

Court offers limited ruling on cake case

In its new decision involving religious liberty and same-sex marriage, the U.S. Supreme Court delivered a win to religious liberty, but the victory is a very limited one that leaves the future far from clear.

The court ruled 7-2 on June 4 that a Colorado baker named Jack Phillips, who refused for reasons of conscience to bake a wedding cake for a same-sex couple, did not get a fair hearing from the state civil rights commission that found him guilty of violating the state anti-discrimination law.

The majority opinion by Justice Anthony Kennedy skirted Phillips' claim that his free speech and religious liberty rights were directly violated and held instead that the civil rights panel showed anti-religious bias in deciding against him.

Moreover, Kennedy said, a future case involving a different set of facts could produce a very different result. This struck many readers as a not-so-subtle invitation to the same-sex marriage side of this argument to try again.

Questions unanswered

Kennedy, who three years ago authored the Supreme Court's majority opinion in a case affirming that same-sex couples have a constitutional right to marry, was joined in his opinion in the new case (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*) by Chief Justice John Roberts and Justices Stephen Breyer, Samuel Alito, Elena Kagan and Neil Gorsuch. Justice Clarence Thomas concurred in the judgment and in part in the opinion. Justices Ruth Bader Ginsburg and Sonia Sotomayor dissented.

In his majority opinion, Kennedy conceded that the case involved “difficult questions” when it came to reconciling two large principles: on the one hand, protecting the “rights and dignity” of same-sex married couples who seek to obtain goods and services; on the other hand, the right of all persons to exercise the “fundamental freedoms” of speech and religious practice guaranteed by the First Amendment.

But the difficult questions were ones that Kennedy’s opinion elected not to address, focusing instead on the boorishness of the civil rights commission as grounds for upholding Phillips.

Case background

The case came to the Supreme Court on appeal from a decision by the Colorado Court of Appeals upholding the commission’s finding that Phillips, owner of a bakery in the Denver suburb of Lakewood, had violated state anti-discrimination law six years ago by saying no to a same-sex couple who wanted him to bake them a wedding cake. Colorado did not recognize same-sex marriage at that time, and the two men were preparing to go to Massachusetts for their wedding.

<p>Also from the Court</p>

The U.S. Supreme Court June 4 threw out a lower court's ruling that allowed a 17-year-old last year to obtain an abortion while she was in a detention center after an illegal border crossing. If the Supreme Court had not acted, the lower court's ruling could have set a precedent that would have allowed minors in similar situations to obtain abortions. The legal battle began when the detained teenager had sought but was denied permission to leave the government-funded center where she was detained to obtain an abortion, saying she had been raped, found out she was pregnant during the detention and did not want to go through with the pregnancy.

The Trump administration objected to allowing her to leave the shelter temporarily for the purposes of obtaining an abortion, and said if she wanted an abortion, she could find a sponsor to get her out of detention or leave the country voluntarily. But an October ruling by a federal judge in Washington said the government couldn't interfere with the teenager's access to doctors and such actions infringed on her constitutional rights. Immediately after that ruling, she was allowed to leave the shelter for what government lawyers believed was pre-abortion counseling but she obtained an abortion instead.

Source: CNS

Phillips, an evangelical Christian who is opposed to same-sex marriage on religious grounds, told the men he would be glad to bake them some other kind of cake or other bakery product, but his religious beliefs prevented him from making a cake to celebrate their marriage.

The men then complained to the civil rights commission. The record of its hearing shows that some of its members spoke disparagingly to Phillips of his religious faith.

In doing so, Justice Kennedy wrote, the commission members exhibited "clear and impermissible hostility" to Phillips' beliefs. One, he noted, went so far as to say that "freedom of

religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust.”

Kennedy said of this that “the delicate question of when the free exercise of [Phillips’] religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the state itself would not be a factor....

“That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.”

At the same time, Kennedy added, “the outcome of cases in this and other circumstances must await further elaboration in the courts” – and all such disputes must be settled “with tolerance, without undue disrespect to sincere religious beliefs and without subjecting gay persons to indignities when they seek goods and services in an open market.”

Kennedy did not explain what he thought due “disrespect” for sincere religious beliefs might look like.

The fights to come

In coming to the Supreme Court, Phillips relied heavily on a novel free speech argument: Baking cakes is a form of self-expression for him, and forcing him to provide a wedding cake in these circumstances would mean forcing him to lend support to something his conscience told him was wrong.

A similar argument is advanced in another case (*National Institute of Family and Life Advocates v. Becerra*) still undecided by the Supreme Court at the time this is written. The dispute there centers on a California law requiring licensed pro-life pregnancy counseling centers to post notices advising clients that free abortions are available elsewhere,

and unlicensed centers to give prominent notice of the fact that they aren't licensed medical centers.

Other courts have overturned such laws, but a panel of the 9th Circuit U.S. Court of Appeals upheld the California version. The California case was argued before the Supreme Court in March. The Masterpiece Cakeshop case was argued in December.

In his concurring opinion in the case, Justice Thomas noted the virtual absence from the majority opinion of significant reference to the First Amendment free speech argument on which Phillips had relied so heavily. Religious freedom, he noted, had "lived to fight another day." But he went on to deplore the Kennedy opinion's scant treatment of free speech.

"In future cases," he warned, "freedom of speech could be essential" to warding off the use of the Supreme Court's 2015 decision supporting same-sex marriage as a weapon to stamp out public dissent.

The U.S. Conference of Catholic Bishops was among the many groups submitting friend of the court briefs to the Supreme Court in both cases.

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