



The Colorado Wedding Cake Case: A Gay Couple Versus A Principled Baker

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May 1, 2018

The Supreme Court soon will issue its opinion in one of the most contentious, but least understood cases on that court's docket, the clash between gay rights advocates on the one hand, and a merchant's claim that his religious conscience forbids him from selling to a gay couple the same services and product (a custom-made wedding cake) that he readily provides to straight couples.

The cacophony on both sides has turned this case into a battleground of the culture wars. In fact, it is — or at least it should be — an easy case to decide. As things stand, however, it likely will result in a 5-4 decision in favor of one side or the other, and I predict that the baker will prevail. Still, it's close enough so that it could go the other way. But for the highly emotional context of the case, it likely would be decided unanimously in favor of the baker, if modern-era due process and free speech precedents coming from the high court are honored.

Masterpiece Cakeshop, Ltd and Jack C. Phillips vs. Colorado Civil Rights Commission; Charles Craig; and David Mullins was argued on December 5th and is currently under advisement. The Court's decision, expected by the end of June, will not end the controversy, but it should clarify one big question: Whether the high court is going to stick to fundamental freedom-of-belief principles even in contentious and highly-charged cases, or whether politics and social pressures are going to override constitutional liberties.

The question presented to the court sounds deceptively simple and straightforward:

Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

After the racial integration/civil rights and gay rights battles of the last half of 20th century settled down, most sectors of society accepted that public accommodations and commercial services, under state and federal laws, must be made available to all on an equal basis. If one can afford to eat in a particular restaurant and is willing to act with civility and decorum, that

establishment must serve all customers regardless of gender, race, religion, or sexual orientation. The same rule applies to all merchants who offer their wares and services to the public.

But the *Masterpiece Cakeshop* case offers an excruciatingly difficult challenge to the public accommodations doctrine. Here, the master baker was asked by a gay couple to bake a custom-made cake specifically for their wedding. The baker countered that his religious beliefs prohibit him from making such a cake, since he believes that gay marriage is sinful. The baker sought an exemption from the Colorado civil rights law that required a merchant to sell his products or services to the general public without picking and choosing on the basis of such characteristics as sexual orientation.

What emerges is a clash between the constitutional right of the gay couple not so much to marry, but to enjoy equal benefits of and access to products and services available to straight couples, and the right of a religious baker to refuse to devote his expressive talent in furthering a cause anathema to his religious sensibilities. The baker asserted that he would without hesitation sell a product to a gay couple, but he would draw the line at using his artistic skill to create a cake – a creative “masterpiece” so to speak – to further the plans for a gay wedding.

The court at oral argument seemed predictably split between the traditional “liberal” faction and the judicial “conservatives.” Justice Anthony M. Kennedy asked questions that could lead observers to predict that he could go in either direction. Kennedy, after all, wrote the court’s landmark decision in the 2015 *Obergefell v. Hodges* case that legalized gay marriage throughout the entire nation. Although deemed a judicial conservative in some respects, Kennedy has been very protective of a range of personal liberties, including gay rights. This case doubtless presented a challenge to Justice Kennedy and perhaps to other members of the court as well.

But in fact it seems to me a rather simple case. Charlie Craig and David Mullins have an absolute right to marry each other and to live in peace in Colorado or anywhere in the United States. And Jack Phillips has an absolute right to honor his religious conscience and refuse to bake a custom-made cake to celebrate the Craig-Mullins marriage. Craig and Mullins can readily find a baker who can provide a custom-made cake without violating religious conscience, and in fact they did. The Constitution, in its wisdom, provides an obvious solution for both sides. But, this being a test case, such an obvious solution will require not a sense of accommodation by either side, but an order of the Supreme Court that insists that such a couple’s undoubted right to marry requires accommodation to the religious sensibilities of the baker.

Perhaps the wisest brief filed in the case was penned by the nation’s two most prominent libertarian think tanks – the Cato Institute and the Reason Foundation. (Disclosure: I am an adjunct scholar at Cato.) Strongly (and predictably – they are libertarians, after all) in favor of gay marriage during the long-running national battle over the issue that culminated in *Obergefell*, Cato and Reason argue against the power of the gay couple to overcome the religious sensibilities of the Christian baker. The libertarian think tanks base their argument – which should be the winning argument in the case – on a 1977 high court decision, *Wooley v. Maynard*, holding that religious conscience secured by the First and Fourteenth Amendments protects a resident of New Hampshire from having to display on his

auto license-plate that state's motto, "Live Free or Die." Wooley had religious and philosophical compunctions against driving around sporting that state-mandated slogan. He prevailed.

"The same principle," proclaimed the Cato/Reason brief, "applies to bakers." "First-Amendment-protected speech, including bakers, florists, and other expressive professionals, must have the right to decide which speech to create or commissions to take." All speakers are entitled to this right, says the brief, "whether religious or secular, liberal or conservative, pro- or anti-same-sex-marriage." Once it is conceded that making custom wedding cakes constitutes "artistic expression," the obvious answer follows.

If the baker wins this case, the Constitution will have prevailed. All civil libertarians should be hoping for this result, including those, like Justice Kennedy, who have long been in favor of equal rights for gays and gay couples.

(The research and editing assistance of paralegal Nathan McGuire is gratefully acknowledged.)

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