

LGBT Law and Your Courtroom

It's Not Just Wedding Cakes

Hon. James E. Snyder

Hon. D. Zeke Zeidler

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OBERGEFELL v. HODGES (2015)

The Bottom Line

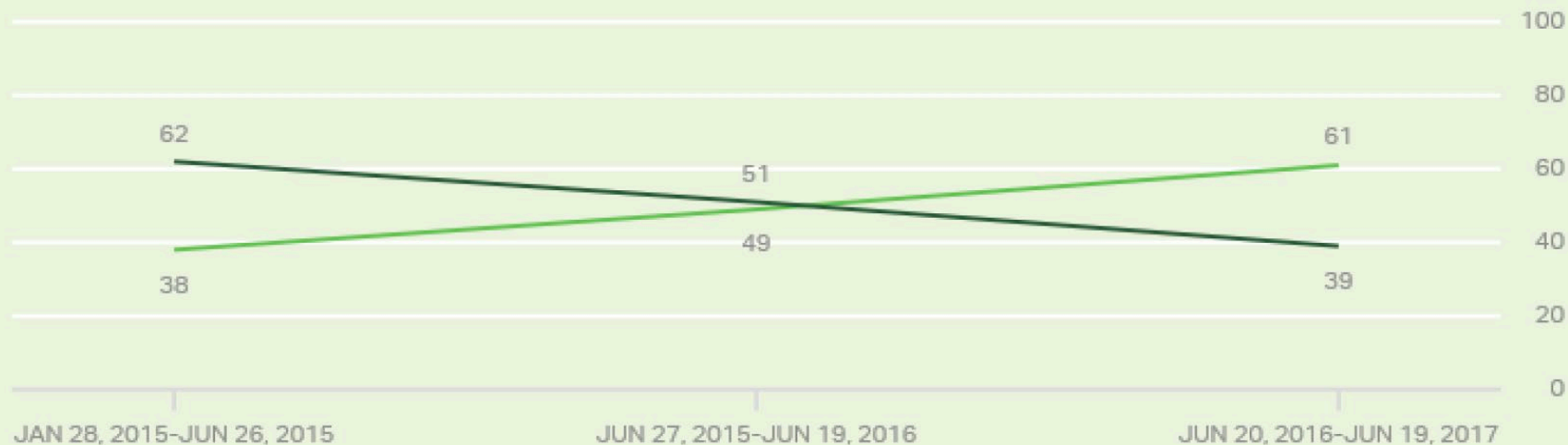
- The Constitution requires a state to license a marriage between two people of the same sex
- The Constitution requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

- ~60% same-sex couples in the US are married (Gallup 2018)
 - cf., ~40% just post-Obergefell
- Alternative statuses decrease (IL Civil Union)

Proportion of Same-Sex Cohabiting Couples Who Are Married Continues to Climb Two Years After Supreme Court Ruling

Based on LGBT adults

■ % Married ■ % Domestic partner



Figures are the % of LGBT adults who are married vs. living with a same-sex partner, based on those in either relationship.

GALLUP DAILY

Marriage and Divorce Today

- In the US, approximately 2% of opposite-sex couples divorce annually. In states with available data, approximately 1.1% of same-sex couples divorce annually.
- Researchers expect that marriage and divorce rates will eventually be in parity.

Marriage and Divorce Today

Post-
Obergefell
Supreme
Court
cases

- ***Obergefell***: the Constitution entitles same-sex couples to civil marriage “on the same terms and conditions as opposite-sex couples.”
- ***V.L. v. E.L. (2016)***(per curiam) AL must recognize GA adoption by same-sex couple, even if would not be recognized by AL law (Full Faith & Credit)

Post-
Obergefell
Supreme
Court
cases

- ***Pavan v. Smith (2017)***(per curiam). AR recognizes marital presumption for man married to woman who conceives a child through ART; it must also grant that status to woman married to another woman who similarly bears a child.

“Having chosen to make its birth certificates more than mere markers of biological relationships and to use them to give married parents a form of legal recognition that is not available to unmarried parents, Arkansas may not, consistent with *Obergefell v. Hodges*, deny married same-sex couples that recognition.”

Responses and Limits

- ***Pidgeon v. Turner (TX 2018)***:
Obergefell and *Pavan* did not hold that states must provide the same benefits to all married persons in both same- or different-sex marriages. Therefore, lawsuit against Houston could proceed challenging city policy granting identical benefits to same- and different-sex married city employees.
- **KS** marriage restoration act to reverse *Obergefell*

Responses and Limits

- **AL** (2019) abolish marriage licenses. Now only “record marriages” SSA or FFC
- **MO** (2016) Lesbian couple denied private senior center married housing
- Some state clerks (NY 2018) refusing to issue licenses to same-sex couples
- *cf.* discussion of state/ federal religious freedom laws and regulations/policies

Marital Presumptions and Family Law

- ***Strickland v. Day, (MS 2018)***: non-biological same-sex spouse entitled to parent status, even if marriage not recognized at birth
- ***In re Registered Domestic Partnership of Madrone (OR App. 2015)***: parent status based on whether couple would have married had they been able to)
- ***Ramey v Sutton 362 P3d 217 (OK 2015)***: Same-sex couple's failure to marry before *Obergefell* can't prevent the nonbiological parent from seeking custody of the child when she had acted *in loco parentis* to the child

Marital Presumptions and Family Law

- ***Conover v Conover (MD, 2016)***: Same-sex partner had standing as facto parent to pursue custody of a child born to other partner before marriage
- ***But see, Mabry v. Mabry (MI 2016)***: equitable parent doctrine only applies to married couples. Same-sex couple whose marriage was unrecognized *pre-Obergefell* not married by state law

Discrimination on basis of SOGI

And the 3 cases

currently before the US Supreme Court

Currently
Before
the
Supreme
Court

- ***Bostock v. Clayton County, Georgia (5th Cir.)***
Lesbian plaintiff
- ***Altitude Express, Inc. v. Zarda (2nd Cir.)*** Gay
male plaintiff

Does Title VII's existing prohibition on employment discrimination "*on the basis of sex*" include sexual orientation discrimination

Currently
Before
the
Supreme
Court

- ***R.G. & G.R. Harris Funeral Homes v. EEOC*** (6th Cir.) Transgender female plaintiff

Does Title VII's existing prohibition on employment discrimination "*on the basis of sex*" include (a) gender identity discrimination, (b) sex stereotyping

Religious Freedom and SOGI

State RFRAs and other laws

Religious Freedom and SOGI

Masterpiece Cakeshop v. Colo. Civ. Rts. Com'n (2018) (Kennedy, J.)

Baker refused on religious grounds to make wedding cake for same-sex commitment ceremony. Litigation before the CCRC and in federal courts.

S.Ct remands the case without deciding the religious freedom issue because the Com'n hearing officer was hostile to baker's religious beliefs, and that hostility not disavowed by subsequent courts.

Brush & Nib Studio v. Phoenix (Az. Ct. App. 2018): applying *Masterpiece Cakeshop* to uphold municipal non-discrimination ordinance to wedding engraver

Arlene's Flowers Inc. v Washington (WA 2017): Florist's religious freedom challenge to WA non-discrimination law vacated and remanded for reconsideration in light of *Masterpiece Cakeshop*

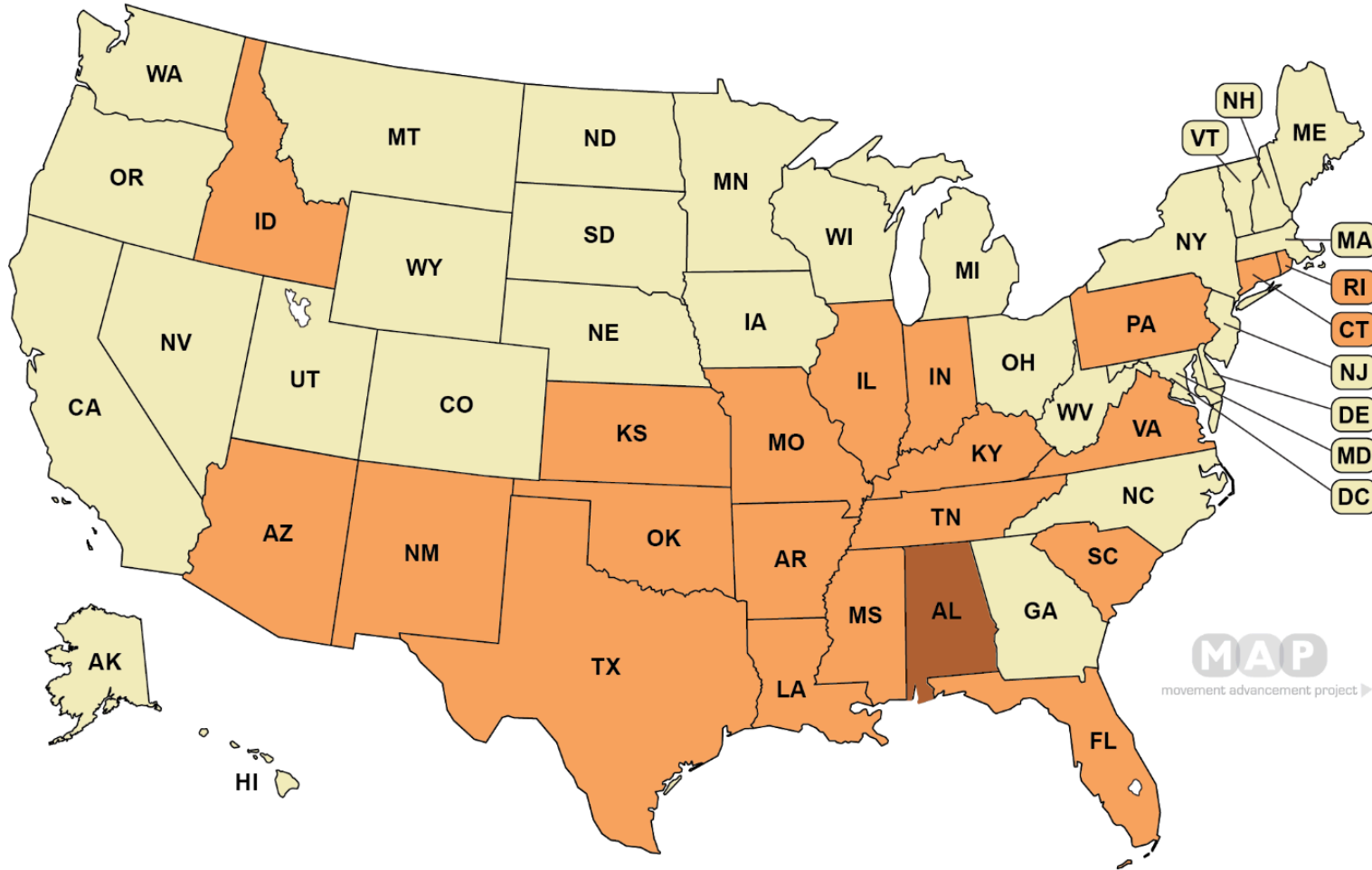
Federal and State RFRA's




- Federal RFRA does not apply to states, state or local governments or state actors, but does to federal government regs/laws
 - *Boerne v. Flores* (1997)
- Neither federal RFRA or state RFRA's or state constitutions cannot override a federal Constitutional demand.
 - *Burwell v. Hobby Lobby Stores, Inc.* (2014) not to contrary.

Federal and State RFRA's

- ***But, state RFRA's may control the accommodation of state religious freedom claims with state/local equality requirements.***
- ***Federal RFRA applies to federal administrative regulations and interpretations***
 - E.g., DOJ, HUD, OCR, State Dept. and “natural law” Commission

STATES WITH RELIGIOUS FREEDOM RESTORATION ACTS (RFRAs)



-  State has constitutional religious exemption law
(1 state, 0 territories)
-  State has statutory religious exemption law
(20 states, 0 territories)
-  State has no broad religious exemption law
(29 states, 5 territories + D.C.)

Issues for Judges

Judicial Canons

Related Judicial Canons

- Canon 1 -- Uphold the integrity and independence of the judiciary
- Canon 2 (Illinois) and 1 (ABA) – Avoid impropriety and the appearance of impropriety in all activities
- Canon 2(a) (Illinois) and 2.2 (ABA) – Respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary

Related Judicial Canons – cont'd

- Canon 3 (Illinois) and 2 (ABA) – Perform the duties of judicial officer impartially and diligently
- Canon 3(a)(1) (Illinois) and 2.4 (ABA) – be faithful to the law and maintain professional competence in it ... unswayed by partisan interests, public clamor, or fear of criticism.

Related Judicial Canons – cont'd

- Canon 3(a)(3)(Illinois) and 2.8(ABA) – be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and other with whom the judge deals in an official capacity, and require similar conduct of lawyers and of all court staff and personnel under the judge's direction and control.

Related Judicial Canons – cont'd

- Canon 3(b)(5) and 2.3 (A)&(B) (ABA) – perform judicial duties without bias or prejudice. A judge shall not, in the performance of duties, engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice, including but not limited to bias or prejudice based upon ... sex, gender, or sexual orientation.

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Relevant Judicial Canons – cont'd

- Canon 3(b)(6) (Illinois) and 2.3(C) (ABA)– require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon ... sex or sexual orientation against parties, witnesses, counsel or others. Does not preclude legitimate advocacy when ... sex, sexual orientation, or similar factors are issues in the proceeding.

Relevant Judicial Canons – cont'd

- Canon 5 (Illinois) and 3 (ABA) – Regulate extrajudicial activities to minimize the risk of conflict with judicial duties.
- Canon 4 (Illinois) and 3.1 (ABA) – Conduct all extrajudicial activities so they do not cast doubt on the judge's capacity to decide impartially any issue that may come before him or her.

LGBTQ+ Terminology

And some basic concepts

Biological Sex :

Differences in Sexual Development



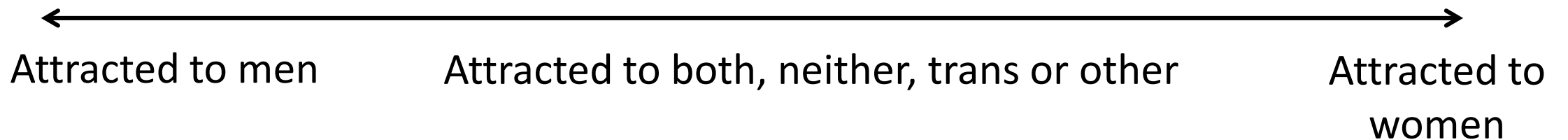
Gender Identity



Gender Expression



Sexual Orientation



Terminology

- Transgender ~~Transsexual~~
- Trans
- Cisgender
- Gender Non-Conforming, Non-Binary
- Gender Fluid
- Genderqueer
- Transition (MTF or FTM)
- Gender Dysphoria (GID)
- Gender Confirmation Surgery Gender Reassignment Surgery ~~Gender Change Surgery~~

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