Suffolk Journal of Trial and Appellate Advocacy

Volume 24 | Issue 1 Article 22

1-1-2019

Constitutional Law - Let Them Eat Cake - Masterpiece Cakeshop, LTD. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018)

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Recommended Citation
24 Suffolk J. Trial & App. Advoc. 315 (2018-2019)

CONSTITUTIONAL LAW—LET THEM EAT CAKE—*MASTERPIECE CAKESHOP, LTD. V. COLO. CIVIL RIGHTS COMM'N*, 138 S. CT. 1719 (2018).

The First Amendment to the United States Constitution protects an individual's free exercise of religion.[1] The Fourteenth Amendment ensures no state shall deny someone equal protection under the law.[2] Flowing from these fundamental freedoms is an oft-deliberated balance between religious exemptions and antidiscrimination laws in cases involving sexual orientation.[3] In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[4] the United States Supreme Court considered whether the Colorado Civil Rights Commission examined the state's possible religious hostility when adjudicating the case.[5] The Court held that the Colorado Civil Rights Commission did not rule with the religious neutrality required by the Constitution.[6]

Masterpiece Cakeshop, a bakery in Lakewood, Colorado, offers a variety of baked goods including custom-designed cakes for events such as weddings and birthdays.[7] Jack Phillips, an expert baker who has owned and operated the cakeshop for over twenty-four years, is a devout Christian.[8] Due to Phillips's deeply-held religious beliefs, he claimed that making a wedding cake for a same-sex couple was a violation of his religious principles.[9] Charlie Craig and Dave Mullins, a gay couple, visited

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[1] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[2] *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[3] *See* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J. 201, 203 (2018) (describing tension between religious exemptions and antidiscrimination laws in sexual orientation cases).

[4] 138 S. Ct. 1719, 1724 (2018).

[5] *See id.* (introducing main issue in *Masterpiece Cakeshop*). Caution against religious hostility, or the state's bias against a citizen's religious belief, calls for a neutral application of a State's law in a Free Exercise Clause case. *Id.* at 1733-35 (Kagan, J., concurring).

[6] *See id.* at 1724 (majority opinion) (setting forth holding).

[7] *See id.* (describing cakeshop's offerings to customers).

[8] *See id.* at 1724 (citation omitted) (introducing cakeshop's owner). In the complaint, Phillips "explained that his 'main goal in life is to be obedient to' Jesus Christ and Christ's 'teachings in all aspects of his life' and . . . seeks to 'honor God through his work at Masterpiece Cakeshop.'" *Id.*

[9] *See id.* (describing Phillips's opposition to making wedding cakes for gay couples). In the complaint, Phillips said, "'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.'" *Id.*

Masterpiece Cakeshop in the summer leading up to their wedding hoping to order a cake for their celebration.[10] Phillips explained to the couple that he did not create wedding cakes for same-sex couples because of his religious opposition to same-sex marriage and further because Colorado did not recognize same-sex marriage at the time.[11] In September 2012, shortly after the couple's visit to Masterpiece Cakeshop, Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop.[12]

The Colorado Anti-Discrimination Act (CADA) prohibits discrimination on the basis of sexual orientation and forbids the discriminatory practice of denying "public accommodation" to same-sex couples.[13] The Colorado Civil Rights Commission, an appellate body established by CADA to review matters of discrimination, conducted a formal hearing addressing the alleged discrimination of Craig and Mullins by Phillips.[14] At the hearing, Phillips argued that requiring him to make a

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[10] *See Masterpiece Cakeshop*, 138 S. Ct. at 1724 (pointing out how Phillips refused to service same-sex couple). At the time of the 2012 encounter, Colorado did not recognize same-sex marriage. *Id.* As such, Craig and Mullins planned to first legally wed in Massachusetts and later hold a celebration with their family and friends in Denver, Colorado. *Id.*

[11] *See id.* (explaining Phillips's reasoning for refusing to make wedding cake). Phillips further explained in his complaint that "'to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship [Craig and Mullins] were entering into.'" *Id.*; *see also* Kitchen v. Herbert, 755 F.3d 1193, 1199 (10th Cir. 2014) (holding state may not deny marriage license based solely on sex). Following *Kitchen*, county clerks for states within the Tenth Circuit, which includes Colorado, began issuing marriage licenses to same-sex couples. *See* John Aguilar, *Boulder County begins issuing same-sex marriage licenses; AG says no*, DENVER POST (June 25, 2014, 10:14 AM), https://www.denverpost.com/2014/06/25/boulder-county-begins-issuing-same-sex-marriage-licenses-ag-says-no/ (describing issuance of marriage licenses to same-sex couples).

[12] *See Masterpiece Cakeshop*, 138 S. Ct. at 1725 (elucidating Craig and Mullins's decision to sue Masterpiece Cakeshop). In the complaint, the couple alleged they were "denied 'full and equal service' at the [cakeshop] because of their sexual orientation and that it was Phillips'[s] 'standard business practice' not to provide cakes for same-sex weddings." *Id.*

[13] *See* COLO. REV. STAT. § 24-34-601(2)(a) (2018) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . ."). CADA defines "public accommodation" broadly to include "any place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes." *Id.* at § 24-34-601(1).

[14] *See Masterpiece Cakeshop*, 138 S. Ct. at 1725 (explaining how *Masterpiece Cakeshop* was initially adjudicated). Complaints arising under CADA are addressed, in the first instance, by the Colorado Civil Rights Division and then, if probable cause is found, the matter is referred to the Colorado Civil Rights Commission. *Id.* During the Commission's formal public hearings, two commissioners made comments that the Court deemed to "cast doubt on the fairness and impartiality of the Commission's adjudication." *Id.* at 1730. One commissioner stated that "Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'" *Id.* at 1729. Another commissioner stated that using the freedom of religion

cake for a same-sex couple would violate his First Amendment rights to free speech and free exercise of religion.[15] However, the Colorado Civil Rights Commission ordered Phillips to "'cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [the bakery] would sell to heterosexual couples.'"[16] Phillips appealed to the Colorado Court of Appeals which affirmed the Commission's decision.[17] After the Colorado Supreme Court declined to hear the case, the Supreme Court of the United States granted certiorari.[18]

The Free Exercise Clause of the First Amendment protects citizens' right to practice their religion free from masked or overt government hostility.[19] With respect to the Constitution's guarantee of free exercise of religion, the government cannot impose burdens that are hostile to a citizen's religious beliefs and cannot act in a manner that presumes the illegitimacy of a citizen's religious beliefs and practices.[20] While it is true that the religious activities of individuals are subject to regulation by the states in the exercise of their power to promote the health, safety, and general welfare of

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to justify discrimination like slavery and the Holocaust are some of the "most despicable pieces of rhetoric that people can use." *Id.* at 1729 (quoting Tr. of Oral Arg. 11-12).

[15] *See id.* at 1726 (explaining Phillips's legal argument).

[16] *See id.* (alteration in original) (quoting App. to Pet. For Cert. at 58a) (explaining Commission's holding). The Civil Rights Commission did not agree that Phillips's creating a wedding cake for Craig and Mullins would force him to adhere to "'an ideological point of view'" that would be seen as violating his freedom of speech. *Id.* (quoting App. to Pet. for Cert. 75a). Furthermore, the Commission upheld the view that CADA is a "'valid and neutral law of general applicability'" and in applying it to the present case, the free exercise of religion clause of the First Amendment was not violated. *Id.*

[17] *See id.* (recognizing Phillips's appeal). The court reasoned that the "Free Exercise Clause 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability' on the ground that following the law would interfere with religious practice or belief." *Id.* at 1727 (citing Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 289 (2015)).

[18] *See id.* (announcing Supreme Court's decision to hear *Masterpiece Cakeshop*).

[19] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)) (citation omitted) (quoting Bowen v. Roy, 476 U.S. 693, 703 (1986)) (citation omitted) ("Facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.' Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *see also* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 696 (1970) (Harlan, J., concurring) ("The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.").

[20] *See Church of Lukumi Babalu Aye*, 508 U.S. at 543 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."); *see also* Braunfield v. Brown, 366 U.S. 599, 607 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.").

their citizens, it is also true that the states cannot deny religiously-grounded conduct protected by the Free Exercise Clause of the First Amendment.[21]

Supreme Court decisions have established that gay persons and couples may not be discriminated against because of their sexual orientation and are considered a protected class of citizens.[22] While people with religious objections to a protected class are accommodated, these objections generally do not allow business owners to deny people equal access to goods and services.[23] Historically, the Supreme Court protects people from discrimination in the name of religious liberty, particularly discrimination of individuals in a protected class.[24]

At the time the events leading to this litigation unraveled, Colorado did not recognize the validity of same-sex marriages.[25] In the past, Colorado prohibited discrimination, including discrimination on the basis of sexual orientation, in places of public accommodation.[26] Cases concerning

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[21] *See* Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."); *see also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (holding certain religiously-grounded conduct is beyond state's control, "even under regulations of general applicability.").

[22] *See* Romer v. Evans, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); *see also* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."); Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) ("[U]nder the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of [the fundamental right to marry].").

[23] *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572 (1995) ("[P]rovisions . . . are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not . . . violate the First or Fourteenth Amendments."); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402, n.5 (1968) (per curiam) (quoting Newman v. Piggie Park Enters., Inc., 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring)) (asserting defendant's belief that Act "contravenes . . . will of God" and impedes "free exercise of . . . religion" are not grounds for discrimination). In *Hurley*, the focal point of the state's prohibition was to discriminate "against individuals in the provision of publicly available goods, privileges, and services." 515 U.S. at 572.

[24] *See Obergefell*, 135 S. Ct. at 2593 (holding right to marry is fundamental right guaranteed under Due Process and Equal Protection Clauses); *see also* Roe v. Wade, 410 U.S. 113, 169-71 (1973) (declaring pro-life religious liberties do not undermine women's equality); Loving v. Virginia, 388 U.S. 1, 2 (1967) (preventing marriage based on race violates Equal Protection and Due Process Clauses); Brown v. Bd. of Educ., 347 U.S. 483, 486 (1954) (holding racial segregation of public schools deprives minority group of equal protection).

[25] *See* COLO. CONST. art. II, § 31 (2012) ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); *see also Obergefell*, 135 S. Ct. at 2593 (holding marriages, both heterosexual and same-gender, are guaranteed under Fourteenth Amendment); United States v. Windsor, 570 U.S. 744, 749 (2013) (ruling Defense of Marriage Act is unconstitutional).

[26] *See* 1885 Colo. Sess. Laws 132-33 (guaranteeing equal enjoyment of certain public places for all regardless of race, color, or servitude); *see also* 1895 Colo. Sess. Laws 139 (amending

discrimination are adjudicated under the CADA which is an administrative system tasked with resolving discrimination claims.[27] The administrative system is required to review all Free Exercise Clause cases with neutrality and absent of hostility towards citizens' religious beliefs.[28] In 2015, the Colorado Civil Rights Commission heard a series of cases involving complaints that alleged bakers discriminated against citizens by refusing to bake cakes depicting hostile messages aimed towards gay persons.[29] The Commission found that the bakers' ultimate refusal to bake cakes displaying hateful messages fell within the constitutional rights of the bakers.[30]

In *Masterpiece Cakeshop*, the Supreme Court concluded that the Colorado Civil Rights Commission failed to decide Phillips's case with the neutrality required when addressing Free Exercise Clause cases.[31] According to the Court, inappropriate and dismissive comments made by two commissioners during the hearing process indicated a lack of due consideration for Phillips's free exercise rights and the dilemma he faced.[32]

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previous antidiscrimination law to extend protection to "all other places of public accommodation"); *see also* COLO. REV. STAT. §24-34-601(2)(a) (2018) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . ."). CADA was amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation in places of public accommodation. § 24-34-601(2)(a).

[27] *See* COLO. REV. STAT. §§ 24-4-105(14), 24-34-306 (2018) (laying out procedural determinations).

[28] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (highlighting Free Exercise Clause cases must be examined free of hostility toward citizen's religious beliefs).

[29] *See* Jack v. Gateaux. Ltd., Charge No. P20140071X (Colo. Civ. Rights Div. Mar. 24, 2015) http://www.adfmedia.org/files/GateauxDecision.pdf; Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X (Colo. Civ. Rights Div. Mar. 24, 2015) http://www.adfmedia.org/files/LeBakerySensualDecision.pdf; Jack v. Azucar Bakery, Charge No. P20140069X (Colo. Civ. Rights Div. Mar. 24, 2015) http://www.adfmedia.org/files/AzucarDecision.pdf [hereinafter *Jack cases*] (offering cases with similar factual circumstances). In each of these cases, the plaintiff requested two cakes, one that resembled an open Bible and decorated with the biblical verses "God hates sin. Psalm 45:7," and "Homosexuality is a detestable sin. Leviticus 18:2." *Jack cases*, *supra* note 29. The second cake depicted two groomsmen holding hands with a red X over the image and the words, "God loves sinners" and "While we were yet sinners Christ died for us. Romans 5:8." *Id.*

[30] *See Jack cases*, *supra* note 29 (concluding bakers acted lawfully in declining to create cakes that demeaned gay persons and weddings).

[31] *See Masterpiece Cakeshop*, 138 S. Ct. at 1729 ("The Civil Rights Commission's treatment of [Phillips's] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.").

[32] *See id.* ("Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state' [and] 'if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.'"). Another commissioner commented during the hearing:

The majority opinion warned that these comments made by the commissioners were inappropriate, especially when considering the commission's primary responsibility is to uphold the fair and neutral enforcement of Colorado's antidiscrimination law.[33]

The Supreme Court wrongly concluded that Craig and Mullins should lose the case by relying too heavily on the comments made by two commissioners in deciding for Phillips.[34] These comments, which came from only two of seven commissioners, on one of the four decision-making entities, are not probative in light of the totality of the circumstances and should not justify reversing the lower court's judgment.[35] The facts of this case are far removed from those of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the case the majority relied upon, where there was merely one decision-making body, the city council.[36]

The Court further misidentified the issue when it failed to properly distinguish the Jack cases from the case at hand.[37] In the Jack cases, the bakers refused to provide a cake that displayed hateful messages demeaning gay persons and gay marriage.[38] The bakers' refusal to make a cake with

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> 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.

Id.

[33] *See id.* ("To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.").

[34] *See id.* at 1729-30 (reiterating holding).

[35] *See id.* (Ginsburg, J., dissenting) (outlining steps involved in proceedings). "First, the Division had to find probable cause that Phillips violated CADA. Second, the [judge] entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips'[s] appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case *de novo*." *Id.*

[36] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (reversing city council's ruling that government's actions violated principle of religious neutrality). The minutes from a meeting showed "significant hostility" from the city council members, other city officials, and residents, towards the plaintiff and their practice of animal sacrifice. *Id.* at 541. These meetings were further interrupted when the public crowd cheered in approval of critical comments made by city council members and taunted the president of the Church of Lukumi Babalu Aye when he spoke. *Id.*

[37] *See Masterpiece Cakeshop*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting) ("Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.").

[38] *See id.* at 1751 (alternations in original) (quoting App. to Pet. for Cert. 20a, n.8) ("'The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather

Jack's requested message would extend to any customer, regardless of religion.[39]

In the present case, Phillips refused to sell any cake at all to Craig and Mullins.[40] Phillips's decision not to sell Craig and Mullins a cake—the kind of cake he regularly sold to other people—was based solely on the couple's sexual orientation.[41] Unlike the Jack cases, where the bakers refused to make cakes based on the hateful messages displayed on the cakes, a wedding cake for a gay couple does not signal support for homosexual weddings in general, but rather for that couple's wedding specifically.[42] Phillips refused to create a cake he personally found offensive based solely on the individuals' sexual orientation.[43]

The Court in *Masterpiece Cakeshop* considered whether the Colorado Civil Rights Commission reviewed Phillips's case with the religious neutrality constitutionally required by the Free Exercise Clause of the First Amendment. Deciding against Craig and Mullins, the Court mistakenly relied too heavily on careless comments made by two commissioners who made up a seven-commissioner panel and were part of a larger, four-layer proceeding. While obsessing over those trivial, off-hand comments, the majority missed the significance of the matter. Under a sensible application of CADA, Phillips's refusal to sell a wedding cake to Craig and Mullins solely on the basis of their sexual orientation and decision to marry was discriminatory toward a protected class of citizens and, therefore, unconstitutional.

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because of the offensive nature of the requested message . . . [T]here was no evidence that the bakeries based their decisions on [Jack's] religion . . . .'").

[39] *See id.* at 1750 (emphasizing differences in Jack cases). The bakers in the Jack cases would have sold Jack or anyone else any baked good including a wedding cake, as long as the bakers did not find the requested messages for the cake to be discriminatory or hateful. *Id.* at 1749. In contrast, Phillips refused to sell Craig and Mullins a cake solely because the couple is gay. *Id.* at 1751.

[40] *See id.* at 1751 (second alteration in original) ("[R]efusal 'to design a special cake with words or images . . . might be different from a refusal to sell any cake at all.'").

[41] *See id.* at 1750 ("Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.").

[42] *See id.* at 1750 (emphasis in original) ("When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied.").

[43] *See Masterpiece Cakeshop*, 138 S. Ct. at 1750 (emphasis added) ("Phillips declined to make a cake he found offensive where the offensiveness of the product was determined *solely by the identity of the customer requesting it.*").