JUSTICE GORSUCH'S CRUSADE: THE INVIOLABLE POWER OF RELIGION

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June 26, 2017 was a sort of "coming out" day for Supreme Court Associate Justice Neil Gorsuch. First, on that day, the Supreme Court

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issued a landmark decision in *Trinity Lutheran Church v. Comer.*[1] Justice Gorsuch, a member of the United States' highest court since only April 2017, penned a short concurrence in *Trinity Lutheran* indicating that he harbors an expansive view of the breadth and power of the First Amendment Free Exercise Clause, which, if adopted by a majority of the Court, could threaten the dignity and equal treatment of vulnerable citizens in countless ways.[2] On the same day, the Court issued a summary reversal of the Arkansas state court case *Pavan v. Smith*, citing the 2015 Supreme Court decision *Obergefell v. Hodges* as authoritative on the question of whether same-sex spouses bear the constitutional right to have both spouses' names included on the birth certificate of a child born to one of them during the marriage.[3] Justice Gorsuch opined in dissent that the applicability of *Obergefell* to the birth certificate issue is questionable and the state law in question arguably justified.[4] Finally, on that busy June 26, the Court announced that it would hear *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a case with a religious theme echoing that of *Trinity Lutheran*, this time pitting the Free Exercise right against the Constitution's protection of same-sex couples.[5]

In both of his June 2017 opinions and in prior writings, Justice Gorsuch has generated a track record that is predictive of his views on the applicability of Free Exercise Clause protection to those who oppose non-traditional marriage on religious grounds.[6] Thus, it should have been no surprise to readers familiar with Justice Gorsuch to discover that he filed a strenuous concurrence in the June 4, 2018 *Masterpiece Cakeshop* decision, in which the majority favored the Free Exercise rights of a wedding cake designer-baker over the anti-discrimination rights of a single-sex couple.[7] Readers of Justice Gorsuch's prior opinions should be equally unsurprised

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[1] Trinity Lutheran Church v. Comer,137 S. Ct. 2012 (2017) (holding state's denial of playground resurfacing grant on basis of applicant's status as church breached the church's free exercise rights).

[2] *Id.* at 2025 (Gorsuch, J., concurring in part) (urging a broad interpretation of free exercise that does not distinguish between religious and secular activities of a church).

[3] Pavan v. Smith, 137 S. Ct. 2075 (2017) (rejecting Arkansas law because it promotes unequal treatment of same-sex and opposite-sex spouses of birth parents *vis-à-vis* identification of parents on birth certificates); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (recognizing constitutional protection of right to marry for single-sex couples in Fourteenth Amendment Due Process and Equal Protection clauses).

[4] *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting) (questioning scope of *Obergefell* and motivation underlying state birth certificate law).

[5] Grant of certiorari, 137 S. Ct. 2290 (2017).

[6] See discussion of opinions authored by Justice Gorsuch while a judge on the Tenth Circuit Court of Appeals, *infra,* Part II.

[7] Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

by his promotion of a vision of a Free Exercise Clause that provides near-unassailable support for virtually all faith-based views and actions, regardless of the pain they may cause or the protected interests they may plunder.[8] Indeed, readers familiar with Justice Gorsuch's prior opinions may discern in his *Masterpiece Cakeshop* concurrence an echo of his oft-asserted warning against the government evaluating or attempting to curb any individual's claim as to the dictates of his or her personal piety.[9] According to Justice Gorsuch, once the government has affirmed the veracity of a party's religious code of conduct, it must deem all deeds and declinations the party ascribes to that code constitutionally protected as religious exercises.[10]

This article examines the role that Justice Gorsuch has played, and will likely continue playing, in decisions weighing religious beliefs and practices against currently recognized constitutional protections for nontraditional couples. Part I of this article critiques Justice Gorsuch's *Masterpiece Cakeshop* opinion in the context of the other opinions in the case. Part I concludes with alternative interpretations of Justice Gorsuch's concurrence and what it may signal about his perspective on the scope and power of Free Exercise rights. Part II reviews a number of opinions on the First Amendment religious clauses that Justice Gorsuch published while a judge for the United States Court of Appeals for the Tenth Circuit. Part II ends with general observations about then-Judge Gorsuch's religious clause opinions and what they indicate about his overall vision concerning the relationship between state authority—namely judicial authority—and religion. Part III evaluates Justice Gorsuch's opinions in *Trinity Lutheran Church* and *Pavan*, which, although brief in length, add to the Justice's religious clause jurisprudence discussed in the Parts I and II. Ultimately, this close reading of Justice Gorsuch's opinions preceding *Masterpiece Cakeshop* makes clear the themes, principles, and arguments that Justice Gorsuch applies to religious clause cases. This article concludes that Justice Gorsuch is engaged in a long-term, concerted effort to assert the primacy of Free Exercise Clause protections of religion-based exclusory treatment over the legal rights of other groups whose dignity and privacy have been legally recognized as warranting constitutional protections.

I. THE *MASTERPIECE* CASE: TWO GROOMS, A CAKE AND A CHRISTIAN

In 2012, Charlie Craig and Dave Mullins visited the Masterpiece Cakeshop bakery in Lakewood, Colorado, to discuss purchasing a wedding

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[8] *Id.* at 1731.

[9] *See* discussion of Justice Gorsuch's opinions addressing religion written while serving on the Tenth Circuit Court of Appeals, *infra*, Part II.

[10] *Masterpiece Cakeshop*, 138 S. Ct. at 1734.

cake for their upcoming marriage celebration.[11] Jack Phillips, the bakery's owner, informed the couple that his Christian devotion prohibited him from contributing a cake to a single-sex wedding.[12] Mr. Phillips assured the couple that he was willing to sell baked goods to customers with a same-sex orientation for purposes other than a single-sex wedding celebration.[13]

In 2012, states did not universally acknowledge single-sex marriage as a constitutionally protected right; Colorado did not provide marriage licenses for same-sex couples.[14] In 2013 and 2015 respectively, two landmark Supreme Court decisions, *United States v. Windsor* and *Obergefell v. Hodges,* recognized same-sex orientation as a protected class and single-sex marriage as a constitutionally protected right.[15] Nevertheless, in 2012 the Colorado Anti-Discrimination Act ("CADA") prohibited discrimination based on sexual orientation in places of public accommodation.[16] Mr. Craig and Mr. Mullins submitted a complaint to the Colorado Civil Rights Division, claiming that Mr. Phillips and Masterpiece Cakeshop had discriminated against them on the basis of their sexual orientation, thus violating their CADA-based right to be treated to full and equal service in a place of public accommodation.[17] After investigating the claim, the Division referred the case to the Colorado Civil Rights Commission ("CRC"), which, in turn, forwarded the case to the State Administrative

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[11] *Id.* at 1724 (providing that because Colorado did not yet recognize same-sex marriage in 2012, the couple planned a Massachusetts wedding to be followed by a reception with family and friends in Denver).

[12] *Id.* (providing Phillips' explanation that his opposition stemmed from his reading of the Bible, and that single-sex marriage was not legal in Colorado).

[13] *Id.* (providing Phillips' assurance to the couple that he would sell them "birthday cakes, shower cakes, . . . cookies and brownies").

[14] *Id.* at 1724 (Gorsuch, J., concurring).

[15] United States v. Windsor, 570 U.S. 744 (2013) (recognizing same-sex marriage as a liberty interest protected by the U.S. Constitution); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (recognizing single-sex marriage as an interest protected under the Due Process and Equal Protection Clauses of the U.S. Constitution's Fourteenth Amendment).

[16] Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1725 (2018) (noting that CADA, COLO. REV. STAT. § 24-34-601(2)(a) (2017), was amended in 2007 and 2008 to prohibit discrimination in a place of public accommodation on the basis of sexual orientation. The Court quotes the statute's relevant language: "It is discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equivalent enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." The Court also describes CADA as defining "public accommodation" to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," while excepting "a church synagogue, mosque, or other place that is principally used for religious purposes."). *Masterpiece Cakeshop*, 138 S. Ct. at 1725, citing COLO. REV. STAT. § 24-34-601(1).

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

Law Judge ("ALJ") for a formal hearing.[18] The ALJ rejected Mr. Phillips' arguments that the U.S. Constitution's First Amendment Free Expression and Free Exercise clauses protected his decision against serving same-sex couples with marriage-related cake orders.[19] The CRC, in affirming the ALJ decision, ordered Mr. Phillips to rectify his discriminatory behavior by, in essence, making a choice to serve all or no customers seeking wedding-related goods and services.[20] Mr. Phillips appealed to the courts, and Colorado Court of Appeals affirmed both the CRC's legal conclusions and its remedial order.[21] Specifically, the Colorado Court of Appeals rejected both Mr. Phillips' Freedom of Expression and Free Exercise arguments, relying on *Employment Div., Dept. of Human Resources of Ore. v. Smith* to reach its conclusion that Phillips could not point to his religious beliefs as a means of avoiding his obligation to comply with the CADA, a valid and neutral law of general applicability.[22]

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[18] *Id.* at 1725-26. After determining that Phillips had rejected potential customers planning weddings on multiple occasions on the basis of their sexual orientation, which essentially amounted to a policy against selling goods to same-sex couples planning commitment ceremonies, the Division "found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission." The CRC "found it proper to conduct a formal hearing, and it sent the case to the State ALJ."

[19] *Id.* at 1726 (outlining the case's procedural history: "Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. . . . And the ALJ determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended.Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artist talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech . . . . Applying CADA to the facts at hand, in the ALJ's view, did not interfere with Phillips' freedom of speech.Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. . . . [T]he ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.") (citations omitted).

[20] *Id.* "The Commission 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.'"

[21] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015).

[22] Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018), citing Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015). See also Emp't Div., Dept. of Human Res.' of Oregon. v. Smith, 494 U.S. 872, 878-79 (1990) (declaring generally applicable laws operating in pursuit of valid goals unrelated to religion to be immune to free exercise claims).

When the Colorado Supreme Court declined to hear the case, Mr. Phillips petitioned for certiorari in the U.S. Supreme Court, which accepted the case in June 2017.[23] The Court had declined to hear several similar cases in recent years, triggering speculation that a connection existed between the decision to hear *Masterpiece Cakeshop* and the April 10, 2017 assent of Associate Justice Neil Gorsuch.[24] Justice Gorsuch produced a record of opinions while a Tenth Circuit Court of Appeals judge that indicates he champions an expansive Free Exercise Clause and a judiciary that is non-deferential toward government agency decisions.[25]

A. *Justice Kennedy's Majority*

On June 4, 2018, the Supreme Court issued its opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[26] Justice Kennedy authored the majority opinion.[27] Chief Justice Roberts and Justices Samuel Alito, Elena Kagan, Stephen Breyer, and Gorsuch all joined Kennedy's opinion. Justice Clarence Thomas, while not signing the majority opinion, issued a separate opinion concurring with the majority holding, which Justice Gorsuch joined.[28] Justice Kagan, joined by Justice Breyer, issued a concurrence, as did Justice Gorsuch, joined by Justice Alito.[29] Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, issued a dissent.[30] The primary constitutional focus of the various opinions (with the exception of the Freedom of Expression Clause focus of Justice Thomas's concurrence), was whether the Free Exercise Clause protected Mr. Phillips' status as a Christian opposed to single-sex marriage as against the couple's right to non-discriminatory treatment in a place of public accommodation.[31]

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[23] Grant of certiorari, 137 S. Ct. 2290 (2017).

[24] Kent Greenfield & Adam Winkler, *Without Kennedy, the Future of Gay Rights Is Fragile*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/opinion/kennedy-gay-rights-same-sex-marriage.html.

[25] *See* Part II, *infra*.

[26] *Masterpiece Cakeshop*, 138 S. Ct. 1719.

[27] *Id.* at 1724 (reversing the Colorado Court of Appeals, primarily on the basis of the Court's determination that the CRC had demonstrated hostility toward Mr. Phillips' religion in the course of its hearings, thus violating the Free Exercise Clause).

[28] *Id.* at 1745-46 (Thomas, J., concurring) (addressing the Free Expression Clause, and concluding that, as expressive conduct, the refusal to creating a wedding cake for a single-sex wedding is exempt from Colorado's public accommodations law unless the law withstands strict scrutiny. Without completing a full strict scrutiny analysis, as none was completed by the Court of Appeals, Justice Thomas asserts that injury to a single-sex couple's dignity fails as a justification to curb or compel expression).

[29] *Id.* at 1732-34 (Kagan, J., concurring); 1734-40 (Gorsuch, J., concurring).

[30] *Id.* at 1748-52 (Ginsburg, J., dissenting).

[31] *Id.* at 1723-24 (identifying free speech and free exercise elements of the dispute, but

The primary analytical focus of the opinions was whether the CRC had received Mr. Phillips' explanation of his religion and its influence on his actions in a neutral and non-hostile manner, which all the Justices recognized as mandated by Free Exercise protections.[32] Thus, the primary focus of four of the five opinions was narrow and fact-based, resting on the simple matter of whether the CRC had treated Mr. Phillips' religious convictions with adequate respect.[33] This focus rendered the decision both a symbolic victory for business owners who make business-related decisions on the basis of their religions, and a blueprint for future government agencies and courts seeking to avoid charges of anti-religion bias when considering religion-based defenses to claims of discriminatory treatment based on sexual orientation in places of public accommodation.[34]

Justice Kennedy's *Masterpiece Cakeshop* majority opinion, similar to the religion-based analysis written by Chief Justice Roberts in *Trinity Lutheran Church v. Comer*, took pains to limit its holding and analysis to the particular facts of the proceedings administered by the CRC.[35] Justice Kennedy presented several legal principles as guiding his analysis, but none

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ultimately deciding the case on free exercise grounds).

[32] *Id.* at 1732 ("The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."); *id.* (Kagan, J., concurring) ("[S]tate actors cannot show hostility to religious views; rather, they must give those views 'neutral and respectful consideration.'") (citations omitted); *id.* at 1734 (Gorsuch, J., concurring) ("As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith."); *id.* at 1748 (Ginsburg, J., dissenting) (agreeing with the general rule of government neutrality in its consideration of an individual's religion).

[33] *Id.* at 1723 ("Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality."); *id.* at 1732 (Kagan, J., concurring) ("I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy [its] obligation [to give actors in the economy and society neutral and respectful consideration]."); *id.* at 1734 (Gorsuch, J., concurring) ("As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith."); *id.* at 1749 (Ginsburg, J. dissenting) (agreeing with the requirement that state actors consider a party's religion in a neutral manner, but disagreeing with the conclusion that the CRC demonstrated hostility toward religion "of the kind we have previously held to signal a free-exercise violation").

[34] *Id.* at 1732 ("The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. . . . However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.").

[35] 137 S. Ct. 2012, 2024 n.3 (2017) ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding to other forms of discrimination.").

of them is controversial or without precedent. For example, he observed that states have the authority to protect the dignity and rights of persons seeking to marry who may face discrimination.[36] He affirmed that generally a party's religious convictions will not justify discriminatory treatment on the basis of sexual orientation in public accommodation settings.[37] He noted that government review of Free Exercise Clause claims must demonstrate "neutral and respectful consideration" of a party's piety-based code of behavior.[38] Justice Kennedy presented all of these guidelines as established, commonsense legal principles leading to his fact-based holding.[39]

Similarly, Justice Kennedy endorsed various pertinent Supreme Court precedents in his opinion. He cited *Windsor* and *Obergefell* for the principle that the Constitution protects persons with a same-sex orientation in their efforts to avail themselves of publicly available rights and privileges, including marriage and commercial transactions, uninhibited by discrimination.[40] Justice Kennedy relied on *Church of Lukumi Babalu Aye, Inc. v. Hialeah* to support the premise that government deliberations demonstrating hostility toward religion violate the Free Exercise Clause.[41]

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[36] Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.").

[37] *Id.* (". . . while . . . religious and philosophical objections [to gay marriage] are protected, it is a general rule that such 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 and generally applicable public accommodations law.").

[38] *Id.* at 1729 (". . . Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case."); *id.* at 1731 ("For the reasons just described, 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 viewpoints.").

[39] *Id.* at 1733 ("The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.").

[40] *Id.* at 1727 ("As this Court observed in *Obergefell v. Hodges*, "[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.") (citation omitted). *See also Masterpiece Cakeshop*, 138 S. Ct. at 1728 (citing *Windsor* and *Obergefell* as recent decisions, supporting a pre-2013 presumption on the part of Mr. Phillips that it was lawful to decline to accommodate customers seeking services in connection with a single-sex wedding.).

[41] Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1731

Finally, without citing the case to support his statement, Justice Kennedy appeared to reference *Employment Div., Dept. of Human Resources of Ore. v. Smith* in stating that state laws impacting the free exercise of religion may survive constitutional challenge if generally applicable and not aimed at religious suppression.[42] This is not a moment, Justice Kennedy indicated, for the Court to overturn or criticize existing law.

Justice Kennedy's efforts to render an opinion without far-reaching or law-shifting impact is also evidenced in his factual observations. He quoted from the CRC hearing record as if to underscore that the holding rests solely on the language hostile toward Mr. Phillips' Christian values.[43] He noted that Mr. Phillips' religious beliefs were established as not only genuine but that their impact on his public business dealings was narrowly focused.[44] Perhaps the strongest sign of Justice Kennedy's intent to offer a decision confined to its facts is his observation that Mr. Phillips rejected Mr. Craig and Mr. Mullins' business in 2012, prior to Colorado's recognition of same-sex marriages and thus reasonable in the legal and social climate of the time.[45] Rather than offering a viewpoint on whether

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(2018) (citing 508 U.S. 520, 520 (1993) for the rule 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.").

[42] *Masterpiece Cakeshop*, 138 S. Ct. at 1727, (noting that "[w]hile . . . religious and philosophical objections [to gay marriage] are protected [forms of religious expression,] it is a general rule that such 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 and generally applicable public accommodations law."); Justice Kennedy cites *Employment Division*, 494 U.S. 872 (1990), (when noting that the Colorado Administrative Law Judge relied on the case to support its conclusion that applying the CADA in the Phillips matter did not violate the Free Exercise Clause); *Masterpiece Cakeshop*, 138 S. Ct. at 1726 (noting that the Colorado Court of Appeals cited the case for the same proposition); *id.* at 1727 (citing Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 289 (Colo App. 2015)).

[43] *Masterpiece Cakeshop*, 138 S. Ct. at 1729-30 (including quotes from the CRC's public hearing record statements such as "religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . . 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.") (citations removed).

[44] *Id.* at 1724 (stating "Phillips is a devout Christian. He has explained that his 'main goal in life is to be obedient to' Jesus Christ and Christ's 'teachings in all aspects of his life.'"); *id.* (providing "Phillips informed the couple that he does not 'create' wedding cakes for same-sex couples. He explained, 'I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.'").

[45] *Id.* at 1728 ("Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of services all occurred in 2012. At that point,

such a decision would be reasonable today, Justice Kennedy's opinion predicted that future courts will consider the balance between religious convictions and the rights of those with same-sex orientation in light of the particular facts, law, and other circumstances surrounding the claims before them.[46]

In short, if Justice Kennedy offered any precedential guidance in *Masterpiece Cakeshop*, it was the view that this is not a moment for large changes to the constitutional protection of gay individuals *vis-à-vis* religious opposition. As Justice Kennedy noted, such a moment occurred in 2015; his apparent view was that the Court should proceed with restraint and sensitivity when balancing the rights of the gay community against conflicting religious convictions.

B. *Justice Kagan's Concurrence and Justice Ginsburg's Dissent*

For the most part, the three *Masterpiece Cakeshop* opinions that share a focus on the Free Exercise Clause with Justice Kennedy's majority also maintain his opinion's factual focus and the apparent avoidance of lengthy or significant critiques of the pertinent law. Justice Kagan's succinct concurrence summarizes the applicable legal standard consistently with the discussion offered by Justice Kennedy, and confines its criticism of the majority opinion to its observation that three prior CRC decisions demonstrate the agency's hostility toward Mr. Phillips' code of behavior as dictated by his Christian beliefs.[47] In the three other CRC decisions based on incidents precipitated while the State considered the Phillips case, three Colorado commercial bakers refused a customer's request that they create two cakes depicting images such as a Bible, a male couple covered with an

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Colorado did not recognize the validity of gay marriage performed in its own State. At the time of the events in question, this Court had not issued its decisions either in *United States v. Windsor* or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity that that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.").

[46] *Id.* at 1732 ("In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.").

[47] *Id.* at 1732-33 (Kagan, J., concurring). In a short opening paragraph, Justice Kagan explains the basis of her concurrence as her agreement that the CRC failed to give Mr. Phillips's religion the neutral and respectful treatment that the Free Exercise Clause demands. The remaining three paragraphs of the concurrence focus on comparing the State's treatment of Phillips with its treatment of three other cases in which Colorado bakers refused to serve a customer due to religion-based differences.

X, and Biblical verses indicating the sinfulness of single-sex marriage (the "Jack cases").[48] The CRC accepted the three bakers' explanations that they had rejected the cake designs as expressions of hate aimed at a vulnerable class, and Justice Kennedy agreed with Mr. Phillips that the contrast between those CRC decisions and his own, when combined with the record of CRC members' statements aimed at Phillips's explanation for declining to work with Mr. Craig and Mr. Mullins, established the agency's hostility toward his religious convictions.[49] Thus, to the majority, the contrast between the Jack cases and Phillips' case constituted evidence of the government's non-neutral consideration of religion, but the statements made by CRC members during the hearing on Phillips' case were insufficient for the Court to find that the agency had violated Phillips' rights.

Justice Kagan agreed that the state's effort to distinguish the Phillips case from the three contrasting cases supported the finding that the CRC had acted with unconstitutional hostility toward Mr. Phillips, as the state displayed a bias against Christian intolerance toward homosexuality and single-sex marriage which, while perhaps principled, constituted non-neutral treatment of religion.[50] Justice Kagan's motivation for concurring, however, was not simply to express her approval of the Court opinion; her primary aim was to point out a distinction between the Jack cases and the Phillips case that she considers valid.[51] This distinction is that the three bakers in the Jack cases who rejected the prospect of creating a cake depicting single-sex marriage as sinful did so solely on the basis of the cake design and without regard to the identity or orientation of the would-be customer.[52] These cases, therefore, were not analogous to Mr. Phillips'

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[48] *Id.* at 1749 (Ginsburg, J., dissenting). Justice Ginsburg includes quoted language from the record describing the cake designs that William Jack proposed to three Colorado bakers, which included the language "God hates sin" and "Homosexuality is a detestable sin," among other Biblical phrases, along with an image of two groomsmen under a red X.

[49] *Id.* at 1730-31 (noting that, on the state agency level, "The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection," followed by the Colorado Court of Appeals "attempt to account for the difference in treatment [by] elevat[ing] one view of what is offensive over another" and in this way "send[ing] a signal of official disapproval of Phillips' religious beliefs.").

[50] *Id.* at 1732 (Kagan, J., concurring) (agreeing with the majority that it is problematic that the Colorado Court of Appeals differentiated between the Phillips case and the William Jack cases with the observation that the state agencies found the Jack message offensive, as "a principled rationale for the difference in treatment" cannot be "based on the government's own assessment of offensiveness.") (citations omitted).

[51] *Id.* at 1732 ("What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious.").

[52] *Id.* ("The three bakers in the Jack case did not violate [CADA]. Jack requested them

case because Phillips had declined to serve Mr. Craig and Mr. Mullins solely on the basis of their orientation, and not due to any particular aspect of the cake they sought.[53] Indeed, the fact that Mr. Phillips never allowed Mr. Craig and Mr. Mullins to describe the cake they envisioned supports that it was the customer, not the cake, to which Phillips objected, thus differentiating the Phillips case from the three others on a key element that rendered the Jack cases of no pertinence.[54] Nevertheless, Justice Kagan concluded, the evidence of CRC hostility toward Mr. Phillips' religious convictions, by itself, established that the agency had violated Mr. Phillips' Free Exercise rights.[55] Thus she, along with Justice Breyer, supported the majority holding.

Justice Ginsburg, dissenting, also made her primary focus the question of whether the facts added up to a government violation of Free Exercise.[56] Like Justice Kagan, Justice Ginsburg did not believe that three other CRC cases were analogous to the Phillips case, in which the customers' sexual orientation both directly triggered the CADA and accounted for Phillips treating them differently than he would have treated an opposite-sex couple seeking a wedding cake.[57] Unlike Justice Kagan, however, Justice Ginsburg also disputed whether the quoted remarks from several CRC

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to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires.").

[53] *Id.* ("By contrast [with the Jack cases], the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive 'the full and equal enjoyment' of public accommodations irrespective of their sexual orientation. The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of the Colorado law—untainted by any bias against a religious belief.").

[54] *Id.* at 1724 (noting that Craig and Mullins had not mentioned the design of the cake they envisioned when Phillips informed them that he would not create their wedding cake). *See also id.* at 1732 (Kagan, J., concurring) (emphasizing that "Phillips did not so much as discuss the cake's design before he refused to make it.").

[55] *Id.* at 1733 (noting that the majority relied on the distinction between the Jack and Phillips decisions as establishing the state's hostility to Phillips's Free Exercise rights due to the CRC's inappropriately judgmental reasoning in reaching that decision, and not due to a misconception that the Jack and Phillips cases were factually identical).

[56] *Id.*, at 1749 (Ginsburg, J., dissenting) (introducing her opinion as an argument that the evidence of agency hostility toward Phillips's religion fail to establish hostility toward religion "of the kind we have previously held to signal a free-exercise violation").

[57] *Id.* at 1751 ("Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakers declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display.").

members at hearings demonstrated a level of hostility toward religion so as to render the government action unconstitutional.[58] To Justice Ginsburg, a government agent observing that insidious discrimination may be perpetrated in the name of religion did not presumptively taint the entire agency proceeding on Free Exercise grounds.[59] Multiple agency and court decisionmakers had reached the same conclusion about the case, so unless all were tainted by an unconstitutional level of hostility toward Christianity, the offensive statements by one or several members of the CRC should not overturn these decisions.[60] Thus, in Justice Ginsburg's view, the handful of offensive remarks by CRC members about the anti-gay bias of Mr. Phillips' religious beliefs did not rise to the level of a Free Exercise violation.[61]

Regardless of her position on this issue, however, it is undisputable that in making these arguments Justice Ginsburg conformed to both the majority approach and that of Justice Kagan in that she confined her analysis to the question of whether the particular CRC process in the Phillips case struck an acceptable balance between the conflicting constitutional interests.[62] Justice Sotomayor joined this focused dissent, a fact that markedly contrasts her reaction to the *Trinity Lutheran Church* majority's similar attempt to present a fact-focused religious clause analysis.[63] In that case, Justice Sotomayor ignored the majority's effort to narrow the case, taking a broader, more principled perspective in her dissent, which accused the majority of engineering a significant erosion of church-state separation.[64]

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[58] *Id.* at 1749 ("The Court also finds hostility in statements made at two public hearings on Phillips' appeal to the Commission. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decision-making entities considering this case justify reversing the judgment below.").

[59] *Id.* at 1752 ("Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins.").

[60] *Id.* at 1751 ("The proceedings involved several layers of independent decision making, of which the Commission was but one . . . . What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say.").

[61] *Id.*, at 1751-52 (noting that in *Church of Lukumi Babalu Aye Inc.*, the only precedent on which the Court relies, the agency action violating the Free Exercise Clause "implicated a sole decision-making body, the city council.") (citations removed).

[62] *Id.* at 1748-52 (Ginsburg, J., dissenting).

[63] *Id.* at 1748 (Sotomayor, J., joins, dissenting); *see also* Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2027 (2017) (Sotomayor, J., dissenting).

[64] *Trinity Lutheran Church*, 137 S. Ct. at 2027-28 (citing the history of the religious clauses, along with Court precedents and the majority opinion's arguments, to argue that the

This contrast underscores the near-universality of the Justices' decision to focus primarily on the facts in *Masterpiece Cakeshop.*

In sum, seven Justices who disagreed on the significance of certain facts and on the interpretation of those facts warranted by precedent all seem to agree that the *Masterpiece Cakeshop* case should not and will not serve as a groundbreaking, long-lived precedent. At best, to these Justices the case serves as a reminder that religious and non-discrimination rights can clash and warrant case-by-case balancing. On a practical note, this approach to the case broadcasts a clear caution to state agency personnel to speak carefully when aiming to protect a socially vulnerable group of persons, lest they invalidate their own deliberations by exhibiting non-neutral judgment toward another group's protected rights.

C. *Justice Gorsuch's Concurrence: Two Readings*

Justice Gorsuch, in a concurrence joined by Justice Alito, began by citing *Employment Division* for its rule that neutral, generally applicable laws that incidentally impact an individual's religious exercise do not violate the Free Exercise Clause.[65] He labelled the decision "controversial," but went on to cull from it a rule of law that decisions made by government actors who fail to maintain a neutral stance when considering religion-based claims must withstand strict scrutiny—that is, must be narrowly tailored to serve a compelling state interest.[66] Based on this assertion, the bulk of Justice Gorsuch's concurrence argued that the trio of CRC decisions condoning the bakers in the Jack cases who declined to bake anti-gay-marriage-themed cakes provide significant evidence of the agency's hostility toward Mr. Phillips' religion-based explanation for declining to work with Craig and Mullins.[67] Thus, Justice Gorsuch appears to have written his concurrence primarily to dispute arguments on the contrasting state decisions made by Justices Kagan and Ginsburg.[68]

Court's logic and its conclusions belied or ignored prior religious clause jurisprudence).

[65] Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1734 (2018) ("In *Emp't Div., Dept. of Human Res.' of Oregon v. Smith*, this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge.") (internal citation omitted).

[66] *Masterpiece Cakeshop*, 138 S. Ct. at 1734 ("*Smith* remains controversial in many quarters. But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling state interest and are narrowly tailored.") (citations omitted).

[67] *Id.* at 1734-36.

[68] *Id.* at 1734 ("In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently

1. One Reading: The Gorsuch Concurrence as Just Plain Logic

In his concurrence, Justice Gorsuch argued that *Employment Division* supports the Court's neutral agency treatment mandate and that the contrast between the Phillips and Jack cases establish hostility. Both of these points are defensible. First, while the neutrality requirement in *Employment Division* refers to legislation, not agency implementation, a reading of *Employment Division* that subjects both laws themselves and their individual applications that consider religious expression to a neutrality standard is far from controversial.[69] Indeed, no other Justice writing in *Masterpiece Cakeshop* cited any directly applicable authority stating that the Free Exercise Clause mandates that government agencies consider religion-based arguments in a neutral manner.[70] This omission is particularly notable because six Justices supported the holding primarily due to the fact that the CRC violated this neutrality obligation when considering Mr. Phillips' case.[71] Perhaps, by choosing to not cite any

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from the other bakers—or that it could have easily done so consistent with the *First Amendment*. But, respectfully, I do not see how we might rescue the Commission from its error.") (citations omitted). It is worth noting that Justice Gorsuch expresses himself as in full agreement with Justice Kennedy's majority opinion. *See id.* at 1734 ("I am pleased to join [the Court's] opinion in full."). The majority opinion, however, as Justice Kagan points out, "limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—'quite apart from whether the [Phillip and Jack] cases should ultimately be distinguished'". *Id.* at 1733-34. Thus, the majority opinion does not agree with Justice Gorsuch on the issue that occupies the bulk of his concurrence.

[69] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557 (1993) (Scalia, J., concurring) (arguing that the "neutral" and "generally applicable" elements of the *Employment Division* standard "are not only "interrelated" but substantially overlap," but then positing that the "generally applicable" element of the *Employment Division* standard encompasses statutes which, "through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment").

[70] *Masterpiece Cakeshop*, 138 S. Ct. at 1721 (noting several times that Phillips was entitled to "neutral and respectful" consideration of his religious views without citing authority.); *id.* at 1732 (Kagan, J., concurring) (citing no authority when agreeing with the majority for the rule that state actors may not display hostility toward religious views); *id.* at 1740 (Thomas, J., concurring) (agreeing with the majority on the hostility issue without identifying authority).

[71] *See id.* at 1728 (noting several times that Phillips was entitled to "neutral and respectful" consideration of his religious views without citing authority). Although the Court cites *Church of Lukumi Babalu Aye* in its primary discussion of the CRC's supposedly anti-religious bias, earlier in the opinion the Court recognizes that *Church of Lukumi Babalu Aye* addresses the issue of whether a law or a legislating body developing a law discriminates on the basis of religion, which the Court acknowledges is a "very different context" from the question of whether an adjudicatory body deciding a particular case discriminated on the basis of religion. *Id.* at 1729-31. *See also id.* at 1732 (Kagan, J., concurring) (citing no authority when agreeing with the majority for the rule that state actors

authority, the other Justices are signaling that the neutral treatment requirement is so universally accepted as to obviate the need for formal support. In any event, Justice Gorsuch's reliance on *Employment Division* to assert that government agents must maintain a neutral stance toward religion is not controversial.

With regard to CRC's alleged inconsistency when faced with the Phillips case and Jack cases, Justice Gorsuch argues that they "share all legally salient features."[72] Supporting this premise, in all four CRC cases the bakers determined that their personal moral code prevented them from creating the requested cakes, and only where that moral code was Christianity-based did the CRC conclude that the baker's decision violated public accommodations law.[73] Additionally, although Mr. Craig and Mr. Mullins could point to the CADA's express protection of those with single-sex orientation from discrimination by the business sector, so too could Mr. Jack argue that CADA protects customers whose religion motivates discriminatory behavior in a place of public accommodation.[74] Because cake designs Mr. Jack sought made it likely that Mr. Jack was Christian, Justice Gorsuch concluded that the CRC displayed tolerance toward

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may not display hostility toward religious views); *id.* at 1734 (Gorsuch, J., concurring) (referencing *Employment Division* and *Church of Lukumi Babalu Aye* when stating, as a "certainty," that the government must always act with neutrality toward religion. Justice Gorsuch's concurrence admits, however, that *Employment Division* focuses on neutral and generally applicable laws, and not their administration, and offers no further explanation that the majority on how *Church of Lukumi Babalu Aye*, which also addressed legislation and not its implementation, supports the broader proposition asserted in the current case); *id.* at 1740 (Thomas, J., concurring) (agreeing with the majority on the hostility issue without identifying authority); *id.* at 1748-49 (Ginsburg, J., dissenting) (disputing the conclusion reached in other opinions that the agency displayed unconstitutional hostility toward Phillips without directly disputing the premise that agency hostility toward a regulated party's religion could violate the party's Free Exercise rights). Justice Ginsburg disputes the applicability of *Church of Lukumi Babalu Aye* to the case, but her reason is that the government action in that case had been committed by a single decision-making body, while the Phillips case had been considered by multiple bodies in addition to the CRC, indicating that any hostility exhibited by the CRC should not invalidate the decisions by the other bodies. *Id.* at 1751.

[72] *Id.* at 1735 (Gorsuch, J., concurring) (citing the impact on the customer, the motivation of the bakers, and their knowledge that their decision left a customer in a protected class unserved).

[73] *Id.* at 1734 ("[T]he Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs.").

[74] *Id.* at 1735 (noting that the CADA "prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits.").

business owners who discriminated against Christian customers while displaying hostility toward Christian business owners who failed to accommodate gay customers.[75] Thus, in all circumstances the CRC failed to maintain a neutral position toward Christians when considering religion-based CADA claims.

In presenting his argument, Justice Gorsuch maintained a tone of logical neutrality.[76] Under CADA, gay persons and Christians are both vulnerable to discrimination, he observed, and thus deserve identical protection.[77] Although the cake designs proposed by Mr. Jack included explicit images and language expressing negative views about single-sex marriage, Justice Gorsuch explained, any wedding cake produced for a single-sex marriage celebration would have projected a message of approval and joy for single-sex unions, at least in Mr. Phillips' perception.[78] Thus, Justice Gorsuch concluded, both cakes were equally infused with messaging about single-sex marriage, a topic that is undeniably steeped in religious meaning.[79]

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[75] *Id.* at 1736 ("Even though the bakers [who rejected Mr. Jack's business] knowingly denied service to someone in a protected class, the Commission found not violation because the bakers only intended to distance themselves from 'the offensive nature of the requested message.' Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a "distinction without a difference.") (citations omitted).

[76] *See, e.g., id.* at 1737 ("Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as 'irrational' or 'offensive' will ever survive strict scrutiny under the *First Amendment*.").

[77] *Id.* at 1735 ("In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation)."); *id.* at 1736 ("If Mr. Phillips's objection is 'inextricably tied' to a protected class, then the bakers' objection in Mr. Jack's case must be 'inextricably tied' to one as well . . . . In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic.").

[78] *Id.* at 1738 (arguing that the explicit nature of the Jack cake decorations do not differentiate the level of messaging his designs project from those of a generic wedding cake: "Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. Like 'an emblem or flag,' a cake for a same-sex wedding is a symbol that serves as 'a short cut from mind to mind,' signifying approval of a specific 'system, idea, [or] institution.' It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith.") (citations omitted).

[79] *Id.* at 1738-39. After accusing Justices Kagan and Ginsburg of applying "a sort of Goldilocks rule" to conclude that Mr. Jack's cake design included a message about single-sex marriage that may be inferred to reflect the baker's viewpoint while a generic wedding

And, although the bakers confronted with the overtly hostile anti-gay designs could claim their adherence to the constitutional principles of equality and acceptance, so too could Mr. Phillips claim that the Free Exercise Clause mandates that all religious perspectives enjoy equality and acceptance in the public sphere.[80]

In addition, while Justices Kagan and Ginsburg argued that Mr. Phillips' decision necessarily involved a judgment about the orientation of his customers, pointing out that Mr. Phillips never allowed Mr. Craig and Mr. Mullins to even describe the cake they sought, thus underscoring that his decision against designing their cake could only have been aimed at the couple's identity as members of a vulnerable group, Justice Gorsuch argued that even a generic wedding cake carries the message of its intended use.[81] Therefore, according to Justice Gorsuch, Mr. Phillips' discomfort in creating such a cake was aimed squarely at the cake, just as the three other bakers' discomfort in creating an anti-gay cake for Mr. Jack was aimed at the cake design, without regard to his identity as a Christian.[82] In sum, to Justice Gorsuch, either all the bakers should be free to reject a baking project contrary to their principles or all should be sanctioned for rejecting customers protected by the CADA.[83] The fact that the CRC treated the baker with a religious objection differently than it treated the bakers with secular moral objections, Justice Gorsuch concluded, established the CRC as hostile toward Mr. Phillips' religion. [84]

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cake ordered for a single-sex marriage would not, Justice Gorsuch concludes "Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips."

[80] *Id.* at 1737 ("Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom.").

[81] *Id.* at 1738 ("To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational.").

[82] *Id.* at 1739-40 ("To some all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise . . . It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.").

[83] *Id.* at 1738 ("[In the Jack case,] the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here.").

[84] *Id.* at 1737.

("Either actual proof of intent to discriminate on the basis of membership in a protected class

2. An Alternative Reading of Gorsuch's Concurrence: A Free Exercise Agenda

As described above, Justice Gorsuch's *Masterpiece Cakeshop* concurrence can be cast as an opinion by a jurist who agrees with the Court's general position on Free Exercise, which is to protect against both legislative and governmental hostility toward religion, but nevertheless felt a need to clarify or dispute various elements of other opinions in the case. Justice Gorsuch explicitly praised the majority and refrained from urging the overturn of *Employment Division*.[85] He attacked Justices Kagan and Ginsburg's logic on an issue that was not crucial to the holding, in the fashion of a debater who enjoys sparring for its own sake.[86] From all this, it is reasonable to read Justice Gorsuch's *Masterpiece Cakeshop* concurrence as nothing more than an indication of his continuing inclination to vote in favor of strong Free Exercise Clause protections as cases arise. As discussed below, however, Justice Gorsuch's *Masterpiece* concurrence also is amenable to an alternative reading.

a. *The Scope of Free Exercise Protection*

Justice Gorsuch's *Masterpiece* concurrence is most distinguishable from the majority opinion in its dogged effort to equate the Phillips case with the Jack cases. As noted above, the Jack cases involved three bakers' refusals to create cake designs containing explicit images and words expressing, as Justice Gorsuch characterized them, "messages disapproving same-sex marriage on religious grounds."[87] While Justice Gorsuch's antiseptic language is accurate to a point, one could more precisely characterize Mr. Jack's requested messages as overtly homophobic, given that he sought to include Biblical quotes such as "God hates sin," "homosexuality is a detestable sin," and "while we were yet sinners, Christ died for us."[88] The bakers Mr. Jack approached were thus forced to consider whether to create

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is required (as the Commission held in Mr. Jack's case), or it is sufficient to 'presume' such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is to apply a more generous legal test to secular objections than religious ones. That is anything but neutral treatment of religion.") (citation omitted).

[85] *Id.* at 1734 (noting in passing the controversial nature of *Employment Division* and joining the majority opinion "in full").

[86] *Id.* at 1734 (noting that Justices Ginsburg and Kagan assert the Commission acted neutrally in treating Phillips differently from the bakers who turned away Jack, then launching a six-page argument against the Justices' assertion).

[87] *Id.* at 1735.

[88] *Id.* at 1749 (Ginsburg, J., dissenting) (quoting the Appendix to the Petition for Certiorari).

a cake that articulated an explicitly hostile social message that those in the targeted group or its sympathizers might reasonably perceive as threatening or even violent.[89] In other words, the bakers were asked to construct an unambiguous, aggressively antagonistic statement on a controversial religious, social, and political topic.

In fairly stark contrast, the complaint brought by Mr. Craig and Mr. Mullins did not include a specific cake design.[90] If they had been allowed to describe language or other emblematic details to Mr. Phillips (such as two groom figurines placed atop a rainbow confection), then the cases would have been arguably analogous. In that case, Mr. Phillips would have been confronted with the prospect of directly involving himself in creating an unambiguous, standalone statement on a controversial religious, social, and political topic, albeit one lacking the aggressive hostility of the Jack cake designs. However, because the design of the Craig-Mullins cake was never discussed with him, Mr. Phillips did not appear before the CRC in an identical position to that of the bakers in the Jack cases. The other bakers were asked to introduce expression of a hostile political viewpoint into their kitchens, while Mr. Phillips was not.[91]

Thus, when Justice Gorsuch insisted that the cases are equivalent in every way – accusing the Justices he opposes of fabricating distinctions that somehow ignore the sameness of a wedding cake and an anti-gay cake – it is difficult to avoid interpreting his argument as one of a crusader against gay advancement.[92] The Jack cases' cakes presented a threatening message

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[89] *Id.* (Ginsburg, J., dissenting) (identifying the reasons the bakers gave for rejecting Jack's designs as their refusal to discriminate, reject classes of individuals, and participate in projecting a hateful message).

[90] *Id.* (stating "[i]n contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.").

[91] *Id.* Any argument that the bakers approached by Mr. Jack rejected him as a customer simply because he revealed himself to be Christian is belied by the bakers' offers to create Bible-themed cakes for Mr. Jack without messages of hate: "One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages . . . . The second bakery owner told Jack he 'had done open Bibles and books many times and that they look amazing,' but declined to make the specific cakes Jack described because the baker regarded the message as 'hateful.' The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message." *Id.* (citations omitted).

[92] *Id.* at 1735 (Gorsuch, J., concurring) (stating "[i]n both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait. . .but. . .the bakers refused service intending only to honor a personal conviction."); *see also id.* at 1736-37 (accusing the CRC of applying a double standard by presuming that Mr. Phillips intended to discriminate against a protected class, while allowing that the three bakers refusing Mr. Jack's commission did so without regard to his status as a member of a

of hate to all who would see them, whether or not they are members of the target group. If Justice Gorsuch's logic is sound, a gay wedding must be equally threatening to Christians. Otherwise, the Justice's insistence on the equivalence of the two scenarios, with its references to symbolic expression and cakes infused with messaging invisible to nonreligious viewers, amounts to little more than wordplay.[93]

Closely related to the question of whether the perspicuity among the messages conveyed by the various cake designs varied significantly is the question of whether the creation of a cake by a commercial baker for a customer is inexorably linked to its intended use. Justice Gorsuch argued that all wedding cakes are expressions of joy about the union where they are served. As such, Mr. Phillips faced the prospect of having to defy his religion by supplying a cake for a gay wedding celebration, regardless of the particular design of the cake or the identity of its buyer.[94] However, differences in the designs requested precipitated different levels of focus in the bakers on facts other than the direct transaction itself, including the would-be customers. While the three bakers in the Jack cases may have presumed to discern his religious or political views (and perhaps even his sexual orientation) when deciding to reject his business, their decisions could have been made without reference to or knowledge of Jack's religion, political views, or sexual orientation.[95] Phillips, on the other hand, focused only on the eventual use of Mr. Craig and Mr. Mullins' cake—use by two men as a couple—when he rejected them as customers.[96] And, although it

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protected class).

[93] *Id.* at 1738-40 (rejecting as "irrational" and "a sort of Goldilocks rule" the distinction between cakes bearing explicit messages and those that do not).

[94] *Id.* at 1735 (explaining that Mr. Phillips offered to make other baked goods for Craig and Mullins, and also testified "that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation.").

[95] *See id.* at 1750 (Ginsburg, J., dissenting) ("When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding – not a cake celebrating heterosexual weddings or same-sex weddings – and that is the service Craig and Mullins were denied. . . . 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. The fact that Phillips might sell other cakes and cookies to gay and lesbian customers was irrelevant to the issue Craig and Mullins' case presented. 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. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer.") (citations and footnotes omitted).

[96] *Id.* at 1739 (Gorsuch, J., concurring) (concluding that "[t]o some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case – his faith teaches him otherwise.").

is true that the purchaser of a cake destined for a single-sex wedding might not be one of the parties to be married, thus not triggering a law aimed at protecting customers, this was not the case Craig and Mullins presented the CRC. Thus, it is both logical and objective for the CRC to have differentiated among the scenarios based on the level of focus each baker necessarily aimed at the customer's identity when rejecting his business. An unbiased CRC could have concluded that, unlike the other three bakers, Phillips' decision to reject his prospective customers was necessarily and solely based on their sexual orientation.[97] In short, whether Justice Gorsuch agreed with the reasoning behind the CRC construing the scenarios as distinguishable, the reasoning exists and forms an objective, non-discriminatory basis for the CRC's decision-making.

Certainly, every business owner has both a professional and personal identity, and regulators cannot expect a business owner's personal identity to disappear at the start of each business day.[98] Equally true is the fact that there is no sharply-defined business sphere inside which public accommodations law requires equivalent treatment of all potential customers and outside of which public accommodations law no longer applies.[99] But wherever the divide exists between a business owner's permissibly disparate treatment of prospective customers based on his personal identity and his obligation to treat all potential customers equally, the fact remains that the Jack and Phillips scenarios are not identical.[100] If the CRC identifies the divide between the personal freedom of business owners and the public accommodations they must provide to all as the point where decisions on whether to reject a prospective customer necessarily involve that customer's identity or the identity of that customer's intended

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[97] *Id.* at 1750-51 (Ginsburg, J., dissenting) ("Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display.").

[98] *Id.* at 1728 (discussing the latitude that the law of public accommodations affords storekeepers "to decline to create specific messages the storekeeper considered offensive.").

[99] *Id.* (discussing the shifting position of the law on public accommodations involving single-sex marriage).

[100] *Id.* at 1733 (Kagan, J., concurring). Justice Kagan articulates the distinction in terms of public accommodations: "Jack requested [that three bakers] make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive 'the full and equal enjoyment' of public accommodations irrespective of their sexual orientation."

gift recipient, then its four cake-related decisions are consistent and reflect no hostility toward Christianity.

Justice Gorsuch attempted to diminish the distinction between the Jack and Phillips cases with two arguments. First, he accused the CRC of conjuring up a result-oriented test so as to discriminate against Christians in his claim that the agency created a false dichotomy in which it differentiated between a cake with explicit messaging and one with symbolic messaging as a means of fabricating a distinction between the Jack and Craig-Mullins scenarios that is, in actuality, legally meaningless.[101] But Justice Gorsuch himself undermined that argument when he insisted that all the CRC needed to have done to dispel the charge of unconstitutional hostility toward Phillips' religion was to apply itself to all cases consistently.[102] Whether or not Justice Gorsuch agreed with the CRC's logic that the bakers approached by Mr. Jack could reject his cake proposals without reference to his personal traits while Mr. Phillips could not reject Mr. Craig and Mr. Mullins' proposal without reference to theirs, it is a pertinent distinction between the Jack and Phillips cases that explains their differing outcomes as consistent.

Justice Gorsuch also argued that the government invaded Mr. Phillips' free expression rights by preventing him from defining the sphere of his religion.[103] To Mr. Phillips, supplying any product from his bakery for a single-sex wedding celebration would make him complicit in a sin.[104] Thus, according to Justice Gorsuch's approach, Mr. Phillips is not only able to refuse to create a wedding cake explicitly celebrating single-sex marriage, but he can also refuse to sell any goods to any customer for use in connection with a single-sex wedding, anniversary, or any other celebration tangentially related to the recognition of single-sex marriage, such as adoptions, births where two persons of the same sex are recognized as the parents, and perhaps even birthdays of children in such families. Although

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[101] *Id.* (Gorsuch, J., concurring) (accusing those who disagree with him of attempting "to gerrymander their inquiries based on the parties they prefer" and of "adjusting the dials *just right* – fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views").

[102] *Id.* at 1737 (identifying actual proof of intent to discriminate against a member of a protected class and intent presumed from actions as two approaches the CRC might have taken to implementing CADA, then concluding that the primary flaw in the CRC's approach was its inconsistency).

[103] *Id.* (acknowledging that "[m]any may . . . consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. . . . But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as 'irrational' or 'offensive' will ever survive strict scrutiny under the First Amendment.").

[104] *Id.* at 1739 (arguing that the CRC was bound to respect Mr. Phillips' religion-based view as to the degree and type of connection he could in good faith have to a single-sex wedding).

the theory that the Free Exercise Clause protects every individual's personal code of religious conduct is not unprecedented, in making this argument, Justice Gorsuch demonstrated the unique power he perceives in the clause.[105] Arming all business owners with the legal authority to define their customer bases in keeping with their personal religion-based codes of conduct could eviscerate public accommodation law completely. Under the guise of his or her personal religious code, a business owner could place a sign in the store window forewarning the public that gay persons will not be served.[106]

b. *When Religion Discriminates*

A third, and perhaps the most meaningful, distinction between the Jack and Phillips cases that Justice Gorsuch did not acknowledge in his concurrence is that the messages requested by Mr. Jack versus Mr. Craig and Mr. Mullins differ fundamentally in their level of compatibility with the essential goal motivating public accommodation law – anti-discrimination. Mr. Phillips rejected the proposition of creating a wedding cake for a single-sex couple, even if the cake were to project a typical positive message of joy and commitment.[107] The transaction that Mr. Craig and Mr. Mullins presented, by itself, conformed to the spirit of the CADA by asking a business to accommodate single-sex customers. The proposition in no way encouraged discrimination, and thus did not contravene the spirit of nondiscrimination that motivates the CADA. In contrast, Mr. Jack requested a cake decorated with overtly hostile messages that condemned to hell those with a same-sex orientation who choose to marry.[108] Although

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[105] *Id.* at 1737 (stating "[j]ust as it is the 'proudest boast of our free speech jurisprudence' that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom.").

[106] *Id.* at 1727 (acknowledging that religious exercises within a clergy may include moral objections to gay marriage without seriously damaging the dignity of gay persons and couples, but warning that if this exception to the protection of gay persons' equality: "were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws and ensure equal access to goods, services, and public accommodations.").

[107] *Id.* at 1743 (Thomas, J., concurring) (discussing the widespread and historical recognition of wedding cakes as symbols of joy and commitment, regardless of their particular design).

[108] *See id.* at 1749 (Ginsburg, J., dissenting) (detailing the particulars of the Jack design, including both an image of two grooms covered by a red 'X' and Biblical verses including language about homosexuality as a "detestable sin," about God hating sin, and about Christ dying for sinners.).

Mr. Jack's intent appeared to be to convey a religious message, thus identifying him as a likely member of a protected class under CADA, his proposition sought to involve a business owner in vilifying a population also protected under the CADA. Thus, although the bakers approached by Mr. Jack had no CADA-based obligation to reject Mr. Jack's business – CADA protects customers, not the third-party subjects of a customer's messaging – those bakers were nevertheless faced with a choice of discriminating against one minority group or another. They could either refuse to accommodate Mr. Jack's religious-based beliefs or honor them by helping propagate insults toward the gay community.

When Justice Gorsuch equated the two situations, focusing on "creed" and "sexual orientation" as two protected classes under CADA, he ignored the actual message each potential cake customer aimed to deliver, thus equating the celebration of single-sex matrimony with its persecution as if each extends the same brand of discrimination as the other.[109] But celebration is the opposite of persecution. To interpret the CADA to mandate that business owners aid customers from one protected class in the persecution of another is to undermine CADA's essential purpose. Faced with a situation in which a business owner can only honor one protected group by denigrating another, a logical interpretation of the CADA is that the CRC should exercise discretion in determining how to best serve the spirit of a law aimed at protecting diverse vulnerable groups against discrimination.[110] A CRC policy allowing business owners to reject intolerance toward vulnerable groups from any source, including other vulnerable groups, sits comfortably within such discretion.

Perhaps Justice Gorsuch presumed that the two scenarios are actually identical when evaluated through the lens of Mr. Phillips' Free Exercise rights rather than that of his obligations under the CADA. From this perspective, because passages from the Bible condemn gay love as sinful, any joy associated with single-sex marriage not only offends but also threatens Christian values, just as religious-based repulsion of single-sex marriage offends and threatens the gay community. Put differently, if Christians actually feel that gay advancements under the law are a threat to them, then the two positions on single-sex marriage may be so incompatible

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[109] *Id.* at 1734-40 (Gorsuch, J., concurring) (laboring throughout his concurrence to equate the scenarios, confining discussion of the offensiveness of Mr. Jack's cake designs to their impact on the personal moral convictions of the bakers who declined to bake for him, and dismissing arguments that the language and images Jack requested might differentiate the scenarios as "gerrymander[ed]" manipulations offered by a result-oriented commission).

[110] *Id.* at 1750 n.3 (Ginsburg, J., dissenting) (stating "[t]he bakers' objections to Jack's cakes had nothing to do with "religious opposition to same-sex weddings. Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA.") (citation omitted).

that each position is equally hostile and equally an expression of repression aimed at the other. This perspective casts Mr. Phillips and the non-homophobic bakers as equally vulnerable to their customers' demands that they honor their personal beliefs.

Only through such logic could Justice Gorsuch conclude that the CRC violated Mr. Phillips's Free Exercise rights by treating his case differently from the Jack cases. But this perspective allows business owners claiming Christian guidance to reject gay customers in connection with virtually any services. And while Mr. Phillips may limit his rejection of customers to those bringing business that connects his services to single-sex weddings, other Christian business owners could go much further in ostracizing gay customers. In equating the cultural vulnerability of gay and religious persons, Justice Gorsuch obligated himself to explain where the balance lies between the acceptance that the gay community may expect in public accommodations and the religious-based rejection that the religious community may inflict. If one group's religious freedom is contingent upon its ability to inhibit another group's equal treatment, the balance point between these conflicting freedoms is crucial. Justice Gorsuch failed to identify this balance point.

In sum, by equating the Craig-Mullins and Jack scenarios, Justice Gorsuch performed an incomplete analysis of the case, and because he seemed particularly bent on comparing the Jack and Craig-Mullins cases as a means of proving the bias of the CRC, his overall analysis fails because it ignored a glaring distinction between them.[111] In the end, Justice Gorsuch presented an opinion that reads as result-oriented and even myopic in its one-sidedness. He appears adamant about protecting the free exercise of religion, regardless of who asserts it – business owner or potential customer – regardless of how offensive its expression.

II. CIRCUIT JUDGE GORSUCH AND THE RELIGIOUS CLAUSES

As demonstrated above, it is possible to read Justice Gorsuch's *Masterpiece Cakeshop* concurrence as an affirmation of the majority opinion, accented with a reminder that the Free Exercise Clause demands that government actors treat religious folk with dignity and respect, just as privacy and liberty interests demand this treatment for vulnerable classes seeking commercial services. It is also possible to read Justice Gorsuch's concurrence as a far more aggressive salvo – an assertion that neither laws nor government actors may inhibit behavior grounded in religion, regardless of its injurious and otherwise-illegal impacts. As a means of

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[111] *Compare with id.* at 1748-52 (setting forth the hateful aspects of the Jack designs and noting the various bakers' offers to accommodate his needs as a means of underscoring that the Phillips case and those of the other three bakers "are hardly comparable.").

exploring Justice Gorsuch's motivation and intent in his *Masterpiece Cakeshop* opinion, this section examines earlier cases in which he published opinions on the power of religion *vis-à-vis* the law or on the rights of single-sex couples.

Prior to joining the Supreme Court, Justice Gorsuch expressed his views on the First Amendment religious clauses in unflinching terms. Writing in a phlegmatic tone that at times contrasts an uncompromising message, the Justice authored a number of opinions while serving as a Tenth Circuit Court of Appeals judge that leave little doubt about his views on the constitutional protection of religion. To present the Justice's long-held vision of Free Exercise, this section reviews then-Judge Gorsuch's 2013 concurrence in *Hobby Lobby Stores, Inc. v. Sebelius* and his 2014 opinion in *Yellowbear v. Lambert.*[112] Section B presents Judge Gorsuch's views on the parameters of the constitutional prohibition of the governmental establishment of religion as expressed in dissents he published to two Tenth Circuit decisions against en banc rehearings, the 2009 *Green v. Haskell County Board of Commissioners* and the 2010 *American Atheists, Inc. v. Davenport.*[113]

A. *Judge Gorsuch on Free Exercise*

While a Tenth Circuit judge, Justice Gorsuch took the position that the Free Exercise Clause and corresponding legislation offer near-impregnable barriers against both state and judicial constraints on faith-based beliefs and rituals. Perhaps the strongest element of Judge Gorsuch's efforts to shield most or all religious practices from political or legal control was his unwavering assurance that the judiciary was neither competent nor authorized to evaluate a party's asserted religious convictions or the actions they might claim a need to perform or abstain from performing in the name of their faith. To Judge Gorsuch, faith-based behavior, once established as genuine, is virtually immune from judicial scrutiny.

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[112] Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014) (vacating district court decision and remanding for further factual inquiry on question of whether state served a compelling government interest through the least restrictive means, in refusing to allow prisoner to exercise his religion through use of a sweat lodge); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (concluding that corporation established substantial likelihood that the Patient Protection and Affordable Care Act imposed an illegal burden under the Religious Freedom and Restoration Act on a closely held business claiming a religious objection to providing employees with insurance coverage for contraceptives that prevent implantation of fertilized eggs), *aff'd*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[113] Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1107 (10th Cir. 2010) (dissenting from denial of rehearing en banc); Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1243 (10th Cir. 2009) (dissenting from denial of rehearing en banc).

1. The Christian Crafts Store Case

Hobby Lobby Stores, Inc. v. Sebelius arose when two closely-held family businesses and their Christian owners challenged regulations promulgated under the 2010 Patient Protection and Affordable Care Act ("ACA"), which required the plaintiff businesses to provide contraceptive services in their employer-sponsored health care plans.[114] The plaintiffs claimed that the government-mandated contraceptive services included several abortifacients, or methods preventing implantation of fertilized eggs, and that the use of abortifacients is contrary to their religion.[115] Thus, they claimed, their compliance with the ACA would force them to sin and in that way violate their rights under both the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause.[116]

By the time Judge Gorsuch opined on the constitutionality of the ACA, the case had been considered by various courts. Both the district and appellate courts had rejected the plaintiffs' motions for preliminary injunction, and the Supreme Court likewise had rejected their emergency appeal for temporary injunctive relief.[117] An important determinant of these decisions was how attenuated the connection was between the

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[114] *Hobby Lobby Stores Inc.*, 723 F.3d at 1122 (identifying the plaintiffs as the Green family, who collectively own and operate Hobby Lobby Stores and Mardel, an arts and crafts chain and bookstore, with a stated, overt, and genuine dedication to promoting New Testament faith and principles); *id.* at 1122-23 (outlining the process through which the ACA implementing agencies incorporated into its coverage contraceptive methods approved by the Food and Drug Administration, including four that act on fertilized eggs).

[115] *Id.* at 1123 (identifying "two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella" as the FDA-approved contraceptive methods to which the Greens object); *id.* at 1122 (stating "one aspect of the Greens' religious commitment is a belief that human life begins when sperm fertilizes an egg. In addition, the Greens believe it is immoral for them to facilitate any act that causes the death of a human embryo.").

[116] *Id.* at 1125 (listing the federal laws that the plaintiffs claimed the ACA's implementation violated as the "RFRA, the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act.").

[117] *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1296-97 (W.D. Okla. 2012). Plaintiffs also asserted "that they 'face[d] an unconscionable choice: either violate the ACA, or violate their faith.'" *Id.* at 1285 (citation omitted). The Court denied preliminary injunction motion, concluding that the ACA survives rational basis scrutiny and that the RFRA does not protect individuals against indirect connections between their religious beliefs and contraception choices their employees may choose through their ACA-mandated health insurance coverage.); *Id.* at 1288-96. A two-judge 10th Circuit panel, agreeing with the reasoning of the district court, denied injunctive relief pending appeal. *See* Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012). The Supreme Court also denied relief. Hobby Lobby Stores, Inc. v. Sebelius, 568 U.S. 1401, 1403-04 (2012) (Sotomayor, J.) (finding that the plaintiffs had failed to meet the demanding standard for injunctive relief under the All Writs Act, 28 U.S.C. § 1651(a)).

employers' religious aversion to abortion and an employee's decision to use an abortifacient. This decision, although perhaps rendered economically feasible for the employee due to her employer's adherence to the ACA, involved a number of actions and considerations outside of the employer's purview, control, or likely knowledge.[118]

Sitting en banc, the Tenth Circuit disagreed with the three prior *Hobby Lobby* decisions, holding instead that Hobby Lobby and Mardel, as for-profit corporations, were subject to the protections of both the Free Exercise Clause and RFRA, and that their preliminary injunction claims had demonstrated a likely violation of their RFRA rights.[119] The RFRA requires that no federal law substantially burden religious exercise unless the burden is the least restrictive means to achieve a compelling government interest, and in so doing, the RFRA reestablishes the analytic approach that the Court abrogated in 1990.[120] As such, an RFRA analysis is the equivalent of a pre-1990 judicial analysis of Free Exercise, and in *Hobby Lobby* the Tenth Circuit discusses the statutory and constitutional analyses as enmeshed in this manner.[121]

Judge Gorsuch joined the majority and also published a concurrence, ostensibly to make the point that members of the Green family, who owned the two companies, were entitled to relief as individuals, but perhaps also to use this high-profile case to articulate his particular view of Free Exercise protection.[122] Judge Gorsuch presented the analysis as a "problem of complicity."[123] The Greens, he noted, professed a religious conviction that

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[118] *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1294-96 (W.D. Okla. 2012) (finding the connection between the business owners and the personal decisions of an employee too indirect for such decisions to constitute a substantial burden on the business owners' religion).

[119] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1191 (10th Cir. 2013). *See also id.* at 1129 (holding that RFRA applied to for-profit corporations); *id.* at 1133-37 (recognizing free exercise rights in "closely held family businesses with an explicit Christian mission as defined in their governing principles"); *id.* at 1147 (reversing the district court's decision on the preliminary injunction likelihood-of-success factor, and remanding with instructions that the district court consider the remaining factors in light of the appellate court's discussion, which favored the plaintiffs on all preliminary injunction factors).

[120] *See, e.g.*, Yellowbear v. Lampert, 741 F.3d 48, 52-53 (10th Cir. 2014) (explaining the genesis of RFRA as a reassertion of free exercise doctrine as expressed in *Sherbert v. Verner*, 374 U.S. 398 (1963), after the Court appeared to overshadow the *Sherbert* mode of analysis in *Emp't Div. v. Smith*, 494 U.S. 987 (1990)).

[121] *Hobby Lobby Stores,* 723 F.3d at 1156 (Gorsuch, J., concurring) (arguing that RFRA protection of religious liberty overrides the ACA mandate that a company owner provide insurance coverage for acts contrary to the owner's religion).

[122] *Id.* at 1152-59.

[123] *Id.* at 1152 ("All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of

the use of abortifacients was sinful, a conviction the court was in no position to evaluate in terms of its significance as an element of their faith.[124] The Greens' claim that a law mandating that the companies they run provide employees with insurance coverage for abortifacients forced them to "lend an impermissible degree of assistance" to sinful acts was likewise and equally a matter of religious conviction beyond the judiciary's ability to gauge in terms of its centrality to the Greens' faith.[125] To Judge Gorsuch, the scope of a person's religion and the breadth of actions or abstentions from action it encompasses are faith issues warranting legal protection, just as the more readily-recognized core tenets of a person's religion warrant such protection.[126]

In making his complicity argument, Justice Gorsuch rejected the notion that the Tenth Circuit must accept the two companies as religious plaintiffs in order to reverse, which some might identify as the key distinction between the appellate court decision and those that preceded it.[127] After all, the degree of connection between a company owner's religion and an employee's pregnancy-related decision is rendered one step less attenuated by the Tenth Circuit recognition of the companies themselves as RFRA plaintiffs.[128] But Judge Gorsuch rejected the district court's focus on the "series of independent decisions by health care providers and patients."[129] "[I]t is not for secular courts to . . . decide whether a religious teaching about complicity imposes 'too much' moral disapproval on those only 'indirectly' assisting wrongful conduct," Judge Gorsuch explained.[130] "Whether an act of complicity is or isn't 'too attenuated' from the

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others").

[124] *Id.*

[125] *Id.* ("As [the Greens] understand it, ordering their companies to provide insurance coverage for drugs or devices whose use is inconsistent with their faith *itself* violates their faith, representing a degree of complicity their religion disallows.").

[126] *Id.* ("For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves gear mural culpability.").

[127] *Id.* at 1156; *see also id.* at 1120-37 (presenting multiple arguments to conclude that for-profit corporations are "persons" under the First Amendment Free Exercise Clause and RFRA).

[128] *But see id.* at 1163 (Briscoe, J., concurring in part and dissenting in part). Judge Briscoe argues that corporate plaintiffs, if recognized as protected under the Free Exercise Clause and RFRA, must present evidence of how the government has impacted the religious convictions of the companies themselves, and not of the company owners. Under this argument, allowing companies to stand as plaintiffs making free exercise claims would not simply remove a degree of separation between the owners and the conduct that offends them.

[129] *Id.* at 1153 (discussing the religious plaintiff's standing) (citation omitted).

[130] *Id.* at 1153-54.

underlying wrong is sometimes itself a matter of faith we must respect."[131] In sum, in his *Hobby Lobby* concurrence Judge Gorsuch left no doubts about his perspective on Free Exercise analysis: once a party establishes a genuine faith-based code of morality, the law must honor and protect as religious exercises all actions or inactions that the religious party identifies as dictates of that religious code of morality.[132]

2. The Prison Sweat Lodge Case

In 2014, Judge Gorsuch again applied his theory that Free Exercise law presumptively protects a person's religious code of behavior when it conflicts with other legal interests.[133] In *Yellowbear v. Lampert*, Judge Gorsuch authored the opinion addressing a prisoner's claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[134] RLUIPA, in essence, applies the free exercise protections of the federally-focused RFRA to state land use and prison laws.[135] Wyoming prison officials, citing safety and logistical concerns, had refused Mr. Yellowbear's request to access its sweat lodge, the use of which all parties recognized as a religious practice in Mr. Yellowbear's Native American tradition.[136]

In the course of his *Yellowbear* analysis, Judge Gorsuch reasserted his *Hobby Lobby* thesis that the judiciary is incompetent to assess spiritual matters. On the issue of the trigger for religious protection, he applied the sincere belief standard, accepting it without question. This was partly

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[131] *Id.* at 1154.

[132] *Id.* at 1153-54. Judge Gorsuch supported his argument with references to *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1980) (refusing to question a Jehovah's Witness' claimed connection between his faith and certain steel manufacturing tasks) and *United States v. Lee*, 455 U.S. 252 (1982) (declaring as outside of the judiciary's competence the question of whether an Amish employer for whom government assistance was sinful may avoid paying social security taxes on behalf of his employees in the name of his religion). *Id.*

[133] Yellowbear v. Lampert, 741 F.3d 48, 56 (2014).

[134] *Id.* (reversing summary judgment on the basis of a lack of factual clarity about whether and how the state could accommodate the plaintiff prisoner's religious practice); *see also* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a) (2000) (prohibiting state land use and prison laws to substantially burden religious exercise unless the burden achieves a compelling state in interest through the least restrictive means).

[135] *Yellowbear*, 741 F.3d. at 52-53 (explaining that in light of the Supreme Court's decision that RFRA invaded state power in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress enacted RLUIPA to once again reassert the *Sherbert* free exercise analysis for state action, this time limited to the land use and prison arenas).

[136] *Id.* at 52 (recognizing the sweat lodge as "a house of prayer and meditation the prison has supplied for those who [practice the] Native American religious tradition" and that "the prison refuses to open the doors of that sweat lodge to Mr. Yellowbear").

because the case was before the court on a summary judgment appeal, but it was also because Judge Gorsuch considered the judicial role in its analysis of a claimant's religious beliefs was properly limited to a credibility assessment. Mr. Yellowbear sincerely believed that "access to a sweat lodge is a form of religious exercise."[137] This triggered the second step of the plaintiff's burden under RLUIPA, which is to establish that the secular law imposed a substantial burden on this religious exercise.[138] Once again, Judge Gorsuch adopted a protective posture on behalf of the religious party, explaining that a claimant meets that burden not only where the state directly prohibited or coerced a particular religious ritual, but also where it "force[d] the religious claimant to choose between following the dictates of his faith and winning an important benefit or forgoing a considerable penalty."[139] Because the Wyoming prison had denied Mr. Yellowbear any access to the facility's existing sweat lodge, Judge Gorsuch easily concluded that the state had imposed a substantial burden on its prisoner's right to exercise his faith.[140] Judge Gorsuch further reasoned that the state fell short on both its obligation to establish the compelling nature of its interest in refusing to accommodate Mr. Yellowbear and also its obligation to establish that its refusal to allow Mr. Yellowbear any access to its sweat lodge was the least restrictive means of effectuating a compelling state interest.[141]

Yellowbear presented an unquestionable faith-based practice that the state declined to accommodate in spite of the availability of obvious means.[142] Although the facts so readily supported the court's holding as to defy

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[137] *Id.* at 56 (noting that the sincere faith-based motive for Mr. Yellowbear's request is undisputed and also noting that at the summary judgment stage his burden is "to show merely that a reasonable fact finder could rule his way when viewing the evidence in the record in the light most favorable to him.").

[138] *Id.* at 53 (identifying the plaintiff's obligations under RLUIPA as both establishing a sincere religious exercise and demonstrating that the state has substantially burdened such exercise).

[139] *Id.* at 56; *see also id.* at 55 (clarifying that courts are not in a position to evaluate the substantiality or centrality to the plaintiff's religion of the exercise in question, but must instead confine themselves to assessing the coercive impact of the state's action inhibiting the plaintiff's full and free exercise).

[140] *Id.* at 56 ("As Mr. Yellowbear understands his faith, it requires as least *some* access to a sweat lodge. The prison refuses *any* access. . . . The prison's policy here falls easily within *Abdulhaseeb's* second category—flatly prohibiting Mr. Yellowbear from participating in an activity motivated by a sincerely held religious belief.") (citing Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010)).

[141] *Yellowbear,* 741 F.3d at 56-64 (dismissing the costs and administrative burdens cited by the state as general and conclusory, and the prison's rejection of Mr. Yellowbear's suggestions for how it might accommodate him as unsubstantiated).

[142] *Id.* at 52-56.

casting the case as an assertion of a particularly principled Free Exercise analysis, Judge Gorsuch took pains in his opinion to demonstrate how, in his view, the four-step Free Exercise review process should operate.[143] According to Judge Gorsuch, once a religious plaintiff establishes a genuine faith-based set of convictions and rituals, the state faces a heavy burden when attempting to establish that its impact on those convictions and rituals is justified by institutional interests and practices. This includes state interests and practices that enjoy a strong presumption of validity in other legal settings.

At the core of this approach to Free Exercise analysis is Judge Gorsuch's repeated warnings against the judiciary presuming to fathom the scope and centrality of an individual's religious practices. "[F]ederal judges are hardly fit arbiters of the world's religions," Judge Gorsuch observed.[144] Later in his *Yellowbear* opinion, he warned that RLUIPA "made plain that [courts] also lack any license to decide the relative value of a particular exercise to a religion."[145] Coupling these assertions of judicial ignorance with his view that a person's religious practice encompasses any "performance of (or abstention from) physical acts" for which the individual claims a sincere religious connection, Judge Gorsuch concluded that courts have virtually no capacity to evaluate any claimed faith-motivated practices for their logic or centrality to religion.[146] In short, according to Judge Gorsuch, once a claimant establishes that his religious code of behavior is sincere, both state institutions and the courts are rendered toothless in terms of questioning, compromising, or curbing any element of that code.

B. *Judge Gorsuch on the Establishment Clause*

As is often noted by the Justices, there is substantial "play in the joints" between the government actions or restraints that the Free Exercise Clause compels and those that the First Amendment's Establishment Clause permits or prohibits.[147] Thus, discussion of Judge Gorusch's approach to Free Exercise analysis would be incomplete without reference to his Establishment Clause opinions.

A division has crystalized among Justices on the proper approach to

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[143] *Id.* at 53, 56-64.

[144] *Id.* at 53 (limiting the analysis of a claimant's religious sincerity to a credibility assessment).

[145] *Id.* at 54 (noting the judiciary's "lack of any comparative expertise when it comes to religious teachings, perhaps especially the teachings of less familiar religions").

[146] *Id.* (quoting from Emp. Div. v. Smith, 494 U.S. 872, 877 (1990)).

[147] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (quoting Locke v. Davey, 540 U.S. 712, 718 (2004) (holding that states may deny participation in scholarship program to students pursuing degrees in devotional theology)).

Establishment Clause analysis through a number of cases in which citizens challenge the constitutionality of monuments and other displays on government property that contain religious quotes, symbols, or other references to spiritual beliefs.[148] Justices who take a firm approach to the separation of church and state claim that the government runs afoul of the Establishment Clause when it may be perceived to endorse a particular religion, group of religions, or religion generally. Other Justices – primarily those labeled conservative – discern violations of the Establishment Clause only where government action may be perceived to either coerce or threaten particular religious practices or beliefs. There are also some differences among the Justices in each camp as to how the "endorsement" and "coercion" tests operate.[149]

While on the Tenth Circuit Court of Appeals, Judge Gorsuch published two Establishment Clause case opinions, *Green v. Haskell County Board of Commissioners* and *American Atheists, Inc. v. Davenport*.[150] In both, Judge Gorsuch dissented from decisions against rehearing the cases en banc. These opinions place Justice Gorsuch among adherents to the coercion test as the proper approach to Establishment Clause analyses.[151] Both opinions also reinforce a jurisprudential theme Justice Gorsuch presented in his Free Exercise opinions: judges are neither qualified nor competent to evaluate religion, particularly where they attempt to distinguish between the religious and the secular.[152]

1. The Ten Commandments Monument Case

In its July 2009 *Green* decision, a Tenth Circuit three-judge panel concluded that the Board of Commissioners of Haskell County, Oklahoma

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[148] *See, e.g.*, Cty. of Allegheny v. ACLU, 492 U.S. 573, 578-79 (1989) (unconstitutional for municipality to display holiday creche); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (holding municipality's displaying creche accompanied by Santa Claus and other non-religious holiday figures constitutional).

[149] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992). The majority discerned a subtle coercion in the inclusion of a prayer in a high school graduation ceremony. *Id.* at 592. In his dissent, Justice Scalia argued that the historical understanding of religious coercion involved coerced involvement in a religion "by force of law and threats of penalty." *Id.* at 640 (Scalia, J., dissenting).

[150] Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1243 (10th Cir. 2009) (Gorsuch, J., dissenting); Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010) (Gorsuch, J., dissenting).

[151] *See Green*, 574 F.3d at 1243-49 (arguing that multiple courts have rejected the endorsement test); *see also Am. Atheists*, 637 F.3d at 1107-11 (questioning the remaining applicability and viability of the endorsement test).

[152] *Green*, 574 F.3d at 1243-49 (negatively critiquing the court's prior application of the endorsement test); *Am. Atheists*, 637 F.3d at 1107-11 (launching a scalding criticism of the endorsement test with a harangue about the ability of judges to apply it).

violated the First Amendment when it approved the siting of a monument depicting the Ten Commandments on the county courthouse grounds.[153] The *Green* panel acknowledged that the Supreme Court had been sending out "scattered signals" on both the utility and precedential authority of the prevailing judicial test for Establishment Clause violations.[154] Nevertheless, the court considered itself obligated to follow Tenth Circuit and Supreme Court precedents, and so it summarized and applied the much-criticized *Lemon* test, as refined by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*.[155] The original test that emerged from the 1971 *Lemon v. Kurtzman* requires a court faced with an Establishment Clause challenge to determine whether the government action in question (i) was motivated by a secular purpose, (ii) has a principal effect that neither advances nor inhibits religion, and (iii) refrains from fostering an entanglement between government and religion.[156] Justice O'Connor's "endorsement patina" guides the application of the test, according to the *Green* panel. It requires the court to adopt the perspective of a reasonable observer when evaluating whether a display erected on government property or with government funding conveys to the observer a government purpose or creates an effect that the government prefers a particular religion or religious belief over other belief systems.[157] However applied, both tests task courts with discerning and differentiating between religious and secular motives, impacts, and impressions.

The *Green* panel considered the design of the monument, the language

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[153] *Green*, 568 F.3d 784 (applying the tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), as refined by Justice O'Connor's concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring)).

[154] *Id.* at 796 ("Despite scattered signals to the contrary, the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*.") (quoting Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10th Cir. 2008)).

[155] The *Lemon* test was refined by a discussion of the endorsement test penned by Justice O'Connor in her *Lynch v. Donnelly* concurrence. Lynch v. Donnelly, 465 U.S. 668 (1984). The Court concluded that a city's inclusion of a creche in its winter holiday display did not violate the Establishment Clause because the nation's celebration of Christmas had historical and other non-religious significance. *Id.* In her concurrence, Justice O'Connor articulated a statement of the Endorsement Test focused on the message a state action with religious content conveyed. State acts conveying that persons of one religious were favored insiders while others were disfavored outsiders violated the Establishment Clause. State acts involving religion but avoiding pejorative messaging did not. *Id.* at 687-88 (O'Connor, J., concurring).

[156] Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that state funding of even non-religious aspects of religion-sponsored private schooling necessitated an ongoing level of state-religion interaction violating the First Amendment).

[157] *Green*, 568 F.3d at 796-98 (puzzling through the elements of the *Lemon* test as impacted by the "endorsement patina").

written on it, its history and approval process, its placement among other monuments, its unveiling ceremony, and its presentation in news media.[158] Ultimately, the *Green* panel concluded that a reasonable observer would consider the monument reflected Haskell County's endorsement of Christianity.[159] In spite of the historical and secular significance of the Ten Commandments, the panel reasoned, the particular depiction chosen for the monument projected a religious theme.[160] Neither the monument's inclusion of the Mayflower Compact text nor its placement near a World War I memorial diminished its religious message enough to convince the court that a reasonable observer would discern from these non-religious nearby messages a unifying, cohesive secular theme.[161] Finally, public statements by several county commissioners approving and defending the monument sealed the court's conclusion that the overwhelming effect of the monument was that of a governmental endorsement of religion in violation of the Establishment Clause.[162]

A month later, the Tenth Circuit rejected a petition for rehearing the *Green* case en banc, with six of the twelve circuit judges dissenting.[163] Two of the dissenters joined Senior Circuit Judge Paul J. Kelly's close critique of the prior *Green* analysis. In this critique, he argued that the original *Green* panel had not only improperly applied the endorsement test, but also had erred in distinguishing the Haskell County circumstances from those in Austin, Texas at the time the Supreme Court decided *Van Orden v. Perry*.[164] In *Van Orden*, the Court had determined that the arrangement of a Ten Commandments monument among other monuments on the grounds of the state capitol rendered the religious significance of the Commandments just one element of a display that was primarily historical

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[158] *Id.* at 798-809 (delving into the perspective of the reasonable observer).

[159] *Id.* at 809 ("In the context of the small community of Haskell County, we hold that the Board's actions in authorizing and maintaining the Monument—inscribed with the Ten Commandments—on the courthouse lawn had the impermissible principal or primary effect of endorsing religion in violation of the Establishment Clause.").

[160] *Id.* at 807 (pointing out that the original text of the Ten Commandments constitutes an unmistakable religious statement).

[161] *Id.* at 807-08 (discussing the failure of these secular messages to dilute the religious message conveyed by the Ten Commandments).

[162] *Id.* at 801-03 (discussing the vehement, religion-focused statements with which various commissioners defended the monument).

[163] Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1235 (10th Cir. 2009) ("On a vote of six to six of the active members of the Court, rehearing en banc was denied.").

[164] *Id.* at 1235-43 (Kelly, J., dissenting) (critiquing the *Green* panel decision in terms of its differentiating the facts from those in *Van Orden*, its emphasis on the timing of the challenge to the Haskell County monument, its understanding of the endorsement test, its emphasis on the size of Haskell County, and the weight it placed on the religious focus of Haskell County commissioners' statements supporting the monument).

in its significance and messaging.[165] "How an aesthetic critique of the monuments distinguishes this case in any meaningful way from *Van Orden* is puzzling," Judge Kelly observed.[166] "Federal courts do not sit as landscape architects or arbiters of style to decide whether small-town commissioners have sufficiently sophisticated taste."[167]

Judge Gorsuch did not join Judge Kelly's dissent.[168] In so refraining, Judge Gorsuch suggested a level of disapproval of Judge Kelly's fact-based argument. Indeed, in his own dissent Judge Gorsuch rejected the approach through which courts strive to conjecture the subjective impressions of a reasonable observer; instead, Judge Gorsuch claimed, *Van Orden* points the way toward a rejection of any version of the *Lemon* test, at least in cases involving monuments or other passive displays.[169]

Next, as a means of underscoring the futility of the *Lemon* test, Judge Gorsuch offered a critique of the "reasonable observer" presented by the *Green* panel. The imagined observer was decidedly "*un* reasonable" according to Judge Gorsuch, and "just gets things wrong" as he speculated about secret and perhaps nefarious government motives behind the approval of the monument. Judge Gorsuch went on to criticize the hypothetical observer for fashioning himself "something of an art critic" in his failed attempt to discern cohesiveness among the monuments contributing to the Haskell County courthouse lawn display.[170] To Judge Gorsuch, apparently, an Establishment Clause analysis involving passive displays should be limited to a simple question of whether government officials demonstrated a preference for donated monuments expressing one religion over those

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[165] Van Orden v. Perry, 545 U.S. 677 (2005) (emphasizing the historical role of religion in U.S. heritage, the grouping of the Ten Commandments monument under analysis in that case among non-religious monuments, and the years through which the Ten Commandments monument had stood on the Texas state capitol grounds without complaint to conclude that its presence did not constitute a violation of the Establishment Clause).

[166] *Green*, 574 F.3d at 1236 (Kelly, J., dissenting) (arguing that the *Green* panel evaluated the Haskell County factual circumstances in a highly subjective manner).

[167] *Id.* at 1237.

[168] *Id.* at 1243 (Gorsuch, J., dissenting) (listing Judges Kelly, Tacha, and Tymkovich as joining Judge Gorsuch's dissent. Two of the six dissenting Tenth Circuit judges involved in the decision, Judges O'Brien and McConnell, joined neither Judge Kelly's dissent nor Judge Gorsuch's.).

[169] *Id.* at 1244 (Gorsuch, J., dissenting) ("[B]y making us apparently the first court of appeals since *Van Orden* to strike down an inclusive display of the Ten Commandments, the panel opinion mistakes the Supreme Court's clear message that displays of the decalogue alongside other markers of our nation's legal and cultural history do not threaten an establishment of religion.").

[170] *Id.* at 1246-48 (offering a thinly-veiled criticism of the *Green* panel's attempt to apply the *Lemon* test through a mocking review of its reasonable observer's pretentions and presumptions).

expressing another.[171] Religion is part of U.S. history, culture, and life, Judge Gorsuch observed, and so religious messaging does not trigger Establishment Clause concerns unless it involves an overt attempt to advance a religious message.[172] Significantly, Judge Gorsuch both launched and concluded his *Green* dissent with a call to his fellow circuit court judges to read *Van Orden* as a directive to reject the *Lemon* test, with its reliance on clumsy judicial assessments of religious impressions and motives, in favor of a simpler analysis that steers clear of judicial evaluations of religion.[173]

2. The Roadside Memorial Case

A year after *Green*, the Tenth Circuit once again pondered the status of Establishment Clause analysis. In *American Atheists, Inc. v. Davenport*, petitioners asked a nine-judge panel to reconsider whether Utah officials violated the Establishment Clause by demonstrating a religious preference when they allowed a highway patrol association to memorialize fallen troopers by erecting crosses along public roadways.[174] Five of the nine judges rejected the petition, upholding the prior panel's decision which relied on the endorsement test to conclude that a reasonable observer would perceive the cross memorials to reflect a state preference for Christianity.[175] The panel reasoned that a state-sponsored display of crosses, recognized by most observers as Christian symbols and bearing no physical proximity to secular memorials, could not take precedential shelter under *Van Orden.*[176] The panel concluded that the reasonable observer could discern from the display "that Christians are likely to receive preferential treatment" in hiring

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[171] *Id.* at 1248 ("Rather than focusing on the aesthetic qualities of Haskell County's display, it should be enough that there is no indication that county officials had any sort of policy by which they discriminate among proposed monuments based on the message they communicate.").

[172] *Id.* at 1248-49 (discussing the secular moral and historical message conveyed by the Ten Commandments, as well as its familiar presence among other common symbols of historical importance in U.S. history).

[173] *Id.* at 1243-44 (opening his dissent with an argument that, in deciding against rehearing *Green*, the court missed an opportunity to reject its prior application of the *Lemon* test and instead endorse a broad reading of *Van Orden*); *id.* at 1249 (ending his dissent with the assertion that *Van Orden* clearly rejected the *Lemon* analysis from Establishment Clause analyses involving passive displays, and that the court missed an opportunity to follow *Van Orden*).

[174] Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010) (altering the prior decision by replacing a particular use of the word "universally" with the word "widely," but otherwise denying the petition for rehearing).

[175] Am. Atheists v. Duncan, 616 F.3d 1145 (10th Cir. 2010).

[176] *Id.* at 1160.

and when interacting with officers.[177]

As he had a year earlier in *Green*, Judge Gorsuch dissented from the *American Atheists* decision to not rehear the case en banc.[178] Just as in *Green*, Judge Gorsuch's primary message was to express doubt about whether, in light of the *Van Orden* decision, the endorsement test remained appropriate for assessing Establishment Clause challenges.[179] Judge Gorsuch also critiqued the panel's application of its "reasonable observer" analysis, once again using the fictitious observer as a rhetorical stand-in for the panel.[180]

In *American Atheists,* however, Judge Gorsuch expressed his exasperation with his judicial colleagues more overtly. He accused the court of launching its analysis with a "biased presumption," disregarding details and precedents, and applying "selective and feeble eyesight."[181] He attempted to shame his colleagues with the accusation that through its *American Atheists* decision, the Tenth Circuit became the only circuit to ban roadside memorials to fallen public servants based on a misapplication of the reasonable observer standard.[182] "Thus, the pattern is clear: we will strike down laws other courts would uphold, and do so whenever a reasonably biased, impaired, and distracted viewer might confuse them for

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[177] *Id.*

[178] Am. Atheists v. Davenport, 637 F.3d 1095, 1107 (10th Cir. 2010) (Gorsuch, J., dissenting).

[179] *Id.* at 1110 ("But whether even the true reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear. A majority of the Supreme Court in *Van Orden* declined to employ the reasonable observer/endorsement test in an Establishment Clause challenge to a public display including the Ten Commandments. Following the Supreme Court's cue, at least three of our sister circuits seem to have rejected the test, at least when it comes to passive public displays like Utah's. And this year a plurality of the Supreme Court questioned whether even the true 'reasonable observer' framework is always appropriate for analyzing Establishment Clause questions.") (citations omitted).

[180] *Id.* at 1107-08 ("Our court has now *repeatedly* misapplied the 'reasonable observer' test, and it is apparently destined to continue doing so until we are told to stop. Justice O'Connor instructed that the reasonable observer should not be seen as 'any ordinary individual, who might occasionally do unreasonable things, but . . . rather [as] a personification of a community ideal of reasonable behavior.' Yet, our observer continues to be biased, replete with foibles, and prone to mistakes.") (citations omitted).

[181] *Id.* at 1108 (accusing the panel of launching its analysis with a presumption of unconstitutionality, ignoring *Salazar v. Buono,* 559 U.S. 700 (2010), failing to notice that the crosses in question bear the fallen troopers' names, and yet noting the Utah highway patrol insignia posted directly below those names).

[182] *Am. Atheists,* 637 F.3d at 1109 (arguing that the mistake is far worse by virtue of its following *Green*, and is thus unable to be dismissed as "a "one-off" misapplication of the reasonable observer test.").

an endorsement of religion."[183] Judge Gorsuch's rebuke approaches a judgment about the basic competence of his colleagues, noting that "[i]t is a rare thing for this court to perpetuate a circuit split without giving due consideration to, or even acknowledging, the competing views of other courts or recent direction from the High Court. But that's the path we have taken."[184]

As he had in *Green,* Judge Kelly published a dissent in *American Atheists.*[185] This time Judge Gorsuch joined his fellow dissenter's opinion, presumably because Judge Kelly's dissent expressed a skeptical perspective on the endorsement test that is fully consistent with Judge Gorsuch's *Green* and *American Atheists* dissents. In his *American Atheists* dissent, Judge Kelly presented the image of the reasonable observer as one who is increasingly hostile toward religious symbolism, to the point where he is intent on purging all religious references from the public sphere.[186] Judge Kelly not only argued that the endorsement test had been distorted into a presumption that any government display with a religious element violates the Establishment Clause, but also that the panel conjured up a "reasonable observer" who considered facts selectively and drew "unsupported and quite odd conclusions."[187] To survive an Establishment Clause challenge, according to Judge Kelly, it seemed apparent that government actors needed to dilute any display containing a religious element with secular content so as to convince observers that any religious messaging is merely incidental to the primary historical or moral message.[188] Such an approach, Judge Kelly argued, is tantamount to forcing government actors to adopt a hostile posture toward religion, "which the First Amendment unquestionably prohibits."[189] In light of the fact that the participating families chose

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[183] *Id.* at 1110. *See also id.* ("Thus it is that the court strikes down Utah's policy *only* because it is able to imagine a hypothetical "reasonable observer" who *could think* Utah means to endorse religion—even when it doesn't.").

[184] *Id.* Judge Gorsuch closes by noting the court's "remarkable use of the 'awesome power' of judicial review." The implication is that the court is abusing its discretion.

[185] *Id.* at 1101 (Kelly, J., dissenting).

[186] *Id.* ("Despite assurances from the Supreme Court that the Establishment Clause does *not* require us to "purge from the public sphere all that in any way partakes in the religious," the court's "reasonable observer" seems intent on doing just that.") (references omitted).

[187] *Id.* at 1102. *See also id.* at 1104-06 (detailing the reasonable observer's selective visual observations, lopsided reliance on background, and insensitivity to pertinent messaging).

[188] *Id.* at 1102-04, 1121 (arguing that the endorsement test has evolved into a question of how effectively the government has overwhelmed any religious element of a display with secular content, rather than retaining its focus on whether the religious content of a government display amounts to an endorsement of religion).

[189] *Id.* at 1103 (arguing that the challenger should bear the burden of proving that a

crosses to honor their deceased relatives, Judge Kelly reasoned, the state's erecting only crosses in no way demonstrated a state preference for Christianity or state-sponsored discrimination against other faith symbols or against symbols without religious connotation.[190]

Although it would be unfair to conclude that Judge Gorsuch's decision to join this dissent indicates his wholehearted agreement with all of it, Judge Kelly's argument certainly echoes Judge Gorsuch's core thesis, expressed in both *Green* and *American Atheists,* that government acknowledgement, acquiescence to, and support for religious symbolism does not amount to government establishment of religion, even where state land, funds, or sponsorship may be involved.[191] In essence, Judge Gorsuch balks at the idea that the state can, must, or even should aim to present itself as fully segregated from the church. Indeed, under Judge Gorsuch's logic, the government's very effort to present itself as purely secular so as to pass muster under the distorted endorsement test would force it to assume a hostile stance toward religious motivations, viewpoints, and symbols, thus violating the Establishment Clause even as it strove to avoid that very violation. A Christian focus discernible in monuments, displays, or memorials, from Judge Gorsuch's perspective, is nothing more than a reflection of the history and culture from which such memorials and monuments emerge. Under this theory, what the Constitution requires is simply government neutrality toward religion, in both executive and judicial decision-making.

C. *Summary Observations of Judge Gorsuch's Religion Clause Opinions*

At first blush, it may appear that the core elements of Justice Gorsuch's Tenth Circuit Free Exercise and Establishment opinions are incompatible or even contradictory. In the Free Exercise Clause cases discussed above, Judge Gorsuch advocated against judicial scrutiny of the legal validity of a religion-based claim, as if he found inappropriate or even offensive any

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government display has the purpose and effect of endorsing religion, and that the burden appears to have shifted to the government to prove that any religious element of a government display does not amount to endorsement).

[190] *Id.* at 1106 ("We really do not know how Utah officials would react if the [Utah Highway Patrol Association] requested permission to erect a symbol other than a cross, or how they would justify their decision. However, we do know the facts of this case. Here, the evidence shows that every family agreed to a cross. Thus, our role is not to postulate on the issue of whether Utah would send a message of endorsement if it permitted only crosses as memorials for deceased troopers.") (citations omitted).

[191] *See* Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1248 (10th Cir. 2009) ("If the class of 1955 wanted to donate a bench, so be it; as Judge Kelly indicates, it doesn't mean the county dislikes the class of 1956. If the Choctaw Nation wanted a commemorative monument, so be it; there's no indication other Indian nations can't also donate one.").

secular institution's attempt to comprehend a person's faith, much less question its scope or depth. Justice Gorsuch has repeatedly indicated that a person's religious life is defined by that person's deity, and setting legal parameters around that life defies the essence of religion in a manner that is both presumptuous and inappropriate. In seeming contrast, in the Establishment Clause cases discussed above Judge Gorsuch encouraged the acceptance of mingled secular and religious institutions, as if confident that the teachings and trappings of the two worlds present little threat of being misconstrued as a single system in which religion dominates. Thus, in the Free Exercise context a mingling of law and religion in judicial reasoning threatens some form of state autocracy over church, while in the Establishment context courts must accept that mingling as historical and natural.

Perhaps these dueling approaches to the religious clauses find common ground in an understanding of faith that comes from religious doctrine itself – faith as permeating the life of the devout to the point where the religious and secular lives cannot be differentiated, rendering the devout person's political and commerce-related actions impossible to objectively gauge or compartmentalize as driven more by faith or secular motivation. From this perspective, if the law can barely segregate religious from secular behavior, the law certainly cannot with any confidence define the importance or centrality of a particular act or inaction to the actor's faith. Under this theory, which seems to capture Judge Gorsuch's view of religion and law in both the Free Exercise and Establishment contexts, when a legal body determines that a particular mode of behavior or physical symbol constitutes a genuine aspect of a party's religion, the determination renders the judiciary powerless, inept to judge, guide or control such behavior or symbol. As such, Judge Gorsuch appears to read the two religion clauses of the First Amendment as sharing the goal of warding off legal constraint of religion.

III. JUSTICE GORSUCH ON RELIGION AND SAME-SEX MARRIAGE

With his outspoken record on constitutional protection for religion, it is unsurprising that Justice Gorsuch wasted no time in addressing religious rights from the platform of the Supreme Court. Prior to authoring his *Masterpiece Cakeshop* concurrence, the Justice took an opportunity to signal his discontent with the legal position of religious institutions under the First Amendment in *Trinity Lutheran Church v. Comer.*[192] Shortly after that, in his *Pavan v. Smith* dissent, Justice Gorsuch indicated his skepticism about a related topic, the fundamental right same-sex couples have to

[192] Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012 (2017).

treatment by the state identical to that offered opposite-sex couples.[193] As noted in this article's introduction, both of these opinions emerged on the date the Court granted certiorari for *Masterpiece Cakeshop*.

A. *The Church Playground Case*

Near the end of his *Trinity Lutheran Church* opinion, Chief Justice John Roberts included a footnote reminding readers that the case involves discrimination "with respect to playground resurfacing."[194] Despite this apparent effort to confine the case to its facts, *Trinity Lutheran Church* is a religion clause case of significance. At its root is a Missouri grant program run by the state's Department of Natural Resources ("DNR"), through which applicants solicited funding to resurface playgrounds with rubber derived from recycled tires.[195] Trinity Lutheran applied for a grant, and the DNR rejected its application because, in keeping with the agency's reading of the Missouri Constitution, DNR policy bars government financial aid to churches.[196] Trinity Lutheran sued, claiming discrimination on the basis of its status as a church.[197] Simply put, the state faced a choice: fund the church or discriminate against the church, and thus risk violating the First Amendment either way. As such, the case presents a classic illustration of the "play in the joints" between government conduct the Establishment Clause prohibits and conduct the Free Exercise Clause compels.[198] Taking a cue from the parties' agreement that Missouri would not violate the Establishment Clause if it included the church in its recycled rubber grant program, the Court majority limited its analysis to the question of whether the Free Exercise Clause compelled such inclusion.[199]

Thus confined, the issue was whether the state's exclusion of religious entities from its grant program solely due to their religious identity hampered church operations to an extent that it violated their free religious

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[193] Pavan v. Smith, 137 S. Ct. 2075 (2017).

[194] *Trinity Lutheran Church*, 137 S. Ct. at 2024 n.3 (underscoring the confined scope of the opinion with the statement, "We do not address religious uses of funding or other forms of discrimination.").

[195] *Id.* at 2017 (described as the Scrap Tire Program offering reimbursement to qualifying nonprofit organizations that purchase playground surface material constituted from recycled tires).

[196] *Id.* (noting the state Department of Natural Resources' express policy against making grants to entities owned or controlled by any religious entity, and citing the Missouri Constitution, Article I, Section 7, which bars the state from taking money from the public treasury to aid a religion or religious representative, and also bars any discrimination against any church or form of faith or worship).

[197] *Id.* at 2018.

[198] *Id.* at 2019 (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)).

[199] *Id.*

exercise.[200] Although states are generally free to limit funding programs as they choose, the Court's manner of framing the issue allowed it to reach its conclusion easily.[201] Thus, Chief Justice Roberts' majority opinion takes a pithy six pages to conclude that a state cannot bar religious institutions from participating in a government program that has no direct bearing on the performance of religious rituals, the training of religious accolades, or other means through which spiritual beliefs may be promoted.[202] Hence, Missouri's interpretation of its Constitution violated the First Amendment Free Exercise Clause.

Justice Sotomayor's dissent indicates that the majority opinion may be less simple and straightforward than its tone suggests.[203] Joined by Justice Ginsburg, Justice Sotomayor chastised the Court for sidestepping the question of whether Missouri would violate the Establishment Clause by allowing religious entities to participate in a state grant program that would fund improvements to church property.[204] Justice Sotomayor noted "[c]onstitutional questions are decided by this Court, not the parties' concessions".[205] In emphasizing the priority of the Establishment Clause issue, Justice Sotomayor explained that the Trinity Lutheran Church Learning Center (which sought the resurfacing grant for its playground), serves a religious mission "by the Church's own avowed description."[206] The Learning Center is used to promote the spiritual growth of parishioners' children "and to spread the Church's faith to the children of

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[200] *Trinity Lutheran Church,* 137 S. Ct. at 2019-25 (defining the issue as the denial of a generally available benefit solely on the basis of an applicant's religious identity, and then exploring precedents to identify justifications for such denials).

[201] *Id.* at 2022 ("Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. . . . The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with a secular organization for a grant.").

[202] *Id.* at 2024 (rejecting the state's "preferred policy" of "skating as far as possible from religious establishment concerns" as an inadequate justification for "expressly denying a qualified religious entity a public benefit solely because of its religious character.").

[203] *Id.* at 2027 (Sotomayor, J., dissenting). For an example of the majority's overall tone suggesting that the analysis is simple and straightforward: "In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply." *Id.* at 2024. The opinion includes a footnote following this sentence in which the Court notes that the case is limited to its facts: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.". *Id.* at 2024 n.3.

[204] *Id.* at 2027.

[205] *Id.* at 2028.

[206] *Id.* at 2029.

nonmembers."[207] Thus, the playground, "like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission."[208] To Justice Sotomayor, state funding of this aspect of the Learning Center would amount to government aid in the establishment of religion, thus violating the First Amendment prohibition.

Justice Sotomayor also addressed the Missouri ban on church participation in its grant program in terms of the Free Exercise Clause.[209] While the majority opinion dismissed the historical development of Missouri's state policies against issuing public funds to houses of worship, Sotomayor's dissent concluded that Missouri acted well within the discretion allowed under Free Exercise Clause when it decided to disqualify all religious entities from participating in its recycled playground surface grant program.[210] Barring religious entities from "a truly generally available public benefit—one provided to all, no questions asked, such as police or fire protections—would violate the Free Exercise Clause," Justice Sotomayor noted.[211] She distinguished such prohibited bans from the Missouri program, which she characterized as "a selective benefit for a few recipients each year."[212] Thus, Justice Sotomayor concluded, the Missouri policy against funding church rehabilitation projects is not a policy decision based on an overabundance of caution against blurring the divide between church and state. Rather, it is a sensible check addressing a fundamental Constitutional precept against a state using tax dollars to fund religion.[213]

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[207] *Id.*

[208] *Compare id.* at 2029, *with* Tilton v. Richardson, 403 U.S. 672 (1971) (holding that a government grant program's twenty-year prohibition on recipient institutions' ability to use of federally-financed facilities for sectarian instruction or religious worship, violated the Establishment Clause because after the prohibition period recipients could connect government funding to a religious use).

[209] *Trinity Lutheran Church,* 137 S. Ct. at 2031-41 (arguing that Court precedents allow states to exclude religious entities from government programs, including those that fund and those that tax).

[210] *Id.* at 2033-35 (discussing the history of the Religion Clauses and concluding "The course of history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship."); *id.* at 2036-39 (discussing Locke v. Davey, 540 U.S. 712 (2004), in which the Court determined that "the government may, but need not, choose not to fund certain religious entities (there, ministers) where doing so raises "historic and substantial" establishment and free exercise concerns."); *id.* at 2038-41 (faulting the majority for fixing only on Missouri's status-based ban of all churches from its grant program as its basis for concluding that the state discriminates against religion).

[211] *Id.* at 2040 (critiquing Justice Breyer's concurrence, which, like the majority opinion, characterizes the DNR grant program as a generally available public benefit).

[212] *Id.*

[213] *Id.* at 2041 ("History shows that the Religion Clauses separate the public treasury

The contrast between the majority and dissenting opinions in *Trinity Lutheran Church* provides context for Justice Gorsuch's concurrence.[214] Justice Gorsuch was among seven Justices who joined the Chief Justice's opinion and so, even as a champion of Free Exercise rights, he could have rested easy within that sizable majority.[215] Instead Justice Gorsuch presented several brief paragraphs as "modest qualifications" that, if taken literally, would go much further than the majority in compelling states to fund church activities in the name of Free Exercise Clause.[216]

First, Justice Gorsuch denied that a true distinction exists between an entity's "status"—by which Justice Gorsuch meant its identity as religious—and its "use"—by which he meant its application of funds to religious purposes.[217] Thus, Justice Gorsuch pointed out, the Trinity Lutheran application for funding its playground's resurfacing may be cast as a religious group aiming to fund a secular activity or as a Missouri entity aiming to advance a religious mission through indoctrination of children.[218] Similarly, the Justice explained, a man pausing before dinner to say grace may be characterized as a religious man preparing to engage in a secular activity or as a man casting his impending meal as a religious activity.[219] In drawing this status-use distinction, Justice Gorsuch aimed to illustrate a shortcoming of the majority's determination that Missouri violated the Free Exercise Clause by barring churches from its grant program solely due to their status as religious entities.[220] While Justice Gorsuch agreed that the observation is correct, he faulted the majority for implying that is it only the status-based nature of the state's ban that violates Free Exercise.[221] In this way, Justice Gorsuch argued, the Court's decision falls short, as the Free Exercise Clause demands far more in terms of the state's obligation to

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from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship.").

[214] *Id.* at 2025-26 (Gorsuch, J., concurring).

[215] *Id.* at 2025 (opening his opinion with the observation that he agrees with the majority and is "pleased to join nearly all of the Court's opinion.").

[216] *Id.*

[217] *Id.* at 2025 ("First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*. Respectfully, I harbor doubts about the stability of such a line.").

[218] *Id.* ("Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission?").

[219] *Id.* ("Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner?").

[220] *Id.*

[221] *Id.* at 2025-26 (arguing that government funding programs must be available to religious persons and entities regardless of their planned uses of such funds).

include religious entities in government programs than it does in terms of the state's obligation to bar religious groups from government programs on the basis of their identity as religious groups.[222]

In so arguing, Justice Gorsuch advocates for fundamental change in the scope and applicability of the Free Exercise Clause. He called for a reading of *Locke v. Davey*—a 2004 Supreme Court decision upholding a state policy prohibiting theology students access to an educational scholarship program—that came close to narrowing the precedent to its particular facts.[223] As if to underscore his support for a sweeping Free Exercise Clause that permits all but the most blatant church-state collaborations, Justice Gorsuch also rejected a footnote included in the majority opinion in which the Court limited its analysis to the case facts, as if to stress that it is the secular nature of playgrounds that renders the state policy unconstitutionally cautious.[224] Certainly Justice Gorsuch was correct that, read literally, the footnote in question renders the entire decision a precedent on nothing more than the law of church playgrounds for which a state agency denied a grant solely and openly on the basis of the applicant's religious identity. Still, his express rejection of the footnote comes across as a flourish meant to signal Justice Gorsuch's dedication to a jurisprudential vision involving broad, powerful, presumptive protection of religious entities and persons.

B. *The Birth Certificate Case*

Although not a religion clause case, the Court's June 26, 2017 decision in *Pavan v. Smith* is nevertheless useful in an analysis of Justice Gorsuch's religion clause views.[225] *Pavan* was a per curium decision summarily reversing a 2016 Arkansas Supreme Court decision that upheld the state's policy against listing the birth parent's same-sex spouse's name on a newborn's birth certificate.[226] Arkansas argued that its policy of recording

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[222] *Id.* ("I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.").

[223] *Id.* at 2026 ("But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here.").

[224] *Id.* (expressing concern that readers may limit the decision to situations in which a state program aims to improve children's safety or health or some similar social good).

[225] Pavan v. Smith, 137 S. Ct. 2075 (2017).

[226] Smith v. Pavan, 505 S.W.3d 169, 182 (Ark. 2016) (rejecting the claims of two female spouses of mothers who gave birth in Arkansas that the birth certificates should bear

only biological parents' names on birth certificates was for the purpose of maintaining a medical history for the child.[227] This argument failed to recognize that Arkansas lists birth mothers and their husbands on birth certificates in cases of artificial insemination where the husband is not the donor and thus has no biological relationship with the child.[228] This disparate treatment, the Court concluded, violated the basic premise of *Obergefell v. Hodges*, which held that marital equality is a constitutionally protected interest of single-sex couples that states must honor.[229] Thus, because Arkansas lists both opposite-sex spouses on birth certificates regardless of the biological connection between the child and the non-birthing spouse, *Obergefell* requires that Arkansas provide the same treatment for single-sex spouses.[230]

Justice Gorsuch published a dissent in *Pavan* that Justices Thomas and Alito joined.[231] In it, Justice Gorsuch argued that Arkansas' policy reason for its disparate treatment of same-sex and opposite-sex spouses – that the primary function and goal of its birth certificate system is to create a biological history for medical purposes – was not necessarily exposed as discriminatory by the state's allowance of an exception for husbands in cases of artificial insemination.[232] If nothing else, these arguments warranted further exploration and hence made the case unsuitable for a summary reversal, Justice Gorsuch insisted.[233] The primary thrust of

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both spouses' names).

[227] *Pavan*, 137 S. Ct. at 2077 (quoting the Arkansas Supreme Court opinion, which states that "the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife.").

[228] *Id.* at 2078 ("As already explained, when a married woman in Arkansas conceives a child by means of artificial insemination, the State will—indeed, *must*—list the name of her male spouse on the child's birth certificate.") (citations omitted).

[229] *Id.* at 2078 (citing Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015) ("*Obergefell* proscribes such separate treatment. As we explained there, a State may not exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.") (quotations omitted)).

[230] *Pavan,* 137 S. Ct. at 2079 ("The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.").

[231] *Id.* at 2079 (Gorsuch, J., dissenting).

[232] *Id.* at 2079-80 (arguing, generally, that the question of why Arkansas created an exception to its biologically-based birth certificate registration system for husbands in cases of artificial insemination and how it generally applied the exception in cases of same-sex spouses warranted further fact investigation, making the case inappropriate for summary reversal).

[233] *Id.* ("Summary reversal is usually reserved for cases where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Respectfully, I

Justice Gorsuch's dissent, however, appears to be that *Obergefell* addresses marriage but not parenting and, more broadly, that its scope is far from clear and so should not be asserted presumptively.[234]

C. *Summary Observations on Justice Gorsuch's Free Exercise Views*

In arguing that all or nearly all daily activities performed by religious persons and institutions are religious in nature, and thus the law should protect and support those activities under the Free Exercise Clause, Justice Gorsuch directly refutes Justice Sotomayor's *Trinity Lutheran Church* dissenting argument and differs substantially from the majority.[235] The majority attempts to identify without precisely defining the divide between secular activities and religious exercise, thus arguably differing from the dissent primarily on the issue of where that divide lies. Justice Gorsuch, on the other hand, appears to argue that a party's religious identity cloaks all its actions with Free Exercise Clause protection, to the point where the state cannot bar the party from any state-funding program without inhibiting its religious exercise.[236] In other words, rather than seeking a balance between Free Exercise and the prohibition against government-funded religion, Justice Gorsuch envisions a First Exercise Clause that effectively eviscerates the Establishment Clause, leaving intact only its prohibition against state-coerced religion.

This interpretation of Justice Gorsuch's *Trinity Lutheran Church* concurrence is consistent with the reading of his *Masterpiece Cakeshop* concurrence as an aggressive gambit to assert the power of a religious person's Free Exercise Clause-based rights to eviscerate any conflicting constitutional rights of those with a single-sex orientation.[237] The two concurrences thus create an impression that Justice Gorsuch believes that religious-based codes of behavior are so powerfully armored by the Free Exercise Clause that they are almost untouchable by either state or judiciary.

Indeed, all the opinions discussed above cast Justice Gorsuch's *Masterpiece Cakeshop* concurrence as part of a crusade to assert an

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don't believe this case meets that standard." (citation omitted).

[234] *Id.* at 2079 ("To be sure, *Obergefell* addressed the question whether a State must recognize same-sex marriage. But nothing in *Obergefell* spoke (let alone clearly) to the question whether section 20-18-401 of the Arkansas Code, or a state supreme court decision upholding it, must go."). *See also id.* ("nothing in *Obergefell* indicates that a birth registration regime based on biology, one no doubt with many analogues across the country and throughout history, offends the Constitution.").

[235] Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017).

[236] *Id.*

[237] *Id.*; Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

expansive vision of the First Amendment religion clauses. Both as a Tenth Circuit judge and a Supreme Court Justice, Gorsuch has argued consistently for a nearly limitless deference to religious claimants in defining the elements, parameters, and depth of their faith-based behavioral code. To Justice Gorsuch, courts threaten the Free Exercise Clause's protections when they question the religious nature or centrality to a party's faith of his or her claimed religious exercises of that faith, even when that exercise contravenes the rights of others. Once a claimant establishes the sincerity of his or her faith, the behaviors that he or she claims reflect that faith are virtually unimpeachable. As such, Justice Gorsuch is likely to look for an opportunity to overrule *Employment Division*. His *Pavan v. Smith* dissent adds a related premonition that the Justice aims to pit his expansive idea of religious freedoms against the liberty interests of others, and single-sex couples in particular. *Obergefell* may be the Justice's ultimate target for obliteration.

Justice Gorsuch is not alone in favoring a broad Free Exercise Clause and, more generally, in presumptively shielding religious expression claims from judicial evaluation. The Supreme Court, in the *Burwell v. Hobby Lobby Stores, Inc.* majority opinion written by Justice Alito, adopted Judge Gorsuch's position as stated in his Tenth Circuit concurrence.[238] After determining that RFRA provided free exercise protection to individuals and closely-held corporations, the Court concluded that the ACA contraceptive mandate substantially burdened both the individual and corporate plaintiffs' free exercise rights.[239] The Court's analysis was streamlined by its endorsement of the view that the judiciary must refrain from evaluating the reasonableness of a RFRA-based claim.[240] Once a court determines that a religious conviction is genuine, the court must accept the believer's assertions on the scope of actions encompassed by that conviction.[241] In so

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[238] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (consolidating the *Hobby Lobby* case, which arose in Oklahoma, with a similar case that arose in Pennsylvania, and determining in both cases that RFRA protects the religious liberties of for-profit closely held corporations, as those liberties are expressed by the owners of such businesses).

[239] *Id.* at 2767-74 (determining that RFRA protects individuals and closely held for-profit corporations); *id.* at 2775-79 (determining that the ACA contraceptive mandate imposes a substantial burden on the two corporations' free exercise of their religions).

[240] *Id.* at 2777-78 (observing that the courts "have no business addressing" the question of whether the connection between a religious party's statutorily-mandated action and moral convictions are too attenuated).

[241] *Id.* at 2778-79 ("[I]n these cases, the Hahns and the Greens and their companies sincerely believe that providing the insurance coverage demanded by the [U.S. Department of Health and Human Services] regulations lies on the forbidden side of the [morality] line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does.") (citation omitted).

closely tracing the logic of Judge Gorsuch's view on the law's protection of religious liberties and the judicial role in evaluating its scope, *Burwell* indicates that its majority has acquired an ally in Justice Gorsuch.[242]

IV. CONCLUSION

The case discussions above allow two conclusions. First, Justice Gorsuch's prior opinions on religion support a reading of Justice Gorsuch's *Masterpiece Cakeshop* concurrence that casts the Justice as an advocate for a powerful Free Exercise Clause and a high level of judicial deference to religion-based assertions. Second, the case discussions support the observation that Justice Gorsuch reveals himself in his *Masterpiece Cakeshop* concurrence to be a somewhat result-oriented logician whose acute sensitivity to the rights of the religious disappears when he considers the rights of other groups with histories of persecution.

More generally, the opinions that Justice Gorsuch has produced on the First Amendment religion clauses as a Tenth Circuit judge and a Justice show that he is comfortable with religion statements, imagery, and even behavioral codes infiltrating the secular institutions of commerce and government. This may indicate that Justice Gorsuch has a pragmatic perspective on the fact that religion guides or even dictates important aspects in the lives and decisions of many devout U.S. residents, which makes clean segregation of the religious and non-religious elements of their lives impossible. From another perspective, however, Justice Gorsuch's high tolerance for religious influence over private sector and government behavior threatens the separation of church and state that is core to U.S. politics, and disarms the First Amendment's protections against invidious discrimination committed in the name of religious conviction.

Id. at 2779.

[242] *Id.* The *Burwell* majority opinion, written by Justice Alito, was joined Chief Justice Roberts, Justice Thomas, Justice Kennedy, and Justice Scalia.