

Justices Invite Challenge to Fix Obergefell Mess

Although the U.S. Supreme Court has declined to grant review of the Sixth Circuit Court of Appeals decision involving former Rowan County Clerk Kim Davis and regarding the legal doctrine known as qualified immunity, Justices Thomas and Alito appear to invite future challenges to the 2015 Obergefell marriage case.

Liberty Counsel reported that Justice Clarence Thomas (joined by Justice Samuel Alito) wrote that the Supreme Court's majority decision in Obergefell v. Hodges caused a collision with religious liberty, and the Court must fix it. Four justices, including Chief Justice John Roberts, strongly dissented in Obergefell. Justice Alito predicted the opinion would cause significant problems for religious freedom.

Monday Justice Thomas wrote, "In Obergefell v. Hodges, the Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text. Several members of the Court noted that the Court's decision would threaten the religious liberty of the many Americans who believe that marriage is a sacred institution between one man and one woman. If the states had been allowed to resolve this question through legislation, they could have included accommodations for those who hold these religious beliefs."

"Due to Obergefell, those with sincerely held religious beliefs concerning marriage will find it increasingly difficult to participate in society without running afoul of Obergefell and its effect on other antidiscrimination laws. It would be one thing if recognition for same-sex marriage had been debated and adopted through the democratic process, with the people deciding not to provide statutory protections for

religious liberty under state law. But it is quite another when the Court forces that choice upon society through its creation of atextual constitutional rights and its ungenerous interpretation of the Free Exercise Clause, leaving those with religious objections in the lurch,” wrote Thomas.

Justice Thomas noted that “Davis found herself with a choice between her religious beliefs and her job.” He continued, “Davis may have been one of the first victims of this Court’s cavalier treatment of religion in its Obergefell decision, but she will not be the last.”

Justice Thomas also wrote, “This petition implicates important questions about the scope of our decision in Obergefell, but it does not cleanly present them.”

The petition was only qualified immunity, namely whether Davis should personally pay for the attorney’s fees of the plaintiffs’ counsel. Justice Thomas continued, “Nevertheless, this petition provides a stark reminder of the consequence of Obergefell.” He ended by saying “the Court has created a problem that only it can fix. Until then, Obergefell will continue to have ‘ruinous consequences for religious liberty.’”

In Davis v. Ermold, the Court of Appeals previously rejected qualified immunity defense to personal liability for Davis’ conscience-based refusal to issue any marriage licenses bearing her name because of her objection to same-sex “marriage.” The case centers on whether Davis is liable to pay the plaintiffs’ attorney fees and/or damages. In the Ermold appeal, the Sixth Circuit agreed with lower court Judge Bunning—that Davis in her official capacity, had sovereign immunity because she acted for the state (not the county). However, the Court of Appeals ruled that Davis has no qualified immunity as an individual.

Davis has continued to argue that she is not liable for

damages because she was entitled to a religious accommodation (which former Governor Bevin and the legislature granted) and that her actions did not violate clearly established rights.

In 2016, Kentucky unanimously passed legislation to provide religious liberty accommodation for Kim Davis and other Kentucky clerks.

There has been no final ruling on whether Davis is liable for damages. Depending on how the case finally concludes at the lower court, Liberty Counsel will then file a petition to present the opportunity for the Supreme Court to address Obergefell.

Liberty Counsel Founder and Chairman Mat Staver said, “Even though the High Court declined to take up qualified immunity, Justices Thomas and Alito are inviting future challenges regarding Obergefell and to fix the mess the Court created.”
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