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Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

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MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION

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The website for Masterpiece Cakeshop says, "Jack Phillips creates a masterpiece. Custom designs are his specialty: If you can think it up, Jack can make it into a cake!"[1]

Well, not quite. He can bake a cake. He can bake a wedding cake. He can design a wedding cake. But he won't make a cake for a same-sex couple seeking to celebrate their marriage.[2]

Masterpiece Cakeshop, Ltd., is a bakery located in a suburb of Denver.[3] Jack Phillips is the owner and operator of the bakery.[4] He is an expert baker.[5] The bakery "offers a variety of baked goods," including elaborate cakes that are custom-designed for special events, including weddings and birthday parties.[6]

Jack Phillips is also a devout Christian.[7] He seeks to "honor God through his work at Masterpiece Cakeshop."[8] One of his religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman."[9] For Phillips, creating a wedding cake for a same-sex couple would be the

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1. *Welcome!*, MASTERPIECE CAKESHOP, http://masterpiececakes.com [https://perma.cc/UJ7H-T3JC].
2. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719, 1724 (2018).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

same as participating in a celebration that conflicts with those deeply held religious beliefs.[10]

Charlie Craig and Dave Mullins planned on marrying in 2012, at a time when Colorado did not recognize same-sex marriage.[11] They intended to legally marry in Massachusetts and then have a reception later in Colorado.[12] They went to the Masterpiece Cakeshop to order a cake for their wedding from Phillips.[13] Phillips told them "that he does not 'create' wedding cakes for same-sex weddings." Phillips "explained that 'I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.'"[14]

Colorado's Anti-Discrimination Act (CADA) makes it a discriminatory practice "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."[15] Masterpiece Cakeshop is a place of public accommodation, which is defined "broadly to include any 'place of business engaged in any sales to the public and any place offering services . . . to the public.'"[16] Churches, synagogues, mosques, or other places used principally for religious purposes are excluded from the definition.[17]

Craig and Mullins filed a complaint with the Colorado Civil Rights Division, which opened an investigation into the complaint.[18] The division "found probable cause that Phillips had violated CADA and referred the case to the Civil Rights Commission."[19] The commission initiated a formal hearing before an administrative law judge, who found that Phillips had violated CADA.[20] That decision was affirmed by the commission.[21] "The Commission ordered Phillips to 'cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [it] would sell to

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1725 (quoting COLO. REV. STAT. ANN. § 24–34–601(2)(a) (2017)).
16. *Id.* (quoting COLO. REV. STAT. ANN. § 24–34–601(1)).
17. *Id.*
18. *Id.*
19. *Id.* at 1726.
20. *Id.*
21. *Id.*

heterosexual couples.'"[22] The commission also required Phillips to provide "comprehensive staff training on the Public Accommodations section of CADA," and to provide quarterly compliance reports for two years.[23]

During the hearing, some of the individual commissioners made comments that exhibited a "hostility toward the sincere religious beliefs that motivated [Phillips's] objection."[24] At various points in the meeting, "commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."[25] One of the commissioners suggested that Phillips could believe "what he want[ed]," but he could not "act on his religious beliefs" if he wanted to do business in Colorado.[26]

The clincher was a statement by a commissioner that "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust," 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."[27] That statement, stacked on the earlier statements, and reinforced by the failure of any commissioner to counter those statements, provided the basis for the Court's conclusion that the statements were "inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation."[28]

Hostility toward religion was not the only problem. The second concern was the commission's disparate treatment of similarly situated cases involving a request by William Jack that three Denver bakeries create two Bible-shaped cakes that were to be inscribed with derogatory messages about gays.[29] One requested inscription read, "Homosexuality is a detestable sin. Leviticus 18:2."[30] The Civil Rights

22. *Id.*
23. *Id.*
24. *Id.* at 1729.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 1730.
30. *Id.* at 1749 (Ginsburg, J., dissenting).

Division found no violation in the bakers' refusals to create the cakes, concluding that the bakers did not refuse to create the cakes because of Jack's creed, but rather because of the offensive nature of the message he wanted inscribed on the cake.[31]

In Phillips's case, the commission concluded that any message a wedding cake carried would be attributed to the customer, rather than to Phillips.[32] The Civil Rights Division did not consider that point in the other cases involving anti-gay marriage symbolism, however.[33]

The division also found that the three bakers in the *Jack* cases did not violate CADA, in part because the bakers were willing to sell other products to the customer.[34] In the Phillips case, the commission considered that Phillips's willingness to sell other bakery products to gays and lesbians was irrelevant.[35]

The Supreme Court thought that this disparate treatment could reasonably be interpreted as being "inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished," and that a principled rationale for the difference in treatment could not be based on the government's assessment of the offensiveness of the messages.[36]

The dual hostility justified reversal of the Colorado Court of Appeals.[37] So, are there guidelines for future cases where there may be no hostility? Justice Kennedy addressed this question in the Court's majority opinion by stating:

> The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.[38]

The statement is aspirational, but not concrete.

In her concurrence, Justice Kagan agreed with Justice Kennedy in concluding that there is no principled distinction between the Phillips case and the three Jack cases "based on the government's own

31. *Id.* at 1731 (majority opinion).
32. *Id.* at 1730.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1732.
38. *Id.*

assessment of offensiveness."[39] She understood the Court's opinion to be limited to the commission's *reasoning* in the case.[40]

Justice Kagan found the result disquieting because she saw a clear basis for distinguishing the three Jack cases, other than the government's assessment of the offensiveness of the message: William Jack requested that the bakers make a cake (one denigrating gay people and same-sex marriage) that the bakers would not have made for any customer.[41] "In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires."[42] Craig and Mullins, in contrast, asked Phillips to make a wedding cake that he would have made for an opposite-sex couple.[43] In doing so, Phillips violated CADA's principle of "full and equal enjoyment" of public accommodations of customers without regard to their sexual orientation.[44] Justice Kagan thought that "[t]he different outcomes in the *Jack* cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief."[45]

Justice Ginsburg, in a dissent joined by Justice Sotomayor, disagreed that the comments of some of the commissioners were sufficient to show bias, but agreed that the case was straightforward.[46] Phillips refused to bake a cake that he would have sold to a heterosexual couple, but the bakeries in the *Jack* cases would not have made the requested cakes for anyone.[47]

Not so fast, Justice Gorsuch said in his concurring opinion.[48] He found that the two sets of cases shared "all legally salient features."[49] The impact on the customer was the same.[50] In each case the bakers

39. *Id.* at 1733 (Kagan, J., concurring).
40. *Id.*
41. *Id.* at 1733.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *See id.* at 1748 (Ginsburg, J., dissenting) ("There is much in the Court's opinion which which I agree. . . . I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.").
47. *Id.* at 1750.
48. *Id.* at 1734 (Gorsuch, J., concurring).
49. *Id.* at 1735.
50. *See id.*

refused service to customers who were statutorily protected, one based on religious faith and one based on sexual orientation.[51] In each case the bakers refused service to adhere to their personal convictions.[52] Further, Justice Gorsuch wrote, "there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic."[53] The bakers explained that they would not sell the cakes to anyone (cakes with a derogatory message in the *Jack* cases and cakes to celebrate same-sex weddings in the Phillips case).[54] Therefore, it was the kind of cake that prompted the refusals to sell, rather than any characteristic of the people requesting the cake.[55] And, if the refusal by Phillips was "inextricably tied" to a protected class (sexual orientation), then so were the refusals of the bakers in the three *Jack* cases (people of faith).[56] In each case, refusal would be based on discrimination against a protected class.[57]

Furthermore, Justice Gorsuch said that suggesting that the case is only about "wedding cakes" and not a wedding cake celebrating same-sex marriage is not only unworkable, but also highlights the problem in the case: the same level of generality must be applied in each case.[58] The commission did not declare that the cakes William Jack requested were about weddings generally, and that because all wedding cakes are the same the bakers had to bake them. Instead, the commission accepted the views of the bakers that the specific cakes requested by Jack would have conveyed a message the bakers found offensive to their convictions.[59] That justified the bakers' refusal to provide service. Justice Gorsuch concluded that because the commission took that position in the three *Jack* cases, it had to do the same in the Phillips case.[60] Wedding cakes convey a message.[61] If the bakers in the *Jack* cases were not sanctioned, then Phillips could not be sanctioned.[62] There can be no picking and choosing—no sliding scale

51. *Id.*
52. *Id.*
53. *Id.* (emphasis in original).
54. *Id.*
55. *Id.* at 1736.
56. *Id.*
57. *Id.*
58. *Id.* at 1738–39.
59. *Id.* at 1737–38.
60. *Id.* at 1740.
61. *Id.* at 1738.
62. *Id.* at 1740.

where a "Goldilocks rule" is applied until the right level of generality is applied in each case.[63]

The Kagan-Gorsuch exchange obviously matters, but how much will depend on whether similar hostility to religion can be established in other cases. Hostile comments by individuals charged with enforcement of civil rights statutes and disparate treatment will be key in determining whether there is a violation of the free-exercise rights of those who refuse service to individuals based on protected characteristics. The principle the Court applied in *Masterpiece Cakeshop* is an important exception to the enforcement of civil rights laws against people with certain religious exceptions, but it may be a narrow one.

The inquiry is not over even if there is no hostility, however. Phillips also argued that his free-speech rights were violated by the commission.[64]

While the majority bypassed the speech issue because of a lack of clarity in the record as to whether Phillips refused to bake a cake with a message or just a cake, Justice Thomas, in an opinion joined by Justice Gorsuch, nonetheless proceeded to consider the speech issue.[65] Justice Thomas initially indicated that while the commissioners' comments were disturbing, the disparate treatment by the commission of the three *Jack* cases and the Phillips case was sufficient to justify reversal.[66] Justice Thomas wrote further to emphasize that, in his opinion, the commission violated Phillips's free-speech rights.[67]

The key elements in the free-speech claim are that baking wedding cakes is expressive conduct, and that if government requires a person to carry either its own or someone else's message, that is compelled speech in violation of the First Amendment.[68] If it is compelled speech, strict scrutiny applies.[69] There is a contrary argument that the Court's cases involving the regulation of conduct with an incidental impact on speech will trigger only intermediate scrutiny.[70] Justice

63. *Id.* at 1738.

64. *Id.* at 1727.

65. *Id.* at 1740 (Thomas, J., concurring).

66. *Id.* at 1740 ("Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights.").

67. *Id.* at 1740.

68. *Id.* at 1743–44.

69. *Id.* at 1745–46.

70. *Id.* at 1746.

Thomas rejected the intermediate scrutiny standard, which applies only in cases where expression is not targeted.[71]

While the Colorado Court of Appeals did not decide the case based on a strict scrutiny standard, and Justice Thomas initially said that he would not do so, he did reject the argument that one of the potential justifications for the law—that application of the CADA precludes denigration of same-sex couples—would be sufficient.[72] These sorts of justifications are "completely foreign to our free-speech jurisprudence," Justice Thomas wrote.[73] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[74]

In concluding, Justice Thomas repeated his warning from *Obergefell v. Hodges* that the Court's decision would "'inevitabl[y] . . . come into conflict' with religious liberty, 'as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples.'"[75] He saw *Masterpiece Cakeshop* as proof "that the conflict has already emerged."[76] While Phillips's right to "religious liberty has lived to fight another day," "in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to 'stamp out every vestige of dissent' and 'vilify Americans who are unwilling to assent to the new orthodoxy.'"[77]

The Court's cases that have prohibited government from discriminating based on sexual orientation have turned on animus or mere moral disapproval by government.[78] While the controlling principles

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

75. *Id.* at 1748 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2638 (2015) (alterations in original)).

76. *Id.* at 1747–48.

77. *Id.* at 1748 (quoting *Obergefell*, 135 S. Ct. at 2584 (Alito, J., dissenting)).

78. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 770 (2013) (restricting U.S. federal interpretation of "marriage" and "spouse" to apply only to opposite-sex unions, by Section 3 of the Defense of Marriage Act (DOMA) unconstitutional under the Due Process Clause of the Fifth Amendment); Lawrence v. Texas, 539 U.S. 558, 582 (2003) (striking down sodomy law in Texas, and by extension, invalidating sodomy laws in thirteen other states, making same-sex sexual activity legal in every U.S. state and territory); Romer v. Evans, 517 U.S. 620, 632 (1996) (holding state amendment in Colorado preventing protected status based upon homosexuality or bisexuality unconstitutional, as it did not satisfy the rational basis review to comply with the Equal Protection Clause).

have perhaps been less than clear in those cases, the decisions have drawn fire in dissenting and concurring opinions that range from claims that the decisions are the product of the "homosexual agenda,"[79] to Justice Thomas's claim in *Masterpiece Cakeshop* that *Obergefell* is part of an attempt to superimpose a new orthodoxy on the country.[80] That is one view, and it informs how some justices view the issues that arise in these cases, but it certainly doesn't resolve them.

So, what next? In *State v. Arlene's Flowers, Inc.*, the Washington Supreme Court held that a florist who refused to create a floral arrangement for a same-sex couple violated Washington's Anti-Discrimination Act, rejecting the florist's First Amendment arguments along the way.[81]

The case arose when Barronelle Stutzman, the president and owner of Arlene's Flowers, declined to serve Robert Ingersoll, who planned to marry his partner, Curt Freed.[82] While Ingersoll had been a steady customer at Arlene's for some nine years, Stutzman told Ingersoll that she could not provide flowers for his wedding because of "her relationship with Jesus Christ."[83] An "active member of the Southern Baptist church," Stutzman's "sincerely held religious beliefs included a belief that marriage can only be between one man and one woman."[84]

Stutzman was willing to sell bulk flowers and "raw materials" to Ingersoll and Freed, but her belief was that selling custom floral arrangements and accompanying customer service constitutes an endorsement of marriage equality for same-sex couples, which was inconsistent with her religious principles.[85]

After learning of Stutzman's refusal to sell flowers to Ingersoll and Reed, the Attorney General's office sent a letter to Stutzman seeking her agreement to cease discrimination on the basis of sexual

79. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.").

80. *Masterpiece Cakeshop*, 138 S.Ct. at 1747 (Thomas, J., concurring).

81. 389 P.3d 543, 552–53, 556–60 (Wash. 2017).

82. *Arlene's Flowers*, 389 P.3d 543, 548 (Wash. 2017).

83. *Id.* at 549.

84. *Id.*

85. *Id.* at 550.

orientation.[86] She was told that there would be no formal action against her if she complied.[87] She was asked in the letter to sign an "Assurance of Discontinuance," which stated that she would not discriminate with respect to "provision of wedding floral services."[88] She declined.[89] The State filed a complaint in superior court under the Washington Law Against Discrimination (WLAD) and the Consumer Protection Act, seeking an injunction and other relief.[90] Stutzman's answer asserted a variety of defenses, including that her refusal to provide wedding services to Ingersoll was protected by the state and federal constitutions.[91] She argued that application of the law in her case violated her right to free exercise of religion, free speech, and freedom of association.[92] The trial court found for the plaintiffs and awarded permanent injunctive relief and monetary damages to Ingersoll and Freed.[93] Stutzman was also found personally liable.[94]

The defendants argued on direct appeal to the Washington Supreme Court that their constitutional rights under the state and federal constitutions were violated.[95] Putting aside the state constitutional claims—because they provided no greater protection for the rights Stutzman asserted than under the federal constitution—the key issues were whether her rights to free exercise, freedom of speech, and freedom of association were violated.[96] The court rejected all of those claims.[97]

The court recognized the *Spence*[98] standard for determining whether conduct is protected expression, but noted that "[r]ecent cases have characterized this as an inquiry into whether the conduct at issue was 'inherently expressive.'"[99] The court rejected the free-speech claim based on its conclusion that "[t]he decision to either

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 550–51.
96. *Id.* at 556–67.
97. *Id.*
98. Spence v. Washington, 418 U.S. 405, 410–11 (1974).
99. *Arlene's Flowers*, 389 P.3d at 557 (quoting Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR), 547 U.S. 47, 64 (2006)).

provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding."[100]

The court applied *Employment Division v. Smith*[101] in rejecting the free-exercise claim.[102] WLAD is a neutral law of general application.[103] That triggers rational basis review, which the court found was readily met because WLAD "is rationally related to the government's legitimate interest in ensuring equal access to public accommodations."[104]

The Washington Supreme Court noted *Spence*, but applied what it thought to be an evolving standard drawn from *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[105] in asking whether the conduct is "inherently expressive."[106] Given the lack of clarity in the standard,[107] it may make little difference which of the two standards applies.

Stutzman and Arlene's Flowers petitioned the Court for a writ of certiorari. The Court granted the petition and In Arlene's Flowers, Inc. v. Washington,[108] the Supreme Court vacated the Washington Supreme Court's judgment and remanded "for further consideration in light of Masterpiece Cakeshop."

On remand, the Washington Supreme Court reaffirmed its original decision.[109] The court applied the Supreme Court's admonition in *Masterpiece Cakeshop* that an adjudicatory body must act neutrally in deciding cases involving the collision of public accommodations laws prohibiting discrimination on the basis of sexual orientation and the free exercise rights of persons refusing service based on the sexual orientation of their customers.[110]

100. *Id.*
101. 494 U.S. 872 (1990).
102. *See Arlene's Flowers*, 389 P.3d at 562.
103. *Id.*
104. *Id.*
105. 547 U.S. 47, 66 (2006) ("[W]e have extended First Amendment protection only to conduct that is inherently expressive.").
106. *Arlene's Flowers*, 389 P.3d at 557.
107. *See, e.g.*, Chris Chung, Note, *Baking a Cake: How to Draw the Line Between Protected Expressive Conduct and Something You Do*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 377, 378–79 (2018); James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind,* 61 OKLA. L. REV. 1, 8 (2008).
108. Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018).
109. 441 P.3d 1203 (Wash. 2019).
110. *Id.* at 1209.

After a detailed review of "the record for any sign of intolerance on behalf of this court or the Benton County Superior Court, the two adjudicatory bodies to consider this case," the Washington Supreme Court was "confident that the two courts gave full and fair consideration to this dispute and avoided animus toward religion."[111] The court held that *Masterpiece Cakeshop* therefore did not apply because the adjudicatory bodies were neutral in their consideration of the case.[112]

In the remainder of the opinion the court reaffirmed the positions that it had taken in *Arlene's Flowers (I).*[113] The court held that Stutzman's free speech rights were not violated because floral design is not art and is not inherently expressive, and that compelled speech is not involved because Stutzman was in no way required to participate in a same-sex wedding.[114] The court also concluded that Stutzman's right to free exercise of religion was not violated, rejecting her arguments that the Washington Law Against Discrimination violated her right to free exercise of religion because it was neutral and generally applicable because of certain patchwork exemptions from the Act for religiously motivated conduct.[115] The court held that her hybrid rights claim failed because the only fundamental right she asserted was free exercise, and that claim failed, but that even if strict scrutiny were applied the standard would be satisfied.[116]

The Washington Supreme Court's resolution of the freedom of speech and expression issues clashes with Justice Thomas's concurring opinion in *Masterpiece Cakeshop*.[117] The court made no mention of his opinion in its decision on remand, however. The conflicts highlight the importance of the speech and expression issues.

While the Washington Supreme Court concluded that floral arrangements do not meet the "inherently expressive" standard, there is certainly a strong historical argument that floral arrangements are an important form of expression.[118] If the art of floral arrangement is

111. *Id.* at 1210.

112. *Id.* at 1216.

113. 389 P.3d 543 (Wash. 2017).

114. *Id.*

115. 441 P.3d at 1228.

116. *Id.* at 1236. The statute granted an exemption for religious organizations and was inapplicable to employers with less and eight employees and because it was inapplicable to rentals of certain multi-family dwellings.

117. *Masterpiece Cakeshop*, 138 S. Ct. 1719, 1740 (Thomas, J., concurring).

118. *See Floral Decoration: Historical and Stylistic Developments*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/art/floral-decoration/Historical-and-stylistic-developments [https://perma.cc/4UXJ-KAFR].

inherently expressive, it is a short half-step to the compelled-speech conclusion, just as in *Masterpiece Cakeshop*. Phillips believed that creation of a wedding cake for an event celebrating something directly contrary to the teachings of the Bible would constitute "a personal endorsement and participation in the ceremony and relationship" that Craig and Mullins were entering into.[119] Stutzman believed that the creation of "floral arrangements is to use her 'imagination and artistic skill to intimately participate in a same-sex wedding ceremony.'"[120] The Washington Supreme Court rejected the argument, however. Justice Thomas's concurrence in *Masterpiece Cakeshop* detailed the history and uniqueness of wedding cakes and the inherent expressiveness in their design,[121] a line that could readily be followed in cases involving floral designs for weddings.

The Washington Supreme Court applied *Hurley* and *FAIR* in concluding that the Stutzman's creation of floral arrangements was not inherently expressive. Justice Thomas found *FAIR* to be "far afield" because the issue was whether the law schools could be required to provide a forum for a third party's speech, not whether the government could force an entity to carry someone else's speech.[122]

If strict scrutiny applies, the issue is whether the state's interest in eliminating discrimination based on sexual orientation is a compelling interest. Justice Thomas rejected that argument in his opinion. Individual respondents in the case argued that Colorado could compel Phillips' speech to prevent him from denigrating the dignity of same-sex couples and prevent the attendant emotional harm,[123] an argument that Justice Thomas rejected as "completely foreign to our free-speech jurisprudence."[124] The Washington Supreme Court did not reach the issue because of its conclusion that Stutzman's free speech claim failed, and it did not consider *O'Brien*'s intermediate scrutiny standard.

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

120. *Arlene's Flowers*, 389 P.3d at 550 (internal quotation omitted). Stutzman also stated that participating in a Muslim or atheistic wedding would not be an endorsement of those beliefs. *Id.*

121. 138 S. Ct. at 1743.

122. *Id.* at 1744-45.

123. *Id*.

124. *Id.*

Of course, the free-speech argument is just in a concurrence by Justice Thomas, joined by Justice Gorsuch.[125] His views may or not prevail, but they will be tested in lower state and federal courts.[126] There are other considerations, however, even if the free exercise claims are rejected because of the inability of a person operating a place of public accommodation to demonstrate that treatment under an anti-discrimination act violates *Masterpiece Cakeshop*'s neutrality mandate, and the freedom of expression arguments are rejected because a court concludes that conduct is not inherently expressive.

In some states, the balance will tip toward those providing services if the state where the issue arises has a religious freedom restoration act,[127] or if the state constitution is interpreted to provide

125. *See id.* at 1740.

126. In Klein v. Or. Bureau of Labor and Indus., 410 P.3d 1051 (Or. Ct. App. Dec. 28, 2017), rev. denied, 434 P.3d 25 (2018) (Or. Sup. Ct. 2018) (Table), the Oregon Court of Appeals, in a case similar to Masterpiece Cakeshop, held that the Kleins violated Oregon's anti-discrimination law. The Kleins argued that their rights to freedom of expression and free exercise of religion were violated. The court rejected those arguments in upholding the administrative law judges' award of damages of $75,000 and $60,000 to the same-sex couple. The Kleins petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted the writ and vacated and remanded to the court of appeals for further consideration in light of *Masterpiece Cakeshop*. 2019 WL 2493912 (2018).

127. *See State Religious Freedom Restoration Acts*, NAT'L CONF. ST.LEGISLATURES, (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/N38K-339X]. State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) is an excellent example of a state applying its constitutional provision on freedom of conscience to provide greater protection for the free exercise of religion than does the U.S. Constitution. The defendants were Old Order Amish who were issued citations for refusing to comply with a Minnesota statute requiring slow-moving vehicles to display a fluorescent orange-red triangular sign emblem when operated on the state's public highways. *See* State v. Hershberger, 444 N.W.2d 282, 284–85 (Minn. 1989). In the first case, the Minnesota Supreme Court applied federal law in concluding that their right to free exercise of religion was violated. *Id.* at 289. The Supreme Court of the United States granted certiorari, vacated the judgment, and remanded for further consideration in light of *Employment Division v. Smith*. State v. Hershberger, 462 N.W.2d 393, 395 (Minn. 1990) (hereinafter "Hershberger II") (citing Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 890 (1990)). On remand, the Minnesota Supreme Court applied the Minnesota Constitution in holding that application of the statute to the defendants violated their right to freedom of conscience under the Minnesota Constitution, Art. I, § 16. *Id.* at 396–97. Had *Smith* applied, application of the neutral state statute, one of general applicability, would not have violated the U.S. Constitution, absent a finding of a "hybrid" claim coupling a free exercise claim with another constitutional claim. *Id.* at 396. There

greater protection for free exercise (or freedom of conscience under some constitutions). In those cases, strict scrutiny will apply to government regulation infringing on sincerely held religious beliefs, even absent any showing of hostility toward religion in the enforcement of a state law against discrimination.[128]

As a coda, the Supreme Court of the United Kingdom recently decided *Lee v. Ashers Baking Co. Ltd.*,[129] involving roughly similar facts to *Masterpiece Cakeshop.* Although *Masterpiece Cakeshop* was decided after the hearing in the *Lee* case, it warranted a postscript in Lady Hale's opinion in *Lee*.[130]

Mr. Lee, who is gay, volunteers with QueerSpace, an LGBT organization in Belfast.[131] That organization held a private event to mark the end of anti-homophobia week in Northern Ireland.[132] Mr. Lee asked the McArthurs to make a cake for him.[133] He wanted a cake that included a "picture of cartoon-like characters 'Bert and Ernie,' QueerSpace's logo, and the headline 'Support Gay Marriage.'"[134] The McArthurs explained in a phone call to Mr. Lee that their business is a Christian business and that they could not print the slogan.[135] The McArthurs's religious belief is that only marriage between a man and woman is consistent with biblical teaching[136] and they run their bakery in a way that is consistent with that belief.[137]

The collision of rights played out in the same manner as in *Masterpiece Cakeshop*. Discrimination on the basis of sexual orientation with respect to goods, facilities, or services is prohibited in Northern Ireland, pursuant to the UK's Equality Act and implementing regulations in Northern Ireland.[138] On the other hand, Articles 9 and 10 of the European Convention on Human rights parallel the U.S. Constitution's First Amendment in protecting freedom of thought, conscience,

were possibilities, as the Minnesota Supreme Court noted, but it nonetheless decided the case under the Minnesota Constitution. *Id.* at 396–97.

128. *See, e.g.*, State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990).
129. [2018] UKSC 49, 2018 WL 04901027, ¶¶ 9–14.
130. *Id*. ¶¶ 59–62.
131. *Id.* at ¶ 10.
132. *Id.*
133. *Id.* at ¶ 12.
134. *Id.*
135. *Id.*
136. *Id.* ¶ 9.
137. *Id.*
138. *Id.* at ¶ 3.

religion, and expression.[139] Compelled speech principles apply in determining whether Articles 9 and 10 are violated.[140]

In the postscript to her opinion, Lady Hale read *Masterpiece Cakeshop* this way:

> The important message from the *Masterpiece Bakery* case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics. One can debate which side of the line particular factual scenarios fall. But in our case there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics. So there was no discrimination on grounds of sexual orientation. If and to the extent that there was discrimination on grounds of political opinion, no justification has been shown for the compelled speech which would be entailed for imposing civil liability for refusing to fulfil the order.[141]

139. *Id.* at ¶ 1.

140. *Id.* at ¶¶ 56–58.

141. *Id.* ¶ 62. The preceding paragraphs parse the several opinions in *Masterpiece Cakeshop*: "The majority held that "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. . . . When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires." The majority recognized that businesses could not generally refuse to supply products and services for gay weddings; but they acknowledged that the baker saw creating a wedding cake as an expressive statement involving his First Amendment rights; and contrasted the treatment that he had received, which they perceived as hostile, from the favorable treatment given to three bakers who had refused to produce cakes with messages demeaning gay persons and gay marriages. Justices Ginsburg and Sotomayor, in dissent, drew a clear distinction between an objection to the message on the cake and an objection to the customer who wanted the cake. The other bakery cases had been clear examples of an objection to the message rather than an objection to the customer. In their view, the objection in this case was to the customer and therefore a violation. Justices Kagan and Breyer, who voted with the majority on the lack of neutrality point, also accepted that the Commission could have based its reasoning on that distinction – [*sic*] the other bakers would have refused to make cakes with the demeaning messages for anyone, whereas this baker had refused to make this cake because it was a gay couple who wanted it. Justices Thomas and Alito, on the other hand, considered that to make a cake for a gay wedding was expressive in itself and thus compelling it required strict scrutiny.

The court in *Lee* nicely summarizes the ongoing dilemma: it is not readily resolvable.

An Addendum

Shortly before this article was to be published the Eighth Circuit decided *Telescope Media Group v. Lucero*,[142] the latest case to address the collision between a state's anti-discrimination law and the First Amendment rights of business owners to tailor the services they provide based on their religious beliefs.

Angel and Carl Larsen "are Christians who believe that god has called them to use their talents and their company to . . . honor God." They "shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage." They want to make wedding videos, but they want to decline any requests for their services that conflict with their religious beliefs.

The Larsens will "'gladly work with all people—regardless of their race, sexual orientation, sex, religious beliefs, or any other classification.'"[143] They "shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage," but they alleged that they "retain ultimate editorial judgment and control" in creating the videos,[144] and decline requests for any services that conflict with their religious beliefs.[145]

Their list includes requests "that, in their view, 'contradict biblical truth; promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman.'"[146]

The Minnesota Human Rights Act prohibits discrimination on the basis of sexual orientation in places of public accommodation,[147] and makes it "an unfair discriminatory practice . . . to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation

Justice Gorsuch would also not have distinguished between a cake with words and a cake without." *Id.* (internal notations omitted)
Id. ¶¶ 60–61.

142. No. 17-3352, 2019 WL 3979621, at *4 (8th Cir. Aug. 23, 2019).
143. *Id.* at *1.
144. *Id.* at *4 (8th Cir. Aug. 23, 2019) .
145. *Id.*
146. *Id*. at *1.
147. Minn. Stat. § 363A.11, subd. 1(a)(1) (2016).

because of . . . sexual orientation," and to "refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's . . . sexual orientation ... , unless the alleged refusal or discrimination is because of a legitimate business purpose.[148]

The Larsens brought a pre-enforcement challenge to these provisions in federal district court.[149] That court denied all of their claims and granted the defendants' motion for failure to state a claim upon which relief could be granted.[150]

The Larsens appealed to the Eighth Circuit, which framed the issue as whether "Minnesota can require them to produce videos of same-sex weddings, even if the message would conflict with their own religious beliefs."[151] Ten months after the case was submitted, the court held in a split opinion that it could not.

The court held that Larsens' videos are a form of speech subject to First Amendment protection. While the State argued that it was regulating conduct, not speech, the court saw the videos as a composition of individual actions that come together to produce finished videos that are media for the expression of ideas. As such, the court held that application of the Minnesota Human Rights Act to the Larsens constituted compelled speech and a content-based regulation of speech, triggering strict scrutiny.[152]

The court found the Supreme Court's opinion in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,[153] "particularly instructive." The *Hurley* Court acknowledged that anti-discrimination laws are generally constitutional, but not if in application they require speakers to alter the expressive content of their message.[154] The Court in *Hurley* concluded that it did.[155]

The Larsens asked the Eighth Circuit to draw the line in their case exactly as Supreme Court did in *Hurley* by preventing government

148. *Id*. § 363A.17(3).
149. Telescope Media Group v. Lindsey, 271 F.Supp.3d 1090, 1097 (D. Minn. 2017).
150. *Id*. at 1128.
151. *Telescope Media Group*, 2019 WL 3979621, at *1.
152. *Id.* at *5.
153. 515 U.S. 557 (1995).
154. *Id.* at 572-73.
155. *Id.* at 573 ("This use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.").

"from requiring their speech to serve as a public accommodation for others,"[156] and the court obliged.[157]

Then, drawing on Supreme Court decisions, some involving freedom of association and some a regulation of the content of speech, the court summarized by noting "[t]he unmistakable message," a noncontroversial one, of course, "is that antidiscrimination laws can regulate conduct, but not expression."[158]

As the court saw it, acceptance of Minnesota's position that only conduct is regulated, not speech, means that the MHRA could be applied expansively:

> In theory, it could use the MHRA to require a Muslim tattoo artist to inscribe "My religion is the only true religion" on the body of a Christian if he or she would do the same for a fellow Muslim, or it could demand that an atheist musician perform at an evangelical church service. In fact, if Minnesota were to do what other jurisdictions have done and declare political affiliation or ideology to be a protected characteristic, then it could force a Democratic speechwriter to provide the same services to a Republican, or it could require a professional entertainer to perform at rallies for both the Republican and Democratic candidates for the same office.[159]

The court held that when "Minnesota seeks to regulate speech itself as a public accommodation, it has gone too far under *Hurley* and its interest must give way to the demands of the First Amendment," but that its "holding leaves intact other applications of the MHRA that do not regulate speech based on its content or otherwise compel an individual to speak."[160]

The court also held that the Larsens free exercise claim could proceed because it fit within the hybrid claim exception in *Employment Division, Department of Human Resources of Oregon v. Smith*.[161] While *Smith* held that the application of neutral, generally applicable laws that substantially burden a person's free exercise rights will trigger only rational basis review, coupling the free exercise claim with another constitutional – creating a hybrid claim – will trigger strict scrutiny.[162]

156. *Id.* at *7.
157. *Id.*
158. *Id.* at *8.
159. *Id.* (citations omitted).
160. *Id.* at *10.
161. 494 U.S. 872 (1990).
162. *Id.* at 881-82.

Minnesota argued that the Court's statement was dictum, but the Eighth Circuit rejected the argument, concluding that it was not dictum and that the Eighth Circuit had accepted the theory in 1991 in *Cornerstone Bible Church v. City of Hastings*.[163]

Having accepted the theory, the court acknowledged that "it is not at all clear that the hybrid-rights doctrine will make any real difference in the end," and that "given the fact that the free speech claim asserted by the Larsens already triggers strict scrutiny, so that "as a practical matter . . . the fact that the videos have religious significance may not move the needle much."[164] The court left it to the district court on remand to allow them to develop the claim.[165]

Judge Kelly dissented from these holdings in a lengthy dissent. She would have held that the MHRA regulates conduct, not speech, and that the fact that the service that the Larsens provide is expressive does not convert it to a content-based regulation of speech.[166] She also rejected the hybrid claim, in part because she saw the *Cornerstone Bible Church* as recognizing only a possibility that *Smith's* dicta could support such a claim and in part because the free speech claim failed as the hybrid link.[167]

The conflict continues, but the analytical lines are drawn. To summarize, the Minnesota Human Rights Act makes it "an unfair discriminatory practice . . . to deny any person the full and equal enjoyment of the goods, *services*, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sexual orientation."

In *Telescope Media*, the public accommodation is the wedding videography service the Larsens provide, not the simple sale of goods. The service includes the creative production of wedding videos. That creation is expressive. That expression is speech. Interference with that creative expression through forced compliance with the MHRA is a content-based regulation of speech and it is compelled speech.

163. 948 F.2d 464, 472–73 (8th Cir. 1991). The hybrid rights theory has been the subject of a number of articles, some of which have been critical of the concept. *See, e.g.*, Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 573-74; Comment, Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175 (2015); Note, *The Best of A Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494 (2010).

164. *Telescope Media Group*, 2019 WL 3979621, at *11.

165. *Id.*

166. *Id.* at *14 (Kelly, J., concurring in part and dissenting in part).

167. *Id.* at *27.

That line of argument is short-circuited if the application of an anti-discrimination law is viewed as a conduct-based regulation, with an incidental impact on speech. At best, it would trigger intermediate scrutiny.

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