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## Frequently Asked Questions For Congregations and Clergy About the Supreme Court's Same-Sex Marriage Decision

This *Frequently Asked Questions* memorandum addresses several frequently asked questions regarding the recent U.S. Supreme Court decision about same-sex marriage, *Obergefell v. Hodges*, and its impact on religious liberty. The purpose of this FAQ is to explain the primary implications of the case as well as to encourage your congregation to put itself in the best position to withstand challenges to your free exercise of religion.

### ***What did the U.S. Supreme Court decide in Obergefell?***

The U.S. Supreme Court held that the Fourteenth Amendment requires the state government in every state to license same-sex marriages and to recognize a same-sex marriage that was lawfully performed in another state. The Court relied primarily on the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and found marriage (including same-sex marriage) to be a fundamental right. (The Court also indicated that the Equal Protection Clause of the Fourteenth Amendment “informed” its decision.)

### ***What does the Obergefell opinion change?***

The opinion requires state governments that did not previously recognize same-sex marriages to do so. Its practical effect is that same-sex married couples are afforded the same opportunities and benefits of a state-issued marriage license as heterosexual married couples.

### ***Does the Obergefell opinion require pastors to marry same-sex couples or churches to hold same-sex weddings?***

No. The opinion does not address who must perform the marriages of same-sex couples. It says that the **state governments** in all fifty states and the District of Columbia must issue marriage licenses to same-sex couples and extend identical benefits as provided to heterosexual couples. While the Supreme Court has now ruled that this is required by the U.S. Constitution, it is not a massive shift in the applicable law in the majority of the country. Same-sex marriage had previously been legalized in thirty-seven states in the United States (with the majority resulting from decisions by lower federal courts).

Pastors continue to enjoy the constitutional right to the free exercise of religion under the First Amendment and under similar provisions of state constitutions and the statutory right to free exercise of religion as also protected under federal and state laws, such as Religious Freedom Restoration Acts (“RFRA’s”). This right has not been abrogated. Under the current legal landscape, the government may not require pastors (unlike state employees) to marry same-sex couples. It is possible that in the future some states may determine that they will not authorize pastors to sign marriage licenses if they refuse to officiate same-sex marriages. However, states are not able to force a pastor to marry same-sex couples.

We expect there will be a number of lawsuits in the future where individuals sue religious organizations or churches under current and new anti-discrimination laws. The *Obergefell* case does not provide a clear framework for how lower courts should handle the conflict between religious exercise and anti-discrimination laws. Therefore, churches and religious organizations need to ensure that their religious identities are clear and their religious free exercise rights are strongly grounded (both legally and factually) so that they can best assert their constitutional religious freedom rights.

***Will my church's tax exempt status be revoked?***

At this time there is no indication that your church's tax-exempt status will be affected by its commitment to a Biblical definition of marriage. The Attorney General of Oklahoma sent a letter on July 13, 2015 to the Commissioner of the Internal Revenue Service asking whether the *Obergefell* decision will impact the administration of tax laws regarding tax-exempt organizations. IRS Commissioner John Koskinen replied: "The IRS does not view *Obergefell* as having changed the law applicable to section 501(c)(3) determinations or examinations. Therefore, the IRS will not, because of this decision, change existing standards in reviewing applications for recognition of exemption under section 501(c)(3) or in examining the qualification of section 501(c)(3) organizations."

This does not mean that there will not be challenges to tax-exemption for churches or religious organizations as a result of the same-sex marriage issue in the future. These challenges could possibly arise first at the state and local level (for instance, revised standards for property tax exemption). At this time, however, we are not aware of a significant short-term threat to the federal tax exempt status of churches.

***What can I do to protect my church?***

The local church is encouraged to continue to love and serve all people. As it does so, it must also ensure that its religious identity is clear in its organizational documents and policies. Churches have a strong institutional religious identity. However, it is important for each church to do all that it reasonably can to bolster its religious identity. The following are a few areas that frequently impact churches and where religious identity should be carefully reviewed:

Facilities Use Policy. Churches are usually inclined to share their facilities with those in their communities. However, providing unlimited or ad hoc availability of facilities could convert those facilities into a "public accommodation" subject to anti-discrimination requirements, curtailing the church's right to deny use for purposes or practices that are not consistent with its beliefs.

Churches should implement a prudent Facilities Use Policy that clearly articulates the religious nature of your facility and imposes religious requirements for the use of your church building. It should also establish an approval process for any outside use of your building or property. Adoption and consistent application of this type of policy will strengthen your church's ability to control the use of its facility for purposes consistent with its mission.

Marriage and Wedding Policy. Churches open their sanctuaries and buildings frequently to celebrate marriages. It is important for your church to clearly reference a Biblical definition of marriage in this policy and to adopt guidelines for weddings that will be celebrated by its pastor

and/or using church facilities. This may include an application process, qualifications for the couple (such as premarital counseling, affirmation of Biblical Christian faith, and others), procedural requirements for the marriage (such as meetings with the pastor in advance, a rehearsal, etc.), cost of using the facility, rules for set-up and clean-up for receptions, and more. It is important that this policy not focus solely on the same-sex marriage issue. The church's position will be more faithful spiritually and stronger legally if the policy reflects a consistent Biblical approach to all issues of sexual morality that may be implicated in weddings conducted by the pastor and/or at the church. Use this as an opportunity to develop a robust policy that will facilitate the procedures for the weddings and marriages that take place at your church.

Anti-Harassment Policy. All employers should adopt an anti-harassment policy, as the U.S. Supreme Court ruled back in the 1990s that the absence of a sexual harassment policy means that an employer faces strict liability for any workplace harassment that may occur. However, a religious employer must thoughtfully articulate the basis for full respect of all *religious* rights, including those of the organization and of all employees and volunteers. A good anti-harassment policy will recognize the bases for treating religion differently and will explain that polite evangelism and other forms of religious speech constitute free exercise of religion (and free speech) and do not create a hostile working environment.

Articulate the Religious Character and Requirements of Each Employee's Position. Written job descriptions should identify the religious requirements and qualifications needed to carry out a particular position. Once you adopt these requirements for a position, enforce them with consistency.

Articulate the Religious Character of Ministries and Ministry Activities. Many churches operate charitable activities, such as soup kitchens, rescue missions, children's homes, and other ministries that offer services to communities. It is important that the church clearly connect these significant charitable services and ministries to their religious purposes.

Beware of Government Grants. If your church is interested in receiving government grants or contracts for charitable activities that it operates, it is important to consult experienced legal counsel prior to accepting a grant. The relevant contracts, addenda, statutes, and regulations under which the funds are being provided must be researched in detail to determine any burden on religious exercise.

Apply All Policies Consistently. The policies and procedures you adopt will not be meaningful or enforceable if they are not applied consistently. Please be sure to educate your employees on the importance of these policies.

Be Winsome and Wise. How we communicate can often affect the reaction to the Biblical truth we seek to faithfully promote. Be winsome in how you speak about the same-sex marriage issue and encourage your congregations to love as Jesus commanded. At the same time, be wise in adopting policies that will protect your local church from attacks that may arise due to your Biblical position.

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