

US Supreme Court hears oral argument on cake shop anti-gay discrimination case

By Ed Hightower
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In oral arguments on Tuesday, a majority of US Supreme Court justices indicated that they may rule in favor of a Colorado baker who refused to make a cake for a gay couple's wedding in violation of a state public accommodations law banning discrimination by businesses. Most significantly, the so-called "swing vote" justice, Anthony Kennedy, showed concern for the religious freedom of the baker.

The nominally liberal judges—Stephen Breyer, Ruth Bader Ginsberg, Sonya Sotomayor, and Eleana Kagan—appeared supportive of Colorado's public accommodations law. The Republican bloc, which includes chief justice John Roberts, Clarence Thomas, Samuel Alito and Neil Gorsuch—clearly supported the bogus religious freedom argument.

Therefore, as in so many cases before the Supreme Court, the law will follow where Kennedy leads.

The facts of the case are briefly stated as follows: gay couple David Mullins and Charlie Craig visited Masterpiece Cakeshop in Lakewood, Colorado in July 2012 to order a cake for a wedding reception. When it became clear to owner Jack Phillips that the cake would commemorate a same-sex wedding, he informed Mullins and Craig that he would not serve them, citing Christian beliefs. By admission, he has denied his services to other gay couples for the same reason. Mr. Phillips proudly told one gay couple that he would not make them a cake any sooner than he would for a pedophile.

The Colorado Civil Rights Commission, a state agency charged with prosecuting illegal discrimination, sanctioned Phillips, who eventually lost in the Colorado Court of Appeals, was denied reviewed in the Colorado Supreme Court, and petitioned the US Supreme Court for review. The US Supreme Court selects only a tiny minority of cases each term, and the

choice of which cases are certified for review often has political significance of its own.

The litigious provocations like the Masterpiece Cakeshop case, or that of Kentucky court clerk Kim Davis, serve to chum the waters of reaction, drawing the most backward and fascistic layers of the population into a feeding frenzy. They embolden the extreme right elements that serve as a base of support for Trump's policies that are harnessed and directed to enrich the ruling class. In this case, the Christian fundamentalist Alliance Defending Freedom (ADF) represents Phillips.

ADF prides itself on providing policy advice to school systems to limit transgender student access to restrooms, and a free legal defense if a student sues for discrimination. They oppose school policies against bullying LGBT students, and even encourage students with anti-gay views to promote their views on school grounds.

The Trump administration has supported Phillips to the hilt, with its solicitor general, Noel Francisco, urging the court Tuesday to find for Phillips. Francisco did pro bono work for ADF and earned their designation "Allied Attorney," facts he failed to disclose in his senate confirmation hearing. He argued, against law and logic, that if the Supreme Court found for the gay couple, then an African American sculptor could be forced to make a cross for the Ku Klux Klan. (Since this would not be an incident of race, gender, sexual orientation or nationality discrimination, the sculptor could happily throw the Klansman out on his head).

As a matter of established US constitutional law, Phillips' First Amendment arguments—that making a cake for a gay wedding reception violates his free exercise of religion and violates his free expression

because of the “expressive” character of baking—are farcical. (His legal brief likens his cakes to the works of Jackson Pollock and Piet Mondrian).

Certainly, American law rarely requires one to say or express something in particular, to support this policy or religion, etc. But Phillips was not asked to make a cake that expressed support for gay marriage. The cake was apolitical; it was the gay customers he turned his nose at, not a specific cake design, statement, shape, color, symbol, etc. All of the expressiveness is therefore incidental to his prejudices.

Moreover, well-settled legal precedent holds that businesses, in their commercial activity, cannot skirt an otherwise valid law simply because they engage in expressive activity or speech. This holds true for newspapers, broadcasters, law firms, non-denominational private schools, labor unions, civic clubs, photography studios, restaurants and professional organizations, all of which are prohibited from discriminating on the basis of race, gender and other categories.

Justice Kennedy touched on what a precedent would be set in the case of Phillips’ victory, asking US Solicitor General Francisco if Masterpiece Cakeshop could legally post a sign saying gay couples would not be served. Indeed, a ruling for Phillips could pave the way for discrimination in housing, insurance, education, lodging, recreation, employment or any number of contexts, provided that the discriminating enterprise could offer a justification based in religious belief.

The main thrust of Kennedy’s comments, however, was his condemnation of any court or state action based on “hostility to religion,” a sound bite for the extreme right-wing campaign to attack equality and secularism under the fig leaf of religious freedom.

One must view the Masterpiece Cakeshop case as a political provocation and an attempt to twist and turn the US Constitution against itself. This viewpoint also holds that secularism is everywhere and always persecuting religious persons, a notion which contrasts starkly with the fact that religion plays an inflated and semi-official role in American public life.

Commercial speech and expression has, for most of American legal history, been treated as far less important than the speech and expression of individuals. More recent decisions in the Hobby Lobby

and Citizens United cases have elevated private corporations, which legally are nothing more than fictitious persons, to a legal status higher than that of real people. Religious freedom formed the main argument for Hobby Lobby in its successful effort to deny birth control coverage to employees.

A ruling for Masterpiece Cakeshop would overturn a long line of Supreme Court decisions dating at least as far back as the 1950s and 1960s. In that period, the Supreme Court, under Chief Justice Earl Warren, made a series of landmark rulings that outlawed segregation based on race in most areas of social life, including businesses like hotels and restaurants. The great cases outlawing segregation include *Brown v. Board of Education* (1954), *Heart of Atlanta Motel, Inc. v. United States* (1964), and *Newman v. Piggie Park Enterprises* (1968).

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