

COMPLICITY AND DISCRIMINATION

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INTRODUCTION

The tension between discrimination and religious concerns over complicity has grown more complex in recent years.¹ As LGBTQ rights

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1. See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518–21 (2015); Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J.F. 369, 382–84 (2016). See generally FRANK S. RAVITCH,

continue to gain social and legal support, some religious people and entities are expressing concerns about being complicit in activities such as same-sex marriage and bathroom access for transgendered individuals.² While many religious people and entities are quite open to increased rights for members of the LGBTQ community,³ those who are not have found themselves on the defensive, often accused of discrimination.⁴ Unfortunately, the dynamics are often framed by the media and opportunistic politicians on both sides as an all or nothing game of brinksmanship.⁵

Yet, the dynamics are far more complex than most partisans on either side are willing to openly recognize, and the possibility for legally supported compromise exists without the need to completely embrace one position or the other. One of the biggest roadblocks to reconciling complicity and discrimination is the protection of the free exercise rights of for-profit corporations.⁶ If we remove for-profit entities from the equation, compromise becomes a more attainable goal. Of course, there is no indication that for-profit entities will be removed from the free exercise equation—at least not in the immediate future—so the tension between complicity and discrimination remains high.

The U.S. Supreme Court's recent decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, teaches us little about the tension between complicity and discrimination that truly gave rise to that case.⁷ Many important questions went unanswered. What happens when a business whose owner has a religious objection to same-

FREEDOM'S EDGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA (Cambridge Univ. Press 2016) (addressing the relationship between religious freedom and sexual freedom, and discussing the role conscience claims play in that relationship).

2. NeJaime & Siegel, *supra* note 1, at 2543–65, 2573; Laycock, *supra* note 1, at 375–77, 380–84.

3. Frank S. Ravitch, *Tradition's Edge: Interactions Between Religious Tradition and Sexual Freedom*, in *LAW, RELIGION & TRADITION* 71–84 (Jessica Giles, Andrea Pin, and Frank S. Ravitch, eds., 2018).

4. Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 B.Y.U. L. REV. (forthcoming); NeJaime & Siegel, *supra* note 1, at 2576–78; Christopher J. Walker, *Disagreement is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL'Y 123, 139–40 (2018); *see also* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (reflecting these views in the July 25, 2014 statement by a commissioner of the Colorado Civil Rights Commission).

5. RAVITCH, *supra* note 1, at 9.

6. *See generally* Frank S. Ravitch, *Be Careful What You Wish for: Why Hobby Lobby Weakens Religious Freedom*, 2016 B.Y.U. L. REV. 55 (analyzing how the Court has decided cases in favor of for-profit organizations in the interest of free exercise).

7. 138 S. Ct. at 1732.

sex marriage denies a service to customers in violation of antidiscrimination laws? Does it make a difference if the business is engaged in expressive activity? In dicta, the Court hints at some answers to these questions.⁸ Moreover, the dissent and some of the concurring opinions suggest possible answers.⁹

Observing the public response to the case has been nearly as disappointing as the Court's punting on the important questions that arise in these circumstances. Reports and commentary on the case range from suggesting outrage that a "bigot" was able to discriminate against a same-sex couple,¹⁰ to those suggesting that progressive intolerance toward people with deeply held religious convictions is the root of the problem.¹¹ Perhaps counterintuitively, both sides have a point on the broader issues. Yet, rather than seek compromise and a way to protect both sides to the greatest extent possible, each side seems to further entrench itself in its echo chamber of ideas and fails to see the humanity and deep interests at stake on the other side.¹²

Despite the Court punting in *Masterpiece Cakeshop*, the opinion in that case shows that the Court is expanding the neutrality exception to the test from *Employment Division v. Smith*.¹³ That exception, first

8. *Id.* at 1727–28.

9. *Id.* at 1740 (Thomas, J., concurring); *Id.* at 1748 (Ginsburg, J., dissenting).

10. *See, e.g.*, Dahleen Glanton, *Cake Case Is About Gay Intolerance—But Isn't the Same as Racial Intolerance*, CHI. TRIBUNE (Dec. 11, 2017), <http://www.chicagotribune.com/news/columnists/glanton/ct-met-gay-wedding-cake-dahleen-glanton-20171208-story.html#share=email~story> (referring to Jack Phillips as a bigot and his refusal to bake the cake as bigotry, but noting the significant difference between *Masterpiece Cakeshop* and racial segregation); Lisa Needham, *SCOTUS Ruling for Bigoted Baker Is a Blow to Civil Rights*, DAME MAGAZINE (June 5, 2018), <https://www.damemagazine.com/2018/06/05/scotus-ruling-for-bigoted-baker-is-a-blow-to-civil-rights/> (“Businesses that hold themselves open to the public shouldn’t be able to refuse service based on their bigoted beliefs.”).

11. *See, e.g.*, Orrin G. Hatch, *Sen. Orrin Hatch: Tolerance Has Become Intolerant: But There is a Cure*, TIME (Sept. 11, 2018), http://time.com/5392510/pluralism-religion-democracy-lgbt/?utm_source=emailshare&utm_medium=email&utm_campaign=email-share-article&utm_content=20190407 (arguing that intolerance against Jack Phillips was extreme and based on a flawed concept of tolerance); Andrew C. McCarthy, *Masterpiece Cakeshop Is a Setback for Liberty*, NAT’L REV. (June 5, 2018, 4:21 PM), <https://www.nationalreview.com/2018/06/masterpiece-cakeshop-setback-liberty/> (“The Justices, manifestly pained, side ever so ambiguously with religious liberty, a founding principle of the nation, over gay marriage, a trendy progressive cause that would not remotely have been threatened in Colorado had Jack Phillips been left in peace to honor his convictions.”).

12. RAVITCH, *supra* note 1, at 202–04.

13. *See* 138 S. Ct. at 1726–27; 494 U.S. 872, 883–85 (1990) (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)).

announced in the *Church of Lukumi Babalu Aye v. City of Hialeah*,¹⁴ was expanded in *Trinity Lutheran v. Comer*,¹⁵ and then again in *Masterpiece Cakeshop*.¹⁶ The dynamics of this expansion may have some impact in resolving the larger tension between complicity and discrimination, but perhaps not an impact either side will embrace.

This Article proceeds in three parts. Part I explores the broad tension between complicity and discrimination thus far in the twenty-first century. Specific attention is paid to the issues of same-sex marriage and transgender bathroom access, as well as a potential resolution to the tension between laws protecting religious freedom and antidiscrimination laws.

Part II addresses the *Masterpiece Cakeshop* case specifically to determine if any legal trend can be gleaned from it. Despite the Court's attempt to limit the decision to the facts before it, this Part suggests *Masterpiece Cakeshop* is part of a trend expanding the neutrality exception to the test *Smith* created. Moreover, this Part suggests the Court's use of the neutrality concept is unbalanced. A more even-handed approach will better protect religious people from becoming complicit in activities that violate their faith and will better protect members of the LGBTQ community from discrimination.

Part III proposes that much of the tension between complicity and discrimination arises from a failure within the legal system to understand the concepts themselves, as well as their commonality. The legal resolution of many of these cases fails to consider potential compromises that could lead to a less one-sided outcome in many situations. The key to analyzing these issues is a context-based approach which considers the settings where complicity and discrimination are in conflict and the sorts of discrimination involved in these conflicts.

I. COMPLICITY AND DISCRIMINATION

The terms “complicity” and “discrimination” do not have clear meanings in the contexts where they interact. This is true both practically and legally. Leading scholars have disagreed over the meaning of “complicity” and “discrimination,”¹⁷ as have Justices of the U.S.

14. See 508 U.S. 520, 534 (1993).

15. See 137 S. Ct. 2012, 2021 (2017) (citing *Lukumi Babalu Aye*, 508 U.S. at 533).

16. 138 S. Ct. at 1731 (citing *Lukumi Babalu Aye*, 508 U.S. at 534).

17. See generally NeJaime & Siegel, *supra* note 1 (defining and addressing complicity and discrimination in the religious exemption context); Laycock, *supra* note 1 (disagreeing with NeJaime and Siegel's definition and treatment of complicity and discrimination).

Supreme Court.¹⁸ Yet, the concepts have a salience in framing the issues legally, philosophically, and politically. Therefore, in this Part I will attempt to explain these concepts within the contexts where they interact.

First, complicity will be explained with specific reference to the context of religious freedom claims. Second, discrimination as a result of complicity-based religious freedom claims will be explained. A natural focus of this will be the impact of conflicts between complicity claims and LGBTQ rights. Finally, this Part will explain the interaction of these two concepts within the religious freedom arena.

A. Complicity

Complicity has been defined in a number of ways by a variety of scholars both from the legal academy and from the fields of religion and philosophy.¹⁹ The general thrust of the concept in the religion context is that by doing something, or by failing to do something, a person or entity becomes complicit in the harm or sin that results.²⁰ The most obvious example of a complicity claim is when a Catholic hospital refuses to allow abortions to be performed on its premises by doctors who are not directly on staff at the hospital. The Church argues that by allowing its facilities to be used for abortions it becomes complicit in what it views as the sin that results.²¹ One need not agree with the Church's position on abortion to understand the basic argument.

These claims differ from other sorts of free exercise claims because, as Douglas NeJaime and Reva Siegel have explained, they are not about what one does or does not do directly, but rather about how what one does or does not do facilitates some more indirect harm.²² Moreover, complicity claims are more likely to—but do not necessarily—involve the rights of others. As Douglas Laycock has explained, however, the fact that the harm to a person or entity seeking protection from becoming complicit is connected to the acts or rights of third parties makes little or

18. See generally *Masterpiece Cakeshop*, 138 S. Ct. 1719 (demonstrating, throughout the various opinions in *Masterpiece Cakeshop*, the profound disagreement between Justices over both the meaning of, and relationship between, complicity and discrimination).

19. See, e.g., NeJaime & Siegel, *supra* note 1, at 2518–21 (defining complicity); Laycock, *supra* note 1, 382–86 (disagreeing with NeJaime and Siegel's characterization of "complicity"). See generally JOHN CORVINO ET AL., *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* (Oxford Univ. Press 2017) (debating the meaning and application of religious freedom claims, including complicity claims).

20. CORVINO ET AL., *supra* note 19, at 89.

21. NeJaime & Siegel, *supra* note 1, at 2536–37.

22. *Id.* at 2519–20, 2566–74.

no difference from a religious perspective.²³

For example, for a Quaker who opposes war to be required to make weapons that will be used to kill in war is still a serious harm to that person even if he or she is not required to directly engage in war.²⁴ While manufacturing weapons may be less direct than fighting, the end result is that the person has violated their faith by facilitating killing in war. One can choose not to empathize with this person's belief, or one can choose not to regard it as worthy of legal protection all things considered, but that does not make manufacturing weapons any less a harm for the person involved.

B. Discrimination

Discrimination is a term that should not need much explanation because it sadly exists in so many contexts and throughout many fields of law. Interestingly, however, in the context of complicity-based free exercise claims there is significant disagreement over the demarcation point between discrimination and conscience, or as some might argue between exempt discrimination and non-exempt discrimination.²⁵ This latter framing is disturbing, and for reasons that will be explained in Section I.C, it is not helpful because the idea of exempt discrimination muddies what both those claiming a religious exemption to antidiscrimination laws are actually arguing—that their complicity claims are not based in discrimination—and the very real pain the victims of discrimination feel.²⁶

When examining discrimination in the context of free exercise claims based on complicity concerns, it is helpful to break down the types of discrimination that have arisen in actual cases and address each. The easiest is intentional discrimination where the person asserting the conscience claim acknowledges that the discrimination is based on sexual orientation or other protected characteristics. There is no argument made that the person claiming an exemption objects only to marriage or bathroom access, but rather there is direct opposition to serving gays and lesbians and/or transgendered individuals generally. These are the easiest to deal with and are rarely framed as complicity claims. Even if they were so framed, however, these sorts of religious freedom claims would never, and should never, be successful when they they are asserted by for-profit

23. Laycock, *supra* note 1, at 378, 382–85.

24. *See, e.g.,* Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 709–11 (1981) (involving a Jehovah's Witness in this exact situation).

25. *See* CORVINO ET AL., *supra* note 19, at 165–66.

26. *See* discussion *infra* Section I.C.

entities and conflict with public accommodation or other antidiscrimination laws.²⁷

The most common, and most complex, claims are those where someone claims a conscience-based exemption and the result is some sort of tangible harm to members of the LGBTQ community. This was in a sense the situation in *Masterpiece Cakeshop*, even though the harm was sometimes framed as a dignitary harm, the practical reality is that a same-sex couple—Charlie Craig and David Mullins—were denied service.²⁸ The same was true in the Kim Davis situation where a couple was denied a marriage license.²⁹ These are tangible harms, even though they may also involve dignitary harm.³⁰ This sort of discrimination will be discussed in Part III.³¹

27. See discussion *infra* Section III.A. and B.

28. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018).

29. Frank S. Ravitch, *Complementary or Competing Freedoms: Government Officials, Religious Freedom and LGBTQ Rights*, 11 F.I.U. L. REV. 163, 163 (2015).

30. Ira C. Lupu & Robert Tuttle, *Same Sex-Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 290 (2010); See NeJaime & Siegel, *supra* note 1, at 2566–74; see also Frederick Mark Gedicks, *Third Party Limits on Religious Accommodation*, 32 J.L. & REL. 503, 505–06 (2017) (noting that “the focus in at least some cases might better be trained on the tangible deprivation, not the intangible dignity harm, real though it is,” as part of a broader discussion of dignitary harm and religious accommodation in response to Kathleen Brady’s work). See generally Laycock, *supra* note 1 (disagreeing with NeJaime and Siegel over the demarcation, value, and impact of dignitary harms). Yet, the denial of service is not just a dignitary harm, but is also a tangible harm. See NeJaime & Siegel, *supra* note 1, at 2566–74 (using the term “material harm”); see also *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (“Undoubtedly [the] defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.”). When one is turned away from a store based on a protected characteristic there can, of course, be a variety of emotional responses from pain and offense to anger or depression, but the term dignitary harm captures only some of these responses. It is more helpful, I think, to consider the fact that denial of service itself is a harm regardless of the emotional response to that harm. When one is denied service, one has wasted time and energy and may have a hard time finding service elsewhere, and even if one can easily do so, the denial might force a person to go somewhere that does not provide the same level of service or which has different prices or ways of providing the services. Lupu & Tuttle, *supra*. It is not that dignitary harm is unimportant, but rather that it is connected to something more tangible, the parameters of which are more definable. Dignitary harms may be an adequate basis for liability, and could be relevant to damages, where applicable, but to assume that this is so is to oversimplify the concept and also to disregard possible dignitary harms on the other side. Laycock, *supra* note 1, at 376–78; see also Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 202–07 (2011) (discussing concepts of “Inherent Dignity and Negative Dignity,” that in the legal context tend to attach dignity to another right).

31. See discussion *infra* Part III.

Dignitary harm is often raised in situations where complicity concerns have led to denial of service or other actions alleged to be discriminatory.³² Dignitary harms should not be minimized, but perhaps the concept has been the primary focus too often in situations where there is tangible harm that also causes dignitary pain. This Article suggests that dignitary harms by themselves—that is, without some tangible harm like denial of service—should outweigh complicity concerns only when those harms are substantial, a term that is itself a bit of a moving target. I am not suggesting that dignitary harms are not important, but rather that when complicity claims are involved there are potential dignitary harms on both sides—albeit of very different types—so that other concepts are more useful in determining case outcomes.³³

C. The Contextual Connection in Religion Claims

As I have written elsewhere, the interaction between conscience claims and discrimination is fraught because both go to the core of what it means to be human.³⁴ For those asserting conscience claims, those claims are not negotiable as though one can separate religious convictions from being in public life, and forcing one to do so is to force that person to violate something at his or her core.³⁵ Yet, for those who are harmed by someone else's assertion of a conscience claim, neither the fact that it is a conscience claim nor the "live and let live" ideal lessens the harm or provides solace from the injury and pain.³⁶

What is surprising is that many in the legal arena, and in society generally, tend to frame these potentially competing harms in an all or nothing fashion; yet, it is quite possible to find compromises in a variety of contexts that will prevent significant harm on either side.³⁷ Of course, there are cases where this is not possible, and for those, contextual legal distinctions can be drawn to decide which side wins. These are the primary focus of Part III.³⁸

32. NeJaime & Siegel, *supra* note 1, at 2574–78.

33. *See supra* note 30 and accompanying text.

34. RAVITCH, *supra* note 1, at 21–24, 39–40.

35. *Id.* at 23–24, 139–42.

36. *Id.* at 11, 39–40, 141. *See generally* Mary Anne Case, *Why "Live-and-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015) (contesting the descriptive accuracy of a "live-and-let-live" solution and whether such a solution could be implemented).

37. *See generally* RAVITCH, *supra* note 1 (discussing the situations where compromises have been made and other situations where compromises are possible, as well as those situations where compromise might be harder to reach).

38. *See* discussion *infra* Part III.

For now, it is important to note that the very concepts of conscience and discrimination in the religious freedom arena are bound together by context, and in fact, it is the context of the claim rather than the inherent “correctness” of either conscience or discrimination—as though one has immutable priority over the other—that should guide the legal analysis of these claims. This makes sense considering the different sorts of discrimination mentioned above.³⁹ If a shop owner denies service to members of the LGBTQ community in all situations, even if that denial is based on real religious-based conscience concerns, there are very good reasons that the shop owner should lose in all cases.⁴⁰ This is different from *Masterpiece Cakeshop*, where the owner, Jack Phillips, would have provided service in contexts that did not involve marriage.⁴¹ This does not mean shop owners like Phillips should win in all cases (the reasons why they may still lose in many cases are discussed in Part III). Rather, it means these cases are harder than those where service is denied entirely.⁴²

This is not because of some misplaced legal formalism or categorization—after all, the first shop keeper’s conscience concerns may be no less real than Phillips’ conscience concerns—but rather because of the interaction between the discrimination and conscience principles. Context plays a role in many other situations as well. For example, as I will assert *infra*, if rather than a shop keeper it were a church denying religious services to members of the LGBTQ community, the church should win in every case.⁴³ Here, it is essential to keep in mind that this is assuming the services denied are religious rather than other services offered by the church to the community at large. The latter context, involving situations such as soup kitchens, is more complex.⁴⁴

Religious nonprofits that serve the community at large raise a number of tricky questions. For example, what should happen when a religious organization that provides medical care or adoption services to the public at large denies service based on same-sex marital status? How

39. See discussion *supra* Section I.B.

40. See discussion *infra* Part III.

41. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018). There have been a number of cases involving similar situations in several jurisdictions, with new cases arising regularly. See, e.g., *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1097 (D. Minn. 2017); *Elane Photography v. Willock*, 309 P.3d 53, 58–59 (N.M. 2013); *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 426–27 (App. Div. 2016); *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051, 1056–57 (Or. Ct. App. 2017); *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 548–49 (Wash. 2015), *vacated*, 138 S. Ct. 2671 (2018).

42. See discussion *infra* Part III.

43. See discussion *infra* Part III.

44. See discussion *infra* Section III.D.

can a context-based balance between discrimination and conscience principles aid in deciding these sorts of cases? The answer is that context-based balancing can do so better than bright line rules; I will demonstrate how and why in Part III.⁴⁵

The key is that conscience and discrimination are not in mutually exclusive corners in the religious freedom/LGBTQ rights context. In fact, a context-based balance between the principles could make them mutually reinforcing in some cases. This will seem oddly counterintuitive to many readers on both sides of the debate. I hope Part III will overcome some of the embedded notions, or for some, the state of cognitive dissonance, raised by these concepts. I especially hope that it will pique additional interest in compromise.

Ironically, many interested people, from scholars to activists on both sides, hoped that the *Masterpiece Cakeshop* case would answer some of these questions, at least for claims where the shopkeeper denies a service because of conscience and that service is argued to be “expressive conduct.”⁴⁶ In this sense, the limited scope of the *Masterpiece Cakeshop* decision was a profound disappointment. As Part II will explain, however, there is an important principle to be gleaned from *Masterpiece Cakeshop*.⁴⁷ That principle, however, may be as likely to work against conscience claims as for them, especially as lower courts begin to apply it.

II. *MASTERPIECE CAKESHOP* AND THE EXPANSION OF *LUKUMI* NEUTRALITY

In *Masterpiece Cakeshop*, Jack Phillips, the owner of a bakery in Lakewood, Colorado, refused to make a wedding cake for Charlie Craig and David Mullins’ wedding reception.⁴⁸ Phillips is a devout Christian and opposes same-sex marriage.⁴⁹ He had no problem, however, providing sales or services to gays and lesbians in contexts other than weddings.⁵⁰

The Colorado Anti-Discrimination Act (CADA) clearly protects gays and lesbians from discrimination in public accommodations.⁵¹ Craig

45. See discussion *infra* Part III.

46. Frank S. Ravitch & Brett G. Scharffs, *Piece of Cake?*, 102 JUDICATURE 67, 69 (2018).

47. See discussion *infra* Part II.

48. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018).

49. *Id.* at 1724, 1728.

50. *Id.* at 1724.

51. See COLO. REV. STAT. § 24-34-601(2)(a) (2017).

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and Mullins filed a complaint under CADA.⁵² The Colorado Civil Rights Division (CCRD) investigated the complaint, found probable cause, and sent the matter to the Colorado Civil Rights Commission (the “Commission”).⁵³ Craig and Mullins won their case before an administrative law judge (ALJ) and on appeal to the Commission from the ALJ’s decision.⁵⁴ Ultimately, the Colorado Court of Appeals upheld the Commission’s decision and ordered Phillips to cease and desist in his refusal to make wedding cakes for same-sex marriages.⁵⁵ The U.S. Supreme Court granted certiorari after the Colorado Supreme Court refused to hear the case.⁵⁶

Phillips raised two constitutional defenses to the violation of Colorado law. First, he claimed that his religious convictions should protect him from making the cake for Craig and Mullins’ wedding reception since doing so would make him complicit in what he views as a sin.⁵⁷ He also claimed that making a wedding cake is a use of his artistic and creative talent.⁵⁸ Therefore, forcing him to make the cake would be a violation of his free speech rights.⁵⁹

Colorado does not have a religious freedom law like the Federal Religious Freedom Restoration Act (RFRA),⁶⁰ so at first glance it seemed the state did not need to show a compelling interest and narrow tailoring for refusing to give Phillips an exemption from the generally applicable civil rights law.⁶¹ It seemed, at least to many observers, that the main argument upon which Phillips would have a chance was the free speech argument.⁶² As it turns out, however, the Court punted and did not answer either question directly due to some extenuating facts the Court found

52. *Masterpiece Cakeshop*, 138 S. Ct. at 1725 (citing Joint App. at 31, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16-111)).

53. *Id.* at 1725–26 (citing Joint App., *supra* note 52, at 69, 72–73, 76).

54. *Id.* at 1726 (citing Petition for Writ of Certiorari at 57a, *Masterpiece Cakeshop*, 137 S. Ct. 2290 (16-111)).

55. *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 294–95 (Colo. App. 2015), *rev’d*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

56. *Masterpiece Cakeshop*, 137 S. Ct. at 2290.

57. *Masterpiece Cakeshop*, 138 S. Ct. at 1724, 1728.

58. *Id.* at 1728.

59. *Id.*

60. *See* 42 U.S.C. §§ 2000bb–2000bb-4 (2012); *Religious Freedom Acts by State*, FINDLAW, <https://civilrights.findlaw.com/discrimination/religious-freedom-acts-by-state.html> (last visited Apr. 11, 2019).

61. *See* 42 U.S.C. § 2000bb(a)(2)–(4); *Emp’t Div. v. Smith*, 494 U.S. 872, 894 (1990) (holding that the government does not have a duty to provide exemptions to laws of general applicability under the Free Exercise Clause).

62. *See, e.g., Ravitch & Scharffs, supra* note 46, at 68.

central to the outcome.⁶³ As a result, commentators have lamented the lack of guidance states and lower courts have in deciding cases involving conflicts between complicity and discrimination, at least in situations where there is no state RFRA and expressive activity is argued to be involved.⁶⁴ As I have explained elsewhere, even with a RFRA, there would be no guarantee that Phillips would win, although it would be a much closer question on the merits.⁶⁵

A. Expanded Neutrality

Yet, the U.S. Supreme Court's decision in *Masterpiece Cakeshop* was based on a different principle under the Free Exercise Clause; namely, the principle that government must remain neutral towards religious individuals and entities when it creates or enforces a law.⁶⁶ If the law is not generally applicable, or it is not neutral, the government must meet the strict scrutiny test.⁶⁷ In these cases, the rule from *Smith* does not apply.⁶⁸

This principle arose most clearly in *Lukumi Babalu Aye*.⁶⁹ In that case the Court found the actions of the City of Hialeah were neither generally applicable nor neutral when the city passed an ordinance that targeted the Santeria practice of animal sacrifice.⁷⁰ The ordinance, while neutral on its face, only applied to Santeria practices, and thus failed the

63. See *Masterpiece Cakeshop*, 138 S. Ct. at 1729–32.

64. See, e.g., Kevin Drum, *The Cake Ruling Wasn't "Narrow," It Was a Punt*, MOTHER JONES (June 5, 2018, 6:50 PM), <https://www.motherjones.com/kevin-drum/2018/06/the-cake-ruling-wasnt-narrow-it-was-a-punt/>; Christine Emba, *The Supreme Court Wasn't Ready to Decide on the Wedding Cake. Neither Are We*, WASH. POST (June 5, 2018), https://www.washingtonpost.com/opinions/the-supreme-court-wasnt-ready-to-decide-on-the-wedding-cake-neither-are-we/2018/06/05/55c890f8-6905-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.24f776c7e3b6; Garrett Epps, *Justice Kennedy's Masterpiece Ruling: The Supreme Court Found in Favor of a Baker Who Refused to Sell a Cake to a Same-Sex Couple, but Used a Rationale that Sheds Little Light on the Case's Larger Civil-Rights Implications*, ATLANTIC (June 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/06/the-court-slices-a-narrow-ruling-out-of-masterpiece-cakeshop/561986/>; Timothy R. Holbrook, *Analysis: Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, EMORY L. NEWS CTR. (June 20, 2018), <http://law.emory.edu/news-center/releases/2018/06/masterpiece-cake-shop-opinion-holbrook.html>.

65. RAVITCH, *supra* note 1, at 99–102.

66. 138 S. Ct. at 1731–32.

67. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

68. See *id.*; *Emp't Div. v. Smith*, 494 U.S. 872, 894 (1990).

69. See 508 U.S. at 534–35.

70. *Id.* at 534.

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neutrality requirement.⁷¹ The city did not allege an adequate compelling interest,⁷² and the ordinance was far from the least restrictive means of meeting the alleged compelling interest.⁷³

Justice Antonin Scalia, the author of the *Smith* decision,⁷⁴ filed an opinion concurring in part and in the judgment.⁷⁵ Interestingly, that opinion took issue with the Court's imposition of the neutrality requirement, which he viewed as unnecessarily repetitive of the general applicability test from *Smith*.⁷⁶ The majority answered that neutrality is important because laws may be generally applicable on their face, yet still target religion in their structure or application.⁷⁷ Until recently, it seemed that this limit on the *Smith* principle could only arise in cases where there is some sort of intentional discrimination or religious gerrymandering aimed at a religious practice.⁷⁸

Then, in *Trinity Lutheran v. Comer*, the Court applied the neutrality concept to a situation where the law was not designed to harm the practice of religion, but rather religious entities were denied access to a state benefit—playground chips recycled from tires under a state program—due to a clause in the state constitution.⁷⁹ The Court held that this sort of denial, which was based on religion,⁸⁰ discriminates in violation of the neutrality principle and is therefore unconstitutional.⁸¹ In *Trinity Lutheran*, the neutrality principle went from protecting against religious discrimination that targets religious practices to creating a broad-based ban on differential treatment of religion, even when the differential treatment is based on state establishment of religion concerns.⁸²

Masterpiece Cakeshop is the Court's next step in the evolution of the neutrality principle. The Court did not decide the free speech issues in the case because it found a pattern of hostility against religion by the

71. *Id.* at 535.

72. *Id.* at 538–39.

73. *Id.* at 539.

74. *See* *Emp't Div. v. Smith*, 494 U.S. 872, 874 (1990).

75. *See* *Lukumi Babalu Aye*, 508 U.S. at 557 (Scalia, J., concurring).

76. *Id.* (Scalia, J., concurring) (citing *Smith*, 494 U.S. at 894).

77. *Id.* at 533–34.

78. *See, e.g., id.* at 534 (first quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971); then quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986); and then quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 696 (1970)).

79. 137 S. Ct. 2012, 2017, 2022–23 (2017) (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

80. *Id.* at 2021.

81. *Id.* at 2019–21, 2025 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

82. *Id.* at 2039–41 (Sotomayor, J., dissenting).

Commission,⁸³ and because Phillips was treated differently by the Commission than bakers who refused to make cakes containing homophobic messages that referenced religion.⁸⁴ If either of these findings were based in solid facts, *Masterpiece Cakeshop* would indeed be a case similar to *Lukumi Babalu Aye*, or at the very least, *Trinity Lutheran*.⁸⁵

Significantly, the argument that the Commission (rather than one commissioner in one hearing) demonstrated hostility toward religion is highly questionable.⁸⁶ Certainly, any hostility was far from that aimed at Santeria in *Lukumi Babalu Aye*.⁸⁷ Moreover, the comparison to the cases involving other bakers was based on creating a false equivalency between apples and oranges.⁸⁸ In fact, two concurring Justices recognized that these situations could have been treated differently.⁸⁹ They disagreed, however, with the Commission's decisions because the Commission relied on its perception of the offensiveness of the denials in the two situations rather than the actual differences between the two situations.⁹⁰

Masterpiece Cakeshop expands the sort of conduct that can lead to a finding of discrimination in violation of the Free Exercise Clause. In this way, whether one likes the outcome or not, it is a big step away from the *Smith* standard and a significant addition to the trend of expanding the neutrality principle from *Lukumi Babalu Aye*.⁹¹ It might also work against conscience claims under facts different from those in *Masterpiece Cakeshop*, and it could perhaps be used against states that favor particular religions.⁹² The remainder of this Part will explore the *Masterpiece Cakeshop* case, and its expansion of the neutrality principle, in more detail.

83. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–30 (2018).

84. *Id.* at 1730–31.

85. *See id.* at 1751–52 (Ginsburg, J., dissenting) (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526–28 (1993)). *See generally* 137 S. Ct. 2012 (discussing an entity being treated differently based on its religious character).

86. *See Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting).

87. *See* 508 U.S. at 541–42 (recounting a detailed pattern of religious animus and the gerrymandering of ordinances to target a particular religious practice).

88. *Masterpiece Cakeshop*, 138 S. Ct. at 1750–51 (Ginsburg, J., dissenting); Lawrence G. Sager and Nelson Tebbe, *The Reality Principle*, 34 *Const. Comm.* 171, 179–85, 190 (2019).

89. *Id.* at 1732–33 (Kagan, J. & Breyer, J., concurring).

90. *Id.*

91. *See* 508 U.S. at 533 (first citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); and then citing *Emp't Div. v. Smith*, 494 U.S. 872, 878–79 (1990)).

92. *See* discussion *infra* Part III.

In finding the Commission’s proceedings had “elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips’] objection[,]” the Court focused quite a bit on statements made by a commissioner at public hearings held on July 25, 2014.⁹³ That commissioner said,

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.⁹⁴

The Court noted that the other commissioners did not object to this comment.⁹⁵ The Court fails to mention, however, that the other commissioners said nothing supporting the comment.⁹⁶ Certainly, however, the sentiment of this one commissioner evinces the sort of hostility and lack of neutrality that would violate the neutrality principle from *Trinity Lutheran* and *Lukumi Babalu Aye*.⁹⁷ It is a statement that stereotypes and degrades religious conscience claims generally and draws a false equivalency between some of the worst acts of hate and discrimination in history and Phillips’ conscience claim.

Yet, it is only the statement of one commissioner, and it was not the basis on which the Commission made its decision.⁹⁸ Moreover, the CADA in *Masterpiece Cakeshop* is nothing like the gerrymandered resolution and ordinances found unconstitutional in *Lukumi Babalu Aye*,⁹⁹ nor the state policy at issue in *Trinity Lutheran*, which treated religious entities differently from other entities.¹⁰⁰ The statement of the one commissioner is similar to—but not as extreme—as some of the things said by City of Hialeah officials in the *Lukumi Babalu Aye* case.¹⁰¹ Significantly, in that case the law itself was gerrymandered and it is unlikely that the statement of one official, without more, would have been adequate to find a violation of neutrality or general applicability.¹⁰²

93. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

94. *Id.*

95. *Id.*

96. *See id.*

97. *See* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

98. *See* *Masterpiece Cakeshop*, 138 S. Ct. at 1729 (Ginsburg, J., dissenting).

99. *See* 508 U.S. at 527–28.

100. *See* 137 S. Ct. at 2017.

101. 508 U.S. at 541–42.

102. *See generally id.* (addressing a detailed pattern of hostility and passage and enforcement of laws designed to harm only Santeria religious practices).

Of course, the *Masterpiece Cakeshop* Court discussed more than just the one official's statement in support of its position that the Commission was hostile to Phillips' sincerely held religious beliefs.¹⁰³ The Court relied on statements made by commissioners at an earlier public hearing:

On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."¹⁰⁴

There is nothing in the May 30 statements that suggests hostility toward religion.¹⁰⁵ Rather, the statements suggest that for-profit entities are bound by the law regardless of their views or beliefs.¹⁰⁶ In fact, the May 30 hearing occurred before the U.S. Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*, which gave Federal RFRA protection to for-profit entities.¹⁰⁷ Of course, Colorado does not have a state RFRA, and it is not bound by any decision under the Federal RFRA.¹⁰⁸

The Court seems to acknowledge this: "Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views."¹⁰⁹ This seems quite likely, as that was the prevailing view under the Federal RFRA before the Court decided *Hobby Lobby*.¹¹⁰ Yet, the

103. See *Masterpiece Cakeshop*, 138 S. Ct. at 1729–31.

104. *Id.* at 1729.

105. See *id.*

106. See *id.*

107. 573 U.S. 682, 688–93 (2014) (citing 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

108. See 42 U.S.C. § 2000bb-3; *Religious Freedom Acts by State*, *supra* note 60. This is important because the U.S. Court of Appeals for the 10th Circuit had found in favor of Hobby Lobby under the Federal RFRA. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120–21 (10th Cir. 2013), *aff'd sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

109. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

110. See, e.g., *Grote v. Sebelius*, 708 F.3d 850, 853–54 (7th Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654, 658–59 (7th Cir. 2013); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125 (D.D.C. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 990 (E.D. Mich. 2012); *O'Brien v. U.S.*

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Court relied on the statements of the single commissioner made *after* May 30, to suggest that the “hostility” reading of the May 30 statements is the more likely reading: “On the other hand, [the May 30 statements] might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips’ free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.”¹¹¹

Even if the Court’s reading of the relationship between the statements made on May 30 and July 25 is a bit strained, the Court’s finding of hostility could be supported if the Commission’s treatment of Phillips’ case was comparable to, and less favorable than, its treatment of bakers who refused to make cakes with messages based in religion.¹¹² Yet, for a variety of reasons set forth in the dissenting opinion and Justice Elena Kagan’s concurring opinion, the cases involving the other bakers and Phillips’ case were quite different.¹¹³

The Court held:

Another indication of hostility is the difference in treatment between Phillips’ case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the [CCRD] considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the [CCRD] found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the [CCRD], the requested cake included “wording and images [the baker] deemed derogatory”¹¹⁴

All of these cases were based on complaints filed by William Jack, who visited three different bakeries requesting two cakes at each.¹¹⁵ As Justice Ruth Bader Ginsburg quotes from the record, Jack requested that each cake be

made to resemble an open Bible. He also requested that each cake be

Dep’t of Health & Hum. Servs., 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012), *rev’d in part, vacated in part, remanded*, 766 F.3d 862, 863 (8th Cir. 2014) (per curiam); *see also* Annex Med., Inc. v. Sebelius, No. 12-2804(DSD/SER), 2013 U.S. Dist. LEXIS 2699, at *8–14 (D. Minn. Jan. 8, 2013) (listing a number of unreported opinions).

111. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

112. *See id.*

113. *See id.* at 1732–34 (Kagan, J., concurring); *Id.* at 1750–51 (Ginsburg, J., dissenting); Sager and Tebbe, *supra* note 88 at 179–85, 190.

114. *Id.* at 1730 (quoting Jack v. Gateaux, Ltd., Charge No. P20140071X, at 4 (Colo. Civ. R. Div. 2015)).

115. *Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting).

decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red “X” over the image. On one cake, he requested [on] one side[,] . . . “God hates sin. Psalm 45:7” and on the opposite side of the cake “Homosexuality is a detestable sin. Leviticus 18:2.” On the second cake, [the one] with the image of the two groomsmen covered by a red “X” [Jack] requested [these words]: “God loves sinners” and on the other side “While we were yet sinners Christ died for us. Romans 5:8.”¹¹⁶

The three bakeries refused to make the cakes with the messages that Jack wanted.¹¹⁷ All three were willing to make bible-shaped cakes, but none would write the messages that Jack requested.¹¹⁸ One even stated that she would give Jack the icing and piping bag to write the messages himself, but she would not write messages she viewed as discriminatory.¹¹⁹

Jack filed claims of religious discrimination against all three bakeries and the CCRD found that there was no probable cause to grant his claims because the services were not denied based on his Christian religious beliefs.¹²⁰ The Commission affirmed the CCRD’s finding.¹²¹

The Court held that Jack’s claim and Phillips’ claim were treated differently by the Commission due to hostility toward religion.¹²² The Court found that the Commission did not take Phillips’ religious objections as seriously as it took the other bakers’ objections to what they perceived as the discriminatory messages that Jack requested.¹²³ Thus, according to the Court, the Commission favored the secular concerns of the other bakers over the religious concerns expressed by Phillips.¹²⁴ Justice Neil Gorsuch filed a concurring opinion joined by Justice Samuel Alito reinforcing the Court’s basis for finding that the Commission discriminated when it denied Jack’s claim and granted relief to Craig and

116. *Id.* (quoting Petition for Writ of Certiorari, *supra* note 54, at 319a).

117. *Id.* at 1749 (Ginsburg, J., dissenting) (quoting Petition for Writ of Certiorari, *supra* note 54, at 301a, 310a, 319a).

118. *See id.* (quoting Petition for Writ of Certiorari, *supra* note 54, at 301a, 310a, 319a).

119. Abby Ohlheiser, *This Colorado Baker Refused to Put an Anti-Gay Message on Cakes. Now She Is Facing a Civil Rights Complaint*, WASH. POST (Jan. 28, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/01/22/this-colorado-baker-refused-to-put-an-anti-gay-message-on-cakes-now-she-is-facing-a-civil-rights-complaint/?noredirect=on&utm_term=.9895146003b4.

120. *Masterpiece Cakeshop*, 138 S. Ct. at 1721 (citing Petition for Writ of Certiorari, *supra* note 54, at 297a, 307a, 316a).

121. *Id.* at 1749 (citing Petition for Writ of Certiorari, *supra* note 54, at 326a–31a).

122. *Id.* at 1729.

123. *Id.* at 1731.

124. *Id.* at 1732.

Mullins against Phillips.¹²⁵

Yet, Phillips' case is demonstrably different from Jack's cases. First, the bakers in Jack's cases did not refuse to serve him or make the cake in the shape of the bible.¹²⁶ They refused to write messages they deemed discriminatory on the cakes precisely because they deemed those messages discriminatory, not because the messages were religious.¹²⁷

Second, Phillips never discussed a cake design or message with Craig and Mullins.¹²⁸ He refused to make them a cake as soon as he learned it was for a same-sex marriage.¹²⁹ If the Court had addressed Phillips' free speech claim, perhaps it might have found that Phillips' denial was based on message rather than LGBT status, but the Court never reached this issue.¹³⁰ Since a design was never discussed, Phillips had no idea what message, if any, Craig and Mullins would want on their cake.¹³¹

If a design had been discussed and Phillips refused to make a cake with a groom and a groom holding hands, perhaps the cases would be comparable.¹³² In that situation, his denial would have been more clearly based on the same-sex marriage message rather than the LGBT status of those getting married, but to get to that point there would have had to be discussion of cake design. In the end, the bakers in Jack's cases showed no hostility toward religion or religious messages generally.¹³³ Their objection was to what they saw as discriminatory.¹³⁴

125. *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring).

126. *Id.* at 1750 (Ginsburg, J., dissenting).

127. *Id.* at 1750–51 (Ginsburg, J., dissenting).

128. *Id.* at 1749 (Ginsburg, J., dissenting).

129. *Id.* at 1750 (Ginsburg, J., dissenting).

130. See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 162 (2018) (“The Court in *Masterpiece* chose not to address free speech, with the result that such claims will persist—as will the quandaries they raise.”). See generally *Masterpiece Cakeshop*, 138 S. Ct. 1719 (addressing only the hostility issue and specifically holding it would not decide the free speech or other issues in the case).

131. *Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting); *But see* Laycock, *supra* note 1 (arguing it was obvious they would want a wedding design of some sort and therefore discussing the design was unnecessary since Phillips objection was to being involved in the marriage itself).

132. See *id.* at 1751 (Ginsburg, J., dissenting).

133. See *id.* at 1750–51 (Ginsburg, J., dissenting); *Cf.* Tebbe and Sager, *supra* note 88 at 180-81 183-85 190-91 (suggesting that the issue was refusal to write a message, and had Phillips simply refused to write a specific message rather than refusing to make the cake, the cases would have been more comparable).

134. *Id.* (Ginsburg, J., dissenting). *But see* Laycock, *supra* note 4 (arguing that the cases are equivalent because it was obvious that Craig and Mullins would want some sort of message or design on their cake reflecting their marriage, and therefore both refusals were

If a secular homophobe had asked them to bake similar cakes with non-religious antigay messages, it seems obvious the bakers would have refused to include the messages as they did with Jack.¹³⁵ If a heterosexual couple asked for a wedding cake, Phillips would have made it.¹³⁶ Justice Gorsuch suggests that this is not dispositive of the comparison between Jack and Phillips' situations because Phillips would not have made a cake for a heterosexual couple if the cake celebrated same-sex marriage,¹³⁷ but as Justice Kagan explains in her concurrence, if the couple were heterosexual, they would not be asking for a same-sex wedding cake.¹³⁸ Moreover, while the sexuality of those requesting the cake was central to Phillips' decision, Jack's religion was not central to the other bakers' decisions.¹³⁹ There is no evidence they would refuse to make any cake with a religious message of any kind that was not discriminatory, or that they would have made a cake with a secular homophobic message.¹⁴⁰ The religious aspect of Jack's message was not dispositive for the other bakers—the discriminatory aspect was.¹⁴¹

None of this means that Phillips would have necessarily lost his case if the Court had reached the free speech claims. It might have been that the Court could find Phillips made his decision based on the message of same-sex marriage rather than on the status of the customers. The above discussion suggests, however, that the hostility and lack of neutrality toward religion upon which the Court relied is highly questionable.

Of course, the Court held what it held and we will have to wait for an answer on the free speech question. Significantly, whether merited by the facts or not, the Court seems to have expanded what qualifies as a violation of the neutrality principle from *Lukumi Babalu Aye* and *Trinity Lutheran*.¹⁴² Clearly, whether in the context of a complicity claim or otherwise, government entities cannot act with hostility, or lack of

based on messages directly connected to classes protected under CADA, sexual orientation for Craig and Mullins, and creed for Jack) .

135. *Masterpiece Cakeshop*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting).

136. *Id.* at 1750 (Ginsburg, J., dissenting).

137. *Id.* at 1736 (Gorsuch, J., concurring); *see also* Sager and Tebbe, *supra* note 88, at 185-87 (arguing that the Gorsuch concurrence mischaracterized and wrongly analyzed the situations).

138. *Id.* at 1733 n.* (Kagan, J., concurring).

139. *Id.* at 1750-51 (Ginsburg, J., dissenting).

140. *Masterpiece Cakeshop*, 138 S. Ct. at 1730-31.

141. *Id.* at 1734-35 (Kagan, J., concurring).

142. *See id.* at 1731-32; *see also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017).

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neutrality, toward religion or specific religious beliefs.¹⁴³ Factually, it seems all that is needed to support a claim that the neutrality principle has been violated is a negative statement or statements by someone working on behalf of a government entity charged with enforcing a law, and/or a situation where a government entity treats secular objections and conscience-based religious objections differently.¹⁴⁴

B. Masterpiece Neutrality Should Invalidate Laws Designed to Target Same-Sex Marriage

To the extent this expansion of neutrality is used in a manner to protect against the sorts of situations that arose in *Lukumi Babalu Aye*, or perhaps *Masterpiece Cakeshop*, it is a welcomed recognition that government should not act with hostility toward religion or a particular religious perspective when deciding or legislating about conscience claims. Yet, this expansion raises a question over what happens when a government entity favors religion-based conscience claims over other rights. To be clear, by favoring I am not referring to the granting of an exemption to a generally applicable law under the Federal RFRA¹⁴⁵ (or state RFRAs) or a permissive exemption under *Smith*.¹⁴⁶ Those sorts of religious exemptions are clearly constitutional.¹⁴⁷

Rather, I am referring to laws like Mississippi's Protecting Freedom of Conscience from Government Discrimination Act,¹⁴⁸ or any of the similar laws or bills enacted or being considered in a number of states. These laws are not RFRAs. Unlike RFRAs, these laws specifically target LGBTQ rights, such as same-sex marriage and recognition of transgendered individuals' gender identity, for religious exemptions.¹⁴⁹ This makes them fundamentally different from RFRAs, which as Christopher Lund has demonstrated, primarily benefit religious

143. *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (citing *Lukumi Babalu Aye*, 508 U.S. at 534).

144. This becomes even more apparent when one combines the holding in *Masterpiece Cakeshop* with the holding in *Trinity Lutheran* because *Trinity Lutheran* reinforces the unconstitutionality of the second sort of state action on an even broader scale. See *Masterpiece Cakeshop*, 138 S. Ct. at 1731–32; *Trinity Lutheran*, 137 S. Ct. at 2019–25; see also Laycock, *supra* note 4.

145. See 42 U.S.C. § 2000bb (2012).

146. See *Emp't Div. v. Smith*, 494 U.S. 872, 894 (1990).

147. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (quoting 42 U.S.C. § 2000bb(a)(2), (5) (2012)) (interpreting the RFRA); see also *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (interpreting the Religious Land Use and Institutionalized Persons Act (RLUIPA)); *Smith*, 494 U.S. at 890 (recognizing that permissive accommodations are constitutional).

148. MISS. CODE. ANN. §§ 11-62-1–11-62-19 (2018).

149. See, e.g., § 11-62-5.

minorities,¹⁵⁰ and even when they benefit larger religious groups do not do so by targeting specific rights held by others.¹⁵¹

If a government entity grants a conscience-based exemption under a RFRA that happens to impact LGBTQ rights, it is not evincing hostility to LGBTQ rights unless—under the *Masterpiece Cakeshop* approach—it favors such claims over other sorts of religious exemptions, or an official involved in the process makes a statement that is negative about LGBTQ rights.¹⁵² Under the sort of law mentioned above, however, specific religious conscience claims are favored over the interests of members of the LGBTQ community and over other sorts of religious conscience claims.¹⁵³ The *Masterpiece Cakeshop* Court recognized that members of the LGBTQ community have valuable and important rights at stake in exemption situations.¹⁵⁴

These laws are by their very nature favoring certain sorts of religious conscience claims in a manner that is not neutral according to the Court's own definition, because they privilege anti-LGBTQ conscience claims over other conscience claims and the rights of members of the LGBTQ community. Moreover, the legislative history of some of these laws is rife with statements that can be easily perceived as anti-LGBTQ in the same sense that the comments by the Commission were interpreted by the *Masterpiece Cakeshop* Court as anti-religious, which the Court suggests violated the principle of neutrality and Phillips' rights.¹⁵⁵ Also, on its face and in its legislative history the Mississippi law—at least—favors some conscience claims over others.¹⁵⁶

In contrast, RFRA has been specifically upheld.¹⁵⁷ RFRA does not

150. Christopher C. Lund, *RFRA, State RFRA's, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 164–72 (2016).

151. RAVITCH, *supra* note 1, at 25–28.

152. *See* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–32 (2018) (finding that statements made by government officials are relevant in assessing governmental neutrality and reversing the judgment of the Colorado Court of Appeals because of statements by government officials evincing hostility toward the petitioner's religious beliefs resulting in disparate consideration compared to other cases where services were denied based on conscience-based religious beliefs).

153. *See, e.g.*, § 11-62-5.

154. *Masterpiece Cakeshop*, 138 S. Ct. at 1727–28.

155. *See, e.g.*, H.B. 1523, 2016 Reg. Sess. (Miss. 2016); *Legislative History Project: HB1523, Protecting Freedom of Conscience from Government Discrimination Act*, MC LAW, https://law.mc.edu/legislature/bill_details.php?id=4621&session=2016 (last visited Apr. 11, 2019) (containing legislative history that includes rhetoric which would be highly offensive and derogatory towards members of the LGBTQ community).

156. *See Id.*; *Masterpiece Cakeshop*, 138 S. Ct. at 1729; *see also* Ravitch, *supra* note 6, at 85.

157. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006).

target any particular group or life event; it protects religious freedom while still allowing government to assert its interests in protecting the rights of others through the compelling interest test.¹⁵⁸ It has been repeatedly demonstrated that RFRA generally do not affect the rights of third parties, and when they do, the government can assert its interest in protecting those third parties.¹⁵⁹

While the Court's decision in *Hobby Lobby* makes these concerns greater, states are not bound by *Hobby Lobby* in interpreting their own RFRA and need not interpret them to protect for-profit entities.¹⁶⁰ Indeed, the protection of for-profit entities under the Federal RFRA in *Hobby Lobby* raises a number of problematic questions for RFRA, and—as I have asserted elsewhere—also harms the interests of traditional religious entities for a variety of reasons.¹⁶¹ Yet, these are very different questions from those raised by the laws mentioned above. Whatever one thinks of RFRA, they do not favor one sort of religious claim over others, nor do they target the rights and interests of a specific group to be subject to religious exemption claims.¹⁶² In fact, Mississippi, and some of the states considering legislation like Mississippi's—which target LGBTQ rights and favor one religious perspective over others—already have RFRA, so the new laws do not do much on their own to protect religious freedom.¹⁶³ Rather, a law like Mississippi's only adds a targeting mechanism that favors certain sorts of religious conscience over other constitutionally recognized rights such as same-sex marriage.¹⁶⁴

C. Masterpiece Suggests the Context Approach Matters

Significantly, it is important to note that *Masterpiece Cakeshop* does more than expand the “neutrality” concept. It also contains dicta suggesting conscience claims that conflict with LGBTQ rights may be more or less successful depending on the context in which they arise.¹⁶⁵

158. See 42 U.S.C. § 2000bb (2012); *Gonzales*, 546 U.S. at 438 (applying the compelling interest test); Lund, *supra* note 150, at 165 (explaining how RFRA function to help religious minorities often in most need of exemptions).

159. RAVITCH, *supra* note 1, at 27–28; see Lund, *supra* note 150, at 176, 181.

160. See RAVITCH, *supra* note 1, at 76–77, 103; Ravitch, *supra* note 6, at 56–59. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that for-profit entities are protected under RFRA, even when it places a burden on third parties).

161. RAVITCH, *supra* note 1, at 102–03; Ravitch, *supra* note 6, at 56–59.

162. See 42 U.S.C. § 2000bb; RAVITCH, *supra* note 1, at 26–27; Ravitch, *supra* note 6, at 61–62.

163. See MISS. CODE ANN. § 11-62-5 (2018).

164. Cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (recognizing the constitutional right to same-sex marriage).

165. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727–28 (2018).

Thus, a state might deny a conscience-based exemption for a for-profit wedding vendor that serves the general public and discriminates in providing that service, but could not force a clergy member—or presumably a church, synagogue, mosque or temple—to officiate or accommodate a same-sex wedding.¹⁶⁶ This dicta reinforces the sort of context-based analysis addressed in Part III.

III. MORAL BATTLES AS LEGAL SUBJECTS

Framing battles over morality as legal subjects is fraught with problems. The legal process generally demands that one side win and the other lose, and the alternatives to this possibility—such as mediation—are rarely used in litigation over culture war issues. Perhaps if these issues were mediated more often there would be more empathy on each side for the deeply human concerns of the other, but that is a topic for another article. In the current climate, culture war battles are often framed by the opposing sides as the sort of winner-takes-all battles for which the legal process is well suited.¹⁶⁷ Yet, most culture war issues are far more nuanced than that and compromise is possible even on some of the most controversial issues.¹⁶⁸

Whether compromise can be found, and who should win when only one side can, are complex questions not amenable to any formalistic approach. A context-based approach helps navigate the rough waters between conscience and discrimination in the legal context so that while there may be winners and losers in litigation, neither side will win every battle.¹⁶⁹ Moreover, there may be compromise through legislation that could prevent protracted court battles.¹⁷⁰

166. *Id.*

167. RAVITCH, *supra* note 1, at 8–10.

168. *See id.* at 9–10, 192–94.

169. *See generally id.* (addressing the many issues where compromise is possible and also who might win and lose on various issues when compromise is not possible).

170. Perhaps the best example of this is the “Utah Compromise,” which is a bill signed into law in Utah that amended and enacted a variety of Utah laws to protect both religious-based conscience claims relating to same-sex marriage and same-sex couples who might otherwise be discriminated against by government entities that serve the general public on marriage issues. *See* Antidiscrimination and Religious Freedom Amendments, S.B. 296, 61st Leg., 2015 Gen. Sess. (Utah 2015) (codified at UTAH CODE ANN. §§ 34A-5-102 to -102.5, -106 to -107, -109 to -112, 57-21-2 to -3, -5 to -7, -12 (LexisNexis 2015) (listing various amendments to Utah statutes that provide protections against discrimination based on sexual orientation and gender identity while also protecting the First Amendment rights of religious, nonprofit organizations); WILLIAM ESKRIDGE & ROBIN FRETWELL WILSON, RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (Cambridge Univ. Press 2018) (containing a variety of papers addressing the possibility of compromise from several different perspectives).

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The context-based approach begins from the perspective that both conscience claims and LGBTQ rights go to the core of one's being and are not separable from one's existence.¹⁷¹ For many religious people it is impossible to separate deeply held religious beliefs from other aspects of life.¹⁷² For members of the LGBTQ community this is true as well,¹⁷³ and is also biologically determined.¹⁷⁴ Neither of these core aspects of being should have to be "closeted," and the heartbreaking fact that members of the LGBTQ community were socially pressured, or compelled, to remain closeted for so long, and still are in many contexts, is an abhorrent chapter for society.

The context-based approach also begins from the perspective that both religious freedom and LGBTQ rights are important, and that both can be important interests for government to protect.¹⁷⁵ This is reflected in a line of case law, but ironically may best be summed up by the *Masterpiece Cakeshop* majority:

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. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. 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." Nevertheless, while those religious and philosophical objections 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.

When it comes to weddings, it can be assumed that a member of the

171. RAVITCH, *supra* note 1, at 22–23, 39.

172. *Id.* at 22–23.

173. *Id.* at 22–23, 39.

174. See generally Tuck C. Ngun & Eric Vilain, *The Biological Basis of Human Sexual Orientation: Is There a Role for Epigenetics?*, 86 *ADVANCES GENETICS* 167 (2014) (surveying the many studies that show sexual orientation is biologically determined and discussing whether in utero hormone exposure is relevant).

175. For religious freedom, this is most obvious under RFRA and similar laws such as the RLUIPA. See 42 U.S.C. § 2000bb(a)(2), (5) (2012); 42 U.S.C. § 2000cc-1(a) (2012); *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006). For sexual freedom, this is most obvious from *Obergefell v. Hodges*. See 135 S. Ct. 2584, 2607 (2015).

clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception 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 that ensure equal access to goods, services, and public accommodations.¹⁷⁶

The Court captures the essence of a context-based approach in this short passage by weighing the various contexts in which conscience or discrimination claims may be expected to succeed. The Court does not frame it as such, but this passage is a good demonstration of the sort of contextual balancing that this Article suggests, and which has worked well in other areas of law. The context-based approach proposed in this Article will be applied to a wide range of situations where conscience claims and LGBTQ rights may come into conflict. Still, the essential idea that religious individuals and entities' conscience claims should more clearly be protected than for-profit entities' who provide goods and services,¹⁷⁷ even if owned by people with conscience concerns,¹⁷⁸ is at the core of the context-based approach. Importantly, however, this does not mean there can be no compromise in any situation where a shopkeeper's conscience concerns come into conflict with LGBTQ rights.¹⁷⁹

To demonstrate how the context-based approach would work it is essential to apply it to the variety of settings where conscience and discrimination concerns could conflict. Therefore, this Part will explore a variety of contexts where conscience claims might conflict with specific LGBTQ rights; namely, same-sex marriage and transgender bathroom access.¹⁸⁰ These two issues are at the core of many conscience claims and will enable exploration of the context-based approach across a variety of settings where issues may arise.

The settings where issues may arise include the following: (1) houses of worship and clergy, (2) religious individuals who are not

176. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (quoting *Obergefell*, 135 S. Ct. at 2607) (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968)).

177. *See id.*

178. *See id.*

179. RAVITCH, *supra* note 1, at 91–92.

180. *See* discussion *infra* Sections III.A–B.

clergy, (3) religious non-profits (this category can be broken into a variety of sub-categories addressed *infra*),¹⁸¹ (4) closely held for-profit entities that have multiple employees who might perform business functions, and (5) small sized “ma and pa” type shops that may be either sole proprietorships or family shops where the owners perform most of the business functions. Significantly, in light of *Masterpiece Cakeshop* and similar cases such as *State of Washington v. Arlene’s Flowers*,¹⁸² this last category can be broken into two sub-categories: those businesses not involved in using expressive activity (this category would include most shops), and those that claim to be involved in expressive activity.¹⁸³ When the “neutrality” principle from *Masterpiece Cakeshop*¹⁸⁴ impacts analysis in any of these contexts it will be addressed in the appropriate subsection. Before analyzing the various settings where conflicts may arise, it is helpful to briefly describe how complicity concerns relate to same-sex marriage and bathroom access.

A. Same-Sex Marriage and Complicity Claims

The right to same-sex marriage is constitutionally enshrined and discrimination by government is prohibited.¹⁸⁵ But what about discrimination by non-government actors who assert a conscience defense? There are several key issues.

First, what should happen if a private actor discriminates against a same-sex couple in violation of a state public accommodation law that prohibits discrimination based on sexual orientation? There are a number of these laws.¹⁸⁶ Second, what happens if a private actor claims a

181. See discussion *infra* Section III.C.3.

182. See generally 389 P.3d 543 (Wash. 2017) (holding that the owner of a floral business who denied providing customs flowers for a same-sex wedding constituted discrimination in public accommodations on the basis of sexual orientation), *vacated*, 138 S. Ct. 2671 (2018). See also *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1097 (D. Minn. 2017); *Elane Photography v. Willock*, 309 P.3d 53, 58–59 (N.M. 2013); *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 426–27 (App. Div. 2016); *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051, 1056–57 (Or. Ct. App. 2017).

183. As will be seen, there is no guarantee that members of this latter group would prevail on the assertion that their business is engaged in expressive activity, but if they did so prevail, these sorts of entities would have a better chance to win a case under the context-based approach—assuming there is no other evidence of discrimination or discriminatory intent. See *infra* notes 283–332 and accompanying text.

184. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731–32 (2018).

185. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015); see RAVITCH, *supra* note 1, at 59–75 (discussing the ways to accommodate some government officials’ conscience concerns without discriminating). That topic is beyond the scope of this Article.

186. See, e.g., CAL. CIV. CODE § 51 (West 2018); COLO. REV. STAT. § 24-34-601 (2018); CONN. GEN. STAT. § 46a-64 (2017); DEL. CODE tit. 6, § 4504 (2013); D.C. CODE § 2-1402.31

conscience defense for discrimination under a state law that targets LGBTQ rights directly?¹⁸⁷ Finally, what role does federal law play in this equation?¹⁸⁸

When state or local laws specifically protect against discrimination based on sexual orientation, a shop keeper who asserts a conscience defense would have a weak argument unless the state in question has a RFRA, or interprets its state constitution to provide stronger protection than the federal constitution does under *Smith*.¹⁸⁹ Even then, as will be seen *infra*, the shop keeper could still lose in many circumstances.¹⁹⁰ Significantly, accommodation of the conscience claim might be possible if prior arrangements were made that allowed the conscience claim to be accommodated without the sorts of discrimination that are usually at issue in these cases.¹⁹¹

Houses of worship are generally exempt from these laws, and as the Court explained in *Masterpiece Cakeshop*, it would not be acceptable to require a house of worship or clergy member to provide any service related to same-sex marriage if that faith did not agree with same-sex marriage.¹⁹² This is a theme you will see repeatedly when the context approach is applied to a variety of settings. Importantly, however, some religious nonprofits provide services unrelated to marriage, such as medical services, food, and shelter. These entities may not be exempt under some state public accommodation laws. If they are not exempt, the

(2001); HAW. REV. STAT. §§ 489-2 to -3 (2008); 775 ILL. COMP. STAT. 5/1-102 (2016); IOWA CODE § 216.6 (2017); ME. REV. STAT. ANN. tit. 5, § 4552 (2017); MD. CODE ANN., HUM. REL. § 20-304 (LexisNexis 2014); MASS. GEN. LAWS ch. 272, §§ 92-98 (2016); MINN. STAT. § 363A.11 (2016); NEV. REV. STAT. § 651.070 (2015); N.H. REV. STAT. ANN. § 354-A:17 (2009); N.J. STAT. ANN. § 10:5-12 (West 2013); N.M. STAT. ANN. § 28-1-7 (2017); N.Y. CIV. RIGHTS LAW § 40-c (McKinney 2009); OR. REV. STAT. § 659A.403 (2017); 3 R.I. GEN. LAWS § 11-24-2 (2002); VT. STAT. ANN. tit. 9, § 4502 (2014); WASH. REV. CODE § 49.60.215 (2018); WIS. STAT. § 106.52 (2015).

187. See, e.g., MISS. CODE ANN. § 11-62-5 (2018).

188. Under federal law it is possible that gender discrimination protected under the Civil Rights Act of 1964 might include some protection based on sexual orientation when gender stereotyping occurs. Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 422-24 (2014).

189. Alex J. Luchenitser, *Religious Accommodation in the Age of Civil Rights: A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 72-73, 79-80 (2015); see *Emp't Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.").

190. See *infra* notes 283-332 and accompanying text.

191. RAVITCH, *supra* note 1, at 91-92.

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

analysis would be different as discussed in Section III.D.¹⁹³ Harder questions arise in the context of adoption agencies where marital status may be relevant to the services provided.

Moreover, when a state public accommodation law specifically prohibits discrimination based on sexual orientation, the government's claim under the RFRA or pre-*Smith* free exercise approach will be stronger because the government has demonstrated its interests through specific protections.¹⁹⁴ As a practical matter, it is in these states and localities—such as Colorado—where the government is most likely to pursue violations of the antidiscrimination laws based on same-sex marital status.¹⁹⁵

Significantly, when a state passes a law to specifically protect conscience claims in contexts where they conflict with LGBTQ rights, the “neutrality” concept from *Masterpiece Cakeshop* may work against those conscience claims by rendering the law unconstitutional.¹⁹⁶ Here again, the key is context. These laws are not designed to protect religious freedom, or even just conscience claims, generally like a RFRA. Rather, these laws are designed to protect conscience claims by entities that serve the general public when they deny service to members of the public in the context of same-sex marriage or other LGBTQ rights.¹⁹⁷ These laws only operate to protect businesses and others who serve the general public who have a specific sort of conscience claim, which involves denial of service to same-sex couples.¹⁹⁸

Nothing in these laws suggests that they would protect other sorts of conscience claims like a RFRA does. For example, protecting the rights of an Orthodox Jew or Seventh Day Adventist to be absent from school on religious holidays, or to open their shops on Sunday in areas that have Sunday Closing Laws or other Blue Laws.¹⁹⁹ These new “conscience” laws are not “neutral.”²⁰⁰ They evince a hostility toward LGBTQ rights, and a favoritism toward specific sorts of religious conscience claims over

193. See discussion *infra* Section III.D.

194. See, e.g., *Masterpiece Cakeshop*, 138 S. Ct. at 1725.

195. See, e.g., *id.* (pursuing a case of discrimination based on sexual orientation under CADA).

196. See *supra* notes 145–64 and accompanying text; see also *Masterpiece Cakeshop*, 138 S. Ct. at 1729–32 (discussing why it is unconstitutional for a state to show “hostility” toward religion that violates its duty to provide “neutral and respectful” consideration of Phillips’ religious based objections).

197. See MISS. CODE ANN. §§ 11-62-1–11-62-19 (2018).

198. See *id.*

199. See DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, *BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS* 47–48 (Lexington 1987).

200. See *supra* notes 145–64 and accompanying text.

others.²⁰¹ *Masterpiece Cakeshop*-type neutrality opposes favoritism or hostility by the government where religion is concerned.²⁰²

The question of complicity concerns versus discrimination under federal law is also complex because on its face federal law does not protect against discrimination based on sexual orientation.²⁰³ That is not the end of the story, however. It remains possible that federal antidiscrimination laws, such as title VII of the Civil Rights Act of 1964, protect against discrimination based on sexual orientation or sexual identification because they prohibit gender stereotyping.²⁰⁴ Title VII, of course, has exemptions for religious entities,²⁰⁵ but for-profit entities asserting a conscience defense could only prevail if they asserted a claim under the Federal RFRA,²⁰⁶ and language from *Masterpiece Cakeshop* could work against a RFRA defense.²⁰⁷

B. Transgender Bathroom Access and Conscience Claims

The transgender bathroom access issue has been mostly focused on government entities, such as schools.²⁰⁸ Yet, it can raise conscience questions for non-governmental entities subject to public accommodation laws that protect based on sexual identity.²⁰⁹ As with same-sex marriage, the answers are easy for houses of worship which would be accommodated through exemptions under state public accommodation

201. See *supra* notes 148–64 and accompanying text.

202. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729–32 (2018).

203. See 42 U.S.C. §§ 2000e–2000e-17 (2012).

204. See 42 U.S.C. § 2000e-3; Herz, *supra* note 188, at 399, 402.

205. 42 U.S.C. § 2000e-1(a); see *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338–40 (1987) (upholding the exemption of religious organizations from title VII’s prohibition against discrimination in employment on the basis of religion).

206. See 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

207. See *Masterpiece Cakeshop*, 138 S. Ct. at 1727–28.

208. For example, the case of Gavin Grimm, who was denied access to the men’s room at his high school because he was born female, has gained significant legal and public attention. See *Grimm v. Gloucester City Sch. Bd.*, 302 F. Supp. 3d 730, 737 (E.D. Va. 2018). He most recently won his case on remand to the trial court. See *id.* at 752.

209. See, e.g., CAL. CIV. CODE § 51 (West 2018); COLO. REV. STAT. § 24-34-601 (2018); CONN. GEN. STAT. §§ 46a-64, -81d (2013); DEL. CODE ANN. tit. 6, § 4504 (2013); D.C. CODE § 2-1402.31 (2001); HAW. REV. STAT. §§ 489-2 to -3 (2008); 775 ILL. COMP. STAT. 5/5-102 (2016); IOWA CODE §§ 216.6–216.7 (2017); ME. REV. STAT. ANN. tit. 5, § 4552-91 (2013); MD. CODE ANN., HUM. REL. § 20-304 (LexisNexis 2014); MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016); NEV. REV. STAT. § 651.070 (2015); N.J. STAT. ANN. § 10:5-12 (West 2013); N.M. STAT. ANN. § 28-1-7(F) (2018); OR. REV. STAT. § 659A.403 (2017); 3 R.I. GEN. LAWS § 11-24-2 (2002); VT. STAT. ANN. tit. 9, § 4502 (2014).

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laws.²¹⁰

Transgender bathroom access issues involving public accommodations could arise in situations where a state law prohibits discrimination in public accommodations based on sexual identity or transgender status. There are a limited number of jurisdictions that protect against discrimination based on transgender status or sexual identification more broadly.²¹¹ The issue might also be raised under federal law if antidiscrimination protection based on gender is interpreted to include sexual identity or transgender status.²¹²

The questions raised by religion-based conscience objections to transgender bathroom access are complex. To reach this issue, it is assumed that the business in question does not discriminate in providing goods or services generally, but that it does not allow bathroom access based on customers' sexual identification. In these contexts bathroom access would be limited to the customer's gender at birth or some other criterion that prevents access to an individual's gender identified bathroom.

Context can be quite helpful here, especially for religious entities and individuals and small "ma and pa" type businesses,²¹³ but the issues become much harder when religious non-profits that serve members of the general public (unless religious nonprofits are exempt under the antidiscrimination law) or larger businesses are involved.²¹⁴ As more jurisdictions implement antidiscrimination protections based on sexual identity, it is likely that bathroom access issues will arise. Still, unless objections to bathroom access arise from religion-based conscience concerns, they are beyond the scope of this Article. As will be seen in Section III.C and its sub-sections, when bathroom access is denied based on a conscience claim, the context of the denial can, and should, be highly relevant to the outcome.²¹⁵

C. The Contextual Relevance of Settings

As the *Masterpiece Cakeshop* Court explained, even after *Hobby Lobby*, there is a significant difference between religious entities asserting a conscience-based exemption to a public accommodation law

210. See, e.g., § 24-34-601(1); 5/5-102.1; § 216.6 (6)(d); tit. 9, § 4502(l).

211. See *supra* notes 209–10 and accompanying text.

212. See *supra* notes 203–04 and accompanying text.

213. See discussion *infra* Sections III.C.1–2, F.2.

214. See discussion *infra* Sections III.C.3, 3.D.

215. See discussion *supra* Section III.C.

and a business that serves the general public asserting one.²¹⁶ Some of the most extreme anti-exemption advocates have argued that even religious entities and clergy should not receive exemptions.²¹⁷ The Court has clearly rejected this position,²¹⁸ and as I have argued elsewhere, acceptance of this position would likely cause significant backlash and backfire on the very individuals it is intended to protect.²¹⁹

The context approach suggests that settings are determinative in many situations where conscience and discrimination come into conflict. Settings are particularly relevant because they frame the context where the conscience claim is asserted and where the discrimination occurs. They also frame individuals' expectations about what may or may not be acceptable. There is, after all, a significant difference in expectations on behalf of a same-sex couple when they ask a Roman Catholic priest if he will marry them and when they ask a caterer to cater their wedding.

1. Houses of Worship and Clergy

The *Masterpiece Cakeshop* Court clearly summarized this context:

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception 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 that ensure equal access to goods, services, and public accommodations.²²⁰

This passage does a good job summarizing the issue for clergy, and the same analysis could be applied to houses of worship.²²¹

216. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727–28 (2018).

217. Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992).

218. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

219. See generally, RAVITCH, *supra* note 1 (addressing the relationship between religious freedom and sexual freedom, and discussing the role conscience claims play in that relationship).

220. *Masterpiece Cakeshop*, 138 S. Ct. at 1727–28.

221. The doctrine of church autonomy reflected in *Serbian Orthodox Diocese v. Milivojevich*, would protect houses of worship from being forced to violate the tenets of their

Forcing houses of worship to perform wedding ceremonies that violate their faiths would tread on the religious autonomy and free exercise rights of those faiths.²²² For example, to force a conservative or orthodox synagogue to marry a couple where one spouse is not Jewish would be a significant violation of the autonomy and free exercise rights long recognized by the Court and society. Similarly, forcing a Catholic or Evangelical church to perform a same-sex marriage would be a significant violation of the autonomy and free exercise rights of those churches.²²³ Moreover, requiring a house of worship or clergy member to perform such ceremonies could ultimately undermine the broader goal of equality for members of the LGBTQ community.²²⁴

In fact, religious entities are one of the few institutions in society where even race discrimination may be tolerated—although it need not be subsidized by tax dollars.²²⁵ Of course, any religious entity that discriminates based on race may lose followers as well as tax exemptions, and no one can be compelled by law to attend a church that discriminates.²²⁶ In fact, calling attention to the bigotry of, and protesting

faiths in the unlikely event that a government entity tried to require them to perform ceremonies they did not want to perform. *See* 426 U.S. 696, 710 (1976) (quoting *Watson v. Jones*, 80 U.S. 679, 727 (1871)); *see also* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 173 (2012) (applying the ministerial exception to church decisions regarding the hiring, retention, and firing of “clergy” broadly defined); *Jones v. Wolf*, 443 U.S. 595, 604 (1979) (quoting *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969)) (recognizing the related ecclesiastical abstention doctrine, but finding that neutral principles of law may be available to resolve some legal disputes if a civil court would not be required to answer religious questions or decide religious issues).

222. *See generally Jones*, 443 U.S. 595 (religious autonomy); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (autonomy); *Hosanna-Tabor*, 565 U.S. 171 (free exercise and autonomy); *Serbian Orthodox*, 426 U.S. 696 (same); *Presbyterian Church*, 393 U.S. 440 (same).

223. *Masterpiece Cakeshop*, 138 S. Ct. at 1727; Angela C. Carmella, *After Hobby Lobby: The “Religious For-Profit” and the Limits of the Autonomy Doctrine*, 80 Mo. L. REV. 381, 403–04 (2015).

224. *See* RAVITCH, *supra* note 1, at 28.

225. *Bob Jones Univ. v. United States*, 461 U.S. 574, 595–96, 603–04 (1983) (acknowledging religious entities may follow even racist religious tenets, but government need not support those tenets through tax breaks). “Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.” *Id.* at 603–04.

226. *See Bob Jones Univ.*, 461 U.S. at 603–04. It is axiomatic that no one could ever be compelled to attend a church or other house of worship without violation of the Establishment Clause. Even the most anti-separationist Justices in modern history have agreed that legal coercion is never allowed. *Lee v. Weisman*, 505 U.S. 577, 640–41 (1992) (Scalia, J., dissenting).

against, such faiths and houses of worship is protected speech.²²⁷

The same is true for faiths or houses of worship that discriminate based on sexual orientation in marriage or otherwise.²²⁸ No one can change the tenets of such a faith, or the conscience of its clergy, but people can use peaceful means to call attention to the discrimination and try to influence its followers to go elsewhere.²²⁹ The government also need not provide tax exemptions to these entities²³⁰—although whether it does or does not is a political issue beyond the scope of this Article.

The inability of the courts or other government entities to involve themselves in ecclesiastical questions has been understood and invoked since the nineteenth century.²³¹ The *Masterpiece Cakeshop* Court's recognition of this in the same-sex marriage context is simply an acknowledgement of a well-established legal and common sense principle.²³² People may disagree with this principle, especially in contexts where churches discriminate based on sexual orientation beyond the marriage context, but even if society reaches a point where the political will is there to deny tax exemptions to these entities, government could still not compel a house of worship to welcome congregants it chooses not to welcome or to perform ceremonies its doctrines prohibit.²³³

The same analysis can be applied to bathroom use. While religious entities are free to allow bathroom use based on the sexual identity of congregants and others,²³⁴ they cannot be compelled to do so when doing so would violate the tenets of that faith.²³⁵ This issue is fraught because the negative impact rejection of sexual identity can have on youth has

227. Protests against racist policies, or other discriminatory policies, go to the core of our social and political system. They are an important way to express disagreement with those who support discrimination. Political speech has long been recognized as a highly protected form of speech. *Cohen v. California*, 403 U.S. 15, 18 (1971) (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)).

228. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

229. *See supra* note 227 and accompanying text.

230. *Bob Jones Univ.*, 461 U.S. at 603–05.

231. *See supra* notes 220–22 and accompanying text.

232. 138 S. Ct. at 1727 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015)) (citing *Newman v. Piggie Park Enters, Inc.* 390 U.S. 400, 402 n.5 (1968) (per curiam)).

233. *See supra* notes 220–24 and accompanying text.

234. It seems likely that as many faiths have accepted same-sex marriage, many will, and have, also accepted members' sexual identity. LAW, RELIGION & TRADITION, *supra* note 3.

235. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727.

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been well documented.²³⁶ Yet, the same is true for sexual orientation,²³⁷ and the doctrine of church autonomy would prevent the government from forcing a house of worship to violate its religious tenets by performing a same-sex marriage.²³⁸ People may protest and call attention to these issues, but the government cannot force a house of worship to allow bathroom access that violates its tenets.²³⁹

2. Religious Individuals Who are Not Clergy

The idea that government cannot compel any person to take part in a ceremony that violates his or her conscience or faith should need no serious discussion. Even the most militant opponents of religious conscience claims in regard to same-sex marriage have not argued that private individuals can be forced to attend a same-sex marriage ceremony. This makes sense since the Court, and society, have long recognized the primacy of individual conscience in the private sphere, and even in the public sphere.²⁴⁰

Even scholars like myself, who have openly rejected the notion that originalism is especially helpful in deciding questions under the religion clauses (and perhaps more generally), accept that individual conscience and self-determination played a role in the framing of the Constitution and are reflected in many of the rights that have become well-established in our society.²⁴¹ If government cannot make someone attend a wedding for a friend or relative that person does not like, government certainly cannot force someone to attend a wedding that violates his or her conscience. It is equally clear that no one can force a homeowner to open his or her bathroom to those that he or she does not want to use that bathroom.

236. See generally Sari L. Reisner et al., *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center: A Matched Retrospective Cohort Study*, 56 J. ADOLESCENT HEALTH 274 (2015) (finding that transgender youth have higher rates of depression, anxiety, suicide ideation and attempt, and other mental health concerns than cisgender youth).

237. Numerous studies have shown the psychological harm that discrimination can cause for gays and lesbians. See generally Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. YOUTH ADOLESCENCE 1001 (2009) (demonstrating the significant psychological impact of discrimination on LGBT youth).

238. See *supra* notes 220–22 and accompanying text; see also *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

239. See *supra* notes 220–22 and accompanying text.

240. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

241. FRANK S. RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES 1–9* (NYU Press 2007).

3. Religious Non-Profits

Religious non-profits have a lot in common with houses of worship because they are generally created and operated to serve the tenets and mission of the religion that supports them.²⁴² Yet, there are such a wide array of religious non-profits that these entities do not neatly fit in any one category.²⁴³ Within the setting of religious non-profits, context may dictate different outcomes in different situations. This Article only addresses religious non-profits that serve the general public rather than those that only serve the faith or faiths that support them, because the latter category are less likely to come into conflict with public accommodation laws and more likely to implicate church autonomy protection and to clearly fit within the exceptions contained in most antidiscrimination laws.²⁴⁴ Of course, in jurisdictions where religious non-profits generally are exempt from public accommodation laws the following discussion is purely academic. Religious non-profits are also less likely to receive public funding that may implicate other antidiscrimination concerns.²⁴⁵

Addressing only those religious non-profits that serve the general public does not create a clearly demarcated context, however, because there are a variety of settings where these entities might interact with members of the LGBTQ community. These include soup kitchens and food banks, homeless shelters, community charities such as Catholic Charities, hospitals, orphanages, and adoption agencies.²⁴⁶ Religious non-profits can be affiliated with a specific faith or they can be unaffiliated, such as Samaritan's Purse and similar organizations.²⁴⁷

This Section will not focus on employment decisions made by these non-profits because that raises questions under the ministerial exception,²⁴⁸ and because the Court has granted greater leeway to

242. RAVITCH, *supra* note 1, at 182–83.

243. *Id.* at 182.

244. *See generally*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding the exemption of religious organizations from title VII's prohibition against discrimination in employment on the basis of religion).

245. Most public funding that finds its way to a religious entity goes to religious entities that serve a broader swath of the public than just their own followers. *See generally*, Eric C. Twombly, *Religious Versus Secular Human Service Organizations: Implications for Public Policy*, 83 SOC. SCI. QUART. 947 (2002) (addressing the amount of government funding going to religious versus secular non-profits and the sorts of religious and secular non-profits receiving funding).

246. *See* RAVITCH, *supra* note 1, at 164–91.

247. *See About Us*, SAMARITAN'S PURSE, <https://www.samaritanspurse.org/our-ministry/about-us/> (last visited Apr. 11, 2019).

248. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 180 (2012). Under the ministerial exception, certain employment discrimination claims are

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religious entities in employment decisions.²⁴⁹ There has been some excellent criticism of the breadth of this protection,²⁵⁰ but that debate is beyond the scope of this Article. This Article will focus on what happens in contexts where religious non-profits discriminate against members of the LGBTQ community in violation of public accommodation laws. Importantly, the answer may vary with the sort of religious non-profit and the sort of discrimination involved. This is to be expected when using the context-based approach.

D. Religious Nonprofits Providing Food, Shelter or Other Community Services

Religious non-profits that provide food and shelter have a good deal of freedom in how they serve their patrons. They can, of course, proselytize if that is part of their religion. They can also express their moral and religious convictions even if those may be offensive to people using the facility who do not share the faith of the organization.

Yet, denial of service based on LGBTQ status is a different matter. No one can force a religious nonprofit to recognize a marriage it chooses not to recognize—unless nondiscrimination based on marital status is a specific requirement for receiving some sort of government aid the charity accepts²⁵¹—but that is different from denying access to members of the LGBTQ community. Context is everything here.

The sort of charity and the sort of discrimination involved would determine whether a religion-based conscience claim could succeed in the face of a violation of a public accommodation or antidiscrimination law, assuming the law applies to and does not exempt religious nonprofits that serve the general public. The easiest cases would involve denial of service at a food bank or soup kitchen based on sexual orientation or sexual identity. Such a situation would be an obvious violation of general public accommodation laws or antidiscrimination laws that protect based on sexual orientation.²⁵² Of course, these

“barred by the First Amendment [where they concern] . . . the employment relationship between a religious institution and one of its ministers.” *Id.*

249. *Id.* at 188.

250. See, e.g., Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U.L. REV. 951, 954 (2012).

251. See *infra* notes 271–72 and accompanying text; see also RAVITCH, *supra* note 1, at 182.

252. See, e.g., CAL. CIV. CODE § 51 (West 2007); COLO. REV. STAT. § 24-34-601 (2018); CONN. GEN. STAT. §§ 46a-64, -81d (2017); DEL. CODE ANN. tit. 6, § 4504 (2013); D.C. CODE § 2-1402.31 (2001); HAW. REV. STAT. §§ 489-2 to -3 (2008); 775 ILL. COMP. STAT. 5/5-102 (2016); IOWA CODE §§ 216.2, 216.6–216.7 (2017); ME. REV. STAT. ANN. tit. 5, §§ 4552–4591 (2017); MD. CODE ANN. HUM. REL. § 20-304 (LexisNexis 2014); MASS. GEN. LAWS ch. 272,

situations are highly unlikely because most religious charities do not deny needed food on this basis, and there are no reported incidents of such denial at the time of this writing.

The only way a religious charity could prevail in such a situation is if it is exempt under the antidiscrimination law or asserts a defense under a RFRA. In the former scenario, assuming the exemption applies to religious non-profits engaged in denial of service—and most exemptions do not apply in these situations²⁵³—the religious charity would obviously win, but the outcome under a RFRA could be quite different. In assessing a conscience defense under a RFRA, the nature of the discrimination would be key. In this scenario, we have the denial of food based on sexual orientation or sexual identity alone. The government would have a compelling interest in protecting those in need from denial of basic sustenance due to discrimination based on sexual orientation or sexual identity.²⁵⁴ Moreover, enforcement of the antidiscrimination law under these facts could meet the narrow tailoring requirement.²⁵⁵

As mentioned above, these situations are highly unlikely to arise. If we shift the context to charities that provide shelter, however, issues could easily arise. There might be conscience-based concerns about recognizing same-sex spouses as spouses, housing of same-sex couples in a room together, or whether to house a transgendered individual based

§§ 92A, 98 (2017); MINN. STAT. §§ 363A.08, 363A.11 (2016); NEV. REV. STAT. § 651.070 (2015); N.J. STAT. ANN. § 10:5-12 (West 2013); N.M. STAT. ANN. § 28-1-7(F) (2018); OR. REV. STAT. § 659A.403 (2017); 3 R.I. GEN. LAWS § 11-24-2 (2002); VT. STAT. ANN. tit. 9, § 4502 (2014).

253. Most state public accommodations laws would exempt religious entities that are not open to the general public under an exception available to private membership clubs or organizations, but only a few states include specific religious exemptions in public accommodation laws, and most of these would not apply to religious nonprofits that serve the general public. § 24-34-601(1); 5/5-102.1(b); § 44-1002(h); § 213.065(3); § 13-7-2(c). Of course, recent laws like the one in Mississippi that protects public accommodations specifically in the same-sex marriage context are different, and as suggested, may be unconstitutional. *See supra* notes 190–94 and accompanying text.

254. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624-25 (1984) (Minnesota public accommodation law “reflects the State’s strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. . . . That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order”); *See also*, *Shaw v. Reno*, 509 U.S. 630, 654 (1993) (“The states certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid”); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City*, 502 F.3d 136, 148-49 (2nd Cir. 2007) (State university has compelling in enforcing its non-discrimination policy against gender discrimination by fraternities); RAVITCH, *supra* note 1, at 44, 100 (government has a compelling interest in enforcing antidiscrimination laws).

255. *Roberts*, *supra* note 254 at 626 at 628-29; *Chi Iota*, *supra* note 254 at 149; Ravitch, *supra* note 1, at 100–01.

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on gender identity or gender on a birth certificate. Again, absent an exemption or a RFRA, there is no actionable legal issue and the state can enforce the antidiscrimination law.²⁵⁶ If the organization is exempt under the relevant antidiscrimination law, there is also no legal issue because the law would be unenforceable against the exempt entity. If the state has a RFRA, the question would come down to the compelling interest test and the nature of the religious charity's denial.

The government will always have a compelling interest in enforcing non-discrimination laws.²⁵⁷ Yet, this is not the end of the analysis. There is a significant difference between a policy that does not recognize a same-sex couple as a married couple and one that denies them shelter because they are married. There is also a significant difference between a policy that precludes anyone housed by the charity to have sex in the charity's facilities and one that denies only members of the LGBTQ community.

If a policy does not recognize a same-sex marriage because of a religious charity's views on marriage, but does not otherwise discriminate in providing service to the couple, it is unclear if the government would have a compelling interest because the compelling interest must be considered in light of the specific parties involved.²⁵⁸ Even if there is a compelling interest, failure to provide an exemption to this charity when it does not discriminate in the provision of services, but simply does not itself recognize same-sex marriages, would not likely be narrowly tailored when an exemption for the charity would not alter the services provided to the spouses who were already receiving food and shelter together even though the charity does not recognize the marriage. This would also mean that the state could require the charity to house families recognized as such under state law together, even if the charity does not recognize the parents' marriage itself. If a religious shelter discriminates by refusing to provide services, the result would be different because the government has a compelling interest in preventing denial of shelter based on sexual orientation and marital status.²⁵⁹ Enforcing that policy might be narrowly tailored, assuming the state did so in the least restrictive way—such as allowing the charity to not recognize the marriage²⁶⁰—but not allowing it to otherwise discriminate in providing

256. *Id.* at 99–101.

257. *See supra* notes 254–55, and accompanying text; *id.* at 98–101.

258. *See* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

259. *See supra* notes 254–55, and accompanying text; RAVITCH, *supra* note 1, at 99–101.

260. *See id.* at 100.

services.²⁶¹

Another issue could arise for shelters when a transgender individual seeks housing based on gender identity, but the religious charity has a conscience objection to this and will only house based on gender at birth or based on state-issued identification. If the state has a law that protects against discrimination based on gender identity, and that law does not contain an exemption for religious nonprofits that serve the general public, the state would have a compelling interest in enforcing its antidiscrimination law.²⁶² Yet, narrow tailoring would be tough since the charity is not denying housing, but rather has a conscience-based policy that assigns housing based on gender at birth or as recognized by the state. The key to the narrow tailoring question would be what other options exist. If there are other accessible charities, the government might need to provide transportation or allow free public transportation to those facilities as a less restrictive alternative.²⁶³ This issue has not come up in any reported cases, but it is one to keep an eye on, and one where the context and alternatives could be central to any outcome.

The same sort of analysis would apply to bathroom access for religious non-profits if state or local law provides protection based on sexual identity. The state would have a compelling interest, but narrow tailoring might be hard to achieve so long as bathroom access is available nearby. If the charity received state funding, this equation might change because the state's interest would be even stronger and it could put a non-discrimination requirement on receipt of funding. The charity could also eschew the funding to protect its conscience concerns.

E. Religious Nonprofit Hospitals

This topic is especially fraught in the reproductive rights area, and a great deal has been written on that context.²⁶⁴ There are numerous state and federal laws that address the issue, as well as many cases.²⁶⁵ This

261. See *supra* notes 254-255, and accompanying text; *id.* at 100-01.

262. See *supra* notes 254-55 and accompanying text; *Cf.* *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983) (“the government has a fundamental, overriding interest in eradicating racial discrimination in education.”). The scenario discussed in this sub-section could also arise under a general public accommodation law, regardless of whether it specifically mentions gender identity.

263. See RAVITCH, *supra* note 1, at 99-101 (describing the least restrictive means aspect of the strict scrutiny test under a RFRA or constitutional provision as generally the hardest to meet, assuming the government has some other way to effectuate its interests).

264. See *id.* at 54-58, 137, 143-148, 155, 179-82 (discussing the effects of various state and federal laws on religious non-profits and individuals seeking healthcare or other services.).

265. See *id.* (discussing numerous federal and state laws and a number of cases).

Article will only explore this question in the context of discrimination against members of the LGBTQ community when they are protected under public accommodation or other antidiscrimination laws.

In this context, failure to provide medical services to someone because of their sexual orientation, marital status, or sexual identity would violate public accommodation laws as well as potentially violate a variety of other antidiscrimination laws and regulations applicable to hospitals and entities receiving government funding.²⁶⁶ Unless a religious hospital fits within a religious exemption to antidiscrimination laws that specifically protects hospitals or all religious nonprofits regardless of type, it is unlikely that it would be able to deny general services on any of these bases,²⁶⁷ even if it might be allowed to deny facilities for specific procedures such as gender reassignment surgery.²⁶⁸ Even under a RFRA, a hospital would have a hard time justifying denial of services generally based on sexual orientation or gender identity in the unlikely event that a hospital attempted to do so. The government has a clear compelling interest in enforcing nondiscrimination in the provision of healthcare, and while there may be narrowly tailored exceptions for particular procedures, allowing broader discrimination would not be a more narrowly tailored exception.²⁶⁹ The situation would be different if the hospital did not deny treatment, visitation, or any other right, but rather simply did not recognize a same-sex marriage for its own internal purposes.²⁷⁰

Bathroom access is a harder issue because balancing the harm to the individual denied access to the bathroom consistent with his or her sexual identity,²⁷¹ and the conscience concerns of a religious nonprofit that serves the general public in recognizing only what it considers the G-d given gender of that individual, does not lead to a clear outcome.²⁷² There

266. See *supra* notes 209–11 and accompanying text.

267. Except in states like Mississippi, which have laws that specifically allow entities serving the general public to discriminate, there are no exemptions that apply to non-profits that serve the general public. See *supra* notes 252–53 and accompanying text.

268. This possibility would be based on the sorts of conscience exemptions that religious hospitals sometimes have for procedures that violate their religious tenets. See RAVITCH, *supra* note 1, at 54–56, 137, 143, 146–47, 178–80 (describing various situations where religious non-profits are given exemptions to provide services).

269. See *id.* at 44, 56–58, 99–101, 179–88; See also notes 254–255, and accompanying text.

270. See discussion *supra* Section III.A.

271. *Grimm v. Gloucester City Sch. Bd.*, 302 F. Supp. 3d 730, 737, 752 (E.D. Va. 2018).

272. *Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776, 801–02 (S.D. Iowa 2016) (citing *Traggis v. St. Barbara's Green Orthodox Church*, 851 F.2d 584, 586, 590 (2d Cir. 1988)) (holding that Catholic schools are not places of public accommodation, and denying the church's motion for a preliminary injunction and suggesting there is an important

are important issues on both sides. After all, the transgender individual in this context is not asking the hospital to perform a procedure, but rather to allow access to a bathroom open to hospital visitors that coincides with his or her gender identity. Yet, while a hospital may not be allowed to discriminate in access generally even if the discrimination is based on religious tenets, a religious hospital has an important interest in following the tenets of its faith on non-medical access issues.²⁷³ Thus, if a generally applicable and neutrally enforced state or local government law protects against discrimination based on gender identity and a religious hospital would not fall within any religious exemption applicable to bathroom access, the hospital would lose in the absence of a RFRA.²⁷⁴ If, on the other hand, there is a RFRA and bathroom access is an issue, the question would most likely come down to narrow tailoring because the substantial burden and compelling interest elements are likely to be met by the hospital and the government respectively. Whether the narrow tailoring requirement is met would depend on a number of factors, such as whether a non-gender specific alternative—such as use of a family bathroom—is available.

F. Religious Nonprofit Adoption Agencies

Religious adoption agencies raise a host of complex issues.²⁷⁵ For present purposes the focus will be on situations where an agency does not recognize same-sex marriages, but requires that only married couples or individual single parents can adopt. These situations have arisen more often in recent years as same-sex marriage has become a protected right.²⁷⁶ Some states have passed laws attempting to protect the charities,²⁷⁷ but these laws have been challenged as unconstitutional.²⁷⁸

Assuming there is no RFRA, the state could require these agencies to allow same-sex couples to adopt under a generally applicable

difference between a religious nonprofit that serves the general public and one that does not in context of public accommodation laws that protect bathroom access based on gender identity).

273. *Id.*

274. *Emp't Div. v. Smith*, 494 U.S. 872, 883–85 (1990) (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)).

275. RAVITCH, *supra* note 1, at 188–91.

276. Allison L. McQueen, *Michigan's Religious Exemption for Faith-Based Adoption Agencies: State-Sanctioned Discrimination or Guardian of Religious Liberty?*, 93 NOTRE DAME L. REV. 895, 912 (2017).

277. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 400.5a, 710.23g, 722.124e (West 2018); H.B. 24, 2017 Al. Reg. Sess. (Al. 2017).

278. *See* Jennifer Chambers, *Same-Sex Couples Fight to Adopt in Michigan*, DETROIT NEWS (July 12, 2018), <https://www.detroitnews.com/story/news/local/michigan/2018/07/12/same-sex-couples-fight-adopt-michigan/779763002/>.

antidiscrimination law or a generally applicable nondiscrimination funding requirement if the state provides funding to the charity.²⁷⁹ If the state has a RFRA, or the state constitution provides similar protection, however, the issues become more complex and context becomes more important. On the one hand, the state would have a compelling interest in enforcing antidiscrimination laws if it chose to do so.²⁸⁰ On the other hand, whether that enforcement would be the least restrictive means available may very much depend on what other agencies are available to serve same-sex couples in the state or a given part of the state. If other options are readily available, or the state could easily facilitate adoptions for same-sex couples denied adoptions by a religious adoption agency based on conscience concerns, enforcement of the law without an exemption may not be the least restrictive means available to enforce the law.

One concern that can apply to all religious charities when conscience and discrimination concerns conflict is what happens when the state chooses to enforce its antidiscrimination laws against a charity. One possibility is that the charity will close down or move to another area.²⁸¹ This raises a host of concerns if the services provided by the charity are needed in the community. The government is between a rock and a hard place in these scenarios because its choices are to enforce antidiscrimination laws that are central to its interests and lose services that are essential to the community, or to not enforce the law and allow the services to remain while betraying its interest in preventing otherwise illegal discrimination.²⁸²

1. Larger For-Profit Entities

In *Hobby Lobby*, the Supreme Court held that RFRA protects closely held for-profit entities when they assert conscience claims.²⁸³ *Hobby Lobby* raises a number of concerns and has led to a significant backlash against religious freedom claims generally.²⁸⁴ Yet, it does not answer the

279. A recent case from Pennsylvania directly addresses this issue. A federal court upheld the City of Philadelphia's enforcement of its antidiscrimination laws against Catholic adoption agencies that had received city funding and denied same-sex couples the ability to adopt. *See* *Fulton v. City of Phila.*, 320 F. Supp. 3d 661, 697 (E.D. Pa. 2018).

280. *See supra* notes 254-255, and accompanying text.

281. Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 *BOS. C.L. REV.* 1417, 1446-47 (2012).

282. *Id.*

283. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688-93 (2014) (citing 42 U.S.C. §§ 2000bb-2000bb-4 (2012)).

284. Ravitch, *supra* note 6, at 56, 72.

question of what should happen when a for-profit entity discriminates in violation of a public accommodation law based on same-sex marital status or in bathroom access situations.

First, many jurisdictions do not have RFRA, and antidiscrimination laws are generally applicable under *Smith*,²⁸⁵ so in many jurisdictions *Hobby Lobby* is irrelevant. Second, even in states with RFRA, unless those RFRA specifically protect for-profit entities, state courts are not required to apply *Hobby Lobby* and could find that the relevant state RFRA does not protect for-profit entities, or at least for-profit entities that discriminate.²⁸⁶ Legislatures could also amend RFRA so that they clearly do not protect for-profit entities or for-profit entities that discriminate.²⁸⁷ Finally, even under a RFRA that protects for-profit entities, the government has a compelling interest in enforcing antidiscrimination laws,²⁸⁸ and “neutral” enforcement of those laws against for-profit entities without the sort of bias alleged in *Masterpiece Cakeshop*²⁸⁹ could be narrowly tailored to meet the government’s compelling interest.²⁹⁰

Still, even when a RFRA provides protection to for-profit entities there are fundamental differences between larger for-profit entities and small sole proprietorships or “ma and pa” type businesses, which are discussed in Section III.F.2.²⁹¹ In fact, these differences can be easily demonstrated by considering the wedding cake situation.

If a same-sex couple ordered a wedding cake at their nearest Kroger, Albertson’s, or Shop Rite supermarket and were met with a refusal by the bakery department, the situation would be quite different from a refusal at a small family owned bakery. This does not mean the family owned baker would win if the refusal of service was challenged, but rather that context explains why the chain supermarket would always lose if the refusal of service is challenged. Importantly, in a larger business that serves the general public the company can accommodate, if it so chooses, an employee who has a religious objection to making a cake for a same-

285. *Emp’t Div. v. Smith*, 494 U.S. 872, 881 (1990).

286. *See* RAVITCH, *supra* note 1, at 144, 202–03.

287. *See id.* at 202–203. This is what ultimately happened with the highly publicized Indiana RFRA, which now does not allow businesses to discriminate and use the state RFRA as a defense. *See* IND. CODE ANN. § 34-13-9-07 (LexisNexis 2016).

288. *See supra* notes 254-255, and accompanying text; RAVITCH, *supra* note 1, at 99–100.

289. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729–32 (2018).

290. *See supra* notes 254-255, and accompanying text; RAVITCH, *supra* note 1, at 100.

291. *See* discussion *infra* Section III.F.2.

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sex marriage by having other employees perform that function.²⁹² Moreover, expectations are different when someone goes to a supermarket and orders a cake versus going to a small local bakery. It would be expected in the former context that there would be less significant interaction regarding the cake at a supermarket where the couple would likely just tell the employees what they want. In the small bakery context it could be expected that there would be more custom options and design discussion with the baker.

Assuming a state RFRA (or interpretation of the state constitution that provides a pre-*Smith* level of protection for religious freedom claims), the government's compelling interest in prohibiting discrimination is strong—and enforcement of antidiscrimination laws most closely serves that interest—when dealing with less customized products and larger for-profit entities.²⁹³ This does not mean that the government could not meet strict scrutiny in situations involving more customized items created at smaller shops. Rather, it suggests that the context of having a larger entity and less customized products serves as an almost *per se* defense when government enforcement of antidiscrimination laws is challenged by a conscience claim under a RFRA. The larger size of the entity creates a greater expectation for customers that there will not be a denial of service in violation of antidiscrimination laws. The larger size of the entity also allows it to accommodate employees who have conscience-based objections should it so choose, while still serving customers without discriminating against them.²⁹⁴

Moreover, the fact that the products are likely to be less customized limits the store's arguments based on free speech or other grounds for denying services. As Section III.F.2. explains in more detail, there is a significant difference between a refusal to create custom designed products and a refusal to sell products more generally.²⁹⁵ Phillips did not argue he could discriminate in selling over the counter products for a same-sex marriage.²⁹⁶ If he had, any argument that the refusal to sell was based on expressive conduct or the message creating a cake would send

292. This would be similar to the ways in which towns may be able to accommodate clerks who have a religious objection to providing a marriage license to a same-sex couple, assuming there is no discrimination or delay in providing the license. RAVITCH, *supra* note 1, at 62–66.

293. *Id.* at 99–100; see also notes 254–255, and accompanying text.

294. See *supra* note 292 and accompanying text.

295. See discussion *infra* Section III.F.; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1749 (2018) (Ginsburg, J., dissenting).

296. *Masterpiece Cakeshop*, 138 S. Ct. at 1724. Phillips said he would sell and make other products for Craig and Mullins, but he would not make a wedding cake. *Id.*

would have been undermined by his refusal to sell other products. Also, the state would have an even greater interest in “neutrally” enforcing its antidiscrimination laws.²⁹⁷

Additionally, when dealing with for-profit entities, the question of state laws that specifically protect businesses’ conscience claims, but which seem aimed at same-sex marriage or other LGBTQ rights, arises.²⁹⁸ As explained above, these laws may violate the *Masterpiece Cakeshop* Court’s “neutrality” approach by showing hostility toward LGBTQ rights in the conscience claim context, or by favoring some sorts of conscience claims over others.²⁹⁹ If these laws were found constitutional they would provide a defense even for larger companies, but this violation of the “neutrality” principle in a context where conscience claims are likely to interfere with the rights of members of the LGBTQ community suggests these laws are not constitutional, especially if their legislative history shows bias against members of the LGBTQ community.³⁰⁰

Context is important here as well. These laws are designed to specifically allow business owners and others who serve the general public to deny services.³⁰¹ Moreover, Mississippi, and most of the other states considering these sorts of laws, already have RFRA’s to protect religious freedom more generally.³⁰² Thus, these laws exist in a context where the status quo would have been “neutral,” but the new laws favor conscience claims over the rights of a specific group; a group expressing its constitutionally protected rights.³⁰³ The very existence of these laws is a violation of any balanced concept of “neutrality.”

2. Sole Proprietorships and “Ma and Pa” Type Shops

Small businesses raise some issues not raised by larger for-profit entities. First, it may be harder to separate the owners of a small business, especially a sole-proprietorship, from the business itself.³⁰⁴ In some cases, the owners may be the only ones working at the business, or they

297. *Id.* at 1727–28.

298. *See supra* notes 148–59 and accompanying text.

299. *See supra* notes 196–202 and accompanying text.

300. *See supra* notes 148–59 and accompanying text; *see also* Rachel Johnson Hammersmith, *Equality Trumps Religion: Why Indiana’s Religious Freedom Restoration Act is Inherently Promoting Discrimination Based on Sexual Orientation*, 48 U. TOL. L. REV. 109, 111 (2016).

301. *See supra* notes 148–59 and accompanying text.

302. *See* MISS. CODE ANN. § 11-62-1–11-62-19 (2018).

303. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (recognizing constitutional right to same-sex marriage).

304. RAVITCH, *supra* note 1, at 30–31.

may be the only ones performing the service for which the business was created.³⁰⁵ When these businesses serve the public at large and refuse to provide services due to conscience concerns, it may be hard to distinguish whether the business is asserting a conscience claim or the individual is asserting that he or she cannot perform the service. In larger businesses, there may be others who can serve if an individual employee asserts a conscience claim and the employer recognizes it, but this is less likely—although certainly not always so—in smaller businesses.

If a business, whether large or small, refuses to sell products generally to someone based on LGBTQ status, government will have a compelling interest in prohibiting the discrimination,³⁰⁶ and it would be expected that applying a public accommodation law “neutrally” would be narrowly tailored.³⁰⁷ Thus, even in states that provide RFRA-level protection to for-profit entities, the likelihood is that those entities would not prevail if they discriminate based on sexual orientation or sexual identity in selling products in states or localities that have public accommodation laws that protect on these bases.

Most of the issues that have arisen in the context of small shops involve wedding vendors.³⁰⁸ In these situations, if a state has a RFRA, even if that RFRA does not protect for-profit businesses generally,³⁰⁹ small businesses raise some unusual problems. As I have written elsewhere, however, these issues can be solved by some forethought by business owners who provide wedding services, but have conscience concerns over providing services for same-sex weddings.³¹⁰ *Masterpiece Cakeshop* did not hold—and in dicta the Court suggests it would not have held—that small businesses can refuse wedding services for a same-sex couple in violation of state law, even if the refusal is based on religious complicity concerns.³¹¹

If the state has a RFRA, it seems clear the business owners would

305. *See* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018).

306. *See supra* notes 254-255, and accompanying text.

307. *Id.*

308. *Id.* at 78–79, 93; *see, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013) (involving a small photography business that refused to photograph a same-sex commitment ceremony); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1724 (baker refused to bake wedding cake for same-sex wedding).

309. I suggest in my book *Freedom’s Edge: Religious Freedom, Sexual Freedom, and the Future of America* that it would be better for religious freedom in the long run for RFRA to not protect for-profit entities in their definition of “person” due to the greater likelihood these entities would discriminate against members of the general public and also because of the backlash against religious freedom that could result. RAVITCH, *supra* note 1, at 102–03.

310. *Id.* at 91–92.

311. *Masterpiece Cakeshop*, 138 S. Ct. at 1727–28.

be able to assert a substantial burden after *Hobby Lobby*,³¹² and the government would be able to assert a compelling interest after *Masterpiece Cakeshop*.³¹³ Thus, as usual, it would come down to narrow tailoring, and therefore, whether the government's enforcement of the law against the business involved in the specific case is the least restrictive means of supporting the compelling interest.³¹⁴ Assuming the government would allow a shop to prearrange an accommodation that would not cause a discriminatory refusal,³¹⁵ and the business did not endeavor to create one, enforcement of the law would likely meet strict scrutiny.³¹⁶ This is more true today than when Jack Phillips refused service in *Masterpiece Cakeshop* because the Court has since recognized that same-sex marriage is a fundamental right,³¹⁷ and *Masterpiece Cakeshop* and cases like it have put wedding vendors on notice that they may run into these issues if they have conscience-based objections to providing service for a same-sex wedding.³¹⁸

Still, the biggest issue that can arise with small businesses is not one protected by religious freedom,³¹⁹ but rather by the Free Speech Clause, namely, whether the service provided by the business can be categorized as expressive.³²⁰ If so, there may be compelled speech concerns that

312. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 688–93 (2014) (citing 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

313. *Masterpiece Cakeshop*, 138 S. Ct. at 1727–28, 1732; notes 254–55, and accompanying text.

314. RAVITCH, *supra* note 1, at 100.

315. *Id.* at 91–92.

316. *See id.* at 100–02; *See also* notes 254–255, and accompanying text.

317. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

318. 138 S. Ct. at 1727–28; *see, e.g.*, *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1097 (D. Minn. 2017); *Elane Photography v. Willock*, 309 P.3d 53, 58–59 (N.M. 2013); *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 426–27 (App. Div. 2016); *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051, 1056–57 (Or. Ct. App. 2017); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 548–49 (Wash. 2015), *vacated*, 138 S. Ct. 2671 (2018); *see also* RAVITCH, *supra* note 1, at 78–102 (discussing a number of cases involving wedding vendors through 2015); Douglas Laycock, *The Wedding Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49 (2018) (discussing the issue of wedding vendors in light of report on civil liberty by the USCCR); Mark A. Strasser, *What's Fair for Conscientious Objectors Subject to Public Accommodations Laws*, 48 N.M. L. REV. 124 (2018) (discussing various issues wedding vendors have had in providing services for same-sex weddings).

319. This is because without a RFRA, the doctrine from *Smith*, which does not require a religious exemption to laws of general applicability, would apply. *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

320. This was a key issue in the *Masterpiece Cakeshop* case. *See* Ravitch & Scharffs, *supra* note 46, at 68 (suggesting the free speech issue was likely to be the key issue in the case). However, only Justice Clarence Thomas's concurring opinion directly addressed the issue. *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring).

might also raise strict scrutiny analysis.³²¹

Assuming that most small businesses would lose their conscience claims if they refused service for a same-sex wedding, and did not set up a way to avoid the refusal by working with other vendors, an issue still arises about whether government can force a small business to create something for a same-sex wedding using his or her artistic talent.³²² This is the question many thought *Masterpiece Cakeshop* would answer, but it remains unanswered,³²³ as does the level of scrutiny that would apply if the Court found something like designing and making a cake is expressive activity.

If no expressive activity is involved there is no free speech issue. But what about small businesses whose owners provide what they claim is an expressive service, but who refuse to do so for a same-sex wedding? Assuming that they do not refuse to sell other products or services, the question comes down to whether the service they refuse to provide is actually an expressive activity,³²⁴ and whether the refusal is based on the status of the couple—which would focus the refusal question on the conduct denying service based on a protected classification—or the message the thing being created would convey.³²⁵ In this context, we may find our way back to strict scrutiny, but with a different interest at stake for the wedding vendor than would be at stake under a RFRA.³²⁶

The state, of course, has a compelling interest in enforcing its public accommodation and other antidiscrimination laws.³²⁷ The harder question is whether enforcing the law in this context would be narrowly tailored enough to meet that burden. As is true under a RFRA, narrow tailoring is

321. *Masterpiece Cakeshop*, 138 S. Ct. at 1740, 1745–46 (Thomas, J., concurring). There are, however, plausible arguments that compelled speech does not require the government to meet strict scrutiny, but rather a lower level of scrutiny. See Nat'l Inst. of Family & Life Advoc. v. Harris, 839 F.3d 823, 837–38 (9th Cir. 2016) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 871–72 (1992)), *rev'd*, Nat'l Inst. of Family & Life Advoc. v. Becerra, 138 S. Ct. 2361 (2018).

322. *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring).

323. Ravitch & Scharffs, *supra* note 46, at 74.

324. John G. Culhane, *The Right to Say, but Not to Do: Balancing First Amendment Freedom of Expression with the Anti-Discrimination Imperative*, 24 WIDENER L. REV. 235, 249–52 (2018).

325. The question of status versus message was a central question in the *Masterpiece Cakeshop* briefs and arguments. See Brief for Respondents Charlie Craig & David Mullins at 14–16, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); Brief for Respondent Colorado Civil Rights Commission at 21–26, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111). The oral arguments can be found at the following link: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf (last visited Apr. 11, 2019).

326. *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring).

327. See *supra* notes 254-255, and accompanying text.

an exceptionally hard test to meet, and the state would have to show that there are no less-restrictive means available to enforce the public accommodation or antidiscrimination law.³²⁸ This may be possible, since courts have acknowledged that neutral enforcement of antidiscrimination laws can be the most narrowly tailored way to meet the compelling interest of preventing discrimination.³²⁹ The state would have a strong argument that granting for-profit entities religious exemptions to antidiscrimination laws could lead to broader discrimination.³³⁰ Moreover, if the antidiscrimination law involved is a public accommodation law, the state could argue that if a free speech claim were successful there would be places same-sex couples could be denied a particular service entirely.³³¹ How courts would rule on this issue is unclear. There are, however, a few examples suggesting the state could win, either because the service provided by the vendor is not expressive activity protected by the Free Speech Clause, or because the state can meet the level of scrutiny required for compelled speech.³³²

CONCLUSION

The conflict between religiously grounded conscience claims and discrimination against members of the LGBTQ community has been exaggerated.³³³ Yet, complicity claims, especially by for-profit entities, raise significant concerns when they conflict with antidiscrimination laws.³³⁴ To address the conflict between complicity and discrimination, formalistic, bright-line solutions are too simplistic. An approach that looks at the setting and context when conscience and discrimination conflict is better equipped to capture the core human values on both sides and to address these important questions without engaging in a game of brinksmanship where it is assumed that one right will always prevail over the other even in contexts where compromise can be found that protects both rights.

The U.S. Supreme Court's recent decision in *Masterpiece*

328. *Shelton v. Tucker*, 364 U.S. 479, 493 (1960).

329. *See supra* notes 254-255, and accompanying text.

330. *Masterpiece Cakeshop*, 138 S. Ct. at 1727-28.

331. *See id.*; *see also* RAVITCH, *supra* note 1, at 91.

332. *See, e.g.*, *State of Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 557 (Wash. 2017) (first quoting *Rumsfeld v. Forum for Acad. Inst. Rights, Inc.*, 547 U.S. 47, 64 (2006); and then quoting *Spence v. Wash.*, 418 U.S. 405, 410-11 (1974)), *vacated*, 138 S. Ct. 2671 (2018); *see also* RAVITCH, *supra* note 1, at 78-102.

333. *See generally* RAVITCH, *supra* note 1 (addressing the fact that outside of for-profit entities discriminating, most issues at the nexus of religious conscience claims and LGBTQ rights can be resolved in a manner that strongly preserves rights on both sides).

334. *See* discussion *supra* Sections III.C.F.

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Cakeshop, includes dicta supporting the contextual approach.³³⁵ The Court suggests that for-profit entities are on much weaker footing when they assert complicity defenses to public accommodation and antidiscrimination claims than are clergy and religious entities.³³⁶ This is important because it demonstrates that in cases where conscience and discrimination conflict, there may be ways to resolve cases by considering all the factors involved. *Masterpiece Cakeshop*, while a frustratingly limited decision, also suggests an expansion of the neutrality principle in free exercise cases.³³⁷ In *Masterpiece Cakeshop* that principle worked against a state attempting to enforce its antidiscrimination law because the Court found state actors showed hostility toward religion.³³⁸ Yet, in other cases the neutrality principle may work against state actors trying to discriminate against members of the LGBTQ community. The contextual approach proposed in this article helps demonstrate why this is so.

335. 138 S. Ct. at 1727–28.

336. *Id.*

337. *Id.* at 1729–32.

338. *Id.* at 1729–31.