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Religious liberty or right to discriminate? High court to hear arguments in wedding cake case.

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In July 2012, Charlie Craig and David Mullins walked into a cake shop in Lakewood, Colo. Across the counter was Jack Phillips, owner of the bakery he had opened 24 years earlier.

The two men told him they wanted a cake for their wedding reception. They even had a binder of possible ideas. Before they could open it, Mr. Phillips told them that while he would be happy to make them other products, he did not sell baked goods for same-sex weddings because of his Christian beliefs.

Mr. Craig and Mr. Mullins left embarrassed and, they say, distraught. After the Colorado Civil Rights Commission found in 2014 that Phillips had violated the state's anti-discrimination law and ordered him to make cakes for same-sex weddings or not design wedding cakes at all, Phillips says he felt forced to choose between his faith and his life's work.

Five years after the couple left the Masterpiece Cakeshop, the case challenging a state law prohibiting discrimination against lesbian, gay, bisexual, and transgender (LGBT) people will be heard by the US Supreme Court. As evidenced by the people who began camping outside the high court Friday for a seat at Tuesday's oral arguments, it seems destined to be a historic ruling in a landmark term. Heavyweight legal organizations on both sides have warned that defeat could bring potentially seismic consequences, more than 100 amicus briefs have been filed – some forming unlikely partnerships – and observers are predicting the justices will split along ideological lines. The views of Justice Anthony Kennedy – often the court's swing vote, but also its leading proponent of gay rights – will be of even more interest than usual to court watchers.

This is "the first time we have this question of whether or not someone's religious beliefs in not serving [people] something should be stronger than the state's interest in making sure that people are not improperly excluded from participating in the public marketplace," says Robert Tuttle, a professor of law and religion and George Washington University Law School in Washington.

The case brought to the Colorado Civil Rights Commission is significantly different from the case now before the Supreme Court. Back then, the case mirrored religious freedom-based challenges to advancements in LGBT rights. Phillips also had made an argument on free speech grounds, however, and the validity of that argument is likely to decide the case. The Roberts court has been willing to shift legal precedents on a variety of issues, from union fees to campaign finance, in the interest of protecting free speech. This case could continue that trend, experts say.

‘Compelled speech’ with ‘startling’ implications

Boiling it down, Phillips argues the First Amendment protects his right to create and sell wedding cakes in a way that is consistent with his religious identity. He also refuses to make cakes that celebrate Halloween, divorce, or “promote atheism, racism, or indecency.” What the lower courts in Colorado are doing, he claims, is forcing him to speak in favor of something he objects to.

Under the “compelled speech” doctrine, the Supreme Court has held that in some circumstances the First Amendment protects an individual from being required to express a thought with which they disagree. Students cannot be forced to salute the flag, for example, and a newspaper cannot be required to publish an advertisement. (Other forms of compelled speech, such as warnings on alcohol and tobacco products and filing a tax return, are not protected.)

The thought and care Phillips puts into designing and decorating his wedding cakes, he argues “necessarily express ideas about marriage and the couple, and as a result ... are entitled to full constitutional protection.”

A key precedent he cites is a 1993 high court ruling that the state of Massachusetts could not force the organizers of a private St. Patrick’s Day parade to allow an Irish-American LGBT group to march with them. That ruling means “a cake artist who serves all people, like Phillips does, cannot be forced to create wedding cakes that celebrate marriage at odds with his faith,” his petition says.

He also claims that Colorado’s nondiscrimination law violates his Free Exercise rights because it specifically targets religious objectors to same-sex marriage, pointing to three Colorado bakeries who were not punished for refusing to make cakes with anti-gay inscriptions on them in 2014.

His case has attracted a diverse range of supporters, including the libertarian Cato Institute in Washington, which supported the court legalizing same-sex marriage in Obergefell v. Hodges two years ago.

“We also support private freedoms here,” says Ilya Shapiro, a senior fellow at the Cato Institute.

In its amicus brief, Cato warns of the “startling results” upholding the lower court decisions in favor of the state would mean. A graphic designer who thinks Scientology is fraudulent, for example, would not be allowed to refuse to design flyers for Scientologist meetings, and an actor “would violate the [Colorado] law if he refused to perform in a commercial for a religious organization he dislikes.”

A ‘straightforward’ case with ‘limitless’ consequences

However, some experts say a victory for Phillips would have equally significant consequences.

Phillips’s argument “is no different conceptually than if an artist or painter offered to paint people at a gallery for a fee but refused to paint black people,” says Floyd Abrams, a leading First Amendment scholar, in a conference call with reporters organized by the American Civil Liberties Union (ACLU).

Ria Tabacco Mar, a staff attorney for the ACLU who is representing Craig and Mullins, says “the consequences really are limitless” should the Supreme Court rule broadly against her clients.

The Department of Justice argues against that. In a brief supporting Phillips, it says the justices should be able to write an opinion exempting artists like Phillips from serving same-sex weddings without throwing other forms of discrimination into legal limbo. Racial bias in particular, the government notes, is something the justices found last year to be a "unique historical, constitutional and institutional concern" that gives the state a "compelling" interest to eradicate. "The same cannot be said for opposition to same-sex marriage," the government claims.

The free speech portion of the case has become more prominent largely because Supreme Court precedent makes the free exercise of religion portion practically unwinnable for Phillips, experts say. The court set that precedent in 1990, when Justice Antonin Scalia wrote in Employment Division v. Smith that exempting individuals from certain laws on religious grounds "would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind," including military service, payment of taxes, and child-neglect laws.

"There haven't been any judge-mandated exceptions to public accommodations law, for individual religiously motivated corporate actors, whether in the federal judiciary or in states," says Professor Tuttle, who signed onto an amicus brief supporting the couple. "Opening the door to those is just utterly unpredictable in its consequences."

Some experts argue that the free speech complaint is also unfounded because, unlike the parade in Boston, Phillips's store is not a private event but a public accommodation.

"When [an artist] opens a shop, then invites the public in and offers their works of art for sale, they can't do it in a way that violates the antidiscrimination laws," says Mr. Abrams, a lawyer who has argued numerous high-profile free speech cases, including defending The New York Times against the Nixon administration's attempts to stop them publishing the Pentagon Papers. "This seems a fairly straightforward decision where there was overt discrimination."

Specifically, the couple point to a 1968 high court ruling that government can regulate speech under certain circumstances, including if "the incidental restriction on First Amendment freedoms is not greater" than a "substantial government interest."

Furthermore, some experts say it would be easier for Phillips to convince the justices that he was compelled to say something he disagreed with if there was an actual message on the cake. Since the 2012 conversation never got that far, and Phillips is arguing that the cake by itself speaks to his support for same-sex marriage, there are fewer concrete facts for the justices to point to.

That also makes it harder for the court to write a narrow opinion in favor of Phillips, says Geoffrey Stone, a First Amendment expert and a professor at the University of Chicago Law School. If providing a plain wedding cake for a same-sex wedding is an endorsement of gay marriage, he adds, is providing funeral services for an LGBT person, or an African-American person, an endorsement that they are "people who deserve dignity"?

"It's hard to see what the limiting principle is if there's no specific message involved," he continues. "That extends so far beyond anything the Supreme Court ever imagined."

A right to dignity has been at the heart of American civil rights law, and it is a consistent theme in the Craig and Mullins brief.

“This case is about us getting turned away and humiliated by a business that’s open to public,” says Mullins in a conference call with reporters. “We never want another couple to go through that pain we’ve gone through.”

‘A hard call’ for Kennedy

Justice Kennedy’s majority opinion in Obergefell affirmed that LGBT people have a constitutional right to “equal dignity,” but it also made clear that those “who adhere to religious doctrines may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”

On top of being a leading proponent of free speech on the court, Kennedy has also authored the majority opinion in every Supreme Court decision favoring LGBT rights since 1996’s Romer v. Evans, which held that Colorado couldn’t bar people from legal discrimination protections on the basis of sexual orientation. That doesn’t mean Kennedy sees no limits on gay rights, however. As Adam Liptak, the Supreme Court reporter for The New York Times, told Slate’s Dahlia Lithwick last month, Kennedy subscribes to the philosophy that “losers get to complain.”

“He supports at least certain aspects of gay rights, [but] how far he feels it’s necessary to go in nondiscrimination laws” isn’t clear, says Steven Green, director of the Center for Religion, Law and Democracy at Willamette University in Salem, Ore., who signed onto the same amicus brief as Tuttle.

“What he’ll probably be balancing is the dignity interests of the couple versus the free speech interests of the baker to not express something that goes against his religious beliefs,” adds Steven Schwinn, a professor at the John Marshall School of Law in Chicago. “That’s going to be a hard call.”