

Supreme Court Turns Away Two Gay Rights Cases

By **Braden Campbell**

Law360, New York (January 8, 2018, 3:39 PM EST) -- Monday offered a mixed bag for gay rights and religious freedom advocates at the U.S. Supreme Court as the justices declined to review Mississippi's law letting religious objectors deny services to gay people and let lie a Wyoming state court order that shamed a judge who refused to perform gay marriages.

The justices declined certiorari Monday on two appeals of a Fifth Circuit decision dismissing a challenge to Mississippi's H.B. 1523, as well as Wyoming municipal court Judge Ruth Neely's petition challenging a state Supreme Court decision ordering her to wed gay couples or stop performing marriages altogether.

Gay rights group The Campaign for Southern Equality and a coalition of progressive activists separately asked the Supreme Court in October to review the Fifth Circuit's June order letting H.B. 1523 take effect. The unanimous panel had said the parties did not have standing to sue because the law had not injured them, reversing the Southern District of Missouri's June 2016 ruling granting an injunction in their consolidated case.

The Mississippi State Legislature passed H.B. 1523 in 2016 in response to the Supreme Court's 2015 decision in *Obergefell v. Hodges*, which made gay marriage legal nationwide.

H.B. 1523 protects people who believe marriage is between a man and a woman, that only married heterosexual couples should be able to have sex and that gender is fixed at birth from being made to act against these beliefs. Under the law, the government can't make clerks issue marriage licenses to gay couples or punish state employees who speak out against gay marriage, among other things.

Beth Orlansky, advocacy director at the Mississippi Center for Justice, told Law360 on Monday the group was disappointed with the denial but not surprised.

"We're not entirely shocked, because the Fifth Circuit opinion was basically just a standing decision and the Supreme Court was not terribly likely to jump in on the procedural issue," said Orlansky, who represented the activists.

The Fifth Circuit's order left the door open for a challenge from someone hurt by the law. Orlansky said no one has yet contacted the group claiming to be harmed, but said it's "willing and able to proceed further in litigation" if they do.

Kaplan & Company LLP's Roberta Kaplan, who represented the Campaign for Southern Equality, echoed Orlandy.

"We will keep fighting to ensure that this blatantly unconstitutional law is relegated to the dustbin of history," she said.

Kevin Theriot, an attorney with religious liberty advocacy group the Alliance Defending Freedom, said Monday the law "protect[s] freedom and harm[s] no one."

"We are pleased that the Supreme Court declined to take up these baseless challenges, which misrepresented the law's sole purpose of ensuring that Mississippians don't live in fear of losing their careers or their businesses simply for affirming marriage as a husband-wife union," said Theriot, who represented Mississippi Gov. Phil Bryant in his defense of the law.

H.B. 1523 took effect in October after the Fifth Circuit declined to stay its order pending Supreme Court review.

The Supreme Court also declined to review the Wyoming Supreme Court's March order censuring Judge Neely, a judge for the Town of Pinedale and part-time magistrate judge for the Ninth Judicial District. The divided court rejected the Wyoming Commission on Judicial Conduct and Ethics' recommendation that Judge Neely be removed from the bench, but said she must wed gay couples or none at all, saying she "undermine[d] public confidence in the integrity and impartiality of the judiciary" by placing her religious beliefs before the law.

Two of the court's five judges dissented, saying that punishing Judge Neely for expressing her religious beliefs violates the Wyoming and U.S. Constitutions.

Alliance Defending Freedom attorney James Campbell, who represented Neely, said the justices' decision "leaves judges who have religious beliefs like hers ... in a state of uncertainty." He said this was "ironic" in light of the court declining to review HB 1523, which lets judges who oppose same-sex marriage on religious grounds avoid officiating them.

An attorney for the commission did not immediately respond Monday to requests for comment.

Neely is represented by David Andrew Cortman, Kristen K. Waggoner, James A. Campbell, Kenneth J. Connelly and Rory T. Gray of the Alliance Defending Freedom and Herbert K. Doby.

The Wyoming Commission on Judicial Conduct and Ethics is represented by Paul Whitfield Hughes, Michael B. Kimberly, Charles A. Rothfeld and Andrew J. Pincus of Mayer Brown LLP and Eugene R. Fidell of Yale Law School.

The Campaign for Southern Equality is represented by Roberta A. Kaplan of Kaplan & Company LLP.

Bryant is represented by Drew L. Snyder of the Governor's Office, Kevin Theriot of Alliance Defending Freedom and Jonathan F. Mitchell of Stanford Law School.

The activists are represented by Ginger D. Anders and Donald B. Verrilli Jr., Adele M. El-Khoury of Munger Tolles & Olson LLP, Susan L. Sommer and Elizabeth Littrell of Lambda Legal, Beth Orlandy of the Mississippi Center for Justice, Paul M. Smith and Robert B. McDuff.

The cases are Ruth Neely v. Wyoming Commission on Judicial Conduct and Ethics, case number 17-195; Campaign for Southern Equality, et al. v. Phil Bryant et al., case number 17-642; and Rims Barber et al. v. Phil Bryant et al., case number 17-547, before the U.S. Supreme Court.

--Additional reporting by Matthew Guarnaccia. Editing by Jack Karp.

Update: This story has been updated with comments from attorneys for Neely and the Campaign for Southern Equality.

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