RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / DECEMBER 2018

FROM *the* EDITOR

Welcome to the December 2018 issue of the *Religious Liberty Law Section Newsletter*.

This year the United States Supreme Court handed down one of the most anticipated religious liberty law decisions of the past several years – *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.* – which addressed the State of Colorado's prosecution of a Colorado baker, under the State's public accommodation anti-discrimination law, for declining to create a custom wedding cake celebrating a same-sex marriage, because doing so would have violated the baker's sincerely held religious beliefs about marriage. The 7-2 decision reversed the Commission's and Colorado Court of Appeal's decisions against Masterpiece on the ground that "The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."

The decision has been variously interpreted, with some claiming the opinion is narrow and limited to its facts, while others have claimed the decision establishes several broad legal principles that will govern similar cases going forward. In order to flesh out the legal impact of the *Masterpiece Cakeshop* decision, this issue's twin Feature Articles – analyzing the *Masterpiece Cakeshop* decision – are penned by attorneys on opposite sides of the *Masterpiece Cakeshop* case. Jonathan Scruggs is an attorney with Alliance Defending Freedom, which represented Masterpiece Cakeshop and its owner Jack Phillips. Lindsey Kaley is an attorney with the American Civil Liberties Union, which represented Messrs. Craig and Mullins in the case.

I want to personally thank these authors for taking time out of their busy schedules to provide our readers with their expert "inside" analysis of the *Masterpiece Cakeshop* case.

We hope you find this issue of the *Religious Liberty Law Section Newsletter* both informative and useful.

Bradley S. Abramson

Bradley S. Abramson, Editor

QUOTE DU JOUR

"Religious freedom really, truly is for everyone. It's a right given by God and is a beautiful part of our human dignity."

— **Samuel D. Brownback,**
U.S. Ambassador-at-Large for International Religious Freedom

IN *this* ISSUE

Published by the Religious Liberty Law Section of The State Bar of Arizona.

FROM *the* CHAIR

The Religious Liberty Law Section was formed in 2016 to help bring an informed and balanced Constitutional perspective to the issues arising out of the law of religious liberty – the first liberty protected in the First Amendment to the U.S. Constitution and also protected in the Arizona Constitution. As I write this, the Arizona Supreme Court has recently taken under review the *Brush & Nib Studio v. City of Phoenix* case where the issue of religious liberty is front and center.

If you're reading this, you're probably a member of our fledgling Religious Liberty Law Section. Thank you for taking time from your busy schedule to join us in this effort! We started the Section with just a handful of interested lawyers in the Spring of 2015. Now, the Section has more than 160 members!

Since its founding the Section has presented two outstanding programs at the 2017 and 2018 State Bar of Arizona Annual Conventions, as well as an excellent series of shorter presentations examining contemporary issues in religious liberty law, including:

- Who Prays: Unsettled Questions for Legislative Prayer;
- Religious Speech in Public Schools;
- "In God We Trust?" Government Endorsement of Religion: Current Doctrine and Applications;
- Representing Churches and Other Charitable Organizations: Practical Tips and Issue Spotting for Outside Counsel; and
- Faith Based Alternative Dispute Resolution: Religious Alternatives to Secular Courts (co-sponsored with the Alternative Dispute Resolution Section).

We have also made strides in reaching out to many attorney faith-based organizations, including shared meetings with the St. Thomas More society, informal outreaches to the J. Rueben Clark Law Society, and the Christian Legal Society. We are continuing to watch for opportunities to include attorneys and attorney groups from other faiths, including Sikhs, Hindus, and Buddhists, to name a few where efforts have been made to date.

The Constitution serves as a sort of guard rail in the collision between various social, religious, political, and cultural issues. In the context of this collision, our judicial system is faced with the task of protecting religious liberty – a fundamental and natural right – under a nation of laws. In this manner, the law serves as a kind of social glue which holds society together, protecting the basic human right of religious liberty while resolving conflicts which society – if left to its various members – oftentimes seems unable to resolve.

As attorneys, we all took an oath to support the Constitution of the United States and the Constitution of the State of Arizona, and to maintain due respect for the courts of justice and its judicial officers. In facing the highly charged emotional and potentially divisive issues which seem to swarm around the exercise of religious faith and conscience today, there can be little doubt that members of the legal profession are called to serve in a way which adds more light and less heat.

Thank you again for your willingness to support the Religious Liberty Law Section. The Section is only as good as its members, so we invite you to strongly consider serving with us in this effort.

Robert E. Brown

Robert E. Brown, Chair

SELECTED U.S. CASE LAW *Updates*

CASE 1 ***Brush & Nib Studio, LC, et al. v. City of Phoenix***, 418 P.3d 426 (Ariz. App. 2018). On June 7, 2018, the Arizona Court of Appeals affirmed with modification the trial court's grant of summary judgment in favor of the City of Phoenix in a pre-enforcement challenge to the city's public accommodation law brought by the owners of a business that creates design artwork for décor, weddings, and special events. The court rejected the business owners' position that forcing them to produce custom artwork celebrating same-sex weddings violated their sincerely held religious beliefs about marriage.

Coming on the heels of the U.S. Supreme Court's decision in *Masterpiece Cakeshop*, the court accepted the business owners' assertion that their refusal to create wedding-related merchandise for same-sex weddings and to post an explanatory statement was motivated by their sincerely held religious beliefs., but found – under the Arizona Free Exercise of Religion Act (paralleling the Federal Religious Freedom Restoration Act) – that applying Phoenix's public accommodation law so as to require them to do so, did not substantially burden their free exercise of religion because the business owners are free to discontinue selling custom wedding-related merchandise. The court also noted, however, that even if the Phoenix law did substantially burden the business owners' religious beliefs, the Phoenix law would still be constitutional because Phoenix has a compelling interest in preventing discrimination, and has done so through the least restrictive means. The court stated that "The least restrictive way to eliminate discrimination in places of public accommodation is to expressly prohibit such places from discriminating."

The court also rejected the business owners' free speech, expressive association, overbreadth, vagueness, and equal protection challenges.

However, the court did strike from the Phoenix public accommodations statute, as unconstitutional, that portion of the law banning business owner from stating or implying that any person would be "unwelcome," "objectionable," "unacceptable," or "undesirable" based on sexual orientation.

The Arizona Supreme Court recently agreed to review the Court of Appeal's decision.

CASE 2 ***Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education, et al.***, 896 F.3d 1132 (9th Cir. 2018). In a *Per Curiam Opinion*, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's injunction enjoining the members of the Chino Valley Unified School District Board of Directors "in their official capacities … from conducting, permitting or otherwise endorsing school-sponsored prayer in Board meetings." The Court also left intact the District Court's declaratory judgment that the Board's prayer policy violated the Establishment Clause, on the grounds that the Board chose not to argue the issue on appeal, thereby waiving the issue.

The Court found that the Board's prayer policy and practice – which invited clergy and religious leaders from the community to offer prayers at the Board's public meetings – violated the Establishment Clause of the First Amendment to the U.S. Constitution. The Court determined that invocations to start the open portions of public school board meetings are not within the legislative-prayer tradition – identified in *Marsh v. Chambers* and *Town of Greece v. Galloway* – that allows certain types of prayer to open legislative sessions. For that reason, the Court held, the *Marsh* and *Town of Greece* historical analysis of legislative prayer was not applicable. Instead, the Court held, the school board's prayer policy and practice should be analyzed under the *Lemon* test.

The Court found that the school board's prayer policy and practice did not fit the historical tradition of legislative prayers identified in *Marsh* and *Town of Greece* primarily because, at the time of the framing of the U.S. Constitution, "free public education was virtually nonexistent, so that an historical approach sheds no light on whether school boards' actions violate the Establishment Clause." The Court also found that, because many of the attendees at the Chino Valley School Board meetings are adolescents and children, government sponsored prayer in that context posed a greater Establishment Clause problem than prayer at the legislative sessions considered in *Marsh* and *Town of Greece*, where the attendees tended to be mature adults attending the sessions voluntarily. The Court also pointed to differences between the purpose of the legislative sessions in *Marsh* and *Town of Greece* – which were venues

reserved primarily for policymaking – and the school board meetings in Chino Valley – which not only considered policy, but also served as sites of academic and extracurricular student activity and an adjudicative forum for student discipline. The Court also found it notable that a student representative sat as a member of the school board.

After rejecting the historical analysis of *Marsh* and *Town of Greece*, the Court analyzed the Board's prayer policy and practice under the *Lemon* test and found that the prayer policy failed the first prong of that three-pronged test, because the Board's prayer policy and practice lacked a secular legislative purpose. The Court came to that conclusion by noting that the two secular purposes the Board proffered for the prayer policy – solemnization of the Board's meetings and acknowledging the diversity of religious faiths practiced among the district's residents – were not served by the Board's policy. The Court held that the Board's prayer policy did not serve the first secular purpose because there is no secular reason to limit solemnization to prayers or to limit the solemnizers to religious leaders. And the Court held that the prayer policy did not serve the second secular purpose because the policy does not, in fact, capture all the religious and non-religious diversity in Chino Valley.

In coming to its conclusion, the Court noted that three other circuits have evaluated whether prayer during public school board meetings falls within the *Marsh-Town of Greece* legislative-prayer tradition. The 3rd Circuit (*Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011), *cert. denied*, 565 U.S. 1157 (2012)) and 6th Circuit (*Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999)) cases – both of which were decided prior to *Town of Greece* – found that it does not, whereas the 5th Circuit case (*Am. Humanist Ass'n v. McCarty*, 851 F.3d 521 (5th Cir. 2017), *cert. denied*, 138 S.Ct. 470) – decided after *Town of Greece* – found it does.

CASE 3 ***New Doe Child #1, et al. v. Congress of the United States of America, et al.***, On August 28, 2018 the U.S. Court of Appeals for the 8th Circuit unanimously affirmed a lower court's dismissal of the Plaintiffs' claims that federal statutes requiring the inscription of the national motto – "In God We Trust" – on U.S. coins and currency violated the Establishment, Free Speech, and Free Exercise Clauses of the U.S. Constitution, as well as the federal Religious Freedom Restoration Act and the Equal Protection component of the Fifth Amendment.

In coming to its conclusion, the Court noted, first, that six other Circuits (the 2nd, 5th, 7th, 9th, 10th, and D.C.) have also considered the same question and have all concluded that placing "In God We Trust" on U.S. coins and currency does not violate the Establishment Clause.

It then analyzed the issue in light of *Town of Greece v. Galloway*, holding that the Establishment Clause must be interpreted by reference to historical practices and understandings. The Court found that "the practice comports with early understandings of the Establishment Clause as illuminated by the actions of the First Congress. The Supreme Court has long recognized the 'unbroken history of official acknowledgment by all three branches of government of the rule of religion in American life from at least 1789.'" "As the Supreme Court has noted, 'the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him.'" "Thus, given that our founding documents protect the rights that were thought to derive from God, it is unsurprising that 'religion has been closely identified with our history and government,' a relationship still 'evidenced today in our public life.'"

Rejecting the Plaintiffs claims that inscribing coins and currency with the moot violates the Establishment Clause because it (1) privileges monotheism and (2) was impermissibly motivated by a desire to advance that religion, the Court held that "[T]he Establishment Clause does not re-quire courts to purge the Government of all religious reflection or to 'evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage' … Precluding general reference to God would do exactly that." "As the Supreme Court has proclaimed time and again, our 'unbroken history' is replete with these kinds of official acknowledgments … which 'demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion … A theory that erases that distance necessarily fails."

The Court also denied the Plaintiffs claim that placing "In God We Trust" on coins and currency continually confronted them with an offensive religious message, thereby coercing the Plaintiffs into proselytizing a religious idea they oppose. In denying the claim, the Court relied on *Galloway* for the proposition that "[o]ffense … does not equate to coercion."

The Court also denied the Plaintiffs' claim that inscribing "In God We Trust" on coins and currency violated their Free Exercise rights and statutory rights under the Religious Freedom Restoration Act (RFRA). In both cases the Court held that the inscriptions were not intended to and did not, in fact, burden the Plaintiffs – or the burdens are negligible, avoidable, and not directly compelled by the statutes at issue.'

Finally, the Court held that the inscription on the national motto on U.S. coins and currency did not violate the Equal Protection component of the Fifth Amendment by marginalizing atheists because the statutes do not create any express or implied classifications and "that placing the motto on money is rationally related to the Government's legitimate goal of honoring religion's role in American life and in the protection of fundamental rights."

CASE 4 ***Amanda Kondrat'yev, et al. v. City of Pensacola, Florida, et al.***, ___ F.3d ___ (11th Cir. 2018). On September 7, 2018, the United States Court of Appeals for the 11th Circuit announced its decision in *Amanda Kondrat'yev, et al. v. City of Pensacola Florida, et al.* In a 10 page majority opinion the court found that it was constrained by the 11th Circuit precedent of ACLU of *Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) to affirm the District Court's holding that a 34 foot high concrete cross that had stood in a Pensacola public park for nearly 50 years (and by a wooden cross before that for an additional 28 years), serving as a gathering place for Easter sunrise services as well as Veteran's and Memorial Day services, violated the Establishment Clause.

Although the court found the cross violated the Establishment Clause under a *Lemon v. Kurtzman* analysis because the city had failed to establish a secular purpose for the cross, it appeared to come to that conclusion reluctantly – stating that, given the factual similarity between the Pensacola cross and the cross in *Rabun*, as well as what it called the 11th Circuit's "precedent on precedent" law – "our hands are tied" and "we are constrained to affirm."

The court's reluctance to find that the cross violated the Establishment Clause was emphasized in the 18 page concurring opinion of Judge Newsom, who stated that "under our prior-panel-precedent rule, it seems clear enough to me that we – by which I mean the three of us – are stuck with [the decision in *Rabun*]. Having said that, it's equally clear to me that *Rabun* is wrong. On neither score – standing or the merits – can *Rabun* be squared with a faithful application of Supreme Court precedent, and I urge the full Court to rehear this case en banc so that we can correct the errors that *Rabun* perpetuates." Judge Newsom wrote that "We should take this case en banc in order to bring our own Establishment Clause standing precedent into line with the Supreme Court's and to clarify that 'offen[se],''affront[],' and 'exclu[sion]' do not alone satisfy the injury-in-fact requirement" of standing. With respect to the merits, Judge Newsom wrote "*Rabun* is wrong" – noting that since *Rabun* "the Supreme Court has since made clear that history plays a crucial – and in some cases decisive – role in Establishment Clause analysis" and noting that "[t]here is, put simply, lots of history underlying the practice of placing and maintaining crosses on public land" and that that practice fits comfortably within the tradition long followed in this country.

In his 54 page concurring opinion, in which he also pleads for en banc review, Judge Royal recounted the centuries old history of religious persecution by government that led to the Establishment Clause, and concluded that merely experiencing offense by virtue of viewing a cross on public property did not equate to the governmental coercion of religious belief or action the Establishment Clause was meant to address. Judge Royal wrote that "Courts should not embrace unharmed plaintiffs because of an unpleasant psychological state." He wrote that "[s]ome courts have lost sight of why so many fought for so long at such great cost for religious freedom. It was not to protect people from looking at crosses in public parks. That demeans and debases the sacrifices of millions of people." "Placing a cross in a public park that many people have enjoyed for decades, that stands mute and motionless, that oppresses no one, that requires nothing of anyone, and that commands nothing does not violate the Establishment Clause. Nor is it religious oppression."

CASE 5 ***Olga Paule Perrier-Bilbo v. United States***, ___ F.Supp.3d ___, 2018 WL 4696747 (D.Mass. 2018). The United States District Court for the District of Massachusetts entered summary judgment in favor of the United States against a French national seeking American citizenship who claimed that the regulatory required words "so help me God" in the oath of allegiance administered at U.S. naturalization ceremonies violated the Establishment and Free Exercise Clauses of the First Amendment, the federal Religious

Freedom Restoration Act, the Equal Protection Clause, and the Due Process Clause.

The Court rejected the plaintiff's Establishment Clause claim on the principle laid out in *Town of Greece v. Galloway*, finding that "like legislative prayer … [public oaths ending in 'so help me God" or other similar statements] has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of [the Supreme Court's] sessions." The Court stated that even though the phrase "so help me God" has some religious content, that is not determinative of its constitutionality. "Like ceremonial prayer in *Town of Greece*, the inclusion of 'so help me God' in the oath of citizenship 'is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs."

The Court rejected the plaintiff's Free Exercise claim on the ground that the plaintiff's mere exposure to the phrase "so help me God" in the oath of citizenship does not compel her affirmation of a religious belief – particularly in light of the fact that the plaintiff was given the option of taking the oath at a private ceremony in which the phrase "so help me God" would not be included.

The Court rejected the plaintiff's RFRA claim on similar grounds, finding that – given the fact that the plaintiff was given the option of not expressing the oath at the public ceremony, or having a private ceremony at which the offending phrase was not included in the oath – the regulatory required oath given at the public ceremony did no more than inconvenience the plaintiff and did not substantially burden the plaintiff's exercise of religion.

The plaintiff's equal protection and due process claims were also rejected – the first on the ground that the regulation providing the text of the oath of citizenship does not require different treatment of any class of people because of their religious beliefs or give preferential treatment to any particular religion – and the second because the plaintiff failed to identify a protected liberty or property interest and allege that the U.S., acting under of law, deprived her of that interest without constitutionally adequate process.

INTERNATIONAL
CASE 1

Lee v. Ashers Baking Company, Ltd., [2018] UKSC 49. On October 10, 2018 the Supreme Court of the United Kingdom held that the owners of a bakery did not violate the British Equality Act's prohibition against business discrimination based on sexual orientation when – due to the bakers' religious beliefs that the only form of marriage consistent with Biblical teaching and therefore acceptable to God is that between a man and a woman – the bakers declined to make and sell to a gay man a cake with the headline "Support Gay Marriage" inscribed upon it.

In reaching its conclusion, the Court found that the bakers did not discriminate on the grounds of sexual orientation, because their objection was to the message "Support Gay Marriage" and not to any particular person or persons. The Court pointed out that the bakers would have objected to making a cake with that message on it for anyone, regardless of their sexual orientation, and that not only gay people support gay marriage. A cake with the same message could have been requested by a gay person's children, parents, families and friends, as well as the wider community, who support gay marriage.

The Court concluded that "It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours [sic] to seek to extend it beyond its proper scope."

ARTICLES *of* NOTE

E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 Penn State L. Rev. 485 (2009).

AUTHORS' ABSTRACT:

"Religious freedom is regarded as one of our most precious rights and an essential attribute of a free society. But why? Why does the First Amendment single out religion for special protection in our constitutional system? What, if anything, about religion merits unique constitutional rules? Those in the colonial and founding generations who participated in the theoretical articulation and political achievement of religious freedom believed that religion is special because it entails duties owed to God. Their principal justifications for religious freedom were derived largely from Christian thinkers in early modern England and Europe who presented an array of religiously-based arguments favoring religious toleration, freedom of conscience, and disestablishment. These advocates, in turn, discovered the fundamental ideas of religious toleration and freedom in third and fourth century Christian thought, which provided the first principled justifications for religious toleration that went beyond political expediency. While other arguments, both theoretical and pragmatic, were advanced to support religious freedom, the arguments for religious freedom based on the nature of God and of authentic faith were the predominant principled response to religious intolerance and persecution and the centerpiece of the intellectual offensive against state- imposed religious uniformity.

Modern legal scholarship has broadly covered the events surrounding the ratification of the First Amendment's Religion Clause, but insufficient attention has been given to the rationales for religious toleration that emerged from sixteenth and seventeenth century England and Europe and formed the historical context and theoretical foundation for the American achievement of religious freedom. Neglect of these reasons has resulted in a Religion Clause jurisprudence that lacks the coherence and resonance of our eighteenth-century commitment of religious freedom."

Brian J. Grim and Melissa E. Grim, *The Socio-Economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisciplinary Journal of Research on Religion 1 (2016).

AUTHORS' ABSTRACT:

"This article summarizes the first documented quantitative national estimates of the economic value of religion to U.S. society. Specifically, the study provides conservative, mid-range, and high estimates. The study's most conservative estimate, which takes into account only the revenues of faith-based organizations, is $378 billion annually – or more than a third of a trillion dollars. By way of economic perspective, this is more than the *global* annual revenues of tech giants Apple and Microsoft *combined*. While this estimate has the most concrete data, we believe that it is certainly an undervaluation because it focuses on annual revenues rather than on the fair market value of the goods and services religious organizations provide. Our second mid-range estimate attempts to correct for this in two ways: by providing an estimate of the fair-market value of goods and services provided by religious organizations, and by including the contribution of businesses with religious roots. This mid-range estimate puts the value of religion to U.S. society at over $1 trillion annually. Our third, higher-end estimate recognizes that people of faith conduct their affairs to some extent (however imperfectly) inspired and guided by their faith ideals. This higher-end estimate is based on the household incomes of religiously affiliated Americans, and places the value of faith to U.S. society at $4.8 trillion annually, or the equivalent of nearly a third of America's gross domestic product (GDP). Finally, we discuss the limitations of this study and suggest several possible lines of research that could build upon and extend this research."

FEATURE ARTICLE

Masterpiece Cakeshop: Implications for Religious Liberty

By Jonathan Scruggs

In June, the U.S. Supreme Court issued its decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[2] That case considered whether Colorado could force a cake designer to create custom wedding cakes to celebrate same-sex marriages in violation of his core religious beliefs.

Heading into the argument, commentators focused on the sweeping decisions the Court could issue. It could, for example, rule that business owners give up their right to religious freedom and to control what they say if they open a business and enter into the marketplace. Alternatively, the Court could overrule *Employment Division v. Smith*[3] and return to a system where laws that burden religion—even neutral and generally applicable ones—must overcome a high burden.

The Court, however, took a different approach. And now people want to know what the *Masterpiece* decision means and what impact it will have going forward. This article offers some perspective on those questions as they relate to religious liberty.[4]

The Facts

To understand what *Masterpiece* means, we must start with the facts. Jack Phillips is a cake designer, an artist, and the owner of Masterpiece Cakeshop in Colorado. But above all that, he is a Christian who believes he must do his best to honor God in all things.

Because of that, Jack is happy to serve everyone, but has long declined to create cakes expressing messages that conflict with his religious beliefs. For example, he will not create cakes that are sexually explicit, that demean others, that promote Satan, or that celebrate Halloween. In fact, Jack has received requests for all these things and declined them.

1. Alliance Defending Freedom (ADF) is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith. ADF represents Jack Phillips and Masterpiece Cakeshop.
2. 138 S. Ct. 1719 (2018).
3. 494 U.S. 872 (1990).
4. For thoughts on the impact that *Masterpiece* and two other recent cases will have on the compelled-speech argument raised by those who object to celebrating same-sex marriage, see James A. Campbell, *Compelled Speech in* Masterpiece Cakeshop: *What the Supreme Court's June 2018 Decisions Tell Us About the Unresolved Questions*, 19 Federalist Soc'y Rev. 142 (Sept. 24, 2018), *available at* https://bit.ly/2DwpPE4.

ABOUT THE AUTHOR

Jonathan Scruggs is Senior Counsel and Director of Center for Conscience Initiatives, Alliance Defending Freedom[1] where he defends the constitutionally protected freedom of creative professionals to live out their faith in business and professional life without being subjected to government coercion, discrimination or punishment. Jonathan earned his J.D. from Harvard Law School.

Jack has always made these faith-based decisions about what to communicate through his art. But things got complicated—to put it mildly—when it came to messages about marriage.

Like countless others, Jack believes that God designed marriage as a union between one man and one woman. And he has long enjoyed pouring his heart into designing and creating artistic masterpieces, uniquely tailored to each couple, to celebrate their union and love for one another.

In 2012, two men visited Masterpiece Cakeshop and asked Jack to create a custom wedding cake to celebrate their union. Jack politely declined and offered to design them custom cakes for other occasions or to sell them anything else in his shop. The couple declined and then filed a complaint with the Colorado Civil Rights Commission.[5]

The Commission found that Jack discriminated based on sexual orientation even though he gladly serves *everyone* and simply cannot express messages celebrating same-sex marriage for *anyone*. It also rejected his First Amendment defenses. After years of litigation, Jack's case made its way to the U.S. Supreme Court.

The Decision's Rationale and Implications

The Supreme Court ruled for Jack in a 7-2 decision authored by Justice Kennedy. The Court did so based on Colorado's "clear and impermissible" hostility toward Jack's religious beliefs.[6] And it reinforced important principles set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[7] a leading case regarding government hostility toward religion.

In fact, the *Masterpiece* majority adopted a test from a section of the *Lukumi* opinion that only had the support of two justices in *Lukumi*. It is now clear that "[f]actors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'"[8]

In finding hostility, the *Masterpiece* Court relied on two factors: (1) inappropriate statements by the Commission and (2) the Commission's disparate treatment of Jack as compared with other cake designers who declined to create cakes expressing messages they considered objectionable.

As for the statements, the Court noted that commissioners "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain."[9] It also explained that one commissioner described Jack's faith "as 'one of the most despicable pieces of rhetoric that people can use,'" thus "disparag[ing] his religion in at least two distinct ways: by describing it as despicable and also by characterizing it as merely rhetorical—something insubstantial and even insincere."[10] The Court also criticized a commissioner who compared Jack's "invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust."[11] The Court concluded "that these statements cast doubt on the fairness and impartiality of the Commission's adjudication" of the case.[12]

5. The Commission is part of the Colorado Civil Rights Division. For simplicity, this article uses the term "Commission" to refer to the Commission and the Division.
6. 138 S. Ct. at 1729.
7. 508 U.S. 520 (1993).
8. *Masterpiece*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 540 (Kennedy, J.)).
9. *Id.* at 1729.
10. *Id.*
11. *Id.*
12. *Id.* at 1730.

And this conclusion is significant. Far too often, we hear the tag line that religious people must give up their faith and their freedoms once they open the doors of their business. Or that people who believe in marriage between a man and woman are like racists. That's what the Commission thought and said. The Supreme Court said that sentiment is wrong.

But many discussions of *Masterpiece* focus just on the Commission's egregious statements. That leads some to think that *Masterpiece* offers no protection for religious people so long as officials keep their hostile thoughts to themselves.

Not so. That is because *Masterpiece* discussed a second "indication of hostility"—the Commission's "difference in treatment" of Jack when compared with other cake designers.[13] That differential treatment arose when three different cake designers declined a man's request for cakes containing "religious text" and "convey[ing] disapproval of same-sex marriage."[14] Following the rejections, the man complained to the Commission of discrimi-nation based on creed (which includes religion in Colorado). But the Commission ruled in favor of those three cake designers because it determined that they objected to the messages the cakes would convey.[15] The Court noted that the Commission's "treatment of [these] conscience-based objections … contrasts with the Commis-sion's treatment of [Jack's] objection."[16]

For instance, the Commission ruled against Jack "in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not the baker," but "did not address this point" in the other cases.[17] The Commission also concluded that the three cake designers did not engage in illegal discrimination "in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers," but "dismissed [Jack's] willingness to sell" other cakes "to gay and lesbian customers as irrelevant."[18] In other words, "[t]he Commission's consideration of [Jack's] religious objection did not accord with its treatment of these other objections."[19]

This logic will greatly constrain government efforts to burden religious freedom going forward. Not many bureaucrats on civil rights commissions will have the stomach to interpret their laws as consistently as *Masterpiece* requires. After all, who wants to force a lesbian web designer to create a website criticizing same-sex marriage for a church? Or who wants to force atheist singers to sing at church services? Or force a Muslim printer to design a promotional pamphlet for a synagogue? *Masterpiece* says if the government allows the lesbian, atheist, or Muslim to decline such requests, it must give the same freedom to people like Jack. Equal treatment means equal treatment of people of faith too.

This demand for consistency is already protecting people of faith and limiting government encroachment. For example, the Colorado Commission recently accused Jack of violating the same Colorado law as before—this time by declining to create a custom cake celebrating a gender transition.[20] But this government overreach contradicts *Masterpiece*. Just as before, the Commission cannot allow other cake designers to decline requests to make cakes expressing messages they found objectionable but turn around and try to punish Jack for the same thing. Ignoring Supreme Court decisions and treating people of faith unfairly is the very definition of religious hostility.

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. To learn more about Colorado's second action against Jack Phillips following his victory at the Supreme Court, visit https://bit.ly/2OQPMPV.

Or consider Barronelle Stutzman, a floral artist in Washington state who serves all people but declined to create floral arrangements celebrating same-sex marriage. She suffered from similar hostility and disparate treatment as Jack.[21]

For example, Washington's Attorney General sued Barronelle on his own initiative (before any complaint was filed) and has relentlessly prosecuted her for politely declining to create custom floral arrangements to celebrate the same-sex wedding of her longtime friend and customer. But the Attorney General did not show similar zeal when a video circulated of a Washington coffee shop kicking out Christian patrons—while employing rhetoric far too vile to include here—after learning that they had been distributing literature advocating their beliefs in the streets outside the shop. Although multiple people complained to the Attorney General about this egregious incident of apparent religious discrimination, the Attorney General did not file suit. Under *Masterpiece*'s logic, this disparate treatment cannot fly. It demonstrates impermissible hostility toward Barronelle's religious beliefs.

Limits and Paths Forward

Although *Masterpiece* will be a strong precedent protecting religious freedom going forward, that does not mean *Masterpiece* embraced a system where anything goes. As the *Masterpiece* Court noted, "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[22]

The Court also noted that there are "innumerable goods and services that no one could argue implicate the First Amendment."[23] And it also suggested that the Commission could have ruled in favor of Jack Phillips in a way that was "sufficiently constrained" to avoid reaching a wide array of other goods and services.[24] Indeed, the Court went out of its way to emphasize that "the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."[25]

The *Masterpiece* Court thus chartered a course forward. The First Amendment has the last say in some circumstances. Sometimes those circumstances are obvious. *Masterpiece* itself acknowledged that generally applicable and neutral laws could not compel "a member of the clergy who objects to gay marriage on moral and religious grounds … to perform the ceremony without denial of his or her right to the free exercise of religion."[26] What other situations fit this type, the *Masterpiece* Court did not exhaustively identify. But it did rebuff the theory that anti-discrimination laws always override religious liberty in the public square. There must be a balance. And censoring and excluding religious freedom from the marketplace is not a balance the Court will accept.

Conclusion

Masterpiece strengthened the Court's free-exercise jurisprudence and is welcome news for religious adherents. Time will tell the full extent of *Masterpiece*'s impact, but at least one thing is certain. Government officials must treat religious adherents and their beliefs about marriage fairly, consistently, and respectfully. And that is good news. Not just for people of faith and not just for those who hold certain beliefs about marriage, but for everyone who wants a legal culture that embraces good-faith disagreement alongside true tolerance.

21. ADF represents Barronelle, and information about her case is available at https://bit.ly/2QYqfXx.
22. 138 S. Ct. at 1732.
23. *Id.* at 1728.
24. *Id.* at 1728-29.
25. *Id.* at 1727.
26. *Id.*

FEATURE ARTICLE

Masterpiece Cakeshop Supports Antidiscrimination Protections, Not Exemptions

By Lindsey Kaley

Courts across the country have concluded that the Constitution does not provide license to discriminate against lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people, both before and after the U.S. Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). In briefing and arguing *Masterpiece Cakeshop*, the parties set up several questions for the Court to address regarding the interaction between antidiscrimination laws and First Amendment protections. The Court ultimately declined to grant the bakery the sweeping exemption it had requested. Instead, it reaffirmed two core values: the necessity of protecting LGBTQ people from discrimination, and the importance of adjudications free from hostility to religion.

The majority opinion opens with a concise summary of the relevant facts: Charlie Craig and Dave Mullins visited a Colorado bakery, Masterpiece Cakeshop, to inquire about ordering a cake for their upcoming wedding reception. The owner of the bakery refused to accept their order, voicing his opposition to marriages of same-sex couples like Dave and Charlie.[1] Every state adjudicator that considered the bakery's denial—from the Colorado Civil Rights Division through the Colorado Court of Appeals—found that the bakery had unlawfully discriminated against Dave and Charlie, rejecting the bakery's free speech and free exercise defenses.[2] The Court likewise did not grant the bakery—or any business—the license to ignore the laws that govern businesses open to the public, and did not criticize the ultimate conclusion of the case on the merits.

To the extent the Court did consider the underlying merits of the decisions below, it identified two principles to be reconciled: "The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment… ."[3] The majority opinion provided guidance as to the first principle, but only a case-specific determination as to the second. Specifically, *Masterpiece Cakeshop* confirmed that LGBTQ people "cannot be treated as social outcasts or as inferior in dignity and worth."[4] The Court explicitly affirmed that antidiscrimination laws are a "valid exercise of state power," and stated that it is "unexceptional" that state "law can protect gay persons, just as it can protect other

1. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.
2. *Id.* at 1725–27.
3. *Id.* at 1723.
4. *Id.* at 1727.

ABOUT THE AUTHOR

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classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[5]

Crucially, the Court confirmed that religious objections to same-sex marriage do not merit exemptions from anti-discrimination laws. The Court declared that, "while those religious and philosophical objections [to marriage between same-sex couples] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[6] With challenges to antidiscrimination laws that protect LGBTQ individuals ongoing across the country—not just with regard to wedding services, but also in contexts like employment and healthcare—this statement of the "general rule" should help ensure uniform application of antidiscrimination laws.

The Court recognized the danger posed by extending exceptions to antidiscrimination laws beyond religious clergy, as there is no limiting theory to prevent such exceptions from undermining protections entirely. "[I]f that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[7] This passage acknowledges that the consequences of the bakery's arguments are not limited to same-sex couples ordering wedding cakes, but could generate a much broader license to discriminate for "a long list of persons." Additionally, the quote implicitly connects protections for LGBTQ people with protections for members of other minority groups; the civil rights provisions that aim to prevent stigma against people based on their race or religion are intertwined with the "history and dynamics of civil rights laws" that protect LGBTQ people. Indeed, all protections could be at risk if such a license to discriminate is granted.

Thus, we can confirm that the Court's holding was narrow because the majority opinion did not hold that a bakery can discriminate against a same-sex couple seeking a wedding cake, or even that Masterpiece Cakeshop was entitled to turn away Dave and Charlie. In other words, every business in Colorado must still serve same-sex couples on equal terms as different-sex couples.

Why, then, did the Court give the bakery a free pass for its discrimination? The majority expressed concern that the Colorado Civil Rights Commission had not adhered to the standard of neutrality when adjudicating the bakery's case. It objected to the state's process, not the substance of its decision. Specifically, the majority opinion focused on how the Commission handled a late stage of the case, after initial determinations that the bakery had violated the law. During an administrative appeal, there were statements made by two of the seven commissioners that, in the Court's estimation, "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain."[8] Additionally, the Court noted the difference in treatment by the Colorado Civil Rights Division of claims against the bakery, as compared to three other cases in which bakeries were found to have lawfully declined to commission cakes that bore inscriptions that were derogatory toward gay people.[9]

The opinion is careful to indicate that the commissioners' statements could be subject to different interpretations.[10] And the Court did not conclude that the decisions regarding the different bakeries could not be reconciled, only that the perfunctory reasoning used by the Commission, and later adopted by the state appellate court, was flawed.[11]

5. *Id.* at 1724, 1728.
6. *Id.* at 1727.
7. *Id.*
8. *Id.* at 1729.
9. *Id.* at 1730.
10. *Id.* at 1729.
11. *Id.* at 1730–31.

In fact, Justice Kagan's concurrence explained that the cases can be distinguished, as the other bakeries were refusing to sell cakes that they would not make for any customer, whereas Masterpiece Cakeshop refused to sell the same wedding cake it would have made for a different-sex couple.[12] However, taking together the commissioners' statements and the treatment of other bakeries, the Court concluded that the Commission evidenced hostility to religion in its handling of the case.[13] This peculiar confluence of factors is unlikely to arise in future cases.

Accordingly, we anticipate that *Masterpiece Cakeshop*'s impact on future cases will be to affirm protections for LGBTQ people. This effect is already evident in how the majority opinion has been applied in the six months after the decision was issued. So far, it has either been cited to *uphold* protections for LGBTQ people, or it has simply been quoted for the "proposition that disputes … 'must be resolved with tolerance.'"[14] Courts continue to reject free speech and free exercise challenges to antidiscrimination ordinances, as they would "result in 'a community-wide stigma.'"[15] And where the majority opinion has been cited in support of requests for exemptions based on purported hostility to religion, those requests have been denied.[16]

Yet those who seek to authorize discrimination against LGBTQ people continue to press for the broad exemption the Court declined to grant them in *Masterpiece Cakeshop*, with three cases waiting in the wings seeking the same First Amendment exemption previously denied—one case with a certiorari petition now pending before the Court is even about a bakery that refused a wedding cake to a same-sex couple.[17] In all three cases, the state courts found that the businesses' refusals violated the antidiscrimination laws, and upheld those laws despite challenges that they were contrary to the First Amendment's Free Exercise and Free Speech Clauses. Businesses have tried to shoehorn the facts of their cases into the curious amalgam of circumstances present in *Masterpiece Cakeshop*, but thus far they have been unsuccessful. For example, the only evidence of religious hostility offered by a florist, who had been found liable for unlawful discrimination after refusing to provide flowers for a same-sex couple's wedding, was that the state enforced the law against the business and owner and analogized the refusal to a past denial against Black patrons.[18] But it was not the *enforcement* of the antidiscrimination law that the majority opinion found constituted hostility to religion; the Court's silence regarding multiple state adjudicators' conclusions that Masterpiece Cakeshop had broken the law illustrates that neither investigating indi-viduals for violating a public accommodations law, nor initiating proceedings against them for that violation, nor conclud-ing that they violated the law is, in and of itself, a violation of their free exercise rights.[19] Further, the Court itself analogized such discrimination to the stigmatization of other protected groups, demonstrating that such comparisons do not evince hostility to those who oppose marriage for same-sex couples.

Masterpiece Cakeshop also offers no support for the handful of businesses that have affirmatively sued for religious exemptions from antidiscrimination laws, because they wish to discriminate against same-sex couples seeking

12. *Id.* at 1733–34 (Kagan, J., concurring).

13. *Id.* at 1731.

14. *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 686 (E.D. Pa. 2018) (rejecting claims by foster care agency that lost city contract for not serving same-sex couples; finding *Masterpiece Cakeshop* "has little bearing on this case in view of [its] narrow holding").

15. *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 438 (Ariz. Ct. App. 2018) (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727), *petition for review granted* (Ariz. Nov. 20, 2018) (No. CV-18-0176); *see also Our Lady's Inn v. City of St. Louis*, No. 4:17-CV-01543, 2018 WL 4698785, at *9 (E.D. Mo. Sept. 30, 2018).

16. *See, e.g., Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 720 n.24 (9th Cir. 2018); *Hereditary Chief Wilbur Slockish v. U.S. Fed. Highway Admin.*, No. 3:08-CV-01169-YY, 2018 WL 4909902, at *2 (D. Or. Oct. 10, 2018).

17. *State v. Arlene's Flowers, Inc.*, 187 Wash. 2d 804 (2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018); *Cervelli v. Aloha Bed & Breakfast*, 142 Haw. 177 (Ct. App. 2018), *petition for cert. filed*, (U.S. Oct. 9, 2018) (No. 18-451); *Klein v. Oregon Bureau of Labor & Indus.*, 289 Or. App. 507 (2017), *petition for cert. filed*, (U.S. Oct. 19, 2018) (No. 18-547).

18. Suppl. Br. Pet'r at 2, *Arlene's Flowers*, 138 S. Ct. 2671 (No. 17-108).

19. *Masterpiece Cakeshop*, 138 S. Ct. at 1725–27.

wedding related services.[20] Since the businesses challenged the state laws before any denial of service occurred, the businesses cannot claim that the states' enforcement or adjudication of the businesses' rights were tainted by religious hostility, as there was no such enforcement. To the contrary, *Masterpiece Cakeshop* aids states defending their longstanding civil rights protections against facial attacks; it not only expresses support for laws that protect the dignity of LGBTQ individuals, it prohibits the use of signs indicating that "no goods or services will be sold if they will be used for gay marriages"—a request made by the businesses.[21]

It is undoubtedly disheartening that the discrimination Dave and Charlie faced was not rectified, but the Court left no reason to question the numerous lower court decisions that have refused to carve out a license to discriminate against same-sex couples. And if past is precedent, courts will continue to protect the rights of same-sex couples to access public goods and services on an equal basis.

20. *See, e.g., Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017), *appeal docketed*, No. 17-3352 (8th Cir. Oct. 30, 2017); 303 *Creative LLC v. Elenis*, No. 16-CV-02372, 2017 WL 4331065 (D. Colo. Sept. 1, 2017), *appeal dismissed*, No. 17-1344, 2018 WL 3857080 (10th Cir. Aug. 14, 2018).

21. *Masterpiece Cakeshop*, 138 S. Ct. at 1728–29.

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Articles published in the *Religious Liberty Law Section Newsletter* are solely the work of the articles' author(s) and do not represent the positions or views of the State Bar of Arizona or the Religious Liberty Law Section.

This issue's featured articles discuss the U.S. Supreme Court's decision in *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.* The authors are attorneys who represented opposing parties in the case. Jonathan Scruggs is an attorney with Alliance Defending Freedom, which represented Masterpiece Cakeshop and Jack Phillips. Lindsey Kaley is an attorney with the American Civil Liberties Union, which represented Charles Craig and David Mullins. Both authors were provided the following instructions:

> *"Each author will write an article of not more than 2,000 words, discussing the U.S. Supreme Court's decision in* Masterpiece Cakeshop v. Colorado Civil Rights Commission. *Discuss the facts of the case that you believe were instrumental to the Court's holding; your understanding of the Court's holding; whether such holding is narrow or establishes some broad legal principle(s) that will be applicable to future cases; and what you believe the impact of the case will be, both from a general religious liberty law standpoint as well as for future cases.*

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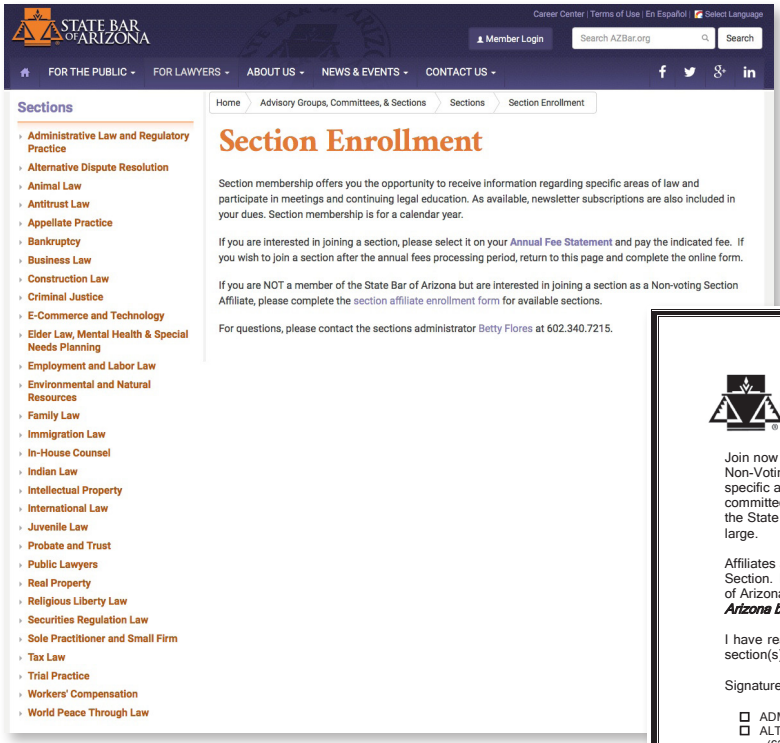
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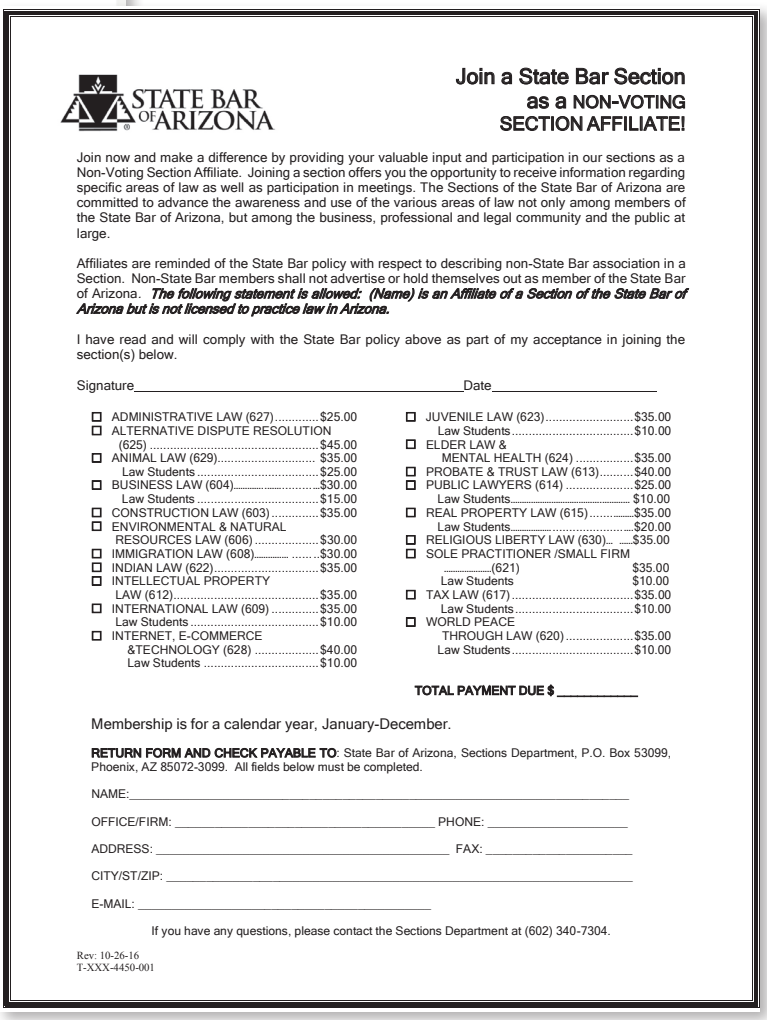
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October 6, 2017 Memorandum: Implementation of Memorandum on Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006791/download

July 30, 2018 Memorandum: Religious Liberty Task Force.
https://www.justice.gov/opa/speech/file/1083876/download

U.S. Department of State

2018 Annual Report of the U.S. Commission on International Religious Freedom.
https://www.uscirf.gov/reports-briefs/annual-report/2018-annual-report

U.S. Department of Labor

August 10, 2018 Directive 2018-03: To incorporate recent developments in the law regarding religion-exercising organizations and individuals.
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

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