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POLSC 294:14 - 01
Special Topics: Religion and the Constitution
Reading Materials

RELIGION AND THE CONSTITUTION

CHAPTER VIII - THE FREE EXERCISE CLAUSE: RECENT CASES

Introduction

Between 2004, when it decided *Locke v. Davey,* and 2017, the Supreme Court decided only one case interpreting the Free Exercise Clause. In 2012, the Court, in a unanimous decision, decided that the Free Exercise Clause required an exception from anti-discrimination statutes so that religious organizations could employ and dismiss members of the clergy without violating such laws. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 556 U.S. 171 (2012) (not included in the cases in this chapter). When such an exception was not included in an anti-discrimination statute, many courts had recognized a judicially crafted "ministerial exception." In *Hosanna-Tabor*, the Court concluded that this exception was required by the Free Exercise Clause. The case, however, did not resolve many issues related to the scope of the required exception. The Court's virtual neglect of free exercise issues changed in 2017 with its decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer* and its upcoming consideration of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.

A. Trinity Lutheran Church of Columbia, Inc. v. Comer

137 Sup. Ct. 2012 (June 26, 2017)

ROBERTS, C. J., delivered the opinion of the Court, except as to footnote 3. KENNEDY, ALITO, and KAGAN, JJ., joined that opinion in full, and THOMAS and GORSUCH, JJ., joined except as to footnote 3. THOMAS, J., filed an opinion concurring in part, in which GORSUCH, J., joined. GORSUCH, J., filed an opinion concurring in part, in which THOMAS, J., joined. BREYER, J., filed an opinion concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to footnote 3 "

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center in Boone County, Missouri, and the surrounding area. The Center merged with Trinity Lutheran Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children age two to five. The Center includes a playground that is equipped with basic playground essentials: slides, swings, jungle gyms, monkey bars, and sandboxes. Almost the entire surface is coarse pea gravel. Youngsters, of course, often fall on the playground. And when they do, the gravel can be unforgiving.

In 2012, the Center sought to replace a large portion of the pea gravel with a rubber surface by participating in Missouri's Scrap Tire Program. Run by the State's Department of Natural Resources to reduce the number of used tires destined for landfills and dump sites, the program offers reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires.

Due to limited resources, the Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling. When the Center applied, the Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution, which provides:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

In its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively." After describing the playground and the safety hazards posed by its current surface, the Center detailed the anticipated benefits of the proposed project: increasing access to the playground for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment by putting recycled tires to positive use. The Center also noted that the benefits of a new surface would extend beyond its students to the local community, whose children often use the playground during non-school hours.

The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. But despite its high score, the Center was deemed categorically ineligible to receive a grant. In a letter rejecting the Center's application, the program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church. The Department ultimately awarded 14 grants as part of the 2012 program. Because the Center was operated by Trinity Lutheran Church, it did not receive a grant.

Trinity Lutheran sued the Director of the Department in Federal District Court. The Church alleged that the Department's failure to approve the Center's application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause. The District Court granted the Department's motion to dismiss. The District Court likened the Department's denial of the scrap tire grant to the situation in *Locke v. Davey*, 540 U.S. 712 (2004). Finding the case "nearly indistinguishable from *Locke*," the District Court held that the Free Exercise Clause did not require the State to make funds available under the Program to religious institutions.

The Court of Appeals affirmed. The court recognized that it was "rather clear" that Missouri could award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause. But that did not mean the Free Exercise Clause compelled the State to disregard the antiestablishment principle reflected in its own Constitution. Viewing a monetary grant to a religious institution as a " 'hallmark[ ] of an established religion,' " the court concluded that the State could rely on an applicant's religious status to deny its application. We now reverse.

The parties agree that the Establishment Clause does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels.

The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993). Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order."

The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. Such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. *Lukumi*, 508 U.S., at 546. This conclusion is unremarkable in light of our prior decisions.

The Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church. But that freedom comes at the cost of absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, the State has punished the free exercise of religion.

The Department contends that declining to extend funds to Trinity Lutheran does not prohibit the Church from engaging in any religious conduct. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi*, which outlawed rituals central to Santeria. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. And absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church.

It is true the Department has not criminalized the way Trinity Lutheran worships. But the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of

religion, not just outright prohibitions." As the Court put it more than 50 years ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S., at 404.

Trinity Lutheran asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church--solely because it is a church--to compete with secular organizations for a grant. The State's decision to exclude it must withstand the strictest scrutiny.

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is controlled by our decision in *Locke v. Davey*. It is not. In *Locke*, the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. While scholarship recipients were free to use the money at accredited religious and non-religious schools alike, they were not permitted to use the funds to pursue a devotional theology degree. Davey sued, arguing that the State's refusal to allow its scholarship money to go toward such degrees violated his free exercise rights.

This Court disagreed. It began by explaining what was not at issue. Washington's selective funding program was not comparable to the free exercise violations found in the "*Lukumi* line of cases," including those striking down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." At the outset, then, the Court made clear that *Locke* was not like the case now before us.

Washington's restriction on the use of its scholarship funds was different. According to the Court, the State had "merely chosen not to fund a distinct category of instruction." Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do--use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is--a church.

The Court in *Locke* also stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for training of clergy; the Court could "think of few areas in which a State's antiestablishment interests come more into play." Opposition to funding "to support church leaders" lay at the historic core of the Religion Clauses. Nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

Relying on *Locke*, the Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches. But *Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." As the Court put it, Washington's scholarship program went "a long way toward including religion in its benefits." Students in the program were free to use their scholarships at "pervasively religious schools." Davey could use his scholarship to pursue a secular degree at one institution while studying devotional theology at another. He could also use his scholarship money to attend a religious college and take devotional theology courses there.

The only thing he could not do was use the scholarship to pursue a degree in that subject.

In this case, there is no dispute that Trinity Lutheran is put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.[3] The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny. *Lukumi*, 508 U.S., at 546.

Under that stringent standard, only a state interest "of the highest order" can justify the discriminatory policy. Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri's same policy preference on a prior occasion, "the state interest asserted here--in achieving greater separation of church and State than is already ensured under the Establishment Clause--is limited by the Free Exercise Clause." *Widmar*, 454 U.S., at 276.

The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause. The exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution and cannot stand.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part.

The Court today reaffirms that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified," if at all, "only by a state interest 'of the highest order.' " The Free Exercise Clause, which generally prohibits laws that facially discriminate against religion, compels this conclusion.

Despite this prohibition, the Court in *Locke* permitted a State to "disfavor religion" by imposing what it deemed a "relatively minor" burden on religious exercise to advance the State's antiestablishment "interest in not funding the religious training of clergy." The Court justified this law based on its view that there is " 'play in the joints' " between the Free Exercise Clause and the Establishment Clause--that is, that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." Accordingly, *Locke* did not subject the law at issue to any form of heightened scrutiny. But it also did not suggest that discrimination against religion outside the limited context of support for ministerial training would be similarly exempt from exacting review.

This Court's endorsement in *Locke* of even a "mil[d] kind," of discrimination against religion remains troubling. But because the Court today appropriately construes *Locke* narrowly and because no party has asked us to reconsider it, I join nearly all of the Court's opinion. I do not,

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[3] (Footnote has not been renumbered) This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

however, join footnote 3, for the reasons expressed by JUSTICE GORSUCH.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in part.

Missouri's law bars Trinity Lutheran from participating in a public benefits program only because it is a church. I agree this violates the First Amendment and I am pleased to join nearly all of the Court's opinion. I offer only two modest qualifications.

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? Often enough the same facts can be described both ways.

Neither do I see why the Free Exercise Clause should care. After all, that Clause guarantees the free exercise of religion, not just the right to inward belief (or status). And this Court has long explained that government may not "devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion. I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.

For these reasons, reliance on the status-use distinction does not suffice for me to distinguish *Locke v. Davey*. Can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here.

Second, I am unable to join the footnoted observation, n. 3, that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing." Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules applied by the Court's opinion. Such a reading would be unreasonable for our cases are "governed by general principles." And the general principles here do not permit discrimination against religious exercise--whether on the playground or anywhere else.

JUSTICE BREYER, concurring in the judgment.

I agree with much of what the Court says and with its result. But I find relevant, and would emphasize, the particular nature of the "public benefit" here at issue. The Court stated in *Everson* that "cutting off church schools from" such "general government services as ordinary police and fire protection is obviously not the purpose of the First Amendment." Here, the State would cut Trinity Lutheran off from participation in a general program designed to improve the health and

safety of children. I see no significant difference. The sole reason advanced that explains the difference is faith. And it is that last-mentioned fact that calls the Free Exercise Clause into play. We need not go further. Public benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

To hear the Court tell it, this is a simple case about recycling tires to resurface a playground. The stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government--that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.

Founded in 1922, Trinity Lutheran Church (Church) "operates for the express purpose of carrying out the commission of Jesus Christ as directed to His church on earth." The Church's religious beliefs include its desire to "associat[e] with the [Trinity Church Child] Learning Center." Located on Church property, the Learning Center provides daycare and preschool for about "90 children ages two to kindergarten." The Learning Center serves as "a ministry of the Church and incorporates daily religion and developmentally appropriate activities into [its] program." "Through the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents" of the area. These activities represent the Church's "sincere religious belief to use [the Learning Center] to teach the Gospel to children of its members, as well to bring the Gospel message to non-members."

The Learning Center's facilities include a playground, the unlikely source of this dispute. The Church provides the playground and other facilities "in conjunction with an education program structured to allow a child to grow spiritually, physically, socially, and cognitively." This case began when the Church applied for funding to upgrade the playground's pea gravel and grass surface. Missouri denied the Church funding based on Article I, §7, of its State Constitution, which prohibits the use of public funds "in aid of any church, sect, or denomination of religion."

Properly understood then, this is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind--payments from the government to a house of worship--would cross the line drawn by the Establishment Clause. See, e.g., *Walz v. Tax Comm'n of City of New York*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, *Mitchell v. Helms* (O'Connor, J., concurring in judgment). The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission. The Court's silence on this front signals either its misunderstanding of the facts or a startling departure from our precedents.

The government may not directly fund religious exercise. Put in doctrinal terms, such funding violates the Establishment Clause because it impermissibly "advanc[es] . . . religion." Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship.

The Church seeks state funds to improve the Learning Center's facilities, which are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface--like a Sunday School room's walls or the sanctuary's pews--are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable.

True, this Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding in those cases came with assurances that public funds would not be used for religious activity. See, *e.g.*, *Rosenberger*, 515 U.S., at 875-876. The Church has not and cannot provide such assurances here. See *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) ("No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these institutions to impose such restrictions."). The Church has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained used to form its windows, or nails used to build its altar.

The Court may simply disagree with this account of the facts and think that the Church does not put its playground to religious use. If so, its mistake is limited to this case. But if it agrees that the State's funding would further religious activity and sees no Establishment Clause problem, then it must be implicitly applying a rule other than the one agreed to in our precedents.

When the Court last addressed direct funding of religious institutions, in *Mitchell*, it adhered to the rule that the Establishment Clause prohibits the direct funding of religious activities. At issue was a federal program that helped state and local agencies lend educational materials to public and private schools, including religious schools. The controlling concurrence assured itself that the program would not lead to the public funding of religious activity. A plurality would have instead upheld the program based only on the secular nature of the aid and the program's "neutrality" as to the religious or secular nature of the recipient. The controlling concurrence rejected that approach. It viewed the plurality's test--"secular content aid distributed on the basis of wholly neutral criteria"--as constitutionally insufficient. This test, explained the concurrence, ignored whether the public funds subsidize religion, the touchstone of establishment jurisprudence.

Today's opinion suggests the Court has made the leap the *Mitchell* plurality could not. For if it agrees that the funding here will finance religious activities, then only a rule that considers that fact irrelevant could support a conclusion of constitutionality. The approach has no basis in the history to which the Court has repeatedly turned to inform its understanding of the Establishment Clause. It permits direct subsidies for religious indoctrination, with all the attendant concerns that led to the Establishment Clause. And it favors certain religious groups, those with a belief system that allows them to compete for public dollars and those well-organized and well-funded enough to do so successfully.

Such a break with precedent would mark a radical mistake. The Establishment Clause protects both religion and government from the dangers that result when the two become entwined, "not by providing every religion with an equal opportunity (say, to secure state

funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state--at least where the heartland of religious belief, such as primary religious [worship], is at issue."

Even assuming the absence of an Establishment Clause violation and proceeding on the Court's preferred front--the Free Exercise Clause--the Court errs. It claims that the government may not draw lines based on an entity's religious "status." But we have repeatedly said that it can. When confronted with government action that draws such a line, we have carefully considered whether the interests embodied in the Religion Clauses justify that line. The question here is thus whether those interests support the line drawn in Missouri's Article I, §7, separating the State's treasury from those of houses of worship. They unquestionably do.

The Establishment Clause prohibits laws "respecting an establishment of religion" and the Free Exercise Clause prohibits laws "prohibiting the free exercise thereof." "[I]f expanded to a logical extreme," these prohibitions "would tend to clash with the other." Even in the absence of a violation of one of the Religion Clauses, the interaction of government and religion can raise concerns that sound in both Clauses. For that reason, the government may sometimes act to accommodate those concerns, even when not required to do so. "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." This space between the two Clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.

Invoking this principle, this Court has held that the government may sometimes relieve religious entities from the requirements of government programs. A State need not, for example, require nonprofit houses of worship to pay property taxes. Nor must a State require nonprofit religious entities to abstain from making employment decisions on the basis of religion. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987). But the government may not invoke the space between the Religion Clauses in a manner that "devolve[s] into an unlawful fostering of religion."

Invoking this same principle, this Court has held that the government may sometimes close off certain government aid programs to religious entities. The State need not, for example, fund the training of a religious group's leaders. It may instead avoid the historic "antiestablishment interests" raised by the use of "taxpayer funds to support church leaders." *Locke v. Davey*, 540 U.S. 712, 722 (2004).

When reviewing a law that, like this one, singles out religious entities for exclusion from its reach, we thus have not myopically focused on the fact that a law singles out religious entities, but on the reasons that it does so. Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds. Its Constitution reflects that choice. Missouri's decision, which has deep roots in our Nation's history, reflects a reasonable and constitutional judgment.

This Court has consistently looked to history for guidance when applying the Religion Clauses. Those Clauses guard against a return to the past, and so that past properly informs their meaning. This case is no different. This Nation's early experience with, and eventual rejection of,

established religion defies easy summary. No two States' experiences were the same. In some a religious establishment never took hold. In others establishment varied in terms of the sect (or sects) supported, the extent of that support, and the uniformity of that support across the State. Where establishment did take hold, it lost its grip at different times and different speeds.

Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws.

Those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion. The civil government, they maintained, could claim no authority over religious belief. Faith was a personal matter, between an individual and his god. Religion was best served when sects reached out on the basis of their tenets alone, unsullied by outside forces, allowing adherents to come to their faith voluntarily. Over and over, these arguments gained acceptance and led to the end of state laws exacting payment for the support of religion.

Take Virginia. After the Revolution, Virginia debated and rejected a general religious assessment. See Virginia Act for Establishing Religious Freedom (Oct. 31, 1785). This same debate played out in nearby Maryland, with the same result. In 1784, an assessment bill was proposed and the bill failed. In New England, which took longer to reach this conclusion, Vermont went first. In 1807, Vermont "repealed all laws concerning taxation for religion." The rest of New England heard the same arguments and reached the same conclusion. Connecticut ended religious assessments first by statute in 1817, then by its State Constitution of 1818. Massachusetts held on the longest, ending religious assessments in 1833. This history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship.

In *Locke*, this Court expressed an understanding of, and respect for, this history. *Locke* involved a provision of the State of Washington's Constitution that, like Missouri's nearly identical Article I, §7, barred the use of public funds for houses of worship or ministers. Consistent with this denial of funds to ministers, the State's college scholarship program did not allow funds to be used for devotional theology degrees. When asked whether this violated free exercise rights, the Court invoked the play in the joints principle and answered no. The Establishment Clause did not require the prohibition because "the link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients." Nonetheless, the denial did not violate the Free Exercise Clause because a "historic and substantial state interest" supported the constitutional provision. The Court could "think of few areas in which a State's antiestablishment interests come more into play" than the "procuring [of] taxpayer funds to support church leaders."

The same is true of this case, about directing taxpayer funds to houses of worship. Like the use of public dollars for ministers at issue in *Locke*, turning over public funds to houses of worship implicates serious antiestablishment and free exercise interests. The history just discussed fully supports this conclusion. As states disestablished, they repealed laws allowing

taxation to support religion because the practice threatened other forms of government support for, involved some government control over, and weakened supporters' control of religion. Common sense also supports this conclusion. Recall that a state may not fund religious activities without violating the Establishment Clause. A state can reasonably use status as a "house of worship" as a stand-in for "religious activities." Inside a house of worship, dividing the religious from the secular would require intrusive line-drawing by government, and monitoring those lines would entangle government with the house of worship's activities. And so while not every activity a house of worship undertakes will be inseparably linked to religious activity, "the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion." Finally, and of course, such funding implicates the free exercise rights of taxpayers by denying them the chance to decide for themselves whether and how to fund religion. If there is any " 'room for play in the joints' between" the Religion Clauses, it is here.

As was true in *Locke*, a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. The rule has a historical pedigree identical to that of the provision in *Locke*. Almost all of the States that ratified the Religion Clauses operated under this rule. Seven had placed this rule in their State Constitutions. Three enforced it by statute or in practice. Only one had not yet embraced the rule. Today, thirty-eight States have a counterpart to Missouri's Article I, §7.The provisions, as a general matter, date back to or before these States' original Constitutions. That so many States have for so long drawn a line that prohibits public funding for houses of worship, based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship "is of a different ilk."

And as in *Locke*, Missouri's Article I, §7, is closely tied to the state interests it protects. A straightforward reading of Article I, §7, prohibits funding only for "any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such." The Missouri courts have not read the State's Constitution to reach more broadly, to prohibit funding for other religiously affiliated institutions, or more broadly still, to prohibit the funding of religious believers. The Scrap Tire Program at issue here proves the point. Missouri will fund a religious organization not "owned or controlled by a church," if its "mission and activities are secular (separate from religion, not spiritual in) nature" and the funds "will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes." Article I, §7, thus stops Missouri only from funding specific entities, ones that set and enforce religious doctrine for their adherents. These are the entities that most acutely raise the establishment and free exercise concerns that arise when public funds flow to religion.

Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid those concerns, and only those concerns, it has prohibited such funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits this choice.

In the Court's view, none of this matters. It focuses on one aspect of Missouri's Article I, §7, to the exclusion of all else: that it denies funding to a house of worship, here the Church, "simply because of what it [i]s--a church." The Court describes this as a constitutionally impermissible

line based on religious "status" that requires strict scrutiny. Its rule is out of step with our precedents in this area, and wrong on its own terms.

The Constitution creates specific rules that control how the government may interact with religious entities. And so of course a government may act based on a religious entity's "status" as such. It is that very status that implicates the interests protected by the Religion Clauses. Sometimes a religious entity's unique status requires the government to act. Other times, it merely permits the government to act. In all cases, the dispositive issue is not whether religious "status" matters--it does, or the Religion Clauses would not be at issue--but whether the government must, or may, act on that basis.

Start where the Court stays silent. Its opinion does not acknowledge that our precedents have expressly approved of a government's choice to draw lines based on an entity's religious status. See *Amos*, *Walz*, *Locke*. Those cases did not deploy strict scrutiny to create a presumption of unconstitutionality, as the Court does today. Instead, they asked whether the government had offered a strong enough reason to justify drawing a line based on that status.

The Court takes two steps to avoid these precedents. First, it recasts *Locke* as a case about a restriction that prohibited the would-be minister from "us[ing] the funds to prepare for the ministry." A faithful reading of *Locke* gives it a broader reach. *Locke* stands for the reasonable proposition that the government may, but need not, choose not to fund certain religious entities (there, ministers) where doing so raises "historic and substantial" establishment and free exercise concerns. Second, it suggests that this case is different because it involves "discrimination" in the form of the denial of access to a possible benefit. But in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination. To understand why, keep in mind that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities. We have, with good reason, rejected that idea and instead focused on whether the government has provided a good enough reason, based in the values the Religion Clauses protect, for its decision.

The Court offers no real reason for rejecting the balancing approach in our precedents in favor of strict scrutiny, beyond its references to discrimination. The Court's desire to avoid what it views as discrimination is understandable. But in this context, the description is particularly inappropriate. A State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. The Court's conclusion "that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence."

At bottom, the Court creates the following rule today: The government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the Religion Clauses protect in other ways. Nothing supports this lopsided outcome. Not the Religion Clauses, as they protect establishment and free exercise interests in the same constitutional breath, neither privileged

over the other. Not precedent. And not reason, because as this case shows, the same interests served by lifting government-imposed burdens on certain religious entities may sometimes be equally served by denying government-provided benefits to certain religious entities.

JUSTICE BREYER's concurrence offers a narrower rule that would limit the effects of today's decision, but that rule does not resolve this case. JUSTICE BREYER, like the Court, thinks that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order." Few would disagree with a literal interpretation of this statement. To fence out religious persons or entities from a truly generally available public benefit--one provided to all, no questions asked, such as police or fire protections--would violate the Free Exercise Clause. This explains why Missouri does not apply its constitutional provision in that manner. Nor has it done so here.

On top of all this, the Court's application of its new rule here is mistaken. In concluding that Missouri's Article I, §7, cannot withstand strict scrutiny, the Court describes Missouri's interest as a mere "policy preference for skating as far as possible from religious establishment concerns." The constitutional provisions of thirty-nine States--all but invalidated today--the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside.

The Religion Clauses of the First Amendment contain a promise from our government and a backstop that disables our government from breaking it. The Free Exercise Clause extends the promise. We each retain our inalienable right to "the free exercise" of religion, to choose for ourselves whether to believe and how to worship. And the Establishment Clause erects the backstop. Government cannot, through the enactment of a "law respecting an establishment of religion," start us down the path to the past, when this right was routinely abridged.

The Court today dismantles a core protection for religious freedom provided in these Clauses. It holds not just that a government may support houses of worship with taxpayer funds, but that--at least in this case and perhaps in others--it must do so whenever it decides to create a funding program. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.

B. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission
Decision below: 370 P.3d 272 (Colo. 2015), *cert. granted*, June 26, 2017

The U.S. Supreme Court will review the case of *Masterpiece Cakeshop* this Term with oral argument scheduled for December 5. The issue before the Court is: “Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.” Below is an article about the case followed by the section of the

opinion of the Colorado Court of Appeals discussing the free exercise issue.

1. Wedding cakes v. religious beliefs?: In Plain English by Amy Howe (SCOTUSblog, Sept. 11, 2017)

Colorado's anti-discrimination law bars places of public accommodation – that is, businesses that sell to the public – from discriminating based on (among other things) sexual orientation. In 2012, Charlie Craig and David Mullins went to Masterpiece Cakeshop, a Denver-area bakery, to order a cake to celebrate their upcoming wedding. But the couple left empty-handed … and upset. Masterpiece's owner, Jack Phillips, is a Christian who closes his business on Sundays and refuses to design custom cakes that conflict with his religious beliefs – for example, cakes that contain alcohol, have Halloween themes or celebrate a divorce. And because Phillips also believes that marriage should be limited to opposite-sex couples, he told Craig and Mullins that he would not design a custom cake for their same-sex wedding celebration.

Craig and Mullins went to the Colorado Civil Rights Division, where they accused Phillips of discriminating against them based on their sexual orientation. The agency initiated proceedings against Phillips, who responded that he had turned down the couple not because of their sexual orientation as such, but because "he could not in good conscience create a wedding cake that celebrates their marriage." The agency, however, dismissed that explanation as "a distinction without a difference," and it ruled both that Phillips' refusal to provide the custom cake violated Colorado anti-discrimination laws and that Phillips had "no free speech right" to turn down Craig and Mullins' request. The Colorado Civil Rights Commission upheld that ruling and told Phillips – among other things – that if he decided to create cakes for opposite-sex weddings, he would also have to create them for same-sex weddings. A Colorado court affirmed, and Phillips asked the Supreme Court to take his case, which it agreed to do in June.

In his brief at the Supreme Court, Phillips depicts the legal battle as one that threatens "his and all likeminded believers' freedom to live out their religious identity in the public square," as well as the "expressive freedom of all who create art or other speech for a living." He stresses that the First Amendment protects expression, which is not limited to words but can also include visual art, from traditional paintings and movies to tattoos to stained-glass windows. The "expression" protected by the First Amendment also extends to Phillips' wedding cakes, he says, even if they are made with "mostly edible materials like icing and fondant rather than ink and clay," because they convey messages about marriage and the couple being married. And the First Amendment also bars the state both from requiring Phillips to design cakes bearing messages that violate his beliefs and from punishing him for refusing to create such cakes – particularly when Phillips could, if he supported same-sex marriage, refuse to design cakes that oppose it.

Because of the burden that Colorado's public-accommodations law places on his religious beliefs, Phillips asserts, the law should be subject to "strict scrutiny." But the state cannot meet that test, he continues. First, he contends, although the state "has an interest in ensuring that businesses are open to all people, it has no legitimate—let alone compelling—interest in forcing artists to express ideas that they consider objectionable." And even if the state did have a compelling interest in making sure that same-sex couples have access to services they need to celebrate their marriages, he adds, the state's efforts to enforce that interest sweep too broadly,

because it has not shown that same-sex couples have any trouble obtaining such services. To the contrary, Craig and Mullins received a free rainbow-themed cake from another local business.

Masterpiece has a number of allies – none more important than the Trump administration, which this week filed a brief supporting the bakery. The federal government argues that public-accommodations laws like Colorado's will generally pass constitutional muster, because they normally only regulate discrimination in providing goods and services – conduct that is not protected by the First Amendment – rather than expression. For example, the government says, when wedding vendors rent out a banquet hall or a limousine, that is not a form of expression. And even if the vendors believed that they were expressing a message about marriage by renting out a venue or providing a chauffeured vehicle, others would not necessarily agree, nor would they necessarily pick up on that message.

But some laws will be subject to a more searching review, the government explains, if applying the law would either alter someone's speech or compel that person to participate in an event that conflicts with his beliefs. The government maintains that, at least in this case, Colorado's public-accommodations law triggers that more searching review because it compels Phillips to create custom cakes for same-sex marriage celebrations, which (depending on the cake) can be either actual speech or, at a minimum, the kind of expressive conduct that conveys a message to others, without allowing Phillips to make clear that he does not share his customers' viewpoints on same-sex marriage. Moreover, Colorado does not have a sufficiently strong interest to justify infringing on Phillips' religious beliefs, particularly because same-sex marriage was not even legal in Colorado when Craig and Mullins asked Phillips to create a cake. Indeed, the federal government emphasizes, this is a far cry from the kind of discrimination that the public-accommodations law was designed to combat: The Supreme Court itself has acknowledged that "opposition to same-sex marriage 'long has been held—and continues to be held—in good faith by reasonable and sincere people.'"

The state and Craig and Mullins counter that there is no constitutional problem because the public-accommodations law targets only conduct, not speech: The law makes clear that when businesses sell products or services to the public, they cannot discriminate against some members of that public based on, for example, their sexual orientation. The state and couple dismiss Phillips' argument that the application of the public-accommodations law to him effectively compels him to speak out in favor of same-sex marriage. They maintain that no "reasonable observer would understand the Company's provision of a cake to a gay couple as an expression of its approval of the customer's marriage, as opposed to its compliance with a non-discrimination mandate" – especially because Masterpiece is also required to post a sign indicating that the law bars discrimination based on, among other things, sexual orientation. Indeed, they point out, Masterpiece could even use its own sign to make clear that providing baked goods for an event does not constitute endorsement of that event. And the law does not impinge on Phillips' right to exercise his religion, they insist, because the Supreme Court has ruled that the free-exercise right "does not include a right to disobey neutral and generally applicable laws, including non-discrimination laws."

The implications of a ruling for Masterpiece, the state and the couple suggest, would be sweeping, far beyond the "countless businesses" such as hair salons, tailors, architects and

florists that "use artistic skills when serving customers or clients." They contend that a wide range of businesses could "claim a safe harbor from any commercial regulation simply by claiming that [they] believe complying with the law would send a message with which [they] disagree." Such an outcome, they conclude, would "eviscerate" the government's ability, including through labor and health laws, to regulate all kinds of transactions.

In 2014, the Supreme Court turned down a request by a photography studio to review a New Mexico decision holding that the studio violated the state's anti-discrimination laws when it refused to photograph a same-sex commitment ceremony. The petitioners argued that taking those photographs would violate their religious beliefs, but – after considering the petition – the justices declined to weigh in. Many court-watchers believed that Phillips' case might meet a similar fate: If the photography studio couldn't muster the four votes needed to grant review while Justice Scalia was on the court, Phillips also would not be able to do so even once Justice Gorsuch took the bench. But after considering the case at 15 conferences, the justices announced on June 26 that they had granted Phillips' petition. The oral argument could give us more insight into the justices' apparent change of heart and how they view Phillips' claims.

2. Craig v. Masterpiece Cakeshop, Inc.
370 P.3d 272 (Colo. App. 2015)

Opinion by JUDGE TAUBMAN

This case juxtaposes the rights of complainants, Charlie Craig and David Mullins, under Colorado's public accommodations law to obtain a wedding cake to celebrate their same-sex marriage against the rights of respondents, Masterpiece Cakeshop, Inc., and its owner, Jack C. Phillips, who contend that requiring them to provide such a wedding cake violates their constitutional rights to freedom of speech and the free exercise of religion.

This appeal arises from an administrative decision by appellee, the Colorado Civil Rights Commission (Commission), which upheld the decision of an administrative law judge (ALJ), who ruled in favor of Craig and Mullins and against Masterpiece and Phillips on cross-motions for summary judgment. For the reasons discussed below, we affirm the Commission's decision.

In July 2012, Craig and Mullins visited Masterpiece, a bakery in Lakewood, Colorado, and requested that Phillips design and create a cake to celebrate their same-sex wedding. Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but advising Craig and Mullins that he would be happy to make and sell them any other baked goods. Craig and Mullins left Masterpiece without discussing with Phillips any details of their wedding cake. The following day, Craig's mother, Deborah Munn, called Phillips, who advised her that Masterpiece did not make wedding cakes for same-sex weddings because of his religious beliefs and because Colorado did not recognize same-sex marriages.

The ALJ found that Phillips has been a Christian for approximately thirty-five years and believes in Jesus Christ as his Lord and savior. Phillips believes that decorating cakes is a form of art, that he can honor God through his artistic talents, and that he would displease God by creating cakes for same-sex marriages.

Craig and Mullins had planned to marry in Massachusetts, where same-sex marriages were legal, and later celebrate in Colorado, which at that time did not recognize same-sex marriages.

Craig and Mullins later filed charges of discrimination with the Colorado Civil Rights Division (Division), alleging discrimination based on sexual orientation under the Colorado Anti–Discrimination Act (CADA). The Division issued a notice of determination finding probable cause to credit the allegations of discrimination. Craig and Mullins then filed a formal complaint with the Office of Administrative Courts alleging that Masterpiece had discriminated against them in a place of public accommodation because of their sexual orientation.

The parties did not dispute any material facts. Masterpiece and Phillips admitted that the bakery is a place of public accommodation and that they refused to sell Craig and Mullins a cake because of their intent to engage in a same-sex marriage ceremony. The ALJ issued a lengthy written order finding in favor of Craig and Mullins. The ALJ's order was affirmed by the Commission. Masterpiece and Phillips now appeal the Commission's order.

Masterpiece contends that the ALJ erred in concluding that its refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation. Specifically, Masterpiece asserts that its refusal to create the cake was "because of" its opposition to same-sex marriage, not because of its opposition to their sexual orientation. We conclude that the act of same-sex marriage is closely correlated to Craig's and Mullins' sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece's refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation, in violation of CADA.

Having concluded that Masterpiece violated CADA, we next consider whether the Commission's application of the law violated Masterpiece's rights to freedom of speech and free exercise of religion protected by the United States and Colorado Constitutions.

Compelled Expressive Conduct and Symbolic Speech

Masterpiece contends that the Commission's cease and desist order compels speech in violation of the First Amendment by requiring it to create wedding cakes for same-sex weddings. Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission's order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs. We disagree. We conclude that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections.

[The court's analysis of the free speech issue is omitted. In rejecting this claim, the court reasoned that a reasonable observer would not conclude that "Masterpiece's creation of a cake for a same-sex wedding celebration" communicated support for "the message expressed in its finished product." Rather, an observer would conclude that Masterpiece was conducting its business as required by Colorado law. While reaching this conclusion, the Court recognized "that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated. However, we need not reach this issue. We note that Phillips denied Craig's and Mullins' request without any discussion regarding the wedding cake's design or possible written inscriptions."]

First Amendment and Article II, Section 4—Free Exercise of Religion

Next, Masterpiece contends that the Commission's order unconstitutionally infringes on its right to the free exercise of religion guaranteed by the First Amendment of the U.S. Constitution and article II, section 4 of the Colorado Constitution. We conclude that CADA is a neutral law of general applicability and, therefore, offends neither the First Amendment nor article II, section 4.

Before the Supreme Court's decision in *Emp't Div., Dep't of Human Res. v. Smith,* 494 U.S. 872, 877 (1990), the Court consistently used a balancing test to determine whether a challenged government action violated the Free Exercise Clause of the First Amendment. In *Smith*, the Court concluded that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." The Court held that neutral laws of general applicability need only be rationally related to a legitimate governmental interest in order to survive a constitutional challenge. As a general rule, such laws do not offend the Free Exercise Clause. However, if a law burdens a religious practice and is not neutral or not generally applicable, it "must be justified by a compelling government interest" and must be narrowly tailored to advance that interest.

First Amendment Free Exercise

Masterpiece contends that its claim is not governed by *Smith*'s rational basis exception to general strict scrutiny review of free exercise claims for two reasons: (1) CADA is not "neutral and generally applicable" and (2) its claim is a "hybrid" that implicates both its free exercise and free expression rights. We disagree.

First, we address Masterpiece's contention that CADA is not neutral and not generally applicable. A law is not neutral "if the object of a law is to infringe upon practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993). A law is not generally applicable when it imposes burdens on religiously motivated conduct while permitting exceptions for secular conduct or for favored religions. The Supreme Court has explained that an improper intent to discriminate can be inferred where a law is a "religious gerrymander" that burdens religious conduct while exempting similar secular activity. If a law is either not neutral or not generally applicable, it "must be justified by a compelling interest and must be narrowly tailored to advance that interest."

The Court has found only one law to be neither neutral nor generally applicable. In *Church of Lukumi*, the Court considered a municipal ordinance prohibiting ritual animal sacrifice. Considering that the ordinance's terms such as "sacrifice" and "ritual" could be either secular or religious, the Court nevertheless concluded that the law was not neutral because its purpose was to impede practices of the Santeria religion. The Court further concluded that the law was not generally applicable because it exempted the killing of animals for several secular purposes.

Neutral Law of General Applicability

Masterpiece contends that, like the law in *Church of Lukumi*, CADA is neither neutral nor generally applicable. First, it argues that CADA is not generally applicable because it provides exemptions for "places principally used for religious purposes" such as churches, synagogues,

and mosques, § 24–34–601(1), as well as places that restrict admission to one gender because of a bona fide relationship to its services, § 24–34–601(3). Second, it argues that the law is not neutral because it exempts "places principally used for religious purposes," but not Masterpiece.

We conclude that CADA is generally applicable, notwithstanding its exemptions. A law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct. *See Church of Lukumi,* 508 U.S. at 542–43 ("[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."). CADA does not discriminate on the basis of religion; rather, it exempts certain public accommodations that are "principally used for religious purposes."

In this regard, CADA does not impede the free exercise of religion. Rather, its exemption for "places principally used for religious purposes" reflects an attempt by the General Assembly to reduce legal burdens on religious organizations and comport with the free exercise doctrine. Such exemptions are commonplace throughout Colorado law and, in some cases, are constitutionally mandated.

Further, CADA is generally applicable because it does not exempt secular conduct from its reach. *Church of Lukumi,* 508 U.S. at 543 (Laws are not generally applicable when they "impose burdens" "in a selective manner."). In this respect, CADA's exemption for places that restrict admission to one gender because of a bona fide relationship to its services does not discriminate on the basis of religion. On its face, it applies equally to religious and nonreligious conduct, and therefore is generally applicable.

Second, we conclude that CADA is neutral. Masterpiece asserts that CADA is not neutral because, although it exempts "places primarily used for religious purposes," Masterpiece is not exempt. However, Masterpiece does not contend that its bakery is primarily used for religious purposes. CADA forbids all discrimination based on sexual orientation regardless of its motivation. Further, the exemption for religious entities undermines Masterpiece's contention that the law discriminates against its conduct because of its religious character.

Finally, we reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation. As one court observed in addressing a similar free exercise challenge to the 1964 Civil Rights Act:

Undoubtedly defendant has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in disregard of the clear constitutional rights of other citizens. This Court refuses to lend support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishment upon the ground that to do so would violate his sacred religious beliefs.

Newman v. Piggie Park Enters., Inc., 256 F.Supp. 941, 945 (D.S.C.1966), *aff'd in relevant part and rev'd in part on other grounds,* 377 F.2d 433 (4th Cir.1967), *aff'd and modified on other grounds,* 390 U.S. 400 (1968). Likewise, Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same-sex marriage. However, if it wishes to operate as a public accommodation and conduct business within Colorado, CADA prohibits it from

choosing customers based on their sexual orientation. Therefore, we conclude that CADA was not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct. Accordingly, CADA is a neutral law of general applicability.

"Hybrid" Rights Claim

Next, we address Masterpiece's contention that its claim is not governed by *Smith*'s rational basis standard and that strict scrutiny review applies because its contention is a "hybrid" of free exercise and free expression rights. In *Smith*, the Supreme Court distinguished its holding from earlier cases applying strict scrutiny to laws infringing free exercise rights, explaining that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." Masterpiece argues that this language created an exception for "hybrid-rights" claims, even where the challenged law is neutral and generally applicable. We note that Colorado's appellate courts have not applied the "hybrid-rights" exception. Regardless, having concluded that the Commission's order does not implicate Masterpiece's freedom of expression, even if we assume the "hybrid-rights" exception exists, it would not apply here. Accordingly, we hold that CADA is a neutral law of general applicability, and does not offend the Free Exercise Clause.

Article II, Section 4 Free Exercise of Religion

Masterpiece argues that, although neutral laws of general applicability do not violate the First Amendment, the Free Exercise Clause of the Colorado Constitution requires that we review such laws under heightened, strict scrutiny. We disagree. The Colorado Supreme Court has recognized that article II, section 4 embodies "the same values of free exercise and governmental noninvolvement secured by the First Amendment." Colorado appellate courts have regularly relied on federal precedent in interpreting article II, section 4. Finally, the Colorado Supreme Court has never indicated that an alternative analysis should apply. Therefore, we see no reason why *Smith*'s holding is not equally applicable to claims under article II, section 4, and we reject Masterpiece's contention that the Colorado Constitution requires a heightened scrutiny test.

Rational Basis Review

Having concluded that CADA is neutral and generally applicable, we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation. The Supreme Court has consistently recognized that states have a compelling interest in eliminating such discrimination and that statutes like CADA further that interest. See *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984). Without CADA, businesses could discriminate against potential patrons based on their sexual orientation. Such discrimination has measurable adverse economic effects. CADA creates a hospitable environment for all consumers by preventing discrimination on the basis of certain characteristics. It prevents the economic and social balkanization prevalent when businesses serve only their own "kind," and ensures that the goods and services provided by public accommodations are available to all of the state's citizens.

Therefore, CADA's proscription of sexual orientation discrimination by places of public accommodation is a reasonable regulation that does not offend the Free Exercise Clauses of the First Amendment and article II, section 4. Accordingly, the Commission's order is affirmed.