

The Aftermath of the Supreme Court's Decision in *Masterpiece Cakeshop* By J. Dominic Campodonico

Introduction

Most anticipated the United States Supreme Court would provide some much-needed guidance in its October Term 2017 regarding a merchant's right to assert an exemption from anti-discrimination laws based on the merchant's religious beliefs. Up to that point, states and municipalities struggled to find the balance of providing nondiscrimination protections for members of disadvantaged communities while protecting the religious freedom of those that provide public accommodations. *See e.g., Elane Photography v. Willock, cert. denied*, 134 S. Ct. 1787 (2014) (mem.) (United States Supreme Court declining to consider whether a New Mexico photographer had a religious-based right to refuse to be the photographer at a 2007 commitment ceremony between two women) and Jack Linshi, *What You Need to Know About Indiana's Controversial Religious Objection Law*, Time Magazine (March 30, 2015), (<http://time.com/3762656/indiana-religious-objections-law/>) (summarizing Indiana Senate Bill 101, which arguably allowed, before it was amended, businesses "to deny service to gay customers due to their moral or religious convictions.") With that backdrop, in June 2018 the Supreme Court issued its decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (584 U.S. __; 138 S. Ct. 1719). The purpose of this paper is to provide the background and summarize the analysis of the majority opinion in *Masterpiece Cakeshop*, and to identify the unanswered questions that now await "further elaboration" in the courts.

Masterpiece Cakeshop, et al. v. Colorado Civil Rights Commission, et al., 138 S. Ct. 1719 (2018)

Background

Sometimes referred to as the "gay wedding cake" case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* originated in the summer of 2012 when Charlie Craig and David Mullins, a gay couple, were turned away by the owner of a Colorado bakery when they requested a cake to celebrate their upcoming out-of-state wedding¹. The owner, Jack Phillips, advised that he did not create wedding cakes for same-sex weddings because of his religious opposition to such marriages and also because the state of Colorado did not recognize same-sex marriages. *Masterpiece Cakeshop, et al. v. Colorado Civil Rights Commission, et al.*, 138 S. Ct. 1719, 1724 (2018). The couple filed a discrimination complaint asserting a violation of the Colorado Anti-Discrimination Act. The complaint was investigated by the Colorado Civil Rights Division which found that Mr. Phillips had, on multiple occasions, refused to sell both custom wedding cakes and premade cupcakes to same-sex couples because, the owner "had a policy of not selling baked goods to same-sex couples for this type of event." *Id.* at 1726 quoting App. at 73. The Colorado Civil Rights Division then referred the case to the Colorado Civil

¹ As was pointed out in the majority opinion, "[a]t that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their friends and family in Denver." *Masterpiece Cakeshop, et al. v. Colorado Civil Rights Commission, et al.*, 138 S. Ct. 1719, 1724 (2018).

Rights Commission (“Commission”) which conducted formal, public hearings and sent the matter to a state Administrative Law Judge (“ALJ”) who heard evidence, argument and ultimately issued a written decision in favor of the couple. *Id.* at 1725-1726. The Commission affirmed the ALJ’s decision and imposed various remedial measures². *Id.* at 1726. Mr. Phillips “appealed to the Colorado Court of Appeals, which affirmed the Commission’s legal determinations and remedial order.” *Id.* at 1726-1727. The Colorado Supreme Court declined to hear the case but the United States Supreme Court subsequently granted certiorari. *Id.* at 1727 *citing* 582 U.S. ___, 137 S. Ct. 2290 (2017).

Analysis

Writing for the majority, Justice Kennedy commenced the opinion noting that “[t]he case presents difficult questions as to the proper reconciliation of at least two principles,” (1) the authority of a State “to protect the rights and dignity of gay persons” and (2) the rights of all persons to exercise fundamental freedoms under the First Amendment.” *Id.* at 1723. The First Amendment freedoms at issue in the case are freedom of speech and the free exercise of religion because, according to Mr. Phillips, requiring him to create a cake for a same-sex wedding violated these freedoms. *Id.* at 1723 and 1726.

Justice Kennedy noted that “the free speech aspect of this case is difficult” because few persons might have thought that a creation of cake was “an exercise of protected speech.” *Id.* at 1723. Indeed, Mr. Phillips regarded the designing of cakes to be an “artistic skill to make an expressive statement” (*Id.* at 1728) and making a wedding cake for a same-sex couple would require him to convey a message that is inconsistent with his deep and sincere religious beliefs.

One of the difficulties presented as it related to Mr. Phillips’ free speech claim, is the uncertainty in the record “as to the extent of the baker’s refusal to provide services.” *Id.* at 1723. In his concurrence, Justice Thomas described this uncertainty by noting that “the parties dispute whether [Mr.] Phillips refused to create a *custom* wedding cake for the [couple], or whether he refused to sell them *any* wedding cake (including a premade one).” *Id.* at 1740 (Thomas, J., concurring) (emphasis in original). As the majority pointed out, “these details might make a difference” when determining if the creation of a cake is protected speech. *Id.* at 1723.³

The majority, however, was more concerned about the free exercise claim. It noted that the Administrative Law Judge, as well as the Colorado Court of Appeals, found the Colorado Anti-Discrimination to be “a valid and neutral law of general applicability” consistent with the Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Masterpiece Cakeshop, supra*, 138 S. Ct. at 1726-1727. Indeed, the Court noted that “the owner of a business serving the public [] might have his right to the free exercise of religion limited by generally applicable laws.” *Id.* at 1723-1724. Moreover, the Court acknowledged that “serious stigma” would be imposed on gay persons if “all purveyors of goods

² The Commission does not have the authority to assess money damages or fines. *Id.* at 1725.

³ For his part, Justice Thomas noted that the Colorado Court of Appeals resolved this factual dispute in favor of Mr. Phillips. *Id.* at 1740 (Thomas, J. concurring).

and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying ‘no goods or services will be sold if they will be used for gay marriages.’” *Id.* at 1728-1729.

What concerned the Court, however, was whether Mr. Phillips was afforded “neutral and respectful consideration of his claims in all the circumstances of this case.” *Id.* at 1729. Focusing on the actions of the Colorado Civil Rights Commission, the Court found that “[t]he neutral and respectful consideration to which [Mr.] Phillips was entitled was compromised” by “elements of a clear and impermissible hostility toward [Mr. Phillips’] sincere religious beliefs.” *Ibid.* Justice Kennedy cited examples from the formal, public hearings wherein commissioners made, what can be viewed as “inappropriate and dismissive comments showing lack of due consideration for [Mr.] Phillips’ free exercise rights and the dilemma he faced.”⁴ *Ibid.*

The Court noted that the indications of hostility were not limited to the statements made by the members of the Commission. Specifically, the Court observed different treatment by the Commission in “Mr. Phillips’ case and [in] the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.”⁵ *Id.* at 1730. The Court found that “the Commission’s disparate consideration of [Mr.] Phillips’ case compared to the cases of other bakers” is suggestive of hostility that is “inconsistent with what the Free Exercise Clause requires.” *Id.* at 1732.

The Court held that the Commission’s actions violated the Free Exercise Clause because the Commission lacked religious neutrality when considering Mr. Phillips’ case. *Id.* at 1732. As such, the Court set aside the Commission’s order and reversed the judgment of the Colorado Court of Appeals. *Ibid.* In doing so, the Court acknowledged that “[t]he outcome of cases like this in other circumstances must await further elaboration in the courts.” *Ibid.*

⁴ The Court took particular exception to the statements made by one commissioner at a public hearing held on July 25, 2014:

“I would like to reiterate what we said in the hearing or the last meeting. 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, 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.”

Ibid. citing Tr. 11-12.

⁵ According to his amicus brief, William Jack is a Christian educator in Colorado who was refused service at three Colorado bakeries when he requested “cakes in the shape of a Bible to be decorated with the text of three Bible verses.” *Brief of Amici Curiae William Jack and the National Center for Law and Policy in Support of Petitioners* at 1. Others have pointed out that Mr. Jack “isn’t just a guy who wanted a cake. He’s a foot soldier in the religious-right evangelical movement.” Stephanie Mencimer, *Did the Supreme Court Fall for a Stunt?*, Mother Jones (June 7, 2018) (<https://www.motherjones.com/politics/2018/06/did-the-supreme-court-fall-for-a-stunt/>). Mr. Jack’s requested cake has been described as “a Bible-shaped cake decorated with an image of two grooms covered by a red X, plus the words ‘God hates sin. Psalm 45:7’ and ‘Homosexuality is a detestable sin. Leviticus 18:22.’” John Corvino, *Opinion: Drawing the Line in the ‘Gay Wedding Cake’ Case*, New York Times (November 27, 2017) (<https://www.nytimes.com/2017/11/27/opinion/gay-wedding-cake.html>)

Key Questions Left Unanswered That Await Further Elaboration in the Courts

In the immediate aftermath of the *Masterpiece Cakeshop* decision, legal observers commented on the narrow ruling (being confined to the actions of the Commission) and many attempted to predict the outcome of a future case based on the makeup of the concurring and dissenting opinions. While seven justices held for Mr. Phillips (five of which joined Justice Kennedy's majority opinion), the analysis of the Commission's "disparate treatment" illustrated by the three bakeries that refused to make the William Jack cakes (footnote 5, *supra*) triggered a battle of concurrences.

Concurring and Dissenting Opinions

Justice Kagan, joined by Justice Breyer, agreed that the Commission did not satisfy its obligation to give "neutral and respectful consideration" to Mr. Phillips' views. *Id.* at 1732 (Kagan, J. concurring). However, Justice Kagan wrote a concurrence to highlight the inapplicability of the Colorado Anti-Discrimination Act to the cakes requested by William Jack. Specifically, the Colorado Anti-Discrimination Act makes it unlawful for a place of public accommodation to deny goods and services to individuals based on certain characteristics, including sexual orientation. *Id.* at 1733 (Kagan, J. concurring). The bakeries that refused to create the cakes requested by William Jack did not deny goods and services based on any of the protected characteristics. Rather, in refusing William Jack's request, the bakers treated him the same way they would have treated anyone else. *Ibid.* (Kagan, J. concurring).

Justice Gorsuch, joined by Justice Alito, had the opposite view. Justice Gorsuch viewed the denials by the bakeries to create the cakes requested by William Jack to be a form of religious discrimination, a violation of the Colorado Anti-Discrimination Act, because William Jack sought cakes that reflected his religious beliefs. *Id.* at 1735 (Gorsuch, J. concurring).

Justice Thomas wrote separately, joined by Justice Gorsuch. Justice Thomas agreed there was a violation of Mr. Phillips' right to freely exercise his religion but also addressed Mr. Phillips' freedom of speech rights. Specifically, Mr. Phillips was being asked to use "his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage." *Id.* at 1743 (Thomas, J. concurring). This, to Justices Thomas, "clearly communicates a message." *Ibid.* As such, it is protected First Amendment speech.

Finally, Justice Ginsburg dissented, joined by Justice Sotomayor. Rejecting Mr. Phillips' free exercise and free speech claims, Justice Ginsburg did not believe the Commission's actions pertaining to the cakes requested by William Jack were indicative of any hostility toward religion. Moreover, Justice Ginsburg contends that the statements made at the Commission's public hearings do not support the Court's holding and there is "no reason why the comments of one or two Commissioners should be taken to overcome [Mr.] Phillips' refusal to sell a wedding cake to [the couple]." *Id.* at 1751 (Ginsburg, J. dissenting).

Cases and Claims on the Horizon

Everyone agrees that this issue will reach the Court again. One matter, *Arlene Flowers v. Washington*, is included in a group of merged civil suits brought against a florist who refused to provide arrangements for same-sex weddings. That matter had a petition for writ of certiorari pending when the Supreme Court issued the *Masterpiece Cakeshop* decision. A few weeks later, the Court granted the petition, vacated judgment and remanded for further consideration in light of *Masterpiece Cakeshop*. *Arlene Flowers Inc. v. Washington*, 584 U.S. __ (June 25, 2018). Additionally, in January 2019, the Arizona Supreme Court will hear an appeal brought by owners of a company that designs custom wedding invitations, as well as other retail goods, and “believe being required to create customer-specific merchandise for same-sex weddings will violate their religious beliefs.” *Brush & Nib Studio, LC v. City of Phoenix*, 24 Ariz. 59, 65 (2018).

Understanding that the issue will reach the United States Supreme Court again, there were already a number of questions raised by *Masterpiece Cakeshop*. But then, on June 27, 2018, Justice Kennedy retired. Looking at the numbers and in reviewing the concurrences and dissent from *Masterpiece Cakeshop*, Justices Thomas and Gorsuch consider it a free speech right to refuse to provide artistic services; Justices Gorsuch and Alito appear to believe in some absolute or quasi-absolute right to refuse to provide services based on a religious expression freedom. The Chief Justice remained silent as it related to these concurrences but agreed with Justice Kennedy that the Colorado Civil Rights Commission expressed a hostility toward religion. And now, with Justice Kavanaugh, there may be five votes to find in favor of service providers even when the fairness of the adjudicatory process by the local administrative agency is not in dispute.

Such a finding would have implications beyond the wedding services industry and beyond the LGBTQ community. Stated differently, if a hotel is permitted to deny a gay couple from reserving a ballroom for a wedding celebration, it seems logical that the same hotel can be permitted to deny a gay couple from reserving a hotel room to stay on a honeymoon – or for a vacation. Importantly, some services that may be permitting employees to assert a religious exemption are critical: in January 2018, the Department of Health and Human Services’ Office for Civil Rights created a new “Conscience and Religious Freedom Division” to protect healthcare providers who refuse to provide services that contradict their moral and religious beliefs. This type of religious-based exemption will impact such things as reproductive rights, standard medical care for transgender patients (having nothing to do with gender transition), HIV-prevention, senior medical services including assisted living and skilled nursing facilities, emergency care/ambulance services, among others.

Conclusion

While the holding in *Masterpiece Cakeshop* was limited to the actions of the Colorado Civil Rights Commission, proponents of anti-discrimination laws were encouraged by language in the majority opinion reaffirming the Court’s precedent in *Employment Division, Department of Human Resources of Oregon v. Smith* that valid and neutral laws of general applicability do not violate the Free Exercise Clause. Such optimism may have been tempered upon the

retirement of Justice Kennedy particularly given his advisement that “[t]he outcome of cases like this in other circumstances must await further elaboration in the courts.” *Masterpiece Cakeshop, supra*, 138 S. Ct. at 1732. While the outcome of a future case is uncertain, it appears that the number and scope of religious exemptions will expand. In addressing these exemptions, it will be important to take heed of the concluding words of one of Justice Kennedy’s final majority opinions: “... 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.” *Ibid.*