LAST October, at a campaign event, Donald Trump proudly waved a rainbow flag a supporter had decorated with the words “LGBT for Trump”. If the image was puzzling then, it is jarring now. In his seven months in office, the 45th president has taken a number of steps to harm gay, lesbian, bisexual and transgender Americans. His Department of Justice (DoJ) recently argued, contrary to the position of the Equal Employment Opportunity Commission, that civil-rights laws do not protect gays and lesbians from being fired on the basis of their sexual orientation. He appointed a judge to Sixth Circuit Court of Appeals who has made homophobic comments and tosses around the word “faggot” in speeches. He withdrew an Obama-era policy instructing public schools to permit transgender students to use bathrooms matching their gender identity. And in July he said he planned to bar transgender soldiers from America’s military.

It is no great surprise, then, that Mr Trump’s DoJ has filed a brief in support of a Christian baker whose opposition to making wedding cakes for gay couples promises to be one of the biggest cases of the Supreme Court’s upcoming term, which begins October 2nd. The brief attempts to buttress Jack Phillips’ claim in Masterpiece Cakeshop v Colorado Civil Rights Commission that a Colorado public-accommodations law requiring him to serve gay and straight customers alike violates his First Amendment freedoms of speech and religion. A wedding cake is “not an ordinary baked good”, Jeffrey Wall, the acting solicitor general, writes. Its “function is more communicative and artistic than utilitarian”. Asking Mr Phillips to create a cake for a gay wedding is, the plaintiffs say, asking him to express ideas he opposes as a matter of faith. Louise Melling, deputy legal director of the American Civil Liberties Union, says the DoJ’s brief is, at bottom, support for “a constitutional right to discriminate”. The question in Masterpiece Cakeshop is “can a business that opens its doors to the public, put up a sign saying, ‘Wedding Cakes for Heterosexuals Only’. Our laws have long said businesses can’t pick and choose who they will serve based on who the customer is”.

The brief waxes rhapsodic on the significance of the wedding cake: the creations are “iconic symbols that
serve as the centerpiece of a ritual in which the married couple cuts the cake in front of their guests, marking the celebratory start to their marriage”. Research includes a New York Times article from 2014 entitled “Extravagant Wedding Cakes Rise Again”. Some cakes, we learn, cost as much as $30,000. That’s a lot of money, but Mr Wall provides no evidence that even the most elaborately decorated and exorbitantly priced wedding confections are endowed with the capacity of speech. Mr Wall is careful to draw a limit to the types of commerce that qualify for First Amendment protection. A convention hall “may not refuse to rent its facilities, nor may a car service refuse to provide limousines, nor may a hotel refuse to offer rooms, nor may an event service refuse to rent chairs”. Why? “Such products or services—a hall, a limousine, a hotel room, or a chair—are not inherently communicative.”

The illogic of this argument has two parts. First, cakes are no more “inherently communicative” than any of the other mentioned goods and services. A limo can be decorated with words or baubles just as a cake can—adornments that may or may not reflect affirmation of gay marriage—but neither is essentially a vehicle for communicating any message. Halls, hotel rooms, even chairs can be prettified for an occasion and used to deliver certain messages. At weddings, they often are. Mr Wall’s attempt to paint cakes as a special case (along with calligraphy, photography and some other wedding accoutrements) fails.

The second defect in Mr Wall’s argument is found in this line of reasoning: “A reasonable observer who views a custom wedding cake could fairly infer that its creator at least does not oppose his clients’ marriage, just as a reasonable observer of a statue memorialising a military victory could fairly infer that its sculptor at least was not a pacifist.” Leave aside several glaring problems: celebrants at a wedding generally have no idea who made the cake; and even if they happen to, are not likely to spend time at the party parsing the intentions of the baker. More damning than these common-sense facts is the warped application of the “reasonable observer” test to the context of religious free exercise. The test comes from another clause in the First Amendment—the establishment clause—and asks whether a reasonable observer would interpret a certain religious display (the Ten Commandments, for example, or a nativity scene) as a government endorsement of religion.

The idea makes some sense in that context. It has been, however, in disfavour among most Supreme Court justices for some time. Justice Neil Gorsuch, in his earlier capacity as a Tenth Circuit Court of Appeals judge, drained the test of most of its bite in a case involving public religious displays. A reasonable observer, he wrote, is an informed observer. This means a wedding guest should be assumed to know, on Justice Gorsuch’s theory, that a baker is a religious Christian whose decision to bake a cake is not to be taken as any indication of his feelings about gay marriage. More fundamentally, Mr Wall’s argument strangely recharacterises a religious conscience right as a right not to have other people mistakenly attribute beliefs to you that you don’t have. That’s very far from what the First Amendment protects.