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# Masterpieces or Simply Wedding Cakes? Exploring the Boundaries of Freedom of Speech through United States Supreme Court Case Masterpiece Cakeshop v. Colorado Civil Rights Commission

Margaret McLean Quick

University of New Hampshire, Durham, [mmq2000@wildcats.unh.edu](mailto:mmq2000@wildcats.unh.edu)

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# Masterpieces or Simply Wedding Cakes? Exploring the Boundaries of Freedom of Speech through United States Supreme Court Case Masterpiece Cakeshop v. Colorado Civil Rights Commission

## **Keywords**

Constitutional Law, First Amendment, Freedom of Speech, Pure Speech, Wedding Cakes, Protected Expression

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**Masterpieces or Simply Wedding Cakes?**

**Exploring the Boundaries of Freedom of Speech through United States Supreme Court  
Case *Masterpiece Cakeshop v. Colorado Civil Rights Commission***

Margaret McLean Quick

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Advisor: Dr. Richard A. Aliano

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**TABLE OF CONTENTS**

Table of Authorities.....3

Introduction.....4

Part I: Understanding *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.....8

    A. Factual History.....8

    B. Procedural History.....11

    C. The Purpose of a Narrow Analysis.....14

    D. Custom Wedding Cakes as Protected “Artistic” Expression.....16

Part II: The Holding and Principles of the *Hurley* case contradict Petitioner’s Freedom of Speech Claim and Reference Features of Protected Mediums of Expression that Wedding Cakes cannot satisfy.....20

    A. *Hurley v. Irish-American, Gay, Lesbian Bisexual Group of Boston*.....21

        1. Jack Phillips’ Misplaced Reliance on *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston*.....23

        2. Historical Significance and Context for mediums of protected expression.....26

        3. “Long Standing Legal Recognition” for mediums of protected expression.....27

        4. Inherent Expressiveness for mediums of protected expression.....28

Part III: Where and How the Supreme Court should draw the Line on mediums as Protected Expression .....31

    A. Relying on *Hurley* and Oral Arguments for guidance: The Importance of the “Inherent Expressiveness” Feature.....32

    B. The Reasoning Behind Adopting a Legal Test.....37

        1. “The Predominant Purpose Test”: *Mastrovincenzo v. City of New York*.....39

Part IV: Conclusion.....44

Bibliography.....49

## TABLE OF AUTHORITIES

### Cases

<i>Barnes v. Glen Theatre Inc.</i> , 501 U.S. 560, (1991).....	<i>passim</i>
<i>Brown v. Entertainment Merchants Association</i> , 564 U.S. 786, (2011).....	4
<i>Church of Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520, (1993).....	15
<i>City of Dallas v. Stanglin</i> , 490 U.S. 19, (1989).....	5, 44
<i>Cohen v. California</i> , 403 U.S. 15, (1971).....	4
<i>Edwards v. South Carolina</i> , 372 U.S. 229 (1963).....	<i>passim</i>
<i>Employment Division, Department of Humans Resources of Oregon v. Smith</i> , 494 U.S. 872, (1990).....	15
<i>Hurley v. Irish-American Gay, Lesbian, Bisexual Group of Boston</i> , 515 U.S. 557, (1993).....	<i>passim</i>
<i>Joseph Burstyn Inc. v. Wilson</i> , 343 U.S. 495 (1952).....	4, 17, 19
<i>Lemon v. Kurtzman</i> , 403 U.S. 602, (1971).....	38
<i>Mastrovincenzo v. City of New York</i> , 435 F3d 78, (2006) .....	<i>passim</i>
<i>Obergefell v. Hodges</i> , (2015).....	9
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989).....	18, 38, 42
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	44, 46
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781, (1989) .....	<i>passim</i>
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 (1943).....	15

## Introduction:

Freedom of Speech is a fundamental right of citizens of the United States and has been firmly preserved and protected since the Bill of Rights's inception in 1791. As society has developed and progressed, this Constitutional right has grown in many ways that reflect the nation's dynamic qualities. Throughout the Twentieth and Twenty-first centuries the development of this Constitutional right can be seen, as the Free Speech Clause has come to protect more than just "speech". In numerous court cases, the Supreme Court of the United States has been faced with the difficult task of deciding whether or not other mediums of expression than just literal speech itself could qualify for protection under the First Amendment. Indeed, over the course of the last century, the Supreme Court has found that "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours" and that "the Constitution looks beyond the written or spoken words as mediums of expression" *see Cohen v. California* (1971), *Hurley v. Irish-American, Gay, Bisexual Group of Boston* (1995). Thus, it can be argued that the Supreme Court has slowly expanded the boundaries of protected expression under the Freedom of Speech Clause over time, offering protection beyond literal speech to diverse mediums of expression such as film, emotions and ideas, parades, paintings, performance dance, and even video games *see Joseph Burstyn Inc. v. Wilson* (1952), *Cohen v. California* (1971), *Hurley v. Irish-American, Gay, Bisexual Group of Boston* (1995), *Barnes v. Glen Theatre Co.* (1991), *Brown v. Entertainment Merchant's Association* (2011). These enumerated court cases suggest that the Supreme Court has been willing to expand the boundaries of what can be considered protected expression despite the emergence of new various mediums of expression.

Yet, the First Amendment right to Freedom of Speech must have its limits for no right is absolute. Not every medium of expression that emerges can or should be granted protection under the First Amendment. As Chief Justice Rehnquist stated in *City of Dallas v. Stanglin*, “It is possible to find some kernel of expression in almost every activity a person undertakes... but such a kernel is not sufficient to bring the activity within the protection of the First Amendment”<sup>1</sup>. While new mediums never before considered by the Court emerge<sup>2</sup>, it is important that the Supreme Court establish where to draw the line on what should and should not be considered expression deserving of protection under the First Amendment. Limitless boundaries of protected expression could have far reaching consequences such as trivializing the First Amendment<sup>3</sup>. Recently in 2017, the pending Supreme Court case *Masterpiece Cakeshop v. Colorado Civil Rights Commission* calls on the Supreme Court of the United States to more clearly define the boundaries of what should and should not be considered protected expression as a brand-new medium emerged that could have far reaching effects on Freedom of Speech if given protection under the First Amendment: custom wedding cakes.

The issue in this pending Supreme Court case began in 2012 when Charlie Craig and David Mullins, a gay couple, were denied a custom wedding cake by the owner of Masterpiece Cakeshop, Jack Phillips. Jack Phillips denied to make Craig and Mullins a custom wedding cake because creating a wedding cake for a gay wedding would be adverse to his deeply held religious

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<sup>1</sup> See *City of Dallas v. Stanglin*. Majority Opinion. Justice Rehnquist.

<sup>2</sup> Tushnet, Mark V., Alan K. Chen, and Joseph Blocher. *Free Speech Beyond Words, The Surprising Reach of the First Amendment*. New York, New York: New York University Press, 2017. 174

<sup>3</sup> Brief of American Unity Fund and Profs. Dale Carpenter and Eugene Volokh as Amici Curiae in Support of Respondents. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 26, 2017.

beliefs<sup>4</sup>. Additionally, Phillips feels that the creation of his custom wedding cakes are art in which he honors God and therefore it would not only violate his free exercise of religion, but principally his freedom of speech<sup>5</sup>. Jack Phillips' Freedom of Speech claim and argument is multilayered. He claims that his cakes are his artistic expression, akin to pure speech, that deserve protection under the First Amendment, that if his wedding cakes are not found to be akin to pure speech that they meet the qualifications of expressive conduct, that the Compelled Speech Doctrine has been violated and that there has been view point discrimination in the application of the Colorado Public Accommodation's Law<sup>6</sup>. While there are many facets to Phillips' Freedom of Speech argument, the most important claim and the claim that will be examined in great depth in this paper is that his custom wedding cakes are artistic expression, akin to pure speech, that should be granted protection under the First Amendment. This is the most important aspect of his argument to analyze because this new medium- custom wedding cakes- has never been considered before the Court, meaning that if the Court decides to grant wedding cakes protection under the First Amendment, it would expand the boundaries of Freedom of Speech further than they are meant to go, thus trivializing the First Amendment.

Furthermore, the baker Jack Phillips claims that his custom wedding cakes are his protected artistic expression and he therefore cannot be compelled to make create a custom wedding cake and sell it to someone he does not want to, like the gay couple Charlie Craig and David Mullins. Thus, if custom wedding cakes are treated as protected expression, which will extend to other baked goods and various custom expression, then the creators of that expression

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<sup>4</sup> Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017.

<sup>5</sup> *Ibid.* 17, 38.

<sup>6</sup> *Ibid.* 40, 50.



could also claim that they cannot be compelled to create speech either. Accordingly, the if wedding cakes are granted protection under the First Amendment, not only will it trivialize the First Amendment, it could allow bakers and other craftsman alike the ability to deny people service, potentially undermining public accommodations laws that have been put in place with the goal of preventing discrimination. Considering these far-reaching ramifications, it is not a matter of “if” a line should be drawn on what mediums can and cannot be considered protected expression under the First Amendment, but “where” and “how” the line should be drawn.

This paper has two objectives. The first objective is to demonstrate that custom wedding cakes should not be treated as protected expression under the First Amendment. By answering question that *Masterpiece Cakeshop* proposes: “should custom wedding cakes be considered protected “artistic” expression under the First Amendment or are they simply just wedding cakes that are no different from other foods that are not afforded any First Amendment protection?” it will be clear from provided evidence that wedding cakes should not be protected expression. Since the right to Freedom of Speech must have its limits and does have its limits, proving that custom wedding cakes should not be protected expression under the First Amendment will help to prevent a limitless variety of baked goods from being recast as a form of protected expression. This could also prevent bakers as well as related craftsman alike from possessing the ability to deny people service, potentially undermining public accommodation laws. To prove why custom wedding cakes should not qualify as anything more than food or a product, this paper will first give an overview of the cases’ factual and procedural history and a detailed explanation of Jack Phillip’s freedom of speech claim to ensure a clear understanding of his argument and the overall case itself. This will be followed by an examination of Supreme Court precedent that will reveal what features of a medium the Court has generally looked for when treating a medium as

protected expression under the First Amendment. This analysis of Supreme Court precedent will show that custom wedding cakes cannot satisfy this cited precedent as they do not possess the necessary features of a protected medium of expression that the Court historically finds important, namely that wedding cakes do not possess the feature of “inherent expressiveness”.

The second objective of this paper is to advocate for where and how the Supreme Court of the United States must draw the line when considering what mediums can and cannot be protected expression under the First Amendment. The purpose of establishing where this line must be drawn is to further prevent the trivialization of the First Amendment in future cases with similar circumstances. This paper will then advocate for exactly how this line can be drawn by proposing the adoption a straightforward legal test, the Predominant Purpose Test, found in *Mastrovincenzo v. City of New York*. This test provides a clear answer to this peculiar legal question that *Masterpiece Cakeshop v. Colorado Civil Rights Commission* sets forth, thereby helping to create a limiting principle when considering what can and cannot be protected expression under the First Amendment. Additionally, the Predominant Purpose Test will set a workable standard for future cases with similar circumstances by establishing exactly where the line should be drawn on which mediums should and should not be protected expression under the First Amendment. The adoption of the “Predominant Purpose Test” will act as a safeguard, aiding in preventing the corrosion of public accommodations laws and the dilution of the First Amendment in future cases with similar circumstances.

## **Part I: Understanding *Masterpiece Cakeshop v. Colorado Civil Rights Commission***

### A. Factual History:

In July 2012, Charlie Craig and David Mullins made accommodations to be legally married in Massachusetts.<sup>7</sup> The couple’s home state of Colorado did not yet legally recognize gay marriage as their wedding was prior to the ruling in *Obergefell v. Hodges*<sup>8</sup> which nationally legalized gay marriage.<sup>9</sup> Following the couple’s wedding ceremony in Massachusetts, Craig and Mullins planned to host a celebratory reception with friends and family back in their home state of Colorado.<sup>10</sup> The couple decided that they wanted a wedding cake at their celebratory reception and accordingly Craig and Mullins decided to visit Masterpiece Cakeshop, a bakery in Lakewood, Colorado to obtain a wedding cake. The couple had not shopped at this bakery before, but were referred to the bakery by the event planner of their reception.<sup>11</sup> The couple, along with Craig’s mother browsed the store and were then shortly met by the owner of the bakery Jack Phillips to discuss creating and buying a custom cake for their wedding reception.<sup>12</sup> However, the bakery’s owner, Jack Phillips, promptly refused to make the couple a custom wedding cake because he felt that doing so would violate his deeply-held Christian beliefs. Phillips allegedly said he would sell the couple “birthday cakes, shower cakes...cookies and brownies, I just don’t make cakes for same sex weddings.”<sup>13</sup>

It should be noted that Jack Phillips deeply identifies as a Christian who “strives to honor God in all aspects of his life, including how he treats people and runs his business”.<sup>14</sup> In addition,

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<sup>7</sup> Respondent’s Brief, Colorado Civil Rights Commission, Charlie Craig and David Mullins. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 23, 2017. 10.

<sup>8</sup> *Obergefell v. Hodges*. Oyez. Web. <https://www.oyez.org/cases/2014/14-556>

<sup>9</sup> *Ibid*, 11

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*.

<sup>14</sup> Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 8.

Jack Phillips feels that creating cakes, specifically custom wedding cakes, is art through which he honors God. Phillips has stated that he closes Masterpiece Cakeshop on Sunday so that he and his employees, many of which are his family members, can attend religious services and honor their religious convictions.<sup>15</sup> Jack Phillips claims that he “gladly serves people from all walks of life, including individuals of all races, faiths and sexual orientations”.<sup>16</sup> However, he states that as a result of his deeply held Christian beliefs he cannot design a custom wedding cake that expresses “ideas or celebrates events at odds with his religious beliefs.”<sup>17</sup> For example, Phillips states that he will not design cakes that celebrate Halloween because it can be seen as celebratory of the devil, create cakes that contain alcohol, express “anti-family themes”, such as a cake that may glorify divorce, contain “hateful, vulgar, or profane messages (such as a cake disparaging the LGBTQ+ community), or promote atheism, racism or indecency”.<sup>18</sup>

In addition, Jack Phillips believes that marriage is inherently religious and sacred. He believes that, according to his faith, marriage is a union only between one man and one woman.<sup>19</sup> Phillips sincerely feels that through creating cakes he is creating art that is honoring God and that his wedding cakes are therefore expression. Accordingly, Phillips would feel it to be “sacrilegious” to create a wedding cake for a gay couple, thereby clearly expressing through his art and through cake as a medium an idea that is odds with his sincerely held and deeply religious beliefs.<sup>20</sup>

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid, 9.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

For the above stated reasons, Jack Phillips refused to create a custom wedding cake for Charlie Craig and David Mullins. The day after Phillips refused to create the custom wedding cake, Charlie Craig's mother called Masterpiece Cakeshop to ask the owner Jack Phillips why he had turned the couple away. Phillips reiterated that creating a custom wedding cake for a same sex wedding would violate his religious beliefs and therefore he could not have any part in the celebration of the couple's marriage.<sup>21</sup>

#### B. Procedural History:

Craig and Mullins were allegedly devastated when Jack Phillips refused to make them a custom wedding cake, and consequently filed a charge of discrimination with the Colorado Civil Rights Division, the administrative agency which is responsible for enforcing the State's antidiscrimination laws across a multitude of sectors, including public accommodation.<sup>22</sup> The charge claimed that Jack Phillips had violated the public accommodations provision of Colorado's Anti-Discrimination Act because his refusal to make them a custom wedding cake constituted discrimination on the basis of sexual-orientation.<sup>23</sup> The Colorado Civil Rights Division then conducted an investigation and found that Phillips had denied service to other same sex couples as well.<sup>24</sup> He also did not deny that his bakery is a place of public accommodation. Upon these findings, the Division issued a probable cause determination against Masterpiece Cakeshop, finding that Phillips had denied Craig and Mullins "full and equal

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<sup>21</sup> Respondent's Brief, Colorado Civil Rights Commission, Charlie Craig and David Mullins. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 23, 2017.

<sup>22</sup> Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 11.

<sup>23</sup> *Ibid.*

<sup>24</sup> Respondent's Brief, Colorado Civil Rights Commission, Charlie Craig and David Mullins. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 23, 2017. 12.

enjoyment in a place of public accommodation”, thereby violating Colorado’s Anti-Discrimination Act (CADA).<sup>25</sup> The Colorado Anti-Discrimination Act reads:

It is discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of a disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.<sup>26</sup>

As a result of its finding, the Colorado Civil Rights Division issued a formal complaint and notice of hearing. In Colorado, such hearings are conducted by the Colorado Office of Administrative Courts (OAC) before an administrative law judge.<sup>27</sup> Masterpiece Cakeshop sought to have the case dismissed by filing a motion for summary judgement. A court will grant a “motion for summary judgement” before trial if there are no “triable issues of fact”.<sup>28</sup> The Office of Administrative Courts then denied the motion for summary judgement, and ruled against Jack Phillips by finding that his refusal to create a custom wedding cake for Craig and Mullins violated the Colorado Anti-Discrimination Act and therefore there was a “triable issue of fact”.<sup>29</sup> Additionally, the administrative law judge rejected Phillips’ free speech defense, but recognized that the First Amendment applies to “nonverbal mediums of expression such as art”.<sup>30</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> Colorado Anti-Discrimination Act. Col.Stat.24-34-601 C.R.S 2014.  
<http://lpdirect.net/casb/crs/24-34-601.html>

<sup>27</sup> Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 11.

<sup>28</sup> Nolo Legal Dictionary. Definition of Summary Judgement. Web.  
<https://www.nolo.com/dictionary/summary-judgement-term.html>

<sup>29</sup> Ibid.

<sup>30</sup> Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 11.

Masterpiece Cakeshop then appealed to the Colorado Civil Rights Commission. The Colorado Civil Rights Commission is responsible for reviewing appeals of cases investigated by the Colorado Civil Rights Division and is composed of seven members.<sup>31</sup> The Colorado Civil Rights Commission then issued a final order which adopted the Office of Administrative Court's ruling.<sup>32</sup> The Commission ordered that if Masterpiece Cakeshop continued to offer custom wedding cakes, then they must design cakes for both homosexual and heterosexual weddings. The Commission also ordered all Masterpiece Cakeshop employees to undergo CADA compliance training. In addition, the Commission ordered Phillips to submit quarterly compliance reports for two years.<sup>33</sup> Masterpiece Cakeshop then appealed to the Colorado Court of Appeals.

The Colorado Court of Appeals, the intermediate appellate court for the Colorado Court system, rejected the argument of Masterpiece Cakeshop, which contended that the application of the CADA unconstitutionally infringed upon Phillip's right of free speech and/or free exercise.<sup>34</sup> The Appeals Court rejected Phillips' free exercise argument, holding that CADA is generally applicable "because a law is generally applicable so long as it does not regulate only religiously motivated conduct".<sup>35</sup> The Appeals Court also rejected Phillips' free speech defense finding that Phillips "does not convey a message supporting same-sex marriages merely by abiding by the law" and "a reasonable observer would understand that his compliance with the law is not a

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<sup>31</sup> Ibid, 12.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid, 13.

<sup>35</sup> Respondent's Brief, Colorado Civil Rights Commission, Charlie Craig and David Mullins. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 23, 2017. 13.

reflection of (his) own beliefs”.<sup>36</sup> Lastly, the Appeals Court dismissed Phillips’ “hybrid rights claim”. What Phillips means by “hybrid rights claim” is because he believes his freedom of speech *and* freedom of religion are being violated in companion with one another, he has a “hybrid rights claim” that will subject the Colorado law to strict scrutiny, which is the highest level of judicial scrutiny that the law will not withstand.<sup>37</sup> The Court stated even if such a “hybrid claim” actually existed within case law “it would not apply here” since “the Commission’s order does not implicate Phillips’ freedom of expression”.<sup>38</sup> Upon receiving this decision from the Colorado Court of Appeals, Phillips then appealed to the Supreme Court of Colorado. The Supreme Court of Colorado refused to grant certiorari by a vote of 4-2. Masterpiece Cakeshop accordingly appealed to the Supreme Court of the United States.<sup>39</sup>

### C. The Purpose of a Narrow Analysis:

Before the United States Supreme Court, Petitioner Masterpiece Cakeshop and Jack Phillips and Respondents Colorado Civil Rights Commission accompanied by Charlie Craig and David Mullins entered comprehensive briefs which detailed their arguments. Petitioner Jack Phillip’s brief was entered on August 31, 2017 and gave three arguments. First, that his custom wedding cakes are artistic expression that deserve protection under the First Amendment and that his freedom of speech is being violated by the application of the Colorado Anti-Discrimination

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<sup>36</sup> Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 13.

<sup>37</sup> See [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny). (Note that Strict Scrutiny is the most rigorous standard of Judicial Review. The burden is placed on the states and to satisfy this standard, states must show a compelling state interest and that the policy is narrowly tailored to achieve that interest.)

<sup>38</sup> Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 14.

<sup>39</sup> Colorado Supreme Court Decision. Order of the Court: Denial of Writ of Certiorari. April 25, 2016. Case No: 2015CS738



Act. Second, that the application of CADA violates his freedom of exercise. Third, he claims that because his free exercise *and* free speech are being violated in companion with one another, he has a “hybrid rights claim” that will subject the application of the Colorado public accommodations law to strict scrutiny, a level of judicial scrutiny Petitioner claims the application of the law will not be able to withstand.

As previously stated, this paper will not be addressing Craig and Mullins’ argument and will only examine one small part of Jack Phillips’ three tiered argument- custom wedding cakes as protected expression under the First Amendment. For clarity, the reason for this narrow analysis should be noted. First, Jack Phillip’s other arguments, Free Exercise and the Hybrid Rights Claim, are not valid arguments. Phillips’ other two layers to his argument, the “hybrid rights claim”<sup>40</sup> and “freedom of exercise”<sup>41</sup> do not have a leg to stand on, as they can be disproved with Supreme Court precedent and are therefore of no concern whatsoever to the outcome of this case or the overall concern of pushing the boundaries of the right to Freedom of Speech too far. The second reason is, as previously stated, analyzing whether or not custom wedding cakes should qualify as protected expression, akin to pure speech, under the First Amendment helps the Supreme Court to find where to draw the line on the right to Freedom of

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<sup>40</sup> See Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017; see also *Oregon v. Smith* (An individual’s religious beliefs do not and have never excused them from complying with a valid law that the government is free to regulate); see also *West Virginia State Board of Education v. Barnette* (A case that Petitioner claims is a clear example of “hybrid rights”, but this was never explicitly stated by the Barnette Court, and has never been officially ruled upon and is therefore unlikely the Supreme Court will accept this claim now, rendering it not applicable).

<sup>41</sup> See Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017; see also *Church of Lukumi Babalu Aye v. City of Hialeah* (Under the Free Exercise Clause if a law targets religion and restricts more religious conduct than necessary, and the law is not applied neutral or generally applicable manner then the law is subject to strict scrutiny. The contended law in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* however does not target religion and was applied in a neutral and generally applicable manner, making the Lukumi standard not applicable).

Speech as peculiar mediums like wedding cakes emerge. As not all rights are absolute, answering the question: “should custom wedding cakes be considered protected “artistic” expression under the First Amendment or are they simply just wedding cakes that are no different from other foods that are not afforded any First Amendment protection?” helps to determine where this line should be drawn. This is extremely important as it will prevent the trivialization of the First Amendment right to Free Speech.

While Jack Phillips has additional layers within his freedom of speech argument, which he feels shows the strength of his claim, wedding cakes as protected expression is the first question the Supreme Court will consider in this case<sup>42</sup>. Additionally, and as stated above, wedding cakes as a medium of protected expression is a very important claim to consider because this new medium has never been considered before the Court. Since this medium is completely new, the outcome of this decision could potentially offer protection to a whole new medium of expression and indeed could expand beyond just wedding cakes, thereby expanding the boundaries of Freedom of Speech too far and possibly affecting public accommodations laws, which could have significant effect on the First Amendment legal landscape of the United States.

#### D. Custom Wedding Cakes as Protected “Artistic” Expression:

Jack Phillips contends that his custom wedding cakes are his artistic expression. Phillips states that free speech protects expression, akin to pure speech, as well as expressive conduct and that the Court must initially decide whether his custom wedding cakes are in fact “artistic” expression deserving of First Amendment protection.<sup>43</sup> The Supreme Court must first tackle this

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<sup>42</sup> See Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 17.

<sup>43</sup> Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 17.

initial question of whether cake can be considered speech because if the Court rejects this argument, there is a strong chance Petitioner Jack Phillips will lose this case. After all, the other layers of his argument can be disproved with Supreme Court precedent, so his Freedom of Speech claim is all he has. Jack Phillips of course argues that his wedding cakes clearly qualify as expression and that the expressive conduct analysis is therefore unnecessary.<sup>44</sup> Petitioner Jack Phillips claims that when the Colorado Court of Appeals was reviewing his case, the court erred in only considering the expressive conduct analysis and never addressed whether Phillips’ custom designed wedding cakes actually constitute as artistic expression, akin to pure speech, rather than just conduct.<sup>45</sup> Jack Phillips contends that his custom wedding cakes are in fact his “artistic” expression because he intends to and does communicate through them.<sup>46</sup> Phillips additionally contends that his custom wedding cakes are “artistic” expression akin to pure speech rather than expressive conduct because pure speech is often given the greatest constitutional protection.<sup>47</sup>

Phillips additionally claims that artistic expression is a broad category which includes traditional forms of visual art such as pictures, paintings, film<sup>48</sup> and engravings, which have been granted protection under the First Amendment.<sup>49</sup> As a result of artistic expression’s inherent broadness, it can encompass art from the traditional portrait, to abstract paintings and can even be as diverse as tattooing.<sup>50</sup> Jack Phillips argues that similar to these other artists, both traditional

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid, 19.

<sup>47</sup> Pure Speech Definition. US Legal Dictionary. <https://definitions.uslegal.com/p/pure-speech/>

<sup>48</sup> See *Joseph Burstyn Inc. v. Wilson*. United States Supreme Court. 1952.

[https://www.law.cornell.edu/supremecourt/text/343/495#writing-USSC\\_CR\\_0343\\_0495\\_ZS](https://www.law.cornell.edu/supremecourt/text/343/495#writing-USSC_CR_0343_0495_ZS)

<sup>49</sup> Petitioner’s Brief, *Masterpiece Cakeshop, LTD. And Jack Phillips. Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 18.

<sup>50</sup> Ibid.

and modern, the end product of his art work reflects a vision brought to life by Phillips himself and involves a great deal of “artistic effort”, such as sketching, sculpting, painting, and molding.<sup>51</sup> Therefore, Jack Phillips claims he is shielded by the Free Speech clause as a “modern painter or sculptor”, and “his greatest masterpieces –his custom wedding cakes- are just as worthy of constitutional protection as an abstract painting or a film.”<sup>52</sup>

Additionally, Jack Phillips urges that each cake he creates communicates messages about marriage and the couple he is creating the custom cake for. Phillips claims that evidence indicates that Respondents Charlie Craig and David Mullins intended to ask for a rainbow themed wedding cake, a symbol of gay pride, because the cake they ended up receiving from a different baker was a rainbow themed wedding cake.<sup>53</sup> Jack Phillips claimed that expressing such celebratory messages about Craig and Mullin’s same sex marriage would contradict the core of his religious beliefs about marriage and express messages that “he could not in good conscience communicate.”<sup>54</sup>

Lastly, Petitioner argues that his custom wedding cakes are akin to pure speech, the level of speech given the highest amount of protection and should be viewed as such. However, Phillips states that if the Supreme Court does not accept the artistic expression argument (akin to pure speech), then the Court should accept that the wedding cakes he creates should at least qualify as expressive conduct.<sup>55</sup> Petitioner Jack Phillips cites the Johnson Test from the landmark Supreme Court case *Texas v. Johnson*.<sup>56</sup> The Johnson Test is a legal test adopted by the

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<sup>51</sup> Ibid, 20.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid, 22.

<sup>54</sup> Ibid, 21.

<sup>55</sup> Ibid, 23.

<sup>56</sup> See *Texas v. Johnson*. United States Supreme Court. 1989.

<https://www.law.cornell.edu/supremecourt/text/491/397>

United States Supreme Court to see if a person is involved in expressive conduct. The Johnson Test is two pronged and asks first, whether an intent to convey a particularized message was present; and second, whether the likelihood was great that the message would be understood by those who viewed it.<sup>57</sup> Petitioner Phillips claims that he satisfies the Johnson Test because he does have an intent and does convey particular messages, explicitly celebratory messages about marriage and is confident that this celebratory message and supporting message for the couple's, Charlie Craig and David Mullins, marriage would be easily understood by those who viewed it.<sup>58</sup>

It can be seen from Jack Phillip's well-crafted argument that considering whether or not custom wedding cakes should be granted protection as expression under the First Amendment is no easy task. Indeed, custom wedding cakes seem to straddle the metaphorical line between speech and non-speech as it could certainly be argued that custom wedding cakes convey a message of jubilation and celebration for the event it is made for. Petitioner's brief also brought up a valid point, which is that artistic expression is a broad category which includes traditional forms of art like paintings and film<sup>59</sup>, which have indeed been granted protection under the First Amendment as well as more modern and abstract forms of art like tattooing.<sup>60</sup> He thus believes that because it can be argued that as a result of expression functioning a "broad category" and as a modern "painter and sculptor" himself, that there is room for his work which he claims is inherently expressive, to be granted constitutional protection. Therefore, it is necessary to review and analyze established United States Supreme Court precedent in order to have a clear

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<sup>57</sup> Ibid.

<sup>58</sup> Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 24.

<sup>59</sup> See Joseph Burstyn Inc. v. Wilson. United States Supreme Court. 1952.

[https://www.law.cornell.edu/supremecourt/text/343/495#writing-USSC\\_CR\\_0343\\_0495\\_ZS](https://www.law.cornell.edu/supremecourt/text/343/495#writing-USSC_CR_0343_0495_ZS)

<sup>60</sup> Petitioner's Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 18.

understanding of the boundaries that have been set by the Court when considering if a medium should qualify as protected expression under the First Amendment.

**Part II: The Holding and Principles of the *Hurley* case contradict Petitioner’s Freedom of Speech Claim and Reference Features of Protected Mediums of Expression that Wedding Cakes cannot satisfy**

This next section will review and analyze United States Supreme Court case *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston*. This court case demonstrates that the Supreme Court has generally treated a medium as protected expression under the First Amendment when it has deep historical significance, when the medium has been historically and traditionally recognized in the law as expressive and when the medium is inherently expressive, meaning the medium in question has little to no non-expressive function.<sup>61</sup> These three features reveal what characteristics the Supreme Court finds paramount to mediums of protected expression, and thus functions as boundaries the Court has set when treating a medium as protected expression. Additionally, three Supreme Court cases, *Ward v. Rock Against Racism*, *Edwards v. South Carolina* and, *Barnes v. Glen Theater, Inc.*, will serve as supplemental evidence in support of the precedent established in *Hurley*. These supplemental cases will demonstrate the strength of the *Hurley* precedent because they will show that the Court has consistently considered the three features (historical significance, long standing legal recognition and inherent expressiveness) to be important when treating a medium as protected expression. Such precedent seen in *Hurley*, bolstered by additional cases, will help show that there is no room for custom wedding cakes as a medium of expression to be granted constitutional

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<sup>61</sup> Brief of American Unity Fund and Profs. Dale Carpenter and Eugene Volokh as Amici Curiae in Support of Respondents. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 26, 2017. 8.

protection because custom wedding cakes exist outside of this protected expression precedent seen in *Hurley*.

*A. Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston:*

A review and analysis of *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston* will serve two purposes here. First, it will be noted that Petitioner Jack Phillips relies heavily on *Hurley* when making his argument about his custom wedding cakes, but this reliance will be shown to be misplaced. Second, Petitioner Phillips' misplaced reliance on *Hurley* will continue to be shown as *Hurley* references that only mediums that have deep historical significance, have been historically and traditionally recognized in the law as expressive and are inherently expressive qualify as protected expression and custom wedding cakes will not satisfy this precedent.

*Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston* is a case that was decided in 1993 which involved the South Boston Allied War Veteran's Council who traditionally organized a St. Patrick's Day Parade in Massachusetts. Every year, the Veteran's Council applied for and received a permit for the parade, "which at times included as many as 20,000 marchers and drawn up to 1 million watchers."<sup>62</sup> Then in 1992, the Irish-American Gay, Lesbian, Bisexual Group of Boston (GLIB) and other members of the LGBT community in Boston who were descents of Irish Immigrants joined together with the intent to march in the St. Patrick's Day parade as a way to honor their Irish-American heritage as part of the LBGT community.<sup>63</sup> However, the Veteran's Council denied GLIB's application to take part in the St. Patrick's Day

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<sup>62</sup> See, *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston*. United States Supreme Court. 1993. <https://www.law.cornell.edu/supct/html/94-749.ZO.html>

<sup>63</sup> Ibid.

parade. The Council again denied GLIB's application to take part in the parade in 1993.<sup>64</sup>

Accordingly, the group (GLIB) filed suit against the South Boston Allied War Veteran's Council, "alleging violations of the Massachusetts and Federal Constitutions and of the Massachusetts public accommodations law, which prohibited "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement."<sup>65</sup>

The Council asserted that "the exclusion of groups with sexual themes merely formalized the fact that the Parade expresses traditional religious and social values," however the Massachusetts state court rejected this assertion, concluding that GLIB was rejected because of their sexual orientation which was in violation of the state's public accommodation's law.<sup>66</sup> The court additionally rejected the Council's assertion that GLIB's admission into the St. Patrick's Day parade would be a violation of the Council's First Amendment rights to free speech and association.<sup>67</sup> Accordingly, the state court ruled that the Veteran's Council must include GLIB due to the Massachusetts public accommodations law, similar to the Colorado public accommodations law, that prohibited discrimination on the basis of sexual orientation, among other identities. The Massachusetts Supreme Judicial Court affirmed this ruling and also found that it was "impossible to detect an expressive purpose from the parade".<sup>68</sup> The United States Supreme Court granted certiorari to determine whether or not the Massachusetts state courts order for the Veteran's Council to include GLIB in the St. Patrick's Day Parade violated the First

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.



Amendment.<sup>69</sup> The United States Supreme Court decided that the state order to include GLIB in the St. Patrick's Day Parade did violate the First Amendment and reversed the Massachusetts Supreme Judicial Court's decision.

Ultimately, the United States Supreme Court decided in a unanimous decision to overturn the Massachusetts Supreme Court's ruling that required the Veteran's Council to include GLIB, noting their commitment to Freedom of Speech and finding that the order by the Massachusetts state court was indeed a violation of the First Amendment. The Court found that the Massachusetts public accommodations law, which prohibited discrimination on the basis of sexual orientation, was constitutional, but its application in this particular case was not because it infringed on the Council's First Amendment rights. To this point Justice Souter stated in the opinion of the Court:

When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.<sup>70</sup>

The Court found that compelling a speaker to alter their message by including others is a violation of the First Amendment as “a speaker has the autonomy to choose the content of his own message, and conversely, to decide what not to say”.<sup>71</sup>

1. Jack Phillip' Misplaced Reliance on *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston*

It should be noted that in Jack Phillips' brief that was filed before the Supreme Court, he relies heavily on *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston* because the

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

Court decided that “a speaker has the autonomy to choose the content of his own message”<sup>72</sup> and claims that *Hurley* established precedent that a state cannot apply a public accommodation law to force individuals engaged in expression to alter what they communicate.<sup>73</sup> Since Petitioner Jack Phillips states that he is being “compelled to speak” by creating custom wedding cakes that are adverse to his sincerely held religious beliefs and that his expression would be altered by making a wedding cake for Craig and Mullins because of this particular application of the Colorado public accommodations law, this is why he heavily relies on *Hurley*.<sup>74</sup>

While this may sound like a convincing argument, it is important to acknowledge that Jack Phillips’ reliance on *Hurley* is misplaced for two reasons. First, in Jack Phillips’ brief that was filed before the Supreme Court, he stated in his argument that the very first question the Supreme Court must consider is whether or not custom wedding cakes are a protected medium of expression<sup>75</sup>. This requirement that the Court must first consider if wedding cakes are speech before moving onto any other argument presented was again repeated by Jack Phillips’ Counsel Kristen Kellie Waggoner in the Oral Arguments that took place on December 5, 2017.<sup>76</sup> This initial question must be satisfied before moving onto arguments that consider, for example, if the

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<sup>72</sup> It is noted that Jack Phillip’s reliance on *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston* is misplaced because the *Hurley* precedent is used to bolster the fact the custom wedding cakes cannot be protected expression under the First Amendment. As Phillip’s used *Hurley* as a backbone of his argument, it is essential to discredit his argument before citing why *Hurley* establishes precedent that wedding cakes cannot fit into. Additionally, as other craftsman similar to Phillips will attempt to use the same “compelled speech” argument to not serve certain people, it is important to discredit his argument so it cannot be used by others for discriminatory purposes.

<sup>73</sup> Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 27.

<sup>74</sup> *Ibid*, 26.

<sup>75</sup> *Ibid*, 17.

<sup>76</sup> See Masterpiece Cakeshop, LTD., et al., Petitioners, v. Colorado Civil Rights Commission, et al., Respondents. Oral Arguments. Roberts Court. December 5, 2017. (Kristen Kellie Waggoner: “The Court would first ask under the speech analysis, is there speech?”), 12.

Compelled Speech Doctrine<sup>77</sup> is violated. This initial question must be satisfied because if the Court decides wedding cakes are not protected expression, then there technically is no “expression” being altered, no speech being compelled and no legal doctrine being violated if there is no “speech” to begin with. Jack Phillip’s argument assumes that his custom wedding cakes are protected expression under the First Amendment and he thus continues with his arguments that address compelled speech found in *Hurley*. However, Phillips’ reliance on *Hurley* is misplaced here because custom wedding cakes are not mediums of expression that should be protected under the First Amendment and this can be proven using *Hurley*, making the initial question that must be answered unsatisfied and thus the “compelled speech” argument, and every argument after, null and void.

Second, Jack Phillip’s reliance on *Hurley* is further misplaced because *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston* referenced what features of a medium the Court generally finds important when treating a medium as protected expression under the First Amendment and wedding cakes do not satisfy these referenced features. *Hurley* demonstrates that the Supreme Court has generally treated a medium as protected when it has “historical significance”, “has historically and traditionally been recognized in the law as expressive” and when the medium itself is inherently expressive<sup>78</sup>. This precedent will show that custom wedding cakes do not fit into the boundaries that *Hurley* establishes, and thus should not qualify as expression protected under the First Amendment. In the opinion of the *Hurley* Court, Justice

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<sup>77</sup> See *Ibid*, 25. The Compelled Speech doctrines forbids the government (1) from forcing citizens (or businesses) to express messages that they deem objectionable or (2) from punishing them for declining to convey such messages

<sup>78</sup> Brief of American Unity Fund and Profs. Dale Carpenter and Eugene Volokh as Amici Curiae in Support of Respondents. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 26, 2017. 8.

Souter writing for the unanimous Court stated that while the Massachusetts courts had decided that parades fell outside of the realm of protected expression, The United States Supreme Court must make a “fresh examination of the crucial facts” and that the Supreme Court has “an obligation to make an independent examination of the whole record to assure that the judgement [of the state courts] does not constitute a forbidden intrusion on the field of free expression”<sup>79</sup>.

## 2. Historical Significance for mediums of protected expression

When analyzing with fresh eyes whether or not parades qualified as medium of protected expression, the Supreme Court found parades indicate marchers who are making “some sort of collective point”, not just to each other, but also to bystanders along the way.<sup>80</sup> Additionally, the Court pointed to the fact that parades have been historically and traditionally recognized as expression, stating “from ancient times, [parades have] been a part of the privileges, immunities, rights, and liberties of citizens”.<sup>81</sup> This demonstrates the Supreme Court’s acknowledgement that parades have deep historical roots and meaning which qualifies them to be considered expression.

Indeed, the importance of historical significance when considering the expressiveness of mediums has been used before by the Supreme Court in *Ward v. Rock Against Racism*. The Supreme Court case *Ward v. Rock Against Racism* was decided in 1989 and was concerned with loud rock concerts taking place in residential neighborhoods in New York City.<sup>82</sup> In the decision, Justice Kennedy writing for the majority noted that “Music is one of the oldest forms of human

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<sup>79</sup> See, *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston*. United States Supreme Court. 1993. <https://www.law.cornell.edu/supct/html/94-749.ZO.html>

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> See *Ward v. Rock Against Racism*. United States Supreme Court. 1989. <https://www.law.cornell.edu/supremecourt/text/491/781>

expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions...<sup>83</sup> Justice Kennedy, after acknowledging music's deep historical meaning, stated that "music is a form of expression and communication that is protected under the First Amendment".<sup>84</sup> This case serves to bolster the precedent cited above in *Hurley*, that historical significance/context is important to the Court when deciding if a medium qualifies for protection under the First Amendment as the majority used the same logic when stating that music is expression protected by the First Amendment in *Ward v. Rock Against Racism* as they did in *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston*.

### 3. "Long Standing Legal Recognition" for mediums of protected expression

Parades have "long standing legal recognition" as *Hurley v. Irish-American Gay, Lesbian, Bisexual Group of Boston* was not the first time parades were deemed to be protected expression. Precedent that evidences parades and assemblies as mediums for expression have been recognized in *Edwards v. South Carolina* which was a case concerning peaceful assembly during a civil rights protest march where the Supreme Court acknowledged the expressiveness of such assemblies, stating "this case reflects an exercise of these basic constitutional rights in their most pristine and classic form."<sup>85</sup> While parades and protests possess long standing legal recognition, it has been noted by an Amicus Brief of the American Unity Fund and UCLA Law Professor Eugene Volokh and SMU Dedman School of Law Professor Dale Carpenter that wedding cakes "lack long-standing legal recognition as an expressive medium" despite their varied presence

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> See, *Edwards v. South Carolina*. United States Supreme Court. 1963.

<https://www.law.cornell.edu/supremecourt/text/372/229>

throughout history.<sup>86</sup> It was also cited that Petitioner Jack Phillips and his Amici were not able to refer to any cases that cite such legal recognition for wedding cakes as mediums of expression. This comes as an unsurprising fact as culinary and/or confectionary expression has truly never been considered a form of constitutionally protected expression because, as American Unity Fund Amici points out, there truly is no case law that has addressed culinary and/or confectionary expression under the First Amendment.<sup>87</sup> These facts demonstrate that long standing legal recognition is important to the Court when treating a medium as protected expression and that wedding cakes in particular have not been legally regarded or let alone considered by the Supreme Court as a protected medium of expression. Wedding cakes are therefore not historically or traditionally in a legal sense regarded as mediums of expression, falling outside of the precedent that *Hurley* sets for mediums of expression.

#### 4. “Inherent Expressiveness” for mediums of protected expression

*Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston* referenced that protected mediums of expression must be inherently expressive, meaning that the medium has little to no non-expressive function. The Justices of the Supreme Court have pointed to the importance of determining the inherent expressiveness of mediums in *Barnes v. Glen Theatre Inc.*<sup>88</sup> This case was concerned with the expressiveness of nude dancing and the constitutionality of a public indecency statute. While the plurality decided that nude dancing was expressive conduct, the

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<sup>86</sup> Brief of American Unity Fund and Profs. Dale Carpenter and Eugene Volokh as Amici Curiae in Support of Respondents. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 26, 2017. 9.

<sup>87</sup> Tushnet, Mark V., Alan K. Chen, and Joseph Blocher. *Free Speech Beyond Words, The Surprising Reach of the First Amendment*. New York, New York: New York University Press, 2017. 174

<sup>88</sup> *See, Barnes v. Glen Theatre, Inc.* United States Supreme Court. 1991.

Concurring and Dissenting opinions highlighted the importance of inherent expressiveness as well as the historical significance of nude dancing, finding that dance is inherently expressive<sup>89</sup>. While the Concurrence and Dissent are not the rule of law, because *Barnes v. Glen Theatre Inc.* was a plurality opinion, this decision still demonstrates that the Justices of the Supreme Court find it important to determine if a medium is inherently expressive when deciding if a medium qualifies as protected expression under the First Amendment<sup>90</sup>.

In *Hurley*, the Supreme Court stated that “if there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself.”<sup>91</sup> Thus, the Supreme Court found that “parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.”<sup>92</sup> Here it can be seen that the Supreme Court acknowledged that parades are a form of protected expression because they are “inherently expressive”, that is to say that parades have little to no non-expressive function beyond their inherently expressive purpose. A parades’ dominant purpose is to express a message and make a collective point, not only to those marching, but to the bystanders as well.

Wedding Cakes however continue to not fit this precedent that *Hurley* sets. As previously stated, parades as a medium of expression are protected because they have deep historically meaning, long standing historical and traditional legal recognition and are inherently expressive.

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<sup>89</sup> See, *Ibid.* (Justice Souter: “performance dance is inherently expressive)

<sup>90</sup> See, *Ibid.* (Justice White: Dancing is an ancient art form and inherently embodies the expression and communication of ideas and emotions... Dance has been defined as "the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." 16 *The New Encyclopedia Britannica* 935 (1989). Inherently, [dance] is the communication of emotion or ideas.

<sup>91</sup> See, *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston*. United States Supreme Court. 1993. <https://www.law.cornell.edu/supct/html/94-749.ZO.html>

<sup>92</sup> *Ibid.*

Wedding cakes have already been shown to barely satisfy the historical significance precedent and exist well outside of the “long standing historical and traditional legal recognition” precedent as there is no case law that exists that regards wedding cakes or any culinary and/or confectionary expression as protected mediums of expression.<sup>93</sup> Wedding cakes additionally exist outside of the “inherently expressive” precedent that *Hurley* established because wedding cakes are not predominantly expressive, meaning their primary function is to be eaten or to be a product, not to function as inherent expression or “pure speech”. As the Amicus brief for Chefs, Bakers and Restaurateurs as Amicus Curiae states, “even when prepared by renowned chefs, food retains a clear non-expressive purpose—namely, consumption. No matter how intricate, creative, and aesthetically pleasing a dish might be, it is not designed to be displayed in perpetuity, but rather to be served and eaten.”<sup>94</sup> Thus, wedding cakes also exists outside of *Hurley*’s required “inherently expressive” precedent.

Such an analysis of *Hurley v. Irish-American, Gay, Lesbian, Bisexual Group of Boston* as well as the supplemental court cases clearly demonstrate the features of mediums that Court has traditionally found to be important when considering if a medium warrants protection under the First Amendment. These features referenced in *Hurley* revealed that Jack Phillips’ reliance on *Hurley* was deeply misplaced as the United States Supreme Court established precedent for considering if mediums qualify of protected expression through this court case and this precedent vastly undermines his argument that custom wedding cakes are protected artistic expression. As

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<sup>93</sup> Tushnet, Mark V., Alan K. Chen, and Joseph Blocher. *Free Speech Beyond Words, The Surprising Reach of the First Amendment*. New York, New York: New York University Press, 2017. 174

<sup>94</sup> Brief of Chefs, Bakers and Restaurateurs as Amicus Curiae in support of Respondents. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 30, 2017. 8.



evidenced at length above, custom wedding cakes exist outside of the *Hurley* precedent because wedding cakes do not possess “long standing historical and traditional legal recognition” as there is no case law that exists that regards wedding cakes as protected mediums of expression and are not inherently expressive as their predominant purpose is to be eaten. For these reasons, the *Hurley* precedent answers the question asked in the beginning of this paper, “should custom wedding cakes be considered protected “artistic” expression under the First Amendment or are they simply just wedding cakes that are no different from other foods that are not afforded any First Amendment protection?” It was stated that this paper would prove that wedding cakes should not be granted protection and *Hurley* demonstrates that custom wedding cakes should not be a protected medium of expression under the First Amendment.

### **Part III: Where and How to Draw the Line on mediums as Protected Expression**

Now that wedding cakes have been proven to be outside of realm of protected expression according to Supreme Court precedent, an important objective of this paper remains: where and how the Supreme Court should draw the line when considering what mediums should and should not be protected expression? Looking to the *Hurley* precedent as well as the *Masterpiece Cakeshop* Oral arguments for guidance, the optimal place for the Supreme Court to draw the line on what mediums should and should not be protected expression under the First Amendment is the third feature from *Hurley*, the “inherent expressiveness” feature. After analyzing *Hurley* as well as the *Masterpiece Cake shop* Oral Arguments, what is clear and should be taken away is that the feature of “inherent expression” is the most straightforward and workable feature of the three that are referenced. It is easy to identify and will therefore be easy to implement and utilize, making it the optimal place for where the line should be drawn.

Drawing from the Petitioner’s brief, numerous Amicus briefs and the Oral Arguments, “inherent expressiveness” seems to be the paramount feature, so much in fact that its importance for treating a medium as protected expression seems to over shadow the other two features mentioned in *Hurley*. This feature of inherent expression has been debated most heavily in the case briefs and Oral Arguments by Petitioner Jack Phillips’ Counsel Kristen Kellie Waggoner. Inherent expressiveness can be considered the most important feature and ultimately where the line should be drawn because, when analyzing the arguments in Petitioner Phillips’ brief as well as the script of the Oral Arguments, it truly seems to be the point of contention, interest and ultimately what will act as the deciding factor for the Justices of the Supreme Court as they work to determine if custom wedding cakes will be protected expression and as they determine where to draw the line on expression. Additionally, the “inherent expressiveness” of a medium is the best place to draw the line because, as previously stated, it is simple and will set a straightforward workable standard that will be relatively clear and easy to interpret and utilize in future cases. Thus, whether a medium is inherently expressive or simply utilitarian is where the Supreme Court should draw the line on what mediums should and should not be protected expression.

A. Relying on *Hurley* and Oral Arguments for guidance: The Importance of the “Inherent Expressiveness” Feature

While all three features referenced in *Hurley* certainly could work well to decide what can and cannot be protected expression, the third feature, “inherent expression”, is the most ideal place to draw the line. The feature of “inherent expressiveness” is the most straightforward of the three features which will then set a workable standard for this Court and the lower courts. When looking the *Masterpiece Cakeshop’s* Oral Arguments, it is clear that the Supreme Court finds the feature of “inherent expression” to be of great importance as well.

When thoroughly reviewing the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* Oral Arguments, it was extremely apparent through the line of questioning that the highest point of contention and interest for the Justices of the Supreme Court was determining whether or not custom wedding cakes were inherently expressive or simply food, which is not inherently expressive, but rather utilitarian.<sup>95</sup>

In the following line of questioning between Justice Kagan and Petitioner’s Counsel Kristen Kellie Waggoner, it can be seen that the Justices take great interest inherent expressivity of medium and exactly how they are supposed to draw the line on which mediums can and cannot be protected expression:

Justice Kagan: “But you have a view that a cake can be speech because it involves great skill and artistry. And I guess I’m wondering if that’s the case, *how do you draw the line* (emphasis added)? How do you decide oh, of course, the chef and the baker...and the florist are on one side versus the hairstylist or the makeup artist? Where would you put a tailor, a tailor who makes a wonderful suit of clothes?”

Kristen Waggoner: “Your Honor, the tailor is not engaged in speech, nor is the chef engaged in speech...”

Justice Kagan: “Why? The baker is engaged in speech, but the chef is not engaged in speech?”<sup>96</sup>

Justice Kagan’s last question speaks directly to the issue of the importance of the inherent expressiveness of a medium. Counsel Waggoner is trying to insinuate that the chef and the tailor are not engaged in speech because their craft is utilitarian, that is to say, the suit a tailor constructs and the dish a chef cooks are not inherently expressive because their dominant purpose to be worn or eaten. It can be seen by Justice Kagan’s last question that the line that was drawn by Counsel Waggoner between wedding cakes and the food a chef cooks is perplexing.

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<sup>95</sup> *Masterpiece Cakeshop, LTD., et al., Petitioners, v. Colorado Civil Rights Commission, et al., Respondents. Oral Arguments. Roberts Court. December 5, 2017.*

<sup>96</sup> *Ibid*, 9.

Justice Alito then chimed in order to clearly understand what Counsel Waggoner’s position was by offering a hypothetical, using a medium unrelated to the culinary or confectionary arts:

Justice Alito: “What would you say about an architectural design? Is that not entitled to First Amendment protection because one might say that the primary purpose of the design of the building is to create a place where people can work and live?”

Kristen Waggoner: “Precisely. In the context of an architect, generally that would not be protected because buildings are functionable, not communitive.”<sup>97</sup>

Through Justice Alito’s hypothetical and Counsel Waggoner’s agreeance, it can clearly be seen that whether or not a medium is inherently expressive is of the utmost importance when treating a medium as protected expression. This was acknowledged by Justice Alito’s careful question and further acknowledged by Counsel Waggoner’s answer in which she agreed that architecture is not expression because its primary purpose is “functionable, not communitive”.<sup>98</sup>

As the importance of expressivity versus utility when treating a medium as expression is shown in the questions from the Justices, a thorough look at Petitioner Jack Phillips’ brief shows that his Counsel spent a great deal of time trying to convince the Justices that Phillips’ custom wedding cakes are inherently expressive, likening them to “temporary monuments”.<sup>99</sup> Jack Phillips’ Counsel certainly did this because, as seen in the answers Counsel Waggoner gave, they too believe that mediums (like architecture, tailored suits and food prepared by chefs<sup>100</sup>) are utilitarian and not inherently expressive, which forces them outside of the realm of First Amendment protection.

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<sup>97</sup> Masterpiece Cakeshop, LTD., et al., Petitioners, v. Colorado Civil Rights Commission, et al., Respondents. Oral Arguments. Roberts Court. December 5, 2017. 11.

<sup>98</sup> Ibid.

<sup>99</sup> Petitioner’s Brief, Masterpiece Cakeshop, LTD. And Jack Phillips. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. August 31, 2017. 19.

<sup>100</sup> Masterpiece Cakeshop, LTD., et al., Petitioners, v. Colorado Civil Rights Commission, et al., Respondents. Oral Arguments. Roberts Court. December 5, 2017. 9.

It is certainly understandable why Counsel Waggoner would liken wedding cakes to a “temporary monument” and call Jack Phillips a modern painter and sculptor whose “greatest masterpieces” are his wedding cakes<sup>101</sup>, because the Supreme Court has stated that monuments are protected expression under the First Amendment. Petitioner Phillips’ brief states that he is a “modern painter and sculptor” because his “artistic design process involves extraordinary effort: drawing the cake on paper (often many times); painting elaborate designs and decorations on it; and sculpting the cake’s form and its decorations”.<sup>102</sup> Additionally, the brief argues that even though Phillips uses edible materials to create his wedding cakes, such as frosting and fondant, rather than the traditional ink and clay that his wedding cakes are still “temporary monuments” that are inherently expressive.<sup>103</sup> Yet, wedding cake, even though it may be visually pleasing and certainly could be argued to express something, like jubilation and celebration for the event that it is made, it is ultimately eaten because that is a cake’s purpose. Monuments on the other hand are made to be revered, to commemorate and to express the importance of preserving history and culture and reside in perpetuity. Monuments are therefore inherently expressive and they have no other purpose. If a cake’s purpose were not to be eaten but revered as “artistic expression” or exist as a shrine of history like monuments, then perhaps it would be “sculpted” from the traditional ink and clay and “be displayed in perpetuity rather than served and eaten”<sup>104</sup>. Indeed, during Oral Arguments Justice Sotomayor also showed great skepticism of the inherent expressiveness of wedding cakes stating:

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<sup>101</sup> Ibid, 20.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Brief of Chefs, Bakers and Restaurateurs as Amicus Curiae in support of Respondents. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 30, 2017. 8.

So that begs the question, when have we ever given protection to a food? The primary purpose of a food of any kind is to be eaten. Now some people might love the aesthetic appeal of a special dessert, and look at it for a very long time, but in the end its only purpose is to be eaten. ... How can we find something whose predominant purpose is virtually always to be eaten [and] call it a medium for expressive expression?"<sup>105</sup>

Justice Breyer additionally showed frustration with Counsel Waggoner and skepticism of the inherent expressiveness of wedding cake. Justice Breyer, like Justice Kagan, was particularly concerned with where to draw the line on mediums as protected expression, specifically citing deep concern over the future of public accommodations laws if wedding cakes are granted protection under the First Amendment:

All right, then, what is the line?...Now, the reason we're asking these questions is because we obviously would want some kind of distinction that will not undermine every civil rights law from the – from – from the year two – including the African Americans, including the Hispanic Americans, including everybody who has been discriminated against in the very basic things of life, food, design of furniture, home and buildings.<sup>106</sup>

Through the line of questioning by the Justices, especially Justice Sotomayor's question, the inherent expressiveness of a medium is the largest point of contention and interest between Counsel and the Supreme Court Justices when determining if custom wedding cakes are protected expression or not. As Justice Sotomayor said, "how can we find something whose predominant purpose is virtually always to be eaten and call it a medium for expression?"<sup>107</sup>

Additionally, Justice Breyer showed a considerable concern over the future of public accommodations laws in the United States, which truly demonstrates the influence custom wedding cakes could have on the legal landscape of the United States and the gravity of this decision. This feature of "inherent expressiveness" is therefore the most ideal place to draw the

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<sup>105</sup> Masterpiece Cakeshop, LTD., et al., Petitioners, v. Colorado Civil Rights Commission, et al., Respondents. Oral Arguments. Roberts Court. December 5, 2017. 10-11.

<sup>106</sup> Ibid, 12.

<sup>107</sup> Ibid, 10-11.

line between what should and should not qualify as protected expression under the First Amendment, not only because it seems to be the feature the Justices find to be the differentiating factor between expression and non-expression, but because “inherent expressiveness” will draw a clear line between protected and non-protected expression that is easy to implement and apply that could aide in preventing the corrosion of public accommodations laws and the dilution of the First Amendment for years to come.

### B. The Reasoning Behind Adopting a Legal Test

Since the “inherent expressiveness” of a medium has been shown to be the optimal place for *where* draw the line on protected and non-protected expression, it is next important to establish *how* this can be done. How this line can be drawn is through the adoption of a straightforward test, known here as the “Predominant Purpose Test”. This legal test was established by the Second Circuit Court and was found in the Second Circuit Court Case *Mastrovincenzo v. City of New York*. This legal test should be adopted by the United States Supreme Court as an official test that is used to determine if a medium should be treated as protected expression under the First Amendment.<sup>108</sup>

There are many reasons why the “Predominant Purpose Test” should be adopted by the Supreme Court. The first reason has been stated throughout this paper, advocating that the adoption of this test will establish a clear line and method of drawing the line on what mediums should and should not be protected expression under the First Amendment in all future cases that relate to *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Though, it should be acknowledged that the entirety of the *Hurley* cases’ referenced features, rather than the

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<sup>108</sup> See, *Mastrovincenzo v. City of New York*. Second Circuit Court of Appeals. 2004. <https://law.resource.org/pub/us/case/reporter/F3/435/435.F3d.78.html>

Predominant Purpose Test, could absolutely be used to draw the line on what should and should not be protected expression. The fact that these three features have a strong presence in *Hurley* as well as in various Supreme Court cases demonstrate they are well liked and workable methods used by the Court. However, *Hurley* and the other supplemental cases did not technically establish an official test for mediums as protected expression. Like the Johnson Test from *Texas v. Johnson* for expressive conduct or the Lemon Test from *Lemon v. Kurtzman*<sup>109</sup> which deals with the constitutionality of statutes concerning religion, there is no official “Hurley Test” to look back on for mediums as protected expression. The *Hurley* case and supplemental cases simply seem to reference these features of a medium. It could be argued that the features referenced in *Hurley* could be adopted as an official test for mediums of expression akin to pure speech and this would certainly work. While *Hurley* could be adopted, the Predominant Purpose Test, while equally comprehensive, is a narrower, more refined and more straightforward test that is superior and will work even better in the long run for similar cases to *Masterpiece Cakeshop* by looking only to the feature of “inherent expressiveness”.

Additionally, it is important for the Predominant Purpose Test to be adopted because there is no current established test that the United States Supreme Court uses for considering mediums as protected expression akin to pure speech. However, there are tests that establish what can and cannot be expressive conduct, a form of speech which is given less protection under the First Amendment than pure speech, like the Johnson Test. Indeed, if custom wedding cakes were being considered as “expressive conduct” then the Supreme Court could look to the provisions set forth in the Johnson Test to make their decision<sup>110</sup>. Such tests like the John Test

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<sup>109</sup> See, *Lemon v. Kurtzman*. United States Supreme Court. 1971.

<sup>110</sup> See, *Texas v. Johnson*. United States Supreme Court. 1989. The Johnson Test asks first, whether an intent to convey a particularized message was present; and second, whether the



for expressive conduct establish a more uniform method of decision making in all levels of the Courts across the nation. Therefore, it is essential to adopt a test for mediums of expression akin to pure speech because legal tests set workable standards for the Supreme Court and the lower courts. The “Predominant Purpose Test” is an efficient and organized method of deciding if a medium qualifies as expression and its adoption and application will create homogeny in decision making. Such homogeny that could result from this test will increase the likelihood that mediums which do not deserve protection under the First Amendment will not gain it, thus helping to preserve long established public accommodations laws and prevent the dilution of the First Amendment beyond *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

1. “The Predominant Purpose Test”: *Mastrovincenzo v. City of New York*

The Predominant Purpose Test was established in the Second Circuit<sup>111</sup> Case *Mastrovincenzo v. City of New York* which was decided in 2004 and was concerned with the expressivity of “graffiti style” shirts and other clothing paraphernalia<sup>112</sup>. Plaintiffs Christopher Mastrovincenzo and Kevin Santos were “trained freelance artists with significant artistic backgrounds” and the two men often offered the sale of their “graffiti style” shirts and other various clothing without proper state licensing. Plaintiffs described their “graffiti style” as a “highly stylized typography, iconography and pictorial representation” which used varying combinations of oil paint, spray paint, markers and permanent paint pens that they applied to

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likelihood was great that the message would be understood by those who viewed it.

<https://www.law.cornell.edu/supremecourt/text/491/397>

<sup>111</sup> Note- the Second Circuit Court of Appeals is the intermediate court for New York. The Second Circuit covers the District of Connecticut; Eastern District of New York; Northern District of New York; Southern District of New York; Western District of New York; District of Vermont. [http://www.ca2.uscourts.gov/about\\_the\\_court.html](http://www.ca2.uscourts.gov/about_the_court.html)

<sup>112</sup> See, *Mastrovincenzo v. City of New York*. Second Circuit Court of Appeals. 2004. 24. <https://law.resource.org/pub/us/case/reporter/F3/435/435.F3d.78.html>

mainly tee shirts and hats.”<sup>113</sup> Plaintiffs apparently did not see their work as merely clothing, but more so as “artwork with the pieces of clothing such as hats and shirts acting as non-traditional canvases.”<sup>114</sup>

In 2002, Plaintiffs Mastrovincenzo and Santos each filed for a vendor’s license but both were denied. Despite this denial, the two men continued creating their work and their sales.<sup>115</sup> Mastrovincenzo, but not Santos, was subsequently arrested twice for continuing the sale of his clothing without a vendor’s license. While Santos was not arrested, his clothing display was shut down.<sup>116</sup> Plaintiffs then filed suit seeking to prevent the City of New York from enforcing the General Vendor’s law<sup>117</sup>, which was filed January 20, 2004, alleging that the defendants’ (City of New York) refusal to permit them to sell their merchandise on public sidewalks violated their rights under the First and Fourteenth Amendments. The District Court then barred the City of New York from enforcing the General Vendor’s Law against the plaintiffs Mastrovincenzo and Santos, concluding that the First Amendment protected the sale of expressive merchandise because the hand-painted shirts and hats were “expressive works of art”.<sup>118</sup>

When the District Court found that Mastrovincenzo’s items qualified as “expressive works of art”, the Court additionally acknowledged that “almost any object can conceivably be considered as possessing some amount of expressiveness and that to decide whether the plaintiffs items fell within the realm of the First Amendment” the court had to look at a “myriad” of

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<sup>113</sup> Ibid, 25.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid, 26.

<sup>117</sup> New York City General Vendor’s Law <http://rules.cityofnewyork.us/tags/general-vendor>

<sup>118</sup> See, Mastrovincenzo v. City of New York. Second Circuit Court of Appeals. 2004. 30. <https://law.resource.org/pub/us/case/reporter/F3/435/435.F3d.78.html>

factors.<sup>119</sup> The factors were “the individualized creation of the item by the particular artist, the artist’s primary motivation for producing and selling the item, the vendor’s bona fides as an artist, whether the vendor is personally attempting to convey his or her own message, and; more generally, whether the item appears to contain any elements of expression or communication that objectively could be understood.”<sup>120</sup> By looking that these “myriad” of factors, the District Court held that New York City violated Mastrovincenzo’s First Amendment right to Free Speech. Defendants City of New York promptly appealed the District Court decision.

When this case reached the Second Circuit Court, the Court reviewed whether or not the “graffiti style clothing” was protected expression. Referencing the five factors established by the District Court, the Second Circuit acknowledged that “objectiveness” is necessary and more reliable than “consulting the vendor himself if he is or is not primarily engaged in self-expression”. However, if the Court were to consider, as the District Court suggested, only whether an item could be objectively understood to have *any* expressive or communicative elements, the “protections of the First Amendment might then be expanded to encompass a broad array of merchandise with only incidental artistic elements, including, for example, playing cards with artistic designs on the back or a trashcan with flowers painted on it.”<sup>121</sup> Thus, the Second Circuit rejected the District Court’s five point test and established a more detailed, yet straightforward three part test, the Predominant Purpose Test. The Predominant Purpose Test first considers if the medium in question possess any expressive elements. If the medium does, even marginally so, then the Court must next consider if the medium in question has a common non-expressive purpose or utility. If medium in question does possess a common non-expressive

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<sup>119</sup> Ibid, 33.

<sup>120</sup> Ibid, 34.

<sup>121</sup> Ibid, 66.

purpose, then the Courts should exercise greater skepticism when offering such a medium protection under the First Amendment. Lastly, upon finding that the medium in question possesses some common non-expressive purpose, the Court should then determine if this non-expressive purpose or utility is the dominant function of the medium in question. Where the medium's dominant purpose is expressive, like parades in *Hurley v. Irish American Gay, Lesbian, Bisexual Group of Boston*, then the medium has a stronger claim to First Amendment protection. Conversely, where the medium's non-expressive purpose is the medium's dominant feature, it should fall outside of the scope of First Amendment protection.<sup>122</sup>

It is clear that this test established in *Mastrovincenzo v. City of New York* is a comprehensive and straightforward legal test, much like the test found and often used in *Texas v. Johnson* for expressive conduct. This test only looks at the inherent expressiveness of a medium, which has been shown from looking to *Hurley* and the Oral Arguments for guidance to be the ideal place to draw the line on what mediums can and cannot be protected expression under the First Amendment. When applying this test to a medium like custom wedding cakes, custom wedding cakes fail this test. First, custom wedding cakes may possess some expressive elements. It could certainly be argued that they relay feelings of celebration and jubilation for the event that they are made for, thus possessing some form of "expressive element". Moving to the second prong, custom wedding cakes do have a common non-expressive purpose or utility and that is to be eaten or even to be sold and ultimately eaten. Considering this, custom wedding cakes should be viewed with skepticism. Finally, when applying the last prong, which asks if this non-expressive purpose or utility is the dominant function of the medium in question, it is clear that a custom wedding cake's dominant function is not to be expressive, but to be eaten. As previously

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<sup>122</sup> Ibid, 68.

stated in this paper, custom wedding cakes are not meant to be displayed in perpetuity in a museum, which is why they are made with edible material like cake, frosting, and fondant rather than clay and paint. A custom wedding cake's dominant purpose is therefore to be eaten and as such, custom wedding cakes fail the Predominant Purpose Test. Indeed, mediums similar to custom wedding cakes such as a variety of other baked goods or custom expression, like cufflinks, hair design, nail design or even plumbing for example, would also fail the Predominant Purpose Test because their dominant function is utilitarian, not expressive.

Thus, the United States Supreme Court should adopt this test because as shown with custom wedding cakes as a model medium and other examples, this test is multi-layered and narrow yet straightforward. There is a benefit to the Predominant Purpose Test's three prongs and that is that the multiple prongs allow for a deeper consideration of the inherent expressiveness of the medium in question. For example, if the medium in question possesses no expressive qualities, then the inquiry can stop at the first prong. However, if the medium in question does possess any expressive elements then there are still two prongs to determine the utility and dominance of the utility that must be satisfied. Additionally, because custom wedding cakes and related mediums in question argue that they are akin to pure speech, this multilayered test allows for an appropriate amount of consideration into the medium's inherent expressiveness. Since pure speech is the level of speech that is offered the most protection under the First Amendment, a multilayered yet workable test is necessary so that the boundaries of the First Amendment will not be expanded too far. This test is a simple method of how to draw the line on treating a medium as protected expression under the First Amendment. The adoption of the Predominant Purpose Test will set a workable standard in for future cases with similar

circumstance and would function as a terrific asset when making the complicated decision of whether a medium should qualify for protection under the First Amendment.

#### **Part IV: Conclusion**

The First Amendment Right to Freedom of Speech must have its limits for no right is absolute. Indeed, the concept that no right is absolute, even the most cherished right of Freedom of Speech, has been reinforced by the United States Supreme Court. In *United States v. O'Brien*<sup>123</sup> Chief Justice Warren stated that the Supreme Court rejected the idea that an inherently limitless variety of speech can be afforded protection whenever the person engaging in that speech intends to express an idea. In *Dallas v. Stanglin*<sup>124</sup> Chief Justice Rehnquist similarly stated, “It is possible to find some kernel of expression in almost every activity a person undertakes... but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” Thus, custom wedding cakes, while beautifully created, multi-tiered and adorned with intricate decorations and perhaps even conveying a message of jubilation, are not “great masterpieces” worthy of constitutional protection but are simply wedding cakes that are principally meant to be eaten. Allowing custom wedding cakes to be anything more than food under the eyes of the Constitution could have far reaching ramifications such as possible corrosion of public accommodations laws and principally, stretching the boundaries of the First Amendment further than they are meant to go.

To prevent such far reaching ramifications from materializing, it was therefore necessary to demonstrate that custom wedding cakes should not qualify as protected expression under the

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<sup>123</sup> See, *United States v. O'Brien*. United States Supreme Court. 1968.

<https://www.law.cornell.edu/supremecourt/text/391/367>

<sup>124</sup> See, *City of Dallas v. Stanglin*. United States Supreme Court. 1989.

<https://www.law.cornell.edu/supremecourt/text/490/19>

First Amendment. This was accomplished by looking to Supreme Court precedent *Hurley v. Irish American, Gay, Lesbian, Bisexual Group of Boston* and supplemental cases *Ward v. Rock Against Racism*, *Edwards v. South Carolina* and *Barnes v. Glen Theatre Inc.* The enumerated cases revealed the three features of a medium (historical significance, long standing legal recognition and inherent expression) that the Supreme Court has historically found to be paramount when treating a medium as protected expression under the First Amendment. Through conducting a thorough analysis, it was shown that custom wedding cakes did not possess the necessary features of a protected medium of expression and as a result could not satisfy this precedent. Disproving wedding cakes as protected expression aides in preventing a limitless variety of baked goods from being recast as a form of protected expression. Additionally, it could potentially prevent bakers as well as related craftsman alike from possessing the ability to deny people service, potentially undermining public accommodation laws.

This pending case additionally presents itself as an opportunity for the United States Supreme Court to prevent the erosion of public accommodations laws and the trivialization of the First Amendment in future cases with similar circumstances to *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. The Court could simply rely on *Hurley v. Irish American Gay, Lesbian, Bisexual Group of Boston* and the supplemental cases provided in this paper to disqualify custom wedding cakes as protected expression and stop there without considering other mediums such as the previously mentioned other baked goods or “custom expression”. Yet, this case calls upon the Supreme Court to draw a clearer line on what mediums can and cannot be protected expression beyond custom wedding cakes. As revealed through *Hurley* the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* Oral Arguments, the feature of

“inherent expression” is the most ideal place to draw the line on what mediums, akin to pure speech, should and should not be protected expression under the First Amendment. By adopting The Predominate Purpose Test, it set a workable standard for future cases with similar circumstances by clearly establishing where the line should be drawn on which mediums should and should not be protected expression under the First Amendment. The Supreme Court truly should view this pending case as an opportunity to adopt a legal test, such as The Predominant Purpose Test, to act as a narrow, yet comprehensive and straightforward safeguard. This test, if adopted, will easily disqualify mediums undeserving of protection that will stretch the boundaries of the First Amendment too far and simultaneously offer protection to mediums that are deserving of First Amendment protection.

However, if the Supreme Court does not take this opportunity and instead chooses to treat custom wedding cakes as protected expression, the consequences could be great. The Supreme Court must understand the consequences of providing something as seemingly innocuous as wedding cake with First Amendment protections. If custom wedding cakes are treated as protected expression under the First Amendment like Petitioner Jack Phillips wants, then their protection will open the door for a seemingly limitless variety of baked goods to also be protected<sup>125</sup>. If wedding cakes are treated as protection under the First Amendment, then what is to stop baby shower cakes, first communion cakes, bar mitzvah cakes, anniversary cupcakes and other pastries alike from also being treated as expression under the First Amendment? Additionally, if wedding cakes are treated as protected expression, it will not only be limited to cake and various other baked goods. Cakes are not the only “custom” medium that exist that

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<sup>125</sup> See, *United States v. O’Brien*. United States Supreme Court. 1968.  
<https://www.law.cornell.edu/supremecourt/text/391/367>



could claim to express something. For every Masterpiece Cakeshop there is a Masterpiece Caterer, Masterpiece Tailor, a Masterpiece Hair, a Masterpiece Nail Salon and a Masterpiece Plumbing who also claim that their forms of expression are protected because they too are “custom” and communicative<sup>126</sup>.

Then, by allowing custom wedding cakes are treated as protected expression, which will extend to other baked goods and various custom expression, it will trigger Jack Phillip’s other arguments that proceed once custom wedding cakes have been treated as protected expression, such as his “Compelled Speech” claim. If custom wedding cakes are treated as protected expression, then Jack Phillips and other creators of “custom” expression could claim that they cannot be compelled to create speech. Accordingly, the if wedding cakes are granted protection under the First Amendment, not only will it trivialize the First Amendment, it could allow Jack Phillips and other bakers and craftsman alike the ability to deny people service, potentially undermining public accommodations laws that have been put in place since 1964 with the goal of preventing such discrimination. The protection of custom wedding cakes could therefore ignite a domino effect and apply to other baked goods and custom mediums of expression, stretching the boundaries of Free Speech much farther than they are meant to go, effecting the strength of public accommodations laws and thus altering the legal landscape of the United States.

Wedding cakes should not be treated as constitutionally protected masterpieces, but rather as simply cake whose dominant purpose is consumption. Wedding cakes, no matter how intricately created, are not meant to sit in perpetuity in a museum or be akin to a monument but

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<sup>126</sup> Brief of American Unity Fund and Profs. Dale Carpenter and Eugene Volokh as Amici Curiae in Support of Respondents. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Roberts Court. October 26, 2017.

are meant to be eaten. The Supreme Court ultimately should look to the cited Supreme Court precedent and not treat custom wedding cakes as protected expression, as they cannot satisfy the referenced features. Furthermore, the Supreme Court should use this pending case as an opportunity to draw clear a line on what mediums should and should not be treated as protected expression that both preserves long standing public accommodations laws as well as respects the boundaries of the First Amendment. The Supreme Court can accomplish this by adopting the Predominant Purpose Test, thus preserving the integrity of the First Amendment in all future cases similar to *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

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