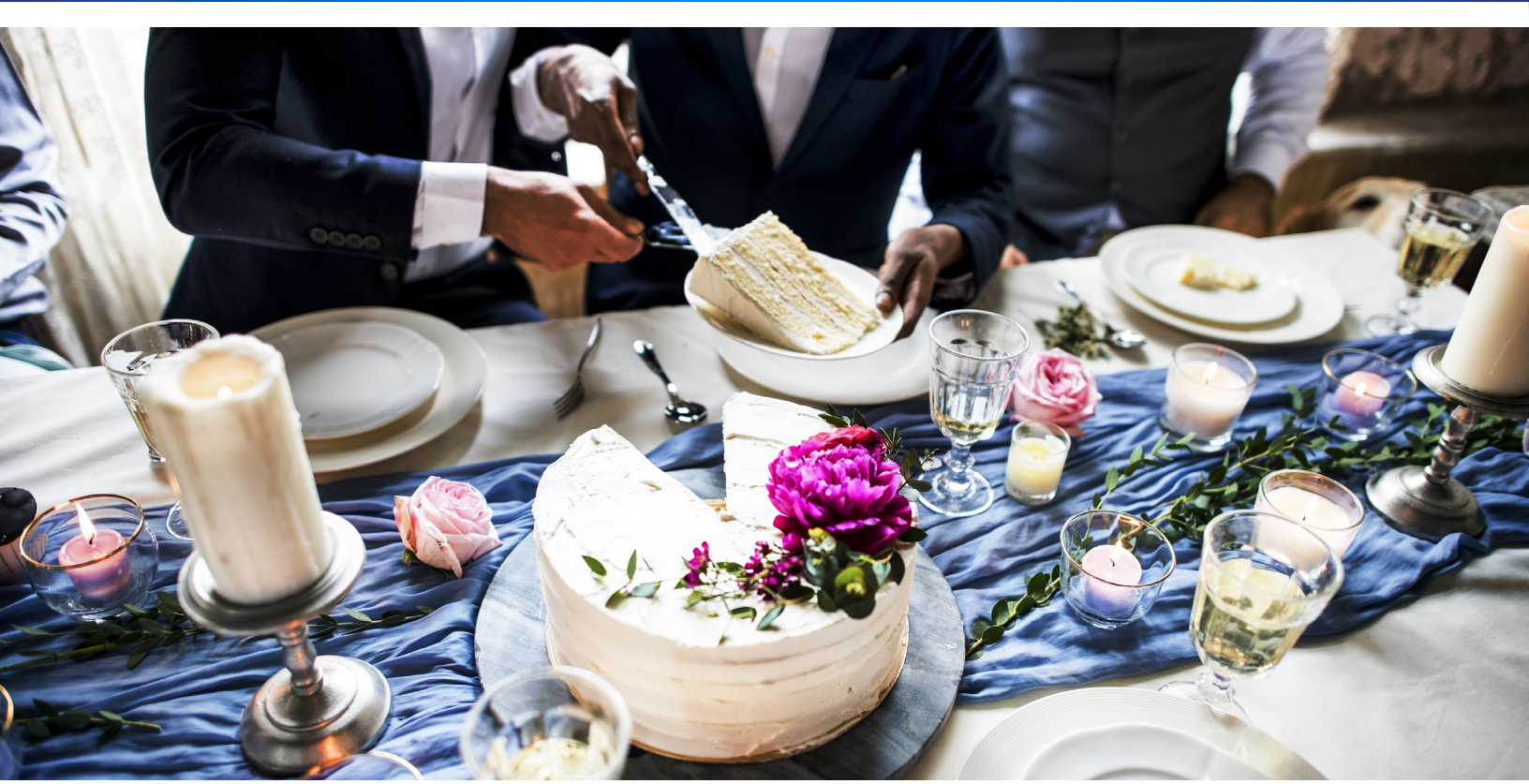


A BAKERY, SAME-SEX MARRIAGE, AND THE SUPREME COURT CONTROVERSIAL ISSUES IN THE NEWS



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A BAKERY, SAME-SEX MARRIAGE, AND THE SUPREME COURT

CENTRAL QUESTION

Does the First Amendment allow a business to deny services to people on the basis of the business owner's religious beliefs?



BACKGROUND

The First Amendment to the Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹

But like many vague constitutional provisions, the definitions of "free exercise" of religion and "freedom of speech" have generated frequent debate in the United States. These debates have been especially heated at times when citizens have viewed the protection of one person's liberties as an encroachment on the liberties of others.

At various points in U.S. history, these complicated questions have reached the Supreme Court. In 1878, for example, the Court ruled in *Reynolds v. United States* that despite the First Amendment's guarantee to protect the free exercise of religion, Mormons were not entitled to practice polygamy in violation of a federal ban.² Nearly a century later, the Court ruled in *Wisconsin v. Yoder* (1972) that Amish children did not have to follow a Wisconsin state law and attend high school, after a group of Amish parents argued that such an action would violate their religious beliefs.³

Thus, the Court has ruled both for and against those who have argued that their religious faith overrides the law of the land.

FACTS OF THE CASE

In July 2012, Charlie Craig and David Mullins visited Masterpiece Cakeshop in Lakewood, Colorado, to order a cake for their upcoming wedding. The shop's owner, Jack Phillips, declined the request, informing the couple that he does not create wedding cakes for same-sex marriages. Phillips believes that cake decoration is an art form through which he honors God, and that decorating a cake for a same-sex marriage would displease God.⁴

Colorado law prohibits places of public accommodation (such as hotels, restaurants, and theaters) from refusing service on the basis of race, sex, marital status, sexual orientation, and several other factors. Craig and Mullins filed complaints with the Colorado Civil Rights Division, which agreed that Masterpiece Cakeshop had violated the law

BACKGROUND

and illegally discriminated against the couple. Judge Robert Spencer of the Colorado Office of Administrative Courts issued a decision confirming that ruling.⁵

Masterpiece Cakeshop appealed the ruling to the Colorado Civil Rights Commission, which affirmed the previous decision that the shop had violated Colorado law. The Commission ordered Masterpiece Cakeshop to (1) change its company policies, (2) provide staff training regarding discrimination, and (3) provide quarterly reports for two years on the steps it has taken to obey the law.⁶ On appeal, the Colorado Court of Appeals affirmed the ruling of the Commission.⁷

The Colorado Supreme Court declined to hear the case on appeal from Masterpiece Cakeshop. But in June 2017, the U.S. Supreme Court announced that it would review the case in its October 2017 term.⁸

QUESTION BEFORE THE COURT

Does the application of Colorado’s anti-discrimination law to compel a shop owner to design and make a cake that violates his sincere religious beliefs about same-sex marriage violate the freedom of speech or free exercise of religion clauses of the First Amendment?⁹

PRECEDENT CASES

When the Supreme Court considers constitutional questions, it looks to previous cases—or precedents—to help guide its decisions. Consider the following three cases:

Employment Division v. Smith (1990). This case dealt with two Oregon men who were fired from their jobs for using peyote (an illegal drug in the state) in a Native American religious ceremony. The two men filed a claim for unemployment compensation, but the state denied it. The Court affirmed Oregon’s right to deny unemployment benefits, with Justice Antonin Scalia writing for the majority that siding with the men “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.” Justice Scalia cited as examples compulsory military service, vaccination requirements, payment of taxes, and child neglect laws.¹⁰

Burwell v. Hobby Lobby Stores (2014). This case dealt with Hobby Lobby, a chain of craft stores owned by the Green family, who have committed to run the stores according to Christian principles.¹¹ The Greens objected to the contraceptive mandate in the Patient Protection and Affordable Care Act (the law also known as Obamacare), which requires health insurance plans offered by employers to cover specific services for female patients—including contraceptives—without out-of-pocket costs.¹² If the Greens had been forced to violate the contraceptive mandate (which they believe helps ends human life after conception), they said they would have faced fines of roughly \$1.3 million per day, or nearly \$475 million per year.¹³ The Court ruled that “closely held” for-profit businesses operated on religious principles could not be required to adhere to the contraceptive mandate.¹⁴

Obergefell v. Hodges (2015). This case dealt with groups of same-sex couples who sued their various states to challenge the constitutionality of state bans on same-sex marriage or the refusal to recognize same-sex marriages conducted in other jurisdictions. The Court ruled that the 14th Amendment guarantees the right to marry as a fundamental liberty—one that applies equally to heterosexual couples and same-sex couples.¹⁵ But in his majority opinion, Justice Anthony Kennedy also noted: “[T]hose who adhere to religious doctrines [...] may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”¹⁶

Does the First Amendment allow a business to deny services to people on the basis of the business owner's religious beliefs?

YES: This case is about the government forcing an artist to endorse a message he disagrees with.

"Every American should be free to choose which art they will create and which art they won't create without fear of being unjustly punished by the government," said David Cortman, one of the lawyers working on behalf of Phillips and Masterpiece Cakeshop.¹⁷

This case presents complicated constitutional questions. But the bottom line is that it is not about discrimination—it is about whether or not the government can dictate which messages citizens must advocate, no matter their beliefs.

"Jack Phillips is an artist," his lawyers wrote to the Supreme Court. "His faith teaches him to serve and love everyone and he does. It also compels him to use his artistic talents to promote only messages that align with his religious beliefs. Thus, he declines lucrative business by not creating goods that contain alcohol or cakes celebrating Halloween and other messages his faith prohibits, such as racism, atheism, and any marriage not between one man and one woman."¹⁸

Phillips is not refusing to serve gay customers; in fact, his lawyers state that "he is happy to create other items for gay and lesbian clients."¹⁹ He just objects to being an active participant in a same-sex wedding. "Don't let anyone tell you that this case is about status-based discrimination," wrote David French, a senior writer for *National Review*. "The bakery is no more discriminating against gay people than a baker discriminates against white people if he declines to bake a Confederate flag cake. The baker bakes cakes for gay customers. He didn't want to lend his talents to send a specific message—namely, approval of gay marriage."²⁰

"Creative professionals should never be required to lend their unique talents to express any form of message they dislike," French continued. "Don't make black lawyers oppose civil rights, don't make liberal fashion designers design clothes for conservative politicians, and don't require racists to design cakes for interracial couples. Some people use liberty wisely. Some people abuse liberty for immoral ends. But we can't limit liberty only to the wise and just."²¹

This case is about protecting the basic freedoms of speech and religious exercise. "Fundamentalist Protestants, Catholics, Orthodox Jews, Muslims, Mormons—it's a big chunk of America," said William Eskridge, Jr., a professor of constitutional law at Yale Law School. "Decent people. They feel they are under siege by government. Many have no problem with gay customers. They just don't want to participate in the choreography of gay weddings."²²

NO This case is about protecting same-sex couples from discrimination.

"This has always been about more than a cake," said Mullins, one of the men who requested the wedding cake. "Businesses should not be allowed to violate the law and discriminate against us because of who we are and who we love."²³

Although this case can be viewed through the lens of free speech and free exercise of religion, it is, at its core, a question of discrimination. "It is no answer to say that Mullins and Craig could shop somewhere else for their wedding cake, just as it was no answer in 1966 to say that African-American customers could eat at another restaurant," the couple's lawyers wrote in a brief to the Supreme Court. "The issue is not access to baked goods; it is full inclusion and participation in civic life."²⁴

This is not the first time that a person or business has used religious belief as a justification for discrimination. "Most Protestant churches in the South believed slavery and, later, apartheid and anti-miscegenation laws were ordained by God. Presbyterians, Methodists, Southern Baptists—respectable religions," said Eskridge. "Maybe several million people still believe that."²⁵

The problem with Phillips' actions is that he categorically refused to bake a wedding cake for a same-sex couple—even before there was discussion of the message or design that would appear on the cake. "He 'was not asked to apply any message or symbol to the cake' that could be reasonably interpreted as endorsing or advocating for same-sex marriage, and, the judge observed, '[f]or all Phillips knew at the time, [Craig and Mullins] might have wanted a nondescript cake that would have been suitable for consumption at any wedding,'" the lawyers for the Colorado Civil Rights Commission wrote in a brief to the Court, citing the ruling of a lower court.²⁶

"The judge distinguished hypothetical scenarios involving bakeries that might refuse to serve customers because of the particular design of a requested cake," the lawyers continued. "'In [those] cases, it [would be] the explicit, unmistakable, offensive message' that would allow the baker to refuse the order. In this case, in contrast, Petitioners refused to bake any cake, without regard to what was written on it."²⁷

Therefore, this case is not about compelling an individual to endorse a particular message that he objects to. It is about a business owner who refused service to two men simply because they are gay. This cannot happen in a just society.

QUESTIONS TO CONSIDER

1. How would the Supreme Court rule in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* if the justices followed the precedent of *Employment Division v. Smith*? How would the Court rule if the justices followed the precedent of *Burwell v. Hobby Lobby Stores*?

2. Would the Court ruling differ depending on which case the justices used as precedent?

3. Which of the precedent cases mentioned do you believe to be most relevant to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*?

4. If you were a justice on the Court, how would you rule in this case?

ENDNOTES

- ¹ U.S. Constitution. Amendment I.
- ² Oyez. “*Reynolds v. United States*.” Web. 5 Jun. 2017.
- ³ Oyez. “*Wisconsin v. Yoder*.” Web. 5 Jun. 2017.
- ⁴ Oyez. “*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.” Web. 8 Aug. 2017.
- ⁵ American Civil Liberties Union. “Charlie Craig and David Mullins v. Masterpiece Cakeshop.” 26 Jun. 2017. Web. 8 Aug. 2017.
- ⁶ Ibid.
- ⁷ Oyez. “*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.” Web. 8 Aug. 2017.
- ⁸ American Civil Liberties Union. “Charlie Craig and David Mullins v. Masterpiece Cakeshop.” 26 Jun. 2017. Web. 8 Aug. 2017.
- ⁹ Oyez. “*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.” Web. 8 Aug. 2017.
- ¹⁰ Oyez. “*Employment Division v. Smith*.” Web. 5 Jun. 2017.
- ¹¹ Denniston, Lyle. “Argument Preview: Religion, Rights, and the Workplace.” SCOTUSblog. 20 Mar. 2014. Web. 8 Aug. 2017.
- ¹² Health Resources and Services Administration. “Women’s Preventive Services Guidelines.” Web. 5 Jun. 2017.
- ¹³ Denniston, Lyle. “Argument Preview: Religion, Rights, and the Workplace.” SCOTUSblog. 20 Mar. 2014. Web. 8 Aug. 2017.
- ¹⁴ Liptak, Adam. “Supreme Court Rejects Contraceptives Mandate for Some Corporations.” *New York Times*. 30 Jun. 2014. Web. 28 Jul. 2015.
- ¹⁵ Oyez. “*Obergefell v. Hodges*.” Web. 8 Aug. 2017.
- ¹⁶ Kennedy, Anthony. Majority Opinion. *Obergefell v. Hodges*. 2015. Web. 8 Aug. 2017.
- ¹⁷ Liptak, Adam. “Justices to Hear Case on Religious Objections to Same-Sex Marriage.” *New York Times*. 26 Jun. 2017. Web. 8 Aug. 2017.
- ¹⁸ Cortman, David, Rory Gray, Nicolle Martin, Jeremy Tedesco, Kristen Waggoner, Jordan Lorence, and J. Caleb Dalton. Petition for a Writ of Certiorari. *Masterpiece Cakeshop, Ltd., and Jack Phillips v. Colorado Civil Rights Commission, Charlie Craig, and David Mullins*. Web. 8 Aug. 2017.
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- ²⁰ French, David. “Three Thoughts on the Masterpiece Cakeshop Cert Grant.” The Corner. *National Review*. 26 Jun. 2017. Web. 8 Aug. 2017.
- ²¹ Ibid.
- ²² Parloff, Roger. “Christian Bakers, Gay Weddings, and a Question for the Supreme Court.” *The New Yorker*. 6 Mar. 2017. Web. 8 Aug. 2017.
- ²³ Liptak, Adam. “Justices to Hear Case on Religious Objections to Same-Sex Marriage.” *New York Times*. 26 Jun. 2017. Web. 8 Aug. 2017.
- ²⁴ Liptak, Adam. “Justices to Hear Case on Religious Objections to Same-Sex Marriage.” *New York Times*. 26 Jun. 2017. Web. 8 Aug. 2017. Silverstein, Mark, Sara Neel, Paula Greisen, Leslie Cooper, Ria Tabacco Mar, Joshua Block, James Esseks, Louise Melling, and Steven Shapiro. Brief in Opposition. *Masterpiece Cakeshop, Ltd., and Jack Phillips v. Colorado Civil Rights Commission, Charlie Craig, and David Mullins*. Web. 8 Aug. 2017.
- ²⁵ Parloff, Roger. “Christian Bakers, Gay Weddings, and a Question for the Supreme Court.” *The New Yorker*. 6 Mar. 2017. Web. 8 Aug. 2017.
- ²⁶ Coffman, Cynthia, Frederick Yarger, Glenn Roper, and Stacy Worthington. Brief of the Colorado Civil Rights Commission in Opposition. *Masterpiece Cakeshop, Ltd., and Jack Phillips v. Colorado Civil Rights Commission, Charlie Craig, and David Mullins*. Web. 8 Aug. 2017.
- ²⁷ Ibid.