A 6-3 Supreme Court Could Erode LGBTQ Rights

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Following Amy Coney Barrett's confirmation to the U.S. Supreme Court, LGBTQ advocates are looking down the road at the possibility that a 6-3 conservative majority would roll back or erode LGBTQ protections by carving out various religious exemptions.

On November 4, the high court will hear oral arguments in Fulton v. Philadelphia, a case in which Catholic Social Services asserts it should receive taxpayer funds even as it refuses to place children with prospective foster or adoptive parents, including same-sex couples, based on its religious beliefs. The city of Philadelphia argues that such a policy violates the city's LGBTQ-inclusive nondiscrimination law.

Speaking with Metro Weekly, David Flugman, who authored an amicus brief in the Fulton case asking the court to decide in favor of the city of Philadelphia, said that Barrett's confirmation hearings last week provided "no comfort" to the LGBTQ community that their rights would be protected by a 6-3 conservative majority.

Flugman noted that the larger issue at play in Fulton is whether a 30-year-old ruling finding that if a law is generally applicable and neutral towards religion, it is constitutional. He says the widest possible ruling in Fulton would be a decision that overturns that rule and requires the government to meet strict scrutiny, or provide a compelling reason for the law on the grounds that its intended outcome cannot be achieved by any other means. If the court requires such a standard, it actually tips the scale in favor of religious entities, at the expense of LGBTQ rights and other civil rights.

In terms of other issues that might come before the court, such as the constitutionality of the court's 2015 decision that legalized same-sex marriage, Flugman is skeptical that the court would go so far as to completely overturn the decision, despite recent calls by Supreme Court Justices Clarence Thomas and Samuel Alito to revisit the issue and the conflicts that same-sex marriages pose to the religious freedom of those who oppose homosexuality.

"The more likely path forward, if there is to be kind of a governing conservative majority on the court, is this kind of erosion at the rights and privileges that go along with marriage," he said. "The Fulton case is a clear example of that.

"I think the biggest and most dangerous one is in the sphere of health care. Particularly given the fact that there are so many hospitals that are run by religious denominations," Flugman added. "And the idea that a health care provider could refuse to provide service to an LGBT person or a transgender person or a child of LGBT parents because they have some type of religious objection to being transgender, to having an LGBT family, to hospital visitation rights."

"What do you do with someone who comes in seeking emergency services and suffers adverse consequences? Is the Supreme Court going to shield hospitals from liability that flows from their failure to provide adequate care?" he asked. "Are state licensing boards going to be able to regulate that sort of conduct because medical professionals are licensed by the state? Can New York or California say that they are going to prohibit these sorts of practices, and will the Supreme Court, if it comes up, rule as a matter of the First Amendment that it's perfectly within the rights of a hospital system run by the Catholic Church to deny treatment to a gay person?"

"It's potentially quite dangerous and quite impactful, specifically for the LGBT community, although it's certainly not the only community that would be adversely affected in such a way."

Read the full interview in Metro Weekly.

Attorney

- David Flugman

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