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("F.U.F.T.P.I.") by former federal prosecutor,
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The Cake, the Couple, and the Court

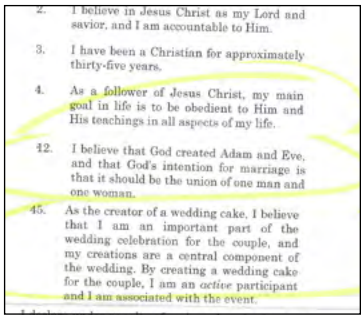
By: Julie A. Werner-Simon

October brings fall but also the first oral arguments of the Supreme Court's 2017-2018 term. The Supremes are a full complement of nine and the cases this term include hot topics such as gay rights, religious liberties, gerrymandering, cell phone privacy and, until just recently, the calendar had included the President's now revised travel bans. Justice Ruth Bader Ginsburg told a class of first year law students at Georgetown last week that she had only one prediction about the upcoming calendar: that it would be "momentous." No doubt about it; and one of the most anticipated cases (and not just because it has an eponymous and invitingly delectable case name) is *Masterpiece Cake*.[1]

In *Masterpiece*, a soon-to-be-married couple (with one of the future mothers-in-law in tow) went into the Masterpiece Cake shop in Lakewood, Colorado on July 19, 2012, to order the wedding cake. Lakewood, an artistic bedroom community of Denver (ten minutes away via light rail), is a town of almost 150,000 residents with its own cultural center and a mayor who proudly mentions that "when you drive into Lakewood you see a sign that says 'we are building an inclusive community.'" [2]

The engaged couple explained that they wanted to purchase a cake for their upcoming Colorado wedding reception. They were admiring the cakes and flipping through the sample book and had not yet picked out a design when the store owner (the Masterpiece baker) explained that he would not make a wedding cake for the couple because he did not make cakes for gay weddings. The men, as the baker had rightly gleaned, were gay.

The threesome left the shop with the future mother-in-law "in disbelief" over the visit to the bakery, which had turned "humiliating."[3] The next day, she called the shop and asked the baker why he would not make a cake for her son and his fiancé.[4] The baker responded that he had religious beliefs against gay marriage, which prevented him from making the cake for the couple. [5]



2. I believe in Jesus Christ as my Lord and savior, and I am accountable to Him.

3. I have been a Christian for approximately thirty-five years.

4. As a follower of Jesus Christ, my main goal in life is to be obedient to Him and His teachings in all aspects of my life.

12. I believe that God created Adam and Eve, and that God's intention for marriage is that it should be the union of one man and one woman.

45. As the creator of a wedding cake, I believe that I am an important part of the wedding celebration for the couple, and my creations are a central component of the wedding. By creating a wedding cake for the couple, I am an *active* participant and I am associated with the event.

Excerpts from petitioner-baker's declaration re: marriage

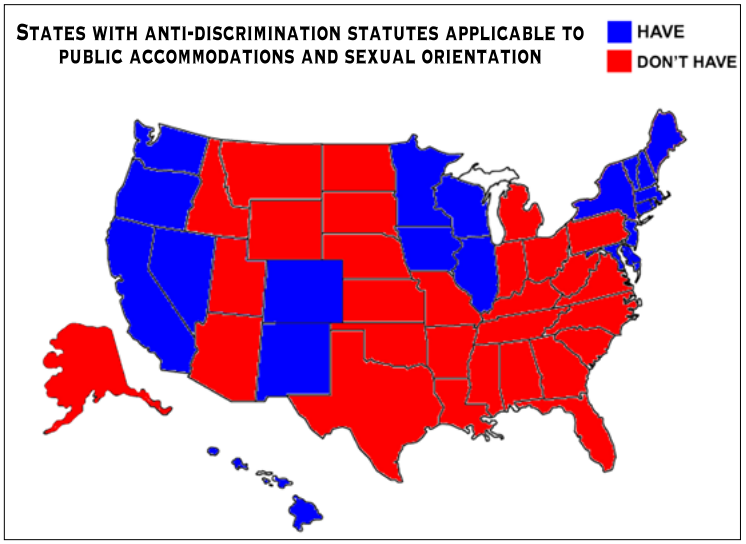
Afterwards, the couple wondered whether privately-owned businesses, such as the cake shop, could legally refuse to provide services to them. This was not a case of having been being sent away because of a store policy on dress (or lack thereof) such as a "no shoes, no shirt, no service" policy; here, the men were refused service because they were men who intended to marry. Apparently, at the mother's instigation, the couple researched the law in Colorado and discovered that Colorado had anti-discrimination laws. The Colorado Anti-discrimination Act, CADA, originally

Courtesy Photo

enacted in 1957, and amended in 2008 to include sexual orientation as a "protected class," prohibits, among other things, any place of business "engaged in sales to the public" or "any place offering services . . . [including] wholesale or retail sales" from discriminating against someone "directly or indirectly," that is, to refuse, withhold or deny services or goods because of the patron/customer's "disability, race, creed, color, sex, sexual orientation, marital status, national origin or ancestry."

In Colorado, (one of 21 states with statutes prohibiting in public accommodations discrimination on the basis of sexual orientation),[6] the owner of a public accommodation (defined as a business or individual providing goods or services to the public) may not discriminate on the basis of race, gender or sexual orientation, or against individuals on the basis of their inclusion in other suspect classes.

The Colorado couple notified the Colorado Civil Rights Division ("the Colorado Commission" or "Commission"), which enforces CADA and, some ten months after the cake "declination," the Commission filed a formal administrative action. The complaint alleged that the baker had discriminated against the couple in violation of the public accommodation provision



States as of 1/1/17 with statutes prohibiting discrimination on the basis of sexual orientation

of Colorado's antidiscrimination law, and sought a cease-and-desist order prohibiting the baker from future discriminatory cake refusals involving other gay couples.

It took five years of administrative and state-court proceedings (all finding that the baker had unlawfully discriminated) for the case to make its way to the United States Supreme Court. In July 2016, **the baker filed his writ of certiorari in the Supreme Court to review the Colorado court's findings of discrimination and its decision upholding the Commission's cease and desist order.** The case could have been considered last term, but the Supreme Court, then with eight members could not decide whether to hear the baker's case. The case kept being relisted, from July 2016 through June 2017, for "an eye-popping 18 conferences" according to Law 360.com.[7]

On June 26, 2017, the Supreme Court granted certiorari ("cert."). It takes four justices to agree to hear a case and, with the addition of Neil Gorsuch as an associate justice, the Court had the fourth vote. Moreover, the decision to accept cert. occurred just three days after the majority of the Court issued a succinct, three-page, per curiam (unsigned) decision in the "Arkansas gay mothers birth certificate" case, *Pavan v. Smith*.[8] The Supreme Court's ruling in *Pavan* required the State of Arkansas to issue birth certificates to all children born of married couples, including those born by artificial insemination, in an identical way, whether the parents were heterosexual or gay. (Arkansas had refused and insisted that only birth mothers could be listed on the birth certificates of children born to same-sex married couples.) The per curiam opinion described being represented as parents on birth certificates of children born during a marriage as one of the "constellation of benefits" emanating from marriage (as established in the 2015 case of *Obergefell v. Hodges*.)[9] The Court also discounted Arkansas' claim that the birth certificates were "biological" records, since both members of heterosexual married couples, who conceived a child by artificial insemination, were listed on Arkansas birth certificates. Justice Gorsuch authored a scathing dissent in *Pavan* (dissents being the exception to per curia, "pro forma" decisions) and was joined by Justices Alito and Thomas in vociferously insisting that nothing in *Obergefell* "spoke to the question" of Arkansas's birth certificates.[10] Justice Gorsuch insisted that Arkansas' "birth registration regime" was "biology based," and accepted as fact that the state had "rational reasons" based on biology to exclude same-sex couples on their children's birth certificates. [11]

It is not a leap, based on Justice Gorsuch's implicit reverence towards traditional "heterosexual families," as evidenced in his *Pavan* dissent, to conclude that he voted to decide to hear the religious heterosexual baker's case. Since neither Chief Justice Roberts nor Justice Kennedy joined Gorsuch's *Pavan* dissent (whether due to its flawed substance relying on biology to determine legal parentage or irritation at Gorsuch's clumsy eagerness "to dissent" on settled law), the question is which of the two (Kennedy or Roberts) joined Gorsuch, Alito, and Thomas as the fourth vote to hear the cake case.[12]

I hope, in the name of the **recently deceased Edie Windsor** (who died this year on September 12) the plaintiff in *United States v. Windsor*,[13] in which the Supreme Court, voting five to four, held that the Defense of Marriage Act, (DOMA), which limited marriage to only opposite-sex couples, was an unconstitutional deprivation of liberty protected by the 5th Amendment that it was not Justice Kennedy. Why? Because it was **Kennedy who authored each of the Supreme Court's three seminal gay rights expansion cases during his 29-year tenure on the Court:** (i) *Lawrence v. Texas*; (ii) United *States v. Windsor;* and (iii) *Obergefell*. To think that it was he, and not Chief Justice Roberts, who voted to hear the cake case would not bode well for the advancement or even the maintenance of anti-discrimination jurisprudence.

The health of anti-discrimination law is tenuous. The current administration has filed friend-of-the-court briefs (meaning, briefs filed in cases in which the administration was not a party to the litigation) and taken decidedly anti-inclusive, anti-gay positions. For example, just two months ago, on July 26, 2017, the U.S. Justice Department filed such a brief in a New York case involving a gay, male employee of a skydiving company who claimed he was terminated from his job because, before a jump, he told a female patron, who he would be holding while sky diving, that he was gay.[15]

The Justice Department, uninvited, took the position that [President Johnson's] Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion or national origin, does not prevent discrimination based on sexual orientation. The Department added that any efforts to the scope of civil rights should be directed to Congress rather than the courts. The Equal Employment Opportunity Commission (EEOC) in 2015 issued guidelines explaining that the Civil Rights Act did protect against discrimination in the workplace based on sexual orientation. Moreover, the EEOC in the skydiving employment matter had filed a pleading in support of the gay kydiver, Donald Zarda. **The Justice Department impugned the EEOC, stating in its brief that the EEOC did not speak "for the United States."**

According to the *New York Times,*[16] the Justice Department's brief against the worker was signed only by political appointees and not by any of the career attorneys at the Justice Department. And the timing of the brief's filing appeared to have been coordinated with a tweet from the President on the same day, in which he announced that transgender people would be banned from serving in the military. As Erin Mulvaney of the National Law Journal has noted, **"the Trump administration is casting aside federal agency arguments that gay and lesbians should be protected from workplace discrimination under the civil rights laws.**[17]

And, as in the Second Circuit case, the federal government is not a party to the dispute in the *Masterpiece Cake* case. The litigation is among the Colorado Commission, the couple, and the baker; but the Trump-Sessions' Justice Department has "jumped into" the cake case, as well . On September 7, 2017, Attorney General Jeff Session's top appellate lawyer, acting Solicitor General Jeffrey Wall (himself a Justice Clarence Thomas law clerk and Federalist Society speaker), filed a 41-page brief supporting the baker's right to discriminate against gay people on religious grounds.

The Solicitor General's brief states that "a wedding cake is not an ordinary baked good," and he argues that making the baker make a cake for a gay wedding causes him to create "expressive works" for ideas he "opposes as a matter of faith."[18] None of the career Justice Department employees signed onto this brief, either. The Economist, in a blog entry entitled *"Taking the Cake,"* points out the illogic of *t*he government "waxing rhapsodic" about wedding cakes as the "iconic centerpiece" of the wedding ritual costing as much as "$30,000 a cake" and equating costly cake to "speech."[19] The Economist pithily and charitably called the DOJ brief "not its finest work." Nor was, I add, the Justice Department's spokeswoman's statement explaining that the Department filed the brief because, while "the First Amendment protects the right of free expression for all Americans . . .[and] [a]though public accommodations laws serve important purposes, they like other laws must yield to . . . individual freedoms . . . [to] include the freedom not to create expression for ceremonies that vi-

*"The Cake," cont.'d, Page **3***

olate one's religious beliefs."[20]

With the Supreme Court finally accepting cert., the spot light has shown brightly on the baker's lawyers. The Colorado baker is represented by **Alliance Defending Freedom.** It is the same religious "rights" law firm that successfully represented craft-store company Hobby Lobby, and convinced the high court 5 to 4, that Hobby Lobby, a closely held corporation with 21,000 employees nationwide, could deny female workers certain forms of birth control, to which they were entitled under the Affordable Care Act, because of the anti-contraception, evangelical beliefs of the company owners, *Burwell v. Hobby Lobby.* [21]

However, it does not appear that **Alliance Defending Freedom** took any part in the legal representation of Hobby Lobby when, this summer, the Justice Department brought a civil suit in the Eastern District of New York accusing the company and its owner of purchasing thousands of smuggled religious artifacts from around the original Holy Land.[22] Hobby Lobby's owners were accused of wiring $1.6 million to seven different bank accounts, associated with five people, in payment for the smuggled items, which came through U.S. Customs falsely labeled as "tiles."[23] In early July 2017, Hobby Lobby agreed to pay to the United States a $3 million fine and agreed to an order of forfeiture for all of the smuggled artifacts.[24] After the announcement of a settlement with Hobby Lobby, Israeli police arrested five Jerusalem-based antiquities dealers for their participation in the international Hobby Lobby smuggling ring.[25]

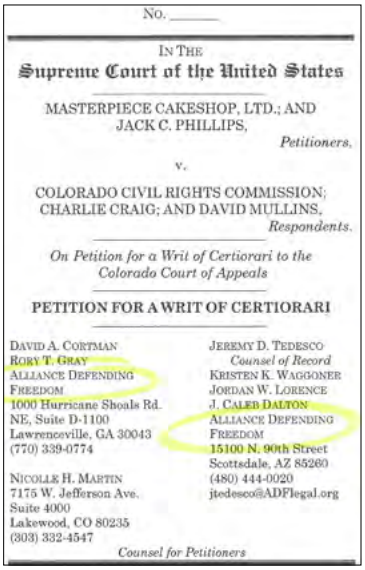
Turns out Hobby Lobby and the Colorado baker are not the only newsworthy cases handled by the **Alliance Defending Freedom.** The group also represented the New Mexico business owners of Elane Photography, which declined, on religious grounds, to photograph a lesbian commitment ceremony.[26] The photography studio owners (who were also the photographers), were found to have violated New Mexico's anti-discrimination public accommodations statute, which bans discrimination in the offering of services to the public.[27] The **Alliance Defending Freedom** argued up the judicial chain in New Mexico that the First Amendment's compelled-speech doctrine protected the photographers from being forced to create expression (by photographing a ceremony in which they did not believe). The U.S. Supreme Court, in 2014, while Justice Scalia was still alive, declined cert. on the photographer's case, letting stand the New Mexico Supreme Court's judgment that discrimination on religious grounds in public accommodations-service-providers was actionable, even when the services arguably are expressive.

The **Alliance Defending Freedom** also currently represents Washington-state florist Arlene's Flowers.[28] Earlier this year, in February 2017, Washington State's Supreme Court fined the florist for violating the state's public accommodation anti-discrimination law. The florist had refused to provide flowers for a wedding of two men because such a marriage violated her religious beliefs. An **Alliance Defending Freedom** lawyer told the Washington Post that the Alliance "would take [the florist's] case to the United States Supreme Court.[29]

Alliance Defending Freedom requested an extension to file its petition for cert., which according to the Supreme Court case docket, was extended by order of Justice Kennedy until July 2017, when it was filed. Washington State, and the complainants in the *Arlene's Flowers* case, also requested an extension to file their response to the petition for cert, which was granted with the response being due on or before October 20, 2017.[30]

The **Alliance Defending Freedom** is no stranger to hyperbole. Its website states that "[a]cross the U.S., Christians are being punished for living by their convictions." The site also has a pie chart design claiming the Alliance is "winning nearly 80% of all our cases" and, in front of a graphic of a roman-style iconic columned building, the Alliance claims it is "playing a role in 52 victories at the U.S. Supreme Court."[31]

The website, which has a tab for monetary donations, makes



No. _____

In The
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND JACK C. PHILLIPS,
Petitioners,
v.
COLORADO CIVIL RIGHTS COMMISSION; CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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First Page of Petition by Alliance Defending Freedom

clear its mission: advocacy. "It is not enough to win cases, we must change the culture and the strategy of **Alliance Defending Freedom** ensures lasting victory."

The opening brief of the baker in *Masterpiece Cake* demonstrates that the Alliance are clever wordsmiths. The brief filed by them does not cast this case as the typical religion-based First Amendment formula, i.e., establishment clause + free exercise clause, (relating to the first two clauses of the six-pronged First Amendment), which in most instances requires a rational-basis test for review of the government conduct. Rather, Alliance describes the baker's case as "compelled expression against religious beliefs," aka "speech" (the third clause of the First Amendment). **Alliance Defending Freedom** combines speech and free exercise claims and calls it a "hybrid" First Amendment claim deserving of the highest level of Supreme Court review strict scrutiny.

Alliance has taken First Amendment law and turned it on its head, casting the business owner on the public street as the oppressed artist who must unwillingly and anti-religiously serve all comers.[32] The Alliance lawyers use the term "artist" 41 times, and 11 of those references are in the phrase "cake artist." The brief's introduction section opens with the sentence: "[The baker's] love for art and design began at an early age," and ends with the words "[s]ince long before this case arose [the baker] has been an artist using cake as his canvas with [the bakeshop] as his studio."[33] That first descriptive paragraph describes the cake shop's logo as that of "an artist's paint palate with paintbrush and whisk."[34]

What is more troubling than Alliance's creativity with First Amendment jurisprudence (as "hybrid" First Amendment claims have gotten little traction in the courts and have been relegated to the dicta-scrap heap), and is more disturbing than a brief that tends to an excess of schmaltz, is the Alliance's looseness with some of the facts. In the Colorado case, the Alliance asked the Administrative Law Judge for discovery from the couple who wanted the cake. Alliance requested discovery on what type of cake the couple would have ordered (if they had not left the store after the baker's pronouncement that he would not make a cake for a gay wedding), and sought details about the couple's wedding ceremony (ostensibly to discover if it was "overtly gay"). **The ALJ denied Alliance's requests for discovery.[35] The Colorado Court of Appeals, in a written opinion, affirmed the ALJ's decision** denying the discovery because the only issues in the case were (i) did baker categorically refuse to make a cake because of his opposition to same sex marriage and, if so, whether CADA as applied to the baker violated his First Amendment rights. "Evidence pertaining to …. The wedding ceremony …. including the nature of the cake served – had no bearing on the legality of" the baker's conduct.[36]

Given this background, why did the Alliance mention in its brief at page 10 that the couple

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received a free cake from someone else and "they had a multi-tiered rainbow-layered wedding cake at their reception in Colorado." To what end? Was the goal to slip into the brief presented to the U.S. Supreme Court arguably irrelevant information to sway the justices into believing the cake was a [secret] gay message hidden beneath the icing in the form of rainbow layers? Also, deep into the hundreds of pages of excerpts of record for the baker were photographs, which appear to be two iPhone photos showing the couple's wedding reception in progress and people, including the couple, standing beside an unadorned three-tiered wedding cake.[37]

As the Colorado Court of Appeals and the ALJ made clear, there was no discussion about the design of the cake. That never happened. Had it happened, the messaging angle on the compelled speech claim, while still weak, would at least have been in the ball park. The facts are that the baker refused to make a wedding cake at all for the couple. At issue (as aptly described by all the levels of review in Colorado) was whether the Commission's cease and desist order to the baker, who worked in a shop open to the public, because he declined to make a cake (and on the facts, a plain, unadorned cake) for a gay couple, was rationally related to the state's interests in preventing discrimination. Period.

The sly moves with the facts alone might give a reviewer pause, but there are other-extra judicial facts that make the whole mixture suspect. In July, 2017, (just two months before the Justice Department filed its friend-of-the-court brief in September 2017), **Attorney General Jeff Sessions** traveled to Orange County, California, and attended a closed-door, no members of the public/press, meeting put on by the **Alliance Defending Freedom** at the Laguna Niguel Ritz Carlton.[38] Given the recent peccadillos involving travel by HHS head Tom Price, **one only wonders how did the Attorney General travel to Southern California, who paid his way, where did he stay and who paid the tab?**

And the amicus briefs, mostly in support of the baker by religious groups and bakers (replete with colored photographs of a myriad of luscious cakes), pour in to the Supreme Court. As of last week, over 50 such briefs were reflected in the legal research databases.

No notice yet on the court's electronic calendar as to when the cake case will be heard. October's calendar is filling up and blank spaces with the word "argument" remain open for some time in the fall.

So here is where we are: The line-up of the justices is pretty clear. The *Pavan* dissenters (Justices Gorsuch, Alito, and Thomas), as well as Chief Justice Roberts, who said in his dissent in *Obergefell*: "The Constitution itself says nothing about marriage . . . ,"[39] are likely all in the religious-freedom-permits-discrimination camp. Conversely, four of the five who believe marriage is a fundamental right (Justices Ginsburg, Sotomayor, Breyer, and Kagan) are firmly in the religious-belief-does-not-permit-discrimination block.

And that leaves the deciding vote to the habitual swing vote, **Justice Kennedy** (although he does not like to be called this as he says he does not "swing" the cases swing.). Justice Kennedy, even though he authored the progressive decisions of Lawrence, *Windsor* and *Obergefell* was the fifth vote which permitted the Hobby Lobby corporation's owners to act in accordance with their religious beliefs and deny women employees birth control on their company health plans. Justice Kennedy also was the 5th vote in *Boy Scouts of America et al. v. Dale*,[40] in which the Court held that the Boy Scouts, a private organization, could terminate a gay associate scout master because his sexual identity conflicted with the organization's religious beliefs. And at the end of last term, June 2017, Justice Kennedy was the fifth vote on the *Trinity Church* decision finding unconstitutional a provision of a state's constitution barring public funds from being spent on religious institutions.[41]

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But here is my hope and if I was able to, and if it were not improper to whisper into Justice Kennedy's ear, here is what I would say:

If a "religious" cake maker can cast himself as a cake artist, then a "religious" hotelier can cast herself as a bedmaking-origami artist, and a "religious" restauranteur can claim to be a "fondue" or "flambé" artist, and they too can discriminate on the basis of sexual orientation . They, too, will be permitted to deny not just cake, but beds and "artistic" meals to those with different sexual orientations.

Can we call what these professionals "do" speech? Should we? Using common sense, and just facts, no. The couple never got to the "message" on the cake. And even if they had, remember that conduct can be expressive; conduct is everywhere. "[I]t is possible to find some kernel of expression in almost every activity a person undertakes,"[42] so do not label it speech whenever the person engaging in conduct intends thereby to express an idea.[43]

I would tell him that the First Amendment is not absolute. One cannot defraud someone and successfully say: "My acts of mail and wire fraud are to be excused because of my religious beliefs." Remember Oliver Wendell Holmes, the now-iconized jurist, whose dissents and concurrences often later became law, and who coined the phrase still used today: "one can't falsely shout[] fire in a theater."[44]

Speech is not absolute, nor is free exercise, and one cannot escape the courts if one takes his child up a mountain to become a ritual sacrifice for his god, and so too are we barred from polygamy.

As Justice Stephen Field said in, *Davis v. Beason*,"[c]rime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'"[45]

It is your beliefs that are sacrosanct no government can tell you what to believe but, as John Locke noted, we, as part of a civil society, give up some freedoms (some conduct) to the extent that it interferes with another member of society's rights. The government is permitted to intrude on conduct so long as the law is neutral, generally applied to all, and not designed to target a particular group's religious practices.[46]

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Justice Kennedy, I ask you to take a page or a phrase from **Washington State Supreme Court Justice Sheryl Gordon McCloud,** writing for the unanimous Washington Supreme Court in rejecting the florist shop owner's claim that her rights to religious freedom justify denying flowers for a gay couple's commitment ceremony. "This case is no more about access to flowers than civil rights cases were about access to sandwiches . . . public accommodations laws do not simply guarantee access to goods or services. Instead they serve a broader societal purpose; eradicating barriers to equal treatment of all citizens in the commercial marketplace."[47]

Or use one of my favorite "expressions" from the New Mexico opinion, *Elane Photography, LLC v. Willock*: ***"[I]f a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve appetizers…."***[48]

I would recite to him a quote from **Sarah Warbelow**, legal director of Human Rights Campaign, an advocacy group for LGBTQ communities, that "people should never use their religious beliefs as a free pass to violate the law or the basic civil rights of others."[49]

Finally, I would ask Justice Kennedy to adopt a line of analysis articulated by the Colorado couple's lawyer, staff attorney from the **ACLU, Ria Tabacco Mar**, during oral argument before the Court of Appeals.[50]

When asked a hypothetical by one of the Colorado appel-

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late justices about a [fictional] portrait painter and whether he needed to paint a gay person's portrait, she responded as follows:

> *If the painter was operating as a public accommodation open to the general public and the fact that the service provided is artistic, does not change the rule of it. If a business chooses to solicit from the general public, it can't turn around and refuse to serve certain members of the public based on a protected characteristic. They can't have it both ways . . . a business open to public must offer the same goods and services to all customers regardless of sexual orientation. [They] can't offer . . . second-class service based on anyone's protected characteristic.*[51]

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Constitutional conflicts are oft time analogous with "driving a clutch" one has to work both pedals with finesse so that the car will drive and not stall out. We, guided by *principled constitutionalism*, recognize and acknowledge other protected classes covered by the penumbra and constellations of rights emanating from our constitution. From the 1967 case, *Loving v. Virginia*,[52] enshrining the unenumerated right to marriage, including interracial marriage, to the more recent *Windsor* and *Obergefell* cases establishing the right of same-sex couples to marry, on sexual orientation, we are placing a foot on the gas pedal of expanded rights and we are letting out the "clutch" of even sincerely-held beliefs and prejudices.

For sure, the initial acceleration may not be smooth, but as we found in the aptly named *Loving* case we ultimately get there. **Justice Kennedy**, let out the clutch, and place your foot ever so slightly on the gas. Let us continue with you on the road to inclusion.

Julie A. Werner-Simon *was a federal prosecutor 1986-2015 and can be reached at jawsMEDIA.la@gmail.com*

JULIE WERNER-SIMON

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[1]*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (2017).
[2]Laura Hill, "Why Lakewood, CO is a Best Place to Live, September 4, 2015", Lakewood, CO real estate blog, https://livability.com/co/Lakewood/real estate/why-lakewood-co-is-a-best-place-to live. Accessed September 23, 2017.
[3]Debora Munn, "It Was Never About the Cake," December 9, 2013, ACLU blog, https://www.aclu.org/blog/lgbt-rights/it-was-never-about-cake.
[4]From page 65(a) of the decision of the Administrative Law Judge ("ALJ"), found in Petitioner's Appendix ("Pet. App."). Pet.App. at 65(a). The ALJ's decision and other documents and pleadings submitted in the administrative and Colorado state court proceedings have not been uploaded or reported by Lexis or Westlaw. See, 2017 U.S. S. Ct. Briefs LEXIS 3231 *13-14. However, uploaded PDF copies of the Petitioner's Supreme Court Excerpt of Record-Appendix, some 334 pages numbered as pages 1(a) through 334(a), are in the public domain. Where applicable, references to the Petitioner's Appendix of documents will be cited using the page number and the (a) designation.
[5]2017 U.S. Ct. Briefs LEXIS 3231 at *21.
[6]As of January 1, 2017, the *states with anti-discrimination statutes applicable to public and private employers and accommodations* are: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. See, Issac Saidel-Goley, *"The Right Side of History: Prohibiting Sexual Orientation Discrimination in Public Accommodations, Housing and Employment,"* 31 Wis.J.L. Gender&Soc'y 117, 121 n. 25 (2016). Some other states have piecemeal anti-discrimination provisions enacted by a governor's executive order. Still other, more progressive, cities, in states with and without antidiscrimination statutes, have local or municipal ordinances barring such discrimination. For example, Miami, Florida, and Omaha, Nebraska are included in this latter category.
[7]Dani Kass, "The Justices And Masterpiece Cakeshop: 18th Time A Charm?," June 15, 2017, Law360.com, http://www.law360.com/articles/935103.
[8]*Pavan v. Smith*, 582 U.S. __, 137 S. Ct. 2075 (2017).
[9]*Obergefell v. Hodges,* 576 U.S. __, 135 S. Ct. 2584 (2015) (constitutionally upholding gay marriage case "on the same terms and conditions as opposite-sex couples").
[10]*Pavan*, 137 S. Ct. at 2075 (dissent).
[11]Id. at 2075-80.
[12]We can assume that the justices who affirmed the lower court's decision did not vote to hear the case because the same result would have been reached if the Court had not taken cert., i.e., the decision of the Colorado Supreme Court would have remained in force.
[13]*United States v. Windsor*, 570 U.S. __, 133 S. Ct. 2675 (2013).
[14]*Lawrence v. Texas*, 539 U.S. 558 (2003) (decriminalizing sodomy and constitutionally establishing the right to sexual intimacy); *United States v. Windsor*, supra, 133 S. Ct. 2675; and *Obergefell*, supra, 135 S. Ct. 2584.
[15]Amicus Brief, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2nd Cir. 2017).
[16]Alan Feuer, "Justice Department Says Rights Law Doesn't Protect Gays," July 27, 2017, New York Times, https://www.newyork times.com.2017/07/27/nyregion/justice-department-gays-workplace.html?mcubz=1
[17]Erin Mulvaney, "Trump Administration Lines Up Against EEOC in LGBT Workplace Rights Case," July 26, 2017, National Law Journal, www.nationallawjournal.com/id=1202794035460?slreturn=20170823075802.
[18]Solicitor's Amicus Brief at 25, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (2017).
[19]https://www.economist.com/blogs/democracyinamerica/2017/09/taking-cake.
[20]Marcia Coyle, "Trump's DOJ Backs Colorado Baker Who Refused Service to Gay Couple," September 7, 2017, National Law Journal blog, http://www.nationallawjournal.com/legaltimes/id=1202797501233/Trumps-DOJ-Backs-Colorado-Baker-Who-Refused-Service-to-Gay-Couple?mcode=1202619327776&curindex=3
[21]*Burwell v. Hobby Lobby*, 573 U.S. __, 134 S. Ct. 2751 (2014).
[22]Chris Boyette, "Hobby Lobby to pay $3 million fine, forfeit ancient artifacts," July 6, 2017, CNN.com, http://www.cnn.com/2017/07/05/us/hobby-lobby-ancient-artifacts-trnd/index.html; Emma Green, "Hobby Lobby Purchased Thousands of Ancient Artifacts Smuggled Out of Iraq," July 5, 2017, TheAtlantic.com, https://www.theatlantic.com/politics/archive/2017/07/hobby-lobby-smuggled-thousands-of-ancient-artifacts-out-of-iraq/532743/.
[23]*U.S.A. v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets and Approximately Three Thousand (3,000) Ancient Clay Bullae,* E.D.N.Y., No. 17-CV-3980 (filed July 5, 2017.)
[24]https://www.justice.gov/usao-edny/pr/united-states-files-civil-action-forfeit-thousands-ancient-iraqi-artifacts-imported.
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[26]*Elane Photography, LLC v. Willock*, 309 P.3d 53, 60-64 (N.M. 2013).
[27]Robert Barnes, "Supreme Court declines case of photographer who denied service to gay couple," April 7, 2017, WashingtonPost.com, https://www.washingtonpost.com/politics/supreme-court-wont-review-new-mexico-gay-commitment-ceremony-photo-case/2014/04/07/f9246cb2-bc3a-11e3-9a05-c739f29ccb08_story.html?utm_term=.606a3df92f76.
[28]*Ingersoll v. Arlene's Flowers*, Benton County Superior Court. No. 13-2-00953-3.
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[32]Petitioner's Opening Brief, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (2017).
[33]Id. at 1.
[34]Id. at 5.
[35]Pet. App. at 51(a).
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[37]Id. at 289(a) – 290(a).
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[39]*Obergefell*, supra, 135 S. Ct. at 2613.
[40]*Boy Scouts of America et al. v. Dale*, 530 U.S. 640 (2000).
[41]*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. __, 137 S. Ct. 2012 (2017).
[42]*City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).
[43]*Rumsfeld v. Forum for Academic & Inst'l Rights*, 547 US 47, 61, 63 (2006).
[44]*Schenck v. United States*, 249 U.S. 47, 52 (1919) (" The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").
[45]*Davis v. Beason*, 133 U.S. 333, 345 (1890), abrogated by *Romer v. Evans,* 517 U.S. 620 (1996).
[46]*Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990))("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)") (internal quotations omitted).
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