

Wabash College Moot Court Competition:  
2017 Participant's Guide

Preliminary rounds of the Competition will be held on Saturday, October 21. Participants should report to Baxter Hall at 8:30 A.M.; room assignments will be available outside of Baxter 101. The First Round will begin at 9:00 A.M., and the Second Round will begin at 11:00 A.M. Each team, consisting of two (2) members, will argue in two rounds, once as Petitioners and once as Respondents.

<b>Party</b>	<i>Name before the ALJ and in the Broadway Civil Rights Commission</i>	<i>Name in the Court of Appeals</i>	<b>Result in the Court of Appeals</b>	<i>Name in the Supreme Court</i>
Henry Higgins and Avenue Q Bakery, Inc.	Respondents <b>Lost</b>	Appellants	<b>Lost</b>	Petitioners
Albin Smith and Georges Jones  Broadway Civil Rights Commission	Complainants <b>Won</b>	Appellees  Appellee	<b>Won</b>  <b>Won</b>	Respondents (NOTE: the Broadway Civil Rights Commission, by statute, must be a party to any appeal from its rulings)

**I. THE PROBLEM:**

- A. Henry Higgins, a baker, owns and operates Avenue Q, a bakery. Avenue Q sells a variety of baked goods to the general public, including custom-made wedding cakes that Higgins himself designs and bakes. Albin Smith and Georges Jones, a gay couple, came to Avenue Q and asked Higgins to bake them a wedding cake. Higgins refused to bake them a wedding cake because doing so would violate his Christian beliefs against gay marriage. Smith and Jones filed a charge alleging public accommodation discrimination based on sexual orientation under the Broadway Anti-Discrimination Act ("BADA"). At the end of an administrative proceeding, the Broadway Civil Rights Commission ordered Higgins and Avenue Q to cease discriminating against Smith and Jones or other same-sex couples "by refusing to sell them wedding cakes or any other product [they] would sell to heterosexual couples." Higgins and Avenue Q appealed to the Broadway Court of Appeals, claiming the Commission's order violated their rights under the Free Speech and Free Exercise Clauses of the First Amendment to the United States Constitution. They asserted Higgins' wedding cakes are inherently expressive, and by ordering him to bake and sell them to gay couples (if he continues to bake and sell them to straight couples), the Commission is forcing him and his business to express support for gay marriage, violating their constitutional right to free speech. Higgins also asserts that the Commission's order unduly burdens his (and Avenue Q's) right freely to exercise religion, specifically the religious belief that marriage is an inherently religious event between a man

and a woman, and God would be displeased if Higgins (and his business) participated in a celebration of gay marriage. The Broadway Court of Appeals rejected both of Higgins' and Avenue Q's claims. They raise them again in this Court.

- B. All public accommodation laws in the United States, including BADA, allow complaints only against businesses. But Avenue Q is a closely held business. Higgins is the sole owner and corporate officer. For purposes of this problem, the parties agree, while Avenue Q and Higgins each possess rights under the First Amendment to the United States Constitution, their rights are essentially fused in this situation. Accordingly, the problem will generally identify the man and his business collectively as "Higgins."
- C. Do not be sidetracked by the fact this was an administrative proceeding rather than a case that moved through a series of lower courts. Higgins denied service. Smith and Jones went to the appropriate State administrative agency (the Broadway Civil Rights Division) and claimed public accommodation discrimination based on sexual orientation. At the end of an administrative proceeding, the Broadway Civil Rights Commission (an administrative board separated from the Division), ordered Higgins not to discriminate on the basis of sexual orientation when deciding who to serve. The Broadway Court of Appeals affirmed the Commission's order. Higgins now appeals to the U.S. Supreme Court. The Commission (functioning on behalf of the State of Broadway) is a party because it is the Commission's Order with which Higgins takes issue. It is that simple. This is just an individual business owner v. the State.
- D. The case is to be decided on the merits: Did the Broadway Civil Rights Commission's application of BADA violate Higgins' rights under the Free Speech Clause or the Free Exercise Clause?

## II. DIVISION OF THE ARGUMENT:

- A. **Petitioner (Higgins and Avenue Q).** We agree with the dissenting opinion.

**First counsel:** the Commission violated the Free Speech clause. A wedding cake is inherently expressive; it is pure speech, just like a painting or a piece of music. Forcing a cake artist like Higgins to create cakes for gay weddings forces him personally to endorse gay weddings. Generally speaking, the First Amendment Free Speech clause prohibits the government from forcing anyone either directly to speak the government's message, or to replace his/her personal message with the governmentally-preferred message of another person. But that is exactly what the Commission's application of BADA does here. Because the Commission's application of the law burdens Higgins' right to free speech, it can only be upheld if the Commission demonstrates the application of BADA in this situation passes "strict scrutiny": it furthers a compelling interest and is narrowly tailored to achieve that interest. The Commission cannot make that showing.

**Second counsel:** the Commission violated the Free Exercise clause. Higgins is a Christian who believes marriage is an inherently religious joining of one man and one woman. Accordingly, the Commission's order, which requires him to bake cakes for same-sex weddings if he would bake them for opposite-sex weddings, burdens his right to exercise his religion freely in violation of the First Amendment. BADA, as applied by the

Commission in this case, is neither neutral nor generally applicable. Accordingly, Higgins must prevail unless the Commission can demonstrate that BADA, as applied here, passes “strict scrutiny” review. The Commission cannot bear its burden.

**B. Respondents (Broadway Civil Rights Commission, Smith & Jones)** The majority opinion is right.

**First counsel:** Avenue Q is place of public accommodation: a commercial business open to all customers who wish to purchase goods and services. Higgins’ refusal to make any wedding cake for any same-sex wedding is discrimination on the basis of sexual orientation in the provision of goods and services. BADA, a content and viewpoint neutral law, prevents public accommodations from engaging in sexual orientation discrimination. The Commission’s Order does no more than direct Higgins to stop discriminating. The Commission’s Order does not compel Higgins to speak. It does not force him to substitute another’s message for his own. And baking and selling a wedding cake simply is not inherently expressive conduct. Even if baking and selling a wedding cake could be deemed expressive conduct, the Commission’s enforcement of BADA against Higgins in this situation does not violate the First Amendment because any burden on free speech is incidental to the law’s generally applicable regulation of conduct in accord with the test established in *O’Brien v. United States*.

**Second counsel:** There is no Free Exercise violation. Higgins is not hindered from believing same-sex marriage is wrong or expressing that belief. BADA, on paper and as applied here, is a neutral law of general applicability. BADA is not designed to impede religious conduct, and the Commission did not apply it here to impose burdens on religious conduct that it failed to impose on secular conduct. Because BADA is neutral and generally applicable, it need only serve a legitimate state interest. BADA easily satisfies that standard. Indeed, the government interest in combating public accommodation discrimination is not merely legitimate, but compelling, and the application of BADA in this case is narrowly tailored to achieve that purpose.

**C. Special Note for 2017: BOTH sides must address** the questions of whether the Court should apply “strict scrutiny” or a less onerous test and whether the Commission can meet the burden imposed by whatever test is applied.

**III. OUTSIDE RESEARCH:**

- A. Outside research is NOT required. It is entirely optional.** Generally, time is much, much better spent on understanding and refining the arguments presented than on doing outside research. Suppress, if you can, the desire to find the “gotcha” or killer authority, statistic, or quotation. There’s plenty of “ammunition” for the arguments in the two opinions you have.
- B.** The problem is a variation of *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission*, which is currently being briefed before the United States Supreme Court. **NOTE:** there are **SIGNIFICANT** differences between the Colorado Court of Appeals’ opinion in *Masterpiece* and this problem. Do NOT use *Masterpiece* as authority in your argument. It is not worth being derailed into exploring how this case is different from that one.

### **ORAL ARGUMENT PROCEDURE:**

- You will argue before a panel of three judges, usually made up of a mixture of practicing attorneys, professors, and judges who have had moot court, trial, and appellate experience.
- Your argument should be stapled into a manila folder. It is NOT a crutch, and DO NOT READ FROM IT VERBATIM. Use it for reference and to keep your place in your argument. Your folder should contain relevant facts, summaries of legal authorities or concepts, and other pertinent information.
- When you enter the room, put your name and the side you will be arguing on the blackboard. If you are in a “courtroom” without a blackboard, the judges will ask your name and the respective side you are arguing and will write it on his/her evaluation sheet.
- The Petitioners (here Avenue Q and Higgins) always argue first. When the judges ask if you are ready to proceed, respond “Yes, Your Honor.”
- The introduction both sides should use is “May it please the Court. My name is \_\_\_\_\_, and I represent \_\_\_\_\_, the [Petitioner or Respondent] in this appeal.” The Petitioner is allowed rebuttal and MUST reserve rebuttal time. You ask for rebuttal immediately after your introduction. “At this time, I would like to reserve (1 to 3) minutes of my time for rebuttal.”
- You will be timed by one of the three (3) judges. The timer will remind you how much time you have left. EACH person gets ten minutes. This may sound like an eternity, but it will go by quickly once you get into your argument. You will get a “5 minutes” left signal card, and “2 minutes” left signal card, and “1 minute” left signal card and a STOP card. You won’t believe how quickly the 5-minute card will be flashed at you.
- When the STOP card is flashed, it means STOP regardless of where you are in your argument, but don’t stop mid-sentence. The best way to handle this is to say, “I see my time has expired. May I have a moment to conclude?” The judge will then grant you additional time quickly to finish your thought and cut to your prayer. More about the prayer later.
- Pay respect to the Court. Be deferential, yet assert your client’s position. Never interrupt a judge – let him/her get the question out before you start to answer it. Listen carefully to the question to ensure that you are really answering it. Never get mad at a judge or be argumentative – be respectful and assertive (have a conversation with the judges – don’t run over them with a truck and call it advocacy!).
- Refer to each of the judges – regardless of gender, profession in the non-moot-court world, or age – as “your Honor” or “Justice (fill in the individual’s last name).”
- DON’T talk too fast. Speak clearly and in a moderate tone of voice. Don’t dance behind the lectern. It is distracting, unprofessional and makes you appear nervous and tentative. Appear confident and collected (even if you don’t feel it). Be calm and alert – you’ll be amazed with how much it will enhance your argument. Dress appropriately. Conservative, dark suit and tie.

### **PREPARING A SUCCESSFUL ARGUMENT:**

- An oral argument has three basic parts – the introduction, the body of the argument itself, and the prayer.
- The Petitioner must briefly state the RELEVANT facts of the case which should only last about one to two minutes. They must be fair, but can be slanted toward your theory of the case. Don't give facts not contained in the record. DON'T ARGUE THE FACTS: ARGUE THE LAW! The parties filed cross motions for summary judgment in this case, an Administrative Law Judge granted the motion Smith & Jones filed, and the Court of Appeals affirmed the summary judgment ruling. There cannot be a summary judgment if facts are in dispute. This is the appeal, and the issues are now legal rather than factual. DO NOT BE SURPRISED IF A JUDGE ASKS A QUESTION – ABOUT THE LAW – BEFORE YOU GET THROUGH YOUR FACTS. IF THAT HAPPENS, ANSWER AND MOVE ON WITH THE ARGUMENT.
- The Respondent should do one of the following: (1) accept the Petitioner's statement of the facts; (2) make corrections in the Petitioner's statement of facts; (3) clarify or point out any ambiguity in the Petitioner's statement of the facts; or (4) make any necessary additions to the petitioner's statement of the facts. Take issue with the facts to suit your theory of the case. Be brief! DON'T ARGUE THE FACTS: ARGUE THE LAW!
- Road map your argument. State the issues for the court to consider in clear, concise terms. For example: "There are three reasons our client should prevail. First,..." BE PERSUASIVE. That is the whole object of an appellate argument. Tell the Court why you should win. "The trial court erred in finding for the Respondent because..." or "the ruling of the trial court should be upheld because..." (The word "erred" is pronounced so that it rhymes with "bird").
- After you have "road mapped" your issues for argument, go back to point one and begin your analysis of each point/reason why you should win.
- The Prayer: Tell the Court in one sentence what you want them to do for your client. "We respectfully request that this Court reverse/affirm the Court of Appeal's decision." After your prayer, close your folder and sit down.
- For rebuttal, do not be verbose. Only one of Petitioner's attorneys gives a rebuttal. Your rebuttal should include one or two strong points. Listen to the Respondent's argument closely to pick up on what the judges are questioning him/her about. If it favors your side, hit it hard in your rebuttal. An example might be the correction of a case that the Respondent did not analyze or apply correctly. Rebuttal is very important because it is a great way to win points, and a lawyer's favorite thing to do is to have the last word.
- EYE CONTACT IS VERY IMPORTANT! Look directly at the judges as much as possible. This will also help you appear confident in your argument and enhance your overall advocacy style.

- The most important thing to keep in mind is that you are very familiar with your case, and you know what you are talking about. The best way to avoid feeling nervous is to prepare your argument well, think clearly, and HAVE FUN!
- You will receive feedback after both sides of the argument are completed (including rebuttal). The judges will give you helpful hints and comments that will be invaluable when you go on to the next round.

### **WHY SO MANY QUESTIONS?**

- The judges will ask you questions about the case. This will happen to EVERYONE, and the purpose is not to humiliate you or trip you up. To the contrary, the judges want to determine how well you know your material, how well you can think on your feet, and how well you respond and get back into the flow of your argument.
- Anticipate what these questions might be and prepare to respond to them. Don't write out an answer to any possible questions and then just read it. That's not what the judges are looking for. Answer the question briefly, and then get back into your argument. Remember, YOU control the flow of your argument as much as possible, so don't open yourself up to distractions and interruptions if you can help it by silently fumbling around trying to figure out what to say next.
- Remember to listen to EACH question before you answer it. It may not be as difficult as you think. If you do not hear or do not understand what the judge is asking, it is acceptable to ask him/her to repeat the question so long as you do so politely and on a limited basis.