

NO. 17-833

IN THE SUPREME COURT OF THE UNITED
STATES

ROGER J. LUCAS,

Petitioner,

v.

THE OFFICE OF THE COLORADO STATE
PUBLIC DEFENDER,
DOUGLAS K. WILSON, individually and in his
official capacity, and
CARRIE THOMPSON, individually and in her
official capacity,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth
Circuit**

PETITION FOR REHEARING

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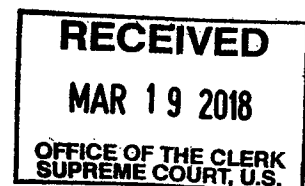


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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Roger J. Lucas respectfully petitions for rehearing of this Court's February 20th, 2018, Order denying his petition for certiorari, requesting the Court consider this case with merits briefing and oral argument. This petition is being filed within 25 days of the Court's Order denying certiorari review.

REASONS WHY CERT SHOULD BE GRANTED

Petitioner Lucas contends this Court may have overlooked the significance of the issues raised in this case, being advanced by a *pro se* litigant without any support from amicus curiae, and humbly requests the Court reconsider its Order denying his petition for a writ of certiorari. As grounds for this Petition for Rehearing, Lucas cites to two significant issues currently at the center of our national conversation- the overwhelming claims of "sexual harassment" that are being levied against men throughout this country, and this Court's anticipated ruling in the *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* case, No. 16-111, which went to oral argument on December 5th, 2017 (<http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/>). Lucas contends that an Opinion in this case is necessary to provide much needed guidance to assist courts and litigants in properly resolving sexual harassment claims, as well as all discrimination claims in every context, by re-addressing the proper burdens of proof under the *McDonnell-Douglas* analysis.

Lucas filed suit in 2015, alleging unlawful employment discrimination and retaliation after he was falsely accused of “inappropriate conduct” towards a female co-worker while he was a state employee for the Office of the Colorado State Public Defender. At the trial level and on appeal, Lucas argued that the clear deprivation of any semblance of procedural due process prior to the adverse treatment he was subjected to warrants a finding of discrimination as a matter of law in his favor, offering a thorough analysis of this Court’s significant opinions following the creation of the *McDonnell-Douglas* framework which was intended to establish the appropriate allocations of burdens of proof in discrimination cases, contending that the source of the breakdown of this burden-shifting framework can be found in this Court’s opinion in *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000).

Rule 44.2 allows for rehearing of an order denying a petition for a writ of certiorari based on “intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.”

Rule 10 of this Court outlines the considerations governing certiorari review: “a) a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned

such a departure by a lower court, as to call for an exercise of this Court's supervisory power" and "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." All of these considerations are present here.

In *Camreta v. Greene*, this Court explained "What we actually will choose to review is a different matter. That choice will be governed by the ordinary principles informing our decision whether to grant certiorari—a 'power [we]...sparingly exercise[e].'" 563 U.S. 692, 709 (2011)(citing to *Forsythe v. Hammond*, 166 U.S. 506, 514 (1897)(this Court grants review "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict [in the lower courts], or some matter affecting the interests of this nation...demands such exercise"))).

This Court's guidance on the criteria for granting a Petition for Rehearing is sparse. (see, e.g., Vito, Brian de, "When U.S. Supreme Court Decisions Are Not Final: An Examination of the Rehearing Rule and the Court's Application of It in *Kennedy v. Louisiana*" Law School Scholarship, Paper 26, Seton Hall Law (2010)). Given the current controversies at the forefront of this nation, this Court should take the opportunity provided by this case to clarify the constitutional considerations surrounding claims of sexual harassment and discrimination, in order to fulfill its obligations owed to our judicial system and society. Currently, there

is an extreme error in this Court's opinions that has confused and confounded our discrimination jurisprudence, which can easily be corrected by addressing Lucas' arguments regarding *Reeves*.

I. Given the recent onslaught of highly publicized "sexual harassment" allegations and scandals involving government officials, celebrities, and other high-profile individuals, this country is in real danger of succumbing to a "Victimhood Culture" unless appropriate guidance is provided to ferret out the legitimate claims from the illegitimate ones

Since late 2017, after the allegations surrounding Hollywood producer Harvey Weinstein surfaced, this nation has been barraged with claims of sexual harassment levied against men in all positions throughout this country, including prominent politicians such as President Donald Trump, former President George H.W. Bush, and Senator Al Franken, as well as celebrities and public figures such as Ben Affleck, Dustin Hoffman, and Matt Lauer. (see, e.g., Criss, Doug, "The (incomplete) list of powerful men accused of sexual harassment after Harvey Weinstein," CNN, 11/1/17, <https://www.cnn.com/2017/10/25/us/list-of-accused-after-weinstein-scandal-trnd/index.html>; Editors, "After Weinstein: More than 100 high-powered men accused of sexual misconduct," USA Today, 11/22/17, <https://www.usatoday.com/story/news/2017/11/22/wei>

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Lucas contends that his case can resolve the issue of how to properly address claims of sexual harassment at the workplace, and what procedural safeguards need to be in place to protect the accused from significant damage to their reputations and liberty interests, while still protecting individuals from legitimate abuse. Based on the public's response to the barrage of sexual harassment allegations that are currently surfacing in this country, men are automatically being labeled and treated as wrongdoers after mere allegations are

made without any meaningful investigation being conducted to verify the accusations that are levied.

While there is a significant movement to vindicate women's rights that may very well have been violated through years of undocumented and unchallenged abuse, the pendulum has so far swung in the opposite direction that men are now in danger of having their rights trampled upon when unsubstantiated allegations of "sexual harassment" are merely levied against them, resulting in the immediate destruction of their careers and reputations in our society. Lucas contends this is a form of gender based discriminatory treatment because decisions are being made by employers and agencies motivated at least in part on a person being male, as evidenced by the automatic assumption that they engaged in the conduct they are being accused of, i.e. clear prejudgment against the male. If this occurs in the government context, this should trigger procedural due process protections for the accused, consistent with Constitutional due process guarantees.

In order to protect this nation from succumbing to a "Victimhood Culture," this Court should take this opportunity presented by Lucas' case to quell this undesirable result.

***II. The Nation is in Dire Need of Guidance
in its Discrimination Jurisprudence,
as Evidenced by the National
Conversation Surrounding the
Masterpiece Cakeshop Ltd. v. Colorado***

Civil Rights Commission case, No. 16-111

The *Masterpiece Cakeshop* case demonstrates the need for additional guidance on how to properly resolve discrimination claims that are litigated before the courts across this country, as the case is being viewed by the general public as one in which this Court is being called upon to make a determination on what is more important, Gay Rights or Religious Freedom, instead of explaining the proper discrimination analysis necessary to reach the just and proper conclusion. (see, e.g., French, David, "Stop Misrepresenting Masterpiece Cakeshop," National Review, 11/30/17, <https://www.nationalreview.com/2017/11/masterpiece-cakeshop-case-stop-misrepresenting/>; Weiner, Greg, "There will be no winners in the Supreme Court's wedding cake case," The Washington Post, 12/4/17, https://www.washingtonpost.com/opinions/there-will-be-no-winners-in-the-supreme-courts-wedding-cake-case/2017/12/04/ba297c96-d6e4-11e7-a986-d0a9770d9a3e_story.html?utm_term=.266d239ee2d7; Franke, Katherine, and Smith, Johnathan, "How a Supreme Court Decision for Masterpiece Cakeshop Would Harm Religious Minorities," Slate, 12/4/17, http://www.slate.com/blogs/outward/2017/12/04/a_supreme_court_decision_for_masterpiece_cakeshop_would_harm_religious_minorities.html; Farris, Michael, "Why Masterpiece Cakeshop case could bring a major Supreme Court ruling on free expression," Fox News, 12/4/17, [7](http://www.foxnews.com/opinion/2017/12/04/why-masterpiece-cakeshop-case-could-bring-major-</p></div><div data-bbox=)

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<https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2018/01/11/masterpiece-cakeshop-v-ccrv-a-difficult-balance-for-justices/?slreturn=20180214050517>)

Significantly, it appears neither side in the *Masterpiece Cakeshop* case discusses the applicability of the *McDonnell-Douglas* burden shifting framework in resolving their dispute. Lucas contends that if the framework is properly understood, what this Court is actually being called upon in *Masterpiece* is to make a determination about whether the defendant who is accused of engaging in unlawful discrimination, carried their burden of proffering a “legitimate, non-discriminatory reason” that effectively rebuts the

mandatory presumption that the challenged action was discriminatory under step two of the analysis.

In *Masterpiece*, the plaintiffs contend they were unlawfully discriminated against and should prevail, simply for the defendant-business' failure to provide the full extent of services offered to the general public because of their sexual orientation. Under *McDonnell-Douglas*, because the circumstances surrounding the denial of services gives rise to a mandatory presumption that the store made its' decision to deny services based on sexual orientation, an actionable claim under Colorado's public accommodations law, if defendant does not proffer a reason that rebuts this presumption, plaintiffs are entitled to a judgment as a matter of law. If, however, the defendant's assertion of a First Amendment right to exercise their religious beliefs can serve to rebut the presumption that the full extent of services offered to the public were not offered to the plaintiffs based on discriminatory criteria, a triable issue of fact exists for the ultimate factfinder to resolve. It is at that point that the Plaintiff would have to persuade the factfinder that the reason given is pretextual.

So, this Court is essentially being asked to make a legal determination on whether the assertion of this First Amendment Right to Religious Freedom, can serve to rebut the inference of discrimination surrounding the denial of the business' services that are otherwise offered to other members of the general public, and not whether the proffered reason is pretextual. This determination is the proper determination every court should be making under

step two of the *McDonnell-Douglas* analysis in every discrimination case.

Lucas contends that the issues he raises in his case in resolving the longstanding disputes over the *McDonnell-Douglas* framework's applicability and its oft noted inability to properly track the issues of discrimination are even more significant than the dispute in *Masterpiece*, which has developed into an apparent bi-partisan dispute over whether Gay Rights are more important than Religious Freedom, because the proper application of the framework can reconcile the conflict between these two important constitutional rights under Colorado's anti-discrimination laws.

CONCLUSION

Unlike the *Masterpiece* case, Petitioner Lucas does not have the political support of various amicus curiae supporting his case based on political agendas. He is not a prominent politician or celebrity, nor an attorney from a high-profile law firm advancing his position before this Court. He is a simple individual, who as a former state employee, asserts his constitutional rights were violated by the State of Colorado through the actions of the Colorado State Public Defender's Office.

Apparently, Mr. Lucas is the first litigant to attempt to advance his analysis of the *McDonnell Douglas* framework and to offer a clear explanation on how this important framework lost its ability to properly track the issues of discrimination in all discrimination cases. Notably, the trial judge

acknowledged merit to Lucas' analysis but clearly stated his hands were tied based on the current state of the case law.

Lucas' analysis is logical, clear, and founded on a proper reading of this Court's Opinions. Given the issues this nation is currently facing, there is no reason why this Court should not have granted Lucas' Petition for a Writ of Certiorari.

For the foregoing reasons Petitioner Lucas humbly requests this Court Reconsider its Order Denying his Request for a Writ of Certiorari in order to uphold the promise of our Constitutional rights.

DATED this 15th day of March, 2018.

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CERTIFICATE OF COUNSEL

Pursuant to Rule 44, Rules of the Supreme Court, counsel hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44, paragraph 2, Rules of the Supreme Court, and is being presented in good faith and not for delay.

Roger J. Lucas, Esq.