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## Legal Q & A A FREE SERVICE

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### Q. What should churches and ministries know about the U.S. Supreme Court's decision regarding same-sex marriage?

**A. On June 26, 2015, the U.S. Supreme Court issued a 5-4 ruling, holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex. The decision also requires states to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state.**

#### The Case: Obergefell v. Hodges

This case began when a same-sex couple from Cincinnati, Ohio, filed a lawsuit alleging state discrimination against same-sex couples who have been lawfully married in another state. John Arthur was terminally ill and sought to name his partner, James Obergefell, as his surviving spouse, but was unable to do so under Ohio's same-sex marriage ban. The Director of the Ohio Department of Health, Richard Hodges, was named as the defendant in the case. As the case made its way through the appellate courts, other same-sex couples joined in the complaint. And as the case continued to progress, the question before the courts became whether Ohio's refusal to recognize marriages legally performed in other states violated the Fourteenth Amendment's guarantees of equal protection and due process.

#### A Landmark Decision



**This ruling does not appear to take away any of the rights that religious organizations currently have under the law. Still, the ruling leaves unanswered questions that may lead to confusion and concern for ministries.**

In its decision, the Court began by recognizing the history of the subject of marriage, noting it is one of both "continuity and change." The Court then applied the following reasoning in making its determination that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex:

- 1) The fundamental liberties protected under the Due Process Clause of the Fourteenth Amendment extend to certain personal choices, and among those is the right to marry.
- 2) Because marriage is inherent in the concept of individual autonomy, supports a two-person union unlike any other in its importance to the individuals involved, safeguards children and families, and is the "keystone of the Nation's social order," marriage is a constitutional right.
- 3) The right of same-sex couples to marry also is derived from the Fourteenth Amendment's guarantee of equal protection.
- 4) Because the right to marry is a fundamental right "inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment," couples of the same sex may not be deprived of that right and that liberty.

#### The Religious Organization "Carve Out"

The Court then added a "carve out" for "religions and those who adhere to religious doctrines" by stating:

*Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.*

Chief Justice Roberts and Justice Thomas noted in their dissents that the First Amendment guarantees the right to “exercise” religion. Chief Justice Roberts further noted that “exercise” is a word that the majority omitted from their opinion. So while this provision acknowledges the First Amendment rights of religious organizations to teach principles that are central to their lives and faiths, the dissenting justices expressed concern that it may not be broad enough to encompass the full exercise of those rights.

Chief Justice Roberts also noted that, “Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage.” He then offered the following examples:

- 1) A religious college that provides married student housing only to opposite-sex couples.
- 2) A religious adoption agency that declines to place children with same-sex married couples.
- 3) The tax-exempt status of some religious institutions that oppose same-sex marriage.

Chief Justice Roberts went on to state that there is “little doubt that these and similar questions will soon be before this Court.” It seems likely that future cases will ultimately determine the full scope and effect of this decision for churches and other religious organizations.

## **So What Does This Mean for Churches?**

This ruling does not appear to take away any of the rights that religious organizations currently have under the law. Still, the ruling leaves unanswered questions that may lead to confusion and concern for ministries. Common concerns include whether a pastor must perform a same-sex wedding ceremony, whether a church must make its facilities available for same-sex wedding events, and if a church must provide same-sex spousal benefits to employees.

## **Communicate Expectations to Limit Lawsuits**

All ministries should have biblically based beliefs and policies documented in the bylaws, articles, and other foundational documents of the organization. Stating the ministry’s beliefs, along with applicable reference to scripture in governing documents, can help avoid claims of improper discrimination. Churches and ministries will do well to clearly communicate that the ministry’s positions and policies are based on sincerely held religious beliefs.

**Statement of belief:** Include a statement of the ministry’s spiritual beliefs within the organization’s governing documents or bylaws. This lays the foundation for the ministry to operate in accordance with its stated beliefs.

**Consistent response:** If the church or ministry treats an individual or a group of people differently than it does another person or group, the odds of the ministry losing a lawsuit increase significantly. For example, if the organization offers its event center for rent to the general public yet declines to allow a same-sex couple to rent the facility, the individual whom the church declined may have a valid claim of discrimination.

## **Take Steps to Avoid a Lawsuit**

To reduce the likelihood of an individual bringing a successful same-sex-related lawsuit against your church or ministry, consider the following steps:

- 1) Include a spiritual purpose provision in your governing documents/bylaws. Be sure your organizational governing documents clearly state your ministry’s spiritual purpose, your reliance on scripture, and the intent to advance the ministry in accordance with scripture. Where appropriate, quote scripture within the purpose statement.
- 2) Include a morals clause in your employee handbook. Be sure your employee handbook includes a policy telling your organization’s employees that the church expects them to support its spiritual purpose and behave in accordance with it. Including such a clause in your handbook, when applied consistently, can go a long way toward protecting the church from employment-related lawsuits.

3) Respond with sensitivity. Train your clergy, staff, and volunteers to approach individual needs and requests with empathy. Although you cannot meet every request or demand, the manner in which you convey your response is sometimes as important as what you have decided.

4) Consult with local counsel. When revising organizational documents and ministry policies and procedures, involve a local attorney. A wide variety of federal, state, and local laws apply to employment and facilities use, and consulting with a local attorney can provide guidance on any state-specific and local legal issues that you may encounter. You also should contact your attorney and your insurance agent any time you anticipate a claim against the church.

All ministries, whether supportive of same-sex unions or not, should recognize and understand the potential impact of this ruling. Following the steps listed above can help ministries continue to operate in accordance with their sincerely held religious beliefs and avoid claims of improper discrimination. Contact a local attorney for assistance with creating policies and procedures and for help in understanding how the law applies to your ministry.

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