MARCH 29, 2019

Corporations Are People. That's Why Arlene's Flowers Should Lose.

KENT GREENFIELD Professor of Law and Michael and Helen Lee Distinguished Scholar, Boston College Law School

The Washington Supreme Court is the current battlefield in a national conflict between religion and anti-discrimination laws. The Court is considering the case of Arlene's Flowers, a small flower shop in the central part of the state, which refused to sell wedding arrangements to a gay couple. The arguments in the case parallel those made last year in the *Masterpiece Cakeshop* controversy, the case of the Colorado bakery that refused to sell a cake for a same-sex wedding. The U.S. Supreme Court decided for the bakery on reasons that don't apply broadly (the Court held that a Colorado official allowed anti-religious bias to affect the state's prosecution of the bakery). So cases like *Arlene's Flowers* are still making their way through the lower courts.

The conflict is serious. On one side, the state has a strong interest in protecting consumers from discrimination. On the other side are religious people who bristle at the state telling them they must use their artistic talents to commemorate same-sex unions.

As in the *Masterpiece Cakeshop* controversy, most of the attention in *Arlene's Flowers* has been paid to whether the business is engaging in a first amendment-protected artistic activity. Is baking a

cake speech? Is a floral arrangement? Justices Ruth Bader Ginsburg and Elena Kagan questioned the Cakeshop's lawyer last year with a series of hypotheticals: how about the make-up artist? The tailor? The hair stylist? The jeweler? The line drawing difficulties are immense.

But there's a way out of this difficulty, and it means that courts can avoid the tricky free speech and religion questions. And the way out is — surprisingly — based on the notion that corporations are people.

The sources of the religious objections to the anti-discrimination laws in both *Masterpiece* and *Arlene's Flowers* is not the bakery or flower shop but the individuals behind the businesses. In *Masterpiece* it was Jack Phillips, and in *Arlene's Flowers* it is Barronelle Stutzman. Both are devout Christians who believe their faith commands them to not sell wedding cakes or wedding arrangements to same-sex couples, since doing so would cause them to be complicit with sin.

This distinction between the companies and the individuals behind them is important. With the help of Daniel Rubens and other excellent lawyers at Orrick, Herrington & Sutcliffe, I recently filed a brief in the Supreme Court of State of Washington, urging the Court to focus on this important point. (We filed a similar brief in *Masterpiece*, but the Court ultimately did not consider the issue.)

In the Washington brief, we argue that the company and Stutzman are not the same in the eyes of the law. Arlene's Flowers – the company – is organized as a corporation, like thousands of small businesses. Stutzman owns shares in the company, and is employed by it. Even though the company is "closely held" and controlled by one family, the company has legal "personhood" of its own.

Even in situations in which a single shareholder is dominant, the separation of shareholder from corporation is a fundamental principle

of business law. Separateness is often the very reason why founders of even small companies choose to incorporate rather than to operate as a sole proprietorship. Shareholders receive immense benefits from separation, including the right of limited liability, which protects their personal assets from claims against the corporation. This protection is especially crucial for small businesses. If Amazon has to pay a tort judgment, it is unlikely any particular shareholder would suffer devastating losses even without limited liability. If a local florist is held liable for a significant judgment, owners would risk financial ruin if not for limited liability.

Religious business people cannot have it both ways. They cannot stand behind the corporate form when it suits them for financial reasons, but claim that they are the same as the company when it comes to religion.

If Arlene's Flowers can assert the religious beliefs of its shareholder to avoid regulations, courts will be faced with years of litigation to define which companies can take advantage of the exemption. Nothing inherent in Appellants' arguments restricts their claims to private companies. Corporations such as Amazon, Costco, and Starbucks could be subject to shareholder pressure to announce religious or political views to exempt them from regulation.

Even if exemptions were limited to private or family companies with a dominant shareholder, courts would face questions about what degree and type of ownership constitutes "control"—and corporate law provides no ready answer. Remember that "closely held" or even "family owned" is not synonymous with "small." Some of this nation's most prominent corporations are privately held, family companies. The huge conglomerate Cargill employs over 150,000 people, enjoys revenues of over $136 billion, and is larger than AT&T — and is both privately held and family-run. If Arlene's Flowers can discriminate, then Cargill can too.

Allowing some companies to discriminate would also erode the efficiency benefits that the markets derive from corporate separateness. Customers and state regulators will not know whether a company is subject to the same laws as others without investigation into the beliefs of the shareholders, the number of shareholders, and the capital structure of the company. Customers and others would then be forced to keep track of which companies could discriminate and which could not. The era of the "Green Book" was not only morally shameful but also economically inefficient. We need not return to such an era.

One final aspect of our argument is worth mention. The separation of corporations from their shareholders is a function of state law. If Washington's courts decided that – as a matter of state law – shareholders cannot be presumed to project their religious and political views onto the company, then such a holding may represent an adequate and independent state law ground for holding that the company must abide by state anti-discrimination law. If so, such a holding would be insulated from Supreme Court review.

Related

ACSBLOG

In Defense of Court Packing

ACSBLOG