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Where to Draw Line on Free Speech? Wedding Cake Case Vexes Lawyers

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Floyd Abrams is the nation's most prominent First Amendment lawyer, and he almost always argues in favor of free speech. But he has struggled with the case of a Colorado baker who refused to create a wedding cake for a gay couple.

Charged with discrimination, the baker said that forcing him to bake a cake for a same-sex wedding would hijack his constitutional right to express himself. Mr. Abrams's first impulse was to agree.

"At first blush, the position of the baker had a good deal of appeal to me," he said. "There was and is no reason to doubt his position was one of conscience, and the visage of state-ordered creation of what could be viewed as some sort of artistic offering certainly set some First Amendment flags flying."

"But the more I thought about it," Mr. Abrams said, "the more I thought of other possibilities. Could a painter invite the public to his gallery at which he painted portraits of them for a fee but refused to paint black people? Could a musician invite the world to his studio where he wrote songs about them for a fee but refused to do so for Jews or Muslims? The First Amendment protects a lot, but not that conduct."

In the end, Mr. Abrams signed a brief supporting the gay couple, David Mullins and Charlie Craig. It was one of close to 100 friend-of-the-court briefs filed in the case, an extraordinary number. Among the most interesting ones are from deeply committed First Amendment experts who have struggled to find the right balance between protected expression and unlawful discrimination.

The case, Masterpiece Cakeshop v. Colorado Civil Rights Commission, No. 16-111, will be argued before the Supreme Court next month. It has tested deep and longstanding commitments to free speech, and it has divided old allies.

Consider Eugene Volokh, a leading First Amendment scholar who teaches at the University of California, Los Angeles. In 2013, he filed a brief supporting a wedding photographer who refused to document a same-sex union.

"Photographers, writers, singers, actors, painters and others who create First Amendment-protected speech must have the right to decide which commissions to take and which to reject," Professor Volokh wrote in the brief, which he filed with Dale Carpenter, a law professor, and the Cato Institute, the libertarian group.

In the new case, Professor Volokh is on the other side. Cakes may be tasty and pretty, he wrote in a brief supporting the couple, but creating them is not expression protected by the First Amendment.

“A chef, however brilliant, cannot claim a free speech clause right not to serve certain people at his restaurant, even if his dishes look stunning,” Professor Volokh wrote. “The same is true for bakers, even ones who create beautiful cakes for use at weddings.”

Professor Carpenter agreed. But the Cato Institute took the opposite view, fling a brief supporting the baker, Jack Phillips. “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,” the brief said.

Ilya Shapiro, a lawyer with Cato, said he and his former allies agreed on the basic principles. Writers, singers, actors and painters are entitled to protection, he said, while caterers and limousine drivers are not. Bakers are a hard case, he said, because they are close to the line.

“If the Supreme Court establishes a precedent that if you’re engaged in an expressive profession you have First Amendment protection against being compelled to produce your product or provide your service, I would be very happy with that,” Mr. Shapiro said. “If it draws the line that excludes bakers but includes florists, or wherever that line is drawn, we can quibble over that, but that’s less important than establishing that there is a valid free speech defense against being forced to use your expressive abilities.”

David Mullins, left, and Charlie Craig had their request for a wedding cake refused. Credit Nick Cote for The New York Times

Professor Volokh agreed, saying the dispute was over where, not whether, a line should be drawn.

“At some point, you have to decide what counts as speech and what doesn’t,” he said in an interview. “Otherwise, all human behavior could be said to be expressive.”

The brief filed by Mr. Abrams did not seek to draw lines between artists and others. “When an artist sells a message,” the brief said, “he must take all comers.”

Other prominent First Amendment scholars who generally take strong free speech positions also signed that brief, including Kathleen M. Sullivan, a former dean of Stanford Law School, and Geoffrey R. Stone, a former dean of the University of Chicago Law School. The brief was filed by Walter Dellinger, who was acting solicitor general in the Clinton administration.

There are big names on the other side, too. Among them are Michael W. McConnell of Stanford, Richard W. Garnett of Notre Dame and Randy E. Barnett of Georgetown, who signed a brief supporting Mr. Phillips, the baker. “The state’s effort to compel Phillips to use his artistic talents in a manner violative of his sincere convictions offends the vital constitutional commitment to freedom of expression,” the brief said.

Professor Volokh said that approach was too broad. The First Amendment, he said, protects only conduct that is inherently expressive or both meant and likely to send a message.

He said his disagreement with the Cato Institute about confectionary expression demonstrated that it was not always easy to decide what warrants First Amendment protection.

“It suggests that this case is not far from the borderline,” he said. “Until the lines are drawn, there can be considerable disputes about where the lines should be drawn.”