



# THE CUMBERLAND PRESBYTERIAN CHURCH

## OFFICE OF THE GENERAL ASSEMBLY



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### **The Supreme Court's Decision on Same-Sex Marriage: How are Cumberland Presbyterian Churches Affected?**

The United States Supreme Court decision in *Obergefell vs. Hodges* made same-sex marriage the law of the land. How does that decision affect Cumberland Presbyterian churches and ministers? Below are answers to many of the questions that Cumberland Presbyterians are asking in the wake of *Obergefell*.

#### **Q. Everyone is saying that the Supreme Court legalized same-sex marriage. What exactly did the Court do?**

The Supreme Court described the right to marry as “a fundamental right inherent in the liberty of the person.” While acknowledging that many people deem same-sex marriage to be wrong based on “decent and honorable religious or philosophical premises,” the Court said that laws based on those religious and philosophical principles result in the government treating its citizens differently, granting some couples the fundamental right to marry while denying that same right to other couples. Denying same-sex couples such a fundamental right “would disparage their choices and diminish their personhood.” The Court declared that two provisions of the United States Constitution (commonly called the Due Process Clause and the Equal Protection Clause) require all States to grant same-sex couples the same fundamental right to marry enjoyed by opposite-sex couples. The Court’s ruling had the effect of invalidating all state laws and state constitutional provisions defining marriage as being only between one man and one woman.

#### **Q. How will the Court’s ruling affect churches?**

The Court’s decision affects only state governments and government officials. Neither the Court’s opinion nor the U.S. Constitution imposes 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.

The decision does dramatically signal that the culture and the law are changing. The Court’s ruling both reflects and contributes to these changes. While churches are not of this world, they minister in this world. *Obergefell* 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.

#### **Q. Do Cumberland Presbyterian churches need to amend their bylaws or other governing documents to specify their religious beliefs regarding marriage and homosexuality?**

No. *The Confession of Faith* is the means by which those in the Cumberland Presbyterian covenant community “understand and affirm their faith.” (*Introduction to the 1984 Confession of Faith*) As members of a connectional church, Cumberland Presbyterians are guided by the *Confession of Faith* as written, amended, and interpreted by the General Assembly and the other judicatories which make up the Church.

**Q. The *Confession of Faith* says that marriage is “between a man and a woman.” (*Confession of Faith, sec. 6.17, 6.19*) Did the Supreme Court’s ruling change that?**

All churches and religious bodies are free to define their sacraments, including marriage, however they see fit. The first amendment to the United States Constitution prevents government from dictating what a church or denomination must believe about marriage or say in its confessional statements.

**Q. But will Cumberland Presbyterian ministers who perform marriages have to marry same-sex couples?**

No. Ministers have always been free to decide whether they will or will not agree to perform a marriage for any couple (*Directory for Worship, sec. III B*). No court can legally force a minister to perform any marriage in his or her capacity as a minister. (However, if the minister also happens to be the county clerk or justice of the peace, the minister may have to perform same-sex marriages in the course of carrying out civil job duties.)

**Q. Will a church be required to allow same-sex couples to be married in the church’s sanctuary?**

No. Ministers and churches also enjoy constitutional rights. Among those rights is the right to freely practice their religion. A church is free to deny the use of its facilities to anyone for whatever religiously motivated reason the church might have.

In some jurisdictions, individuals and businesses which make their facilities available for use by the general public are prohibited by law from discriminating against same-sex couples. These laws (called “public accommodation statutes”) usually have exemptions for churches, or at least church sanctuaries. Any church which rents its facilities to the general public or makes its facilities freely available to the public should contact an attorney to determine whether there are public accommodation laws which apply in its jurisdiction and, if so, how those laws affect churches.

In states and municipalities which have public accommodation statutes, a church may want to have a facilities use policy that requires the church’s facilities to be used exclusively for the furtherance of the church’s religious purposes and consistent with the church’s religious beliefs. 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 first amendment right to freely exercise religion and to be free from state entanglement is strongest 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. The church alone - and not government - enjoys the right to declare what are the church’s sincerely held beliefs.

**Q. I’ve heard that churches which discriminate against same-sex couples may lose their tax-exempt status. Is that true?**

It is extremely unlikely that a church would lose its tax-exempt status on the basis of a religious belief about same-sex marriage. There is one case decided in 1983 in which the Supreme Court allowed the Internal Revenue Service to withdraw tax-exempt status from a university because the university engaged in racial discrimination in the exercise of its religious beliefs. That case did not apply to churches. In the thirty-two years since the case was decided, it has never been applied outside the context of race discrimination in education.

**Q. Will a church be required to employ a person who is 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. “Ministers” are not limited to those employees who are ordained. Any employee whose work involves the propagation of the gospel and the teaching of the church may be treated as a “minister” by the courts.

Churches may discriminate on the basis of religion in their employment of persons in all positions. While federal and state laws prohibit most employers from discriminating on the basis of religion, churches are exempt from those provisions. This allows churches to make employment decisions on the basis of an employee’s beliefs, that is, whether one’s beliefs meet the church’s standards for employment, as well as the employee’s conduct, that is, whether an employee conducts himself or herself in a manner consistent with the church’s religious expectations.

Under federal law, any church which has at least fifteen employees must not discriminate in the employment of employees (other than “ministers”) on the basis of race, color, national origin, age, disability, genetic information, or sex. State nondiscrimination laws may apply to churches which employ less than fifteen people.

Sexual orientation discrimination is not expressly prohibited under federal law, but may be prohibited under local law. Churches which employ persons who are not “ministers” should ask an attorney whether there are local laws which address sexual orientation discrimination and, if so, what exemptions are available to churches.

Laws prohibiting discrimination on the basis of “sex” were originally understood to mean an employer could not treat persons differently according to whether they were male or female. However, the courts’ understanding of sex discrimination has expanded over the years. Shortly after the *Obergefell* decision, the U.S. Equal Employment Opportunity Commission held that discrimination on the basis of sexual preference is “sex” discrimination and is prohibited by federal laws which forbid sex discrimination in employment. Whether the courts will accept this broadening of the definition of sex discrimination remains to be seen.

**Q. I’ve heard that churches which are sued for declining to open their facilities to same-sex couples may not be able to get insurance coverage. Is that true?**

We all know that anyone can file a suit, even one which has no sound legal basis. Going to court can be expensive even if the church wins. Every church will need to check its insurance policies to find out what is and is not covered. If a suit is brought demanding a right to use a church's facilities, the insurance policy may not apply if there is no "claim" as defined in the policy (usually some type of bodily injury or property damage). Churches may experience many different types of claims for which their policies do not provide coverage. I believe this kind of suit will be rare because of the constitutional protections against forcing a church to open its facilities for a use which is contrary to the church's religious beliefs.

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**The above article is being provided in consultation with James D. (“Jaime”) Jordan**, who serves as general counsel to the Cumberland Presbyterian Church. Jaime is an ordained elder at Mt. Sharon Cumberland Presbyterian Church near Springfield, Tennessee, and a partner in the law firm of Guenther, Jordan & Price, PC, of Nashville. This information in this article relating to employment and nondiscrimination issues is intended for general use and not as legal advice. Churches which have questions regarding their legal duties in employment should consult legal counsel who is knowledgeable about the laws in the church’s jurisdiction.