

Wedding cake: What you need to know about the highly anticipated Supreme Court ruling

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It may be the most important case for LGBT people since the Supreme Court's 2015 ruling that marriage is a constitutional right afforded to same-sex couples. It also may be the most important case since then for religious people who object to gay marriage but do business in the public square.

The Supreme Court on Tuesday heard arguments in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. In 2012, a same-sex couple, Charlie Craig and David Mullins, was denied a wedding cake by Longwood, Colorado, baker Jack Phillips. The baker said he would sell the gay couple other kinds of cakes, but he could not in good conscience sell them a wedding cake, since same-sex weddings violate his religious beliefs.

The couple filed a complaint with the Colorado Civil Rights Commission, which found that the cakeshop violated the state's anti-discrimination law. When the state's Supreme Court agreed with the gay couple, the baker appealed to the Supreme Court.

In a move that some believe threatened to roll back Obama-era protections for gay and lesbian people, the Department of Justice in September filed a brief on behalf of Phillips, arguing that it forced him to create expression for and participate in a ceremony that violates his religious beliefs and invades his First Amendment rights.

The Alliance Defending Freedom, an advocacy group representing the baker, and the American Civil Liberties Union, which is representing the gay couple, both agree that important issues are at stake. Both sides, however, disagree as to precisely what is at stake.

What, exactly, is a cake? At the heart of the baker's case, his lawyers argue, is a battle over expression: Not religious, per se, but artistic.

"Phillips is willing to serve any and all customers. He objects only to expressing certain messages through his custom art," said ADF Senior Counsel Jim Campbell in a statement. "Jack should have that basic freedom."

Any law that would otherwise compel him is bad for artists, said ADF's Kristen Waggoner. Such "laws are being used not only to silence, not only to punish, but to ruin creative professionals that don't agree with the government's ideology on marriage."

As both parties have maintained, the couple left Phillips's bakery before discussing the cake's design, including any language they would have wanted included. But Waggoner says the act of crafting a cake that would be used during a same-sex wedding ceremony is an act of expression.

The First Amendment protects expressions that are made without the use of words. A Supreme Court decision in the 1995 *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* case held that “the Constitution looks beyond written or spoken words as mediums of expression.”

A group of nearly 500 artists filed a brief ahead of Tuesday’s arguments reminding the court that “artistic expression – regardless of the medium employed – finds full protection under the First Amendment.” They are concerned that the case could open the door to the “state forcing [artists] to convey objectionable messages through their art.”

Some might scoff at the idea that a cake, sans verbiage, could be considered a sincere artistic expression. But the court is going to take it seriously. In fact, says Walter Olson, constitutional scholar and senior fellow at the Cato Institute, the lasting influence is not primarily which side wins, but where to draw the line between what is and is not expression.

“It’s hard to take cake seriously – it’s just cake,” he says. But it’s part of spectrum of a wide range of wedding services. “Most people agree that a chauffeur is not communicating a message, and nearly everyone agrees that the person performing the ceremony is communicating lots and lots of messages.”

Floyd Abrams, a celebrated First Amendment lawyer, signed a brief arguing that the defense of expression doesn’t matter in this case. “Artists who sell their creations to the public are, like other commercial actors, bound by a variety of generally applicable laws, including laws that forbid businesses to refuse service on certain grounds.”

Indeed, for Louise Melling of the ACLU, this case is neither about artistic expression nor messaging. It’s about discrimination.

“Charlie and Dave walked into the cakeshop and were turned away because of who they are,” she said in a statement. “The stakes could not be higher.”

Freedom of expression “does not protect the right to discriminate,” Melling told *The Washington Post*, citing precedent-establishing court cases, such as the landmark 1968 *Newman v. Piggie Park Enterprises*. When Maurice Bessinger, head of the National Association for the Preservation of White People, was sued for refusing to allow an African American in his restaurant, he argued that he was compelled by his religious beliefs to oppose integration. The court ruled against Bessinger.

Abraham Hamilton III, general counsel to the American Family Association, is wary of arguments comparing Phillips’ refusal to make a wedding cake for gay people to racial discrimination. “As an African American man myself, I think to conflate issues concerning marital preferences as something as easily identifiable as skin color is offensive.” The reason Hamilton believes “the two are not remotely on the same page” is that skin color is a “readily discernible characteristic” and sexual orientation is not.

Ryan T. Anderson, senior research fellow at the Heritage Foundation, says it would be wrong to compare Phillips’ principled refusal to bake a wedding cake with any kind of racial discrimination. He said that while there are “reasons for supporting [heterosexual marriage] that have nothing to do with hatred or condescension,” the same cannot be said of opposition to integration.

“When the Supreme Court struck down bans on interracial marriage, it did not say that opposition to interracial marriage was based on ‘decent and honorable premises’ and held ‘in good faith by reasonable and sincere people here and throughout the world.’ It did not say it because it could not say it,” he said.

Anderson noted that the Supreme Court decision that legalized gay marriage included a statement in the majority opinion from Justice Anthony M. Kennedy that the First Amendment protects religious people who may “advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”

Ahead of Tuesday’s arguments, more than 500 Christian leaders signed a statement declaring that “religious freedom should never be used as a justification for discrimination.”

“For me as a Christian pastor,” Jennifer Butler, Presbyterian minister and CEO of the advocacy group Faith in Public Life who signed the statement, told The Washington Post, “what’s at stake is the heart of the Christian faith. We can’t be following Jesus if we’re slamming doors in our neighbor’s faces.”

Butler said she believes that Phillips’ supporters are trying to win back political ground from LGBT activists.

“Conservatives are still fighting the culture wars,” she said. “They don’t like the fact they’ve lost on gay marriage, so they want to chip away at protections for LGBT people. What’s really sad about that is they’re using a beautiful principle like religious freedom to denigrate other people.”

AFA’s Hamilton sees arguments like Butler’s as a “bit of hyperbole,” and even “emotional alarmism.”

“The Founding Fathers, in their establishment of our country, enshrined religious liberty – and I’d include freedom of conscience – in our Constitution,” he said. “If the court rules against Jack Phillips, it will set the nation reeling backwards toward things the Founders didn’t want.”

The United States Conference of Catholic Bishops also believes the Masterpiece case poses potentially dire consequences for American religious life. In a brief, the bishops urged the court to uphold an individual’s right to follow his conscience.

Catholic priest James Martin, whose recent book, “Building a Bridge,” encourages open dialogue between LGBTs and religious people, agrees that Christian ethics protects the rights of individual consciences, adding that “it also protects the rights of those who feel marginalized.” Martin also thinks it’s important to consider whether “religion is being used as a mask for simple homophobia?”

“Once we started inserting religious dimensions into what is essentially a commercial transaction, we run into complicated questions of discrimination,” said Martin. “I don’t envy the Supreme Court on this one.”

While roughly 4 in 10 Americans support permitting wedding-based businesses to refuse their services to same-sex couples, 53 percent oppose it, according to a recent poll by Public Religion Research Institute. Majorities of Republicans (67 percent) and white evangelicals (65 percent) believe these businesses should be allowed to refuse services to gay couples.

“One of the most notable features of American attitudes on this issue is the racial divide among Protestant Christians,” says Robert Jones, CEO of PRRI. While white evangelicals strongly believe that businesses providing wedding services should be allowed to refuse services to same-sex couples, a majority of black Protestants remain opposed to these religiously based service exemptions.

“The data suggests most black Protestants hear in these appeals echoes of discrimination more than liberty,” Jones said.

A Supreme Court decision on the case is expected in late spring.