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On Performativity and Compelled Commercial Speech: Toward a Workable Standard

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Contemporary compelled speech doctrine is untenable in the face of increasing tensions between public accommodations laws and First Amendment protections for free speech and free exercise of religion. Religious liberty advocates can frame constitutional challenges to anti-discrimination laws as compelled speech claims because current precedent fails to satisfactorily operationalize the performative dimensions of expression. Controversies about how to balance free expression with public accommodations laws call for a reimagining of compelled speech doctrine. This paper considers how Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018) illustrates the problems with current compelled speech precedents and begins to outline a new standard that might protect core First Amendment principles and the equality interests at stake. Specifically, I assess the arguments advanced in concurring opinions written by Justices Thomas and Kagan through the lens of performativity to illustrate the insufficiency of current doctrine. I then argue for a particularity standard that would provide a more workable test to better balance the demands for equality in public accommodations with freedoms of speech and religious exercise.

A series of recent Supreme Court decisions[1] have begun broadening religious exemptions to neutral laws of general applicability, including non-discrimination ordinances designed to protect the rights of LGBTQ+ citizens, public health mandates, and coverage requirements for employer sponsored healthcare plans.[2] In what Micah Schwartzman and Nelson Tebbe described as establishment clause appeasement, a parallel set of Supreme Court decisions[3] have permitted increased entanglement between religion and the state, in what some argue is an attempt to appease

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Judeo-Christian religious groups[4] who perceive themselves as victims in a socially progressive culture.[5] Both threads of this burgeoning jurisprudence raise concerns for how the free speech clause may be used to weaken legal protections for equality. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[6] is an illustrative case that problematizes one dimension of this issue: the relationship between compelled speech precedents and legal strategies that seek to limit the scope of non-discrimination laws. Religious entrepreneurs like Jack Phillips, the owner of Masterpiece Cakeshop, and religious organizations that run schools and hospitals, such as the Little Sisters of the Poor, find themselves at the center of legal disputes about how to balance the need for non-discrimination ordinances with constitutional protections for free speech and the free exercise of religion.

Charlie Craig and Dan Mullens, a same-sex couple, sued Jack Phillips for refusing to create a cake for their wedding reception in 2012. In his legal defense, Phillips appealed to religious liberty as construed under the Free Exercise and Free Speech Clauses of the First Amendment. The appellants argued that in obliging Phillips to create a custom cake for a same-sex wedding, Colorado violated his constitutional rights by trying to compel him to create messages in opposition to his religious faith, even though he did not comply. Writing for a seven-justice majority, Justice Kennedy ruled for the baker on narrow grounds, skirting substantive questions about how to reconcile the First Amendment with the need to protect citizens from discriminatory treatment. Rather, Kennedy seized on statements made by a member of the Colorado Civil Rights Commission that expressed hostility toward the baker's religion as grounds for resolving the case narrowly on free exercise grounds. The Court reaffirmed that the state must remain neutral toward religion but declined to address whether Phillips was being compelled to speak in having to bake a cake for a same-sex wedding or whether he was merely compelled to provide a public accommodation. Put differently, the Court did not decide whether cake is speech or articulate criteria for discerning what counts as compelled speech in the context of public accommodations. Lack of clarity in this area of First Amendment law poses problems for religious business owners, legislators, and lower courts.

This narrow decision remains unsatisfying for First Amendment scholars. Many argue that religious exemptions undermine the purpose of non-discrimination ordinances and view such exemptions as an affront to dignity, not merely inconveniences for LGBTQ+ customers.[7] Conversely, religious liberty advocates warn that free exercise is becoming a second tier right and submit that religious business owners should be exempt from some ordinances on free exercise grounds.[8] Neither camp got the ruling they desired in *Masterpiece.* Although narrow in its reasoning, however, the decision may portend broader implications for the adjudication of future free speech and free exercise disputes. Right-leaning scholars, such as Douglas Laycock, have suggested that the ruling in *Masterpiece* constituted an important step toward restoring constitutional protections for religious liberty in gesturing toward a re-interpretation of *Employment Division v. Smith*. The Court in *Smith* held that the free exercise clause does not prevent the enforcement of neutral and generally applicable laws that may incidentally burden religion.[9] The reasoning in *Masterpiece*, Laycock explained, suggested that any law which provides for secular exemptions is not generally applicable; and thus, if religious exemptions are not also available, that law violates the First Amendment by failing to be neutral with respect to religion.[10] Others find this possibility problematic. In an essay about *Masterpiece* in the *Supreme Court Review,* Melissa Murray echoed the primary sentiment among left-leaning scholars that the decision is consistent with an emergent trend to view white Christians as victims whose religious freedom is threatened by an increasingly multicultural America. She argued that the decision reflected an inversion of animus doctrine in anti-discrimination law, making "the oppressed victim no longer the discrete and insular minorities… but rather religious objectors who were once trumpeted as a 'moral majority.'"[11]

The decision also raised critical questions for rhetoricians because Justice Kennedy appeared to be of two minds on the role of rhetoric in society. Whereas legal scholars were concerned about the use of the First Amendment to limit anti-discrimination protections, rhetoricians may also be troubled by Kennedy's disavowal of rhetoric. The majority opinion in *Masterpiece* was rhetorically problematic in two senses. First, it underestimated the influence of rhetoric on the cultural dialogue about equality

and it validated religious liberty concerns about LGBTQ+ equality. This lent "moral encouragement" to opponents of LGBTQ+ rights by "providing ammunition for discrimination justified by religious freedom."[12] Second, Kennedy's understanding of rhetoric appeared contradictory: he conceived of Phillips' use of religious freedom as a defense for refusing to serve the couple as *merely* a rhetorical tactic, whereas the commission's criticism of Phillips' religion was deemed sufficient to show unconstitutional animus against religion and thereby violate his First Amendment rights.

I focus in this essay on the free speech dimension of *Masterpiece* and analyze the deficiencies in current precedent that encourage litigants to make compelled speech arguments to defend religious liberty interests. Although important questions persist about how to apply the free exercise clause in these disputes, the use of the free speech clause to diminish the effectiveness of non-discrimination protections is underappreciated. I argue that a reimagining of compelled speech doctrine is necessary to resolve controversies about how to balance religious liberty interests and the need for non-discrimination ordinances. Recourse via the free exercise clause remains insufficient in a commercial context, notably in cases involving sole proprietors and small family businesses. In what follows I analyze two of the concurring opinions in *Masterpiece* to develop a two-fold claim: first, that current compelled speech doctrine fails to satisfactorily operationalize the performative dimensions of expression. By analyzing Jack Phillips' free speech claim through the lens of speech act theory[13] and the arguments in Justice Thomas' concurrence, I illustrate how current case law on compelled speech is untenable. Ambiguity in this doctrine encourages litigants to challenge non-discrimination ordinances on compelled speech grounds.[14] Second, I argue for the adoption of a particularity standard to adjudicate claims of compelled speech in religious liberty contexts. Such a standard, I submit, would allow lower courts to adjudicate religious liberty claims made by entrepreneurs whose work could be characterized as artistic—florists, make-up artists, decorators, et cetera—while ensuring individuals retain protections from having government compel them to express a particular message they wish not to communicate.

Case History

After marrying in Massachusetts, Craig and Mullins planned to host a wedding reception in their home state of Colorado.[15] They visited Masterpiece Cakeshop, a bakery in Lakewood owned and operated by Phillips, to inquire about ordering a cake for their wedding reception. The factual record is unclear about a critical contextual issue: whether a custom design for the cake was requested prior to the refusal of service. According the case record, the couple was "browsing a photo album of Phillips' custom designed work, when Phillips sat down with them at his consultation table."[16] However, Craig and Mullens "did not mention the design of the cake they envisioned."[17] Phillips informed the couple that he did not create cakes for same-sex weddings but offered to sell them other products. He explained his refusal to produce a custom cake for Craig and Mullens on the basis of his belief that to "create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible would have been a personal endorsement" of their union.[18] Phillips also claimed that all his wedding cakes are individually designed, custom products.[19] Whether the couple requested a "custom" cake or merely a generic one is a critical fact for adjudicating the merits of Phillips' compelled speech arguments, making the case a less than ideal vehicle for resolving key First Amendment questions.

Craig and Mullens subsequently filed suit under the Colorado Anti-Discrimination Act (CADA),[20] which provides that businesses cannot refuse service to patrons on account of their membership in a protected class. A 2007 amendment to CADA added protections from discrimination based on sexual orientation. An initial investigation by the Colorado Civil Rights Division found that Phillips had "on multiple occasions... turned away potential customers on the basis of their sexual orientation,"[21] and the case was then referred to the Colorado Civil Rights Commission, which sent it to a State Administrative Law Judge (ALJ) for a formal hearing. The ALJ found that Phillips' refusal of service was discriminatory and rejected his claims that (1) CADA compelled him to express a message with which he disagreed, since preparing a wedding cake did not count as constitutionally protected speech, and (2) that the same requirement violated

his right to free exercise of religion. The Commission affirmed the judgment of the ALJ and ordered additional remedies including requiring "comprehensive staff training" on CADA and the preparation of "quarterly compliance reports" that document "the number of patrons denied service" and the reasons why.[22] The Colorado Court of Appeals subsequently heard Phillips' case and affirmed the previous judgments.

When the Colorado Supreme Court declined to hear the case, Phillips appealed to the U.S. Supreme Court, which granted certiorari and subsequently heard oral argument on December 5, 2017. As put by petitioners, the question presented was "Whether applying Colorado's public accommodation law to compel artists to create expressive content that violates their sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment."[23] The case initially seemed primed to establish an important precedent, but the majority opinion ultimately provided little direction for legislators and lower courts about how to reconcile religious liberty with antidiscrimination laws. The Court only held that Phillips' First Amendment rights were violated because statements blatantly hostile to his religion were made by a member of the Commission during its proceedings. When the Court issued its ruling, media reports presented misleading accounts about what it meant. The 7–2 vote in favor of Phillips caused some social conservatives to celebrate and some progressives to denounce the Court for sanctioning discrimination. But the fact that seven justices signed on to the judgement did not mean there was agreement as to a standard that might help resolve future disputes. The Court's holding in *Masterpiece* lacks broad applicability because it turned upon the anti-religious hostility expressed by one member of the Commission (and the rest of the Commission's failure to disavow those remarks). We learn little about the Court's thinking on the free speech dimension of the question presented from the majority opinion. The concurrences, however, provide crucial analysis of issues that deserve further study.

Performativity and the Problem of Context

Theories of performativity problematize the distinction between speech and conduct, which is essential for determining whether creating a cake, arranging flowers, or

designing a website are public accommodations or protected speech that the government cannot lawfully compel. In a series of lectures at Harvard University, J.L. Austin outlined the principles that would become speech act theory.[24] Austin divided utterances into two primary categories: (1) constative utterances, which describe something and may be factually true or false, and (2) performative utterances wherein "the issuing of an utterance is the performing of an action."[25] Utterances act in the world by illocution, perlocution, or a combination of the two. Illocutionary speech acts produce effects by their very utterance—that is, the speaker *in* saying something is simultaneously performing an action. For example, when a judge states, in her official capacity, "I hereby sentence you to 20 years" she performs the act of sentencing, whereas when a local reporter states, "The court has sentenced the defendant to 20 years," his utterance is constative, merely a statement that describes the act that the first utterance performed. The latter example is constative not just because it is written in the past tense or framed as a statement of fact. Given the right context, performatives that appear to be mere statements of fact can still exert illocutionary force. When a police officer confronts a citizen and states "you have violated the law," the utterance is performative insofar as the officer's position enables him to provisionally indict a subject for unlawful behavior. However, it is also constative in the sense that a jury may subsequently conclude that the officer's statement was false and, in another performative act, "find" the accused not guilty.

Perlocution differs from illocution. The effects of perlocutionary performatives are often temporally distant from the utterance and less reliant on the intent of the speaker. Austin used perlocution to describe "what we bring about or achieve *by* saying something."[26] Utterances that act by perlocution "initiate a set of consequences," which tend to manifest at different times than the utterance itself.[27] For example, when a meteorologist warns that rain is probable tomorrow, some viewers will choose to pack an umbrella, but only if they were persuaded that it will rain. The meteorologist does not modify the probability of rain in saying so; rather his speech act may cause viewers to modify their beliefs about tomorrow's weather. Rather than completing the action simultaneously with the utterance as an illocutionary performative does, perlocutionary performatives may act for some time after the words are uttered. For this reason,

perlocutionary force can also be cumulative. Austin explained this by distinguishing between a "perlocutionary object" (e.g., notifying), where the impact is more immediate and intent of the speaker is typically relevant, and an additional layer of consequences, which he termed the "perlocutionary sequel" (e.g., alarming).[28] The sequel of a perlocution may occur irrespective of the speaker's intent and can build cumulatively.

Speech acts rely on context to function properly, but even unsuccessful performatives may be considered protected speech under current case law. As Austin showed, a speech act must meet certain conditions to be felicitous: "Besides the uttering of the words of the so-called performative, a good many other things have as a general rule to be right and go right" for a performative to work.[29] If felicity conditions are not met, the act will "misfire," making the act "void or without effect."[30] For example, when a boisterous baseball fan declares "You're out" from the grandstand upon watching a close play, the fan attempts to perform a speech act, but it misfires because the fan lacks the position that would give any force to her utterance attempting to adjudicate the play. Only if the umpire makes such a declaration will a runner be compelled to return to the dugout.

Current case law remains unclear about whether a speech act must be felicitous to merit constitutional protections. The Court's landmark ruling in *West Virginia State Board of Education v. Barnette* considered whether a speech act could be compelled and suggested that even infelicitous performatives may be protected.[31] The petitioners in that case, practicing Jehovah's Witnesses, challenged a school policy requiring students to salute the American flag during the recitation of the pledge of allegiance or be considered insubordinate and subject to disciplinary action. This, Justice Jackson opined, was impermissible compelled speech because "no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[32] The act of the salute, even if it were not felicitous (i.e., students are insincere in their allegiance to the flag), the *Barnette* Court implied, was nevertheless "speech" for purposes of the First Amendment. Because "the compulsory salute and pledge require[d] affirmation of a belief," it therefore violated the First Amendment by requiring students to assent to the viewpoint associated with saluting the flag at school.[33] Applying the logic

of *Barnette* to Phillips' case would ask us to consider whether his providing a cake similarly would require him to affirm a belief in violation of his conscious.

There has long been "significant disagreement on which speech acts, if any, should be viewed as conduct rather than 'speech' in a legal sense."[34] The murky factual record of *Masterpiece* made it a less than ideal vehicle for resolving the legal questions involving performativity and compelled speech. The alleged speech act requested of Phillips did not involve language (i.e., an inscription on the cake), and it is unlikely that one would attribute the message of the cake to the baker. Even if the cake contained an inscription reading "God bless this union," the context does not necessarily suggest that this speech belongs to the baker. It might seem just as plausible that it was authored by the couple or by family members. In other words, we have reason to doubt whether the cake would**,** to quote Jacques Derrida, "possess the characteristic of being readable even if the moment of its production is irrevocably lost or if I do not know what its alleged author-scripter intended to say."[35] On the other hand, lack of clarity in the standards for operationalizing the performative dimensions of expression leave the door open to an alternative interpretation: that Phillips' production, because it is sufficiently artistic and he believes it expresses a viewpoint, is protected speech regardless of whether it is felicitous or how viewers may interpret the message. If so, compelling its creation may violate the First Amendment in a similar fashion as the compelled flag salute in *Barnette.*

Adjudicating compelled speech claims requires deciding when performatives qualify as protected speech. When performatives operate by perlocution, it becomes much less clear whether that act should be considered "speech" and thus subject to prohibitions of being compelled by the state. In perlocution, the temporality of the communicative act expands to such a degree that it becomes difficult to pinpoint its origin. It is one thing to claim that illocutionary performatives should be subject to the First Amendment's demands because the speaker's position, intentions, and the context must align to ensure the felicity of those utterances. However, it quite another claim that there are downstream perlocutionary consequences that result from an utterance's uptake.[36] If Phillips saw the object of his perlocution as defending traditional marriage, its sequel served to stigmatize same-sex relationships, regardless of whether he intended that

consequence. Speech acts that cause harm because they cumulatively drive a narrative (e.g., that same sex-marriage is not real marriage), which may produce consequences (e.g., discrimination and stigma against LGBTQ+ individuals), operate via perlocution rather than interpellation. If Phillips' refusal to create the cake harmed the couple via illocution, it would be in the interpellative sense: that the couple's dignity was not recognized, causing them to feel insulted in having been so hailed. On the other hand, if Phillips' refusal to create the cake caused injury as a perlocutionary sequel (by the consequences it helped make possible), it becomes harder to interpret it as speech rather than as conduct. The doctrine on compelled speech must evolve to account for the performative dimensions of expression problematized in this section. One means of advancing this evolution is by placing particularity at the center of any standard distinguishing speech from conduct.

Developing Law on Compelled and Commercial Speech

Commercial speech was not originally thought to be protected by the First Amendment. Rather, it was believed that it was only necessary to protect core political speech.[37] This norm began to change in the 1970s when a series of cases tested whether and under what conditions commercial advertising warranted First Amendment protections. As Justice Blackmun concluded for the majority in *Bigelow v. Virginia*, "the relationship of speech to the marketplace does not make it valueless in the marketplace of ideas."[38] Following *Bigelow* the Court developed a doctrine on commercial speech, most of which focused on the regulation of advertising. In general, this case law suggests that it is permissible for the government to regulate false or misleading claims made in a commercial context, but that truthful information about lawful activity is protected speech. The Court also established that the government has a compelling interest in regulating the speech of proprietors who are licensed (e.g. physicians, lawyers) and subject to professional standards enforced by state or local authorities, but that any regulation in the name of upholding professional standards must be narrowly tailored to achieve that goal.[39] One area where licensed proprietors are regulated concerns requirements to make certain disclosures.

Despite these developments, the doctrine on compelled commercial speech leaves much to be desired. As put by Vikram Amar and Alan Brownstein, "this area of constitutional law lack[s] any firm, principled foundation" and remains "unmoored from any serious doctrinal framework."[40] In a review of commercial speech doctrine, R. Michael Hoefges concluded that jurisprudence on commercial speech remains underdeveloped in three areas: (1) discerning misleading claims from non-misleading claims, (2) the degree of latitude that can be exercised in regulating quality of service claims, and (3) the constitutionality of requiring disclosures in advertisements for professional services.[41] The doctrine should be clarified in all three areas, but recent controversies like the one exemplified in *Masterpiece* add a fourth: the degree to which traditional compelled speech law applies to commercial actors *outside* the context of mandatory disclosures. That is, under what circumstances can the state require a business to express a message *in* and *by* its exchange of goods and services? Moreover, what if the commercial product itself could be deemed expressive? While some cases have addressed the constitutionality of disclosure requirements, it is difficult to apply such rulings in the context of vendors whose products or services are arguably artistic expression in themselves.

The idea of that compelling a citizen's speech in a commercial context might raise Constitutional concerns emerged more recently. Only one of the three areas for development in commercial speech law that Hoefges identified involves compelled speech, the issue of mandatory disclosures. Overall, there remains no clear standard for determining when it is permissible for the state to require a business to communicate a message. Hoefges suggested that the Court ought to definitively adopt the *Central Hudson* test[42] for adjudicating questions about required disclosures in professional communication.[43] Under such a framework, courts would apply intermediate scrutiny to disputes involving commercial speech, rather than the higher bar of strict scrutiny, in recognition of the fundamental distinction between commercial and individual speech. In *Zaudrerer v. Office of Disciplinary Counsel*, the Court deemed it appropriate to apply a lower level of scrutiny in commercial contexts when the presence of disclosures might prevent consumer deception.[44] However, this finding was complicated by the issues raised

in a 2018 decision, *National Institute of Family and Life Advocates v. Becerra*.[45] In *Becerra,* the Court ruled that California could not compel crisis pregnancy centers (CPCs) to post a disclosure about the availability of low cost abortions in the state because that regulation had the effect of modifying what Eugene Volokh has termed a "coherent speech product," the anti-abortion message that CPCs wished to convey.[46]

The question of how to treat mandatory disclosures that may modify a coherent speech product remains open. But even if courts could resolve this issue, it will be hard to apply such a rule to disputes that involve tensions between religious freedom and public accommodations. As a general matter, "traditional speech doctrine is simply not equipped to deal with claims of coerced speech."[47] To make it work requires drawing bright line distinctions between speech and conduct, which do not hold up well in commercial contexts; moreover, empirical research has demonstrated that adjudicators are likely to use motivated reasoning when deciding to which category an edge case belongs.[48] Unfortunately, delimiting the contours of this line is incredibly difficult in a service-driven economy where communication is an integral part of nearly all business transactions. Since speech is ubiquitous in the marketplace, the question to be answered is *when* that speech is protected expression subject to strict scrutiny and when should it be subjected to intermediate scrutiny, which has been suggested as a pragmatic solution that might balance competing doctrinal demands.[49]

The Court's Holdings

Justice Kennedy's majority opinion in *Masterpiece* set up two problems that the concurrences attempted to address. First, Kennedy problematized the issue of symbolic speech that does not neatly belong to the conventional categories of expression protected by previous precedents. Kennedy acknowledged that a cake is not protected speech *de novo*, but also noted that its contextual significance at a wedding celebration might prompt debate as to whether it should merit First Amendment protections. Second, as he did in his *Obergefell* opinion, Kennedy reiterated the Court's moral commitment to gay rights while simultaneously acknowledging that some citizens may have good faith

religious objections to same-sex marriage.[50] Somewhat after the fashion of a well-known cake adage, Kennedy tried to have it both ways.

Justice Kennedy acknowledged the difficulty of delimiting what counts as protected expression but did not conduct a rigorous First Amendment analysis that might clarify the Court's stance on performative speech. Kennedy noted, "the free speech aspect of the case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech," but, he conceded, the case could be "instructive" regarding how the "application of constitutional freedoms in new contexts can deepen our understanding of their meaning."[51] In his description of the issues in the case, Kennedy recognized Phillips' belief that to create a wedding cake for a same-sex wedding "would be equivalent to participating in a celebration that is contrary to his own religious beliefs"; he also highlighted that Phillips' craft requires artistic skill, all of which suggests that it could be construed as expression.[52] But the Court ultimately did not decide whether creating a cake is protected speech. Kennedy cited ambiguities in the factual record as one reason for not opining on this question. As Kennedy saw it, that question could not be answered without knowing whether the cake would contain a particular message: "If the baker refused to design a special cake with words or images celebrating the marriage . . . that might be different from a refusal to sell any cake at all."[53]

Because the majority chose not to opine on the free speech question, Justice Kennedy declined to articulate a standard for adjudicating future cases like this one. In addition to the concurring opinions that I examine in detail, the case produced two other opinions: a concurrence by Justice Gorsuch, joined by Justice Alito, and a dissent, written by Justice Ginsburg and joined by Justice Sotomayor. The Gorsuch concurrence expounded at length about what he deemed disfavored treatment of Phillips on account of his religion by comparing Phillips' case with a set of lawsuits filed by a religious customer against three other local bakers, which presented similar fact patterns. Gorsuch argued that the Commission only reached different results because they examined the cakes in these cases at different levels of generality. As conceived by the Commission, Phillips was only asked to bake a generic cake, whereas the bakers approached by the

religious customer, William Jack, were asked to create cakes with explicit messages that demonized same-sex marriage.[54] Had they been examined at the same level of generality, Gorsuch submitted, the same result should have followed. The dissent said essentially the opposite: that the requests made by Jack were easily distinguishable because it was only in the case of the request made of Phillips that refusal was predicated on the identity of the customers. The dissent also disputed whether statements by one commissioner were sufficient to demonstrate animus in the Commission's deliberations. The primary disagreement between the Gorsuch concurrence and the Ginsburg dissent, then, might be understood to turn on the role of particularity.

Drawing a Line at Particularity

In a short concurring opinion, Justice Kagan, joined by Justice Breyer, laid the groundwork for a standard based on the presence of a particularized message in artistic products. Kagan and Breyer argued that absent the commissioner's ill-conceived hyperbole, CADA—or any similar statute—would pass constitutional muster if challenged on First Amendment grounds. Like the dissent, Kagan rejected Justice Gorsuch's claim that that the Commission violated the neutrality principle set down in *Church of Lukumi Babalu Aye v. Hialeah*[55] and *Employment Division v. Smith*[56] by treating Phillips' case differently than it treated the cases involving bakers who refused to create cakes for a religious customer. In those cases, William Jack approached three Colorado bakers to request cakes that expressed religious messages opposed to same-sex marriage using words and widely-understood visual signifiers. Conversely, Phillips was asked to bake a generic wedding cake, without any unique signifiers. For this reason, Kagan criticized the "the state agencies' consideration" of these cases for failing to recognize that "a proper basis for distinguishing the cases was available—in fact, was obvious."[57] The basis for this distinction turned on particularity. Although they do not phrase it as such, Kagan and Breyer suggested that without a particularized message, a cake is just like any other good or service and properly subject to regulations concerning public accommodation.

Rather than being evidence of animus toward religion, the different outcomes in *Masterpiece* and the *Jack* cases could be explained by the absence of particularity in the

message Phillips claimed he was compelled to create and its presence in the *Jack* cases. Because Phillips did not discuss with Mullens and Craig what messages would be on their cake one can conclude that he objected to the hypothetical cake because of its implied role in a same-sex wedding. Thus, his objection was related more closely to the identity of the customers than to any message the cake itself might convey. If this rationale for refusing service were sufficient, almost anyone with a religious objection to same-sex marriage could apply for an exemption from having to serve same-sex couples. In the cases brought by Mr. Jack we know the specific messages he requested: Jack attempted to order two cakes that contained Bible verses from Psalms, Leviticus and Romans that disapproved of homosexuality as sinful and images of "two groomsmen covered by a red X" to visually signify opposition to same-sex marriage.[58] Unlike the non-descript cake about which Craig and Mullens inquired,[59] these messages derived their illocutionary force from words (Bible verses) and common symbols (a circle with an X). Moreover, the bakers approached by Jack refused to make for him cakes "that they would not have made for any customer," so they were not "singl[ing] out Jack because of his religion."[60] Phillips, on the other hand, refused to sell to a same-sex couple a product that he would have made for an opposite-sex couple. Lacking explicit messaging, Phillips making a generic cake could only implicitly communicate a pro same-sex marriage message, thereby compelling him to speak contrary to his religious convictions. On the reasoning of Justice Kagan's concurrence, unless the Court were to broaden its conception of protected expression to say that to bake a wedding cake—whatever its specific contents—is to perform a speech act, the absence of particularity in Craig and Mullens' request for a wedding cake means that that cake is not speech. It was just a cake.

Compelling Artistic Expression

Justice Thomas' separate opinion concurring in part and concurring in the judgement was the only writing to directly address the free speech question presented. Thomas argued that wedding cakes should be considered expressive because the Court's precedents have already recognized a wider array of conduct as meriting free speech protections and because the history of wedding cakes imbues them with a rich symbolic

significance. For Thomas, resolving the case only on free exercise grounds raised concerns for how future religious liberty claims involving performative speech might be decided. If wedding cakes cannot be construed as expressive, he argued, there is little to prevent other bakers, florists, hair stylists, and wedding planners who, like Phillips, consider their work artistic, from being compelled to produce messages opposed to their religious beliefs about marriage. For this reason, Thomas believes that the Court should clarify prior precedents to ensure that public accommodations laws remain subject to the First Amendment's demands.

Justice Thomas acknowledged that most public accommodations laws target conduct and are valid when they are neutral and generally applicable per the Court's ruling in *Smith.* However, he also noted that in the modern service economy some of these laws have the effect of making speech itself an accommodation, a scenario for which *Smith* does not account. The First Amendment must apply with full force to laws in the latter category, he argued. Thomas substantiated this view by analogizing *Masterpiece* to the Court's 1995 ruling in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,* which involved a Massachusetts law that prevented persons from being refused entry to a place of public accommodation on account of sexual orientation. A group of LGB Irish-Americans filed suit, arguing that the law required they be allowed to march in a St. Patrick's Day parade, but the Court ruled that parades are expressive and that the effect of applying that law in this case was to "alter the expressive content" of the parade, thereby compelling speech on the part of its organizers.[61] Put differently, the Court held that parades constituted a *coherent speech product*, although they did not use that language, and to interfere with it is tantamount to compelling speech. In *Hurley,* too, it was not an explicit, particularized message that the organizers opposed; rather it was the symbolic implication that the participation of the LGB group "merit[ed] celebration."[62] Although Thomas recognized the validity of public accommodations laws generally, he stressed that those laws become constitutionally invalid when they have "the effect of declaring… speech itself to be a public accommodation."[63] From this perspective, if a cake is expressive, then it must be afforded protections just as the parade in *Hurley* was. Although the message may be chosen by the couple, this logic goes, the baker, like the

parade organizers, is still being obliged to alter the expressive content of the product, making speech itself the accommodation.

Justice Thomas pointed to the Court's precedents and the history of wedding cakes as reasons for designating them as expressive. Prior cases recognize a wide array of conduct as "expressive" and wedding cakes, he submitted, are within the expressive range: "To determine whether conduct is sufficiently expressive. . . "the Court asks whether it was intended to be communicative" and whether it "in context would be reasonably understood by the viewer to be communicative."[64] The "context in which it occur[s]" is critical to ascertaining "the meaning of expressive content," as the Court found when it affirmed that the First Amendment protected flag burning.[65] Given the need for context to determine if cakes are expressive, Thomas turned to the rich history of wedding cakes, which dates back to Victorian England. That history reveals that wedding cakes are replete with symbolism—so much so, that "if an average person walked into a room and saw a white, multi-tiered cake, he would immediately know he had stumbled upon a wedding."[66] The cake's symbolic purpose is to "mark the beginning of a new marriage."[67] By this logic, Phillips "us[ing] his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage" would be considered expressive.[68] The Colorado court essentially said as much when it "described his [Phillips'] conduct as a refusal to design and create a cake to celebrate a same sex wedding."[69] Describing the cake as deliberately "designed" and "created" is language that suggests individual, particularized production, perhaps even more so than the composition of a parade.

Justice Thomas even argued that a reasonable observer might well attribute the expressive message of the cake to Phillips. The Colorado Court of Appeals had suggested that Phillips' creation of a wedding cake for Craig and Mullens would be interpreted by observers as complying with the law rather than as an endorsement of their union. Thomas rejected this supposition, noting that even if Phillips were to post a disclaimer to that effect, it would be insufficient to defeat his compelled speech claim. Rather, he contended, such "reasoning flouts bedrock principles of our free speech jurisprudence and would justify virtually any law that compels individuals to speak."[70] On Thomas' view,

the Court's compelled speech precedents have "rejected arguments that would resolve every issue of power in favor of those with authority."[71]

The Inadequacy of Current Doctrine

Ambiguities in current compelled speech law enable religious liberty advocates to make reasonable arguments that some public accommodations laws compel them to speak. Without evidence that Craig and Mullens requested an inscription or other recognizable signifier on their cake, we must decide whether baking a wedding cake is symbolic expression *in itself* to adjudicate whether obliging Phillips to create the cake violates the free speech clause. Speech act theory is a tool we can employ to discern whether the cake is sufficiently expressive by virtue of its design and context, irrespective of any explicit message placed on it. Using a performative analysis to devise a legal standard would be quite a task, however. It would require deciding whether the creation of a wedding cake qualifies as a performative speech act, either through illocution or perlocution; and whether the context of the wedding reception is sufficient to presume the speech act would be felicitous. Arguably, whether a reasonable observer would attribute the speech to baker is also relevant. For cake to be performative speech under this rubric, it must be said to act through illocutionary or perlocutionary means, the context must be determined enough that the act would be unlikely to misfire, and the speech must be attributable to the baker, since it is his speech allegedly being compelled.

Conducting this performative analysis makes for an interesting intellectual exercise, but it performs poorly as a legal standard for two reasons. First, since context can never be fully determined and because previous case law admits such a wide array of conduct as expressive, it will be difficult to definitively categorize the production of any arguably artistic product a mere good or service. Second, even if one could devise a bright line standard for whether a wedding cake, a floral arrangement, or a wedding website is sufficiently expressive, this does not account for the fact that governments have wider latitude to regulate commercial speech than individual speech. In sum, then, speech act theory ably illustrates the primary deficiencies of current compelled speech doctrine, even though it does not provide a serviceable method for resolving edge cases.

Any workable standard in this area must distinguish between speech and conduct. Public accommodations laws generally regulate conduct, but as Justice Thomas pointed out, if speech itself is the accommodation, presumably the free speech clause becomes operative. A detailed contextual analysis is required to adjudicate the merits of any free speech claim that involves performatives—and, like *Masterpiece*, most disputes will involve gaps in the factual record that make context difficult to assess. Austin directed us to examine a speech act's propriety with the "total speech situation" in view "to see the parallel between statements and performative utterances, and how each can go wrong."[72] Performatives are subject to failure because of the indeterminacy of context and the general instability of signifiers. Non-linguistic speech acts—especially those with dual purposes such as a wedding cake—are especially liable to misfire. Ensuring the success of any speech act would require a fully saturated context, which admittedly we shall never have.

As Justice Thomas showed, however, the context of wedding ceremonies and the symbolic function of cakes within them is about as saturated and determining as they come. Even if the audience does not recognize Phillips' creation as a speech act that endorses Craig and Mullens' marriage, the wedding cake may still be communicative "to the extent that, organized by a code, even an unknown or nonlinguistic one, it is constituted in its identity as mark by its iterability."[73] The wedding cake's long history as a signifier renders its meaning reasonably stable and iterable. Even though a generic wedding cake lacks a linguistic code, it is still organized by a code that constitutes it as repeatable and decipherable even when its creator (Phillips) "no longer answers for what he has written."[74] There are certainly conditions under which the wedding cake as performative would misfire, but it seems plausible that the context of a wedding reception lends the wedding cake to a comprehensible symbolic interpretation on par with other acts the Court has deemed expressive, such as flag burning, nude dancing, or wearing a black armband.[75] So, how then can jurists fairly draw a speech-conduct distinction without discriminating on the basis of the content of speech?

Under current doctrine, one would also consider to whom the speech is attributable to decide whether it is unconstitutionally being compelled. This question

boils down to what a reasonable observer would think. That is, would a reasonable observer interpret Phillips' conduct as an endorsement of same-sex marriage or as "mere compliance with Colorado's public-accommodations law?"[76] The Colorado Court of Appeals suggested that Phillips could post a disclaimer to clarify that he will create cakes for same-sex couples to comply with the law but not as an endorsement of their marriage. But as Justice Thomas pointed out, this would set a dangerous precedent that could "justify any law that compelled protected speech" and would contradict the Court's holding in *Hurley*, which concluded that the altered version of a coherent speech product could be reasonably interpreted as that of the parade organizers. Whether a reasonable observer would attribute the speech to the baker in *Masterpiece* remains an open question. Nevertheless, Justice Thomas makes a strong case that the context for a wedding cake is reasonably comparable to the parade in *Hurley* and that the act of creating a cake could be deemed expressive under current case law.

Lack of clarity about how compelled speech law applies in commercial contexts raises serious questions for the future of First Amendment jurisprudence. The neutrality principle articulated in *Smith, Lukumi,* and now reiterated in *Masterpiece* provides insufficient guidance to lower courts on how to apply the free exercise clause in cases that involve balancing religious liberty interests, which sometimes implicate speech, with the need for non-discrimination protections. As Laycock argued, the Court in *Smith* never really defined "neutral and generally applicable," instead treating the concept as "intuitive," and *Lukumi* failed to clarify this standard because the law at issue in that case was so obviously designed to target adherents of Santeria.[77] Although *Masterpiece* may inch toward some definition of these nebulous terms, it hardly provides an administrable standard for resolving future free exercise disputes. Even if it had, free exercise is only part of the equation. The Court's decision not to opine on the free speech question has encouraged more religious liberty challenges. The decisions in *Smith* and *Lukumi* began to chip away at the veracity of free exercise protections.[78] However, these same limitations do not apply to the free speech clause, which has induced litigators, such as those with the Alliance Defending Freedom, to continue framing their arguments in terms of speech because they perceive greater likelihood of obtaining an exemption on those grounds.[79]

We should expect these arguments to be made when the Court hears another free speech challenge to CADA during OT 2022, this time involving web design services.[80]

The proliferation of religious liberty claims should prompt the Court to clarify the scope of both free speech and free exercise rights. Especially after *Obergefell*, religious liberty has emerged as a central argument strategy in lawsuits seeking exemptions for individuals and institutions with religious objections to same-sex marriage.[81] Laws seeking to facilitate diversity and inclusion bring with them "concerns about accommodating liberties in an increasingly intercultural America" and present challenges "to constitutional provisions of religious freedom."[82] Weddings are often the flashpoint of these conflicts. Isaac West recognized that "a wedding cake is always more than just a cake" but urged us to "recast wedding cakes as what they really are: a good in a marketplace governed by well-established principles guaranteeing equality in public accommodations."[83] From a legal perspective, whether wedding cakes are defined as expressive will require a workable standard, which recent case law—in both the United States and the United Kingdom—fails to provide.[84] Without precedent that clarifies the standard for *when* a wedding cake is expressive and therefore deserving of First Amendment protections, these ambiguities will continue to pose problems for legislatures and courts.

Particularity as a Workable Standard

Adopting a particularity standard for adjudicating compelled speech claims in a commercial context would go a long way toward mitigating these problems. This standard would not resolve all the complicated issues involved in balancing equality interests with free expression ones. Courts would still be left with much to decide about the scope of free exercise. However, subjecting compelled commercial speech claims to a particularity standard would, I submit, do the best job of providing guidance to lower courts about where they can draw the line between protected speech and public accommodations. James Oleske proposed that to resolve the compelled speech issue in service refusal cases, courts need to grapple with two issues: (1) whether the regulation of commercial speech is permissible because the infringement on speech is merely incidental to the

regulation of conduct and (2) whether it matters to whom a reasonable observer might attribute the speech.[85] Oleske's first heuristic question points to a need for elaboration about when speech should be deemed core, rather than merely incidental, to a commercial transaction. A particularity standard would help courts more clearly demarcate this line. The second question prompts us to reject the reasonable observer test in the context of compelled commercial speech. I address in more detail the utility of a particularity standard with respect to each of these issues in the following paragraphs.

It should be more acceptable to limit commercial speech when the speech being regulated is merely incidental to the regulation of conduct, but requiring businesses to express a particular viewpoint imposes severe burdens on freedom of conscience and should be subject to the strict scrutiny. Identifying the presence or absence of a particularized message can help us ascertain whether a regulation of speech is incidental or content-based. Artistic products can be judged to contain a particularized message when they utilize well-recognized signifiers to express a viewpoint that is *external* to the product itself. Put differently, to discern whether a product or service includes particularized speech, observers could ask whether the viewpoint communicated is an essential feature of the product as a generic category. If the speech is an essential feature of the product, we can conclude that the speech being regulated is incidental to the regulation of commerce. As the Court explained in *Sorrell v. IMS Health Inc.,* a burden on commercial speech is not incidental if it is "based on the content of speech or the identity of the speaker."[86] That same test can be applied in reverse to compelled speech. If the public accommodations ordinance makes speech part of the accommodation on account of the viewpoint expressed by the speech itself (an inscription or symbol requested on the cake) or based on the identity of the speaker, then it has moved beyond the incidental.

In what follows, I sketch some examples that illustrate the utility of drawing a line at particularity, as well as the difficulties it may still encounter with edge cases. Obliging a baker to write an inscription on a wedding cake that reads "God Bless this Union," or create with icing a widely recognizable signifier such as a rainbow flag would be more than incidental to regulating equal access to public accommodations. Regardless of

whether the couple requesting these messages is a same-sex couple or a heterosexual couple, requiring a vendor to create these messages impermissibly compel his speech. An atheist baker may object to the religious message, just as a religious baker may object to the viewpoint conveyed by the rainbow flag, even were it to appear on a cake requested by an opposite-sex couple in solidarity with their LGBTQ+ friends or family members. In these cases, the symbols crafted out of frosting and food coloring are external to the product's essence, a generic form characterized by a multi-tiered, typically white, cake. By contrast, whatever speech might be impacted by requiring a vendor to provide a generic[87] white cake for a wedding reception is incidental to the core act the vendor performs, engaging in public commerce. However, if the vender regularly produces a set of similarly designed, stock wedding cakes and then chooses not to create a cake with the same essential form for a couple based on their identity, then a content-neutral law could prevent him from refusing service on this basis.

The Court will soon hear argument in a related case, *303 Creative LLC v. Elenis*. In this case, the vendor, a web designer, posted a notice explaining that she will not create websites for same-sex weddings. In subjecting this case to a particularity standard, we would ask whether the messages she would create are external to the core product. If the core product is lines of computer code that make the website aesthetically appealing and usable for visitors, then a refusal to design such a site for different sets of couples based on their identity could be regulated in a content-neutral manner. However, if articulating the unique stories of the couple's love for each other is core to designing the site, then the message would be particularized. Under that circumstance, the designer could refuse to compose stories celebrating a marriage that goes against her religious convictions because obliging her to create these messages is a content-based compulsion, just as it would have been a compulsion to require the bakers approached by William Jack to design the cakes with verses from Leviticus inscribed on them.

The Court has also recognized a ministerial exception for members of the clergy who object to same-sex marriage on free exercise and establishment clause grounds,[88] but a particularized message standard could be applied to this scenario as well. When a minister presides over a wedding, he is using her own utterance to "perform" the marriage

(i.e., "I pronounce you married"). Such speech cannot be compelled because to do so would not be incidental, but core, to what is being regulated—in this case religious practice. However, if a minister runs a food bank to help provide for needy families, their providing equal service to a same-sex couple presents no particularized message of sanction for the union. To the extent it communicates a message, the regulation of that message would be incidental to ensuring equal service. In cases where the regulation of commercial conduct might incidentally and minimally interfere with a coherent speech product, that regulation should survive a compelled speech challenge. However, it would remain open to a free exercise challenge if the state did not act neutrally with respect to religion.

We have already seen how such a standard could work in practice, in reasoning advanced, separately, by Justices Thomas and Kagan. Justice Kagan implicitly used it to distinguish the cakes with homophobic messages that William Jack requested from a non-descript cake for a wedding that Craig and Mullens requested. Kagan concluded that Jack was not discriminated against on the basis of his religion because the particularized message was one the government could not compel a baker to produce for any customer. In his concurrence in *Masterpiece*, Justice Thomas, citing *Hurley*, rejected the requirement for a particularized message. However, in his majority opinion in *Becerra*,[89] Thomas uses particularity as a reason for invalidating California's notice requirement. The message that California required the crisis pregnancy centers to post was a particularized one prescribed by the state, and thus, "by compelling individuals to speak a *particular* message, such notices alte[r] the content of [their] speech."[90] The California statute in that case specified the wording of the required notice, which explained how one could obtain an abortion and receive monetary assistance from the state to do so. So, although Justice Thomas rejected particularity in *Masterpiece*, he found the standard useful during the same Supreme Court term in a case where it was clear a particularized message was what the state required.

Adopting a particularity standard also enables us to answer the second heuristic question Oleske identified in the negative. Whether a reasonable observer would view the content as expressive or to whom they would attribute that expression is irrelevant to

the harms of compelling particularized messages. The Court did not use a reasonable observer standard in *Barnette*, nor in *Wooley v. Maynard*, a case involving the state motto being placed on New Hampshire license plates, but as Oleske rightly noted, the commercial context of cases like *Masterpiece* differs from "the government's dictation of ideological messages."[91] Focus on the "reasonable observer" question directs jurists' attention away from the fundamental First Amendment principle and toward diversions like the history of wedding cakes. When the message is particularized, the harms of compelling speech, confusion, dilution, humiliation, and psychological manipulation,[92] erode the ideals of an open society irrespective of to whom an observer would attribute the message. One primary benefit of clarifying compelled commercial speech doctrine with a standard that requires claimants identify a particularized message they allege the state is compelling them to communicate is that that it could replace the ambiguous reasonable observer standard.

Conclusion

Admittedly, this compromise position is unlikely to satisfy ardent advocates on either side of the controversy. Religious liberty defenders may reject this standard because it limits religious exemptions to generally applicable laws (even though it provides increased protections relative to *Smith* and *Lukumi*). LGBTQ+ activists may object because the standard does not require affirmation of same-sex marriage and may permit some refusals of service (even though it would limit the applicability of an argument strategy frequently deployed by religious liberty advocates). A particularity standard would, at least, make business owners who feel their speech is compelled by anti-discrimination laws point to a specific message expressed in and by their exchange of commerce. Any successful compelled speech claim, then, would require a showing of content discrimination, that claimants were obliged by law to "facilitate speech on a particular matter or of a particular viewpoint."[93] Absent a particularized message, regulation of the commerce of artistic goods and services would be content-neutral. Any interference with speech would be merely incidental to the regulation of conduct. Proprietors could no longer do as Phillips did and simply object to creating the cake

merely because of the identity of the customers, using an ambiguous doctrine to avoid complying with a neutral and generally applicable law. At the same time, such a standard could better account for scenarios where speech itself might be considered a public accommodation and reaffirm protections for freedom of conscience.

Identifying the presence or absence of a particularized message provides a more administrable standard than attempting to discern whether context makes a product or service sufficiently expressive to merit free speech protections. Although it does not address free exercise disputes, it does provide a limiting principle that is lacking in current case law on compelled speech as applied to commercial activity. While helping to clarify First Amendment protections for commercial speech, it still comports with both strands of current compelled speech law that Volokh identified: (1) interference with a coherent speech product and (2) what he termed "pure speech compulsions," which require "people to speak things they do not want to speak" or fund speech they do not wish to fund, unless certain, narrow conditions are met.[94]

In preserving the distinction between commercial speech and core political speech, applying a particularity requirement in commercial contexts does not disturb prior precedents that protect an individual's right to freedom of conscience. Non-commercial compelled speech claims would still be subject to strict scrutiny; the Court's prohibition against government compulsion of an ideological view as codified in *Barnette* and *Wooley* is left undisturbed. Applying this standard only in commercial settings recognizes the principle that the government has more of a legitimate interest in regulating speech in the commercial space. This standard would only impact those who sell artistic products in a public marketplace. For these reasons, it brings us closer toward a workable standard that balances the interests of equality and free expression without minimizing the danger of the state requiring "involuntary affirmation" of orthodox ideas.[95] Future research should continue working to define the contours of the standard and how courts might design a test that could be readily applied.

NOTES

[1] See, e.g., *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 141 S.Ct. 63 (2020); *Fulton v. City of Philadelphia*, 141 S.Ct. 1868; *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores* 134 S. Ct. 2751 (2014)

[2] Michael Eisenstadt, "Perspective by Incongruity: Law and Rhetoric in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*," *First Amendment Studies* 54, no. 1 (2020): 128–135. Isaac West, "Wedding Cakes, Equality, and Rhetorics of Religious Freedom," *First Amendment Studies* 53 no. 1–2 (2019): 1–21.

[3] See e.g., *Shurtleff v. City of Boston*, 596 U.S. _____ (2022); *Kennedy v. Bremerton School District*, 597 U.S. _____ (2022); *Carson v. Makon* 596 U.S. _____ (2022); *American Legion v. American Humanist Association* 139 S.Ct. 2067 (2020); *Trinity Lutheran Church of Columbia v. Missouri Department of Natural Resources*, 137 S.Ct. 2012 (2017); *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020)

[4] Micah Schwartzman and Nelson Tebbe, "Establishment Clause Appeasement," *Supreme Court Review* Vol 2019 (2019): 271–311; Melissa Murray, "Inverting Animus: *Masterpiece Cakeshop* and the New Minorities," *Supreme Court Review,* 2018 (2018): 257–297; Adrienne E. Hacker Daniels, "Is it too heavy a constitutional cross to bear? Making sense of the decision in *American Legion v. American Humanist Association, First Amendment Studies* 54, no. 1, 136–147.

[5] Calvin R. Coker, "From exemptions to censorship: religious liberty and victimhood in *Obergefell v. Hodges," Communication and Critical/Cultural Studies* 15, no. 1 (2018): 35–52; Christian Lundberg, "Enjoying God's Death: *The Passion of the Christ* and the practices of an Evangelical Public," *Quarterly Journal of Speech* 95, no. 4 (2009): 387–411.

[6] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018) (Hereinafter Masterpiece).

[7] Marvin Mim and Louise Melling, "Inconvenience or Indignity— Religious Exemptions to Public Accommodation" Laws," *Journal of Law and Policy* 22, no. 2 (2014): 705–726; Frederick Mark Gedricks, "An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions," *University of Arkansas and Little Rock Law Review* 20, no. 3 (1998): 555–574

[8] John Yoo and James C. Phillips, "More on the Free-exercise Clause and Religious Exemptions," *National Review,* December 12, 2018, https://www.nationalreview.com/2018/12/constitution-free-exercise-of-religion-clause-exemptions/; Douglas Laycock, "The Campaign Against Religious Liberty" In *The Rise of Corporate Religious Liberty*, edited by Micah Schwartzman, Chad Flanders, and Zoë Robinson (New York: Oxford University Press, 2016), 231–255.

[9] *Employment Division, Department of Human Resources of Oregon v. Alfred L. Smith*, 110 S.Ct. 1595 (1990) (Hereinafter Smith); c.f., Eugene Volokh, "More on Masterpiece Cakeshop from Prof. Michael McConnell," *The Volokh Conspiracy Blog,* https://reason.com/volokh/2018/06/17/more-on-masterpiece-cakeshop-from-prof-m/ McConnell argues that even with no change to *Smith* the Colorado Antidiscrimination Law (CADA) is not neutral or generally applicable and thus would be subject to strict scrutiny.

[10] Douglas Laycock, "The Broader Implications of *Masterpiece Cakeshop*," *The Brigham Young University Law Review* 2019, no. 1 (2019): 167–204. A variation of this reasoning was used in a recent case involving the public funding of "sectarian" school in Maine, where the Court ruled that the state has no obligation to provide assistance to private schools, but that once it chooses to do so, it cannot discriminate against religious schools. See: *Carson v. Makon* 596 U.S. _____ (2022).

[11] Murray, "Inverting Animus," 282.

[12]Eisenstadt, "Perspective by incongruity," 130, 133.

[13] I understand performativity as initially theorized by J.L. Austin and subsequently expanded on by deconstructionist scholars, notably Jacques Derrida and Judith Butler. Illocutionary speech acts produce effects by their very utterance—the saying constitutes "doing." Perlocution refers to the actions performed "by" saying something which, in Butler's words, "initiate a set of consequences." Both acts can "misfire" if context is lacking, and as Derrida was adamant, "context can never be fully certain or saturated," especially so in cases of non-linguistic speech. See: J.L. Austin, *How to do things with words* (Cambridge, MA: Harvard University Press, 1962); Jacques Derrida, *Limited INC.*, (Evanston, IL: Northwestern University Press, 1988); Judith Butler, *Excitable Speech: A Politics of the performative* (New York: Routledge, 1997).

[14] We have seen this strategy play out in follow-on cases that cite Masterpiece, including that of a florist, which was remanded to the Washington State Supreme Court in light of Masterpiece, and another case challenging CADA brought by a website designer from Colorado that is set for argument during OT 2022. See: *Arlene's Flowers LLC v. Washington*, 193 Wash.2d 469 (2021); *303 Creative LLC v. Ennis* 142 S.Ct. 1106 (2021). Unlike in *Masterpiece*, however, the question presented in *303 Creative LLC* is confined to whether the statute burdens the designer's free speech rights.
[15] Massachusetts recognized same-sex marriage on the state level in 2004, whereas Colorado did not recognize it until the Court's ruling in *Obergefell v. Hodges* deemed it a right guaranteed by the equal protection clause of the 14th Amendment. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (Hereinafter *Obergefell).*
[16] Brief for Petitioners at 10.
[17] *Masterpiece*, 138 S. Ct. at 1724.
[18] *Masterpiece*, 138 S. Ct. at 1724.
[19] Brief for Petitioners at 6.
[20] Colo. Rev. Stat. §24–24–601(2)(a) (2016)
[21] *Masterpiece*, 138 S. Ct. at 1726.
[22] *Masterpiece*, 138 S. Ct. at 1726.
[23] Brief for the Petitioners at i.
[24] J.L. Austin, *How to do Things with Words.* (Cambridge, MA: Harvard University Press, 1962).
[25] Austin, *How to do things with words*, 6.
[26] Austin, *How to do things with words*, 109.
[27] Judith Butler, *Excitable Speech: A Politics of the Performative.* (New York: Routledge, 1997), 17.
[28] Austin, *How to do things with words*," 118.
[29] Austin, *How to do things with words*, 14.
[30] Austin, *How to do things with words*, 16.
[31] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (Hereinafter *Barnette*)
[32] *Barnette*, 319 U.S. at 642.
[33] *Barnette*, 319 U.S. at 633.
[34] Butler, *Excitable Speech*, 20.
[35] Derrida, *Limited INC,* 9.
[36] Eric Barendt, "What is the Harm in Hate Speech," *Ethical Theory and Moral Practice* 22 (2019): 539–553.
[37] *Valentine v. Christensen*, 316 U.S. 52 (1942)
[38] *Bigelow v. Virginia* 421, U.S. 809, 826 (1975)
[39] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*, 96 S. Ct. 1817 (1976)
[40] Vikram David Amar and Alan Brownstein, "Toward a more explicit, independent, consistent, and nuanced compelled speech doctrine," *Illinois Law Review* 2020, no. 1 (2020): 45.
[41] R. Michael Hoefges, "Regulating Professional Services Advertising: Constitutional Parameters and issues under the First Amendment Commercial Speech Doctrine," *Cardozo Arts & Entertainment Law Journal* 24 (2007): 953–1026.
[42] *Central Hudson Gas and Electric v. Public Service Commission*, 447 U.S. 557 (1980). The test articulated in Central Hudson is comprised of four parts: 1) whether the content of the commercial message is truthful and pertains to a lawful good or service, 2) whether the government interest in constraining the message is substantial, 3) whether the regulation in question would support the government interest, and 4) whether there is a reasonable fit between the ends and means of the restriction. If all four factors are met, then government regulation of the commercial speech could be permissible and courts should apply intermediate scrutiny. Speech that is verifiably false or promotes illegal goods or services still did not warrant First Amendment protections.
[43] Hoefges, "Regulating Professional Services Advertising," 1024.
[44] *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985)
[45] *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) (Hereinafter *Becerra*).
[46] Eugene Volokh, "The Law of Compelled Speech," *Texas Law Review* 97, no. 2 (2018): 361.
[47] Amar and Brownstein, "Toward a more explicit," 4.
[48] Dan M. Kahan et al, "'They Saw a Protest': Cognitive Illiberalism and the Speech-Conduct Distinction," *Stanford Law Review* 64 (2012): 851–906.

[49] Allen Rostron, "Pragmatic, Paternalism, and the Constitutional Protection of Commercial Speech," *Vermont Law Review* 37, no. 3 (2013): 527–590.
[50] Some have argued that Kennedy's recognition that religious objections to same-sex marriage are legitimate is problematic for ensuring LGBTQ+ rights. See: Coker, "From exemptions." Notable in the Court's recent discourse is Justice Alito's comment during a recent oral argument over Catholic Social Services' claim to a religious exemption in their role as a certifier of foster families. He posed as a rhetorical question, "Didn't the Court say [in *Obergefell*] that there are honorable and respectable reasons for continuing to oppose same-sex marriage" (*Fulton v. City of Philadelphia,* Transcript of the Oral Argument at 39).
[51] *Masterpiece,* 138 S. Ct. at 1723.
[52] *Masterpiece,* 138 S. Ct. at 1724.
[53] *Masterpiece*, 138 S. Ct. at 1724.
[54] The purpose of William Jack's requests was not to obtain the cakes but instead to provide test cases that illustrated viewpoint discrimination in CADA's enforcement by the Commission in an effort to bolster Phillips' defense.
[55] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993). (Hereinafter Lukumi)
[56] *Smith*, 110 S.Ct. 1595 (1990)
[57] *Masterpiece*, Kagan, J, concurring at 1733.
[58] *Masterpiece*, Petition for certiorari at 319a.
[59] Because Phillips notified the couple of his policy against making cakes for same-sex weddings so early in their encounter, it remains possible that Craig and Mullens planned to request a cake with a particularized message. The brief for the petitioners notes that at their Colorado reception, the couple served a "multi-layered, rainbow tiered wedding cake." See: Brief for the Petitioners at 10 and Joint Appendix, 175–76.
[60] *Masterpiece*, Kagan, J, concurring at 1733.
[61] *Irish-American Gay, Lesbian, and Bisexual Group of Boston v. Hurley*, 115 S.Ct. at 2338 (1995) (Hereinafter Hurley)
[62] *Hurley,* 115 S. Ct. at 2338.
[63] *Masterpiece,* 138 S. Ct., Thomas, J, concurring in part and concurring in the judgement at 1741.
[64] Justice Thomas is quoting from *Clark v. Community for Creative Nonviolence*, 104 S. Ct. 3065 (1984). Internal quotation marks omitted.
[65] Here Justice Thomas quotes *Texas v. Johnson*, 109 S.Ct. 2533 (1989).
[66] *Masterpiece,* 138 S. Ct., Thomas, J, concurring in part and concurring in the judgement at 1743.
[67] *Masterpiece,* 138 S. Ct., Thomas, J, concurring in part and concurring in the judgement at 1743.
[68] *Masterpiece,* 138 S. Ct., Thomas, J, concurring in part and concurring in the judgement at 1743.
[69] *Craig v. Masterpiece Cakeshop, Inc*., 370 P.3d 272, 276 (2015)
[70] *Masterpiece,* 138 S. Ct., Thomas J., concurring in part and concurring in the judgement at 1740. This same line of reasoning was deployed by Justice Thomas in *NIFLA* and featured prominently in the oral arguments over *Fulton v. City of Philadelphia,* with Justice Breyer suggesting in the latter case that Catholic Social Services could include a disclaimer in their certification documents that their approval of a same-sex couple to become foster parents was merely complying with the Philadelphia's criteria and does not endorse same-sex marriage as on par with heterosexual marriage. See: *Fulton v. City of Philadelphia,* Transcript of the Oral Argument at 11–12.
[71] Justice Thomas is quoting from *Barnette* 63 S.Ct. 1178 (1943). Internal quotation marks omitted.
[72] Austin, *How to Do things with Words*, 52.
[73] Derrida, *Limited Inc*., 7.
[74] Derrida, *Limited Inc*., 8.
[75] *Barnes v. Glen Theatre, Inc*., 111 S. Ct. 2456; *Texas v. Johnson*, 109 S. Ct. 2533 (1989); *Tinker v. Des Moines Independent Community School Dist*., 89 S. Ct. 733 (1969). See also: Masterpiece, Thomas, J., concurring in part and concurring in the judgement at 1741–1742.
[76] *Masterpiece,* Thomas, J., concurring in part and concurring in the judgement at 1744.
[77] Laycock, "The Broader Implications of *Masterpiece*," 176.
[78] In response to the standard in *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) and states and localities have experimented with different approaches that might enable them to apply strict scrutiny to laws that might burden free exercise. See: Matthew Linnabary, Employment Division v. Smith

and State Free Exercise Protections: Should State Courts Feel Obligated to Apply the Federal Standard in Adjudicating Alleged Violations of Their State Free Exercise Clauses? *Notre Dame Law Review Online* 93, no. 1 (2018): 99–114; Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993

[79] David French, "A *New York Times* Op-ed is very wrong about religious liberty," *National Review*, May 7, 2019, https://www.nationalreview.com/corner/new-york-times-wrong-religious-liberty/

[80] *303 Creative LLC v. Ennis* 142 S.Ct. 1106 (2021)

[81] See a survey of recent cases predicated on religious liberty pursued by The Alliance Defending Freedom, the conservative legal fund that brought Phillips' case to the Supreme Court here: https://www.adflegal.org/for-attorneys/cases/supreme-court-cases. Claims of religious liberty have frequently referenced Justice Kennedy's qualification in *Obergefell* 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 is disparaged here" (at 2602).

[82] Mike Hübler and Thomas Lessl, "The Establishment Clause and the Problem of Religious Symbols: Some Implications of Metaphor Theory for First Amendment Jurisprudence," *Free Speech Yearbook* 38, no. 1 (2000): 81.

[83] West, "Wedding Cakes, Equality, and rhetorics of Religious Freedom, 13.

[84] James M. Oleske, "The 'Mere Civility' of Equality Law and Compelled Speech Quandaries," *Oxford Journal of Law and Religion,* 9, no. 2 (2020): 288–304.

[85] Oleske, "The 'Mere Civility' of Equality Law," 292.

[86] *Sorrell v. IMS Health INC.*, 131 S. Ct. 2653 (2011) at 2665.

[87] By generic, I refer to a non-customized product that conforms to conventions typical for that product or service (e.g., a multi-tiered white cake for a wedding or an advertised floral or decorative package that would be arranged for multiple different clients). It would be difficult to apply such a standard to a photographer but in theory may be possible.

[88] *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church of North America*, 73 S.Ct. 143 (1952); *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S.Ct. 694 (2012).

[89] *Becerra*, 138 S.Ct. 2361

[90] *Becerra*, 138 S.Ct. at 2371, internal quotation marks omitted.

[91] *Wooley v. Maynard*, 430 U.S. 705 (1977); Oleske, "'Mere Civility' of Equality Law," 301.

[92] Martin H. Redish, "Compelled Commercial Speech and the First Amendment," *Notre Dame Law Review* 94, no. 4 (2019): 1756–1757.

[93] Amar and Brownstein, "Toward a more explicit," 14.

[94] Volokh, "The Law of Compelled Speech," 368.

[95] *Barnette*, 319 U.S. 624, at 633.