate with the phrase "Live Free or Die" embossed on it. In his affidavit filed with the District Court, Mr. Maynard stated, "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent." [14]Likening the license plate to a "mobile billboard" for the state's ideological message the court held that the "State may not constitutionally require an individual to

participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." [15] The court compared the case to *Barnette*, finding that the state was again forcing citizens to be instruments of adherence to an ideological point of view. "In doing so, the State invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind."[16]

Of the three cases, perhaps the most important one dealing with coerced speech is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* [17]Here, an unincorporated association (the South Boston Allied War Veterans Council referred to as the Alliance) was authorized by the City of Boston to organize and conduct the annual St. Patrick's Day Parade. As such, the Alliance was responsible for deciding what groups could march in the parade. They issued an invitation to members of the public inviting them to march in the parade and accepted nearly every group that applied except the LGBT group. [18]

The Massachusetts courts held that the parade organizers had engaged in unlawful discrimination and ordered them to include the group. The Supreme Court unanimously reversed. It explained that the state applied its public accommodation law "in a peculiar way," [19]when it required the parade organizers to alter the content of their expression to accommodate "any contingent of protected individuals with a message," [20]This violated the First Amendment right of speakers "to choose the content of [their] own message," and decide "what merits celebration,"[21] even if the state or some individuals deem those choices "misguided, or even hurtful." [22]

Hurley is especially applicable to *Masterpiece Cakeshop*, because it is one of the few examples of free speech principles overriding a state discrimination law. Hurley established that "the state cannot apply a public-accommodation law to force individuals engaged in expression to alter what they communicate, much less to celebrate something that they deem objectionable. This is particularly true for speakers, like the parade organizers in Hurley, who exclude no class of people but merely decline to express certain ideas. Similarly, it could be argued that the cake maker would be forced to alter what he (normally) communicated on his cakes if the court enforced the Colorado statute against his business.

## *THE U.S. SUPREME COURT MAJORITY DECISION*

Justice Kennedy wrote for a 7-2 majority reversing the decision of the Colorado Civil Rights Commission. At first blush, the reversal appears to allow *Masterpiece Cakeshop* to discriminate against customers based on sexual orientation. Yet the court never reached a decision about whether the bakery's free exercise and free speech rights were violated. The court never addressed the substantive questions in the case.

In his opinion, Justice Kennedy began by reassuring the LGBT community. \

> Our society has come to the recognition that gay persons and gay couples cannot treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.[23]

The primary issue in the case, and the one that most followers of the court had hoped would be resolved was whether places of public accommodation, like a store, give up religious beliefs in favor of protected classes? Could the owner of a cake shop refuse to make a wedding cake for a gay couple despite Colorado's statutory protection of gays at places of public accommodation?

As a rule, when there is a clash between business owners and protected classes, the protected classes will prevail as long as the statute giving them protection is not an arbitrary or biased law. "While those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[24] What constitutes a 'neutral and generally applicable public accommodations law' becomes key in deciding the outcome.

Phillip's case, however, might be an exception according to Kennedy, because "the baker found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs."[25] And it was exactly that decision that provoked such interest in the case. If on the one hand the statute is enforced, then the free exercise clause does not protect one's religious interests; but if religion is allowed to excuse shopkeepers from compliance, this allows shopkeepers to discriminate with impunity.

Unfortunately, the court never reached the issue of free speech, freedom or religion or whether the statute was 'neutral

and generally applicable.' And herein lies the disappointment with the decision. The court harkened all the way back to the hearing that had taken place many years before at the Colorado Civil Rights Commission. Recall that when the case was initially reviewed there, one of the commissioners made the following statement:

> 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. [26]

The court found this statement was evidence of a profound disrespect for the baker's sincere religious beliefs, thus tainting the board's decision. "The baker was entitled to a neutral decision maker who would give full and fair consideration to his religious objection."[27] The "clear and impermissible hostility" violated the baker's free exercise rights. Because the hearing board's conduct was prejudiced against the cake maker, the court did not reach a decision weighing the statute against free exercise rights.

> The delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the state itself would not be a factor in the balance the state sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.[28]

The court said that the inconsistent treatment by the Civil Rights Commission showed hostility towards Phillips' religious faith. Colorado had violated its duty "not to base laws or regulations on hostility to a religion or a religious

viewpoint."[29] The state must "proceed in a manner neutral toward and tolerant of Phillips' religious beliefs." The commission had been "neither tolerant nor respectful"; it had proceeded on the basis of "a negative normative 'evaluation of the justification' for his objection" (quoting *Lukumi*). As a result, the court did not further examine the free exercise issues, leaving the question of which should prevail---the state discrimination statute or the Petitioner's religious rights---unanswered.

Finally, because the Colorado Commission had engaged in discriminatory behavior toward Phillips (the baker), the Court overturned the decision of the Commission. This left no other options for the Mullins and Craig to appeal or have a re-hearing, to a close their discrimination complaint.

***The Kagan Concurrence***

Justice Kagan explained in her concurrence that she wished to elaborate on one basis of the Court's holding. She wanted to distinguish the current case from one involving "three other bakers" also in Colorado, a case that was working its way through the courts around the same time as *Masterpiece*. The "three bakers" refers to a case involving a man named Mr. Jack who went to three different Denver, Colorado bakeries and asked each one to make him a cake that included two Bible verses: "God hates sin. Psalm 45:7" and "Homosexuality is a detestable sin. Leviticus 18:2[2]" and then place two grooms holding hands on the top with a red "X" placed over them.[30] Each of the three bakeries refused and Mr. Jack then brought his case to the Colorado Civil Rights Commission and Division claiming religious discrimination.

In direct contravention to its holding in *Masterpiece*, the Commission and Division both held that the three bakeries

did *not* violate Colorado's discrimination statute. This was so because the bakeries could refuse to sell cakes with these particular messages to *any* customer requesting them.

To Kagan, the standard that the public accommodations law must be "neutral and generally applicable" means that all customers who come into a store must be treated the same. Therefore, she saw no contradiction between *Masterpiece* and the "three bakeries." In *Masterpiece*, the bakery was in the wrong because it would make wedding cakes for some people (heterosexuals) but not others (homosexuals); this disparate treatment is discrimination. But in the "three bakeries" none of the bakeries would make the cakes with the hateful sayings on them for any customers, thereby treating all customers the same. Therefore, the "three bakeries" did not discriminate.

### *The Gorsuch Concurrence*

Justice Gorsuch on the other hand, disagreed with Kagan's analysis. He emphasized the viewpoint of each cake maker and whether the requested cake violated *that person's* own beliefs. For example, in the "three bakers case" Mr. Jack requested cakes with messages inscribed on them denigrating same-sex marriage. All three bakeries refused because *they the bakers*, found the request offensive to their own beliefs. Gorsuch then compared the three bakers' refusal to that of Mr. Phillips, who declined to make a cake with a message in favor of same-sex marriage, because it violated his own beliefs. How could the three bakeries be free from discrimination for refusing to make the cakes when Phillips was discriminatory for refusing to make the cake? Those are opposite results for the same act. To Gorsuch this contradiction by the Commission showed that it made its decisions based on whether or not it agreed with the

message. “The Commission could not have it both ways, setting a different standard when the message was one the Commission supported (the “three bakers”) but finding discrimination when the request went against gay people. Gorsuch likened the Commission’s actions to a sliding scale that resulted in unfair and disparate decisions based on the Commission’s own prejudice.

### *The Ginsberg Dissent*

Justice Ginsberg, in contrast to Gorsuch, viewed this case from the standard of equal treatment. When the baker refused to make a cake for the two men, it was not the message on the cake, but their status as a gay couple that was significant. Phillips discriminated because he would make a wedding cake for some people (heterosexuals) but not others (homosexuals). Treating people differently because of their sexual orientation is a violation of the Colorado statute and thus the case should not have been overturned by the Supreme Court.

In the Mr. Jack case, the baker refused to make a cake with a hateful message. Because that baker would not make the “hateful cake” for anyone; therefore, all customers were treated equally. Since they were all treated equally, no one was discriminated against and there was no statutory violation. The Commission should have found such.

In short, it is not about speech or religion, but rather how the law is applied that matters, and equal treatment under the law is the test of discrimination.

## CONCLUSION

Shortly after filing his Petition with the Supreme Court, Jack Phillips received a call at his bakery. This time the person on the other end of the phone asked Phillips if he would make her a cake with a blue exterior and a pink interior. Then the

caller disclosed that the color scheme represented her transition from a male to a female. Phillips declined to make the cake [31] citing his religious beliefs as the reason.

This time, Phillips took the offensive and filed a lawsuit in Federal District Court in Denver alleging that Colorado officials are on a "crusade" against him. He argued that because he refuses to make cakes that violate his religious beliefs, the state is "out to get him". In recent years, his lawyers say, he has been targeted by potential customers eager to test the limit of the law.[32]

There is a very good reason that Phillips is back in court so soon after the Supreme Court decision. The court failed to answer the most important question at the heart of the case, namely, can places of public accommodation discriminate against protected classes? Instead the court chose to side-step the question. What impact does this have? For Phillips, he has become a target by anyone in the LGBT community who wants to prove a point and use him to litigate. For those not inclined to personally test the law, the door appears to be open to use religion as a reason to discriminate with impunity. One can imagine numerous scenarios in which business owners profess a religious belief to avoid serving any number of people. A dry cleaner who hates Muslims can claim his religion does not permit him to clean clothes of another faith; a doctor may refuse to treat a pregnant woman who is not married on religious grounds; the list is endless. Since the court provided no guidance on the issue, nor admonishment of Phillip's actions toward the gay men, there appears to be at least a tacit nod of approval for his role in violating the statute and blatantly discriminating.

Not only may the court be reflecting its own conservatism, but the allowance of discrimination and bigotry may also reflect the country's leaning toward a more conservative view

of gay rights. A poll taken after the *Masterpiece* decision showed that close to half of all Americans (46 %) believe that the owners of "wedding-based businesses, such as caterers and bakers, should be allowed to refuse service to same-sex couples if doing so violates their religious beliefs." [33] The poll was conducted by the Public Religion Research Institute and it contains alarming information including data that shows "Black American's support for conservative business owners like Phillips rose from 36% in 2017 to 45% this year while Hispanic Americans support rose from 26 percent to 34 percent." [34] Given the history of discrimination against Blacks and Hispanics, the fact that these groups support discrimination against another protected class is surprising.

Some court watchers believe that *Masterpiece II* will likely end up at the Supreme Court, but the decision this time will address religion and discrimination against gays. Given the conservative nature of the court, that may not be good news for the LGBT community. If public perception is any indication of where the court would land, religious freedom certainly seems to be the "winner." Just look at recent headlines regarding the second case against the baker:

- *Colorado end your crusade against Masterpiece Cakeshop*[35].
- *Colorado Hauls Vindicated Christian Baker Back to Court*.[36]
- *Hostility Unabated: Colorado seeks to punish cake artist Jack Phillips*[37]

If the past behavior of the court is any indication, then the fact the court found that the Colorado Civil Rights Commission showed prejudice based on one statement made by a Commission member regarding the use of religion to justify

discrimination is alarming. Compare that finding to the court's reasoning in *Trump v. Hawaii*, upholding the Muslim travel ban. In that case, despite President Trump's frequent anti-Muslim statements, the court voted 5-4 to impose a travel ban. This is clearly irrational when on the one hand a statement by a commissioner results in a finding of religious hostility but an entire political campaign and election based on banning a religious groups is not hostile. "In contrast to *Masterpiece Cakeshop*, the evidence of anti-religious animus in the Muslim ban case is unambiguous and consistent. And it all flows from President Trump, the person singularly responsible for the policy. He formally called for a "shutdown of Muslims entering the United States" in a statement that remained on his campaign website well into his presidency."[38]

Finally, if the Supreme Court does allow shop owners to use religion as a basis for discrimination, it is difficult to see where any limits would exist. Once the doors are open to discriminate against one group, then the underpinnings are in place to extend legalized discrimination against others. One reason for the supposed equal application of the law is to prevent such an outcome. Yet, given the actions of this court, the likelihood of a future outcome consistent with precedent seems unlikely.

## ENDNOTES

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8 Id.
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[10] 318 U.S. 624 (1943)
[11] *Id*. at 640
[12] *Id*. at 642
[13] 430 U.S. 705 (1970)
[14] *Id* at 714
[15] *Id*.
[16] *Id*.
[17] 515 U.S. 557 (1995)
[18] *Id.* at 561-65.
[19] *Id.* at 558
[20] *Id*. at 561
[21] *Id* at 574
[22] *Id*.
[23] 584 US ---- (2018).
[24] *Id*
[25] *Id*
[26] *Id*
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[28] *Id*
[29] *Id.*

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