

KAGAN, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS
v. COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
COLORADO

[June 4, 2018]

JUSTICE KAGAN, with whom JUSTICE BREYER joins,
concurring.

“[I]t is a general rule that [religious and philosophical] 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.” *Ante*, at 9. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views “neutral and respectful consideration.” *Ante*, at 12. I join the Court’s opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court’s holding.

The Court partly relies on the “disparate consideration of Phillips’ case compared to the cases of [three] other bakers” who “objected to a requested cake on the basis of conscience.” *Ante*, at 14, 18. In the latter cases, a customer named William Jack sought “cakes with images that conveyed disapproval of same-sex marriage, along with religious text”; the bakers whom he approached refused to make them. *Ante*, at 15; see *post*, at 3 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for

religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See *ante*, at 15. And the Court takes especial note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested “offensive [in] nature.” *Ante*, at 16 (internal quotation marks omitted). As the Court states, a “principled rationale for the difference in treatment” cannot be “based on the government’s own assessment of offensiveness.” *Ibid.*

What makes the state agencies’ consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny “the full and equal enjoyment” of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. §24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA’s demand that customers receive “the full and equal enjoyment” of public accommodations irrespective of their sexual orientation. *Ibid.* The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious

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belief.*

I read the Court’s opinion as fully consistent with that view. The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—“quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished.” *Ante*, at 15. And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court

*JUSTICE GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases “would not sell the requested cakes to anyone.” *Post*, at 4. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. JUSTICE GORSUCH can make the claim only because he does not think a “wedding cake” is the relevant product. As JUSTICE GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a “cake celebrating same-sex marriage.” *Ibid.*; see *post*, at 3, 6, 8–9. But that is wrong. The cake requested was not a special “cake celebrating same-sex marriage.” It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See *ante*, at 4 (majority opinion) (recounting that Phillips did not so much as discuss the cake’s design before he refused to make it). And contrary to JUSTICE GORSUCH’S view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with “religious significance.” *Post*, at 11. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *ante*, at 9. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips’ religious beliefs—Colorado could have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.

says, “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.” *Ante*, at 10. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State’s decisions are not infected by religious hostility or bias. I accordingly concur.