Supreme Court Update

By: Amanda Karras, Executive Director

International Municipal Lawyers Association

IMLA

Membership organization for local government attorneys. Provide education and advocacy services for local governments.

File 30-40 amicus briefs in the lower courts and at the Supreme Court each year in support of local governments.

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Agenda

First Amendment Cases

- *City of Austin v. Reagan National Advertising*
- *Shurtleff v. Boston*
- *Kennedy v. Bremerton School District*

Law Enforcement Cases

- Qualified Immunity Cases
- *Vega v. Tekoh*

Other Major Decisions from 2022 Term

- *NYSRPA v. Bruen*

Preview of Next Term

City of Austin, Texas v. Reagan National Advertising of Texas Inc.

Reed v. Town of Gilbert Holding

Content-based regulations are presumptively unconstitutional, strict scrutiny applies, and compelling governmental interest is required.

Content based: "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."

"Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."

Ordinances/Laws Struck Down and/or Challenged Under *Reed*

- Sign codes
- Panhandling ordinances
- Ballot selfie bans
- Robocall statutes
- Harassment statutes
- Political contribution limits
- Recordkeeping, labeling, and inspection requirements in the Child Protection and Obscenity Enforcement Act
- City rejecting a ballot initiative to decriminalize marijuana possession

Justice Alito's Concurrence

- Court's opinion "does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:
- Rules regulating the size of signs…location…lighted/unlighted…
- Rules imposing time restrictions on signs advertising a one-time event.
- Rules distinguishing between on-premises and off-premises signs.

City of Austin, Texas v. Reagan National Advertising of Texas Inc.

- **Austin prohibited new off-premise signs beginning in 1983.**
  - Existing off-premise signs are non-conforming signs.
  - **May not increase the degree of nonconformity, change the method of technology used to convey a message, or increase the sign's illumination**.
- Austin's amendments since 1983.
  - Allowed to relocate some non-conforming signs. (2008)
  - *Reed*-focused amendments that did not impact the City's off-premise sign/non-conforming sign requirements. (Aug. 2017)

The Litigation

- RNA wants to digitize some of its off-premise signs.
- RNA alleged that the distinction between on- and off-premise signs is an unconstitutional content-based restriction of speech (facially and as applied).
- RNA sought a declaration that City's regulations are unconstitutional, and RNA may convert its off-premise signs to digital.

Fifth Circuit Decision

Held that the City's on-premise/off-premise distinction is content-based under *Reed v. Town of Gilbert*.

Reasoned that if one must **read the sign** to determine whether the sign is "off-premises" then it is a content-based inquiry and subject to strict scrutiny.

Held that since on-premise/off-premise distinction applied to both commercial and noncommercial messages, strict scrutiny applies.

Ruled that traffic safety and aesthetics are not compelling interests.

**** Relied on *Thomas v. Bright* and rejected DC case. ***

Issue before SCOTUS

Issue: Whether the Austin city code's distinction between on-premise signs, which may be digitized, and off-premise signs, which may not, is a facially unconstitutional content-based regulation under *Reed v. Town of Gilbert*.

Sub issue: Whether the Court should reject the "need to read" test that lower courts have applied in the wake of *Reed.*

IMLA's Amicus Brief

- Filed in support of the City of Austin, petitioning the Supreme Court for certiorari on the issue of whether distinctions between on/off-premise signs are automatically content based and subject to strict scrutiny.
- Highlighted the importance of these issues to local governments, including the ongoing confusion in this area as well as the time, money, and resources it takes to amend sign codes.
- Provided safety study information to underscore importance of regulating billboards to local governments.

Oral Argument Highlights

"[T]his decision is going to affect every state and local official around America…"

Supreme Court Rules in Favor of Austin

- Justice Sotomayor, writing for a 5 Justice majority, concluded that that Austin's distinction between on/off premise signs was not content based under *Reed*. The Court explained these distinctions are "**location-based and content-agnostic**…" and they are "therefore similar to ordinary time, place, or manner restrictions."

Supreme Court Rejects "Need to Read" and Limits *Reed v. Town of Gilbert*

- Called the need to read test **"too extreme."**
- Explained Reagan's argument that city was defining off-premise signs by their function or purpose in violation of *Reed* as "stretch[ing] *Reed's* 'function or purpose' language too far."
- Clarified *Reed's* function / purpose language encompasses situations where f/p are used as **proxies** for subject matter distinctions.
- *Reed* did not mean that "any classification that considers function or purpose is always content based" because that would "contravene numerous precedents."

What Now?

- A regulation is content based if it singles out any topic or subject matter for differential treatment or if it uses function or purpose in a way that is simply a proxy for subject matter.
- Local governments are free to keep their distinctions between on/off-premise sign regulations so long as they can show they are 'narrowly tailored to serve a significant governmental interest (intermediate scrutiny).
- Case is about more than on/off-premise signs?

Shurtleff v. City of Boston

- **Issue:** Whether flying third-party flags in front of city hall on a city flagpole amounts to government speech or whether the City created a public forum, such that refusing to fly a third-party flag amounts to content discrimination in violation of the First Amendment?

Summum / Government Speech Background

The First Amendment does not apply in cases of government speech because the Free Speech Clause only applies to the regulation of private speech.

In Pleasant Grove City v. Summum, the Supreme Court held that although a public park is a traditional public forum, a local government was not required to accept for placement in that public park a permanent monument.

Facts

Boston flies the United States and the POW/MIA flag on one flagpole, the Commonwealth of Massachusetts flag on the second flagpole, and its own flag on the third flagpole.

Boston sometimes allows third parties to fly their flag instead of the City's flag in connection with an event taking place near the flagpoles. Broadly speaking, the third-party flags that the City approved to fly on its flagpole were for "the flags of other countries, civic organizations, or secular causes."

Facts

Camp Constitution asked the City to fly its Christian flag, which has a picture of a cross on it.

The City refused its requests, explaining that "the City's policy was to refrain respectfully from flying non-secular third-party flags in accordance with the First Amendment's prohibition of government establishment of religion."

Over 12 years, the City approved 284 third party flags and until the Camp Constitution request, never rejected one. However, the Camp Constitution request, was the first request made by a religious organization

First Circuit Holding

First Circuit look at the history of governmental use, whether the message conveyed would be ascribed to the government, and whether the government "effectively controlled" the messages because it exercised "final approval authority over their selection" to determine if the City was engaging in government speech.

Concluded this was government speech, particularly given the location and prominence of the flags at Boston's City Hall.

Supreme Court Holding (6-3)

- The majority underscored the importance of the government speech doctrine: that a government is free to speak for itself, to formulate policies, and implement programs. And when it does so, "the First Amendment does not demand airtime for all views" as government would be unable to function otherwise.
- Crucial question in this case was whether Boston was engaging in government speech.
- SCOTUS determined that Boston was not engaging in government speech, and it therefore violated the First Amendment by engaging in viewpoint discrimination.

3 Factors to Consider

- To determine if a message is government speech, the majority provided a "holistic inquiry," which looks to
- 1) "the history of the expression at issue;
- 2) the public's likely perception as to who (the government or private person) is speaking; and
- 3) the extent to which the government has actively shaped or controlled the expression."

Analysis

- Although history of use factor favored Boston, in this case, Boston exercised no control of the message and the Court found this was the "most salient feature of the case." On this point, the Court found Boston's lack of a policy to determine which flags to fly (until after litigation) problematic as well.

How Can Governments Adopt Third Party Messages?

- Majority provides a helpful example from the City of San Jose's flag policy, which provides in writing that its "'flagpoles are not intended to serve as a forum for free expression by the public,'" and lists approved flags that may be flown "'as an expression of the City's official sentiments.'"
- Court also notes that Boston is free to change its policies going forward.

Justice Alito's Concurrence

- Disagrees with use of 3-part test / factor analysis.
- Under his approach, "government speech occurs if – but only if – a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech."

Kennedy v. Bremerton School District

Kennedy v. Bremerton School District

- **Issues**: (1) Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection; and (2) whether, assuming that such religious expression is private and protected by the free speech and free exercise clauses, the establishment clause nevertheless compels public schools to prohibit it.

Facts

Kennedy was an assistant football coach at a public school who felt compelled by his religious beliefs to kneel and pray at the 50-yard line immediately after each game concluded.

His version: he prayed silently, to himself and when students asked if they could join, he told them it's a free country.

School District's version: Kennedy would audibly pray at the 50-yard line with a large group of players from his team and the opposing team. At least one parent complained that his son "felt compelled to participate" in the prayer.

Facts

School district tells Kennedy he needs to pray privately / not in front of the students. Offers various options / accommodations.

Kennedy says he will only accept praying at the 50-yard line at the conclusion of the game and goes on a media blitz to discuss the issue.

At the next game, students and parents rush the field, and along with the players, circle Kennedy as he kneels and prays.

School does not renew his contract.

Ninth Circuit Ruling

Concluded that when he was engaging in the prayer activity, he was speaking as a public employee and not a private citizen. His behavior was therefore not insulated from discipline under *Pickering* and *Garcetti v. Ceballos.*

Even if Kennedy were speaking as a private citizen, the school district had an adequate justification to treat him differently due to the school's Establishment Clause concerns.

Rejected Kennedy's Free Exercise arguments, finding that the district could satisfy strict scrutiny in this case because of its need to avoid Establishment Clause violations.

Supreme Court Reverses in 6- 3 Decision

- Concluded that the District violated both the Free Speech and Free Exercise Clauses of the First Amendment when it terminated Kennedy's contract based on his religious conduct / speech. In dismissing the employer's Establishment Clause concerns, the majority explained "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."

Free Exercise Claim – Not Neutral or Generally Applicable = Strict Scrutiny

- Explained that in "forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule."
- The rule was not generally applicable given that the religious conduct was prohibited while secular conduct that was comparable was not subject to discipline, including staff being allowed to make personal calls and visit with friends after the game.
- The rule was not neutral, as it specifically singling out religious conduct as the prohibited practice.

Free Speech Claim: Public Employee or Private Citizen?

- Kennedy was speaking as a private citizen because "he was not engaged in speech 'ordinarily within the scope' of his duties as a coach."
- He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach."
- The fact that coaches were free to engage in other secular conduct during this time underscored that this was private speech.
- The Court rejected an overly broad reading of *Garcetti*, explaining employers cannot utilize "excessively broad job description[s] and treat "everything [employees] say in the workplace as government speech subject to government control."
- Cannot meet strict scrutiny.

What about the Establishment Clause?

- The District argued it could meet strict scrutiny because it had a compelling interest in avoiding an Establishment Clause violation, relying on *Lemon*'s "reasonable observer" standard.
- The Supreme Court rejected this argument, explaining that the Free Speech, Free Exercise, and Establishment Clauses should be read as "complementary" and are not at "warring" purposes.

Lemon Test is no More

- Held that the Supreme Court **"long ago abandoned *Lemon* and its endorsement test offshoot."**
- "An Establishment Clause violation does not automatically follow whenever a … government entity 'fail[s] to censor' private religious speech… Nor does the Clause 'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'"
- Instead of *Lemon*, the majority explains that the Establishment Clause must be interpreted "by reference to **historical practices and understandings**," which will allow courts to "faithfully reflect the understanding of the Founding Fathers."

Dissent disagrees with the majority on the law and the facts

- “Properly understood, this case is not about the limits on an individual’s ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee’s personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.”

Takeaways

1. Establishment Clause issues are a concern for local governments – local government officials must be trained on this case and the fact that the *Lemon* test is no more.
2. This Court is acutely interested in religion and any actual or perceived religious discrimination. Ordinarily, a case with this many factual disputes would not be ripe for certiorari. The Boston case is another example of an unusual certiorari grant if all the Court is going to do is say Boston accidentally created a public forum. But the bigger picture is cases implicating religion are very high on the Court's radar.

Law Enforcement Cases

2 Qualified Immunity Cases – Both GVRs

- *Rivas-Villegas v. Cortesluna* – IMLA filed an amicus brief in this case at the certiorari stage.
- *City of Tahlequah v. Bond*

1 Section 1983 / *Miranda* case

- *Vega v. Tekoh* – IMLA filed an amicus brief in this case at the certiorari and merits stage.

Rivas-Villegas v. Cortesluna - Facts

Police officers responded to a domestic disturbance 911 call made by a child who indicated the mother's boyfriend was threatening them with a chainsaw and they had locked themselves in a bedroom.

When the officers arrived, they saw the boyfriend, Cortesluna, through a window but did not see or hear a chainsaw. The officers formulated a plan, which included using less lethal force.

They announced themselves and when Cortesluna came to the door, he was holding a large metal object that appeared to be a crowbar. The officers ordered him to drop the weapon and come outside.

Rivas-Villegas v. Cortesluna - Facts

The plaintiff dropped the metal object, put his hands up and came outside.

The officers noticed a knife in his pocket. They ordered him not to put his hands down (toward the knife). Cortesluna lowered his head and hands (toward the knife) and one of the officers immediately shot him with two rounds from a bean bag shotgun.

He then put his hands up and they ordered him to get down on the ground, and he complied. Officer Rivas-Villegas then put his knee on Cortesluna's back for no more than 8 seconds in order to get him restrained in handcuffs.

Ninth Circuit's Decision

- Cortesluna sued the officers, claiming excessive force.
- The Ninth Circuit concluded that the officer who fired the beanbag gun did not violate the Fourth Amendment given the rapidly unfolding events and the threat to the officers.
- As to officer Rivas-Villegas, the Ninth Circuit concluded that he violated the Fourth Amendment right to be free from excessive force "by leaning too hard" on Cortesluna's back.
- The Ninth Circuit denied qualified immunity, concluding it was clearly established that "police may not kneel on a prone and nonresisting person's back so hard as to cause injury." Relied on *LaLonde v. County of Riverside,* 204 F.3d 947 (9th Cir. 2000).

IMLA's Amicus Brief

- Focused on practical implications of the Ninth Circuit's decision for law enforcement.
- Explained this is a widely used / minimally intrusive handcuffing technique to help minimize danger to officers. It is taught to prevent flight or violent resistance during handcuffing.

Supreme Court Reverses – Law was not Clearly Established

1. *LaLonde* involved a response to a noise complaint, whereas this case involved a response to a serious domestic violence situation.
2. The individual in *LaLonde* was armed only with a sandwich, whereas in this case, it was undisputed that Cortesluna had a knife in his pocket.
3. Relying on the video evidence, the Court concluded that the officer in this case put his knee on the suspect's back for no more than 8 seconds, whereas in the *LaLonde* case the plaintiff had claimed the officer "deliberately dug his knee into his back when he had no weapon and had made no threat when he approached the police."

City of Tahlequah v. Bond

- Officers were called to a possible domestic violence situation where an intoxicated individual would not leave his ex-wife's garage. When she called 911, she explained to the dispatcher that she needed police assistance or "it's going to get ugly real quick."
- When the officers arrived, they stayed about 6-8 feet back from the ex-husband who walked to the back of the garage. He grabbed a hammer and turned around to face the officers, bringing it up with both hands as if he was going to swing a baseball bat.
- The officers can be heard yelling at him over the video to drop the hammer. Instead, he raised the hammer as if he planned to throw it or charge at them and two officers then fired their weapons and killed him.

Tenth Circuit

- Denied the officers qualified immunity, concluding they had recklessly or deliberately created the situation requiring deadly force by cornering him in the back of the garage.
- The Tenth Circuit concluded the law was clearly established for the purposes of qualified immunity in that circuit.

Supreme Court Reverses on Clearly Established Law

- Explained "[n]ot one of the decisions relied upon by the Court of Appeals…comes close to establishing that the officers' conduct was unlawful." The Court noted that it has repeatedly told lower courts "**not to define clearly established law at too high a level of generality"** and that "it is not enough that a rule be suggested by then-existing precedent."
- For example, *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997) involved a situation where officers were responding to a possible suicide situation by running toward the individual in his parked car and screaming at him while attempting to wrestle the gun from his hands, which was readily distinguishable.
- The Court **did not decide whether an officer can violate the Fourth Amendment by "recklessly creating a situation that requires deadly force."**

Takeaways

Video footage is increasingly important in Section 1983 cases. The Supreme Court was comfortable summarily reversing in both cases and in both emphasized the body camera / video footage.

Section 1983 cases are the rare cases in which the Supreme Court will (on occasion) summarily reverse the lower courts. Typically, the Supreme Court is not a "court of error." But in these cases, you may be able to get the Court to summarily reverse if the Circuit Court is defining clearly established at too high of a level of generality.

Vega v. Tekoh

- Issue: Whether an individual may bring a Section 1983 claim against a police officer based on an alleged improper admission of an unMirandized statement during a criminal prosecution.

Facts: Involve a Deputy Sheriff's Investigation of Sexual Assault Allegations.

Deputy Vega believed his questioning was non-custodial and he did not *Mirandize* Tekoh.

Tekoh confessed to the crime both in writing and in conversation (Claims confession was coerced).

Tekoh was arrested and charged in state court for the sexual assault.

The prosecutor introduced the confession and the judge admitted the confession.

After the jury returned a verdict of not guilty, Tekoh sues under Section 1983 for failing to provide a *Miranda* warning.

6-3 Decision, Authored by Justice Alito

- Held that a *Miranda* violation does not provide a basis for a claim under Section 1983.
- The Court reasoned that while *Miranda* is "constitutionally based," it is a prophylactic rule, meant to provide procedural safeguards to ensure that police do not violate the Fifth Amendment rights of those in custody.
- At no point in the *Miranda* decision or any subsequent decision, did the Court say a violation of the *Miranda* rule was tantamount to a violation of the Fifth Amendment. Instead, the Court explained, *Miranda* and subsequent cases demonstrate that the Miranda warnings are "needed to safeguard [the Fifth Amendment] right during custodial interrogation."
- The remedy for a violation of *Miranda* is suppression of evidence at the criminal trial, not a Section 1983 lawsuit.

Takeaways

- This was an important win as a contrary result could have created substantial liability for local governments. This is particularly true given how many encounters police officers have with citizens and how it is not always clear where the custodial line is.
- IMLA filed an amicus brief at the certiorari stage and the merits stage.

New York State Rifle & Pistol Association, Inc. v. Bruen

- New York and six other states had discretionary permit laws for firearms, meaning that a prospective licensee had to show a "special need" to carry a handgun outside the home in that state, beyond just a generalized need of self defense.

Issues

Is New York's license regime unconstitutional under the Second Amendment?

Is there a Second Amendment right to carry a firearm outside the home for self-defense?

How should challenges to firearm regulations be analyzed?

Holding

- New York's discretionary permit regime is unconstitutional under the Second Amendment.
- Court rejects means end scrutiny (strict or intermediate) in favor of text and historical tradition analysis.
- Court does not call into question the "shall issue" permitting regimes in place in 43 states.

What about Safety Sensitive Places?

- The Court underscored that governments may still prohibit firearms from sensitive places, such as schools, government buildings, polling places, courthouses, and legislative assemblies, noting it was not providing an exhaustive list.
- Court did say that New York could not classify the entire island of Manhattan as a sensitive place.
- To determine if another location was a "sensitive place," the Court explained that lower courts need only use "analogies to those historical regulations of 'sensitive places…"

Important Takeaways

Trend in utilizing historical framework to analyze constitutional rights (this case, *Bruen*, abandonment of *Lemon* in Establishment Clause context).

Lawyers should be prepared to justify proposed laws with reference to historical traditions and be prepared to utilize historical arguments in defending (or challenging) laws.

Court reiterates that rights secured by the Second Amendment are not "unlimited."

Open Questions

- What history matters?
  - Depends on what you are analyzing. For the Second Amendment, the Court tells us the focus should be on the time period when the Second Amendment was adopted in 1791 and when the Fourteenth Amendment was ratified in 1868.
  - But *see Dobbs v. Jackson Women's Health Organization*
- How much historical evidence is necessary?
- What constitutes a historical analogue?

Preview of Next Term

- LGBTQ rights in public accommodation v. claims of free speech
- Affirmative action
- Proper test for WOTUS
- Dormant Commerce Clause case that could impact local regulations in a host of areas
- Independent State Legislature Theory

Harper v. Moore

- Issue: Whether a state's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives ... prescribed ... by the Legislature thereof," and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

Facts

Following the 2020 census the North Carolina legislature redistricted.

A group of voters and non-profits challenged the map, claiming they reflected an unconstitutional partisan gerrymander under the North Carolina constitution.

At trial a redistricting expert testified that the maps the legislature enacted were more favorable to Republicans than at least 99.999% of comparison maps generated by an algorithm.

Background : *Rucho v. Common Cause (2019)*

The Supreme Court held that partisan gerrymandering claims present political questions beyond the reach of federal courts. However, the Court stated: "Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts."

The Court specifically noted that state courts and state constitutions can apply to prevent partisan gerrymandering.

North Carolina Supreme Court Decision

- Held that the state legislature engaged in partisan gerrymandering in violation of numerous provisions of the North Carolina Constitution, including the "Free elections" clause.
- The NC court ordered the state legislature to submit new maps.

Arguments Before SCOTUS

Article I, Section 4 of the US Constitution states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

North Carolina Legislature argues that the U.S. Constitution's Federal Elections Clause vests sole authority with the state legislatures to set rules for governing federal elections and forbids state courts from reviewing those rules.

Implications for Counties

- Election administrability nightmare. Possibility of a two-tiered election system: one for state and one for federal elections.
  - Any county rule or regulation or any law prescribed by the secretary of state or board of elections related to voting would be null and void for federal elections, but still valid for state elections.
- Applies to all election rules: curbside voting, mail in ballots, voter ID laws, polling locations, etc.
- Disaster scenario – how would state legislature act quickly?

303 Creative v. Elenis

- **Issue**: Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

303 Creative Facts

- Lorie Smith designs websites for her company 303 Creative.
- She wants to start creating wedding websites, but she does not want to create websites that celebrate same-sex marriage due to her religious beliefs.
- She also wants to publish a statement on her website that she will not create wedding websites for same-sex couples as doing so would compromise her religious beliefs.

CADA

- Colorado's Anti-Discrimination Act's (CADA) "accommodation clause" prohibits public accommodations from refusing to provide services based on a number of protected characteristics, including sexual orientation. CADA's "communication clause" prevents public accommodations from communicating that someone's patronage is unwelcome because of sexual orientation.

Tenth Circuit Holding

- Statute does not violate free speech or free exercise clause.
- Court concluded the accommodation clause compels speech and is a content-based restriction, but that it is nevertheless constitutional and survives strict scrutiny. The court reasoned that the "accommodation clause" is "narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'"
- Also concluded the "communication clause" did not violate Smith's free speech rights because, the court reasoned, the State could "prohibit speech that promotes unlawful activity, including discrimination."

Déjà vu?

- *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* (2018)
- **Issue**: 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.

Masterpiece Cakeshop Holding

- 7-2, found in favor of the baker, but dodged the actual question in the case.
- In adjudicating whether his religion "must yield to an otherwise valid exercise of state power," (here the anti-discrimination provision of the state's public accommodation law), the Colorado Civil Rights Commission failed to consider the case "with the religious neutrality that the Constitution requires." Instead, the Court found that the Commission evidenced "clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."
- Inconsistent treatment of cases involving bakers who refused to make cakes with messages that were hostile to homosexuality.

Observations

- The Petitioner asked the Court to take up the free exercise issue, but the Court rewrote the question presented. Why? Perhaps signifying *Smith* is safe for now, or that it has already been eroded by *Fulton* and a couple of other cases (*Tandon)* .
- The Court wants to decide the anti-discrimination law issue. They found narrow ways out of the last 2 cases, probably won't happen this time.
- If the Court is to grant an exception to public accommodation laws, how will that be workable? Will local officials need to determine what is a "custom" or "expressive" service to be able to apply the exception? This will surely lead to increased litigation.

Questions?

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