AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **Interested Persons**
Date: **July 2018**
From: **A. Eric Johnston**
Re: ***Masterpiece Cakeshop v. Colorado Civil Rights Commission***

On June 4, 2018, the United States Supreme Court ("SCOTUS") handed down the long-awaited decision in the case involving the Colorado baker who refused to make a wedding cake for a same-sex marriage. While the case reaffirmed valuable legal principles of religious free exercise, it left additional questions that will only be resolved by future cases. The case did not reach as far as we hoped.

The facts are fairly simple. In 2012, Jack Phillips, "a devout Christian [whose] main goal in life is to be obedient to Jesus Christ and Christ's teachings in all aspects of his life . . . and he seeks to honor God through his work at Masterpiece Cakeshop." He was asked by two men to prepare a wedding cake for their marriage celebration. He declined to do so because "one of Phillips' religious beliefs is that God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman . . . [C]reating a wedding cake for a same-sex wedding would be equivalent to participation in the celebration that is contrary to his own most deeply held beliefs."

If you visit MasterpieceCakeshop.com, you will see the extraordinary cakes Mr. Phillips makes for weddings. They are an expression of his faith and are expressive conduct, i.e., free speech. Colorado had a law, the Colorado Anti-Discrimination Act ("CADA""), in effect at the time that forbid discrimination based on sexual orientation. The Colorado Civil Rights Commission ("CCRC") found Phillips violated CADA by refusing to prepare the wedding cake. He appealed through all state procedures and was ruled against at every turn.

The position of the CCRC and Colorado courts was that CADA prohibits discrimination in public accommodation (a term with expansive definitions in law for any kind of public offering, *viz.*, restaurants, hotels, stores, *etcetera)* and was a valid and neutral law of general applicability. However, the CCRC showed extreme animus to Mr. Phillips with comments such as religion being an excuse for discrimination throughout history, describing a man's faith as "one of the most despicable pieces of rhetoric that people can use," and demonstrating such hostility towards his belief that someone of such religious values has no place in Colorado society. At the same time that the CCRC condemned Mr. Phillips, it also upheld the right of three bakers to refuse requests by a Mr. Jack to prepare wedding cakes condemning same-sex marriage. They found their activities in accordance with CADA.

As we predicted, the opinion was written by Justice Anthony Kennedy. While he has been known as a free speech advocate, his more recent notoriety has been the author of the three SCOTUS opinions recognizing same-sex rights. The 2015 *Obergefell v. Hodges* decision was handed down during the process of Mr. Phillips' case. With the establishment of same-sex rights, it put them on a collision course with religious rights as Justice Clarence Thomas had predicted in his *Obergefell* dissenting opinion. Justice Kennedy uses the *Masterpiece* opinion to protect his same-sex rulings, while at the same time attempting to satisfy the constitutional rights of free exercise of religion.

Mr. Phillips argued both free exercise of religion and free speech rights to SCOTUS. Although Justice Kennedy acknowledged the free speech claim, he made no ruling on it. In a separate opinion, Justice Thomas opined that these issues cannot ultimately be resolved without addressing the issue that speech is more than just words, but is expressive conduct. The activities of Mr. Phillips are such expressive conduct which should be accorded the additional protection of free speech rights. If SCOTUS had addressed those rights as well in the majority opinion, it would have strengthened the rights of Christians who are forbidden by Scripture to condone what they believe are sinful activities. In attempting to reconcile the conflict between same-sex rights newly minted by *Obergefell* and the centuries old free exercise of religion rights, Justice Kennedy said:

> "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. The exercise of their freedom on terms equal to others must be given weight and respect by the courts. At the same time, the religion and philosophical objections to gay marriage are protected views and in some instances, protected forms of expression. As this court observed in *Obergefell* . . . [t]he First Amendment insures 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.' . . . *Nevertheless, while those religious and philosophical objections 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."* (Emphasis added)

Justice Kennedy then went on to say that we recognize clergy may object to performing a gay marriage, but "there are no doubt innumerable goods and services that no one could argue implicate the First Amendment." The implication of all this is that if a person can closely tie the prohibited action to his religious beliefs, then he may be protected. Otherwise, persons in the general course of commerce, regardless of their religious beliefs, may be required to condone same-sex activities. The uniqueness of all of this is that our culture has never faced such an incongruous

conflict in the public square. Not even the issue of abortion has created the possibility that a person may be required to accept and even subscribe to activities he believes to be sinful and wrong.

Most commentators have said this court decision is very "narrow." They are correct. The facts made the case narrow by giving Justice Kennedy the opportunity to avoid the larger question of protecting religious freedom by relying on the religious animus of the CCRC commissioners. As we often say, bad facts make bad law. These facts permitted SCOTUS to escape directly addressing the expansive protection of religious freedom, but ruling instead that the hostility of the commissioners to religion violated the application of an otherwise neutral law. That now leaves the question of all of the other situations which may now arise on whether persons' religious rights are protected.

The most immediate example that comes to mind could arise in either the cities of Birmingham or Montevallo, where nondiscrimination ordinances have been adopted, which include no discrimination for sexual orientation or sexual identity, both activities which would be objected to by most persons in those cities. Those ordinances apply to anyone with one or more employees, and include persons who may own apartment complexes. For example, consider a devout Christian who has an apartment complex with only four units which he uses to supplement his income. He will be confronted with renting an apartment to persons which might include those who openly live in a same-sex conjugal relationship. Will that apartment owner be required to rent to those persons when it is offensive to is sincerely held religious beliefs?

Justice Kennedy is not known for sticking to the legal principles he enunciates. For example, in *Obergefell*, while legalizing same-sex marriage, he said:

> "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine concepts, same-sex marriage should not be condoned. The First Amendment insures 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, and to their own deep aspirations to continue the family structure they have long revered."

In *Masterpiece* he says, "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. But , to decide the case, he says, "The central expressions of hostility to religion in some of the commissioners' comments . . . were inconsistent with what the Free Exercise Clause requires." As he did in *Obergefell*, so does he in *Masterpiece*, he gives with one hand and takes away with the other. He talks about the strength of the free exercise of religion in protecting those rights, while at the same time minimizes those rights by protecting them only when there is an actual expressed hostile animus toward a religious belief.

The significance of this is that the basis for *Masterpiece* is the malicious hostility of the commissioners in condemning Mr. Phillips' religious beliefs. The case does not simply recognize his religious beliefs as being protected from CADA. SCOTUS just refused to hear a Washington florist case. The Washington Supreme Court is to re-evaluate the case. It does not have the animus present in *Masterpiece.* What was required in Colorado in 2012 is now required in the 50 states. Justice Kennedy concludes the majority opinion as follows:

> "The outcome of cases like this in other circumstances must await further elaboration in the court, all in the context of recognizing that those disputes must be resolved with tolerance, *without undue respect to sincere religious beliefs,* and without subjecting gay persons to indignities when they seek goods and services in an open market." (Emphasis added)

This leaves the door open for significant litigation. The gay rights lobby will not stop until they eradicate any opposition to their position. While *Masterpiece* protects religious rights to an extent, it gives encouragement to the gay rights lobby to pursue litigation against those who disagree with them because of long-held constitutionally-protected rights to religious belief.

Therefore, it becomes important that as Christians face intolerance in a changing society, they obtain competent legal advice quickly when faced with one of these issues. We believe that bakers and florists who participate in wedding ceremonies have a measure of protection. However, others with businesses of every description will not have that same protection. It is becoming increasingly possible that Justice Kennedy will retire soon. Another justice like Justice Gorsuch, who wrote a fine concurring opinion in *Masterpiece*, must be appointed. President Trump would do so, but the nominee must be confirmed by the Senate. If the 51-seat majority in the Senate loses two seats in the general election in November, that opportunity may be lost. Also, lawyers must take note of Justice Gorsuch's comments:

> "But we know this with certainty: When the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored."

That is the appropriate religious test which must be applied to protect religious freedom. As fact situations arise, as predicted by Justice Kennedy, lawyers must frame their defense in these terms. It is difficult for non-Christians to recognize the spiritual dimension of a person's beliefs. Mr. Phillips articulated the type of lives that Christians live. (See, *e.g.*, www.WSJ.com/articles/the-supreme-court-let-me-live-my-faith-again) Lawyers must understand those spiritual principles in order to provide a proper and hopefully successful defense of Christians who attempt to live in a disintegrating culture that recognizes as normal abnormal lifestyles.