

## Perspective

# ‘Masterpiece Cakeshop’ Is a Reminder Of How Far We Still Have to Go

BY JEFFREY S. TRACHTMAN

In the epilogue of Tony Kushner’s “Angels in America,” now being revived on Broadway, a defiant HIV survivor declares: “We will be citizens.” That was a hopeful, even visionary avowal for the LGBTQ community in 1993. We have traveled far towards its vindication over the last quarter century, but last week’s Supreme Court decision in the *Masterpiece Cakeshop* case was a reminder that we still have a way to go.

On the plus side, Justice Kennedy’s decision for the Court spoke broadly of respecting LGBTQ rights and garnered seven votes for a general reaffirmation of the principle that private religious views do not give license to violate neutral public accommodation laws – an aspect of the decision that has led some



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commentators to declare it an LGBTQ victory.

But the Court ducked the question whether that rule applies fully to anti-gay discrimination by holding that the *process* by which Colorado adjudicated this particular case was tainted by anti-religious animus. This leaves the door open to further cases arguing for a special exemption and sends

an unfortunate message that may encourage what should be obviously illegal discrimination – even in places like New York City that have strong anti-discrimination laws.

The Court identified only the thinnest evidence that Colorado violated religious neutrality: a handful of stray comments by commissioners that do not seem

to have affected the outcome, and the supposedly different treatment by Colorado of complaints against bakers who refused to adorn cakes with explicitly anti-gay messages. But a first year law student could distinguish the latter cases: they simply did not implicate Colorado's public accommodation law, because no one was subjected to discrimination based on their membership in a protected group.

On the merits, this was not a close case. The baker, Jack Phillips, refused to sell Charlie Craig and Dave Mullins a wedding cake precisely *because* they were a gay couple. A straight couple could have bought exactly the same cake to celebrate their marriage. This posed a clear facial violation of the Colorado Anti-Discrimination Act.

In reaching for evidence of religious bias in the adjudication of this claim, the Court seemed to strain to protect the sensibilities of the baker – giving short shrift to the humiliation inflicted on his customers, the usual focus of public accommodation jurisprudence. Had Mr. Phillips refused to bake a wedding cake for an interracial couple based solely on his private religious convictions, a majority of the Court would have been horrified – and concerned mainly with the dignitary injury to the couple.

The baker's First Amendment claims would have been laughed out of court.

But it appears that LGBTQ rights are still, even after marriage equality, taken just a little less seriously. The instinctive focus on Mr. Phillips' rights over those of Messrs. Craig and Mullins shows that LGBTQ individuals remain, in some measure, second-class citizens. At least that's the message that many may take away from this decision.

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The Supreme Court's holding in the Masterpiece case is narrow, and the religious neutrality principles it espouses are inarguable. But the subtler message – that religious objections to LGBTQ equality may be entitled to greater consideration under the law than religiously motivated racism or sexism – is out of step with the Court's recent strides towards full equality. And the general perception that the baker "won" is likely to fuel more instances of discriminatory exclusion in the name of

religious conscience. This creates a hurtful environment even if strong civil rights enforcement (in New York or elsewhere) ultimately prevails.

The decision also leaves open the possibility that the Court may yet recognize an express religious exemption from public accommodation laws protecting LGBTQ people – a particular risk if the current administration gets the chance to name Justice Kennedy's successor. Contrary to Mr. Kushner's other hopeful dictum in the final moments of "Angels," as we have painfully learned in the last eighteen months, the world does not only spin forward.

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