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Why *Masterpiece Cakeshop* Is a Win for Religious Freedom

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The Supreme Court's 7-2 decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* has been widely described as narrowly tailored (as with so many recent decisions that have big political ramifications). But while Justice Anthony Kennedy's majority opinion focuses heavily on Colorado's unfair treatment of plaintiff Jack Phillips and leaves alone the case's First Amendment question, it also represents a significant victory for proponents of religious liberty and freedom of conscience. Even if it seems likely that those core issues will end up before the court again.

Phillips' ordeal began in 2012, when he declined to bake a custom wedding cake for Charlie Craig and David Mullins. Phillips is a sincere and committed Christian who also doesn't bake Halloween-themed goods and has turned down cake orders meant to celebrate divorces. That didn't matter to the the Colorado's Civil Rights Commission, which initiated a hearing before an administrative law judge after the couple complained. The administrative judge concluded that Phillips's artistic skill was not protected speech and the state Civil Rights Commission upheld that ruling. The majority, which included Stephen Breyer and Elena Kagan, paid close attention to how the commission treated Phillips and found the commissioners' behavior wanting. One of them went so far as to compare Phillips, whose father was part of the force that liberated Buchenwald, to a Nazi. (For more on Phillips and the specifics of his case, see my interview with him from last summer.)

The court ruled that the government has an obligation to act neutrally with regard to religious beliefs when evaluating whether forcing someone to violate those beliefs is ultimately in the public interest, and that that the commission did not do so in regard to Phillips. The majority opinion written by Anthony Kennedy, the court's swing vote and author of *Obergefell* majority opinion, really hammered this point home:

The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects discrimination on the basis of religion as

well as sexual orientation. The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

This is hardly the outcome religious freedom advocates were hoping for, in what is otherwise a significant win for their cause. However, this smackdown of the hostility displayed shouldn't be dismissed as a technicality, either. Certain elements of the left were pushing for declaring certain commonly held religious beliefs to be defined as bigotry, in what has become an accepted legal tactic. Recall that Tim Gill, an architect of the gay marriage legalization effort, and the current push for SOGI (sexual orientation and gender identity) laws, told *Rolling Stone* that the intention behind these efforts was to "punish the wicked." Monday's ruling means that mounting legal arguments and PR campaigns without acknowledging the open hostility to religion may prove tricky and outright damaging to the cause going forward.

The decision essentially punts on the central questions of the case: Is Jack Phillips's artistic skill in baking cakes that he sells protected speech, or is it merely commerce with no expressive significance? Here Kennedy simply lays out the dilemma neutrally without weighing in:

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

However, that Kennedy understands and even outlines the distinction here is a win for religious freedom advocates. The argument against letting business owners refuse to perform services that violate their beliefs has long hinged on the application of public accommodation laws, which are designed to broadly prevent discrimination. However, there's a fundamental difference between, say, an African American sitting at a lunch counter asking for the same symbolically insignificant sandwich being served to the white guy next to him, and a customer demanding a custom product that requires its creator to express a specific opinion, even if it goes against his

beliefs. Gay rights activists have taken the public accommodation argument to such an extreme that there is a case in Kentucky against a Christian T-shirt printer who declined to print shirts for a gay-pride festival. If public accommodation laws can force the owner of a literal printing press to print words he doesn't agree with, it would seem to undercut the First Amendment considerably. (The Kentucky Court of Appeals ruled in favor of the printer last year, though the case is ongoing.)

Kennedy also noted that the issue of conscience protections for business owners must be enforced fairly, and this raises significant questions about the state effectively telling you what you can and cannot say:

On at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included "wording and images [the baker] deemed derogatory" .... Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies," … to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Finally, it's worth noting the fact the case was narrowly tailored is not necessarily a bad omen for religious freedom advocates. That the case was more narrowly decided likely contributed to the fact that it was a 7-2 decision, which sends a signal suggesting the encouraging predicates described above for settling the bigger free expression questions are durable.

That's key because it seems unlikely that the court is going to dodge the question of what constitutes free expression here forever. In fact, there's a similar case in Washington state involving a florist, Barronelle Stutzman, who was sued for refusing to do the flowers for the wedding of a regular customer she'd otherwise been serving for years. Ilya Shapiro, a constitutional lawyer at the Cato Institute observes, "Indeed, the petition of the Washington florist, *Arlene's Flowers v. Washington*, is currently pending before the court; with today's narrow ruling, the justices can't simply send that case back to the state supreme court for reevaluation." While this ruling is a definite win for religious liberty advocates, much remains unresolved and it seems likely the court will be forced to address the issues it sidestepped here before long.