

Mike Schutt: Welcome back to Cross and Gavel Audio. This is your host Mike Schutt. I have with me Kim Colby, my colleague at Christian Legal Society. Kim is the director for the Center for Law and Religious Freedom, and we're here to talk about the recent Supreme Court decision in *Masterpiece Cakeshop*.

Mike Schutt: Hi Kim, thanks for doing this.

Kim Colby: Hey Mike. It's good to be here.

Mike Schutt: Kim, let's just jump right to it. You have shepherded efforts to file amicus briefs in this case. You've been following [it]. You've been doing religious freedom work for decades. You know the ins and outs of this stuff more than anybody. Let's just start with the big picture. Some people are saying this is a big win. Some people are saying it doesn't really matter. It just seems to me like it's way better than the alternative to start with.

Mike Schutt: But what do you think about the import of this case, and whether this is a big win for those who love religious freedom?

Kim Colby: This is a big win, and it's a narrow win. That's absolutely true, but it is a very big win. And there are many narrow wins in the past that are still standing decades later and have done good work. And I think that's what this one will do as it goes forward.

Mike Schutt: Well maybe we better explain a little bit what you mean by narrow because I've seen in the Twitter universe, which is a really terrible place to be. Twitter's a terrible place by the way. I don't know if you knew that or not, but it is. People are talking about ... well 7-2 ... it's not narrow. Tell us what you mean by narrow, even though the margin was a good one.

Kim Colby: Well that's actually a really good reminder, which is it was a 7-2 decision. Those don't happen every day and that's a very strong decision. It drew support from both the liberals on the Court and, of course, the conservatives. So why though do we call it a narrow decision? Well so basically much of the argument in the brief had been about whether or not Jack Phillips, the baker here, should win on free speech grounds ... whether he could be compelled to provide an expression through creating this wedding cake ... a message that he didn't want to convey.

Kim Colby: And so there had been a lot of talk about whether a wedding cake could be a message, whether the couple could force him to put certain words on the cake. They hadn't asked for words in this case, but it actually evolved that at oral argument. The state and the ACLU argued that Jack could be forced to write things on the cake, so a lot of the discussion surrounding this case was about free speech. And sort of a second argument, but less focused on until oral arguments, was the free exercise of religion claim.

Kim Colby: Of course, both free speech and free exercise are in the First Amendment, but generally free speech has been the stronger right to rely on. And free exercise has not always been enforced as strongly by the Court as it should be. So, during oral argument - we saw about halfway through when the state and the ACLU, the state especially, started its argument - there was a shift. So, Jack Phillips' attorney Kristen Waggoner, who did a fantastic job, and the U.S. Solicitor General, who argued on behalf of Jack as well, they both had had questions almost totally about free speech.

Kim Colby: But when the state of Colorado stood up, the questions by first Chief Justice Roberts and then Kennedy and Alito shifted to free exercise. And that's actually the ground that the Court ended up ruling for Jack on ... free exercise, and not on free speech. So that's why we talk about it as sort of a narrow victory.

Mike Schutt: Yeah, because the grounds on which the opinion was ... the grounds on the opinion, the legal grounds, are narrow legal grounds rather than taking a broader view of free exercise generally, right?

Kim Colby: Right.

Mike Schutt: That's what we're talking about.

Kim Colby: So within even free exercise it was a narrow ground in the sense that the Court 7-2 said that there had been hostility to Jack's religious beliefs; they had been disrespected by the Colorado Civil Rights Commission. And they pointed to two things there: one was that two of the commissioners on the commission had actually expressed views that could be read as hostile to Jack Phillips' religious beliefs, and I'm sure we'll talk about that a little more later. And then the second thing they pointed to - a separate ground for finding hostility to Jack's religious beliefs and therefore a free exercise violation - was the fact that a religious person out in Colorado had gone to three different bakeries asking them to make a message, a religious message on a cake that was perceived to be anti-same sex marriage. And three bakeries turned this person down, and when he filed a complaint with the Colorado Civil Rights Commission, the Colorado Civil Rights Commission said he had no grounds for a complaint, that the bakers have the right to not make a cake that they found offensive. And so, it's that disparate treatment of Jack Phillips, he was being forced to make a cake by the commission that he found offensive, but these three bakers weren't. And then the fact that two of the seven commissioners had voiced what could be taken to be anti-religious views. That's what the narrow grounds are for the ruling here.

Mike Schutt: Good. So let's go back and make sure that we tie up all the procedural ... well the procedures in this case, so everybody's on the same page as they listen to this. Because it's interesting to me how the Colorado Civil Rights Commission really is the defendant in this case, right? I mean this is the ... so the two men walk in to Jack Phillips bakeshop, they ask him to bake a cake for their wedding. He says, "I'll sell you anything in the shop, but I don't make Halloween cakes. I

don't make divorce party cakes, and I don't make same sex wedding cakes." He didn't say all that to them, but that's the gist of who Jack Phillips is.

Mike Schutt: And he said, "so I'm sorry I can't help you." And they file a claim with the Colorado Civil Rights Commission, and how does that end up in litigation? I mean these are two guys who didn't get a cake, and they are able to basically shut down Jack Phillips' business by bringing a claim with the civil rights commission. And then the claim for release is brought by Jack Phillips and Masterpiece Cakeshop.

Mike Schutt: Just walk us through just how that works in terms of the procedural set up for what this appeal is about? Jack is asking for the Supreme Court to declare that something the Colorado Civil Rights Commission did was unconstitutional. Right?

Kim Colby: Right. Right. So, the reason Jack is the petitioner in this case is he lost below every time, so it's kind of an encouraging story of perseverance and courage. But basically, the couple files a complaint with the Colorado Civil Rights Commission, and the Colorado Civil Rights Commission does an investigation, and after the investigation it could say there aren't any grounds for a claim here ... there's not been discrimination, or whatever.

Kim Colby: But instead, the Colorado Civil Rights Commission said, we find that Phillips was discriminating against this couple based on their sexual orientation. That's same-sex discrimination under Colorado law; it's illegal. And, therefore, we're going to bring charges. And then the commission brings the charges, and the commission is basically the prosecutor at that point. And then also, the commission has itself, to listen to this case against Jack - that it's bringing - so the commission's bringing a case against Jack that it's also basically the judge in. Okay?

Kim Colby: And that's one of the problems with these commissions is their mission, and it's a good mission overall, right? Their mission and the people who are on the commission, and the people who are on the staff ... they want to get discrimination and stop it. And most of the time that's a really good thing, but it also means that ... I was trying to remember the saying ... you know, you see a hammer, if you need a hammer, a hammer in every tool. I can't remember, it's better than that.

Mike Schutt: It's when you're hammer, everything's a nail.

Kim Colby: Okay, that's it. So that's what these commissions are. And most of the time that's good because we don't want discrimination in our society. But they are going to see discrimination everywhere, and then they get to be the judge of whether Jack Phillips is discriminating. So they, the commission, ruled he had violated the Colorado law and that, therefore, he should either ... he either could stop baking all wedding cakes or bake a wedding cake for same-sex

couples, which he wasn't going to do because of his religious beliefs. So he stopped baking all cakes, and he lost 40% of his business as a result.

Kim Colby: And had to let off half, lay off half of his staff. And then they also said he had to basically re-educate his staff as to why what he had been doing was wrong. And a lot of the staff ... including his mother whom he said is who taught him how to be a Christian. And he's going to have to tell her why she had taught him wrong, and so anyway after you go through the commission I think there also was an administrative law judge. But the administrative law judge works for the commission too.

Kim Colby: Sometimes, I don't know about this case, but sometimes they're not even lawyers. And so, you have to work your way through a very long process in the commission - it can take a year or two - during which you are being boycotted, and Phillips was receiving death threats, before you get to the point when you've gone through the commission's whole process, and they've ruled against you. And the administrative law judge has ruled against you. Then you get to appeal to a state court to, I hate to say it, but to a real judge.

Kim Colby: But this has taken months and years okay, and then ...

Mike Schutt: Years in this case.

Kim Colby: In this case it was ... this started in 2012, right? And so here he appealed to the state courts, he lost in the Colorado Court of Appeals. The Colorado Supreme Court said, "we don't even have to hear this case; it's no big deal." And so that's when Jack got to petition the Supreme Court to review the Colorado Civil Rights Commission's ruling. So that's a long answer of how we got to where we were.

Mike Schutt: That's good. I think that's helpful for people to see what this is, and I have a rant on this. You and I have talked about this before, and we disagree a little bit. And you say these commissions are good, but you know the commission is made up of people who made their name by being advocates for gay rights. And to have them sitting as basically judge and jury of the first resort over whether it should be unlawful, or whether it is wrong for a Christian baker to refuse service ... to refuse to make a special wedding cake for a same sex wedding for this couple is the fox guarding the henhouse in lots of ways.

Mike Schutt: With no legal training, for the most part. I mean some of them may be lawyers I don't know personally, but I mean even ... so the makeup of the commission is set up to be a losing proposition for anyone who is not bending over backwards to accommodate the LGBT agenda. And that's just me. I know you don't completely agree with that, and that's a discussion for another day. Because we'll talk a little bit about it, because the grounds of this decision were on how the commission made its decision.

Mike Schutt: The state action here, that Phillips is complaining about is what the commission did. So, let's just get into this, to the grounds of this opinion. How does Phillips end up winning this case, not on free speech grounds, but on free exercise grounds?

Kim Colby: Okay so this kind of ties into what we've already been talking about, which is nice. I'll read you one of the things that ... there were two commissioners who said very negative things about Jack Phillips' religious beliefs, or about religion and religious freedom generally. And I'll read you one just to give you the flavor. "Freedom of religion, and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it can be, we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to, to use their religion to hurt others." And that's one of the quotes from Justice Kennedy's opinion for the majority of the court.

Kim Colby: The 7-2.

Mike Schutt: He's quoting one of the members of the commission?

Kim Colby: Right. Right. And so, it's that flavor of comment that Justice Kennedy says ... basically, the commission is an adjudicatory body, and they made this kind of comment. They made, I think, two or three others like that ... two of the seven commissioners did. And as a result of that, basically - he doesn't use the word tainted, but that's the word I think that fits here - is the results are tainted. When they ruled against Jack, we can't be sure that they just weren't biased against religion and Jack's religion from the start.

Kim Colby: Before they heard the facts, before they thought about the law. And so because of that bias of this adjudicatory body, basically because he had a biased judge, Jack should win, because it was hostility toward his religion, and basically we all have a right to a fair judge. So that's one part of the narrow grounds of free exercise, and the other, of course, was these three bakeries.

Mike Schutt: So, the evidence is basically, going backwards, the evidence of this hostility towards religion, or the unfairness of the decision maker, as you said, really is grounded in ... the comments of the two commissioners that were just incredible. I mean the quote you read, to call religion despicable and a rhetoric, right? Kennedy elaborates on why this is really bad. And then secondly because they showed bias in treating a Christian who wanted cakes baked by LGBT-friendly bakeries - they treated him differently than they treated Jack Phillips. Those were the two pieces of evidence that Kennedy cites in the record as saying this shows that he [Jack] got unfair treatment by the court basically.

Mike Schutt: And that's the entire grounds for the decision, wouldn't you agree?

Kim Colby: Right. That's how he picked up seven votes.

Mike Schutt: Okay. All right. So next, where were you going next?

Kim Colby: Well, where I was going to go before we went to the other three bakeries, and I don't know ... maybe we've already said enough about the other three bakeries, but where I was going to go after I read that is, so what I'm seeing in discussions of the case since it was handed down two days ago, is kind of well this is just a sui generis decision because the commissioner ... well first they'll say the commissioner didn't mean what she said; that's it's being taken out of context.

Kim Colby: But I don't think that's quite true ... but anyway ... but also well you have this one bad commissioner roving around out in Colorado, but the thing is, I think this is, as we were talking about a little earlier, this is the mindset of a lot of the people who are appointed to these commissions.

Kim Colby: And I don't think they even realize their own anti-religious bias. Even when they're saying such awful things, I don't think they even get that they are displaying a bigotry against religious people. Because in their heads they're not bigots, right? They don't discriminate, they're not bigots, except when they say these awful things about religious people.

Kim Colby: And so, I was just going to point out, if you can let me read one other thing, is ... so this is to me, and I think to you, and people that work in this area, this is not all that unusual to find this in high places, these types of sentiments. And we've seen them especially in the last three to four years, and in the media, and in all kinds of public discussion.

Kim Colby: And so, September of 2016, right before the Presidential election, the U.S. Commission on Civil Rights issued a report about how to balance religious freedom and the civil rights laws. And basically, in a 6-2 decision, which isn't really a court ... it's just kind of a report, it's not really a case.

Mike Schutt: But two commissioners said they couldn't join in the report.

Kim Colby: But the chairman of the report captured the tone of the report when he wrote, "The phrases religious liberty and religious freedom will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian Supremacy, or any form of intolerance." And then he goes on in that vein. The other five commissioners who basically said religious freedom never wins against a non-discrimination law or principle, they kind of tried to distance themselves from such a vociferous statement. But they still, they kept saying religious freedom isn't supposed to be a license to discriminate and things like that.

Kim Colby: So basically, this is the Chairman of U.S. Civil Rights Commission, less than two years ago, was saying exactly what we see the Colorado commissioners say.

Mike Schutt: Yes, exactly the same thing.

Kim Colby: So, this is not unusual. This is a mindset, and Kennedy fortunately said it's a bad mindset. So, okay go ahead.

Mike Schutt: Well that's where I was going to ... that's exactly where I was going to go with this Kim. Because there is, as you pointed out, there are a lot of people saying, this is a decision that says because the Colorado Civil Rights Commission wasn't nice when they denied Jack Phillips his rights, then he can win. But as long as they're nice, in the future, religious liberty can be trampled upon. And there are commentators who are worried about that. I think what you're pointing out here is that Justice Kennedy, I mean Justice Kennedy of all people is here saying, no.

Mike Schutt: And, yes, it's be nice and, yes, it's tolerance above all. But he's saying that this kind of rhetoric and this kind of attitude towards religious freedom that we're seeing from the government across the board more and more lately ... I think of confirmation hearings where we've had people saying nasty things about a Wheaton College Grad because they believe in the gospel. Stuff like that. I mean it is more and more prevalent. This actually can be a big deal if we realize how important the idea of recognizing the importance of religion in society, the importance of religious freedom to the world. This is a foothold.

Mike Schutt: No, Kennedy is not a full-blown supporter of free exercise, but I think for the reasons you point out, this could be a little bit of a foothold for reclaiming some of the lost ground in the cultural conversation.

Kim Colby: Right. What I would hope at a minimum ... and you know everyone's probably listening would laugh at this kind of Pollyanna-ish view, but I would hope that the media, some of the media, anyone who is in the media, who is trying to be fair-minded ... let's put it that way ... would read this opinion and say, "Oh." In a way Kennedy might be calling for the people who've supported same sex marriage to kind of do a self-examination and say, "Okay, am I really a tolerant supporter or am I someone whose wanting to crush people like Jack Phillips because of their religious beliefs in order to force them to agree with what I believe, even if it violates their deepest religious convictions?"

Kim Colby: And so, you know before we get too much further in, I do think the decision is a call for people of good faith on all sides to talk with each other, to be tolerant, and to try to be respectful of other people even when we disagree with much of what they want to do, or what they say ... that we can live in a civil society with each other, with our deepest disagreements, as long as the First Amendment is enforced.

Kim Colby: When the First Amendment's not enforced, then I don't think there's much hope for us living together with such deep disagreements. But if the First Amendment protects everyone to believe and say what they think, and that's

like you said, this a foothold, this is a first step toward that vision of the First Amendment, then there is some hope for those of us who have goodwill who want to find a way forward.

Mike Schutt: Yeah. Well yeah, that's right. And one of the things that highlights that this may not have been the decision that we wanted, right? In terms of its breadth but compared to what we would be talking about today had Jack Phillips lost, things would be pretty bad. Things would be pretty bleak in terms of the ability of people of faith, and not just Christians, people of all faiths, really in public life.

Mike Schutt: It would be a very difficult balance given the aggressiveness of the LGBT agenda in terms of cultural.

Kim Colby: Affirmation.

Mike Schutt: Yeah, exactly. So, given the alternative, I mean we would be ... to have a First Amendment ... a religious freedom grounds for this decision is way better than the alternative. My view is, this animus deciding based on the hostility of the tribunal, it seems to me that there's room for arguing that these civil rights commissions are by nature hostile to religion. By looking at the background of the commissioners, the decision-making process, and I don't think it's a dead end in terms of in the future. And you and I have talked about this, maybe say a few words on the people who say ... well in fact in the Washington Examiner yesterday, where you're quoted at length, the HIV project guy Jim Essex I think his name is said, if a same sex couple walked ... a different same-sex couple walked into Masterpiece Cakeshop today, he could not deny them a wedding cake based on this decision.

Mike Schutt: Would you comment on that in terms of it's not quite that stark?

Kim Colby: Yes. So, I think what we're really saying is this is a situation in which the Court could have ruled, and many people expected it to rule before the oral argument. At oral argument we started to see the outlines of how the Court actually ruled, but before that oral argument I think a lot of people had trouble counting to five votes, and so - I mean I was one of them - and so this is a really significant win, because at the end of the day, Jack Phillips is still standing, and he gets to run his shop as he sees fit, and the non-discrimination laws were forced take into account the religious beliefs of an individual and that's really what we need going forward as a legal matter. That yes non-discrimination laws are very important, but don't trump - automatically trump - religious freedom.

Kim Colby: That judges, and others should be looking at how strong is the religious freedom interest, how strong is the non-discrimination interest, and not just immediately throwing out the religious freedom as inconsequential. And that's what this decision says they can't do.

Mike Schutt: Yeah that reminds me, can you say a word or two about the CLS brief, the amicus brief that we filed in this case, that you filed in this case? Because that's the approach that we, that you opted to take in the case. Say a few words about the brief.

Kim Colby: Right. So you know it's easy to claim credit for something but I do think the Christian Legal Society brief had an influence on the court's thinking about this case. Because we decided not to go with the compelled speech approach when we were drafting it, which was what most other briefs did. And instead we focused on the free exercise argument, and we laid it out quite closely to how the Court did, not quite as narrowly as the Court did, broader.

Kim Colby: But basically, the main points are there. And so, before I take too much more credit ... the brief was ... I think I may have one sentence that I wrote in the brief ... it was written by Professor Doug Laycock of University of Virginia Law School, and Professor Tom Berg of St. Thomas University School of Law in Minneapolis who are probably among the top five, maybe not even the top five, they may be the top two scholars on religious freedom in the country. There are few others. But they just did an amazing job on this brief and poured so much of themselves into it. And I think it had a tremendous influence on the Court.

Mike Schutt: Thanks for your work on that, and we're grateful to them for their work, and of course congratulations to Kristen Waggoner and our friends at Alliance Defending Freedom too for the argument. All right. Let's talk a little bit about a couple of the dissents. I mean a couple of the other opinions. There were two concurring opinions, three concurring opinions and a dissent. Right?

Mike Schutt: Anyway, however many there were, let's start with the dissent from Justice Ginsberg and Justice Sotomayor. I mean it's an incredible piece of writing. If those two could dissent from this narrow decision, they're both trouble. I mean some of the things that they said in the dissent were incredible. So what was their problem here? Maybe I'll ... since I'm ranting let me rant for a minute.

Mike Schutt: I mean Ginsberg basically closes her dissent by saying look just because two commissioners say really, really, really nasty things about religion and Christianity in general does not mean that their decision was guided by hostility towards religion. I mean if you can't take their expressed statements in the hearing as evidence of hostility towards religion, what do you have to do?

Kim Colby: Right.

Mike Schutt: What does she want? So anyway.

Kim Colby: And she also has ... she and Justice Sotomayor also have reasons why the fact that the three bakeries turned down the cake that was against same-sex marriage with a religious message, why that's not the same as Jack Phillips turning down a cake for a same-sex wedding ceremony. So, it's actually a much

shorter dissent than I had expected because in *Trinity Lutheran* last year, Justice Sotomayor dissented. I don't think Ginsberg joined her dissent. But it was a very long dissent, and so I kind of expected that here, but they constrained themselves to saying why these two narrow grounds, as you explained, don't really mean what ... the commissioners didn't really mean what they said.

Kim Colby: So, I don't think that dissent ... it's just kind of interesting that they didn't put more into it because I don't think it will have any effect going forward. The other interesting thing of course about it is that Justice Ginsberg was the author of the *CLS v. Martinez* decision about eight years ago, and it just shows I think both she and Justice Sotomayor are pretty close minded on these types of issues.

Kim Colby: Now having said that I'll contradict myself, and I do think it's important to remember that in 2012 the Court had a unanimous decision in *Hosanna Tabor v. EEOC*, where the Court had a case where a teacher was invoking a federal non-discrimination law, the Americans with Disabilities Act, and the Court said, "No." Well actually, I'll just read it.

Kim Colby: The Court ruled in favor of the church school's ability to fire the teacher and not have to defend itself before the EEOC on non-discrimination grounds. The Court said, "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important, but so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide its way."

Kim Colby: And that was a unanimous decision where non-discrimination law had to give way to religious freedom. So, I'm hoping that with the *Masterpiece* decision, and the *Hosanna Tabor* [decision] that we will, going forward, see maybe in a year or two another decision from the Court that is a broader affirmation of the fact that people sometimes have a free exercise right to not comply with a non-discrimination law when it would violate their religious beliefs.

Mike Schutt: Yeah. Good. And that's hopeful jurisprudence in *Hosanna Tabor* and *Trinity Lutheran*, which you mentioned a minute ago, and this case. They're not bombshells but they're right. So that's good. That's a good word. Before we go, there's one more ... the concurring opinions are interesting. Gorsuch talking about the Goldilocks standard of how you define what's going on here, in terms of what level of generality you define the cakes that are being presented in this case, is very interesting.

Mike Schutt: But it's just sort of a complicated discussion about the difference between the Christian who wanted bible verses from Leviticus on a cake and Jack Phillips who wouldn't bake this celebratory cake, and just the way that Kagan, for example, defines the cakes, and the way that Gorsuch defines the cakes is a pretty interesting battle.

Mike Schutt: Do you see anything helpful or interesting in that, other than ... it's a little bit complicated and just an interesting sideline of the case I thought.

Kim Colby: So, I would let you tell me what's interesting in there, I think it is interesting. But I think it was a pretty complicated discussion too. So why don't you expand a little more.

Mike Schutt: Well I was going to punt on it, because it's a little harder to describe just for the podcast, but the question is that Ginsberg is saying the person who brought a case before the civil rights commission because gay-friendly bakers would not bake cakes with derogatory as she called them, or hateful, as they called them, expressions on the cake ... about the Bible and Leviticus. These cakes are different because the bakers would make any cake, as long as it didn't have hateful speech, whereas Jack Phillips would bake any cake but only wouldn't do it for this couple.

Mike Schutt: Well it's all in how you define what is not being done. Are you not serving the couple or are you not serving a particular kind of cake? And so, the discussion evolved into what kind of cake are we really talking about? And so, the thing that's interesting about it is - that the rhetoric and the definitions that define what's going on here - actually drive the jurisprudence, and Kagan and Gorsuch are the ones that come at it from opposite directions.

Mike Schutt: Just fortunately Kagan believed the hostility was so obvious on the civil rights commission that she didn't feel like she needed to talk much about ... she could disagree about the cakes, about the disparate standards of cakes and still find with the majority. So it was just interesting to me, not on legal grounds, but on cake definition grounds.

Kim Colby: Right. And I think you put your finger on what was happening in much of this whole case. Both in the public discussion, and in the Justices' consideration of it, which is, and it's an important thing we should remember going forward, so basically the ACLU and the Colorado attorney kept saying Phillips wasn't turning down this order because of the cake being for a wedding. He turned it down because the couple, the customers were same sex. Right?

Kim Colby: He looked at the customers instead of at the message. Well the record was clear, he was looking at the message, because he said to them, I sell you anything that I've already made in here, I just won't make a cake for a wedding for you. And the next day, the mother of one of the men you know called and [asked] "why won't you make a cake?" And he wouldn't make it for her either, assuming she's heterosexual, so that was a big part of where's the focus?

Kim Colby: Kagan's looking at the couple, and Ginsberg and Sotomayor are looking at the couple, and Gorsuch is saying no it's about the cake because then we come to the three bakers and the Christian customer, you know there the Colorado commission says, "Oh it's okay, they're not discriminating against the religious

customer” ... because religious discrimination's unlawful in Colorado too. They're turning it away because of the message of the cake. And that's really where this case hinged, and what our brief really pushed ...

Kim Colby: Was the commission has to choose one or the other. It either looks at the cake and the message for both Jack Phillips and the three bakers or it looks at the customers. But you can't choose the customers one time and say, “Oh you discriminated against the same-sex couple,” but then go to the three bakers and say, “Oh no you didn't discriminate against the religious customer. You just turned down a message you didn't like.” And so that's ... really you're putting your finger on the crux of the case.

Kim Colby: And then the other thing that I did want mention before we ... a lot of attention's being given to how often are you going to have a hostile commissioner? So, this is so narrow. But the second part, the discussion about the bakers - and I think this is why Kagan and Breyer spend so much of their time fighting it - is really crucial because it goes very much to free exercise doctrine which starting in 1993, and I'll make this painless, I hope.

Kim Colby: In a case called Lukumi [Church of Lukumi], the Court said, “If the government treats secular conduct it doesn't make it unlawful.” So, there's secular conduct it's okay with the government. But then it turns around and conduct is the same but it's being done for religious reasons, that's illegal? That's a violation of the Free Exercise Clause. And that's what the bakers discussion is about ... it's about this thread of free exercise jurisprudence that doesn't rely on a hostile commissioner ... it just relies on looking at conduct and saying, are you treating non-religious conduct better than you're treating almost the exact same religious conduct?

Kim Colby: So, in the bakers' situation, the three bakers are getting to turn away a cake because they don't like the message. But Jack Phillips, the religious baker, is not getting to turn away a cake because he doesn't like the message. And so, the commission, the state, the government is treating non-religious reasons for turning away the cake better than religious reasons, which is a way of the government saying religion isn't as important, and that's a violation of the Free Exercise Clause in and of itself ... even if no one's hostile. So that's why the bakers piece is probably - going forward - going to be used more and really is a contribution to free exercise jurisprudence.

Mike Schutt: Good. ... Right. The Lukumi connection and it's cited throughout the concurrences too. Thank you. That's helpful. That's very helpful. Okay ... last question, then I'll let you go. I know it's been a super busy week for you. So, thanks for taking the time to do this.

Mike Schutt: So, there is a florist in Washington Baronelle Stutzman, who would not provide floral arrangements for a same-sex wedding, even though one of the participants, one of the participants in the wedding was a very good friend of hers who was a longtime customer. But she said, “Look, I'll sell you anything in

the shop, but I can't do your wedding - I'm really sorry - based on my religious convictions about this."

Mike Schutt: That case has gone up through the Washington courts, and it is ... well where is it right now? Can you give a full explanation of exactly how it's going to turn out? Because you probably can predict it.

Kim Colby: Well I don't know, I wish I did know. Anyone who's gone on Alliance Defending Freedom's website, or just googled/youtubed Baronelle Stutzman Washington florist, and watched her talk about the ordeal that she's been through ... I get choked up just thinking about it.

Kim Colby: This is a grandmother who was friends for I think a decade with one of the people suing her ... because she wouldn't arrange flowers for his wedding. She would sell him flowers for Valentine's Day, but she just couldn't do the wedding. And so, she is in danger of losing everything she owns because ... at some point, she's become possibly liable for attorney's fees. And the ACLU is talking about literally hundreds of thousands of dollars of attorney's fees against her. That would take her home and her property and stuff.

Kim Colby: So anyway, what I think is probably going to happen, but we'll know on Monday maybe, and the Court will be conferencing tomorrow. So, this case, she's petitioned the Supreme Court to hear her case, but her case got up there just a little behind Jack Phillips case, and so Jack Phillips case was the one they took, but it's the same issue. So often usually what happens in situations where they've got several cases with the same issue and they heard one is they will do what's called GVR, which stands for grant ... g grant certiorari, Vacate, V as in victory, vacate the decision below, and then Remand it back to the court below to decide the case now that that court has the benefit of the Supreme Court's thinking in the Masterpiece case.

Kim Colby: And so that's what I would expect to happen ... is I think it will be probably remanded back to the Washington State Supreme Court, and one would hope that the Washington State Supreme Court would get it right this time. If they don't it's a really good case that, you know, maybe the Supreme Court would hear maybe even as soon as next term. Maybe the term after it.

Kim Colby: So that's the possibility, I don't know what will actually happen but that would be kind of what I would expect.

Mike Schutt: Well I thought you would know for sure, but that's good answer. Thanks for taking a stab at it. Good speculation. You make a good point when you talk about Baronelle Stutzman, and you've talked before on this podcast about Jack Phillips and you said a few words about him earlier. But the fact that these are real people, that have given, have lost a lot, and then have given a lot to try to take a stand for something they believe is important.

Mike Schutt: Not everybody would have been able to do what Jack Phillips and Baronelle Stutzman have done in these cases ... to just stand and to take it, and to take death threats, and to the threat of losing their business, and all the rest. And I don't mean to minimize the claims of the homosexual couples who want a cake, or flowers, and the real hurt I'm sure that they feel when someone says, "I can't serve you because of what you're doing." I mean I get it, that is painful, I truly do get it.

Mike Schutt: But I do not see, I don't see the claims and the harm as anywhere near commensurate in these cases. Where a couple can walk down the street literally to another of hundreds of bakeries, or literally hundreds of other florists, and get similar service, get the same service, and have their feelings hurt. Even if it stings a lot ... even if they feel stigmatized. It wasn't ... They've made it a public issue. It was a private conversation, and now these people are facing action by the state that will result in their businesses being taken away. I just don't see the commensurate harm, and as you weigh these issues, I just don't ... I can't fathom what Jack and Baronelle are going through.

Kim Colby: Well, we made that point in our brief, and I don't have the language right in front of me but the basic idea is not only the harm that's being done here, but the fact that this couple can go to, I think there were like 60 other bakeries within an ... I don't know five- or ten-mile radius, and like you say they ended up getting a free cake. They can go there, and they get married, and they get to live according to their deepest beliefs about what's right and wrong. Right?

Kim Colby: No one's stopping them. Someone just said, "I don't want to make the cake to celebrate what you're doing, because I don't agree with it, because of my religious beliefs." But they got their cake, and they get to live according to their deepest beliefs and identity. But the Colorado commission ... if their ruling had been upheld by the Supreme Court, Jack was not going to get to live according to his deepest beliefs. He was going to be forced to do something that violated his religious conscience and, as he describes it, you know interfered with his relationship with God.

Kim Colby: And so, the outcome of this case is one in which everyone gets to live according to their deepest convictions and what they think is right for them. And yes, the couple had hurt feelings for a little bit, but by and large everyone gets to live according to their deepest convictions. But if Jack is forced to bake the cake, he doesn't get to live according to his deepest convictions, or else he has to stop being a baker. And so that's just another way of saying what you're saying.

Kim Colby: That the balance of harms here is clearly on the side of Jack Phillips. That might not be true in some of the other cases. I don't know of any case where it's not true because market forces, businesses, our society, is so supportive of same-sex marriage at this point, but what we're really aiming for under the First Amendment is the right of everyone to live according to what they believe is right and wrong.

Mike Schutt: Well thank you Kim. That's a good place to end our conversation. There's so much more to talk about here.

Kim Colby: Yeah, yeah I'm thinking already of what we forgot.

Mike Schutt: Yeah, right. Well we'll do it again, is that all right?

Kim Colby: Okay.

Mike Schutt: Can we do this again?

Kim Colby: Yeah. Sure.

Mike Schutt: Sounds good. Well thank you, thank you very much.

Kim Colby: Well thank you for having me.

Mike Schutt: Oh, you bet, I've been talking to my good friend and colleague Kim Colby who is the Director of the Center for Law and Religious Freedom at the Christian Legal Society. You can visit us at [www.christianlegalsociety.org](http://www.christianlegalsociety.org), and you can listen to Kim on other episodes of our podcast, just search Cross and Gavel Audio and Kim Colby, and our conversations on RFRA, and on the oral argument in this case will come up along with other conversations we've had about religious freedom. Cross and Gavel is a project of the Institute for Christian Legal Studies, which is a joint ministry, a cooperative ministry of Regent University School of Law and the Christian Legal Society.

Mike Schutt: Thanks for listening, come visit us on iTunes and leave a comment, if you don't mind, and we'll talk to you next time.