

North Carolina Magistrates Secure Their Own Religious Liberty

In 1968, the U.S. Supreme Court determined in its 8-1 decision in *Flast v. Cohen* that a citizen can have standing against a law he or she believes is unconstitutional merely on the basis of being a taxpayer.

Liberal activist groups have, for years since, attempted to use this narrowly defined provision of standing—largely unsuccessfully—in attempts to get federal courts to overturn state laws they don't like. Such was the case earlier this year when North Carolina's religious liberty exemption for magistrate judges who do not wish to perform same-sex "marriages" was heard by the 4th Circuit Court of Appeals.

The court once again, however, determined the LGBT activists who filed the lawsuit against that part of Senate Bill 2, otherwise known as the "North Carolina bathroom bill," which has since become law in the Tar Heel State. The opinion stated:

The outcome here is in no way a comment on same-sex marriage as a matter of social policy. The case before us is far more technical—whether plaintiffs, simply by virtue of their status as state taxpayers, have alleged a personal, particularized injury for the purposes of Article III standing. Based on a century of Supreme Court precedent, we conclude that they have not.

As detailed above, this case presents one of the most problematic terrains for finding standing—either under general rules or the *Flast* exception. The classic conception of an injury-in-fact is missing. So too are essential ingredients of a *Flast* claim like a specific

legislative appropriation and the subsidy of a sectarian entity.

Article III's case-or-controversy limitation ensures that federal courts respect "the proper—and properly limited—role of the courts in a democratic society" ... "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so" ... This case is no exception.

While it was not a full-throated endorsement of the magistrates' religious liberty, the 4th Circuit's decision did reinforce that federal courts will not delve deeply into state issues without good cause to do so. Liberty Counsel, which represented several of the magistrates in the case, issued the following statement after learning of the court's decision:

The 4th Circuit Court of Appeals handed North Carolina magistrates a huge victory by ruling that the plaintiffs who opposed their religious liberty opt out of same-sex "marriage" lacked standing to challenge the law.

Liberty Counsel represented, among others, Magistrate Brenda Bumgarner, who has an excellent record during her 10 years of service as a magistrate, and who sought a religious opt out of performing "marriages" for same-sex couples. Liberty Counsel filed an amicus brief that argued that SB 2 is not only constitutionally permissible but actually required for magistrates and judges. SB 2 states: "Every magistrate has the right to recuse from performing all lawful marriages under this Chapter based upon any sincerely held religious objection."

In 2015, Liberty Counsel filed suit on behalf of magistrates seeking accommodation for their religious convictions regarding same-sex "marriage." The state house

and senate passed SB 2 granting an accommodation, and both houses later overrode the governor's veto. Liberty Counsel dismissed its suit, but then the new law was challenged by those who want to force magistrates to violate their religious convictions and consciences.

"We celebrate this victory for North Carolina magistrates who have the constitutional right to follow their conscience and rights to free exercise without fear of punishment," said Mat Staver, Founder and Chairman of Liberty Counsel. "The LGBT agenda seeks to steamroll over the conscience of everyone, including those who serve in the court system who believe in natural marriage. We were proud to defend Magistrate Brenda Bumgarner and others in this case as it sets a precedent and has an effect on all judges and their sincerely held religious beliefs," said Staver.

It is unlikely the Supreme Court will take up the activists' case, given the high hurdle they would have to climb to prove the circuit court erred in its decision. {eoa}