No Cake For You: Saying 'I Don't' To Same-Sex Marriage

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There were a few snickers when a Colorado state judge ruled that a baker has to produce wedding cakes for gay couples even though he opposes same-sex marriage on religious grounds.

A cake? What's the big deal?

But the decision, handed down late last week, is just the latest slice in a debate that has gone front burner with gay marriage now legalized in 16 states, and counting.
Can individual businesspeople like Jack Phillips of Masterpiece Cakeshop in suburban Denver be compelled to provide wedding (or commitment ceremony) goods and services to gay couples?

Or should they be allowed a religious exemption, like churches and some institutions? Or a First Amendment free expression pass — a sort of "conscientious objector" status — if the job is at odds with their beliefs?

Those questions, long simmering, are being debated in legal circles and in a handful of pending court cases involving not just cakes, but photography, event hall rentals and beyond.

And it's an issue that the U.S. Supreme Court has now been asked to weigh in on.

**Faith Dictates No Photos**

Lawyers for Albuquerque photographers Elaine and Jonathan Huguenin, who declined to photograph a lesbian couple's 2006 commitment ceremony, have asked the high court to overturn a New Mexico Supreme Court ruling that found the refusal discriminatory under state law.

Gay rights advocates hailed the August ruling as a victory for gay Americans, and in line with New Mexico's public accommodations law that, like those in 21 other states, bars discrimination based on sexual orientation.

But lawyers for the Huguenins and their Elane Photography business argue that, as artists, their clients have a First Amendment right to free expression and should not be compelled to create expressive work at odds with their values and beliefs.

James Gottry, a Phoenix lawyer who is writing a friend of the court brief on behalf of wedding photographers who support the Huguenins' position, characterized the First Amendment conflict in the photographers' case "as really inevitable."

"As a society we value tolerance, we value inclusion," Gottry says. "But from our founding, we have also placed a high value on the freedom of speech and expression."

He likens the case to one out of New Hampshire in the late 1970s, when the U.S. Supreme Court decided that the state could not require residents to display the state motto, "Live Free or Die," on their license plates if they found it "morally objectionable."
"The Elena Photography case takes that concept to the next level," Gottry says, "by very directly requiring a photographer to express a message that he or she does not agree with."

Discrimination Is Discrimination

In his Colorado cake case ruling, Administrative Law Judge Robert Spencer acknowledged that some may view the actions of baker Phillips as within his rights as a businessman.

"At first blush," he wrote, "it may seem reasonable that a private business should be able to refuse service to anyone it chooses.

"This view, however," Spencer added, "fails to take into account the cost to society and the hurt caused to persons who are denied service simply because of who they are."

Colorado, like New Mexico, bars discrimination based on sexual orientation.
For Laura Durso, the issue is one of basic rights.

"There is a steady drumbeat of people understanding fairness in the marketplace," says Durso, director of LGBT research and communication at the Center for American Progress. "Open a business to serve the public? You have an obligation to serve everyone."

The cake and photography cases are a cause for concern in the LGBT community, she says, characterizing the prospect of new religious carve-outs for businesses as a "slippery slope" that could lead to legal efforts to terminate gay, lesbian and transgender employees.

The rulings in Colorado and New Mexico, she notes, "are in line with the letter of the law."

Predictable Conflict

The current court collisions are no surprise to religious liberty advocates including Eric Rassbach, deputy general counsel at the Becket Fund for Religious Liberty.

"These are the kinds of cases that scholars have been predicting for a long time, and there's going to be a lot of them going forward, with all kinds of permutations," he says. "Photographers, cake bakers, florists, people who design invitations."

He argues that state public accommodations laws, which specify groups protected from discrimination, "were not written with same-sex marriage in mind."

The laws started with efforts in the 1960s to prevent discrimination based on race and evolved to include gender, marital status and other groups.

"They didn't have these types of conflicts in mind," says Rassbach, whose work has included cases attempting to secure kosher meals for a Jewish prison inmate in Texas and assisting in the Hobby Lobby case currently before the U.S. Supreme Court.

Hobby Lobby, a craft store giant represented by the Becket Fund, is challenging on religious grounds an Affordable Care Act requirement that its employer-provided health plan include birth control coverage.

"There's a conflict between the way public accommodations laws have been designed in the past, and religious liberty, and free expression," Rassbach argues. "Many activities surrounding weddings are expressive, because weddings themselves are symbolic expressions, ceremonies that have meaning."
Douglas Laycock, a noted expert in the field of same-sex marriage and religious liberty, wrote recently that while the number of people who think same-sex marriage is morally or religiously wrong "is large," there is a very small percentage of businesspeople "who will turn away business in the name of conscience." And he predicted their numbers should fall as same-sex marriages become "more familiar and accepted."

Laycock, a University of Virginia law professor, supports same-sex marriage and religious exemptions, he writes, as "parallel protections for quite similar claims to individual liberty in matters essential to personal identity."

Conscientious exemptions granted, he argued, would be small in number, "while the benefit to the individuals who need the exemption remains great."

So, what's the fix? Where is the line, constitutionally?

"That's the million-dollar question," Gottry says, and one that will have to be answered by state legislatures, or by the Supreme Court.

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