



MASTERPIECE CAKESHOP, LTD.
v.
COLORADO CIVIL RIGHTS COMMISSION
No. 16-111
SUPREME COURT OF THE UNITED STATES
June 4, 2018
[6 – 2]

OPINION: KENNEDY/ROBERTS/BREYER/ALITO/KAGAN/GORSUCH...In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion.

If only the Court had decided the free speech and free exercise issues. Instead, after six years of appeals, the Court decided the outcome on very narrow and, in my mind, questionable grounds. In my estimation, all but Gorsuch, Alito and Thomas did a great disservice to our nation and to Mr. Phillips by kicking this can down the road.

The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

Just to get you thinking: Should a local diner be able to refuse hamburgers to a gay couple at the diner? Should a local diner who caters be able to refuse 100 hamburgers delivered to a gay party? A gay wedding reception? Would it matter if the bride/groom displayed a sign at the reception: Catered by Jimmy's Diner? Would it matter if the hamburger itself sent no message? What if the couple wanted a toothpick in each burger with some sort of gay symbol on it?

John asks a Christian baker to bake five plain sheet cakes for pick up. He is not told they are going to be used in celebration of a gay wedding. Or, he is told. Or, he finds out through an anonymous source. Nothing on the cakes or in literature suggests where the cakes were made, but everybody knows their source. What is your ruling in each instance and, more importantly, why?

The same difficulties arise in determining whether a baker has a valid free exercise [of religion] claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question

of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Is Justice Kennedy suggesting that this victory for Christians (really, for all Americans if they only knew it) might have turned out differently if the Colorado Commissioners had concealed their hatred of Christian beliefs towards the gay lifestyle from the record? I really don't believe this is much of a victory. In fact, I would anticipate a new order for a gay wedding cake to be placed at the doorstep of the Masterpiece Cakeshop real soon. I would anticipate the Colorado Commission will rule against Masterpiece, but this time, they will keep their hateful thoughts to themselves. What result when this arrives back on the Supreme Court docket?

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

I
A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." And he seeks to "honor God through his work at Masterpiece Cakeshop." One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig

and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." The couple left the shop without further discussion.

The following day, Craig's mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into."

B

For most of its history, Colorado has prohibited discrimination in places of public accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed "An Act to Protect All Citizens in Their Civil Rights," which guaranteed "full and equal enjoyment" of certain public facilities to "all citizens," "regardless of race, color or previous condition of servitude." A decade later, the General Assembly expanded the requirement to apply to "all other places of public accommodation."

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

"It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, **creed**, color, sex, **sexual orientation**, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."

The Act defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes."

CADA establishes an administrative system for the resolution of discrimination claims...If the [Colorado Civil Rights] Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. Available remedies include, among other things, orders to cease-and-desist a discriminatory policy, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public." Colorado law does not permit the Commission to assess money damages or fines.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in August 2012, shortly after the couple's visit to the shop. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission.

The Commission...ruled in the couple's favor...Phillips raised two constitutional claims before the [Commission]. **He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed.** The [Commission] rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins' cake would force Phillips to adhere to "an ideological point of view." Applying CADA to the facts at hand, in the [Commission's] view, did not interfere with Phillips' freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court's precedent in *Employment Div. v. Smith* (1990), the [Commission]

determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. The [Commission] thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

...The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with . . . this Order." The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken."

Apparently, Phillips chose to refrain from making any wedding cakes for anyone during his six year appeal ordeal. And, apparently, the Colorado Civil Right Commission was ok with that decision. The Supreme Court decision is bereft of knowledge on this point.

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order. The [Court of Appeals] rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." The [Court of Appeals] also rejected the argument that the Commission's order violated the Free Exercise Clause. Relying on this Court's precedent in *Smith*, [it] stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" on the ground that following the law would interfere with religious practice or belief. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips [then] sought review here, and this Court granted certiorari.

Fundamentally, granting certiorari is tantamount to granting permission to appeal to the Supreme Court.

He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II
A

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.

If Justice Kennedy is referring to his decision in *Obergefell v. Hodges* that struck down state laws defining marriage as between one man and one woman, his statement attributing a shift in the social mores of our day is a massive lie. Indeed, it was he (the swing vote in a 5-4 decision) that decided for the rest of us how we are going to deal with this issue.

See a small portion of Justice Scalia's dissent in the *Obergefell* case:

I write separately to call attention to this Court's threat to American democracy. The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. **The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.**

For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges* (2015), "the First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths."

Nevertheless, while those religious and philosophical objections are protected, 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...

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

The Court is trying to couch its decision in terms that won't come back to haunt. I do not believe a Christian baker should be forced by his government to celebrate or be a part of endorsing gay marriage any more so than a Muslim baker should be forced to create a cake with a Muhammed caricature on the top for a Nazi celebration. But, how far does it go? Can a local builder refuse to build a home for a gay couple? Everyone needs shelter.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners [the baker and his corporation] conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.

So, apparently, the baker agrees that he could not refuse to sell any and all cakes for gay weddings. For example, one presumes, a plain cake with no writing antithetical to his Christian views and no same-sex couple on top would be ok with Phillips. And, one presumes, he would have to sell such a cake unless he were asked to participate at the wedding site. This really concerns me. I fear the baker caved in too soon. Should a Jewish florist be forced to supply flowers to the annual Nazi convention? Flowers don't speak, but again, the presence of flowers aid in celebrating the Holocaust. Should a black florist be forced to supply flowers for the annual KKK convention? And, for that matter, should a white supremacist florist be forced to supply flowers for the annual NAACP convention?

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Clearly, the closer government gets to demanding that sincerely held religious beliefs and ones' own speech take second place to the will of "the discriminated," the better the case for the provider of goods and services. Also, assuming a qualified baker down the street has no objection to a gay wedding cake, where is the tolerance of gays for the beliefs of their Christian brothers? Sounds rather discriminatory, does it not?

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. At the time of the events in question, this Court had not issued its decisions either in *United States v. Windsor* (2013) or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

Justice Kennedy sounds so warm and fuzzy, just like a good parent. But, in truth, the baker's understanding of the state of same-sex marriage laws was irrelevant to any issue. And, by mentioning the issue at all, Kennedy would have to likewise agree that the baker's belief would not have been so understandable if the *Windsor* and *Obergefell* Supreme Court decisions had been reached prior to the summer of 2012 when this gay couple demanded service. In reality, Justice Kennedy's arrogance knows no bounds. Does he really think his *Windsor* and *Obergefell* decisions should serve to take precedence over Phillips' understanding of the Holy Bible, the teachings of Jesus Christ himself and thousands of years of human moral history?

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three

occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages.

My, oh my. It appears that as long as the citizens of Colorado think like the Commission, they will do just fine before the Commission.

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

Stigma: a mark of shame. Stigmata (plural of stigma): bodily marks resembling the wounds of the crucified Jesus Christ. I find it fascinating that these two words are so closely associated. I by no means suggest that a sign as defined above would be appropriate or legal. I ask how Justice Kennedy would react to a sign that said, "if your faith teaches that the gay lifestyle is a sin, you are not welcome in this establishment."

Justice Kennedy has a serious problem with what I will dub a "King Solomon Syndrome." Acting with the wisdom of a King Solomon is very appropriate if you are the King or you are placed in positions that ask for wisdom, such as a trial court judge asked to rule on the best interests of children in a broken marriage. But, Justice Kennedy is neither King nor, in most instances, asked to come up with the one and only "right" answer to society's problems. He is asked merely to interpret the Constitution, not to mold it to suit his definition of virtue.

The Constitution does not protect us from offensive language. It does not protect us from the stigma of shame. Shame has different meaning in different regions of the world and can change with time (and change back over time). Christians are taught to forgive others just as they have been forgiven. Christians are also taught that sin has consequences, one of them being the stigma of shame. Serious people of faith (of any religion) are not looking to you, Justice Kennedy, to define for them how they should think about morality. That is not your job. And, it should be much easier to interpret the Constitution through the eyes of an oath-taker than to meet the heavy burdens placed upon the shoulders of a King Solomon.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, **commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community.** One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." A few moments later, the commissioner restated the same position: "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." Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again...On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

"...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."

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn

responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

...[We] cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. *Church of Lukumi Babalu Aye* (1993). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included "wording and images [the baker] deemed derogatory;" featured "language and images [the baker] deemed hateful;" or displayed a message the baker "deemed as discriminatory".

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies" to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The

Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that "[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the requested cakes. In those cases, the court continued, there was no impermissible discrimination because "the Division found that the bakeries . . . refused the patron's request . . . because of the offensive nature of the requested message."

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed. v. Barnette* (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

Justice Kennedy chastises the Court of Appeals for taking on the role of the "offensive speech police" after having done so himself in this very opinion, concluding that a sincere belief that the gay lifestyle is Biblically forbidden is tantamount to undignified treatment by Christians towards gays. We are all hypocrites to a degree, but Justice Kennedy "takes the cake."

C

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye*, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."

Kennedy to Colorado Civil Rights Commission: "Hey, folks. Next time around if you at least appear to be fair, you just might get your wish to put anyone out of business that dares to disagree with your Commission's morality police. It's not the substance of your commands that counts – it's all in the delivery." I fear my cynicism will be born out in future cases. At a minimum, if a future baker prevails on the real issues surrounding retail sales, it won't be 7-2 or 6-3 --- it will be 5-4.

Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." In view of these factors **the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "every appearance" of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.**

While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments...were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. **However later cases raising these or similar concerns are resolved in the future**, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance,

without **undue disrespect** to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

If Justice Kennedy has his way next time around when the lower courts have the sense to hide their true colors, no future Christian baker, florist or photographer will prevail. **“Undue”**: unwarranted or inappropriate because excessive or disproportionate. Kennedy is showing his hand. If, as he clearly believes, gay persons are subjected to indignities when being declined service from a person of faith, the only conclusion that can be reached is that forcing a baker to violate his faith is right in line with showing **due disrespect** to his sincere religious beliefs because his beliefs are excessive or disproportionate. He did not, in like manner, refer to potential indignities to gays as **undue**. The writing of Justice Kennedy is on the wall. I just hope he is in the minority when the next baker’s beliefs are on the chopping block.

The judgment of the Colorado Court of Appeals is reversed. *It is so ordered.*

CONCURRENCE: KAGAN/BREYER...“It is a general rule that [religious and philosophical] 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.” But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views “neutral and respectful consideration.” I join the Court’s opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court’s holding.

I can now safely predict that when the Court is courageous enough to actually address the real issues of these retail cases (religion and speech), the future baker, florist or photographer will lose in a decision written by Kennedy with Kagan, Breyer, Sotomayor and Ginsburg in the majority against Thomas, Alito, Roberts and Gorsuch with either Alito or Gorsuch writing for the dissent.

The Court partly relies on the “disparate consideration of Phillips’ case compared to the cases of [three] other bakers” who “objected to a requested cake on the basis of conscience.” In the latter cases, a customer named William Jack sought “cakes with images that conveyed disapproval of same-sex marriage, along with religious text”; the bakers whom he approached refused to make them. Those bakers prevailed before the Colorado Civil Rights [Commission], while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. And the Court takes especial note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested “offensive in nature.”

As the Court states, a "principled rationale for the difference in treatment" cannot be "based on the government's own assessment of offensiveness."

What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed. The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation. The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.

I read the Court's opinion as fully consistent with that view. The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—"quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished." And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court says, "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State's decisions are not infected by religious hostility or bias. I accordingly concur.

CONCURRENCE: GORSUCH/ALITO...In *Employment Div. v. Smith*, this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. *Smith* remains controversial in many quarters. But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have

required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs "offensive." That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. (GINSBURG, J., dissenting); (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack's case. He approached three bakers and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. He pointed to Colorado's Anti-Discrimination Act (CADA), which prohibits discrimination against customers in public accommodations because of **religious creed**, sexual orientation, or certain other traits.

Please see page four of this document. The CADA is quoted as outlawing discrimination as to "creed." Just Gorsuch implies it speaks to "religious creed". Which is it?
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Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. Mr. Jack appealed to the Colorado Civil Rights Commission [and lost].

What am I missing? Phillips also declined based upon his moral convictions and also would have declined for anyone seeking to celebrate gay marriage.

Next, take the undisputed facts of Mr. Phillips's case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation. ("I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer"). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig's mother. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer, then, would simply mistake the undisputed factual record. Nonetheless, the Commission held that Mr. Phillips's conduct violated the Colorado public accommodations law.

...In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. **In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.**

...The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from "the offensive nature of the requested message." Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a "distinction without a difference." It concluded instead that an "intent to disfavor" a protected class of persons should be "readily . . . presumed" from the knowing failure to serve someone who belongs to that class. In its judgment, Mr. Phillips's intentions were "inextricably tied to the sexual orientation of the parties involved" and essentially "irrational."

Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's objection is "inextricably tied" to a protected class, then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions simply reduce to this: it *presumed* that Mr. Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that "no such showing" of actual "animus"—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips's case.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack's case), or it is sufficient to "presume" such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. That is anything but the neutral treatment of religion.

The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of "irrational" or "offensive . . . message" that the bakers in the first case refused to endorse. Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. **In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise.** Just as it is the "proudest boast of our free speech jurisprudence" that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. Popular religious views are easy enough to

defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom.

Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission. It is no answer, for example, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. It is no answer either simply to slide up a level of generality to re-describe Mr. Phillips's case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. Like "an emblem or flag," a cake for a same-sex wedding is a symbol that serves as "a short cut from mind to mind," signifying approval of a specific "system, idea, or institution." It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack's case the choice to refuse to advance a message they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether "high or petty," bear no license to declare what is or should be "orthodox" when it comes to religious beliefs or whether an adherent has "correctly perceived" the commands of his religion. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith...

The second suggestion fares no better. Suggesting that this case is only about "wedding cakes"—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general*; understanding it as celebrating a same-

sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips's case at "wedding cakes" exactly—and not at, say, "cakes" more generally or "cakes that convey a message regarding same-sex marriage" more specifically? If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack's case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips's case (a cake that conveys no message regarding same-sex marriage). Of course, under *Smith* a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and *Smith*, it must be applied in a manner that treats religion with neutral respect. That means the government must apply the *same* level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description. To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points "repeatedly and in many different contexts" over many years. For example, in *Thomas* a faithful Jehovah's Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. Of course, the line Mr.

Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order "must be set aside." Maybe in some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, "however later cases raising these or similar concerns are resolved in the future, . . . the rulings of the Commission and of the state court that enforced the Commission's order" in *this* case "must be invalidated." Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

CONCURRENCE: THOMAS/GORSUCH...I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips' right to freely exercise his religion. As JUSTICE GORSUCH explains, the Commission treated Phillips' case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips' religion. The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips' religion. Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. Specifically, the parties dispute whether Phillips refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a pre-made one). But the Colorado Court of Appeals resolved this factual dispute in Phillips' favor. The court described his conduct as a refusal to "design and create a cake to celebrate a same-sex wedding." And it noted that the

Commission's order required Phillips to sell "any product he would sell to heterosexual couples," including custom wedding cakes.

Even after describing his conduct this way, the Court of Appeals concluded that Phillips' conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

I

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the "freedom of speech." When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose "incidental burdens" on expression. As the Court explains today, public-accommodations laws usually regulate conduct. "As a general matter," public-accommodations laws do not "target speech" but instead prohibit "the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services."

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law "has the effect of declaring . . . speech itself to be the public accommodation," the First Amendment applies with full force. *Boy Scouts of America v. Dale* (2000). In *Hurley*, for example, a Massachusetts public-accommodations law prohibited "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation." When this law required the sponsor of a St. Patrick's Day parade to include a parade unit of gay, lesbian, and bisexual Irish-Americans, the Court unanimously held that the law violated the sponsor's right to free speech. Parades are "a form of expression," this Court explained, and the application of the public-accommodations law "altered the expressive content" of the parade by forcing the sponsor to add a new unit. The addition of that unit compelled the organizer to "bear witness to the fact that some Irish are gay, lesbian, or bisexual"; "suggest . . . that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals"; and imply that their participation "merits celebration." While this Court acknowledged that the unit's exclusion might have been "misguided, or even hurtful" it rejected the notion that governments can mandate "thoughts and statements acceptable to some groups or, indeed, all people" as the "antithesis" of free speech.

The parade in *Hurley* was an example of what this Court has termed "expressive conduct." This Court has long held that "the Constitution looks beyond written or spoken words as mediums of expression" and that "symbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed. v. Barnette*. Thus, a person's "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas v. Johnson* (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.

Of course, conduct does not qualify as protected speech simply because "the person engaging in it intends thereby to express an idea." *United States v. O'Brien* (1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." *Clark v. Community for Creative Non-Violence* (1984). But a "particularized message" is not required, or else the freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Hurley*.

Once a court concludes that conduct is expressive, the Constitution limits the government's authority to restrict or compel it. "One important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say" and "tailor" the content of his message as he sees fit. This rule "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*. And it "makes no difference" whether the government is regulating the "creation, distribution, or consumption" of the speech.

II A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palette with a paintbrush and baker's whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece's website. See <http://masterpiececakes.com/wedding-cakes> (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that "a wedding has occurred, a marriage has begun, and the couple should be celebrated."

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, "wedding cakes are so packed with symbolism that it is hard to know where to begin." M. Kronl (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is "so standardized and inevitably a part of getting married that few ever think to question it." Almost no wedding, no matter how spartan, is missing the cake. "A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards." Although the cake is eventually eaten, that is not its primary purpose. ("It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings"); ("Nothing is made of the eating itself"); (explaining that wedding cakes have long been described as "inedible"). The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple.

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, *Barnes v. Glen Theatre, Inc.* (1991), or flying a plain red flag, *Stromberg v. California* (1931). By forcing Phillips to create custom wedding cakes for same-sex weddings, Colorado's public-accommodations law "alters the expressive content" of his message. The meaning of expressive conduct, this Court has explained, depends on "the context in which it occurs." Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to "bear witness to these facts" or to "affirm . . . a belief with which he disagrees."

B

The Colorado Court of Appeals nevertheless concluded that Phillips' conduct was "not sufficiently expressive" to be protected from state compulsion. It noted that a reasonable observer would not view Phillips' conduct as "an endorsement of same-sex marriage," but rather as mere "compliance" with Colorado's public-accommodations law. It also emphasized that Masterpiece could "disassociate" itself from same-sex marriage by posting a "disclaimer" stating that Colorado law "requires it not to discriminate" or that "the provision of its services does not constitute an endorsement." This reasoning is badly misguided.

1

The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a reasonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it. From the beginning, this Court's compelled-speech precedents have rejected arguments that "would resolve every issue of power in favor of those in authority." *Barnette*. *Hurley*, for example, held that the application of Massachusetts' public-accommodations law "required the organizers to alter the expressive content of their parade." It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party's speech. See *FAIR* (law school refused to allow military recruiters on campus); *Rosenberger* (public university refused to provide funds to a religious student paper); *PruneYard* (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them to endorse that speech. But these decisions do not suggest that the government can force speakers to alter their *own* message. See *Pacific Gas & Elec.* ("Notably absent from *PruneYard* was any concern that access . . . might affect the shopping center owner's exercise of his own right to speak")...

The Colorado Court of Appeals also noted that Masterpiece is a "for-profit bakery" that "charges its customers." But this Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech. See *Pacific Gas & Elec.* (collecting cases); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council* (deeming it "beyond serious dispute" that "speech . . . is protected even though it is carried in a form that is 'sold' for profit"). Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to

bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over the messages that Masterpiece sends are still more evidence that Phillips' conduct is expressive.

2

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as "begging the core question." *Tornillo*. Because the government cannot compel speech, it also cannot "require speakers to affirm in one breath that which they deny in the next." States cannot put individuals to the choice of "being compelled to affirm someone else's belief" or "being forced to speak when they would prefer to remain silent."

III

Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien*, that test does not apply unless the government would have punished the conduct regardless of its expressive component. Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand "the most exacting scrutiny."

The Court of Appeals did not address whether Colorado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from "denigrating the dignity" of same-sex couples, "asserting their inferiority," and subjecting them to "humiliation, frustration, and embarrassment." These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." A contrary rule would allow the government to stamp out virtually any speech at will. See *Morse v.*

Frederick ("After all, much political and religious speech might be perceived as offensive to some").

This is true constitutional oath-taking interpretation and jurisprudence. We need more justices on the Court to do their job.

As the Court reiterates today, "it is not . . . the role of the State or its officials to prescribe what shall be offensive." "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc. v. Falwell* (1988)...If the only reason a public-accommodations law regulates speech is "to produce a society free of . . . biases" against the protected groups, that purpose is "decidedly fatal" to the law's constitutionality, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *United States v. Playboy Entertainment Group, Inc.* (2000) ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"). "A speech burden based on audience reactions is simply government hostility . . . in a different guise."

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags"—all of which this Court has deemed protected by the First Amendment. *Hurley; Dale; Snyder v. Phelps* (2011). Moreover, it is also hard to see how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, *Virginia v. Black* (2003); conduct a rally on Martin Luther King Jr.'s birthday, *Forsyth County v. Nationalist Movement* (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to "Bury the niggers," *Brandenburg v. Ohio* (1969).

Nor does the fact that this Court has now decided *Obergefell v. Hodges* somehow diminish Phillips' right to free speech. "It is one thing . . . to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted" and unentitled to express a different view. **This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage "long has been held—and continues to be held—in good**

faith by reasonable and sincere people here and throughout the world." If Phillips' continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected. *Dale* ("The fact that the social acceptance of homosexuality may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view").

* * *

In *Obergefell*, I warned that the Court's decision would "inevitably . . . come into conflict" with religious liberty, "as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples." This case proves that the conflict has already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy." (ALITO, J., dissenting). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

Why are Justices Thomas and Gorsuch the lone voices in this Concurrence? Why didn't Roberts and Alito join them? Unless a future court draws a line at a customer demanding scripture on a cake or to persons of the same sex on top, I fear the next baker is going to lose. That means America will lose. The cost will be a diminishment of the free exercise of religion as well as a severe blow to the freedom of speech.

DISSENT: GINSBURG/SOTOMAYOR...There is much in the Court's opinion with which I agree. "It is a general rule that [religious and philosophical] 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." "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." "Purveyors of goods and services who object to gay marriages for moral and religious reasons may not put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'" Gay persons may be spared from "indignities when they seek goods and services in an open market." I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." This conclusion rests on evidence said to show the Colorado Civil Rights Commission's (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case

compared to the cases of" three other bakers who refused to make cakes requested by William Jack...The Court also finds hostility in statements made at two public hearings on Phillips' appeal to the Commission. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

"made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. He requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake, he requested on one side, . . . 'God hates sin. Psalm 45:7' and on the opposite side of the cake 'Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, the one with the image of the two groomsmen covered by a red 'X' Jack requested these words: 'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Romans 5:8.'"

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discriminate" and "accepts all humans." The second bakery owner told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message.

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Antidiscrimination Act (CADA) protects. The Commission summarily affirmed the Division's no-probable-cause finding.

The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of the other bakers' objections." But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer.

Nor was the Colorado Court of Appeals' "difference in treatment of these two instances . . . based on the government's own assessment of offensiveness." Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal "to design a special cake with words or images . . . might be different from a refusal to sell any cake at all." The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See App. to Pet. for Cert. ("The Division found that the bakeries did not refuse Jack's request because of his creed, but rather because of the offensive nature of the requested message. . . . There was no evidence that the bakeries based their decisions on Jack's religion . . . whereas Phillips discriminated on the basis of sexual orientation."). I do not read the Court to suggest that the Colorado Legislature's decision to include certain protected characteristics in CADA is an

impermissible government prescription of what is and is not offensive. To repeat, the Court affirms that "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."

II

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one...

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.