

Management Alert



U.S. Supreme Court Hears Oral Argument in Key Case on LGBT Rights and Religious Liberty

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Seyfarth Synopsis: Oral argument suggests the Supreme Court is narrowly divided on how to reconcile non-discrimination protections for LGBT individuals with claims for religious liberty, with Justice Kennedy appearing likely to cast the decisive vote.

On December 5, 2017, the United States Supreme Court heard oral arguments in *Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Commission*, No. 16-111. The question presented was “Whether applying Colorado’s public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.”

The case involves Jack Phillips, the owner of Masterpiece Cakeshop in Colorado, who refused to bake a custom wedding cake for a same-sex couple. The owner asserted that the First Amendment rights to freedom of speech and religious liberty protected his refusal to make custom cakes for same-sex couples. Based on his refusal, he was ultimately found to have violated Colorado’s Anti-Discrimination Act, and the Supreme Court ultimately took up the case.

At oral argument, the baker’s attorney argued that the government cannot force a person “to express messages that violate religious convictions” and that requiring the bakery owner to “sketch, sculpt, and hand-paint cakes that celebrate a view of marriage in violation of his religious convictions” would violate those rights.

Conversely, counsel for Colorado argued that the bakery, as a commercial enterprise holding itself open to the public, cannot invoke religious beliefs to avoid application of a generally applicable anti-discrimination law, which “extended to LGBT people the same protections used to fight discrimination against race, sex and persons of faith.”

At the spirited oral argument, Justice Ginsburg and Justice Kagan pressed the baker’s counsel to explain where the line could be drawn: after admitting that it would not be compulsion of speech to require a baker to sell a pre-made cake, but suggesting that a custom cake is protected speech, the Justices asked whether florists, jewelers, and hairstylists also could claim First Amendment protections to refuse service to customers. Justice Sotomayor also expressed concern that a rule where expressive speech trumps public accommodation laws against discrimination could have an impact on race discrimination and other civil rights laws.

However, Justice Kennedy — historically a champion for LGBT rights — challenged Colorado’s position. He pressed counsel for Colorado on whether the application of the anti-discrimination law in this case expressed impermissible hostility to religious views. Justice Kennedy later stated: “[T]olerance is essential in a free society. And is most meaningful when it’s mutual. It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips’ religious beliefs.”

Justice Gorsuch suggested that the requirements of the anti-discrimination law amounted to compelled speech. He also asked whether a baker would have to serve a customer who wants a red cross to celebrate the Red Cross, but also provide the same red cross to someone who wishes to celebrate the KKK.

At the close of oral argument, Justice Sotomayor noted the importance of public accommodations law in changing discriminatory views and promoting an inclusive society: “[T]he problem is that America’s reaction to mixed marriages and to race didn’t change on its own. It changed because we had public accommodation laws that forced people to do things that many claimed were against their expressive rights and against their religious rights. It’s not denigrating someone by saying. . . : If you choose to participate in our community in a public way, your choice, you can choose to sell cakes or not. You can choose to sell cupcakes or not, whatever it is you choose to sell, you have to sell it to everyone who knocks on your door, if you open your door to everyone.”

A decision in *Masterpiece Cakeshop* may have significant impact on the status of LGBTQ+ employees. While the case does not address employment nor revolve around employment law, the ruling will serve as a touchstone for the reach of religious liberty claims. A ruling for the bakery would likely lead to a slew of case filings testing the landscape between religious liberty and principles of non-discrimination. Justice Ginsburg warned of such an eventuality in her 35-page dissent in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Specifically, she noted that by extending religious rights to businesses the Court had “ventured into a minefield.” She asked, “Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?”

A victory for the bakery would strengthen the argument that religious beliefs trump notions of non-discrimination and allow disparate treatment of individuals (customers or employees) based on their LGBTQ+ status (and potentially another form of legally protected statuses). Such a result would lead to litigation on whether a religious liberty defense in a state with an LGBTQ+ inclusive non-discrimination law protect an employer’s termination of a gay employee on the basis of that employee marrying his same-sex spouse or from providing transition related medical services to a transgender employee or spousal benefits to a same sex spouse.

A ruling for the bakery, would impact workplace dynamics and likely lead to an increase in LGBTQ+ discrimination. Pending a decision from the Supreme Court, employers are wise to consider how their policies, practices, and procedures impact their LGBT employees. Employers who wish to implement LGBTQ+ inclusive policies and practices must set forth their expectation of inclusion and protection of the rights of LGBT employees.

As always, we invite employers to reach out to their Seyfarth contact for solutions and recommendations regarding anti-harassment and EEO policies and addressing compliance with LGBTQ+ issues in the law.

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