ISSUE BRIEF

Can Pastors and Churches Be Forced to Perform Same-Sex Marriages?

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The short answer: almost certainly not, at least for now. While churches are slightly more vulnerable than pastors in some areas, both have significant protection under the First Amendment and other provisions of law from being forced to perform same-sex marriages. Even following the Supreme Court's decision in *Obergefell v. Hodges*,[1] in which the Court held that states must issue licenses for same-sex marriages and recognize such licenses issued by other states, there is no significant risk that pastors and churches can be compelled by a court to solemnize, host, or perform a same-sex marriage ceremony. *Obergefell* is only binding on states, and did not decide any religious liberty question—for pastors or anyone else. While religious liberty challenges are expected to occur going forward, they will likely be aimed at other religious entities and individuals first, as legal protections for pastors and churches are currently quite strong. Below are cases and other provisions of law describing generally the protections available to pastors and churches.

Federal Protections

Constitutional Protections

First Amendment—Free Exercise and Establishment Clauses (Ministerial Exception)

The Supreme Court has held that the ability of churches and religious organizations to hire and fire ministers as they wish is protected under the "ministerial exception" as required by the Free Exercise and Establishment Clauses of the First Amendment.[2] This exception applies to a narrow subset of employers and employees (likely only churches or directly affiliated organizations, and only for employees of those employers who are closely linked to the religious mission), and prohibits virtually any governmental or judicial interference with hiring/firing decisions for those to whom it applies.

First Amendment—Free Exercise and Establishment Clauses (Church Autonomy Doctrine)

The legal notion of church autonomy—rooted in both the Free Exercise and Establishment Clause protections of the First Amendment—means that courts lack jurisdiction to resolve disputes that are strictly and purely ecclesiastical in nature.[3] The scope of the Church Autonomy Doctrine covers questions of (i) doctrine, (ii) ecclesiastical polity and administration, (iii) selection, discipline, and conditions of appointment of clergy and ministers, and (iv) admission, guidance, and discipline of church parishioners. Exceptions to the church autonomy doctrine

include fraud or collusion,[4] property disputes resolved by neutral principles of law,[5] and advancing compelling government interests.[6] While small, there is a possibility that the third exception, advancing compelling government interests, could be used as an argument for requiring churches to at least host same-sex marriages (such as under public accommodation laws, discussed below).

Notwithstanding minimal concern over possible exceptions for advancing compelling government interests, the church autonomy doctrine will be strongly protective of pastors being forced to perform same-sex marriages. The doctrine includes the ministerial exception and therefore protects churches in their hiring and firing of those connected to the mission of the church. It also protects churches in their ability to profess that they disagree with same-sex marriage in the pulpit, through their usage policy, and through their marriage performance policies.

First Amendment—Free Exercise

Since 1990, the Supreme Court has interpreted the Free Exercise Clause to permit neutral and generally applicable laws to infringe on religious exercise.[7] However, laws that are not neutral and generally applicable must survive strict scrutiny—meaning they must be backed by a compelling government interest and narrowly tailored to achieve that interest.[8] A law requiring ministers to officiate same-sex weddings would likely not be neutral or generally applicable as there probably would be exemptions to such a law.

Even a law that appears neutral in its wording and text will not be considered neutral if it is proven that the law was enacted to target a religious group.[9] In that case, it must meet strict scrutiny, for the government "may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."[10] This requirement would protect pastors from being targeted by the government for their exercise of religion with regard to same-sex marriage whether or not the law discriminated against their religious practice on its face.

First Amendment—Freedom of Speech

Current Supreme Court free speech jurisprudence is very strong and provides significant protection for pastors. The Court has affirmed free speech rights in the context of homosexuality, holding that private parade organizers cannot be forced to include groups with messages they did not approve of (including gay rights groups), because this would compel the parade organizers to speak a message against their will and make free speech and freedom of association protections meaningless.[11] This free speech jurisprudence will protect pastors as they communicate their message that marriage is between a man and a woman, and as they express themselves through the natural marriages they choose to perform.

First Amendment—Freedom of Association

Freedom of association protections are also very strong and offer pastors and churches a significant defense. In the context of homosexuality, the Supreme Court ruled that a private group's decision to not accept openly gay leaders was protected by its freedom of association,

reasoning that the forced inclusion of such leaders would harm the group's message.[12] The same protections are available for churches and pastors to choose leaders and members according to their beliefs—including their beliefs about marriage.

Statutory Protections

Religious Freedom Restoration Act

The Religious Freedom Restoration Act ("RFRA")[13] prevents the federal government from substantially burdening a person's exercise of religion through even a generally applicable law or regulation, unless the government can show it is furthering a compelling government interest through the least restrictive means. RFRA was passed in response to the *Smith* case discussed above; it restores (in statutory form) the protections that *Smith* removed. Thus, RFRA is a strong bulwark to protect churches' and pastors' free exercise of religion, including protection from being forced to perform same-sex marriages.

However, as of the Supreme Court's decision in *City of Boerne v. Flores*,[14] the federal RFRA is only applicable to the federal government and does not protect against state or local action which would burden pastors' or churches' free exercise.

State Protections

Because the Supreme Court in *Obergefell* held that same-sex marriage is a constitutional right, states now must license same-sex marriages and recognize those from out-of-state on the same terms as natural marriage. However, the ruling does not interfere with state laws permitting pastors to solemnize marriages as they wish, or otherwise disrupt state-level religious liberty protections for pastors and churches.

Statutory Protections

State Religious Freedom Restoration Acts

Since the Supreme Court's decision in *City of Boerne*, twenty-one states have enacted state Religious Freedom Restoration Acts.[15] Although many closely track the protections of the federal RFRA, there are wide variations between some state RFRAs. State RFRAs generally prevent government at the state and local levels from (like the federal RFRA) substantially burdening a person's exercise of religion through even a generally applicable law or regulation, unless the government can show it is furthering a compelling government interest through the least restrictive means.

Even those states which passed RFRAs that heavily gutted protections for religious freedom in the context of same-sex marriage (*e.g.*, Indiana) have protections for churches and ministers.[16] These statutes are an important protection for pastors' free exercise of religion, including protection against being forced to perform same-sex marriages.

Solemnization Statutes

State law generally authorizes a variety of public officials (judges, magistrates, etc.) and private individuals (including pastors) to solemnize marriages.[17] It does not *require* any of them to perform any marriages, but just provides that they *may* solemnize marriages.[18] Therefore, pastors decide what marriages they will and won't perform—they are not required to perform marriages they do not wish to perform, such as same-sex marriages. No individual has been denied a marriage ceremony because they couldn't find anyone to perform it. Therefore, it is difficult to see what interest the state would have in forcing anyone to perform any solemnization. For this reason, pastors solemnizing civil marriages are not in immediate danger of being forced to perform same-sex marriages under such state statutes.

Same-Sex Marriage Legislation

Some state legislation legalizing same-sex marriage allows for the protection of religious freedom in the context of those who are asked to officiate the marriages. For instance, New Hampshire exempts members of clergy from being obligated to perform any marriage ceremony in violation of their religious beliefs.[19] Vermont,[20] Rhode Island,[21] Connecticut,[22] Illinois,[23] Hawaii,[24] Washington,[25] and the District of Columbia[26] all have some form of exemption based on religious belief within their same-sex marriage legislation.

Notwithstanding the fact that these protections focus narrowly on clergy, they demonstrate that even when legislatures have authorized same-sex marriages, pastors have been protected from being forced to perform them.

Public Accommodations Statutes

Whether churches fall under the jurisdiction of public accommodations laws could affect whether they can be forced to permit same-sex marriages on their property and in their facilities. For instance, Colorado specifically exempts churches from all public accommodations law,[27] while other states specifically provide that churches are not exempt.[28] Other states are silent on the matter.[29] Even if public accommodations laws are silent on this issue, courts or other authorities may determine that churches fall under the jurisdiction of such laws.

If churches fall under the jurisdiction of public accommodation laws, and then act in a manner governed by public accommodations laws (such as opening their facilities to the public for marriage ceremonies), it is possible that states could try to force them to host same-sex weddings if they try to only permit marriages between a man and a woman in their facility.

Yet, even if the state says that churches have to open their facilities for the ceremony, the pastor of the church has additional legal protections (as discussed throughout this brief) from being forced to officiate it himself. In addition, some states explicitly protect clergy even though they do not protect churches. For example, Hawaii specifically exempts clergy from being forced to perform same-sex marriages,[30] even though it forces churches to open their facilities to them in certain scenarios.[31]

In the face of these developments, churches will need to take steps to enhance their protections against being forced to perform or open their facilities for same-sex marriages.

To bolster their legal position and protect themselves in this regard, churches can establish additional and specific facilities usage policies that will legally allow them to deny uses that are inconsistent with their faith. Model policies and more specific legal advice is available from our allies at Alliance Defending Freedom[32] and Liberty Institute.[33] Rather than retreat from the public square, churches and pastors should ensure they have taken the proper steps to have protections in place so they can continue to play an active part in and minister to their local communities.

Despite the aforementioned concerns with public accommodation laws, legal protections for pastors and churches are currently quite strong. There is almost no risk that a pastor could be forced to perform a same-sex marriage at this point, and quite minimal risk for churches in being forced to host them (there is slightly more reason for concern regarding churches because of their potential liability under public accommodations laws). Currently, other religious organizations, individuals, and schools are legally more vulnerable than both pastors and churches, and can be expected to receive the first challenges to religious liberty legal protections in the context of same-sex marriage.

However, the current legal position of pastors and churches does not mean there will be no legal challenges, as some may still attempt them. Any efforts to force churches to open their facilities for same-sex weddings or otherwise infringe on the ability of pastors or churches to act according to their faith should be promptly communicated to us so we can be sure these issues receive the proper attention, and assistance from our allied legal organizations can be made available.

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[1] 135 S. Ct. 2584 (2015).
[2] *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012).
[3] *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952).
[4] *See Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).
[5] *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595 (1979).
[6] *See Reynolds v. United States*, 98 U.S. 145 (1878).

[7] *See Employment Division v. Smith*, 494 U.S. 872, 878 (1990).
[8] *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).
[9] *Id.*
[10] *Id.* at 547.
[11] *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573-81 (1995).
[12] *Boy Scouts of America v. Dale*, 530 U.S. 640, 648, 656 (2000).
[13] 42 U.S.C. § 2000bb-1.
[14] 521 U.S. 507 (1997).
[15] The twenty-one states are Alabama, Arkansas, Arizona, Connecticut, Florida, Idaho, Indiana, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia.
[16] Ind. Code § 34-13-9 (2015).
[17] *See, e.g.*, Nev. Rev. Stat. § 122.066 (2013).
[18] *See, e.g.*, Tex. Fam. Code Ann. § 2.203(a) (2013).
[19] N.H. Stat. § 457:37 ("Members of the clergy . . . shall not be obligated or otherwise required by law to officiate at any particular civil marriage or religious rite of marriage in violation of their right to free exercise of religion protected by the First Amendment . . .").
[20] Vt. Stat. Ann. tit. 18 § 5144 (2013).
[21] R.I Gen. Laws § 15-3-6.1(b) (1956).
[22] Conn. Gen. Stat. § 46b-22b (2009).
[23] 750 Ill. Comp. Stat. 5/209 (2014).
[24] Haw. Rev. Stat. § 572-12.1 (2013).
[25] Wash. Rev. Code § 26.04.010 (2012).
[26] D.C. Code § 46-406 (2013).
[27] Colo. Rev. Stat. § 24-34-601 (2015).
[28] *See, e.g.*, Haw. Rev. Stat. § 572B-9.5 (requiring churches to allow use of their facilities for civil unions if they allow use of their facilities for non-member weddings).
[29] *See, e.g.*, N.J. Stat. § 10:5-12 (2014).
[30] *See* Haw. Rev. Stat. § 572B-4 (exempting clergy from performing same sex unions).
[31] *See* Haw. Rev. Stat. § 572B-9.5 (requiring churches to allow use of their facilities for civil unions if they allow use of their facilities for non-member weddings).
[32] *See* Defending the Right to Share the Gospel, Alliance Defending Freedom, https://www.alliancedefendingfreedom.org/issues/church.
[33] *See* Five Simple Steps to Protect your Church, Liberty Institute, https://www.libertyinstitute.org/church-audits.