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How *Obergefell v. Hodges* could affect your ministry

by Whitman H. Brisky

In response to my newsletter article last month describing the increased discrimination that Christians, and Christian ministries, might confront if the Supreme Court approves gay "marriage", we received a number of questions about how this might impact church and ministry tax exemptions and the ability of clergy to legally marry only opposite sex couples.

These questions were triggered by a comment of the Solicitor-General, representing the United States, in oral argument on the case. When asked whether finding a constitutional right of gay couples to marry might affect the income tax exemptions of religious schools who upheld the traditional view of marriage, the Solicitor-General replied that "it's certainly going to be an issue" much like Bob Jones University was denied a tax exemption because it opposed interracial dating and marriage.

While there are perhaps distinctions to be made between what Bob Jones was doing, by, for example including prohibitions in their code of conduct, and a school simply teaching its position on gay "marriage" without imposing any limitations on conduct or contrary speech, the distinctions are not so compelling or so broad as to foreclose the possibility of the IRS attempting to revoke, or failing to give, a tax exemption merely because of the content of the school's teaching. Whether such an attempt would succeed in the face of free speech protection is not clear.

Nor is there any fundamental distinction for constitutional purposes between a religious school or other religious ministry and a church. So if a religious school can be deprived of its tax exemption simply for opposing same-sex "marriage", we see no clear bar to the government taking away the tax exemptions of churches that refuse to perform gay "marriages". Indeed, since the church is doing more than just teaching traditional marriage by also refusing to accommodate gay couples who want to marry, it may be easier to revoke their tax exemption.

The loss of the tax exemption could have significant financial consequences for churches, ministries and, especially, their contributors who could no longer deduct their contributions. Nor does there appear to be an easy work-around which does not involve seriously compromising the ability of churches to teach and act in accordance with their religious convictions.

Similarly, with pastors who refuse to legally marry same-sex couples, the government could potentially condition their authority to perform any legal marriage on their not "discriminating" against gay couples. The solution here may be easier in that a pastor could tell couples that he can marry them in a religious ceremony, but that they had to make it "legal" in a civil ceremony.

One other concern is raised by the Solicitor-General's remark. If any legal "discrimination" against gay couples is unconstitutional because it is a violation of the 14th Amendment's equal protection clause, any exemption in state or federal law which allows persons with religious or other moral objections to gay marriage to avoid obeying laws protecting persons from discrimination because of sexual orientation might also be unconstitutional.

Much will depend on the details of the Supreme Court opinion expected before the end of June. The Supreme Court might find a way to duck the question. It might leave marriage decisions to the states. It might find a constitutional right to gay "marriage" but write the opinion in a narrow enough way to allow states to accommodate persons of faith with narrowly written exemptions. Or the Supreme Court may write more broadly and in a way likely to lead to some of the potential bad consequences I have described. A careful reading of the opinion, including any concurrences and dissents, will be necessary before we can begin to understand its ruling.

We will update you in a future issue after the Supreme Court has ruled and some of these questions have been answered or at least narrowed. ■