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IN THE SUPREME COURT OF THE UNITED STATES

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MASTERPIECE CAKESHOP, LTD., ET AL.,)
 Petitioners,)

v.) No. 16-111

COLORADO CIVIL RIGHTS COMMISSION,)
 ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, December 5, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

1 APPEARANCES:

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3 behalf of the Petitioners

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10 Respondent

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12 the private Respondents

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 16-111,
5 Masterpiece Cakeshop versus Colorado Civil
6 Rights Commission.

7 Ms. Waggoner.

8 ORAL ARGUMENT OF KRISTEN K. WAGGONER

9 ON BEHALF OF THE PETITIONERS

10 MS. WAGGONER: Mr. Chief Justice, and
11 may it please the Court:

12 The First Amendment prohibits the
13 government from forcing people to express
14 messages that violate religious convictions.
15 Yet the Commission requires Mr. Phillips to do
16 just that, ordering him to sketch, sculpt, and
17 hand-paint cakes that celebrate a view of
18 marriage in violation of his religious
19 convictions.

20 JUSTICE SOTOMAYOR: Can I ask you --

21 JUSTICE GINSBURG: What if -- what if
22 it's -- if it's an item off the shelf? That
23 is, they don't commission a cake just for them
24 but they walk into the shop, they see a lovely
25 cake, and they say we'd like to purchase it for

1 the celebration of our marriage tonight.

2 The Colorado law would prohibit that.
3 Would you claim that you are entitled to an
4 exception?

5 MS. WAGGONER: Absolutely not. The
6 compelled speech doctrine is triggered by
7 compelled speech. And in the context of a
8 pre-made cake, that is not compelled speech.

9 Mr. Phillips is happy to sell anything
10 in his store, including --

11 JUSTICE KENNEDY: Well, didn't --
12 didn't he express himself when he made it?

13 MS. WAGGONER: Yes, he did express
14 himself when he made it. And the purpose for
15 which he expressed it is important to the
16 compelled speech doctrine and how it applies,
17 but when you --

18 JUSTICE SOTOMAYOR: I'm sorry, he did
19 refuse to sell --

20 JUSTICE KENNEDY: Well, could I -- but
21 could I get the answer to the question? So --
22 so -- so if it -- if you agree that it's
23 speech, then why can he not refuse to sell the
24 cake that's in the window according to Justice
25 Ginsburg's hypothetical?

1 MS. WAGGONER: Well, in the context of
2 if it's already been placed in the stream of
3 commerce in a public accommodation setting, his
4 speech has been completed. He -- he intended
5 to speak through that cake with the purpose of
6 whatever it was when he created it.

7 In contrast, though, when he has a
8 different purpose, and is expressing a message
9 through a cake, it would render a different
10 result. It's still speech.

11 JUSTICE SOTOMAYOR: I'm sorry, didn't
12 he refuse to sell cupcakes that he sells
13 regularly to the public to some same-sex
14 couples who intended to marry?

15 MS. WAGGONER: That allegation was
16 never involved in the complaint, the formal
17 charges, the ALJ's decision.

18 JUSTICE SOTOMAYOR: But I thought --
19 I'm a little bit surprised by what you're
20 saying because your briefs seem to suggest
21 differently -- that the couple was looking at
22 his already pre-designed cakes that he appears
23 to sell without any customization, and they sat
24 down with him, and he said I don't supply cakes
25 of any kind to gay couples.

1 So I thought this cake was about his
2 refusal to supply a cake for any wedding
3 ceremony.

4 MS. WAGGONER: Justice Sotomayor,
5 that's not how he responded to the couple. The
6 couple came in and they requested a custom cake
7 for their wedding. At that point, they brought
8 in a folder with all kinds of designs they
9 wanted to discuss and ended up purchasing a
10 rainbow-layered cake or -- or received a free
11 rainbow-layered cake, which certainly is
12 expression.

13 The order below requires Mr. Phillips
14 also to include words and symbols on his cakes.
15 It's that broad. So if, for example,
16 Mr. Phillips had used a Bible verse on a cake
17 in the past, he would be compelled to use that
18 Bible verse in a different context.

19 JUSTICE GINSBURG: Where does -- where
20 does it say -- I thought that the requirement
21 was he supply a custom-made cake, as he would
22 to any other shopper, but that he didn't have
23 to convey somebody else's message; that is, he
24 didn't have to write anything on the cake.

25 MS. WAGGONER: In Petitioners'

1 Appendix 57(a), the order is provided, and that
2 order requires him to provide anything that he
3 would provide on a cake in another setting for
4 a marriage between a man and a woman, which
5 includes words and images that he would provide
6 on --

7 JUSTICE GINSBURG: Well, suppose we
8 exclude that and say let's make the assumption
9 that he -- if he makes custom-made cakes for
10 others, he must make it for this pair, but he
11 doesn't have to write anything for anybody. He
12 doesn't have to write a message that he
13 disagrees with.

14 MS. WAGGONER: Well, this Court has
15 recognized in Hurley as well as in other
16 decisions that artistic expression doesn't need
17 to include words and symbols to express a
18 message or to be protected speech.

19 JUSTICE KENNEDY: Well, just -- just
20 one more thing, and then we'll leave this part
21 alone, at least as far as I'm concerned.
22 Suppose the couple goes in and sees the cake in
23 the window and the cake has a biblical verse.

24 Does he have to sell that cake?

25 MS. WAGGONER: Under our theory, he

1 would need to sell that cake because he's
2 already created that cake with the message that
3 he intended for it, but we are drawing the line
4 prior to the compulsion -- there can be no
5 compulsion of speech.

6 If the Court were to choose to draw
7 that line in a different place and protect more
8 speech, there certainly is precedent for that.
9 But under the compelled speech doctrine, when
10 someone comes in and requests speech, if that
11 speech has already been created, then that
12 would be -- not be compelled.

13 JUSTICE SOTOMAYOR: Could you tell me
14 how far --

15 CHIEF JUSTICE ROBERTS: There's no --
16 there's no compulsion of speech, but if he is
17 required to sell a cake in the window with the
18 message already on it, that is compelling him
19 to associate that message with the ceremony.
20 And I thought that was something to which you
21 objected.

22 MS. WAGGONER: There would possibly be
23 an expressive association claim and potentially
24 a free exercise claim if he was delivering the
25 case and there was other involvement. But in

1 terms of the Court's application of the
2 compelled speech doctrine, the compulsion is
3 the trigger for that, but the Court could draw
4 that line at an earlier place and not force him
5 to sell that cake.

6 JUSTICE GINSBURG: But your --

7 JUSTICE KAGAN: Go ahead.

8 JUSTICE GINSBURG: -- the question
9 that I started out with, I -- I wanted to
10 clarify that what you're talking about is a
11 custom-made cake. You are not challenging his
12 obligation to sell his ordinary wares, his, as
13 you put it, already-made wares?

14 MS. WAGGONER: Not at all. And, in
15 fact, Mr. Phillips offered the couple anything
16 in his store, as well as offered to sell
17 additional cakes, custom cakes, that would
18 express other messages.

19 JUSTICE GINSBURG: Going --

20 JUSTICE KAGAN: Ms. Waggoner --

21 JUSTICE GINSBURG: -- you mentioned --
22 you brought up Hurley, but in Hurley, the
23 parade was the event. It was the speech, a
24 parade. At a wedding ceremony, I take it, the
25 speech is of the people who are marrying and

1 perhaps the officiant, but who -- who else
2 speaks at a wedding?

3 MS. WAGGONER: The artist speaks,
4 Justice Ginsburg. It's as much Mr. Phillips's
5 speech as it would be the couples'. And in
6 Hurley, the Court found a violation of the
7 compelled speech doctrine.

8 JUSTICE GINSBURG: Who else then? Who
9 else as an artist? Say the -- the person who
10 does floral arranging, owns a floral shop.
11 Would that person also be speaking at the
12 wedding?

13 MS. WAGGONER: If the -- if they are
14 custom-designed arrangements and they are being
15 forced to create artistic expression which this
16 Court determines is a message --

17 JUSTICE KAGAN: So could --

18 JUSTICE GINSBURG: How about the
19 person who designs the invitation?

20 MS. WAGGONER: Yes.

21 JUSTICE GINSBURG: Invitation to the
22 wedding or the menu for the wedding dinner?

23 MS. WAGGONER: Certainly, words and
24 symbols would be protected speech, and the
25 question would be whether the objection is to

1 the message provided or if it's to the person.

2 JUSTICE KAGAN: So the jeweler?

3 MS. WAGGONER: It would depend on the
4 context as all free-speech cases depend on.
5 What is the jeweler asked to do?

6 JUSTICE KAGAN: Hair stylist?

7 MS. WAGGONER: Absolutely not.

8 There's no expression or protected speech in
9 that kind of context, but what it --

10 JUSTICE KAGAN: Why is there no speech
11 in -- in creating a wonderful hairdo?

12 MS. WAGGONER: Well, it may be
13 artistic, it may be creative, but what the
14 Court asks when they're --

15 JUSTICE KAGAN: The makeup artist?

16 MS. WAGGONER: No. What the Court
17 would ask --

18 JUSTICE KAGAN: It's called an artist.
19 It's the makeup artist.

20 (Laughter.)

21 MS. WAGGONER: The makeup artist may,
22 again, be using creativity and artistry, but
23 when this Court is looking at whether speech is
24 involved, it asks the question of is it
25 communicating something, and is it analogous to

1 other protected --

2 JUSTICE KAGAN: But I'm --

3 MS. WAGGONER: -- forms of speech.

4 JUSTICE KAGAN: -- I'm quite serious,
5 actually, about this, because, you know, a
6 makeup artist, I think, might feel exactly as
7 your client does, that they're doing something
8 that's of-- of great aesthetic importance to
9 the -- to the wedding and to -- and that
10 there's a lot of skill and artistic vision that
11 goes into making a -- somebody look beautiful.
12 And why -- why wouldn't that person or the
13 hairstylist -- why wouldn't that also count?

14 MS. WAGGONER: Because it's not
15 speech. And that's the first trigger point --

16 JUSTICE KAGAN: Some people may say
17 that about cakes, you know?

18 MS. WAGGONER: Some --

19 JUSTICE KAGAN: But you have a -- you
20 have a view that a cake can be speech because
21 it involves great skill and artistry.

22 And I guess I'm wondering, if that's
23 the case, you know, how do you draw a line?
24 How do you decide, oh, of course, the chef and
25 the baker are on one side, and you said, I

1 think, the florist is on that side, the chef,
2 the baker, the florist, versus the hairstylist
3 or the makeup artist?

4 I mean, where would you put a tailor,
5 a tailor who makes a wonderful suit of clothes?
6 Where does that come in?

7 MS. WAGGONER: Your Honor, the tailor
8 is not engaged in speech, nor is the chef
9 engaged in speech but, again, this Court --

10 JUSTICE KAGAN: Well, why -- well --
11 woah. The baker is engaged in speech, but the
12 chef is not engaged in speech?

13 MS. WAGGONER: The test that this
14 Court has used in the past to determine whether
15 speech is engaged in is to ask if it is
16 communicating something, and if whatever is
17 being communicated, the medium used is similar
18 to other mediums that this Court has protected.
19 Not --

20 CHIEF JUSTICE ROBERTS: Does it depend
21 on --

22 JUSTICE SOTOMAYOR: So that begs the
23 question, when have we ever given protection to
24 a food? The primary purpose of a food of any
25 kind is to be eaten.

1 Now, some people might love the
2 aesthetic appeal of a special desert, and look
3 at it for a very long time, but in the end its
4 only purpose is to be eaten.

5 And the same with many of the things
6 that you've mentioned. A hairdo is to show off
7 the person, not the artist. When people at a
8 wedding look at a wedding cake and they see
9 words, as one of the amici here, the pastry
10 chef said, there was a gentleman who had upset
11 his wife and written some words that said "I'm
12 sorry for what I did," something comparable,
13 and the chef was asked, the cake maker was
14 asked, was that affiliated with you?

15 And she said no. It's affiliated with
16 the person who shows the cake at their wedding.
17 It's what they wish to show.

18 So how is this your client's
19 expression, and how can we find something whose
20 predominant purpose is virtually always to be
21 eaten? Call it a medium for expressive
22 expression. Mind you, I can see if they've --
23 create a cake and put it in a museum as an
24 example of some work of art, that might be
25 different because the circumstances would show

1 that they want this to be affiliated with
2 themselves.

3 But explain how that becomes
4 expressive speech, that medium becomes
5 expressive speech.

6 MS. WAGGONER: Certainly not all cakes
7 would be considered speech, but in the wedding
8 context, Mr. Phillips is painting on a blank
9 canvas. He is creating a painting on that
10 canvas that expresses messages, and including
11 words and symbols in those messages.

12 JUSTICE SOTOMAYOR: You know, the
13 other night I had some people over and one of
14 them brought a box of cupcakes and one of the
15 cupcakes was smashed against the box. That was
16 the only cupcake not eaten.

17 Now, I suspect that one of the reasons
18 is the others were so much more attractive
19 whole. There is creation in serving food, in
20 creating any type of edible product.

21 People -- there are sandwich artists
22 now. There are people who create beauty in
23 what they make, but we still don't call it
24 expressive and entitled to First Amendment
25 protection.

1 MS. WAGGONER: No, but when we have
2 someone that is sketching and sculpting and
3 hand designing something, that is creating a
4 temporary sculpture that serves as the
5 centerpiece of what they believe to be a
6 religious wedding celebration, that cake
7 expresses a message.

8 JUSTICE KAGAN: Is this just a --

9 JUSTICE ALITO: What would you say
10 about an architectural design; is that entitled
11 to -- not entitled to First Amendment
12 protection because one might say that the
13 primary purpose of the design of a building is
14 to create a place where people can live or
15 work?

16 MS. WAGGONER: Precisely. In the
17 context of an architect, generally that would
18 not be protected because buildings are
19 functionable, not communicative.

20 JUSTICE ALITO: You mean an
21 architectural design is not protected?

22 MS. WAGGONER: No. Architect --
23 generally speaking, architectural would not be
24 protected.

25 JUSTICE BREYER: So in other words,

1 Mies or Michelangelo or someone is not
2 protected when he creates the Laurentian steps,
3 but this cake baker is protected when he
4 creates the cake without any message on it for
5 a wedding? Now, that -- that really does
6 baffle me, I have to say.

7 MS. WAGGONER: Well, I did say
8 generally no in terms of architecture.

9 JUSTICE BREYER: Well, then, what is
10 the line? That's what everybody is trying to
11 get at, because obviously we have all gone into
12 a Mexican restaurant. They have this fabulous
13 Mole specially made for the people at the table
14 to show what important and wonderful evening it
15 was, which it did import -- impart.

16 There are all kinds of restaurants
17 that do that. And maybe Ollie's Barbecue, you
18 know, maybe Ollie thought he had special
19 barbecue.

20 All right. Now, the reason we're
21 asking these questions is because obviously we
22 want some kind of distinction that will not
23 undermine every civil rights law from the --
24 from -- from the year to -- including the
25 African Americans, including the Hispanic

1 Americans, including everybody who has been
2 discriminated against in very basic things of
3 life, food, design of furniture, homes, and
4 buildings.

5 Now, that is, I think, the point of
6 the question, and I've tried to narrow it and
7 specify it to get your answer.

8 MS. WAGGONER: Thank you, Justice
9 Breyer. In terms of the test that would be
10 applied, the Court would first ask under the
11 speech analysis, is there speech? And by
12 asking that, you are asking is there something
13 that is being communicated and is it a
14 protection --

15 JUSTICE BREYER: And there isn't one
16 of the people I mentioned who doesn't think he
17 is communicating something. What do you think
18 they're doing when they are making the Essow or
19 the building?

20 MS. WAGGONER: It's not just about
21 what the individual thinks they are
22 communicating. This Court also routinely makes
23 that inquiry in all kinds of situations in all
24 free-speech cases.

25 Second, though, the Hurley framework

1 provides a framework for this Court to make
2 those decisions and to protect individuals.
3 The way that it does that is it asks: Is the
4 individual who's being compelled to speak
5 objecting to the message that is contained in
6 that speech or the person? And that's usually
7 a very obvious inquiry. If it's connected --

8 JUSTICE SOTOMAYOR: Would you stop --
9 would that belief that expresses speech trump
10 public accommodation laws against
11 discrimination or protecting customers from
12 race? Yes or no.

13 MS. WAGGONER: This Court has never
14 compelled speech in the context of race, but if
15 it were ever to do so --

16 JUSTICE SOTOMAYOR: Oh, it didn't in
17 Newman versus Piggie?

18 MS. WAGGONER: Not in terms of
19 compelling speech.

20 JUSTICE SOTOMAYOR: There was a -- he
21 claimed that he was religious, that he opposed
22 serving blacks because it mixed the races, and
23 we basically refused both his free expression
24 and his free exercise clauses. So are you
25 saying that your rule now would trump

1 protection against race discrimination?

2 MS. WAGGONER: Respectfully, Your
3 Honor, I don't think this Court has ever
4 compelled speech in the context of --

5 JUSTICE SOTOMAYOR: I'll read Newman
6 myself.

7 JUSTICE KAGAN: I'm sorry, can I just
8 --

9 JUSTICE SOTOMAYOR: Answer my
10 question.

11 JUSTICE KAGAN: -- understand --

12 JUSTICE SOTOMAYOR: Is your theory --
13 is your theory that you -- that you -- public
14 accommodation laws cannot trump free speech or
15 free-exercise claims in protecting against race
16 discrimination?

17 MS. WAGGONER: That is not my theory.
18 That would be an objection to the person and
19 the Court may find a compelling interest in
20 that --

21 JUSTICE KAGAN: If I could just,
22 sorry, very quickly, I know your light is on
23 and I'm sure you'll be given a little bit of an
24 adjustment. Is that okay?

25 (Laughter.)

1 JUSTICE KAGAN: I guess I just didn't
2 understand your answers to Justice Sotomayor's
3 question. Same case or not the same case, if
4 your client instead objected to an interracial
5 marriage?

6 MS. WAGGONER: Very different case in
7 that context.

8 JUSTICE KAGAN: Not the same. How
9 about if he objected to an interreligious?

10 MS. WAGGONER: Similar case, assuming
11 that the objection is to --

12 JUSTICE KAGAN: Similar to what?

13 MS. WAGGONER: Similar to Mr.
14 Phillips. That would be protected under the
15 Compelled Speech doctrine if the objection is
16 to the message being conveyed in that
17 expression.

18 JUSTICE KAGAN: You are just saying
19 race is different?

20 MS. WAGGONER: I'm saying that --

21 JUSTICE KAGAN: I mean, I don't want
22 to put words in your mouth. I -- I just
23 really, you know, just want to know the answer.

24 MS. WAGGONER: I think race is
25 different for two reasons: one, we know that

1 that objection would be based to who the person
2 is, rather than what the message is.

3 And, second, even if that were not the
4 case, the Court could find a compelling
5 interest in the race inquiry just as it did in
6 the Pena-Rodriguez case.

7 JUSTICE KAGAN: So --

8 JUSTICE SOTOMAYOR: So how about
9 disability; I'm not going to serve cakes to two
10 disabled people because God makes perfect
11 creations, and there are some religions who
12 believe that?

13 MS. WAGGONER: Well --

14 JUSTICE SOTOMAYOR: So how about
15 there?

16 MS. WAGGONER: I'm not aware of any
17 religions that believe that but, if they did,
18 that would clearly be based on who the person
19 is and not the message in the final product
20 that's -- they're being asked to create.

21 JUSTICE SOTOMAYOR: Well, your client
22 was saying that providing a cake to a same-sex
23 couple was against his free-expression rights
24 because -- and his free-exercise rights,
25 because he cannot celebrate that kind of

1 marriage.

2 MS. WAGGONER: Mr. Phillips is looking
3 at not the "who" but the "what" in these
4 instances, what the message is. And for 25
5 years --

6 JUSTICE GORSUCH: Well, actually,
7 counsel, that seems to be a point of
8 contention. The state seems to concede that if
9 it were the message, your client would have a
10 right to refuse. But if it -- the objection is
11 to the person, that's when the discrimination
12 law kicks in. That's footnote 8 of the
13 Colorado Court of Appeals' decision. I know
14 you know this.

15 So what do you say to that, that
16 actually what is happening here may
17 superficially look like it's about the message
18 but it's really about the person's identity?

19 MS. WAGGONER: I would say that in
20 footnote 8, the court applies an offensiveness
21 policy, which allows the state the discretion
22 to decide what speech is offensive and what is
23 not, and it did not apply that in a fair way to
24 Mr. Phillips, which creates viewpoint
25 discrimination, as well as a violation of free

1 exercise -- the Free Exercise Clause.

2 But what's deeply concerning is that
3 is not the theory that Respondents are
4 submitting to this Court today. They believe
5 that they can compel speech, of filmmakers, oil
6 painters, and graphic designers in all kinds of
7 context.

8 If there are no further questions, I
9 would reserver -- like to reserve the balance
10 of my time.

11 CHIEF JUSTICE ROBERTS: We'll afford
12 you the full rebuttal time.

13 MS. WAGGONER: Thank you.

14 CHIEF JUSTICE ROBERTS: Sure.

15 General Francisco.

16 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO
17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING THE PETITIONERS

19 GENERAL FRANCISCO: Mr. Chief Justice,
20 and may it -- may it please the Court:

21 This case raises an important issue
22 for a small group of individuals; namely,
23 whether the state may compel business owners,
24 including professional artists, to engage in
25 speech in connection with an expressive event

1 like a marriage celebration to which they're
2 deeply opposed.

3 In those narrow circumstances, we
4 believe the Free Speech Clause provides
5 breathing space --

6 JUSTICE GINSBURG: How narrow is it?
7 Consider Justice Kagan's question. I mean,
8 we've gotten the answer that the florist is in
9 the same place as the cake-maker, so is the
10 person who designs the invitations and the
11 menus. I don't see a line that can be drawn
12 that would exclude the makeup artist or the
13 hairstylist.

14 GENERAL FRANCISCO: Well, Your Honor,
15 that's, of course, the question that the Court
16 -- Court has to answer at the threshold of
17 every Free Speech Case. Is the thing that's
18 being regulated something we call protected
19 speech? I think the problem for my friends on
20 the other side is that they think the question
21 doesn't even matter. So they would compel an
22 African American sculptor to sculpt a cross for
23 a Klan service --

24 JUSTICE KENNEDY: But the problem for
25 you is that so many of these examples -- and a

1 photographer can be included -- do involve
2 speech. It means that there's basically an
3 ability to boycott gay marriages.

4 GENERAL FRANCISCO: Well, Your Honor,
5 I think what it boils down to is that in a
6 narrow category of services that do cross the
7 threshold into protected speech -- and I do
8 think it's a relatively narrow category -- you
9 do have protection. For example, I don't think
10 you could force the African American sculptor
11 to sculpt a cross for the Klan service just
12 because he'd do it for other religious --

13 JUSTICE SOTOMAYOR: Well --

14 JUSTICE KENNEDY: If you prevail,
15 could the baker put a sign in his window, we do
16 not bake cakes for gay weddings?

17 GENERAL FRANCISCO: Your Honor, I
18 think that he could say he does not make
19 custom-made wedding cakes for gay weddings, but
20 most cakes --

21 JUSTICE KENNEDY: And you would not --

22 GENERAL FRANCISCO: -- would not cross
23 that threshold.

24 JUSTICE KENNEDY: -- think that an
25 affront to the gay community?

1 GENERAL FRANCISCO: Well, Your Honor,
2 I -- I agree that there are dignity interests
3 at stake here, and I would not minimize the
4 dignity interests to Mr. Craig and Mr. Mullins
5 one bit, but there are dignity interests on the
6 other side here too.

7 JUSTICE SOTOMAYOR: Counsel, sometimes
8 it's not just dignity. A couple of the
9 briefs -- one of the amici briefs pointed out
10 that most military bases are in isolated areas
11 far from cities and that they're in areas where
12 the general population, service population, is
13 of one religion or close to one religious
14 belief. So where there might be two cake
15 bakers. They name a couple of military bases
16 like that. Or two florists or one
17 photographer. Very small number of resources.

18 GENERAL FRANCISCO: Right.

19 JUSTICE SOTOMAYOR: And in those
20 situations, they posit, and I don't think
21 probably wrongly, that it may come to pass
22 where the two cake bakers will claim the same
23 abstention here. So how do we protect the
24 military men and women who are of the same sex
25 who want to get married in that town because

1 that's where all their friends are, because the
2 base is there?

3 GENERAL FRANCISCO: Right.

4 JUSTICE SOTOMAYOR: All right? How do
5 we protect those people?

6 GENERAL FRANCISCO: And, Your Honor, I
7 think that is precisely a situation where the
8 state would be able to satisfy heightened
9 scrutiny because their interests in providing
10 access to goods and services would be narrowly
11 tailored.

12 JUSTICE SOTOMAYOR: So -- but isn't
13 that -- isn't that the same for everybody?
14 Meaning, look, we live in a society with
15 competing beliefs, and all of our cases have
16 always said where LGBT people have been -- you
17 know, they've been humiliated, disrespected,
18 treated uncivilly. The briefs are filled with
19 situations that --

20 GENERAL FRANCISCO: Right.

21 JUSTICE SOTOMAYOR: -- the gay couple
22 who was left on the side of the highway on a
23 rainy night, people who have been denied
24 medical treatment or whose children have been
25 denied medical treatment because the doctor

1 didn't believe in same-sex parenthood, et
2 cetera.

3 GENERAL FRANCISCO: Mm-hmm.

4 JUSTICE SOTOMAYOR: We've always said
5 in our public accommodations law we can't
6 change your private beliefs, we can't compel
7 you to like these people, we can't compel you
8 to bring them into your home, but if you want
9 to be a part of our community, of our civic
10 community, there's certain behavior, conduct --

11 GENERAL FRANCISCO: Right.

12 JUSTICE SOTOMAYOR: -- you can't
13 engage in. And that includes not selling
14 products that you sell to everyone else to
15 people simply because of their either race,
16 religion, national origin, gender, and in this
17 case sexual orientation.

18 So we can't legislate civility and
19 rudeness, but we can and have permitted it as a
20 compelling state interest legislating behavior.

21 GENERAL FRANCISCO: And --

22 JUSTICE SOTOMAYOR: So why is not
23 selling or selling to one group as opposed to
24 another not behavior?

25 GENERAL FRANCISCO: And, Your Honor,

1 if I could respond, I think it's because here
2 we have speech involved, and this case is
3 essentially the flip side of the Hurley case.

4 In Hurley, we couldn't force a parade
5 to include a particular speaker. Here, we
6 don't think you can --

7 JUSTICE SOTOMAYOR: That was a private
8 parade.

9 GENERAL FRANCISCO: And here, Your
10 Honor, we don't think you can force a speaker
11 to join the parade. Because when you force a
12 speaker to both engage in speech and contribute
13 that speech to an expressive event that they
14 disagree with, you fundamentally transform the
15 nature of their message from one that they want
16 to say to one that they don't want to say.

17 JUSTICE GINSBURG: How about if it's a
18 --

19 JUSTICE KAGAN: So, General, you
20 started by --

21 JUSTICE GINSBURG: -- if it's a
22 question of race? There's a certain irony in
23 here because one of the things that
24 anti-discrimination in public accommodations is
25 supposed to do is to protect religion, minority

1 religions. So you -- you have already said
2 that you put -- might put race in a different
3 category, right?

4 GENERAL FRANCISCO: Yes, Your Honor.

5 JUSTICE GINSBURG: How about gender?

6 GENERAL FRANCISCO: Well, Your Honor,
7 I think that race is particularly unique
8 because when it comes to racial
9 discrimination --

10 JUSTICE GINSBURG: Well, I asked you
11 what about --

12 GENERAL FRANCISCO: Sure. I think --
13 I think --

14 JUSTICE GINSBURG: I have your answer
15 on race. How about gender? How about national
16 origin --

17 GENERAL FRANCISCO: Right.

18 JUSTICE GINSBURG: -- and religion?

19 GENERAL FRANCISCO: I think pretty
20 much everything but race would fall in the same
21 category, but as this Court made clear in the
22 Bob Jones case, the IRS could withdraw
23 tax-exempt status from a school that
24 discriminated on the basis of interracial
25 marriage, but I'm not at all sure that it would

1 reach the same result if it were dealing with a
2 Catholic school that limited married student
3 housing to opposite-sex couples only.

4 I think when you get to this case, if
5 you agree with our test -- and I know that I
6 have a little bit of an uphill battle in
7 convincing some of you of that. If you agree
8 with our test, I think the heightened scrutiny
9 standard is particularly easy because they're
10 the same interests at stake as were at stake in
11 Hurley.

12 And if I could --

13 JUSTICE KAGAN: General, it -- it
14 seems as though there are kind of three axes on
15 which people are asking you what's the line?
16 How do we draw the line? So one axis is what
17 we started with, like what about the chef and
18 the florist --

19 GENERAL FRANCISCO: Speech,
20 non-speech.

21 JUSTICE KAGAN: -- and -- and, you
22 know, everybody else that participates in a
23 wedding? A second axis is, well, why is this
24 only about gay people? Why isn't it about
25 race? Why isn't it about gender? Why isn't it

1 about people of different religions? So that's
2 a second axis.

3 And there's a third axis, which is why
4 is it just about weddings? You say ceremonies,
5 events. What else counts? Is it the funeral?
6 Is it the Bar Mitzvah or the communion? Is it
7 the anniversary celebration? Is it the
8 birthday celebration?

9 So there are all three of these that
10 suggest like, whoa, this doesn't seem like such
11 a small thing. And so let me give you one
12 hypothetical and then you can answer more
13 broadly.

14 GENERAL FRANCISCO: Thank you.

15 JUSTICE KAGAN: Which, you know -- so
16 I'll just pick one of those. It's like how
17 about a -- a -- a -- a couple, a same-sex
18 couple goes to a great restaurant with a great
19 chef for an anniversary celebration, and the
20 great chef says I don't do this for same-sex
21 couples? How about that?

22 GENERAL FRANCISCO: So, Your Honor, if
23 I could answer that question starting out with
24 another example that illustrates the point in
25 a reply to your example --

1 JUSTICE KAGAN: Well, I'd like my
2 example, please.

3 (Laughter.)

4 GENERAL FRANCISCO: Sure. So in your
5 example I would first say, one, there's no
6 speech involved and, two, there's --

7 JUSTICE KAGAN: No, there is.

8 GENERAL FRANCISCO: -- no expressive
9 event.

10 JUSTICE KAGAN: The chef is expressing
11 something about how he feels --

12 GENERAL FRANCISCO: Right.

13 JUSTICE KAGAN: -- about same-sex
14 couples and same-sex marriage. He doesn't want
15 to celebrate a same- -- the anniversary of a
16 same-sex marriage.

17 GENERAL FRANCISCO: And that's where
18 --

19 JUSTICE KAGAN: Just like --

20 GENERAL FRANCISCO: Sure.

21 JUSTICE KAGAN: -- the baker doesn't
22 want to celebrate a same-sex marriage.

23 GENERAL FRANCISCO: And that's where I
24 would go to something that I think that my
25 friends on the other side have to deal with, is

1 often is the case in the First Amendment law
2 you are dealing with something that everybody
3 clearly agrees is speech. And what makes this
4 case difficult is because we're kind of on that
5 line. Is it speech or is it not speech?

6 We think it is on the speech side of
7 the line. But take, for example, the sculptor
8 who does not want to sculpt that cross.

9 JUSTICE KAGAN: Well, I -- Mr. --
10 General, really, I mean, could we just -- I
11 guess I would like an answer to my
12 hypothetical.

13 GENERAL FRANCISCO: Sure. So the
14 answer to your hypothetical is, as this Court
15 has repeatedly said, not everything that
16 expresses a message is speech. I think when it
17 comes to --

18 JUSTICE KAGAN: So the baker is
19 speech, but the great chef who is like
20 everything is perfect on the plate and it's a
21 work of art, it is a masterpiece?

22 GENERAL FRANCISCO: Well, Your Honor,
23 you have to confront that issue in every First
24 Amendment case, if you're --

25 JUSTICE ALITO: General, my colleagues

1 I think go to more elite restaurants than I do,
2 but my --

3 (Laughter.)

4 GENERAL FRANCISCO: Same here, Your
5 Honor.

6 JUSTICE ALITO: I think that if --

7 JUSTICE KAGAN: Well, Ollie's
8 Barbecue.

9 JUSTICE ALITO: If -- if in my -- if
10 in my dreams I could go to a Michelin, I don't
11 know, one-tenth star, I don't know, two-star
12 restaurant, and there was a menu of wonderful
13 dishes created by the chef with -- with great
14 creativity, and I said I really don't want any
15 of these. Here is the recipe. I want you to
16 make this for me. Do you think he would do
17 that?

18 GENERAL FRANCISCO: Probably not, Your
19 Honor, but I think the critical question always
20 --

21 JUSTICE ALITO: He's serving up -- he
22 creates something when he makes -- when he
23 devises those dishes and when somebody comes in
24 and asks to buy one, he is just mechanically
25 producing another example of the thing that he

1 created earlier.

2 GENERAL FRANCISCO: Yes. Justice --
3 Mr. Chief Justice, may I answer?

4 CHIEF JUSTICE ROBERTS: Why don't you
5 take an extra five minutes and I'll accord the
6 same to your friends.

7 GENERAL FRANCISCO: Well, thank you.
8 And so what happens, though, in every
9 free-speech case you have got to make that
10 initial cut. Does it cross the line into
11 protected speech? And if it does, and I
12 understand --

13 JUSTICE KAGAN: Okay. How about the
14 same cake, if you don't -- if you want to, as I
15 understand it, you want to treat the chef
16 differently from the baker, but let's say the
17 same cake, and a couple comes in, a same-sex
18 couple, and says it's our first-year
19 anniversary, and we would like a special cake
20 for it.

21 Can he then say no? No cake?

22 GENERAL FRANCISCO: Well, Your Honor,
23 if it is the exact same cake and it crosses
24 that threshold into speech, I would say --

25 JUSTICE KAGAN: It's a great cake.

1 What do you mean is it the exact same cake?

2 GENERAL FRANCISCO: No, what I'm
3 saying is if it's the same type of
4 highly-sculpted stylized cake that Mr. Phillips
5 makes, such that in our view it crosses the
6 line into speech, then you can't force him to
7 create that any more than you can force the
8 sculptor --

9 JUSTICE GORSUCH: So General, what --
10 what is the line? How would you have this
11 Court draw the line?

12 GENERAL FRANCISCO: Sure. There are a
13 couple of --

14 JUSTICE GORSUCH: You make a lot of
15 specifics --

16 GENERAL FRANCISCO: Yeah.

17 JUSTICE GORSUCH: -- but I'd -- I'd
18 appreciate a more abstract general rule that
19 the government suggests.

20 GENERAL FRANCISCO: I think there are
21 a couple of ways to draw that line, and this is
22 something that the Court has to struggle with
23 in a lot of cases. I think the first way to
24 draw that line is you analogize it to something
25 that everyone regards as traditional art and

1 everyone agrees is protected speech.

2 JUSTICE GORSUCH: Like the Jackson
3 Pollock?

4 GENERAL FRANCISCO: Exactly. And here
5 you have a cake that is essentially synonymous
6 with a traditional sculpture except for the
7 medium used. But I also think that the Second
8 Circuit's decision in the Mastrovincenzo case
9 provides a good and workable standard when
10 you've got something that is part art and part
11 utilitarian.

12 And what the Second Circuit asks is it
13 predominantly art or predominantly utilitarian?
14 And here people pay very high prices for these
15 highly sculpted cakes, not because they taste
16 good, but because of their artistic qualities.

17 I think the more important point --

18 JUSTICE GORSUCH: In fact, I have yet
19 to have a -- a wedding cake that I would say
20 tastes great.

21 (Laughter.)

22 GENERAL FRANCISCO: And, Your Honor,
23 my wedding cake, the top of it is still sitting
24 in our freezer, and I'm sure it no longer
25 tastes great.

1 But I think the point is when you
2 cross that threshold into free speech, the
3 question is can you compel somebody to create
4 and contribute speech to an expressive event --

5 JUSTICE GORSUCH: Is it a purpose test
6 --

7 GENERAL FRANCISCO: -- that they --

8 JUSTICE KAGAN: How about this --

9 JUSTICE GORSUCH: -- or is it -- would
10 you say it's a predominant purpose or a
11 predominant effect? How would you characterize
12 that?

13 GENERAL FRANCISCO: So if you're
14 talking about the line between speech and
15 non-speech --

16 JUSTICE GORSUCH: Yes.

17 GENERAL FRANCISCO: -- with the item
18 that is part utilitarian and part art --

19 JUSTICE GORSUCH: Yes, yes.

20 GENERAL FRANCISCO: I would say is it
21 predominantly expressive or predominantly
22 utilitarian?

23 JUSTICE GORSUCH: In its purpose or
24 its effect on others?

25 GENERAL FRANCISCO: I think both. And

1 I think one of the key factors that the Second
2 Circuit looks to, it looks to a bunch of
3 different factors, but one factor is price.
4 Are people paying for the utilitarian side of
5 it or are they paying for the artistic side of
6 it?

7 JUSTICE SOTOMAYOR: What --

8 JUSTICE GINSBURG: I'm not going to --

9 JUSTICE KAGAN: What if somebody comes
10 in, it's a baker who's and atheist and really
11 can't stand any religion, and somebody comes in
12 and says I want one of your very, very special,
13 special cakes for a First Communion or for a
14 Bar Mitzvah. And the baker says no, I don't --
15 I don't -- I don't do that. I don't want my
16 cakes to be used in the context of a religious
17 ceremony.

18 GENERAL FRANCISCO: Well, and, again,
19 I think if you apply these tests, you first
20 have to decide whether --

21 JUSTICE KAGAN: I just want the
22 answer.

23 GENERAL FRANCISCO: Well, what I'm
24 saying is that when you apply these tests you
25 first have got to decide if the cake rises to

1 the level of speech.

2 JUSTICE KAGAN: It's a special,
3 special cake.

4 GENERAL FRANCISCO: Well, you know, if
5 so, and it rises to the level of speech, then I
6 think he has a claim just like that same baker
7 could refuse to sculpt that cake --

8 JUSTICE BREYER: Would I -- could I
9 ask you your answer to what I think is the same
10 question going on in different forums.

11 Forget the doctrine for a minute.
12 There's a category of people called artisans.
13 An artisan is a kind of artist. They are in
14 many fields. They are also people who are
15 discriminated against. And we're in a country
16 of minorities, there are many different groups
17 that have been discriminated against.

18 For many years Congress has passed
19 laws saying, at least to the artisans: You
20 cannot discriminate on the basis of -- of race,
21 religion, dah, dah, dah.

22 GENERAL FRANCISCO: Mm-hmm.

23 JUSTICE BREYER: Sexual orientation.
24 If we were to write an opinion for you, what
25 would we have done to that principle? And, of

1 course, the concern is that we would have
2 caused chaos with that principle across the
3 board because there is no way of confining an
4 opinion on your side in a way that doesn't do
5 that. So tell me how?

6 GENERAL FRANCISCO: Well, Your Honor,
7 I think that the way you do it is because none
8 of these Courts' cases has ever involved
9 requiring somebody to create speech and
10 contribute that speech to an expressive event
11 to which they are deeply opposed.

12 And if I could go back to my example,
13 when you force that African-American sculptor
14 to sculpt that cross for a Klan service, you
15 are transforming his message.

16 He may want his cross to send the
17 message of peace and harmony. By forcing him
18 to combine it with that expressive event, you
19 force him to send a message of hate and
20 division.

21 JUSTICE SOTOMAYOR: I -- I -- I am
22 very confused --

23 JUSTICE KENNEDY: What would the
24 government -- what would the government's
25 position be if you prevail in this case, the

1 baker prevails in this case, and then bakers
2 all over the country received urgent requests:
3 Please do not bake cakes for gay weddings. And
4 more and more bakers began to comply.

5 Would the government feel vindicated
6 in its position that it now submits to us?

7 GENERAL FRANCISCO: Your Honor, I
8 think in that case, the case for strict
9 scrutiny would be much stronger, because you'd
10 be able to show that your -- that the
11 application of the law is narrowly tailored to
12 the government's interests in ensuring access.

13 Here, of course, you have these
14 products that are widely available from many
15 different sources. And I would submit, just to
16 finish up, that if you were to disagree with
17 our basic principle, putting aside the line
18 about whether a cake falls on speech or
19 non-speech side of the line, you really are
20 envisioning a situation in which you could
21 force, for example, a gay opera singer to
22 perform at the Westboro Baptist Church just
23 because that opera singer would be willing to
24 perform at the National Cathedral.

25 And the problem is when you force

1 somebody not only to speak, but to contribute
2 that speech to an expressive event to which
3 they are deeply opposed, you force them to use
4 their speech to send a message that they
5 fundamentally disagree with.

6 And that is at the core of what the
7 First Amendment protects our citizenry against.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 General.

10 GENERAL FRANCISCO: Thank you, Mr.
11 Chief Justice.

12 CHIEF JUSTICE ROBERTS: Mr. Yarger.

13 ORAL ARGUMENT OF FREDERICK R. YARGER

14 ON BEHALF OF THE STATE RESPONDENT

15 MR. YARGER: Thank you, Mr. Chief
16 Justice, and may it please -- please the Court:

17 A decade ago Colorado extended to LGBT
18 people the same protections used to fight
19 discrimination against race, sex and a person's
20 faith. Masterpiece Cakeshop is a retail bakery
21 that is open to the public and subject to the
22 Colorado Anti-Discrimination Act.

23 Yet, Petitioners' claim that they can
24 refuse to sell a product, a wedding cake of any
25 kind in any design to any same-sex couple.

1 JUSTICE KENNEDY: I don't want to --

2 CHIEF JUSTICE ROBERTS: Counsel, take
3 an organization --

4 JUSTICE KENNEDY: Go ahead.

5 CHIEF JUSTICE ROBERTS: -- I think
6 there are many different faiths, but Catholic
7 Legal Services, they provide pro bono legal
8 representation to people who are too poor to
9 avoid it and they provide it to people of all
10 different faiths.

11 So let's say someone just like
12 Respondents here, except needing the pro bono
13 assistance, goes into Catholic Legal Services
14 and say, we want you to take this case against
15 Masterpiece Cakeshop. And the people at the --
16 the lawyers say: well, we -- we're not going
17 to, because we don't support same-sex marriage.

18 Are they in violation of the Colorado
19 law?

20 MR. YARGER: No, Chief Justice, Mr.
21 Chief Justice, they are not. Refusing to offer
22 a particular service in that case when they
23 wouldn't provide it to any other customer --

24 CHIEF JUSTICE ROBERTS: No, no, they
25 would provide it, if a -- if a heterosexual

1 couple comes in and says we need a --
2 particular services in connection with our
3 marriage, they would provide it.

4 It's only because, and they say this,
5 it's only because it is a same-sex marriage
6 that we're not going to provide pro bono legal
7 services to you.

8 MR. YARGER: In -- in the sense of a
9 -- services regarding maybe divorce or --

10 CHIEF JUSTICE ROBERTS: Something in
11 connection -- something in connection with the
12 marriage. You know, they're having a -- a -- a
13 -- whatever, a contract dispute with somebody
14 in connection with their marriage, and the
15 lawyer says we're not going to provide services
16 in connection with same-sex marriage because we
17 have a religious objection to that.

18 MR. YARGER: Mr. Chief Justice, I
19 think there's an initial question that's asked
20 in all of these cases, and it's the way that
21 states have been resolving these questions for
22 literally 100 years, and that -- the question
23 is: Is this entity operating in the way of a
24 retail store in the sense that it is --

25 CHIEF JUSTICE ROBERTS: No, no.

1 MR. YARGER: -- inviting --

2 CHIEF JUSTICE ROBERTS: It's
3 clearly -- it's clearly covered by Colorado's
4 law. It's not primarily religious. It's
5 primarily legal. It's provided to all faiths.
6 And there's nothing in the law that I can see
7 that says it's limited to for-profit
8 organizations.

9 MR. YARGER: And, Your Honor, again, I
10 -- I think the question is going to be is -- is
11 that operating in the sense of a retail store?
12 If it is, then, yes, a state can require a --
13 someone offering a service to give the same
14 services regardless of --

15 CHIEF JUSTICE ROBERTS: So --

16 MR. YARGER: -- the protected
17 characteristics of -- of the customer. If that
18 --

19 CHIEF JUSTICE ROBERTS: So -- so
20 Catholic Legal Services would be put to the
21 choice of either not providing any pro bono
22 legal services or providing those services in
23 connection with the same-sex marriage?

24 MR. YARGER: If -- if it is operating
25 in the same way as a retail store, I think the

1 answer --

2 CHIEF JUSTICE ROBERTS: Under Colorado
3 law, is --

4 MR. YARGER: -- is yes, Your Honor.

5 CHIEF JUSTICE ROBERTS: -- are they or
6 are they not?

7 MR. YARGER: I don't -- I can't answer
8 that question, because --

9 CHIEF JUSTICE ROBERTS: What facts
10 would you need besides the ones I've given you?

11 MR. YARGER: I would have to
12 understand what the -- the purpose and the
13 history is of that entity choosing customers
14 and how it works. If there's genuine
15 selectivity --

16 CHIEF JUSTICE ROBERTS: They have
17 taken every other customer to date, except this
18 is the first time someone has come in and wants
19 legal services in connection with a same-sex
20 marriage and they say we're not going to do it
21 because, as a religious matter, we're opposed
22 to same-sex marriage.

23 MR. YARGER: And -- and, Your Honor, I
24 think -- I think if they were operating like a
25 retail store like that, then -- then Colorado

1 would have the ability to regulate them.

2 JUSTICE KENNEDY: Well, the Chief
3 Justice --

4 MR. YARGER: If the answer were
5 otherwise --

6 JUSTICE KENNEDY: -- has introduced
7 the question of the Free Exercise Clause in
8 this case. We didn't talk about it earlier.

9 And perhaps you want to get on to
10 speech, but in this case, pages 293 and 294 of
11 -- of the Petitioner appendix, the --
12 Commissioner Hess says freedom of religion used
13 to justify discrimination is a despicable piece
14 of rhetoric.

15 Did the Commission ever disavow or
16 disapprove of that statement?

17 MR. YARGER: There were no further
18 proceedings in which the Commission disavowed
19 or disapproved of that statement.

20 JUSTICE KENNEDY: Do you disavow or
21 disapprove of that statement?

22 MR. YARGER: I would not have
23 counseled my client to make that statement.

24 JUSTICE KENNEDY: Do you now disavow
25 or disapprove of that statement?

1 MR. YARGER: I -- I do, yes, Your
2 Honor. I think -- I need to make clear that
3 what that commissioner was referring to was the
4 previous decision of the Commission, which is
5 that no matter how strongly held a belief, it
6 is not an exception to a generally applicable
7 anti-discrimination law.

8 And if -- if the assertion that what
9 is engaging in is speech is enough to overcome
10 that law, you're going to face a situation
11 where a family portrait artist can say I will
12 photograph any family but not when the
13 father --

14 JUSTICE KENNEDY: But -- but -- in --

15 MR. YARGER: -- is wearing a yarmulke
16 because I have a sincere objection to the
17 Jewish faith. That would be discrimination.

18 JUSTICE KENNEDY: Suppose we thought
19 that in significant part at least one member of
20 the Commission based the commissioner's
21 decision on -- on -- on the grounds that -- of
22 hostility to religion. Can -- can your --
23 could your judgment then stand?

24 MR. YARGER: Your Honor, I don't think
25 that one statement by the commissioner,

1 assuming it reveals bias --

2 JUSTICE KENNEDY: Well, suppose we --
3 suppose we thought there was a significant
4 aspect of hostility to a religion in this case.
5 Could your judgment stand?

6 MR. YARGER: Your Honor, if -- if
7 there was evidence that the entire proceeding
8 was begun because of a -- an intent to single
9 out religious people, absolutely, that would be
10 a problem.

11 JUSTICE SOTOMAYOR: How many
12 commissioners --

13 MR. YARGER: But this was a complaint
14 filed by a couple --

15 JUSTICE SOTOMAYOR: How many
16 commissioners are there?

17 MR. YARGER: Excuse me, Justice
18 Sotomayor.

19 JUSTICE SOTOMAYOR: I'd like you to
20 answer Justice Kennedy's question. How many
21 commissioners are there?

22 MR. YARGER: There are seven
23 commissioners, Your Honor.

24 JUSTICE SOTOMAYOR: All right. If one
25 -- if there was a belief, not yours -- stop

1 fighting the belief; accept the hypothetical --
2 that this person was improperly biased, what
3 happens then? I think that's what Justice
4 Kennedy is asking you.

5 MR. YARGER: If there is one person
6 that's improperly biased?

7 JUSTICE SOTOMAYOR: One of the
8 commissioners is improperly biased.

9 MR. YARGER: I think you're going to
10 have to ask whether the complaint filed with
11 the division, which was filed by a customer who
12 was referred to a bakery to receive a product,
13 and the ALJ and the commission in the appeal
14 were all biased in the sense that this was a
15 proceeding meant to single out a religious
16 person for his views.

17 And that is not the fact here.

18 CHIEF JUSTICE ROBERTS: We've -- we've
19 had this case before --

20 JUSTICE GORSUCH: But you agree that
21 would be a problem --

22 CHIEF JUSTICE ROBERTS: -- in the
23 context -- the context of courts, I think it's
24 not just where you have a three-judge panel and
25 it turns out one judge was -- should have been

1 disqualified, whether -- for whatever reason,
2 they don't say that, well, the vote, there were
3 two still, so it doesn't change the result
4 because it's a deliberative process, and the
5 idea is, well, the one biased judge might have
6 influenced the views of the other.

7 MR. YARGER: And, Your Honor, again, I
8 don't think that this -- that particular
9 phrase -- I wouldn't advise my client to make
10 that statement, but it was referring back to
11 the previous decision --

12 JUSTICE GORSUCH: Mr. Yarger, you
13 actually --

14 MR. YARGER: -- where the commission
15 fully debated the issue --

16 JUSTICE GORSUCH: Mr. Yarger, you
17 actually have a second commissioner who also
18 said that he's -- if someone has an issue with
19 the laws impacting his personal belief system,
20 he has to look at compromising that belief
21 system presumably, as well, right?

22 MR. YARGER: And, yes, Your Honor.
23 That's the same principle that this Court
24 recognized in cases --

25 JUSTICE GORSUCH: But a second

1 commissioner?

2 MR. YARGER: -- cases like United
3 States versus Lee --

4 JUSTICE GORSUCH: -- so we have two --
5 two -- two commissioners out of seven who've
6 expressed something along these lines.

7 MR. YARGER: I don't agree that what
8 was expressed in the record reveals the kind of
9 bias that existed in cases like the Church of
10 --

11 JUSTICE GORSUCH: What if we disagree
12 with --

13 MR. YARGER: -- Lukumi Babalu Aye.

14 JUSTICE GORSUCH: What if we disagree
15 with you; then what follows?

16 MR. YARGER: I think you have to do
17 that analysis and decide whether this
18 proceeding was engineered in a way to single
19 out people with a certain faith and they're
20 not. This --

21 JUSTICE SOTOMAYOR: You --

22 JUSTICE GINSBURG: This --

23 JUSTICE BREYER: Well, the reason that
24 I --

25 MR. YARGER: -- this law would apply

1 to protect people with religious beliefs.

2 JUSTICE BREYER: I see that. The
3 reason I want you to continue this is that many
4 of the civil rights laws, not all public
5 accommodations laws, though -- there are
6 exceptions, like, for example, with housing, a
7 person's own room, for example.

8 And what people are trying to do with
9 exceptions is take the thing you're worried
10 about, where they are genuine, sincere
11 religious views or whatever it is, and minimize
12 the harm it does to the principle of the
13 statute while making some kind of compromise
14 for people of sincere beliefs on the other
15 side.

16 And we find that in -- in a lot of
17 them, but that's primarily a legislative job.
18 And my impression of this is there wasn't much
19 effort here in Colorado to do that.

20 JUSTICE GINSBURG: And your --

21 JUSTICE BREYER: My problem is can we
22 do that in any way, or is there any way to get
23 to a place that without harming the law, and
24 its object, which is fine, you can have narrow
25 kinds of exceptions for sincere, et cetera? Do

1 you see -- do you see what I'm driving at?

2 MR. YARGER: I do.

3 JUSTICE BREYER: And I can't think of
4 a way to do it. Maybe you can't think of a way
5 to do it, but I thought it's worth asking.

6 MR. YARGER: Justice Breyer, I -- I do
7 not agree that this law, which was passed in
8 2008, after literally a decade in the wake of
9 Romer, was not an attempt sincerely to hear
10 from all sides about a question of whether to
11 grant the same protections to people who are
12 discriminated based on race or faith to people
13 of the LGBT community.

14 JUSTICE ALITO: One thing that's --

15 MR. YARGER: And if you look at the --

16 JUSTICE ALITO: One thing that's
17 disturbing about the record here, in addition
18 to the statement made, the statement that
19 Justice Kennedy read, which was not disavowed
20 at the time by any other member of the
21 Commission, is what appears to be a practice of
22 discriminatory treatment based on viewpoint.

23 The -- the Commission had before it
24 the example of three complaints filed by an
25 individual whose creed includes the traditional

1 Judeo-Christian opposition to same-sex
2 marriage, and he requested cakes that expressed
3 that point of view, and those -- there were
4 bakers who said no, we won't do that because it
5 is offensive.

6 And the Commission said: That's okay.
7 It's okay for a baker who supports same-sex
8 marriage to refuse to create a cake with a
9 message that is opposed to same-sex marriage.
10 But when the tables are turned and you have the
11 baker who opposes same-sex marriage, that baker
12 may be compelled to create a cake that
13 expresses approval of same-sex marriage.

14 MR. YARGER: Justice Alito --

15 JUSTICE SOTOMAYOR: Counselor, in that
16 case --

17 CHIEF JUSTICE ROBERTS: Maybe you
18 could answer -- maybe you could Justice Alito's
19 question.

20 MR. YARGER: Yes, Mr. Chief Justice.
21 The facts of that case are that someone walked
22 into a bakery and wanted a particular cake with
23 particular messages on it that that bakery
24 wouldn't have sold to any other customer.

25 Mr. Phillips would not be required to

1 sell a cake to a gay couple that he wouldn't
2 sell to his other customers.

3 JUSTICE ALITO: No, but Mr. --
4 Mr. Phillips --

5 MR. YARGER: What he said in this
6 case --

7 JUSTICE ALITO: Mr. Phillips would not
8 -- do you disagree with the fact that he would
9 not sell to anybody a wedding cake that
10 expresses approval of same-sex marriage?

11 MR. YARGER: I -- what he may not do
12 as a public accommodation that offers to the
13 public --

14 JUSTICE SOTOMAYOR: Would you answer
15 the question?

16 MR. YARGER: -- yes -- yes, Your
17 Honor -- is decide that he won't sell somebody
18 a product that he would otherwise sell because
19 in his view the identity of the customer
20 changes the message.

21 JUSTICE ALITO: No, he didn't say the
22 identity.

23 MR. YARGER: That is discrimination
24 under our law.

25 JUSTICE ALITO: He said the message.

1 He said the message.

2 MR. YARGER: Well, and the message in
3 this case, Your Honor, depended entirely on the
4 identity of the customer who was ordering the
5 cake. If he had said I have a deeply --

6 JUSTICE SOTOMAYOR: I'm sorry, could
7 you answer the question asked? Let's assume
8 this couple did come in and wanted the rainbow
9 cake.

10 MR. YARGER: Yes.

11 JUSTICE SOTOMAYOR: And this gentleman
12 says one of two things: If you're same-sex,
13 I'm not going to provide you with a rainbow
14 cake or I don't create rainbow cakes for
15 weddings because I don't believe in same-sex
16 marriage. I'm not going to sell it to you.
17 I'm not going to sell it to a same -- a
18 heterosexual couple. I just don't want to be
19 affiliated with that concept of rainbowness at
20 a wedding, any kind of wedding.

21 MR. YARGER: And Justice --

22 JUSTICE SOTOMAYOR: So what are the
23 difference in treatment?

24 MR. YARGER: Justice Sotomayor, in
25 that latter case, if that truly a product he

1 wouldn't sell to any other customer, he would
2 not have to sell it to this customer.

3 But if it's a question of a cake he
4 would sell to any other customer, he cannot say
5 I have a very strong objection to interracial
6 or interfaith marriages and I don't want to
7 send message about those -- those events, and
8 so I'm not going to sell it to you. That's
9 discrimination. It wouldn't be appropriate
10 under Colorado law, and it would be a First
11 Amendment objection.

12 JUSTICE KENNEDY: Counselor, tolerance
13 is essential in a free society. And tolerance
14 is most meaningful when it's mutual.

15 It seems to me that the state in its
16 position here has been neither tolerant nor
17 respectful of Mr. Phillips' religious beliefs.

18 MR. YARGER: And, Your Honor, I --

19 JUSTICE KENNEDY: And -- because
20 accommodation is, quite possible, we assume
21 there were other shops that -- other good
22 bakery shops that were available.

23 MR. YARGER: Your Honor, I don't -- I
24 don't agree that Colorado hasn't taken very
25 seriously the rights of those who wish to

1 practice their faith. I urge you to read the
2 legislative history that culminated in
3 literally ten years of debate about how to deal
4 with this question.

5 And what the legislature decided after
6 hearing from the faith community, after making
7 an exception for places of worship and doing --
8 making other exceptions decided we can't make
9 exceptions here for same-sex people who deserve
10 the same protections if we wouldn't make those
11 same exceptions for discrimination based on
12 race and sex and religion.

13 JUSTICE GORSUCH: Mr. Yarger --

14 JUSTICE BREYER: I'm asking can you do
15 this? Can a baker say do this? Could the
16 baker say, you know, there are a lot of people
17 I don't want to serve, so I'm going to
18 affiliate with my friend, Smith, who's down the
19 street, and those people I don't want to serve,
20 Smith will serve. Is that legal?

21 Would that be legal under Colorado
22 law? That'd be a kind of accommodation, so
23 they get the cake.

24 MR. YARGER: It would be, Your Honor

25 --

1 JUSTICE BREYER: It would be legal?

2 MR. YARGER: No, no.

3 JUSTICE BREYER: It would be illegal?

4 MR. YARGER: You cannot turn away from
5 your storefront if you're a retail store.

6 JUSTICE BREYER: It's a -- it's a
7 joint venture. I have a regular affiliation
8 with Smith. Smith and I work together. I
9 serve the people he doesn't like, he serves the
10 people I don't like.

11 Does that violate the law?

12 MR. YARGER: I don't -- I would say
13 that there's -- there is a possibility that
14 that does not violate the law if there is not
15 some other pretext there to ensure that a
16 disfavored class of customers receives lesser
17 service. And that's always a question in a
18 case like this.

19 CHIEF JUSTICE ROBERTS: Does it make a
20 difference, was -- was same-sex marriage
21 permitted in Colorado at the time of these
22 events?

23 MR. YARGER: It was not, Your Honor.

24 CHIEF JUSTICE ROBERTS: Does that make
25 a difference?

1 MR. YARGER: I don't think it does,
2 Your Honor.

3 CHIEF JUSTICE ROBERTS: Could he have
4 said I am not going to make a cake for, you
5 know, celebrating events that aren't permitted
6 in Colorado?

7 MR. YARGER: Well, Mr. Chief Justice
8 -- may I answer?

9 CHIEF JUSTICE ROBERTS: You have five
10 -- more minutes.

11 MR. YARGER: Oh.

12 CHIEF JUSTICE ROBERTS: If you want.
13 (Laughter.)

14 MR. YARGER: I'll have to think about
15 that, Your Honor. But in the meantime, there
16 was nothing illegal about two gay people in
17 2012 in Colorado expressing their commitment to
18 each other and celebrating that commitment with
19 their loved ones.

20 JUSTICE GINSBURG: Would Colorado be
21 required to give full faith and credit to the
22 Massachusetts marriage?

23 MR. YARGER: Well, it certainly would
24 today, Your Honor.

25 JUSTICE ALITO: But it wouldn't at the

1 time.

2 MR. YARGER: No, it wouldn't.

3 JUSTICE ALITO: It did not at the
4 time. This is very odd. We're thinking about
5 this case as it might play out in 2017, soon to
6 be 2018, but this took place in 2012.

7 So if Craig and Mullins had gone to a
8 state office and said we want a marriage
9 license, they would not have been accommodated.

10 If they said: Well, we want you to
11 recognize our Massachusetts marriage, the state
12 would say: No, we won't accommodate that.
13 Well, we want a civil union. Well, we won't
14 accommodate that either.

15 And yet when he goes to this bake shop
16 and he says I want a wedding cake, and the
17 baker says, no, I won't do it, in part because
18 same-sex marriage was not allowed in Colorado
19 at the time, he's created a grave wrong. How
20 does that all that fit together?

21 MR. YARGER: Well, Your Honor, again,
22 it -- it -- the decision by this bakery was it
23 wouldn't sell any product --

24 JUSTICE ALITO: No, that's not right,
25 Mr. Yarger. It is a disturbing feature of your

1 brief because this case was decided on summary
2 judgment, and, therefore, you have to view the
3 facts in the light most favorable to Mr.
4 Phillips.

5 And the only thing he admitted and
6 what was said in the undisputed -- the list of
7 undisputed facts was he would not create -- he
8 was very careful to use the word "create." Is
9 that wrong?

10 MR. YARGER: That's not incorrect,
11 Your Honor. What -- what he has said is that
12 all of his wedding cakes are custom-made. And
13 so what he said is that he would have a right
14 to refuse that service to anyone whose identity
15 in his view means that the message has changed.
16 And he does not want to sell it to them.

17 It would be akin to a --

18 JUSTICE ALITO: And we have a history
19 of -- in the questioning by -- of Petitioner's
20 counsel, we explored the line between speech
21 and non-speech, but as I understand your
22 position, it would be the same if what was
23 involved here were words.

24 Am I wrong? If he would put a
25 particular form of words on a wedding cake, on

1 a cake for one customer, he has to put the same
2 form of words, the same exact words on a
3 wedding cake for any other customer, regardless
4 of the context?

5 MR. YARGER: That's right, just as he
6 would have to sell a Happy Birthday cake to a
7 member of the Jewish faith or an
8 African-American couple.

9 JUSTICE ALITO: So if someone came in
10 and said: I want a cake for -- to celebrate
11 our wedding anniversary, and I want it to say
12 November 9, the best day in history, okay,
13 sells them a cake. Somebody else comes in,
14 wants exactly the same words on the cake, he
15 says: Oh, is this your anniversary? He says:
16 No, we're going to have a party to celebrate
17 Kristallnacht. He would have to do that?

18 MR. YARGER: Your Honor, that wouldn't
19 be --

20 JUSTICE ALITO: It is the same words.

21 MR. YARGER: It is, Your Honor. I
22 haven't -- I don't -- that would be a question
23 about whether there is a even-handed, genuine
24 policy applied by the baker that doesn't have
25 to do with the identity of the customer.

1 And if it has to do with a message
2 that is apart from the identity of the
3 customer, then he can refuse that. Otherwise,
4 you'd have a circumstance in which he would
5 paint a picture of a couple but couldn't change
6 the skin tone of the -- of the couple that's
7 pictured on the cake. That would be
8 discrimination. And there wouldn't be any
9 First Amendment problem with enforcing our law
10 against that.

11 JUSTICE GORSUCH: I have a quick
12 question about the remedy. As I understand it,
13 Colorado ordered Mr. Phillips to provide
14 comprehensive training to his staff, and it
15 didn't order him to attend a class of the
16 government's own creation or anything like
17 that, but to provide comprehensive staff
18 training.

19 Why -- why isn't that compelled speech
20 and possibly in violation of his free-exercise
21 rights? Because presumably he has to tell his
22 staff, including his family members, that his
23 Christian beliefs are discriminatory.

24 MR. YARGER: He -- a training
25 requirement is a common remedy that is used in

1 many civil rights cases.

2 JUSTICE GORSUCH: But this isn't
3 attending your training, Mr. Yarger.

4 MR. YARGER: He doesn't have to say
5 that his --

6 JUSTICE GORSUCH: Mr. Yarger, again, I
7 agree with you, some sort of training by an
8 outside group, but this order was ordering him
9 to provide training and presumably compelling
10 him to speak, therefore, and to speak in ways
11 that maybe offend his religion and certainly
12 compel him to speak.

13 And given that, plus the
14 discriminatory language in the -- in the
15 Commission's discussion, I just -- that
16 concerns me, and I just wonder what you have to
17 say.

18 MR. YARGER: I understand, Your Honor,
19 if all that is required in these training
20 sessions is an understanding, and a
21 demonstrated understanding of the Colorado
22 Anti-Discrimination Act.

23 It has nothing to do with a particular
24 person's belief. It has to do with ensuring
25 that the conduct that was found discriminatory,

1 and if that conduct can be regulated consistent
2 with the First Amendment, I think that a
3 training requirement like that can be imposed.

4 JUSTICE KENNEDY: Part of that speech
5 is that state law, in this case, supersedes our
6 religious beliefs, and he has to teach that to
7 his family. He has to speak about that to his
8 family.

9 MR. YARGER: He has to speak about the
10 fact that --

11 JUSTICE KENNEDY: His family who are
12 the employees.

13 MR. YARGER: -- in running a public
14 accommodation that is open to all people, he
15 cannot use his faith to discriminate based on
16 identity in selling a good he would otherwise
17 sell.

18 JUSTICE GINSBURG: The question does
19 -- he doesn't have to tell his family -- I
20 mean, his belief is his belief. All he has to
21 --

22 MR. YARGER: That's correct.

23 JUSTICE GINSBURG: -- instruct them is
24 this is what the law of Colorado requires.

25 MR. YARGER: Thank you, Justice

1 Ginsburg. That's precisely correct.

2 JUSTICE GINSBURG: You must adhere to
3 the law.

4 MR. YARGER: That's precisely correct.

5 JUSTICE GINSBURG: Nothing about I've
6 changed my belief in any way.

7 MR. YARGER: Absolutely not. That's
8 correct.

9 MR. YARGER: If there are no further
10 questions.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Cole.

14 ORAL ARGUMENT OF DAVID COLE

15 ON BEHALF OF THE PRIVATE RESPONDENTS

16 MR. COLE: Mr. Chief Justice, and may
17 it please the Court:

18 We don't doubt the sincerity of Mr.
19 Phillips's convictions. But to accept his
20 argument leads to unacceptable consequences.

21 A bakery could refuse to sell a
22 birthday cake to a black family if it objected
23 to celebrating black lives. A corporate
24 photography studio could refuse to take
25 pictures of female CEOs if it believed that a

1 woman's place is in the home.

2 And a florist could put a sign up on
3 her storefront saying we don't do gay funerals,
4 if she objected to memorializing gay people.

5 Now, both Petitioner and the United
6 States recognize that these results are
7 unacceptable with respect to race.

8 And so they suggest that you draw a
9 distinction between race discrimination and
10 sexual orientation discrimination and the
11 state's ability to protect it. But to do that
12 would be to constitutionally relegate gay and
13 lesbian people to second class status, even
14 when a state has chosen, as Colorado has done
15 here, to extend them equal treatment.

16 CHIEF JUSTICE ROBERTS: I'm not sure
17 he provides equal services outside the context
18 of wedding -- weddings, to gay and lesbian
19 individuals. And the racial analogy obviously
20 is very compelling, but when the Court upheld
21 same-sex marriage in Obergefell, it went out of
22 its way to talk about the decent and honorable
23 people who may have opposing views.

24 And to immediately lump them in the
25 same group as people who are opposed to

1 equality in relations with respect to race, I'm
2 not sure that takes full account of that -- of
3 that concept in the Obergefell decision.

4 MR. COLE: So, Chief Justice Roberts,
5 the Court in Obergefell did, indeed, say that
6 individuals are free to express their
7 disagreement through speech with the notion of
8 same-sex marriage, but it did not say that
9 businesses who make a choice to open themselves
10 to the public can then turn away people because
11 they are gay and lesbian.

12 All the baker needed to know about my
13 clients was that they were gay and lesbian.
14 And, therefore -- or gay. And, therefore, he
15 wouldn't sell them a wedding cake which he
16 would sell, gladly --

17 JUSTICE BREYER: But is there an
18 answer to that? I was trying to get the answer
19 to that, and I think that they are proceeding
20 roughly on the line that, well, all that you
21 say is true, but that doesn't mean that under
22 these laws, maybe the African American, et
23 cetera, is separate, but it doesn't mean that
24 the person could be hired to come to the
25 wedding and announce to the general people

1 there, this is the most wonderful thing I've
2 ever been at.

3 Now, that's where they say they have a
4 right not to do that. And then the second step
5 of that is to say: And what's going on here is
6 the equivalent of that.

7 MR. COLE: Right.

8 JUSTICE BREYER: I took that as -- I
9 may be unfair with them -- but I -- I took that
10 as -- as -- as the outlines of the answer to
11 what you're saying. So I'd like to hear what
12 you say in respect, if I'm right, about what
13 they say.

14 MR. COLE: Yeah, thank you. No one is
15 suggesting that the baker has to march in the
16 parade, as Mr. Francisco said here. What the
17 Colorado law requires is that you sell a
18 product -- when a -- when a mom goes into a
19 bakery and says make me a happy birthday cake
20 for my child, and then she takes that cake home
21 for her four-year-old son's birthday party, no
22 one thinks that the baker is wishing happy
23 birthday to the four-year-old.

24 JUSTICE GINSBURG: Would that be true
25 -- would that be true if what the message --

1 the message, let's say Craig and Mullins said
2 we would like to have on this wedding cake of
3 ours these words: "God bless the union of
4 Craig and Mullins."

5 MR. COLE: So if he would not put that
6 message on any other cake, then he doesn't have
7 to put it on that cake.

8 JUSTICE GINSBURG: He would put --

9 MR. COLE: If he --

10 JUSTICE GINSBURG: -- that message on
11 a cake that said: God bless the union of Ruth
12 and Marty.

13 MR. COLE: Right. If he would -- if
14 he would say that, then he would have to say
15 God bless the union of Dave and Craig because
16 the only difference between those two cakes,
17 Your Honor, is the identity of the customer who
18 is seeking to purchase it.

19 It is the same cake otherwise. So --
20 so, yes, if he -- but, again, in this case --

21 JUSTICE KAGAN: Do we have to answer
22 that question, Mr. Cole?

23 MR. COLE: No, you don't, no, Justice
24 Kagan, you don't, because in this case, again,
25 the only thing the baker knew about these

1 customers was that they were gay. And, as a
2 result, he refused to sell them any wedding
3 cake.

4 There was no request for a design.
5 There was no request for a message. He refused
6 to sell them any wedding cake. And that's
7 identity-based discrimination. It is not a
8 decision to refuse to put particular words on
9 it.

10 JUSTICE KENNEDY: Suppose that either
11 in this case or some cases you have a very
12 complex case -- cake, and -- case and cake --

13 (Laughter.)

14 JUSTICE KENNEDY: That -- that -- and
15 you need a baker, a baker's assistant to be
16 right there at the wedding so you cut it in the
17 right place and the thing doesn't collapse.

18 Does the baker have to attend that
19 wedding and help cut the cake?

20 MR. COLE: So, I think, again, that --

21 JUSTICE KENNEDY: Assume the hypo,
22 that the --

23 MR. COLE: Right, right, that is not
24 necessary to decide this case, but I think in
25 -- I think in a future case that involved

1 physical participation in a -- in a -- in a
2 religious ceremony that an individual deeply
3 opposed, that a court -- this Court might draw
4 -- might create new doctrine and draw a new
5 line and say, no, that's not governed by Smith.
6 That's not governed by O'Brien. We're going to
7 make an exception. But -- in this --

8 JUSTICE BREYER: How do we do that?
9 You know, we can't have 42,000 cases, each kind
10 of vegetable --

11 (Laughter.)

12 JUSTICE BREYER: -- that the preparer
13 or thinks is something special.

14 So -- so here, is it an answer that
15 satisfies you to say, well, you see, here, of
16 course, all custom goods, all custom goods have
17 an element of expression. An artisan is not
18 quite the same as an artist, but an artisan can
19 be a great artisan and can produce good things.
20 But where the clash is between an important
21 public policy, the policy of opening the doors
22 to everyone, including minorities, in the
23 public commercial area, well, there the speech
24 element of the artisan is not really sufficient
25 to outweigh that. Now, that's pretty

1 straightforward.

2 And I don't know how it fits within
3 the law and the so forth. But -- but if you're
4 looking at the policies here, it seems to me
5 the cases do support that. And they do have to
6 leave open the instance where the speech goes
7 farther than just preparing a specially-shaped
8 cake, admitted that a specially-shaped cake can
9 suggest approval, et cetera.

10 MR. COLE: So, Justice Breyer --

11 JUSTICE BREYER: And if that's not
12 good, what is?

13 MR. COLE: So, Justice Breyer, I think
14 the -- the -- the colloquy with my opponent
15 with respect to whether a cake artist is
16 different from a makeup -- makeup artist, or
17 whether a highly-sculpted cake is different
18 from an unsculpted cake illustrates that it is
19 just not possible to develop doctrine based on
20 how expressive, how artistic the speech is.
21 And that's --

22 JUSTICE BREYER: Fine. Then what do
23 we do?

24 MR. COLE: This is what you do, Your
25 Honor. You do what you did in O'Brien, in

1 CCMV, in Fair versus Rumsfeld, and in Turner
2 Broadcasting.

3 And what the -- what the Court has
4 done when it's expressive conduct, because
5 that's what we have here at most is expressive
6 conduct, we don't ask is it expressive from the
7 perspective of the baker or is it expressive
8 from the perspective of the -- of a customer.
9 We ask what's the state's interest in
10 regulating? What is the state doing?

11 And if the state is regulating conduct
12 because of what it expresses, well, now that's
13 strict scrutiny. That's --

14 JUSTICE ALITO: Are the words on the
15 cake expressive conduct or are they not speech?

16 MR. COLE: The -- the conduct, Your
17 Honor, that is regulated by Colorado here is
18 not the words on the cake. The conduct that --
19 that Colorado regulates is the sale by a
20 business that opens itself to the public,
21 invites everybody in, it's -- it's regulating
22 the conduct of refusing a transaction --

23 JUSTICE ALITO: But you're --

24 MR. COLE: -- to somebody because of
25 who they are.

1 JUSTICE ALITO: Yeah, but --

2 MR. COLE: It doesn't matter whether
3 it's speech or whether it's not speech.

4 JUSTICE ALITO: But you just said, and
5 I understand Mr. Yarger's position for Colorado
6 to be the same, is that someone can be
7 compelled to write particular words with which
8 that person strongly disagrees.

9 MR. COLE: If he --

10 JUSTICE ALITO: That's your -- that is
11 your position, isn't it?

12 MR. COLE: If he has written the same
13 words for others, and the only difference is
14 the identity of the customer, yes, so, again, a
15 baker could sincerely believe that saying happy
16 birthday to a black family is different from
17 saying happy birthday to a white family, but we
18 would not say that, therefore, it is
19 permissible for a baker to say: birthday cakes
20 for whites only.

21 JUSTICE ALITO: There are services, I
22 was somewhat surprised to learn this, but
23 weddings have become so elaborate, that will
24 write custom wedding vows for you and custom
25 wedding speeches.

1 So somebody comes to one of these
2 services and says: You know, we're not good
3 with words, but we want you to write wedding --
4 a vow -- vows for our wedding, and the general
5 idea we want to express is that we don't
6 believe in God, we think that's a bunch of
7 nonsense, but we're going to try to live our
8 lives to make the world a better place. And
9 the -- the person who is writing this is
10 religious and says: I can't lend my own
11 creative efforts to the expression of such a
12 message.

13 But you would say, well, it's too bad
14 because you're a public accommodation. Am I
15 right?

16 MR. COLE: What I would say, Your
17 Honor, is that if that case were to arise, it
18 would certainly be open to this Court to treat
19 it differently, but this is not a case in which
20 anyone is being asked to --

21 JUSTICE KENNEDY: Differently on what
22 -- differently on what basis --

23 MR. COLE: I think, Your Honor --

24 JUSTICE KENNEDY: On what -- what
25 principle would we use to treat it differently?

1 MR. COLE: I think the principle would
2 have to be some amendment to Smith versus
3 Employment Division to say that even where
4 there's a generally applicable law, and even
5 where it's neutrally applied, if it has the
6 effect of compelling somebody to engage in a
7 religious ceremony that is against their deep
8 religious commitment, we might treat that
9 differently, but under current law --

10 CHIEF JUSTICE ROBERTS: Is that a
11 modification of --

12 MR. COLE: -- that would not be the
13 result under Smith versus Employment Division.

14 CHIEF JUSTICE ROBERTS: Is that -- is
15 that a modification of Smith? It sounds like
16 an overruling of Smith.

17 MR. COLE: Well, I think it would
18 depend on how broadly you wrote it, certainly.
19 But -- but I don't think in this case, where
20 all that's asked for is a product, that you
21 have to reach that question.

22 And the other thing I would say,
23 Justice Alito --

24 JUSTICE SOTOMAYOR: How do you deal
25 under your hypothetical with hotels associated

1 with weddings? You know, hotels rent out
2 banquet halls, their staff. Would they be
3 entitled to the exception you are imagining?

4 MR. COLE: No. And I'm not -- let me
5 say -- let me make it clear. I am not
6 advocating --

7 JUSTICE SOTOMAYOR: You're not
8 advocating this?

9 MR. COLE: -- this exception at all.
10 I am saying that this case does not involve
11 that kind of participation, and so you don't
12 need to address it. If at some point a case
13 arises, then you might --

14 JUSTICE GORSUCH: Well, let's take --
15 let's take a case a little bit more like ours,
16 and -- and it doesn't involve words, but just a
17 cake. It is Red Cross, and the baker serves
18 someone who wants a red cross to celebrate the
19 anniversary of a great humanitarian
20 organization. Next person comes in and wants
21 the same red cross to celebrate the KKK. Does
22 the baker have to sell to the second customer?
23 And if not, why not?

24 MR. COLE: It's not identity-based
25 discrimination. If -- all -- all that Colorado

1 law and public accommodations law generally
2 requires is that you not discriminate on the
3 basis of particular protected classes, sexual
4 orientation, race, disability, religion, and
5 the like.

6 And if I can go back to Justice
7 Alito's question --

8 JUSTICE GORSUCH: Well, why is that
9 any different than our case? You say it's not
10 based on identity, but the baker might well say
11 I -- I -- I despise people who adhere to the
12 creed of --

13 MR. COLE: Right.

14 JUSTICE GORSUCH: -- of the KKK.
15 That's one way of characterizing it. Another
16 way of characterizing it is saying I disagree
17 with the message of the KKK.

18 So too here. One could make the exact
19 analogy, I would think, that you could either
20 characterize it as I -- I don't like people of
21 a certain class or I -- or I have a religious
22 belief against this kind of union.

23 So how do I distinguish those cases?

24 MR. COLE: So I -- I think -- I think,
25 Your Honor, if -- if identity discrimination is

1 involved -- and there's no question that
2 identity discrimination is involved here
3 because, again, the only thing the baker knew
4 was the identity of the people who were --

5 JUSTICE GINSBURG: Mr. Cole, maybe I
6 --

7 JUSTICE GORSUCH: I -- I -- but --

8 JUSTICE GINSBURG: -- I misunderstood
9 your answer to Justice Gorsuch. Did you say
10 you could refuse to sell the identical cake
11 with the red cross?

12 MR. COLE: If -- if he is not doing it
13 on the basis of the identity -- a protected
14 identity. The Ku Klux Klan as an organization
15 is not a protected class.

16 So, yes, the LB -- the public
17 accommodations law does not say you must treat
18 everybody; it says you cannot discriminate on
19 the basis of protected categories.

20 JUSTICE KENNEDY: Well, but this whole
21 concept of identity is a slightly -- suppose he
22 says: Look, I have nothing against -- against
23 gay people. He says but I just don't think
24 they should have a marriage because that's
25 contrary to my beliefs. It's not --

1 MR. COLE: Yeah.

2 JUSTICE KENNEDY: It's not their
3 identity; it's what they're doing.

4 MR. COLE: Yeah.

5 JUSTICE KENNEDY: I think it's -- your
6 identity thing is just too facile.

7 MR. COLE: Well, Justice Kennedy, this
8 Court faced that question in Bob Jones
9 University. Bob Jones University said we're
10 not discriminating on the basis of race; we
11 allow black people to come into the school. We
12 just refuse to admit those who are engaged in
13 interracial marriages or advocate interracial
14 dating. And this Court said that's race
15 discrimination. That's identity-based
16 discrimination, even if you treat others
17 similarly.

18 But -- but I think one way to think
19 about this case is -- is -- is analogize it to
20 O'Brien, right? In O'Brien, nobody disputed
21 that O'Brien's burning of the draft card to
22 protest the Vietnam War was expressive. It was
23 core political expression.

24 But what the Court did was it didn't
25 say, well, how expressive is it? Is it

1 artistry; is it not? Is it core; is it not?
2 It said what is the state trying to do here?
3 Because it's expressive conduct. And if the
4 state's seeking to regulate conduct, then the
5 fact that it has an incidental effect on
6 Mr. O'Brien's expression is not a problem as
7 long as the state has a content-neutral reason
8 for regulating that conduct.

9 JUSTICE BREYER: I take Justice
10 Gorsuch's question and substitute for the KKK a
11 religious group, bizarre perhaps, but a
12 religious group that unfortunately has the same
13 beliefs as the KKK. It doesn't -- then you can
14 ask your question --

15 MR. COLE: Right.

16 JUSTICE BREYER: -- and the answer is
17 they do have to sell it to them, right?

18 MR. COLE: I think if the
19 discrimination is based on a -- a protected
20 characteristic, yes, they -- they can't say
21 because I object to the message that equal
22 treatment sends, right? Piggie Park objected
23 to the message that equal treatment sent. To
24 serve a -- a black person in a segregated --
25 previously segregated restaurant sent a

1 tremendous message, a message that Piggie Park
2 sincerely religiously objected to. And this
3 Court said that that's a frivolous claim in
4 that context.

5 So I don't -- I just -- I don't think
6 you can carve out exceptions to generally
7 applicable rules that regulate conduct in a
8 content-neutral way, as this does. And so just
9 as Mr. -- the fact that Mr. O'Brien's conduct,
10 burning the draft card, was expressive did not
11 give him a First Amendment exemption to a
12 content-neutral prohibition on draft card
13 destruction, so the fact that Mr. Phillips
14 considers his cake-baking to be expressive
15 doesn't give him a First Amendment exemption to
16 a content-neutral regulation of public
17 accommodation sales in the retail context.

18 This Court has already said that that
19 interest in prohibiting discrimination on the
20 basis of identity in public accommodations is a
21 interest unrelated to the suppression of
22 expression, said that in Roberts versus
23 Jaycees, it serves compelling interests,
24 Roberts versus Jaycees, even where race is not
25 involved.

1 CHIEF JUSTICE ROBERTS: Is your -- is
2 your answer to my hypothetical about the
3 religious legal services organization the same
4 as Mr. Yarger's?

5 MR. COLE: I think -- I -- I -- I
6 think if -- if Christian Legal Services,
7 Catholic Legal Services, sorry, Your Honor, has
8 offered a service to the public generally,
9 let's say it was wills, and a -- and a
10 same-sex -- someone who died, the survivor of a
11 same-sex couple --

12 CHIEF JUSTICE ROBERTS: I just --
13 you're -- you're changing the hypothetical just
14 a little --

15 MR. COLE: Well, I think it's the
16 same.

17 CHIEF JUSTICE ROBERTS: -- I -- the
18 services they offered was pro bono legal
19 services --

20 MR. COLE: Yeah.

21 CHIEF JUSTICE ROBERTS: -- to people,
22 whether it's wills or --

23 MR. COLE: Yeah.

24 CHIEF JUSTICE ROBERTS: -- contracts or
25 landlord/tenant or anything at all.

1 MR. COLE: Right. So I -- I don't
2 think they have -- they obviously don't have to
3 argue for a position that they disagree with.
4 But what they -- if they provide wills or they
5 provide landlord/tenant to a -- a straight
6 couple, then they have to provide that to a gay
7 couple. And --

8 CHIEF JUSTICE ROBERTS: So they
9 would -- if someone had a problem in connection
10 with their marriage, again, whatever it is,
11 contract dispute, something like that, they
12 would have to provide representative services
13 to someone who had a similar problem in
14 connection with a same-sex marriage?

15 MR. COLE: So I'd say two things, Your
16 Honor. First of all, I -- I think they would,
17 if they have provided the same services to
18 couples who are straight.

19 But the Court might say that when what
20 you're regulating is only speech, not
21 expressive conduct -- because, remember, the
22 O'Brien test, the CCMV test, the FAIR versus
23 Rumsfeld test --

24 CHIEF JUSTICE ROBERTS: But this not
25 only speech; it's providing legal services.

1 MR. COLE: Yeah, but the -- the legal
2 services are speech, Your Honor, I don't know
3 what other than speech I'm engaged in, for
4 example, right now.

5 CHIEF JUSTICE ROBERTS: No, I would
6 say partly expressive conduct. You're engaged
7 in a representation before the Court, which
8 involves a lot more than simply what you're
9 saying in response to the answers.

10 MR. COLE: Well, you know, if -- if
11 you -- if you treat -- if you treat -- Hurley,
12 I think, illustrates that where the state is
13 regulating only expression, no conduct at all,
14 just a banner that's in the parade, the Court
15 takes a different view, but where expressive
16 conduct is involved -- and the reason the Court
17 takes a different view makes sense because,
18 again, the -- the analysis this Court uses with
19 respect -- with respect to expressive conduct
20 is is the state regulating the conduct for some
21 reason other than what it expresses or is it
22 regulating what it expresses?

23 And -- and when you only have
24 expression, when all that's involved is
25 expression, as was the case with the parade in

1 Hurley, that's different because there's no --
2 there's no neutral conduct to be regulated.
3 But here what we have is the sale of a good, a
4 cake to a -- to an individual. That's -- that
5 -- to the extent it's expressive, it's
6 certainly also conduct.

7 And Colorado's interest in ensuring
8 the bakeries and tailors and -- and other
9 public accommodations treat all people equally
10 is a content-neutral interest in ensuring that
11 everybody has a right to participate in the
12 economic life of the community and that no
13 one has this --

14 JUSTICE ALITO: Along the same lines
15 as the Chief Justice's question, would you say
16 that Colorado can compel a religious college
17 that -- whose creed opposes same-sex marriage
18 to provide married student housing for a
19 married same-sex couple or allow a same-sex
20 wedding to be performed in the college chapel?

21 MR. COLE: So I think that --

22 JUSTICE ALITO: That's not -- those
23 are not free speech --

24 MR. COLE: I think, again, under
25 something like Hosanna-Tabor, they might be

1 religious-based exceptions for core religious
2 institutions, but a bakery that opens itself to
3 the public is not a church, is not -- you know,
4 it's --

5 JUSTICE ALITO: Well, this is not a
6 church. It's an educational -- it's a -- it's
7 an independent educational institution with a
8 religious heritage. And that's what they
9 believe.

10 MR. COLE: So, I think -- I think --

11 JUSTICE GORSUCH: So your answer is
12 they would be --

13 MR. COLE: I --

14 JUSTICE GORSUCH: -- they would be
15 required to do it?

16 MR. COLE: Well, I think under this
17 Court's doctrine in Employment Division versus
18 Smith, the question would be is it a generally
19 applicable neutral law? And if it's a
20 generally-applicable neutral law, there would
21 not be a free exercise question at all. Right?

22 And so -- and -- and the reason for
23 that, as Justice Scalia said in -- in
24 Employment Division versus Smith is equally
25 applicable here.

1 Once you open this up, once you say
2 generally applicable regulations of conduct
3 have exceptions when someone raises a religious
4 objection, or in this case have objections
5 where someone raises a speech objection, you're
6 in a world in which every man is a law unto
7 himself.

8 And so the only sensible way to
9 approach this is to say if the state is
10 targeting religion, then we're going to be very
11 careful about protecting religion. And if the
12 state is targeting the message, is targeting
13 the content of speech, then we're going to be
14 very careful about protecting.

15 But when the state is regulating
16 conduct neutrally, unrelated to expression,
17 which is what this Court has already said is
18 the case with respect to public accommodations,
19 then we can have a world in which everybody who
20 raises an objection -- otherwise we would live
21 in a society in which businesses across this
22 country could put signs up saying we serve
23 whites only, music lessons for Muslims need not
24 apply, passport photos not for the disabled.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Thank you, counsel.

2 MR. COLE: Thank you.

3 CHIEF JUSTICE ROBERTS: Ms. Waggoner,
4 five minutes.

5 REBUTTAL ARGUMENT OF KRISTEN K. WAGGONER,
6 ON BEHALF OF PETITIONER

7 JUSTICE SOTOMAYOR: Here the seller of
8 the cakes is not Mr. Phillips, it's Masterpiece
9 Corporation. Does it -- in your arguments, who
10 controls the expression here, the corporation
11 or its shareholders?

12 I always thought corporations were
13 separate entities. And how do we impute to
14 this corporation, which is just a bakery,
15 doesn't purport to sell just religious items,
16 it's a public place, how do we -- and how do we
17 make this decision with respect to the rights
18 of individuals in a corporation that don't have
19 objections?

20 So can the chef at the Hilton -- and I
21 don't mean to demean the Hilton or anybody
22 else, I'm using it as an example -- can he say
23 I don't believe in same-sex marriage and I
24 won't create a cake and can he be fired?

25 MS. WAGGONER: Justice Sotomayor, in

1 the context of your question regarding the
2 Hilton, there may be a religious accommodation
3 that is made to that employee; but in the
4 context of Masterpiece Cakeshop, this -- this
5 Court has found that corporations have free
6 speech rights, as well as closely family-held
7 corporations have free exercise rights.

8 And Mr. Phillips is also the speaker.
9 So they're both speaking when they're creating
10 --

11 JUSTICE SOTOMAYOR: But who makes a
12 decision for the corporation? In -- in most
13 situations -- it may be easier in a
14 closely-held corporation, it may be the
15 shareholders. I don't know if it's the
16 corporate board or it's the shareholders.

17 Who -- who decides?

18 MS. WAGGONER: Well, certainly I think
19 it -- again, if it's dealing with an employee,
20 the employee certainly decides what -- what
21 they're willing to express, and --

22 JUSTICE SOTOMAYOR: It can't be the
23 employee --

24 MS. WAGGONER: -- and --

25 JUSTICE SOTOMAYOR: -- speaking for

1 the corporation. The employee can be made an
2 agent of the corporation and speak on its
3 behalf, but the employee can't choose it on
4 behalf of the corporation.

5 MS. WAGGONER: Certainly. But if
6 we're talking about what the corporation will
7 speak, then the shareholders in an -- a small
8 family-held corporation, the shareholders would
9 decide that. And that's exactly what's at
10 stake in this case.

11 Mr. Phillips owns Masterpiece
12 Cakeshops. He designs most of the wedding
13 cakes himself by him -- -

14 JUSTICE SOTOMAYOR: It's him and his
15 wife, right?

16 MS. WAGGONER: Yes, it is.

17 I have three brief points in rebuttal:

18 First of all, the bias of the
19 Commission is also evidenced in the unequal
20 treatment of the cake designers, the three
21 other cake designers who were on the squarely
22 opposite sides of this issue.

23 If -- if the Court looks at the
24 analysis that was provided by the Colorado
25 court of appeals, line by line they take the

1 opposite approach to Mr. Phillips that they do
2 to those who are unwilling to criticize
3 same-sex marriage --

4 JUSTICE GINSBURG: And they say they
5 wouldn't -- they would say no to anyone who
6 came with that request?

7 MS. WAGGONER: No. The Colorado court
8 of appeals said that they could have an
9 offensiveness policy, and they said that those
10 three cake designers were expressing their own
11 message if they had to design that cake.

12 In Mr. Phillips's case, they said it
13 wasn't his message. It's simply compliance
14 with the law.

15 In the other case, they said that the
16 cake designers, because they served Christian
17 customers in other contexts, that that was
18 evidence it was a distinction based on the
19 message, but in Mr. Phillips's case, they ruled
20 the opposite way.

21 Professor Laycock's brief provides a
22 good analysis of that as well. It was filed in
23 this case.

24 Second, the Compelled Speech Doctrine
25 and the Free Exercise Clause is anchored in the

1 concept of dignity and speaker autonomy. And
2 in this case dignity cuts both ways. The
3 record is clear on that.

4 Demeaning Mr. Phillips' honorable and
5 decent religious beliefs about marriage, when
6 he has served everyone and has a history of
7 declining all kinds of cakes unaffiliated with
8 sexual orientation because of the message, he
9 should receive protection here as well.

10 This law protects the lesbian graphic
11 designer who doesn't want to design for the
12 Westboro Baptist Church, as much as it protects
13 Mr. Phillips.

14 Lastly, political, religious, and
15 moral opinions shift. We know that. And this
16 Court's dedication to Compelled Speech Doctrine
17 and to free exercise should not shift.

18 JUSTICE SOTOMAYOR: Counsel, the
19 problem is that America's reaction to mixed
20 marriages and to race didn't change on its own.
21 It changed because we had public accommodation
22 laws that forced people to do things that many
23 claimed were against their expressive rights
24 and against their religious rights.

25 It's not denigrating someone by

1 saying, as I mentioned earlier, to say: If you
2 choose to participate in our community in a
3 public way, your choice, you can choose to sell
4 cakes or not. You can choose to sell cupcakes
5 or not, whatever it is you choose to sell, you
6 have to sell it to everyone who knocks on your
7 door, if you open your door to everyone.

8 MS. WAGGONER: Mr. Chief Justice?

9 CHIEF JUSTICE ROBERTS: You can
10 respond, if you'd like.

11 MS. WAGGONER: Justice Sotomayor, I
12 think that the gravest offense to the First
13 Amendment would be to compel a person who
14 believes that marriage is sacred, to give voice
15 to a different view of marriage and require
16 them to celebrate that marriage. The First
17 Amendment --

18 JUSTICE SOTOMAYOR: Then don't
19 participate in weddings, or create a cake that
20 is neutral, but you don't have to take and
21 offer goods to the public and choose not to
22 sell to some because of a protected
23 characteristic. That's what the public
24 anti-discrimination laws require.

25 CHIEF JUSTICE ROBERTS: A brief last

1 word, Ms. Waggoner.

2 MS. WAGGONER: A wedding cake
3 expresses an inherent message that is that the
4 union is a marriage and is to be celebrated,
5 and that message violates Mr. Phillips's
6 religious convictions.

7 Thank you. This Court should reverse.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel. The case is submitted.

10 (Whereupon, 11:31 a.m., the case was
11 submitted.)

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Official - Subject to Final Review

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