



Will Kennedy stick with gays in Masterpiece Cakeshop case?

Chris Johnson

November 29, 2017

When the U.S. Supreme Court hears oral arguments in the Masterpiece Cakeshop case on Tuesday, all eyes will be on U.S. Associate Justice Anthony Kennedy to ascertain whether the court will uphold Colorado law in the face of a First Amendment challenge that could enable the denial of services to LGBT people not just in that state, but throughout the country.

After all, Kennedy is the swing vote and will be asked to uphold LGBT rights yet again after a long career advancing them on the bench as the author of several milestone decisions: the 2003 ruling in *Lawrence v. Texas*, striking down state sodomy laws; the 2013 ruling in *Windsor v. United States* against the anti-gay Defense of Marriage Act; and the 2015 ruling for marriage equality nationwide in *Obergefell v. Hodges*.

But there's an earlier decision on LGBT rights written by Kennedy, the 1996 decision in *Romer v. Evans* striking down Colorado's Amendment 2, which may also weigh on Kennedy even though the legal principles at hand are different from the Masterpiece Cakeshop arguments. In 1996, the U.S. Supreme Court found Amendment 2, which barred the Colorado Legislature or municipalities from enacting pro-gay non-discrimination ordinances, violated the Equal Protection Clause of the U.S. Constitution.

The *Romer* decision paved the way for Colorado to bar anti-LGBT discrimination in its anti-discrimination law. Now, 21 years after the ruling, anti-LGBT forces in the Masterpiece Cakeshop case are seeking a First Amendment right to refuse to make wedding cakes for same-sex couples despite the statute.

The petitioner in the case, Jack Phillips in Masterpiece Cakeshop, argues that making a wedding cake is inherently an artistic act of expression protected under the First Amendment, therefore he should be able to deny wedding cakes out of religious objections to same-sex couples like Charlie Craig and David Mullins, who sought to buy a cake for their wedding in 2012.

Both the *Romer* and Masterpiece Cakeshop cases originated in Colorado. While the *Romer* case asked the court whether the state could deny non-discrimination protections to LGBT people with Amendment 2, the Masterpiece Cakeshop case asks whether the First Amendment takes precedence over LGBT protections in a way that undermines the the *Romer* decision.

Jean Dubofksy, who successfully argued the Romer case in 1996 and is now a law professor at University of Colorado, Boulder, said a decision in favor of Masterpiece Cakeshop “would really undo the decision in Romer” because that ruling enabled Colorado to add sexual orientation to its public accommodations law.

“If you make an exemption to a person who says, ‘Well, I’m not going to provide rental housing, or I’m not going to provide various kinds of services, whether they’re medical services or grocery stores or whatever to a person because I don’t believe in gay marriage,’ then all of a sudden all of those protections are undone, and so if I were Justice Kennedy, I think I’d be concerned about that,” Dubofksy said.

One friend-of-the-court brief before the Supreme Court filed by the New York-based Kaplan & Company, LLP, on behalf of legal scholars on the separation of church and state cites the Romer decision in a section arguing a ruling for Masterpiece Cakeshop on First Amendment grounds would have no limiting principle.

“In another instructive case from Colorado, this Court rejected an effort to single out gays and lesbians for exclusion,” the brief says. “It would be peculiar for the same court that decided Romer to hold now that Colorado uniquely lacks the power to protect gays and lesbians in public accommodations. Petitioner’s rule must therefore be seen as a general theory that arises from the context of gay rights but would sweep much further.”

Joshua Matz, an attorney for Kaplan & Company, LLP, and former clerk for Kennedy, said Romer becomes relevant in the pending case before the Supreme Court because justices held in 1996 gay people can’t be singled out for discrimination.

“It would be strange if the same court that said in another case from Colorado were now to say that you can’t do that as a matter of your state constitution, but as a matter of the federal constitution, in fact, you can single out gay people and deny them rights either under the Free Exercise Clause or under the Free Speech Clause, but it turns out that that principle doesn’t apply anywhere else,” Matz said. “It would be the total inverse of Romer in a way that would really make no sense.”

LGBT rights advocates have argued a decision in favor of Masterpiece Cakeshop would result in sweeping discrimination not just for same-sex couples seeking wedding cakes, but LGBT people seeking a range of services — and perhaps other individuals who could face discrimination based on race or religion.

The Center for American Progress published an [issue brief](#) one week before the Masterpiece Cakeshop arguments titled, “The Harms of Refusing Service to LGBTQ People and Other Marginalized Communities,” which outlines the potential harms if the Supreme Court ruled in favor of Phillips.

“In reality, service refusals act like a one-two punch,” the brief says. “The discrimination itself causes harm that negatively affects both psychological and physical health and well-being, as

shown by research and lived experiences of LGBTQ people and their families. Then, compounding that harm, the refusal can make it harder or impossible for LGBTQ people to access services at all, denying them full participation in the public square.”

Citing data from a January 2017 Center for American Progress report, the issue brief says in the event of being turned away from a retailer, a significant minority of LGBT people would have difficulty finding an alternative.

One in five said it would be “very difficult” or “not possible” to find the same type of service at a different retail store selling wedding attire, while in one in 10 said the same about finding the same type of service at a different bakery or florist.

The difficulty is compounded for LGBT people living in non-metropolitan areas. Four in 10 non-metro LGBT people said it would be “very difficult” or “not possible” to find the same type of service at a different retail store selling wedding attire, three in 10 non-metro LGBT people said the same about finding the same type of service at a different bakery and one in five said the same about finding service at a different florist.

The attorney for the American Civil Liberties Union representing the same-sex couple in the Masterpiece Cakeshop case, David Cole, may hit on this potential impact on LGBT people during oral arguments, as could Colorado Solicitor General Frederick Richard Yarger, who’s representing the state.

Meanwhile, Kristen Waggoner, the attorney for the anti-LGBT legal firm Alliance Defending Freedom, will rely on primacy of the First Amendment. U.S. Solicitor General Noel Francisco, who was granted time to speak by the Supreme Court, will also likely make similar arguments. Determining whether Kennedy will seek to mitigate this kind of discrimination or side with Masterpiece Cakeshop is difficult. In addition to being the author of gay rights decisions, Kennedy has also ruled in favor of expansive views of the First Amendment, such as the 2010 decision in *Citizens United* that ruled campaign finance laws limiting contributions are unconstitutional because those activities amount to speech.

Moreover, Kennedy’s decision may determine the outcome of the case if the four liberal justices — Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan — side with the Colorado law and the four conservatives justices — Clarence Thomas, Samuel Alito, John Roberts and Neil Gorsuch — side with Masterpiece Cakeshop.

Dubofksy said she thinks Kennedy may vote to uphold Colorado’s Anti-Discrimination Law because other First Amendment libertarians “of whom Justice Kennedy apparently is particularly drawn to have stated baking a wedding cake amounts to conduct, not speech, as shown in [a recent Washington Post article](#).

“It’s saying that wedding-cake makers are conducting themselves,” Dubofksy said. “That’s conduct, it’s not expression, and so, you draw the line at a wedding photographer who’s doing an expressive activity and a maker of a cake who isn’t required to be at the wedding and is really just making a cake.”

Additionally, Dubofksy predicted Kennedy will seek to uphold the Colorado law because he'll want to uphold the impact of the Romer decision.

“There’s a good reason to be worried, but I’m not sure the court will take that sweeping of an approach because it would cut back on the sexual orientation discrimination cases in a way that could completely undermine Romer,” Dubofksy said. “I don’t see that happening.”

Walter Olson, a senior fellow at the Cato Institute’s Robert Levy Center for Constitutional Studies, said Kennedy may be in conflict in the case because of the history of rulings for gay rights and the First Amendment.

“He is on the one hand the great architect of the gay rights decision, but at the very same time, he is a very important justice on First Amendment issues, on both free speech and the role of religious liberty and religious conscience have also been very important to Justice Kennedy,” Olson said.

Olson, whose organization has filed a friend-of-the-court brief on behalf of Masterpiece Cakeshop, said Kennedy may lead the court to a “center territory” other than a sweeping ruling one way or the other.

“Neither side wants to inflict a culture war on the country; they’re trying to work out something without culture war,” Olson said. “That’s why it won’t surprise me if the court comes up with something a little muddled and a little bit hard to read because certainly Kennedy personally, and I think the court generally is trying to reach the center ground here.”

Matz said despite his history with Kennedy he doesn’t know which way the justice will rule, but also noted there are other ways the court could decide other than in favor of the Colorado law or a sweeping ruling for Masterpiece Cakeshop.

“If the court is going to rule for the baker, it could just rule for the baker and if its ruling has these extraordinarily disruptive and chaotic implications, it could simply refuse to address them and leave them for the future, which is often how the court does this,” Matz said.

As an example, Matz cited the ruling the Hobby Lobby case — a decision Kennedy joined that closely held for-profit companies need not comply with the contraception mandate under Obamacare under the Religious Freedom Restoration Act.

“Justice Alito’s majority opinion essentially said, ‘Well, under the Religious Freedom Restoration Act, preventing racial discrimination is always super compelling, but we’re not going to tell you in advance whether anything else is,’” Matz said. “You can imagine the court doing something like that, which I don’t think would be prudent and would, in fact, unleash enormous uncertainty and confusion, and could harm not just gay people, but many others, but the Supreme Court doesn’t always tell you in advance how far it will allow its principles to go.”