Written by **Joe Wolverton, II, J.D.** on June 9, 2018

Was Masterpiece Cakeshop Decision a Victory for Religious Liberty?

Although many commentators have described the Supreme Court's decision in *Masterpiece Cakeshop v. Civil Rights Commission of Colorado* as a "major victory for religious liberty" and for the "freedom of religious expression," a closer examination of the text of the majority opinion reveals that religious liberty is no safer now than before the Court issued its opinion in this controversial case.

To begin, many conservative and Christian writers have pointed to the agreement of seven judges on the majority opinion as evidence that the holding in *Masterpiece Cakeshop* was not narrow.

There are many who were no doubt hopeful of a pro-religious ruling that were surprised by the 7-2 split and reckoned religious liberty and the freedom to refuse to act contrary to one's convictions was being — finally — upheld by the Supreme Court.

The decision was very narrow in that it did not protect the plaintiff's right to refuse service based on his religious beliefs; it simply agreed that in this case and this case only, "Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality."

In other words, the ruling was narrow because the opinion explicitly confines itself to the facts in this case — the Colorado Civil Rights Commission mishandled the case — and not to the question of how the free exercise of religion should be weighed against the "rights" of homosexuals to have their "weddings" recognized and supported in some future case.

Given the supermajority's ruling for the plaintiff in the case, Jack Phillips, owner of Masterpiece Cakeshop, many people of faith argued that there is no way such a lopsided decision could be construed as "narrow." Many of them, in fact, argued that such a characterization was an attempt by Progressives and the irreligious sucking on sour grapes to spin the findings of the case in a way that was sympathetic to their cause and the cause of the LGBT lobby.

While there may have been such misguided misconstructions by the Left, the description of the *Masterpiece Cakeshop* decision as "narrow" is accurate. And their mistake is perpetuated and mimicked by many politicians and pundits whose opinions on the opinion have been bouncing around the Twittersphere since the decision was published.

For example, Representative Jeff Duncan (R-S.C.) posted on Twitter: "Since when are 7-2 Supreme Court rulings considered "narrowly" decided? When the court rules in favor of Christians and religious freedom? When the mainstream media disagrees with the ruling? What gives @washingtonpost?"

Donald Trump, Jr., followed the family tradition of turning to Twitter, when he tweeted: "I am reading about a 7 – 2 vote. Pretty sure that's not narrowly… At least 2 dem leaning justices must have agreed."

Finally, even Senator Ted Cruz (R-Texas), a man who has argued cases before the Supreme Court and should know what the designation of a decision as "narrow" means, published his misleading and unforgivably misinformed take on the *Masterpiece Cakeshop* holding on Twitter: "Today's Supreme Court decision upholding a Colorado baker's constitutional right to live according to his faith is a major victory for religious liberty. The fact that the decision was 7-2 (not a narrow 5-4) underscores that govt should NEVER discriminate against religious faith."

Contrary to Cruz, enter Daniel Horowitz. Horowitz, writing for *Conservative Review*, explained the sad and sadly misunderstood decision this way:

> Free speech, conscience, and property rights were hanging by a thread before today's court opinion. They are no more secure after that opinion.
>
> The sexual identity movement is rapidly being enshrined into civil rights and the Constitution, and Americans will continue to suffer from assaults on their conscience rights, even though Jack Phillips of Masterpiece Cakeshop, thankfully, secured a victory in court today. If conservatives were looking for the religious liberty version of what Obergefell did for gay marriage, they will be sorely disappointed.

Disappointed because the seven justices who joined in the majority opinion did not rule that federal government (or state government) has no authority to force individuals to violate the tenets of their faith and accommodate the demands of those whose lifestyle is offensive to those tenets. The majority most certainly did not say any such thing.

In fact, the plain language of the opinion makes it very clear that religious liberty is still under assault and that the Supreme Court is still hostile to the unfettered freedom of men and women of faith to refuse service that would force them to choose between obedience to God or obedience to "the law."

Writing for the majority, Justice Anthony Kennedy, in reversing the decision of the Colorado Court of Appeals, explains the holding, hardly sounding like a steadfast supporter of religious liberty:

"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 re-solved 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."

See there?

I (and other people of faith) would ask Justice Kennedy and his High Court cohorts a few questions:

First, if these sorts of disputes must be settled in the future without undue disrespect to sincere religious beliefs, what amount of disrespect to those beliefs is acceptable?

Second, who determines which religious beliefs are "sincere" and which are not?

Next, in an "open market," shouldn't buyers and sellers be free to provide and seek goods and services from whomever they wish? Isn't that the very definition of "open market?"

Finally, who is to decide when a refusal to violate a religious restriction rises to the level of "indignity?"

Another selection from the text of the opinion should serve to belie the belief that the Supreme Court came down on the side of Christians.

In her concurring opinion, Justice Kagan explained that "Phillips contravened CADA's [the Colorado

Anti-Discrimination Act] demand that customers receive 'the full and equal enjoyment' of public accommodations irrespective of their sexual orientation.

Could that be any clearer? Kennedy and the other six justices that found in Phillips's favor did not do so because they believed his right to refuse service based on his religious tenets should be upheld. Not at all! In fact, they held that this case should have been decided against Phillips from the beginning, but based on other reasons, rather than those relied on by the Colorado Civil Rights Commission and the Colorado Court of Appeals.

How any sincere observer could construe that message into something pro-Christian is beyond me.

In conclusion, consider this paragraph taken from the majority opinion:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.
>
> The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in Obergefell v. Hodges, 576 U. S. ___ (2015), "[t]he 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." Id., at ___ (slip op., at 27).
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> Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such 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.

Read it closely: Religious objections to "gay marriage … do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services."

If you can read that and still think that the *Masterpiece Cakeshop* decision was, as Ted Cruz suggests "a major victory for religious liberty," then you and I have very different definitions of the words "victory" and "religious liberty."

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