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## LEGAL UPDATES

**Purpose.** *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

### FIRST AMENDMENT RIGHTS AND DISCRIMINATION BASED ON SEXUAL ORIENTATION IN PUBLIC ACCOMMODATIONS

Filed by the United States Supreme Court

June 4, 2018

**Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission**

**No. 16-111**

[www.supremecourt.gov/opinions/17pdf/16-111\\_j4el.pdf](http://www.supremecourt.gov/opinions/17pdf/16-111_j4el.pdf)

**Factual and Procedural Background.** In 2012, a same-sex couple requested to order a custom wedding cake from Jack Phillips, who owned and operated Masterpiece Cakeshop, Ltd. Phillips refused to create and sell a wedding cake to the couple because he was opposed to same-sex marriage, but offered to sell them other types of baked goods, such as a birthday cake. The mother of one of the grooms called Phillips and asked why he would not serve her son. Phillips explained that he was religiously opposed to same-sex marriage and noted that Colorado did not recognize same-sex marriage.

The couple filed a complaint of discrimination based on sexual orientation in violation of the Colorado Anti-Discrimination Act (CADA) with the Colorado Civil Rights Commission (Commission). The Colorado Civil Rights Division (Division) found probable cause and referred the case to the Commission, which subsequently referred the case for a formal hearing before a state administrative law judge (ALJ). The ALJ ruled in favor of the couple and rejected Phillips' arguments that compelling him to create a cake for a same-sex couple's wedding would violate his First Amendment rights to free speech and the free exercise of religion by compelling him to utilize his artistic talents to express a message that he disagreed with and which was contrary to his religious beliefs. The ALJ held that the act of preparing the cake is not a protected form of speech and would not force Phillips to adopt that ideological viewpoint. The ALJ did not view CADA as interfering with Phillips' constitutional right to free speech. Furthermore, citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the ALJ held that requiring Phillips to create the cake would not violate his right to the free exercise of religion because "CADA is a 'valid and neutral law of general applicability.'"

On appeal, the seven-member Commission held two formal, public hearings. At the first hearing, one of the commissioners stated that a business person must keep the person's religious beliefs out of the person's business practice. At the second hearing, another commissioner made statements comparing religious beliefs opposing same-sex marriage to religious beliefs justifying the Holocaust and slavery. The record does not show that the other commissioners objected to these comments made during the hearing. The Commission ruled in favor of the couple and against Phillips. Phillips appealed to the Colorado Court of Appeals (Court of Appeals).

The Court of Appeals affirmed the Commission's decision and made no mention of the commissioners' comments about religion. The Court of Appeals held that Phillips' conduct was not sufficiently

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expressive to be protected by the First Amendment. The Court of Appeals held that Phillips was not unconstitutionally compelled to “speak” by compelling him to exercise his talents to express a message with which he disagreed. The Court of Appeals also held that the First Amendment did not prohibit the Commission’s order under the Free Exercise Clause, which does not relieve an individual of an obligation to comply with a valid and neutral law of general applicability on the ground that following the law would interfere with religious practices or belief. The Colorado Supreme Court declined to hear the case, and the United States Supreme Court (Court) granted certiorari.

**Issue.** Whether the Commission’s decision that Masterpiece Cakeshop and Jack Phillips discriminated against a same-sex couple in public accommodations in refusing to create a wedding cake violated the Free Exercise Clause or Free Speech Clause of the United States Constitution.

**Analysis.** The Court placed an emphasis on the importance of government neutrality required by the Free Exercise Clause. The Court’s evidence that the Commission act with religious hostility toward Phillips was based on the comments of two of the commissioners who adjudicated the case before the Commission. The Court deemed these comments and sentiments inappropriate for an agency that is charged with enforcing antidiscrimination laws not only based on sexual orientation but also on religion.

The Court held that the Commission also showed hostility to religion by treating this case differently than three other bakers’ creation cases in Colorado involving William Jack (Jack cases). Two months before the Commission heard Masterpiece Cakeshop’s appeal of the ALJ decision, Jack visited three bakeries requesting two cakes with messages opposing homosexuality and same-sex marriage with biblical verses written on the cakes. All three bakeries refused to create the cakes as requested and Jack filed complaints against the bakeries based on religious discrimination in public accommodation in violation of CADA. The Division found no probable cause of discrimination in all three cases. The Commission subsequently affirmed the Division’s findings.

Before the Court of Appeals, Phillips objected to the different treatment of his case from the bakers in the Jack cases, arguing that the Commission had treated his religious beliefs as illegitimate but the conscience-based objections by the bakers in the Jack cases as legitimate. The Court of Appeals stated that the cases are distinguishable because the bakers in the Jack cases did not discriminate on an impermissible basis but rather “because of the offensive nature of the requested message.”

The Court expressed displeasure with the way the Court of Appeals dealt with the disparate treatment of the bakers. By concluding that Phillips’ viewpoint was more offensive than Jack’s viewpoint, the Court stated that the Court of Appeals had indicated disapproval of Phillips’ religious beliefs.

The Court held the Commission treated this case differently than the Jack cases by stating that in this case the message would be attributed to the customer, not the baker, but the Commission did not address that point in the Jack cases. In the Jack cases, the Commission found that because the bakeries were willing to sell other baked goods, including those depicting Christian themes to prospective customer cases, there was no violation of CADA, but in this case, the Commission found the fact that Phillips was willing to sell other baked goods to be irrelevant.

The Court did not address the Free Speech argument on appeal.

**Holding.** Justice Kennedy delivered the majority opinion and Chief Justice Roberts and Justices Breyer, Alito, Kagan, and Gorsuch joined. The Court held that the Commission violated the Free Exercise Clause in issuing its decision against Masterpiece Cakeshop, Ltd., and Jack Phillips by

exhibiting hostility to a religion or religious viewpoint. The Court reversed the Court of Appeals and set aside the Commission's order.

**Concurrence by Justice Kagan (Joined by Justice Breyer).** Justice Kagan opined that a comparison of the Jack cases and the Phillips cases does not suggest religious bias. Justice Kagan stated the different outcomes are a result of the three bakers in the Jack cases not violating the prohibition against discrimination in public accommodations under CADA (the bakers would not have made the cakes requested for any customers) and, by contrast, Phillips violating CADA (Phillips would have made a wedding cake for a heterosexual couple).

**Concurrence by Justice Gorsuch (Joined by Justice Alito).** Justice Gorsuch argued that the Commission failed to act neutrally toward Phillips' religious faith. He compared the Commission's treatment of Phillips to the treatment of the bakers in the Jack cases. Justice Gorsuch viewed the Commission as not penalizing the bakers in the Jack cases for refusing service on the basis of secular beliefs but penalizing Phillips for refusing service on the basis of religious beliefs. In Justice Gorsuch's opinion, this does not survive strict scrutiny.

Justice Gorsuch argued that the Commission should have applied a consistent legal rule. Justice Gorsuch argued that in both cases, the bakers refused to create the cake based on the type of cake, not on the protected characteristic of the customer; however, just as a cake requested for a same-sex wedding is usually requested by a person of a certain sexual orientation, a cake opposing same-sex marriage on religious grounds is usually requested by a person of a certain religious background. Justice Gorsuch stated that the legal rule would either need to be that actual proof of intent to discriminate on the basis of a protected class is required or that intent to discriminate is presumed from the knowing failure to serve someone in a protected class. Justice Gorsuch emphasized that the Commission cannot apply a more generous legal test or rule to secular objections than legal objections.

**Concurrence by Justice Thomas (Joined by Justice Gorsuch).** Justice Thomas opined that the prohibition on abridgment of freedom of speech includes regulation of conduct. Some applications of public accommodation laws can burden protected speech. For example, requiring a St. Patrick's Day Parade to include a parade unit of LGBT Irish-Americans violated the sponsor's right to free speech because the parade is expressive conduct. "To determine whether conduct is sufficiently expressive, the Court asks whether it was 'intended to be communicative' and, 'in context, would reasonably be understood by the viewer to be communicative.'" If the conduct is expressive, Justice Thomas opined, the state's authority to limit or compel it is restricted. Justice Thomas concluded that the conduct of creating and designing a custom wedding cake is expressive, and thus requiring Phillips to create the cake violated the First Amendment.

Justice Thomas stated that the Court of Appeals was incorrect in concluding that Phillips' conduct was not expressive. Justice Thomas also rejected several arguments of the Court of Appeals justifying the interpretation on the basis that it could be used to justify any law compelling protected speech.

Justice Thomas argued that there is a flaw with an asserted justification for CADA: that Phillips must serve same-sex couples because to do otherwise is offensive and harms the dignity of same-sex couples. He recounted: "If the only reason a public-accommodations law regulates speech is 'to produce a society free of . . . biases' against the protected groups, that purpose is 'decidedly fatal' to the law's constitutionality, 'for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.'" He argued that it is important to maintain free speech jurisprudence in light of *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

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**Dissent by Justice Ginsburg (Joined by Justice Sotomayor).** Justice Ginsburg’s dissent compared this case with the Jack cases. Phillips refused to sell a wedding cake to people because of their sexual orientation. In contrast, Jack was not sold cakes for reasons other than his religion or any other protected characteristic. Justice Ginsburg stated that it mattered that Phillips would not sell wedding cakes to other gay or lesbian people but would sell wedding cakes to heterosexual people. Similarly, it mattered that the bakers in the Jack cases would sell other baked goods to other Christians. This showed that the Phillips case and the Jack cases were dissimilar. One encountered protected basis discrimination and the other did not.

Justice Ginsburg rejected the majority’s contention, stating: “Nor was the Colorado Court of Appeals’ ‘difference in treatment of these two instances . . . based on the government’s own assessment of offensiveness.’” Phillips’ declination to make a cake was based solely on the identity of the customer. The declinations by the bakeries in the Jack cases to make cakes were based on literal messages.

Finally, Justice Ginsburg stated that the comments of one or two commissioners should not be taken to overcome the sexual orientation discrimination committed by Masterpiece Cakeshop in public accommodations by refusing to create the wedding cake because of the multiple layers of independent decision making that occurred by the Division, the ALJ, the Commission, and the Court of Appeals.

*LSA Monitor:* Amber Shanahan-Fricke, Legal Services, 515.725.7354