

The oral argument in the Supreme Court's Masterpiece Cakeshop same-sex marriage case is heartening

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“JUSTICE KAGAN: Why is there no speech in — in creating a wonderful hairdo? ... The makeup artist. It's called the *artist*.”

With those examples Justice Elena Kagan summed up the central issue the Supreme Court grappled with yesterday when it heard oral argument in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Which trades or occupations can claim speech, artistry or expression for purposes of the First Amendment?

It's not an easy question. Jack Phillips says the amendment protects his refusal to bake a cake for Charlie Craig and David Mullins' wedding. Are Phillips' creations — each custom, and one-of-a-kind — more a standard commodity like chair rentals? Or something more expressive and artistic, like painting an oil portrait of the newlywed couple or composing a song for them?

The conventional split between the Supreme Court's liberal and conservative wings came through in yesterday's lively argument. Justice Sonia Sotomayor hammered the baker's position, while the conservative trio of Samuel Alito, Neil Gorsuch and Chief Justice John Roberts did the same to Colorado's.

And yet on another level the Justices share a good deal of common ground. None were gunning for any major turnabout in Court doctrine.

In conservative circles, some yearn for a sweeping new right to ignore discrimination laws in the name of religious liberty or freedom of association.

That's a non-starter, even (or especially) with today's conservative Court. The Court shows no signs of wavering from its 1990 ruling in *Employment Division v. Smith* that the Constitution affords no general right to a religious exemption from otherwise applicable laws.

On the Left, some pine for a hard-line opinion that claims of religious liberty or free speech can never, ever provide an excuse for discrimination.

But it's not just the Alitos and Clarence Thomases who would oppose that outcome. All four liberal justices yesterday gave indications that even if they would not draw the line on compelled speech here, they would draw it somewhere.

Justice Ruth Bader Ginsburg, for example, suggested that one logical place to search for a line would be when cakes had words on them. Several Justices on both sides proposed that cakes bearing particular symbols, such as a cross or rainbow, might convey a message. Even Sotomayor jumped in at one point to suggest that Colorado was going too far with its aggressive legal stance, under which it might sometimes compel a baker to inscribe a particular Bible verse demanded by a customer. (The state also seemed to suggest that it would punish a lesbian graphic designer who turned down a poster commission for the Westboro Baptist Church, and maybe even an African-American sculptor who refused to craft a cross for the KKK. Despite past assertions that offers of goods or services to the public must be #OpenToAll with no exceptions, it's rarely that simple, especially when it comes to personal services.)

In short, the Justices yesterday were not going for a knockout in the culture wars; they were intelligently disputing the dimensions of a fairly narrow strip of legal territory. Despite what you heard on social media, neither side was trying to gut discrimination laws on the one side, or require rainbow loyalty oaths on the other. And no, no one's marriage is at risk either way. In the middle, as usual, is Justice Anthony Kennedy, famous as the author of the Court's gay rights decisions but also as a strong First Amendment proponent. Kennedy yesterday did not seem to warm to a couple of the theories offered on behalf of Phillips, including one from the U.S. Department of Justice that would recognize participation in ceremony as a legal category of its own.

But he did show an unexpected interest in what had been regarded as a side issue in the case, namely bits of evidence that the Colorado commission, or some of its personnel, had taken a dismissive view of Phillips' religious scruples ("freedom of religion used to justify discrimination is a despicable piece of rhetoric," one commissioner had said).

"Tolerance is essential in a free society," Kennedy pronounced from the bench. "And tolerance is most meaningful when it's mutual. It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips' religious beliefs."

If he so chooses, the theme that the commission acted badly in this particular case might give Kennedy a narrow way to let Phillips off the hook or send the case back without creating any particular carve-out to discrimination laws.

As usual, that will be up to Justice Kennedy, who holds the result in his hands.

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