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Colorado Appeals Court Issues Second Ruling Against Masterpiece Cakeshop and Jack Phillips

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LAW NOTES

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**9th Circuit Denies En Banc Rehearing of
Challenge to Conversion Therapy Ban**

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it does not foster excessive government entanglement with religion.” Plaintiffs do not dispute this standard and assert that the religious exemption fails the *Lemon* test because it benefits religious institutions over non-religious ones; benefits some religions over others; is not even-handed because some religious institutions affirm LGBTQ+ identities; and entangles the government in religion as Defendants analyze the religious beliefs of the school in approving exemptions. Describing some of Plaintiffs’ explanations as “confusing and contradictory” and lacking developed facts, Judge Aiken was unable to find any impermissible purpose by Congress in enacting the exemption; furtherance of religion by Defendants; or evidence of excessive entanglement as the exemption seeks to limit government interference in religious organizations carrying out their missions. Therefore, despite Plaintiffs having “much to say about Defendants,” Judge Aiken found a motion to amend futile on these grounds.

Looking next to Plaintiffs’ third cause of action, Judge Aiken considered whether Plaintiffs have sufficiently stated a First Amendment free speech claim. Plaintiffs alleged that the religious exemption “exerts a chilling effect” on their rights to exercise “their freedoms of religion, speech, assembly, and association” especially regarding their “religious beliefs about sexuality, gender identity, and marriage.” They also asserted that Defendants lack a compelling governmental interest in granting funding to institutions that restrict free speech in ways not possible in public schools, that the exemption is not narrowly tailored to a further a compelling government interest and could have been limited in ways like Title VII and the Fair Housing Act.

Judge Aiken labeled these allegations as “hard to string together” and noted the disconnect between Plaintiffs claims that the exemption itself violates the First Amendment and Defendants’ alleged lack of compelling interest for matters of funding these institutions. Circling back to the “bare and conclusory” allegation of the exemptions “chilling effect,” she reasons that this claim is

insufficient in claiming that it is a free speech violation, especially considering that it mentions “no reference to speech or viewpoint.” As such, Judge Aiken concluded that amendment would be futile on this basis.

Finally, Judge Aiken addressed Plaintiff’s RFRA claim, which requires them to “allege their injuries are caused by the government, not private actors.” However, per the text of RFRA, government granted exemptions only constitute a violation after a finding that the principles of the Establishment Clause have been violated. Additionally, Judge Aiken finds no facts distinguishing Defendants, not a private actor, burdening their religious beliefs. In consideration of these absences, Judge Aiken again found amendment futile. Further, seeing Plaintiffs were unable to succeed on the merits of their claims, their motion for preliminary relief was denied and this case was subsequently dismissed. Pending whether Plaintiffs decide to appeal, the case may next appear before the 9th Circuit.

Although Judge Aiken determined that Plaintiffs properly asserted constitutional standing under Article III, they otherwise failed to sufficiently bolster their claims to survive Defendants’ motions to dismiss.

Plaintiffs are represented by the Religious Exemption Accountability Project. Defendants are represented by Carol Federighi and Elliott M. Davis from the Justice Department. Defendant-Intervenors are represented by Herbert G. Grey, Gene Schaerr, Joshua James Prince, and Nicholas P. Miller.

Judge Ann Aiken was appointed to the United States District Court for the District of Oregon by former President Bill Clinton. ■

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Colorado Appeals Court Issues Second Ruling Against Masterpiece Cakeshop and Jack Phillips

By Arthur S. Leonard

The Colorado Court of Appeals ruled on January 26 that Masterpiece Cakeshop (a Denver-area bakery) and its proprietor, Jack Phillips, violated the Colorado Anti-Discrimination Act by refusing an order for a custom-designed cake from Autumn Scardina, a transgender woman, because she wanted to use the cake for a celebration of both her birthday and her gender transition. Masterpiece unsuccessfully claimed a First Amendment right to decline the order because of its owner’s Christian religious views about gender and his refusal to express support or approval for gender transition. *Scardina v. Masterpiece Cakeshop*, 2023 WL 407620, 2023 COA 8, 2023 Colo. App. LEXIS 100 (Colorado Ct. App., Div. IV, Jan. 26, 2023).

In the earlier case, *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, Phillips had refused to produce a wedding cake for Charlie Craig and David Mullins in 2012 because of his religious objections to same-sex marriage. He believed that making a custom-designed wedding cake for them would communicate approval for their marriage, which violated his religious beliefs. Phillips lost before the Colorado Civil Rights Commission and the Court of Appeals.

When Scardina called Masterpiece on June 26, 2017, the staff was busy because of the publicity about the Supreme Court’s decision announced that morning to grant a petition for certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in which it subsequently reversed the Colorado Court of Appeals, see 138 S.

Ct. 1719 (2018). The Supreme Court found that the Colorado Civil Rights Commission had shown hostility to Phillips' religious views during its hearing on the complaint by Craig and Mullins, thus failing to provide a "neutral forum" and requiring that the state court ruling against him be reversed. However, the Court did not rule on whether Phillips and his business generally enjoyed a First Amendment right to refuse the men's cake order, and Justice Anthony Kennedy's opinion for the Court cited precedents holding there was no religious exemption for a public accommodation to refuse to comply with an anti-discrimination law, although the case cited involved race discrimination by a restaurant subject to the public accommodation provisions of the Civil Rights Act of 1964 (which do not apply to sex discrimination cases).

Scardina got Phillips' daughter Debra on the phone, asking if she could order a cake with a pink interior and blue icing. After Debra agreed to take the order, Scardina informed her that the cake had a two-fold purpose: to celebrate her birthday and to celebrate her male-to-female gender transition. Scardina was then informed that Masterpiece could not take the order.

Scardina filed a complaint with the Colorado Commission, which found probable cause to believe that Masterpiece violated the law by declining this order. The Commission required the parties to submit to mediation, but that did not result in an agreement. Then the Commission filed a notice and complaint against Masterpiece. Before a hearing could be held, however, Masterpiece sued the Commission in federal court, seeking to block the proceeding. Then Masterpiece, Phillips and the Commission reached a settlement, under which Masterpiece withdrew the federal lawsuit and the Commission agreed to dismiss its complaint against Masterpiece. Masterpiece and Phillips were not required by this settlement to concede that they had violated the statute.

Scardina was not a party to this agreement and did not agree with it, filing her own lawsuit in the Denver

District Court against Masterpiece and Phillips, as the statute allows her to do. Masterpiece offered to pay her \$500.01, one cent above the statutory maximum fine for this kind of case, either by paying the money into the court or giving a certified check payable to her through her lawyer, but the court refused to accept the money and so did Scardina. There was a trial in Denver District Court, which ruled in Scardina's favor. Masterpiece appealed, raising jurisdictional arguments and repeating the First Amendment free exercise and free speech arguments from its earlier case, with the same result: The Colorado Court of Appeals three-judge panel unanimously ruled for Scardina, in an opinion by Judge Timothy Schutz.

Before addressing the merits, Judge Schutz's opinion dealt with various procedural/jurisdictional arguments raised by Masterpiece. The court found that Scardina had done all she had to do to exhaust administrative remedies before filing suit. Masterpiece also claimed a statutory bar, finding that the Commission lost its jurisdiction over this claim by entering into the settlement with Masterpiece, thus it was open for Scardina to file her own lawsuit under the statute. Masterpiece also argued that because it had tendered one cent more than the statutory maximum fine for this sort of violation and the Commission had a settlement agreement with Masterpiece, Scardina's claim was precluded. Rejecting this argument, the court noted that Scardina was not a party to the settlement, and that the Commission's dismissal of the complaint pending before it did not constitute a final judgment on the claim that Scardina filed in the district court. "The absence of a final judgment prevents the application of the claim preclusion doctrine," wrote Judge Schutz. Neither was the claim mooted by Masterpiece's attempt to pay Scardina what she could have won as damages under the statute, plus any accrued court costs. The court pointed out that counsel for Masterpiece, in offering the money, said it was "not to be construed as an admission of liability, fault, or wrongdoing caused by [Masterpiece or Phillips] or as an admission that

[Scardina] has been caused any injury by [them]." The trial court determined that neither attempting to pay the money into court nor attempting to pay it to Scardina directly had mooted her claim, since the claim was not just about the money.

After disposing of these non-substantive objections raised by Masterpiece, the Court of Appeals found, contrary to Masterpiece's contentions, that the refusal of the cake order was "because of Scardina's transgender status." Trial Judge A. Bruce Jones had found that at first Debra agreed to make the cake as described by Scardina, "but then retracted the commitment once Scardina told her what the cake was for." Jack Phillips testified that he would make the same custom pink and blue cake for other customers, if he did not know why the cake was being used and, "most critically," wrote Judge Schutz, "Phillips acknowledged that a pink cake with blue frosting 'has no intrinsic meaning and does not express any message.'" But the order was refused after Scardina communicated that the cake was intended to celebrate her gender transition.

Phillips argued that the order was declined not because Scardina is transgender but because of "the message conveyed by its intended use to celebrate such status." But, citing the Supreme Court's earlier decision, Judge Schutz observed that "the Supreme Court has rejected efforts to differentiate between discrimination based on a person's status and discrimination based on conduct that is inextricably intertwined with such status," and approved the ruling on this argument by Denver District Court Judge A. Bruce Jones.

The court rejected Phillips' argument that Colorado applies the anti-discrimination law using an "offensiveness rule" that allows bakers to decline to create messages that they find offensive, citing a stunt that had been pulled by William Jack, who, responding to publicity about the earlier case, had gone to several bakers seeking cakes decorated with messages condemning same-sex marriages with Biblical verses and images, but had been refused by those bakers, who

found Jack’s intended message to be offensive. Jack filed complaints with the Commission, which found that the bakeries had not discriminated based on Jack’s religion “but instead refused to create cakes for anyone, regardless of creed, where a customer requests derogatory language or imagery.”

The Colorado court concluded that “the outcomes in Jack’s cases were not due to whether the proprietor or the Commission viewed the message as objectionable based on its religious content but, rather, because the cakes required the bakers to create a message that amounted to compelled speech.”

In this case, Judge Schutz pointed out, Scardina did not ask for a cake that included Biblical texts, just “a pink cake with blue frosting with no verse or imagery.” In light of Phillips’ concession at the trial that there is no inherent meaning or expressive message associated with such a case, it could not fall within an alleged “offensiveness rule” exception, “even if we assume, for the sake of argument, that such an exception exists.”

The court found that making the cake that Scardina wished to order was not “inherently expressive” activity, detracting from Phillips’ free speech argument. Would anybody who saw a cake with blue icing, knowing it was produced by Masterpiece Cakeshop, interpret that cake as expressing any message whatsoever? Masterpiece called a witness at the trial and asked what message he would derive from a pink cake with blue icing. Nothing, he said, unless he was informed that it was ordered by a person celebrating a male-to-female gender transition. From this, Phillips argued that the cake “may be perceived as conveying information.” But, said the court, “the information is not derived from any artistic details or message created by the baker. Rather, the message in that context would be generated by the observer based on their understanding of the purpose of the celebration, knowing the celebrant’s transgender status, and seeking the conduct of the persons gathered for the occasion.” Thus, the court concluded, “the message would not be attributable” to the baker.

Turning to the free exercise of religion argument, the court found that Colorado’s anti-discrimination law is a religiously-neutral law of general application. Under the Supreme Court’s long-standing precedent, *Employment Division v. Smith*, 494 U.S. 872 (1990), such a law may be applied even though it incidentally burdens free exercise, so long as the state had a legitimate governmental interest for the law. In this case, the court considered that Colorado has a compelling interest in preventing discrimination by businesses providing goods and services to the public.

Phillips argued that because of his free speech claim, the court should put a greater burden on the state to justify this alleged imposition on his religious beliefs, but the court reminded him that it had already determined that his free speech rights were not involved here. The court also rejected Phillips’ attempt to equate this case to the earlier case as an instance of hostility to religion by the Commission. The Commission’s conduct is not implicated in this lawsuit at all, because it was filed by Scardina after the Commission settled her discrimination claim in a way unsatisfactory to her, and Phillips is appealing a decision by the trial court, not by the Commission. The Commission, unlike in the prior case, is not a party to this litigation.

“We do not discern any suggestions of hostility in the [trial] court’s statements,” wrote Schutz. “The trial court gave all parties the benefit of its careful attention to the evidence and arguments they presented, and the court rendered a thorough order that dispassionately explained the reasons for its rulings. In short, these proceedings were not marked by any hostility toward Masterpiece or Phillips, or by a desire to punish or target them based on their religious views.”

This is, of course, just one stage in the litigation. Alliance Defending Freedom, representing Masterpiece and Phillips, has an agenda in these sorts of cases: getting the Supreme Court to overrule *Employment Division v. Smith*. A majority of the justices have in recent years signaled their unhappiness with the *Smith* rule, but as of yet the Court has backed away from attempts to overrule it.

In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), Justices Thomas, Alito and Gorsuch signaled their eagerness to overrule *Smith* in a concurring opinion, but did not bring along Chief Justice Roberts or Justice Barrett on this point. Perhaps this case will provide a vehicle for them to do so if they can find one more vote.

Autumn Scardina is represented by the law firms of Fennemore Craig, P.C. and King & Greisen LLP, both of Denver. The case drew amicus briefs in support of Scardina’s lawsuit from the Colorado Hispanic and LGBT Bar Associations, the Colorado Women’s Bar Association, and in support of Masterpiece by now-former Arizona Attorney General Mark Brnovich. ■

