AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion

Craig v. Masterpiece Cakeshop, No. 14CA1351 (CO, 2015)

In the summer of 2012, Charlie Craig and David Mullins asked Masterpiece Cakeshop to create a cake to celebrate their same-sex wedding. At the time, same-sex marriages were not recognized in the state of Colorado, but Craig and Mullins had planned to wed in Massachusetts and have a celebration in Colorado. Colorado changed its policy on same-sex marriage in the fall of 2014. Jack Phillips, the owner of Masterpiece Cakeshop, declined to take the commission explaining that same-sex marriages were contrary to Colorado state laws and creating a work of art (a wedding cake) to celebrate such a marriage was contrary to his own religious commitments. Although Colorado did not recognize same-sex marriage, it did have a state law prohibiting public accommodations from refusing service based on various factors, including sexual orientation.

Craig and Mullins filed a complaint, and the Colorado Civil Rights Commission found Masterpiece Cakeshop to be in violation of the Colorado Anti-Discrimination Act and ordered Phillips to change his policies, retrain his staff, and submit a series of compliance reports. Phillips appealed that order to the Colorado Court of Appeals, which unanimously affirmed the Commission's actions. Although Phillips argued that his refusal was specific to the same-sex wedding and not because of the sexual orientation of Craig and Mullins, the appellate court concluded that as a matter of state law the wedding was "closely correlated" to sexual orientation and that was sufficient to trigger the public accommodations requirement. As a matter of constitutional law, the state court found that Phillips did not have a right of free expression or religious free exercise that exempted him from anti-discrimination law requirements.

The state supreme court refused to hear the case, but the U.S. Supreme Court agreed to hear an appeal on a federal constitutional claim that Phillips had a free speech and religious free exercise right to decline to create cakes for same-sex weddings.

JUDGE TAUBMAN,

. . .

The freedom of speech protected by the First Amendment includes the "right to refrain from speaking" and prohibits the government from telling people what they must say. . . .

. . .

These cases establish that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" by forcing individuals to publicly disseminate its own ideological message. *West Virginia Board of Education v. Barnette* (1943). . . .

The second line of compelled speech cases establishes that the government may not require an individual "to host or accommodate another speaker's message." *Rumsfeld v. Forum for Academic & Institutional Rights* (2006). . . .

The Supreme Court has also recognized that some forms of conduct are symbolic speech and deserve First Amendment protections. *United States v. O'Brien* (1968). . . . [But] First Amendment protections extend only to conduct that is "inherently expressive."

In deciding whether conduct is "inherently expressive," we ask whether "'[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson* (1989). . . .

Masterpiece's contentions involve claims of compelled expressive conduct. In such cases, the threshold question is whether the compelled conduct is sufficiently expressive to trigger First Amendment protections. . . . The party asserting that conduct is expressive bears the burden of demonstrating that the First Amendment applies and the party must advance more than a mere "plausible contention" that its conduct is expressive.

Finally, a conclusion that the Commission's order compels expressive conduct does not necessarily mean that the order is unconstitutional. If it does compel such conduct, the question is then whether the government has sufficient justification for regulating the conduct. The Supreme Court has recognized that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." In other words, the government can regulate communicative conduct if it has an important interest unrelated to the suppression of the message and if the impact on the communication is no more than necessary to achieve the government's purpose.

. . .

We conclude that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it. We further conclude that, to the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.

. . .

As in *FAIR*, we conclude that, because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct. Rather, we conclude that a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs.

. . .

We do not suggest that Masterpiece's status as a for-profit bakery strips it of its First Amendment speech protections. However, we must consider the allegedly expressive conduct within "the context in which it occurred." The public recognizes that, as a for-profit bakery, Masterpiece charges its customers for its goods and services. The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product. Nothing in the record supports the conclusion that a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an endorsement of same-sex marriage, rather than a reflection of its desire to conduct business in accordance with Colorado's public accommodations law.

. . .

We recognize that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated. However, we need not reach this issue. We note, again, that Phillips denied Craig's and Mullins' request without any discussion regarding the wedding cake's design or any possible written inscriptions.

Finally, CADA does not preclude Masterpiece from expressing its views on same-sex marriage—including its religious opposition to it—and the bakery remains free to disassociate itself from its customers' viewpoints. . . . CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA. Masterpiece could also post or otherwise disseminate a

message indicating that CADA requires it not to discriminate on the basis of sexual orientation and other protected characteristics. Such a message would likely have the effect of disassociating Masterpiece from its customers' conduct. . . .

. . .

We conclude that CADA is generally applicable, notwithstanding its exemptions. A law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct. *Church of Lukumi Babalu Aye v. City of Hialeah* (1993). CADA does not discriminate on the basis of religion; rather, it exempts certain public accommodations that are "principally used for religious purposes."

In this regard, CADA does not impede the free exercise of religion. Rather, its exemption for "places principally used for religious purposes" reflects an attempt by the General Assembly to reduce legal burdens on religious organizations and comport with the free exercise doctrine. Such exemptions are commonplace throughout Colorado law. . . .

Further, CADA is generally applicable because it does not exempt secular conduct from its reach. In this respect, CADA's exemption for places that restrict admission to one gender because of a bona fide relationship to its services does not discriminate on the basis of religion. On its face, it applies equally to religious and nonreligious conduct, and therefore is generally applicable.

. . .

Finally, we reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation. . . . Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same-sex marriage. However, if it wishes to operate as a public accommodation and conduct business within the State of Colorado, CADA prohibits it from picking and choosing customers based on their sexual orientation.

. . .

We recognize that, with regard to some individual rights, the Colorado Constitution has been interpreted more broadly than the United States Constitution, and that we apply strict scrutiny to many infringements of fundamental rights. However, the Colorado Supreme Court has also recognized that article II, section 4 embodies "the same values of free exercise and governmental noninvolvement secured by the religious clauses of the First Amendment." . . .

. . .

. . . Therefore, we see no reason why *Employment Division v. Smith*'s (1990) holding—that neutral laws of general applicability do not offend the Free Exercise Clause—is not equally applicable to claims under article II, section 4, and we reject Masterpiece's contention that the Colorado Constitution requires the application of a heightened scrutiny test.

Having concluded that CADA is neutral and generally applicable, we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation. . . .

. . .

Affirmed.