

COMPELLED SPEECH, EXPRESSIVE  
CONDUCT, AND WEDDING CAKES:  
A COMMENTARY ON  
*MASTERPIECE CAKESHOP V.*  
*COLORADO CIVIL RIGHTS*  
*COMMISSION*

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INTRODUCTION

It may be impolite to talk with a full mouth, but is it constitutional to ban speaking through baking a cake? In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, the Supreme Court is considering whether the First Amendment gives businesses the right to refuse to serve same-sex marriages.<sup>1</sup> This case will determine the balance between same-sex couples enjoying the “equal dignity” of marriage and those that still oppose these marriages “based on decent and honorable religious or philosophical premises.”<sup>2</sup> Wedding vendors and same-sex couples nationwide may be deeply impacted by the balance the Court strikes.<sup>3</sup>

This commentary argues that the lower courts correctly ruled that Jack Phillips did not have a right to refuse to serve Charlie Craig and David Mullins any custom-made cake for their wedding. However, cake baking can serve as expressive conduct under some circumstances not met here. Therefore, the remedy issued by the lower courts is overbroad and unconstitutional because it could force Phillips to create cakes that

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1. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111 (U.S. 2017).

2. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 2608 (2015).

3. *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (discussing a photographer who refused to take wedding photos for a same-sex couple); *Lexington Fayette Urban Cty. Human Rights Comm’n v. Hands on Originals, Inc.*, No. 2015-CA-000745, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017) (dealing with a T-shirt printer who refused to print t-shirts for a pride parade).

include speech without satisfying strict scrutiny. The Supreme Court should affirm in part and reverse in part, remanding to the lower courts to issue a remedy that explicitly does not compel expressive conduct or speech.

## I. BACKGROUND

### A. Facts

Jack Phillips owns Masterpiece Cakeshop, where he and his employees design and create custom cakes for weddings and other occasions.<sup>4</sup> When creating these unique and expensive wedding cakes,<sup>5</sup> Phillips meets with his clients to learn their preferences, desires, and wedding plans, and incorporates these personal details into the cake design.<sup>6</sup> Phillips seeks to run his business in harmony with his Christian beliefs, including by closing on Sundays and refusing to create cakes for occasions that he disagrees with, such as Halloween and same-sex weddings or commitment ceremonies.<sup>7</sup>

In 2014, Charlie Craig and David Mullins, along with Craig's mother Deborah Munn, went to Masterpiece to inquire about purchasing a unique cake for a wedding reception in Colorado to celebrate their impending marriage in Massachusetts.<sup>8</sup> After learning about their intentions, Phillips said he would not create their cake because same-sex marriage was illegal in Colorado and he would not make cakes for illegal commitment ceremonies.<sup>9</sup> Phillips said he would sell them goods for other events and the couple and Munn left.<sup>10</sup> The next day, Munn called Phillips who reiterated that he did not create cakes for any illegal weddings and added that his Christian beliefs prevented him from making cakes for any same-sex wedding, legal or illegal.<sup>11</sup> Craig and Mullins later married in Massachusetts and

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4. Joint Appendix at \*157, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, NO. 16-111, 2017 WL 4232758 (Aug. 31, 2017) [hereinafter Joint Appendix].

5. *Id.* at \*170, \*174. See MASTERPIECE CAKESHOP WEDDING, <http://masterpiececakes.com/wedding-cakes/> (last visited Mar. 25, 2018), for examples of Phillips' unique, custom-made cakes.

6. Joint Appendix, *supra* note 4, at \*161.

7. *Id.* at \*164–65.

8. They married in Massachusetts because same-sex marriage was not legal in Colorado at that time. *Id.* at \*39.

9. *Id.*

10. *Id.* at \*39, \*60.

11. *Id.* at \*39–40

celebrated with a rainbow-themed wedding cake in Colorado among family and friends.<sup>12</sup>

Craig and Mullins filed a complaint with the Colorado Civil Rights Division (Division), which enforces the Colorado Anti-Discrimination Act (CADA), that Phillips’ refusal to bake a wedding cake for a same-sex wedding constituted discrimination on the basis of sexuality.<sup>13</sup> The Division issued a probable cause determination in Craig and Mullins’ favor, which was sustained by an Administrative Law Judge (ALJ).<sup>14</sup> Phillips lost his appeals to the Colorado Civil Rights Commission and later to the Colorado Court of Appeals.<sup>15</sup> The Colorado Court of Appeals rejected Phillips’ first amendment defenses, affirming the remedy.<sup>16</sup> The Colorado Supreme Court denied certiorari,<sup>17</sup> and the United States Supreme Court then agreed to hear the case.<sup>18</sup>

### *B. Legal Background*

Masterpiece Cakeshop is a place of public accommodation subject to the Colorado Anti-Discrimination Act (CADA).<sup>19</sup> CADA forbids discrimination on the basis of, among other things, sexual orientation.<sup>20</sup> Places principally used for religious purposes, such as churches, are not covered by CADA, but Phillips does not claim Masterpiece is such an establishment.<sup>21</sup> The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech,” and this restraint also applies to state governments.<sup>22</sup> Closely held corporations, like Masterpiece Cakeshop, are protected by the First Amendment.<sup>23</sup>

Speech protection is not confined to words alone, whether written or spoken, but also to expressive conduct.<sup>24</sup> To determine whether a

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12. *Id.* at \*175–76.

13. *Id.* at \*47–52.

14. *Id.* at \*69.

15. *Craig v. Masterpiece Cakeshop Ltd.*, 370 P.3d 272 (Colo. App. 2014).

16. *Id.* at 283.

17. Joint Appendix, *supra* note 4, at \*259–60.

18. *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 466, 466–67 (2017).

19. *See* COLO. REV. STAT. § 24-34-301(5.3) (2014) (incorporating 42 U.S.C. § 12181(7)).

20. COLO. REV. STAT. § 24-34-601(2)(a).

21. *Id.*; Brief for Petitioners at \*45, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111, 2017 WL 3913762 (U.S. Aug. 31, 2017) [hereinafter Brief for Petitioners].

22. U.S. CONST. amend. I; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

23. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014) (closely held corporations should be treated just as nonprofit corporations, which can bring claims under RFRA and the Free Exercise Clause).

24. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (“Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties

regulation of conduct violates the Free Speech Clause, first the Court must decide if the conduct was expressive.<sup>25</sup> If expressive, the Court then must decide if the regulation is related to the expression.<sup>26</sup> The level of scrutiny the Court applies depends on whether the regulation indeed targets the expressive conduct; when the government compels expressive activities, strict scrutiny applies and the regulation or remedy must be narrowly tailored to a compelling state purpose.<sup>27</sup> If the regulation does not implicate expressive conduct, the regulated actor will not have any First Amendment claims to raise.<sup>28</sup> The Court has created a two-pronged test to determine whether conduct is expressive.<sup>29</sup>

The first prong is evaluating whether the conduct is traditionally protected.<sup>30</sup> The Court is able to avoid comparing the relative communicative merits of specific conduct or works by categorizing entire groups of mediums as expressive.<sup>31</sup> This conduct does not need to be articulable or even contain a “particularized message” to be expressive.<sup>32</sup> When the Court determines that regulated conduct falls under one of these mediums, it will simply apply strict scrutiny rather than evaluating the conduct for its particular expressive content.<sup>33</sup> For example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court found that the organizer of a private parade did not violate a state anti-discrimination law by refusing to let

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of the Constitution.”).

25. See, e.g., *Spence v. Washington*, 418 U.S. 405, 409–11 (1974) (the hanging of an American flag outside of a dorm room window with a peace symbol superimposed after the U.S. invasion of Cambodia was “a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government”).

26. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (the government interest in forbidding the burning of draft cards was unrelated to the suppression of anti-war speech).

27. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–801 (1988), *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 9–21 (1986) (plurality opinion) and *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 254–58 (1974) for courts that evaluated compelled speech under strict scrutiny.

28. *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 61–62 (2006) (regulations requiring law schools to engage in specific types of non-expressive speech did not give rise to a First Amendment Claim).

29. See *Texas v. Johnson*, 491 U.S. 397, 404–06 (1989) (burning flags in protest is expressive).

30. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995).

31. See Brief of American Unity Fund et al. as Amici Curiae Supporting Respondents at \*7, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111, 2017 WL 4918194 (U.S. Oct. 26, 2017) (“Having courts decide case by case whether a particular painting conveys enough of a message would require aesthetic judgments that courts are ill-equipped to make.”) [hereinafter Brief of American Unity Fund].

32. *Hurley*, 515 U.S. at 569.

33. *Id.*

a gay and lesbian group participate in the march.<sup>34</sup> Parades, the Court reasoned, are a traditionally expressive medium, a category that also includes activities such as painting, music, poetry, displaying or saluting flags, or wearing armbands.<sup>35</sup> In the Court's view, the state had, by forcing the parade organizers to include a particular group, required the organizers to adopt expressive conduct and change the message the parade was intended to convey.<sup>36</sup>

Under the second prong, not traditionally expressive mediums can receive first amendment protection if “[a]n intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it.”<sup>37</sup> For example, in *Texas v. Johnson*, the Court determined that flag burning has an “overtly political nature” that was “intentional and overwhelmingly apparent.”<sup>38</sup> This is an objective rather than subjective test because it takes into account how apparent the communication was to observers, and is highly contextual.<sup>39</sup>

In *Rumsfeld v. FAIR*, the Court applied this two-part test and found that a law requiring law schools to host military recruiters was not inherently expressive.<sup>40</sup> Under prong one, the Court contrasted traditionally expressive mediums, like parades of *Hurley* and newspapers,<sup>41</sup> with school military recruiting, which the Court determined was “not inherently expressive.”<sup>42</sup> Under prong two, the Court concluded that “there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views.”<sup>43</sup> After all, the law school was only a medium through which the recruiters expressed their own message.<sup>44</sup>

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34. *Id.* at 557.

35. *Id.* at 569.

36. *Id.* at 572–73.

37. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

38. *Id.* at 407.

39. *Id.* at 405–06, (the communication behind the burning of an American flag was “overwhelmingly apparent”).

40. *See generally* *Rumsfeld v. FAIR*, 547 U.S. 47 (2006).

41. *See* *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974) (discussing a state statute requiring newspapers to give a right to reply to political candidates attacked in editorials was unconstitutional).

42. *Rumsfeld*, 547 U.S. at 64, 66.

43. *Id.* at 65 (discussing the holding in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980)).

44. *See id.* (“There [is] little likelihood that the views of those engaging in the expressive

## II. HOLDING

The Colorado Court of Appeals upheld the Colorado Civil Rights Commission in finding that Phillips and Masterpiece Cakeshop violated CADA.<sup>45</sup> The lower court rejected Phillips’ Free Speech Clause arguments because it found that baking cakes for same-sex weddings was not expressive conduct.<sup>46</sup> It also upheld the Commission’s three-part cease and desist order.<sup>47</sup> This remedy first required that Masterpiece “cease and desist from discriminating against [Craig and Mullins] and other same-sex couples by refusing to sell them wedding cakes or any product [it] would sell to heterosexual couples.”<sup>48</sup> Second, it required Masterpiece to “take remedial measures, including comprehensive staff training and alteration to the company’s policies to ensure compliance with CADA.”<sup>49</sup> Third, Masterpiece was required to “file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.”<sup>50</sup>

## III. ARGUMENTS

### A. *Petitioner’s Arguments*

Phillips and Masterpiece concede all the relevant facts, namely that Phillips denied Craig and Mullins his services because they wanted a wedding cake to celebrate their same-sex marriage.<sup>51</sup> He argues that his refusal was based on his Christian religious beliefs which hold that same-sex weddings are immoral, and he feels that he cannot assist in what he considers to be the celebration of immoral activities.<sup>52</sup> In refusing the respondents, Phillips claims the Free Speech Clause and the Free Exercise Clause shield him from the requirements of Colorado’s anti-discrimination law. This commentary will only focus on the compelled speech defenses under the Free Speech Clause, although

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activities would be identified with the owner.”).

45. *Craig v. Masterpiece Cakeshop Ltd.*, 370 P.3d 272, 280 (Colo. App. 2014).

46. *Id.* at 286.

47. *Id.* at 294.

48. *Id.* at 286.

49. *Id.* at 277.

50. *Id.*

51. Brief for Petitioners, *supra* note 21, at \*10.

52. Joint Appendix, *supra* note 4, at \*157–58, \*164–65.

the petitioner makes potentially successful claims invoking the protection of the Free Exercise Clause.<sup>53</sup>

Phillips first claims that he does not violate the statute because he does not discriminate against same-sex couples; he is willing to sell them products for birthdays and other occasions.<sup>54</sup> Furthermore, he would refuse any person seeking to buy a cake for a same-sex wedding, no matter their sexual orientation, just like he would refuse anyone looking to buy Halloween cakes or products for any other occasion deemed immoral by Phillips.<sup>55</sup> Because he is refusing to provide goods for a specific event (a same-sex ceremony) rather than for specific people (same-sex individuals), he claims his actions fall outside of the statute.<sup>56</sup> Therefore, the Commission overstepped its bounds in issuing summary judgement against him and should be reversed.

Even if his refusal to serve falls within the confines of the statute, Phillips argues that his creation of custom cakes is expressive conduct which is protected under the First Amendment, under the two-prong expressive conduct test.<sup>57</sup> Wedding cakes, to Phillips, play an integral role in wedding ceremonies and are inherently meaningful and celebratory.<sup>58</sup> The newlywed couple cutting the cake is often a central element of the post-wedding celebration and is long grounded in historical practice.<sup>59</sup> If guests of Craig and Mullins saw them celebrate their commitment with a Masterpiece cake created by Phillips, they would take this to mean that Phillips approves of and is celebrating the marriage as well, contrary to his true feelings.<sup>60</sup> Therefore, creating

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53. Brief for Petitioners, *supra* note 21, at \*38–48. For discussion of Free Exercise Clause claims see Christian Legal Society et al. as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, NO. 16-111 (U.S. Sept. 7, 2017) (arguing that the Free Exercise Clause protects Phillips from being forced to participate in a religious ritual he disagrees with through baking a cake). *See also* Brief for the Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioners, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, NO. 16-111 (U.S. Sept. 7, 2017) (Phillips is protected by the Free Speech Clause, Religion Clauses, and Due Process Clauses); *cf.* Brief of Freedom From Religion Foundation as Amicus Curiae Supporting Respondents, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, NO. 16-111 (U.S. Oct. 27, 2017) (Phillips’ Free Exercise Rights are not implicated here).

54. Joint Appendix, *supra* note 4, at \*168.

55. *Id.* at \*165-67.

56. Reply Brief for Petitioners at \*6–7, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, NO. 16-111, 2017 WL 5644420 (U.S. Nov. 22, 2017).

57. Brief for Petitioners, *supra* note 21, at \*17.

58. *Id.* at \*19, \*21–22.

59. *Id.* at \*6.

60. *Id.* at \*24.

wedding cakes is expressive conduct because it meets both prongs of the Supreme Court’s expressive conduct test.<sup>61</sup>

Phillips claims that he is more artist than baker to emphasize that his wedding cakes are artistic expression.<sup>62</sup> This status is reflected by his bakery’s name (Masterpiece Cakeshop), its logo (which includes a paintbrush), its décor (large picture of Phillips holding a paintbrush), and its products (unique, customized, beautiful baked goods, including cakes).<sup>63</sup> Because he engages in activities like those of painters and sculptors, he should likewise be protected from being forced to create art by the government.<sup>64</sup> If the government could do otherwise, it would compromise the artistic freedom guaranteed by the First Amendment.<sup>65</sup>

Therefore, Phillips claims the first part of the Commission’s remedy violates the compelled speech doctrine by forcing Phillips to create wedding cakes for same-sex weddings, which is expressive conduct.<sup>66</sup> The regulation fails strict scrutiny because it does not serve a compelling interest and is not narrowly tailored.<sup>67</sup> The Commission wrongly applied CADA to Phillips and acted unconstitutionally by disregarding Phillips’ free-speech rights, which protects Phillips.<sup>68</sup> Thus, the Commission’s summary judgment should be reversed, and the order should be found to conflict with Phillips’ rights under the Free Speech Clause.<sup>69</sup>

### *B. Respondent’s Arguments*

The respondents see allowing an exemption under the First Amendment for business owners to flout CADA as opening a door for discrimination against any number of groups. Craig and Mullins argue that CADA absolutely extends to refusal to serve same-sex weddings and that Phillips’ refusal to make a cake is not protected by the Free Speech Clause.<sup>70</sup> They further argue that businesses open to the public

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61. *Id.* at \*24–25.

62. *Id.* at \*18.

63. Joint Appendix, *supra* note 4, at \*160.

64. Brief for Petitioners, *supra* note 21, at \*20–21.

65. *Id.* at \*28.

66. *Id.* at \*27–29.

67. *Id.* at \*49.

68. *Id.* at \*17.

69. *Id.* at \*61.

70. Brief of Respondents Craig and Mullins at \*10, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, NO. 16-111, 2017 WL 4838415 (U.S. Oct. 23, 2017) [hereinafter *Brief for Respondents*].



must follow anti-discrimination laws even if they sell artistic products.<sup>71</sup> Phillips did not deny them service because of the message they asked him to express, but because Craig and Mullins are gay.<sup>72</sup> Because the regulation is content- and viewpoint-neutral, the government action's effects on Phillips' speech were only incidental and justified with a compelling purpose of preventing discrimination.<sup>73</sup> This law furthers the substantial government interest of "fostering full inclusion in civic life" thus meeting this standard.<sup>74</sup>

The respondents further argue that cakes are not expressive conduct because they are not inherently expressive nor are they likely to be understood as expressive speech.<sup>75</sup> First, baking cakes is fundamentally different from other forms of expressive conduct that are protected by the First Amendment.<sup>76</sup> Although creative and requiring skill, custom wedding cakes are unlike sculptures and paintings because they are not generally recognized as art.<sup>77</sup> Furthermore, the claim that people will intuit Phillips' support of gay marriage from his creation of the cake is unreasonable.<sup>78</sup> Phillips overstates the symbolic role of cakes in weddings.<sup>79</sup> Because Phillips refused to create any wedding cake for the couple, he cannot know what type of message the cake would be sending.<sup>80</sup> It is impossible for Phillips to have known whether they would have requested a pre-made or pre-designed cake. Because he did not know what type of cake they wanted or even if they wanted a unique design, he could not have known it would have been expressive, thus undermining his artistic expression claim.<sup>81</sup>

The respondents claim that policy also suggests the petitioners' proposed First Amendment exemption from CADA for cake makers is unworkable.<sup>82</sup> Allowing this exception would create a slippery slope that would deny services to LGBT minorities, especially in rural areas

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71. *Id.*

72. *Id.* at \*26–27.

73. *Id.* at \*23–24.

74. *Id.* at \*37.

75. *Id.* at \*29–30.

76. *Id.* at \*19–20.

77. *See Id.*

78. *Id.* at \*34–35.

79. *Id.* at \*34.

80. *Id.* at \*27.

81. *Id.* at \*46.

82. *Id.* at \*45.

where the number of vendors may be very limited.<sup>83</sup> Furthermore, such an exception would cause dignitary harm to LGBT individuals everywhere and reduces the ability of same-sex couples to marry, which is a fundamental constitutional right.<sup>84</sup> The same logic would also allow bakeries to refuse service to interfaith or interracial marriages and other significant, meaning-laden ceremonies.<sup>85</sup> This exemption is much broader than a Free Exercise exemption would be because it does not need to be rooted in religious beliefs but can be for any reason at all.<sup>86</sup> It can also be used to discriminate against any group (including race, gender, ethnicity, and religion) by any business with creative or artistic products (such as those crafted by tailors, cosmetologists, designers, and landscapers) for any event (baptisms, anniversaries, or birthdays).<sup>87</sup> This exception would swallow anti-discrimination law.<sup>88</sup>

The respondents assert that because neither the law nor the remedy violated any of Phillips' constitutional rights, he can have no exemption to anti-discrimination laws. The commission and the appellate courts were correct in issuing and affirming the remedy, which should be upheld here as well.

## V. ANALYSIS

### A. *Requiring Phillips to create wedding cakes for same-sex marriages does not always compel expressive conduct*

Creating wedding cakes, even artistic, expensive, unique cakes is not necessarily expressive conduct. Phillips' conduct fails to satisfy either prong of the Court's expressive conduct test. Therefore, the Free Speech Clause is not implicated and the statute remains valid. The court below correctly found that Phillips violated CADA by refusing to create any cake for Craig and Mullen's wedding.

Historically, wedding cakes have not been protected as expressive conduct under the inherently expressive medium prong in the Free Speech Clause nor does Phillips' self-conception as an artist elevate his craft into one of these mediums. Lines must be drawn to divide speech

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83. Brief of Respondent Colorado Civil Rights Commission at \*57–58, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, NO. 16-111, 2017 WL 4838416 (U.S. Oct. 23, 2017).

84. *Id.*

85. Brief for Respondents I, *supra* note 70, at \*2.

86. *Id.* at \*45.

87. *Id.* at \*47–48.

88. *Id.* at \*45–50 (giving hypotheticals of religious and racial discrimination the respondents claim will be allowed by the petitioner's proposed exemption).

and non-speech, and traditionally recognized mediums are an important guide in doing so. Unlike parades, paintings, or sculptures, which have been repeatedly protected,<sup>89</sup> case law has not extended Free Speech Clause rights to cake makers, suggesting that it is not a traditionally protected category. Phillips argues that his profession is essentially the same as painting or sculpting,<sup>90</sup> and this self-conception is certainly supported by his shop's decorations and name.<sup>91</sup> However, branding oneself as an artist cannot be enough to receive the protections of traditionally protected artists. Otherwise any craftsperson or artisan or Subway employee could declare themselves an artist engaging in protected speech.<sup>92</sup> Allowing such a broad interpretation would eviscerate discrimination law since, as one amici curiae brief argues, "effectively any form of human activity could be recast as a form of First Amendment protected expression."<sup>93</sup> A Subway Sandwich Artist is not engaging in speech by refusing to "sculpt" sandwich "art" for a LGBT customer.<sup>94</sup> And while baking requires greater creativity and artistic talent than sandwich making, it does not join parades as a historical medium of expression.

Even though cake baking is not traditionally protected, it may still be symbolic speech if it is intended to and likely to convey a particular message. Whether a given expression meets these factors requires a factual inquiry into the context.<sup>95</sup> Phillips asserts that when he creates cakes he intends to convey a specific message, one that is likely to be understood by his customers and their wedding guests.<sup>96</sup> However, no particularized message was requested since Phillips denied Craig and Mullins service before learning of their specifications and design preferences.<sup>97</sup> Without knowing what words or designs would be incorporated, the cake would not be likely to convey any particular message. A blanket refusal to serve any form of wedding cake fails the second prong.

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89. *Hurley v. Irish American Gay, Lesbian & Bisexual Grp. Of Boston*, 515 U.S. 557, 569 (1995) (paintings, parades, poetry, and music are "unquestionably protected" as expressive conduct).

90. Brief for Petitioners, *supra* note 21, at \*20.

91. Joint Appendix, *supra* note 4, at \*160.

92. SUBWAY CAREERS, <https://apply.mysubwaycareer.com/us/en/careers/> (last visited Mar. 10, 2018) (beginning workers at Subway Restaurants have the title Sandwich Artist).

93. Brief of American Unity Fund, *supra* note 31, at \*14.

94. *Id.* at \*11.

95. See *Texas v. Johnson*, 491 U.S. 397, 405 (1989) ("In characterizing such action for First Amendment purposes, we have considered the context in which it occurred.").

96. Brief for Petitioners, *supra* note 21, at \*8–9.

97. Joint Appendix, *supra* note 4, at \*39.

Phillips' conduct is not expressive speech here because it satisfied neither prong. Therefore, the government did not violate his Free Speech rights. The lower court's determination that Phillips violated CADA in this instance should be affirmed.

*B. Baking a cake could be expressive conduct*

While a general blanket refusal to bake a cake for a same-sex wedding is not expressive conduct, certain types of cakes do satisfy the two-pronged test of expressive speech. The Colorado Court of Appeals admitted this possibility, saying "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated."<sup>98</sup> While cake baking is not and is unlikely in the foreseeable future to become an inherently expressive form of conduct like parades or flag burning, they can be designed to bear a "particularized message" that viewers are likely to understand especially when the cake has written inscriptions.<sup>99</sup>

For example, had Craig and Mullins asked Phillips to bake them the tiered rainbow cake they later enjoyed at their reception, Phillips' refusal would have been protected by the First Amendment. A rainbow cake references a widely recognizable symbol of the LGBT rights movement for decades.<sup>100</sup> Individuals, businesses, and other organizations regularly use the rainbow to signal support for gay rights and same-sex marriage. Indeed, hours after the Court released *Hodges v. Obergefell*, the White House was awash in rainbow lights celebrating the landmark moment in same-sex rights.<sup>101</sup> The combination of a particularized message (support for same-sex marriage and LGBT rights in general) with the strong likelihood that observers would understand this message results in clear expressive speech.

Bakers should also not be compelled to write any particular message on their cakes. Written speech is not subject to the expressive conduct test, but rather the traditional compelled speech analysis which requires the application of strict scrutiny.<sup>102</sup> Other forms of wedding

98. *Craig v. Masterpiece Cakeshop Ltd.*, 370 P.3d 272, 288 (Colo. App. 2014).

99. *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

100. Paola Antonelli, *MoMA Acquires the Rainbow Flag*, MOMA: INSIDE/OUT (June 17, 2015), [https://www.moma.org/explore/inside\\_out/2015/06/17/moma-acquires-the-rainbow-flag/](https://www.moma.org/explore/inside_out/2015/06/17/moma-acquires-the-rainbow-flag/).

101. Adam B. Lerner, *White House Set Aglow With Rainbow Pride*, POLITICO (June 26, 2015, 10:07 PM), <https://www.politico.com/story/2015/06/white-house-set-aglow-with-rainbow-pride-119490>.

102. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state cannot constitutionally

vendors are even more likely than bakers to engage in expressive speech.<sup>103</sup> These may include musicians, painters, and photographers who create traditional forms of inherently expressive conduct.<sup>104</sup>

*C. The lower court's remedy is overbroad and compels Phillips to speak*

The remedy first issued by the Colorado Commission could impermissibly compel Phillips to engage in expressive conduct against his will. The first element of the remedy requires that Phillips make any cake he would make for a heterosexual customer that he would make for a homosexual customer.<sup>105</sup> This includes any personalized design or written inscription.<sup>106</sup> The Colorado Court of Appeals recognized in dicta that written messages would potentially intrude on Phillips' First Amendment rights.<sup>107</sup> But the same court allowed a remedy that would restrict these rights in a way that would not survive strict scrutiny. The remedy must be narrowed to allow Phillips to assert his Free Speech rights when asked to create an expressive cake.

This remedy is overbroad because it ignores that the expressive messages of the cakes are highly dependent on context. Two couples, one heterosexual and one homosexual, could request an identical cake with the intent to create entirely different meanings, thus potentially forcing Phillips to speak a message he disagrees with. For example, a rainbow cake at a LGBT wedding or commitment ceremony would have a particularized message (support of same-sex marriage and LGBT pride) that would be clearly understood by viewers.<sup>108</sup> An

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require a citizen to disseminate a written ideological message on a license plate); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (“Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.”).

103. See Brief of American Unity Fund, *supra* note 31, at \*4 (“[T]he government cannot compel photographers, videographers, graphic designers, printers, painters, or singers to record, celebrate, or promote events they disapprove of, including same-sex weddings.”).

104. *Id.*

105. *Craig v. Masterpiece Cakeshop Ltd.*, 370 P.3d 272, 286 (Colo. App. 2014) (“As noted, the Commission’s order requires that Masterpiece ‘cease and desist from discriminating against [Craig and Mullins] and other same-sex couples by refusing to sell them wedding cakes or any product [it] would sell to heterosexual couples.’” (alterations in original)).

106. Transcript of Oral Arguments at \*81–82, *Masterpiece Cakeshop, Ltd v. Colo. Civil Rights Comm’n*, 2017 WL 6025739 (U.S. 2017).

107. *Masterpiece*, 370 P.3d at 288 (“We recognize that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated. However, we need not reach this issue. We note, again, that Phillips denied Craig’s and Mullins’ request without any discussion regarding the wedding cake’s design or any possible written inscriptions.”).

108. Brief for Petitioners, *supra* note 21, at \*22.

identical cake at a wedding for a opposite-sex couple could mean support for LGBT rights or a love of Hawaii or of the Wizard of Oz. Alternatively, if two couples that ordered a cake inscribed with the phrase “God Bless this Wedding” or “God Approves of this Marriage,” Phillips would certainly agree with the message for the opposite-sex couple, but probably not the same-sex couple. Under the remedy, Phillips would have to create the same cake for either couple, compelling him to express a message with which he disagrees. Either he can comply and speak against his will and conscience, or he can refuse to bake the cake for both couples.

The remedy as laid out by the lower court would compel Phillips to speak and therefore must be subject to strict scrutiny, a standard rarely met in the free speech context.<sup>109</sup> The government must show a compelling interest and a restriction narrowly tailored to address that interest.<sup>110</sup> At least three compelling interests are asserted to justify the strict scrutiny.<sup>111</sup> First, the Colorado Court of Appeals found one compelling interest to be ensuring that “goods and services . . . are available to all of the state’s citizens.”<sup>112</sup> Here, there is no evidence that Craig and Mullins were prevented from obtaining the goods and services they wanted. To the contrary, they received a wedding cake for free.<sup>113</sup> Second, the state claims that denying service will have negative economic impacts by “prevent[ing] the economic and social balkanization prevalent when businesses decide to serve only their own ‘kind.’”<sup>114</sup> However, the state has not introduced evidence that this is occurring and must rely on more than predictive or ambiguous proof.<sup>115</sup>

A third compelling interest may be the dignitary harm suffered by couples rejected and demeaned because of their sexuality.<sup>116</sup> However, the Court has been reluctant to recognize the prevention of stigmatic or emotional injuries as compelling government interests, except in

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109. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010) (finding, for the first and only time, that compelled speech satisfied strict scrutiny where regulation that restricted money given to organizations with ties to terrorist groups).

110. *Wooley v. Maynard*, 430 U.S. 705, 716–17 (1977) (analyzing the State’s asserted compelling interests and finding that the means were not sufficiently narrowly tailored).

111. *Masterpiece*, 370 P.3d at 293–94.

112. *Id.*

113. Joint Appendix, *supra* note 4, at \*185.

114. *Masterpiece*, 370 P.3d at 293.

115. *Brown v. Entm’t Merchs. Ass’n.*, 564 U.S. 786, 799–800 (2011) (holding that California’s burden of proof is higher than intermediate scrutiny and “ambiguous proof will not suffice”).

116. Brief for Respondents, *supra* note 70, at \*6.

some Establishment Clause cases.<sup>117</sup> Furthermore, the remedy is under-inclusive, and thus not narrowly tailored, when stigmatic injury is the relevant compelling interest because it fails to prevent emotional harm being done to LGBT individuals at his place of business.<sup>118</sup> Indeed, the lower court specifically encourages Phillips to express his opposition to same-sex marriage, as long as he does not refuse to serve same-sex couples.<sup>119</sup> Under this remedy, a baker could declare his moral opposition to same-sex unions by placing a sign in the shop window or stating his view to customers, while still baking cakes for those weddings.<sup>120</sup> While the couple would have the cake for their wedding, the court would have failed to prevent the emotional injury of feeling demeaned. Preventing dignitary, stigmatic injury does not satisfy strict scrutiny.

Because none of the asserted compelling interests meet strict scrutiny, the remedy as applied to cakes with expressive speech or written speech must be unconstitutional. Therefore, the Supreme Court should remand to the state court to allow it to create a remedy that does not compel any expression with the intent of a specific message or that is likely to be understood by the reasonable observer. This will protect the rights of vulnerable minorities desiring access to businesses, while also protecting business owners from being forced by the government to express a message with which they disagree.

## CONCLUSION

The disposition suggested above is far from perfect. Rather than have a bright-line rule that allows courts, ALJs, and commissions to sift speech from discrimination, courts will have to undertake a fact- and context-intensive examination into whether conduct satisfies the expressive conduct tests laid out in *Johnson*, *Hurley*, and *FAIR*. Ideally,

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117. See *Allen v. Wright*, 468 U.S. 737, 755 (1984), *abrogated on other grounds by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014)) (holding that stigmatic racial injuries do not convey standing); *McCreary County v. ACLU*, 545 U.S. 844, 881–84 (O'Connor, J., concurring)(arguing that emotional harm does give standing in Establishment Clause display cases).

118. Brief for Petitioners, *supra* note 21, at \*56–57.

119. *Craig v. Masterpiece Cakeshop Ltd.*, 370 P.3d 272, 288 (Colo. App. 2014) (“However, CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA.”); *see also* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (“[S]igns, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.”).

120. *Masterpiece*, 370 P.3d at 288.

the courts will then be able to protect the rights of vulnerable minorities while not driving business owners from the market for following their consciences. A compromise is the only way the court can have its cake and eat it too.