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Weighing Wedding Cake Questions At The High Court

By **Joel Kurtzberg** (December 13, 2017, 4:53 PM EST)

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Last week, in Masterpiece Cakeshop LTD. v. Colorado Civil Rights Commission, the U.S. Supreme Court heard oral argument on whether applying Colorado's anti-discrimination law to compel Masterpiece Cakeshop to bake a cake for a same-sex wedding, inconsistent with shop owner Jack Phillips' sincerely held religious beliefs about marriage, violates the free speech or free exercise clauses of the First Amendment.

The case stems from a 2012 Colorado Anti-Discrimination Act (CADA) claim filed by Charlie Craig and David Mullins with the Colorado Civil Rights Commission (the commission) against Masterpiece Cakeshop, a Colorado bakery owned by Jack Phillips that refused to create a cake for Craig and Mullins' same-sex wedding on the grounds that same-sex unions were against Phillips' sincerely-held religious beliefs opposing same sex marriage. Under the CADA, it is discriminatory to deny anyone "the full and equal enjoyment of the goods and services ... of a place of public accommodation" based on protected characteristics, such as sexual orientation. The commission found for Craig and Mullins and ordered Masterpiece Cakeshop to take remedial measures, including providing comprehensive training to the bakery's staff on how to comply with the CADA.

The Colorado Court of Appeals upheld the commission's order in 2015, rejecting the bakery's contentions that the commission's findings violated the bakery's free speech and free exercise rights under the First Amendment. The Colorado Supreme Court denied Masterpiece Cakeshop's request for further review. The U.S. Supreme Court granted certiorari on June 26, 2017. In advance of oral argument, nearly 100 amicus briefs were filed, equally divided between the two sides.

The petitioners, Masterpiece Cakeshop and Phillips, argued that the commission's order violates Phillips' free speech rights under the First Amendment because requiring him to bake a cake for a same-sex marriage compels him to convey a message inconsistent with his sincerely held religious beliefs. The petitioners posited, "[t]he [cake] artist speaks [at a wedding]. It's as much Mr. Phillips' speech as it would be the couples." The questions at oral argument focused on whether baking a wedding cake constituted speech under the First Amendment at all, as opposed to merely transactional conduct.

Justice Elena Kagan led the charge, asking whether a hairstylist, jeweler, florist, invitation designer, tailor, chef or makeup artist could cite their religious beliefs as the basis to refuse to provide services for a same-sex wedding. When the petitioners answered that those persons could not because they were

not engaged in speech, Justice Kagan countered, “Some people may say that about cakes.” The petitioners responded by suggesting that unlike those other services potentially engaged in expressive activities, “the medium” that a baker uses to communicate something “is similar to other mediums that this court has protected.” When Justice Kagan queried whether the court has ever protected food as a medium for expression before — noting that “the primary purpose of a food of any kind is to be eaten” — the petitioners likened the wedding cake to traditional art, explaining that, although “not all cakes would be considered speech ... in the wedding context, Mr. Phillips is painting on a blank canvas ... [and] creating a painting on that canvas that expresses messages.”

Solicitor General Noel Francisco, who argued in support of the bakery, suggested that the compelled speech doctrine applied because (1) the creation of the wedding cakes at issue in this case is analogous to sculpture, a traditional art form and; (2) the cakes at issue are predominantly art, not just items to eat. He noted that “people pay very high prices for these highly sculpted cakes, not because they taste good, but because of their artistic qualities.”

The respondents, Craig and Mullins, argued that, because baking a wedding cake does not constitute speech at all, the petitioners’ compelled speech claim must fail. Contending that the CADA regulates the conduct of refusing a transaction, the respondents claimed that it should not matter whether the words on a cake are speech or not because merely transactional conduct is at issue in this case. Further, the respondents argued that any speech derived from a cake is imputed to the customer, not the baker. The respondents contended, “[W]hen a mom goes into a bakery and says 'make me a happy birthday cake for my child,' and then she takes that cake home for her four-year-old son’s birthday party, no one thinks that the baker is wishing happy birthday to the four-year-old.”

The respondents also claimed that accepting the petitioners’ argument would lead to consequences of the sort that the Supreme Court has already recognized as “unacceptable with respect to race.” Unpersuaded by this last point and drawing on the court’s language in Obergefell v. Hodges, however, Chief Justice John Roberts noted that, while “the racial analogy obviously is very compelling ... when the court upheld same-sex marriage in Obergefell, it went out of its way to talk about the decent and honorable people who may have opposing views.”

On the free exercise claim, the petitioners argued that the commission’s application of the CADA violates the First Amendment because it forces Phillips to participate in a religious activity disallowed by his own sincerely held religious beliefs. This argument, which seemed to gain traction with the court, prompted a discussion on whether Colorado has generally and neutrally applied the CADA. The Supreme Court has previously held that a generally applicable, neutrally worded law does not violate the free exercise clause, even if it incidentally burdens religious conduct. See Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (laws prohibiting use of the drug peyote did not violate free exercise clause when applied to Native Americans who used the drug in religious ceremonies). However, if a law is only applied (either in language or effect) to conduct or speech concerning certain topics or viewpoints, it is content-based and must survive strict scrutiny. See Church of the Lukumi Babalu Aye Inc. v. Hialeah, 508 U.S. 520 (1993).

According to the petitioners, the record is replete with evidence of a double standard indicating that strict scrutiny applies. The petitioners argued that “the bias of the commission is ... evidenced in the unequal treatment of the cake designers ... on the squarely opposite sides of this issue,” as the commission has undisputedly declined to apply the CADA to three secular cake artists who refused to create cakes opposing same-sex marriage for a Christian patron. The petitioners also pointed out, and Justice Anthony Kennedy seemed concerned by, the fact that one of the Colorado Human Rights

Commissioners who reviewed the case stated, in his review of the issue that, “freedom of religion used to justify discrimination is a despicable piece of rhetoric.” Justice Kennedy seemed very disturbed by those remarks. When pressed by Justice Kennedy, counsel for the petitioners expressly disavowed the commissioner’s comments.

Justice Kennedy continued to press the point, asking, “Suppose we thought that in significant part at least one member of the commission based the commissioner’s decision on ... on ... on the grounds that ... of hostility to religion. Can ... can your ... could your judgment then stand?” Chief Justice Roberts suggested that the answer to Justice Kennedy’s question was no, as he analogized the situation to ones where a judge on a three-person appellate panel is disqualified: “We’ve ... we’ve had this case before ... in the context ... of courts, I think it’s not just where you have a three-judge panel and it turns out one judge was ... should have been disqualified whether ... for whatever reason, they don’t say that, well, the vote, there were two still, so it doesn’t change the result because it’s a deliberative process, and the idea is, well, the one biased judge might have influenced the views of the other.”

If there were any doubt about Justice Kennedy’s views on the subject, he made them clear when, following the petitioners’ arguments, he said to the respondents, “It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips’ religious beliefs.”

Craig and Mullins conversely argued that the commission applied the CADA in a content-neutral manner and that any burden placed on Phillips’ religious expression was merely incidental. The respondents contended, “[T]he fact that Mr. Phillips considers his cake baking to be expressive doesn’t give him a First Amendment exemption to a content-neutral regulation of public accommodation sales in the retail context.”

While there are many ways the Supreme Court could slice this case, it seems likely that the vote will be 5-4 with — as is so often the case — Justice Kennedy casting the deciding vote. Kennedy’s sentiments seemed to shift throughout the argument. Towards the start of the argument, Kennedy pointedly asked if a baker could post a sign in his window saying, “We do not bake cakes for gay weddings.” When told by the petitioners that the baker could, with some conditions, Justice Kennedy responded, “You would not think that an affront to the gay community?” However, his later defense for religious tolerance, as highlighted above in the discussion of the petitioners’ free exercise claim, suggests that he is likely leaning towards a vote in favor of Masterpiece Cakeshop on free exercise grounds.

If the court decides in favor of Masterpiece Cakeshop, the ruling will likely be narrow, particularly in light of ill-addressed concerns articulated by Justice Stephen Breyer and others on the bench that the court must be careful not to rule in such a way that would “undermine every civil rights law” ever passed.

For instance, an opinion siding with Phillips might be so closely tied to the particular facts of this case (e.g., the type of artistic cakes he bakes) that it does not impact most services provided for weddings and other occasions. Alternatively, the court may decide the case on the basis of free exercise of religion rather than free speech and confine the ruling to the manner of the decision-making outlined in this case — i.e., leaving open the possibility that an opposite outcome could happen in future cases if a different, religion-neutral decision-making procedure were applied. The court may also just remand the case to Colorado for further proceedings because of the evidence that one of the Colorado Human Rights Commissioners who heard the case was allegedly biased against Phillips’ sincerely held religious beliefs.

The decision is expected in June, the month of wedding cakes.

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