

Supreme Court Argument: Baker's First Amendment Rights vs. Colorado's Anti-Discrimination Law

By Michelle E. Phillips, Paul Patten and John T. Cigno

December 6, 2017

The United States Supreme Court heard oral argument in a case with potentially far-reaching implications for issues at the intersection of civil rights and religious freedoms on December 5, 2017. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111.

The Court will decide whether applying Colorado's Anti-Discrimination Law (CADA) to a baker who refused, based on his religious belief, to prepare and sell a wedding cake to a same-sex couple violates the baker's First Amendment rights.

CADA prohibits places of public accommodation from discriminating against individuals on the basis of certain protected characteristics, including sexual orientation.

The Colorado Civil Rights Commission found that Jack Phillips violated CADA when he refused to sell a cake to a same-sex couple for their wedding.

Kristen Waggoner, arguing for Phillips, did not make the broad claim that a business owner with a religious belief should be allowed to refuse services based on the same-sex status of customers. Instead, she argued that the Commission's actions constituted "compelled speech," a violation of the First Amendment. She explained that the objection was to the *message* expressed by the cake, as opposed to the *people* who requested it.

During oral argument, Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan expressed concern over ruling in a way that would "undermine every civil rights law from the year [two]." Justice Sotomayor pointedly asked about whether speech espousing religious beliefs should trump public accommodation laws that prohibit discrimination on the basis of legally protected characteristics such as race. The Justices pressed Waggoner to distinguish between the baker's position and that of a hypothetical individual who refused on religious grounds to bake a cake for an interracial wedding.

Chief Justice John Roberts and Justices Samuel Alito and Neil Gorsuch expressed concern over respecting the sincerely held religious beliefs of individuals like Phillips, and potentially providing protection to a company for refusing services broader than the "compelled speech" doctrine advocated by Phillips. Chief Justice Roberts repeatedly returned to a hypothetical indicating his sympathy for a company with strongly held religious beliefs seeking to refuse services to a same-sex married couple.

As was the case with the Court's landmark 2015 *Obergefell v. Hodges* ruling (which effectively legalized same-sex marriage), Justice Anthony Kennedy's vote likely will decide the outcome of this case. Initially, Justice Kennedy appeared sympathetic to the same-sex couple, Charlie Craig and David Mullins. He asked U.S. Solicitor General Noel Francisco, representing the U.S. in opposing CADA, whether a ruling invalidating CADA would allow "a baker [to] put a sign in his window, we do not bake cakes for gay weddings." Francisco replied that it would. Justice Kennedy then questioned whether that would be "an affront to the gay community."

As the argument progressed, Justice Kennedy appeared to shift his concerns to whether the Colorado Civil Rights Commission's initial ruling demonstrated an anti-religious bias. He pointed to the Commissioner's statement that "freedom of religion used to justify discrimination is a despicable piece of rhetoric[.]" as evidence of such bias. He also said the state's position is "neither tolerant nor respectful of Mr. Phillips' religious beliefs." Ultimately, Justice Kennedy echoed the concerns of other Justices for striking an appropriate balance between freedom of religion and freedom from discrimination.

Meet the Authors



[Michelle E. Phillips](#)

Principal
New York Metro
White Plains 914-872-6899
Email



[Paul Patten](#)

Principal
Chicago 312-803-2570
Email



[John T. Cigno](#)

Associate
New York Metro
White Plains 914-872-6876
Email

The Court's decision may have far-reaching implications for the application of civil rights laws for those who seek to avoid those laws on the grounds of religious belief.

Jackson Lewis will provide updates on this case and other Supreme Court cases. Please contact the Jackson Lewis attorney with whom you regularly work with questions about this case or any federal and state employment laws prohibiting discrimination based on sexual orientation or gender identity.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.

©2020 Jackson Lewis P.C. All rights reserved. Attorney Advertising. Prior results do not guarantee a similar outcome. No client-lawyer relationship has been established by the posting or viewing of information on this website.

*The National Operations Center serves as the firm's central administration hub and houses the firm's Facilities, Finance, Human Resources and Technology departments.