

2018

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## Recommended Citation

Leonard, Arthur S., "Anti-Gay Colorado Baker Prevails in Narrow Ruling" (2018). *Other Publications*. 360.  
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# Anti-Gay Colorado Baker Prevails in Narrow Ruling

Supreme Court finds Colorado agency showed “hostility” to religious claims

BY ARTHUR S. LEONARD

The US Supreme Court ruled on June 4 that overt hostility to religion tainted the decision process at the Colorado Civil Rights Commission when it ruled that baker Jack Phillips and his Masterpiece Cakeshop had unlawfully discriminated against Charlie Craig and Dave Mullins in 2012 by refusing to make them a wedding cake.

Writing for the court, Justice Anthony M. Kennedy reaffirmed the right of the states to ban discrimination because of sexual orientation by businesses that sell goods and services to the public, but insisted that those charged with discrimination are entitled to a respectful consideration of their religious beliefs when their cases are adjudicated.

Five other members of the court — Chief Justice John Roberts and Justices Samuel Alito, Stephen Breyer, Neil Gorsuch, and Elena Kagan — joined Kennedy’s opinion.

The majority’s focus on a flawed procedure at the Colorado Civil Rights Commission suggests this ruling, controversial as it is, may be of limited significance in other cases involving claims of religious exemption from LGBTQ non-discrimination protections.

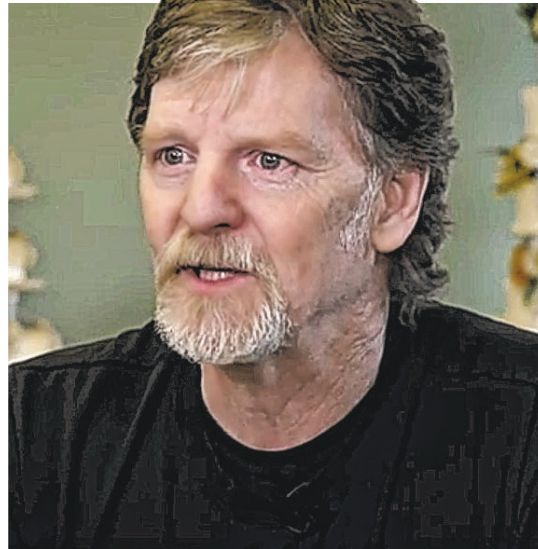
Kennedy found that the Commission failed in meeting the requirement that government be neutral in matters of religion. During the case’s oral argument in December he had signaled this concern, making a troubling observation during Colorado Solicitor General Frederick Yarger’s defense of the state court’s decision against the baker.

“Counselor, tolerance is essential in a free society,” Kennedy said to Yarger. “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’s religious beliefs.”

In his opinion this week, Kennedy, pointing to comments made by two Commission members at hearings in the case, said, “The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”

Kennedy continued, “One commissioner suggested that Phillips can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state.’” This commissioner also said, “If a businessman wants to do business in the state and he’s got an issue with the — the law’s impacting his personal belief system, he needs to look at being able to compromise.”

At a second hearing, a different commissioner talked about how “freedom of religion and reli-



Jack C. Phillips, owner of Masterpiece Cakeshop, Ltd.

gion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be — I mean, we — we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others.”

Kennedy found that in making these remarks, the two commissioners — who had an obligation to be neutral — in fact disparaged religion. He emphasized that the record of the hearings “shows no objection to these comments from other commissioners” and that the state Court of Appeals ruling affirming the Commission’s decision did not mention them either.

## Precedents Cited by Justice Kennedy

Kennedy invoked a 1993 decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, where the Supreme Court held that overtly anti-religious bias by a Florida legislative body that enacted a ban on the ritual slaughter of chickens directly aimed at the practices of a minority religious sect violated the Constitution’s Free Exercise Clause. Even though the law, on its face, was neutral with respect to religion and so would normally be enforceable against anyone who engaged in the prohibited practice, the court found that the openly stated anti-religious sentiments of the legislative sponsors undercut the requirement that government be neutral regarding religious practices. The only reason the municipality had passed the ordinance was to forbid ritual slaughter of chickens by members of this particular religious sect, the court held, and so it was not a neutral law.

Similarly in this case, Kennedy said, evidence of hostility to religion by the Commission mem-

bers tainted the process.

Kennedy observed that when the high court decided in 2015 that same-sex couples have a fundamental right to marry, it had also noted that “the First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.”

At that time, dissenting Justices Alito and Antonin Scalia had emphasized the inevitable future clashes as people with religious objections confronted the reality of same-sex marriages, and Scalia — as was his practice when he dissented from Kennedy’s gay rights majority opinions — ridiculed Kennedy’s statements for falling short of addressing that likelihood.

Kennedy statements in this case do not suggest that religious objectors enjoy a broad exemption from complying with public accommodations laws.

## Concurrences from the Left and Right

Kagan filed a concurring opinion, joined by Breyer, generally joining the court’s reasoning but disavowing Kennedy’s reliance on evidence from a stunt conceived by William Jack, a religious opponent of same-sex marriage who filed an amicus brief in the case. When he heard about the Masterpiece Cakeshop discrimination charge, Jack approached three other Colorado bakers, asking them to make a cake decorated with pictures and Biblical quotations derogatory of same-sex marriage and gay people, and all three bakers refused his request because they found the desired product to be offensive.

Jack filed charges of religious discrimination against them, but the Colorado Commission rejected his charges, finding the bakers had a right to refuse to make cakes conveying messages they found offensive. Jack then argued — persuasively, in the view of Kennedy, Roberts, Alito, and Gorsuch — that the Commission’s different treatment of these three bakers compared to Jack Phillips showed its hostility to religious beliefs. Justice Clarence Thomas, whose separate concurring opinion was joined by Gorsuch, also found Jack’s arguments persuasive.

Kagan’s concurrence argued that the case involving the three other bakers was distinguishable. Jack had asked the bakers to make a cake they would have refused to make for any customer, regardless of their religion or sexual orientation, she pointed out. By contrast, Phillips refused to make a wedding cake he would happily have sold to different-sex couples but refused to sell to same-sex couples.

Gorsuch, in his separate concurrence, in

which he was joined by Alito, argued that the three bakers were discriminating against Jack based on his religious beliefs. He also insisted on distinguishing between a cake to “celebrate a same-sex marriage” and a generic “wedding cake.”

Interestingly, Kennedy’s opinion focused on free exercise of religion and evaded ruling on the other main argument advanced by Phillips: that requiring him to bake the cake would be a form of compelled speech prohibited by the First Amendment freedom of speech clause. The Trump administration had come into the case in support of Phillips’ appeal, but limited its argument to the free speech contention, which Gorsuch and Thomas embraced in their concurring opinions.

### Justice Ginsburg’s Dissent, Joined by Justice Sotomayor

Justice Ruth Bader Ginsburg dissented in an opinion joined by Justice Sonia Sotomayor, minimizing the significance of the statements by the two Colorado commissioners.

“Whatever one may think of the statements in historical context,” Ginsburg wrote, “I see no reason why the comments of one or two commissioners should be taken to overcome Phillips’ refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one.”

The state’s Civil Rights Division and an administrative law judge considered Craig and Mullins’ complaint before it went to the Commission, whose finding was upheld by the Colorado Court of Appeals.

“What prejudice infected the determinations of the adjudicators in the case before and after the Commission?,” Ginsburg wrote. “The Court does not say. Phillips’ case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council.”

Ginsburg focused her dissent on a series of statements in Kennedy’s opinion that make clear that the court’s ruling does not endorse some sort of broad exemption for religious from complying with anti-discrimination laws, including the following:

“It is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”

“Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services



AMERICAN CIVIL LIBERTIES UNION  
Charlie Craig and David Mullins, whose sexual orientation discrimination complaint against Masterpiece Cakeshop, led to this week’s Supreme Court ruling.

they choose on the same terms and conditions as are offered to other members of the public.”

“Purveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying ‘no goods or services will be sold if they will be used for gay marriages.’”

“[Gay people should not be subjected to] indignities when they seek goods and services in an open market.”

All of these statements, Ginsburg noted, “point in the opposite direction” from the majority’s finding that Phillips should win his appeal.

The narrowness and potentially limited precedent established by the ruling were well expressed by Kennedy, who wrote, “The delicate question of when the free exercise of [Phillips’] religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.”

### The Issue of Free Speech

Gorsuch and Thomas would have gone beyond the majority opinion to find a violation of Phillips’ freedom of speech, as well. On that question, Kennedy wrote, “The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.” He took the issue no further, however.

### What Comes Next

The next shoe to drop, which could better clarify the significance of this ruling, may come quickly. The high court, also on June 4, announced it will discuss a similar case, *State of Washington v. Arlene’s Flowers, Inc.*, on June 7; if the case is accepted for review that would likely be announced on June 11.

Arlene’s Flowers refused to provide floral arrangements for a same-sex wedding and was found by the state civil rights agency and the Washington courts to be in violation of its public accommodations statute. Arlene’s petition for Supreme Court review was filed last summer, but no action was taken by the court pending a decision on Masterpiece Cakeshop. If the court denies the petition, that would reinforce the view that the Masterpiece ruling is narrowly focused on the evidence of “hostility to religion” by the Colorado Civil Rights Commission.

However, the court might grant the petition and send the case back to the Washington Supreme Court for reconsideration in light of Masterpiece. This could respond to Kennedy’s observation that the Colorado Court of Appeals decision did not even mention the remarks made by commissioners that aroused his ire at oral argument and were a significant factor in the Supreme Court’s decision. A remand to the Washington court could implicitly direct that court to examine the record for any signs of hostility to religion at any stage in that proceeding.

The Oregon Supreme Court recently heard oral argument in a similar wedding cake case, *Klein d/b/a Sweetcakes by Melissa v. Oregon Bureau of Labor and Industries*. A ruling by the Oregon court could provide the first sign of how lower courts will interpret Masterpiece Cakeshop. That case was instigated not by the same-sex couple denied service but rather by the state’s attorney general, reacting to press reports about the denial.

It can be difficult to predict what controversial decisions by the Supreme Court might mean for future cases. Kennedy spelled out his thinking on that, saying, “The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”

At the oral argument, Phillips and Masterpiece Cakeshop were represented by Kristen K. Waggoner of Alliance Defending Freedom, the Arizona-based anti-LGBTQ religious advocacy firm. Trump administration Solicitor General Noel J. Francisco made his first appearance before the court in that post to argue the administration’s unavailing freedom of speech position. On the other side, David D. Cole, an American Civil Liberties Union attorney, arguing on behalf of Craig and Mullins, joined Colorado Solicitor General Yarger.