

AN EDUCATIONAL UPDATE FROM  
THE SOUTHEAST LAW INSTITUTE™, INC.

**To:** Interested Persons  
**Date:** November 2017  
**From:** A. Eric Johnston  
**Re:** City of Birmingham Passes a Gay Rights Ordinance

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The City of Birmingham recently passed an ordinance, effective within the city limits, that provides criminal penalties for discrimination on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, disability or familiar status. Most of these are already covered by federal law, but what is not covered is “sexual orientation” and “gender identity,” the real motivations behind this ordinance. The law of federal discrimination is lengthy and detailed. This ordinance is simplistic and vague. The ordinance is defective in several ways, but the primary issue being whether the city even has authority to pass it. If it does not, that ends the problem. If it does, then we have a true free exercise of religion issue. This Educational Update addresses that issue.

While there are no religious objections to the other grounds for discrimination, there certainly are for sexual orientation and gender identity. This has been the issue beginning with the *Obergefell* opinion in 2015 legalizing same sex marriage and the “constellation of benefits” that have followed from it as suggested by Justice Anthony Kennedy, author of that court opinion. Primarily, Christians, and some other religions, believe homosexual activities are sinful. Same sex marriage is not condoned. Although *Obergefell* establishes those rights, they are in conflict with the religious freedom rights of religious persons. These must be protected. If we are to have constitutional rights related to homosexual activities, then the rights of persons who have different religious views must be respected with the rights being able to coexist.

The ordinance prohibits discrimination in employment, accommodation, housing, education, and in other ways. An employer is considered to be anyone with one or more employees. In other words, it will reach virtually every activity within the city limits. The only religious exception is activities by “a religious corporation, association, or society that employs an individual of a particular religion to perform work connected with the performance of religious activities by the corporation, association, or society.” Note, this covers only employment and not other activities. It only covers individuals such as pastors, Bible teachers, and others actually engaged in “religious activities.” This means that administrative, clerical, custodial, and others working for a church or religious entity will not be protected. They will be required to hire persons without regard to their sexual orientation or gender identity. There surely will be test cases that will follow putting churches and religious entities in the position of having to defend themselves. The fines required by the ordinance can mount up significantly in a short period of time.

But, everyone else is covered by this ordinance. This includes the most classic examples of wedding planners, bakers and florists who will be required to provide services for same sex weddings. This has already been a problem around the country and is the subject of a case before the U.S. Supreme Court (“SCOTUS”). The case will be argued in December and a decision will be handed down by next summer. The case of *Charlie Craig and David Mullins v. Masterpiece Cake Shop, Inc. and Jack C. Phillips* involves a Colorado law that required a baker to make a wedding cake for a same sex couple. As a Christian, the baker believed decorating wedding cakes is a form of art honoring God. He told the men he would be glad to sell them anything in his shop, but he could not design a wedding cake for them. The law required him to change his policy, provide comprehensive staff training and make quarterly reports of compliance for two years. The Colorado court ruled in favor of the law applying *Emp. Div., Dept. Human Res. v. Smith*, 494 U.S. 872 (1990), that held a “valid and neutral law of general applicability” regardless of religious belief, only be “rationally related to a legitimate governmental interest.” This lowest judicial standard did not recognize Mr. Phillips’ religious beliefs, which resulted in the court holding against him and then the review by SCOTUS. *Smith* should not apply since both religion rights and speech rights are affected. The proper judicial test should have been the “compelling interest” test which would have protected Mr. Phillips’ rights. If that test is used, the highest judicial test of strict scrutiny is applied and that should result in protection of his religious right and right to express himself.

We must keep in mind that Justice Anthony Kennedy, the author of all of the gay rights opinions, will likely be the swing vote and there will be a five-four decision, one way or the other. Except for the litigants in the case, there is nothing that can be done now except pray that Justice Kennedy will respect our historic rights of religious freedom and permit them to coexist with the newfound rights of homosexual behavior.

This case means everything for the future of the Birmingham ordinance. If Mr. Phillips’ rights are protected, the Birmingham ordinance will clearly be unconstitutional. If his rights are not protected, then the other issues concerning the ordinance, particularly its vagueness and its lack of protection of religious freedom, will become subjects of many lawsuits, but, most importantly, religious freedom will be severely diminished. Churches, ministries and Christians in the city limits of the City of Birmingham, as well as, the rest of the country, will be placed in a very difficult position. The stakes involved in the same sex rights issues become increasingly high. This is an issue that will not end anytime soon and will become a continuous challenge to all aspects of religious freedom.