

# ORANGE COUNTY REGISTER

## Will the Supreme Court restore religious liberty?

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December 4, 2017

Can religious liberty coexist alongside modern anti-discrimination law? That's the question the Supreme Court will consider tomorrow when it hears oral argument in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

The case arose when Charlie Craig and David Mullins, a gay couple, walked into the Masterpiece Cakeshop in Lakewood, Colorado, owned by Jack Phillips, a devout Christian. As with all of his customers, Phillips had no problem with selling the couple anything on his shelves. But he declined to make a custom-made cake for their upcoming wedding, citing his religious convictions. And he was willing to direct them to nearby bakeries that would design their wedding cake, as he had with others.

That wasn't good enough for Craig and Mullins. They filed a complaint with the Colorado Civil Rights Commission alleging that Phillips had violated the Colorado Anti-Discrimination Act. Finding in their favor, the commission ordered Phillips, among other things, to conduct comprehensive staff training, including for his family members who worked in the bakery – “reeducation,” in effect. The commission's decision put Phillips to a choice: Ignore his religious beliefs, or go out of business.

After supporters of Craig and Mullins picketed the bakery, Phillips lost 40 percent of his business and most of his employees. He appealed, but like courts around the country that have decided similar complaints against bakers, florists, photographers, and others, Colorado's Court of Appeals upheld the commission and the Colorado Supreme Court declined review. The U.S. Supreme Court will now draw some lines, we hope.

A little history will put this case in perspective. Under common law, private parties were generally free to associate, or not, as they wished. There were exceptions, of course. Monopolies, common carriers, and public utilities had to serve everyone on reasonable terms. So also oftentimes for isolated public accommodations like inns and taverns. But service was generally not compelled where markets offered multiple choices, as here. In short, the presumption was on the side of freedom of association – and the implicit right to discriminate for any reason, good or bad, or no reason at all.

By contrast, public institutions, belonging to all of us, could not discriminate except on grounds related to their function. Slavery and Jim Crow made a mockery of that principle, of course. But when we decided finally to end segregation systematically, starting with the 1964 Civil Rights Act, we prohibited most private discrimination as well – probably the only way to break the back of institutionalized racism in the South.

We're more than half a century beyond those days, even if prejudice of many kinds remains, as it always will at some level. The question now is what to do about it, especially when measures that seemed necessary decades ago intrude today on basic principles like freedom of association – and on so fundamental a principle as religious liberty. What have we come to when a law like Colorado's enables a gay couple to bring the wrath of the state down upon an individual, driving him out of business, simply by requesting a custom-made cake, when the couple could easily go down the street to get that cake?

The conclusion is inescapable, buttressed by the state's reeducation remedy, that Craig and Mullins were animated by what they saw as Phillips's intolerance. But they read him wrongly. He was not asking the state to come down on them. And he was willing to sell them his ready-made goods. It was the next step that he was unwilling to take – to create a custom-made cake that implicated him in a ceremony inconsistent with his religious convictions. If there is intolerance here, it is from those who would force a man to choose between his religious beliefs and his livelihood.

Set aside the practical question of how, were the state to compel performance, it would police its quality: Would a disgruntled couple have a legal action against a baker whose heart was not in it? The broader concern, beyond this law's implicit aim of driving "incorrect" views underground, is the failure of the law's supporters to appreciate how freedom of association encourages a multitude of private religious and social associations in infinite variety, as the relatively unregulated world of websites makes perfectly clear. This law frustrates that by forcing people into associations they would not voluntarily choose. It's time to start peeling back these efforts to regulate our associations and let them arise naturally, without the heavy hand of the state. And what better place to begin than with our first freedom?

*Roger Pilon is vice president for legal affairs at the Cato Institute, which filed an amicus brief supporting the appellants in the Masterpiece Cakeshop case.*