

From the Wall Street Journal, 6 December 2017:

In Wedding-Cake Case, Supreme Court Weighs Clash Between Gay Rights and Religious Views

Spotlight turns to Justice Anthony Kennedy as justice's challenge both sides (- Brent Kendall)

WASHINGTON—Supreme Court justices wrestled with competing visions of individual rights Tuesday, vigorously debating a legal collision between a baker whose Christian faith condemns same-sex marriage and a state law requiring him to sell wedding cakes without regard to sexual orientation.

The case was the first major dispute to reach the high court in the wake of its 2015 ruling extending same-sex marriage nationwide, forcing the justices to evaluate that decision's impact on private parties who, typically for religious reasons, remain opposed to the practice.

While federal law doesn't explicitly protect gay couples from discrimination, more than 20 states and hundreds of local jurisdictions outlaw discrimination based on sexual orientation, much as they forbid bias against customers for reasons of race, sex, religion, disability and other attributes.

Neither side's attorneys yielded ground during the arguments, which left little clear other than the court's recognition that both Jack Phillips, the Lakewood, Colo., baker, and the Denver couple he refused to serve, Charlie Craig and David Mullins, have significant rights at stake.

In a nod to the complexity of the case, several justices challenged lawyers representing the side they were expected to sympathize with.

Justice Neil Gorsuch, a Donald Trump appointee championed by conservatives, suggested that the administration's argument favoring Mr. Phillips could open the door to wider discrimination. And liberal Justice Stephen Breyer voiced concern that Colorado had been too cavalier in its treatment of the vendor's religious views.

But empathy rarely is enough to move justices off their ideological ground, leaving the spotlight on Justice Anthony Kennedy, the maverick conservative who embodies the legal conflict within the case.

Over the past two decades, Justice Kennedy has joined, and led, the court's liberal wing in expanding gay rights, culminating in a 2015 decision extending same-sex marriage nationwide. But Justice Kennedy also has joined fellow conservatives in easing the strict separation of church and state that had been charted by precedents dating from the 1960s.

On Tuesday, he pressed both sides toward the uncomfortable extremes their arguments could portend.

The Trump administration joined the case on the side of the baker, and the U.S. solicitor general argued on his behalf at the court Tuesday. That marked another occasion when the administration has sided with social conservatives on a high-profile issue reversing a position taken by the Obama White House.

U.S. Solicitor General Noel Francisco, making his first argument as the Trump administration's high-court advocate, suggested that regardless of antidiscrimination laws, the First Amendment's free-speech guarantee should allow businesses to reject any customer seeking their product or services for "an expressive event like a marriage celebration to which they're deeply opposed."

"If you prevail, could the baker put a sign in his window, 'We Do Not Bake Cakes for Gay Weddings'?" Justice Kennedy asked. "And would you not think that an affront to the gay community?"

"I would not minimize the dignity interests to Mr. Craig and Mr. Mullins one bit, but there are dignity interests on the other side here, too," Mr. Francisco said.

When Frederick Yarger, the Colorado solicitor general, took the lectern, Justice Kennedy upbraided the state with equal force. "Counselor, tolerance is essential in a free society, and tolerance is most meaningful when it's mutual," he said. "It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips's religious beliefs."

Where Justice Kennedy questioned Mr. Francisco over the possibility of a nationwide campaign pressuring bakers to refuse service to gay couples, he told Mr. Yarger that “accommodation is quite possible” because “other good bakery shops” presumably would welcome business from engaged couples of the same sex.

The dispute arose in 2012, when Messrs. Craig and Mullins came to Mr. Phillips’s Masterpiece Cakeshop, only to be turned away within moments of expressing their interest in a wedding cake. The couple filed a complaint with the Colorado Civil Rights Division, where an administrative law judge and then a seven-member commission found the bakery must offer wedding cakes to same-sex couples on the same terms as other customers.

When a state appellate court upheld the commission’s decision, Mr. Phillips stopped selling wedding cakes altogether rather than make them for same-sex couples.

The case poses several levels of legal questions, starting with whether baking a custom wedding cake counts as speech under the Constitution.

Kristen Waggoner, an attorney with the advocacy group Alliance Defending Freedom that represented Mr. Phillips, painted her client as an artist with expressive rights equal to that of any sculptor or painter.

Mr. Phillips would have no choice but to sell an off-the-shelf cake to a gay couple but he can refuse to bake a cake to order, she contended. The difference, she said, was that “his speech has been completed” when the cake is placed on the retail rack before the same-sex couple enters the store.

The case raised issues that could affect a range of small businesses, some of the justices suggested.

Justice Ruth Bader Ginsburg asked if a floral-shop owner, or “the person who designs the invitations” would be considered to be “speaking” at the wedding.

Yes, if they produced “custom-designed” products with “artistic expression,” Ms. Waggoner said.

Justice Elena Kagan picked up the thread: “The jeweler?” she asked. Maybe, Ms. Waggoner said.

“Hair stylist?” Justice Kagan asked.

“Absolutely not,” said Ms. Waggoner.

“The makeup artist?”

“No,” said Ms. Waggoner.

“It’s called an artist. It’s the makeup artist,” Justice Kagan said, prompting laughter in the courtroom.

David Cole, an American Civil Liberties Union attorney representing Messrs. Craig and Mullins, argued that siding with the baker would undermine broad anti-discrimination laws, including those passed to protect African-Americans.

Chief Justice John Roberts didn’t buy it.

“The racial analogy obviously is very compelling, but when the court upheld same-sex marriage in [2015], it went out of its way to talk about the decent and honorable people who may have opposing views,” said Chief Justice Roberts, who dissented from that opinion. “And to immediately lump them in the same group as people who are opposed to equality in relations with respect to race, I’m not sure that takes full account of that concept.”

That may be so, Mr. Cole said, but the 2015 decision also “did not say that businesses who make a choice to open themselves to the public can then turn away people because they are gay and lesbian.”

Justice Samuel Alito turned the issue around, suggesting that the Colorado commission had singled out Mr. Phillips’s beliefs for unfavorable treatment.

He noted that the commission declined to take action against three other bakeries that refused to make cakes with messages hostile to same-sex marriage.

“The commission said, ‘That’s okay, it’s okay for a baker who supports same-sex marriage to refuse to create a cake with a message that is opposed to same-sex marriage,’” Justice Alito said. “But when the tables are turned and you have the baker who opposes same-sex marriage, that baker may be compelled to create a cake that expresses approval of same-sex marriage.”

That line of the argument suggested a potential way out if the court wants to avoid confronting the larger issues: finding flaws in the specific way Colorado handled the complaint against Mr. Phillips.

Justice Kennedy cited remarks by one of the members of the state commission suggesting that religion had sometimes been used to justify discrimination.

“Suppose we thought there was a significant aspect of hostility to a religion in this case,” Justice Kennedy asked Mr. Yarger. “Could your judgment stand?”

Chief Justice Roberts and Justice Gorsuch echoed those concerns, suggesting at least a small chance the court could produce a narrow decision that leaves the larger clash for another day.

A decision in the case is expected by June.

—*Louise Radnofsky contributed to this article.*

From The Washington Post – 6 December 2017:

Supreme Court seems divided in case of baker who refused to create a wedding cake for a same-sex couple

The Supreme Court seemed closely divided Tuesday over whether the First Amendment protects a Colorado baker from creating a wedding cake for a same-sex couple, with Justice Anthony M. Kennedy likely to cast the deciding vote.

Kennedy, who wrote the court's 5 to 4 decision in 2015 saying gay couples have a constitutional right to marry, speculated about what might happen if a decision in baker Jack C. Phillips's favor prompted requests for bakers across the country to refuse to make cakes for same-sex couples. Would the federal government feel vindicated? Kennedy asked.

On the flip side, just moments later, Kennedy sharply questioned Colorado Solicitor General Frederick R. Yarger. The justice seemed offended by a comment made during the deliberations of the Colorado Civil Rights Commission when one commissioner said: “And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others.”

At one point, Kennedy and some conservative justices raised the possibility that the proceedings against baker Jack C. Phillips had been infected by bias.

[\[Wedding cakes can be stunning creations. But do they qualify as art?\]](#)

The rest of the court seemed to line up as expected. Liberal justices worried that an exception for Phillips would gut public accommodations laws that require businesses to serve the public without discriminating because of race, gender, religion and, in the case of Colorado and more than 20 other states, sexual orientation.

Justice Stephen G. Breyer said the court did not want to “undermine every single civil rights law.”

The court's conservatives were concerned with what Justice Samuel A. Alito Jr. said was a “disturbing record” from the Colorado Civil Rights Commission and the Colorado Court of Appeals, which ruled against Phillips.

That raised the possibility that the case could be returned. But they also seemed sympathetic to Phillips's argument that, as a “cake artist,” the law violates his freedom of expression to create a custom cake for a same-sex wedding. His religious beliefs teach that marriage is only between a man and a woman.

David D. Cole, legal director for the American Civil Liberties Union, which represents the couple, Charlie Craig and David Mullins, acknowledged there were complicated issues, but they did not apply to Phillips's decision that he would not create a cake for the couple.

“All he knew was that they were gay,” Cole said.

Several of the liberal justices questioned what other types of business owners would be exempt if the court made an exception for Phillips.

“Who else is an artist?” asked Justice Ruth Bader Ginsburg.

What about a hair stylist, a chef or a makeup artist, asked Justice Elena Kagan.

Phillips’s attorney, Kristen K. Waggoner, distinguished between the baker’s highly-stylized, sculpted creations and the services provided by other professions that she said were “not speech.”

“Some people might say that about cakes,” responded Kagan.

The Trump administration filed a brief on behalf of Phillips; supporters of the couple said it was the first time the government has argued for an exemption to an anti-discrimination law.

But the government agreed with Phillips that his cakes are a form of expression and that he cannot be compelled to use his talents for something that he does not support.

U.S. Solicitor General Noel J. Francisco, representing the Trump administration, told the court Tuesday that the exemption should apply only to a narrow category of business owners who should not be forced to create or contribute to an event they disagree with on the basis of their religious beliefs.

[*\[Edible art: Bakers want Supreme Court to acknowledge there’s more to a cake than baking\]*](#)

He repeatedly used as an analogy an African American artist, who he said should not be compelled to sculpt a cross that would be used for a Ku Klux Klan service.

When asked where to draw the line, he said the justices should ask whether the creation is “predominantly expressive” in its purpose and whether customers are paying a premium for it.

That prompted a lighthearted retort from Justice Neil M. Gorsuch, who noted that high-priced wedding cakes rarely taste as good as they look.

It was to Francisco that Kennedy posed his question about whether the baker could post a sign in the window notifying potential customers that the shop does not make cakes for same-sex couples and asked whether that would be “an affront to the gay community.”

Phillips contends that dual guarantees in the First Amendment — for free speech and for the free exercise of religion — protect him against Colorado’s public accommodations law, which requires businesses to serve customers equally regardless of “disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.”

Scattered across the country, florists, bakers, photographers and others have claimed that being forced to offer their wedding services to same-sex couples violates their rights. Courts have routinely turned down the business owners — as the Colorado Court of Appeals did in the Phillips, saying that state anti-discrimination laws require businesses that are open to the public to treat all potential customers equally.

There’s no dispute about what triggered the court case in 2012, when same-sex marriage was still prohibited in Colorado (Alito and Chief Justice John G. Roberts Jr. wondered whether that prohibition was significant). Craig and David Mullins decided to get married in Massachusetts, where it was legal. They would return to Denver for a reception, and those helping with the plans suggested they get a cake from Masterpiece.

The couple arrived with Craig’s mother and a book of ideas, but Phillips cut short the meeting as soon as he learned the cake was to celebrate the couple’s marriage.

Phillips recalled: “Our conversation was just about 20 seconds long. ‘Sorry guys, I don’t make cakes for same-sex weddings.’”

The couple then learned that Colorado’s public accommodations law specifically prohibited discrimination based on sexual orientation, and they filed a complaint with the Colorado Civil Rights Commission. The commission ruled against Phillips, and the appeals court upheld the decision.

“Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same-sex marriage,” Judge Daniel M. Taubman wrote. “However, if it wishes to operate as a public accommodation and conduct business within the State of Colorado, [the law] prohibits it from picking and choosing customers based on their sexual orientation.”

The case is *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.