IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

Disruptive Public Meetings and the First Amendment



MAY JUNE 2022
VOL.63 NO.03

OFFICERS
PRESIDENT
Barbara A. Adams
General Counsel
Illinois Local Government
Lawyers Association

PRESIDENT ELECT
Lori Grigg Bluhm
City Attorney
Troy, Michigan

IMMEDIATE PAST PRESIDENT
Tyrone E. Cooper
City Attorney
Beaumont, Texas

TREASURER
Rose Humway-Warmuth
City Solicitor
Wheeling, West Virginia

GENERAL COUNSEL AND EXECUTIVE DIRECTOR
Amanda Karras
IMLA, Rockville, Maryland

BOARD OF DIRECTORS
Christopher Balch
City Attorney
Brookhaven, Georgia

Shauna Billingsley
City Attorney
Franklin, Tennessee

Alan Bojorquez
City Attorney
Bastrop, Texas

Beth Anne Childs
Town Attorney
Bristow, Oklahoma

Diana Cortes
City Solicitor
Philadelphia, Pennsylvania

Bradford Cunningham
Municipal Attorney
Lexington, South Carolina

Jeffrey Dana
City Solicitor
Providence, Rhode Island

Arthur Gutekunst
Sr. Assistant Corporation Counsel
White Plains, New York

Nina R. Hickson
City Attorney
Atlanta, Georgia

Lori Lein
General Counsel
Alabama League of Municipalities

Wynetta Massey
City Attorney
Colorado Springs, Colorado

Bryan Scott
City Attorney
Las Vegas, Nevada

Todd Sheeran
City Attorney
Bluffdale, Utah

Jennie Granahan Tarr
Chief Assistant County Attorney
Hillsborough County Hospital Authority

Nancy Thompson
City Counselor
Columbia, Missouri

Randall Van Vleck
Town Attorney
Kirtland, New Mexico

Wendy Walberg
City Solicitor
Toronto, Ontario

Byron Werry
City Solicitor
Regina, Saskatchewan

Susana Alcala Wood
City Attorney
Sacramento, California

CONTENTS

MAY / JUNE 2022

DISRUPTIVE PUBLIC MEETINGS AND THE FIRST AMENDMENT

By: Tom Carr, County Counsel, Washington County, Oregon and Tonya Haas Davidson, City Attorney, City of Greenwood Village, Colorado

The First Amendment clearly protects the right of constituents to speak at public meetings, and on virtually any subject during "open comment" segments. But there are limits, particularly during subject-specific public hearings. Counsel need to distinguish between legitimate guardrails and viewpoint discrimination.

PAGE 6

GPS CHIPPING YOUR EMPLOYEES AND OTHER FOURTH AMENDMENT PITFALLS

By: Amanda Stanley, City Attorney, City of Topeka, Kansas

While local governments have a valid interest in ensuring that public employees conscientiously perform their duties, oversight that strays into the worker's reasonable expectation of privacy will result in constitutional challenges.

PAGE 10

SUCCESS ON APPEAL IN SECTION 1983 CASES

By: Timothy Coates and Ted Xanders, Greines, Martin, Stein & Richland LLP, Los Angeles, California

Section 1983 actions alleging violations by local government actors continue apace, resulting in prolonged litigation. Our authors present strategies and considerations that can help achieve victory on appeal.

PAGE 14

DEPARTMENTS

18 LISTSERV

How Long to a Cashless Society?

By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina and IMLA Board member

A reluctant farewell to the greenback.

20 AMICUS CORNER

***Masterpiece Cakeshop* 2.0 - Antidiscrimination Laws Under Challenge Again**

By: Amanda Karras, IMLA Executive Director and General Counsel

May a website designer refuse to serve same-sex weddings?

24 YOUNG LAWYERS

Ten Things Every Young Lawyer Should Know

By: Patrick Baker, City Attorney, Charlotte, North Carolina

Building a foundation for success in future years.

26 INSIDE CANADA

Overreaching Councillors, Roadway Obstacles, Undisclosed House Defects, and More

By: Monica Ciriello, Ontario 2015

Recent cases of interest.

STAFF

EXECUTIVE EDITOR
Amanda Karras

EDITOR
Erich R. Eiselt

ART DIRECTION AND PRODUCTION
Trujillo Design

MARKETING
Caroline Storer

Views appearing in *Municipal Lawyer* are those of the authors. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2022 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada. It offers its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information- sharing network in the field of municipal law. *Municipal Lawyer* is IMLA's membership magazine, published bi-monthly. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, Maryland 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome. *Municipal Lawyer* reserves the right to refuse or edit manuscripts submitted for publication.

AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

Masterpiece Cakeshop 2.0 – Anti-Discrimination Laws Challenged Again

The Supreme Court has granted certiorari in 303 *Creative v. Elenis*, to tackle an issue that it has twice deflected in recent Terms: whether someone purveying goods or services to the public can be exempted from a law prohibiting discrimination based on their claim of free speech.1 The case is a near carbon copy of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) and presents issues similar to those in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020). In both *Masterpiece Cakeshop* and *Fulton*, the Court failed to resolve the tension between the free speech/free exercise clauses and anti-discrimination laws, but as the saying goes, perhaps the third time's a charm. To understand the arguments in *303 Creative*, it is necessary to revisit *Masterpiece Cakeshop* and *Fulton*.

Masterpiece Cakeshop v. Colorado Civil Rights Commission

In July 2012, a same-sex couple visited Masterpiece Cakeshop, a Colorado bakery, and requested that the owner, Mr. Phillips, create a custom cake for their wedding. Phillips declined, telling them that he does not create cakes for same-sex weddings because of his religious beliefs.

The Colorado Anti-Discrimination Act (CADA) prohibits discrimination in places of public accommodation based on sexual orientation and other protected characteristics.[2] CADA defines "public accommodation" to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes."[3]

The couple filed a complaint alleging that the bakery had discriminated against them in a place of public accommodation because of their sexual orientation, violating CADA. The Colorado Civil Rights Commission (Commission) affirmed an Administrative Law Judge (ALJ) holding in favor of the couple, and Masterpiece appealed, arguing the First Amendment provided an exemption to CADA. The Colorado Court of Appeals affirmed, rejecting Masterpiece's free speech and free exercise arguments.

The Supreme Court granted certiorari to answer the following question: Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.

In a narrow 7-2 ruling, authored by Justice Kennedy, the Court decided in favor of the baker, concluding that in adjudicating whether his religion "must yield to an otherwise valid exercise of state power," the Commission failed to consider the case "with the religious neutrality that the Constitution requires."[4] This case presented, as Justice Kennedy put it, "difficult questions as to the proper reconciliation of at least two principles," pitting the authority of a State and its governmental entities to protect the rights of gay couples who face discrimination when they seek goods or services against "the right of all persons to exercise fundamental freedoms under the First Amendment..."[5]

Justice Kennedy acknowledged that while the First Amendment protects religious and philosophical objections to gay marriage, as "a general rule … such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[6]

However, the Court went on to explain, instead of treating Mr. Phillips' claims with the "neutral and respectful consideration" to which they were entitled, the Commission evinced "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[7] Specifically, during a public hearing, one Commission member had stated: "Freedom of

religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust …And to me it is one of the most despicable pieces of rhetoric that people can use – to use their religion to hurt others."[8] The Court also found evidence that the Commission had declined to find illegal discrimination by other bakers who refused to bake cakes for same-sex weddings based on religious objections. In these other cases, the Commission took no action, which the Court saw as further evidence of individualized hostility toward Mr. Phillip's religion.[9]

The Court concluded by noting "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[10]

Fulton v. City of Philadelphia

The Court next attempted to resolve the tension between anti-discrimination laws and the free /free exercise clauses in *Fulton v. City of Philadelphia*. This case pertained to Philadelphia's practice of contracting with outside agencies like Catholic Social Services (CSS) to place children with foster families. In 2018, the City learned that CSS would not consider same-sex couples as prospective foster parents and informed CSS that such a refusal violated the nondiscrimination provision in the parties' contract as well as the City's Fair Practices Ordinance (FPO), which forbids discrimination because of sexual orientation in places of public accommodation.

Section 3.21 of the contract prohibited CSS from rejecting a child or family because of protected characteristics, including sexual orientation "unless an exception is granted by the Commissioner … in his/her sole discretion."

When the City ceased referring foster children to CSS because CSS refused to certify same-sex couples as foster parents, CSS sued, arguing that the City was violating CSS's free exercise and free speech rights. One of the important questions in this case was whether the Supreme Court should overrule *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990), which has long prevented religiously-based exemptions to neutral laws of general applicability.

The Supreme Court found in favor of CSS on its free exercise challenge, but declined to overrule *Employment Div. v. Smith*.[11] In a decision authored by Chief Justice Roberts, the Court held that Section 3.21 of the City's contract was not generally applicable under Smith because it allows for exemptions at the discretion of the Commission; meaning that the City needed to meet heightened scrutiny for the requirement to survive, which it could not.[12]

The Court therefore weighed whether the policy could survive strict scrutiny under *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993). Under this rubric, a governmental regulation or policy can only survive strict scrutiny if it advances "interests of the highest order and is narrowly tailored to achieve those interests."[13]

The City argued that its policy satisfied strict scrutiny because it serves three compelling interests: "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children."[14] The Court rejected the first two reasons outright. As to ensuring equal treatment for gay and lesbian foster parents, the Court agreed this is a "weighty" interest but "[t]he City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[15] Because the Court concluded that the City had violated CSS's free exercise rights, it did not rule on the free speech issues.

303 Creative v. Elenis

That brings us to the current dispute. Lorie Smith designs websites through her company, 303 Creative, which is based in Colorado. She would like to start creating wedding websites, but she does not want to design those that celebrate same-sex marriage, due to her sincerely held religious beliefs. Ms. Smith would also like to publish a statement on her website that she will not create wedding websites for same-sex couples, for religious reasons.

As described above, CADA's "accommodation clause" prohibits public accommodations from refusing to provide services based on a number of protected characteristics, including sexual orientation.[16] CADA's "communication clause" prevents public accommodations from communicating that someone's patronage is unwelcome because of sexual orientation.[17]

Ms. Smith sued Colorado, claiming that CADA violates her free speech and free exercise rights. The Tenth Circuit ruled that the statute does not violate the First Amendment,[18] although it rejected Colorado's arguments that CADA regulates conduct, not speech[19] and that the speech at issue is that of the third party (in this case, the same-sex couple).[20] The court concluded that despite compelling speech and imposing a content-based restriction, the accommodation clause is nevertheless constitutional and survives

Continued on page 22

Cakeshop *cont'd from page 21*

strict scrutiny.[21] It reasoned that the clause is "narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'"[22]

Next, the Tenth Circuit concluded the "communication clause" did not violate Ms. Smith's free speech rights because the State could "prohibit speech that promotes unlawful activity, including discrimination,"[23] even though "compelled speech is deeply suspect in our jurisprudence … given the unique harms it presents."[24]

303 Creative petitioned the Supreme Court for certiorari on both the free speech and free exercise issues, but the Supreme Court only granted certiorari on the following question: whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

Implications for Anti-Discrimination Laws / Next Steps

Local governments have a strong interest in preventing discrimination against their constituents, both because of the harm to the individuals affected and the economic harms it can inflict on the locality itself. When IMLA filed our brief in *Masterpiece Cakeshop*, we noted that 21 states and more than 100 local governments had anti-discrimination provisions protecting citizens from discrimination based on sexual orientation and presumably more localities have these protections now. If the Court holds in favor of Smith, states and local governments will likely have to contend with challenges to public accommodation laws on First Amendment grounds. Such exceptions could easily be expanded to other protected classes and would be difficult to administer.

As was discussed at length during the oral argument in *Masterpiece Cakeshop*, if the Court were to allow exceptions from anti-discrimination laws based on religious objections to same sex marriage, it would open the door to discrimination against other protected statuses, such as sex, race, and religion. For example, Justice Kagan asked the attorney arguing for the baker:

JUSTICE KAGAN: … Same case or not the same case, if your client instead objected to an interracial marriage?
MS. WAGGONER: Very different case in that context.
JUSTICE KAGAN: Not the same. How about if he objected to an interreligious?
MS. WAGGONER: Similar case, assuming that the objection is to –
JUSTICE KAGAN: Similar to what?
MS. WAGGONER: Similar to Mr. Phillips [the baker]. That would be protected under the Compelled Speech doctrine if the objection is to the message being conveyed in that expression.
JUSTICE KAGAN: You are just saying race is different?[25]

Justice Ginsburg later asked the Solicitor General (arguing in support of the baker) about this same slippery slope issue:

JUSTICE GINSBURG: … So you -- you have already said that you put -- might put race in a different category, right?
GENERAL FRANCISCO: Yes, Your Honor.
JUSTICE GINSBURG: I have your answer on race. How about gender? How about national origin … and religion?
GENERAL FRANCISCO: I think pretty much everything but race would fall in the same category, but as this Court made clear in the Bob Jones case, the IRS could withdraw tax-exempt status from a school that discriminated on the basis of interracial marriage, but I'm not at all sure that it would reach the same result if it were dealing with a Catholic school that limited married student housing to opposite-sex couples only ….[26]

Thus, it seems clear that the advocates seeking exemptions from anti-discrimination laws would also advocate for exemptions beyond sexual orientation, including perhaps all categories except race. There is of course no guarantee that litigants would not also push for exemptions for race discrimination as well.

In terms of administrability of exemptions, the oral argument in *Masterpiece Cakeshop* gives a window into the difficulty local officials will face in determining whether an exception should apply. During a colloquy between Justice Ginsburg, Justice Kagan and counsel for the bakery about who is "speaking" at a wedding, counsel for the bakery indicated that in addition to the couple and officiant, the artist speaks at the wedding, including the baker, florist (if arrangements are custom designed), the person who designs the menu and invitation and perhaps the jeweler.[27] But counsel for the baker indicated that a hairstylist and makeup artist would not be engaging in protected speech at a wedding, despite, as Justice Kagan quipped, the fact that "artist" is in the makeup artists' professional designation.[28]

As the foregoing demonstrates, the lack of a workable standard is very troubling and further underscores the implications of this case. Creating exceptions to these laws will not only undermine important civil rights protections, but will lead to protracted litigation. If a

baker and florist are creating expression at a wedding, but a makeup artist and hairstylist are not, local officials will have a challenging time drawing appropriate lines in determining what speech would be protected and how to enforce their antidiscrimination ordinances.

IMLA will be joining an amicus brief being filed by the State and Local Legal Center in support of Colorado. The case will be briefed this summer, argued sometime in the fall, and then we can expect a decision sometime before the end of June 2023. ML

Notes

1. The petition also had a free exercise claim, but the Supreme Court did not grant certiorari on that question.
2. Colo. Rev. Stat. § 24-34-301 et seq.
3. Colo. Rev. Stat.. §24–34–601(1).
4. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).
5. *Id*. at 1723.
6. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.
7. *Id*. at 1729.
8. *Id*.
9. *Id*. at 1730.
10. *Id*. at 1732.
11. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–77, 210 L. Ed. 2d 137 (2021). Justice Alito, who was joined by Justices Thomas and Gorsuch, issued a vociferous (and lengthy) concurrence in the judgment only, indicating they would overrule Smith given its "severe holding" and that its interpretation can result in "startling consequences." *Fulton*, 141 S. Ct. at 1883-84.
12. *Id*. at 1878.
13. *Id*. at 1881 (internal quotations omitted).
14. *Id*.
15. *Id*. at 1882.
16. Colo. Rev. Stat. § 24-34-601(2)(a)
17. *Id*.
18. Because the Supreme Court is only reviewing the speech issue, this article does not discuss the Tenth Circuit's Free Exercise analysis.
19. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1177 (10th Cir. 2021), cert. granted in part, 142 S. Ct. 1106 (2022).
20. *Id*.
21. *Id*. at 1178-80.
22. *Id*. at 1179.
23. *Id*. at 1182-83.
24. Id. at 1181.
25. *Masterpiece Cakeshop*, Oral Argument Transcript, p. 22.
26. *Id*. at 32.
27. *Id*. at 10-12.
28. *Id*.

