

In Narrow Decision, Supreme Court Sides With Baker Who Turned Away Gay Couple



Jack Phillips, the owner of Masterpiece Cakeshop, leaving the Supreme Court in December. The court said on Monday that a Colorado panel's decision against him had been infected by religious animus. Credit Zach Gibson for The New York Times

WASHINGTON — The Supreme Court on Monday ruled in favor of a Colorado baker who had refused to create a wedding cake for a gay couple. The court's decision was narrow, and it left open the larger question of whether a business can discriminate against gay men and lesbians based on rights protected by the First Amendment.

The court passed on an opportunity to either bolster the right to same-sex marriage or explain how far the government can go in regulating businesses run on religious principles. Instead, Justice Anthony M. Kennedy's majority opinion turned on the argument that the Colorado Civil Rights Commission, which originally ruled against the baker, had been shown to be hostile to religion

because of the remarks of one of its members.

At the same time, Justice Kennedy strongly reaffirmed protections for gay rights.

“The outcome of cases like this in other circumstances must await further elaboration in the courts,” he wrote, “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.”

Justice Kennedy often casts the deciding vote in closely divided cases on major social issues. When the court agreed to hear the Colorado case last June, it seemed to present him with a stark choice between two of his core commitments. On the one hand, Justice Kennedy has written every major Supreme Court decision protecting gay men and lesbians. On the other, he is the court’s most ardent defender of free speech.

On Monday, Justice Kennedy chose a third path, one that seemed to apply only to the case before the court.

Writing for the majority in the 7-to-2 decision, he said the Civil Rights Commission’s ruling against the baker, Jack Phillips, had been infected by religious animus. He cited what he said were “inappropriate and dismissive comments” from one commissioner in saying that the panel had acted inappropriately and that its decision should be overturned.

“The neutral and respectful consideration to which Phillips was entitled was compromised here,” Justice Kennedy wrote. “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.”

That passage echoed his plea for tolerance in his majority opinion in 2015 in *Obergefell v. Hodges*, which recognized a constitutional right to same-sex marriage. In that decision, he called for “an open and searching debate” between those who opposed same-sex marriage on religious grounds and those who considered such unions “proper or indeed essential.”

When the Colorado case was argued in December, Justice Kennedy seemed frustrated with the main choices available to him and hinted that he was looking

for an off ramp. His questions suggested that his vote had not been among the four that had been needed to add the case to the court's docket.

The breadth of the court's majority was a testament to the narrowness of the decision's reasoning. Chief Justice John G. Roberts Jr. and Justices Stephen G. Breyer, Samuel A. Alito Jr., Elena Kagan and Neil M. Gorsuch joined Justice Kennedy's majority opinion. Justice Clarence Thomas voted with the majority but would have adopted broader reasons.

Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented.

The case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111, arose from a brief encounter in 2012, when David Mullins and Charlie Craig visited Mr. Phillips's bakery, Masterpiece Cakeshop, in Lakewood, Colo. The two men were going to be married in Massachusetts, and they were looking for a wedding cake for a reception in Colorado.

Mr. Phillips turned them down, saying he would not use his talents to convey a message of support for same-sex marriage at odds with his religious faith. Mr. Mullins and Mr. Craig said they were humiliated by Mr. Phillips's refusal to serve them, and they filed a complaint with Colorado's Civil Rights Commission, saying that Mr. Phillips had violated a state law barring discrimination based on sexual orientation.

Mr. Mullins and Mr. Craig won before the commission and in the state courts.

The Colorado Court of Appeals ruled that Mr. Phillips's free speech rights had not been violated, noting that the couple had not discussed the cake's design before Mr. Phillips turned them down. The court added that people seeing the cake would not understand Mr. Phillips to be making a statement and that he remained free to say what he liked about same-sex marriage in other settings.

Though the case was mostly litigated on free speech grounds, Justice Kennedy's opinion barely discussed the issue. Instead, he focused on what he said were flaws in the proceedings before the commission. Members of the panel, he wrote, had acted with "clear and impermissible hostility" to sincerely held religious beliefs.

One commissioner in particular, Justice Kennedy wrote, had crossed the line in

saying that “freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust.”

Justice Kennedy wrote that “this sentiment is inappropriate for a commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s anti-discrimination law.”

In dissent, Justice Ginsburg said that a few stray remarks were not enough to justify a ruling in Mr. Phillips’s favor.

“What prejudice infected the determinations of the adjudicators in the case before and after the commission?” Justice Ginsburg asked. “The court does not say.”

Justice Kennedy wrote that the commission had also acted inconsistently in cases involving an opponent of same-sex marriage, “concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages.”



Protesters outside the Supreme Court after the ruling, which one gay rights group said “offered dangerous encouragement to those who would deny civil rights to L.G.B.T. people.” Credit Tom Brenner/The New York Times

In dueling concurring opinions, two sets of justices debated how central that last

observation was to the court's decision. Justice Kagan, joined by Justice Breyer, said such differing treatment could be justified. Justice Gorsuch, joined by Justice Alito, disagreed, saying that "the two cases share all legally salient features."

In another concurring opinion, Justice Thomas, joined by Justice Gorsuch, said he would have ruled in favor of Mr. Phillips on free speech grounds. Mr. Phillips's cakes are artistic expression worthy of First Amendment protection, Justice Thomas wrote, and requiring him to endorse marriages at odds with his faith violated his constitutional rights.

In dissent, Justice Ginsburg disagreed with that analysis and noted that the majority had not adopted it. She wrote that there was no reason to think that people seeing a wedding cake made by Mr. Phillips would understand it to be conveying his views on same-sex marriage.

Alliance Defending Freedom, which represented Mr. Phillips, said the ruling was a victory for religious liberty.

"Government hostility toward people of faith has no place in our society, yet the State of Colorado was openly antagonistic toward Jack's religious beliefs about marriage," said Kristen Waggoner, a lawyer with the group. "The court was right to condemn that. Tolerance and respect for good-faith differences of opinion are essential in a society like ours."

The American Civil Liberties Union, which represented Mr. Mullins and Mr. Craig, said it welcomed the parts of the majority opinion that reaffirmed legal protections for gay men and lesbians.

"The court reversed the Masterpiece Cakeshop decision based on concerns unique to the case but reaffirmed its longstanding rule that states can prevent the harms of discrimination in the marketplace, including against L.G.B.T. people," said Louise Melling, the group's deputy legal director.

Some gay rights groups took a darker view of the decision. "The court today has offered dangerous encouragement to those who would deny civil rights to L.G.B.T. people," said Rachel B. Tiven, the chief executive of Lambda Legal. "We will fiercely resist the coming effort that will seek to turn this ruling into a broad license to discriminate."

Even as she dissented, Justice Ginsburg wrote that “there is much in the court’s opinion with which I agree,” quoting several passages reaffirming gay rights protections.

“Colorado law,” Justice Kennedy wrote in one, “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.”

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