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Should Free Speech Protections Include Self Expression That Discriminates?

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On Dec. 5, Supreme Court justices heard oral arguments on “Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,” a high-profile case involving a Colorado baker who refused to make a wedding cake for a gay couple.

The baker, Jack Phillips, says that he should not be forced to use his talents to convey a message of support for same-sex marriage. The couple, Charlie Craig and David Mullins, say that businesses open to the public should not be allowed to discriminate against gay men and lesbians.

What is your immediate reaction to the facts above? Do you have an opinion on how the Supreme Court should decide? If so, what is it, and why?

In “Justices Return to Culture Wars in Wedding Cake Case,” Adam Liptak writes:

Mr. Phillips, who calls himself a cake artist, argued that two parts of the First Amendment — its protections for free speech and the free exercise of religion — overrode a Colorado anti-discrimination law and allowed him to refuse to create a custom wedding cake. But he has focused most of his argument on his free speech claim, relying on Supreme Court decisions forbidding the government from compelling people to say things they do not believe.

In 2015, a Colorado appeals court ruled against Mr. Phillips, saying that his free speech rights had not been violated and noting that the couple had not discussed the cake’s design before Mr. Phillips turned them down. The court added that people seeing a cake created by Mr. Phillips would not understand him to be making a statement and that he remained free to say what he liked about same-sex marriage in other settings.

“Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally,” the court said.

The Alliance Defending Freedom, a conservative Christian group that represents Mr. Phillips, said in a brief that the Supreme Court has long recognized a First Amendment right not to be forced to speak. In 1977, for instance, the court ruled that New Hampshire could not require people to display license plates bearing the state’s motto, “Live Free or Die.”

The American Civil Liberties Union, which represents the couple, has argued that a ruling for Mr. Phillips would create a broad mandate for discrimination. If a baker has a free speech right to discriminate, the A.C.L.U. said, then so do all business owners who may be said to engage in

expression, including florists, photographers, tailors, choreographers, hair stylists, restaurateurs, jewelers, architects and lawyers.

The case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111, is likely to turn on the vote of Justice Anthony M. Kennedy, who is at once the court's most prominent defender of gay rights and its most committed supporter of free speech.

Students: Read the entire article, then tell us:

— Do you agree with Mr. Phillips's line of reasoning, that he should legally be able to refuse his services to some customers so that he won't have to go against his religious beliefs, and that his cake baking is a form of self expression and therefore protected under the First Amendment? Why or why not?

— In the Times article, "Where to Draw Line on Free Speech? Wedding Cake Case Vexes Lawyers," Eugene Volokh, a leading First Amendment scholar, wrote that cakes may be tasty and pretty, but that creating them is not expression protected by the First Amendment. The Cato Institute, however, took the opposing view in a brief supporting the baker, saying, "The fact that Jack's media are icing and chocolate rather than ink or paint does nothing to diminish the artistic content of his work." In your view, should Mr. Phillips's cake baking be considered "speech" and protected by the First Amendment? Why or why not?

— Where should the line be drawn in free speech protections? Do you think the Supreme Court should draw a line between artists and others? Or, should artists selling their creations be required to serve all customers equally? Why or why not? What human actions should be considered "speech" and why?

— Should free speech protections include self expression that discriminates? How do you think the Supreme Court will rule in this case? And how do you think Judge Kennedy, who is described in the article as "at once the court's most prominent defender of gay rights and its most committed supporter of free speech," will vote?

For related coverage, see, "Cake Is His 'Art.' So Can He Deny One to a Gay Couple?" and "Listen to 'The Daily': Free Speech and Wedding Cake."