

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MASTERPIECE CAKESHOP, LTD., ET AL.,)
) Petitioners,)
) v.) No. 16-111
COLORADO CIVIL RIGHTS COMMISSION,)
ET AL.,)
) Respondents.)

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COLORADO CIVIL RIGHTS COMMISSION,)
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Respondents.)
- - - - -

Washington, D.C.

Tuesday, December 5, 2017

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:03 a.m.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 16-111,
5 Masterpiece Cakeshop versus Colorado Civil
6 Rights Commission.

7 Ms. Waggoner.

8 ORAL ARGUMENT OF KRISTEN K. WAGGONER

9 ON BEHALF OF THE PETITIONERS

10 MS. WAGGONER: Mr. Chief Justice, and
11 may it please the Court:

12 The First Amendment prohibits the
13 government from forcing people to express
14 messages that their violate religious
15 convictions. Yet the Commission requires Mr.
16 Phillips to do just that, ordering him to
17 sketch, sculpt, and hand-paint cakes that
18 celebrate a view of marriage in violation of
19 his religious convictions.

20 JUSTICE SOTOMAYOR: Can I ask you --

21 JUSTICE GINSBURG: What if -- what if
22 it's a -- if it's an item off the shelf? That
23 is, they don't commission a cake just for them
24 but they walk into the shop, they see a lovely
25 cake, and they say we'd like to purchase it for

1 the celebration of our marriage tonight.

2 The Colorado law would prohibit that.
3 Would you claim that you are entitled to an
4 exception?

5 MS. WAGGONER: Absolutely not. The
6 compelled speech doctrine is triggered by
7 compelled speech. And in the context of a
8 pre-made cake, that is not compelled speech.

9 Mr. Phillips is happy to sell anything
10 in his store, including --

11 JUSTICE KENNEDY: Well, didn't --
12 didn't he express himself when he made it?

13 MS. WAGGONER: Yes, he did express
14 himself when he made it. And the purpose for
15 which he expressed it is important to the
16 compelled speech doctrine and how it applies,
17 but when he --

18 JUSTICE SOTOMAYOR: I'm sorry, he did
19 refuse to sell --

20 JUSTICE KENNEDY: Well, could I -- but
21 could I get the answer to the question? So --
22 so -- so if it -- if you agree that it's
23 speech, then why can he not refuse to sell the
24 cake that's in the window according to Justice
25 Ginsburg's hypothetical?

1 MS. WAGGONER: Well, in the context of
2 if it's already been placed in the stream of
3 commerce in a public accommodation setting, his
4 speech has been completed. He -- he intended
5 to speak through that cake with the purpose of
6 whatever it was when he created it.

7 In contrast, though, when he has a
8 different purpose, and is expressing a message
9 through a cake, it would render a different
10 result. It's still speech.

11 JUSTICE SOTOMAYOR: I'm sorry, didn't
12 he refuse to sell cupcakes that he sells
13 regularly to the public to some same-sex
14 couples who intended to marry?

15 MS. WAGGONER: That allegation was
16 never involved in the complaint, the formal
17 charges, the ALJ's decision.

18 JUSTICE SOTOMAYOR: But I thought --
19 I'm a little bit surprised by what you're
20 saying because your brief seemed to suggest
21 differently -- that the couple was looking at
22 his already pre-designed cakes that he appears
23 to sell without any customization, and they sat
24 down with him, and he said I don't supply cakes
25 of any kind to gay couples.

1 So I thought this cake was about his
2 refusal to supply a cake for any wedding
3 ceremony.

4 MS. WAGGONER: Justice Sotomayor,
5 that's not how he responded to the couple. The
6 couple came in and they requested a custom cake
7 for their wedding. At that point, they brought
8 in a folder with all kinds of designs they
9 wanted to discuss and ended up purchasing a
10 rainbow-layered cake or -- or received a free
11 rainbow-layered cake, which certainly is
12 expression.

13 The order below requires Mr. Phillips
14 also to include words and symbols on his cakes.
15 It's that broad. So if, for example,
16 Mr. Phillips had used a Bible verse on a cake
17 in the past, he would be compelled to use that
18 Bible verse in a different context.

19 JUSTICE GINSBURG: Where does it --
20 where does it say -- I -- I thought that the
21 requirement was he supply a custom-made cake,
22 as he would to any other shopper, but that he
23 didn't have to convey somebody else's message;
24 that is, he didn't have to write anything on
25 the cake.

1 MS. WAGGONER: In Petitioners'
2 Appendix 57(a), the order is provided, and that
3 order requires him to provide anything that he
4 would provide on a cake in another setting for
5 a marriage between a man and a woman, which
6 includes words and images that he would provide
7 on --

8 JUSTICE GINSBURG: Well, suppose we
9 exclude that and say let's make the assumption
10 that he -- if he makes custom-made cakes for
11 others, he must make it for this pair, but he
12 doesn't have to write anything for anybody. He
13 doesn't have to write a message that he
14 disagrees with.

15 MS. WAGGONER: Well, this Court has
16 recognized in Hurley as well as in other
17 decisions that artistic expression doesn't need
18 to include words and symbols to express a
19 message or to be protected speech.

20 JUSTICE KENNEDY: Well, just -- just
21 one more thing, and then we'll leave this part
22 alone, so at least as far as I'm concerned.
23 Suppose the couple goes in and sees the cake in
24 the window and the cake has a biblical verse.

25 Does he have to sell that cake?

1 MS. WAGGONER: Under our theory, he
2 would need to sell that cake because he's
3 already created that cake with the message that
4 he intended for it, but we are drawing the line
5 prior to the compulsion -- there can be no
6 compulsion of speech.

7 If the Court were to choose to draw
8 that line in a different place and protect more
9 speech, there certainly is precedent for that.
10 But under the compelled speech doctrine, when
11 someone comes in and requests speech, if that
12 speech has already been created, then that
13 would be -- not be compelled.

14 JUSTICE SOTOMAYOR: Could you tell me
15 how far --

16 CHIEF JUSTICE ROBERTS: There's no --
17 there's no -- there's no compulsion of speech,
18 but if he is required to sell a cake in the
19 window with the message already on it, that is
20 compelling him to associate that message with
21 the ceremony. And I thought that was something
22 to which you objected.

23 MS. WAGGONER: There would possibly be
24 an expressive association claim and potentially
25 a free exercise claim if he was delivering the

1 cake and there was other involvement. But in
2 terms of the Court's application of the
3 compelled speech doctrine, the compulsion is
4 the trigger for that, but the Court could draw
5 that line at an earlier place and not force him
6 to sell that cake.

7 JUSTICE GINSBURG: But your --

8 JUSTICE KAGAN: Ms. --

9 JUSTICE GINSBURG: -- the question
10 that I started out with, I -- I wanted to
11 clarify that what you're talking about is a
12 custom-made cake. You are not challenging his
13 obligation to sell his ordinary wares, his, as
14 you put it, already-made wares?

15 MS. WAGGONER: Not at all. And, in
16 fact, Mr. Phillips offered the couple anything
17 in his store, as well as offered to sell
18 additional cakes, custom cakes, that would
19 express other messages.

20 JUSTICE GINSBURG: Going --

21 JUSTICE KAGAN: Ms. Waggoner --

22 JUSTICE GINSBURG: -- you mentioned --
23 you brought up Hurley, but in Hurley, the
24 parade was the event. It was the speech, a
25 parade. At a wedding ceremony, I take it, the

1 speech is of the people who are marrying and
2 perhaps the officiant, but who -- who else
3 speaks at a wedding?

4 MS. WAGGONER: The artist speaks,
5 Justice Ginsburg. It's as much Mr. Phillips's
6 speech as it would be the couples'. And in
7 Hurley, the Court found a violation of the
8 compelled speech doctrine.

9 JUSTICE GINSBURG: Who else then? Who
10 else as an artist? Say the -- the person who
11 does floral arranging, owns a floral shop.
12 Would that person also be speaking at the
13 wedding?

14 MS. WAGGONER: If the -- if they are
15 custom-designed arrangements and they are being
16 forced to create artistic expression which this
17 Court determines is a message --

18 JUSTICE GINSBURG: How about --

19 JUSTICE KAGAN: So could --

20 JUSTICE GINSBURG: -- the person who
21 designs the invitation?

22 MS. WAGGONER: Yes.

23 JUSTICE GINSBURG: The invitation to
24 the wedding or the menu for the wedding dinner?

25 MS. WAGGONER: Certainly, words and

1 symbols would be protected speech, and the
2 question would be whether the objection is to
3 the message provided or if it's to the person.

4 JUSTICE KAGAN: So the jeweler?

5 MS. WAGGONER: It would depend on the
6 context as all free-speech cases depend on.
7 What is the jeweler asked to do?

8 JUSTICE KAGAN: The hairstylist?

9 MS. WAGGONER: Absolutely not.
10 There's no expression or protected speech in
11 that kind of context, but what it would --

12 JUSTICE KAGAN: Why is there no speech
13 in -- in creating a wonderful hairdo?

14 MS. WAGGONER: Well, it may be
15 artistic, it may be creative, but what the
16 Court asks when there's --

17 JUSTICE KAGAN: The makeup artist?

18 MS. WAGGONER: No. What the Court
19 would ask --

20 JUSTICE KAGAN: It's called an artist.
21 It's the makeup artist.

22 (Laughter.)

23 MS. WAGGONER: The makeup artist may,
24 again, be using creativity and artistry, but
25 when this Court is looking at whether speech is

1 involved, it asks the question of is it
2 communicating something, and is it analogous to
3 other protected --

4 JUSTICE KAGAN: But I'm --

5 MS. WAGGONER: -- forms of speech.

6 JUSTICE KAGAN: -- I'm quite serious,
7 actually, about this, because, you know, a
8 makeup artist, I think, might feel exactly as
9 your client does, that they're doing something
10 that's of -- of great aesthetic importance to
11 the -- to the wedding and to -- and that
12 there's a lot of skill and artistic vision that
13 goes into making a -- somebody look beautiful.
14 And why -- why wouldn't that person or the
15 hairstylist -- why wouldn't that also count?

16 MS. WAGGONER: Because it's not
17 speech. And that's the first trigger point of
18 this case --

19 JUSTICE KAGAN: I mean, some people
20 might say that about cakes, you know?

21 MS. WAGGONER: Some --

22 JUSTICE KAGAN: But you have a -- you
23 have a view that a cake can be speech because
24 it -- it involves great skill and artistry.

25 And I guess I'm wondering, if that's

1 the case, you know, how do you draw a line?
2 How do you decide, oh, of course, the chef and
3 the baker are on one side, and you said, I
4 think, the florist is on that side, the chef,
5 the baker, the florist, versus the hairstylist
6 or the makeup artist?

7 I mean, where would you put a tailor,
8 a tailor who makes a wonderful suit of clothes?
9 Where does that come in?

10 MS. WAGGONER: Your Honor, the tailor
11 is not engaged in speech, nor is the chef
12 engaged in speech but, again, this Court --

13 JUSTICE KAGAN: But why well, why --
14 well -- woah. The baker is engaged in speech,
15 but the chef is not engaged in speech?

16 MS. WAGGONER: The -- the test that
17 this Court has used in the past to determine
18 whether speech is engaged in is to ask if it's
19 communicating something, and if whatever is
20 being communicated, the medium used is similar
21 to other mediums that this Court has protected.
22 Not --

23 CHIEF JUSTICE ROBERTS: Does it depend
24 on --

25 JUSTICE SOTOMAYOR: So that begs the

1 question, when have we ever given protection to
2 a food? The primary purpose of a food of any
3 kind is to be eaten.

4 Now, some people might love the
5 aesthetic appeal of a special dessert, and look
6 at it for a very long time, but in the end its
7 only purpose is to be eaten.

8 And the same with many of the things
9 that you've mentioned. A hairdo is to show off
10 the person, not the artist. When people at a
11 wedding look at a wedding cake and they see
12 words, as one of the amici here, the pastry
13 chef said, there was a gentleman who had upset
14 his wife and written some words that said "I'm
15 sorry for what I did," something comparable,
16 and the chef was asked -- the cake maker was
17 asked, was that affiliated with you?

18 And she said no. It's affiliated with
19 the person who shows the cake at their wedding.
20 It's what they wish to show.

21 So how is this your client's
22 expression, and how can we find something whose
23 predominant purpose is virtually always to be
24 eaten? Call it a medium for expressive
25 expression. Mind you, I can see if they've --

1 create a cake and put it in a museum as an
2 example of some work of art, that might be
3 different because the circumstances would show
4 that they want this to be affiliated with
5 themselves.

6 But explain how that becomes
7 expressive speech, that medium becomes
8 expressive speech.

9 MS. WAGGONER: Certainly not all cakes
10 would be considered speech, but in the wedding
11 context, Mr. Phillips is painting on a blank
12 canvas. He is creating a painting on that
13 canvas that expresses messages, and including
14 words and symbols in those messages.

15 JUSTICE SOTOMAYOR: You know, the
16 other night I had some people over and one of
17 them brought a box of cupcakes and one of the
18 cupcakes was smashed against the box. That was
19 the only cupcake not eaten.

20 Now, I suspect that one of the reasons
21 is the others were so much more attractive
22 whole. There is creation in serving food, in
23 creating any type of edible product.

24 People -- there are sandwich artists
25 now. There are people who create beauty in

1 what they make, but we still don't call it
2 expressive and entitled to First Amendment
3 protection.

4 MS. WAGGONER: No, but when we have
5 someone that is sketching and sculpting and
6 hand designing something, that is creating a
7 temporary sculpture that serves as the
8 centerpiece of what they believe to be a
9 religious wedding celebration, that cake
10 expresses a message.

11 JUSTICE SOTOMAYOR: All right.

12 JUSTICE KAGAN: Is this just a --

13 JUSTICE ALITO: What would you say
14 about an architectural design? Is that
15 entitled to -- not entitled to First Amendment
16 protection because one might say that the
17 primary purpose of the design of a building is
18 to create a place where people can live or
19 work?

20 MS. WAGGONER: Precisely. In the
21 context of an architect, generally that would
22 not be protected because buildings are
23 functionable, not communicative.

24 JUSTICE ALITO: You mean an
25 architectural design is not protected?

1 MS. WAGGONER: No. Architect --
2 generally speaking, architecture would not be
3 protected. It would --

4 JUSTICE BREYER: So, in other words,
5 Mies or Michelangelo or someone is not
6 protected when he creates the Laurentian steps,
7 but this cake baker is protected when he
8 creates the cake without any message on it for
9 a wedding? Now, that -- that really does
10 baffle me, I have to say.

11 MS. WAGGONER: Well, I did say
12 generally no in terms of architecture.

13 JUSTICE BREYER: All right, then, what
14 is the line? That's what everybody's trying to
15 get at, because obviously we've all gone -- I
16 went to a Mexican restaurant. They have this
17 fabulous Mole specially made for the people at
18 the table to show what important and wonderful
19 evening it was, which it did import -- impart.

20 There are all kinds of restaurants
21 that do that. And maybe Ollie's Barbecue, you
22 know, maybe Ollie thought he had special
23 barbecue.

24 All right. Now, the reason we're
25 asking these questions is because obviously we

1 would want some kind of distinction that will
2 not undermine every civil rights law from the
3 -- from -- from the year two -- including the
4 African Americans, including the Hispanic
5 Americans, including everybody who has been
6 discriminated against in very basic things of
7 life, food, design of furniture, homes, and
8 buildings.

9 Now, that is, I think, the point of
10 the question, and I've tried to narrow it and
11 specify it to get your answer.

12 MS. WAGGONER: Thank you, Justice
13 Breyer. In terms of the test that would be
14 applied, the Court would first ask under the
15 speech analysis, is there speech? And by
16 asking that, you're asking is there something
17 that's being communicated and is it a protected
18 --

19 JUSTICE BREYER: And there isn't one
20 of the people I mentioned who doesn't think
21 he's communicating something. What do you
22 think they're doing when they're making the
23 Essow or the building?

24 MS. WAGGONER: It's not just about
25 what the individual thinks they're

1 communicating, though. This Court also
2 routinely makes that inquiry in all kinds of
3 situations in all free-speech cases.

4 Second, though, the Hurley framework
5 provides a framework for this Court to make
6 those decisions and to protect individuals.
7 The way that it does that is it asks: Is the
8 individual who's being compelled to speak
9 objecting to the message that's contained in
10 that speech or the person? And that's usually
11 a very obvious inquiry. If it's connected --

12 JUSTICE SOTOMAYOR: Would you stop --
13 would that belief that expresses speech trump
14 public accommodation laws against
15 discrimination or protecting customers from
16 race? Yes or no.

17 MS. WAGGONER: This Court has never
18 compelled speech in the context of race, but if
19 it were ever to do so --

20 JUSTICE SOTOMAYOR: Oh, it didn't in
21 Newman versus Piggie?

22 MS. WAGGONER: Not in terms of
23 compelling speech.

24 JUSTICE SOTOMAYOR: There was a -- he
25 claimed that he was religious, that he opposed

1 serving blacks because it mixed the races, and
2 we basically refused both his free expression
3 and his free exercise clauses. So are you
4 saying that your rule now would trump
5 protection against race discrimination?

6 MS. WAGGONER: Respectfully, Your
7 Honor, I don't think this Court has ever
8 compelled speech in the context of --

9 JUSTICE SOTOMAYOR: I'll read Newman
10 myself.

11 JUSTICE KAGAN: But, I'm sorry, could
12 I just --

13 JUSTICE SOTOMAYOR: Answer my
14 question.

15 JUSTICE KAGAN: -- understand your --

16 JUSTICE SOTOMAYOR: It's your theory
17 -- is your theory that you -- that you --
18 public accommodation laws cannot trump free
19 speech or free-exercise claims in protecting
20 against race discrimination?

21 MS. WAGGONER: That is not my theory.
22 That would be an objection to the person and
23 the Court may find a compelling interest in
24 that --

25 JUSTICE KAGAN: But if I could just,

1 sorry, very quickly, I know your light is on
2 and I'm sure you'll be given a little bit of an
3 adjustment. Is that okay?

4 (Laughter.)

5 JUSTICE KAGAN: I guess I just didn't
6 understand your answers to Justice Sotomayor's
7 question. Same case or not the same case, if
8 your client instead objected to an interracial
9 marriage?

10 MS. WAGGONER: Very different case in
11 that context.

12 JUSTICE KAGAN: Not the same. How
13 about if he objected to an interreligious?

14 MS. WAGGONER: Similar case, assuming
15 that the objection is to --

16 JUSTICE KAGAN: Similar to what?

17 MS. WAGGONER: Similar to Mr.
18 Phillips. That would be protected under the
19 Compelled Speech doctrine if the objection is
20 to the message being conveyed in that
21 expression.

22 JUSTICE KAGAN: You're just saying
23 race is different?

24 MS. WAGGONER: I'm saying yes --

25 JUSTICE KAGAN: I mean, I don't want

1 to put words in your mouth. I -- I just
2 really, you know, just want to know the answer.

3 MS. WAGGONER: I think race is
4 different for two reasons: one, we know that
5 that objection would be based to who the person
6 is, rather than what the message is.

7 And, second, even if that were not the
8 case, the Court could find a compelling
9 interest in the race inquiry just as it did in
10 the Pena-Rodriguez case. There are no --

11 JUSTICE SOTOMAYOR: So how about
12 disability; I'm not going to serve cakes to two
13 disabled people because God makes perfect
14 creations, and there are some religions who
15 believe that?

16 MS. WAGGONER: Well, I'm --

17 JUSTICE SOTOMAYOR: So how about
18 there?

19 MS. WAGGONER: -- I'm not aware of any
20 religions that believe that, but, if they did,
21 that would clearly be based on who the person
22 is and not the message in the final product
23 that's -- they're being asked to create.

24 JUSTICE SOTOMAYOR: Well, your client
25 was saying that providing a cake to a same-sex

1 couple was against his free-expression rights
2 because -- and his free-exercise rights,
3 because he cannot celebrate that kind of
4 marriage.

5 MS. WAGGONER: Mr. Phillips is looking
6 at not the "who" but the "what" in these
7 instances, what the message is. And for 25
8 years, he --

9 JUSTICE GORSUCH: Well, actually,
10 counsel, that seems to be a point of
11 contention. The state seems to concede that if
12 it were the message, your -- your client would
13 have a right to refuse. But if it -- the
14 objection is to the person, that's when the
15 discrimination law kicks in. That's Footnote 8
16 of the Colorado Court of Appeals' decision. I
17 know you know this.

18 So what do you say to that, that
19 actually what is happening here may
20 superficially look like it's about the message,
21 but it's really about the person's identity?

22 MS. WAGGONER: I would say that in
23 Footnote 8, the court applies an offensiveness
24 policy, which allows the state the discretion
25 to decide what speech is offensive and what is

1 not, and it did not apply that in a fair way to
2 Mr. Phillips, which creates viewpoint
3 discrimination, as well as a violation of free
4 exercise -- the Free Exercise Clause.

5 But what's deeply concerning is that
6 is not the theory that Respondents are
7 submitting to this Court today. They believe
8 that they can compel speech, of filmmakers, oil
9 painters, and graphic designers in all kinds of
10 contexts.

11 If there are no further questions, I
12 would reserver -- like to reserve the balance
13 of my time.

14 CHIEF JUSTICE ROBERTS: We'll afford
15 you the full rebuttal time.

16 MS. WAGGONER: Thank you.

17 CHIEF JUSTICE ROBERTS: Sure.

18 General Francisco.

19 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO
20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING THE PETITIONERS

22 GENERAL FRANCISCO: Mr. Chief Justice,
23 and may it -- may it please the Court:

24 This case raises an important issue
25 for a small group of individuals, namely,

1 whether the state may compel business owners,
2 including professional artists, to engage in
3 speech in connection with an expressive event
4 like a marriage celebration to which they're
5 deeply opposed.

6 In those narrow circumstances, we
7 believe the Free Speech Clause provides
8 breathing space --

9 JUSTICE GINSBURG: How narrow is it?
10 Consider Justice Kagan's question. I mean,
11 we've gotten the answer that the florist is in
12 the same place as the cake-maker, so is the
13 person who designs the invitations and the
14 menus. I don't see a line that can be drawn
15 that would exclude the -- the makeup artist or
16 the hairstylist.

17 GENERAL FRANCISCO: Well, Your Honor,
18 that's, of course, a question that the course
19 has -- Court has to answer at the threshold of
20 every Free Speech Case. Is the thing that's
21 being regulated something we call protected
22 speech? I think the problem for my friends on
23 the other side is that they think the question
24 doesn't even matter. So they would compel an
25 African-American sculptor to sculpt a cross for

1 a Klan service --

2 JUSTICE KENNEDY: But the problem for
3 you is that so many of these examples -- and a
4 photographer can be included -- do involve
5 speech. It means that there's basically an
6 ability to boycott gay marriages.

7 GENERAL FRANCISCO: Well, Your Honor,
8 I think that what it boils down to is that in a
9 narrow category of services that do cross the
10 threshold into protected speech -- and I do
11 think it's a relatively narrow category -- you
12 do have protection. For example, I don't think
13 you could force the African-American sculptor
14 to sculpt a cross for the Klan service just
15 because he'd do it for religious services.

16 JUSTICE KAGAN: Mr. --

17 JUSTICE KENNEDY: If you prevail,
18 could the baker put a sign in his window, we do
19 not bake cakes for gay weddings?

20 GENERAL FRANCISCO: Your Honor, I
21 think that he could say he does not make
22 custom-made wedding cakes for gay weddings, but
23 most cakes --

24 JUSTICE KENNEDY: And you would not --

25 GENERAL FRANCISCO: -- would not cross

1 that threshold.

2 JUSTICE KENNEDY: -- consider that an
3 affront to the gay community?

4 GENERAL FRANCISCO: Well, Your Honor,
5 I -- I agree that there are dignity interests
6 at stake here, and I would not minimize the
7 dignity interests to Mr. Craig and Mr. Mullins
8 one bit, but there are dignity interests on the
9 other side here too.

10 JUSTICE SOTOMAYOR: Counsel, sometimes
11 it's not just dignity. A couple of the
12 briefs -- one of the amici briefs pointed out
13 that most military bases are in isolated areas
14 far from cities and that they're in areas where
15 the general population, service population, is
16 of one religion or close to one religious
17 belief.

18 GENERAL FRANCISCO: Uh-huh.

19 JUSTICE SOTOMAYOR: So where there
20 might be two cake bakers. They name a couple
21 of military bases like that. Or two florists
22 or one photographer. Very small number of
23 resources.

24 GENERAL FRANCISCO: Right.

25 JUSTICE SOTOMAYOR: And in those

1 situations, they posit, and I don't think
2 probably wrongly, that it may come to pass
3 where the two cake bakers will claim the same
4 abstention here. So how do we protect the
5 military men and women who are of the same sex
6 who want to get married in that town because
7 that's where all their friends are, because the
8 base is there?

9 GENERAL FRANCISCO: Right.

10 JUSTICE SOTOMAYOR: All right? How do
11 we protect those people?

12 GENERAL FRANCISCO: And, Your Honor, I
13 think that is precisely a situation where the
14 state would be able to satisfy heightened
15 scrutiny because their interests in providing
16 access to goods and services would be narrowly
17 tailored.

18 JUSTICE SOTOMAYOR: So -- but isn't
19 that -- isn't that the same for everybody?
20 Meaning, look, we live in a society with
21 competing beliefs, and all of our cases have
22 always said where LGBT people have been -- you
23 know, they've been humiliated, disrespected,
24 treated uncivilly. The briefs are filled with
25 situations that --

1 GENERAL FRANCISCO: Right.

2 JUSTICE SOTOMAYOR: -- the gay couple
3 who was left on the side of the highway on a
4 rainy night, people who have been denied
5 medical treatment or whose children have been
6 denied medical treatment because the doctor
7 didn't believe in same-sex parenthood, et
8 cetera.

9 GENERAL FRANCISCO: Mm-hmm.

10 JUSTICE SOTOMAYOR: We've always said
11 in our public accommodations law we can't
12 change your private beliefs, we can't compel
13 you to like these people, we can't compel you
14 to bring them into your home, but if you want
15 to be a part of our community, of our civic
16 community, there's certain behavior, conduct --

17 GENERAL FRANCISCO: Right.

18 JUSTICE SOTOMAYOR: -- you can't
19 engage in. And that includes not selling
20 products that you sell to everyone else to
21 people simply because of their either race,
22 religion, national origin, gender, and in this
23 case sexual orientation.

24 So we can't legislate civility and
25 rudeness, but we can and have permitted it as a

1 compelling state interest legislating behavior.

2 GENERAL FRANCISCO: And --

3 JUSTICE SOTOMAYOR: So why is not
4 selling or selling to one group as opposed to
5 another not behavior?

6 GENERAL FRANCISCO: And, Your Honor,
7 if I could respond, I think it's because here
8 we have speech involved, and this case is
9 essentially the flip side of the Hurley case.

10 In Hurley, we couldn't force a parade
11 to include a particular speaker. Here, we
12 don't think you can --

13 JUSTICE SOTOMAYOR: That was a private
14 parade.

15 GENERAL FRANCISCO: And here, Your
16 Honor, we don't think you can force a speaker
17 to join the parade, because when you force a
18 speaker to both engage in speech and contribute
19 that speech to an expressive event that they
20 disagree with, you fundamentally transform the
21 nature of their message from one that they want
22 to say to one that they don't want to say.

23 JUSTICE GINSBURG: How about if it's
24 --

25 JUSTICE KAGAN: So, General, you

1 started by --

2 JUSTICE GINSBURG: -- if it's a -- if
3 it's a question of race? There's a certain
4 irony in here because one of the things that
5 anti-discrimination in public accommodations is
6 supposed to do is to protect religion, minority
7 religions.

8 GENERAL FRANCISCO: Uh-huh.

9 JUSTICE GINSBURG: So you -- you have
10 already said that you put -- might put race in
11 a different category, right?

12 GENERAL FRANCISCO: Yes, Your Honor.

13 JUSTICE GINSBURG: How about gender?

14 GENERAL FRANCISCO: Well, Your Honor,
15 I think that race is particularly unique
16 because when it comes to racial
17 discrimination states have --

18 JUSTICE GINSBURG: Well, I asked you
19 what about --

20 GENERAL FRANCISCO: Sure. I think --
21 I think --

22 JUSTICE GINSBURG: I have your answer
23 on race. How about gender? How about national
24 origin --

25 GENERAL FRANCISCO: Right.

1 JUSTICE GINSBURG: -- and religion?

2 GENERAL FRANCISCO: I think pretty
3 much everything but race would fall in the same
4 category, but as this Court made clear in the
5 Bob Jones case, the IRS could withdraw
6 tax-exempt status from a school that
7 discriminated on the basis of interracial
8 marriage, but I'm not at all sure that it would
9 reach the same result if it were dealing with a
10 Catholic school that limited married student
11 housing to opposite-sex couples only.

12 I think when you get to this case, if
13 you agree with our test -- and I know that I
14 have a little bit of an uphill battle in
15 convincing some of you of that. If you agree
16 with our test, I think the heightened scrutiny
17 standard is particularly easy because they're
18 the same interests at stake as were at stake in
19 Hurley.

20 And if I could --

21 JUSTICE KAGAN: General, it -- it
22 seems as though there are kind of three axes on
23 which people are asking you what's the line?
24 How do we draw the line? So one axis is what
25 we started with, like what about the chef and

1 the florist --

2 GENERAL FRANCISCO: Speech,
3 non-speech.

4 JUSTICE KAGAN: -- and -- and, you
5 know, everybody else that participates --

6 GENERAL FRANCISCO: Uh-huh.

7 JUSTICE KAGAN: -- in a wedding?

8 A second axis is, well, why is this
9 only about gay people? Why isn't it about
10 race? Why isn't it about gender? Why isn't it
11 about people of different religions? So that's
12 a second axis.

13 GENERAL FRANCISCO: Uh-huh.

14 JUSTICE KAGAN: And there's a third
15 axis, which is why is it just about weddings?
16 You say ceremonies, events. What else counts?
17 Is it the funeral? Is it the Bar Mitzvah or
18 the communion? Is it the anniversary
19 celebration? Is it the birthday celebration?

20 So there are all three of these that
21 suggest like, whoa, this doesn't seem like such
22 a small thing. And so let me just give you one
23 hypothetical and then you can answer more
24 broadly.

25 GENERAL FRANCISCO: Thank you.

1 JUSTICE KAGAN: Which, you know -- so
2 let me -- I'll just pick one of those. It's
3 like how about a -- a -- a -- a couple, a
4 same-sex couple goes to a great restaurant with
5 a great chef for an anniversary celebration,
6 and the great chef says I don't do this for
7 same-sex couples? How about that?

8 GENERAL FRANCISCO: So, Your Honor, if
9 I could answer that question starting out with
10 another example that illustrates the point in
11 applying it to your example --

12 JUSTICE KAGAN: Well, I'd like my
13 example, please.

14 (Laughter.)

15 GENERAL FRANCISCO: Sure. So, in your
16 example, I would first say, one, there's no
17 speech involved and, two, there's --

18 JUSTICE KAGAN: No, there is.

19 GENERAL FRANCISCO: -- probably no
20 expressive event.

21 JUSTICE KAGAN: The chef is expressing
22 something about how he feels --

23 GENERAL FRANCISCO: Right.

24 JUSTICE KAGAN: -- about same-sex
25 couples and same-sex marriage. He doesn't want

1 to celebrate a same- -- the anniversary of a
2 same-sex marriage.

3 GENERAL FRANCISCO: And that's where
4 --

5 JUSTICE KAGAN: Just like --

6 GENERAL FRANCISCO: Sure.

7 JUSTICE KAGAN: -- the baker doesn't
8 want to celebrate a same-sex marriage.

9 GENERAL FRANCISCO: And that's where
10 I'd go to something that I think that my
11 friends on the other side have to deal with, is
12 often is the case in First Amendment law you're
13 dealing with something that some -- everybody
14 clearly agrees is speech. And what makes this
15 case difficult is because we're kind of on that
16 line. Is it speech or is it not speech?

17 We think it's on the speech side of
18 the line. But take, for example, the sculptor
19 who does not want to sculpt that cross.

20 JUSTICE KAGAN: Well, I -- Mr. --
21 General, really, I mean, could -- could we just
22 -- I -- I guess I'd like an answer to my
23 hypothetical.

24 GENERAL FRANCISCO: Sure. So the
25 answer to your hypothetical is, as this Court

1 has repeatedly said, not everything that
2 expresses a message is speech. I think when it
3 comes to --

4 JUSTICE KAGAN: So the baker is
5 speech, but the -- the great chef who's like
6 everything is perfect on the plate and it's a
7 work of art, it's a masterpiece?

8 GENERAL FRANCISCO: Well, Your Honor,
9 you have to confront that issue in every First
10 Amendment case, if you're --

11 JUSTICE ALITO: You know, General, my
12 -- my colleagues I think go to more elite
13 restaurants than I do, but my --

14 (Laughter.)

15 GENERAL FRANCISCO: Same here, Your
16 Honor.

17 JUSTICE ALITO: I -- I -- I think that
18 if --

19 JUSTICE KAGAN: Well, Ollie's
20 Barbecue.

21 JUSTICE ALITO: If -- if in my -- if
22 in my dreams I could go to a Michelin, I don't
23 know, one-tenth star, I don't know, two-star
24 restaurant, and there was a menu of wonderful
25 dishes created by the chef with -- with great

1 creativity, and I said I really don't want any
2 of these. Here is the recipe. I -- I want you
3 to make this for me. Do you think he'd do
4 that?

5 GENERAL FRANCISCO: Probably not, Your
6 Honor, but I think the critical question always
7 --

8 JUSTICE ALITO: He's serving up -- he
9 creates something when he makes -- when he
10 devises those dishes and when somebody comes in
11 and asks to buy one, he is just mechanically
12 producing another example of the thing that he
13 created earlier.

14 GENERAL FRANCISCO: Yes. Justice --
15 Mr. Chief Justice, may I answer?

16 CHIEF JUSTICE ROBERTS: Why don't --
17 why don't you take an extra five minutes and
18 I'll accord the same to your friends.

19 GENERAL FRANCISCO: Well, thank you.
20 And so what happens, though, in every
21 free-speech case you've got to make that
22 initial cut. Does it cross the line into
23 protected speech? And if it does, and I
24 understand --

25 JUSTICE KAGAN: Okay. How about the

1 same cake, if you don't -- if you want to, as I
2 understand it, you want to treat the chef
3 differently from the baker, but let's say the
4 same cake, and a couple comes in, a same-sex
5 couple, and says it's our first-year
6 anniversary, and we would like a special cake
7 for it.

8 Can he then say no -- no? No cake?

9 GENERAL FRANCISCO: Well, Your Honor,
10 if it's the exact same cake and it crosses that
11 threshold into speech, I would say --

12 JUSTICE KAGAN: It's a great cake.

13 GENERAL FRANCISCO: Yeah, he can --

14 JUSTICE KAGAN: What do you mean is it
15 the exact same cake?

16 GENERAL FRANCISCO: No, what I'm
17 saying is if it's the same type of
18 highly-sculpted stylized cake that Mr. Phillips
19 makes, such that in our view it crosses the
20 line into speech, then you can't force him to
21 create that any more than you can force the
22 sculptor --

23 JUSTICE GORSUCH: So, General, what --
24 what is the line? How -- how would you have
25 this Court draw the line?

1 GENERAL FRANCISCO: Sure. There are a
2 couple ways to --

3 JUSTICE GORSUCH: You've been asked a
4 lot of specifics --

5 GENERAL FRANCISCO: Yeah.

6 JUSTICE GORSUCH: -- but I'd -- I'd
7 appreciate a more abstract general rule that
8 the government suggests.

9 GENERAL FRANCISCO: I think there are
10 a couple of ways to draw that line, and this is
11 something that the Court has to struggle with
12 in a lot of cases. I think the first way to
13 draw that line is you analogize it to something
14 that everyone regards as traditional art and
15 everyone agrees is protected speech.

16 JUSTICE GORSUCH: Like the Jackson
17 Pollock?

18 GENERAL FRANCISCO: Exactly. And here
19 you have a cake that is essentially synonymous
20 with a traditional sculpture except for the
21 medium used. But I also think that the Second
22 Circuit's decision in the Mastrovincenzo case
23 provides a good and workable standard when
24 you've got something that is part art and part
25 utilitarian.

1 And what the Second Circuit asks is,
2 is it predominantly art or predominantly
3 utilitarian? And here people pay very high
4 prices for these highly sculpted cakes, not
5 because they taste good, but because of their
6 artistic qualities.

7 I think the more important point --
8 JUSTICE GORSUCH: In fact, I have yet
9 to have a -- a wedding cake that I would say
10 tastes great.

11 (Laughter.)

12 GENERAL FRANCISCO: And, Your Honor,
13 my wedding cake, the top of it is still sitting
14 in our freezer, and I'm sure it no longer
15 tastes great.

16 JUSTICE GORSUCH: Yeah.

17 GENERAL FRANCISCO: But I think the
18 point is when you cross that threshold into
19 free speech, the question is can you compel
20 somebody to create and contribute speech to an
21 expressive event --

22 JUSTICE GORSUCH: Is it a predominant
23 purpose test --

24 GENERAL FRANCISCO: -- that they
25 oppose.

1 JUSTICE KAGAN: How about this --

2 JUSTICE GORSUCH: -- or is it -- would
3 you say it's a predominant purpose or a
4 predominant effect? How would you characterize
5 that?

6 GENERAL FRANCISCO: So if you're
7 talking about the line between speech and
8 non-speech --

9 JUSTICE GORSUCH: Yes.

10 GENERAL FRANCISCO: -- with the item
11 that's part utilitarian and part art --

12 JUSTICE GORSUCH: Yes, yes.

13 GENERAL FRANCISCO: I'd say is it
14 predominantly expressive or predominantly
15 utilitarian?

16 JUSTICE GORSUCH: In its purpose or
17 its effect on others?

18 GENERAL FRANCISCO: I think -- I think
19 both. And I think one of the key factors that
20 the Second Circuit looks to, it looks to a
21 bunch of different factors, but one factor is
22 price. Are people paying for the utilitarian
23 side of it or are they paying for the artistic
24 side of it?

25 JUSTICE SOTOMAYOR: I'm not going to

1 --

2 JUSTICE KAGAN: What if somebody comes
3 in, it's a baker who's an atheist and really
4 can't stand any religion, and somebody comes in
5 and says I want one of your very, very special,
6 special cakes for a First Communion --

7 GENERAL FRANCISCO: Uh-huh.

8 JUSTICE KAGAN: -- or for a Bar
9 Mitzvah. And the baker says no, I don't -- I
10 don't -- I don't do that. I don't want my
11 cakes to be used --

12 GENERAL FRANCISCO: Right.

13 JUSTICE KAGAN: -- in the context of a
14 religious ceremony.

15 GENERAL FRANCISCO: Well, and, again,
16 I think if you apply these tests, you first
17 have to decide whether --

18 JUSTICE KAGAN: I just want the
19 answer.

20 GENERAL FRANCISCO: Well, what I'm
21 saying is that when you apply these tests
22 you've first got to decide if the cake rises to
23 the level of speech. If so, then, yeah.

24 JUSTICE KAGAN: It's a special,
25 special cake.

1 GENERAL FRANCISCO: Well, you know, if
2 so, and it rises to the level of speech, then I
3 think he has a claim just like that same baker
4 could refuse to sculpt that cake --

5 JUSTICE BREYER: Would I -- could I
6 ask you your answer to what I think is the same
7 question going on in different forums.

8 Forget the doctrine for a minute.

9 GENERAL FRANCISCO: Uh-huh.

10 JUSTICE BREYER: There's a category of
11 people called artisans. An artisan is a kind
12 of artist. They're in many fields. They're
13 also people who are discriminated against. And
14 we're in a country of minorities, there are
15 many different groups that have been
16 discriminated against.

17 For many years Congress has passed
18 laws saying, at least to the artisans: You
19 cannot discriminate on the basis of -- of race,
20 religion, dah, dah, dah. Sexual orientation.

21 If we were to write an opinion for
22 you, what would we have done to that principle?
23 And, of course, the concern is that we would
24 have caused chaos with that principle across
25 the board because there is no way of confining

1 an opinion on your side in a way that doesn't
2 do that. So tell me how.

3 GENERAL FRANCISCO: Well, Your Honor,
4 I think that the way you do it is because none
5 of these Courts' cases has ever involved
6 requiring somebody to create speech and
7 contribute that speech to an expressive event
8 to which they are deeply opposed.

9 And if I could go back to my example,
10 when you force that African-American sculptor
11 to sculpt that cross for a Klan service, you're
12 transforming his message.

13 He may want his cross to send the
14 message of peace and harmony. By forcing him
15 to combine it with that expressive event, you
16 force him to send a message of hate and
17 division.

18 JUSTICE SOTOMAYOR: I -- I -- I was a
19 little confused --

20 JUSTICE KENNEDY: What would the
21 government -- what would the government's
22 position be if you prevail in this case, the
23 baker prevails in this case, and then bakers
24 all over the country received urgent requests:
25 Please do not bake cakes for gay weddings. And

1 more and more bakers began to comply.

2 Would the government feel vindicated
3 in its position that it now submits to us?

4 GENERAL FRANCISCO: Your Honor, I
5 think in that case, the case for strict
6 scrutiny would be much stronger, because you'd
7 be able to show that your -- that the
8 application of the law is narrowly tailored to
9 the government's interests in ensuring access.

10 Here, of course, you have these
11 products that are widely available from many
12 different sources. And I would submit, just to
13 finish up, that if you were to disagree with
14 our basic principle, putting aside the line
15 about whether a cake falls on speech or
16 non-speech side of the line, you really are
17 envisioning a situation in which you could
18 force, for example, a gay opera singer to
19 perform at the Westboro Baptist Church just
20 because that opera singer would be willing to
21 perform at the National Cathedral.

22 And the problem is when you force
23 somebody not only to speak but to contribute
24 that speech to an expressive event to which
25 they are deeply opposed, you force them to use

1 their speech to send a message that they
2 fundamentally disagree with.

3 And that is at the core of what the
4 First Amendment protects our citizenry against.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 General.

7 GENERAL FRANCISCO: Thank you, Mr.
8 Chief Justice.

9 CHIEF JUSTICE ROBERTS: Mr. Yarger.

10 ORAL ARGUMENT OF FREDERICK R. YARGER
11 ON BEHALF OF THE STATE RESPONDENT

12 MR. YARGER: Thank you, Mr. Chief
13 Justice, and may it please -- please the Court:

14 A decade ago Colorado extended to LGBT
15 people the same protections used to fight
16 discrimination against race, sex and a person's
17 faith. Masterpiece Cakeshop is a retail bakery
18 that is open to the public and subject to the
19 Colorado Anti-Discrimination Act.

20 Yet, Petitioners claim that they can
21 refuse to sell a product, a wedding cake of any
22 kind in any design to any same-sex couple.

23 JUSTICE KENNEDY: I -- I don't want to
24 --

25 CHIEF JUSTICE ROBERTS: Counsel, take

1 an organization --

2 JUSTICE KENNEDY: Go ahead.

3 CHIEF JUSTICE ROBERTS: -- I think
4 there are many different faiths, but Catholic
5 Legal Services, they provide pro bono legal
6 representation to people who are too poor to
7 afford it and they provide it to people of all
8 -- all different faiths.

9 So let's say someone just like
10 Respondents here, except needing the pro bono
11 assistance, goes into Catholic Legal Services
12 and say, we want you to take this case against
13 Masterpiece Cakeshop. And the people at the --
14 the lawyers say: Well -- we -- we -- we're not
15 going to, because we -- we don't support
16 same-sex marriage.

17 Are they in violation of the Colorado
18 law?

19 MR. YARGER: No, Chief Justice -- Mr.
20 Chief Justice, they are not. Refusing to offer
21 a particular service in that case when they
22 wouldn't provide it to any other customer --

23 CHIEF JUSTICE ROBERTS: No, no, they
24 would provide it, if a -- if a heterosexual
25 couple comes in and says we need particular

1 services in connection with our marriage, they
2 would provide it.

3 It's only because, and they say this,
4 it's only because it's a same-sex marriage that
5 we're not going to provide pro bono legal
6 services to you.

7 MR. YARGER: In -- in the sense of a
8 -- services regarding maybe divorce --

9 CHIEF JUSTICE ROBERTS: Something in
10 connection --

11 MR. YARGER: -- or something --

12 CHIEF JUSTICE ROBERTS: -- something
13 in connection with the marriage. You know,
14 they're having a -- a -- a -- whatever, a
15 contract dispute with somebody in connection
16 with their marriage, and the lawyer says we're
17 not going to provide services in connection
18 with same-sex marriage because we have a
19 religious objection to that.

20 MR. YARGER: Mr. Chief Justice, I
21 think there's an initial question that's asked
22 in all of these cases, and it's the way that
23 states have been resolving these questions for
24 literally 100 years, and that -- the question
25 is: Is this entity operating in the way of a

1 retail store in the sense that it is --

2 CHIEF JUSTICE ROBERTS: No, no.

3 MR. YARGER: -- inviting --

4 CHIEF JUSTICE ROBERTS: It's
5 clearly -- it's clearly covered by Colorado's
6 law. It's not primarily religious. It's
7 primarily legal. It's provided to all faiths.
8 And there's nothing in the law that I can see
9 that says it's limited to for-profit
10 organizations.

11 MR. YARGER: And, Your Honor, again, I
12 -- I think the question is going to be is -- is
13 that operating in the sense of a retail store?
14 If it is, then, yes, a state can require a --
15 someone offering a service to give the same
16 services regardless of --

17 CHIEF JUSTICE ROBERTS: So --

18 MR. YARGER: -- the protected
19 characteristics of -- of the customer. If that
20 --

21 CHIEF JUSTICE ROBERTS: So -- so
22 Catholic Legal Services would be put to the
23 choice of either not providing any pro bono
24 legal services or providing those services in
25 connection with the same-sex marriage?

1 MR. YARGER: If -- if it is operating
2 in the same way as a retail store, I think the
3 answer --

4 CHIEF JUSTICE ROBERTS: Under Colorado
5 law, is that --

6 MR. YARGER: -- is yes, Your Honor.

7 CHIEF JUSTICE ROBERTS: -- are they or
8 are they not?

9 MR. YARGER: I don't -- I can't answer
10 that question, because --

11 CHIEF JUSTICE ROBERTS: What facts do
12 you need besides the ones I've given you?

13 MR. YARGER: I would have to
14 understand what the -- the purpose and the
15 history is of that entity choosing customers
16 and how it works. If there's genuine
17 selectivity --

18 CHIEF JUSTICE ROBERTS: They have all
19 -- they have taken every other customer to
20 date, except this is the first time someone's
21 come in and wants legal services in connection
22 with a same-sex marriage and they say we're not
23 going to do it because, as a religious matter,
24 we're opposed to same-sex marriage.

25 MR. YARGER: And -- and, Your Honor, I

1 think -- I think if they were operating like a
2 retail store like that, then -- then Colorado
3 would have the ability to regulate them.

4 JUSTICE KENNEDY: The Chief Justice --

5 MR. YARGER: If the answer were
6 otherwise --

7 JUSTICE KENNEDY: -- the Chief Justice
8 has introduced the question of the Free
9 Exercise Clause in this case. We didn't talk
10 about it earlier.

11 And perhaps you want to get on to
12 speech, but in -- in this case, pages 293 and
13 294 of -- of the Petitioner Appendix, the --
14 Commissioner Hess says that freedom of religion
15 used to justify discrimination is a despicable
16 piece of rhetoric.

17 Did the Commission ever disavow or
18 disapprove of that statement?

19 MR. YARGER: There were no further
20 proceedings in which the Commission disavowed
21 or disapproved of that statement.

22 JUSTICE KENNEDY: Do you disavow or
23 disapprove of that statement?

24 MR. YARGER: I would not have
25 counseled my client to make that statement.

1 JUSTICE KENNEDY: Do you now disavow
2 or disapprove of that statement?

3 MR. YARGER: I -- I -- I do, yes, Your
4 Honor. I think -- I need to make clear that
5 what that commissioner was referring to was the
6 previous decision of the Commission, which is
7 that no matter how strongly held a belief, it
8 is not an exception to a generally applicable
9 anti-discrimination law.

10 And if -- if the assertion that what
11 is engaging in is speech is enough to overcome
12 that law, you're going to face a situation
13 where a family portrait artist can say I will
14 photograph any family but not when the
15 father --

16 JUSTICE KENNEDY: But -- but -- but in
17 --

18 MR. YARGER: -- is wearing a yarmulke
19 because I have a sincere --

20 JUSTICE KENNEDY: -- in that -- in
21 that --

22 MR. YARGER: -- objection to the
23 Jewish faith. That would be discrimination.

24 JUSTICE KENNEDY: Suppose -- well,
25 suppose we thought that in significant part at

1 least one member of the Commission based the
2 commissioner's decision on -- on -- on the
3 grounds that -- of hostility to religion. Can
4 -- can your -- could your judgment then stand?

5 MR. YARGER: Your Honor, I don't think
6 that one statement by the commissioner,
7 assuming it reveals bias --

8 JUSTICE KENNEDY: Well, suppose we --
9 suppose we thought there was a significant
10 aspect of hostility to a religion in this case.
11 Could your judgment stand?

12 MR. YARGER: Your Honor, if -- if --
13 if there was evidence that the entire
14 proceeding was begun because of a -- an intent
15 to single out religious people, absolutely,
16 that would be a problem.

17 JUSTICE SOTOMAYOR: How many
18 commissioners are there?

19 MR. YARGER: But this was a complaint
20 filed by a couple who was --

21 JUSTICE SOTOMAYOR: How many
22 commissioners are there?

23 MR. YARGER: Excuse me, Justice
24 Sotomayor.

25 JUSTICE SOTOMAYOR: I'd like you to

1 answer Justice Kennedy's question. How many
2 commissioners are there?

3 MR. YARGER: There are seven
4 commissioners, Your Honor.

5 JUSTICE SOTOMAYOR: All right. If one
6 -- if there was a belief, not yours -- stop
7 fighting the belief; accept the hypothetical --
8 that this person was improperly biased, what
9 happens then? I think that's what Justice
10 Kennedy is asking you.

11 MR. YARGER: If there is one person
12 that's improperly biased?

13 JUSTICE SOTOMAYOR: One of the
14 commissioners is improperly biased.

15 MR. YARGER: I think you're going to
16 have to ask whether the complaint filed with
17 the division, which was filed by a customer who
18 was referred to a bakery to receive a product,
19 and the ALJ and the commission in the appeal
20 were all biased in the sense that this was a
21 proceeding meant to single out a religious
22 person for his views.

23 And that is not the fact here.

24 CHIEF JUSTICE ROBERTS: We've -- we've
25 had this case before --

1 JUSTICE GORSUCH: But you'd agree that
2 would be a problem --

3 CHIEF JUSTICE ROBERTS: -- in the
4 context -- the context of courts, I think it's
5 not just where you have a three-judge panel and
6 it turns out one judge was -- should have been
7 disqualified, whether -- for whatever reason,
8 they don't say that, well, the vote, there were
9 two still, so it doesn't change the result
10 because it's a deliberative process, and the
11 idea is, well, the one biased judge might have
12 influenced the views of the other.

13 MR. YARGER: And, Your Honor, again, I
14 don't think that this -- that particular
15 phrase -- I wouldn't advise my client to make
16 that statement, but it was referring back to
17 the previous decision --

18 JUSTICE GORSUCH: Mr. Yarger, you
19 actually --

20 MR. YARGER: -- where the commission
21 fully debated the issue --

22 JUSTICE GORSUCH: -- you actually have
23 a second commissioner who also said that
24 he's -- if someone has an issue with the laws
25 impacting his personal belief system, he has to

1 look at compromising that belief system
2 presumably as well, right?

3 MR. YARGER: And, yes, Your Honor.
4 That's the same principle that this Court
5 recognized in cases --

6 JUSTICE GORSUCH: But a second
7 commissioner?

8 MR. YARGER: -- cases like United
9 States versus Lee --

10 JUSTICE GORSUCH: -- so we have two --
11 two -- two commissioners out of seven who've
12 expressed something along these lines.

13 MR. YARGER: I don't agree that what
14 was expressed in the record reveals the kind of
15 bias that existed in cases like the Church of
16 --

17 JUSTICE GORSUCH: What if we disagree
18 with --

19 MR. YARGER: -- Lukumi Babalu Aye.

20 JUSTICE GORSUCH: What if we disagree
21 with you? Then what follows?

22 MR. YARGER: I think you have to do
23 that analysis and decide whether this
24 proceeding was engineered in a way to single
25 out people with a certain faith and they're

1 not. This --

2 JUSTICE GINSBURG: You would -- you
3 would --

4 JUSTICE BREYER: Well, the reason that
5 I think --

6 MR. YARGER: -- this law would apply
7 to protect people with religious beliefs.

8 JUSTICE BREYER: All right. I see
9 that. The reason I want you to continue this
10 is that many of the civil rights laws, not all
11 public accommodations laws, though -- there are
12 exceptions, like, for example, with housing, a
13 person's own room, for example.

14 And what people are trying to do with
15 exceptions is take the thing you're worried
16 about, where there are genuine, sincere
17 religious views or whatever it is, and minimize
18 the harm it does to the principle of the
19 statute while making some kind of compromise
20 for people of sincere beliefs on the other
21 side.

22 And we find that in -- in a lot of
23 them, but that's primarily a legislative job.
24 And my impression of this is there wasn't much
25 effort here in Colorado to do that.

1 JUSTICE GINSBURG: There were -- there
2 were exceptions --

3 JUSTICE BREYER: And my problem is can
4 we do that in any way, or is there any way to
5 get to a place that without harming the law,
6 and its object, which is fine, you can have
7 narrow kinds of exceptions for sincere, et
8 cetera? Do you see -- do you see what I'm
9 driving at?

10 MR. YARGER: I -- I do.

11 JUSTICE BREYER: And I can't think of
12 a way to do it. Maybe you can't think of a way
13 to do it, but I thought it's worth asking.

14 MR. YARGER: Justice Breyer, I -- I do
15 not agree that this law, which was passed in
16 2008, after literally a decade in the wake of
17 Romer, was not an attempt sincerely to hear
18 from all sides about a question of whether to
19 grant the same protections to people who are
20 discriminated based on race or faith to people
21 of the GLBT community.

22 JUSTICE ALITO: I mean, one thing
23 that's --

24 MR. YARGER: And if you look at the --

25 JUSTICE ALITO: I mean, one thing

1 that's disturbing about the record here, in
2 addition to the statement made, the statement
3 that Justice Kennedy read, which was not
4 disavowed at the time by any other member of
5 the Commission, is what appears to be a
6 practice of discriminatory treatment based on
7 viewpoint.

8 The -- the Commission had before it
9 the example of three complaints filed by an
10 individual whose creed includes the traditional
11 Judeo-Christian opposition to same-sex
12 marriage, and he requested cakes that expressed
13 that point of view, and those -- there were
14 bakers who said no, we won't do that because it
15 is offensive.

16 And the Commission said: That's okay.
17 It's okay for a baker who supports same-sex
18 marriage to refuse to create a cake with a
19 message that is opposed to same-sex marriage.
20 But when the tables are turned and you have a
21 baker who opposes same-sex marriage, that baker
22 may be compelled to create a cake that
23 expresses approval of same-sex marriage.

24 MR. YARGER: Justice Alito --

25 JUSTICE SOTOMAYOR: Counselor, in that

1 case --

2 CHIEF JUSTICE ROBERTS: Maybe you
3 could answer --

4 JUSTICE SOTOMAYOR: Could you answer
5 --

6 CHIEF JUSTICE ROBERTS: -- maybe you
7 could Justice Alito's question.

8 MR. YARGER: Yes, Mr. Chief Justice.
9 The facts of that case are that someone walked
10 into a bakery and wanted a particular cake with
11 particular messages on it that that bakery
12 wouldn't have sold to any other customer.

13 Mr. Phillips would not be required to
14 sell a cake to a gay couple that he wouldn't
15 sell to his other customers.

16 JUSTICE ALITO: No, but Mr. --
17 Mr. Phillips --

18 MR. YARGER: What he said in this
19 case --

20 JUSTICE ALITO: Mr. Phillips would not
21 -- do you disagree with the fact that he would
22 not sell to anybody a wedding cake that
23 expresses approval of same-sex marriage?

24 MR. YARGER: I -- what he may not do
25 as a public accommodation that's -- that's

1 offered to the public --

2 JUSTICE SOTOMAYOR: Would you answer
3 that question?

4 MR. YARGER: -- yes -- yes, Your
5 Honor -- is decide that he won't sell somebody
6 a product that he would otherwise sell because
7 in his view the identity of the customer
8 changes the message.

9 JUSTICE ALITO: No, he didn't say the
10 identity.

11 MR. YARGER: That is discrimination
12 under our law.

13 JUSTICE ALITO: He said the message.
14 He said the message.

15 MR. YARGER: Well, and the message in
16 this case, Your Honor, depended entirely on the
17 identity of the customer who was ordering the
18 cake. If he had said I have a deeply --

19 JUSTICE SOTOMAYOR: I'm sorry, could
20 you answer the question asked? Let's assume
21 this couple did come in and wanted the rainbow
22 cake.

23 MR. YARGER: Yes.

24 JUSTICE SOTOMAYOR: And this gentleman
25 says one of two things: If you're same-sex,

1 I'm not going to provide you with a rainbow
2 cake or I don't create rainbow cakes for
3 weddings because I don't believe in same-sex
4 marriage. I'm not going to sell it to you.
5 I'm not going to sell it to a same -- a
6 heterosexual couple. I just don't want to be
7 affiliated with that concept of rainbowness at
8 a wedding, any kind of wedding.

9 MR. YARGER: And Justice --

10 JUSTICE SOTOMAYOR: So what are the
11 difference in treatment?

12 MR. YARGER: Justice Sotomayor, in
13 that latter case, if that was truly a product
14 he wouldn't sell to any other customer, he
15 would not have to sell it to this customer.

16 But if it's a question of a cake he
17 would sell to any other customer, he cannot say
18 I have a very strong objection to interracial
19 or interfaith marriages and I don't want to
20 send message about those -- those events, and
21 so I'm not going to sell it to you. That's
22 discrimination. It wouldn't be appropriate
23 under Colorado --

24 JUSTICE KENNEDY: Counselor --

25 JUSTICE GORSUCH: Mr. Yarger --

1 MR. YARGER: -- law, and it would be a
2 First Amendment objection.

3 JUSTICE KENNEDY: Counselor, tolerance
4 is essential in a free society. And tolerance
5 is most meaningful when it's mutual.

6 It seems to me that the state in its
7 position here has been neither tolerant nor
8 respectful of Mr. Phillips's religious beliefs.

9 MR. YARGER: And, Your Honor, I --

10 JUSTICE KENNEDY: And -- because
11 accommodation is, quite possible, we assume
12 there were other shops that -- other good
13 bakery shops that were available.

14 MR. YARGER: Your Honor, I don't -- I
15 don't agree that Colorado hasn't taken very
16 seriously the rights of those who wish to
17 practice their faith. I urge you to read the
18 legislative history that culminated in
19 literally 10 years of debate about how to deal
20 with this question.

21 And what the legislature decided after
22 hearing from the faith community, after making
23 an exception for places of worship and doing --
24 making other exceptions decided we can't make
25 exceptions here for same-sex people who deserve

1 the same protections if we wouldn't make those
2 same exceptions for discrimination based on
3 race and sex and -- and religion.

4 JUSTICE GORSUCH: Mr. Yarger, may I
5 ask --

6 JUSTICE BREYER: I'm asking can you do
7 this? Can you -- can a baker say do this?
8 Could the baker say, you know, there are a lot
9 of people I don't want to serve, so I'm going
10 to affiliate with my friend, Smith, who's down
11 the street, and those people I don't want to
12 serve, Smith will serve. Is that legal?

13 Would that be legal under Colorado
14 law? That'd be a kind of accommodation, so
15 they get the cake.

16 MR. YARGER: It would be, Your Honor.
17 You --

18 JUSTICE BREYER: It would be legal?

19 MR. YARGER: -- can't turn -- no, no.

20 JUSTICE BREYER: It would be illegal?

21 MR. YARGER: If -- you cannot turn
22 away from your storefront if you're a retail
23 store.

24 JUSTICE BREYER: No, it's a -- it's a
25 joint venture. I have a regular affiliation

1 with Smith. Smith and I work together. I
2 serve the people he doesn't like, he serves the
3 people I don't like.

4 Does that violate the law?

5 MR. YARGER: I don't -- I -- I would
6 say that there's -- there is a possibility that
7 that does not violate the law if there's not
8 some other pretext there to ensure that a
9 disfavored class of customers receives lesser
10 service. And that's always a question in a
11 case like this.

12 CHIEF JUSTICE ROBERTS: Does it make a
13 difference, was -- was same-sex marriage
14 permitted in Colorado at the time of these
15 events?

16 MR. YARGER: It was not, Your Honor.

17 CHIEF JUSTICE ROBERTS: Does that make
18 a difference?

19 MR. YARGER: I don't think it does,
20 Your Honor.

21 CHIEF JUSTICE ROBERTS: Could he have
22 said I'm not going to make a cake for, you
23 know, celebrating events that aren't permitted
24 in Colorado?

25 MR. YARGER: Well, Mr. Chief Justice

1 -- may I answer?

2 CHIEF JUSTICE ROBERTS: You have five
3 -- five more minutes.

4 MR. YARGER: Oh.

5 CHIEF JUSTICE ROBERTS: If you want.
6 (Laughter.)

7 MR. YARGER: I'll have to think about
8 that, Your Honor. But in the mean -- meantime,
9 there was nothing illegal about two gay people
10 in 2012 in Colorado expressing their commitment
11 to each other and celebrating that commitment
12 with their loved ones.

13 JUSTICE GINSBURG: Would Colorado be
14 required to give full faith and credit to the
15 Massachusetts marriage?

16 MR. YARGER: Well, it certainly would
17 today, Your Honor.

18 JUSTICE ALITO: But it wouldn't at the
19 time.

20 MR. YARGER: No, it wouldn't.

21 JUSTICE ALITO: It did not at the
22 time. That is -- this is very odd. We're
23 thinking about this case as it might play out
24 in 2017, soon to be 2018, but this took place
25 in 2012.

1 So, if Craig and Mullins had gone to a
2 state office and said we want a marriage
3 license, they would not have been accommodated.

4 If they said: Well, we want you to
5 recognize our Massachusetts marriage, the state
6 would say: No, we won't accommodate that.
7 Well, we want a civil union. Well, we won't
8 accommodate that either.

9 And yet, when he goes to this bake
10 shop and he says I want a wedding cake, and the
11 baker says, no, I won't do it, in part because
12 same-sex marriage was not allowed in Colorado
13 at the time, he's created a grave wrong. How
14 does that all that fit together?

15 MR. YARGER: Well, Your Honor, again,
16 it -- it -- the decision by this bakery was it
17 wouldn't sell any product --

18 JUSTICE ALITO: No --

19 MR. YARGER: -- of any kind, not even
20 when the same --

21 JUSTICE ALITO: -- that's not right,
22 Mr. Yarger. It's a disturbing feature of your
23 brief because this case was decided on summary
24 judgment, and, therefore, you have to view the
25 facts in the light most favorable to Mr.

1 Phillips.

2 And the only thing he admitted and
3 what was said in the undisputed -- the list of
4 undisputed facts was he would not create -- he
5 was very careful to use the word "create." Is
6 that wrong?

7 MR. YARGER: That's not incorrect,
8 Your Honor. What -- what he has said is that
9 all of his wedding cakes are custom-made. And
10 so what he said is that he would have a right
11 to refuse that service to anyone whose identity
12 in his view means that the message has changed.
13 And he does not want to sell it to them.

14 It would be akin to a --

15 JUSTICE ALITO: And we have a history
16 of -- in the questioning by -- of Petitioners'
17 counsel, we explored the line between speech
18 and non-speech, but as I understand your
19 position, it would be the same if what was
20 involved here were words.

21 Am I wrong? If he would put a
22 particular form of words on a wedding cake, on
23 a cake for one customer, he has to put the same
24 form of words, the same exact words, on a
25 wedding cake for any other customer, regardless

1 of the context?

2 MR. YARGER: That's -- that's right,
3 just as he would have to sell a happy birthday
4 cake to a member of the Jewish faith or an
5 African-American couple.

6 JUSTICE ALITO: So, if someone came in
7 and said: I want a cake for -- to celebrate
8 our wedding anniversary, and I want it to say
9 November 9, the best day in history, okay,
10 sells them a cake. Somebody else comes in,
11 wants exactly the same words on the cake, he
12 says: Oh, is this your anniversary? He says:
13 No, we're going to have a party to celebrate --
14 celebrate Kristallnacht. He would have to do
15 that?

16 MR. YARGER: Your Honor, that wouldn't
17 be -- the -- the test is whether --

18 JUSTICE ALITO: It's exactly the same
19 words.

20 MR. YARGER: It is, Your Honor. I
21 haven't -- I don't -- that would be a question
22 about whether there is a even-handed, genuine
23 policy applied by the baker that doesn't have
24 to do with the identity of the customer.

25 And if it has to do with a message

1 that is apart from the identity of the
2 customer, then he can refuse that. Otherwise,
3 you'd have a circumstance in which he would
4 paint a picture of a couple but wouldn't change
5 the skin tone of the -- of the couple that's
6 pictured on the cake. That would be
7 discrimination. And there wouldn't be any
8 First Amendment problem with enforcing our law
9 against that.

10 JUSTICE GORSUCH: I -- I have a quick
11 question about the remedy. As I understand it,
12 Colorado ordered Mr. Phillips to provide
13 comprehensive training to his staff, and it
14 didn't order him to attend a class of the
15 government's own creation or anything like
16 that, but to provide comprehensive staff
17 training.

18 Why -- why isn't that compelled speech
19 and possibly in violation of his free-exercise
20 rights? Because presumably he has to tell his
21 staff, including his family members, that his
22 Christian beliefs are discriminatory.

23 MR. YARGER: He -- a training
24 requirement is a common remedy that's used in
25 many civil rights cases. He --

1 JUSTICE GORSUCH: Yeah. But this
2 isn't attending your training.

3 MR. YARGER: He doesn't have to say
4 that his --

5 JUSTICE GORSUCH: Mr. Yarger, again, I
6 agree with you, some sort of training by an
7 outside group, but this order was ordering him
8 to provide training and presumably compelling
9 him to speak, therefore, and to speak in ways
10 that maybe offend his religion and certainly
11 compel him to speak.

12 And given that, plus the
13 discriminatory language in the -- in the
14 Commission's discussion, I just -- that
15 concerns me, and I just wonder what you have to
16 say about it.

17 MR. YARGER: I understand, Your Honor,
18 if -- all that's required in these training
19 sessions is an understanding and a demonstrated
20 understanding of the Colorado
21 Anti-Discrimination Act.

22 It has nothing to do with a particular
23 person's belief. It has to do with ensuring
24 that the conduct that was found discriminatory,
25 and if that conduct can be regulated consistent

1 with the First Amendment, I think that a
2 training requirement like that can be imposed.

3 JUSTICE KENNEDY: Part of that speech
4 is that state law, in this case, supersedes our
5 religious beliefs, and he has to teach that to
6 his family. He has to speak about that to his
7 family.

8 MR. YARGER: He has to speak about the
9 fact that --

10 JUSTICE KENNEDY: His family who are
11 the employees.

12 MR. YARGER: -- in running a public
13 accommodation that's open to all people, he
14 cannot use his faith to discriminate based on
15 identity --

16 JUSTICE GINSBURG: He doesn't have to
17 --

18 MR. YARGER: -- in selling a good he
19 would otherwise sell.

20 JUSTICE GINSBURG: The question does
21 he -- he doesn't have to tell his family -- I
22 mean, his belief is his belief. All he has to
23 --

24 MR. YARGER: That's --

25 JUSTICE GINSBURG: -- instruct them is

1 this is what the law of Colorado requires.

2 MR. YARGER: Thank you, Justice
3 Ginsburg. That's precisely correct.

4 JUSTICE GINSBURG: You must adhere to
5 the law.

6 MR. YARGER: That's precisely correct.

7 JUSTICE GINSBURG: Nothing about I've
8 changed my belief in any way.

9 MR. YARGER: Absolutely not. That's
10 correct.

11 If there are no further questions.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Cole.

15 ORAL ARGUMENT OF DAVID COLE

16 ON BEHALF OF THE PRIVATE RESPONDENTS

17 MR. COLE: Mr. Chief Justice, and may
18 it please the Court:

19 We don't doubt the sincerity of Mr.
20 Phillips's convictions. But to accept his
21 argument leads to unacceptable consequences.

22 A bakery could refuse to sell a
23 birthday cake to a black family if it objected
24 to celebrating black lives. A corporate
25 photography studio could refuse to take

1 pictures of female CEOs if it believed that a
2 woman's place is in the home.

3 And a florist could put a sign up on
4 her storefront saying we don't do gay funerals,
5 if she objected to memorializing gay people.

6 Now, both Petitioner and the United
7 States recognize that these results are
8 unacceptable with respect to race.

9 And so they suggest that you draw a
10 distinction between race discrimination and
11 sexual orientation discrimination and the
12 state's ability to protect it. But to do that
13 would be to constitutionally relegate gay and
14 lesbian people to second class status, even
15 when a state has chosen, as Colorado has done
16 here, to extend them equal treatment.

17 CHIEF JUSTICE ROBERTS: I'm not sure
18 he provides equal services outside the context
19 of wedding to -- weddings, to gay and lesbian
20 individuals. And the -- the racial analogy
21 obviously is very compelling, but when the
22 Court upheld same-sex marriage in Obergefell,
23 it went out of its way to talk about the decent
24 and honorable people who may have opposing
25 views.

1 And to immediately lump them in the
2 same group as people who are opposed to
3 equality in relations with respect to race, I'm
4 not sure that takes full account of that -- of
5 that concept in the Obergefell decision.

6 MR. COLE: So -- so, Chief Justice
7 Roberts, the Court in -- in Obergefell did,
8 indeed, say that individuals are free to
9 express their disagreement through speech with
10 the notion of same-sex marriage, but it did not
11 say that businesses who make a choice to open
12 themselves to the public can then turn away
13 people because they are gay and lesbian.

14 All the baker needed to know about my
15 clients was that they were gay and lesbian.
16 And, therefore -- or gay. And, therefore, he
17 wouldn't sell them a wedding cake which he
18 would sell, gladly, to anybody outside --

19 JUSTICE BREYER: But is there an
20 answer to that? I was trying to get the answer
21 to that, and I -- I think that they're
22 proceeding roughly on the line that, well, all
23 that you say is true, but that doesn't mean
24 that under these laws, maybe the African
25 American, et cetera, is separate, but it

1 doesn't mean that the person could be hired to
2 come to the wedding and announce to the general
3 people there, this is the most wonderful thing
4 I've ever been at.

5 Now, that's where they say they have a
6 right not to do that.

7 MR. COLE: And no one --

8 JUSTICE BREYER: And then the second
9 step of that is to say: And what's going on
10 here is the equivalent of that.

11 MR. COLE: Right.

12 JUSTICE BREYER: I took that as -- I
13 may be unfair to them -- but I -- I took that
14 as -- as -- as the outlines of the answer to
15 what you're saying. So I'd like to hear what
16 you say in respect, if I'm right, about what
17 they say.

18 MR. COLE: Yeah, thank you. No one is
19 suggesting that the baker has to march in the
20 parade, as Mr. Francisco said here. What the
21 -- what the Colorado law requires is that you
22 sell a product -- when a -- when a mom goes
23 into a bakery and says make me a happy birthday
24 cake for my child, and then she takes that cake
25 home for her four-year-old son's birthday

1 party, no one thinks that the baker is wishing
2 happy birthday to the four-year-old. It's the
3 mom.

4 JUSTICE GINSBURG: But would that be
5 true -- would that be true if what the message
6 -- the message -- let's say Craig and Mullins
7 said we'd like to have on this wedding cake of
8 ours these words: "God bless the union of
9 Craig and Mullins."

10 MR. COLE: So, if he would not put
11 that message on any other cake, then he doesn't
12 have to put it on that cake.

13 JUSTICE GINSBURG: He would put --

14 MR. COLE: If he --

15 JUSTICE GINSBURG: -- that message on
16 a cake that said: God bless the union of Ruth
17 and Marty.

18 MR. COLE: Right. If he would -- if
19 he would say that, then he would have to say
20 God bless the union of Dave and Craig because
21 the only difference between those two cakes,
22 Your Honor, is the identity of the customer who
23 is seeking to purchase it.

24 It's the same cake otherwise. So --
25 so, yes, if he -- but, again, in this case --

1 JUSTICE KAGAN: Do we have to answer
2 that question, Mr. Cole?

3 MR. COLE: No, you don't, no, Justice
4 Kagan, you don't, because in this case, again,
5 the only thing the baker knew about these
6 customers was that they were gay. And, as a
7 result, he refused to sell them any wedding
8 cake.

9 There was no request for a design.
10 There was no request for a message. He refused
11 to sell them any wedding cake. And that's
12 identity-based discrimination. It is not a
13 decision to refuse to put particular words on
14 it.

15 JUSTICE KENNEDY: Suppose that either
16 in this case or some cases you have a very
17 complex case -- cake, and -- case and cake --

18 (Laughter.)

19 JUSTICE KENNEDY: That -- that -- and
20 -- and -- and you need a baker, a baker's
21 assistant to be right there at the wedding so
22 you cut it in the right place and the thing
23 doesn't collapse.

24 Does the baker have to attend that
25 wedding and -- and help cut the cake?

1 MR. COLE: So, I think, again, that --

2 JUSTICE KENNEDY: Assume the hypo,
3 that the --

4 MR. COLE: Right, right, that is --
5 that is not necessary to decide this case, but
6 I think in -- I think in a future case that
7 involved physical participation in a -- in a --
8 in a religious ceremony that an individual
9 deeply opposed, that a court -- this Court
10 might draw -- might create new doctrine and
11 draw a new line and say, no, that's not
12 governed by Smith. That's not governed by
13 O'Brien. We're going to make an exception.
14 But -- this -- this --

15 JUSTICE BREYER: How do we do that?
16 Because, you know, we can't have 42,000 cases,
17 each kind of vegetable --

18 (Laughter.)

19 JUSTICE BREYER: -- that the preparer
20 thinks is something special.

21 So -- so here, is it an answer that
22 satisfies you to say, well, you see, here, of
23 course, all custom goods, all custom goods have
24 an element of expression. An artisan is not
25 quite the same as an artist, but an artisan can

1 be a great artisan and can produce good things.
2 But where the clash is between an important
3 public policy, the policy of opening the doors
4 to everyone, including minorities, in the
5 public commercial area, well, there the speech
6 element of the artisan is not really sufficient
7 to outweigh that. Now, that's pretty
8 straightforward.

9 And I don't know if -- how it fits
10 within the law and the so forth. But -- but if
11 you're looking at the policies here, it seems
12 to me the cases do support that. And they do
13 have to leave open the instance where the
14 speech goes farther than just preparing a
15 specially-shaped cake, admitted that a
16 specially-shaped cake can suggest approval, et
17 cetera.

18 MR. COLE: So, Justice Breyer --

19 JUSTICE BREYER: And if that's not
20 good, what is?

21 MR. COLE: So, Justice Breyer, I think
22 the -- the -- the colloquy with my opponent
23 with respect to whether a cake artist is
24 different from a makeup -- makeup artist, or
25 whether a highly-sculpted cake is different

1 from an unsculpted cake illustrates that it's
2 just not possible to develop doctrine based on
3 how expressive, how artistic the speech is.
4 And that's --

5 JUSTICE BREYER: All right. Fine.
6 Then what do we do?

7 MR. COLE: This is what you do, Your
8 Honor. You do what you did in O'Brien, in
9 CCMV, in FAIR versus Rumsfeld, and in Turner
10 Broadcasting.

11 And what the -- what the Court has
12 done when it's expressive conduct, because
13 that's what we have here at most is expressive
14 conduct, we don't ask is it expressive from the
15 perspective of the baker or is it expressive
16 from the perspective of a -- of a -- of a
17 customer. We ask what's the state's interest
18 in regulating? What is the state doing?

19 And if the state is regulating conduct
20 because of what it expresses, well, now that's
21 strict scrutiny. That's --

22 JUSTICE ALITO: Are the words on the
23 cake expressive conduct or are they not speech?

24 MR. COLE: The -- the conduct, Your
25 Honor, that is regulated by Colorado here is

1 not the words on the cake. The conduct that --
2 that Colorado regulates is the sale by a -- by
3 a business that opens itself to the public,
4 invites everybody in, it's -- it's regulating
5 the conduct of refusing a transaction --

6 JUSTICE ALITO: But you're --

7 MR. COLE: -- to somebody because of
8 who they are.

9 JUSTICE ALITO: Yeah, but --

10 MR. COLE: It doesn't matter whether
11 it's speech or whether it's not speech.

12 JUSTICE ALITO: What you just said,
13 and -- and -- and I understand Mr. Yarger --
14 Yarger's position for Colorado to be the same,
15 is that someone can be compelled to write
16 particular words with which that person
17 strongly disagrees.

18 MR. COLE: If he --

19 JUSTICE ALITO: That's your -- that is
20 your position, isn't it?

21 MR. COLE: If he has written the same
22 words for others, and the only difference is
23 the identity of the customer, yes, so, again, a
24 baker could sincerely believe that saying happy
25 birthday to a black family is different from

1 saying happy birthday to a white family, but we
2 would not say that, therefore, it's permissible
3 for a baker to say: birthday cakes for whites
4 only.

5 JUSTICE ALITO: There's a -- there are
6 services, I was somewhat surprised to learn
7 this, but weddings have become so elaborate,
8 that will write custom wedding vows for you and
9 custom wedding speeches.

10 So somebody comes to one of these
11 services and says: You know, we're not good
12 with words, but we want you to write wedding --
13 a vow -- vows for our wedding, and the general
14 idea we want to express is that we don't
15 believe in God, we think that's a bunch of
16 nonsense, but we're going to try to live our
17 lives to make the world a better place. And
18 the -- the person who's writing this is
19 religious and says: I can't lend my own
20 creative efforts to the expression of such a
21 message.

22 But you would say, well, it's too bad
23 because you're a public accommodation. Am I
24 right?

25 MR. COLE: What I would say, Your

1 Honor, is that if that case were to arise, it
2 would certainly be open to this Court to treat
3 it differently, but this is not a case in which
4 anyone is being asked to --

5 JUSTICE KENNEDY: Differently on what
6 -- differently on what principle --

7 MR. COLE: I think it would -- it
8 would -- it would have --

9 JUSTICE KENNEDY: On what -- what
10 principle do we use to treat it differently?

11 MR. COLE: I think the principle would
12 have to be some amendment to Smith versus
13 Employment Division to say that even where
14 there's a generally applicable law, and even
15 where it's neutrally applied, if it has the
16 effect of compelling somebody to engage in a
17 religious ceremony that is against their deep
18 religious commitment, we might treat that
19 differently, but under current law --

20 CHIEF JUSTICE ROBERTS: Is that a
21 modification of --

22 MR. COLE: -- that would not be the
23 result under Smith versus Employment Division.

24 CHIEF JUSTICE ROBERTS: Is that -- is
25 that a modification of Smith? It sounds like

1 -- it sounds like an overruling of Smith.

2 MR. COLE: Well, I think it would
3 depend on how broadly you wrote it, certainly.
4 But -- but I don't think in this case, where
5 all that's asked for is a product, that you
6 have to reach that question.

7 And the other thing I would say,
8 Justice Alito --

9 JUSTICE SOTOMAYOR: How do you deal
10 under your hypothetical with hotels associated
11 with weddings? You know, hotels --

12 MR. COLE: Yeah.

13 JUSTICE SOTOMAYOR: -- rent out
14 banquet halls, their staff. Would they be
15 entitled to the exception you're imagining?

16 MR. COLE: No.

17 JUSTICE SOTOMAYOR: Why?

18 MR. COLE: And I'm not -- let me say
19 -- let me make it clear. I am not advocating
20 --

21 JUSTICE SOTOMAYOR: You're not
22 advocating this?

23 MR. COLE: -- this exception at all.
24 I am just saying that this case does not
25 involve that kind of participation, and so you

1 don't need to address it. If at some point a
2 case arises, then you might --

3 JUSTICE GORSUCH: Well, let's take --
4 let's take a case a little bit more like ours,
5 and -- and it doesn't involve words, but just a
6 cake. It is Red Cross, and the baker serves
7 someone who wants a red cross to celebrate the
8 anniversary of a great humanitarian
9 organization. Next person comes in and wants
10 the same red cross to celebrate the KKK. Does
11 the baker have to sell to the second customer?
12 And if not, why not?

13 MR. COLE: It's not identity-based
14 discrimination. If -- all -- all that Colorado
15 law and public accommodations law generally
16 requires is that you not discriminate on the
17 basis of particular protected classes: sexual
18 orientation, race, disability, religion, and
19 the like.

20 And if I can go back to Justice
21 Alito's question --

22 JUSTICE GORSUCH: Well, why is that
23 any different than our case? You say it's not
24 based on identity, but the baker might well say
25 I -- I -- I despise people who adhere to the

1 creed --

2 MR. COLE: Right.

3 JUSTICE GORSUCH: -- of the KKK.

4 That's one way of characterizing it. Another
5 way of characterizing it is saying I disagree
6 with the message of the KKK.

7 So too here. One could make the exact
8 analogy, I would think, that you could either
9 characterize it as I -- I don't like people of
10 a certain class or I -- or I have a religious
11 belief against this kind of union.

12 So how do I distinguish those cases?
13 I'm not sure it's quite as easy as you suggest.

14 MR. COLE: So I -- I think -- I think,
15 Your Honor, if -- if identity discrimination is
16 involved -- and there's no question that
17 identity discrimination is involved here
18 because, again, the only thing the baker knew
19 was the identity of the people who were --

20 JUSTICE GINSBURG: Mr. Cole, maybe I
21 --

22 JUSTICE GORSUCH: That -- that's --

23 JUSTICE GINSBURG: -- I misunderstood
24 your answer to Justice Gorsuch. Did you say
25 you could refuse to sell the identical cake

1 with the red cross?

2 MR. COLE: If -- if he is not doing it
3 on the basis of the identity -- a protected
4 identity. The Ku Klux Klan as an organization
5 is not a protected class.

6 So, yes, you don't -- you're -- you're
7 -- the -- the public accommodations law does
8 not say you must treat everybody; it says you
9 cannot discriminate on the basis of protected
10 categories.

11 JUSTICE KENNEDY: Well, but this whole
12 concept of identity is a slightly -- suppose he
13 says: Look, I have nothing against -- against
14 gay people. He says, but I just don't think
15 they should have a marriage because that's
16 contrary to my beliefs. It's not --

17 MR. COLE: Yeah.

18 JUSTICE KENNEDY: It's not their
19 identity; it's what they're doing.

20 MR. COLE: Yeah.

21 JUSTICE KENNEDY: I think it's --

22 MR. COLE: Well --

23 JUSTICE KENNEDY: -- your identity
24 thing is just too facile.

25 MR. COLE: Well, Justice Kennedy, this

1 Court faced that question in Bob Jones
2 University. Bob Jones University said we're
3 not discriminating on the basis of race; we
4 allow black people to come into the school. We
5 just refuse to admit those who are engaged in
6 interracial marriages or advocate interracial
7 dating. And this Court said that's race
8 discrimination. That's identity-based
9 discrimination, even if you treat others
10 similarly.

11 But -- but I think one way to think
12 about this case is -- is -- is analogize it to
13 O'Brien, right? In O'Brien, nobody disputed
14 that O'Brien's burning of the draft card to
15 protest the Vietnam War was expressive. It was
16 core political expression.

17 But what the Court did was it didn't
18 say, well, how expressive is it? Is it
19 artistry; is it not? Is it core; is it not?
20 It said: What is the state trying to do here?
21 Because it's expressive conduct. And if the
22 state's seeking to regulate conduct, then the
23 fact that it has an incidental effect on
24 Mr. O'Brien's expression is not a problem as
25 long as the state has a content-neutral reason

1 for regulating that conduct.

2 JUSTICE BREYER: I take Justice
3 Gorsuch's question and substitute for the KKK,
4 a religious group, bizarre perhaps, but a
5 religious group that unfortunately has the same
6 beliefs as the KKK. It doesn't -- then you can
7 ask your question --

8 MR. COLE: Yeah.

9 JUSTICE BREYER: -- and the answer is
10 they do have to sell it to them, right?

11 MR. COLE: I think if the
12 discrimination is based on a -- a protected
13 characteristic, yes, they -- they can't say
14 because I object to the message that equal
15 treatment sends, right? Piggie Park objected
16 to the message that equal treatment sent. To
17 serve a -- a black person in a segregated --
18 previously segregated restaurant sent a
19 tremendous message, a message that Piggie Park
20 sincerely religiously objected to. And this
21 Court said that that's a frivolous claim in
22 that context.

23 So I don't -- I just -- I don't think
24 you can carve out exceptions to generally
25 applicable rules that regulate conduct in a

1 content-neutral way, as this does. And so just
2 as Mr. -- the fact that Mr. O'Brien's conduct,
3 burning the draft card, was expressive did not
4 give him a First Amendment exemption to a
5 content-neutral prohibition on draft card
6 destruction, so the fact that Mr. Phillips
7 considers his cake-baking to be expressive
8 doesn't give him a First Amendment exemption to
9 a content-neutral regulation of public
10 accommodation sales in the retail context.

11 This Court has already said that that
12 interest in prohibiting discrimination on the
13 basis of identity in public accommodations is a
14 interest unrelated to the suppression of
15 expression, said that in Roberts versus
16 Jaycees, it serves compelling interests,
17 Roberts versus Jaycees, even where race is not
18 involved.

19 CHIEF JUSTICE ROBERTS: Is your -- is
20 your answer to my hypothetical about the
21 religious legal services organization the same
22 as Mr. Yarger's?

23 MR. COLE: I think -- I -- I -- I
24 think if -- if Christian Legal Services --
25 Catholic Legal Services, sorry, Your Honor, has

1 offered a service to the public generally,
2 let's say it was wills, and -- and a
3 same-sex -- someone who died, the -- the
4 survivor of a same-sex couple --

5 CHIEF JUSTICE ROBERTS: No, I just --
6 you're -- you're changing the hypothetical just
7 -- just a little --

8 MR. COLE: Well, I think it's the
9 same.

10 CHIEF JUSTICE ROBERTS: -- I -- the
11 services they offered was pro bono legal
12 services --

13 MR. COLE: Yeah.

14 CHIEF JUSTICE ROBERTS: -- to people,
15 whether it's wills or --

16 MR. COLE: Yeah.

17 CHIEF JUSTICE ROBERTS: -- contracts or
18 landlord/tenant or anything at all.

19 MR. COLE: Right. So I -- I don't
20 think they have -- they obviously don't have to
21 argue for a position that they disagree with.
22 But what they -- if they provide wills or they
23 provide landlord/tenant to a -- a straight
24 couple, then they have to provide that to a gay
25 couple. And --

1 CHIEF JUSTICE ROBERTS: So they
2 would -- if someone had a problem in connection
3 with their marriage, again, whatever it is,
4 contract dispute, something like that, they
5 would have to provide representative services
6 to someone who had a similar problem in
7 connection with a same-sex marriage?

8 MR. COLE: So I'd say two things, Your
9 Honor. First of all, I -- I think they would,
10 if they provide the same services to couples
11 who are straight.

12 But the Court might say that when what
13 you're regulating is only speech, not
14 expressive conduct -- because, remember, the --
15 the O'Brien test, the CCMV test, the FAIR
16 versus Rumsfeld test --

17 CHIEF JUSTICE ROBERTS: But this is
18 not only speech; it's providing the legal
19 services.

20 MR. COLE: Well, but the -- the legal
21 services are speech, Your Honor, I don't know
22 what other than speech I'm engaged in, for
23 example, right now.

24 CHIEF JUSTICE ROBERTS: Well, I would
25 say partly expressive conduct. You're engaged

1 in a representation before the Court, which
2 involves a lot more than simply what you're
3 saying in response to the answers.

4 MR. COLE: Well, you know, if -- if
5 you -- if you treat -- if you treat -- Hurley,
6 I think, illustrates that where the state is
7 regulating only expression, no conduct at all,
8 just a banner that's in the parade, the Court
9 takes a different view, but where expressive
10 conduct is involved -- and the reason the Court
11 takes a different view makes sense because,
12 again, the -- the analysis this Court uses with
13 respect -- with respect to expressive conduct
14 is, is the state regulating the conduct for
15 some reason other than what it expresses or is
16 it regulating what it expresses?

17 And -- and when you only have
18 expression, when all that's involved is
19 expression, as was the case with the parade in
20 Hurley, that's different because there's no --
21 there's no neutral conduct to be regulated.
22 But here what we have is the sale of a good, a
23 cake, to a -- to an individual. That's -- that
24 -- to the extent it's expressive, it's
25 certainly also conduct.

1 And Colorado's interest in ensuring
2 the bakeries and tailors and -- and other
3 public accommodations treat all people equally
4 is a content-neutral interest in ensuring that
5 everybody has a right to participate in the
6 economic life of the community --

7 JUSTICE ALITO: Along the --

8 MR. COLE: -- and that no one has this
9 --

10 JUSTICE ALITO: Along the same lines
11 as the Chief Justice's question, would you say
12 that Colorado can compel a religious college
13 that -- whose creed opposes same-sex marriage
14 to provide married student housing for a
15 married same-sex couple or allow a same-sex
16 wedding to be performed in the college chapel?

17 MR. COLE: So I think that --

18 JUSTICE ALITO: That's not pure --
19 those are not pure speech --

20 MR. COLE: I think, again, there
21 might, under -- under something like
22 Hosanna-Tabor, there might be religious-based
23 exceptions for core religious institutions, but
24 a bakery that opens itself to the public is not
25 a church, is not -- you know, it's --

1 JUSTICE ALITO: Well, this is not a
2 church. It's an educational -- it's a -- it's
3 an independent educational institution with a
4 religious heritage. And that's what they
5 believe.

6 MR. COLE: So, I think -- I think --

7 JUSTICE ALITO: So your answer is they
8 would be --

9 MR. COLE: I --

10 JUSTICE ALITO: -- they would be
11 required to do it?

12 MR. COLE: Well, I think under this
13 Court's doctrine in Employment Division versus
14 Smith, the question would be, is it a generally
15 applicable neutral law? And if it's a
16 generally applicable neutral law, there would
17 not be a free exercise question at all. Right?

18 And so -- and -- and the reason for
19 that, as Justice Scalia said in -- in
20 Employment Division versus Smith, is equally
21 applicable here.

22 Once you open this up, once you say
23 generally applicable regulations of conduct
24 have exceptions when someone raises a religious
25 objection, or in this case have objections

1 where someone raises a speech objection, you're
2 in a world in which every man is a law unto
3 himself.

4 And so the only sensible way to
5 approach this is to say if the state is
6 targeting religion, then we're going to be very
7 careful about protecting religion. And if the
8 state is targeting the message, is targeting
9 the content of speech, then we're going to be
10 very careful about protecting.

11 But when the state is regulating
12 conduct neutrally, unrelated to expression,
13 which is what this Court has already said is
14 the case with respect to public accommodations,
15 then we can have a world in which everybody who
16 raises an objection -- otherwise we would live
17 in a society in which businesses across this
18 country could put signs up saying we serve
19 whites only, music lessons for Muslims need not
20 apply, passport photos not for the disabled.

21 CHIEF JUSTICE ROBERTS: Thank you.
22 Thank you, counsel.

23 MR. COLE: Thank you.

24 CHIEF JUSTICE ROBERTS: Ms. Waggoner,
25 five minutes.

1 REBUTTAL ARGUMENT OF KRISTEN K. WAGGONER
2 ON BEHALF OF PETITIONER

3 JUSTICE SOTOMAYOR: Ms. Waggoner, here
4 the seller of the cakes is not Mr. Phillips,
5 it's Masterpiece Corporation. Does it -- in
6 your arguments, who controls the expression
7 here, the corporation or its shareholders?

8 I always thought corporations were
9 separate entities. And how do we impute to
10 this corporation, which is just a bakery, it
11 doesn't purport to sell just religious items,
12 it's a public place, how do we -- and how do we
13 make this decision with respect to the rights
14 of individuals in a corporation that don't have
15 objections?

16 So can the chef at the Hilton -- and I
17 don't mean to demean the Hilton or anybody
18 else, I'm using it as an example -- can he say
19 I don't believe in same-sex marriage and I
20 won't create a cake and can he be fired?

21 MS. WAGGONER: Justice Sotomayor, in
22 the context of your question regarding the
23 Hilton, there may be a religious accommodation
24 that is made to that employee; but in the
25 context of Masterpiece Cakeshop, this -- this

1 Court has found that corporations have free
2 speech rights, as well as closely family-held
3 corporations have free exercise rights.

4 And Mr. Phillips is also the speaker.
5 So they're both speaking when they're creating
6 --

7 JUSTICE SOTOMAYOR: But who makes a
8 decision for the corporation? In -- in most
9 situations -- it may be easier in a
10 closely-held corporation, it may be the
11 shareholders. I don't know if it's the
12 corporate board or it's the shareholders.

13 Who -- who decides?

14 MS. WAGGONER: Well, certainly I think
15 it -- again, if it's dealing with an employee,
16 the employee certainly decides what -- what
17 they're willing to express, and --

18 JUSTICE SOTOMAYOR: It can't be the
19 employee --

20 MS. WAGGONER: -- and --

21 JUSTICE SOTOMAYOR: -- speaking for
22 the corporation. The employee can be made an
23 agent of the corporation and speak on its
24 behalf, but the employee can't choose it on
25 behalf of the corporation.

1 MS. WAGGONER: Certainly. But if
2 we're talking about what the corporation will
3 speak, then the shareholders in an -- in a
4 small family-held corporation, the shareholders
5 would decide that. And that's exactly what's
6 at stake in this case.

7 Mr. Phillips owns Masterpiece
8 Cakeshops. He designs most of the wedding
9 cakes himself by him --

10 JUSTICE SOTOMAYOR: It's him and his
11 wife, right?

12 MS. WAGGONER: Yes, it is.

13 I have three brief points in rebuttal:

14 First of all, the bias of the
15 Commission is also evidenced in the unequal
16 treatment of the cake designers, the three
17 other cake designers who were on the squarely
18 opposite sides of this issue.

19 If -- if the Court looks at the
20 analysis that was provided by the Colorado
21 Court of Appeals, line by line they take the
22 opposite approach to Mr. Phillips that they do
23 to those who are unwilling to criticize
24 same-sex marriage --

25 JUSTICE GINSBURG: And they say they

1 wouldn't -- that they would say no to anyone
2 who came with that request?

3 MS. WAGGONER: No. The Colorado Court
4 of Appeals said that they could have an
5 offensiveness policy, and they said that those
6 three cake designers were expressing their own
7 message if they had to design that cake.

8 In Mr. Phillips's case, they said it
9 wasn't his message. It's simply compliance
10 with the law.

11 In the other case, they said that the
12 cake designers, because they served Christian
13 customers in other contexts, that that was
14 evidence it was a distinction based on the
15 message, but in Mr. Phillips's case, they ruled
16 the opposite way.

17 Professor Laycock's brief provides a
18 good analysis of that as well. It was filed in
19 this case.

20 Second, the Compelled Speech Doctrine
21 and the Free Exercise Clause is anchored in the
22 concept of dignity and speaker autonomy. And
23 in this case, dignity cuts both ways. The
24 record is clear on that.

25 Demeaning Mr. Phillips's honorable and

1 decent religious beliefs about marriage, when
2 he has served everyone and has a history of
3 declining all kinds of cakes unaffiliated with
4 sexual orientation because of the message, he
5 should receive protection here as well.

6 This law protects the lesbian graphic
7 designer who doesn't want to design for the
8 Westboro Baptist Church, as much as it protects
9 Mr. Phillips.

10 Lastly, political, religious, and
11 moral opinions shift. We know that. And this
12 Court's dedication to Compelled Speech Doctrine
13 and to free exercise should not shift.

14 JUSTICE SOTOMAYOR: Counsel, the
15 problem is that America's reaction to mixed
16 marriages and to race didn't change on its own.
17 It changed because we had public accommodation
18 laws that forced people to do things that many
19 claimed were against their expressive rights
20 and against their religious rights.

21 It's not denigrating someone by
22 saying, as I mentioned earlier, to say: If you
23 choose to participate in our community in a
24 public way, your choice, you can choose to sell
25 cakes or not. You can choose to sell cupcakes

1 or not, whatever it is you choose to sell, you
2 have to sell it to everyone who knocks on your
3 door, if you open your door to everyone.

4 MS. WAGGONER: Mr. Chief Justice?

5 CHIEF JUSTICE ROBERTS: You can
6 respond, if you'd like.

7 MS. WAGGONER: Justice Sotomayor, I
8 think that the gravest offense to the First
9 Amendment would be to compel a person who
10 believes that marriage is sacred, to give voice
11 to a different view of marriage and require
12 them to celebrate that marriage. The First
13 Amendment --

14 JUSTICE SOTOMAYOR: Then don't
15 participate in weddings, or create a cake that
16 is neutral, but you don't have to take and
17 offer goods to the public and then choose not
18 to sell to some because of a protected
19 characteristic. That's what the public
20 anti-discrimination laws require.

21 CHIEF JUSTICE ROBERTS: A brief last
22 word, Ms. Waggoner.

23 MS. WAGGONER: A wedding cake
24 expresses an inherent message that is that the
25 union is a marriage and is to be celebrated,

1 and that message violates Mr. Phillips's
2 religious convictions.

3 Thank you. This Court should reverse.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. The case is submitted.

6 (Whereupon, 11:31 a.m., the case was
7 submitted.)

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