

What does the Supreme Court's decision mean for Texas Southern Baptist churches? *by SBTC Legal Counsel Jim Guenther*

The United States Supreme Court has declared that state prohibitions against same-sex marriages are unconstitutional. This means the State of Texas will be required to issue marriage licenses to same-sex couples.

The decision was an interpretation of the United States Constitution's provisions regarding a state's duty to ensure all citizens equal protection under the laws. The fourteenth amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Supreme Court said the question before it was: "Does the fourteenth amendment require a State to license a marriage between two people of the same sex?" The Court has answered, "Yes, it does."

So, this decision directly affects the State of Texas and state officials. It does not directly affect churches and ministers. The fourteenth amendment imposes obligations on government and gives citizens rights over and against government. It does not impose any duty on churches or their ministers. It does not give any person any rights over and against a church or its minister.

Therefore, while the Court's decision is a major pronouncement of newly declared legal duties owed by the states, and of newly declared rights enjoyed by citizens in their dealings with the states, the decision does not directly speak to churches or their ministers.

However, the decision dramatically signals that the culture and the law are changing. While churches are not of this world, they minister in this world. This decision both reflects and contributes to these changes. It will have an indirect but significant effect on churches. There will be a ripple effect, at least, that will reach many corners of the law.

As a result of this decision, same-sex couples can now get a license to marry from the State of Texas. Their next step will be to find an authorized person to conduct a marriage ceremony. Baptist ministers are among those the State recognizes as being competent to perform the ceremony. This means a Baptist minister has the right and power to perform a marriage ceremony recognized by the State of Texas.

Will a Baptist minister be required to conduct a marriage ceremony for a same-sex couple? Will a church be required to allow its facilities to be used for a same-sex marriage?

No and no. A Baptist minister and a Baptist church also enjoy constitutional rights. Among those rights is the right to freely practice their religion. If a minister's religious beliefs prevent his participating in a marriage ceremony, for whatever reason, he is free not to participate. Just because he may legally perform a marriage ceremony recognized by the state, that does not mean he must perform a marriage ceremony for all comers. A Baptist church likewise is free to deny the use of its facilities to anyone for whatever religiously motivated reason the church might have. These are rights guaranteed by the first amendment.

To celebrate and spotlight these rights, the Texas legislature had enacted a law which reads as follows:

FREEDOM OF RELIGION WITH RESPECT TO RECOGNIZING OR PERFORMING CERTAIN MARRIAGES

RIGHTS OF CERTAIN RELIGIOUS ORGANIZATIONS. A religious organization, an organization supervised or controlled by or in connection with a religious organization, an individual employed by a religious organization while acting in the scope of that employment, or a clergy or minister may not be required to solemnize any marriage, provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage, or treat any marriage as valid for any purpose if the action would cause the organization or individual to violate a sincerely held religious belief.

DISCRIMINATION AGAINST RELIGIOUS ORGANIZATION PROHIBITED. A refusal to provide services, accommodations, facilities, goods, or privileges under (the above) . . . is not the basis for a civil or criminal cause of action or any other action by this state or a political subdivision of this state to penalize or withhold benefits or privileges, including tax exemptions or governmental contracts, grants, or licenses, from any protected organization or individual.

Is a church required to admit into membership a practicing homosexual or one who is in a same-sex marriage?

No. The first amendment clearly gives the church the right to choose its members on any basis the church deems appropriate. This is a fundamental right of association and free exercise of religion.

Any suit brought against a church by one rejected for membership, or expelled from membership, because of one's status in a same-sex marriage or homosexual lifestyle, would be dismissed because the courts must defer to churches on these issues. It would violate both the free exercise and the establishment clauses of the first amendment for a court to undertake to settle such disputes.

Should a church amend its governing documents to specify its religious beliefs regarding marriage and homosexuality?

In order for the church's position on key issues of faith and practice to be understood and available to be widely known, a church may wish to declare its doctrine in its governing documents. This might be done by including a statement in the church's bylaws that the church has adopted the 2000 *Baptist Faith and Message*. The *Baptist Faith and Message's* article on the family defines marriage as the uniting of one man and one woman and declares that relationship to be the channel of sexual expression according to biblical standards.

If a church wants to speak to this issue in its governing documents it might amend its bylaws to include something like:

The Church, in its autonomy, shall determine criteria for church membership and the process for admission and expulsion of members. Church membership shall not be available to those whose lifestyle is in conflict with the Church's statement of faith, the *Baptist Faith and Message 2000*; this shall include membership ineligibility for one in a same-sex marriage, and those living in a homosexual or transgendered lifestyle. Further the Church and its ministers shall only recognize, participate in, conduct, or allow Church facilities to be utilized for, marriage ceremonies and other functions which are related to marriages deemed to be scriptural. This shall prohibit the use of Church facilities for same-sex marriage ceremonies and related functions, and shall bar the Church's ministers from conducting or otherwise participating in same sex marriage ceremonies and related functions.

If a church has a personnel manual, membership policy, or a facilities utilization policy, it might want to speak to these issues in those documents as well. There is no "magic" wording required. The church would merely declare its policies concisely and clearly.

For example, a facilities utilization policy might speak to the use of the church's facilities being exclusively for the furtherance of the church's religious purposes and consistent with the church's religious beliefs. Or, if the church wants to speak directly to the use of its facilities in connection with a same-sex marriage it could do so in the policy statement.

But it is important to understand that a church whose governing instruments and policy statements are silent on these issues has not, by its silence, lost its first amendment rights. The strength of the first amendment's right to freely exercise religion and to be free from state entanglement is at its greatest when it comes to the church's faith and practice, its choice of its ministers and its members, in what may be preached from the pulpit, and in its religious activities. Government cannot declare a church's beliefs and polity to be different from those the church declares them to be, absent fraud.

Will a church be required to employ a person in a same-sex marriage?

A church may discriminate in any manner it chooses when it comes to the employment of ministers. Employment nondiscrimination laws do not apply to the relationship between a minister and the church. And, those who are "ministers" are not limited to those employees who are ordained. Any employee whose work involves the propagation of the gospel, who is held out by the church and who holds himself out as one whose role is distinct from that of some other employees, who has special training, and whose employment duties involve minister-like functions, may well be a "minister" under the ministerial exception rule in constitutional law.

And, churches may discriminate on the basis of religion in their employment of persons in all positions. While federal and state law generally prohibits employers from discriminating on the

basis of religion, churches are exempt from those provisions in the law. This permissible religious discrimination by the church may relate to one's beliefs, that is, whether one's beliefs meet the church's standards for employment, and it may relate to one's conduct, that is, whether one conducts himself in a manner consistent with the church's religious expectations of its employees.

Under federal and state law, any church which has at least fifteen employees must not discriminate in employment of its non-ministerial employees, those who do not fall into the "minister" category, on the basis of race, color, national origin, age, disability, genetic information, or *sex*.

Sexual orientation discrimination is not prohibited under federal or state laws. Some Texas cities are among the more than two hundred cities in the nation which do explicitly prohibit sexual orientation discrimination in employment. But, none of these Texas ordinances apply to religious organizations.

"Sex" in nondiscrimination laws was originally understood to mean an employer could not treat persons differently according to whether they were male or female. However, "sex" nondiscrimination has morphed toward including the prohibition of discrimination on the basis of characteristics associated with one's sex. For example, it is illegal to discriminate against a man because he is effeminate or otherwise acts in a manner inconsistent with the stereotypical characteristics of maleness, and it is illegal to discriminate against one because he or she is transgendered. And, the Equal Employment Opportunity Commission, the federal agency which enforces federal employment nondiscrimination laws, has held that it is illegal sex discrimination for an employer to discriminate against a person because that person is in a same-sex marriage or because that person announces his or her intention to marry one of the same sex. (There will be litigation on this issue.)

Because of these developments, if a church has a sex discrimination charge made against it by an employee or prospective employee who has suffered some religiously motivated adverse employment action by the church, the first question will be whether the nondiscrimination law applies to the relationship between the church and that employee. In other words, was the employee a "minister?" If so, the charge should be dismissed. If the employment relationship was not that of the church with its ministers, the question will be whether the church's discrimination will be seen as permissible religious discrimination or whether it will be seen as impermissible sex discrimination. So, churches who employ at least fifteen persons need to take care and seek legal counsel when dealing with non-ministerial employees and prospective employees in circumstances which may be alleged to be sex discrimination.

May a church support or oppose a candidate for public office as part of its opposition to same-sex marriage?

No, not if the church wants to retain its 501(c)(3) tax exempt status. A condition of the exemption is that the church will not participate or intervene in political campaigns on behalf of or in opposition to any candidate for public office. This is an absolute prohibition. For some, that

sounds like an infringement of the church's first amendment right. But the courts say it is not; a church may not at the same time enjoy the benefits of federal tax exemption and participate in elections. The church may speak to biblically based positions on issues such as abortion, same-sex marriage, and homosexuality, without reference to any political candidate. The church must not link a candidate to the church's position on these issues.