

## Ropes & Gray Lawyer Who Argued ‘Obergefell’ Isn’t Sweating Kennedy Rumors

BY MARCIA COYLE

If Justice Anthony Kennedy retires soon, **as rumors** continue to predict, some worry a more conservative successor would endanger the U.S. Supreme Court’s **landmark same-sex marriage decision**. Ropes & Gray’s Douglas Hallward-Driemeier, who argued the historic challenge, doesn’t buy those fears.

“I think certainly when you see the strength of the dissents there, obviously one has a concern whether a shift in membership in the court would cause the court to revisit that question,” Hallward-Driemeier told the Supreme Court Brief.

Some parties and perhaps even some state governments, he said, might be keen to question marriage again. “But I’m not aware of any other situation in which the court would have ever reversed itself as to take rights away from people in the way that would occur if *Obergefell [v. Hodges]* were overturned,” he said.



Douglas Hallward-Driemeier addresses the media outside the U.S. Supreme Court after arguments in the same-sex marriage cases, *Obergefell v. Hodges*. April 28, 2015.

In 2015, **the high court heard two** related same-sex marriage cases: *Obergefell*, which raised the basic question of same-sex couples’ right to marry, and *Tanco v. Haslam*, which asked whether the Fourteenth Amendment required a state to recognize a same-sex marriage licensed and performed in another state.

Hallward-Driemeier argued on behalf of the same-sex couples in *Tanco*. The justices said yes

to both questions **in the 5-4 decision**.

The same-sex marriage challenge was neither the beginning nor the end of the work on behalf of the LGBTQ community by Ropes & Gray. Hallward-Driemeier, the leader of the firm’s appellate and Supreme Court practice, recently shared his thoughts on the firm’s work in this area and what lies ahead. The interview below was edited for clarity and length.

*You are firmly linked with the same-sex marriage case but didn't your work in that area begin before that case?*

Our work on these issues more broadly goes beyond that. The firm has been active in the area for a while. As a general matter, for as long back as there has been grading of law firms on how they treat members of the LGBTQ community when they are employees of the firm, we always score perfectly. It is a focus of the firm to be incredibly welcoming and to value the contributions of all.

We had worked with Lambda Legal on a number of amicus briefs on the importance to the community of the Affordable Care Act and its limitations on insurers for pre-existing conditions. We had filed a Federal Tort Claims Act brief against prison guards for violence against members of the community and filed a number of briefs on behalf of prisoners seeking medical treatment consistent with their identity. We also did some work on the immigration asylum side; we're still doing a lot of immigration work for folks. Before *Tanco*, we and Lambda Legal had sued Louisiana to vindicate the right of LGBTQ individuals to make use of Ryan White funds to access treatments for HIV.

*How did you and the firm become involved in the marriage equality issue?*

We had been involved representing a group of amici led by the Anti-Defamation League in the lower courts, making the point there is not a monolithic religious view on these issues. We had not been representing any of the parties to the marriage equality suits. We were brought into the Tennessee case—*Tanco*—by a person who had been a college friend and law school friend of mine at the National Center for Lesbian Rights. They needed somebody about a week before the Supreme Court deadline. We jumped in with all feet to pitch in and help.

*You are skeptical that the Supreme Court would overturn Obergefell if given the opportunity and a change in the court's composition. Why?*

They would be faced with a different scenario if the case were ever posed again. We now have hundreds of thousands of individuals acting in reliance on *Obergefell*. And society has moved forward. You would actually be creating chaos if you overturned *Obergefell*. States have adopted other laws that sort of presume *Obergefell* even if they never changed their [legal definition of marriage].

*The justices are getting back into this area next term in a challenge by a Colorado baker who refused, on religious grounds, to bake a wedding cake for a same-sex couple. He was found to have violated that state's anti-discrimination law. What are your thoughts on the case and will you and the firm get involved?*

The fact that the **court has taken the wedding cake case** puts it front and center. The case in the Supreme Court is about an individual saying you can't make me serve all comers. The other end of it is states affirmatively saying if you have a religious basis to discriminate, that doesn't give you an exemption from our anti-discrimination laws.

I think the issue presented in those cases is really a much broader assertion of a right—anybody who can articulate a religious basis can exempt himself or herself from any of our anti-discrimination laws. I like to remind people of the trial court decision in *Loving [v. Virginia]*. The trial court said God Almighty put the races down on different continents, meaning they should never intermingle, and it was religiously compelled to keep them separate.

The assertion of the right in the cake case is not about same-sex marriage but about any kind of

anti-discrimination law. I think it's quite distressing that someone opens a business and then picks and chooses between our citizens. I thought we decided this back in the '60s.

*The justices were ready to take up the case of a transgender high school boy who wanted to use the school bathroom associated with his gender identity, but the case fizzled after the Trump administration's action. Do you see transgender legal issues coming back soon?*

In *Obergefell*, there also was an equal protection argument. The chief justice said: "Sally wants to marry Bob and Dick wants to marry Bob. Why isn't this a question of gender discrimination?" I thought at the time: He got it! He never addressed it in his dissent.

I've thought all along these questions were most easily understood as questions of gender discrimination. As the court has held, it includes appearance. It's non-conformity to that gender stereotype that's what's upsetting. We're starting to see courts adopt that view. That's where I expect the law to be going. I think it's right and a natural extension of

decisions already made, [in which case] we would not need a whole other set of laws on protecting people on the basis of sexual orientation.

*On the last day of 2016-17 term, you won a summary reversal in Pavan v. Smith, in which the justices said Arkansas could not deny married same-sex couples the right to have the name of the birth mother's spouse entered as the second parent on their child's birth certificate. Justice Neil Gorsuch, joined by Justices Clarence Thomas and Samuel Alito Jr., dissented. What do you make of the Gorsuch dissent?*

The dissent is framed as one about the standard for summary reversal. I suppose different justices can have different views on that internal court procedure. What I was troubled by was the extent to which it seemed to buy into a characterization of the state law by the state Supreme Court and also by the state attorney general that was really quite misleading.

We were chastised by the state Supreme Court and attorney general for not having challenged the artificial insemination law instead of the birth certificate

law. That is totally bogus. It only proves the birth certificate law is not a biological law, but is based on the marital relationship. If you actually took the time to assess that, the way they characterized it as a biological statute was just patently false, willfully false. That the dissenters were willing to give credence to that was disappointing.

*What effect, if any, has there been on the firm from your work in this area of the law?*

It's fair to say that given the firm's very central involvement in *Obergefell*, it really has spurred and even increased the level of excitement and commitment and people stepping up and saying, "We want to be involved in these issues."

The day after *Pavan*, we had cert granted in a bankruptcy case—our third in a span of five years. I also do a lot of work on patent cases, False Claims Act. But I do really relish the opportunity to get involved in some of this really meaningful litigation that has such an important impact on people's lives. I have been so appreciative—it's not something I do alone or with the firm holding its nose. The firm has been 100 percent supportive of that work.