



Jack Phillips Case Shows Misunderstanding of Discrimination, Warn Legal Experts

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There is a clear legal distinction in declining to express a message and refusing to serve a class of people, legal experts said regarding the case of a Colorado baker that declined to design and bake a cake for a same-sex wedding.

“Fundamentally there is a difference between denying a service to certain kinds of people and declining to convey a particular message,” @ishapiro says.

“Sexual orientation discrimination laws are being misused right now in a way to silence and punish those who have religious convictions about marriage being between a man and a woman,” said Kristen Waggoner, who argued before the Supreme Court Tuesday on behalf of the baker Jack Phillips, owner of the Masterpiece Cakeshop.

Phillips declined to design a custom cake for a same-sex wedding because it violated his Christian faith.

Waggoner, a senior vice president of Alliance Defending Freedom, a religious liberty legal group, added that Phillips was willing to sell other products and provide other services to the LGBT community, just not a wedding cake. Not being a vendor for same-sex weddings is similar to Phillips’ decision not to do Halloween cakes or cakes that celebrate a divorce, Waggoner said.

“They serve everyone, but they can’t express all messages that violate those religious convictions about marriage,” Waggoner continued, speaking at a forum at The Heritage Foundation Wednesday.

“We have clients that are literally facing jail time in Minnesota and Arizona because they won’t express messages about marriage that violate their conscience,” she continued.

The Colorado Civil Rights Commission and an administrative law judge determined Phillips engaged in sexual orientation discrimination. Phillips contends forcing him to design and bake a cake violates his First Amendment rights to free speech and free expression of religion.

Waggoner noted the far-reaching consequences of the case.

“Respondents’ theory, hopefully, was breathtaking to the court when they look at it closely because the [American Civil Liberties Union] and the Colorado government have told the court that in a public accommodation law they can force speech of filmmakers, oil painters, graphic designers, anyone, without really any limit on the government’s authority under these public accommodation laws,” she said.

She added that the Colorado commission has accused Phillips of being akin to perpetrators of the Holocaust and slave owners, but the commission has demonstrated bias in other cases.

“Three other bakeries were asked to design custom cakes that only had a religious message, a verse from the Bible. That verse was critical of same-sex marriage,” Waggoner said. “The Colorado commission said that that message they could decline because it was offensive.”

The Cato Institute supported the Supreme Court’s 2015 ruling recognizing same-sex marriage as a constitutional right. However, the libertarian think tank supports Phillips’ First Amendment rights in this case.

“Creating expressive products is constitutionally different than nonexpressive activities like delivering food, renting out ballrooms, or driving limousines,” Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, said during The Heritage Foundation forum. “We might want, or there might be, different kind of defenses for those types of businesses, be they statutorily or constitutional. But they don’t resound in the freedom of speech.”

He said using the government to stamp out dissenting views should cause concern.

“Fundamentally there is a difference between denying a service to certain kinds of people and declining to convey a particular message,” Shapiro added. “I don’t even know why you would want to have as your wedding vendor someone who can’t in good faith—literally—support your union.”

A public accommodations argument is weak in this case because there is no shortage of competing bakeries that would gladly serve as vendors for a same-sex wedding, said Lloyd Cohen, a professor at the Antonin Scalia Law School at George Mason University.

“The state of Colorado offered no evidence that the vast majority of merchants are unwilling to offer their services for same-sex nuptials on the same grounds they would service any other request,” Cohen said at the forum.

Legal precedent is that the legal presumption lies with liberty in lieu of a compelling state interest, Cohen continued. He made references to the Statue of Liberty, President Abraham Lincoln’s Gettysburg Address and Patrick Henry.

“We do not have in New York Harbor a ‘Statue of Inclusion’ and the 16th president did not in his most famous address refer to this as a nation conceived in giving no offense,” Cohen said. “And Patrick Henry did not rise in the Virginia House of Burgess and proclaim, ‘Give me a safe place or give me death.’ Rather, all of these major emblematic utterances in our history privileged liberty as a foundational principle.”