NOTE

THE MANY LAYERS OF *MASTERPIECE CAKESHOP*

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ABSTRACT

Throughout the spring of 2018, poised to issue an opinion in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court had scholars and advocates on the edges of their seats, wondering how the Court would finally resolve the "clash of rights" cases—or, balance the respondent's Fourteenth Amendment equal protection claims and the petitioner's First Amendment claims. These cases have become a focus in recent years as protections in the marketplace for LGBTQ persons have expanded, particularly in the wedding-vendor context. With the number of cases increasing and lower courts uncertain how to balance two fundamental rights, all eyes were on the high Court to provide guidance. Unfortunately, to many, Justice Kennedy's opinion was less than masterful in its balancing of these important freedoms, with a number of critics contending that the Court essentially "punted" on the fundamental issue.*

To the contrary, this Note seeks to deconstruct the Masterpiece *decision to reveal the key guidance the Court provided for deciding clash-of-rights cases in the future. Like any good wedding cake, the opinion contains many layers, which stand for propositions both narrower and broader than the overall holding. Uniting each layer is a recognition that these freedoms cannot be perfectly balanced, and, while harsh, it is thus on the religious believer to pay a price before selling products in the public marketplace in order to maintain societal values. This, as New Mexico Supreme Court Judge Richard Bosson once eloquently articulated, is the "price of citizenship."*

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CONTENTS

INTRODUCTION

The Supreme Court's recent ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[1] left scholars wondering how the Court will resolve future "clash of rights" cases—First Amendment challenges to antidiscrimination laws protecting the LGBTQ community in places of public accommodation.[2] To many, the Court "punted" on the case, resting its holding on a procedural-fairness concern.[3] In the end, the Court narrowly reversed the Colorado Court of Appeals' holding, noting that future free exercise claims must be adjudicated without state "hostility" toward religion.[4] Thus, most of the current discourse about *Masterpiece Cakeshop* stresses the narrowness of the Court's decision and emphasizes that the decision's precedential value is limited to the case's particular facts.[5]

To the contrary, this Note intends to demonstrate that *Masterpiece Cakeshop*—like any good wedding cake—contains many layers, standing for propositions both broader and narrower than its holding. Recognizing these nuances could have important implications for clash-of-rights cases, which "are

[1] 138 S. Ct. 1719, 1732 (2018) (finding that Colorado Civil Rights Commission was not religiously neutral in issuing cease-and-desist order to cake shop that refused to sell wedding cake for same-sex wedding).

[2] *See, e.g.*, Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *For Religious Objectors?*, 2017-2018 CATO SUP. CT. REV. 139, 139 ("Reviewing the case of [a] baker who declined on religious grounds to 'design and create a custom cake to celebrate [a] same-sex wedding,' the Court seemed primed to address multiple issues affecting other wedding vendors (florists, photographers, wedding planners) and religious objectors (colleges, adoption agencies, etc.) facing penalties for sexual-orientation discrimination arising from their traditional beliefs." (second alteration in original)).

[3] *See, e.g.*, Jeff Jacoby, Opinion, *The Real Significance of the* Masterpiece Cakeshop *Decision*, BOSTON GLOBE (June 5, 2018, 2:29 PM), https://www.bostonglobe.com/opinion/2018/06/05/the-real-significance-masterpiece-cakeshop-decision/bYepFqaIEdPKyL19UAmYCL/story.html ("[The] majority opinion sidestepped the hard questions posed by this litigation."); Amanda Marcotte, Opinion, *Supreme Court Dodges the Big Issues in* Masterpiece Cakeshop *Ruling: Is There a Loophole for Bigots?*, SALON (June 4, 2018, 5:20 PM), https://www.salon.com/2018/06/04/supreme-court-dodges-the-big-issue-in-masterpiece-cakeshop-ruling-is-there-a-loophole-for-bigots/ [https://perma.cc/G2DB-ZUKL].

[4] *Masterpiece Cakeshop*, 138 S. Ct. at 1732 ("The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires.").

[5] *See, e.g.*, Adam Liptak, *Justices Favor Baker in Case on Gay Rights*, N.Y. TIMES, June 5, 2018, at A1 ("The court's decision was narrow, and it left open the larger question of whether a business can discriminate against gay men and lesbians based on rights protected by the First Amendment."); Richard A. Epstein, *Symposium: The Worst Form of Judicial Minimalism* – Masterpiece Cakeshop *Deserved a Full Vindication for Its Claims of Religious Liberty and Free Speech*, SCOTUSBLOG (June 4, 2018, 8:29 PM), http://www.scotusblog.com/2o18/o6/symposium-the-worst-form-of-judicial-minimalism-masterpiece-cakeshop-deserved-a-full-vindication-for-its-claims-of-religious-liberty-and-free-speech [https://perma.cc/XY45-ZKDP] (describing *Masterpiece Cakeshop*'s holding as "narrow").

not going away."[6] Part I traces the development of the clash of rights, with a particular focus on how it develops in a class of "wedding-vendor" cases. These cases ask whether florists, bakers, wedding planners, and the like have to provide services for same-sex weddings when doing so goes against their religious beliefs.[7] Given the sensitivity of the rights involved and the Court's lack of guidance on the issue, lower courts have been reluctant to decisively take a stand as to the appropriateness of religious accommodation to sexual orientation nondiscrimination laws.[8]

One notable exception to this hesitation is New Mexico Supreme Court Judge Richard Bosson's concurrence in *Elane Photography, LLC v. Willock*,[9] a wedding-vendor case involving a religious believer's refusal to photograph a same-sex wedding.[10] In his concurrence, Judge Bosson announced a guiding principle for these cases, stating that a religious believer who holds himself out to the public square must subsequently channel his conduct to maintain civic society—or, as Judge Bosson painted it, the believer must pay a "price of citizenship."[11] In his view, the clash of rights exists because it involves two conflicting government obligations, and government protection of one obligation necessarily comes at the expense of the other.[12] The religious believer, surrendering a fraction of his First Amendment constitutional protection, pays a price to maintain the larger constitutional ideal of a respectful society working for equality and justice for all.[13] Judge Bosson also emphasized that the price purchases the utmost governmental respect to the religious believer in adjudicating his free exercise claim.[14] The religious person's respect for the LGBTQ individual, combined with the government's respect for the religious person's beliefs, creates the mutually tolerant society in which both sides seek to live.

Judge Bosson's concurrence offers a useful template for understanding and applying the "general rule" Justice Kennedy set forth in his majority opinion in *Masterpiece Cakeshop*, which Justice Kagan further explicated in her concurrence:

> [I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral

[6] Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 53 (2018).

[7] *See id.*

[8] *See infra* note 62 and accompanying text.

[9] 2013-NMSC-040, 309 P.3d 53, *cert. denied*, 134 S. Ct. 1787 (2014) (mem.).

[10] *Id.* ¶ 1, 309 P.3d at 58-59.

[11] *Id.* ¶ 92, 309 P.3d at 80 (Bosson, J., concurring).

[12] *See id.* ¶ 83, 309 P.3d at 78 ("If honoring same-sex marriage would so conflict with their fundamental religious tenets, no less than the Jehovah's Witnesses in *Barnette*, how then, they ask, can the State of New Mexico compel them to 'disobey God' in this case? How indeed?").

[13] *See id.* ¶ 91, 309 P.3d at 79 ("On a larger scale, this case provokes reflection on what this nation is all about, its promise of fairness, liberty, equality of opportunity, and justice.").

[14] *See id.* ¶ 91, 309 P.3d at 80.

> and generally applicable public accommodations law. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views neutral and respectful consideration.[15]

Part II dissects this "general rule" to reveal the two layers that its two sentences provide: (1) the broad guidance it provides courts in resolving clash-of-rights cases and (2) the narrow reminder it provides the adjudicators moderating these claims.[16] With regard to the first layer, this Note demonstrates that the first sentence of the general rule should be read to elevate LGBTQ equality to the level of a compelling governmental interest.[17] As for the second layer, this Note demonstrates that the second sentence of the general rule (i.e., "the hostility holding") is a narrow restriction on the first.[18] At most, it reminds the government of two preexisting rules guiding First Amendment jurisprudence: (1) discriminatory sentiments among official decisionmakers can render their actions unconstitutional, and (2) the government cannot prescribe which messages or viewpoints are permissible when protected groups are not involved.[19] Given the hostility holding's unremarkable guidance, this addendum to the general rule should not be viewed as necessitating religious accommodation. Instead, in its deliberate use of tolerant language and tone, Justice Kennedy's opinion (and Justice Kagan's concurrence) should be read as adopting Judge Bosson's "price of citizenship" approach. Clear in its guidance and simple to apply, this framework provides the best tool for resolving wedding-vendor cases moving forward.[20] Thus, Part III discusses how the price-of-citizenship framework can be used to determine the fate of similar free speech challenges, which the Court left largely unaddressed in *Masterpiece Cakeshop*.[21]

I. "CLASH OF RIGHTS": FIRST AMENDMENT FREE EXERCISE MEETS FOURTEENTH AMENDMENT ANTIDISCRIMINATION LAW

The clash of rights is a conflict between two constitutional protections. On one side stands the Free Exercise Clause and the Court's corresponding free

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[15] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) (Kagan, J., concurring) (alterations in original) (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (majority opinion)).

[16] *See infra* Part II. This Note largely focuses, as the *Masterpiece Cakeshop* opinion did, on the resolution of free exercise challenges to antidiscrimination laws. *See Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring) ("The Court does not address this [free speech] claim because it has some uncertainties about the record.").

[17] *See infra* Section II.A (tracing how Justice Kennedy in *Masterpiece Cakeshop* ties sexual orientation back to the compelling interest standard).

[18] *See infra* Section II.B (examining lack of remarkability in Justice Kennedy's reminder to government adjudicators that they must approach free exercise claims with neutrality).

[19] *See infra* Section II.B (dissecting neutrality reminder).

[20] *See infra* Section II.C (explaining how Justice Kennedy's opinion echoes that of Judge Bosson's concurrence, making both useful tools in examining clash-of-rights challenges until the Court gives more explicit guidance).

[21] *See infra* Part III (examining implications of *Masterpiece Cakeshop* on free speech challenges to antidiscrimination laws).

exercise jurisprudence, the latter of which has continued to evolve over the past half-century.[22] This state of flux only serves to complicate the ways in which the Free Exercise Clause interacts with the other side of the clash—state antidiscrimination laws aimed at the Fourteenth Amendment's guarantee of equal protection. While this clash has been resolved in some contexts, such as antidiscrimination protections on the basis of race, the laws continue to evolve, adding forbidden bases of discrimination.[23] Today, the wedding-vendor cases remain unresolved, with courts still wondering if religious accommodations to sexual orientation antidiscrimination laws are appropriate.[24]

A. *The Clash of Rights: Free Exercise and Antidiscrimination Law*

The Free Exercise Clause of the First Amendment, made applicable to the states by incorporation through the Fourteenth Amendment,[25] provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[26] This protects religious observers from unequal treatment, guaranteeing "first and foremost, the right to believe and profess whatever religious doctrine one desires."[27] For twenty years, the leading decision surrounding the Free Exercise Clause was *Sherbert v. Verner*,[28] in which Justice Brennan's majority opinion held that courts should apply strict scrutiny in reviewing a law imposing a substantial burden on the free exercise of religion.[29] However, hinting at changes to come, Justice Harlan in dissent stated that he could not "subscribe to the conclusion that the State is constitutionally compelled to carve out an exception" to a general law.[30]

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[22] *See infra* Section I.A (discussing changes in Court's free exercise jurisprudence).

[23] *See infra* Section I.A (discussing evolving antidiscrimination laws).

[24] *See infra* Section I.A (discussing current state of clash between free exercise rights and antidiscrimination laws protecting on basis of sexual orientation).

[25] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

[26] U.S. CONST. amend. I.

[27] Emp't Div. v. Smith, 494 U.S. 872, 876-77 (1990), *superseded by statute*, Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 574 U.S. 352 (2015).

[28] 374 U.S. 398 (1963).

[29] *Id.* at 403 (requiring denial of unemployment benefits to Seventh-Day Adventist Church member to be justified by "compelling state interest"). He stated that "some compelling state interest . . . [must] justif[y] the substantial infringement of appellant's First Amendment right" in order for a law to stand. *Id.* at 406.

[30] *Id.* at 423 (Harlan, J., dissenting) (emphasis omitted). He emphasized: "Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area." *Id.* (first citing Braunfeld v. Brown, 366 U.S. 599 (1961); then citing Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); and Reynolds v. United States, 98 U.S. 145 (1878)).

Justice Scalia later wove this thread from Justice Harlan's dissent into the majority opinion for *Employment Division v. Smith*.[31] There, he suggested that directing heightened scrutiny for every policy that infringes on religious convictions, while well intentioned, could be misguided.[32] In that case, two members of a Native American church who had used peyote for sacramental purposes brought a free exercise claim challenging the state's decision to deny them unemployment benefits because the use of peyote violated the state's drug laws.[33] In an opinion by Justice Scalia, the Court rejected the challenge, reasoning that "so long as an otherwise valid law is neutral and generally applicable, any incidental effect on a person's exercise of religion does not violate the First Amendment."[34] He argued that to maintain a "compelling interest" test, like that in *Sherbert*, would lead to anarchy by allowing a person, by virtue of his beliefs, "to become a law unto himself."[35] He instead encouraged Smith and his supporters to obtain exemptions through the legislative process at the state level.[36]

The reaction to *Smith* came quickly, with Congress responding to fears that religious liberty was under attack by almost unanimously passing the Religious Freedom Restoration Act of 1993 ("RFRA").[37] The RFRA sought "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[38] Under this standard, the government is prohibited from substantially burdening a person's exercise of religion unless it "demonstrates that application of the burden to the person—(1) is in furtherance of a

[31] 494 U.S. 872, 878-79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."), *superseded by statute*, Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 574 U.S. 352 (2015).

[32] *See* Patrick Weil, *Freedom of Conscience, but Which One? In Search of Coherence in the U.S. Supreme Court's Religion Jurisprudence*, 20 U. PA. J. CONST. L. 313, 330 (2017) ("Scalia argued that to adopt a true 'compelling interest' requirement for laws that affect religious practice would lead towards 'anarchy.'").

[33] *Smith*, 494 U.S. at 874.

[34] VALERIE C. BRANNON, CONG. RESEARCH SERV., LSB10146, *MASTERPIECE CAKESHOP*: PROVING GOVERNMENT HOSTILITY TO RELIGION 2 (2018); *see also Smith*, 494 U.S. at 878 (reasoning that if a burden on religious activity is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended").

[35] *Smith*, 494 U.S. at 885, 888 (quoting *Reynolds*, 98 U.S. at 166-67). He further asserted that such a test would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.* at 888-90.

[36] *Id.* at 890.

[37] Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2018)); *see also All Information (Except Text) for H.R. 1308—Religious Freedom Restoration Act of 1993*, CONGRESS.GOV, https://www.congress.gov/bill/103rd-congress/house-bill/1308/all-info [https://perma.cc/QU4T-TUPK] (last visited Dec. 18, 2019). A unanimous U.S. House and a nearly unanimous U.S. Senate—three senators voted against passage—passed the bill, and President Bill Clinton signed it into law. *Id.*

[38] 42 U.S.C. § 2000bb(b)(1).

compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[39] The Court, however, did not back down. In 1997, the Court in *City of Boerne v. Flores*[40] found the RFRA unconstitutional as applied to the states.[41] Congress fired back and "continued its legislative efforts to eliminate *Smith*," ultimately passing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),[42] "a scaled-back version [of the RFRA] targeting land use regulation and institutionalized persons."[43]

However, perhaps the most important development in the clash of rights occurred independently of this battle between the Court and Congress, with twenty-one states adopting a state-based religious exemption law or "mini-RFRA," either through statute or constitutional amendment.[44] These mini-RFRAs implemented the *Sherbert* strict-scrutiny standard at the state level, once again obligating the government to justify an incidental suppression of religious free exercise as narrowly tailored to further a compelling governmental interest.[45]

[39] *Id.* § 2000bb-1(b).

[40] 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[41] *Id.* at 511 ("We conclude the statute exceeds Congress' power."). Writing for the Court, Justice Kennedy held that Congress had exceeded its constitutional power by imposing *Sherbert*'s compelling interest standard on the states through the RFRA. *Id.* at 536 ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.").

[42] Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-4).

[43] Alvin C. Lin, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 724 (2001).

[44] Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 19, 20 (2016).

[45] *Id.* at 24 n.113 ("[M]ost state RFRAs closely, if not completely, track the federal RFRA."). In recent years, the executive branch has become more involved in the dispute, inflaming these existing tensions over the appropriate standard of review for religious claims. *See* Eric Bihlear, Note, *A Cake by Any Other Name: An Analysis of* Masterpiece Cakeshop *and the Delicate Balance Between Sexual Autonomy and Religious Freedom*, 19 RUTGERS J.L. & RELIGION 355, 355-56 (2018). On May 4, 2017, President Trump signed an Executive Order entitled "Promoting Free Speech and Religious Liberty," guiding the executive branch to vigorously enforce protection for religious freedoms. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017). On October 6, 2017, as a response to this, Attorney General Jeff Sessions issued a government-wide, twenty-five-page memo promoting sweeping protection for religious freedom. Memorandum from Jeff Sessions, Attorney Gen., to All Exec. Dep'ts and Agencies on Federal Law Protections for Religious Liberty 1 (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download [https://perma.cc/QL6F-

Thus, the main issue under the Court's free exercise jurisprudence revolves around the standard of review for such claims. This is particularly important because it raises another fundamental question: Does the Constitution compel free exercise exemptions to neutral laws of general applicability?[46] Under *Smith*, the Court's premier precedent, "if granting a religious exemption from a public accommodations law would frustrate the government's interest in enacting the law or harm the law's beneficiaries, then unencumbered enforcement of the law is likely the least restrictive means of furthering the government's compelling ends."[47] Yet *Sherbert*'s strict-scrutiny review, codified in mini-RFRAs, guides state courts to provide religious accommodations in most cases.[48]

These issues have only been further complicated by the passage of numerous state public accommodations laws protecting individuals from discrimination on the bases of sexual orientation and gender identity. The aim of these laws—promoting a government interest in equality for the LGBTQ community—directly conflicts with certain religious beliefs and thus sparks increased requests for religious accommodation under laws of seemingly general and neutral applicability.[49]

The Civil Rights Act of 1964 brought this clash to the forefront on the national stage.[50] It stated, "All persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[51] Places of public accommodation generally include privately owned, for-profit businesses open to the general public.[52] Churches, synagogues,

L859]. These documents indicated an executive preference for the RFRA's strict-scrutiny standard. *See* Exec. Order No. 13,798, 82 Fed. Reg. at 21,675 (ordering that agencies "to the greatest extent practicable and permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech"); Memorandum from Jeff Sessions, *supra*, at 3-4 (establishing three principles for enforcing RFRA).

[46] Lin, *supra* note 43, at 724 ("Underlying the argument over whether *Smith* was correctly decided is a more fundamental question of whether free exercise exemptions are compelled by the Constitution."); *see also* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 360 (1989) (arguing against religious accommodation to neutral laws); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1495 (1990) (arguing that Framers intended religious exercise to receive special protection).

[47] Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J.F. 201, 212 (2018).

[48] *See* 42 U.S.C. § 2000bb(b)(1) (2018) ("The purposes of this chapter are . . . to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) . . . .").

[49] *See infra* note 62 (providing examples of cases involving requests for religious accommodation to antidiscrimination law).

[50] Pub L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h (2018)).

[51] 42 U.S.C. § 2000(a).

[52] *See id.* § 2000(b) ("Each of the following establishments which serves the public is a place of public accommodation . . . any inn, hotel, motel, or other establishment that provides

mosques, and other religious organizations are generally not considered places of public accommodation.[53] Besides these exceptions, courts have interpreted places of public accommodation to include almost any business that is open to the public, especially in the context of enforcing antidiscrimination laws.[54]

Many states had passed their own public accommodations laws by 1964; however, for those that had not, the federal act served as a baseline for them to follow.[55] Moreover, in the years since its passage, many states have expanded the number of prohibited classifications beyond the "historical classes" of "race, religion, gender, and national origin."[56] One category that has gained particular attention in recent decades is sexual orientation. Since the Civil Rights Act of 1964, twenty-three states have adopted some form of an antidiscrimination statutory scheme that protects on the basis of sexual orientation.[57] These states have made it clear that to discriminate in business on the basis of sexual orientation is "just as intolerable as discrimination directed toward race, color, national origin, or religion."[58]

Thus, the clash of rights between the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause was born. On the one hand, twenty-four states have some form of an antidiscrimination statutory scheme that protects against unequal treatment on the basis of sexual orientation

lodging to transient guests, . . . any restaurant cafeteria, lunchroom, lunch counter, soda fountain, other facility principally engaged in selling food . . . .").

[53] *See id.* (omitting any houses of worship on the list of covered establishments).

[54] *See* I.J. Schiffres, Annotation, *What Businesses or Establishments Fall Within State Civil Rights Statute Provisions Prohibiting Discrimination*, 87 A.L.R.2d 120 (2018) (collecting cases "which consider the question of what businesses, amusements, or other establishments fall within provisions of civil rights statutes prohibiting discrimination on account of race, color, or religion in certain specified places and in all places of public accommodation or amusement" (footnotes omitted)).

[55] Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 240 (1978) ("Similarly, the existence of numerous state laws facilitated Congress' acceptance of Title II."); *see also* Telescope Media Grp. v. Lucero, 936 F.3d 740, 755-56 (2019) (Kelly, J., dissenting) ("Approximately half the states in the Union, along with the District of Columbia, provide similar protections. In the remaining states, more than 100 local jurisdictions have adopted laws or ordinances prohibiting discrimination on the basis of sexual orientation in places of public accommodation. In all, more than half of all Americans live in a jurisdiction that prohibits this type of discrimination." (footnote and citation omitted)).

[56] Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 89, 309 P.3d 53, 79 (Bosson, J., concurring).

[57] *See Non-discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws [https://perma.cc/8CMJ-A2NW] (last visited Dec. 18, 2019) (demonstrating that twenty-one states and District of Columbia have explicit antidiscrimination laws for public accommodations with regard to sexual orientation and gender identity, two states have interpreted preexisting statutory schemes as including sexual orientation and/or gender identity, and one state has protection for sexual orientation only).

[58] *Elane Photography*, ¶ 89, 309 P.3d at 79.

in the public square.[59] On the other hand, twenty-one states have religious exemption laws resembling the RFRA.[60] As a result, in a number of states, the government either currently faces or could soon face two independent and incompatible obligations.[61]

Known colloquially as the "wedding-vendor" cases, a typical case illustrating the problem today proceeds as follows: A gay couple comes to a religious business owner to obtain services for a wedding. The business owner declines to provide a service based upon their religious belief that marriage is between one man and one woman. A state antidiscrimination commission finds that the business owner has violated a state antidiscrimination law protecting individuals on the basis of sexual orientation. The business owner then appeals the decision, arguing that the state antidiscrimination law infringes on his First Amendment free exercise rights.[62] Courts then need to determine which interest—equality based on sexual orientation or free exercise of religion—should receive priority or at least attempt to strike a balance between the two paramount interests. While the Supreme Court has been reluctant to take on the issue, courts across the country have necessarily been grappling with this line.[63]

[59] *See Non-discrimination Laws*, *supra* note 57.

[60] *See Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/religious_exemption_laws [https://perma.cc/W3ET-B64X] (last visited Dec. 18, 2019) (demonstrating that one state has religious exemption constitutional provision and twenty more have statutory provisions).

[61] *Compare id.* (detailing state religious exemption laws), *with Non-discrimination Laws*, *supra* note 57 (demonstrating that Connecticut, Illinois, New Mexico, Pennsylvania, and Rhode Island already face competing obligations, and another thirty-four states have at least one of the two protections).

[62] To date, bakers, photographers, florists, graphic designers, videographers, and the owners of wedding venues have attempted to block the application of state civil rights laws that prohibit them from denying services for weddings on the basis of sexual orientation. *See, e.g.*, 303 Creative LLC v. Elenis, No. 16-cv-02372, 2019 WL 4694159, at *1 (D. Colo. Sept. 26, 2019) (graphic design); Country Mill Farms, LLC v. City of E. Lansing, 280 F. Supp. 3d 1029, 1038 (W.D. Mich. 2017) (venue); Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1099-100 (D. Minn. 2017) (videography), *aff'd in part, rev'd in part, and remanded*, 936 F.3d 740 (2019); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 432-33 (Ariz. Ct. App. 2018) (calligraphy), *vacated in part by* 448 P.3d 890 (2019); *Elane Photography*, ¶ 7, 309 P.3d at 59-60 (photography); Gifford v. McCarthy, 137 A.D.3d 30, 33-34 (N.Y. App. Div. 2016) (venue); State v. Arlene's Flowers, Inc., 389 P.3d 543, 550 (Wash. 2017) (floristry), *vacated and remanded mem.*, 138 S. Ct. 2671 (2018).

[63] *See Arlene's Flowers*, 389 P.3d at 559 (citing *Elane Photography*, ¶ 52, 309 P.3d at 71) (explaining that New Mexico Supreme Court, in grappling with same question, determined that courts should not decide whether businesses are artistic enough to "warrant exemptions from antidiscrimination laws"). *Masterpiece Cakeshop* represents the first time the Supreme Court seemed willing to take up the challenge, having previously rejected certiorari in similar cases. *See, e.g.*, Elane Photography, LLC v. Willock, 572 U.S. 1046 (2014) (mem.) (denying petition for writ of certiorari).

B. *Judge Richard C. Bosson's Framework: "The Price of Citizenship"*

Endeavoring to do what the Supreme Court had not yet done, Judge Bosson of the New Mexico Supreme Court articulated a potential resolution to the wedding-vendor cases in *Elane Photography*.[64] In 2006, Vanessa Willock emailed Elane Photography, LLC, requesting its services in photographing her commitment ceremony to another woman, Misti Collinsworth.[65] The owner, Elaine Huguenin, denied services, claiming that providing them to a lesbian couple would violate her religious beliefs.[66] After an investigation, the New Mexico Human Rights Commission found the company guilty of discrimination based on sexual orientation in violation of the state public accommodation law.[67] The New Mexico Supreme Court upheld that decision in 2013.[68]

In his concurring opinion, Judge Bosson announced a broad principle centered around the idea that "at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others."[69] Accordingly, Judge Bosson opined, Huguenin could no more turn away customers on the basis of sexual orientation than she could refuse to photograph African Americans and thus was compelled by law to compromise her religious beliefs.[70] His lesson: "In a constitutional form of government, personal, religious, and moral beliefs, when *acted upon* to the detriment of someone else's rights, have constitutional limits."[71] As he explained, the Huguenins are free "to think, to say, to believe, as they wish" in their personal lives; however, in the world of public accommodation, all citizens must "channel their conduct . . . so as to leave space for other Americans who believe something different."[72] This is, as he described it, "the price of citizenship," which we "all have to pay somewhere in our civic life."[73]

Judge Bosson stressed that government, as well as society as a whole, owes the religious believer something in return for paying the "price of citizenship"—namely, the religious believer has earned the right to have his or her claim viewed and adjudicated with respect.[74] When Judge Bosson spoke of the compromise "that holds us together as a nation" and "the tolerance that lubricates the varied moving parts of us as a people,"[75] he was speaking to citizens on both sides of the clash of rights, acknowledging that his approach

[64] *Elane Photography*, ¶¶ 89-92, 309 P.3d at 79-80 (Bosson, J., concurring).

[65] *Id.* ¶¶ 7-8, 309 P.3d at 59-60 (majority opinion).

[66] *Id.* ¶ 7, 309 P.3d at 59-60.

[67] *Id.* ¶ 9, 309 P.3d at 60.

[68] *Id.* ¶ 79, 309 P.3d at 77.

[69] *Id.* ¶ 91, 309 P.3d at 79 (Bosson, J., concurring).

[70] *Id.* ¶ 89, 309 P.3d at 79.

[71] *Id.* ¶ 86, 309 P.3d at 78.

[72] *Id.* ¶¶ 91-92, 309 P.3d at 79-80.

[73] *Id.* ¶ 91, 309 P.3d at 80.

[74] *Id.* ¶ 83, 309 P.3d at 78 ("On the record before us, no one has questioned the Huguenin's devoutness or their sincerity; their religious convictions deserve our respect.").

[75] *Id.* ¶ 92, 309 P.3d at 80.

would put a "tangible" hardship on the Huguenins,[76] who are now "compelled by law to compromise the very religious beliefs that inspire their lives."[77] He further stressed that no one questions the Huguenins' "devoutness or their sincerity," concluding that "their religious convictions deserve our respect."[78] Thus, in return for the price of citizenship, government adjudicators owe sincere religious believers the dignity of adjudicating their claims without hostility.

C. Masterpiece Cakeshop*: Procedural History and Holding*

Masterpiece Cakeshop began, like many other wedding-vendor cases, when Charlie Craig and David Mullins, two men intending to celebrate their wedding, visited Jack Phillips, the baker and owner of the Colorado business "Masterpiece Cakeshop," to obtain a cake for the celebration.[79] Phillips informed them that he did not make cakes for same-sex weddings.[80] The next day, Craig's mother called Phillips and asked why he had refused to serve her son.[81] Phillips told her that he refused to make cakes for any same-sex wedding ceremony because of "his religious opposition to same-sex marriage" and 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 and participation in the ceremony and relationship that [Craig and Mullins] were entering into."[82]

The couple then filed a claim with the Colorado Civil Rights Division, alleging that Phillips had violated the Colorado Anti-Discrimination Act ("CADA") by refusing them service on the basis of sexual orientation.[83] Similar to other antidiscrimination laws, CADA defines "public accommodation" broadly to include a "place of business engaged in any sales to the public and any place offering services . . . to the public," but it excludes "a church, synagogue, mosque, or other place that is principally used for religious

[76] *Id.* ¶ 90, 309 P.3d at 79 ("It will no doubt leave a tangible mark on the Huguenins and others of similar views.").

[77] *Id.*

[78] *Id.* ¶ 83, 309 P.3d at 78.

[79] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018). As gay marriage was not legalized in Colorado at the time, Craig and Mullins planned to marry in Massachusetts and then celebrate back in Colorado with their families. Nick Gass, *Appeals Court Rules Colorado Bakery Can't Refuse Service to Gay Couple*, POLITICO (Aug. 13, 2015, 12:27 PM), https://www.politico.com/story/2015/08/colorado-bakery-refuse-service-gay-couple-appeals-court-ruling-121331 [https://perma.cc/4H2N-QU9D].

[80] *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1725. CADA provides in relevant part:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, *sexual orientation*, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

COLO. REV. STAT. § 24-34-601(2)(a) (2019) (emphasis added).

purposes."[84] Colorado has an administrative system to resolve claims of discrimination under this act, the final step of which is a public hearing before the Colorado Civil Rights Commission.[85] During the adjudication of Phillips's case in front of the Commission, one commissioner made a comment that later became crucial. He stated:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust . . . —we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[86]

Ultimately, the Commission agreed with Craig and Mullins that Phillips had violated CADA, and it ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples."[87]

Phillips subsequently appealed to the Colorado Court of Appeals, calling attention to the case of another Colorado citizen, William Jack.[88] Jack filed three claims of discrimination under CADA after he was denied service at three Colorado bakeries, all of which had declined to create a custom cake containing verses from the Bible and imagery expressing his opposition to same-sex marriage.[89] In all three of these claims, the Commission concluded that the bakers had not violated CADA.[90] Phillips contended that the disparity in the treatment of these bakers showed hostility toward his religious beliefs.[91] The Colorado Court of Appeals rejected this argument, concluding that the bakers in William Jack's case had declined to serve him because of the offensive nature of the message he requested.[92] The court also rejected the argument that the Commission's order unconstitutionally compelled Phillips to convey a celebratory message about gay marriage.[93] Phillips sought review in the U.S. Supreme Court, which granted certiorari, renewing his claims under the Free Speech and Free Exercise Clauses of the First Amendment.[94]

Thus, the clash of rights had made its way to the highest court, which now had the opportunity to resolve the dispute between First Amendment liberties and Fourteenth Amendment protection for sexual orientation. Justice Kennedy

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[84] *Id.* § 24-34-601(1).

[85] *Masterpiece Cakeshop*, 138 S. Ct. at 1725.

[86] *Id.* at 1729.

[87] *Id.* at 1726 (omission in original).

[88] *See id.* at 1730 (describing Phillips's appeal).

[89] *Id.* at 1749 (Ginsburg, J., dissenting).

[90] *Id.* at 1730 (majority opinion).

[91] *Id.*

[92] *Id.* at 1730-31.

[93] *Id.* at 1727 (citing Mullins v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 57, 370 P.3d 272, 283).

[94] *Id.*

began the majority opinion by drawing attention to this fact, noting the difficulty of the issue.[95] He explained that it presented a tension between the state's authority to protect the "rights and dignity of gay persons" facing discrimination in places of public accommodation and "the right of all persons to exercise fundamental freedoms under the First Amendment."[96]

Yet, in the end, the Court largely avoided this underlying clash and instead decided the case on grounds of adjudicative hostility toward religion.[97] Citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[98] Justice Kennedy's majority opinion held that "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[99] The Court pointed to two aspects of the state proceedings as compromising this neutrality: (1) comments within the Commission's formal hearings and (2) the Commission's apparent disparate treatment of William Jack's case.[100]

II. BROAD AND NARROW IMPLICATIONS OF *MASTERPIECE CAKESHOP*

The Supreme Court's decision to grant certiorari in *Masterpiece Cakeshop* was significant, as it represented the Court's first opportunity to hear oral argument in and definitively resolve the wedding-vendor cases.[101] Commentators sat waiting in suspense, speculating about the outcome.[102] In the end, the Court's decision disappointed many people, leaving them to wonder how the clash of rights will be moderated moving forward.[103] This reality, in turn, has caused many people to criticize *Masterpiece Cakeshop*'s precedential

[95] *Id.* at 1723.

[96] *Id.*

[97] *See, e.g.*, Berg, *supra* note 2, at 139.

[98] 508 U.S. 520 (1993).

[99] *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

[100] *Id.* at 1729-31.

[101] *See* Laycock, *supra* note 6, at 54 (tracing line of lower-court wedding-vendor cases culminating in *Masterpiece Cakeshop*).

[102] *See, e.g.*, Terri R. Day & Danielle Weatherby, *Contemplating* Masterpiece Cakeshop, 74 WASH. & LEE L. REV. ONLINE 86, 90 (2017) ("*Masterpiece Cakeshop* provides an opportunity for the Court to reclaim the grounding principles inherent in public accommodation laws that recognize the civic duty in 'serving the public' and hold that free exercise must bow to equal protection when necessary to maintain the social order."); David Savage, *Cake Case Could Put Limits on Civil Rights; Justices to Weigh a Baker's Rebuff of a Gay Couple*, L.A. TIMES, June 27, 2017, at A1 ("The Colorado case is likely to become one of the court's most contentious cases next term. It could decide whether business owners are allowed to cite their religious views as a reason for refusing to serve gay and lesbian couples. Potentially, it could sweep even more broadly, opening a religious exemption to civil rights laws that could allow discrimination against other groups.").

[103] *See* Liptak, *supra* note 5, at A1 ("The court's decision was narrow, and it left open the larger question of whether a business can discriminate against gay and lesbians based on rights protected by the First Amendment.").

scope as limited to the facts of Phillips's case.[104] However, to the contrary, the Court did not avoid the important issues; instead, it provided two important guiding principles in this clash of rights—one broadly applicable to courts resolving upcoming First Amendment challenges to antidiscrimination laws based on sexual orientation, the other narrowly applicable to the government in adjudicating these claims. Reconciling the case's broad and narrow implications reveals that Justice Kennedy's opinion is best read as an adoption of Judge Bosson's price-of-citizenship approach—one which provides clear guidance on how future wedding-vendor cases should be resolved.

A. *Broad: State Antidiscrimination Laws Withstand Strict Scrutiny*

At first glance, Justice Kennedy's opinion seems to further complicate the debate behind the proper standard of review for a free exercise claim. In reaching the "general rule" that religious objections do not entitle believers to deny service to the LGBTQ community, the opinion fails to indicate what standard of review the Court employed—the rational-basis review of *Smith* or the strict-scrutiny review of state mini-RFRAs.[105] In actuality, *Masterpiece Cakeshop* resolves rather than complicates this religious jurisprudence by indicating that accommodation to antidiscrimination law is inappropriate under either standard, making the standard of review for free exercise claims irrelevant for purposes of antidiscrimination law accommodations. It does this in two ways: First, it elevates LGBTQ equality to the level of a compelling governmental interest. Second, through analogy to race, it indicates that the least restrictive means of reaching this compelling interest necessitates denying religious accommodations.

The Court's descriptions of Colorado's antidiscrimination law as "neutral" and "generally applicable" would have been enough to establish its constitutionality under *Smith*.[106] Far more interesting, though, is the fact that, in setting its rule, the Court cited the leading precedent for *rejecting* a free exercise claim in the public-accommodations context[107]—*Newman v. Piggie Park Enterprises, Inc*.[108] In that case, the public-accommodations provision of the 1964 Civil Rights Act protecting on the basis of racial discrimination met the "compelling interest" standard of state mini-RFRAs.[109] In the years following

[104] *See id.* (depicting *Masterpiece Cakeshop* holding as narrow).

[105] *See supra* Section I.A (discussing conflicting standards of review under Free Exercise Clause).

[106] Emp't Div. v. Smith, 494 U.S. 872, 888-90 (1990) (listing examples of neutral and generally applicable laws that should withstand Free Exercise scrutiny), *superseded by statute*, Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 574 U.S. 352 (2015).

[107] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

[108] 390 U.S. 400, 402 n.5 (1968) (per curiam) (rejecting as "patently frivolous" restaurant operator's contention that serving African American customers "'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion'").

[109] *Id.* at 401-02.

Piggie Park, the Court continued to characterize the government's interest in securing equal opportunities for the beneficiaries of antidiscrimination law as compelling—"in the free exercise context with *Bob Jones University v. United States* and in the associational freedom context with *Roberts v. United States Jaycees*, addressing race and sex discrimination, respectively."[110]

However, the Court's jurisprudence surrounding discrimination in places of public accommodation on the basis of sexual orientation experienced a hiccup following *Piggie Park*. In *Boy Scouts of America v. Dale*,[111] the Boy Scouts of America, asserting that same-sex sexual conduct was inconsistent with their values, revoked the adult membership of James Dale, an openly gay Eagle Scout.[112] The legislature and the Supreme Court of New Jersey, drawing on *Roberts v. United States Jaycees*,[113] had adopted the view that the state has a compelling interest in eliminating discrimination on the basis of sexual orientation in places of public accommodation.[114] However, while it acknowledged that view, the Supreme Court took a different path in its opinion than it had in *Roberts* and *Bob Jones University v. United States*,[115] choosing to dismiss the argument in a conclusory fashion.[116] The *Boy Scouts* majority conceded that it had "recognized in cases such as *Roberts* . . . that States have a compelling interest in eliminating discrimination against women in public accommodations."[117] Nevertheless, it went on to hold that it would violate the Boy Scouts of America's freedom of expressive association to admit gays because doing so would "materially interfere with the ideas that the organization sought to express."[118]

This result was surprising given both the Court's public-accommodations and gay-rights precedents up to that point.[119] At the same time that the Court had

[110] NeJaime & Siegel, *supra* note 47, at 211-12 (footnotes omitted).

[111] 530 U.S. 640 (2000).

[112] *Id.* at 644 ("Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist.").

[113] 468 U.S. 609, 623 (1984).

[114] Dale v. Boy Scouts of Am., 734 A.2d 1196, 1223 (N.J. 1999), *rev'd and remanded*, 530 U.S. 640 (2000).

[115] 461 U.S. 574, 599 (1983) (finding that private school that adopted racially discriminatory admission standards on basis of religion did not qualify as tax-exempt organization under Internal Revenue Code).

[116] *Boy Scouts*, 530 U.S. at 657.

[117] *Id.*

[118] *Id.*

[119] As Professors James Fleming and Linda McClain note:

> Even if the Court were not ready to go all the way with *Roberts* and hold that a compelling governmental interest was present in *Boy Scouts*, it should have taken at least a few steps in that direction, given its decisions in *Romer v. Evans* (invalidating a state constitutional amendment "bar[ring] homosexuals from securing protection" against discrimination that had been justified in part to protect freedom not to associate with homosexuals) and *Lawrence v. Texas* (striking down a state statute making it a crime for

been recognizing the compelling interest in assuring equal status for minority groups, gay rights cases, such as *Romer v. Evans*[120] and *Lawrence v. Texas*,[121] indicated that the Court had "manifested some concern for government's securing the status of gays and lesbians" as well.[122] *Boy Scouts* flipped that narrative. Justice Stevens called attention to this inconsistency in dissent, where he expressed concerns that the Court's decision undermined the goal of promoting equal citizenship for members of the LGBTQ community.[123] He explained that "unfavorable opinions about homosexuals 'have ancient roots,'" and he asserted that the fact "[t]hat such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes."[124]

Thus, Justice Kennedy's choice in *Masterpiece Cakeshop* to connect sexual discrimination to the principles underlying *Piggie Park* appears deliberate.[125] In making this connection, the Court reiterated that the government has a compelling interest in securing the status of free and equal citizens, doing so in the context of sexual orientation.[126] In other words, in tying sexual orientation back to the compelling-interest standard, *Masterpiece Cakeshop* does what the Court declined to do in *Boy Scouts* and "offers guidance about the analysis of exemptions from antidiscrimination law under RFRA as well as the

two persons of the same sex to engage in certain intimate sexual conduct not forbidden to two persons of the opposite sex).

JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 155 (2013) (footnotes omitted) (first citing Romer v. Evans, 517 U.S. 620 (1996); then citing Lawrence v. Texas, 539 U.S. 558 (2003)).

[120] 517 U.S. 620, 635 (1996).

[121] 539 U.S. 558, 578 (2003).

[122] FLEMING & MCCLAIN, *supra* note 119, at 155.

[123] *Id.* at 156.

[124] Boy Scouts of Am. v. Dale, 530 U.S. 640, 699-700 (2000) (Stevens, J., dissenting) (quoting Bowers v. Hardwick, 478 U.S. 186, 192 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)).

[125] NeJaime & Siegel, *supra* note 47, at 212 ("Accordingly, in reaffirming the authority of *Piggie Park*, *Masterpiece Cakeshop* offers guidance about the analysis of exemptions from antidiscrimination law under RFRA as well as the Constitution. After the Court decided *Smith*, Congress passed RFRA, which sought to 'restore' *Sherbert*'s 'compelling interest' standard. *Piggie Park* therefore supplies strong authority to support public accommodations laws against challenges under RFRA as well as the Free Exercise Clause." (footnote omitted)).

[126] As the NAACP Legal Defense Fund articulated in its amicus brief for the *Masterpiece Cakeshop* case, "The overarching lesson of *Piggie Park*, *Bob Jones*, and *Loving* [*v. Virginia*] is that this Court has repeatedly and unambiguously rejected religious-based justifications for differential treatment . . . for good reason: the government has a compelling interest in combating discrimination in its various forms." Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents at 15, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127302, at *15.

Constitution," asserting that public accommodations laws continue to serve "important social ends."[127]

Perhaps even broader than the recognition of LGBTQ equality as a compelling interest is the impact of the Court's opinion on the second prong of strict-scrutiny analysis—that is, the ways the opinion implicitly rejects religious accommodation as the least restrictive means of furthering the government's compelling interest. As discussed above, the opinion analogizes to free exercise challenges to antidiscrimination laws protecting on the basis of race—a context in which the Court has consistently held that religious accommodation would undermine the state's interest in promoting racial equality.[128] Phillips and his supporters argued extensively in their briefs against this comparison, contending that while "[e]xemptions from laws banning discrimination on the basis of race run the risk of undermining the valid purposes of those laws," exemptions for people who act "in accordance with the conjugal understanding" do not.[129]

Given this extensive briefing surrounding the racial comparison, the Court's references to *Piggie Park*, as well as its decision to call LGBTQ protection in the public square "unexceptional,"[130] would seem to indicate that the argument for religious accommodation from public accommodations laws based on sexual orientation succumbs to the same limitation as it did in the racial context—namely, that accommodation must be disfavored because it undermines the equality interest. In other words, *Masterpiece Cakeshop* revives certain arguments but does not change them,[131] and "[t]hose who characterize the Court's opinion in *Masterpiece Cakeshop* as narrow do not appreciate how the majority rejects certain familiar arguments for expansive religious exemptions from LGBT-protective laws."[132]

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[127] NeJaime & Siegel, *supra* note 47, at 212-13.

[128] *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401-02 (1968) (per curiam).

[129] Amicus Curiae Brief of Ryan T. Anderson, Ph.D., & African-American & Civil Rights Leaders in Support of Petitioners at 4, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004529, at *4; *see also* Brief of Amici Council for Christian Colleges & Universities (CCCU) & Nine Individual Religious Colleges & Universities in Support of Neither Party at 34, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4023116, at *34 ("*Obergefell*, moreover, went out of its way to emphasize that 'reasonable and sincere people' can hold Phillips' view about the morality of same-sex marriage—and, by extension, the morality of participation in same-sex weddings. That is, unlike denying service based on race, 'reasonable and sincere people' can believe it would be sinful for them to be complicit in such a ceremony. By contrast, no 'reasonable and sincere person' could believe it is okay to deny a generic good or service to someone simply because she is black." (citation omitted)); Brief of Amici Curiae Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. in Support of Petitioners at 26, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005657, at *26 ("Petitioner's religious objections are limited to same-sex marriage and have no relation to the unique issues of race, racism or interracial marriage.").

[130] *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

[131] FLEMING & MCCLAIN, *supra* note 119, at 172-73 (explaining that arguments for religious accommodation to antidiscrimination laws often "suffer[] from amnesia," forgetting that "religious convictions have been marshaled to justify racial discrimination").

[132] NeJaime & Siegel, *supra* note 47, at 205.

The Washington Supreme Court embraced this reading of *Masterpiece Cakeshop* in a case that followed the same trajectory. In *State v. Arlene's Flowers, Inc.*,[133] the State of Washington brought an action against a flower shop owner and her corporation, alleging violations of Washington's antidiscrimination law ("WLAD") after the owner refused to sell wedding flowers to a same-sex couple. The case was appealed to the Supreme Court of Washington, which held, inter alia, that WLAD did not violate the owner's right to free exercise.[134] The owner further appealed to the U.S. Supreme Court, which vacated and remanded the decision for further consideration after first deciding *Masterpiece Cakeshop*.[135]

After considering *Masterpiece Cakeshop*, the Supreme Court of Washington again held that WLAD did not violate the owner's free expression.[136] The court called attention to the fact that "the *Piggie Park* footnote to which the United States Supreme Court cites [in *Masterpiece Cakeshop*] explicitly states that the shop owners' defense in that case—that the Civil Rights Act of 1964, 42 U.S.C. § 2000e, 'constitutes an interference with the free exercise of the Defendant's religion'—was 'patently frivolous.'"[137] Then, although it rejected the owner's argument that "WLAD is subject to strict scrutiny under a First Amendment free exercise analysis,"[138] the court continued its analysis to conclude that WLAD does in fact survive strict scrutiny under both the Washington Constitution and the U.S. Constitution.[139] It came to this conclusion by finding that (1) the state has a compelling interest in eradicating discrimination, and (2) this eradication could not be achieved by less restrictive means.[140]

B. *Narrow: Nonhostility Does Not Require Religious Accommodation*

Although cases like *Arlene's Flowers* illustrate that analogizing the wedding-vendor cases to race would necessitate denying religious accommodation,

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[133] State v. Arlene's Flowers, Inc. (*Arlene's Flowers I*), No. 13-2-00871-5, 2015 WL 720213, at *1 (Wash. Super. Ct. Feb. 18, 2015).

[134] State v. Arlene's Flowers, Inc. (*Arlene's Flowers II*), 389 P.3d 543, 560 (Wash. 2017), *vacated and remanded mem.*, 138 S. Ct. 2671 (2018).

[135] Arlene's Flowers, Inc. v. Washington (*Arlene's Flowers III*), 138 S. Ct. 2671 (2018) (mem.).

[136] State v. Arlene's Flowers, Inc. (*Arlene's Flowers IV*), 441 P.3d 1203, 1209 (Wash. 2019).

[137] *Id.* at 1214 (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam)).

[138] *Id.* at 1229.

[139] *Id.* at 1234-36. The court focuses its strict-scrutiny analysis on the free exercise claim under the Washington Constitution; however, in addressing the owner's argument that WLAD is subject to strict scrutiny under the U.S. Constitution because it implicates "hybrid rights," it held that "even if WLAD does trigger strict scrutiny in this case, it satisfies that standard." *Id.* at 1236. The court then cites back to its discussion of strict scrutiny under the Washington Constitution. *Id.*

[140] *Id.* at 1234 ("[T]his court [has] upheld numerous health and safety regulations under strict scrutiny . . . .").

Justice Kennedy threw a wrench into this easy analysis. He carefully counterbalanced the dignitary respect owed to the LGBTQ community with the neutrality rights owed to the religious believer's claim. In fact, the Court overturned the lower court opinion based on Colorado's treatment of Phillips, with the second half of the Court's general rule effectively stating: "But in upholding [the antidiscrimination law], state actors cannot show hostility to religious views; rather, they must give those views 'neutral and respectful consideration.'"[141] This assertion neglects to include a crucial definition to courts adjudicating these claims moving forward—namely, what constitutes government "neutrality" to religion? To advocates of religious accommodation, the government is "nonhostile" toward religion when it actively works to guarantee free religious practice.[142] Thus, Justice Kennedy's holding on hostility could have broad implications. As one scholar phrased it, "[T]he question arises whether *Masterpiece Cakeshop*'s holding based on case-specific strains of hostility will serve as prelude to broader protection for religious dissenters whose beliefs clash with sexual-orientation nondiscrimination laws."[143]

[141] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) (Kagan, J., concurring). The Court's finding rested on two kinds of evidence. The first involved a Colorado Commissioner's on-record statement calling religion "one of the most despicable pieces of rhetoric" people can use to hurt others. *Id.* at 1729 (majority opinion). The other involved not statements but actions—namely, the Commission's disparate treatment of Jack's case, in which three bakers had refused the conservative Christian's request to bake cakes with antigay messaging. *See id.* at 1732 (Kagan, J., concurring) ("The Court partly relies on the 'disparate consideration of Phillips' case compared to the cases of [three] other bakers' . . . ." (quoting majority opinion)).

[142] *See* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 147-48 (1986) (citing Goldman v. Weinberger, 475 U.S. 503 (1986)) (explaining how neutrality in regulations is not always enough to ensure religious liberty; for example, prohibiting all Air Force members from wearing headgear is "neutral" but fails to protect a Jewish person's religious liberty to wear a yarmulke). Accommodationists believe it is fitting for government "to treat sympathetically the demands of religious life . . . as it furthers material and intellectual development—provided that it does so with an even hand, without intrusion or control, and without coercion of non-believers." William J. Cornelius, *Church and State—the Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 14 (1984) (quoting THE SUPREME COURT ON CHURCH AND STATE, at xv (J. Tussman ed., 1962)). This view is perhaps best articulated in Chief Justice Rehnquist's dissent in *Wallace v. Jaffree*, 427 U.S. 38, 98 (1985) (Rehnquist, C.J., dissenting). There, Chief Justice Rehnquist maintained that the actions of the First Congress confirm the view that, although the government should not prefer one religion, accommodating religious practice is acceptable and was common during the Founding Era. *Id.*; *see* Krista M. Pikus, *Hopeful Clarity or Hopeless Disarray?: An Examination of* Town of Greece v. Galloway *and the Establishment Clause*, 65 CATH. U. L. REV. 387, 395 (2015) ("Justice Rehnquist's dissent . . . maintained that the actions of the First Congress confirm the view that the government should not prefer one religious sect to another, but that accommodating religious faith and practice is acceptable and was common during the Founding Era . . . ." (footnote omitted)).

[143] Berg, *supra* note 2, at 140.

In reality, this addendum to the "general rule" is a narrow one. It does not issue a mandate to government adjudicators to provide religious accommodations in the wedding-vendor cases but instead provides unremarkable guidance, reiterating two long-existing constitutional obligations of government officials adjudicating free exercise and antidiscrimination claims: First, it reminds government officials that they owe religious believers neutral consideration under the First Amendment when adjudicating a free exercise claim.[144] Second, it makes clear that prescribing what is "orthodox" or offensive in politics is not the government's role in adjudicating any claim.[145]

The obligation that government adjudicators provide religious believers neutral consideration is well established under *Smith*.[146] Justice Kennedy's majority opinion in *Masterpiece Cakeshop* reiterated this obligation through citation to a later case, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, in which

> the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.[147]

In other words, "The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion."[148] Justice Kennedy cautioned: "The Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.'"[149]

In other words, *Masterpiece Cakeshop* is unremarkable because it simply "follows in a line of others that prohibit public officials from acting on the basis of prejudice, hatred, or the 'bare . . . desire to harm' others."[150] It is the

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[144] *Masterpiece Cakeshop*, 138 S. Ct. at 1724 ("When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.").

[145] *Id.* at 1731 ("A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness.").

[146] Emp't Div. v. Smith, 494 U.S. 872, 885 (1990) (holding that Free Exercise Clause does not insulate adherents from complying with law when government enacts general law without intent to discriminate against religious beliefs), *superseded by statute*, Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 574 U.S. 352 (2015).

[147] *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993)).

[148] *Id.* (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 534).

[149] *Id.* (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 547).

[150] Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 134 (2018) (omission in original) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to

predictable resolution of Justice Kennedy's line of gay rights cases, in which dissenters lambasted the language he used to describe religious believers as "hostile" toward religion.[151] In dissent in *Romer*, Justice Scalia charged Justice Kennedy's majority opinion as "verbally disparaging as bigotry" the "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores."[152] In *United States v. Windsor*[153] and then again in *Obergefell v. Hodges*,[154] Justice Alito said Justice Kennedy's majority opinions created a future in which religious believers in traditional marriage would need to "whisper their thoughts in the recesses of their homes," fearing that "if they repeat those views in public, they will risk being labeled as bigots."[155] The call to treat religious believers with respect in Justice Kennedy's final majority opinion functions as little more than a realization that "it is . . . needlessly provocative to portray religious beliefs as a pretext or code word for

harm a politically unpopular group cannot constitute a *legitimate* governmental interest."));
see also, respectively, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985) (citation omitted) (citing *Moreno* for proposition that "some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests" (omission in original)); Romer v. Evans, 517 U.S. 620, 634-35 (1996) (same); United States v. Windsor, 570 U.S. 744, 770 (2013) (same).

[151] As two scholars recently reminded readers:

> Notably, in *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor*, Justice Kennedy's opinions for the Court attributed animus to citizens and officials who opposed the recognition of civil and constitutional rights for gays and lesbians. That their opposition was grounded in sincere religious beliefs was deemed irrelevant to the constitutional issues raised in those cases.

Kendrick & Schwartzman, *supra* note 150, at 142 (footnotes omitted); *see Romer*, 517 U.S. at 632 ("Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

[152] *Romer*, 517 U.S. at 636, 652 (Scalia, J., dissenting).

[153] *Windsor*, 570 U.S. at 813 (Alito, J., dissenting) ("Acceptance of the [challengers'] argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.").

[154] Obergefell v. Hodges, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting) ("[The majority opinion] will be used to vilify Americans who are unwilling to assent to the new orthodoxy.").

[155] *Id.* at 2642-43; *see Windsor*, 570 U.S. at 813 (Alito, J., dissenting) (warning that finding DOMA unconstitutional would lead to vilification of those who oppose same-sex marriage). Similarly, Chief Justice Roberts contended in his *Obergefell* dissent that the Court had disparaged as bigoted millions of Americans who, "as a matter of conscience, cannot accept same-sex marriage." *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

discrimination in arguing that there must be limits to acting on such beliefs in the marketplace."[156]

Regardless of the language used, the Court in *Masterpiece Cakeshop* also found evidence of "hostility" by the state in its disparate treatment of various bakers who objected to baking a cake on the basis of conscience.[157] Comparing the Commission's resolution of William Jack's three claims to the decision in Phillips's case, the Court agreed with Phillips that the Commission erred when it "treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves."[158] The majority reminded Colorado that "[a] principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness."[159]

However, this reminder, while an important one, is not what occurred here. Antidiscrimination law, by its design, necessitates that the government treat claims differently.[160] CADA does not

> prohibit a baker from refusing to make a cake on the grounds of politics (for example, Nazi cakes), vulgarity (penis-shaped cakes), or aesthetics (red velvet armadillo cakes). The differing outcomes in Jack and Phillips's cases mean nothing if both situations are not covered by the principles of nondiscrimination embodied in the Colorado law.[161]

As Justice Ginsburg explained in her *Masterpiece Cakeshop* dissent:

> [T]he cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. . . . Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.[162]

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[156] LINDA C. MCCLAIN, WHO'S THE BIGOT?: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (forthcoming 2020) (manuscript at 209) (on file with the Boston University Law Review).

[157] Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).

[158] *Id.* at 1730.

[159] *Id.* at 1731 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

[160] Kendrick & Schwartzman, *supra* note 150, at 155.

[161] *Id.*

[162] *Masterpiece Cakeshop*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting) (internal citation omitted).

Jack did not suffer discrimination as codified in CADA because he was refused service that would have been refused to anyone, regardless of protected class.[163] Craig and Mullins, on the other hand, were denied a cake that would have been provided to them were they not gay.[164] That is the conduct antidiscrimination law serves to prevent.[165]

Thus, the disparate-treatment issue in *Masterpiece Cakeshop* is also narrower than it first appears.[166] Rather than standing for the principle that the government must treat claims of religious and secular conscience the same, *Masterpiece Cakeshop* reiterates and reminds the government of its obligations in moderating antidiscrimination claims—primarily, its limited responsibility in adjudicating these claims without prescribing its own ideas of what is orthodox or offensive.[167] In other words, antidiscrimination laws encompass certain groups of people that the government has a compelling interest in protecting.[168] Once those protections are in place, it is the responsibility of the parties in their role as citizens to decide what other services they will or will not provide within the bounds of the law.[169] If a vendor decides it will not provide services to a certain group of unprotected people because the vendor takes offense to that group (e.g., if this Note's author chose not to offer legal advice to Yankees fans because she believes they are objectively wrong), it is not for the government to decide whether this definition of offense is valid.[170] Instead, the role of the government is narrow: the adjudicator checks if the group is protected and, if so, neutrally applies the law.[171]

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[163] *Id.* at 1751 (explaining that Jack's request was denied because of the "offensive nature of the requested message" and not his "creed").

[164] *Id.* at 1750 ("What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.").

[165] *Id.* at 1751 ("Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination.").

[166] Kendrick & Schwartzman, *supra* note 150, at 144 ("Although some of the Justices made broader claims regarding the significance of this alleged disparate treatment, the Court relied on narrower grounds in accepting that such treatment demonstrated religious hostility." (footnote omitted)).

[167] *See Masterpiece Cakeshop*, 138 S. Ct. at 1731 (majority opinion) ("A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness.").

[168] *See id.* at 1725 ("Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. [It was] [a]mended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics . . . .").

[169] *See id.* at 1728 ("At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive.").

[170] *See* Kendrick & Schwartzman, *supra* note 150, at 145 ("[C]ommercial public accommodations can refuse service on bases not prohibited by law.").

[171] *See Masterpiece Cakeshop*, 138 S. Ct. at 1734 (specifying that "Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground").

On remand from the Supreme Court, the Supreme Court of Washington in *Arlene's Flowers* illustrated the narrow reach of Justice Kennedy's hostility holding. While supporters of the flower shop called on the court to interpret *Masterpiece Cakeshop*'s nonhostility holding broader than the two limitations outlined in the opinion, the court depicted this as an "attempt to stretch its holding beyond recognition."[172] Instead, the court viewed *Masterpiece Cakeshop* as holding that "the [Colorado] Commission violated the free exercise clause of the First Amendment in two respects: two of its members made disparaging comments about religion and it treated similarly situated parties differently."[173] It then addressed those holdings in turn, finding no evidence of either in *Arlene's Flowers*.[174]

In sum, Justice Kennedy's general rule in *Masterpiece Cakeshop* is less than clear in how it balances the fundamental rights involved. Thus, both sides of the clash interpret the hostility holding differently, with some scholars contending that it could have broad implications.[175] However, given the unremarkable guidance it provides, Justice Kennedy's hostility holding should not be read to necessitate religious accommodation in the wedding-vendor cases. Instead, his emphasis on the tolerance owed to the religious believer should be read as a recognition of the need for a better approach to wedding-vendor cases. His opinion invites a way to reconcile the reality that religious accommodations must be denied in promoting the compelling interest of LGBTQ equality and the reality that the underlying religious views are entitled to respect.[176] It is an invitation to adopt the clearer framework Judge Bosson provides.[177]

C. *Frosting the Layers: Adopting the Price-of-Citizenship Framework*

As the above Sections illustrate, Justice Kennedy's guidance is less than clear throughout the *Masterpiece Cakeshop* opinion. However, his language, tone, and guidance echo back to Judge Bosson's concurrence in *Elane Photography*—an opinion that is clear in its message and its call moving forward. Overall, both opinions stand for the same broad principles: (1) states can protect LGBTQ people as they would the groups protected under Title II,[178] and (2) religious

[172] State v. Arlene's Flowers, Inc. (*Arlene's Flowers IV*), 441 P.3d 1203, 1217 (Wash. 2019).

[173] *Id.* at 1215.

[174] *Id.* at 1215-17.

[175] Berg, *supra* note 2, at 140 ("[T]he question arises whether *Masterpiece Cakeshop*'s holding based on case-specific strains of hostility will serve as prelude to broader protection for religious dissenters whose beliefs clash with sexual-orientation nondiscrimination laws.").

[176] *See Masterpiece Cakeshop*, 138 S. Ct. at 1727 (identifying the tension between ensuring LGBTQ people are able to "exercise their civil rights" and ensuring "religious organizations and persons are given proper protection").

[177] Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 92, 309 P.3d 53, 80 (Bosson, J., concurring) (articulating price-of-citizenship framework).

[178] *See Masterpiece Cakeshop*, 138 S. Ct. at 1728 ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals . . . on the same terms and conditions as are offered to other members of the public."); *Elane Photography*,

believers are entitled to have their free exercise claims adjudicated with respect.[179] In doing so, the opinions each acknowledge that, because it cannot fully resolve the conflicting First Amendment and Fourteenth Amendment rights, the government must instead aim to protect the Constitution's ideals as a whole.[180] Thus, while Judge Bosson's opinion is more explicit in its guidance, both opinions open the door to viewing the "price of citizenship" as a framework for resolving the clash of rights moving forward. This Section demonstrates that this is not only a possible framework; it is the best framework. The price-of-citizenship approach, which has existed since the nation's founding, ameliorates the problems with the Court's third-party harm jurisprudence and provides the rhetoric society needs in order to meet both judges' goals of mutual respect.

Acknowledging that the wedding-vendor cases can only be resolved through compromise between private actors is far from radical. Indeed, the idea of a "price of citizenship" as a solution to the clash of rights has existed since the nation's founding.[181] Although they were not considering antidiscrimination law when drafting the Bill of Rights, the Founding Fathers were cognizant of the idea that citizenship comes with a price in the form of obligations to one another.[182]

¶ 86, 303 P.3d at 78-79 ("[The Huguenins'] refusal to do business with the same-sex couple in this case, no matter how religiously inspired, was an affront to the legal rights of that couple, the right granted them under New Mexico law to engage in the commercial marketplace free from discrimination.").

[179] *See Masterpiece Cakeshop*, 138 S. Ct. at 1729 (explaining that Phillips was entitled to "neutral and respectful" consideration); *Elane Photography*, ¶ 83, 303 P.3d at 78 ("On the record before us, no one has questioned the Huguenin's devoutness or their sincerity; their religious convictions deserve our respect.").

[180] *See Masterpiece Cakeshop*, 138 S. Ct. at 1729 (discussing religious and civil rights issues inherent in the decision); *Elane Photography*, ¶ 91, 303 P.3d at 79 ("On a larger scale, this case provokes reflection on what this nation is all about.").

[181] As a disclaimer, one must approach this argument recognizing that studying the intentions of the Founding Fathers can be a frustrating and oftentimes fruitless endeavor. As Justice Brennan explained, this sort of analysis is difficult for three reasons:

> First, the brevity of Congressional debate and the lack of writings on the question by the framers make any historical argument inconclusive and open to serious question. Second, the [First] [A]mendment was designed to outlaw practices which had existed before its writing, but there is no authoritative declaration of the specific practices at which it was aimed. And third, most of the modern religious-freedom turn on issues which were at most academic in 1789 and perhaps did not exist at all.

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 236 n.5 (1963) (Brennan, J., concurring) (quoting LOREN PETER BETH, THE AMERICAN THEORY OF CHURCH AND STATE 88 (1958)).

[182] *See* VINCENT PHILLIP MUÑOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON 62 (2009) (discussing Washington's consideration of religious obligations and obligations stemming from duty of citizenship); *see also* City of Boerne v. Flores, 521 U.S. 507, 556 (1997) (O'Connor, J., dissenting) (quoting G. HUNT, JAMES MADISON AND RELIGIOUS LIBERTY, *in* 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION, H. R. DOC. NO. 702, at 166-67 (1st Sess. 1901) (emphasis added)) (discussing Madison's and Jefferson's acknowledgements that citizenship and religious freedoms should be balanced),

George Washington's letters in particular "contain an approach to church-state matters that focuses on the ends or purposes of state action. He defended governmental actions that touched religion by their connection to a legitimate civic end."[183] For instance, in a letter submitting the proposed Constitution to the President of Congress, he stated: "Individuals entering into society, must give up a share of liberty to preserve the rest."[184] Similarly, both James Madison and Thomas Jefferson also recognized the necessity of some qualifications on the Free Exercise Clause, particularly to prevent harm to others. Jefferson echoed President Washington's sentiment in his 1781 *Notes on the State of Virginia*, stating, "The legitimate powers of government extend to such acts only as are injurious to others."[185] Moreover, Madison's original draft of the First Amendment stated: "[A]ll men are equally entitled to the full and free exercise [of religion], according to the dictates of conscience . . . . *Unless under color of religion the preservation of equal liberty and the existence of the State be manifestly endangered*."[186] In drafting a clause preserving the free exercise of religion, Madison recognized that such an exercise is impermissible if it subordinates or endangers the liberty of others.[187]

Several state charters and constitutions included similar language placing a caveat on religious exercise for the maintenance of society as a whole. Rhode Island's Charter of 1663 stated that residents may "freely, and fully have and enjoy his or their own judgments, and conscience in matters of religious concernments" but also prohibited residents from "using this liberty . . . to the civil injury, or outward disturbance of others."[188] The New York Constitution of 1777 mandated that the "liberty of conscience . . . shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."[189] The religious liberty clause of the Georgia Constitution of 1777, while providing that "[a]ll persons whatever shall have the free exercise of religion," also did not permit laws that allowed conduct "repugnant to the

superseded by statute, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[183] MUÑOZ, *supra* note 182, at 63.

[184] *Id.* at 49. Washington went on to state that the "magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the lines between those rights which must be surrendered, and those which may be reserved." *Id.*

[185] JOSEPH L. BLAU, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 70 (1950).

[186] HUNT, *supra* note 182, at 166-67 (emphasis added).

[187] *See id.* (finding previous version of amendment to be insufficient because "clause might easily be so twisted as to oppress religious sects" under excuse that they disturbed "the peace, the happiness, or safety of society").

[188] City of Boerne v. Flores, 521 U.S. 507, 551-52 (1997) (O'Connor, J., dissenting) (quoting *Charter of Rhode Island and Providence Plantations, 1663*, *in* 8 W. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 363 (1979)), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[189] *Id.* at 553 (quoting N.Y. CONST. of 1777, art. XXXVIII).

peace and safety of the State."[190] The Maryland Declaration of Rights of 1776 provided that religious rights must not be "molested . . . unless, under colour of religion, any man shall . . . injure others, in their natural, civil, or religious rights."[191]

Justice O'Connor, noting that "[t]hese state provisions . . . are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty,"[192] concluded that "it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses."[193] While historical records on the First Amendment's drafting are limited, these state provisions make clear that, when the Bill of Rights was ratified, "free exercise" was a familiar term that implied that the government had a right to interfere with religious activities once those activities infringed on the rights of others.[194] The historical evidence reminds modern readers of the First Amendment that the Founders knew from personal experience that even true believers can use the State to impose their beliefs on others or to persecute and harass nonbelievers.[195] Hence, the Founders' respect for religious conscience did not include behavior that risked harm to others or shifted the burdens of citizenship to third persons.[196]

The Supreme Court looked to these founding conversations in an 1878 case, *Reynolds v. United States*,[197] that tested the limits of religious liberty by holding that laws criminalizing polygamy did not infringe on the Free Exercise Clause.[198] The Court reasoned that, while it was not allowed control over opinion, Congress was "left free to reach actions which were in violation of social duties or subversive of good order."[199] Over time, this notion that rights under the Free Exercise Clause must give way to promoting social order has persisted among courts and scholars.[200] It has become known academically as

[190] *Id.* at 554 (quoting GA. CONST. of 1777, art. LVI).

[191] *Id.* at 553-54 (quoting MD. DECLARATION OF RIGHTS of 1776, art. XXXIII).

[192] *Id.* at 553 (highlighting that these provisions were often longer and more detailed than federal equivalent).

[193] *Id.*

[194] U.S. DOJ OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 9 (1986), https://www.ncjrs.gov/pdffiles1/Digitization/115053NCJRS.pdf [https://perma.cc/2USP-U4EY].

[195] BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 96 (N.Y.: N.Y. Press 2015).

[196] *See id.* (explaining that Madison's understanding that religious conscience can "transcend the capacity for reasoned judgement" caused him to add preventative safeguards to First Amendment, restricting its use).

[197] 98 U.S. 145 (1879).

[198] *Id.* at 165 ("In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.").

[199] *Id.* at 164 ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

[200] As one scholar explains,

the "doctrine of third-party harm"—that is, the argument that the Free Exercise Clause includes significant limits on accommodations that would harm or burden nonreligious third parties.[201]

Applying this doctrine of third-party harm unifies some of the most prolific cases in which the Court granted religious accommodations to laws of general applicability. For instance, in *West Virginia State Board of Education v. Barnette*,[202] the Court held that compelling Jehovah's Witness children to salute the flag was unconstitutional, stating that "[w]hen [accommodations] are so harmless to others or the State as those we deal with here, the price is not too great."[203] Later, in *Wisconsin v. Yoder*,[204] the Court held that Amish children could not be placed under compulsory education past eighth grade, finding that the individual's interests in religious expression under the Free Exercise Clause of the First Amendment outweighed the State's interests in compelling school attendance.[205] In doing so, the Court noted that this case was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."[206] Thus, in both of these cases, the Court justified its opinion at least in part on the notion that an accommodation to the religious believer would not be burdensome to others.

The third-party harm doctrine also guided the Court's reasoning in a recent RFRA case addressing the Affordable Care Act. In *Burwell v. Hobby Lobby Stores, Inc.*,[207] Hobby Lobby sought exemptions under the RFRA from requirements that insurance coverage for employees include coverage for contraception.[208] The majority opinion, Justice Kennedy's concurrence, and Justice Ginsburg's dissent all referred to the third-party harm doctrine's

> Conscience is not a license to harm others. Freedom of conscience does not empower even a true believer to shift the costs of her belief to others. For example, Christian Scientists may neither deny their children critical medical care nor enroll them in school without inoculation against communicable diseases. A religious aversion to paying Social Security taxes doesn't license a true believer to avoid a general duty to help pay for the program. Nor would a religious aversion to unions excuse an employer from complying with the collective bargaining rights in the National Labor Relations Act. In each of those settings, a true believer unfairly asks someone else to bear the costs of the believer's religious conduct.

NEUBORNE, *supra* note 195, at 98 (footnotes omitted).

[201] Kendrick & Schwartzman, *supra* note 150, at 157; *see also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 357-71 (2014) (interpreting Free Exercise Clause to include third-party harm doctrine and thus limit religious exemptions). *But see* Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 140-44 (2015) (criticizing third-party harm doctrine).

[202] 319 U.S. 624 (1943).

[203] *Id.* at 641-42.

[204] 406 U.S. 205 (1972).

[205] *Id.* at 234-35.

[206] *Id.* at 230.

[207] 573 U.S. 682 (2014).

[208] *Id.* at 682-83.

underlying principle. While Justice Alito's majority opinion provided a religious accommodation, he qualified his decision by emphasizing that the corporation's female employees would face "minimal logistical and administrative obstacles" to obtaining birth control in the wake of the decision.[209] Hence, his holding rested in part on the realization that, in granting Hobby Lobby its exemption, the effect of that "accommodation on the women employed by Hobby Lobby . . . would be precisely zero."[210] Justice Kennedy's concurring opinion made note that accommodation is an option when it does not "unduly restrict other persons, such as employees, in protecting their own interests."[211] In a similar vein, Justice Ginsberg in dissent reminded the Court it "*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[212]

In other words, guided by the third-party harm doctrine, "[a]cross its cases, the Court has reasoned about the validity of religious accommodation with attention to its impact on those who do not share the objector's belief."[213] Unfortunately, the third-party harm doctrine leads to more debates than solutions when courts try to apply it to the wedding-vendor cases, particularly because the parties to these disputes differ on what they define to be a "harm." Specifically, the two sides disagree on "whether dignitary harms count when courts balance the rights of religious believers against the rights of those who might be burdened by their exercise of religious liberty."[214] While some scholars contend that "[p]reventing these [dignitary] harms cannot be a compelling interest that justifies suppressing someone else's individual rights,"[215] others contend that "when Congress adopted the Civil Rights Act, it made 'clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."'"[216]

Unsurprisingly, the same debate arose in the briefs for *Masterpiece Cakeshop*. On the one hand, Colorado argued that it had a compelling interest in protecting against dignitary harms that follow from a denial of service based on sexual orientation.[217] On the other, Phillips and amici claimed that the state's interest

[209] *Id.* at 732.

[210] *Id.* at 693.

[211] *Id.* at 739 (Kennedy, J., concurring).

[212] *Id.* at 764 (Ginsburg, J., dissenting) (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)).

[213] NeJaime & Siegel, *supra* note 47, at 217.

[214] Kendrick & Schwartzman, *supra* note 150, at 158.

[215] Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J.F. 369, 376 (2016).

[216] Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2575 (2015) (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964)).

[217] *See* Brief for Respondent Colorado Civil Rights Commission at 56, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838416, at *56.

in preventing dignitary harms was not compelling.[218] Given this briefing, the Court's decision could be viewed as a resolution of this fight over the third-party harm doctrine's applicability to the wedding-vendor cases, declaring dignitary harm valid to defeat a religious believer's request for accommodation to LGBTQ antidiscrimination law. Indeed, a number of scholars view Justice Kennedy's "general rule" this way.[219]

However, it is unlikely that this was the intent of Justice Kennedy, who reminded readers that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths."[220] Accepting the third-party harm doctrine as the resolution in *Masterpiece Cakeshop* would leave little satisfaction for the religious believer Justice Kennedy clearly sought to protect. Denying accommodation necessitates that the believer must endure his own harm as a third party uninterested in the government's compelling interest. As the Alliance Defending Freedom—an American Christian nonprofit organization advocating for religious freedom[221]—phrased it in their amicus brief, the law "must respect Phillips's freedom to part ways with the current majority view on marriage," asserting that freedom "does not crush those who hold unpopular views, pushing them from the public square."[222] Demanding the religious believer act contrary to his religious beliefs places "a true believer in an impossible moral dilemma when forced by the state to choose between god and Caesar."[223]

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[218] Brief for Petitioners at 52-56, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762, at *52-56; *see also* Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 31, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005662, at *31 ("The argument from dignitary harm to individuals is, at bottom, an argument that petitioner's religious practice must be suppressed because it offends the customer turned away. That argument is at odds with the whole First Amendment tradition.").

[219] *See, e.g.*, Kendrick & Schwartzman, *supra* note 150, at 158-59 ("The Supreme Court has long held that the purpose of civil rights laws includes protecting against dignitary harms and that the government has a compelling interest in enforcing such laws in the commercial context despite religious objections. *Masterpiece* is no exception to this rule." (footnotes omitted)); NeJaime & Siegel, *supra* note 47, at 217 ("*Masterpiece Cakeshop* reasons in the tradition of these earlier cases. The Court affirms a public accommodations regime that has restricted exemptions to prevent harm to those protected by the law. Importantly, the Court emphasizes both material and dignitary harm. The public accommodations law seeks to promote not only equal access but also equal respect. The Court recognizes the government's interest in avoiding exemptions that would undermine these objectives.").

[220] *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015)).

[221] *See* ALLIANCE DEFENDING FREEDOM, https://adflegal.org/ [https://perma.cc/V53N-SB2E] (last visited Dec. 18, 2019).

[222] Sarah Posner, *The Christian Legal Army Behind 'Masterpiece Cakeshop,'* THE NATION, (Nov. 28, 2017), https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop/.

[223] NEUBORNE, *supra* note 195, at 96.

This tension in applying the third-party harm doctrine to deny Phillips religious accommodation illustrates the need for a better answer for these wedding-vendor cases. Judge Bosson's idea of the "price of citizenship" is a recognition of the reality that the government cannot uphold its constitutional obligations to both the religious believer and the LGBTQ community without inflicting third-party harm. Thus, it is incumbent upon citizens to bridge the gap between the two liberties through compromise under an imperfect law. Judge Bosson's theory returns to the original understanding of constitutional liberties as well as the philosophy on which religious liberty is based—that is, the fundamental requirement that we tolerate our fellow citizens with differing viewpoints as equal within a civic space.[224] Put more simply, in the words of Sir Isaiah Berlin, resolving the clash of rights requires a recognition that "[e]quality is not compatible with unlimited liberty."[225]

Judge Bosson's approach is not only useful in its practical shift from impossible governmental balance to private actors working toward a mutual civic understanding but also in the rhetoric it provides in setting out this approach. The need for language endorsing respect and mutual cooperation within culture wars becomes increasingly critical each year. A Pew Forum survey taken just before the 2016 U.S. presidential election found that while the country is evenly split on religious exemptions in the wedding-vendor cases, "only eighteen percent could muster at least some sympathy for both sides."[226] In fact, "[m]ore than eighty percent expressed none or not much sympathy for the people they disagreed with."[227] As Professor Douglas Laycock recently summarized in viewing the results: "These are not Americans committed to liberty and justice for all; these are two sides looking to crush each other."[228] Striving for their own personal liberty, each side of the clash has become increasingly hostile toward liberties with which they disagree.[229] Rhetoric speaking of a "clash" in which one side's rights must be subordinated to the other is not only divisive but also unhelpful, at best distracting from the

[224] *See supra* notes 182-96 and accompanying text (discussing Founders' views on religious liberty). As one scholar recently explained:

> Interacting with your fellow citizens does not require judgments about their equal worth or moral dignity; it requires toleration, not moral approval. Yes, this accords your fellow citizens a minimal amount of dignity in pursuit of their day-to-day activities, and a recognition that they have the same rights that you have, which allows them to function as equals. If this limits liberty in a small way, it is the price of citizenship in a pluralistic commercial democracy that attempts to secure both civic equality *and* religious liberty.

George Thomas, *Religious Liberty, Same-Sex Marriage, and Public Accommodations*, 16 PERSP. ON POL. 58, 60 (2018) (footnotes omitted).

[225] Thomas, *supra* note 224, at 58.

[226] Laycock, *supra* note 6, at 58.

[227] *Id.*

[228] *Id.*

[229] *Id.* at 59 ("Their claims to liberty are impeached by their hostility to liberty for those they disagree with.").

underlying constitutional issues and at worst undermining them.[230] Judge Bosson's approach acknowledges that neither side should be vilified for its views, refocusing the dialogue on compromise over conflict.

In sum, given his compassion for the religious believer, Justice Kennedy's reluctance to provide religious accommodation to CADA is best read as a broad acceptance of Judge Bosson's price-of-citizenship approach. A government decision to deny religious accommodation to an antidiscrimination law burdens the religious believer, as it fails to protect his free exercise rights. In turn, a decision to permit religious accommodation to an antidiscrimination law burdens the LGBTQ community, as it fails to protect against dignitary harm. Courts will continue to struggle to resolve the wedding-vendor cases if they continue calling on the government to balance First Amendment and Fourteenth Amendment liberties. Instead, courts must call on citizens to reach a compromise, working to channel their actions in the public square in a way that fosters a society tolerant of the rights of all. In Judge Bosson's words, this is the "price of citizenship."[231]

III. MOVING FORWARD: APPLYING THE PRICE OF CITIZENSHIP TO FREE SPEECH CLAIMS

As of now, Phillips's claim has not been readjudicated in Colorado. However, if it is, the Colorado courts and potentially the Supreme Court sans Justice Kennedy will again have to grapple with Phillips's case, which consists of both an alleged free exercise violation and an alleged free speech violation. In *Masterpiece Cakeshop*, only Justice Thomas, joined by Justice Gorsuch, addressed Phillips's compelled-speech argument, with the majority and concurring opinions barely touching on the potential expressive content underlying the process of cake baking.[232] However, given the emphasis Phillips and his amici placed on the First Amendment free speech claim in the original *Masterpiece Cakeshop* case, this notion of what sorts of wedding services constitute a vendor's "compelled speech" is likely to resurface in future challenges. Examining the Court's free speech jurisprudence illustrates that

[230] *See, e.g.*, Laycock, *supra* note 6, at 60 ("Same-sex civil marriage is a great advance for human liberty, but the gain for human liberty will be severely compromised if same-sex couples now force religious dissenters to violate their conscience in the same way that those dissenters, when they had the power to do so, forced same-sex couples to hide in the closet."); MCCLAIN, *supra* note 156 (manuscript at 6) ("The rhetoric of bigotry plays a potent—but sometimes distracting—role in these conflicts. For it is not necessary to label a belief 'bigoted' to uphold an anti-discrimination law limiting people's ability to act on their sincere religious beliefs when doing so harms or interferes with the rights of others.").

[231] Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 92, 309 P.3d 53, 80 (Bosson, J., concurring).

[232] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1746 (2018) (Thomas, J., concurring). In this concurrence, Justice Thomas concluded that the state violated the baker's free speech rights and that strict scrutiny should apply. *Id.* However, because the state court had not addressed who would prevail under strict scrutiny, Justice Thomas refrained from doing so "in the first instance." *Id.*

Judge Bosson's "price of citizenship" approach can and should be applied to these challenges, making it equally unlikely that they will change the outcome of *Masterpiece Cakeshop* or related cases.

The Court, in its free speech jurisprudence, has long been willing to contextualize the right to freely express one's views, providing stronger evidence of the appropriateness of the price-of-citizenship framework to addressing these claims. Notwithstanding the robust protections afforded to speech, "the Court has not hesitated to explore the limit of the right of freedom of speech as it interferes with competing constitutional values."[233] Freedom of speech does not include the right to incite actions that would harm others,[234] to make or distribute obscene materials,[235] to burn draft cards as an antiwar protest,[236] to permit students to print articles in a school newspaper over the objections of the school administration,[237] or students' right to make an obscene speech at a school-sponsored event,[238] among others. Even protected speech is not protected in all places at all times.[239]

All of these examples stand for the principle that the Court is willing to explore the limits on speech that has a potentially deleterious impact on third parties.[240] "Put differently the right to freely express one's views should not be construed merely as a shield from impermissible governmental regulation, but as a potential sword that can deprive other citizens of basic constitutional protections."[241] Thus, "[s]tates have the authority to enact reasonable restrictions on speech that account for the speaker's relationship *to other citizens*."[242] This "effects-driven approach" to free speech "underscores the principle that there are limited circumstances in which the exercise of an individual right can undermine collective liberty"[243]—that is, when Judge Bosson's "price of citizenship" framework should be applied.

Justice Kennedy's *Masterpiece Cakeshop* opinion should be read to support this idea. It stresses the notion that antidiscrimination laws would collapse if constitutional immunity were to extend to every provider of services who

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[233] Justin Kirk Houser, *Is Hate Speech Becoming the New Blasphemy? Lessons from an American Constitutional Dialectic*, 114 PA. ST. L. REV. 571, 595 (2009).

[234] Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (distinguishing "mere advocacy" from "incitement to imminent lawless action"); Schenck v. United States, 249 U.S. 47, 52 (1919).

[235] Roth v. United States, 354 U.S. 476, 485 (1957).

[236] United States v. O'Brien, 391 U.S. 367, 382 (1968).

[237] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[238] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[239] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . . .").

[240] Adam Lamparello, *Contextualizing the Free Exercise of Religion*, 69 FLA. L. REV. 681, 686 (2017).

[241] *Id.* at 697.

[242] *Id.*

[243] *Id.*

interprets his work as expressing support for customers.[244] As one commentator summarized, this would mean that

> every carpenter, dress-maker, chef, florist, jeweler, designer, decorator, tailor, chauffeur, architect, lawyer, physician, dentist, nurse, baker, or undertaker could claim that the work of their hands or minds constituted their own personal expression, and that the First Amendment should therefore prohibit anti-discrimination laws from forcing them to sell their labor in a manner which they believed conveyed a message inconsistent with their beliefs.[245]

This reality is unacceptable under antidiscrimination law as it would impose a serious stigma on gay persons.[246]

Moreover, state courts both before and after *Masterpiece Cakeshop* have found various rationales for dismissing the free speech challenge. In *Elane Photography*, the Supreme Court of New Mexico held that the government had not compelled the Huguenins to express any message, stating: "The government has not interfered with Elane Photography's editorial judgment; the only choice regulated is Elane Photography's choice of clients."[247] This case and others like it center around the notion that providing services for a wedding is not an expressive act. In *Brush & Nib Studio, LC v. City of Phoenix*,[248] the Arizona Court of Appeals stressed the difference between conduct and speech, holding that an antidiscrimination ordinance regulated the commercial conduct of selling stationery products, not any kind of expression.[249]

Perhaps most directly related, in *Klein v. Oregon Bureau of Labor & Industries*,[250] the Court of Appeals of Oregon held that requiring the Kleins,

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[244] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1728-29 (2018).

[245] Robert Post, *What About the Free Speech Clause Issue in* Masterpiece*?*, TAKE CARE BLOG (June 13, 2018), https://takecareblog.com/blog/what-about-the-free-speech-clause-issue-in-masterpiece [https://perma.cc/QV4W-T3CD].

[246] *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

[247] Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 38, 309 P.3d 53, 67.

[248] 418 P.3d 426 (Ariz. Ct. App. 2018), *vacated in part*, 448 P.3d 890 (2019).

[249] *Id.* at 439 ("The operation of a stationery store—including the design and sale of customized wedding event merchandise—is not expressive conduct . . . ."). While the Supreme Court of Arizona subsequently vacated that holding, the decision was a 4-3 split, with a crucial concurring opinion emphasizing the broader protections for speech provided under Arizona state law. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 894 (Ariz. 2019). Judge Bolick, in concurrence, reminded readers: "Regardless of the circumstances under which compelled speech may be tolerated under United States Supreme Court precedent, our state constitution categorically protects an individual's freedom to write free from compulsion, being responsible only for the abuse of that right." *Id.* at 929 (Bolick, J., concurring) (citation omitted). Thus, while the plurality opinion, relying on Justice Thomas's *Masterpiece Cakeshop* concurrence, embraces a First Amendment free speech analysis, the concurring opinion falls short.

[250] 410 P.3d 1051 (Or. Ct. App. 2017), *vacated and remanded*, 139 S. Ct. 2713 (2019) (mem.).

owners of a bakery called "Sweetcakes by Melissa," to create cakes for a same-sex couple did not violate their free expression.[251] Similarly to the cases already mentioned, the court began by rejecting the notion that cake baking is inherently expressive.[252] However, this court went further in two respects: First, it stated that even if cake baking were expressive, the court would reject the notion that the Oregon antidiscrimination statute compelled certain expression.[253] Second, echoing Judge Bosson, the court concluded its First Amendment free speech analysis by rejecting religious accommodation on the ground that the "burden imposed on the Kleins' expression is no greater than essential to further the state's interest . . . in avoid[ing] the evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity."[254] While the court nominally only applied intermediate scrutiny, it also recognized that Oregon had "a compelling interest both in ensuring equal access to publicly available goods and services and in preventing the dignitary harm that results from discriminatory denials of service . . . for same-sex weddings."[255]

While the decision in *Klein* came down before *Masterpiece Cakeshop*, the Washington Supreme Court in *Arlene's Flowers IV* came to a similar conclusion following remand from the Supreme Court for consideration in light of *Masterpiece Cakeshop*.[256] The court maintained that providing flowers for a wedding does not inherently express a message about the wedding.[257] This was

[251] *Id.* at 1064-73.

[252] *Id.* at 1071 ("Although the Kleins' wedding cakes involve aesthetic judgments and have decorative elements, the Kleins have not demonstrated that their cakes are inherently 'art,' like sculptures, paintings, musical compositions, and other works that are both intended to be *and are* experienced predominantly as expression.").

[253] *Id.* at 1067 ("[The statute] is a content-neutral regulation that is not directed at expression at all. It does not even regulate cake-making; it simply prohibits the *refusal of service* based on membership in a protected class."). The Court contrasted this case to cases like *Barnette*, in which "the government prescribed a specific message that the individual was required to express." *Id.* at 1067-68.

[254] *Id.* at 1073-74 (quoting King v. Greyhound Lines, Inc., 656 P.2d 349, 352 (1982)).

[255] *Id.* at 1073. Note that the U.S. Supreme Court vacated and remanded this case to the Court of Appeals of Oregon in light of *Masterpiece Cakeshop*. *See* Klein v. Or. Bureau of Labor & Indus., 139 S. Ct. 2713 (2019) (mem.). It has not yet been reconsidered.

[256] State v. Arlene's Flowers, Inc. (*Arlene's Flowers IV*), 441 P.3d 1203, 1225 (Wash. 2019).

[257] *Id.* at 1227. The court contrasted the act of arranging flowers with other acts that are "inherently expressive." *Id.* (citing, inter alia, United States v. Eichman, 496 U.S. 310 (1990) (burning American flag); United States v. Grace, 461 U.S. 171 (1983) (distributing leaflets outside Supreme Court building in violation of federal statute); Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (per curiam) ("[m]arching, walking or parading" while wearing Nazi uniforms (alteration in original)); Wooley v. Maynard, 430 U.S. 705 (1977) (state motto on license plates); Cohen v. California, 403 U.S. 15 (1971) (wearing jacket emblazoned with words "F**k the Draft"); Schacht v. United States, 398 U.S. 58 (1970) (wearing army uniform in short play criticizing U.S. involvement in Vietnam, inasmuch as it does not tend to discredit armed forces); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (wearing black armbands to protest Vietnam conflict); Brown v. Louisiana,

the primary reason for the court's decision; however, the court also went on to address Justice Thomas's free speech concerns, refusing the shop owner's request for an accommodation—or, as the court phrased it, a "new, narrow protection."[258] The court focused on the compelling issue at stake, stating that such a rule "would create a 'two-tiered system' that carves out an enormous hole from the public accommodations laws: under such a system, a 'dime-store lunch counter would be required to serve interracial couples but an upscale bistro could them turn them away.'"[259] Referring back to *Elane Photography*, the court emphasized that this concern is "hardly hypothetical in light of the proliferation of cases requesting exemptions."[260]

This reluctance among courts to legitimize free speech challenges in the wedding-vendor cases is compatible with the broad implications of *Masterpiece Cakeshop* in the free-exercise context discussed in Part II—namely, that protecting LGBTQ people from discrimination is a compelling interest and that accommodation would undermine this goal. In other words, all of these cases, rather than resting on a variety of explanations for denying free speech protection, can be unified under the notion that Judge Bosson's idea of a "price of citizenship" should preclude First Amendment accommodation to antidiscrimination laws such as CADA.

CONCLUSION

After the release of the *Masterpiece Cakeshop* opinion in June 2018, one blogger described the opinion as "a bit like a wedding cake. It offers a slice for everyone but the flavor is bland and insubstantial."[261] Although it might take some slicing to get to them, Justice Kennedy's opinion contains layers of significance that could have important implications for wedding-vendor cases to come. In its citations to previous antidiscrimination cases, analogies to race, rhetoric of tolerance, and calls for neutrality, *Masterpiece Cakeshop* is both broader and narrower than commentators currently appreciate. It elevates LGBTQ equality to the level of a compelling governmental interest, and while it emphasizes the need for religious tolerance, it rejects the notion of religious accommodation as the least restrictive means of achieving this interest. Cutting through the cake to reach these layers is difficult and time-consuming; fortunately, Judge Bosson has frosted them all together in one, easy-to-access

383 U.S. 131 (1966) (sit-in to protest "whites only" area in public library during civil rights struggle); Stromberg v. California, 283 U.S. 359 (1931) (peaceful display of red flag as sign of opposition to organized government)).

[258] *Id.* at 1228.

[259] *Id.* (quoting Brief of Amicus Curiae Americans United for Separation of Church & State in Support of Respondents at 13, *Arlene's Flowers IV*, 441 P.3d 1203 (No. 91615-2), 2016 WL 3552837, at *13).

[260] *Id.*

[261] Kate Nicholson, *The Supreme Court's Take on Cakes Is Nothing but Empty Calories for Creative Industries*, HYPERALLERGIC (June 6, 2018), https://hyperallergic.com/446009/masterpiece-cakeshop-v-colorado-civil-rights-commission/ [https://perma.cc/CW2Q-9FFE].

approach—the price-of-citizenship framework. Justice Kennedy's opinion should be read as embodying this framework, and thus its clear guidance should be used to resolve all First Amendment challenges in wedding-vendor cases to come.