OREGON

CIVIL RIGHTS

NEWSLETTER

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Marriage Equality Ruled Constitutionally Protected

Margaret (Gosia) Fonberg
Buchanan Angeli
Altschul & Sullivan LLP

On June 26, 2015, the Supreme Court, in the 5–4 decision of *Obergefell v. Hodges*, held that states must allow same-sex couples to marry and must recognize same-sex marriages performed in other states.[1] Justice Kennedy's majority opinion recognized the importance of marriage throughout history as an institution, which has strengthened by changing over time.[2]

Drawing on the notion of that evolution, Justice Kennedy explained that when courts identify and protect fundamental constitutional rights, they must be informed by history but take care not to let the past dictate the present. Applying this method, the majority reasoned that the same principles underlying the fundamental right to marriage in the context of opposite-sex partners apply equally to same-sex partners and to the recognition of out-of-state same-sex marriages.

For example, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy" and applies regardless of whether one's spouse is the same or the opposite sex.[3] Further, both opposite- and same-sex couples benefit from the permanence marriage brings and from the numerous government benefits conferred by marriage. Recognizing that there is no difference between opposite- and same-sex couples with respect to those principles, and drawing on the relationship between liberty and equality set forth in earlier Court decisions, the majority concluded that state laws banning same-sex marriage and the recognition of out-of-state marriages violate the Fourteenth Amendment's due process and equal protection clauses.[4]

Justice Kennedy's opinion rejected the Sixth Circuit's rationale for upholding state same-sex-marriage bans: same-sex couples should let the political process play out instead of seeking change through the judicial process.[5] He noted that "[a]s the more than 100 *amici* make clear," substantial discussion of the same-sex marriage issue has already occurred.[6] Moreover, the resolution of such issues is exactly why we have the Constitution, and same-sex couples should not have to wait to have their fundamental rights recognized. Justice Kennedy assured that churches and other groups that oppose same-sex marriage on religious grounds will be able to continue to express their views.

In the wake of *Obergefell*, it appears that Chief Justice Roberts's fears—that same-sex couples, complicit in their new-found equality, will put aside the opportunity to win "true acceptance . . . just when the winds of change were freshening at their backs"—will not be realized.[7] County clerks and other government officials who view *Obergefell* as an attack on their "religious liberty" are offering plenty of opportunity for continued grassroots campaigns for equality.[8] The efforts to avoid granting same-sex couples marriage licenses, however, are likely to quickly fail. The idea that states are either not obligated to follow Supreme Court rulings or can pass laws that supersede federal law (known as nullification theory) is "unlawful and unconstitutional."[9] Moreover, although individual county clerks (and deputy clerks) are free to hold whatever personal religious beliefs they choose, courts will likely find that it violates the First Amendment's establishment clause for governmental officials to choose whom they will serve or what duties they will perform based on an individual's religious conviction.[10] ✦

Margaret (Gosia) Fonberg represents both individuals and employers at Buchanan Angeli Altschul & Sullivan LLP.

Endnotes

1. 135 S. Ct. 2584 (2015).

2. *Id* at 2595–96.

3. *Id.* at 2599.

4. *Id.* at 2604–05.

5. Embracing the Sixth Circuit's reasoning, Justice Roberts argued that same-sex couples are better off "persuading their fellow citizens—through the democratic process—to adopt their view." *Id.* at 2611.

6. *Id.* at 2605.

7. *Id.* at 2025.

8. *See, e.g.*, Susan Gardner, "Texas attorney general tells county clerks they can refuse marriage licenses to gay couples" Daily Kos (June 28,

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✦ In This Issue

Supreme Court Update

[Editor's note: Recent US Supreme Court decisions are also discussed on pages 1, 5, and 7 of this newsletter.]

Alyssa Engelberg
Fisher & Phillips LLP

Kirsten Rush
Busse & Hunt

***City and County of San Francisco v. Sheehan*, No. 13-1412 (May 18, 2015)**

In this case out of the Ninth Circuit, the US Supreme Court, in a 6–2 decision, held that two police officers were entitled to qualified immunity from a lawsuit seeking redress for the shooting of a disabled, but potentially violent, individual because there was no "clearly established" law requiring the officers to accommodate the individual's mental illness. By issuing such a narrow ruling, the Court sidestepped the issue of whether the Americans with Disabilities Act (ADA) requires police officers to make "reasonable accommodations" to potentially violent, but disabled, individuals in the course of making an arrest.

***EEOC v. Abercrombie & Fitch Stores, Inc*, No. 14-86 (June 1, 2015)**

The Supreme Court held 8–1 that Title VII of the 1964 Civil Rights Act, which bars discrimination on the basis of religion and requires employers to provide reasonable accommodations for an applicant's or employee's religious practice, is invoked when the employer has some suspicion that the applicant or employee follows a specific religious practice. In this case, the employer had a dress code that prohibited wearing "caps," and it did not hire the applicant because her wearing a head scarf would violate that policy. The Tenth Circuit had granted summary judgment in favor of the employer because, despite evidence that the hiring manager knew the head scarf was worn for religious reasons, the applicant had not explicitly requested the religious accommodation of being allowed to wear a head scarf.

The Court refused to adopt the Tenth Circuit's reasoning and instead held that an employer can be liable under Title VII when it refuses to allow an exception to workplace rules if that refusal is based on even a suspicion that the worker needs the exception because of her religious practices. In light of its newly articulated rule, the Court remanded the case.

***Grady v. North Carolina*, No. 14-593 (Mar. 30, 2015)**

The Supreme Court, in a per curium opinion, held that forcing an individual to wear an ankle bracelet that monitored his location via GPS for the duration of his life is a search under the Fourth Amendment. The Court left open the question whether the search was unreasonable and therefore unconstitutional.

***Rodriguez v. United States*, No. 13-9972 (Apr. 21, 2015)**

In this 7–2 decision, the Court held that absent reasonable suspicion, a routine traffic stop cannot be unnecessarily prolonged to conduct an additional investigation.

***Williams-Yulee v. The Florida Bar*, No. 13-1499 (Apr. 29, 2015)**

The Supreme Court, in a 5–4 decision, held that a state rule of judicial conduct that prohibits judicial candidates from personally soliciting campaign contributions does not violate the First Amendment. The Court found that although the rule does infringe on First Amendment rights, it is narrowly tailored to achieve the compelling interest of judicial integrity and the public's perception of judicial impartiality.

***Young v. United Parcel Service*, No. 12-1226 (Mar. 25, 2015)**

The Supreme Court, in this 6–3 decision, held that the *McDonnell-Douglas* burden-shifting framework applies to failure-to-accommodate

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OREGON CIVIL RIGHTS NEWSLETTER

The *Oregon Civil Rights Newsletter* is published by the Civil Rights Section of the Oregon State Bar.

The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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Oregon's 2015 Legislative Session Produces Substantial Changes and Additions to Civil Rights Laws

Dan Grinfas
Buchanan Angeli
Altschul & Sullivan LLP

Oregon's 78th Legislative Assembly convened its 2015 regular session on Feb. 2, 2015 and adjourned *sine die* on July 6, 2015. This article provides a brief summary of key civil rights legislation enacted during the session. Except as otherwise indicated, the new laws take effect on Jan. 1, 2016. Detailed measure history and the full text of the bills are accessible on the legislature's website at https://www.oregonlegislature.gov/.

HB 2002: Ending Profiling of Criminal Suspects by Race and Other Characteristics

House Bill 2002 requires law enforcement agencies, no later than Jan. 1, 2016, to adopt written policies and procedures prohibiting profiling, broadly defined as an "agency or . . . officer target[ing] an individual for suspicion of violating a provision of law based solely on the real or perceived factor of the individual's age, race, ethnicity, color, national origin, language, gender, gender identity, sexual orientation, political affiliation, religion, homelessness or disability, unless the agency or officer is acting on a suspect description or information related to an identified or suspected violation of a provision of law."

Agencies must allow a complaint alleging profiling to be made to the agencies by various methods including in person, in writing, by e-mail, or using appropriate forms provided by the agencies. Agencies must submit copies of each complaint to the Law Enforcement Contacts Policy and Data Review Committee and must notify the committee of the disposition of each complaint. Individuals can also make complaints of profiling directly to the committee. The law exempts from public disclosure the personal information of complainants and law enforcement officers who are the subject of profiling complaints. The bill declared an emergency and took effect upon its passage and signature by the Governor on July 13, 2015, but the provisions on complaint procedures become operative on Jan. 1, 2016.

HB 2007: Right to Inquire About and Disclose Wage Information

House Bill 2007 amends ORS Chapter 659A to make it an unlawful employment practice to discipline, discriminate, or retaliate against an employee for inquiring about or disclosing wage information of the employee or another employee, or for making a related complaint based on such disclosure of wage information. This bill was the result of various measures recommended in a 2014 report of the Oregon Council on Civil Rights, an advisory board appointed by the Oregon Bureau of Labor and Industries (BOLI) Commissioner to close the pay gap, with women nationally earning seventy-seven cents and women in Oregon earning seventy-nine cents for every dollar earned by men. Proponents of the bill noted that without the ability to freely share information on wages, women cannot learn if they are being unfairly paid and by how much.

HB 2177: Registering Citizens to Vote When They Obtain Driver Licenses

House Bill 2177 authorizes the Secretary of State to issue regulations setting a schedule by which the Oregon Department of Transportation will provide the secretary electronic records containing the name, age, residence, and citizenship information for, and the electronic signature of, each person who meets qualifications identified by the secretary's regulations. The secretary will then provide the information to the county clerk of the county in which the person may be registered to vote, and the secretary or county clerk will notify each person of the process to decline being registered to vote and to adopt a political-party affiliation. If the individual does not decline within twenty-one days, and if the person is not already registered to vote, the person's electronic record and electronic signature will constitute a completed voter registration card.

The first such law to be enacted in the United States, HB 2177 was initially sponsored by Governor Brown when she served as Secretary of State, and she signed it as one of her first acts as governor on Mar. 16, 2015. The bill declared an emergency and took effect immediately as of that date.

HB 2478: Gender-Neutral References to Legally Married Individuals

House Bill 2478 amends the text of various ORS chapters to achieve gender-neutral language with respect to individuals who are married. For example, the bill replaces references to "a man and a woman" with "two individuals"; replaces "a husband and wife" with "spouses," "spouses married to each other" or "spouses in marriage"; and replaces "husband or wife" with "spouse."

HB 2571: Policies for Body Cameras Worn by Police Officers

House Bill 2571 requires law enforcement agencies to establish policies and procedures for the use and retention of recordings from police-officer body cameras to record the officer's interactions with members of the public while the officer is on duty. The law specifies the required content of the body camera policies and procedures, including a minimum 180-day retention period, a requirement that the camera be set to record continuously beginning when an officer develops reasonable suspicion or probable cause to believe that a crime or violation has occurred, and a prohibition on the use of facial

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recognition or other biometric matching technology to analyze recordings. It also provides that a defendant who receives video evidence from a police-officer body camera has good cause to request a sixty-day extension of a trial date. The law exempts from the public records law disclosure of recordings of an officer's interactions with the public, unless the public interest requires the disclosure, and it requires that images of faces in disclosed recordings be rendered unidentifiable. The bill declared an emergency and took effective immediately upon its passage and signature by the governor on June 25, 2015.

HB 2600: Continuation of Health Insurance Benefits During OFLA Leave Period

House Bill 2600 amends ORS 659A.171 and requires continuation of group health insurance coverage for an employee on leave under the Oregon Family Leave Act (OFLA) on the same terms as when the employee is not on leave. The employee must continue to make any regular contributions to the cost of the health insurance premiums during the OFLA-leave period. The federal Family and Medical Leave Act (FMLA) has always, since its enactment in 1993, included this requirement for benefit-coverage continuation, but the requirement will now also apply to certain employers and to certain categories of leave covered only under OFLA and not FMLA.

HB 2763: Pay Availability for Public Employees on Military Leave

House Bill 2763 amends ORS 408.240 and removes the provision in the law stating that a public employee who leaves his or her position to perform military duty is "absent on leave" and may not, while performing military duty, receive the amount of pay the employee was entitled to before the leave of absence. The law, which took effect immediately on passage as of Apr. 22, 2015, permits a state, county, municipality, or political subdivision to establish a program that allows public officers or employees to receive pay that supplements and exceeds the compensation they receive for military duty, not to exceed the base salary of the employee before the leave of absence.

HB 2879: Allowing Expanded Access to Birth Control Through Pharmacists

House Bill 2879 amends ORS 689.005 and authorizes pharmacists to prescribe and directly dispense hormonal contraceptive patches and self-administered oral hormonal contraceptives to a person age eighteen or over, regardless of whether the person has evidence of a previous doctor's prescription, or to a person under age eighteen, but only if the person has evidence of a previous prescription from a primary care practitioner or women's health care practitioner for such contraceptives. The bill directs the State Board of Pharmacy to adopt regulations on the prescription and dispensation of contraceptives by pharmacists. The bill declared an emergency and took effect immediately upon its passage and signature by the governor on July 6, 2015.

HB 3025: Inquiring Into Applicant's Conviction History Pre-Interview as Unlawful Employment Practice

House Bill 3025 amends ORS Chapter 659A and establishes an unlawful employment practice of inquiring into or considering a job applicant's conviction history on a job-application form or prior to a job interview or, if no interview is conducted, prior to a conditional offer of employment. The effect of this "ban-the-box" legislation is to generally require Oregon employers to remove any criminal-conviction question from job-application forms and to make it unlawful to exclude an applicant from an initial interview solely because of a past criminal conviction. The law, however, still permits inquiries about convictions beginning with the initial job interview, and it also permits employers to consider an applicant's conviction history when making a hiring decision.

HB 3343: Requiring Insurance Companies to Cover Birth Control Prescriptions for Specified Duration

House Bill 3343 amends ORS 743.066 to require that insurers that cover prescription contraceptives cover refills for a specified duration. Specifically, the amended law requires that the contraceptive coverage reimburse a health-care provider or dispensing entity for dispensing of contraceptives intended to last for a three-month period for the first dispensing of the contraceptive to an insured; and for a twelve-month period for subsequent dispensing of the same contraceptive to the insured, regardless of whether the insured was enrolled in the program, plan, or policy at the time of the first dispensing.

SB 185: Unlawful Employment Practices Regarding Employee Social Media Accounts

Senate Bill 185 amends ORS 659A.330 and makes it an unlawful employment practice for an employer to require an employee or job applicant to establish or maintain a personal social media account or to require authorization for the employer to advertise on the employee's or applicant's social media account. (The existing statute already prohibits employers from requiring disclosure of social media account user names and passwords or requiring access to personal social media accounts.)

SB 380: BOLI Commissioner Discretion in Civil Rights Enforcement Matters

Senate Bill 380 amends ORS 659A.845 and 659A.870 to make certain actions based on civil rights complaints filed with the BOLI Com-

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Supreme Court Allows Disparate-Impact Claims in Fair Housing

Scott Aldworth
Kell, Alterman & Runstein, LLP

Aside from the many highly publicized US Supreme Court decisions of the past Term, the Court also released a less-publicized decision with broad ramifications on the tools available in the fight against housing discrimination. That case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (*TDHCA*),[1] addressed the question whether the Fair Housing Act (FHA) allows claims based on a theory of disparate impact.[2]

In the decades prior to the Court's decision, every circuit that had considered the question had held that the disparate-impact claims were cognizable under the FHA. In 2011, the Court granted *certiorari* to a case that presented the question whether the FHA supported claims based on the disparate-impact theory.[3] Before the Court heard oral arguments, however, the case settled. In 2013, the Court again granted *certiorari* to a case regarding the same question.[4] Again, the case settled before the Court heard oral arguments.

Given the lack of a circuit split on the issue and the Court's apparent eagerness to consider it, many believed that *TDHCA* provided the opportunity that the Court had been waiting for to strike down the disparate-impact theory under the FHA. It was somewhat of a surprise, then, when the Court ruled by a 5–4 margin that disparate-impact claims are cognizable under the FHA.

FHA's Plain Language Supports Disparate-Impact Claims

Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, delivered the majority opinion. The Court's decision did not simply defer to a HUD regulation supporting disparate-impact liability, but rather found that the plain language of the FHA supports such claims. The Court based its decision on several factors.

First, the Court looked to precedent interpreting two similar antidiscrimination statutes: Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA). Although neither statute contains language explicitly addressing disparate-impact liability, the Court had previously interpreted both statutes to allow for disparate-impact claims.[5] In both cases, the Court focused on language in the statutes prohibiting actions that "otherwise adversely affect" an employee because of the employee's protected characteristic, which, according to the Court, focused on the effects of an action on an employee, rather than on the motivations of the employer in taking that action.

The *TDHCA* decision summarized this precedent as requiring that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."

Turning to the FHA, the Court found that its prohibition of actions that "otherwise make unavailable" housing because of a protected characteristic was functionally equivalent to the "otherwise adversely affect" language contained in Title VII and the ADEA. The Court then looked to whether disparate-impact liability was consistent with the FHA's statutory purpose and found that it was. The FHA was enacted to combat segregated-housing patterns, as well as both the open and covert racial discrimination that inhibited fully integrated communities. Claims based on disparate impact had been critical in allowing "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."

Finally, the Court found that amendments made to the FHA in 1988 supported disparate-impact liability. At the time of the amendments, all nine circuit courts that had addressed the issue had held that disparate-impact claims were cognizable under the FHA. As the Court stated, Congress was aware of this unanimous precedent and left the relevant language in the FHA unmodified, implicitly ratifying the interpretation of the courts. Further, the amendments in 1988 articulated exemptions to liability that, according to the Court, would be superfluous if the FHA did not encompass disparate-impact liability.

Disparate-Impact Claims Have Strict Pleading Standards

The Court's upholding of disparate-impact liability under the FHA was a huge victory for fair housing advocates. The victory was somewhat limited, however, because the Court also articulated strict standards that must be met to state a disparate-impact claim. The Court cautioned that disparate-impact liability must not be used in a way that would lead to governmental and private entities using numerical quotas or injecting racial considerations into every housing decision, which would give rise to serious constitutional questions.

To safeguard against this, the Court stated that disparate-impact claims must be subject to a "robust causality requirement" in which a plaintiff may not simply rely on statistical disparities, but must show that the defendant's policy was the cause of that disparity. Further, a policy that disparately impacts a protected class may still be permissible if the defendant can prove it is necessary to achieve a valid interest.

The result is that moving forward, claims relying on a disparate-impact theory will likely only be successful in those cases that the Court characterizes as the "heartland of disparate-impact liability": zoning laws and other housing restrictions that have

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missioner discretionary on the part of the commissioner rather than mandatory. The bill specifies that following a BOLI substantial evidence determination and a failure to reach settlement through conciliation, or if the commissioner determines that the interest of justice requires a hearing without first seeking settlement, the commissioner "may" (rather than "shall") prepare formal charges. The bill also specifies that if a respondent in a BOLI case timely elects to have the matter heard in circuit court, the commissioner "may" (rather than "shall") pursue the matter in court on behalf of the complainant at no cost to the complainant.

SB 454: Mandatory Paid Sick Time

Under Oregon's new sick-leave law, most Oregon employees will be entitled to accrue and use up to forty hours per year of protected paid sick time, and will be protected from discrimination for inquiring about or using the sick time for a broad variety of purposes. A detailed article on this new law will be featured in the next issue of the *Oregon Civil Rights Newsletter*.

SB 491: Pay Equity in Public Contracts; Right to Discuss Wages

Senate Bill 491, which took effect immediately as of its passage on June 16, 2015, implements various procedures requiring prospective bidders or proposers for public contracts to demonstrate an understanding of or training and certification in pay-equity provisions of Oregon law. The law also requires that public contracts specify that contractors may not prohibit an employee from discussing with others the employee's rate of wage, salary, or other compensation or retaliate against employees who discuss those matters.

SB 492: Right to Use Paid Sick Leave During Domestic-Violence Leave

Senate Bill 492 amends ORS 659A.285 and authorizes an eligible employee who takes leave under ORS 659A.272 (related to domestic violence, harassment, sexual assault, or stalking) to use accrued sick leave or personal-business leave. The existing statute allows only the use of any paid accrued vacation leave and other paid leave that is offered in lieu of vacation.

SB 552: Domestic Workers' Protection Act

Senate Bill 552 amends ORS 659A.885 to establish the "Domestic Workers' Protection Act," providing a wide variety of pay and civil rights protections to domestic workers and making violations of the law an unlawful employment practice. The bill covers workers who provide care (including child care) in private homes and who maintain private homes or their premises (including housekeeping). The bill requires the employer of a domestic worker to provide notice prior to employment and annually about work hours, compensation, and overtime details; provides for at least twenty-four consecutive hours of rest in each workweek and overtime pay if a domestic employees agrees to work on the day of rest; requires at least eight consecutive hours of rest in each twenty-four-hour period and adequate sleeping facilities; requires the worker be allowed to cook the worker's own food; requires payroll recordkeeping by the employer; and prohibits the employer from requiring possession of the worker's passport or subjecting the worker to harassment based on various protected classifications.

SB 941: Requiring Background Checks for Private Gun Sales

Senate Bill 941 requires a private person to complete a transfer of a firearm by appearing with the transferee before a gun dealer to request a criminal background check, or by shipping or delivering the firearm to a gun dealer in certain circumstances. The law provides exceptions for family members, law enforcement, inherited firearms, and certain temporary transfers. The law allows for up to one year's imprisonment, a $6,250 fine, or both for an initial violation, and up to ten years' imprisonment, a $250,000 fine, or both, for further offenses. The law authorizes the Department of State Police to notify an appropriate law enforcement agency when it determines during a background check that the recipient is prohibited from possessing a firearm. The law authorizes courts to prohibit a person ordered to participate in assisted outpatient treatment from purchasing or possessing a firearm during the treatment period under certain circumstances. The bill declared an emergency, and it took effect immediately upon its passage and signature by the governor on May 11, 2015. ✦

Dan Grinfas is of counsel to the Portland employment law firm Buchanan Angeli Altschul & Sullivan LLP.

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the effect of excluding minorities without any sufficient justification. Because of the standards the Court articulated, the case underlying its decision—which was based on the novel theory that a housing authority's allocation of tax credits for low-income housing had caused continued segregated-housing patterns—will likely be dismissed on remand. ✦

Scott Aldworth practices civil litigation at Kell, Alterman & Runstein, LLP.

Endnotes

1. 135 S. Ct. 2507 (2015).

2. Disparate-impact claims focus on the effect of someone's actions rather than his or her motivations. Disparate-impact claims generally involve facially neutral policies that disproportionately burden members of a protected class. In the context of the FHA, the disparate-impact theory has been used to challenge zoning laws and other housing restrictions that have had the effect of excluding minorities from certain neighborhoods. Disparate-treatment claims, by contrast, involve a bad actor intentionally discriminating against someone on the basis of a protected characteristic.

3. *Magner v. Gallagher*, 132 S. Ct. 548 (2011).

4. *Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013).

5. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Smith v. City of Jackson*, 544 U.S. 228 (2005).

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Supreme Court Upholds Independent Redistricting Commissions

Katelyn Oldham
Tedesco Law Group

In one of the most important voting-rights cases decided in the last decade, *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[1] the US Supreme Court upheld Arizona voters' right to create an independent, non-partisan electoral commission to tackle redistricting, in an effort to fight back against gerrymandering.

When the Arizona Independent Redistricting Commission (AIRC or Commission) was enacted by voter initiative in 2000, Arizona had become a highly partisan state in which the (Republican-controlled) state legislature used gerrymandering to ensure continued over-representation of Republican seats in the state legislature.[2] Recognizing that the manner in which the state legislature had determined redistricting was antithetical to democratic ideals, Arizona voters placed the authority to redistrict with the AIRC, a non-partisan, independent body. The AIRC is a five-member body, no more than two of which could share the same political affiliation.

The AIRC undertook to redraw the electoral lines after the 2010 census and adopted a new map in 2012. The Arizona legislature challenged the constitutionality of the Commission, on the grounds that it violated the state legislature's inherent authority to create electoral districts under the elections clause of the US Constitution.[3]

The Court first determined that the Arizona state legislature had standing to sue because the creation of the AIRC nullified the legislature's authority to legislate in this particular area. The Court, however, was careful to note that this dispute did not implicate separation-of-powers concerns and implied that, if it had, whether the legislature had standing could have had a different result.

The case's outcome depended on the Court's interpretation of the term "Legislature" in the elections clause. The clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .[4]

According to the Arizona state legislature, the Commission could not "legislate" by redrawing an electoral map because it was an independent body, not the duly elected legislative body. Chief Justice Roberts, in dissent, adopted this view.

The Court's majority view, however, interpreted the term "Legislature" more broadly by revisiting its meaning when the Constitution was authored and the nation founded. The Court relied on the historical record to support its positions that "the dominant purpose of the [e]lections [c]lause . . . was to empower Congress to override state election rules, not to restrict the way States enact legislation."[5] Ultimately, the Court determined that "Legislature" simply meant "the power to enact laws."[6] And, because that power is ultimately vested in the state's own electorate, it was "the people" who were empowered to legislate (either through their representative body or through direct democracy). The Court consequently reaffirmed the initiative and referendum processes as acceptable methods of the people to legislate their state laws. As a result, because the Arizona state constitution permitted the use of both referendums and initiatives, Justice Ginsburg determined that the creation of the AIRC was an inherently acceptable method of legislating by "the people" through direct democracy.

In her majority opinion, Justice Ginsberg engaged in a sweeping endorsement of the use of direct democracy by the people and interpreted "Legislature" to mean any state-sanctioned mechanism by which the people choose to enact laws.

In the context of this case, she wrote:

> The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have a[] habitual recollection of their dependence on the people. In so acting, Arizona voters sought to restore the core principle of republican government, namely, that the voters should choose their representatives, not the other way around. The Elections Clause does not hinder that endeavor.[7]

This decision has important ramifications for voting rights. Presently, only two states (California and Arizona) have enacted independent non-partisan commissions to address redistricting. Gerrymandering, however, is a major problem in many other states. And, in many western states, including Oregon, the initiative process is a recognized form of lawmaking. The Court's positive ruling may pave the way for other independent commissions to be enacted through the initiative process and, ultimately, temper the negative impact gerrymandering has on democratic elections in our nation. Regardless of political affiliation, this ruling is a victory for democracy. ✦

Katelyn Oldham is an attorney at the Tedesco Law Group, where she represents labor unions and workers.

Endnotes

1. 135 S. Ct. 2652 (2015).

2. For an excellent illustration of the electoral unfairness created by gerrymandering, see Christopher Ingraham, "Gerrymander, explained" Wonkblog (Mar. 1, 2015), https://www.washingtonpost.com/blogs/wonkblog/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/.

3. U.S. Const. art. 1, § 4, cl. 1.

4. *Id.*

5. 135 S. Ct. at 2672.

6. *Id.* at 2667.

7. *Id.* at 2677 (citations omitted) (internal quotation marks omitted).

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cases under the Pregnancy Discrimination Act (PDA), which Congress enacted in 1978 by amending Title VII of the Civil Rights Act of 1964. Specifically, the Supreme Court stated that a pregnant employee may establish a prima facie case of discrimination under the PDA by showing that (1) she belongs to a protected class, (2) she sought an accommodation, (3) the employer failed to accommodate her, and (4) the employer accommodated other employees "similar in their ability or inability to work."

Once the employee proves those points, the employer may show that it had a legitimate non-discriminatory reason for treating the employee differently. The Court explained that this neutral business reason generally cannot consist of an argument that it is "more expensive or less convenient to add pregnant women" to the category of individuals whom the employer accommodates. Once the employer proffers its neutral business reason, the burden shifts back to the employee to establish that the employer's rationale is "mere pretext."

The Court went on to explain that in situations such as the instant case, the fact that UPS had multiple policies that accommodated similarly situated non-pregnant employees created a dispute as to whether the employer treated non-pregnant employees more favorably than pregnant employees. Ultimately, the Fourth Circuit, on remand, was tasked with determining the strength of the UPS's arguments as to why it was unable to accommodate Ms. Young under the Court's new framework. ✦

Alyssa Engelberg is an associate at the Portland office of Fisher & Phillips LLP, where she practices in all areas of labor and employment law.

Kirsten Rush is an associate at Busse & Hunt, which represents employees in employment cases, including civil rights, discrimination, harassment, wrongful discharge, defamation, and fraud cases.

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2015), http://www.dailykos.com/story/2015/06/29/1397559/-Texas-attorney-general-tells-county-clerks-they-can-refuse-marriage-licenses-to-gay-couples; Mark J. Stern, "North Carolina Passes Law Allowing Magistrates to Refuse to Marry Same-Sex Couples" Slate (June 11, 2015), http://www.slate.com/blogs/outward/2015/06/11/north_carolina_passes_law_letting_magistrates_claim_religious_exemption.html; http://www.courier-journal.com/story/news/politics/politics-blog/2015/07/15/proposal-exempt-clerks-same-sex-marriage-licenses/30204223/; *see also* Douglas NeJaime & Reva Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics," Yale L.J. (2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560658 (discussing how invoking religious liberty in this way can prolong social conflict).

9. "Nullification: Unlawful and Unconstitutional" The Heritage Foundation (Feb. 8, 2012), http://www.heritage.org/research/factsheets/2012/02/nullification-unlawful-and-unconstitutional.

10. Such stances by county clerks may also give rise to municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Additionally, counties may be obligated to explore options to accommodate employees who assert that processing same-sex marriage licenses violate bona fide religious beliefs. *See, e.g., Bhatia v. Chevron*, 734 F.2d 1382 (9th Cir. 1984).

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Oregon State Bar
Civil Rights Section
P.O. Box 231935
Tigard, OR 97281-1935

Civil Rights Section Hosts Forum

Matthew Ellis
Law Office of Matthew Ellis

The Civil Rights Section of the Oregon State Bar hosted its free public forum on May 27, 2015, at the McMenamins Kennedy School in northeast Portland. Titled "Squeezed Out: The Experience of Diversity, Gentrification, and Growth in Portland," the presentation started with two short films. The first film, *What Happened?*, is a student film that highlights black and white Portlanders' disparate experiences of economic development in north and northeast Portland. The second film, *Future: Portland*, shows black community leaders talking about what it means to make a home in Portland during a time in which the black community is increasingly pushed out of historically black neighborhoods.

Following the films, Nkenge Harmon Johnson, an attorney and the chief executive officer of the Urban League of Portland, moderated a panel discussion. The panelists included *What Happened?* student filmmaker Llondyn Elliott, Karl Dinkelspiel of the City of Portland Housing Bureau, and Rukaiyah Adams from *Future: Portland*.

The presentation generated significant interest from the general public and received positive press coverage in the *Oregonian*. More than 220 people attended and many more were turned away at the door; more than 1,400 people had responded on Facebook that they intended to attend. A link to the films and the full panel discussion is available on the Civil Rights Section's webpage, at http://www.osbar.org/sections/civilrights/civil-index.html. ✦

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