THE BROADER DANGER OF THE *MASTERPIECE CAKESHOP* CASE

The First Step to Eroding Nondiscrimination Protections Nationwide

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movement advancement project

INTRODUCTION

On Dec. 5, 2017, the U.S. Supreme Court will hear arguments in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[1] On the surface, the Court considers a Colorado bakery that refused to serve a gay couple in violation of Colorado's law protecting people from discrimination in public accommodations based on sexual orientation and gender identity. But the real impact of this case could be much broader than the facts of the case suggest. A loss in the *Masterpiece* case would paves the way to dismantling our nation's nondiscrimination laws. Not only would it open the door to much wider ranging *forms* of discrimination, but it would also expand the types of *people* who could face discrimination. In short, the case could lead to the erosion of the federal Civil Rights Act and other federal and state nondiscrimination protections across the country.

WHAT IS THE LEGAL QUESTION IN THE CASE?

The question the Court has said it will consider is, "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."[2]

This isn't the first time courts have encountered business objections to nondiscrimination laws on religious or free speech grounds. For example, a small chain of BBQ restaurants in South Carolina called Piggie Park refused service to black customers, with the owner arguing that his religious beliefs about integration should allow him to be exempt from nondiscrimination laws.[3] Years later, Bob Jones University argued it had a right to refuse to admit interracial couples and students who supported interracial marriage.[4] Both lost their legal arguments, including at the Supreme Court. So most people assume the law is settled. But a ruling for the bakery in the *Masterpiece* case would open it all back up.

How is that possible? The *Masterpiece* case puts forth a different question, asked in a different way, than anything that has come before the Supreme Court before. The bakery isn't just arguing that businesses with religious objections should be exempt from nondiscrimination laws; it also argues that commercial businesses that involve some form of creativity should be exempt from nondiscrimination laws. The bakery claims that requiring it to follow those laws not only violates its religious beliefs, but because the business involves "artistic expression," it also violates its right to free speech.

WHY IS THIS CASE SO DANGEROUS?

A Ruling for the Bakery Would Open the Door to Broader Forms of Discrimination

First, the kind of expression-related exemptions that the backers of the bakery seek go far beyond wedding cakes. This kind of right-to-refuse-service could include any kind of business or service where someone claims there is an element of creativity or expressiveness involved—for example: a restaurant, a caterer, a hair salon or barber shop, a tailor, a school counselor, a florist, a picture-framer, an architect, or an interior designer, just to name a few—as highlighted in an amicus brief filed by nine leading racial and legal justice organizations:

> *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.*[5]

A Ruling for the Cake Shop Would Open the Door to More Types of People Facing Discrimination

Public accommodations laws commonly prohibit discrimination on the basis of race, national origin, color, and religion. Most of those supporting the bakery in this case would like the public and the Justices to believe that a ruling in their favor would only allow discrimination based on sexual orientation. But consider an amicus brief filed on behalf of 20 states which argues that "Government cannot compel private artistic expression [here, wedding cakes]—ever."[6]

These 20 states—nearly half the states in our nation—are arguing that if "artistic" products and services are involved, the government should *never* be able to require those businesses to follow nondiscrimination laws—whether they are discriminating due to sexual orientation, race, religion, national origin, color, religion, sex or any other factor. As the legal brief by nine legal and racial justice organizations noted, this means that bakeries, restaurants, hair salons and barber shops, and many others would be able to deny service to LGBT people, African Americans, interracial couples, Jewish people, or anyone else they disapproved of:

> *The "custom goods" and "sexual orientation" carve-outs proposed by Masterpiece and the federal government have no limiting principles. Indeed, the federal government cannot even confirm that the "custom goods" carve-out could not be used to discriminate against racial minorities.*[7]

The U.S. Department of Justice is arguing that it is possible for the Supreme Court to rule for the bakery but limit the ruling to only allow discrimination based on sexual orientation—leaving the question of whether racial discrimination is also allowed for another day.[8] Even if the Court were to agree with that, a ruling for the bakery would almost certainly lead to follow-up cases aimed at expanding the ruling to make it legal for businesses to discriminate based on race or another characteristic.

A Swiftly Changing Cultural Landscape Means Civil Rights Protections Are Increasingly Vulnerable

Many people assume that because there are strong precedents against discrimination based on race—and a longer history of courts affirming such nondiscrimination protections—there would be little chance that such protections would actually be at risk. But the reality is that, while the histories of discrimination vary, there is little true *legal* distinction in our laws that would justify why discrimination based on sexual orientation would be constitutional, but discrimination based on race would be unconstitutional. At the end of the day, what most people are really counting on is the Court would preserve nondiscrimination protections based on race because it would be culturally unacceptable not to.

However, the events of the past few months and years have seen the fraying, and even some unravelling, of that cultural fabric. We have seen the Supreme Court gut a key part of the Voting Rights Act in *Shelby County vs. Holder*,[9] a President promoting myriad attempted Muslim bans, plans for "the wall," protestors blamed when white supremacists in Charlottesville committed murder, and increased frequency and size of white supremacist rallies. And the current cultural climate is being fed and led, in no small part, by an administration that is poised to appoint new Supreme Court justices should vacancies arise.

The current composition of the Court already mirrors the majorities that gave us the decisions in *Hobby Lobby*[10] and *Shelby County vs. Holder*, so all it would take is the retirement or death of one more justice to tilt the Court farther to the right for a generation or more—putting at risk many of the laws intended to protect people of color, women, religious minorities, LGBTQ people and others from discrimination.

BOTTOM LINE

Masterpiece Cakeshop vs. Colorado Civil Rights Commission is a far-reaching and dangerous case that could lead to the erosion and dismantling of nondiscrimination protections across the country—opening the door not only to more *forms* of discrimination, but also to more kinds of *people* who could face discrimination.

ENDNOTES

1 *Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Commission, et al*. U.S. Supreme Court. Docket No. 16-111 (2017-2018).

2 U.S. Supreme Court, "Questions Presented: 16-111 *Masterpiece Cakeshop v. CO Civil Rights Commission*," June 26, 2017. https://www.supremecourt.gov/qp/16-00111qp.pdf.

3 *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

4 Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

5 "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.

6 "Brief for the States of Texas, Alabama, Arizona, Arkansas, Idaho, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin, the Commonwealth of Kentucky, by and through Governor Matthew G. Bebin, and Paul R. Le Page, Governor of Maine, as *Amici Curiae* in Support of Petitioners." http://www.scotusblog.com/wp-content/uploads/2017/09/16-111_tsac_States-of-Texas.pdf.

7 "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.

8 "Brief for the United States as *Amicus Curiae* Supporting Petitioners." http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-tsac-USA.pdf.

9 *Shelby County v. Holder*, 570 U.S. 2 (2013).

10 *Burwell v. Hobby Lobby Stores, Inc*. 573 US _ (2014).