A Prediction of Masterpiece Cakeshop Ltd. V. Colorado Civil Rights Commission

Hilary Price

University of Mississippi. Sally McDonnell Barksdale Honors College

Follow this and additional works at: https://egrove.olemiss.edu/hon_thesis

Part of the Political Science Commons

Recommended Citation
https://egrove.olemiss.edu/hon_thesis/382

This Undergraduate Thesis is brought to you for free and open access by the Honors College (Sally McDonnell Barksdale Honors College) at eGrove. It has been accepted for inclusion in Honors Theses by an authorized administrator of eGrove. For more information, please contact egrove@olemiss.edu.
A PREDICTION OF MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION

by

Hilary Price

A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of the requirement of the Sally McDonnell Barksdale Honors College.

Oxford
May 2018

Approved by

________________________
Advisor: Professor John W. Winkle, III

________________________
Reader: Professor Charles E. Smith, Jr.

________________________
Reader: Professor John Bruce
ABSTRACT

A PREDICTION OF MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION

(Written by Hilary Price under the direction of John W. Winkle, III)

This is a study of the Supreme Court ruling in the case of Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission. The paper attempts to make a prediction of the ruling based on factors relevant to the Court’s decision. I studied the facts of the case, the briefs submitted by petitioners and respondents, Supreme Court precedents, interpretive tests, amicus curiae briefs, and voting patterns of the Supreme Court Justices. Based on this information, I came to the conclusion that I believe the Court will issue a conservative ruling in favor of petitioners, Masterpiece Cakeshop.
# TABLE OF CONTENTS

LIST OF FIGURES ......................................................................................................................v

CHAPTER 1: THE LITIGANTS AND THE PROCESS ................................................................. 6

CHAPTER 2: INFLUENCES ON THE SUPREME COURT ....................................................... 16

CHAPTER 3: VOTING PATTERNS OF CURRENT JUSTICES ............................................... 37

CHAPTER 4: CONCLUSION ................................................................................................... 52

BIBLIOGRAPHY ....................................................................................................................... 58
LIST OF FIGURES

Figure 1  Levels of Scrutiny.................................................................26
Figure 2  Roberts Court frequency of Liberal v. Conservative Votes on civil rights and First Amendment rights cases........................................38
Figure 3  Segal-Cover Scores.................................................................39
Figure 4  Roberts Frequency of Vote with Majority........................................40
Figure 5  Kennedy Frequency of Vote with Majority.......................................42
Figure 6  Thomas Frequency of Vote with Majority.........................................43
Figure 7  Ginsburg Frequency of Vote with Majority.......................................45
Figure 8  Breyer Frequency of Vote with Majority.........................................46
Figure 9  Alito Frequency of Vote with Majority............................................48
Figure 10 Sotomayor Frequency of Vote with Majority.................................49
Figure 11 Kagan Frequency of Vote with Majority........................................50
Chapter 1: The Litigants and the Process

The case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* piqued my interest and aroused my curiosity because of the importance of the three rights that are at stake. I realized the weight of this case when I first heard of it. The clash between LGBT rights and religious rights and/or free speech rights have come to a head and created a culture war of sorts. The ruling in this case will be instrumental in the future interpretations of the First and Fourteenth Amendments. The result of *Masterpiece Cakeshop* has the potential to be impactful for so many individuals and also to carry with it broader implications for society at large.

Jack Phillips has been the owner of Masterpiece Cakeshop, Inc. in Lakewood, Colorado for over 20 years. He opened the doors to his business in 1993. Phillips is a devout Christian. It is for this reason that Phillips does not create Halloween goodies, keep his store open on Sundays, or make wedding cakes for same-sex weddings. He believes that God would find fault with him were he to participate in activities that would not line up with the interpretation of the Bible that he embraces (Alliance Defending Freedom). He has used his artistic abilities to create and design all sorts of baked goods for many different types of occasions. Phillips has utilized his talent in accordance with his deeply held religious convictions, believing that his skills are a gift from God and should be put to use with that as the guiding principle (Brief of Petitioners).
With this in mind, it is easy to imagine what happened when same-sex couple, Charlie Craig and David Mullins, entered Masterpiece Cakeshop in July 2012. Craig and Mullins are a same-sex couple who reside in Colorado. In 2012, same-sex marriage was not allowed in the State of Colorado. For this reason, Craig and Mullins planned to have their marriage performed in Massachusetts and then return home for a reception with friends and family. In the course of planning their reception, the couple found themselves at Masterpiece Cakeshop. The undisputed facts are that they met Phillips and requested a custom made wedding cake for their marriage celebration ceremony. Phillips denied service to Craig and Mullins, instead offering to sell them any of the pre-made cakes or goodies from the store (Brief of Respondents). He made a point to tell them that he had served homosexuals in the past, making baked goods for other occasions. However, he did not want to participate in or endorse the wedding of a homosexual couple because of the fact that his religion defines marriage as the union between one man and one woman. Without further discussion, Craig and Mullins left the store (Alliance Defending Freedom).

Soon after, Craig and Mullins then filed a complaint with the Colorado Civil Rights Division under CADA citing sexual orientation discrimination. The public accommodations statute says that it is discriminatory to refuse full and equal enjoyment of goods and services to a person because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. CADA was created to work in consort with the Fourteenth Amendment (Colorado Anti-Discrimination Act). This amendment instructs States not to deny any persons under its jurisdiction equal protection under the law. In accordance with this, Colorado has implemented its own anti-
discrimination laws. CADA covers employment, housing, and public accommodations. The particular statute that comes to play in this case is under the public accommodations section where goods and services provided to the general public cannot be denied to a person on the basis of sexual orientation. According to CADA, Phillips’s refusal to provide Craig and Mullins with his services from a place of public accommodation, based on their sexual orientation, classifies as discrimination. The Colorado Civil Rights Division conducted an investigation and attempted to resolve the dispute through conciliation.

The case went next to an Administrative Court. The Administrative Law Judge ruled in a summary judgement that making wedding cakes is not expressive conduct that equates to speech and would therefore warrant any First Amendment protections. The ALJ did not deny the skill and artistry that goes into making a wedding cake but reasoned that this falls short of calling cake making “speech.” Further, the ALJ discussed that CADA attempts to regulate conduct, not speech. Similarly, by regulating conduct only, the state does not attempt to regulate any person’s belief. Any restriction of speech or religion here was purely incidental to the states legitimate regulation. The decision makes plain that the government may regulate conduct when it interferes with the rights of another person and is in the state’s interest to regulate. The ALJ ruled that CADA would be scrutinized by the rational basis test because it saw CADA as being a neutral law of general applicability and did not invoke a “hybrid” claim. Therefore CADA would not fall under strict scrutiny (CO Office of Administrative Courts).

In light of this ruling, the Colorado Civil Rights Commission issued an order for Masterpiece Cakeshop to come into compliance with CADA. To remedy their actions,
Masterpiece Cakeshop had to follow several actions. They were ordered to cease and desist from discriminating against same-sex couples by not serving them with wedding cakes. Staff training and company policies were ordered to change to be in line with CADA. The Commission required quarterly compliance reports. These reports were to detail any denial of service and reasons for denial (CO CCRC Final Agency Order).

The ALJ’s decision was appealed to the Colorado Court of Appeals. This court affirmed the ruling of the ALJ. It agreed that cake making was not inherently expressive. To be inherently expressive, an action must send a clear message. It was ruled that the message that was being sent by a cake would be the message of the customer and not that of the baker. For this reason, cake making did not warrant First Amendment protection. In regard to the free exercise claim, the Court of Appeals also agreed with the ALJ that CADA did not fall under strict scrutiny because it was neutral and generally applicable. It was found that the idea of “hybrid rights” was not binding because it was purely dicta. That left CADA needing only to pass the rational basis test. The order of the Commission was affirmed and stated that it was within the scope of the Commission’s power to issue such remedial measures. It did not believe that compliance with CADA would be seen as an unconstitutional compelling of speech from Masterpiece Cakeshop. Where a case involves both speech and non-speech elements, the state’s interest in regulation of the non-speech element may justify the regulation of speech (Craig and Mullins v. Masterpiece Cakeshop, Inc. and Phillips).
Appealed again, the Colorado Supreme Court refused to hear the case (Alliance Defending Freedom). This brings us to the court of last resort which granted review of Phillips’ case. The U.S. Supreme Court heard oral arguments in December 2017.

Why will the ruling in this case be significant? As society is becoming more socially liberal, there will undoubtedly be more cases come to light like Masterpiece Cakeshop. Civil rights under the Fourteenth Amendment will continue to be pitted against First Amendment freedoms as tension grows. The Court’s decision will be a good indicator of the direction the country is headed. It boils down to a question of which right is valued over the other. If the Court were to side with Craig and Mullins in favor of anti-discrimination, it would essentially mean that the government is allowed to command the conscience of religious individuals. If the Court chooses to get behind Phillips’ argument for religious freedom, it would be a blow to civic equality in that it would hold the LGBT community as subordinate and unprotected by law. Either way, the ruling will impact future legislation and will affect both the LGBT community and the religious community.

The case warrants attention because if the Court were to rule in favor of petitioners, there is concern that the ruling would be construed as the government’s condoning of discrimination against a specific class of people. If a stance that values anti-discrimination over free exercise of religion is taken, society will be able to avoid the systematic unequal treatment of individuals that recognize themselves as part of the LGBT community. It could be argued in this case that petitioner’s religious rights stand in contrast to the interest of social order and must therefore bend to anti-discrimination sentiments. This would be a step backwards for equal protection, and possibly a reversion to Plessy v. Ferguson (1896) where the Supreme Court allowed for a distinct class of
people to be classified as second-rate citizens and permitted the unequal treatment of that class. This is an opportunity for the Court to put their foot on base in their stance on the Fourteenth Amendment and its importance when held in regard to other rights of individuals. Will the Court be willing to sacrifice a part of religious freedom and free speech for the sake of societal order? If not, it could be the start of a new wave on intolerance.

The idea that practitioners of religion should be able to practice their faith without penalty is rooted in America’s history. Religious toleration has not come under serious scrutiny because it is so fundamental to the American ideal. In fact, the Supreme Court has spoken in the past in support of religious freedom. In *West Virginia State Board of Education v. Barnette* (1943), the Court expressed the viewpoint that, “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion” (319 U.S. 624, at 642). This illustrates the standpoint that it is improper for the state to weigh in on the conscience of individuals. *Masterpiece Cakeshop* could be a chance for the Court to stand up for religious freedom and say that religious exemptions are justified out of respect for the religious beliefs of individuals. If the Court rules otherwise, it could be a serious blow to the integrity and autonomy of freedom of religion. Phillips associates marriage with religious principles and his involvement in the ceremony holds religious implications for him as a Christian. Being compelled to participate would infringe on his right to freely express his religion. The First Amendment’s protection includes freedom of speech. It is being argued that Phillips’ talent and abilities are a form of artistic expression. This expression could be regarded as Phillips’ speech and therefore should
not be abridged or compelled. If the Court rules in favor of respondents, it could have a chilling effect on speech. The backbone of American society includes the absence of fear in being able to speak freely. The Court may be unwilling to rule against such an established right.

I will approach this paper as a study in an objective, if not scientific manner. It will work by observing that the *Masterpiece Cakeshop* case is significant, questioning which side the ruling will come down on, gathering information to aid in prediction, developing a hypothesis about the decision of the Court, and in conclusion, being able analyze the implications of the ruling. The observation in this study is that the *Masterpiece Cakeshop* case will be impactful, no matter what the outcome. This is a crossroads of sorts for religious freedom and freedom of speech and equal protection. As the country is becoming more tolerant of alternative lifestyles, the religious community has had to adapt within the parameters of evolving law. The decisions made in this case will define a period of religious liberty.

The question this entire paper will be working toward is: How will the Supreme Court rule on the *Masterpiece Cakeshop* case? This prediction of the ruling will be made by using a variety of information gathered by research. Most information will come from primary documents. The state has created a paper trail of the case as it has traveled through administrative reviews and lower courts. It has generated many briefs, appeals, and rulings. The federal government has also created its own paper trail in oral arguments and amicus curiae briefs. I will look to relevant past rulings of the Supreme Court so assess their initial leaning. Also acting as a guide will be certain interpretive tests that the Court has developed over the years to use as standards that may come to play in this case.
I will take into account the current make-up of the Court, recognizing that the individual Justices will surely impact the probability of either side winning. These elements will aid in making a prediction about the ruling of the Supreme Court.

No right is absolute. They all have restrictions and limitations placed on them. By taking a closer look at the way the Court has placed constraints on First Amendment rights in the past and the criteria with which they use to weigh the importance of rights in relation to one another, we may be able to make a prediction about the way in which the Court will rule in this case. The Court will choose to give preference to either the freedom of religious exercise or freedom of speech or anti-discrimination sentiments. It will be interesting to see the balance they seek to satisfy these competing rights. To gain some context and background information we will look to precedent set by the Court in the cases that have dealt with religious freedom and freedom of speech. There have been instances where the Court has preferred the side First Amendment rights and when they have stood for the interest of the government. We must also look at the evolution of LGBT rights. It will be informative to study cases similar to Masterpiece Cakeshop that have come before the U.S. Supreme Court in recent decades.

The Masterpiece Cakeshop case has spawned much legal literature. Legal documents may be the greatest asset to the study of this case. Each side’s core arguments are laid out in their initial briefs and will aid in understanding the facts of the case and the stance of each camp. Lower court rulings will be telling of how judges are looking at this case and how they pick apart the intricacies of the rights at play. Exemplified in the fact that the case has generated many amicus curiae briefs, many interested onlookers are weighing in on the dispute. Each side has accumulated support from concerned groups
that the ruling may impact directly. The variety from which comes the briefs is interesting. Religious organizations and individuals like Billy Graham have submitted briefs. Eighty-six United States senators and representatives are looking to have their voice heard. Four hundred seventy-nine creative professionals who could find themselves in similar situations have also filed briefs to voice their opinion. Even the United States government has filed a brief. Each of the briefs brings a unique perspective and that is why it will be interesting to sift through them to see the resounding impact that the ruling will have on people from various walks of life. All of these legal documents will be very important in the prediction of the ruling.

It will be beneficial in making a prediction to examine the makeup of the Court at this time. By looking at the track records of the Justices, inferences can be made about which way they tend to lean, not only by broad ideology but also by views on specific rights in this case. The methods they have used to interpret the law in the past may serve to give expectation to the way they will rule in the future. Chief Justice John Roberts and Associate Justices Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Samuel Alito, Sonia Sotomayor, Elena Kagan, and Neil Gorsuch each bring a unique perspective to the Court and contribute their individual views to the rulings that the Court makes. The leaning of the Court in terms of ideology has been pretty stable. With the fresh appointment of conservative Justice Gorsuch, the conservatives on the Court now outweigh the liberals. Justices can make a difference in a ruling as individuals as well as a bloc.

By breaking down each side’s argument and analyzing the pre-existing factors that will come into play in the decision, I hope to be able to come up with a reasonable
and objective answer to the question at hand. During the course of the paper, my wish is that the significance, importance, and relevance of the ramifications resulting from this case will be very apparent.
Chapter 2: Influences on the Supreme Court

The idea of adhering to precedent is a cornerstone principle of American judicial decision-making. Precedent is rooted in the common law concept of “stare decisis” which is Latin for “let the ruling stand”. When a higher court rules on an issue, lower courts are bound to the precedent that is handed down. The Supreme Court is influenced only by its own precedent. And while Justices pay great heed to previous rulings, they are not completely bound by stare decisis. It is not unheard of for the Court to stray from its own legal interpretations and to create new precedent (Knight and Epstein). However, it is common practice for the attorneys arguing before the Court to raise every case ruling that may support what they are advocating. This is an attempt to remind the Court of how it has ruled in the past and to persuade the sitting justices to apply that ruling to the case at hand. In Masterpiece Cakeshop both sides have provided ample precedent for the Court to consider. They have presented case law from areas involving freedom of speech, free exercise of religion, anti-discrimination, gay rights, and government interests. The cases addressed in this chapter are arguably the most controlling for the Court. By studying these rulings, I hope to gain an understanding of how the Court has already ruled on similar issues so that I may make predictions about how they will rule in Masterpiece Cakeshop. I am presenting the cases organized by content, with a case supporting petitioners and then a counterargument case supporting respondents. Content of cases will include freedom of speech, compelled speech, free exercise of religion, weighing government interest to individual rights, levels of scrutiny, and equal protection.
A principal argument made on behalf of Masterpiece Cakeshop and Phillips is that making decorative cakes is a form of artistic expression that warrants protection by the First Amendment freedom of speech. They rely on *Texas v. Johnson* (1989). In this case, a Texas man burned an American flag in protest of the Reagan administration. The Supreme Court deemed 5-to-4 that the burning of the flag was a symbolic expression that equates to speech. This is relevant because it reinforces the fact that speech does not always have to include actual verbal language. The constitutional meaning of speech can include communicative conduct that conveys a message. The Court also states that just because an audience takes offense to certain ideas does not mean that those ideas can be suppressed. The Court used the *O’Brien* test and deemed that the government interest in this case was related to the suppression of the speech element and therefore was not justification for a limitation on speech. If the *Johnson* precedent were applied to *Masterpiece*, cake making would be considered speech on the basis of it being communicative conduct. This is an important distinction because it would mean that cake making is now entitled to First Amendment protections.

Conversely, there are some forms of expressive conduct that do not warrant First Amendment protection because of the fact that it interferes with the State’s interest. This circumstance happened in *United States v. O’Brien* (1968). In this case, O’Brien destroyed his draft card in opposition to war. The Supreme Case found 7-to-1 that while the act of burning a draft card was symbolic speech, it was being evaluated against a government interest. That interest, being content neutral and substantial, won out against a claim of freedom of expression. The Court developed a formula for evaluating restrictions on speech. First it must be determined if the regulation is unrelated to the
suppression of the speech element. Secondly, the regulation must be narrowly tailored to achieve the government interest. This case shows that freedom of speech is not an absolute right. It is open to restrictions. Were the Court to decide *O’Brien* should be controlling for *Masterpiece*, when weighing the freedom of expression through cake making, against the interest of the government in protecting marital rights of gay couples, cake making would not receive First Amendment protection.

Since it has been established that a person’s expressive conduct can fall under the First Amendment, Petitioners needed to prove that not only people, but also corporations can be protected. They argued this by relying on *Burwell v. Hobby Lobby Stores* (2014). In this case, Hobby Lobby, as a faith based corporation, objected to certain measures under the Affordable Care Act that made provision of contraceptives required under employment-based health care plans. Hobby Lobby made a free exercise claim, arguing that they should not be required to supply contraceptives, which in their religious view would equate to abortion. The Supreme Court ruled 5-to-4 in their favor, granting corporations First Amendment protection. The Court reasoned that the Religious Freedoms Restoration Act did not make a meaningful distinction between non-profit religious organizations and for-profit corporations. While there were exemptions for the non-profit religious organizations, there were not for for-profit corporations. In the opinion of the Court, this placed too great a burden on free exercise of religion, which is a fundamental right. The burden was not the least restrictive means and could not pass strict scrutiny. Therefore, Hobby Lobby could not be made comply with these regulations. Dissenters brought up the ruling in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), where a free exercise claim could not
excuse noncompliance with an otherwise valid law. The ruling in *Hobby Lobby* only applies the religious exemption to the contraceptives mandate under the Affordable Care Act. This ruling is beneficial to the petitioners in the *Masterpiece* case because it allows the company the same protections that would be awarded an individual person.

Petitioners also contend that requiring them to make cakes that advocate same-sex marriage would compel them to speak the government’s message. Being compelled to express a message that is not one’s own, they argue would be a violation of free speech. The compelled speech doctrine follows two lines of case law: government may not require an individual to speak the government’s message; and, government may not require a speaker to host another speaker’s message. Under the compelled speech doctrine, an individual retains not only the right to speak freely, but also the right not to speak at all. When a regulation requires that a speaker host a message that is not their own, and one that they would rather not speak, that speech is said to be compelled. Compelling speech is generally unconstitutional. *Masterpiece* petitioners argue that being forced to engage in expressive conduct that violates their own view while promoting the message of the government would be compelling their speech. They fear that the creation of a cake to celebrate a same-sex marriage would send the message that they agree with homosexual marriage, when in fact they do not.

Respondents argue that CADA does not compel speech but that it provides for equal treatment under the law. They state that no reasonable person would see making a cake as advocating for same-sex marriage or hosting and facilitating the views of the government. Their argument is that making a cake will not be construed clearly as
Phillips promotion of same-sex marriage, but rather will be understood as Craig and Mullins’ speech in celebration of their own marriage.

Petitioners also rely on the ruling in *Wooley v. Maynard* (1977), the state of New Hampshire issued license plates with the state motto, “Live Free or Die,” prominently displayed. Maynard, a Jehovah’s Witness, disagreed with the slogan because of his religious and political views. The Supreme Court found in a 6-to-3 vote, that Maynard may not be compelled to foster the government’s message. In support of the idea that individuals retain the right to hold a view that is different from the majority, the Court ruled that individuals should not be required to host the government’s message. Similarly, in *Boy Scouts of America v. Dale* (2000), the Court ruled 5-to-4 that the Boy Scouts could not be compelled to allow a homosexual to serve as a troop leader. This violated the First Amendment rights of the Boy Scouts as an expressive association. They were not required to host the government’s viewpoint. Homosexual conduct was inconsistent with the values that the Boy Scouts wished to instill in its members. By allowing a homosexual troop leader, the Court said it gives the illusion that the Boy Scouts support and accept this conduct, when in fact, they did not. In another case, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995), a court mandated that LGBTs were to be allowed in a St. Patrick’s Day parade. The parade organizer argued that conclusion violated the First Amendment by compelling speech. The Supreme Court ruled unanimously that a speaker has the autonomy to choose their own message. The Court stated that an individual is allowed to decide what to say and what not to say. Requiring private citizens to express a message that they do not wish to convey is a violation of free speech. Petitioners argue that it is in a similar situation with Maynard,
Hurley, and the Boy Scouts and that by being forced to make a cake for a same-sex marriage they would be being compelled to speak a viewpoint they did not agree with.

The contention presented in response to the compelled speech argument is that in each of the above cases, the Court was dealing with private institutions, private persons, and a not-for-profit organization. Attorneys on behalf of Respondents argue that Masterpiece Cakeshop is a place of public accommodation and therefore should not be held to the precedent set by *Wooley, Boy Scouts, or Hurley*. Instead, they put forth the case of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc* (2006). This case involves the Solomon Amendment which mandated the withdrawal of federal funds from colleges that refused to allow military recruiters on campus. The schools disagreed with the exclusive policies of the military and did not want to be seen as advocating that message or be compelled to speak it. The Supreme Court unanimously ruled that First Amendment rights were not violated here because the government was attempting to regulate conduct, not speech. The view that conduct can be labeled as speech was rejected, and instead the Court embraced the idea that the First Amendment extended protection to only conduct that was inherently expressive. The Court ruled here that since the Constitution would not prevent direct improvising of these measures, the taking away of federal funds was constitutional. The compelled speech claim failed on the basis that inclusion of military recruiters would not be seen as endorsement for any military policies. Respondents argue that their case should follow *Rumsfeld*. The anti-discrimination legislation put forth by Colorado is an attempt to regulate conduct and any effect on speech is incidental. In this way, *Masterpiece* is similar to *Rumsfeld* and should
follow its precedent. Like educational institutions, Masterpiece Cakeshop is open to the public.

In cases that call into question the freedom of speech, regulations must be deemed to be content neutral. Content neutral means that the speech is neither a promotion nor restriction of a particular message. We see this test play out in the opinion from *Texas v. Johnson*. This case dealt with an instance of protest against the Reagan administration in which a Texas man burned the American flag. Flag desecration was prohibited by Texas law. The Supreme Court ruled that the Texas law could not stand because it was not content neutral. It was passed in attempt to protect it from abuse of those who view it differently than the majority, not because of an effort to protect the integrity of the flag. Because Texas was restricting a point of view, the law was not content neutral. The opinion from the Court points out the fact that the government does not have the right to suppress a point of view just because society may find it offensive. Petitioners from *Masterpiece* argue that CADA is not content neutral because it restricts them from voicing their view that marriage is between one man and one woman. They make the argument that CADA advocates for and promotes the view that same-sex couples can marry and discriminates against the view that marriage should retain its traditional definition. Respondents argue that the law is not based on content, but rather on discrimination. It is not based on a particular viewpoint because the law works both ways, to protect the religious and the non-religious alike.

To elevate their free exercise claim, Petitioners have brought to light a couple of cases in which the Supreme Court has deemed that free exercise outweighs the government’s interest. In *Sherbert v. Verner* (1963), a Seventh-day Adventist was denied
unemployment benefits after being fired from her job for refusing to work on Saturdays which conflicted with her religious beliefs. The Court found 7-to-2 that this placed a significant burden of the free exercise of religion and was not justified by a compelling state interest. Since the government interest did not outweigh the burden that was placed on free exercise of religion, the Court ruled on the side of individual rights. In a similar case, Wisconsin v. Yoder (1972), Amish children were able to be exempt from a state law requiring school attendance until age 16. Here, the Court also found unanimously that the government’s interest was outweighed by the potential burden to the free exercise of religion. Because an additional two years of education would not produce the benefits that the government was seeking, free exercise won. The Court took the Amish tradition of over 200 years into account. These two cases show that in the past, the government has implemented laws that directly and substantially affect First Amendment rights. Legislation that encumbers free exercise is scrutinized and does not always pull through. Petitioners argue that CADA would be an example of legislation that places too substantial a burden on the free exercise of religion and therefore cannot stand.

In response to this argument, Respondents present the case of Employment Division, Department of Human Resources of Oregon v. Smith (1990). This case involved two Native Americans who were let go from their job for using the drug peyote. Using peyote was a ritual of their religion. The Supreme Court decided 6-to-3 that the Native Americans were not entitled to unemployment benefits because they were fired justly. They ruled that free exercise of religion could not be used as a defense to a law that was otherwise valid law in an area that the government is free to legislate in. The Court found that the Oregon law was a neutral law of general applicability because no exceptions
were permitted. The ruling applied to all members of the Native American Church in Oregon. The Court believed this would create a slippery slope and an opportunity for countless claims to be made for religious exemption from other civic obligations. An earlier case, *Bob Jones University v. United States* (1983), also presents a similar example of the prevailing interest of the government. In this case, federal funding was withdrawn from a university because they did not allow interracial dating or marriage due to their Christian beliefs. This pinned race anti-discrimination against a free exercise claim. Much like in *Smith*, the Court found 8-to-1 that the government’s interest justified the burden of free exercise. The University did not perform its duty to provide a beneficial and stable influence that was to be supported by tax payers and therefore the IRS was correct to revoke its tax exempt status. This shows that sometimes limitations on religious liberty are necessary to accomplish a government interest. Were this reasoning to apply to the *Masterpiece* case, the Court would again rule that CADA is a legitimate law and that a free exercise claim does not offer escape from compliance from a law that is neutral and generally applicable.

Legislation that interferes with the right to exercise religion freely must be proved to be neutral and generally applicable. Neutral means that the law cannot favor one view over the other or discriminate against a point of view in any way. It cannot discriminate on its face or in application. Generally applicable means that the law applies to everybody and treats everyone equally. If a law is general it should have no exemptions. This was put to the test in *Smith* where the law in question was deemed to be neutral and generally applicable because any restriction of religious freedom was incidental in the law’s application. Petitioners argue that because CADA allows exemptions such as one
for non-profit religious organizations, CADA is not generally applicable. They also argue that the law is not neutral because it discriminates against their religious views. Overall, they make the argument that CADA is one sided and selective in its application.

Respondents argue that CADA is neutral because it applied to both secular and religious entities. They also state that the law is generally applicable because exemptions that the law allows are in place to relieve a burden on principally religious places and that they are accommodating rather than targeting.

Another point of contention in the *Masterpiece* case is the standard that CADA should be held to. The Supreme Court has developed some interpretive tests that help them determine if laws are constitutional. Interpretive tests are an important tool for any Justice to have in their judicial toolbox. Tests help the Justices hold legislation to a standardized system of review. The Court has developed interpretive tests for each of the rights listed in the Bill of Rights and more. Tests are used as a guide for a specific case and similar cases that arise thereafter. These tests provide a framework of stability for the Court to work within. They are designed to illustrate a way to understand the conditions under which to limit government interests or individual rights. Tests provide a framework or a formula for the Supreme Court to work with when they are analyzing legislations. They help to lay out a framework in which the Court can make a checklist of what qualities a piece of legislation needs in order to pass a certain level of scrutiny. They are also useful to use when the Court is required to weigh a government interest against the rights of an individual. By using these tests, the Supreme Court will be able to determine whether or not CADA is constitutional.
Over the years, three tiers of interpretive tests have developed to analyze government action in consideration of equal protection. The least stringent is the rational basis test. The most restrictive is strict scrutiny. That leaves intermediate scrutiny to fall in between.

Figure 1: Levels of Scrutiny

<table>
<thead>
<tr>
<th></th>
<th>Rational Basis</th>
<th>Intermediate</th>
<th>Strict</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Applies to:</strong></td>
<td>All other classes not listed</td>
<td>Gender</td>
<td>Race</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Illegitimacy</td>
<td>National Origin</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Non-citizens</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Fundamental Rights</td>
</tr>
<tr>
<td><strong>Standard:</strong></td>
<td>Classification in law is not related to rational government purpose or objective.</td>
<td>Classification in law is substantially related to an important government purpose or objective.</td>
<td>Law is narrowly tailored to advance a compelling government interest.</td>
</tr>
</tbody>
</table>

Petitioners believe that CADA should be looked at through the lens of strict scrutiny. This is the most exacting level of analysis. To pass strict scrutiny, legislation must be proved to be the least restrictive means of obtaining a compelling government interest. This is a tall order. Strict scrutiny is generally reserved for use on suspect classes or fundamental rights. A suspect class is a definable group with a history of discrimination or a minority. In the past, the Court has declined to accept sex as a suspect
class. Fundamental rights are those that the Court has deemed deserve the highest degree of protection. Most fundamental rights are those outlined in the Bill of Rights or those that have been decided to be fundamental under the Equal Protection Clause. In the *Obergefell* case, the Court decided that same-sex marriage is a fundamental right under Due Process and Equal Protection. To buoy this argument, they use a case that I have already covered *Employment Division, Department of Human Resources of Oregon v. Smith*. As discussed, this case created precedent that a neutral law of general applicability cannot be subject to a free exercise claim. *Smith* came to the Court as a free exercise of religion claim. The Supreme Court refused to decide in favor of religious freedom. Instead, the justices strayed from earlier decisions in *Sherbert* and *Yoder*. They stated that those who are religious are not exempt from otherwise valid legislation. But it left open another avenue where a free exercise claim in combination with another constitutionally protected right (free speech in this instance), creates a “hybrid” of rights, and will be subject to strict scrutiny. Hybrid claims are those that come about when free exercise rights are invoked in conjecture with another protected right. This is the point most heavily argued by petitioners and they rely on the case of *Employment Division, Department of Human Resources of Oregon v. Smith*. Petitioners believe that CADA does not pass this test and therefore cannot be constitutional. Respondents respond to this by saying that the idea of hybrid rights that stems from *Smith* is purely dicta. That is, not binding law from the opinion written by the Court. The *Smith* case itself did not qualify as a hybrid rights claim and was not decided on that basis. Additionally, since this ruling, the Supreme Court has been reluctant to invoke hybrid rights in any subsequent case. There is not much to rely on in terms of seeing hybrid rights in practice.
Instead, Respondents believe that CADA should only have to pass the rational basis test. This is the least stringent of the interpretive tests. When rational basis is applied, great deference is given to the legislative branch. The justices are to presume that the legislative branch did their job correctly and that the law is valid. The burden to prove that the law cannot stand is on the party making the challenge. In this case, the burden of proof would be on petitioners. Under rational basis, what they would need to prove is that CADA is not rationally related to further a legitimate government interest. This test is common in cases that deal with the Fifth or Fourteenth Amendments’ equal protection clause. Under most laws, there will be a party that wins and a party that loses. Benefits cannot always be evenly distributed. Therefore, a class of people is left feeling that they have been dealt an unfair hand, which gives rise to equal protection claims. It is also commonly used in cases that are said to incidentally burden a right given by the First Amendment. This can happen when a law seems neutral on its face, yet in application discriminates against a certain group of peoples’ rights. Since respondents believe that CADA is regulating conduct and not speech, it should be governed by the type of review that was set forth in United States v. O’Brien. O’Brien gives us the test of substantial government interest that would be achieved less effectively were the law not to be in place. Because their argument is that CADA only affects speech incidentally, they believe that the regulation of conduct need only to prove that it furthers a rational government interest. The interest in question would be the potential societal and economic harms that could come about because of discrimination. In their view, without CADA in place, the government could not as effectively ensure anti-discrimination. Recall from the earlier discussion of O’Brien, that this case involved a protester of the
war, burning his draft card. This was a free speech case that was sparked by a federal law making the destruction of a draft card a crime. The question before the Court was whether or not this law infringed on a person’s right to free speech, assuming that burning a draft card constituted expressive conduct that equates to speech. The government needed to prove that the law was rationally related to a legitimate government interest. The Court determined that the law was neutral in nature, not intended to infringe on an individual’s rights. Any affect that the law had in its application was purely incidental. *O’Brien* was the birth place of the rational basis test.

The Supreme Court ruled that a law that burdens free speech is justifiable given that it is within the constitutional means of the government, it furthers a substantial government interest, that interest is unrelated to the suppression of free speech, and the incidental restriction is no greater than necessary. In this test, the Court weighs the speaker’s rights with the government’s justification. *O’Brien* resulted in a ruling that supported the government’s interest in the useful properties of draft cards for the purposes of the war. The law was not burdensome enough on speech to warrant intervention.

The last line of precedent involves anti-discrimination rulings dealing with the Fourteenth Amendment. Rising from the same state as *Masterpiece, Romer v. Evans* (1996) disputed an amendment to the state constitution of Colorado that barred LGBTs from any protection under the law. The Court decided 6-to-3 that the amendment furthered no compelling government interest and therefore did not satisfy strict scrutiny and could not remain law. The Court found that this amendment placed too broad a disability by singling out a specific class of people. The sole desire to cripple an unpopular group is not a legitimate government interest. *Lawrence v. Texas* (2003) is a
case that came before the Court after police, responding to a disturbance call, found two men engaging in a homosexual relationship, which was against Texas law. The Court found 6-to-3 that this law did not further a legitimate state interest, yet denied homosexuals to their right of equality under the law. The Court stated that two free adults, in exercise of their liberty, engaging in private conduct, could not be restricted. In California, *Hollingsworth v. Perry* (2013) arose from the unrest surrounding the legality of same-sex marriage. Proposition 22 clarified that marriage was to be defined as the union of one man and one woman. This was invalidated by a California Supreme Court that ruled marriage to be inclusive to same-sex couples. In response, Proposition 8 was passed to redefine marriage to be for only heterosexual couples. A homosexual couple sued with a Fourteenth Amendment claim. The lower courts had ruled that Proposition 8 did deny same-sex couples equal protection under the law and that same-sex marriages were valid. This met with resistance and worked its way through the California court system to end up on the Supreme Court docket. The Supreme Court ruled 5 to 4 in this case that the petitioners had no standing to sue because there was no actual controversy. By declining to make any decisions on the merits of the case, the Court effectively affirmed the rulings of the lower courts. This means that same-sex marriages in California were deemed legal and that the Court would respect the autonomy of individual states to make this decision for themselves. That same year, the Court had a similar case come before them. In *United States v. Windsor* (2013), the constitutionality of the Defense of Marriage Act was called into question. DOMA defined marriage under federal law as the union between one man and one woman. The Court ruled 5 to 4 that this legislation imposes disadvantages to homosexuals by depriving them of the rights
that come with federal recognition of marriage. They stated that this created a stigma and separate status for a class of people and therefore denied them equal protection under the law. Further, the Court decided that states should retain the authority to define for themselves the meaning of marriage. *Obergefell v. Hodges* (2015) resulted from members of the LGBT community challenging the ban on same-sex marriage. A split court ruled 5-to-4 that marriage was a fundamental right and that to exclude a class of citizens from that right was unconstitutional due to the Fourteenth Amendment. Same-sex marriage was deemed equal in principle to opposite-sex marriage. The Court stated that in order to protect liberty and equality, marriage, as the keystone of social order, must be allowed for all. States were impacted because they were no longer allowed to ban same-sex marriage and they were required to recognize marriages performed in other states. Respondents hope that the Court will craft its decision after the hard stance that they have taken against discrimination in the past.

For every argument presented before the Supreme Court, there is precedent that corresponds. There is no shortage of case law to refer to when trying to gain insight about the complicated rights that are before the Court. These cases are presented to offer a guide or an example as to how the Court may apply the law to the case at hand. While these cases are informative and educational, they are not to be considered binding. The Court has been known to overrule itself.

Because the *Masterpiece Cakeshop* decision will be so influential, it has generated much attention. Consequently, a substantial amount of amicus curiae briefs have been submitted to the Court. Amicus curiae is Latin for “friend of the court.” Amicus briefs are submitted by individuals or groups who are not party to the case but
retain an interest in the outcome. They are written for the purpose of persuasion and to point out arguments that may not have been addressed by the actual parties to the case (Johnson, Wahlbeck, and Spriggs). I was surprised by the diversity of arguments that were addressed in these briefs. Everyone seems to want to weigh in and give their opinion of how the Court should decide the case.

Perhaps the most striking brief that was filed was on behalf of the United States government. The brief comes from the Solicitor General and carries a generous amount of weight as it represents the way in which the government would prefer that the Court rule in Masterpiece Cakeshop. The interest of the United States was to preserve constitutional rights. It was written on behalf of petitioners and argued principally that making a wedding cake is a form of expression. It pointed out disagreement with the fact that government should be able to compel expression as they seem to do in this case. The difference between the sale of a pre-made good and a custom-made good is important to their argument as it illustrates the difference between being a conduit to another’s expression and having a personalized contribution to one’s message. CADA should only apply to discriminatory provision of goods rather than the content of expression. Applying it broadly would result in a chilling effect. The view of the government is that because CADA is seen as fundamentally altering speech rather than incidentally impacting speech, it triggers higher level of scrutiny. Lastly, it is argued that the government provides no sufficient interest to justify the burdens that are created by CADA (Brief of amicus curiae of United States).

The next amicus brief that stood out to me was one submitted by the Southern Baptist Convention. The SBC is a coalition of the Baptist Christian denomination. They
wrote in the interest of their concern for First Amendment rights and protecting freedoms that are critical to religious missions. They relied heavily on a promise found in the opinion of the Courts decision in *Obergefell*. This promise stated that believers would remain secure to teach, believe, and live out their convictions. The SBC argues that CADA creates a de facto religious test of sorts, which have long been held as unconstitutional. “No American should have to satisfy the government that he holds the ‘right’ beliefs to keep his business.” This quotes flows from their opinion that the State has no right to impose penalties for religious opinions. The statement was made that CADA is tantamount to posting a sign in a business window that “Evangelicals need not apply.” They bring up conscience violations and complicity, which is the extent to which a person is willing to engage in the wrongdoing of others and was addressed in *Hobby Lobby*. The SBC points out that there is a lack of material harm for respondents but there is material harm to petitioner’s business and that there are comparable dignitary harms for both parties involved. They believe that CADA should be subject to strict scrutiny because of the fact that religious groups are primarily targeted in the application of the law (Brief of amicus curiae of Ethics and Religious Liberty Commission of the Southern Baptist Convention, et al.).

Just as many briefs were submitted for petitioners, respondents received numerous supportive briefs. The most interesting brief that was submitted on behalf of respondents was from the American Bar Association. The ABA is an association of lawyers and law students. They stated their interest as considering the equal dignity of gay and lesbian people because they should have the right to participate on full and equal terms. The ABA fears that if the Court were to rule in favor of petitioners that it would
undermine all antidiscrimination legislation. They also argue that it would leave a gaping hole to allow businesses to treat any particular group as second class citizens worthy of second class service. The ABA brings up the Civil Rights Act of 1964 and says that the Court has never honored arguments against the Act. They argue that applying public accommodations to commercial establishments should raise no First Amendment concerns. They point out that the Court would have grounds to rule in favor of petitioners only if CADA forced Masterpiece Cakeshop to alter their message, but they believe that any speech from petitioners is only incidental to their commercial service. Lastly, the ABA argues that ‘decent and honorable’ religious or philosophical premises are not a sound basis for exemptions to antidiscrimination legislation (Brief of amicus curiae of American Bar Association).

The National LGBTQ Task Force wrote to support respondents. The task force is a nonprofit organization that is involved in advocating for social justice on behalf of the LGBTQ community. Their interest was to achieve full freedom, justice, and equality. In their views, a person’s beliefs should not justify the act of discrimination. If CADA were to be struck down it would send the message that discrimination is worthy of protection. It may also open the door to legally permissible discrimination in other areas. The task force points out that LGBTQ people of color are subject to multifaceted discrimination. They go to great lengths to try and draw parallels between race discrimination and discrimination based on sexual orientation. They pose the question of what the difference is in the two types of discrimination, believing that if they Court will not stand for discrimination based on race, they should not allow it based on sexual orientation (Brief of amicus curiae of National LGBTQ Task Force, et al.).
There were several briefs that were submitted on behalf of neither party and attempted to bring new arguments to the table that were not yet addressed by the parties involved. I was interested in these because it was easy to see the far reaching implication that the decision in *Masterpiece Cakeshop* will have in all types of circles. The Institute for Justice submitted one such brief. The Institute for Justice is a non-profit, libertarian public interest law firm. They stated their interest as the potential reduction of First Amendment protection because of the mere fact of payment. In their view, CADA imposes special burdens on speakers who choose to speak for pay because it applies to places of public accommodation that are engaging in commerce. “The Constitution does not require someone whose speech is valuable enough that others want to pay for it to choose between accepting compensation and retaining the protections of the First Amendment.” The Institute argues that this creates what they refer to as a line drawing problem. It would require the Court to determine what speech is paid speech which would make the law unworkable. The end of the argument states that protected speech is not diminished by a speaker’s motivation (Brief of amicus curiae of Institute for Justice).

Another argument that was submitted on behalf of neither party was from The Council for Christian Colleges and Universities. The CCCU is an association of religious institutions for higher learning. I enjoyed this brief because it is another example of the diversity of arguments that are being made in this case. Their interest is in making the case that if the lower court ruling stands, the government would be allowed to impose its values on religious colleges. They note that sometimes the policies of religious institutions are not popular in the majority of the communities that surround the schools. The coercion in maintaining policies that run counter to religious values would equate to
compelled speech. The schools would be unable to express moral perspectives in their policies and would cause them to engage in hypocrisy. If CADA were allowed to stand, future legislation may not bother to include religious exemptions. The CCCU argues that there has been a misinterpretation of Smith and that it should not be a license to coerce. In Smith, the ruling applied to instances of prohibition and not instances of coercion. They also point to the government’s long history of hostility toward government compulsion. Their main idea is that religious institutions for higher learning are integral to society and that they would suffer under the lower court’s application of CADA (Brief of amicus curiae of Council for Christian Colleges and Universities, et al.).

All of these briefs were submitted in effort to lobby the Court. Amicus Curiae briefs are important for the Court to consider because they can reinforce arguments from either parties to the case or they can provide an introduction to arguments that have yet to be raised. Often they give information about how the ruling in the case could impact people outside the parties to the case. The Supreme Court does pay attention to and sift through the arguments found in the briefs. This is why they are important to mention and to look through for the purposes of this paper.
Chapter 3: Voting Patterns of Current Justices

Legal and extralegal factors shape judicial decision-making, and will no doubt influence the votes and arguments of Supreme Court Justices in *Masterpiece Cakeshop*. For this reason, it is beneficial to examine the makeup of the current Court. Each of the nine Justices brings their own ideology and philosophy to the table. Their accumulated voting patterns on the Court, which will be important to scrutinize because past judicial behavior arguably influences future actions. I will examine each Justice, taking into consideration their history on the Court, their ideological leanings, and their most recent voting patterns. The current Court is several terms into Chief Justice Roberts’ time.

During his tenure, the Court has maintained a conservative majority, though more recently its rulings in some subject matter areas have trended in more liberal directions (InsideGov). Figure 2 shows the rulings of the Roberts Court in cases dealing with civil rights and First Amendment rights. The Figure breaks down the liberal rulings as compared to the conservative rulings. The liberal trend is seen starting in 2014. (Figures were made by manipulating variables provided and generated by the Supreme Court Data Base.)
Jeffrey Segal and Albert Cover systematically analyzed the content of newspaper editorials to develop measures of the ideological values of the Justices of the U.S. Supreme Court. Scholars have adopted these measures as reliable because they were derived from sources independent of the judicial vote itself. The scores have been updated to include current Justices. Segal-Cover scores are assigned to Justices as a way of measuring ideology. The scores range from 0 to 100, with a score of 0 corresponding to extreme conservatism and 100 corresponding to extreme liberalism. The scores are derived through analysis of newspaper editorials from The New York Times, Washington Post, Chicago Tribune, Los Angeles Times, St. Louis Post-Dispatch, and The Wall Street
Journal. They have been found to be highly correlated with the voting pattern of Justices (Segal and Cover).

Figure 3: Segal-Cover Scores

Roberts

The Chief Justice of the Supreme Court is John G. Roberts. He received an undergraduate degree and a law degree from Harvard. Republican President George W. Bush appointed Roberts in 2005. He was confirmed in a Republican Senate by a vote of 78 to 22. He has participated in almost 500 cases and has authored 53 opinions of the Court (InsideGov). Roberts is a conservative Justice. His Segal-Cover score is 12. Broken down by topic, he receives a score of 40 in issues of civil rights and a score of 33 in issues arising from the First Amendment (Segal and Cover). His voting pattern since his introduction to the Court consists of a liberal vote in 40% of civil rights cases and 50% of First Amendment cases (InsideGov). As the numbers show, Justice Roberts is
predominantly conservative, but cannot always be counted on to vote that way in cases dealing with civil rights or questions of the First Amendment. In cases that have specifically considered the rights of LGBTs, Justice Roberts has voted liberally in *Hollingsworth v. Perry*. He has voted conservatively in *United States v. Windsor* and *Obergefell v. Hodges*. Figure 4 shows the frequency with which Justice Roberts voted with the majority in the most recent cases involving civil rights and the First Amendment as a function of whether the decision was conservative or liberal.

Figure 4: Roberts Frequency of Vote with Majority
Kennedy

Anthony Kennedy is the longest serving Justice on the current Court. He graduated from Stanford University before receiving a degree from Harvard Law School. Taking his seat in 1988, he was appointed as an Associate Justice by Republican President Reagan and his confirmation hearings in a Democratic Senate resulted in a unanimous vote. Since then Justice Kennedy has heard over 2,000 cases and written 223 opinions for the Court (InsideGov). Kennedy falls near the middle on the scale of ideology. His score of 36 has earned him the reputation as the swing Justice. He is ideologically in the middle of the road which makes his vote pivotal in the split decisions of the Court. Kennedy’s topical Segal-Cover scores are 42 for civil rights and 44 for the First Amendment (Segal and Cover). These scores correspond to a liberal voting percentage of 44% in civil rights cases and 46% in First Amendment cases since his introduction to the Court (InsideGov). These numbers tend to suggest that Justice Kennedy is living up to his name as the swing justice. Half of the time he sides with the conservatives and half the time he sides with the liberals. Overall, Kennedy is considered to be conservative, but he could go either way. In cases that have specifically considered the rights of LGBTs, Justice Kennedy has voted liberally in Romer v. Evans, Lawrence v. Texas, United States v. Windsor, and Obergefell v. Hodges. He has voted conservatively in Hollingsworth v. Perry. Figure 5 shows the frequency with which Justice Kennedy voted with the majority in the most recent cases involving civil rights and the First Amendment as a function of whether the decision was conservative or liberal.
Thomas

Clarence Thomas has sat on the Court since his appointment as Associate Justice in 1991 by Republican President George H.W. Bush. He went to school at Holy Cross College before attending law school at Yale. Thomas had a rocky confirmation to the Court. A Democratic Senate came to a vote of 52 to 48. Justice Thomas has heard over 1,500 cases and has written 169 opinions (InsideGov). Segal-Cover gives him a score of 16, marking him as one of the more conservative Justices of the Court. In cases of civil rights, Thomas receives a score of 23 and in First Amendment, he receives a score of 29 (Segal and Cover). His voting record since his appointment reveals a 40% liberal vote in
cases of civil rights and 33% in cases dealing with the First Amendment (InsideGov).

According to these statistics, Thomas has a conservative voting record that closely matches his conservative ideology. In cases that have specifically considered the rights of LGBTs, Justice Thomas has voted conservatively in *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, *Hollingsworth v. Perry*, and *Obergefell v. Hodges*. Figure 6 shows the frequency with which Justice Thomas voted with the majority in the most recent cases involving civil rights and the First Amendment as a function of whether the decision was conservative or liberal.

Figure 6: Thomas Frequency of Vote with Majority
Ginsburg

The forth longest-sitting Justice is Ruth Bader Ginsburg. She attended Cornell University before continuing on to Harvard Law School and eventually receiving her law degree from Columbia Law School. Democratic President Bill Clinton appointed her as an Associate Justice in 1993. A Democratic Senate confirmed her appointment with a vote of 96 to 3. Ginsburg has participated in almost 1,500 cases and has written 158 opinions for the Court (InsideGov). She is recognized as being liberal. Her Segal-Cover score is 68. Topically, she has a score of 69 in civil rights and in First Amendment issues (Segal and Cover). Ginsburg’s liberal vote percentages since her introduction to the Court are 69% in civil rights cases and in First Amendment cases (InsideGov). Her numbers seem to suggest that she is nothing if not consistent, and she is consistently liberal. In cases that have specifically considered the rights of LGBTs, Justice Ginsburg has voted liberally in Romer v. Evans, Lawrence v. Texas, United States v. Windsor, Hollingsworth v. Perry, and Obergefell v. Hodges. Figure 7 shows the frequency with which Justice Ginsburg voted with the majority in the most recent cases involving civil rights and the First Amendment as a function of whether the decision was conservative or liberal.
Breyer

Stephen G. Breyer obtained a degree from Stanford University and then a law degree from Harvard. In 1994, Democratic President Bill Clinton appointed him to the position of Associate Justice. A Democratic Senate confirmed him with a vote of 87 to 9. He has heard just over 1,300 cases during his time on the Court. Breyer has authored 141 opinions of the Court (InsideGov). Justice Breyer is more moderate, even leaning conservative, as shown by his Segal-Cover score of 47. In civil rights cases he has earned a score of 69 and in First Amendment cases he has earned a score of 50 (Segal and
Cover). During his time on the Court Breyer has voted liberally 70% of the time in cases dealing with civil rights and 56% of the time in First Amendment cases (InsideGov). The statistics show that while Justice Breyer is considered a liberal, he is a moderate one. In cases that have specifically considered the rights of LGBTs, Justice Breyer has voted liberally in *Romer v. Evans, Lawrence v. Texas, United States v. Windsor, Hollingsworth v. Perry,* and *Obergefell v. Hodges.* Figure 8 shows the frequency with which Justice Breyer voted with the majority in the most recent cases involving civil rights and the First Amendment as a function of whether the decision was conservative or liberal.

Figure 8: Breyer Frequency of Vote with Majority
Alito

Samuel Alito studied at Princeton University and then obtained his law degree from Yale. He received his appointment to Associate Justice in 2005 from Republican President George W. Bush. A Republican Senate vote of 58 to 42 confirmed his nomination. He has taken part in almost 500 cases during his tenure. He has written 45 opinions for the Court (InsideGov). Alito has a Segal-Cover score of 10 which would make him extremely conservative. In civil rights, he has a score of 37 and in First Amendment rights he has a score of 21 (Segal and Cover). Liberal votes makeup 39% of his civil rights decisions. He also votes liberally on 39% of his First Amendment decisions (InsideGov). These numbers suggest that Justice Alito is one of the most conservative Justices on the current Court. In cases that have specifically considered the rights of LGBTs, Justice Alito has voted conservatively in United States v. Windsor, Hollingsworth v. Perry, and Obergefell v. Hodges. Figure 9 shows the frequency with which Justice Alito voted with the majority in the most recent cases involving civil rights and the First Amendment as a function of whether the decision was conservative or liberal.
Sotomayor

Sonia Sotomayor received an undergraduate degree from Princeton and went on to Yale Law School. Democratic President Barack Obama appointed her to Associate Justice in 2009. A Democratic Senate confirmed her nomination with a vote of 68 to 31. She has heard 210 cases since taking her seat on the Court and has written 21 opinions (InsideGov). Her Segal-Cover score is 78. Sotomayor’s score for civil rights cases is 63 and her score for First Amendment cases is 76 (Segal and Cover). Since her appointment she has voted liberally 71% of the time on issues of civil rights and 68% of the time of
issues involving the First Amendment (InsideGov). As the numbers suggest, Justice Sotomayor is one of the more liberal Justices as she votes that way most of the time. In cases that have specifically considered the rights of LGBTs, Justice Sotomayor has voted liberally in *United States v. Windsor* and *Obergefell v. Hodges*. She has voted conservatively in *Hollingsworth v. Perry*. Figure 10 shows the frequency with which Justice Sotomayor voted with the majority in the most recent cases involving civil rights and the First Amendment as a function of whether the decision was conservative or liberal.

Figure 10: Sotomayor Frequency of Vote with Majority

Kagan

Elena Kagan attended Princeton for her undergraduate degree and continued on to Harvard Law School. She was appointed by Democratic President Barack Obama in 2009. A Democratic Senate confirmed her nomination in a vote of 63 to 37. She has
participated in 113 cases during her short time on the Court. She has authored 14 opinions (InsideGov). Kagan receives a score of 73 on the Segal-Cover scale. Topically, she has a score of 61 in civil rights cases and a score of 62 in First Amendment cases (Segal and Cover). Her voting record since appointment has been a liberal vote of 72% in issues of civil rights and 68% in issues of the First Amendment (InsideGov). Kagan’s tenure on the Court so far has proved her to be considered a liberal Justice. In cases that have specifically considered the rights of LGBTs, Justice Kagan has voted liberally in *Romer v. Evans, Lawrence v. Texas, United States v. Windsor, Hollingsworth v. Perry*, and *Obergefell v. Hodges*. Figure 11 shows the frequency with which Justice Kagan voted with the majority in the most recent cases involving civil rights and the First Amendment as a function of whether the decision was conservative or liberal.

Figure 11: Kagan Frequency of Vote with Majority
Gorsuch

The latest appointment to the Supreme Court is Neil M. Gorsuch. He went to Columbia University before obtaining a law degree from Harvard. He received his appointment from Republican President Donald Trump in 2017. A tumultuous confirmation process landed him with a vote of 54 to 45 from a Republican Senate (InsideGov). His Segal-Cover score is 11 (Segal and Cover). Because Justice Gorsuch has not yet been on the Court for a full year, to report his vote numbers would be misleading. However, he is considered a very conservative Justice, often aligning himself with Justice Thomas (the Court’s most conservative Justice). He was appointed to replace conservative Justice Scalia.

Making inferences about the future occurrence of events can be tricky. However, one of the most indicative elements of the future is the past. The Justices have developed reputations, accumulated voting histories, and created patterns of voting. Using numbers to put these patterns into perspective aids understanding of the way that each Justice operates in their position. Assuming that the trends shown here will continue, I can predict the decision of the Justices.
Chapter 4: Conclusion

My conclusion will be rooted in analysis based on the material that has been gathered throughout this paper. I have looked at competing lines of precedent, interpretive tests, speech and religious checks, amicus curiae briefs, and the voting patterns of the Justices. I believe that the accumulation of all this information will provide a somewhat reliable indication of how the Supreme Court will rule in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission.*

The case presents a few essential questions for the Court that each side has attempted to answer with competing lines of precedent. The first question that is addressed is: Does making a custom wedding cake constitute speech? According to the case precedent presented in response to this question, expressive conduct may be considered speech when it conveys a clear message. I believe the Court will say that custom wedding cakes constitute artistic expression that equates to speech. They have done so before in *Texas v. Johnson* and in *United States v. O’Brien.* The expressive conduct in question in those cases were flag burning and draft card desecration. Surely then, cake making is also expressive conduct. The speech in *O’Brien* was allowed to be regulated because of a rational government interest. This should not apply in *Masterpiece Cakeshop* because it should be evaluated under a higher level of scrutiny.

Assuming that cake making is speech, the Court must then answer whether or not the government is compelling speech in this case. I believe the Court will find that being
coerced to create artwork is compelled speech. The precedent is clear in *Wooley v. Maynard*, *Boy Scouts of America v. Dale*, and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* that the Court will not require an individual to host the message of another or of the government. The Court has ruled that slogans on license plates, association in clubs, and participation in a parades are all instances where the speaker’s autonomy in infiltrated. I believe they will also say that being required to participate in an inherently religious, celebratory ceremony of another would also be an example of compelled speech. Additionally, the remedy provided by the lower court ruling requires that Masterpiece retrain staff to comply with CADA and this too is compelling speech. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* should not apply because the expressive conduct in question will clearly send a message of agreement with same-sex marriage where the speech being considered in *FAIR* would not have been seen as endorsement for military policies.

The Court may then turn to the question of whether or not CADA is a burden on the free exercise of religion. Does the violation of religious conscientiousness constitute a burden on religious exercise? I believe that the Court will say that it does. The line of precedent that supports this is overwhelming. In *Sherbert v. Verner*, working on Saturdays was considered burdensome and in *Wisconsin v. Yoder* it was going to school past the eighth grade. *Burwell v. Hobby Lobby Stores* also supports this view with a ruling which states that providing contraceptives is a burden on free exercise. These actions were government regulations that violated a religious believer’s deeply held system of beliefs. In *Masterpiece Cakeshop*, being an active participant in the celebration of same-sex marriage would violate petitioner’s conscience by going against his sincere,
honorable religious beliefs. Employment Division, Department of Human Resources of Oregon v. Smith would not apply because I believe the Court will find that CADA is neither neutral nor generally applicable.

The Court must decide under which level of scrutiny they will analyze the government interest as compared to the individual right at issue in this case. I believe that they will apply strict scrutiny. The reasons that they should apply strict scrutiny are numerous. Topics to be analyzed under strict scrutiny include fundamental rights. The freedom of speech, freedom of religious exercise, and right to marry are each classified as fundamental rights. The rights that are outlined in the Bill of Rights are all considered fundamental, and in Obergefell v. Hodges the Court ruled that marriage was a fundamental right as well. An additional argument for strict scrutiny is found in Smith, where the Court introduced hybrid rights. Under this idea, anytime a free exercise claim is made in conjunction with another protected right, strict scrutiny will apply. In Masterpiece Cakeshop, a free exercise claim is brought in combination with a free speech claim and therefore a hybrid rights case is created. I believe that the Court will not apply the O'Brien standard of rational basis scrutiny because of the ample evidence that strict scrutiny should apply. Under strict scrutiny the burden of proof is on the government to prove that CADA is narrowly tailored to advance a compelling government interest. This is a tall order and I do not believe that CADA will be able to survive this level of scrutiny.

All of this precedent must be held in light of the precedent of anti-discrimination under the equal protection clause. United States v. Windsor allowed states to define for themselves what the meaning of marriage is. Obergefell v. Hodges, however, disallowed
states to ban same-sex marriage and required the states to recognize same-sex marriages performed in other states. This was also the case that made marriage a fundamental right. The Court has held in Romer v. Evans and Lawrence v. Texas that there was no compelling government interest to justify the denial of equal protection. While this was a win for the LGBT community, I do not think these cases will carry as much weight when held against equally important First Amendment rights.

In Masterpiece Cakeshop, the right to free speech and free exercise come head to head with the right to equal protection under the law, the question then becomes one of government interest. Does the government interest in anti-discrimination satisfy the applicable level of scrutiny it would take to restrict free exercise and freedom of speech? As mentioned before, I believe that the Court will apply strict scrutiny. This level of scrutiny requires that the government interest be compelling rather than substantially related or rationally related to an important government interest. The government interest in this case would be to protect sexual orientation. The Court has stated before that this interest is not considered compelling. Neither is CADA narrowly tailored, which is the second prong of the strict scrutiny analysis. The law is over inclusive and broad. It applies to everyone who sells anything. For these reasons I do not believe that CADA will be able to survive strict scrutiny.

Further, laws regarding speech have to pass the checks of being content neutral and cannot be compelled. I believe the court will see that CADA is content based and viewpoint discriminatory in application by affecting only a certain class of people: the religious. It also compels speech because it mandates speech that a speaker otherwise would not make. Laws regarding religion must pass the check of being neutral and
generally applicable. CADA is not neutral because it imposes a special disability on the basis of religious views. Neither is it generally applicable because it allows exemptions and therefore does not apply to everybody.

Amicus briefs can be influential to the Justices, especially briefs that are submitted on behalf of the United States government. The Solicitor General wrote to support the case of petitioners. I do not think that will be overlooked by the Court and that they will consider that with the weight that it deserves. The government reiterates the argument of petitioners that making custom cakes is speech that is fundamentally altered by CADA. The law also is argued to be a burden on religious freedom that is unable to be justified by the government’s interest. It is also argued that in light of the interest in preserving these two constitutional rights, the public accommodation law should be considered under strict scrutiny.

The voting patterns of the Justices allow me to infer their tendencies to lean towards conservative or liberal rulings. The Roberts Court has overall been a conservative one. Based on the statistics laid out in an earlier chapter, I believe that the Justices will stick to their ideological leanings. Their votes will most likely mirror their Segal-Cover scores. I expect a conservative vote from Justices Roberts, Thomas, Alito and Gorsuch. On First Amendment issues, conservative votes have been rendered by Roberts in 50% of cases, by Thomas in 67% of cases, and by Alito in 61% of cases. I expect a liberal vote from Justices Ginsburg, Breyer, Kagan and Sotomayor. On First Amendment issues, liberal votes have been rendered by Ginsburg in 69% of cases, by Breyer in 56% of cases, by Kagan in 68% of cases, and by Sotomayor in 68% of cases (InsideGov). The only one that is left up in the air is Justice Kennedy, as usual. His vote
could be decisive in this case, but ultimately I believe he will vote with the conservatives because he votes conservatively in 54% of cases involving First Amendment issues (InsideGov). Also, when reading the transcripts of the oral arguments, it seemed to me that Kennedy was leaning toward a conservative vote. He even stated, “Tolerance is essential in a free society. And tolerance is most meaningful when it is mutual. It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips religious beliefs” (U.S. Supreme Court Oral Argument Transcript).

In summary, and in light of the above analysis, I predict that the Court will decide in favor of Masterpiece Cakeshop in a 5 to 4 vote by applying strict scrutiny to find that CADA is a content based, compulsion of speech that is neither neutral nor generally applicable. It is possible that the Court will find in favor of Masterpiece Cakeshop but for different reasons. They could make a decision that is not based on freedom of speech, but rather on freedom of religion. The Court may decide that CADA burdens the free
exercise of religion to the point that it cannot stand when held against antidiscrimination sentiments. The outcome would be the same, but the reasoning could vary.
BIBLIOGRAPHY

Documents:


**Academic Journals:**


**Cases:**


