SPEAKING OF RELIGIOUS FREEDOM

The Current Legal Landscape Regarding Same-sex Marriage, Religious Liberty Protections, and Nondiscrimination Laws

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It's an obvious understatement to say that this year has seen numerous changes in the legal environment surrounding religious liberty, same-sex marriage, and nondiscrimination laws. The *Obergefell* decision, in which the Supreme Court re-defined marriage for the entire country, received the most attention, but it is only one piece of the legal puzzle that faces religious institutions and religious citizens who sincerely believe that marriage is only between one man and one woman. The purpose of this article is simply to give a broad overview of some of the puzzle pieces that need to be considered in protecting religious liberty for individuals, churches, schools, and other religious institutions.

This article provides only the most cursory survey of the current legal landscape, but I would suggest that readers take the time to read two things. First, set aside an hour to read the *Obergefell* opinions, including Justice Kennedy's majority opinion and the four dissenting opinions. All of the opinions are concise, well-written, and highly readable. Clearly, the justices wrote their opinions for the American public, not the academy. The contrast between Justice Kennedy's legal analysis and Chief Justice Roberts' rigorous analysis in dissent should be required reading for everyone. (Chief Justice Roberts read his dissent from the bench for the first time in his decade sitting on the Court.) Justice Thomas' insistence that humans derive their dignity from God, rather than from government, exposes Justice Kennedy's fundamental analytical error.

Second, on the heels of *Obergefell,* Professor Carl Esbeck has written two articles that lawyers interested in these issues should read. The first is a thorough examination of the meaning of "religion" in Title VII and whether it encompasses religious standards of conduct and not just "belief."[1] This will be a critical question in coming months as courts are urged to expand Title VII's protection against "sex" discrimination to include "sexual orientation" and "gender identity." Professor Esbeck's second article suggests one way forward in this new era: a compromise that agrees to add "sexual orientation" and "gender identity" to nondiscrimination laws in return for robust religious liberty protections in those laws.[2] Regardless of whether one agrees, this article is a thoughtful discussion of the current legal landscape.

Two Supreme Court decisions regarding same-sex marriage: Twice in the past two years, the United States Supreme Court has addressed whether American governments must recognize marriage between persons of the same sex. In 2013, in *United States v. Windsor,*[3] the Supreme Court narrowly ruled (5-4) that it was unconstitutional for the *federal* government to define marriage as only existing between a man and a woman.

Writing for the majority in *Windsor,* Justice Kennedy emphasized that marriage had always been a matter of definition by the States rather than the federal government, and therefore, since New York had legislatively approved of same sex marriage, the federal government's law treated unfairly different sets of married couples in New York. Justice Kennedy asserted that Congress's only reason for the law had been to demean persons who engaged in same-sex conduct. Essentially, in Justice Kennedy's view, the traditional definition of marriage was based on animus, or hostility toward homosexual persons. In the wake of the *Windsor* decision, many lower federal courts applied *Windsor*'s "animus" rationale to strike down about half of the States' laws that defined marriage as between only a man and a woman.

On June 26, 2015, in *Obergefell v. Hodges,*[4] the Supreme Court narrowly ruled (5-4) that it was unconstitutional for any state government to define marriage as only existing between a man and a woman. Writing for the majority, Justice Kennedy relied on two provisions of the Constitution, the Fourteenth Amendment's Due Process Clause and its Equal Protection Clause, to

[1] Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 Ox. J. Law Religion 368 (2015).
[2] Carl H. Esbeck, *A Post-Obergefell America: Is a Season of Legal and Civic Strife Inevitable?*, (University of Missouri School of Law Legal Studies Research Paper No. 2015-24).
[3] 133 S. Ct. 2675 (2013).

rule that States cannot have laws that define marriage as only between a man and a woman. Justice Kennedy specifically claimed that the right to marry is a fundamental right that cannot be denied to same-sex couples.

Emphasizing the historical understanding of marriage, the four dissenting justices wrote powerful opinions. Their many potent arguments centered on the fact that the federal Constitution left the definition of marriage to the States and to the People, and should not be dictated by five unelected judges. The dissenters urged that the democratic process be permitted to work, as it had been doing for the past twenty years in the state legislatures, state courts, and public debate.

In addition, three dissenting justices expressed concern for the religious freedom of persons holding the traditional definition of marriage. In the majority opinion, Justice Kennedy acknowledged that "[t]he 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."[5] But none of the dissenting justices thought the majority had gone far enough to assuage religious believers' legitimate concerns about practicing their faith under a constitutional regime requiring all States to recognize same-sex marriage.

The dissenters' religious liberty concerns were fueled by answers given to their questions at the *Obergefell* oral argument by the United States' top attorney, Solicitor General Verrilli. In response to Justice Alito's question, General Verrilli had agreed that religious colleges' tax-exempt status would likely become an issue for colleges that prohibited same-sex conduct by their students.[6] In response to Chief Justice Roberts' question, General Verrilli avoided answering whether religious colleges would be allowed to prohibit same-sex couples in their married housing facilities. As Justice Thomas observed in his dissent, it is "all but inevitable" that the new definition of marriage and the religious definition of marriage "will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."[7]

RFRA LEGISLATION TO PROTECT RELIGIOUS LIBERTY

As a result of the Court's decision, federal and state laws that protect religious liberty are crucial. Because twenty-five years ago, in *Employment Division v. Smith*,[8] the Supreme Court greatly diminished the First Amendment's protections for religious liberty, the primary protection for religious liberty at the federal level is the Religious Freedom Restoration Act ("RFRA").[9] Enacted in 1993 by nearly unanimous bipartisan votes in Congress, RFRA recently has been attacked by organizations that support same-sex marriage. Keeping RFRA strong is crucial to preserving religious liberty in this country.

Similarly, where they exist, state RFRAs may provide critical protection for religious liberty at the state and local levels. To date, 21 States have enacted their own RFRAs, but each State should have its own RFRA. The campaign of massive misinformation against Indiana's RFRA was a significant setback, but state RFRAs are vital and should be enacted. The key is to enact state RFRAs that are identical to the federal RFRA and do not try to add new terms or definitions to the federal RFRA. For example, the exemption for discrimination laws that was added to the Indiana RFRA in an attempt to resolve the fight does not provide adequate protection for religious individuals and many religious institutions, so it is important that it not be extended to other RFRAs.

Another important protection is for state nondiscrimination laws to include explicit and expansive protections for religious liberty. While nondiscrimination laws traditionally contain some protection for religious liberty, organizations that support amending nondiscrimination laws to include sexual orientation and gender identity increasingly seem hostile to including any protection for religious liberty.

The federal RFRA and state RFRAs, as well as other laws aimed at protecting religious liberty, have never been more necessary, or more under attack. As Christian institutions and individuals brace for further attacks on their religious liberties, RFRA and similar state laws offer essential protections.

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[4] 135 S. Ct. 2584 (2015).

[5] *Id.* at 2607.

[6] Transcript of Oral Argument in *Obergefell v. Hodges*, No. 14-556, U.S. Supreme Court (April 28, 2015), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_3j4a.pdf at 36 (last visited May 24, 2015).

[7] 135 S. Ct. at 2638 (Thomas, J., dissenting).

[8] 494 U.S. 872 (1990).

[9] 42 U.S.C. §2000bb-1.

INCREASING SOGI PROTECTION IN PUBLIC ACCOMMODATIONS, HOUSING, AND EMPLOYMENT

While sexual orientation and gender identity ("SOGI") are not protected classes under most federal laws,[10] 22 states and many local jurisdictions have passed laws making sexual orientation and/or gender identity protected classifications. Generally speaking, such laws make discrimination on the basis of sexual orientation or gender identity illegal with respect to: 1) public accommodations;[11] 2) housing; and 3) employment. Sometimes these laws include narrow exceptions for religious institutions or individuals, but the protections are highly dependent on the specific language of the different laws.

Whether such laws exist in a state or local jurisdiction is very important in determining what religious institutions or individuals are legally required to do. Note that a religious institution or individual may be in a state that does not have a SOGI law but may still be in a city or county that does have a SOGI law. Regardless of whether an institution or individual is in a state or local jurisdiction with a SOGI law, it is wise for every church, school, or other religious nonprofit to be prepared. I outline some specific steps in my article in *The Christian Lawyer* mailed with this edition of the *Journal*.

Employment: Religious organizations have at least two basic federal protections for their employment decisions. First, the federal law known as Title VII allows religious schools to require all employees to conform to their religious doctrine,[12] which includes conduct based on Biblical beliefs. In other words, religious schools may act on the basis of religion in their employment practices as to all employees. Notably, however, this federal protection applies only to federal discrimination claims; it does not protect against claims brought under state or local discrimination laws, for which similar protections may or may not exist.

Second, with respect to other potential discrimination claims, such as sex, disability, or age, religious schools may make whatever employment decisions they want as to employees who are "ministers" in the school. The U.S. Supreme Court affirmed religious schools' religious freedom protections under the "ministerial exception," in *Hosanna-Tabor Evangelical Lutheran School & School v. EEOC*.[13] In that 2012 decision, the Court ruled that the First Amendment barred a claim by a teacher at a church school, thereby recognizing that churches and religious schools must be left alone with respect to employment matters of their ministers. Consequently, defining staff members (such as the teachers who regularly give devotions in class, teach Bible and participate in chapel as in *Hosanna-Tabor*) as "ministers" may significantly increase protection against legal liability if a religious organization's beliefs or conduct policies are challenged.

Housing: Although Congress has passed no law prohibiting sexual orientation or gender identity discrimination in housing, the Department of Housing and Urban Development in 2012 issued a final regulation that HUD's Office of Fair Housing and Equal Opportunity would ensure that HUD's core programs (e.g., federally assisted housing) would be "open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status."[14] In addition to this federal action, 21 states and the District of Columbia have laws prohibiting discrimination in housing on the basis of sexual orientation, and 16 states and the District have laws prohibiting discrimination on the basis of sexual "identity" and/or "expression."[15]

Two students filed complaints against Christian colleges, alleging that these schools violated state and federal law in not allowing them to live in dormitories of their choice.[16] These schools both requested and received a letter from the U.S. Department of Education exempting them on religious grounds from Title IX's sex discrimination provisions, but this exemption does not relieve the colleges from compliance with state and local laws. Moreover, because of the language in Title IX, it

[10] Notably, the federal Equal Employment Opportunity Commission ruled on July 15, 2015 that a complaint based on sexual orientation falls within Title VII's protection against sex discrimination. *See* EEOC Agency NO. 2012-24738-FAA-03; Appeal No. 0120133080. This decision, however, is completely contrary to numerous federal courts that have uniformly ruled against such an unwarranted extension of Title VII's legal protections.

[11] 45 states have a public accommodation statute. All prohibit discrimination on the grounds of race, gender, ancestry and religion. In addition, 18 jurisdictions prohibit discrimination based on marital status, 22 prohibit discrimination based on sexual orientation and 18 prohibit discrimination based on gender identity.

[12] 42 U.S.C. §§2000e-1(a), 2000e-2(e)(2).

[13] 132 S. Ct. 694 (2012).

[14] 77 Fed. Reg. 5662 (Feb. 3, 2012).

[15] See http://portal.hud.gov/hudportal/HUD?src=/program_offices/ fair_housing_equal_opp/LGBT_Housing_Discrimination.

[16] See http://www.nytimes.com/2014/07/25/us/transgender-student-fights-for-housing-rights-at-george-fox-university.html.

is uncertain whether independent institutions that are not "controlled by" a specific religious denomination or other religious order are eligible for this exemption.

This overview cannot cover all the developments in this area, but CLS presented three webinars and prepared three documents suggesting practical steps that religious ministries, including churches and schools, should be taking to decrease their legal exposure on some of these issues. Please review those resources at **religiouslibertyguidance.org**.

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