



Can Businesses Turn Away LGBT Customers? Court Battles Bubbling Back Up

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The original story behind the Masterpiece Cakeshop case is both undisputed and well known: a gay couple in Colorado walked into the bakery in 2012 and asked for wedding cake. The owner and master baker Jack Phillips declined to make a custom cake for their party because he said their union violated his religious beliefs.

The couple filed a complaint with the state's civil rights commission, which found Phillips was violating the state's anti-discrimination laws that prohibit businesses from discriminating against LGBTQ people.

The battle between the two sides, the state and Phillips, eventually landed in the high court.

Last summer, the court narrowly sided with Phillips — and admonished the state's commission for showing animus against religion.

But because it didn't settle the looming question on whether the First Amendment guarantees of religious freedom are more important than a state or city's anti-discrimination laws, similar cases are again simmering in lower courts — including Arizona and Colorado.

Among the questions: when does an invitation or a cake qualify as free speech?

"The main question is do you get to object to that kind of anti-discrimination law because it's forcing you to convey a message?" said Ilya Shapiro with the Cato Institute, a conservative think tank that has supported some businesses that have turned customers away.

"Only two justices would have held that the baking of a custom wedding cake is protected as speech by the First Amendment," said Kaipo Matsumura, who teaches law at Arizona State University. "The other justices refrained from commenting on the issue and just reserved that question for future decisions in other cases."

In Arizona, Brendan Mahoney was one of the lawyers in town who people would call when they were fired from a job or refused a room because they were gay.

"It really happened all the time," Mahoney said.

Mahoney, who was openly gay, would explain the reality of the law in Arizona.

"There are no federal protections, no state or city protections," Mahoney said. "Your best solution is to get involved and change the law."

Mahoney eventually took his own advice.

He went to work for the city and advocated for a Phoenix law prohibiting discrimination on the basis of sexual orientation. The ordinance would apply to housing, employment and other public accommodations — just as the law already did for categories like race, sex, marital status and religion.

The measure did ultimately prevail. More than five years later, Mahoney said the law has made a huge difference in the lives of LGBTQ people.

"I think the impact was profound," he said.

But one Phoenix business argues it cannot in good conscience follow that law — because they say it violates their freedom of speech and religion.

Brush & Nib Studio designs custom invitations for events like weddings. The shop owners say making an invitation for a same-sex wedding would violate their Christian belief that marriage is only between a man and a woman.

"The government shouldn't be telling artists what they can and can't say," Breanna Koski, a co-owner of Brush & Nib, said. "We're challenging this law not just for us, but for all artists to be able to create freely."

The owners are asking the Arizona Supreme Court to excuse them from the city's anti-discrimination law. Those who break it face thousands of dollars in penalties — and even possible jail time.

Last year, the Arizona Court of Appeals ruled against the duo, which is represented by the Scottsdale-based Alliance Defending Freedom.

The influential Christian law firm also has offices in Washington, D.C. and has become nationally known for challenging nondiscrimination protections. The Alliance has logged nine high court wins in just seven years.

They also represent Colorado's baker Jack Phillips, who is again suing Colorado's commission on civil rights for harassment.

Back in 2017, the day the Supreme Court announced it was taking up the first Masterpiece case, Phillips declined to bake another cake. The cake was requested to be pink on the inside and blue on the outside, celebrating a gender transition.

Phillips said the message about sex and gender identity conflicted with his Christian religious beliefs.

"I believe that God made male and female and we don't get to choose that and we don't get to change that," he said. "And it's wrong for the state to force me to create artistic products."

The state found Phillips had violated the state's anti-discrimination law and filed an administrative complaint against him. Phillips' attorneys are seeking an injunction to halt the state from moving forward on that complaint.

"The pending case is an obvious attempt to harass the baker," said Jim Campbell, Phillips' attorney from the Alliance Defending Freedom.

While both cases make their way through lower courts, both sides anticipate the high court taking the issue up again — for the sake of clarity.

"It may very well might end up at the nation's highest court again," Campbell said.

Already, powerful forces are divided.

In Arizona, the state's attorney general and Republican leadership are siding with the business, while major companies are backing the city of Phoenix. Arizona has no statewide protections for LGBTQ people.

It's a much different political reality in Colorado where the state's new Democratic Attorney General Phil Weiser will defend the state against Phillips.

Weiser was elected in a giant blue wave that swept the state last year, along with a new, and openly gay, Gov. Jared Polis. Weiser says the high court, in its opinion, never challenged the state's anti-discrimination laws.

"Equality for all is something that we here in Colorado are committed to, the laws will be enforced," Weiser said. "We will just have to play a few more innings before we win this game."