No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,
PETITIONERS
v.
COLORADO CIVIL RIGHTS COMMISSION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF NEITHER PARTY

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] has written the Court previously about, *inter alia*, denial of expected services by businesses for religious reasons, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (refusal of employers to offer employees certain contraceptives, with religious rationale). So he writes to assist in the instant case which also involves denial of services under color of religion, though with same-sex issues involved as well. An epic clash of our times: religious rights versus gay rights. Irresistible force, meet immovable object.

This case has difficult and troublesome aspects (e.g., the always-controversial topic of sodomy), which may be why the Court "punted" it through an epic nineteen distributions to conference. It almost sounds like a parody instead of a real case: the idea that parties are arguing about a wedding cake when Houston is drowning, North Korea is threatening, and white nationalists are murdering, seems a little surreal. Yet, there are important matters here (religious freedom, speech freedom, obligations of businesses, equal protection) that deserve serious attention, and maybe deserve a serious solution that does not favor either set of parties to excess.

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[1] No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court, except from respondents Charlie Craig and David Mullins, who e-mailed Amicus permission.

The late Princess Diana of Wales, whose 20th anniversary of passing recently occurred, made it her business in later life to reach out to neglected or oppressed groups of people, such as AIDS patients or landmine victims. In that spirit, one hopes the Court finds ways to respect both religious people and same-sex-affectionate people, both of whom have been oppressed in various ways throughout history.

SUMMARY OF ARGUMENT

The time after *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015), has been confusing and frightening for many people of a traditional, or even quasi-traditional, bent. The Court may want to consider the shock and desperation of various religious, or other, people *vis-à-vis* same-sex-related issues.

The Court should carefully consider just how the "decorative" bleeds into the "expressive", as it scrutinizes the various physical layers of the cake (interior, frosting, words or symbols), and what the difference between "art" and "food" is.

Petitioners should likely receive the relief they seek, but to the narrowest extent reasonably possible, lest Respondents or similarly-situated people needlessly suffer, and lest separation of church and state, and the balance of power between businesses and consumers, be needlessly violated. Perhaps Respondents should also receive some increment of relief.

The issue of "sodomy" is germane here not only because of the traditional definition (same-sex sexual relations), but also because of a broader

definition, including any needless meanness, parochiality, or exclusion. Both definitions have resonance.

Petitioners', and others', religious rights are important, but so are individuals' rights not to be oppressed by putatively religious entities or structures, e.g., if America had a *sub silentio* state Calvinism, or other oppressive regime, as the unnamed default setting for how the society is run.

Giving Petitioners freedom to avoid supporting same-sex weddings need not mean giving businesses freedom to discriminate racially, especially considering recent case law.

If Petitioners are denied their freedom, then, say, a Holocaust survivor might have to make a cake for Nazis following white-supremacist religious ideas. This is unpleasant.

Too, the freedom of a Christian not to make a cake for a Satanist wedding, might allow other freedoms people may find more offensive. But part of freedom may be the right to offend.

Petitioner should ideally have given notice of his desire not to serve same-sex couples, by posting his policy on the outside of his store, or by similar means. This might have avoided an unwelcome surprise for Respondents.

One workable solution to the case could involve fining Petitioners and using the money to compensate Respondents for damages, but relieving Petitioners from re-education, being shut down, or

jail time for noncompliance. Everyone would be left free, and externalities would be compensated.

If Petitioners cannot be given relief from fines, then they should be fined in only a fair amount, which may be much smaller than some other bakers in similar situations have been fined so far.

Jail time for Petitioners for following their consciences, sounds oppressive and abusive.

Finally, the Court should be courtly and show grace and kindness to everyone, given the chance for an extreme, unbalanced Court opinion to create social strife and inequity.

ARGUMENT

I. *OBERGEFELL* HAS LEFT MUCH CONFUSION IN ITS WAKE; OR, POSSIBLE BURDENS OF IGNORING THE PAST

The deciding of *Obergefell*, *supra* at 2, in favor of same-sex couples' rights occasioned much joy to such couples, and to their allies. However, things have not been without controversy or even bloodshed since then.

For example, Justice Ruth Bader Ginsburg once opined that "it would 'not take a large adjustment' for people to eventually come around on the issue [of same-sex marriage]", Inae Oh, *Ruth Bader Ginsburg: America Is Ready to Accept a Pro-Gay-Marriage SCOTUS Ruling*, Mother Jones, Feb. 12, 2015, 2:46 p.m., http://www.motherjones.com/politics/2015/02/ruth-bader-ginsburg-believes-americans-are-ready-accept-scotus-gay-marriage-ruling/ (internal citation

omitted). Unfortunately, what really happened after *Obergefell* is, among other things, the tragic June 2016 massacre of 49 clubgoers at the Pulse gay nightclub in Orlando, Florida. There has also been the election of Donald J. Trump as President, which might not have happened but for the backlash from voters who wanted to change the membership of the present Court, and maybe to overturn *Obergefell*.

Might it have been wiser, then, to have let the States make democratic decisions about same-sex marriage? Maybe, or maybe not, depending on one's point of view; still, a slower pace of change might have avoided certain problems.

One point of confusion from *Obergefell* is Justice Anthony Kennedy's statement, "Only in more recent years have psychiatrists and others recognized that sexual orientation is . . . a normal expression of human sexuality", slip op. at 8. What exactly does "normal", *id.*, mean? Does it mean statistically normal in the sense that it frequently occurs? Or morally normal, e.g., implying that all parents should tell their children (along with schoolteachers reinforcing the lesson), "Sodomy and dating people of your own sex are good things, you should enjoy them and ignore outdated taboos"? Or physically normal, e.g., that sodomy is as fertile, safe, and uncontroversial as heterosexual sex relations?

As for the latter point: of course, sodomy is completely infertile and has some documented tendency to spread AIDS and other diseases, sadly enough. And as for "controversy", *see, e.g.*, Christopher Knaus, *Pelvic mesh victims disgusted at*

suggestion of anal sex as solution, The Guardian, Aug. 28, 2017, 8:05 a.m., https://www.theguardian.com/australia-news/2017/aug/28/pelvic-mesh-victims-disgusted-at-suggestion-of-sodomy-as-solution,

> Australian victims of faulty pelvic mesh implants have expressed disgust at doctors' suggestions of anal intercourse as a solution to their ruined sex lives.
>
> . . . .
>
> "My husband and I were given advice [about] sexual activity," one woman said. "We were gobsmacked. The whole sexual deviation thing is supposed to make the pain and complications from mesh go away. I find this type of advice disgusting."
>
> . . . .
>
> "Our vaginas have been abused by mesh and now doctors are suggesting our anus be abused. Despicable! Only a misogynist could think this way," [another woman] said.
>
> . . . .

Id. So if the *Obergefell* Court was trying to norm sodomy for everybody: not everyone wants to be "normed", it seems, *see* Vaginal Mesh Article, *supra*. (Sodomy is certainly not "fungible" with, or indistinguishable from, other forms of sexual contact.) A lesson to ponder.

Since the Court's *Obergefell* decision seemed, to many Americans, to violate thousands of years of religious and other tradition about what a marriage really is, there has much to-do. Part of the to-do is that various vendors have resisted, for religious or ethical reasons, catering to same-sex weddings; just as Petitioners, of course, are resisting cake-making for Respondents.

If there is ever genuine, inarguably cruel bigotry in society, e.g., a restaurant refusing to serve African-Americans simply because of skin color, that is inexcusable. However, in context, maybe Petitioners are not that bad a sort of person, and are not evincing that malicious variety of bigotry. Indeed, Petitioners reportedly have no problem with serving gay people in other contexts besides same-sex marriage.

Individuals do have some right of resistance against social trends. And much of the culture is seemingly pushing hard these days to spread laudatory images of LGBT life, with which not everybody might agree. For example, there is the Hanna-Barbera cartoon character Snagglepuss, a lisping, theatrical pink mountain lion who says things like "Heavens to Murgatroyd!" and "Exit, stage left!", and has long been a gay icon. Wikipedia, *Snagglepuss*, https://en.wikipedia.org/wiki/Snagglepuss (as of 2:55 GMT, Sept. 3, 2017).

Id. However, the effete feline has now recently been portrayed as an *actual homosexual*, *see* William Hughes, *New comic series reimagines Snagglepuss as a gay 1950s playwright*, AV News, Jan. 31, 2017 4:56 p.m., http://news.avclub.com/new-comic-series-reimagines-snagglepuss-as-a-gay-1950s-1798257072. Even if the world is turning gayer, some people may want to stop and get off, including Petitioners. If they want to fight (or change, or just survive) the future, they may have some First Amendment right to do so. Thus, their resistance to a wedding cake for Respondents.

II. PETITIONERS' ARGUMENTS ABOUT "EXPRESSIVE" OR "ARTISTIC" BEHAVIOR" RE CAKES MAY EARN THEM RELIEF, BUT ONLY LIMITED RELIEF

A. What Precisely Is the Court Looking at Here? The Cake, or Just Part(s) of It?

Or, "Where Is the *Res*?"

About that cake: one source of confusion in the instant case is the scope of what is being looked at. Petitioners claim that the cake is "expressive artistry": well, does that include all of the cake? What if it were an unadorned yellow cake with no frosting?

Otherwise put, "Where, or what, is the *res*?" *Res* is being used in a broad sense here: this is not an "*in rem*" proceeding, and nobody is suing the cake itself. Amicus is just using the term "*res*" to foreground the idea of trying to understand precisely what physical object, or objects, are the matter of discussion here. Otherwise, we may all be confused.

Just as there may be various "tiers of scrutiny" in the law, then,

Scrutiny Levels (simplified version)

1. Strict scrutiny
2. Intermediate scrutiny
3. Rational basis

there may be various layers of scrutiny of what a cake means or comprises:

Cake Scrutiny Levels (Layers)

1. Expressive/decorative (e.g., words, figurines, symbols, or designs)
2. Frosting or other surface of the cake (e.g., candies without any expressive design, but possibly decorative along with tasting good)

3. The mass of the cake itself, including any filling/interior, which would be invisible (covered up)

Level 1 of "Cake Scrutiny" is literally the topmost layer: words on top of the frosting, etc. Level 3 is obviously the bottommost, or even interior, layer or space of the cake. What is perhaps most interesting is Level 2: what exactly is the difference between "expressive" and "decorative", for example?

Words on the cake saying, "GOD WANTS EVERYONE TO ENTER A GAY MARRIAGE" would clearly be sending an expressive message. But what about merely decorative design, say, little flowers etched in the frosting, or candies designed to look like roses or rainbows? Would those be expressive (in particular, endorsing same-sex marriage), or merely decorative, and expressing no message about same-sex weddings?

Otherwise put: is the whole cake the *res*, or are just the Reese's Pieces or other candies, words, or other objects on top and sides of the cake, the *res*? or just *some* of the objects atop the cake??

B. What Components of Petitioners' Cakes, Then, Might Really Be Expressive Behavior Re Same-Sex Weddings?

So, there is some difficulty here. —There is an interesting, and here relevant, part of the script (albeit unused in the film) of John Boorman's *Excalibur* (Orion Pictures 1981), *available at* http://www.scifiscripts.com/scripts/excalibur.txt. King Arthur is dispensing justice in his hall, *see id.*

A fat man who sells ale complains that a thin man has the annoying habit of not buying the ale, but just smelling its odor, "lean[ing] over the barrel and sucking its vapors", *id.* The King asks the thin man to give him three shillings, the price of the ale; the man sadly complies. Then,

> Arthur tosses them in the air and lets them fall on a metal plate. He hands them back to the Thin Man, who is totally confused now, as is everybody else.
>
> ARTHUR
>
> For the smell of your ale, the jingle of his coins.
>
> The knights roar with laughter and the Fat Man and the Thin Man look at each other in astonishment.

Id. The ale versus the smell. Fascinating.

Somewhat similarly, and as partially discussed with the "cake scrutiny layers" diagram *supra*: we may be able to separate the cake itself, the actual *food*—which is not decoration, it is edible—from any *decoration or expression*, edible or not, on it: rainbow ribbons (whether cloth or candy) put on top of the frosting; little plastic figurines of two men in wedding gear; actual words printed on the cake, e.g., "Gay Marriage Is Wonderful!"; etc.

(Amicus is repeating some ideas slightly, but that is useful for emphasis at times.)

But Petitioners would seem to disagree, and claim that the whole cake, indivisibly—and the making of

the cake, or refusal to make the cake—, is an "expressive object" deserving full First Amendment protection. …Is this valid, though?

On the one hand: Amicus suspects that it risks straining belief to claim that the cake itself, and its taste, comprise expressive behavior. If that were true, then some bigot who refused to serve certain minorities at his restaurant could claim that he is willing to serve some food, e.g., slop, to them, but that to make food that is delicious, tastes very good, *is "artistic expression"*, and thus his failure to serve them certain foods is protected under the First Amendment.

Sometimes food may be expression, e.g., when a protestor throws a pie into a politician's face. Otherwise, maybe food is not really expression. Even food that looks good, wedding-cake style.

By contrast with mere food, which can be tasty but expressively inert: let's look at some *real* expression, or at least artistic decoration, in cakery: *see* Paula Cocozza, *Fake off! Meet baking's masters of illusion cakes*, The Guardian, Aug. 31, 2017, 7:00 a.m., https://www.theguardian.com/lifeandstyle/2017/aug/31/fake-off-meet-bakings-masters-of-illusion-cakes,

> Illusion cakes – cakes that look like something they are not – must have seemed the perfect trick to divert the eye from The Great British Bake Off's own recasting. . . . Illusion is a burgeoning area of baking, although its practitioners prefer to think of their

> creations as "hyperrealistic" and themselves as cake artists.
>
> . . . .
>
> . . . Natalie Sideserf entered a lifelike cake model of Willie Nelson's head in a baking competition in Texas. She won, and the Sideserf Cake Studio was born. . . . She achieved notoriety with her own wedding cake: a plate decorated with the words "Till death do us part", on which rolled the severed heads of her and her husband.

Id. While the foregoing picture is "a little disgusting", it does memorably make the point that there is serious cake artistry, which may go far beyond just making a cake that tastes good and has some nicely-colored bands of frosting on it.

Too, that photograph is definite expressive content about marriage: showing images-in-cake of the two lovebirds, with the poignant (if punny) message, "Till Death Do Us Part", expressing love, faith, and mutual commitment, even despite the visible (and maybe risible?) horrors of decapitation (!!!). Would every cake that Petitioners might sell Respondents rise (or sink…) to that level? The Court shouldn't lose its head(s) over this issue, but should ponder it carefully.

At this point, one wonders if Petitioners should do themselves a favor and drop the "artistic expression" claim, at least for the cake itself and any unadorned, unlettered sections of frosting, which may "express" precisely nothing. If, instead, they simply claimed, as did the religious parties in *Hobby Lobby*, *supra* at 1, that they do not want to assist in an activity that they think is sinful, that might be more forthright and successful than some "expressive freedom" claim.

…On the other hand, though, and trying to be fair: the fact that Petitioners' wedding cakes cost hundreds of dollars might signal that they are not just some cheap cake bought for eating at some grocery store or run-of-the-mill bakery, but rather, a fairly expensive and even "artistic" construction. The base cake underneath the outer layers might just be food; but arguably, the consumers are largely paying for the top, visible layers, instead of just paying for what is underneath.

(Or does that all create "class issues", in that an "artiste" who charges hundreds of dollars to make a

cake gets First Amendment protection, while an average Joe Schmo baker who puts some simple designs on the cake but nothing fancy or expensive, does not get First Amendment protection?)

The following photograph of Jack Phillips and cakes helps see that there may be some art involved, as he says:

Chuck Hickey, *Colorado Supreme Court won't hear baker's appeal over same-sex wedding cakes*, KDVR.com, Apr. 25, 2016, 11:37 a.m., http://kdvr.com/2016/04/25/colorado-supreme-court-wont-hear-bakers-appeal-over-same-sex-wedding-cakes/.

So, given all that, the Court must decide to what extent (full, none, part) the *decorative* aspects of a cake, beautiful tiers or what-have-you, also qualify as being *expression*, specifically expression that addresses same-sex marriage. *Cf.* William Butler Yeats, "How can we know the dancer from the dance?" *Among School Children*, The Tower (1928).

III. IF GRANTED RELIEF, PETITIONERS SHOULD RECEIVE REASONABLY NARROW RELIEF, SO AS NOT NEEDLESSLY TO HURT RESPONDENTS OR THOSE SIMILARLY SITUATED

If the Court finds Petitioners' arguments worthy re artistic/expressive issues, or just on religious conscience in general, the Court could grant various types of relief. It could give Petitioners full relief as they ask; or it could give them relief only on indubitably expressive elements (e.g., relief from printing "THE LORD BLESSES SAME-SEX MARRIAGE AND SODOMY!" on the cake), or it could allow a fine but limit the amount of it (*see infra* Section XI), etc. The larger the relief, though, the more risk that Respondents' rights and dignities, or those of people situated similarly to Respondents, might get trampled on needlessly.

Even those who do not endorse *Obergefell*, may still have to admit that it is the law of the land, with all that that implies. Thus, Respondents may have to receive more respect than certain people might like to give them.

The Court can be creative and conscientious here, naturally. For example, if it does grant full relief, it could mix that with the obligation for all future bakers (or other foodstuff makers) to post on the outside of their stores in advance, that they refuse to serve same-sex weddings; or if local laws do not allow them to do that, then at least posting, either in-store or on the Internet, what disclaimers or relevant information they can—e.g., that the State requires them not to deny service to gays—, to give

some reasonable warning to potential clients. (*See infra* Section IX, discussing this issue)

One problem that makes it more difficult to give full and untrammeled relief to Petitioners, is the externalities, the damaging baggage, their actions cause. In *Hobby Lobby*, by contrast, there may have been largely some paperwork involved, and using accommodations which non-profit corporations were allowed, *see id.*, so that there were arguably few serious externalities. But in the instant case, some externalities include the hurt which Respondents claim, that their dignity was insulted as being treated as less than that of opposite-sex marrying partners', along with the need to go find someone else to make the cake, with the time and energy that entailed.

Given the externalities, it is appropriate to discuss some broader issues, even controversial ones, re sodomy, church-state relations and balance, hypocrisy or bad judgment, and other factors. They may not seem to directly affect the case, but they might show how certain forms of relief may or may not be appropriate, given the present real-life social situation we all live in. (There will follow some extended commentary on sex and religion: not all people may enjoy it, but their patience is appreciated.)

IV. "SODOMY" MAY DENOTE NOT ONLY SEXUAL ISSUES, BUT BROADER ISSUES OF INJUSTICE AND EXCLUSION

First off: sodomy is traditionally taken to mean the kinds of sexual relations common between same-

sex sexual partners: largely genital/anal, oral/genital, and maybe oral/anal (with some limited genital/genital, anal/anal, and even oral/oral possibilities), to put it rather frankly. We may call that all "Sodomy Type 1". However, since some people are so quick to criticize homosexuals as "those terrible sodomites", maybe they need to take a log out of their own eyes before criticizing the speck (or log) in others'.

Indeed, Sodom may have other associations besides certain body-part connections. *See Ezekiel* 16:49-50, "Now this was the sin of your sister Sodom: She and her daughters were arrogant, overfed and unconcerned; they did not help the poor and needy. They were haughty and did detestable things before me." *Id.* This is what might be called "Sodomy Type 2", not focused on sexual sin as much as on greed, cruelty, and treating people as inferiors.

The second type of sodomy may be even more dangerous than the first, in some instances. For example, if an Administration were reluctant to admit refugees to this country, that could be considered the second type of sodomy, and could end up with getting those refugees killed, massacred in their own countries. (Which might get Americans killed, eventually, if America gets bad press over its refusal to admit refugees.)

Also, with the hitting of Houston by Hurricane Harvey, a refusal to show kindness to flood victims chimes with the Bible on Sodomy Type 2. (One notes that "prosperity preacher" Joel Osteen has been savagely criticized for his church's late lack of

response to the disaster, *see, e.g.*, Brie Loskota & Peter Gudaitis, *The prosperity gospel was not the only problem with Joel Osteen's Harvey response*, Raw Story, 12:04 p.m., Sept. 4, 2017, https://www.rawstory.com/2017/09/the-prosperity-gospel-was-not-the-only-problem-with-joel-osteens-harvey-response/.)

See also, e.g., Elyse Wanshel, *Pastor Warns Hurricanes Will Hit Cities That Don't Repent 'Sexual Perversion'*, Huffington Post, Sept. 1, 2017, 4:31 p.m., http://www.huffingtonpost.com/entry/pastor-kevin-swanson-houston-repent-sexual-perversion-hurricane-harvey_us_59a97d74e4b0b5e530fe394d?ncid=inblnkushpmg00000009 (pastor makes unsubstantiable claims); Randall Balmer, *Under Trump, evangelicals show their true racist colors*, L.A. Times, Aug. 23, 4:00 a.m., http://www.latimes.com/opinion/op-ed/la-oe-balmer-evangelical-trump-racism-20170823-story.html ("The deafening silence from leaders of the religious right in the wake of the neo-Nazi violence in Charlottesville, Va., points to an even larger one, which places racism at the very heart of the movement.")

Also, why do Christian preachers who condemn homosexuals as "sodomites", whether employing the word "sodomite" or not, tend to forget completely that there are likely many more heterosexuals these days committing sodomy than homosexuals? just judging from the sheer difference in number between "straights" and gays, and the massive prevalence of sodomy these days?

This hypocrisy is reminiscent of the Pharisees, who self-righteously condemned (certain selected)

others, while turning a blind eye to the sins of themselves and their cronies. (Indeed, from an objective point of view, an elderly gay couple who get married, but then stay chaste—they may be too old and tired to have sex, say—may be objectively less sinful than some young "conservative" or "evangelical" heterosexual couple who are regularly committing sodomy till the cows come home—and maybe with the blessing or deliberate silence of their "pastor" who doesn't want to jeopardize financial contributions from his flock by criticizing his congregation.)

True, under the First Amendment, people's beliefs do not need to be coherent, logical, or consistent to receive protection. If, say, someone's professed "god" is a talking watermelon from Neptune which, invisibly and silently, is perpetually revolving around the top of Mount Everest, beyond human detection or proof, the law still protects this palpably absurd belief. (Though, as for "proving a negative": if said watermelon really were silent and invisible, how could you prove it's not there?)

But context still matters, to an extent. If one's absurd beliefs or actions cause externalities to others, absurdity can be a problem. In that vein, while Petitioners may deserve some relief, they do not deserve so much relief that it would be unfair to Respondents, or that it would fall in with the plans or sentiments of those who seek to misuse religion to their unethical advantage, *see infra* Section V. Again, it may be wise for the Court to give Petitioners the narrowest relief reasonably possible,

so as not to violate the spirit of the Establishment Clause, equal protection, or other legal provisions.

This Court is not here to decide who is sinning or not; but the discussion of sin and hypocrisy, and sodomy type 1 versus type 2, helps add depth to the discussion. And the Court, while respecting Petitioners' desire not to be involved with Sodomy Type 1, should not give them so broad relief that Sodomy Type 2 occurs, whereby self-righteousness and exclusion unnecessarily hold sway.

V. "STATE CALVINISM" IS NOT SUCH A GOOD IDEA FOR THE U.S.

Indeed, while America formally has no state religion, some recent political developments almost seem as if a soft "state Calvinism" is developing in the United States. Muslim bans; transgender bans which go beyond a fair consideration of issues like bathroom privacy; immigrant bans: all that "federal big government" is considered laudable by figures in the current Administration. But if you are a business owner, one of the "elect": suddenly, you are virtually an oppressed saint who has to be rescued from the horror of being regulated by government. And the instant case is in that vein, since it seeks ways for businesses to avoid treating people equally.

See, e.g., Antonio Spadaro & Marcelo Figueroa, *Evangelical Fundamentalism and Catholic Integralism: A Surprising Ecumenism*, La Civiltà Cattolica (undated, but c. July 13, 2017), http://www.laciviltacattolica.it/articolo/evangelical-fundamentalism-and-catholic-integralism-in-the-usa-a-surprising-ecumenism/,

> Today President Trump steers the fight against a wider, generic collective entity of the "bad" or even the "very bad." . .
>
> . . . .
>
> A third element, together with Manichaeism and the prosperity gospel, is a particular form of proclamation of the defense of "religious liberty.". . .
>
> . . . .
>
> .. . . There is a well-defined world of ecumenical convergence between sectors that are paradoxically competitors when it comes to confessional belonging. This meeting over shared objectives happens around such themes as abortion, same-sex marriage . . . .
>
> . . . The word "ecumenism" transforms into a paradox, into an "ecumenism of hate." . . .

Id. It is bad to forget the past, but reactionary attempts to return to the past can be bad too. For example, in the final episode of *Twin Peaks: The Return* (Showtime television broadcast Sept. 3, 2017) *see id.*, an FBI agent travels back in time to prevent a young woman's murder, but arguably makes everything worse by doing so. This offers a lesson in not trying hubristically to defy time, e.g., treating minorities as they were treated in the bad old days.

One flagrant problem, following the above observations about turning a blind eye to various religious or pseudo-religious hypocrisies, is typified

in the Orwellian-toned "First Amendment Defense Act", a bill, H.R. 2802, 114th Cong. (2015), which has not become law. This interesting attempt at legislation gives businesses, *see id.*, the right to avoid federal punishment for acting on beliefs re same-sex marriage or extramarital sex: a sort of moral gerrymandering—at a time when the Court is considering gerrymandering—that could make certain sexual groups second-class citizens. (And, when did the First Amendment center on denial of services to people because of their sexual behavior?)

So what are the parameters here, if taking negative actions re same-sex marriage is somewhat undefined by "FADA"? …Let us imagine that two "religious" restaurant owners, Rosa Beef and Charles Roast, have a prospective customer, Frenda Gaze. Gaze conversationally notes to Beef, who is taking her order, "I'll have a bacon cheeseburger. I'm going to the wedding of my two girlfriends later, and I don't know if I'll make it without some food!"

Beef walks over to her partner, who is at the cash register, and says, "Hey Chuck, that lady's gonna go to some lesbian wedding. Under FADA, we don't have to support anything related to same-sexes marriages! The Feds can't touch us!" Roast then calls out to Gaze, "Sorry, we're decent god-fearin' Christians and don't wanna do anything which could support any two-gal weddin'."

Beef escorts the disheartened Gaze out the door (if the State has no protections for Gaze's rights). Since there are no other food sources for a long distance, Gaze becomes weak and disoriented and crashes her car, suffering substantial injuries, and also missing the wedding.

True, this nightmare scenario might not happen—but then again, it, or something similar, might. If the Court wants such horrible scenarios to happen, then it should rule for Petitioners in such an overbroad way that businesses have carte blanche to discriminate as much as they like, on flimsy grounds. But the Court doesn't want that, of course.

VI. WHAT *RATIO DECIDIENDI* MAY ALLOW BUSINESSES TO AVOID SERVING CERTAIN PEOPLE OUT OF CONSCIENCE, BUT WON'T ALLOW THOSE BUSINESSES TO DISCRIMINATE BY RACE OR OTHER COMPLETELY IMMUTABLE CHARACTERISTICS? THERE MAY BE ONE

On that note, re the "nightmare scenario" *supra*: many people may worry that if Petitioners are allowed not to serve Respondents, then businesses could use that precedent not to serve minority couples, or interracial couples, or mixed-religion (differing-faith) couples, or couples of a religion the businessperson despises. Is there some magic method, though, that would allow freedom of conscience to businesspeople like Petitioners, but not let them employ race discrimination or other forms of discrimination that people find particularly odious?

One case noting that "race is special" is *Peña-Rodriguez v. Colorado*, 580 U.S. ___ (2017). While the "no-impeachment" rule for juries is often considered sacred, the Court has recently held that racial animus is so vile that it allows an exception to the "no-impeachment" rule, *see id. passim*. Other

cases may have similar commentary about the special noxiousness of racial bias; but *Peña-Rodriguez* alone nicely supports the idea that one could completely ban race discrimination by business, but in matters relating to moral or sexual issues, there might be more freedom of conscience for businesses.

(Is there a sexual or sexual-orientation bias exception to the no-impeachment rule yet? If not, does that make the Court outdated and bigoted; or does it just acknowledge the special poisonousness of racial bias? Perhaps the latter is correct.)

Maybe other completely immutable characteristics, such as one's birth sex or congenital disabilities (although taking into account, if needed, the difficulties that disabilities can sometimes cause), can also serve as barriers to "freedom of conscience" for businesses who might want to avoid service to people on the basis of such characteristics. But for other scenarios, more leeway could be given, as shall be explored below.

Amicus is concerned that if Petitioners receive no relief, that could endanger other cases of conscience. For example, what is there is a Jewish baker who is called upon to cater a Nazi event? or even worse, make a cake for a Nazi wedding with a big swastika on top of it? What protection could there be, if any, for a baker in that situation who wishes to avoid making the swastika cake?

Of course, someone could say, "Well, if it's a hate group, the baker can have an exception." But how do you define a hate group? What if the wedding was not of Nazis, but instead, a wedding of Hindus or

Buddhists, who also requested a swastika cake, albeit not in a Nazi context? But what if the baker is so personally repulsed by the swastika and its symbolism, that he feels obliged to avoid baking any swastika on any cake??

Or, one may argue that being a Nazi is not a congenital inheritance like one's racial or birth-sex identity, so that Nazis have so special legal protection. But what if the Nazis are not only Nazi but also belong to a white-supremacist church that claims God has ordered them to be white supremacists? Now they could try to claim religious protection, and claim that they are victims of religious discrimination because the Jewish baker doesn't make the swastika cake, or any cake at all, for them, due to their religious beliefs.

VII. THE CASE OF SHLOMO SATMAR, WHO REFUSES TO GIVE RELIGIOUS NAZIS A WEDDING CAKE

Following those ideas: let us imagine that Shlomo Satmar, an elderly Holocaust survivor and baker—a "cake artist", in fact—, is paid a visit by Dirk Hisler, a proud member of Odin's Nordic Sons, a group which is not only Nazi and white-supremacist but also practices ancient Norse religion (or a modernized version of it), and uses that as a justification for their Nazi beliefs, believing that Odin just loves white people more than other people.

Hisler says, "Well, well. Shlomie, you're just the right guy to make us a cake for a white-folks' wedding we're having at our Odin's Nordic Sons

religious convention. Make it a WHITE cake! Haw haw!! And…put a great big beautiful swastika on it!"

Satmar: "I don't think so. In this country, I don't have to express any ideas I don't want to! No swastika! Good-bye."

Hisler: "Well, aren't you clever. O.k., then just make us that white cake with no letters on it; and decorate it beautifully, Mr. Famous Cake Artist. We have a human right to eat. And even to have a beautiful cake with lotsa pretty white swirls and white roses in the frosting. Don't discriminate, bro!!!'

On a human level, many of us would say that it would be wrong to force Satmar to give Hisler *any cake at all*, swastika or no swastika. After all, he is a Holocaust survivor, and white supremacists are horrible. And they could get the cake somewhere else.

But what is a *principled* way to let Satmar off the hook? Under the theory of the court below, the poor man might have to give them a cake, even a beautifully decorated one, although he would not have to put a swastika or other Nazi symbology on the cake.

(And principle is key here. One cannot just rely on, say, there being a judge who with a wink and a nudge finds some way to get Satmar off scott-free, or there being a good-hearted jury who disregard the law to help a sympathetic defendant. A logical principle is a better way to handle things.)

This is part of what is at stake in the instant case. If Phillips has to give a beautiful cake to Craig and Mullins, then why couldn't Satmar also be forced to give a beautiful cake to Hisler?

Some people would say, "Too bad, Satmar chose to be in business. And it's just a cake." But what if they're wrong? What if there is a right to avoid any involvement, "artistic", "expressive", or whatever, with actions you find morally repulsive, and maybe even a direct (or indirect) attack on your way of life?

So even those who say, "Phillips is a horrible bigot, make him suffer", might want to think about the Shlomo Satmars of the world. Even allowing Phillips to do a (putatively) "horrible thing", by refusing to make Respondents a wedding cake, might be the price to pay for making sure that the Satmars don't have to make a cake for Odin's Nordic Sons.

…A further point is the color of the cake. Could Satmar say, "Since they're white supremacists, I shouldn't have to make a white cake, since that is meant to celebrate whiteness?" Or is he exaggerating?

On a similar note: word is that Respondents eventually got a rainbow wedding cake. Could Petitioners, or those similarly situated, say, "Since they're gays getting married, I shouldn't have to make a rainbow cake, since that is meant to celebrate gayness."? Or, could they at least say, "Well, even if you force me to make a cake in rainbow colors—which are just colors, after all—, I refuse to put them into the shape of an actual rainbow, or the shape of a gay pride flag, because that is definitely an expressive endorsement of gayness, sodomy, and gay marriage."? Would that be legitimate, or not?

(By the way, since we have had a picture of Phillips, here is one of Charlie Craig and David Mullins:

Elizabeth Kiefer, *This Married Couple Just Won A Major Victory For LGBT Rights*, Refinery29, Aug. 14, 2015, 10:30 a.m., http://www.refinery29.com/2015/08/92392/colorado-lgbt-rights-victory-masterpiece-cakeshop.)

Amicus sympathizes with the Court, having to decide on issues which may sound like hair-splitting to many people. But laser precision may sometimes be needed, if one is to be fair to both sides on complicated, emotional, divisive issues.

(Incidentally it is possible that if race is forbidden as a criterion for discrimination, then religion that is racist might be called a proxy for race; and thus, if the Nazis were the bakers, they wouldn't be allowed

to use their "religion" as an excuse to discriminate or have "expressive freedom" not to make a cake.)

VIII. WHAT IF A BUSINESS TRIED TO DENY SERVICE TO INTERFAITH, OR ANY-FAITH, MARRIAGES? OR, "NO CAKE FOR SATANISTS"?

A possible objection to the model above in Section VII, is that it could be used to deny a wedding cake to interfaith marriages, or marriages of one particular faith that a particular baker hates. Amicus finds it horrific for a business to deny service because of consumers' faith; but what about outlier instances?

For example, let us say that Goodie Twoshoes, a highly virtuous Christian (or other traditional religion) baker finds that Darkhon Vlad, the leader of Ye Foule Olde Coven of Satan, a devil-worshippers' group, has sidled into her store, black cape dragging behind him.

"What ho, Christian lass!" Vlad intones, "Thou shalt make me a cake for my upcoming Satanic wedding! Be sure to put a beautiful baphomet [an upside-down pentagram: a satanic symbol] on it, and the words, 'ALL MUST WORSHIP THE PRINCE OF DARKNESS'!

MU HA HA HAA!!"

Twoshoes politely declines, pointing out that she might burn in Hell for eternity if she makes such a cake for the sinister ceremony.

Vlad: "Well, it'd be good company down there!" Then, he paws his oily sideburns and says, "At least, you must make me a black and red cake, that looks

like the burning landscape of Hell! HA HA HA HAAA!!!", as lightning flares in the window behind him.

There are largely the same issues here as with the "Odin's Nordic Sons" scenario *supra*. Should Goodie have to make the Satanists any wedding cake at all? If she makes one, does it have to be black and red? or are such colors, in the given situation, inherently "expressive"—i.e., allowing the baker to refuse using those colors—in that they resemble the volcanoes of Hell, even if Ms. Twoshoes refuses to artistically sculpt the cake so that it actually looks like the doomed peaks and valleys of Hell?

And if we allow her to avoid making the cake (or some "expressive" version of the cake) for Vlad, then, since the Constitution doesn't allow the State to favor or disfavor a particular religion, could we easily prevent someone from refusing to cater an interfaith, or whatever-faith (or even atheist/ agnostic) wedding? Part of freedom is that it may allow people to do vile things, in order that people may have freedom to do good things, too.

Again, some might say, "Too bad, she's in a licensed business, she has to make the cake." But is that true? And even if she is obliged to make the cake for the Byronic baddie, should she be fined massively, re-educated, shut down, or jailed for refusal to make it? Excessive punishment doesn't sound right.

Instinctively, it seems that businesses should have some way to opt out of particular actions that seem abominable to them, except for absolute no-go

zones like race. (One can debate about the difference between "status" and "conduct" endlessly, of course, *vis-à-vis* mere group membership, e.g., being a Satanist who wants a cookie just like a Christian might, versus what that group might actually do, e.g., being a Satanist who wants to practice a Satanic ceremony, as opposed to just buying and eating a cookie like anyone else.)

What if, say, polygamy is legalized—not an impossible thing—, and bakers are forced to bake for polygamous weddings? Where does it end?

The theories in Sections VI-VIII may not satisfy everybody; but they might help bridge some of the gap between

a. discrimination because of race, and

b. "discrimination" against events celebrating polygamy or other particular sexual activity.

If what the Court said in *Obergefell* is correct, that "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here", slip op. at 19 (Kennedy, J.), then that bolsters the instincts of many of us, that "a" *supra*, is always wrong, while "b" might be allowed under some, possibly limited, circumstances.

Is there any other way the difference between "a' and "b" *supra* can be justified legally and rationally?

One way to do so springs from *Matal v. Tam*, 137 S. Ct. 1744 (2017). Amicus respectfully wonders if that case may not have been rightly decided by the

Court; people could now get a federal trademark for an Anne Frank dartboard, or a dartboard utilizing the "n-word" in a horrific racist fashion. Do bigots and haters really deserve federal trademarks?

But *Matal*, *supra*, is what it is, and if people can express themselves so hatefully, then, constitutionally, there is seemingly more latitude for what Amicus has described, i.e., room for business owners not to serve people if they think they are going to go to Hell for participating in activities that bother their consciences.

Of course, if businesses do something really outrageous, like refusing to serve weddings in any of the traditional religions, a requirement by the Court that they post a prior disclaimer or other notice of their prejudices, should likely help get them boycotted bankrupted and, anyway, due to the ensuing bad publicity. We now discuss disclaimers.

IX. IN THE INSTANT CASE OR FUTURE CASES, IT MAY BE WISE TO REQUIRE THAT BUSINESSES PUBLICLY POST THEIR POLICY OF REFUSING TO CATER SAME-SEX WEDDINGS (OR OTHER MATTERS), INSOFAR AS THEY MAY

Respondents had the unpleasant surprise of learning from Masterpiece Cakeshop that that business would refuse to provide a cake for their same-sex wedding…and it was a surprise because the Cakeshop apparently did not make any public posting of that policy. Why wasn't there one?

True, Colorado might forbid Phillips putting a sign at the front of his store, saying, "WE DO NOT

CATER TO SAME-SEX WEDDINGS". However, some States might not forbid such a posting. If businesspeople had the courage of their convictions, they should likely put up such a sign, publicly. This would express their feelings of conscience, and also give warning to people similarly situated to Respondents, so they would not be shocked or dejected by having to hear in private, that they would not be getting a wedding cake.

Even bigots, in a sick way, have shown "candor" by putting signs in their windows, "NO IRISH OR BLACKS NEED APPLY", "WOMEN NOT WELCOME AT THIS BAR", "HINDUS GO HOME", etc. Especially if Phillips's sentiments are less disgusting than some of those just mentioned, then what prevented him from publicly airing them in writing, in some way, shape, or form?

So if Phillips is fined, perhaps his lack of notice to Respondents might be part of that. Or, if he is given a pass because the Court had not decided on that policy before now, then the Court could make that a future requirement, that those businesses who wish to avoid fines must first publicly post, as much as they are allowed to do, their intended exclusions against, or their objections to the State forcing them to be inclusive towards, various sectors of the public, same-sex spouses or otherwise. *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015),

> However, CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet

> indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA. Masterpiece could also post or otherwise disseminate a message indicating that CADA requires it not to discriminate on the basis of sexual orientation and other protected characteristics. . . .

Id. at 288 (Taubman, J.) (citation omitted).

X. ONE FAIR SOLUTION COULD INVOLVE FINING PETITIONERS FOR THEIR BURDEN ON RESPONDENTS, BUT WITHOUT FORCING FUTURE COMPLIANCE OR THREATENING SHUTDOWN OR JAIL TIME

Disclaimers aside: so what is to be done about the main problem? Is the Court caught between Scylla and Charybdis? I.e., must it either rule that: Petitioners' putative rights must be violated, and Petitioners must be fined, forced to "re-educate" their employees, and maybe shut down or even jailed for non-compliance? or, on the other hand, must the Court rule that Respondents' putative rights must be violated, and that bakers have carte blanche to refuse service and thus to make gay spouses-to-be go hunting for another bakery? (And in some regions of the Nation, what if no nearby baker is willing to make the cake?)

Fortunately, all that might be a false dichotomy. What if, instead, if the Court feels that Phillips has to be punished in some way: what about simply fining him? The fine could go not just to the

government, but also to Respondents (which might mean raising the amount of the fine…maybe including the price of a cake bought elsewhere?): a sort of fixed-number "liquidated damages", maybe. This would perform several tasks:

a. Petitioners would be punished;

b. Petitioners would be made to compensate Respondents for lost time, energy, and money spent in having to go find another baker;

c. Any "dignitary harm" to Respondents would be compensated, at least in part;

d. With a fixed amount of damages, there would be predictability, and the need for trial or excessive administrative involvement would be avoided.

The middle points *supra*, "b" and "c", deal with the externalities Petitioners ladle out on Respondents (lost resources, emotional hurt), so that Petitioners would be forced to spend money to place Respondents in roughly the place they were before the refusal to make the wedding cake.

But, since Petitioners' conscience rights and dignity are also important: the Court might not allow the State to excessively fine Petitioners, nor to force them to re-educate their employees, nor to shut down, nor to go to jail. (The State could *encourage* re-education, and provide ample resources for doing so; but re-education would not be mandatory, but rather, precatory, in that there would be no penalty for non-compliance by Petitioners.)

Critics could sneer and call this the "Led Zeppelin solution": i.e., that Petitioners would be "buying a stairway to heaven", Led Zeppelin, *Stairway to Heaven*, *on* Led Zeppelin IV (Atlantic 1971), by being allowed to "buy" the right of conscience ("buy" it by paying fines) not to make a cake for Respondents, without any further punishment. But would that be such a terrible thing?

Under that rubric, Petitioners would be punished and have to pay some damages to Respondents, but Petitioners would still be allowed to practice their faith and business the way they want to—with the proviso that every time they refuse service to people like Respondents, they must pay a fine (and maybe incur community ill-will or boycotts).

Some refusal of service is so odious that society cannot tolerate it; most notably, refusal of service because of race or color, two harmless and immutable characteristics, and considering the background of slavery and "Jim Crow" in the Nation's history. But: remember Shlomo Satmar.

The most that Satmar should be punished, if at all, for his refusal to make a "white" cake (or maybe even a darker-colored one) for Odin's Nordic Sons, should be a relatively small fine and damages, if any. He could pay the fine and move on with his life, and the Nordic Sons, as vile as they are, could move on with their lives, and even slightly richer (sadly enough) due to Satmar's refusal to make them a cake.

And similarly, then, with the instant case. If Respondents want to massively fine, re-educate,

shut down, or jail Phillips and his store and workers: maybe that goes a little too far. Especially since the same coercive tools could be used against Shlomo Satmar, or similarly-situated people. Does America want that result? Does the Court?

No jail, no mandatory re-education, no denial of people's freedoms, no lack of monetary compensation for externalities forced on people. Amicus is not sure there are very many problems with this legal and intellectual model. And if a solution solves problems, maybe it could be adopted.

Admittedly, one issue with having the damages be fixed is that, say, an organized effort—sometimes known as a "conspiracy"—could be made to bankrupt Petitioners or other bakeries, e.g., by having a "flash mob" of a thousand people all go to the bakery, demand a wedding cake for a same-sex marriage, get refused, and then get 500 times the damage amount (1000 people divided by two, since there'd be 500 couples denied service). Perhaps there should be judicial discretion to "impose a reasonable fine", which would let the judge lower the fine, maybe to nothing, in case of such a "cake conspiracy" to bankrupt a baker.

XI. FINES SHOULD BE REASONABLE

Amicus has already implied that fines for Petitioners should not be great. In a similar case to the instant one, in Oregon, bakers Sweet Cakes by Melissa, refusing to make a cake for a same-sex marriage, were fined a whopping $135,000, *see* George Rede, *Same-sex couple in Sweet Cakes controversy should receive $135,000, hearings officer*

says, The Oregonian/OregonLive, updated Apr. 27, 2015, 4:32 p.m., http://www.oregonlive.com/business/index.ssf/2015/04/same-sex_couple_in_sweet_cakes.html. But is that too much money?

See, by contrast, Olivia Solon, *Airbnb host who canceled reservation using racist comment must pay $5,000*, The Guardian, July 13, 2017, 1:00 p.m., https://www.theguardian.com/technology/2017/jul/13/airbnb-california-racist-comment-penalty-asian-american: "An Airbnb host who canceled a woman's reservation using a racist remark has been ordered to pay $5,000 in damages for racial discrimination and take a course in Asian American studies." *Id.* That situation involves the horror of racism, and canceling a pre-made reservation, thus violating reliance interests. But the fine is only $5000, compared to the $135,000 fine mentioned *supra* for just not making a cake for somebody.

Apparently, then, a fine for not making a wedding cake for a gay couple walking in off the street should perhaps be less than $5000—maybe far less. (Although if Petitioners are not required to take a course or otherwise re-educate themselves, perhaps the fine could be raised, lest the burden on Petitioners be made too light.) While Respondents may have had their dignity violated, Petitioners might feel their own dignity violated if they had to renounce their religious values and make the cake.

XII. IT SEEMS EXCESSIVE TO PUT PETITIONERS IN JAIL IF THEY REFUSE TO COMPLY WITH "RE-EDUCATING" THEMSELVES, OR WITH SOME

OTHER COMMANDS

Amicus has already mentioned that jailing Petitioners might be a bad idea; but he repeats it here for the sake or reinforcement. Would people consider jailing Shlomo Satmar for refusing to give a cake, "expressive" or otherwise, to Odin's Nordic Sons? Many people would be quite uncomfortable with that. We might also be uncomfortable, then, with putting Petitioners behind bars for following their consciences.

* * *

"We must love one another or die." W.H. Auden, *September 1, 1939* (1939). On that note: Amicus almost feels like he is writing two briefs in one here. On one hand, he is trying to defend Petitioners' legitimate legal rights and dignities, if any; on the other, he is, though without endorsing same-sex marriage in any way, trying to defend Respondents' legitimate legal rights and dignities, if any. (If Respondents are morally wrong—or Petitioners, for that matter—, they can answer to God in the afterlife; but on Earth, under America's current laws, they may have some protection for their claims.) Civil coexistence and even mutual love, even despite disagreements, is better than mutual hate.

Amicus refers once again to Princess Diana, as he did earlier. Just as that dearly missed member of royalty showed courtly kindness and grace, this Court can do similarly. Courts can be courtly.

Part of that is finding ways not to cause too much misery to decent people. Jack Phillips doesn't seem

like a monster. He is willing to serve LGBT people in various contexts. He is worried about peril to his immortal soul. He deserves a chance.

But so do Charlie Craig and David Mullins. They believe their love, now protected by *Obergefell*, deserves respect, and that they should have the same rights at business establishments that others have. They deserve a chance too.

If the Court can create a better, kinder, more "courtly" solution than Amicus has offered, excellent. Amicus can only try. But when the country is flying apart into polarized fragments, it could really use a decision from the Court that considers everyone's points of view and maybe brings people together, with suitable justice for all, instead of causing more social fracturing and misery for the Nation.

CONCLUSION

The Court should consider what will uphold the dignity of both sets of parties; and Amicus humbly thanks the Court for its time and consideration.

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