Amanda Scott

Prof. Hartman

Constitutional Law II

Final Exam Paper

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CHIEF JUSTICE SCOTT delivered the opinion for the Court.

The case before the Court today is brought by Charlie Craig and David Mullins, a same-sex couple in Lakewood, Colorado. In July 2012, Mr. Craig and Mr. Mullins requested a wedding cake from Masterpiece Cakeshop, Inc. ("Masterpiece"), a local bakery owned and operated by Jack Phillips. Mr. Phillips declined their request on the basis that making cakes for same-sex weddings violates his sincerely held Christian beliefs about marriage being between one man and one woman. Craig and Mullins subsequently filed a complaint against Masterpiece and Phillips (collectively "Petitioners") alleging they were discriminated against on the basis of their sexual orientation in violation of Colorado's Anti-Discrimination Act ("CADA"), Colo. Rev. Stat. §§ 24-34-301. The Colorado Civil Rights Commission found in favor of Craig and Mullins, the Colorado Circuit Court of Appeals affirmed, and the Colorado Supreme Court denied review. Petitioners appealed the decision to the Supreme Court and argued that being compelled by Colorado state law to bake a cake for a same-sex couple violates his freedom of religion under the Free Exercise Clause of the First Amendment to the U.S. Constitution. Now we consider.

The first question we are posed with is whether Petitioners discriminated based on sexual orientation in violation of the Colorado Anti-Discrimination Act ("CADA") by declining to make and sell a cake for Craig and Mullins' wedding. As a principle of federalism, this Court defers to the authority of Colorado state courts to interpret CADA and determine whether declining to make and sell wedding cakes to same-sex couples constitutes discrimination on the basis of sexual orientation under CADA. Here, the Colorado Court of Appeals ruled that Masterpiece and Phillips did indeed discriminate against Craig and Mullins on the basis of their sexual orientation by declining to make and sell a cake for their wedding in violation of CADA.

The question, then, is whether the state compelling Philips to create a wedding cake for a same-sex couple, contrary to his sincerely held beliefs about marriage, violates his rights under the Free Exercise Clause of the First Amendment to the U.S. Constitution. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . [r]estricting the free exercise [of religion]." U.S. Const., amend. I. The Free Exercise Clause is incorporated against state and local governments through the Due Process Clause of the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). The amendment embraces two concepts: the freedom to believe and freedom to act. *Cantwell*, 310 U.S. at 304.

We have found the protections of the Free Exercise Clause apply if the law or government action at issue "discriminates against some or all religious beliefs" or "regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 US 520, 533 (1993) (internal citations omitted). However, we have recognized that the right to free exercise of religion is not absolute and does not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the

ground." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-879 (1990)

Our Free Exercise Clause jurisprudence has held that laws that are generally applicable and neutral with regard to religion are subject to rational basis review, the lowest tier of judicial scrutiny. Under rational basis review, the government need only demonstrate that the law in question is rationally related to a legitimate government interest. Our case law has "establish[ed] the general proposition that a law that is neutral and of general applicability" need not "be justified by a compelling governmental interest," even when the law "has the incidental effect of burdening a particular religious practice." *Lukami*, 508 U.S. at 532.

First, in order to evaluate whether Colorado's anti-discrimination statute is generally applicable and is neutral, we must turn to the text of the law. A law "lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* at 532. The Colorado Anti-Discrimination Act provides in relevant part:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of 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.

The statute here does not refer to any particular religion, religious practice or belief. The anti-discrimination provisions apply equally to all persons who own commercial establishments that serve the public, regardless of the owner's religious affiliation or lack thereof. It applies as much to a Muslim owner of a wedding planning service or a Jewish owner of a videography service as it does to a Christian owner of a bakery like Phillips and Masterpiece.

The government regulations are placed solely on owners of commercial establishments that conduct business with the public. It does not reach religious organizations or private citizens who practice religion. Christian churches that object to same-sex marriage and homosexuality remain free to refuse to officiate same-sex weddings according to church doctrine, and private citizens are still empowered to express their opinions on issues of marriage, cultural tradition, and equality. As such, the Colorado statute meets the requirements for facial neutrality and general applicability set forth in *Smith*.

Colorado has demonstrated that it has a legitimate government interest in preventing discrimination against members of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community and same-sex couples. Our most recent decisions in *Obergefell v. Hodges*, 576 U.S. 644 (2015) and *United States v. Windsor*, 570 U.S. 744 (2013) invalidating state and federal laws prohibiting same-sex marriage on the basis of Equal Protection and Due Process clauses of the Fourteenth Amendment are part of a long struggle for the LGBTQ community to achieve full equality and dignity in the eyes of the law.

The right to marry a partner of the same gender is just one battle of many for this historically marginalized minority group. LGBTQ people continue to face discrimination in all facets of public life — education, employment, housing, healthcare, and indeed, places of public accommodation.[1] Prejudice and stereotypes against LGBTQ persons continue to permeate in society. Because Congress has yet to extend federal civil rights protections to the LGBTQ

[1] The Human Rights Campaign, the nation's largest organization advocating for the civil rights of the LGBTQ community, publishes an annual "State Equality Index" reviewing state legislation that is considered "anti-LGBTQ." The 2018 annual report found at least 129 anti-LGBTQ bills were introduced in 30 states during the 2017 state legislative season.

community,[2] state and local governments have stepped in and used their respective authority to pass laws prohibiting discrimination against their own residents. Colorado amended its state anti-discrimination law to include sexual orientation to ensure LGBTQ people are able to enjoy full and equal participation in public life, the same as heterosexual people. Prohibiting places of public accommodation from refusing service to LGBTQ persons serves to further that interest. As such, the Colorado statute survives rational basis review.

However, even if we were to adopt Petitioners' argument that the Colorado anti-discrimination statute should be subject to strict scrutiny review, we believe Petitioners' claims under the Free Exercise Clause would still fail. We have recognized that "not all burdens on religion are unconstitutional." *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983). The state may "justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Bob Jones*, 461 U.S. at 603. This Court has found "certain governmental interests so compelling as to allow even regulations prohibiting religiously-based conduct." *Id.* at 604. *See, e.g., Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990) (rejecting Free Exercise claim from Native American denied unemployment benefits for ritual drug use); *Reynolds v. United States*, 98 U.S. 145 (1878) (rejecting Free Exercise claim from polygamous Mormons charged under bigamy laws); *United States v. Lee, 455 U.S. 252 (1982)* (rejecting Free Exercise claim from Amish employer fined for failure to pay social security taxes); *Prince v. Massachusetts,* 321 U.S 158 (1944) (rejecting Free Exercise claim from Jehovah's Witnesses convicted under child labor laws).

[2] Both houses of Congress have introduced bills, such as the Employment Non-Discrimination Act ("ENDA"), to amend the federal Civil Rights of Act of 1964 to include sexual orientation and gender identity as protected classes, but they have been unsuccessful.

Perhaps most relevant to the present case is *Bob Jones University v. United States*, 461 U.S. 574 (1983). In *Bob Jones*, we rejected a Free Exercise claim from a religiously-affiliated private university that had its tax exemption revoked for discriminating on the basis of race by denying admission to applicants that engaged in interracial marriage or dating. 461 U.S. at 604. There we found that the government has "a fundamental, overriding interest in eradicating racial discrimination . . . which substantially outweighs whatever burden denial of tax benefits places on the exercise of [the university's] religious beliefs." *Id.* Like in *Bob Jones*, we find Colorado's interest in prohibiting discrimination against the LGBTQ community in places of public accommodation is an overriding interest that justifies incidental burdens on the religious exercise of the owner.

Petitioners counter that Philips did not discriminate on the basis of sexual orientation as a *protected status*, but declined Respondents' request based on a religious objection to same-sex marriage as *conduct*. Petitioner stated that he would serve members of the lesbian, gay, bisexual, transgender and queer community (LGBTQ) other baked goods that were not made for the purpose of commemorating a same-sex wedding. We do not find this argument compelling.

In the case of the LGBTQ community, status and conduct are indistinguishable. LGBTQ persons are members from a historically marginalized minority group defined by their sexual orientation and their relationships with partners of the same sex. For a baker to make and sell wedding cakes to opposite-sex couples, but to refuse to provide the same services and goods to same-sex couples, is tantamount to discriminating against two people on the basis of their sexual orientation. The only distinction between the two couples is solely the sexual orientation of the individuals in the relationship and the gender of their partner.

These cases are ultimately about treating all people with equal dignity and respect under the law. When a same-sex couple is refused service at a bakery, they suffer a harm far more significant than just being denied a wedding cake. They suffer the harm of their marriages and families not being accorded the same dignity and respect as their heterosexual counterparts. This historically marginalized group will not achieve equal dignity and respect in society as long as they are discriminated against in places of public accommodation and denied participation in all aspects of public life.

The judgment of the Colorado Circuit Court of Appeals is affirmed.

IT IS SO ORDERED.