



# *Masterpiece Cakeshop*: Proving Government Hostility to Religion

June 5, 2018

On June 4, 2018, the Supreme Court released its much-anticipated [decision](#) in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. The case presented a dispute between the State of Colorado and a baker who refused to make a wedding cake for a same-sex wedding. The state argued that this refusal violated its laws prohibiting businesses that serve the public, known as places of public accommodation, from discriminating on certain protected grounds, including sexual orientation. The baker [had argued](#) that the state’s enforcement of its anti-discrimination laws violated his First Amendment rights of free speech and free exercise of religion. While much of the briefing before the Court focused on the baker’s free speech claims, the Court, in a 7-2 ruling authored by Justice Anthony Kennedy, ultimately ruled for the baker on free exercise grounds. In so doing, the Court avoided many of the most difficult issues presented by the free speech claims, such as whether making a cake can be deemed to be an expressive activity protected by the Free Speech Clause, and if so, whether the First Amendment’s protections against compelled expression require a carve-out from Colorado’s public accommodations law. Instead, the Court’s heavily fact-dependent decision turned on the state’s reasoning underlying its decision to enforce the anti-discrimination statute in this particular instance. Nonetheless, the opinion is significant because it clarifies what kind of government action suffices to demonstrate a hostility to religion that will invalidate an enforcement action—and underscores the importance of government neutrality towards religion, especially when evaluating claims by the religious to the protection of the First Amendment.

This Sidebar begins by reviewing the broad constitutional principles underlying the central rationale for the *Masterpiece Cakeshop* decision, then discusses the specifics of the decision and the importance of the case moving forward.

## **Legal Background on the Free Exercise Clause**

The First Amendment’s Free Exercise Clause, which is applicable to the states through the Fourteenth Amendment’s Due Process Clause, “[protects religious observers from unequal treatment](#)” by the government. The seminal case governing free exercise challenges, decided by the Supreme Court in 1990, is *Employment Division v. Smith*. In that case, two members of a Native American church who had used peyote for sacramental purposes brought a free exercise claim challenging the decision of the State of Oregon to deny them unemployment benefits because they had violated Oregon’s drug laws. In an

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opinion written by Justice Scalia, the Court [rejected](#) this challenge, stating that Free Exercise Clause did not excuse the church members from complying with Oregon’s general criminal laws prohibiting the use of peyote. Justice Scalia reasoned that so long as an otherwise valid law is neutral and generally applicable, any incidental effect on a person’s exercise of religion does not violate the First Amendment.

Three years later, in *Church of Lukumi Babalu Aye v. City of Hialeah*, the Court struck down a set of ordinances enacted by a Florida city that had the “impermissible object” of targeting “conduct motivated by religious beliefs” and therefore violated “the principle of general applicability” announced in *Smith*. The ordinances at issue in *Lukumi* prohibited animal sacrifice, making certain exemptions for animals killed for food consumption. These ordinances were passed in direct response to the establishment of a Santeria church within the city and city residents’ concerns about the Santeria practice of animal sacrifice. The Court [concluded](#) that the circumstances surrounding the passage of the ordinance “compel[led] the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.” The text of the ordinances suggested that they targeted religion, and in practice, their operation accomplished a “[religious gerrymander](#)” by prohibiting very little conduct other than Santeria sacrifice. Accordingly, unlike the law at issue in *Smith*, the ordinance in *Lukumi* was subject to strict scrutiny, and the Court held that it [failed](#) to meet that “rigorous” standard.

Justice Scalia wrote separately in *Lukumi* to say that he [disagreed](#) with the lead opinion’s consideration of “the subjective motivation of the *lawmakers*,” as opposed to a focus on “the object of the *laws*,” in determining whether a free exercise violation had occurred. This concern stemmed from Justice Scalia’s general unease with focusing on legislative “motive,” and his [belief](#) that “it is virtually impossible to determine the singular ‘motive’ of a collective legislative body.” Accordingly, he concluded that the First Amendment required a focus not on legislative intent, but on a law’s effects. In 2016, in an opinion dissenting from the Court’s decision to deny certiorari in the case of *Stormans, Inc. v. Wiesman*, Justice Alito [noted](#) that it remained “an open question whether a court considering a free exercise claim should consider evidence of individual lawmakers’ personal intentions.” As a result, some [lower courts](#) have considered the statements of individual governmental decisionmakers as evidence of impermissible governmental hostility to religion.

### ***Masterpiece Cakeshop: Factual Background***

*Masterpiece Cakeshop* began when [Charlie Craig and David Mullins](#) asked [Jack Phillips](#), a baker who owns the Colorado business Masterpiece Cakeshop, to make a cake for their wedding. Phillips declined without discussing the details of the request, stating that because of his religious beliefs, he does not make cakes for same-sex weddings. The couple then filed a claim with the state alleging that Phillips had violated the [Colorado Anti-Discrimination Act](#) by discriminating against them on the basis of their sexual orientation. Colorado has set up an [administrative system](#) to resolve claims of discrimination under this Act. The final step in the administrative process is a public hearing before the Colorado Civil Rights Commission (Commission). During the adjudication of Phillips’ case before the Commission, one commissioner [said](#):

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust . . . 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 [sic] use their religion to hurt others.

Ultimately, the Commission agreed with Craig and Mullins that Phillips had violated the state’s anti-discrimination law and entered an [order](#) requiring Phillips to “cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples.”

Phillips challenged this order in state court, arguing that it violated his rights under the First Amendment to free speech and free exercise of religion. The state courts affirmed the order, **holding** that Colorado's anti-discrimination law was neutral and generally applicable under *Smith* and withstood rational basis review. The lower court also rejected Phillips' argument that the Commission had treated his case differently than other cases involving discrimination by bakers. Specifically, Phillips noted the case of another Colorado citizen, William Jack, who had filed three claims of discrimination with the state after he was denied service at three Colorado bakeries. Jack had **sought** to purchase custom cakes that contained verses from the Bible and imagery expressing his opposition to same-sex marriage. He **claimed** that the bakeries had impermissibly denied him service on the basis of his Christian "**creed**." In all three of Jack's claims, however, the Commission **concluded** that the bakeries had not violated the **Colorado Anti-Discrimination Act**. Phillips contended that the disparity in the Commission's treatment of these bakery cases was due to hostility toward Phillips' religious beliefs. The state court **rejected** this argument, concluding that the bakeries in Jack's cases declined to serve Jack "because of the offensive nature of the requested message" and not because of religious animus. By contrast, in the lower court's view, Phillips had impermissibly refused service on the basis of the clients' sexual orientation. As discussed in a **previous Sidebar**, Phillips again raised his First Amendment arguments on appeal to the Supreme Court.

### ***Masterpiece Cakeshop: Decision***

In *Masterpiece Cakeshop*, the Supreme Court **reversed** Colorado's action, with seven members of the Court ruling for the baker. Justice Kennedy's opinion for the Court was joined by five other Justices—all but Justice Thomas, who concurred in the judgment, and Justices Ginsburg and Sotomayor, who dissented. Justice Kennedy began the opinion by noting the difficulty of the issues facing the Court, **stating** that the case presented a clash between the state's authority to protect the "rights and dignity of gay persons" facing discrimination in public accommodations, and "the right of all persons to exercise fundamental freedoms" protected by the First Amendment. While **noting** that "religious and philosophical objections to gay marriage" generally do not allow business owners to deny service to persons protected under neutral public accommodations laws, the Court nonetheless resolved the case in Phillips's favor because of the peculiarities of the underlying state proceedings.

Citing *Lukumi*, Justice Kennedy's majority opinion **held** that "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." The Court highlighted two aspects of the state proceedings that "**compromised**" Phillips' entitlement to "neutral and respectful consideration" of his claims. First, the Court concluded that the Commission exhibited religious hostility at its formal hearings on Phillips' claims. In particular, the Court **noted** one Commissioner's statement describing "a man's faith as 'one of the most despicable pieces of rhetoric that people can use.'" In the view of the Court, this statement disparaged religion and **showed** that the state had not acted with the required neutrality towards religion. The Court **noted** that while it is not entirely clear under *Lukumi* whether "statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion," Phillips' case was different, because the problematic remarks were made "by an adjudicatory body deciding a particular case."

Second, the Court found evidence of "hostility" by the state in its disparate treatment of various bakers who objected to baking a cake on the basis of conscience. Comparing the Commission's resolution of Jack's three claims to its decision in Phillips' claim, the Court **agreed** with Phillips that the Commission—and the Colorado state courts—had erred when it "treated the other bakers' conscience based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves." As **stated** in the majority opinion, "a principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness." In so concluding, the

Court drew from [cases](#) interpreting the Free Speech Clause of the First Amendment to [state](#) that the government may not “prescribe what shall be offensive.”

Although the Court’s ruling was 7-2 for the baker, the dispute elicited a number of concurring opinions that addressed some of the more difficult issues raised by the case, revealing division on the issues avoided by the majority opinion. Justice Kagan, joined by Justice Breyer, authored a concurring opinion that emphasized that the ruling was a narrow one, as the central problem in this case was the Commission’s “[legal reasoning](#).” Specifically, Justice Kagan [agreed](#) that the Commission’s consideration of the “offensiveness” of the messages requested by Jack was inappropriate. However, she [argued](#) that the Commission could have distinguished Jack’s cases from Phillips’ case on an “obvious” and constitutionally permissible basis: that “the three bakers in the Jack cases did not violate that law,” while Phillips did. She [noted](#) that while the bakers who refused Jack’s requests would not have made the anti-homosexuality cakes for any customer, Phillips declined to make a cake—a wedding cake—for a same-sex couple that he *would* have made for an opposite sex couple. Justice Ginsburg echoed this view in her dissent, [arguing](#) that what differentiated the two cases was “the role the customer’s ‘statutorily protected trait’ played in the denial of service.” In [her opinion](#), the state correctly concluded that “Craig and Mullins were denied service based on an aspect of their identity.”

In contrast, Justice Gorsuch, in a concurring opinion joined by Justice Alito, argued that the Jack cases were not distinguishable from Phillips’ case, [claiming](#) that “in both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.” [In his view](#), it was constitutionally impermissible to simply “slide up a level of generality to redescribe Mr. Phillips’s case as involving only a wedding cake like any other,” rather than as a cake celebrating same-sex weddings, because the state did not “play with the level of generality in Mr. Jack’s case in this way. [The state] didn’t declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them.” In this vein, he [argued](#) that adopting Justice Kagan’s opinion “would invite civil authorities to gerrymander their inquiries based on the parties they prefer.”

Justice Thomas wrote separately to address Phillips’ free speech claim, explaining that [in his view](#), Colorado’s reasoning “flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak.” He [concluded](#) that “Phillips’ creation of custom wedding cakes is expressive” and protected by the First Amendment, and accordingly, [determined](#) that “Colorado’s public accommodations law cannot penalize [that conduct] unless the law withstands strict scrutiny.” In contrast, Justice Ginsburg, in a dissent joined by Justice Sotomayor, dismissed Phillips’ free speech claims, [stating](#) that the baker had “submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker’s, rather than the marrying couple’s.”

In addition, with regard to the free exercise claims, Justice Ginsburg [argued](#) that there was no evidence that any “prejudice infected” the proceedings as a whole. She [would have held](#) that “the comments of one or two Commissioners” did not invalidate the entire proceedings, which “involved several layers of independent decisionmaking.”

## Implications

[Commentators are describing](#) the Court’s decision as narrow. Justice Kennedy’s majority opinion limited the Court’s holding to the specific facts of the particular adjudication it was reviewing and [noted](#) that in evaluating claims of free speech or free exercise of religion, factual “details might make a difference.” The Court left open the question whether a state could enforce its anti-discrimination laws to require businesses to provide services for same-sex weddings if the state proceedings did not contain statements evidencing hostility to religion. Notably, on the same day it issued the decision in *Masterpiece Cakeshop*, the Court [distributed](#) for conference discussion another appeal presenting many of the same issues as that

case. As described in [this Sidebar](#), in that case, a florist had refused to provide floral arrangements for a same-sex couple’s wedding. If the Court takes up that case, it could again consider many of the issues left open by its opinion in *Masterpiece Cakeshop*.

However, *Masterpiece Cakeshop* is significant on its own terms. It partially resolved the issue of when statements of individual governmental decisionmakers can demonstrate unconstitutional hostility to religion, by clarifying that isolated comments in the context of an adjudication can suffice to render a decision unconstitutional. Additionally, the Court [announced](#) that in the context of the enforcement of an antidiscrimination statute, governments may not regulate conduct on the basis of “the government’s own assessment of offensiveness.” The Court [concluded](#) that when Colorado “elevate[d] one view of what is offensive,” it sent an unconstitutional “signal of official disapproval of Phillips’ religious beliefs.” In so holding, the Court indicated that when the government enforces a public accommodations law, it must act with neutrality in assessing claims against places of public accommodations accused of discrimination, whether those entities claim religious or secular objections. The question left open by the opinion—one that will likely be the subject of future litigation—is what principles are sufficiently neutral to ensure that such disputes are “resolved . . . without undue disrespect to sincere religious beliefs,” while simultaneously not “subjecting gay persons to indignities when they seek goods and services in an open market.”

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