

UNDERSTANDING MASTERPIECE CAKESHOP vs. COLORADO CIVIL RIGHTS COMMISSION



movement advancement project ▶

This report was authored by:

Movement Advancement Project

The Movement Advancement Project (MAP) is an independent think tank that provides rigorous research, insight and analysis that help speed equality for LGBT people. MAP works collaboratively with LGBT organizations, advocates and funders, providing information, analysis and resources that help coordinate and strengthen their efforts for maximum impact. MAP also conducts policy research to inform the public and policymakers about the legal and policy needs of LGBT people and their families.

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BACKGROUND

On the surface, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* involves a business—one that is open to the public—that refused to sell a cake to a couple for their wedding reception because they are gay. But in reality, this case is about whether laws against discrimination can continue to be enforced without sweeping exemptions.

A loss in *Masterpiece* would open the door to much wider ranging forms of discrimination and people facing discrimination. In short, it could lead to the erosion of federal and state nondiscrimination protections across the country.

Despite opponent claims that enabling broader discrimination is not the intent of the lawsuit, the current political environment—combined with efforts past and present to erode protections for people of color (e.g., the recent Supreme Court decision gutting the Voting Rights Act)—show that opponents will continue to chip away at foundational nondiscrimination protections until that foundation collapses entirely.

A ruling allowing discrimination in this case would next be used to support legal arguments enabling discrimination against women, minority faiths, and people of color—as well as LGBT people. Virtually all states—and the federal government—have laws prohibiting discrimination in public accommodations based on race, national origin and disability. Many states prohibit other forms of discrimination as well. This case is about whether all these laws can be enforced without sweeping exemptions.

Masterpiece Cakeshop argues that the Constitution's free speech protections should allow businesses with a creative element to refuse service to some people in violation of laws against discrimination. **If the Supreme Court were to agree, any business that provides custom services or products could claim a right to violate local, state or federal laws against discrimination—and it likely wouldn't be limited to discrimination based on sexual orientation.**

If the Supreme Court carves out a broad exemption in nondiscrimination laws for so-called “creative” enterprises, we could see an explosion of discrimination by restaurants, hair salons, event venues, funeral parlors and more. **Sanctioning discrimination by so-called “creative” enterprises will only be a start of the march by other businesses to claim a right to discriminate.**

As a friend-of-the-court brief by a coalition of racial justice groups supporting the couple in the *Masterpiece* case noted:

The unprecedented carve-outs proposed by Masterpiece and the federal government could apply well beyond the wedding context to other businesses that are also arguably engaged in expressive activities, such as culinary arts, interior design and architecture firms, fashion boutiques, beauty salons, and barber shops, who would prefer not to associate with racial, ethnic, or other underrepresented minorities. And even beyond artistic commercial enterprises, a free-speech exception could potentially exempt a broad range of businesses that claim free-speech objections from serving particular customer groups.¹

The bakery also argues that its religious beliefs entitle it to an exemption from nondiscrimination laws. If the Court agrees with this view, it could allow all kinds of businesses to refuse service because of religious objections. It could open the door to discrimination against people of minority faiths, against women, against single parents, and more.

¹ “Brief for Lawyers’ Committee for Civil Rights Under Law, Asian American Legal Defense and Education Fund, Center for Constitutional Rights, Color of Change, the Leadership Conference on Civil and Human Rights, National Action Network, National Association for the Advancement of Colored People, National Urban League, and Southern Poverty Law Center As Amici Curiae Supporting Respondents.” <https://lawyerscommittee.org/wp-content/uploads/2017/10/16-111-bsac-Lawyers-Committee-for-Civil-Rights-Under-Law-2.pdf>

Overview of the Case

In 2012, David Mullins and Charlie Craig, accompanied by Craig's mother, Debbie Munn, visited Masterpiece Cakeshop, a Denver-area bakery, to order a cake for their wedding reception. Before even discussing the design of the cake, Jack Phillips, the bakery owner, told them he wouldn't sell them a wedding cake because they were a same-sex couple.

Colorado state law prohibits all public accommodations, including businesses like Masterpiece Cakeshop, from refusing service to anyone based on their religion, race, sex, disability, age, national origin, marital status, creed, sexual orientation or gender identity. The couple filed a complaint with the Colorado Civil Rights Commission, which found the bakery had violated Colorado law by discriminating against Mullins and Craig.

The bakery admits that it had a policy of refusing service to gay couples seeking wedding cakes, but argues that it has a constitutional right to discriminate based on religious and free speech grounds. The Colorado state courts rejected this defense, and the bakery sought review of the state ruling by the Supreme Court, which agreed to hear the case.

The question before the Supreme Court is whether the Constitution provides a right to discriminate in violation of longstanding laws that apply to businesses that are open to the public, like Masterpiece Cakeshop.

Laws like Colorado's ensure that people previously subject to discrimination have the freedom to go about their day-to-day life without worrying whether they will be turned away from a business simply because of who they are. These laws provide access that goes far beyond cakes—including businesses and services that range from medical care to restaurants, from hotels to public transportation. A ruling that finds a right to discriminate would turn the Constitution's promise of equal treatment under the law on its head. It could have implications far beyond LGBT people, and would jeopardize long-standing laws against discrimination across the country.

TALKING ABOUT MASTERPIECE CAKESHOP VS. COLORADO CIVIL RIGHTS COMMISSION

It's not about cake. It's about discrimination.

- As a nation, we decided more than a half-century ago that businesses that are open to the public should be open to everyone on the same terms. Protecting people from discrimination is part of our country's promise of equal treatment under the law for everyone. No business open to the public has a constitutional right to discriminate against a customer based on their religion, gender, race, sexual orientation, or gender identity.
- Laws like Colorado's ensure that people previously subject to discrimination can go about their lives without worrying whether they will be turned away from a business simply because of who they are.
- Businesses can make decisions about what kinds of products or services they will provide – but they can't pick and choose who they will serve. With respect to this specific case, that means that no bakery has to sell wedding cakes, but if it chooses to do so, it can't turn some customers away just because of who they are.
- Businesses and their owners have a right to express themselves and to their religious beliefs—but those freedoms don't give businesses the right to discriminate when serving their customers. The Constitution does not protect the right of a bakery to post a sign that says, "Wedding Cakes for Heterosexuals Only."
- Permitting businesses that open their doors to the public to exempt themselves from laws against discrimination would mean sliding backwards to a time when such businesses engaged in blatant discrimination against people based on religion, race, gender and more. We can't go back to the days when businesses could say to customers, "We don't serve your kind not served here." Our Constitution does not protect this kind of discrimination.
- This isn't the first time that courts have encountered, and rejected, objections by businesses to nondiscrimination laws on religious or free speech grounds:
 - In 1964, soon after the federal Civil Rights Act was enacted to prohibit race discrimination by places of public accommodation, a small chain of BBQ restaurants in South Carolina called Piggie Park continued to refuse service to Black customers.

The owner argued that his religious beliefs about integration should allow him to break the law; he lost at every stage, including at the Supreme Court.

- In 1983, the Supreme Court rejected Bob Jones University's argument that it had religious right to refuse to admit interracial couples and students who supported interracial marriage.
- In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* (1973), a newspaper argued for a free speech right to post "help wanted" ads that listed jobs for men and jobs for women separately, in violation of antidiscrimination laws.
- And in *Hishon v. King & Spalding* (1984), a law firm sought to defend its refusal to hire women as partners, claiming the First Amendment allowed the partnership to choose to associate only with other men. The Supreme Court rejected both arguments.

Requiring Masterpiece Cakeshop to follow Colorado's nondiscrimination law does not violate constitutional protections for speech and religion.

- Freedom of religion is one of our most fundamental rights as Americans. But that freedom does not give any of us the right to harm other people, to impose our beliefs on others, or to discriminate.
- Our laws against discrimination apply to businesses that sell their goods to the public. Granting a business like Masterpiece Cakeshop a right to turn away customers based on religious objections would create a sweeping license to discriminate and have far-reaching, damaging consequences.
- Providing commercial services doesn't mean a business is endorsing anyone's marriage, or agreeing with everything the customer believes. It simply means it is providing services to the public, and it is open to everyone on the same terms.
- The specifics of the baked goods are a distraction. We are allowed to say and believe what we want in America, but we can't discriminate—and free speech doesn't mean a business open to the public can turn away customers just because of who they are, or not sell them products (no matter what that product is) that it sells to everyone else. For example, a law barring discrimination does not violate free speech protections because it requires a store to take down a sign that says "whites only."
- These laws don't stop business owners from expressing individual opinions or beliefs. That's exactly what Jack

Phillips has done here by going on national TV and telling his story.

- The bakery in this case routinely sells wedding cakes to straight couples, but it refused to sell a wedding cake to the couple here because they are gay. That is discrimination, and it's very different from refusing to sell a product that a business doesn't sell to any customers (e.g., a swastika cake). Businesses can have policies about the kinds of products they refuse to sell. What they can't do is turn customers away simply because of who they are.

Creating a special carve out for "creativity" undermines the purpose of nondiscrimination protections.

- Businesses that sell products to the general public aren't above the law just because there is a creative element to their work. There is no exemption for businesses with an "expressive" or "creative" element to turn customers away just because of who they are.
- If the Supreme Court carves out an exemption to anti-discrimination laws for "creative" businesses, any business that provides custom services or products could claim a right to violate nondiscrimination laws as they apply to others, not just LGBT people.
- It could mean a funeral home could refuse service to the surviving spouse of a gay couple, a salon could refuse to cut hair for a bat mitzvah, a printing company could refuse to sell invitations to a person of color, a tailor could refuse to provide service to a man because he is transgender.

The consequences and harms of a decision in favor of discrimination would be far-reaching.

- A loss at the Supreme Court allowing discrimination would have implications reaching far beyond LGBT people. It could also threaten our longstanding protections against discrimination for people of color, women, people with disabilities, religious minorities and others.
- We are a diverse society, and many business owners—and their customers—are people of different faiths. And just because a business serves a customer doesn't mean they share or endorse everything that customer believes in. The best way we respect those differences is to ensure that all of us are able to go about our day-to-day lives free from discrimination. Businesses that open their doors to the public should be open to everyone on the same terms.

Frequently Asked Questions

Why shouldn't bakeries or other business that serve the public be able to decide what kinds of cakes or creative products they will make?

Any business can decide what kind of products it will make. All that laws against discrimination—like the Colorado law at issue in this case—say is that, once a business that opens its doors to the public and decides to sell a particular product, it can't refuse to sell that product to someone because of who they are—for example, because they are lesbian, Jewish, or Black. The bakery here is just being asked to follow the law and provide the same services to gay couples that it provides to straight couples.

Why shouldn't businesses open to the public be able to refuse to provide a service for a wedding, if they object? What about religious freedom?

Laws against discrimination apply to businesses that open their doors to the public to sell a product. All the law involved in this case says is that, once a business decides to sell wedding cakes, it can't discriminate as to whom it sells those cakes. When a business sells products to the public, providing a commercial product like a cake isn't endorsing any customer or their beliefs. It is simply providing a commercial product. While weddings themselves are certainly expressive, that expression is of the couple's commitment and values, not those of the bakery, the dress shop, the hair salon, or any other provider. Nobody goes to a wedding and thinks that the bakery, or caterer, or other service provider is endorsing anything about the couple.

Religious freedom is a fundamental American value, which is why it is protected in the First Amendment of the Constitution. But that freedom doesn't give anyone the right to harm others, impose their beliefs on others, or to discriminate. This is why the courts have previously rejected businesses that have sued for the right, on religious grounds, to discriminate against African Americans, interracial couples, and more.

Why would anyone want to get a wedding cake from a bakery that objected to their wedding?

The case isn't about where to buy a cake; it's about whether a whole range of businesses that are open to the public can discriminate in such a way that people will never know when they might be served or when they might be turned away. It's about whether we can enforce our longstanding laws against discrimination. No one should have to endure the humiliation and shame of being turned away from a business because of who they are. The only way to prevent that harm is to apply the laws evenly. A victory for the bakery would mean that they can post signs that say, "Wedding cakes for heterosexuals only."

Does this mean a Jewish bakery has to bake a pro-Nazi cake, or a KKK cake?

No. The bakery here routinely sells wedding cakes to straight couples, but it refused to sell a wedding cake to Dave and Charlie because they are gay. That is discrimination, and it's very different from refusing to sell a product that a business doesn't sell to anyone, like a swastika cake. A business can have policies about the kinds of products it refuses to sell. What it can't do is refuse service because of who the customer is.



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