**Applied Government Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
Harkness Grading Rubric:** First Amendment: Freedom of Conscience v. Discrimination and Equal Protection of the Law **Mr. Faulhaber  
  
  
DIRECTIONS: Read through each category and its criteria***. Complete either or both columns to give yourself an accurate grade.*   
  
In the LEFT column: Place a check plus next to those you completed in an exceptional manner, a check plus/check mark if it was only completed well, a check mark next to the criteria in which you completed okay, a check mark/check minus if it was completed okay but not great, a and a check minus that you completed but not very well, and place an X next to the criteria not completed at all.   
  
In the RIGHT column: Place the appropriate grade in the space to the immediate left of EACH criteria required by determining those areas you performed or were lacking and based upon the point value listed. Place a N/A or “not applicable next to any criterion not required for your specific role. Average the points together in place that score in the “your estimate” blank.   
 ***\*\*\*Remember, a perfect grade should reflect perfect work and only be used when the work done had no deficiencies & could not have been performed any better***.\*\*

* **PREPARATION AND RESEARCH (1-20):**

\_\_\_\_\_ \_\_\_\_\_Viewed **AND** took notes on ALL the information from Mr. Faulhaber’s webpage and conducted your own research

\_\_\_\_\_ \_\_\_\_\_**Read, Highlighted or Underlined, Emojied, Commented, and Completed Packet Questions**

\_\_\_\_\_ \_\_\_\_\_Completed Chapter 6 Notes (and utilized that information to understand the focus question   
pg. 123-top left of 124 on civil right/pg. 144- 148 Gay Rights, Gay Rights Cases, Looking Back/Ahead/Policy Dynamics/Learning Obj.)  
\_\_\_\_\_ \_\_\_\_\_Attached and turned in Research Notes with rubric and other documents

\_\_\_\_\_ **\_\_\_\_\_Discussed with one or both** Parents**, grandparent, and/or adult in one’s life about these issues/cases**  
 and/or Asked peers/ co-workers/ others and put a good faith effort into contacting governmental officials directly related to this issue

\_\_\_\_\_ \_\_\_\_\_Spent necessary time outside of class researching

\_\_\_\_\_ \_\_\_\_\_Gathering information to be effective in deliberation   
 **Your Average** \_\_\_\_\_\_/20

* **CONTENT COVERED/PERSUASIVENESS/PARTICIPATION/OVERALL PERFORMANCE (1-20):**

\_\_\_\_\_ \_\_\_\_\_Clearly outlined your position on the question proposed Arguments generated employed insight of the issue

\_\_\_\_\_ \_\_\_\_\_Used Logos:: **Cited verifiable facts and** used data/evidence to prove ones case:

\_\_\_\_\_ \_\_\_\_\_Got material across in a way that was informative and easily understood

\_\_\_\_\_ \_\_\_\_\_Demonstrated Ethos: ability to establish credibility through a strong grasp of principles involved

\_\_\_\_\_ \_\_\_\_\_Use of anecdotes was to reinforce NOT as sole rationale for position

\_\_\_\_\_ \_\_\_\_\_Pathos: or emotion was used appropriately and not primary focus   
\_\_\_\_\_ \_\_\_\_\_Did not propagate lies or false truths and your peers are generally smarter for your participation  
\_\_\_\_\_ \_\_\_\_\_Did not simply echo the thoughts of others or make irrelevant comments

\_\_\_\_\_ \_\_\_\_\_Utilized ***clarification*** questions to gain information

\_\_\_\_\_ \_\_\_\_\_When asked a question, showed ability to think on feet providing clear main arguments to original posit

\_\_\_\_\_ \_\_\_\_\_Was a **Frequent** Participant but did not hog the conversation   
\_\_\_\_\_ \_\_\_\_\_Performed to the best of your abilities and was an attribute, not detriment to this simulation  
\_\_\_\_\_ \_\_\_\_\_Felt good about my performance afterward and my role in the Harkness **Your Average** \_\_\_\_\_\_/20

* **RESPECTFUL/RESPONSIBLE BEHAVIOR/REFLECTION AND SELF-EVALUATION (1-10):**

\_\_\_\_\_ \_\_\_\_\_Professional and Attentively listened by looking at speakers

\_\_\_\_\_ \_\_\_\_\_Followed proceedings- taking notes when necessary **(Attach your notes to this self-evaluation)**

\_\_\_\_\_ \_\_\_\_\_Was Respectful to Peers both verbally and through mannerisms; Avoided ad hominin attacks   
\_\_\_\_\_ \_\_\_\_\_Let others speak before we spoke again **(general rule to follow: at least 3 people spoke before I spoke again)**

\_\_\_\_\_ \_\_\_\_\_Did not interrupt peers or tell them “they could not argue that”

\_\_\_\_\_ \_\_\_\_\_Had a positive Attitude during Harkness and Played Well with Others  
\_\_\_\_\_ \_\_\_\_\_Read and followed direction when completing rubric: Placed the appropriate mark next to EACH category  
\_\_\_\_\_ \_\_\_\_\_Did not just use whole numbers and only gave yourself a 10 if your performance was PEFERCT and a model for future classes  
\_\_\_\_\_ \_\_\_\_\_Answered reflection questions with MINIMALLY three sentences for each question

**Your Average** \_\_\_\_\_\_/10

**TOTAL\_\_\_\_\_\_\_\_\_\_\_/50**

**REFLECTION QUESTIONS: Answer each question on this page and another sheet if necessary.**   
QUESTION #1. How would you rate your preparation (1-10), knowledge and understanding of the issue and performance in regards to your prior performances and your peers?. Was the rubric grade accurate? If not, what grade would you suggest? Explain your reasoning

QUESTION #2. What was your initial thoughts on the subject and question? How has that opinion evolved and/or become more nuanced? What was the most important concepts or ideas learned through this Harkness.

QUESTION #3. Did your group (small or large) find consensus (general widespread agreement)? If so, where? If not, why not? **What were the best arguments made on both sides and who made the arguments?**

QUESTION #4. How would you rate the simulation (1-10)? What can be done to improve the process to make it more meaningful? What can be done to make the rubric better (for example, is point value/score for this activity, criterion required, were the point values in each section reasonable)? What questions do you still have regarding the focus issue or essential questions?

**Religious Freedom Restoration Act Background**  
When it comes to religion, many people are just plain wrong about what protections they have and what the U.S. Constitution actually says about church and state. For example, many people erroneously believe that the phrase separation of church and state is enshrined in either the Declaration of Independence and/or the US Constitution. It is found in neither. Instead, the phrase was included in a letter to the Danbury Baptists in which Thomas Jefferson advocated for “a wall of separation between Church & State.” This letter is not a legal document nor did it express the wishes of all the Founders- many of whom did not want to see a wall, let alone a high wall of separation between church and state. The U.S. Constitution, however, does include an establishment clause, which reads: “Congress shall make no law respecting an establishment of religion…” that has been interpreted by the Supreme Court to mean that government cannot prefer one religion over another or religion over nonreligion.

Conversely, many religious persons believe they have free reign to practice their religion without restriction. This again is a misconception. The other clause in the First Amendment, the free exercise clause, states that “Congress shall make no law… prohibiting the free exercise thereof.” Although no right is absolute-saying fire in a crowded theatre as an example when free speech is limited-the Supreme Court has limited the free exercise of religion more than most other rights. The Court sees a distinction between faith and practice and while protecting the former, is willing to limit the latter. For example, the Court has upheld bans on polygamy and mandatory vaccinations to attend public school. In the case of *Oregon v. Smith (1988),* two Native Americans who worked as counselors for a private drug rehabilitation organization, ingested peyote, a powerful hallucinogen, as part of the religious ceremonies as member of their Native American church. As a result of this conduct, they were fired as counselors. The fired counselors sued, claiming Oregon’s state drug laws that prohibited the consumption of illegal drugs for sacramental religious uses violated the Free Exercise Clause of the US Constitution. The Supreme Court observed that the Court has never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that government is free to regulate. They elaborated that allowing exceptions to every state law or regulation affecting religion “would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind.” Justice Scalia cited examples of compulsory military service, payment of taxes, vaccination requirements, and child-neglect laws. The Court once again saw a distinction between belief and practice.

Religious people felt like their rights and religious beliefs were under attack (see attached article by Jordan Hall) and pushed for protections of the faith. Consequently, a campaign was begun to protect religious practice culminating in the enacting of the Religious Freedom Restoration Act (RFRA) which was passed by a Republican Congress and signed by the a Democratic President (Bill Clinton). This piece of bipartisan legislation’s aim was protecting religious practices from unnecessary intrusion by the government. Although uncontroversial when enacted, it quickly became a lightning rod when Hobby Lobby successfully sued the federal government arguing that the Affordable Care Act’s (Obamacare) mandate of employer health coverage that included contraceptives and birth control violated the religious conscience of the owners and constituted an undue burden. In essence, the Supreme Court said business owners could apply their beliefs to their business practices.

This culture war debate was amplified as states began legalizing gay marriage, the Supreme Court decided in *Obergefell v. Hodges* (2015) that required states to license and recognize same-sex marriage, and states revised their civil rights and public accommodation laws that extended anti-discrimination protections from traditional race and gender to also include sexual orientation. These public accommodation protections require private businesses to serve gays and lesbians and have been used to force religious bakeries, photographers, and florists to provide their services for gay weddings.

Although the United States Congress passed the RFRA, under our federal system it only applies to federal laws, not state civil rights acts. Therefore, a handful of states including Indiana has begun to pass RFRAs that protect business and individuals from state laws that violate their religious conscience. It is highly probably that if Colorado had a RFRA that the Masterpiece Bakery owner would win his case.

When does tolerance become intolerance? How do we adhere to the will of the majority but ensure protections of minority rights? In an age of divisive politics, how do we achieve the proper balance between religious freedom and a protected class?

Can a baker refuse to make a gay wedding cake?

*The Supreme Court is due to consider the case of Jack Phillips, who says his refusal to bake for same-sex weddings is protected by the First Amendment*[Democracy in America](https://www.economist.com/blogs/democracyinamerica) Jul 7th 2017 by S.M. | SAN DIEGOONE of the most contentious cases the Supreme Court will hear in its term beginning October 2nd is the enticingly named *Masterpiece Cakeshop v Colorado Civil Rights Division, Charlie Craig, and David Mullins.* It’s not every day that the justices hear a conflict between a sweets purveyor and both a gay couple and a government agency charged with policing discrimination. But the clash was inevitable. Two years ago, in *Obergefell v Hodges,* Justice Anthony Kennedy inserted a caveat into his otherwise sweeping majority opinion opening marriage laws nationwide to gays and lesbians. “[T]hose who adhere to religious doctrines”, he wrote, “may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned” and they are protected in this mission by the First Amendment. The court will now clarify how far this umbrella extends.

The tiff in *Masterpiece Cakeshop* began in 2012 when Charlie Craig and David Mullins, sweethearts living in Massachusetts, began planning their Colorado wedding reception with the help of Mr Craig’s mother. The trio entered Jack Phillips’s shop to buy a wedding cake and promptly learned they were not in entirely friendly territory. As the couple’s brief to the justices says, Mr Phillips told the men that it is his “standard business practice not to provide cakes for same-sex weddings”. While happy to “sell the couple other baked goods, including ‘birthday cakes, shower cakes, … cookies and brownies’”, he draws the line at nuptials: “I just don’t make cakes for same-sex weddings”.

Contrary to initial appearances, Masterpiece Cakeshop does not entail a clash of constitutional rights. There is nothing in America’s constitution that entitles a gay couple to a cake prepared by a particular baker. The same goes for race-based discrimination by private entities. In the 1883 Civil Rights Cases, the Supreme Court ruled that Congress had no power under the 13th or 14th amendments to require “public accommodations”—restaurants, theatres, inns, petrol stations—to serve patrons of all races equally. Those amendments, the court reasoned, empowered Congress to ban only official acts of discrimination by the state, not “individual invasion of individual rights” by non-state actors. The Civil Rights Casesruling has never been overturned. When Congress finally barred public accommodations from refusing service to blacks, women and others in Title II of the 1964 Civil Rights Act, it grounded its authority in the constitution’s “commerce clause”, and this view was promptly ratified by the Supreme Court.

To this day, no federal law requires bakeries or other private businesses to serve gays and lesbians, but 21 states and the District of Columbia do extend these protections. Colorado’s public accommodations law is unequivocal: no “business engaged in any sales to the public” may “refuse...to an individual or a group, because of..sexual orientation” the “full and equal enjoyment” of their goods and services. On the basis of this rule, Mr Craig and Mr Mullins complained to the Colorado Civil Rights Division, and the agency ordered Mr Phillips, Masterpiece Cakeshop’s proprietor, to comply with the law and make wedding cakes—if he makes them for anyone—for all comers. Now Mr Phillips, who has suspended his wedding-cake business to avoid supplying dessert to gay-wedding celebrants, is asking the Supreme Court for relief. The First Amendment’s guarantees of free speech and free religious exercise, he says, prohibit Colorado from compelling him to make cakes that violate his conscience.

The parties are now at work on their briefs to the justices, but a preliminary sense of how the argument is likely to proceed is found in the documents they submitted last autumn when the Supreme Court was considering whether to take the case. The crux of the disagreement lies in the two sides’ radically different characterisations of the legal issue at stake: the so-called “question presented”.

Mr Phillips’s lawyers say the justices must resolve “[w]hether applying Colorado’s public accommodations law to compel Mr 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”. Notice this query says nothing about cake. It concerns “expression” and whether Colorado may “compel” Mr Phillips to “create” it against his conscience. The gay couple’s brief, by contrast, asks whether the free-speech clause is implicated by a “neutral state law that does not target speech” and whether the free-exercise clause could possibly be violated by a “state law that is neutral and generally applicable”. The commission’s take adds another facet that is sure to dominate the argument. The issue is not really about compelling expression, the commission argues, because Mr Phillips “refuses to sell a wedding cake of any kind to any same-sex couple”, even, presumably, a plain-vanilla variety bearing an innocuous sentiment like “Congratulations”.

If the Supreme Court accepts Mr Phillips’s framing, his chances are good. The court has long read the First Amendment to bar the government from forcing individuals to express ideas they disagree with. In rejecting compulsory flag salutes by public school students in 1943, Justice Robert Jackson famously noted that ‘‘[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein”. But as the commission and the couple point out, Mr Phillips’s did not object to creating a cake bearing any particular message or image. He told the men he had a blanket policy of not baking any cakes to be consumed at same-sex weddings. Despite his professed willingness to sell gay people other goodies like brownies and birthday cakes, that flat-out rejection of a wedding cake sounds more like a refusal to serve gay and lesbian couples rather than a conscientious objection to creating particular “expression” on a confection.

If the conservative-tilting Supreme Court ultimately sides with Mr Phillips, it will have to work out how to limit the fallout of a decision that prioritises solicitude toward religious views over fair-dealing in the marketplace. For if there is a constitutional right for a Christian proprietor not to bake any kind of cake for two men getting married, it is hard to see why there wouldn’t be a similar right for a photographer or a caterer to turn away, say, interracial couples or Muslims whose beliefs or lifestyles clash with his religious scruples. Spending money, as we know from Citizens United v Federal Elections Commission, the controversial 2010 ruling striking down some campaign-finance restrictions, counts as free speech. If any business transaction is to be construed as expression, Masterpiece Cakeshop could engender something far broader than lawful discrimination against gays and lesbians. It could set the stage for religious views intruding further and further on laws designed to make society more civil and more open.

***Masterpiece Cakeshop v. Colorado Civil Rights Commission*Argued: Dec. 5, 2017**

## Facts

Masterpiece Cakeshop is a specialty cakeshop owned by a baker, Jack Phillips, who is Christian. He refuses to design cakes that conflict with his religious beliefs. That means that he won’t design and decorate cakes for Halloween, or those with alcohol in them. He believes that same-sex couples should not be able to marry. When a same-sex couple visited his shop and tried to order a specialized cake to celebrate their upcoming wedding, Phillips said they were free to purchase items in his store, but refused to make them a specialized cake.

The couple believed that they had been discriminated against because of their sexual orientation. Colorado has a law that prohibits discrimination in places of public accommodation. That means that business that sell to the public cannot discriminate based on race, religion, disability, or sexual orientation, among other things. The couple complained to the Colorado Civil Rights Division, which enforces the law. That agency ruled that Philips had violated Colorado’s law. They said that if Philips was going to create cakes for opposite-sex weddings, he had to do the same for same-sex weddings.

Phillips appealed that ruling, and a Colorado court confirmed that he had violated the Colorado law. Phillips then asked the Supreme Court to hear his case, and the Court agreed to do so.

## Issue

Does enforcement of Colorado’s anti-discrimination law require Masterpiece Cakeshop to create expression in a way that violates the baker’s Free Speech or Free Exercise rights under the First Amendment?

## Constitutional and State Law

* **U.S. Constitution, First Amendment:** “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech…”
* **Colorado’s Anti-Discrimination Law:** Colorado bans discrimination in places of public accommodation, which include restaurants, hospitals, hotels, retail stores and public transportation, among others. Discriminatory actions include denial of service, terms and conditions, unequal treatment, failure to accommodate and retaliation. Places of public accommodation are prohibited from taking discriminatory actions against people because of their: race, color, disability, sex, sexual orientation (including transgender status), national origin/ancestry, creed, or marital status.

***Legal Precedents***

***Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston (1995)***

The South Boston War Veterans Council was authorized by the City of Boston to organize the St. Patrick’s Day Parade. The Council refused a request by the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) to join the parade in order to express gay pride. The state had a law prohibiting discrimination on account of sexual orientation in public accommodations. GLIB challenged the Council’s refusal in court. The case went to the Supreme Court of the United States, which ruled in favor of the Council. The Court said that if the Council (a private group) was required to include in the parade a group expressing a message that the Council did not want to convey, that would violate the Council’s First Amendment rights. The First Amendment means that speakers can choose not only what to say but also what not to say.

***Bob Jones University v. U.S. (1983)***

Bob Jones University is a private, Christian institution. The University was dedicated to fundamentalist Christian beliefs and prohibited interracial dating and marriage. In 1970, the Internal Revenue Service (IRS) began to deny tax exempt status to private schools engaging in racial discrimination. The University claimed that the IRS had violated their religious beliefs by revoking their tax exempt status. In an 8 – 1 ruling, the Supreme Court ruled in favor of the IRS, saying that racial discrimination in education violated a fundamental national public policy and that not all burdens on religion are unconstitutional.

## Arguments for Masterpiece Cakeshop

* The First Amendment protects expression, which includes visual art. Like paintings and sculptures, elaborately designed and decorated cakes are works of art. The Constitution does not permit the government to force artists to create art that goes against their beliefs.
* Phillips’ cakes convey messages – wedding cakes celebrate marriage and the couple being married. The state would violate his First Amendment beliefs by forcing him to express a message he disagrees with.
* Laws that prohibit discrimination by public-serving businesses can still apply to anyone who simply provides goods or services, because that is conduct and not expression. Conduct is not protected by the First Amendment. For example, renting a banquet hall or limousine service is not a form of expression. Artistic endeavors like cake decorating are expression and protected as speech.
* When a law limits someone’s exercise of their religious beliefs, courts should look at it very closely. The government must have an extremely good reason to interfere with someone’s religious beliefs, and Colorado does not have an extremely good reason to force Phillips to design cakes that go against his beliefs.
* There are plenty of other bakeries that happily design same-sex wedding cakes. The couple could easily go to another bakery.
* The Supreme Court 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.” And there is no dispute in this case that Phillips’ objection to same-sex is based on a genuine and sincere religious belief, not a religious belief claimed only as a pretext for discrimination.

If the Court rules that Phillips must design a cake in violation of his beliefs, then it is hard to see why the government could not also force people to participate in, or even officiate, same-sex marriages in violation of their sincerely held religious beliefs.

* As the Supreme Court said in the *Hurley* case, the First Amendment not only protects what a person says but it also protects persons from being forced to say something they don’t believe.

## Arguments for Colorado

* The Colorado anti-discrimination law does not target speech. It targets conduct. The law is not directed at anyone’s religious beliefs. It simply says that if you are going to sell products to the public, you need to sell those products to everyone, regardless of their race, sex, or sexual orientation.
* No reasonable observer would assume that a company’s provision of a cake for a wedding amounts to the owner’s approval of the marriage. Making a cake to sell to someone is not a forced expression of a message.
* Masterpiece could hang up signs in the shop to make it clear that providing baked goods for an event does not constitute endorsement of the event.
* The government does have an extremely good reason for the anti-discrimination law: to fight unlawful discrimination. In the 1960s, businesses used “religious beliefs” as a reason to justify discriminating against African-Americans. This is discrimination and government has the authority to prohibit it.
* More than 100 local governments in 38 states have adopted ordinances that protect citizens from discrimination based on sexual orientation in public accommodations. The courts should not undermine the democratic choices of these communities.
* If the Court rules for the Cakeshop, it could open the floodgates. Hair salons, tailors, architects, musicians, and florists could all claim that they use artistic skills when serving customers. Countless businesses would be able to discriminate if they claimed a religious belief motivated the discrimination. Moreover, they could claim that any law does not apply to them if they believe that complying with the law would send a message with which they disagree. Those could include labor laws, health and safety laws, and other important business regulations.
* As the Supreme Court said in the *Bob Jones* case, a law can place some burden on religion as long as there is a very good reason for the law.

[POLITICS](https://www.npr.org/sections/politics/)  
Supreme Court Takes Up Birth-Control Conscience Case

January 17, 20204:51 PM ET

[SARAH MCCAMMON](https://www.npr.org/people/448294256/sarah-mccammon)

The U.S. Supreme Court says it will consider whether employers should be allowed to opt out of providing contraceptive coverage to their workers because of moral or religious objections.

At issue are Trump administration regulations allowing employers to claim such exemptions to the contraceptive insurance coverage mandate in the Affordable Care Act, which requires most employer-provided plans to include birth control coverage without a copay. Churches and other religious organizations [already can opt out](https://www.healthaffairs.org/do/10.1377/hblog20200107.852383/full/)of the requirement, but the Trump administration has sought to expand that exemption to include a wider array of businesses and organizations.

Pennsylvania and New Jersey [challenged the Trump administration](https://www.scotusblog.com/case-files/cases/trump-v-pennsylvania/) regulation and won a nationwide injunction temporarily blocking the rules.

Brigitte Amiri, [an attorney](https://www.aclu.org/node/20481) with the American Civil Liberties Union's Reproductive Freedom Project, called the Trump administration rules "an attempt to rob people of their contraception coverage." The ACLU filed an amicus brief in the case opposing the Trump rule.

It's not the first time the Supreme Court has considered the issue. In 2014, the court sided with the conservative Christian owners of the national craft chain [Hobby Lobby in a case](https://www.npr.org/2014/06/30/326959298/supreme-court-ruling-affirms-hobby-lobby-victory) challenging the contraceptive mandate on religious grounds.

Amiri said that this case goes further and that it's hard to predict how many employees could be affected if the court sides with the administration.

"What we're talking about is very concrete and fundamental to people's daily lives," Amiri said. "Nobody should be at risk of losing their contraceptive coverage because of where they work or where they go to school."

Kristen Waggoner,[an attorney](https://www.adflegal.org/detailspages/biography-details/kristen-k.-waggoner) with the religious liberty group the Alliance Defending Freedom, said the case could have far-reaching implications for other businesses and organizations that oppose providing contraception through their health plans.

"They're not interfering [with employees' choices]," Waggoner said. "This is about whether a person can run their business in a way that's consistent with their beliefs."

Waggoner's group is representing the anti-abortion rights group the March for Life in a related case that is also working its way through the legal system.

"It's about the right of all religious organizations and people of faith, and those who believe that life begins at conception, not to believe that they believe is the taking of human life," Waggoner said.

In a statement, Pennsylvania Attorney General Josh Shapiro said, "Two federal courts have blocked the Trump Administration's rules because they would allow virtually any employer to deny women access to contraception for any reason—including the belief that women should not be in the workforce" and expressed hope that the Supreme Court would ultimately strike down the rules.

The U.S. Department of Health and Human Services declined to comment on pending litigation.

[**Courts & Law**](http://www.washingtonpost.com/politics/courts-law)  
**Supreme Court will hear cases on electoral college, birth control mandate**  
By [**Robert Barnes**](https://www.washingtonpost.com/people/robert-barnes/)   
Jan. 17, 2020 at 4:17 p.m. MST

The Supreme Court on Friday said it will consider whether states may punish or replace “faithless” presidential electors who refuse to support the winner of their state’s popular vote, or whether the Constitution forbids dictating how such officials cast their ballots.

Lower courts have split on the question, and both red and blue states urged the justices to settle the matter in advance of the “white hot” glare of the 2020 election. They say they fear a handful of independent-minded members of the electoral college deciding the next president.

“It is possible that a presidential election could turn on just a few disputed electoral votes cast in purported violation of state law,” said a [petition filed by three electors](https://www.supremecourt.gov/DocketPDF/19/19-465/118334/20191007154112674_19-_PetitionForAWritOfCertiorari.pdf) who faced fines from the state of Washington for not supporting Hillary Clinton, the winner of that state’s popular vote in 2016.

“It is not entirely clear how that would play out — but there is a very real risk of substantial unrest, or worse, if that does happen.”

The Supreme Court accepted cases from Washington and Colorado in time to hold oral arguments this spring and decide the outcome by June. It also said it will consider the Trump administration’s attempt to allow some employers and universities to claim religious or moral exemptions from offering contraceptive care. It will make the third time the court has considered the requirement of the Affordable Care Act.

In the electors case, 10 members of the electoral college attempted to freelance after the 2016 election between Clinton and President Trump. Five of the 58 presidential elections have been decided by smaller margins, most recently in 2000, when President George W. Bush defeated Democrat Al Gore by five electoral votes.

A brief filed on behalf of the states said that 32 states and the District of Columbia require electors to vote for the winner of the statewide vote, and asked the Supreme Court to make clear there is no constitutional prohibition on such laws.

Anything else, the state of Washington told the Supreme Court [in its brief](https://www.supremecourt.gov/DocketPDF/19/19-465/121923/20191108142441699_19-465BriefInOpposition.pdf), “would mean that only 538 Americans — members of the Electoral College — have a say in who should be president; everything else is simply advisory.”

The motive of those challenging the laws, the state said, “is to destroy public faith in the Electoral College so that the people decide to do away with it.”

Challengers say the Constitution leaves up to states the appointment of electors, but no more than that.

“There is no mechanism for state officials to monitor, control, or dictate electoral votes,” said a brief filed by Harvard law professor Lawrence Lessig and his group Equal Citizens. “Instead, the right to vote in the Constitution and federal law is personal to the electors, and it is supervised by the electors themselves.”

In the summer of 2016, Peter Bret Chiafalo, Levi Jennet Guerra and Esther Virginia John were nominated as presidential electors for the Washington Democratic Party. They ran pledging to vote for the party’s nominee.

But when the electoral college convened after the election, all three voted for former secretary of state Colin Powell for president, and split their votes for vice president among Sens. Maria Cantwell (D-Wash.), Susan Collins (R-Maine) and Elizabeth Warren (D-Mass.)

Congress counted their votes. According to the voting advocacy group FairVote, “Congress has accepted the vote of every vote contrary to a pledge or expectation in the nation’s history that has been transmitted to it — a total of more than 150 votes across twenty different elections from 1796 to 2016.” As in each of those elections, the 2016 defections did not change the outcome of the race.

But Chiafalo, Guerra and John were in violation of Washington law, which requires electors to support their nominee of their party or be subject to a civil fine of up to $1,000.

The trio challenged the law and lost at the Washington Supreme Court. The majority found “the Constitution explicitly confers broad authority on the states to dictate the manner and mode of appointing presidential electors.” Additionally, nothing in the document “suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature.”

Justice Steven Gonzalez dissented. The Constitution contemplated that electors “would be free agents,” he said, “to exercise an independent and nonpartisan judgment as to who was best qualified for the nation’s highest offices.”

A few months later, a panel of the U.S. Court of Appeals for the 10th Circuit [decided the issue](https://www.supremecourt.gov/DocketPDF/19/19-518/119162/20191016143112774_Petition%20Appendix.pdf) along the lines Gonzalez suggested.

It was considering the Colorado secretary of state’s attempt to throw out the vote of Micheal Baca, who was pledged to vote for Clinton but cast his vote for Republican John Kasich of Ohio. Baca envisioned a plan where Republicans might ditch Donald Trump in favor of someone else.

The appeals court panel took a deep dive into the Constitution’s language, and a majority said the words pointed in one direction: Electors are “free to vote as they choose.”

“While the Constitution grants the states plenary power to appoint their electors, it does not provide the states the power to interfere once voting begins, to remove an elector, to direct the other electors to disregard the removed elector’s vote or to appoint a new elector to cast a replacement vote,” wrote Judge Carolyn B. McHugh.

The Supreme Court in 1952 ruled that states could allow parties to require those running for elector to pledge to support their party’s nominees. The Washington Supreme Court extrapolated from that ruling.

But Jason Harrow of Equal Citizens said the court has not said what can happen when electors don’t honor that pledge. “With this petition, we are asking the Supreme Court to resolve a critical question that has gone strangely unanswered for two centuries: Who are presidential electors, and can state officials force them to vote for certain presidential candidates?”

The cases are *Chiafalo v. State of Washington* and *Colorado Department of State v. Baca*.

The contraceptive case concerns a Trump administration rule issued in 2018 that it said was an attempt to resolve long-running litigation. It made it easier for more companies and universities to claim religious exemptions to providing contraceptives through their health plans. It also allowed some employers to claim a moral exemption.

But Pennsylvania and other states objected and challenged the rule in court. The U.S. Court of Appeals for the 3rd Circuit ruled that the administration likely lacked authority to issue such broad exemptions. It also said the administration did not comply with requirements to allow adequate public comment on the rules.

The Trump administration, and an order of nuns that has been active in fighting the contraceptive requirement for employees, asked the Supreme Court to intervene.

The combined cases are*Trump v. Pennsylvania*and *Little Sisters of the Poor v. Pennsylvania.*