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There's no free speech right to refuse wedding cakes to gay couples

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On behalf of the American Unity Fund (AUF) and ourselves, Eugene Volokh and I have filed a Supreme Court amicus brief (available here) in support of a same-sex couple in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which involves a baker's refusal to provide the couple a wedding cake. We argue, in essence, that the Free Speech Clause does not protect a baker's right to refuse their request because baking cakes is conduct that is neither historically nor inherently a form of protected speech. Furthermore, contrary to what the Justice Department argues, requiring a baker simply to make a cake for a wedding is not tantamount to requiring him to participate in the wedding celebration. "Such theories," we argue, "would convert the First Amendment into a broad anti-complicity principle punching a hole through the center of the Nation's anti-discrimination laws." (We do not address the baker's separate claim based on the Free Exercise Clause.)

In the case, Charlie Craig and David Mullins walked into Masterpiece Cakeshop, owned by Jack Phillips, and said they wanted a cake for their wedding. Phillips replied that he would make them a cake for other events like a birthday or a shower but would not make a cake for a same-sex wedding. The couple got up and left. There was no discussion of any words, symbols, or designs the couple might want. The entire exchange lasted twenty seconds. The Colorado Civil Rights Commission found that a categorical refusal to sell wedding cakes to gay couples amounted to sexual-orientation discrimination, which is prohibited under the state's public accommodations law. It ordered Masterpiece to "cease and desist from discriminating against [Craig and Mullins] and other same-sex couples by refusing to sell them wedding cakes or any product it would sell to heterosexual couples." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. Ct. App. 2015). Colorado courts affirmed that decision and the state supreme court refused to reconsider it.

Here is the summary of our argument from the brief:

The freedom not to speak must include the freedom not to create speech, and not to participate in others' speech. A freelance writer cannot be punished for refusing to write press releases for the Church of Scientology, even if he is willing to work for other religious groups. A musician cannot be punished for refusing to play at Republican-themed events, even if he will play at other political events, and even if the jurisdiction bans discrimination based on political affiliation in public accommodations. Likewise, a photogapher or a wedding singer should not be punished for choosing not to create photographs celebrating a same-sex wedding, or for choosing not to sing at such a wedding.

But this First Amendment right must have its limits. The First Amendment shields refusals to speak, but generally not refusals to do things. Limousine drivers, hotel operators, and caterers should not have a Free Speech Clause right to exempt themselves from antidiscrimination law, because the law is not compelling them to speak or to create First-Amendment-protected expression. The same limit should apply to wedding cake makers.

Likewise, the First Amendment shields refusals to participate in others' speech—say, as an actor or a musical accompanist or a singer—but not all conduct can be labeled participation: consider again the limousine driver, hotel operator, or caterer. This Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). There must also be limits set on the variety of conduct compulsions that can be labeled "speech compulsions," and on the degree and quality of involvement that can be labeled compelled "participation" in a ceremony. This case calls on this Court to define those limits, while still preserving the rights of those who are genuinely being coerced into creating First-Amendment-protected expression.

Read the whole brief. Unlike the couple's counsel (the ACLU), Eugene and I recognize that the First Amendment imposes substantive restraints on the government's power to compel even businesses to provide certain traditionally or inherently expressive goods and services. For that reason, we filed a Supreme Court brief in 2013arguing that a New Mexico photographer could not be compelled under the Free-Speech Clause to photograph a lesbian couple's commitment ceremony. *Elane Photography, LLC v. Willock*, 309 P.3d (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (No. 13-585) (2013).

But we argue in *Masterpiece Cakeshop* that cake-baking, unlike photography, is not a historically or inherently expressive medium, long recognized as such in the law. Nevertheless, bakers do have First Amendment rights and if Phillips were required to write messages on a cake that would raise serious concerns about speech compulsion in a traditionally and inherently expressive medium (writing). But nothing in the facts of the Colorado case suggests any protected expression was even requested by the couple, much less ordered by Colorado authorities. And unlike the photographer in *Elane Photograqphy*, nothing in the nature of creating wedding cakes requires the baker's actual presence at–much less "participation" in–the wedding.

There has been no more important constitutional friend of the LGBT-rights movement than the First Amendment. Its evenhanded protection of unpopular speech and association shielded gay advocacy and political organizing at a time when most Americans would have gladly shut them down. These protections should be understood now to protect the speech and association of religious and secular dissenters from prevailing equality mandates in the law.

As we argue in the Conclusion of the brief:

Antidiscrimination laws, like other laws, cannot claim categorical immunity from the Bill of Rights. Hate crimes laws must be enforced consistently with the Sixth Amendment, even if that makes it harder for prosecutors to get convictions. Civil liability for employment discrimination must be imposed consistently with the Seventh Amendment—even though the prospect that certain juries might not properly enforce the law likely discouraged Congress from authorizing jury trials and damages awards in the original Civil Rights Act of 1964. Likewise,

antidiscrimination laws cannot be enforced in ways that violate the First Amendment. See, e.g., *Hurley*, 515 U.S. at 572-73; *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hosanna-Tabor Evangelical v. EEOC*, 565 U.S. 171 (2012).

Antidiscrimination laws, like other laws, should not be stymied by attenuated claims of incidental burden, where no real constitutional problem is present. *See, e.g., Rumsfeld [v. FAIR]*, 547 U.S. at 67. Petitioners are "attempt[ing] to stretch . . . First Amendment doctrines well beyond the sort of activities these doctrines protect," and "overstat[ing] the expressive nature of their activity and the impact of the [Colorado antidiscrimination law] on it, while exaggerating the reach of our First Amendment precedents." *Id*. at 70. This Court must draw a line that properly respects both the First Amendment rights of those who are truly being compelled to create speech, and the legitimate interests of states that are trying to protect their citizens from discrimination. Bakers, including bakers of wedding cakes, are on the constitutionally unprotected side of the line.

The Court will hear argument on December 5. Arrayed on the other side of the case are the Alliance Defending Freedom (counsel for Petitioners) and a host of other groups aligned with religious conservatives, the United States government, twenty states led by Texas, the Cato Institute (with whom Eugene and I joined on the *Elane Photography* brief), the Reason Foundation, and various legal scholars (including co-Conspirator Randy Barnett).