

2017 Supreme Court Preview: Justice Kennedy's Last Blockbusters?

By: Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

The thing that stood out the most about the Supreme Court's 2016 term is the fact that almost no cases really stood out. The term was characterized by fairly mundane, procedural issues and the vast majority of the Court's rulings were narrow, often resulting in remand to lower courts to decide questions that it arguably could have decided itself. While the fact that the Court was short one Justice likely led to some of these narrow rulings, in June, Chief Justice Roberts may have explained another reason when he addressed a conference for the D.C. Circuit, noting that he views the Court's opinions as speaking for the court versus expressing the views of an individual jurist. Thus, he urged his colleagues to consider the other Justices' views when drafting a majority opinion. It remains to be seen whether the Chief Justice will be able to continue to build consensus among his colleagues next term, when what can only be termed "blockbusters" are already filling the docket.

The 2017 docket is not even half full, but the Court has already accepted cases destined for history books. These include whether partisan gerrymandering violates the Constitution, whether President Trump's so-called "travel ban" is unconstitutional, and whether a state or local government can compel someone, through a public accommodation law, to provide goods or services to a gay couple if doing so violates that person's sincerely-held religious beliefs about marriage and violates the First Amendment's free speech and free exercise clauses. The Court is also going to decide whether the warrantless seizure and search of historical cell-phone records revealing the location and movements of the phone's user is permitted by the Fourth Amendment, and a number of other cases that will impact local governments--including a rare and potentially significant anti-commandeering case under the Tenth Amendment. IMLA will be filing amicus briefs in six cases next term, and perhaps more, depending on how the Court fills the remainder of its docket. These include *Gill v. Whitford* and *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, which are discussed more fully below.

Not only are the cases for the 2017 term shaping up to be exciting for Court watchers, but rumors of Justice Kennedy's possible retirement are already swirling around Washington DC, given that he informed applicants for his 2018 law clerk positions that he is considering stepping down. Perhaps Justice Kennedy will want to draft one more major opinion before he leaves the bench, and if so, this may just be the term to do that.

Masterpiece Cakeshop v. Colorado Civil Rights Commission

Having drafted the majority opinions in *Obergefell v. Hodges* and *United States v. Windsor*, Justice Kennedy may also write for the majority in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. At issue is whether someone who sells their goods to the public can be exempted from a public accommodation law of general applicability based on the seller's claim of religious liberty. The case thus pits two competing foundational principles against one another: religious liberty and anti-discrimination.

Masterpiece involves a bakery, but similar challenges have been brought elsewhere by photographers and other vendors--and as discussed below, the case could have broad implications. In this instance, a same-sex couple visited Masterpiece Cakeshop, a popular bakery on the western periphery of Denver, and requested that the owner create a cake for their wedding. The owner declined, explaining that he does not create wedding cakes for same-sex unions because of his religious beliefs. He offered to sell them other baked goods in his store but the couple left without purchasing anything.

They then filed a complaint alleging that Masterpiece had discriminated against them in a place of public accommodation based on their sexual orientation, in violation of Colorado's public accommodation law. Colorado's Anti-Discrimination Act, COLO. REV. STAT. § 24-34-601 prohibits businesses that sell goods to the public from discriminating based on race, creed, sex, and other protected characteristics. That law was amended in 2008 to prohibit discrimination based on sexual orientation as well.

Masterpiece argued that requiring it to create a wedding cake violates its rights to freedom of speech and the free exercise of religion. Masterpiece also argued that its refusal to create a wedding cake for the couple was not "because of" their sexual orientation, rather the refusal was "because of" its religiously-based opposition to same-sex marriage.

The Colorado Court of Appeals rejected Masterpiece's argument, concluding it was premised on a distinction without a difference. The court noted that distinguishing between a person's status and conduct closely correlated with that status is impermissible in the context of discrimination. Further, the court concluded that merely requiring Masterpiece not to discriminate against potential customers consistent with Colorado's Anti-Discrimination Act, even if compelled by the gov-

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ernment, did not implicate expression sufficiently to warrant First Amendment speech protections. Regarding the bakery's religious liberty claim, the court concluded that the statute was a neutral law of general applicability: it was not requiring Masterpiece to support or endorse a particular religion, but merely prohibited Masterpiece from discriminating against a potential customer on account of a protected status. The Colorado Court of Appeals applied rational basis to Colorado's law, noting: "we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation."

The issue before the Supreme Court is whether applying Colorado's public accommodation 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.

The Supreme Court took up a similar issue in *Bob Jones University v. United States*, 461 U.S. 574 (1983). In that case, a religious University had its tax-exempt status revoked by the IRS because of the school's religiously-based policy of prohibiting interracial dating and marriage. The question in *Bob Jones University* was whether the government could prohibit race discrimination at the expense of the First Amendment's Free Exercise Clauses. The Supreme Court held in favor of the government, declaring "[g]overnment has a fundamental, overriding interest in eradicating racial discrimination in education ... which substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." The Court noted that the government may justify a limitation on religious liberties by showing the limitation is necessary to accomplish an "overriding governmental interest." Prohibiting race discrimination was such a governmental interest.

The Court's holding may not be as sweeping in this case, and instead may simply conclude that state and local governments may enact measures to prevent discrimination in retail sales through public accommodation laws.

IMLA will join an amicus brief being filed by the SLLC in this case. According to the National Council of State Legislatures, 22 states have public accommodations laws that prohibit discrimination based on sexual orientation. Additionally, it is likely that many cities and counties have similar ordinances. If the Court holds in favor of Masterpiece, states and local governments may have to contend with challenges to public accommodation laws on the grounds that those statutes violate the First Amendment.

IMLA believes *Masterpiece Bakery* is important on its face, but what makes the case even more compelling are its implications. If the Court were to hold that providers of services to the public can use religion as an excuse to discriminate, it opens the door for discrimination based not merely on sexual orientation, but on a number of other protected statuses as well. For example, a business proprietor might refuse, on religious grounds, to serve a woman in public because she was not accompanied by a man. The case reprises themes that arose only a few generations ago, when religion was used as the rationale for many segregation laws, as some people believed their religion required different races to remain separate–particularly because integration might lead to interracial marriage, violating their religious precepts. (Long before *Bob Jones University*, for example, a Senator cited the Bible in opposition to the Civil Rights Act of 1964, and the lower court opinions in *Loving* affirmed Virginia's laws against interracial marriage on biblical grounds).

If religious motivation exempted businesses from anti-discrimination laws, government would be powerless to protect all Americans from the harms of invidious discrimination. Local governments have a strong interest in helping prevent discrimination against their citizens both because of the harm discrimination causes to the individual and the economic harms it can inflict on the local government itself. For example, in *City of Miami v. Bank of America*, heard last term, local governments argued that discrimination under the Fair Housing Act proximately caused harm to cities by decreasing property values and spurring foreclosures, which depressed tax revenues and increased costs to the municipalities, which were left having to combat the ensuing blight. While *Masterpiece Bakery* is perhaps an attenuated example, *Bank of America* demonstrates that discrimination against individuals can cause real economic harm to local governments.

Although we believe religious liberty is a principle of exceptional importance, this case portends a classic "slippery slope" if the court exempts a merchant engaged in retail sales to the public from anti-discrimination laws, based on the seller's religious beliefs. If the same-sex couple is to prevail in this case, it seems likely that we will see another Justice Kennedy opinion on the subject of same-sex marriage and anti-discrimination principles.

Gill v. Whitford

This soon-to-be-infamous partisan gerrymandering case is another opportunity for a Justice Kennedy opinion next term and another dispute that is sure to result in a sharply divided Court. The issues in *Gill v. Whitford* are whether partisan gerrymandering cases are justiciable and if so, by what standard should the constitutionality of partisan gerrymandering claims be measured? The reason Justice Kennedy is at the forefront of this case (aside from the fact that he typically is the deciding vote in controversial decisions), stems from *Vieth v. Jubelierer,* 541 U.S. 267 (2004), the last political gerrymandering case the Court decided. It resulted in a split, with Justice Kennedy merely concurring in the judgment.

In *Vieth*, a Pennsylvania redistricting plan was challenged as constituting unconstitutional political gerrymandering. Justice Scalia could only muster three other Justices for his majority opinion, which concluded that political gerrymandering claims were nonjusticiable and affirmed the dismissal of the complaint. Justice Kennedy concurred in the judgment only, agreeing that the complaint should be dismissed, but opining that he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." In other words, while the *Vieth* case did not provide an adequate vehicle to address the political gerrymandering ill, Justice Kennedy believed it was possible another case might provide "[s]uitable standards for measuring" burdens on representational rights, which in his mind, would be "critical" to the Court's inter-

vention. And while he noted that "[t]here are... weighty arguments for holding cases like these to be nonjusticiable..." he reasoned that they "are not so compelling that they require [the Court] now to bar all future claims of injury from a partisan gerrymander."

That brings us to *Gill v. Whitford*, the case pending before the Court for the coming term. In *Whitford*, Wisconsin legislators redrew state assembly districts in 2011 to reflect population changes recorded in the 2010 census. Map makers used a model designed to predict the likelihood that various proposed districts would elect a Republican. In the 2015 election, Republican candidates received less than 49% of the statewide vote and won seats in more than 60% of the state's assembly districts; and, in 2014, 52% of the vote yielded 63 seats for Republicans. In 2015, Wisconsin voters filed a lawsuit claiming that Wisconsin's election map was the result of partisan gerrymandering and violated their constitutional rights.

A divided panel of three federal judges ruled in favor of the challengers, finding that the map enacted by the Wisconsin legislature was a result of partisan gerrymandering and prohibited by the First and Fourteenth Amendments. The three-judge panel had ordered that new legislative districts be drawn by this November for the 2018 elections, but the Supreme Court stayed that order until it has a chance to rule on the case.

The challengers in *Whitford* propose a three-part test for determining whether a redistricting practice constitutes unconstitutional partisan gerrymandering. The first prong analyzes whether there is discriminatory intent. The next step assesses whether the practice has a discriminatory effect; specifically, whether the plan results in a partisan imbalance that is "sizeable" and likely "to persist throughout the decennial period." To measure a discriminatory effect, the challengers propose the court utilize "the efficiency gap." "The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast." *See Whitford v. Gill*, No. 3:15-cv-00421(W.D. Wis. Nov. 11, 2016). The challengers proposed that an efficiency gap of 7% would demonstrate a discriminatory effect in the second prong of their analysis.

The third prong in the proposed analysis examines whether the redistricting plan's "partisan effect can be explained by the legitimate state prerogatives and neutral factors that are implicated in the redistricting process." *See* Motion to Affirm.

IMLA will be filing an amicus brief in this case that will discuss the effects of partisan gerrymandering on local governments, specifically as it relates to preemption of local authority.

In reading the tea leaves of this case, the fact that the Court stayed the lower court's ruling may not bode well for the challengers. The Court needed five votes to stay the lower court's decision and whether the party requesting a stay is likely to succeed on the merits is a part of the calculus on whether to stay the decision. But in the end, like so many other major cases that divide the Court, the outcome will almost certainly come down to Justice Kennedy's key vote.

2016 Supreme Court Scorecard

IMLA and local governments fared better during the 2016 Supreme Court term than in prior years. Specifically, in the 2016 term, IMLA filed eight amicus briefs, of which four were definitive wins for local governments: *Murr v. Wisconsin*, *Count of Los Angeles v. Mendez*, *Bank of America v. City of Miami*, and *Town of Chester v. Laroe Estates, Inc.* Only one, *Manuel v. City of Joliet*, was a loss. *Expressions Hair Design v. Schneiderman and Packingham v. North Carolina*, both First Amendment cases, had neutral outcomes, in that the party IMLA was supporting may have lost or the case may have been remanded for further analysis, but the overall principle IMLA advocated was advanced (in these cases, IMLA filed its briefs to prevent any expansion of *Reed v. Town of Gilbert*). And the last case where IMLA filed an amicus brief in the 2016 term, *Ivy v. Morath*, was dismissed before oral argument as moot. One other notable victory was *Hunter v. Cole*, in which IMLA filed an amicus brief at the certiorari stage in a qualified immunity case. In that case, in a win for the officers and IMLA, the Supreme Court granted the petition and vacated and remanded the case, overturning the lower court's denial of qualified immunity

If you need help with amicus assistance or would like more information about IMLA's legal advocacy program, please contact Amanda Kellar at akellar@imla.org. ML

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