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Legal

SCOTUS Denies Review to Florist Who Refused to Serve Same-Sex Couple

By Arthur S. Leonard

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Robert Ingersoll and Curt Freed were rejected by a florist when they asked for flowers for their wedding in 2013.
ACLU OF WASHINGTON

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The Supreme Court announced on July 2 that it will not hear an appeal by Barronelle Stutzman and her business, Arlene's Flowers, from a decision by the Washington State Supreme Court holding that she violated the state's Civil Rights Act by refusing to provide floral decorations for the wedding of Robert Ingersoll and Curt Freed in 2013 because of her religious objections to same-sex marriage. The state court rejected her argument that she had a First Amendment right to refuse the job.

Ingersoll and Freed became a couple in 2004. In 2012 Washington voters approved a referendum making same-sex marriage available, and Freed proposed to Ingersoll. They planned to have a big wedding in the fall of 2013. Ingersoll was a long-time customer of Stutzman's florist shop,

and he considered them to be friends — so he approached her about doing the flowers for his wedding. She said no because of her religious beliefs about marriage. She claims that she offered to refer him to other florists who would be happy to take his order. He was shaken enough by this rejection to scale down the scope of the wedding ceremony, and Freed, upset by what had happened, posted about it to his Facebook account.

The story broke out into local media. The state attorney general's office sent a letter to Stutzman, demanding that she sign a document promising not to discriminate in this way in the future, but she refused to sign. The attorney general filed suit against her in state court and Ingersoll and Freed joined as co-plaintiffs, represented by the ACLU. Alliance Defending Freedom (ADF), a religious legal advocacy group, sprang to Stutzman's defense, arguing that she was entitled to decline the business based on her First Amendment rights of freedom of religion and freedom of speech. The trial court ruled in favor of the state and Ingersoll and Freed, and Stutzman appealed. The Washington Supreme Court affirmed the trial court, and ADF petitioned the Supreme Court for review. The petition was pending at the court in 2018 while it was deciding the Masterpiece Cakeshop case.

In Masterpiece, the Court held that Jack Phillips, a baker who refused to make a wedding cake for a same-sex couple and was found to have violated Colorado's Civil Rights Act, had confronted an administrative forum that was openly hostile to his religious beliefs, and thus was denied a fair hearing of his First Amendment defense. The court set aside the Colorado court's ruling against Phillips, but expressed no view about whether Phillips was entitled by the First Amendment to decline the cake order on religious or free speech grounds. However, the court stated that in general, businesses are required to comply with state anti-discrimination laws, regardless of their owners' religious views.

After the Masterpiece ruling, ADF told the court that Washington's attorney general had shown hostility to religion in public comments he made about the case, and the court sent the case back to the Washington Supreme Court to "reconsider" in light of Masterpiece. The Washington court stated, in its new opinion, that it had scoured the record and found no signs of hostility to religion by the trial court or itself. It concluded that under Masterpiece, the attorney general had no obligation to be neutral regarding religion, as the Supreme Court's ruling had focused on the neutrality of the forum that decided the case, the Civil Rights Commission, and not those charged with enforcing the law. The Washington Supreme Court reaffirmed its earlier ruling, quoting extensively from its earlier opinion.

ADF filed a new petition with the Supreme Court on September 11, 2019. ADF asked the court to decide the question it had skirted in Masterpiece: whether a business owner with religious objections to same-sex marriage could be compelled by the state to provide goods or services for a same-sex wedding. It also asked the court to consider whether the requirement that government be neutral regarding religion extended to officials like the attorney general of Washington, acting in his law enforcement role. Of course, underlying this petition, as in the Masterpiece case, was the question whether the court would stand by its long-time precedent (dating back to 1990), Employment Division v. Smith, which held, in an opinion by Justice Scalia, that there was no religious free exercise exemption from complying with neutral laws of general applicability, such as, for example, a state anti-discrimination law.

Many were expecting the court to address that issue in Fulton v. City of Philadelphia, decided by the court a few weeks ago on June 17. Catholic Social Services (CSS) argued that it had a free exercise right to refuse to certify same-sex couples to be foster parents, and that Philadelphia violated its First Amendment rights by terminating its contract with the city to provide this service. The court avoided dealing with the Smith precedent by finding that CSS was not a public

accommodation under Philadelphia's Fair Practices Ordinance, and that because the written contract used by the city with foster care agencies reserved to the city the sole right to make exceptions to its non-discrimination provision, that provision was not a rule of "generally applicability." Thus, Smith did not apply to the case, and the court fell back on its Free Exercise doctrine in cases not governed by Smith, evaluating the city's position under the "strict scrutiny" standard and concluding that because the city was able to make exceptions under its contract, it could not argue that it had a compelling interest that all contractors comply with the non-discrimination requirement. For example, the city had in the past allowed foster care agencies to take race into account in recommending foster parents for particular children, even though the contract language forbids discrimination because of race.

The day after the court issued the Fulton decision, ADF filed a new statement with the court, urging it to grant review to Arlene's Flowers. The statement noted that several of the justices had expressed disappointment in their concurring opinions in Fulton that the court had avoided reconsidering the Smith precedent, and that a majority of the justices had indicated doubt about its continuing validity, so it seemed likely that the court would grant review.

Consequently, the announcement that the court was denying ADF's petition was a bit surprising. It is not surprising that Justices Alito, Thomas, and Gorsuch indicated they would have granted review, since they had signed concurring opinions in Fulton chiding the majority for failing to take this issue on. But it takes four votes to grant review. Justice Barrett's concurring opinion in Fulton, joined by Justice Kavanaugh, expressed doubts about Smith but also raised concerns about the myriad issues that would have to be confronted if it was overturned, since she was uncomfortable with the idea that every government policy that incidentally burdens a person's religious practices would automatically be subject to strict scrutiny without any evidence that a facially neutral policy was in reality targeted at a religious practice.

It seems inevitable that at some point there will be a fourth vote for granting review in a case that requires the court to reconsider Smith. Chief Justice Roberts announced that the court would begin its summer recess after issuing its Order List on July 2. That Order List added many new cases to the court's docket for the October 2021 term, including some that will affect the enforcement of civil rights laws, but there was no ruling on a petition in a case about denial of health care services to a transgender person by a Catholic Hospital based on religious objections to gender confirmation surgery. Perhaps that case will bring the issue of the Smith precedent back onto the court's docket next term, but the court usually does not announce decisions on petitions for review during its summer recess.