EDITOR'S NOTE:

Let Them Eat Cake

As many in the legal community look ahead to December 1 and the High Court's consideration of a baker's refusal to decorate a wedding cake for a gay couple, a more explosive iteration of that dispute is quietly gathering energy in Mississippi. While *Masterpiece Cakeshop* involves an assertion of free expression and religious prerogative in a relatively narrow context, the Mississippi legislature has taken action that exponentially accelerates the discussion. Magnolia State lawmakers have essentially sanctioned outright discrimination against the LGBT community based not only on religious grounds, but also on a more ambiguous standard—"moral conviction."

The measure, HB1523, is titled the "Protecting Freedom of Conscience from Government Discrimination Act." Signed into law by Governor Phil Bryant on April 5, 2016, it was Mississippi's response to the Court's declaration in *Obergefell* that same-sex partners have Constitutional rights equal to those of heterosexual couples. Its purpose is "to provide certain protections regarding a sincerely held religious belief or moral conviction for persons, religious organizations and private associations."

In clear rebuttal to *Obergefell*, HB1523 codifies three "sincerely held beliefs" that are to be protected in Mississippi. They are:

> "Marriage is or should be recognized as the union of one man and one woman; and
> Sexual relations are properly reserved to such a marriage; and
> Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."

The law prohibits Mississippi from taking a "discriminatory act" against religious groups, private associations or individuals that exercise such sincerely-held beliefs. HB1523 applies across a wide swathe of activities. It squarely answers the *Masterpiece* question, excusing every conceivable wedding-related business—bakers, photographers, limo drivers, flower arrangers, poets, disc jockeys, printers and the like—from having to serve same-sex unions. Also safeguarded are officials, judges, individuals and entities who decline to perform or solemnize such weddings; as are as clerks and registrars who refuse to record same-sex unions in Mississippi's public archives.

The range of HB 1523's protected beliefs extend far beyond nuptials. Religious entities are immune from state action for not considering LGBT job applicants or for terminating LGBT workers, and may refuse to rent or sell real estate to LGBT prospects. Medical professionals may decline to perform sex-reassignment surgeries, offer hormone replacement services or provide gender identity counselling. Adoptive and foster care parents are free to attempt converting LGBT children back to the law's core heterosexual moorings.

Not surprisingly, it took barely one month for legal challenges to HB1523. Among plaintiffs' arguments were that, by enumerating explicit religious tenets for state protection, the measure endorses a particular species of Christianity, transgressing the Establishment Clause. In June 2016, the law was enjoined by a federal district court before it could take effect. That decision was reversed by the Fifth Circuit in June 2017 on the grounds that the plaintiff, the Campaign for Southern Equality, had not itself been injured by HB1523 and lacked standing. In late September, the Circuit declined, en banc, to reconsider the case. HB 1523 thus went into effect in October 2017.

IMLA has added its voice to the *Masterpiece Cakeshop* debate, signing on to an amicus brief that points out, among other things, that more than 100 jurisdictions around the country have enacted measures similar to the Colorado non-discrimination law challenged by the baker. But other jurisdictions have enacted laws similar in tone to Mississippi's (albeit not as extreme). Like the stark dichotomy presented in the sanctuary cities discussion, where California has moved to declare itself a sanctuary state while Texas has attempted to criminalize the failure of officials to actively assist federal immigration efforts, the wedding cake dispute exemplifies a great divide among Americans.

In this circumstance, the role of our courts to discern a way forward is critical—as is the national will to accept, however grudgingly, a judicial determination as to what the Constitution permits. IMLA's interest is not only in a just society but in local antonomy. As municipal lawyers, we are privileged to have a front-row seat to this ongoing evolution.

Best regards,
Erich Eiselt