

## **A wedding cake with serious implications**

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We really never know from where the next landmark First Amendment case will arise. The case of *New York Times v. Sullivan* – which created the “actual malice” standard for public officials bringing libel suits – arose from an advertisement in the *New York Times*. The case of *Morse v. Frederick* – which gave public schools the right to discipline students for off campus speech – sprung from a banner proclaiming “Bong Hits for Jesus.”

And the next landmark case is likely to revolve around a wedding cake. But not just any wedding cake. This particular cake is one by Jack Phillips, a Colorado baker who would prefer that his creation not be used in a gay wedding. The 10th Circuit Court of Appeals held that his refusal constituted discrimination on the basis of sexual orientation. The United States Supreme Court has agreed to hear the case.

And the case may ultimately depend on what the court believes Mr. Phillips is selling. The Cato Institute, a conservative leaning think tank, has filed an amicus brief on behalf of Mr. Phillips contending that the cake is an artistic expression. Much like a painter or a singer, Mr. Phillips is sought out by an “audience” and, in the view of the Cato Foundation, he can decline to perform, especially if the “performance” somehow “blesses” the event. The brief cites to a case in which the Supreme Court agreed citizens could not be compelled to display state issued license plates bearing a motto with which they objected. The court found that requiring the citizens to do so would be “compelled speech” – a First Amendment violation.

The brief argues that compelling a custom cake baker to design and bake a cake is much like requiring an actor to appear in a Scientology commercial, despite his objections to that religion. This isn’t a case of selling an item – it is art.

Not surprisingly, in a contrary amicus brief, filed on behalf of a group of First Amendment scholars, the argument is that once an artist decides to sell an item, the artist can’t discriminate among potential customers. In the view of these folks, the baker could decline to decorate the cake with a particular message – “God Bless This Gay Marriage” for example. But the baker cannot bake a cake that generically celebrates marriage, and then refuse to sell it to a gay couple. In the first case, the message is the issue. In the second case, it’s just about commerce.

And the First Amendment filers would apparently not take into account the view of the “recipient” of the message. Imagine a t-shirt maker who makes a shirt saying “Queen for a Day.”

On its face, it's an innocuous phrase that's been part of our culture for years. But if gay men decide to buy the shirts and proudly wear them, can the t-shirt maker refuse to sell them? The Cato institute I guess would say "yes" – because the customer's use conveys a message that the t-shirt maker opposes. The First Amendment filers would disagree. And commerce is commerce.

We will see what happens. But this is one cake that will leave a bitter taste for somebody.