

Supreme Court asked if baker's case protects religious rights or illegal discrimination

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December 4, 2017

Two years after the Supreme Court ruled in a landmark case that the Constitution provides same-sex couples the right to marry, the justices will consider this week whether it also protects business owners with religious objections from providing wedding services to these couples.

Religious liberty or a license to discriminate?

That is how the issue is framed in many of the briefs filed in the case of a deeply religious Christian baker from Colorado who in 2012 refused to even discuss making a wedding cake for Charlie Craig and David Mullins, a Denver couple who made Masterpiece Cakeshop one of the first stops in planning their reception.

The case's importance is underscored by the attention it has received: 100 amicus briefs have been filed and people began camping out Friday afternoon on the sidewalk in front of the Supreme Court to secure a spot for Tuesday's oral arguments.

Baker Jack C. Phillips contends that dual guarantees in the First Amendment — for free speech and for the free exercise of religion — protect him against Colorado's public accommodations law, which requires businesses to serve customers equally regardless of "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry."

Twenty other states and the District of Columbia have similar protections for sexual orientation.

The case marks an intersection of two important trends at the Supreme Court that until now have progressed on parallel tracks.

On one, the court has consistently provided protection and rights for gay Americans, culminating in the 2015 decision in *Obergefell v. Hodges*. It said the Constitution's guarantee of due process and equal protection afforded them the right to marry.

On the other track, the court has been fiercely protective of the First Amendment and vigilant in guarding against government intrusion on religious beliefs. As one example, it ruled in 2014 that companies owned by people with religious objections could not be forced to provide government-mandated contraceptive services to female employees as part of their insurance coverage.

Only one justice — Anthony M. Kennedy — was in the majority in both of those decisions, and he is likely to be pivotal to the outcome of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

As it happens, Kennedy was the author of *Obergefell*, and his words in that case are repeated by both sides now.

Kennedy wrote that the right to marry is a “fundamental right inherent in the liberty of the person,” and that same-sex couples may not be “denied the constellation of benefits that the states have linked to marriage.”

To James Obergefell, one of 30 plaintiffs who brought those cases to the court, resistance to the landmark ruling is what the current battle is about.

“The Supreme Court ruled that we have that right, yet there are people still trying to prevent same-sex couples from fully participating in . . . the public arena,” he said in a conference call with reporters.

Phillips and his supporters point to another part of Kennedy’s opinion.

“It must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned,” Kennedy wrote for the majority in the 5-to-4 decision. “The 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.”

Phillips said in an interview before the court accepted the case that he has no animosity toward Craig and Mullen; they just happened to choose a bakery “whose owner is a follower of Jesus Christ.” Asked if Jesus would deny the couple a cake, he said: “Jesus was a carpenter. I don’t think he would have made a bed for their wedding. He would have never condoned something that he was against.”

Phillips said he would have sold the couple anything in his shop except a wedding cake, because it would be contrary to his religious views that marriage is between a man and a woman.

Mullen said recently that the couple left the bakery “mortified and humiliated,” and that the ease of finding another baker to fulfill their order was not the point. The idea that service might be denied them, Craig said, makes them “think hard about whether we want to reveal we’re a married couple.”

Despite Phillips’ obvious faith — he closes his shop on Sundays, and refuses to make cakes celebrating Halloween or bawdy bachelorette parties — his lawyers are not relying primarily on arguments about his freedom of religious exercise.

That’s because some legal observers say he would have an important Supreme Court precedent to overcome.

In a 1990 case, the justices said two Oregon men were not protected from being fired from their jobs as drug counselors because they had used an illegal drug, peyote, as part of their Native American religious ceremonies. The opinion by Justice Antonin Scalia in *Employment Division v. Smith* said a person may not use religious motivation as a reason not to obey a law generally

applicable to the public and passed without animus to a specific religion. To find otherwise, Scalia wrote, would invite “a system in which each conscience is a law unto itself.”

Instead, most of the debate ahead of the baker’s case this week has centered on Phillips’s claim that Colorado’s anti-discrimination law violated his freedom of speech. He says Colorado cannot compel him to use his artistic skills to create a message that violates his religious beliefs.

A wedding cake, serving “as the iconic centerpiece of the marriage celebration, announces through Phillips’s voice that a marriage has occurred and should be celebrated,” says the baker’s brief filed by the conservative legal organization Alliance Defending Freedom. “The government can no more force Phillips to speak those messages with his lips than to express them through his art.”

This is the same argument used nationwide by florists, calligraphers, photographers and others who do not want to provide services for same-sex weddings, and it has been met with little success.

But the Trump administration agreed with it, prompting outrage by civil rights groups that say it is the first time the government has backed a constitutional exception to an anti-discrimination law.

“Forcing Phillips to create expression for and participate in a ceremony that violates his sincerely held religious beliefs invades his First Amendment rights,” the administration told the court. It distinguished between those vendors whose wares could be considered artistic and others, such as hotels or furniture rental companies, that the government said could not refuse service.

The administration took no position on whether Colorado’s law harmed Phillips’s right to the free exercise of his religion.

The Colorado Court of Appeals, which upheld the civil rights commission’s finding that Phillips had violated the law, said free speech rights were not implicated. No one would regard the baker’s creation of a cake as an endorsement of same-sex marriage but only as complying with the law.

The issue has set off a debate even among those who support same-sex marriage but sympathize with Phillips and who consider themselves free speech absolutists but also favor anti-discrimination laws.

The libertarian Cato Institute, for instance, favored allowing same-sex couples to marry. But it told the court that “photographers, writers, singers, actors, painters, and others who create First-Amendment-protected speech — including bakers, florists, and other expressive professionals — must have the right to decide which speech to create or commissions to take.”

First Amendment lawyer Floyd Abrams, noted for his defense of the New York Times in litigation, lent his name along with others to a brief supporting the couple. Anti-discrimination laws regulate commerce, not speech, they say. “When an artist sells a message, he must take all comers,” the brief says. “When a Colorado baker sells wedding cakes, he cannot turn away LGBT customers who will use the cake to celebrate their marriage.”

The briefs on both sides offer hypotheticals meant to make the justices pause. Could a white customer require a black baker to create a cake displaying the Confederate flag? Would

theological beliefs about the mixing of races serve as reason to deny service to an interracial couple? Is creating even the most intricate wedding cake a form of artistic expression or simply satisfying the request of a customer?

Craig and Mullins, represented by the American Civil Liberties Union, say the justices need not make the case too hard.

The court has found that the government may enforce anti-discrimination laws despite challenges from law firms, labor unions, private schools and universities, civic clubs, restaurants and newspapers, they say in their brief. "Retail bakeries should fare no differently."