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THE CASE FOR NEUTRALITY:
A RHETORICAL ANALYSIS OF JUSTICE ANTHONY M. KENNEDY'S OPINION FOR *MASTERPIECE CAKESHOP, LTD. v. COLORADO CIVIL RIGHTS COMMISSION*

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ABSTRACT

On June 4, 2018, the Supreme Court of the United States issued an opinion penned by Associate Justice Anthony M. Kennedy for *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Justice Kennedy, writing for a 7-2 majority, ruled in favor of Masterpiece Cakeshop on the grounds of the Free Exercise Clause of the First Amendment. His ruling mainly addressed the Colorado Civil Rights Commission's lack of neutrality and due respect in addressing the religious beliefs of the owner and operator of Masterpiece Cakeshop, Jack Phillips. The case was a response to a brief incident that occurred between Jack Phillips and a same-sex couple, Charlie Craig and David Mullins, in 2012. Jack Phillips refused to design the couple a wedding cake, citing religious and free speech objections. The two parties then underwent years of litigation through the state-level appeals process before reaching the Supreme Court. The issues presented in their case followed a long tradition of legislative and legal conflicts over the civil rights of protected groups to access public accommodations, and the free exercise rights of religious individuals under the First Amendment.

Justice Kennedy faced a number of rhetorical and legal challenges in this case. He was tasked with weighing the positions of an ideologically divided court, balancing two fundamental rights he had protected throughout his legal career, and creating a fair standard of analysis to serve as precedent for handling these types of cases. In order to understand the case and articulate these challenges, I consulted a series of related case law, a six-year history of litigation between the two parties, the opinions and decisions of lower adjudicatory bodies, oral arguments before the Supreme Court, and the final opinion of the Supreme Court. My investigation led to the following conclusion: *Justice Kennedy's opinion for* Masterpiece Cakeshop *offers a*

framework by which judges may actualize the principle of neutral review which Kennedy emphasizes throughout the text. To validate this position, I take up Kennedy's three main rhetorical tactics in applying neutral review: (1) Recognize the genuine challenge in balancing civil rights and civil liberties; (2) Provide strong and accurate articulations of each side's positions; and (3) Denounce any signs of bias in any proceedings and work to avoid prejudice in your own deliberations and writings.

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Introduction: A Neutral Consideration

On June 4, 2018, the Supreme Court of the United States released its highly anticipated decision in the hotly contested case *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. A diverse collection of legal groups, advocacy teams, policy think tanks, religious institutions, LGBT activists, and attentive members of the American public were closely monitoring the case, some since its inception in 2012. What began as a twenty-second ordeal at a small cakeshop in a small town in Colorado had blossomed over six years into what many believed would be a landmark decision for both civil rights and First Amendment precedent. On one side of the conflict, Charlie Craig and David Mullins, a same-sex couple, were fighting to preserve the legitimacy of a Colorado civil rights law which afforded protections for LGBT people in places of public accommodations (i.e., businesses serving the public). Up to that point, Craig and Mullins had succeeded at every step of the appeals process in upholding an order from the Colorado Civil Rights Commission which penalized Masterpiece Cakeshop for refusing to design them a wedding cake and discriminating against them under Colorado law. On the other side, Jack Phillips, the owner and designer for Masterpiece Cakeshop, was fighting to preserve his freedom of religion and freedom of speech. Phillips believed that the Colorado Civil Rights Commission had violated his First Amendment liberties because he was a Christian who held a Biblically-based opposition to same-sex matrimony, and that he was being required to choose among breaking the law, violating his conscience by designing wedding cakes for same-sex couples, or facing the financial losses of ceasing to design wedding cakes altogether. Many observers believed that, in the summer of 2018, the Supreme Court would be the final arbiter of

whether Colorado's civil rights laws were constitutional as applied to Masterpiece Cakeshop. The observers knew that the ruling could have potentially radical implications for civil rights and civil liberties across the nation. Then they read the opinion. The ruling was not what most were expecting.

The Supreme Court decided that Jack Phillips' First Amendment right to the free exercise of religion had been violated – but not because his request for a religious exception to Colorado's civil rights laws was refused. Rather, the author of the opinion, Associate Justice Anthony M. Kennedy, ruled on behalf of a 7-2 majority that the behavior of some of the members of the Colorado Civil Rights Commission was unacceptable while those members were reviewing Jack Phillips' case in two 2014 hearings, especially when compared to similar cases they reviewed in the past. They were to be held solely accountable for the Commission's loss to Masterpiece Cakeshop. Justice Kennedy did not rule that religious liberty claims could be made to override generally applicable civil rights laws at the state level. Kennedy did not rule that civil rights laws could, in every case, override claims of religious liberty violations. Kennedy did not rule on whether or not Phillips' freedom of speech or freedom of expression were legitimately transgressed in this case. Rather than addressing these major contentions, Justice Kennedy instead claimed that Jack Phillips was not granted by the Commission the "neutral and respectful consideration of his claims in all the circumstances of the case," a fundamental courtesy to which he was "entitled" (*Masterpiece* 12). The question of the "Commission's hostility" — and thereby lack of "neutral" consideration — toward Mr. Phillips' case in the earlier stages of its progression would dominate the opinion (*Masterpiece* 18).

Nonetheless, the American public was still left with conflicting conceptions of who actually "won" the case, for although Masterpiece Cakeshop was the direct victor, there was a

pro-LGBT civil rights thread throughout Justice Kennedy's opinion worth noting. This thread was captured in such statements as, "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights" (*Masterpiece* 9). Although the decision did not rule explicitly on LGBT civil rights, it did strongly suggest that in future cases the Court would be inclined to uphold public accommodation protections for LGBT citizens. After six years of litigation, Mr. Phillips would no longer have to comply with the Commission's demands on his business, but Justice Kennedy left the future of similar cases before the Court open to further examination.

Regardless of its failure to rise to the expectations of a groundbreaking constitutional declaration, the Supreme Court's decision is not devoid of significance, nor is its place in the American constitutional lineage negligible. For the first time, the Supreme Court was wrestling with how to handle the alleged tension between the First Amendment and civil rights with respect to same-sex couples and religious business owners. Only a small segment of this tension was resolved by this case, namely the neutrality with which civil rights adjudicatory bodies must treat all litigants and belief systems in their reviews. Still, the case's history deserves to be traced and documented, and the arguments elicited from it deserve to be reviewed and deconstructed, as they will serve some role in future cases on these topics. How did this case begin? Who were the relevant parties and actors involved? What arguments did they make to the press? What decisions were made by the courts and review bodies? How was the case appealed to the Supreme Court? How did Justice Kennedy react to the claims of both parties during oral arguments? How did those reactions and his review of the case material translate into his opinion? What legal and rhetorical challenges did he face as he crafted his decision? Towards the

purpose of answering these questions, I first completed a review of the case law on public accommodations and the free exercise of religion that preceded and informed Justice Kennedy's decision. Second, I conducted a background review for the case, tracing its lineage from inception to conclusion, by interconnecting reports from dozens of local and national news articles on the case with portions of court documents that describe the case's history. Third, I analyzed portions of the amicus briefs, oral arguments, and opinions from lower courts that constituted some of the rhetorical foundation on which the course would at least partially base their arguments. Finally, I completed a summary and rhetorical analysis of the core text, Kennedy's eighteen-page main opinion for the majority in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, for the sake of clarifying its content and identifying the rhetorical tactics Kennedy employed within its pages.[1]

In order to more clearly direct my review of the opinion based on this research, I decided to focus my analysis on how Justice Kennedy demonstrates his principle of neutral consideration in *Masterpiece*. Throughout the opinion, Justice Kennedy expresses displeasure with the Commission's apparent prejudice and lack of decorum in handling Phillips' case, and he unabashedly puts forth his criticisms of the Commission to justify his overarching decision. He does not issue his criticisms, his justifications, or his descriptions of the case, though, in a haphazard or biased manner. Rather, he actually writes the opinion in a neutral fashion – as if he's exemplifying the neutrality which he demands the Commission apply to free exercise and civil rights cases. In short, *Justice Kennedy's opinion for* Masterpiece Cakeshop *offers a*

[1] Please note that I am aware of the role freedom of speech played in the early court arguments and reviews. I am also aware of the role Justice Kennedy's colleagues on the Supreme Court played in contributing their concurring and dissenting opinions to *Masterpiece*. The exclusion of both of these components is not the result of negligence, but rather the result of seeking to narrowly focus the scope of this work, specifically on Justice Kennedy and his main arguments in the majority opinion concerning neutral review and religious liberty.

framework by which judges may actualize the principle of neutral review which Kennedy emphasizes throughout the text.

In what follows, I will support this observation by highlighting the three rhetorical tactics employed by Kennedy, which I have formatted as guiding principles: (1) Recognize the genuine challenge in balancing civil rights and civil liberties; (2) Provide strong and accurate articulations of each side's positions; and (3) Denounce any signs of bias in any proceedings and work to avoid prejudice in your own deliberations and writings. Leading up to the analysis and demonstration of these tactical principles, I will first provide an overview of the case law and political history which precedes the case, then provide a history of the case itself, both in the interest of entrenching Justice Kennedy's opinion in its proper rhetorical context.

Political Background: From the *Civil Rights Cases* to *Sweet Cakes*

On June 26, 2015, the Supreme Court of the United States issued its momentous 5-4 decision supporting the constitutionality of same-sex marriage in *Obergefell v. Hodges*. Justice Anthony M. Kennedy's opinion marked the culmination of years of litigation over whether tradition or inclusion would define the nation's legally recognized position on marital rights. Justice Kennedy was forthright in his judgment, declaring, "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter" (*Obergefell* 17-18). While James Obergefell and John Arthur's victory before the Court marked a major milestone in the movement for LGBT civil rights, and was reflective of a broader trend toward greater acceptance of same-sex marriage,[2] the cultural differences and political battles surrounding LGBT Americans were far from resolved.

Obergefell was only one ruling determining the outcome of one constitutional question. The opinion in favor of same-sex marital rights was only narrowly decided, with four dissenting Justices – Chief Justice John Roberts, Justice Antonin Scalia, Justice Clarence Thomas, and Justice Samuel Alito – each contributing an individual dissenting opinion (with some also joining onto the dissents of their fellow justices). While the number of states where same-sex

[2] According to a Gallup poll from the time period, "public support for the legality of same-sex marriage" rose from 27% in 1996 to 60% in 2015, a 33% increase (McCarthy).

marriage was constitutionally, legislatively, or federally recognized jumped from nineteen to thirty-seven[3] between 2014 and 2015, thirteen states refused to permit same-sex marriages in their state laws and over a third of the nation still opposed same-sex marriage at the time of the opinion ("Same-Sex Marriage Laws"; Karimi & Pearson; Pew Research Center). Politicians, pundits, and analysts averse to the decision voiced their opposition, claiming judicial overreach and a disregard for the conservative convictions they believed should undergird the legal system. Edward Whelan, columnist for *National Review*, argued that "the Court majority acted unconstitutionally" in *Obergefell*, and that their "ruling poses severe threats to marriage" and would "sharply intensify the threats to religious liberty." While Mike Pence, then Governor of Indiana, called for compliance with the ruling, he also announced, "Like many Hoosiers, I believe marriage is a union between one man and one woman, and I am disappointed that the Supreme Court failed to recognize the historic role of the states in setting marriage policy in this country" (Wang). Rick Santorum, then a GOP Presidential candidate, attacked Justice Kennedy's opinion as "absurd," criticized the Justices for legislating from the bench, and advocated a "First Amendment Protection Act" to constrict its likely consequences ("Santorum"). The cultural clash undergirding LGBT rights was evidently unfinished. What would be the next battle to reach the Supreme Court?

There were some early indications as to what conflicts would follow *Obergefell* in the comments of both opponents and supporters of the decision. Mike Huckabee, also a GOP Presidential candidate, predicted that the opinion was "setting up a collision with the First Amendment guarantee of religious liberty," citing "many examples of businesses" who were

[3] Note that there was a conflict in 2015 in Alabama between a ruling from U.S. District Judge Callie Granade and a ruling from the Alabama Supreme Court on marriage licenses for same-sex couples, which Judge Granade "reaffirmed" in her favor but held her ruling in light of the upcoming *Obergefell v. Hodges* decision (Dobuzinskis; de Vogue).

"fined, penalized, or economically terrorized because the owners held to their convictions about marriage based on their religious views" (*USA Today*). Ilya Shapiro of the Cato Institute similarly warned "that people would be forced to do what their deepest beliefs prohibit," citing legal dilemmas between religious liberty and LGBT civil rights that had gained attention, including "the New Mexico photographer, the Washington florist, [and] the New York farm owners." Even Justice Clarence Thomas, in his dissenting opinion for *Obergefell*, expressed concern over government and religion entanglements, claiming, "It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples" (*Obergefell* 15).[4]

LGBT advocates were also aware of these entanglements, as they had already been monitoring and engaging in state battles over First Amendment defenses and LGBT civil rights. James Obergefell himself recognized in statements before the Texas Capitol that there would be more legal fights ahead, explaining, "In many states, including my home state of Ohio and right here in Texas, you can get married but then suffer consequences," and noting, "You can get married and then lose your job, lose your home and so much more because we are not guaranteed nondiscrimination protections….Friday's historic ruling is a victory, but it's just the beginning" (Ura). James Esseks, Director of the ACLU Lesbian Gay Bisexual Transgender & HIV Project, recognized in the aftermath of *Obergefell* that LGBT people still lacked "basic protection from anti-LGBT discrimination in employment, housing, businesses, schools, credit, and other aspects of life" and explained that the American Civil Liberties Union was already "fighting back"

[4] The pagination refers specifically to page 15 of Justice Clarence Thomas' dissenting opinion. With regards to the full document provided by the Supreme Court, the provided quotation may be found on page 92 of that file.

against "religious exemptions" to LGBT civil rights laws ("After Obergefell"). Also, just a few months following the *Obergefell* ruling, the LGBT research and information group Movement Advancement Project released an LGBT Policy Spotlight report on how "religious exemptions" relate to federal and state Religious Freedom Restoration Acts and serve to undermine the LGBT rights movement ("LGBT Policy Spotlight"). Based on these considerations, there was a clear understanding across the political spectrum that the conflict between LGBT non-discrimination rights and the First Amendment claims of religious observers would likely be the next civil rights battle before the Supreme Court – and perhaps no area was more ripe for targeting than the fight over public accommodations and religious exemptions.

The first movement for federal recognition of civil rights in public accommodations dates back to May 13, 1870, when Senator Charles Sumner introduced a bill partially aimed at securing anti-discrimination laws for former slaves who wished to access white-owned places of business (Wyatt-Brown 763). After heated deliberation, and the removal of public school desegregation from the legislation, Sen. Sumner's bill passed the House in February 4, 1875, then the Senate on February 27, 1875, and was finally signed by President Ulysses S. Grant on March 1, 1875 (Wyatt-Brown 774; "Landmark Legislation"). Referred to as the Civil Rights Act of 1875, this legislation declared that citizens could no longer be discriminated against on the basis of "race and color" in accessing "accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement" ("Landmark Legislation"). This legislation was short-lived. In an 1883 decision known as the *Civil Rights Cases,* the Supreme Court "ruled that Congress only had power under the Fourteenth Amendment to protect citizens from discriminating acts carried out by states, not acts carried out by individuals," rendering the public accommodation protections of the 1875 Civil Rights Act

"null and void" (Robinson 228). An over eighty-year gap would ensue before the federal government would again secure public accommodation protections through the Civil Rights Act of 1964. Title II of the 1964 Civil Rights Act, labeled "Injunctive Relief Against Discrimination in Places of Public Accommodation," rendered illegal any segregation in any businesses open to the public. Section 201, the opening line in Title II, dictates in broad language, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodation of any place of public accommodation…without discrimination or segregation on the ground of race, color, religion, or national origin" (Eighty-Eighth Congress 3). Essentially, any publicly used facilities or "businesses offering lodging, food and entertainment to the general public" were henceforth required to serve the protected classes listed in the Act on a non-discriminatory basis (Bebermeyer 457). The Supreme Court would uphold Title II of the 1964 Civil Rights Act in *Heart of Atlanta Motel, Inc. v. United States* (1964) and *Katzenbach v. McClung* (1964), distinguishing their decisions from the *Civil Rights Cases* by grounding their opinions in Congress' powers under the Commerce Clause.[5] Hence, lunch counters, theatres, amusement parks, motels, and other locations, where "Whites Only" signs once hung, were compelled by law to desegregate.[6]

Only a short time would pass before civil rights in public accommodations would come into conflict with religious objections. On December 18, 1964, Maurice Bessinger, president of

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[5] For a detailed account of *Heart of Atlanta Motel, Inc. v. United States* (1964) and *Katzenbach v. McClung* (1964), see Cortner.
[6] Notably, Americans with a disability, defined as those with "a physical or mental impairment that substantially limits one or more major life activities," were also extended public accommodation protections through the Americans with Disabilities Act of 1990 (amended in 2008). Subchapter III of the law offers protections and regulations in public accommodations, such as a guarantee that businesses provide "reasonable modifications in policies, practices, or procedures" suitable for "individuals with disabilities" (ADA §12102, §12182).

the National Association for the Preservation of White People, was sued for violating Title II of the Civil Rights Act of 1964 by discriminating against plaintiffs John Mungin, Sharon Neal, and Anne Newman (Collins; *Newman* 256 F. Supp. 943). Mr. Bessinger was "a devout Baptist" who owned and operated Piggie Park Enterprises, a series of six barbecue establishments in South Carolina that barred African Americans from entry and restricted them to take-out (Monk; *Newman* 256 F. Supp. 946). As part of his defense, Mr. Bessiner's lawyer's claimed that "Bessinger believes as a matter of faith that racial intermixing or any contribution thereto contravenes the will of God," and Jack Greenberg, attorney for the plaintiffs, noted in oral arguments that "It was the First Amendment religious privilege claim that petitioner asserted that his religion required him to act this way" (Farias; *Newman* "Oral Argument"). Mr. Bessinger's case, *Newman v. Piggie Park Enterprises, Inc.*, would land in the United States District Court of the District of South Carolina, Columbia Division, the opinion for which further states that Bessinger believed the Civil Rights Act of 1964 "violate[d] his freedom of religion under the First Amendment 'since his religious beliefs compel him to oppose any integration of the races whatever'" (*Newman* 256 F. Supp. 944). District Judge Charles Earl Simons, Jr., author of the Court's opinion, dismissed Bessinger's religious liberty defense for discriminating against African Americans, drawing a distinction between his "right to espouse [his] religious beliefs" and the "right to exercise and practice such beliefs," the former being Constitutionally protected and the latter being limited where it intrudes on the "constitutional rights of other citizens" (*Newman* 256 F. Supp. 945). Judge Simons explicitly stated that "free exercise…is subject to regulation when religious acts require accommodation to society," thus determining that a religious opposition to behavior dictated by civil rights laws in public accommodations was not sufficient to exempt a business owner from complying with the Civil Rights Act (*Newman* 256 F.

Supp. 945). Regardless, Judge Simons ruled against the plaintiffs, interpreting Title II of the Civil Rights Act as only extending to "those eating places primarily engaged in serving food for on-the-premises consumption," thus excluding Piggie Park; Piggie Park, concluded the Court, was a "drive-in" where food "may be consumed by the customer in his automobile on the premises or after he drives away, solely at his option" and where "fifty percent of the food served at defendant's drive-ins is consumed off the premises" (*Newman* 256 F. Supp. 946, 952-53). The Court also decided that "Court costs exclusive of attorneys' fees" were to be "awarded to plaintiffs" (*Newman* 256 F. Supp. 953). The plaintiffs, expectedly, appealed the decision to the U.S. Court of Appeals for the Fourth Circuit, which decided on April 24, 1967 to reverse and remand the District Court's decision. With respect to attorney fees, the Court stated that any "litigant who increases the burden upon opposing counsel" by offering additional but false "defenses" for discrimination "for purposes of delay and not in good faith," is to "ordinarily bear the cost of unnecessary trial preparation" (*Anne P. Newman* 377 F.2d "COUNSEL FEES"). In his concurring opinion joined by Circuit Judge Sobeloff, Circuit Judge Winter reprimanded the defense for "interpos[ing] defenses patently frivolous," including within those defenses the claim "that the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion'" (*Anne P. Newman* 377 F.2d "WINTER"). In other words, by Justice Winter's view, the First Amendment violation claim was clearly used to "burden" the plaintiffs rather than offer a legitimate defense. When, finally, the Supreme Court of the United States addressed the case, they upheld the Fourth Circuit's interpretation of attorney fees under Title II, deciding that "the District Court on remand should include reasonable counsel fees as part of the costs to be assessed against the respondents" (*Anne P. Newman* 390 U.S. [final paragraph]). Notably, the Supreme Court agreed with and quoted

Circuit Judge Winter's concurring opinion, affirming that the Defendant's First Amendment defense was "patently frivolous" (*Anne P. NEWMAN* 390 U.S. n5). Thus the first constitutional conflict between religious liberty and civil rights in public accommodations was concluded – in favor of Title II.

The history of constitutional battles over the free exercise of religious-based actions in contravention to governmental statutes dates far back before *Piggie Park.* A cursory overview of landmark decisions in religious liberty reveals a varied assortment of opinions by the United States Supreme Court, some in favor of individual or group autonomy, others in favor of the rule of law (Bill of Rights Institute). In the decision for *Reynolds v. United States* (1879), for example, Chief Justice Morrison Waite affirmed the constitutionality of a Congressional statute barring "bigamy" and "plural marriages" in U.S. "Territories" (in this case, Utah), proclaiming that religious liberty could not serve as a proper defense (*Reynolds* n.p.). Chief Justice Waite argued that "while [laws] cannot interfere with mere religious belief and opinions, they may with practices," establishing a similar distinction as District Judge Simons' demarcations set decades later (*Reynolds* n.p.). Waite was concerned that "the professed doctrines of religious belief" could become "superior to the law of the land" if every acclaimed religious belief was to be found exempt from otherwise universally applicable statutes; under such a passive system, any American would effectively "become a law unto himself," being able to dictate what laws were viable or illegitimate based on his religious convictions (*Reynolds* n.p.). Over a century after *Reynolds,* and not long after *Piggie Park,* came *Bob Jones University v. United States,* in which the Supreme Court upheld the IRS' revocation of Bob Jones University's tax-exempt status due to their discriminatory admissions process which rejected "applicants engaged in an interracial marriage or known to advocate interracial marriage or dating" (*Bob Jones University* 581). Bob

Jones University is a "fundamentalist Christian" school which exercised its racially exclusionary ban on interracial relationships based on a sincere position "that the Bible forbids interracial dating and marriage" (*Bob Jones University* 581). Chief Justice Burger, author of the majority opinion, dismissed the petitioner's claim that the IRS had "violate[d] their free exercise rights under the Religion Clauses of the First Amendment" by applying the "overriding governmental interest" principle established in *United States v. Lee*, claiming that the government's interest "in eradicating racial discrimination in education" is "so compelling" as to justify the "burden" placed on the petitioners' "religious beliefs" (*Bob Jones University* 603-604).[7]

Conversely, cases such as *Cantwell v. Connecticut* (1940) and *Sherbert v. Verner* (1963) found the Supreme Court defending the free exercise of religion over state interests. In *Cantwell*, Justice Owen Roberts argued that Jesse Cantwell, a member of Jehovah's Witnesses, had to the right, while on "a public street," to "peacefully…impart his views to others" and play a record lambasting organized religion on a phonograph (*Cantwell* 308-9). Justice Roberts conceded that the "freedom to act" according to religious belief "cannot be" rendered "absolute" in the same sense as "freedom to believe," holding that "the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury" (*Cantwell* 306). Nonetheless, Judge Roberts found Connecticut's law on solicitation – which mandated that "the secretary of the public welfare council" decide whether to grant permission for public solicitation on the grounds of "whether such cause is a religious one" – to be "a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the

[7] Chief Justice Burger cites the following line from the *Lee* opinion: "[n]ot all burdens on religion are unconstitutional….The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. *United States v. Lee,* 455 U.S. 252, 257-258 (1982)" (*Bob Jones University* 603).

Fourteenth." (*Cantwell* 301-302, 305). In other words, Connecticut's Act legally forcing persons to undergo an approval process from a state official in order to engage in solicitation, on the grounds of whether or not that official found their cause to be sufficiently religious, served as a violation of both "due process of law" and "free exercise" of religion, a "forbidden burden" not penetrable by claims of "a substantial interest of the State" (*Cantwell* 303, 307, 311).

Similarly, in *Sherbert v. Verner*, the Supreme Court again upheld an individual's right to exercise her religion without undue consequences over a state's interest expressed through law. The appellee, Adeil Sherbert, lost employment due to her refusal to work on Saturdays out of respect for her faith as a Seventh-Day Adventist, and the state of South Carolina refused to provide her unemployment benefits as she had "failed, without good cause,…to accept suitable work when offered" (*Sherbert* 401). As may well be expected at this point, Justice William J. Brennan, Jr. followed his predecessors in affirming that "any governmental regulation of religious beliefs" is completely impermissible, but governments may intervene in the case of religiously inspired "conduct or actions" which "have invariably posed some substantial threat to public safety, peace or order" (*Sherbert* 402-3). In this case, because "it is clear" that the "disqualification for benefits" is a "burden on the free exercise of appellant's religion," and because of the absence of any "abuse or danger" that would permit a "compelling state interest," the free exercise clause had been violated (*Sherbert* 403, 406-7. 410). In reading these cases, then, a clear pattern of review emerges: (1) There are distinctions drawn between rights of conscience and rights of action under the First Amendment's religion clauses, and (2) The government is permitted to circumvent the free exercise clause only when reasonably necessary and under select circumstances where a "compelling interest" is evident. This pattern seemed to be solidified precedent – that is, until *Employment Division v. Smith*.

The case in *Employment Division v. Smith* (1990) called upon the Supreme Court to decide whether the state of Oregon violated Alfred Smith and Galen Black's right to the free exercise of religion. Specifically, the Court had to decide whether or not respondents were rightfully denied unemployment compensation as a result of being "fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church," in a state where such drug consumption is illegal (*Employment* 876). Justice Antonin Scalia, writing for the majority, maintained the pattern of belief-action distinction found in the previous free exercise cases, re-affirming that "the right to believe and profess whatever religious doctrine one desires" remains unassailable, while denying the respondents' assertion that a citizen may be exempt from "a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)" (*Employment* 877-78). Justice Scalia decisively states that the Supreme Court "ha[s] never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (*Employment* 878-79). Justice Scalia then articulated another distinction in free exercise jurisprudence based on his analysis of the relevant precedent: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press" (*Employment* 881). In other words, only under "a hybrid situation" between religious free exercise and other First Amendment liberties had the Supreme Court been compelled to rule in favor of individual freedom (*Employment* 882).

But Justice Scalia did not end his bold ruling there. In the second half of his opinion, he also challenged the *Sherbert* test, which he described as the principle that "governmental actions

that substantially burden a religious practice must be justified by a compelling governmental interest" (*Employment* 883). Justice Scalia stated that, with very few exceptions, the Court has only applied the *Sherbert* test in cases involving "the denial of unemployment compensation" and refrained from its use elsewhere (*Employment* 883). Therefore, Justice Scalia proclaimed, the *Sherbert* test should be made "inapplicable" to cases involving the "criminal prohibition on a particular form of conduct," for to say that "generally applicable" laws may be evaded if they conflict with a citizen's religious beliefs "contradicts both constitutional tradition and common sense" (*Employment* 884-85). Due to the great plurality of religious positions, and the government's inability to declare any person's belief system illegitimate before the law, Justice Scalia feared that the application of the compelling interest test upon religious conduct prohibitions or allowances "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind" (*Employment* 887-8). Hence, in echoing the *Reynolds* decision, Justice Scalia concluded that the nation must not create "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs," and ruled against the respondents (*Employment* 890). As a result, a new hybrid test was set into place as the Court's precedent in handling free exercise claims in the face of government intervention, and the *Sherbert* test was to be no more.

The effective judicial dismantling of the compelling interest test drew the ire of American interest groups across the political spectrum (Bomboy). These groups were primarily concerned that the religious practices of persons of "minority faiths" would be the target of restrictive legislation without a course for redress – in the post-*Smith* era, a state government or the federal government would only have to demonstrate a "rational basis" for a law, by presenting a

"legitimate reason" acceptable to the courts, in order to justify its constraining effects on a person's free exercise of religion (Berz 11-12). When lower courts began ruling on religious liberty cases following the *Smith* precedent, advocates of its overturning reported that of the free exercise cases held from the *Smith* decision to 1993, "50 to 60" had been ruled in favor "of government infringements on religious practices" (Steinfels). In response, "an unusually broad-based coalition of religious and civil liberties groups from right to left," from the National Association of Evangelicals to the American Civil Liberties Union, in addition to "over a hundred constitutional law scholars," petitioned for a "rehearing" of the *Smith* ruling by the Supreme Court (McConnell 1111; Drinan & Huffman 533).

The response would come from Congress instead, in the form of a piece of legislation known as the Religious Freedom Restoration Act (RFRA). There were some contentions against the RFRA by "pro-life groups," including the National Right to Life Committee and the U.S. Catholic Conference, over possible claims by women that their "desire for an abortion is motivated by [their] religion" and they could thereby override state laws "restrict[ing] or prohibit[ing] abortion" – especially relevant in the event *Roe* were to ever be overturned (Drinan & Huffman 534). Once these and other disputes were resolved through "amended language" to the bill and "clarify[ing]" language in "the legislative reports," and after further disputes in the Senate over the free exercise rights of prisoners, the bill passed in the House on May 11, 1993 and in the Senate on October 28, 1993 (Drinan & Huffman 538-540). The bill was signed into law by President Bill Clinton on November 16th at a signing ceremony, in which President Clinton offered some key remarks worth noting (Clinton). President Clinton expressed the tentative nature of this form of check and balance against the Supreme Court, stating, "The power to reverse by legislation a decision of the United States Supreme Court is a power that is

rightly hesitantly and infrequently exercised by the United States Congress" (Clinton). He felt, however, that because "[m]ore than 50 cases have been decided against individuals making religious claims against government action since" *Smith*, there was a necessity to pass the RFRA to affirm that "the government should be held to a very high level of proof before it interferes with someone's free exercise of religion" (Clinton). Therefore, the RFRA was to become the law of the land and the standard set by *Employment Division v. Smith* was to be erased.

The Religious Freedom Restoration Act would accomplish its goal of resetting the judicial precedent for free exercise claims by "restor[ing] the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)" (Religious Freedom Restoration § 2000bb[b][1]). In *Sherbert v. Verner*, Justice Brennan referenced *NAACP v. Button* in introducing the compelling state interest test into his opinion, indicating that an "incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' *NAACP v. Button, 371 U.S. 415, 438.*" (*Sherbert* 403). In *Wisconsin v. Yoder*, Chief Justice Burger concluded that the state of Wisconsin's "interest in its system of compulsory education" failed to be "compelling" enough to override the religious rights of Amish students, who wished to refuse to receive "formal education beyond the eighth grade" in accordance with their conviction that high school is "an impermissible exposure…to a 'worldly' influence in conflict with their beliefs" (*Wisconsin* 210-211, 221). The Act's demands toward this end are succinctly captured in its stipulations. The RFRA straightforwardly states that the "[g]overnment may substantially burden a person's exercise of religion" under "only" two justifications: if the burden "is in furtherance of a compelling governmental interest" and if it "is the least restrictive means of furthering that compelling governmental interest" (Religious

Freedom Restoration § 2000bb-1[b][1-2]). In other words, if a sincere claim is raised that a statute violates a person's right to act in accordance with their religious beliefs, the government must make every effort to show that such a restriction is necessary for a highly significant purpose and all attempts have been made to ensure its impact on religious observers is as minimal as possible. The Court was thus prompted by Congress to restore "*strict judicial scrutiny*" to free exercise cases – though, unhelpfully, the RFRA did not remark on what defines "a compelling governmental interest" (Miller 72). Nor had the Supreme Court ever "given a general account of what makes some ends that government may pursue compelling and others not" (Miller 72). There was serious question raised, then, as to how the Supreme Court would respond to the RFRA and how it would apply an unclearly defined re-establishment of its earlier precedent.

With respect to responding to the RFRA directly as a piece of legislation, the Supreme Court would re-assert its judicial power through constitutional review in *City of Boerne v. Flores* (1997), in which the Court limited some of the legislative power applied through the RFRA. Specifically, Justice Anthony M. Kennedy, with the majority of the Court, held that while "Congress can enact legislation under §5 [of the Fourteenth Amendment] enforcing the constitutional right to the free exercise of religion," Congress does not possess "the power to decree the substance of the Fourteenth Amendment's restrictions on the States" (*City of Boerne* 9). The Supreme Court determined that there was a lack of precedent in their "case law" for "a substantive, nonremedial power under the Fourteenth Amendment" bestowed to Congress; that the "RFRA cannot be considered remedial, preventive legislation" within Congress' §5 authority; and that the RFRA cannot be interpreted as being "designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion" (*City of Boerne* 17,

22, 25). For these reasons, Justice Kennedy responded to "a daring and dramatic congressional challenge to the Supreme Court's authority" through the RFRA "by striking down" the Act as it "applied to the states" (Paisner 540-41). Notably, Congress fired back with the Religious Land Use and Institutionalized Persons Act (RLUIPA) in order "to correct the constitutional infirmities of the RFRA" and institute "a strict scrutiny standard of review to generally applicable state laws that substantially burden religion in the context of land-use regulation and institutionalized persons" (Dalton 647; "Religious Land Use" 351). Therefore, though the scope of the application of RFRA to state law had been limited by the Court, Congress ultimately established some exceptions.

Nonetheless, the Supreme Court would not remain on the offensive. In *Gonzales v. O Centro Espírita Beneficente União do Vegetal* (2006), the Court, through an opinion authored by Chief Justice Roberts, constitutionally affirmed the two-pronged test established by the Religious Freedom Restoration Act. The majority upheld the First Amendment right of the American division of the Brazilian "Christian Spiritist sect" O Centro Espírita Beneficente União do Vegetal (UDV) to ingest "a sacramental tea" called *hoasca* which contains the illegal substance dimethyltryptamine (DMT) (*Alberto R. Gonzales* 3-4). The majority decided – in part for the purpose of "strik[ing] sensible balances" as directed by Congress through the RFRA – "that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest" in the case, and therefore the Court could not uphold their prosecution of UDV under the Controlled Substances Act (*Alberto R. Gonzales* 4, 18). The Supreme Court would also, notoriously, hold that the RFRA "applies to regulations that govern the activities of closely held for-profit corporations" in the majority's opinion for *Burwell v. Hobby Lobby Stores, Inc.* (2014) (*Sylvia Burwell* 16, ["Syllabus" 2]). Under this holding, the Department of Health and Human

Services' enforcement of the contraception mandate for health-insurance coverage could be rendered unconstitutional, where applied to for-profit corporations objecting to it on religious grounds, if it failed the two-pronged RFRA test. While the mandate was permitted to pass the compelling interest test – as the Court agreed to "assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling" – the mandate also had to "constitute the least restrictive means of serving that interest," but "plainly fail[ed] that test" (*Sylvia Burwell* 2, 40). Therefore, the federal government's contraception mandate had violated the First Amendment when applied to these companies. Based on these rulings, the judiciary appeared adamant to enforce the RFRA and maintain strict scrutiny over free exercise cases. There was still, though, some degree of discretion on the Court's part over defining the unclear parameters of the RFRA's two-pronged test – and in the background of *Hobby Lobby*, the judicial system was beginning to address a new collision between governmental interest and free exercise: LGBT civil rights in public accommodations.

As I noted earlier, the controversy over LGBT civil rights in public accommodations predominantly revolves around one core question: Are the First Amendment rights of business owners violated if said owners hold sincere religiously based objections to same-sex marriage and are compelled by civil rights laws to provide their services in any way to same-sex weddings? An LGBT rights activist may frame the question: Does the First Amendment allow religious business owners "a license to discriminate"[8] against non-heterosexual couples? A right-wing religious liberty advocate may frame the question differently: Does a governmental agency have the right to "punish" a business owner "for running his business in accordance with his

[8] This reflects the language of the Human Rights Campaign, an LGBT advocacy group. See Human Rights Campaign Staff.

religious convictions"?[9] Both are aimed at determining whether religious exemptions may be incorporated into LGBT civil rights directives, legislation, and jurisprudence. Both are also responding to a series of public accommodations cases that pit LGBT civil rights at the state level against the religious liberty claims of business owners whose work overlaps with the wedding industry. An emphasis should be placed on "state level," as, notably, there are currently no federal protections for LGBT people in public accommodations. There have been multiple attempts to add sexual orientation (in addition to sex and gender identity) to federal civil rights laws through a piece of Congressional legislation known as the Equality Act (United States, House Resolution 2282). Efforts to pass one version of the Equality Act began in 1974, but "never earned enough support to make it out of committee in the House, and it was never introduced in the Senate" (Hunt). In 1994, the legislation was "stripped down" to the Employment Non-Discrimination Act (ENDA), but never passed both houses of Congress (Hunt; Keisling). ENDA was then replaced in 2015 following the ruling in *Obergefell* with a more updated and expansive version of the Equality Act "introduced [by]…Senator Jeff Merkley (D-OR) in the U.S. Senate and Rep. Cicilline (D-RI) in the U.S. House of Representatives" (Keisling). Neither the Equality Act introduced in 2015 nor the Equality Act introduced in 2017 would succeed at being written into law, either (United States, House Resolution 3185; 2282).

Nonetheless, there were dozens of successful efforts at the state level to incorporate LGBT people into their statewide civil rights laws. As of the most updated version of the Movement Advancement Project's non-discrimination law maps, in regards to public accommodations, 20 states and Washington, D.C. now "explicitly" bar "discrimination based on

[9] This reflects the language from a blog post for Alliance Defending Freedom, a religious liberty advocacy group. See Maureen Collins.

sexual orientation and gender identity," while two states (Michigan and Pennsylvania) allow for sex discrimination law to "include sexual orientation and/or gender identity," and one state (Wisconsin) "explicitly prohibits discrimination based on sexual orientation only" ("Equality Maps"). At the same time, though, according to the National Conference of State Legislatures in a 2017 post, "21 states have enacted state RFRAs" from 1993 to 2015, which "echo the federal RFRA, but are not necessarily identical to the federal law" ("State Religious"). There are also a number of states with "court rulings" that have guaranteed a "heightened protection for the exercise of religion" that do not have their own RFRAs (Eilperin). Worth mentioning is the fact that, in comparing the map from the Movement Advancement Project and the map provided by the National Conference of State Legislatures, there is little overlap between the states with explicit protections for LGBT people in public accommodations and those states that have passed their own RFRAs. This combination of factors – no federal legislative guidance on LGBT civil rights in public accommodations, no Supreme Court precedent on religious liberty and LGBT civil rights in public accommodations, and a country apparently split over what degree of protection to afford religious liberty and LGBT people – proved (and continues to prove) to be fertile ground for litigation.

Unsurprisingly, then, lower court cases began cropping up around the country pitting religious business owners against same-sex couples. In a case that began in 2013, for example, Christian owners Aaron and Melissa Klein of Sweet Cakes by Melissa were charged by Oregon's Bureau of Labor and Industries with unlawful discrimination in violation of the Oregon Equality Act of 2007; the couple had refused to create a wedding cake for a lesbian couple, Rachel Cryer and Laurel Bowman, based on a religious objection to same-sex marriage (Nichols; Parks; Young). After losing their case in the Oregon Court of Appeals in December of 2018, the owners

petitioned the Oregon Supreme Court to overturn the decision, but the Court refused to hear the case in June of 2018, "offering no explanation" (Bernstein; Green). Nonetheless, lawyers for the couple decided to appeal to the Supreme Court of the United States on October 22, 2018, and in late November a series of amicus curiae briefs were filed for the case (Njus; "Klein"). The last action as of the writing of this thesis was executed on January 25, 2019, when the Oregon Bureau of Labor and Industries filed a brief in opposition ("Klein"). In a 2014 dispute out of New Mexico, Christian photographers Elaine and Jonathan Huguenin lost their case before the New Mexico Supreme Court in which they were charged with violating the New Mexico Human Rights Act. The Huguenins defended their First Amendment right as owners of Elane Photography to refuse to photograph a "commitment ceremony of a lesbian couple, Vanessa Willock and Misti Collinsworth" (Barnes, "Case weighing religious freedom"). Upon appeal, the United States Supreme Court elected not to address the case, indicating its decision "[w]ithout comment" on April 7, 2014 (Barnes, "Supreme Court declines case"). In another legal conflict in 2017, Christian florist Barronelle Stutzman lost her case before the Washington State Supreme Court after violating the Washington Law Against Discrimination. She defended her First Amendment right as the owner of Arlene's Flowers to refuse to sell flowers to a gay couple, Curt Freed and Robert Ingersoll, for their wedding service (Somashekhar). This decision, however, would be "vacated" by the United States Supreme Court and sent back to Washington State Supreme Court for reconsideration in light of a soon to be released and highly anticipated 2018 decision (Willmsen). In sum, these rulings began establishing the legal relationship on the federal level between civil rights in public accommodations for LGBT persons and religious liberty defenses under the First Amendment. However, none of these cases formally set a national precedent. That national precedent would be approached for the first time by the

Supreme Court in a case involving a cakeshop in Colorado. The title of the case: *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

Case Background: The Cake v. The Customers

The date is July 19, 2012. An engaged couple enters a small cakeshop in the Mission Trace Shopping Center of Lakewood, Colorado. Their names are Dave Mullins and Charlie Craig, and they are accompanied by Craig's mother, Ms. Deborah Munn. Mullins and Craig were planning their wedding and were looking for a specially designed cake, specifically "a rainbow-layered masterpiece decked out in teal and red frosting (their ceremony colors)" (Whipple). Coming prepared for their appointment, Craig was carrying with him "a portfolio full of designs and a list of flavors for their five-tier cake" (Munn "How It Feels"). The cake was for a wedding reception in Denver they had scheduled for October after their wedding in Provincetown, Massachusetts in September (Queer Voices). When they entered the shop, the owner and cake designer, a baker named Jack Phillips, "motioned [them] to a small table inside the bakery" where they could discuss their options and where the couple began "viewing photos of the available wedding cakes" (Chavez 2; Munn "How It Feels"). Their exchange, Phillips would later note, "lasted no more than 20 seconds" (Chavez 2). Jack Phillips asked the couple for whose wedding would the cake be designed. Craig responded, "It is for our wedding." Mr. Phillips said that "he does not make cakes for same-sex couples' weddings or commitment ceremonies" (Munn "It Was Never"). When Craig, asked, "Really?," Mr. Phillips replied, "I'll make you birthday cakes, shower cakes, sell you cookies and brownies; I just don't make cakes for same-sex weddings" (Munn "It Was Never"; State of Colorado 2). According to both Mullins and Craig's account, a "pregnant pause" settled over the seated group (Somashekhar; Stanley, et al.). Mullins, Craig, and Munn then decided to leave the establishment, but not before Mullins fired off a "Fuck you and your homophobic cake shop"; and he also "may or may not have flipped [Jack Phillips] off" (Whipple). The three of them retreated to their car, where Craig

began “shaking” and “crying” out of “embarrass[ment]” over the incident (Munn “How It Feels”). Such was the catalyzing event that would spawn years of litigation and conclude with an opinion from the Supreme Court of the United States.

The following day, Ms. Munn called Phillips “in an effort to obtain more information as to why her son was refused service” (Chavez 2). Phillips responded “that he does not create wedding cakes for same-sex weddings because of his religious beliefs, and because Colorado does not recognize same-sex marriages” (State of Colorado 3). This would be the first of multiple occasions on which Phillips would cite his religious convictions as compelling him to refuse to create a same-sex wedding cakes. For example, in another early response to the incident, Jack Phillips commented, “I’m a follower of Jesus Christ, so you could say this is a religious belief. I believe the Bible teaches that (homosexuality) is not an OK thing” (Meredith and Holden). Phillips would be sure to note, however, that he was willing to sell the couple any other items in the store, and would also refuse to design “cakes depicting witches or ghosts for Halloween, or to design cakes with sexually suggestive images” as he “belongs to a Baptist-rooted church” and finds these depictions violative of his religious faith (McIntyre). As a result, Phillips claimed in an interview that “since 1993” Masterpiece Cakeshop “ha[d] turned away about a half dozen same sex weddings” (Meredith and Holden). Mullins, rather than a matter of religious liberty, interpreted Phillips’ actions as discriminatory, the incident between them being “the first time” he had “ever been refused service at a business because [he] was gay,” and decided that “standing up for [his] community’s rights” was the proper response (McDonald). The couple’s first public reaction was released when they “went home” from Masterpiece Cakeshop “and vented online to tell [their] friends what happened,” because of which the Cakeshop was swiftly hit with incendiary Yelp comments, “thousands of negative messages on

[the] shop's website," an online petition, a boycott, "garbage thrown at [the] shop," and "several death threats" from those who disagreed with Phillips' decision (Meredith & Holden; Queer Voices; Savage). A protest was even held on August 4, 2012 in front of the Cakeshop (AP). Craig and Mullins would not be immune from attack, however: the couple also was targeted online by a "number of ugly, mean comments" (Savage). The clash between the two parties was just beginning to materialize.

Mullins and Craig expanded their conflict in the public sphere to the judicial sphere by electing to take legal action, and "filed charges of discrimination with the Colorado Civil Rights Commission" (State of Colorado 1). Though they "did ultimately go to a different bakery," they knew "that Colorado's public accommodations law specifically prohibited discrimination based on sexual orientation" (Barnes "The Spurned Couple"). First, the Colorado Civil Rights Division conducted an "investigation" through which they discovered "that Phillips had declined to sell custom wedding cakes to about six other same-sex couples" and "cupcakes to a lesbian couple for their commitment celebration" due to his religious beliefs and/or for fear that the couples were breaking Colorado's ban on same-sex marriage (*Masterpiece* 6-7). With this further knowledge, and through the legal support of the American Civil Liberties Union and the Colorado Civil Rights Commission, Mullins and Craig filed a complaint against Masterpiece Cakeshop with the Office of Administrative Courts on May 31, 2013, to be reviewed by administrative law judge Robert N. Spencer (State of Colorado 1; AP).

Jack Phillips would not submit to the lawsuit quietly, and secured the backing of Alliance Defending Freedom (ADF), "a legal firm specializing in religious liberty cases" (Starnes "Judge orders baker"). ADF is known as a well-staffed, well-connected, well-funded team of legal professionals dedicated to preserving Christian conservative values in laws across the globe. As

Sarah Posner of *The Nation* has described them, "[ADF] has trained thousands of lawyers, many of whom have gone on to government service at the federal, state, and local levels. The organization has helped shape 'religious freedom' legislation; provides grants to other Christian-right organizations; and presses school districts to adopt its model policies on issues like transgender facility access." Concomitantly, a letter was posted on the Masterpiece Cakeshop website which condemned Colorado Attorney General John Suthers for "partner[ing] up with the ACLU and the Colorado Civil Rights Commission," claimed that Phillips "did not discriminate on the basis of sexual orientation; he declined participation in speech and activity that would violate his religious beliefs," and called for "Colorado citizens" to "please stand up for Jack Phillips and for [their] right to freely exercise [their] religion" by calling Attorney General Suthers, Governor Hickenlooper, and their legislators (Masterpiece Cakeshop "Masterpiece Letter" 1-2). Both parties would fight for their rights before the law, and no victor was immediately obvious.

In their arguments before the Office of Administrative Courts, Phillips' legal team conceded that Masterpiece Cakeshop was a public accommodation, but insisted that Phillips' actions were not discriminatory, as his actions were based on "a deeply held religious conviction that marriage is only between a man and a woman" and not a result of "bias against Complainants' (Craig and Mullin's) sexual orientation" (State of Colorado 2). They held, on the contrary, that compelling Phillips to serve Mullins and Craig would actually be a violation of his "rights of free speech and free exercise of religion" under the United States and Colorado constitutions (State of Colorado 2). Despite this attempt by the ADF attorneys at framing the situation in Phillips' favor, Judge Spencer did not find their arguments compelling, and so he ruled against Masterpiece for violating Colorado's anti-discrimination laws on December 6,

2013, and ordered Phillips to "cease and desist from discriminating" and to "take…corrective action" proscribed by the Commission (State of Colorado 3). Under Title 24, Article 34, Part 6 of the Colorado Revised Statutes, a person may not discriminate against a customer in a public accommodation based on their "sexual orientation" in a way that denies them "the full and equal enjoyment of the goods" and "services" of the establishment, or else the state may impose a penalty in the form of a fine "not less than fifty dollars nor more than five hundred dollars for each violation" ("Discrimination in places"; "Penalty and civil liability."). These statutes fall under what, in more general parlance, is referred to as the Colorado Anti-Discrimination Act, or CADA ("Anti-Discrimination Statutes"). Phillips was found to have "violated the terms of [these statutes] by discriminating against Complainants because of their sexual orientation" (State of Colorado 6). Judge Spencer found unconvincing the Respondents' position that Phillips does not "hold any animus toward homosexuals or gay people" and only refused service to Craig and Mullins "due to [his] objection to same-sex weddings, not because of [their] sexual orientation," seeing it as "a distinction without a difference" as "[o]nly same-sex couples engage in same-sex weddings" (State of Colorado 5). One of Phillips' attorneys, Nicolle Martin, responded harshly to the order: "He can't violate his conscience in order to collect a paycheck. If Jack can't make wedding cakes, he can't continue to support his family. And in order to make wedding cakes, Jack must violate his belief system. That is a reprehensible choice. It is antithetical to everything America stands for" (AP). In a *Fox and Friends* segment, "The Death of Free Enterprise," Phillips also responded to the decision: "I don't believe that I need to throw out my religious convictions at any time for any reason" and expressed that he was willing to go to jail "If that's what it takes" (Leber). Conversely, Ms. Munn would respond with jubilation in an op-ed praising the decision: "The decision that Judge Spencer made has renewed my hope that no other couple

in Colorado will face discrimination by a business owner based on their sexual orientation. It was never about the cake. It was about my son being treated like a lesser person" ("It Was Never"). And Dave Mullins responded both firmly and optimistically, "Being denied service by Masterpiece Cakeshop was offensive and dehumanizing especially in the midst of arranging what should be a joyful family celebration. No one should fear being turned away from a public business because of who they are. We are grateful to have the support of our community and our state, and we hope that today's decision will help ensure that no one else will experience this kind of discrimination again in Colorado" (Fields). The first round of judicial conflict had thus been decided in favor of LGBT civil rights.

The next level of review would be held before the Colorado Civil Rights Commission. Given their open and direct support of Craig and Mullins, their ultimate decision was more or less pre-ordained to be in the couple's favor. There was no surprise, then, when on May 30, 2014, the seven commissioners of the Colorado Civil Rights Commission upheld Judge Spencer's order, agreeing with his decision that the Masterpiece Cakeshop had violated Colorado Civil Rights law prohibiting discrimination because of sexual orientation in places of public accommodation (Asmar). In their deliberations during the May 30th meeting, Commissioner Jairam expressed agreement with Judge Spencer's analysis that sexual orientation and same-sex marriage were "tied together" in discrimination cases ("Joint Appendix" 198). Another speaker agreed, making comparison to anti-miscegenation laws where race and interracial marriage could not be separated ("Joint Appendix" 198-199). With regards to Phillips and his legal team's free speech and free expression argument, one of the commissioners reasoned that a free speech exception claim would fail if Phillips had said, "I don't bake cakes for Hispanics," and therefore it must also fail here ("Joint Appendix" 201). Commissioner Jairam, in agreement, responded, "I

mean, it's not an issue of free speech. I mean, I can believe anything I want to believe….But if I'm going to do business here, then I'd better not discriminate if I'm going to follow the laws of discrimination" ("Joint Appendix" 202). The Chairwoman added, "I don't know that by making a cake that someone has ordered, that they're being forced to say something that they don't agree to with. I don't think that that's what's happening. I think they're just -- they're making a cake" ("Joint Appendix" 203). With regards to the religious liberty claim, the Chairwoman offered one possible argument that "the Colorado Antidiscrimination Act should be reviewed under strict scrutiny," but Commissioner Rice cut in to say that "the Colorado Antidiscrimination Act is written in a very neutral manner" and Phillips' cakeshop is not "within the [possible] exceptions" ("Joint Appendix" 204-5). Commissioner Jairam commented, "I don't think the act necessarily prevents Mr. Phillips from believing what he wants to believe," and, summarizing Judge Spencer's position, the Commissioner states that "essentially he was saying that 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. And I think it was very well said by that judge" ("Joint Appendix" 205-207). Their position on the case was thus made clear. In their final agency order, the Commission stated that Masterpiece Cakeshop must "take remedial measures to ensure compliance," such as "comprehensive staff training on the Public Accommodations section of the Colorado Anti-Discrimination Act" and "changes to any and all company policies to comply" with the law and "this Order" ("Final Agency Order" 2). They further ordered that the company was to provide them "quarterly compliance reports…for two years" which would include "the remedial measures taken" and any instances in which a customer was "denied service" ("Final Agency Order." 2). There would, again, be no relief or approval for Phillips' First Amendment claims.

Around this time, the couple and Phillips would increasingly find themselves in the press as their case began making national headlines. Predictably, Mullins responded approvingly and hopefully in the media to the Commission's decision: "We've already been discriminated there. We've already been treated badly. The next time a gay couple wanders in there asking for a wedding cake, they won't have the experience we had. They will have a responsible experience and leave feeling respected" (CBS). Rather than submit to the Commission's orders or be further penalized for refusing to serve same-sex couples wedding-related goods, however, Phillips declared that he would cease creating wedding cakes altogether, stating "We would close down the bakery before we would complicate our beliefs" and reiterating "I don't want to participate in a same-sex wedding" (CBS4 Denver). Phillips was adamant in vowing not to be cowed by the Commission, proclaiming, "I will stand by my convictions until somebody shuts me down" and "I don't plan on giving up my faith and changing because" of the decision (Starnes "Baker"; Torres).

Phillips and his legal team decided to fight the Commission one final time by requesting a motion of stay on their order – though the Commission itself would have to agree to grant it. In response, the commissioners held further proceedings on the case in a meeting on July 25, 2014, the intention being to discuss the requested "motion for a stay of…the Commission's final order" and "a notice of appeal regarding…the appellate court" ("Colorado Civil Rights" 7). In addressing the motion for a stay, one of the commissioners commented, "Complying with the order is not harmful or irreparable to Masterpiece Cake. I don't see that any harm is done there" ("Colorado Civil Rights" 8). Another remarked that "the U.S. Supreme Court has found over and over that you cannot discriminate on the basis of race, and sexual orientation is a status absolutely like race" ("Colorado Civil Rights" 10). The Chairman recognized that "Mr. Phillips

says that he wants to be respected or his views and religious views to be respected," but the Chairman "[did not] believe that the individual's right to practice his religion violates other people's rights to free access" ("Colorado Civil Rights" 10). One of the commissioners added that "there's some rhetoric that this is a case about same sex marriage. Well, it's really not. It's really about a case about denial of service" ("Colorado Civil Rights" 11). Then came from a commissioner what would prove to be a rather consequential set of remarks for the case at the Supreme Court:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be -- I mean, we -- we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to -- to use their religion to hurt others. So that's just my personal point of view. ("Colorado Civil Rights" 11-12)

There were no further comments. By a voice vote, the Commission "denie[d] the respondent's motion for a stay of [their] final order" ("Colorado Civil Rights" 12). Jack Phillips and Alliance Defending Freedom had thus failed a third time to receive a decision in their favor.

Regardless of these setbacks, Phillips was still not ready to surrender his case, and with the aid of his Alliance Defending Freedom legal team, he appealed the Commission's order to the Colorado Court of Appeals, where arguments would begin on July 7, 2015 (Osborn; Somashekhar). This additional push for victory proved equally fruitless. The Colorado Court of Appeals also disagreed with Phillips' arguments on all accounts. First, they dismissed his claim that Administrative Law Judge (ALJ) Spencer "erred in denying two motions to dismiss" filed by

Phillips' legal team (Colorado Court of Appeals 4). In the first motion, Phillips argued "that the Commission lacked jurisdiction to adjudicate the charges against him…because Mullins named only 'Masterpiece Cakeshop,' and not Phillips personally, as the respondent in the initial charge of discrimination filed with the Commission" (Colorado Court of Appeals 6). In the second motion, Phillips, and the Masterpiece Cakeshop as a company, jointly made the same argument that the Commission lacked jurisdiction, but this time because of an "erroneous citation" that allegedly failed to communicate to Phillips the "legal authority and jurisdiction of the commission" (Colorado Court of Appeals 10). Second, the Court of Appeals dismissed the claim that Phillips only refused to serve Craig and Mullins due to his religious opposition to same-sex marriage, rather than due to their sexuality, and because the language of the Colorado Anti-Discrimination Act (CADA) explicitly states "because of" sexual orientation, he thereby did not technically violate CADA (Colorado Court of Appeals 12). Third, the Court dismissed Phillips' arguments that he was being compelled to express "a celebratory message about marriage" contrary to his religious beliefs and therefore his First Amendment rights to freedom of speech and freedom of religion were being violated (Colorado Court of Appeals 24, 42). Finally, the Court dismissed Phillips claim "that the Commission's cease and desist order exceeded the scope of its statutory authority" as "it may only issue orders with respect to the specific complaint or alleged discriminatory conduct in each proceeding" and not "unidentified parties" such as "individual employees" or those future same-sex couples who would wish to purchase wedding cakes at Masterpiece Cakeshop (Colorado Court of Appeals 62-63). The Commission's order was thereby upheld, and Craig and Mullins' position that they were unlawfully discriminated against was again vindicated by a judicial body.

Mullins and Craig were understandably satisfied with the Court's decision, with Mullins commenting: "We are very pleased with today's ruling. We feel like the Court of Appeals has really affirmed the argument we have been making…that the way we were treated at Masterpiece Cakeshop was both illegal and wrong" (Stanley, et.al.). Phillips, also understandably, was dissatisfied: "I think, obviously, (the Court's decision) is wrong. The U.S. Constitution clearly protects my rights of freedom of speech and freedom of religion" (Stanley, et.al.). To bolster his business, members of Phillips' family reacted by crowdfunding through an online campaign titled "Support Jack Phillips," which intended to raise $200,000 for the Masterpiece Cakeshop (McIntyre; Richardson). In an interview with the *Daily Signal* following the decision, Phillips also reaffirmed why he continues to fight: "What's important is that I'm being obedient to Christ. He's given me this business and if he were here, he wouldn't make the cake. If he were my employee, I wouldn't force him to make the cake and participate in it because it doesn't honor God. The Bible calls it a sin" (McIntyre). Jack Phillips was thus committed to defending his position that his First Amendment rights were being violated by the Commission, and was still not prepared to surrender that conviction. Therefore, in an attempt to have the Court of Appeals' decision overruled, Phillips and his legal team appealed to the Colorado Supreme Court, petitioning for writ of certiorari on October 23, 2015 (Petitioners). But in April of 2016, the Colorado Supreme Court denied their petition and allowed the decision of the lower court to stand (Colorado Justice Department; Roberts). Celebrating another victory for their legal team, ACLU Attorney Ria Tabacco Mar responded positively to the denial: "We all have a right to our personal beliefs, but we do not have a right to impose those beliefs on others and discriminate against them. We hope today's win will serve as a lesson for others that equality and fairness should be our guiding principles and that discrimination has no place at the table — or the

bakery, as the case may be" (Roberts). All of the tiers of the judicial system at the state level were hence exhausted, leaving the federal judiciary as the final possible destination for the case. Phillips and Alliance Defending Freedom thus filed a Petition for Writ of Certiorari to the Supreme Court of the United States on July 22, 2016 ("Masterpiece Cakeshop" *SCOTUSblog*).

Unlike the Supreme Court of Colorado, the Justices at the highest court in the nation decided, after several conferences across several months, to grant Masterpiece Cakeshop's petition on June 26, 2017 ("Masterpiece Cakeshop" *SCOTUSblog*). Arguing on behalf of Jack Phillips would be Kristen Waggoner of Alliance Defending Freedom, who "was chosen to argue *Masterpiece Cakeshop* by ADF's new president, Michael Farris," and Solicitor General Noel J. Francisco who would argue "on behalf of the United States, as amicus curiae, supporting the Petitioners" (Posner; Transcript 2). In a 2017 *USA Today* editorial, Jack Phillips reiterated his core argument for continuing to appeal this case: "The First Amendment defends my right to create custom cake art that is consistent with my faith, while declining requests that ask me to celebrate events or messages that conflict with my faith. As a cake artist, I can live out my faith in my day-to-day life, and make that faith the basis for my creative decisions" (Phillips "Here's"). On November 8, 2017, the Centennial Institute of the Colorado Christian University hosted a "Religious Freedom Rally for Jack Phillips" in order to "send a message to Washington, D.C. that religious freedom needs to be protected!" (Centennial Institute). At the event, Jack Phillips spoke on his then five-year-old case on its way to oral arguments: "Every American should be free to choose which art they create and which art they won't create without fear of being unjustly punished by the government….If the government can force me to create custom art that is against my faith, it can force you to express messages that violate the beliefs you hold" (Phillips "Religious Freedom"). Between the Supreme Court's granting of Masterpiece's petition

and oral arguments, a series of amicus curiae briefs were filed in support of Masterpiece Cakeshop, including those from legal groups like the Christian Law Association, religious groups like the United States Conference of Catholic Bishops, policy groups such as the Cato Institute, and political actors, including a group of United States Senators and Representatives, and even the Department of Justice ("Masterpiece Cakeshop" *SCOTUSblog*). The petitioners were well-prepared and well-fortified for their arguments before the Court, but they were not without their opposition.

For the respondents' attorneys, the Colorado Civil Rights Commission would be represented by Frederick R. Yarger, Solicitor General of Colorado, and the couple, Craig and Mullins, would be represented by David D. Cole, the national legal director of the American Civil Liberties Union ("David Cole"; Transcript 2). They also received a series of amicus briefs in support of their positions, including LGBT rights group like the Transgender Law Center, secularist groups like Americans United for the Separation of Church and State, civil rights groups like the NAACP Legal Defense & Education Fund, and even the American Psychological Association and the American Bar Association ("Masterpiece Cakeshop" *SCOTUSblog*). The American Civil Liberties Union condemned the Department of Justice for its support of the petitioners' arguments, with Deputy Legal Director Louise Melling stating, "This Justice Department has already made its hostility to the rights of LGBT people and so many others crystal clear. But this brief was shocking, even for this administration. What the Trump Administration is advocating for is nothing short of a constitutional right to discriminate" ("ACLU comment"). Craig and Mullins were understandably "disappointed" at the Supreme Court's acceptance of the case, with Mullins commenting, "We're at the five-year point now," but nonetheless committed to their ethic undergirding the case: "This case isn't about Jack

Phillips and it isn't about us. It's about the principle that gay people should be able to receive equal service at businesses open to the public" (Barnes "The spurned couple"). Echoing a similar sentiment, Craig suggested that they were still pursuing this case in the interest of civil rights in public accommodations, remarking, "While we're disappointed that the courts continue debating the simple question of whether LGBT people deserve to be treated like everyone else, we hope that our case helps ensure that no one has to experience being turned away simply because of who they are" ("Supreme Court Will Hear"). Regarding their position on religious liberty, Mullins stated in a *Washington Post* interview that he and his partner "strongly believe in the rights of people to practice their religious beliefs whatever they may be, but you can't practice your beliefs in a way that excludes others from public life based on who they are. And in the end a cake shop is a business that is open to the public, and it is governed by civil laws and not religious laws" (Somashekhar). Thus the positions were established, the briefs sent to the court, and the headlines were blasted across the country. The only matter left for both sides was to deliver oral arguments before the nine Justices of the Supreme Court.

On December 5, 2017, the litigants entered the Supreme Court for oral arguments. Outside, activists and supporters for both the couple and Masterpiece "played music, chanted and carried signs and banners" before the front steps of the Supreme Court building, some rallying to keep stores #OpenToAll people, others advocating for #JusticeForJack in defense of First Amendment freedoms (Manzella; Totenberg). Inside, ADF's Waggoner and Solicitor General Franciso presented their arguments first for the petitioners, followed by Colorado Solicitor General Yarger and the ACLU's Cole for the respondents (Transcript). Justice Kennedy – who , based on his case history, some (rightly) presumed would be the opinion's author – had the opportunity to probe each side and clarify their views in preparation for the Court's decision.

Justice Kennedy would speak approximately twenty times throughout the almost one hour and thirty minute session. Ms. Waggoner opened the arguments by answering a barrage of questions from Justices Sotomayor, Ginsburg, and Kennedy over the distinction between being compelled by law to sell any item in a store and being compelled by law to sell an item specially designed for a particular purpose – specifically a purpose that is contrary to the designer's conscience (Transcript 4-10). Ms. Waggoner argued that in such a context of special design, for a political or legal body to demand that someone create an item that violates their religious beliefs is tantamount to "compelled speech," a violation of the First Amendment (Transcript 5). Justice Kennedy inquired whether or not Phillips had already "express[ed] himself when he made" a cake that he would be selling as pre-made in his storefront, in the same way he would be expressing himself in a specially designed cake (Transcript 5). Otherwise, why, according to Ms. Waggoner, would Phillips be reasonably compelled by law to "to sell the cake that's in the window," but could not be compelled by law to sell a specially designed cake that violates his religious beliefs (Transcript 5)? Ms. Waggoner responded that the intended purpose of a pre-made cake is already decided upon its creation, and once it is "placed in the stream of commerce in a public accommodation setting," that purpose is settled at the discretion of the baker. Conversely, when Phillips is compelled to design a cake for "a different purpose" which violates his conscience, "and is expressing [that] message through a cake," then the "result" would be a cake endorsing that unconscionable message (Transcript 6). Justice Kennedy, seeking further clarification, also asked if Phillips would "have to sell" a cake with "a biblical verse" that he had placed in "the window" if the couple sought to purchase it (Transcript 8). Ms. Waggoner replied that "he would need to sell that cake" as "there [would] be no compulsion of speech," given that

"the message he intended for it" had already been expressed through the design (Transcript 9). Justice Kennedy would question Ms. Waggoner no further.

During General Francisco's arguments, Justice Ginsburg continued a line of questioning that began with Ms. Waggoner, in which Justice Ginsburg was trying to determine whose work would be considered a form of artistic design within the meaning of free expression; she inquired whether lines could be drawn among florists, invitation makers, makeup artists, and hairstylists, as Ms. Waggoner suggested (Transcript 26). Justice Kennedy commented that there are "so many of these examples….[which] do involve speech," and if everyone included in these examples could claim exemptions to public accommodation laws under their First Amendment rights, then that "means that there's basically an ability to boycott gay marriages" (Transcript 26-27). General Francisco responded that the categories of "protected speech" would be "relatively narrow," and stated, as an example, that a commission "could [not] force the African American sculptor to sculpt a cross for Klan service just because he'd do it for other religious –" (Transcript 27). Justice Sotomayor cut in first, but was then cut-off by Justice Kennedy who asked bluntly, "If you prevail, could the baker put a sign in his window, we do not bake cakes for gay weddings?," evoking the Jim-Crow-era signs refusing people of color service (Transcript 27). When General Francisco replied that Phillips "could say he does not make custom-made wedding cakes for gay weddings," Justice Kennedy shot back, "And you would not…think that an affront to the gay community?," in an appeal to the dignity of that community he so often espoused in his pro-LGBQ opinions (Transcript 27). General Francisco affirmed that Mr. Craig and Mr. Mullins have "dignity interests," but emphasized that "there are dignity interests on the other side here too" (Transcript 28). In a similar line of reasoning further along in the arguments, Justice Kennedy expressed concern over the collective effect of multiple bakers nationwide

refusing service to same-sex weddings, asking, "What would…the government's position be if you prevail in this case, the baker prevails in this case, and then bakers all over the country received urgent requests: Please do not bake cakes for gay weddings. And more and more bakers began to comply. Would the government feel vindicated in its position that it now submits to us?" (Transcript 44-45). Again, Justice Kennedy indicated an apparently high level of concern for the damaging impact the Court's decision could have on same-sex couples, reminiscent of his dignifying language toward the gay community in *Obergefell*. Justice Kennedy would question General Francisco no further.

During General Yarger's arguments, the issue of the Free Exercise Clause of the First Amendment was raised. Justice Kennedy used its introduction as an opportunity to discuss the comments by Commissioner Hess of the Colorado Civil Rights Commission when the Commissioner said "freedom of religion used to justify discrimination is a despicable piece of rhetoric" (Transcript 51). Justice Kennedy inquired straightforwardly, "Did the Commission ever disavow or disapprove of that statement?," clearly finding Commissioner Hess' comments inappropriate, at the least (Transcript 51). Mr. Yarger responded that no such disavowal had been made, but agreed to disavow the statement before the Court, and clarified that Commissioner Hess' comments were meant to express the problem of claiming a religious belief as the grounds for "an exception to a generally applicable anti-discrimination law" (Transcript 52). Justice Kennedy then followed-up with a hypothetical: If they were to "suppose….there was a significant aspect of hostility to a religion in this case," that "at least one member of the commission based [their] decision on…the grounds…of hostility to religion," then would it be permissible to allow the "judgment [to] stand" (Transcript 52-53)? Mr. Yarger replies that if that was the case, then "absolutely, that would be a problem" (Transcript 53). Justice Gorsuch also

contributed that another commissioner commented that "if someone has an issue with the laws impacting his personal belief system, he has to look at compromising that belief system" (Transcript 55). Mr. Yarger stated that he does not believe "that what was expressed in the record reveals the kind of bias that existed in cases like the Church of…Lukumi Babalu Aye" and tells the Justices that, if they "disagree," as Gorsuch posed as a hypothetical that they do, then they "have to do that analysis and decide whether this proceeding was engineered in a way to single out people with a certain faith and they're not. This law would apply to protect people with religious beliefs" (Transcript 56). Justice Alito also added to this line of questioning, and his inquiries are worth quoting in full due to their future relevance to the Court's opinion:

> JUSTICE ALITO: One thing that's disturbing about the record here, in addition to the statement made, the statement that Justice Kennedy read, which was not disavowed at the time by any other member of the Commission, is what appears to be a practice of discriminatory treatment based on viewpoint. The -- the Commission had before it the example of three complaints filed by an individual whose creed includes the traditional Judeo-Christian opposition to same-sex marriage, and he requested cakes that expressed that point of view, and those -- there were bakers who said no, we won't do that because it is offensive. And the Commission said: That's okay. It's okay for a baker who supports same-sex marriage to refuse to create a cake with a message that is opposed to same-sex marriage. But when the tables are turned and you have the baker who opposes same-sex marriage, that baker may be compelled to create a cake that expresses approval of same-sex marriage. (Transcript 58)

In other words, if the Commission was willing to allow businesses to exercise their conscience in rejecting religious messages they found abhorrent, but was not willing to allow businesses to do

the same for pro-LGBT messages, then there appears to be an unacceptable bias. Mr. Yarger attempts to defend this decision by drawing a distinction between items with "messages….[a baker] wouldn't have sold to any other customer" and one they would, and adds that "a very strong objection to interracial or interfaith marriages" would also not be exempt from the law (Transcript 59, 62). Mr. Yarger is essentially arguing that because Jack Phillips would sell a wedding cake to any heterosexual couples, but intentionally exclude same-sex couples, that was unlawful discrimination, just as it would be if he denied the same service on the grounds that a couple were of different races or religions rather than being one race or one religion. Regardless, Justice Kennedy responded paternalistically and sternly to the Commission's behavior, claiming that the commissioners were "neither tolerant nor respectful of Mr. Phillips' religious beliefs" and goes so far as to say that "accommodation is, quite possible, we assume there were other shops that -- other good bakery shops that were available," implying there was a less restrictive means of dealing with this case by simply having another baker create the cake for Craig and Mullins (Transcript 62). Justice Kennedy would go on to also seemingly express concern over the "training sessions" that are a part of Phillips' penalties. Mr. Yarger claimed that they are only used to instill "a demonstrated understanding of the Colorado Anti-Discrimination Act," though Kennedy framed them more sinisterly: "Part of that speech is that state law, in this case, supersedes our religious beliefs, and he has to teach that to his family. He has to speak about that to his family….His family who are the employees" (Transcript 71). There is a connotation here that the training may be somewhat draconian in Justice Kennedy's view, in that it intrudes too deeply into how Phillips instructs his family based on his conscience. Justice Kennedy would question General Yarger no further.

Finally, Mr. Cole from the American Civil Liberties Union presented before the Court, and Justice Kennedy sought even further clarification through another line of hypothetical questioning. Kennedy first inquired whether or not "a baker's assistant," who objected to a same-sex wedding ceremony on religious grounds, but was needed to cut the cake at the ceremony, would be compelled by law to "attend that wedding and help cut the cake?" (Transcript 77). Mr. Cole responded that "in a future case" under that type of scenario the "Court might…create new doctrine and draw a line," though he did not believe that line of reasoning was "necessary to decide this case" (Transcript 77-78). Justice Kennedy also responded to a hypothetical from Justice Alito, who questioned if a religious business owner could be forced by public accommodation laws to design wedding vows denouncing God for an atheist couple (Transcript 81-82). Mr. Cole responded that the Court may decide "to treat it differently," for which Justice Kennedy sought clarification, asking "what principle would we use to treat it differently?" Mr. Cole repeated his agreement that direct participation should be where the line is drawn, answering, "if it has the effect of compelling somebody to engage in a religious ceremony that is against their deep religious commitment, we might treat that differently" (Transcript 83). Lastly, Justice Kennedy described the basing of civil rights laws in these cases on identity to be "too facile," given that anyone could claim "It's not their identity; it's what they're doing" to work around it (Transcript 87). Mr. Cole countered that, in *Bob Jones University*, the Supreme Court agreed that "refus[ing] to admit those who are engaged in interracial marriage or advocate interracial marriage" was tantamount to "race discrimination" (meaning equivalently applicable to civil rights laws as would be a case of explicit prejudice "on the basis of race") (Transcript 87). The two cannot be separated, according to the Court's precedent. With that final comment, Justice Kennedy would be silent the remainder of the session.

Following the oral arguments, all the litigants stepped outside to give their remarks before the demonstrators and cameras. They seized this opportunity to reiterate the core arguments of their opposed positions. Michael Farris, the President of Alliance Defending Freedom, spoke in monumentalizing terms: “This is the first time in American history where there is a serious consideration of compelling people to deliver a message that is contrary to their beliefs. Freedom of speech means the ability to refuse to speak a message you do not agree with, and the freedom includes a context where other people might be offended” (“Supreme Court Sights and Sounds”). Jack Phillips also took to the microphones: “Though I serve everyone who comes into my shop, like many other creative professionals, I don’t create custom designs for events or messages that conflict with my conscience. I don’t create cakes for Halloween, promote sexual or anti-American themes, or disparage people, including people who identify as LGBT. For me, it’s never about the person…; it’s always about the cake. It is always about the message the person wants the cake to communicate” (“Supreme Court Sights and Sounds”). Phillips went on to say, “Stopping the wedding art has cost us much of our business, so much so that now we are struggling just to make ends meet….It is hard to believe that the government is forcing me to choose between providing for my family and my employees and violating a relationship with God. That is not freedom. That is not tolerance” ” (“Supreme Court Sights and Sounds”). The respondents also offered their remarks. Charlie Craig voiced to the crowd, “Today, we stand up for ourselves, but we stand up for you, too, and we can tell you guys are standing up for us, and we are all in this together, right?....You know, I feel like Dave and I do not have an agenda. We do have hopes and dreams. We want our friends and families to be able to live meaningful lives” (“Supreme Court Sights and Sounds”). David Mullins spoke in even stronger terms, “This is not about the cake. This has never been about the cake. And this is not

about weddings. It has never been about weddings. No. This is about freedom, freedom for LGBT people to live full lives in public and not in constant fear that they will be denied basic services, fired from their jobs, or lose their homes because of who they are" ("Supreme Court Sights and Sounds"). In the end, the litigants went home, the press left, the demonstrators filed off, all of the signs, music, and applause melted away, and all that was left to do was wait for the nine Justices to finally make their decision.

The Case: A Complicated Cake

In the opening line to Federalist No. 10, James Madison offered insight into the protective power of the United States Constitution, arguing that "Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." Madison foresaw the continued fracturing of the American people into ideological camps "adversed to the rights of other citizens" who would attempt to wield the power of a centralized government "to vex and oppress each other." Madison believed that the unbridled treacheries of a domineering faction could be subdued by a properly arranged republican form of government. Simultaneously, the United States Constitution would demand the establishment of a federal judiciary, which Alexander Hamilton suggested in Federalist No. 78 would incidentally render courts responsible for defining the "meaning and operation" of conflicting statutes, either by "reconcil[iation]" or by upholding one law and abolishing the other. This process of judicial review would be formally solidified by Chief Justice Marshall in his foundational opinion for *Marbury v. Madison* (1803), in which he famously declared, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

This confluence of faction control and judicial review would lead the Supreme Court of the United States to decide the constitutionality of statutes in countless cases brought and bolstered by competing interest groups, each vying to see their preferred interpretations enshrined in the nation's jurisprudence. As their case law accumulated over centuries, the Supreme Court would also find itself grappling with the interpretations set by its own ancestral

justices during past factional conflicts, in some cases having to establish a new precedent to abolish the old (e.g., the notable overturning of the *Plessy v. Ferguson* doctrine of "separate but equal" in *Brown v. Board of Education*). The Supreme Court's struggle to address competing factional interests and determine the continued legitimacy of controversial precedents continues in various forms in their present casework. In confronting this struggle, Justices on the Supreme Court often consider and implement a series of calculated maneuvers in response to a number of political, social, and inter-judicial pressures. Many of these maneuvers fall under the implementation and study of judicial rhetoric.

When Associate Justice Anthony M. Kennedy was selected by Chief Justice John G. Roberts, Jr. to author the opinion for *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, he was responsible for adopting these historic struggles and significant duties. Two competing factions – supporters of Craig and Mullins and supporters of Jack Phillips – were in intense disagreement across the country and looking to the judiciary branch to settle their differences. Based on his analysis of the case material, his review of the oral arguments, the comments of his fellow Justices during conference, the advisement of his clerks, and his knowledge of the relevant precedent and principles at play, Justice Kennedy had to decide how he would form and articulate his opinion in response.

This would be no easy task for the long-time jurist. He knew he had to write the opinion moderately and agreeably enough to represent the diversity of viewpoints in the 7-2 majority – though he likely recognized early on that there would be concurring and dissenting opinions, given Justice Breyer and Justice Kagan's obvious progressive lean, Justice Roberts, Alito, Gorsuch, and Thomas' clear conservative lean, and the inevitable dissent of Justices Ginsburg and Sotomayor as the most steadfast defenders of civil rights on the Court. While there was

certainly tact and deliberate movements that had to be made toward this end, remaining temperate and measured in his response seemed to already align with Justice Kennedy's own centrally located (albeit clashing) sentiments. He was known as a staunch defender of the dignity and equal rights of homosexuals and same-sex couples from his landmarks decisions in *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*, yet he also was the authoring justice of the landmark free-exercise case *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* and the landmark freedom of speech case *Citizens United v. Federal Election Commission*. Two of his beloved principles – LGBT civil rights and First Amendment liberties – were mired in conflict in *Masterpiece*, and it is doubtful that he found granting one supremacy over the other a simple or desirable task. Out of this dilemma, Justice Kennedy also had to decide to what extent he would address each principle, or determine the magnitude of how far he wished for the opinion to reach. He could decide to address only the free speech arguments, or only the free exercise defenses, in their relation to public accommodation laws, or take on both. He could declare that religious exemptions to public accommodation laws in every state are constitutionally valid, or that public accommodation laws must always trump religious liberty claims in every situation, or he could more narrowly tailor his decision. He could defiantly reinstitute the *Smith* precedent which he concurred with almost three decades ago, in contravention of the Religious Freedom Reformation Act, or he could maintain the *Gonzales* ruling in which he joined the majority. Each decision would have potentially far-reaching consequences, and would likely result in some public and political controversy.

Whichever course he chose, he would also have to take into consideration a number of rhetorical factors in order to tactfully shape his opinion and convince readers that he had arrived at a proper and well-informed opinion. One of his rhetorical challenges was to establish a

persuasive and comprehensive standard of review for these types of cases in the interest of future application. If the standard for review was left unclear, incomplete, or full of logical holes, then it could either be overturned by a future Supreme Court or misapplied by lower courts. Another one of his rhetorical challenges was to persuasively present the evidence from the history of the case in order to effectively support the Court's final decision. If the evidence was poorly presented, the Court's decision could appear unsubstantiated, ill-conceived, emotional, or biased, and future courts on all levels would have no official base of comparison to see if the details of two apparently similar cases actually align. And a third rhetorical challenge for Justice Kennedy was to properly entrench his opinion in the case law that serves as precedent on issues of the First Amendment and civil rights. In this case, Kennedy possessed an array of case law from which he could have crafted a reasonable opinion for either party in *Masterpiece*. Regardless of the set of ideas and cases he adopted, he needed to wield them well enough to satisfy the American public.

How did Justice Kennedy decide to manage these responsibilities? As indicated in the introduction, Justice Kennedy would decide to render a narrowly tailored opinion addressing the neutral treatment of free exercise claims before adjudicatory civil rights bodies. Not only would Justice Kennedy advocate for such neutral treatment – a recognition and respect for both sides of the issue and a response that reflects unbiased goodwill toward both parties – but he would actually format his opinion as a demonstration of that neutrality. This rhetorical tactic effectively provides influential guidance to both civil rights bodies and lower courts as an exemplar for how they may handle comparably disputed conflicts. Justice Kennedy was likely aware of the multitudes of cases similar to *Masterpiece* that were being litigated across the country, and wanted to send a clear and forceful message that tolerance and objectivity would be necessary,

lest an adjudicator sought their ruling to be overturned. Justice Kennedy also intended to retire soon after the release of this opinion, and this would be his final opportunity to set into precedent how he believed civil rights and religious liberty controversies could be appropriately addressed. He further knew that strictly supporting one of the two principles, LGBT civil rights or religious freedom, would cause him to either lose Chief Justice Roberts and Justices Gorsuch, Thomas, and Alito from the majority, or Justices Breyer and Kagan, respectively, drastically alter the outcome of the case, and show hardline splits between the Justices. He thereby wrote an opinion on neutral treatment which was agreeable to seven of the nine justices and allowed him to impact the future litigation of this conflict.

During oral arguments, Justice Kennedy, though speaking in a hypothetical, suggested that future litigation on these matters could involve "very complex case[s]" (Transcript 77). This recognition of complexity, and implicit demand for opinions that respect that complexity, would constitute the first piece of guidance extractable from Kennedy's decision. Based on the transcripts of the Commission's hearing, and Kennedy's comments on those hearings, the Commission utterly failed to fulfill that responsibility, treating the case as being straightforward and obviously in favor of Craig and Mullins. From the opening paragraphs of Kennedy's opinion, conversely, there is early indication that *Masterpiece* itself "presents difficult questions," and that a process of "reconciliation" would be necessary to answer them (*Masterpiece* 1). From these observations, the reader already has a sense that Kennedy has no overwhelming bias for one principle over the other, and instead is going to conduct a balancing act of some form between the two.

There is also recognition that this balancing act is not to be taken lightly, that there are nuanced contentions that need to be handled with care. Kennedy provides references to the oral

arguments to exemplify this "difficult[y]" at play, including some of the distinctions in speech and refusal of service that need to be ultimately drawn. He does not want this standard-setting process to be approached without an adequate consideration of the "all but endless" possibilities, so as to avoid infringing on a person's legitimate rights and to respect the intricacy of the issues involved (*Masterpiece* 2). In other words, to treat these types of cases with any sense of one-sided looseness or superficiality would be to fail to address them properly, as they do not have the luxury of such simplicity.

Even in the main thesis of the case, Justice Kennedy exemplifies a measured approach that accounts for the case's complexity. He affirms, based on some of the "precedents" on free exercise previously mentioned, "that the baker….might have his right to the free exercise of religion limited by generally applicable laws" (*Masterpiece* 3). The use of "might have" is notable, as opposed to "must have" or "should have," suggesting that not every religious exemption case may be treated with a uniform response, and that the Supreme Court will not uphold such an absolutist doctrine on the matter. The possible interpretations of the constitutionality of religious free exercise exemptions is thus left somewhat open. Nonetheless, even though it was possible for Jack Phillips to be constitutionally prevented from discriminating, the Commission had failed to conduct themselves properly in their analysis and adjudication of his case. The Commission had failed to exercise "the religious neutrality that the Constitution requires" and thereby "violated the Free Exercise Clause" (*Masterpiece* 3). The case would thus only focus on the unconstitutional conduct of the Commission, as especially emphasized by Kennedy's inclusion of the line "whatever the outcome of some future controversy involving facts similar to these," a line indicating that the full breadth of the major issues involved would not be solved in this opinion. If the question of how a Commission must

approach these cases requires a full opinion of its own, then the actual applications of that approach will require further judicial deliberation.

Beyond an explicit recognition of the intricacy of the case matter, Justice Kennedy's opinion also exemplifies a sense of neutral consideration by making an honest attempt to "steel man" each side's arguments, i.e., to grant credence to each side by presenting a strong, well-articulated version of their positions. The Commission had also failed in this regard, only offering, more or less one-sided agreement with the opinion of Judge Spencer without serious articulation or debate over the petitioners' – or even the respondents' – positions. Justice Kennedy upholds that when the "dignity and worth" of LGBT people are threatened, then the Court has a duty to protect their civil rights and treat their freedom with "great weight and respect" (*Masterpiece* 9). The courts must also apply similar consideration to "religious and philosophical objections to gay marriage," but due to the precedent of *Newman* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law" (emphasis on *neutral*) (*Masterpiece* 9). Kennedy recognizes that not every religious exemption may be granted, because if the religious "exception" provided to churches and clergymen within civil rights laws "were not confined," then "a community-wide stigma" may ensue that would be "inconsistent" with the Court's civil rights precedent (*Masterpiece* 10). Kennedy even goes so far to say that Colorado's public accommodation laws for LGBT people are "unexceptional," meaning they are as legitimate as any other civil rights laws, and in the case where "a baker refused to sell any goods or any cakes for gay weddings," then "the State would have a strong case" in affirming the constitutionality of preventing such

behavior (*Masterpiece* 10). This is a clear and powerful articulation and affirmation of the position espoused by the ACLU, the Colorado Solicitor General, and Craig and Mullins.

Kennedy then immediately transitions into a similarly goodwill articulation of Phillips' positions. Kennedy frames Phillips' argument as concerning the state compelling him to use "his own voice" and "his own creation" against his conscience, causing him to violate his "sincere religious beliefs" (*Masterpiece* 11). Kennedy expresses that "Phillips' dilemma was particularly understandable" given that the Supreme Court had not yet not struck down the Defense of Marriage Act in *Windsor* nor upheld same-sex marriage in Obergefell; nor had the state of Colorado legalized same-sex marriages, at the time of his refusal of service. How could Phillips be expected to recognize same-sex marriage when it was neither recognized by his state nor his country (*Masterpiece* 11)? Phillips might also have seen the Colorado Civil Rights Commission allowing other bakeshop owners, "on at least three occasions," to refuse service based on an objection to anti-homosexual messages (*Masterpiece* 11). While the State may have had good reason to want to avoid a return to Jim-Crow-era signs, this time excluding LGBT people from businesses, their decisions were ambiguous enough to produce some confusion. For these reasons, Phillips' positions could be seen as rational and not easily dismissible (*Masterpiece* 12).

Next, Justice Kennedy further upholds the principle of neutral consideration by directly lambasting the Colorado Civil Rights Commission for failing to apply a fair and unbiased approach to Phillips' case. If a jurist is to be an impartial arbiter of the law who sustains a doctrine of neutrality toward religious free exercise, it follows that they must be willing to invalidate the decisions of jurists who do no share in their commitments to objectivity. Speaking on behalf of the majority, Justice Kennedy was forthright in his condemnation that the commission demonstrated "a clear and impermissible hostility toward the sincere religious

beliefs that motivated [Phillips'] objection" (*Masterpiece* 12). The justice accused the Commission of "endors[ing] the view that religious beliefs cannot legitimately be carried into the public sphere" and that such beliefs and their holders "are less than fully welcome in Colorado's business community," echoing the language oft-used by LGBT activists against public accommodation discrimination. In their comments, it seems that one of the commissioners is upholding that a person's religious beliefs cannot trump Colorado's law — which is basically consistent with Kennedy's arguments in the introductory paragraphs to the opinion. Kennedy believes, though, that one could also read into these comments a tone that is possibly "inappropriate and dismissive" toward Phillips' situation. In the first comment cited, the commissioner is paraphrased and quoted as having said, "Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state'" (*Masterpiece* 12-13). In conventional usage, the phrase "you can believe what you want" tends to be said in a rude manner, as if people have a right to believe whatever nonsense they would like by law, but in no way do those beliefs need to be taken seriously. The other line from the same commissioner reads, "[I]f 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" (*Masterpiece* 13). Again, in conventional usage, the phrase "if you've got an issue with this" is usually followed by "then you can get out" or something similarly rude and standoffish. And demanding that Phillips compromise by saying he "needs" to do it may be seen as targeted and forceful.

Justice Kennedy also references the second 2014 hearing by the Commission, where another commissioner issued more clearly problematic remarks, in Kennedy's eyes, by stating that religious beliefs have "been used to justify" both "slavery" and "the holocaust" and that

religious beliefs that promote discrimination are "despicable pieces of rhetoric" (*Masterpiece* 13). Kennedy equated the word "rhetoric" with that which is "insubstantial and even insincere" (*Masterpiece* 14). Unless the commissioner was familiar with the work of Aristotle or Burke, it is likely this interpretation is valid. According to Kennedy, there is also a neutrality infringement in the suggestion that discriminating against same-sex couples on religious grounds is equivalent to some of the worst atrocities in human history: the enslavement of African-Americans and the genocide of the European Jewish people. The commissioner was suggesting that Phillips, by extension of his argument, is in the same amoral league as slave owners and Nazis, which a reasonable observer could see as a hyperbolic and biased position. This is improper decorum for a commissioner, in Kennedy's view, as his speech appears to unnecessarily demean Phillips' beliefs and violate what should be unprejudiced conduct by a Commission that is also tasked with protecting religious citizens (*Masterpiece* 14). Given that there had been no contest as to the accurate recording of these comments, or hardly even an argument in the lower courts regarding their part in the review process, the Court is responsible for pointing out the lack of "fairness and impartiality" in Phillips' procedures with the Commission (*Masterpiece* 14). Thus, Kennedy is affirming neutral consideration by condemning the lack of neutral consideration for Phillips' case. Kennedy reminds that these are not merely "lawmakers" on the Commission, but in fact adjudicators who are tasked with judging cases and issuing fair decisions; and thus, recognizing their errors to prevent future mistreatment is necessary (*Masterpiece* 14).

Kennedy then, in order to further demonstrate proper procedure for neutral consideration, argues that the Commission failed to execute equal evaluation and fair treatment toward Phillips in relation to three similar cases in which other businesses were permitted to refuse anti-same-sex and anti-religious design requests. The Commission defended these businesses' right to

refuse service based on one set of evaluative standards which they failed to also apply to Phillips' case. Kennedy points out that the Commission reasoned that Mullins and Craig were promoting the message of their marriage with the cake as the "customers," whereas Phillips as the "baker" could remain divorced from that message as merely its creator — a point of consideration never applied to the three previous cases (*Masterpiece* 15). The Commission also permitted the defense on behalf of the other three businesses that they offered "to sell other products" to their customers, whereas they dismissed this argument wholesale when made by Phillips (*Masterpiece* 15). Kennedy finds this "inconsistent" behavior unacceptable (*Masterpiece* 15). Also unacceptable was the Colorado Court of Appeals decision to approve that behavior on the grounds that "the offensive nature of the requested message" in the other bakery cases was sufficient to distinguish them from Phillips' case. For the Justice, the Colorado Court of Appeals violated the Court's precedent that adjudicatory bodies have no power "to prescribe what shall be offensive," and by suggesting and implicitly deciding that anti-gay messages are more offensive than pro-gay marriage messages, they disparaged and "disfavor[ed]" Phillips' sincere beliefs (*Masterpiece* 16).

Based on these arguments and these pieces of evidence, Kennedy concludes, at the beginning of Part C of the opinion, that the Commission should be held in violation of the Free Exercise Clause, by the precedent of *Church of Lukumi Babalu Aye, supra,* under which "even 'subtle departures from neutrality'" constitute a violation (*Masterpiece* 17). Kennedy states forcefully that the "government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate" (*Masterpiece* 17). This line is important as it seems to be the driving thesis motivating Kennedy's willingness to focus the entirety of this case on the Commission's behavior and not on the other possible

Constitutional issues presented in the oral arguments. The word "suggesting" indicates that he rejects objections to his arguments that the Commission's comments and actions were not severe enough to constitute ruling in favor of Masterpiece Cakeshop. The level of severity is unimportant. What is relevant and condemnable is the presence of *any* discrepancy in treatment between cases and *any* signal of hostility from government officials, regardless of its magnitude or nature. Therefore, Phillips may no longer be subject to the ruling or any penalties imposed by the Commission.

Prior to closing out the majority opinion, Kennedy again signals an awareness that the issues at play in this case have not been fully resolved and will very likely be the subject of future proceedings. In the closing paragraphs, Kennedy offers that "the adjudication concerned a context that may well be different going forward," suggests that "later cases" will address the issues presented in the case "in the future," and offers that "further elaboration" is needed in further court opinions to determine "[t]he outcome of cases like this" (*Masterpiece* 18). He finishes by again reiterating that all due consideration must be given to balancing gay rights with religious liberty with all regards to "respect" and avoiding "indignities" (*Masterpiece* 18). With this argument, Justice Kennedy had finished demonstrating how a justice could craft a truly neutral opinion in facing this complicated conflict between LGBT civil rights in public accommodations and the freedom to exercise one's religious beliefs without unwarranted restraints.

Conclusion: Where Do We Go From Here?

As Justice Kennedy rightly indicates, the rhetorical and constitutional battle over LGBT civil rights will rattle the Courts over the course of the next decade. The American judiciary finds itself in one of its greatest jurisprudential conflicts: balancing the well-established precedent of religious liberty and freedom of expression with its well-fortified precedent of upholding civil rights for protected groups wherever they are legally threatened. Their opinions in the upcoming years will have strong implications for the civil rights and civil liberties communities. It will define the extent to which the LGBT civil rights movement will be permitted to advance. It will define the extent to which commercial owners may apply their religious beliefs to their places of business. The only sure thing is that commissioners must be more diligent in how they evenly apply the law and more careful in how they speak at public hearings. In the meantime, the cases, briefs, arguments, interest groups, and opinions will continue to rage on in these arenas. Justice Kennedy has left jurists and adjudicators guiding principles through his *Masterpiece* decision: (1) Recognize the challenge in balancing these rights; (2) Provide strong and accurate articulations of each side's positions; and (3) Denounce any signs of bias in any proceedings and work to avoid prejudice in your own deliberations and writings. If Justice Kennedy's guidance proves persuasive, the Courts will have a framework through which to develop their opinions – and they will literally shape the future of the First Amendment and civil rights across the nation.

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ACADEMIC VITA

EDUCATION

The Pennsylvania State University — May 2019
Schreyer Honors College
Bachelor of Arts in Political Science, Philosophy, and English — GPA 3.92
Concentrations in Justice, Law, & Society (Philosophy) and Rhetoric (English)
Rhetoric Minor in Communication Arts and Sciences

Honors Thesis: *The Case for Neutrality: A Rhetorical Analysis of Justice Anthony M. Kennedy's Opinion for* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission
Under the advisement of Dr. Jack Selzer and Dr. Xiaoye You

CIVIL RIGHTS EXPERIENCE

The Leadership Conference on Civil and Human Rights, Washington, D.C. — June - August 2018
Fair Courts Intern
- Created donor profiles, communication material, and informative spreadsheets to aid coalition efforts
- Conducted research regarding the background of then Supreme Court nominee Brett Kavanaugh

Pennsylvania Human Relations Commission, Harrisburg, PA — March 2017
Researcher and Reviewer
- Wrote an informative report on the hate crime crisis response protocols upheld by state agencies and endorsed by civil rights organizations
- Reviewed and provided commentary on educational Fair Housing Rights materials for young adults

Office of Pennsylvania State Representative Marguerite C. Quinn, Doylestown, PA — June - August 2016
Researcher
- Constructed and delivered presentation on LGBT civil rights House Bill 1510 for State Rep. Quinn
- Authored a research explication on the history, rhetoric, and circumstances surrounding HB 1510

POLITICAL EXPERIENCE

Committee to Elect Collin Warren for Pennsylvania State Representative, 57th Legislative District — April - November 2018
Communications Director
- Designed targeted social media content including policy posts, event advertisements, and videos
- Constructed press releases for campaign endorsements and issue statements for public distribution
- Communicated with local voters by canvassing door-to-door and advocating for the candidate

Law Office of Robert A. Mancini, Esq., Doylestown, PA — May - June 2017
Legal Intern
- Observed juvenile court proceedings and a criminal case in the Bucks County Prothonotary
- Organized case files and legal documents pertaining to clientele and cases on behalf of the office

Pennsylvania Office of the Attorney General, State College, PA — September - December 2016
Dispute Mediator
- Analyzed details of complaints filed to the Bureau of Consumer Protection to determine a settlement
- Resolved conflicts between businesses and consumers through phone calls, emails, and letters

ACADEMIC EXPERIENCE

Center for Democratic Deliberation, McCourtney Institute for Democracy, University Park, PA — September 2018 - Present
Interview Series Creator and Co-Host
- Established the regularly occurring, online interview series *Penn State Deliberates*, which is published weekly on the McCourtney Institute for Democracy's website
- Plan and conduct interviews on democratic deliberation with Penn State community members

Central Intermediate Unit #10's Development Center for Adults, West Decatur, PA — September - December 2017
Adult Literacy Tutor
- Conducted forty hours of tutoring for an adult literacy learner through weekly educational sessions
- Developed lesson plans instructing on reading comprehension, essay writing, and textual analysis

ACADEMIC EXPERIENCE (Cont.)

Office of Dr. Cheryl Glenn, Professor of English and Women's Studies, University Park, PA — January - March 2016
Researcher and Librarian
- Generated supporting academic research in the interest of Dr. Glenn's feminist and rhetorical projects
- Created and executed a system of organization for the Program in Writing and Rhetoric Office Library

LEADERSHIP EXPERIENCE — Membership Tenure

The Liberal Arts Undergraduate Council, Pennsylvania State University, University Park, PA — Fall 2015 - Present
President (August 2018 – Present), *Vice President* (2017 – 2018), *Co-THON Chair* (2016 – 2018)
- Elected by student membership to plan and coordinate events, speakers, recruitment efforts, and organization activities with the Executive Board and advisors of the College of the Liberal Arts
- Lead weekly meetings by hosting discussions and creating presentations with membership updates

Pi Sigma Alpha, Penn State Chapter, National Political Science Honor Society, University Park, PA — October 2017 - Present
Vice President (August 2018 – Present)
- Elected by student membership to set missions and develop projects, discussions, and events with the Executive Board
- Support the Executive Board with planning and carrying out bi-weekly group discussions on pressing national and international political topics with full chapter membership

Secular Student Alliance, Penn State Chapter, Pennsylvania State University, University Park, PA — January 2018 - Present
Vice President (August 2018 – Present)
- Prepare events and weekly presentations for the membership on topics relevant to religious and secular philosophy, politics, and identity
- Maintain social media presence on Twitter and Facebook by sending articles, videos, and club updates

Philosophy in Conversation, Philosophy Club at Pennsylvania State University, University Park, PA — January 2018 - Present
Secretary (August 2018 – Present)
- Collaborate with the Executive Board to select weekly learning materials and set-up the meeting space
- Engage in informative discussions with our full membership on an variety of philosophical topics

VOLUNTEER EXPERIENCE — Time Period Active

College of the Liberal Arts, Pennsylvania State University, University Park, PA — August 2017 - Present
- Selected and paid by collegiate administrators to serve on a student group and develop the College of Liberal Arts' First Year Welcoming Ceremony.
- Supported the First Year Welcoming Ceremony each year, such as by serving as a speaker, holding conversations with new students, and helping to run various activities
- Volunteer on behalf of the College in several of their sponsored events, such as co-leading a class session for a first-year seminar on the opportunities and resources available to Liberal Arts students

THON Fundraising, University Park, PA — August 2016 - February 2019
- Raised money for the Four Diamonds fund of Penn State Children's Hospital through the Pennsylvania State University's annual THON drive to combat pediatric cancer
- Fundraising efforts included multiple "canning trips" asking for donations on street corners, collecting online donation through the DonorDrive system, requesting donations through "THONvelopes," and organizing on-campus events

Martin Luther King Jr. Commemoration Week, University Park and Centre County, PA — January 2017, 2018, 2019
- From September 2016 – January 2017, volunteered with the MLK, Jr. Commemoration Committee to develop and prepare the Oratorical Contest, an annual speech competition for students
- In January of 2018 and 2019, participated in the annual MLK, Jr. Day of Service, performing community service at a local assisted living home in 2018, and a local thrift shop in 2019

HONORS

- Paterno Fellow, Honor in the College of the Liberal Arts, Pennsylvania State University — August 2015 - Present
- Phi Beta Kappa, National Academic Honor Society for excellence in the Liberal Arts & Sciences — May 2018 - Present
- Africana Research Center Scholar, Africana Research Center, Pennsylvania State University — October 2018
  - Nominated by Dr. Jack Selzer as an ARC Scholar for 2018-2019 and was accepted to compete in the judged Africana Research Center Research Exhibition
  - Received 2nd Place in the Exhibition for poster presentation: *Guarding the Heart of the Civil Rights Act: A Rhetorical Analysis of* Heart of Atlanta Motel, Inc. v. United States