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MEMORANDUM

TO: Ministry and Church Organization Clients and Friends

FROM: Stuart Lark
John Wylie

DATE: July 10, 2018

RE: **Religious Exercise Following the *Masterpiece Cakeshop* Decision**

As many of you know, the U.S. Supreme Court last month issued a decision in a high-profile case involving a cake shop which, based on its owner's religious beliefs, had declined to create a cake for a same-sex wedding celebration. The cake shop won. In the days following the Court's decision, many commentators and experts offered perspectives on what the decision might mean for future disputes between religious and sexual liberty rights.

Most of these perspectives focused on small commercial businesses and on the Court's seemingly narrow focus on the unique facts in the case. By way of contrast, this memo discusses how the premises underlying the decision could provide additional religious liberty protection for ministry and church organizations seeking to conduct their activities in a manner consistent with their distinct religious convictions.

The key facts of the case are as follows: Jack Phillips owns and operates Masterpiece Cakeshop in accordance with his Christian beliefs, which include a belief that God created marriage as a union between one man and one woman. Mr. Phillips also believes that creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his beliefs about marriage. In response to a complaint about the shop's "no same-sex wedding cake" policy, the Colorado Civil Rights Commission (the "Commission") held that the policy discriminates based on sexual orientation in violation of Colorado's public accommodation law. In addition, the Commission made disparaging remarks about Mr. Phillips' religious beliefs.

On appeal, the U.S. Supreme Court held that these disparaging remarks, combined with the Commission's decision to permit other bakers not to create cakes opposing same-sex marriage, violated the U.S. Constitution's free exercise of religion clause.¹ Although the Court's analysis

¹ *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, __ U.S. __ (2018).

(which was joined by two liberal members of the Court) focused on several unique actions taken by the Commission, it also rested on a number of key premises that support religious exercise rights and that are not tied to the Commission's actions.

This memo first discusses these premises and then offers several recommendations for how ministry and church organizations can best protect their religious exercise in light of the decision. Of course, the intersection of religious and sexual liberty law is a particularly volatile, complex, and hotly disputed area of law; as such, there can be no guarantee as to how the law will develop in the future. But we think these recommendations will put ministry and church organizations in the best position to carry out their missions and preserve their rights.

I. Key Premises Supporting Religious Exercise Rights

1. *Government may not disparage religious views on human sexuality and marriage.*

Many supporters of sexual liberty rights, as well as various government agencies like the Equal Employment Opportunity Commission, have characterized any form of religious exemption as a "license to discriminate." In so doing, they frequently equate orthodox religious views on human sexuality and marriage with racism. In its *Masterpiece Cakeshop* decision, the Court rejected such a characterization of Mr. Phillips' beliefs, as asserted by one of the commissioners. The Court observed that:

The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law. [Emphasis added].

Moreover, the Court affirmed that "*religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.*" To this end, the Court quoted from a prior decision in which it granted same sex marriage rights: "*[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.*"

Accordingly, the Court held that government officials cannot disparage or reject the legitimacy of religious views on human sexuality and marriage.

The Commission gave every appearance of adjudicating Phillips' religious objection based on a negative normative evaluation of the particular justification for his objection and the religious grounds for it. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. [Emphasis added].

The Court's respect for Mr. Phillips' religious beliefs could take the wind out of the sails of efforts to oppose religious exemptions in future court cases and even in legislation.²

2. *Religious exercise rights may be protected in the commercial marketplace.*

Many supporters of sexual liberty rights argue that religious persons must give up their religious exercise rights when engaging in the commercial marketplace. Some even argue that commercial activities can never be considered as religious exercise. But consistent with its prior holdings,³ the Court rejected both of these arguments. The Court accepted that Masterpiece Cakeshop's commercial activities are religious exercise and held that the Commission violated the shop's free exercise rights with respect to such activities.

3. *Laws protecting sexual liberty must include certain religious exemptions.*

As noted above, Colorado's public accommodation law prohibits discrimination based on sexual orientation (and also based on religion). But the law also exempts any place that is "a church, synagogue, mosque or other place that is principally used for religious purposes." The Court's decision suggested that a religious exemption such as this one may be required. Specifically, the Court held that compelling a pastor to perform same sex weddings would violate the pastor's free exercise rights:

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion.

The decision notes that such exemptions cannot be open-ended, but it provides no further insight into the extent to which either the constitutional or statutory religious exemptions must include various types of activities of ministry and church organizations. Nevertheless, it is clear that the scope of these religious exercise protections will be informed by the next two premises.

4. *Government must be religiously neutral in every way.*

In a controversial 1990 decision,⁴ the U. S. Supreme Court held that constitutional religious exercise rights apply *only* to laws that are *not* religiously neutral or generally applicable. This limitation on free exercise rights has been criticized, and there was some hope that in the *Masterpiece Cakeshop* decision that the Court would overturn it. While the Court did not do

² Similarly, at oral argument, Justice Kennedy described as "facile" the Commission's conclusion that the cakeshop's *faith-based* policy was actually discrimination based on *sexual orientation*.

³ See, e.g., *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014).

⁴ *Employment Division v. Smith*, 494 U.S. 872 (1990).

that, it did expand the scope of laws subject to religious exercise protections by imposing strict and comprehensive requirements for religious neutrality.⁵

The Free Exercise Clause bars even subtle departures from neutrality on matters of religion. Here, that means the Commission was obligated under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. [Emphasis added; quotations omitted].

The Court noted a variety of ways in which a law may not be religiously neutral.

Factors 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. [Quotations omitted].

Religious neutrality also supports broad interpretations of statutory religious exemptions. For this reason, we filed an amicus (friend of the court) brief in the *Masterpiece Cakeshop* case on behalf of ministry and church organizations. We argued that the Commission's failure to classify *Masterpiece Cakeshop* as a place "principally used for religious purposes" under the Colorado religious exemption violated religious neutrality. Although the Court did not reach this argument, the expanded neutrality standards set forth by the Court advanced the main point of the brief, which was that religious exemptions must be interpreted broadly.

5. *A policy like that adopted by Masterpiece Cakeshop may not create serious or community-wide stigma of gay persons and gay couples.*

It is clear that dignity remains a central focus on the Court, both for religious liberty and for sexual liberty. Indeed, the decision's legal analysis started as follows:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. [Emphasis added].

⁵ These religious neutrality requirements narrow the reach of the *Smith* decision by making it more difficult for a law to qualify as religiously neutral and generally applicable, which is a good result for religious liberty.

With respect to future conflicts between religious and sexual liberty, the Court concluded:

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be solved 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.
[emphasis added]

Elsewhere in the decision, the Court described these “indignities” as “serious stigma” or “community-wide stigma.” Religious activities that cause such stigma are unlikely to be protected, even from laws that are not religiously neutral. Although the decision provides little guidance as to what constitutes “serious” or “community-wide” stigma, by ruling in favor of Masterpiece Cakeshop the Court seems to have concluded that such stigma was not present in this case.⁶

II. Ministry and Church Organizations Responses

In response to expanding sexual liberty rights we have for some years regularly advised ministry and church organizations to take the following steps.

1. Clarify the organization’s religious beliefs regarding human sexuality and marriage.
2. Determine the standards through which the organization exercises and expresses its beliefs (this process usually includes standards for ministry leaders, employees, volunteers, and participants, as well as for ministry activities and for facility uses).
3. Document these standards in one or more policies describing how the organization exercises and expresses its beliefs as a community.
4. Advocate for religious exercise rights, as appropriate.

Based on the *Masterpiece Cakeshop* decision, we also recommend that each ministry and church organization integrate its theological understandings of dignity and worth into its beliefs and standards regarding human sexuality and marriage. For example, an organization could clarify and define its beliefs regarding human sexuality and marriage in terms of how those beliefs connect to its beliefs on human dignity and worth.⁷

⁶ The retirement of Justice Kennedy may result in future interpretations of this standard that are even more favorable to religious exercise.

⁷ The understanding of dignity in the *Masterpiece Cakeshop* decision appears to center on the exercise of choices. For many of our Christian ministry and church organization clients, this may be a superficial understanding of dignity and worth. A more complete theological understanding of dignity may start with the conviction that each individual is created in God’s image, and may then affirm that individuals inevitably make choices that undermine their God-given dignity (and alienate them from God and from others). Many Christian organizations believe that

Similarly, an organization could ensure that its community standards exercise and express its beliefs not only regarding human sexuality and marriage, but also regarding dignity and worth. We recommend that these standards be framed to the extent possible in terms of what the organization affirms and is for rather than what it is against.

We think these steps will best position an organization to assert that all of its activities (even those that have secular or commercial counterparts) are religious exercise, and that such activities affirm rather than undermine dignity (at least as the organization understands that term theologically). Taking a proactive theological position on dignity will make it more difficult for a court or government agency, while avoiding prohibited religious entanglement, to assert that the organization's religious exercise harms the dignity interests of others.

Finally, and perhaps most importantly, we recommend that organizations strive to demonstrate gratitude in communicating their beliefs and applying their standards. We think gratitude is warranted in part because there is perhaps more religious freedom in the U.S. today than in any other country, ever. But even if that were not the case, gratitude is also strategic, because actions emanating from genuine gratitude are much harder to characterize as stigmatizing.⁸ This may be the most important lesson from Masterpiece Cakeshop.

sexual activity outside of traditional marriage is just one example of such a choice. Finally, such organizations may affirm that each individual's dignity ultimately flows from the cross.

⁸ Christian organizations may also consider the biblical perspective that followers of Christ are blessed when they suffer for what is right, and that such followers should present their beliefs with gentleness and respect. 1 Peter 3:14-15.