

High Court's First Gay-Issues Ruling

Same-sex marriage cases spark new interest in 1958 First Amendment decision.

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With same-sex marriage litigation pending before the U.S. Supreme Court, lawyers and scholars are focusing intense interest on a long-forgotten, one-line ruling by the court in 1958 — the first decision the justices ever made regarding issues that directly impact gay rights.

The ruling is *One Inc. v. Olesen*, in which the high court ruled, on First Amendment grounds, that a Los Angeles-based magazine for gays was not obscene and should be delivered to subscribers by the U.S. Post Office like any other publication.

In addition to giving gay expression constitutional protection, the case represents to gay rights advocates the federal government's post-World War II campaign against homosexuals in the federal workforce and beyond.

"This is a landmark civil rights case that has not had its due, its place in history," said Lisa Linsky, a McDermott Will & Emery partner and head of a team at the firm seeking historical documents about the case.

Researching the history of discrimination against LGBT individuals, Linsky said, is necessary to "document the nature and extent of the animus that goes back so many years." She pointed to Chief Justice John Roberts Jr.'s dissent in the 2013 *United States v. Windsor* case, which said that more than mere "snippets" of history are needed to prove the government's bigotry against gays.

Jonathan Rauch, a Brookings Institution scholar and author of a 2004 book on same-sex marriage, said of the *One Inc.* decision, "That one sentence set us free. This is a case which, after languishing for 60 years, will not be forgotten again."

At a Cato Institute forum on the case Nov. 24, Rauch said that throughout history, "the first way to oppress and harass a minority is to silence it." By giving First Amendment protection to expression among homosexuals, he said, the *One Inc.* decision could be "the most important civil rights case we've ever had."

McDermott took on the *One Inc.* research project, which may include litigation under the Freedom of Information Act, in cooperation with the Mattachine Society of D.C., a gay advocacy group that was founded in 1961 but lapsed in recent years. New president Charles Francis revived and repurposed the group in 2011 with the goal of "archive activism" to shed light on the history of the movement.

Government agencies have been slow to retrieve and release documents related to the *One Inc.* case, Francis said. "We need to find these documents," Francis said. "I guarantee they would fill a truck."

One, which billed itself as "The Homosexual Magazine," began publication in 1953. It was the first gay "magazine of ideas," Francis said, as opposed to "beefcake" publications.

One soon drew the attention of postal authorities as a possible violation of rules prohibiting the mailing of obscene publications. The August 1953 issue, with the prophetic question "Homosexual Marriage?" on its cover, was held up for three weeks before being delivered.

The Post Office permanently withheld the October 1954 issue, triggering the legal battle that eventually reached the Supreme Court. Its volunteer lawyer Eric Julber at first approached the American Civil Liberties Union for help, but was turned down, according to *Courting Justice*, a 2001 book that charts the history of gay rights issues before the Supreme Court.

Authors Joyce Murdoch and Deb Price wrote that the magazine was targeted in part because "the federal government had adopted an aggressive new posture in 1950 that treated homosexuals as a national menace." Cold War fears were spreading about communists allegedly infiltrating American government and society, and soon, homosexuals were lumped together with communists as potential threats.

The magazine sued Los Angeles postmaster Otto Olesen. The U.S. attorney's office defended the postmaster's actions, asserting that a fictional article in the magazine about a lesbian relationship was obscene because it was "lustfully stimulating to the average homosexual reader."

A district court judge agreed with the government in March 1956, ruling that "the suggestion that homosexuals should be recognized as a segment of our people and be accorded special privilege as a class is rejected. In February 1957, a panel of the U.S. Court of Appeals for the Ninth Circuit upheld the ruling, finding the magazine "morally depraving and debasing." Julber appealed to the Supreme Court on equal-protection grounds, with little expectation the court would grant review.

By coincidence, soon after *One* filed the petition, the Supreme Court issued its ruling in *Roth v. United States*, defining obscenity as material that appeals to "prurient interest." In urging the Supreme Court not to review the *One* case, Solicitor General J. Lee Rankin cited *Roth* and asserted that the magazine fit that definition.

Justices' files include several memos from law clerks sympathetic to the magazine's arguments, according to *Courting Justice*. "If the story in *One* is calculated to promote lesbianism, certain stories in [Ladies'] Home Journal are probably calculated to promote adultery," a clerk for Justice Harold Burton wrote.

Surprisingly, five justices voted to grant review in January 1958, according to the papers of Justice William O. Douglas: Felix Frankfurter, Douglas, Hugo Black, Charles Whittaker and John Marshall Harlan. But instead of setting the case for argument, the justices voted on it again

the next week. Frankfurter, Douglas, Thomas Clark, Harlan and Whittaker voted to reverse the Ninth Circuit — a narrow 5-4 majority.

But the closeness of the vote was not revealed to the public. On Jan. 13, 1958, the court released its terse unsigned opinion: "The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed. *Roth v. United States*." By mentioning *Roth*, the court was ruling, in effect, that "homosexual content in a publication did not automatically equal obscenity," Murdoch and Price assert.

The ruling got scant attention in the press when it was issued. It was not until the next day that One's staff learned it had won. Founder Dale Jennings later said he thought it was a prank when a friend told him of the victory. "I said, 'Look, don't joke. The year 2000, yes. But not today.' "