



## Masterpiece Cakeshop Ruling Dodges the Big Question

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In the end, the *Masterpiece Cakeshop* ruling was narrow without being close. Justice Kennedy won over liberals Elena Kagan and Stephen Breyer [into a 7-2 majority](#) to rule that Colorado had improperly shown contempt for Jack Phillips's religious views while considering the case against him brought by wedding-cake hopefuls Charlie Craig and Dave Mullins. By deciding the case on those grounds, Kennedy sidestepped the broader question that has dominated public discussion of the case all year: When does it violate the First Amendment to require business people to accept work they believe implicates them in expression contrary to their beliefs? Dodged today, that question will assuredly be back in future.

Despite early melt-the-screen reactions from some on the left (bake a take as fast as you can!) Kennedy specifically did not carve out any new exceptions from state LGBT anti-bias measures; he even took pains to praise that body of law. Instead, his message to Colorado was: Go back and run the process again without showing animus toward people's religious beliefs.

As he documents in his majority opinion, at least two members of the Colorado Civil Rights Commission had used official proceedings to make clear their disdain for the baker's convictions. One had dismissed an argument as "one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Overall, Kennedy wrote, Phillips was not given "the neutral and respectful consideration of his claims" to which he was entitled. Or as Justice Gorsuch put it in a pithier concurrence, "no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment."

Justices Kagan and Breyer agreed that the proceedings were tainted by anti-religious animus—a relatively easy concession compared with the other ways Phillips might have won—but the liberals did nothing to hide their view that the state would win a future case on these facts if it went back and did things in proper form. Their concurrence even provides a little road map for the state to get there by tinkering with its legal theory. It's true that in separate concurrences, Justices Gorsuch, Alito, and Thomas express more eagerness to get to Phillips's substantive claims. But that adds up to three: there is no sign at present that the court is one vote away from declaring a sweeping or even narrow win for the next baker in a similar situation.

The Ginsburg and Sotomayor dissent deserves special notice. They argue that for the proceedings of a state agency to be tainted by prejudicial remarks from some participants is not itself reason to throw out its work if there were freestanding untainted grounds for action, if a multi-stage process worked to counteract a bias confined to one stage, and so forth. These are not bad arguments! In fact they're much the same arguments that Trump administration lawyers will need to rely on if they are to defend the legality of executive actions that (plaintiffs argue) were tainted by prejudicial remarks made by the President himself or appointees along the way.

Monday's ruling will not keep agencies like the Colorado Civil Rights Commission from waging culture war on minority religious beliefs. But it may induce them to sublimate how they talk and emote along the way, so as at least to simulate respect for all parties. Progress?