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Introductory Summary

Anyone who turns on the news, opens a magazine, or browses the Web can see that American society and culture are changing rapidly.

Some 30 to 50 years ago, a majority of Americans shared many core Judeo-Christian beliefs. Today, the country is going through a transition in which popular belief appears to be heading away from beliefs held by many churches. This shift can be disheartening to ministry leaders and others who view American society as “heading in the wrong direction.”

There is also a valid concern that this societal shift will place churches and ministries in the crosshairs of negative publicity, governmental scrutiny, and litigation. With these current cultural trends, the question becomes when and how can ministries operate within their foundational standards of beliefs without crossing the line to illegal discrimination?

The question has become especially important since the Supreme Court of the United States issued its June 2015 ruling regarding same-sex marriage. In its decision, the Court held that the Fourteenth Amendment requires states to license and recognize marriages between two people of the same sex.

While responding to a specific question, the Justices left several other potential questions that surround this divisive issue unanswered. The Supreme Court’s ruling does not appear to take away any of the rights that religious organizations currently have under the law. However, as Chief Justice John Roberts noted in his dissenting opinion, “Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage.”

The purpose of this paper is to help ministry leaders more fully understand the Supreme Court’s decision regarding same-sex marriage. It provides background information about the *Obergefell v. Hodges* decision and some potential issues and solutions that ministries can consider as they address their ministry’s activities and needs.

The paper addresses six specific questions:

- I. What should churches and ministries know about the Supreme Court’s decision regarding same-sex marriage?
- II. What other lawsuits should ministry leaders be aware of regarding belief-based decisions?
- III. What steps can a ministry take to protect itself if it wishes to avoid activities, events, or the use of its premises that run counter to the beliefs of the ministry?

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- IV. How do ministries balance their sincerely held religious beliefs with current cultural trends, which in some cases run counter to biblical teaching?
- V. What should ministries look for in an insurance company to ensure that their sincerely held religious beliefs are respected and protected?
- VI. How have insurance companies responded to ministries that stand up for their sincerely held religious beliefs?

This paper also references a number of additional resources that can help churches and ministries understand the potential impact of the Supreme Court's decision on same-sex marriage. You will find those resources listed at the conclusion of select sections of this white paper.

Current Case Law

I. What should churches and ministries know about the Supreme Court's decision regarding same-sex marriage?

On June 26, 2015, the Supreme Court of the United States issued a 5-4 ruling, holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state.

A. The Case: Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

This case began when a same-sex couple from Cincinnati, Ohio, filed a lawsuit alleging state discrimination against same-sex couples who have been lawfully married in another state. John Arthur was terminally ill and sought to name his partner, James Obergefell, as his surviving spouse, but was unable to do so under Ohio's same-sex marriage ban. The Director of the Ohio Department of Health, Richard Hodges, was named as the defendant in the case. As the case made its way through the appellate courts, other same-sex couples' cases were joined. And as the case continued to progress, the question before the courts became whether Ohio's refusal to recognize marriages legally performed in other states violated the Fourteenth Amendment's guarantees of equal protection and due process.

B. A Landmark Decision

In its decision, the Supreme Court began by recognizing the history of the subject of marriage, noting it as one of both "continuity and change." The Court then applied the following reasoning in making its determination that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex:

- 1) The fundamental liberties protected under the Due Process Clause of the Fourteenth Amendment extend to certain personal choices, and among those is the right to marry.
- 2) Because marriage is inherent in the concept of individual autonomy, supports a two-person union unlike any other in its importance to the individuals involved, safeguards children and families, and is the "keystone of the Nation's social order," marriage is a constitutional right.
- 3) The right of same-sex couples to marry also is derived from the Fourteenth Amendment's guarantee of equal protection.
- 4) Because the right to marry is a fundamental right "inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment," couples of the same sex may not be deprived of that right and that liberty.

C. The Religious Organization “Carve Out”

The Supreme Court then added a “carve out” for “religions and those who adhere to religious doctrines” by stating:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The 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. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

Chief Justice Roberts and Justice Thomas noted in their dissents that the First Amendment guarantees the right to “exercise” religion. Chief Justice Roberts further noted that “exercise” is a word that the majority omitted from their opinion. So while this provision acknowledges the First Amendment rights of religious organizations to teach principles that are central to their lives and faiths, the dissenting justices expressed concern that it may not be broad enough to encompass the full exercise of those rights.

D. Limits of Obergefell v. Hodges

What often has been lost in the media’s coverage of the Supreme Court’s decision is the fact that the holding is applicable only to how states may view same-sex marriage. The Court held that individual states must issue marriage licenses to same-sex couples and recognize same-sex marriages that were performed out-of-state.

While there may be several implications flowing from the Supreme Court’s decision, the focus of the ruling was limited to states only. The decision did not directly address how businesses, organizations, or even individuals must treat same-sex couples. Accordingly, ministries and ministry leaders have been provided little guidance from the Court as to what the ruling means for them.

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Indeed, Chief Justice Roberts observed as such in his dissenting opinion when he noted, “Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage.” He then offered the following examples:

- 1) A religious college that provides married student housing only to opposite-sex couples.
- 2) A religious adoption agency that declines to place children with same-sex married couples.
- 3) The tax-exempt status of some religious institutions that oppose same-sex marriage.

Chief Justice Roberts went on to state that there is “little doubt that these and similar questions will soon be before this Court.” It seems likely that future cases will ultimately determine the full scope and effect of this decision for churches and other religious organizations.

As it stands now, however, this ruling does not appear to take away any of the rights that religious organizations currently have under the law. Still, the ruling leaves unanswered questions that may lead to confusion and concern for ministries.

II. What other lawsuits should ministry leaders be aware of regarding belief-based decisions?

As Chief Justice Roberts cautioned, the Supreme Court's same-sex marriage decision presents "little doubt" that several issues regarding religious freedom and belief-based decisions will "soon be before the Court."

Many pundits and bloggers simply dismiss any fear that ministries and clergy will be forced to conduct ceremonies that may violate their sincerely held religious beliefs. However, the current legal landscape has already presented several challenges to religious freedom, signaling that more are coming.

A. Knapp v. City of Coeur d'Alene (pending as of January 27, 2016)

Donald and Evelyn Knapp have operated the Hitching Post Wedding Chapel, in Coeur d'Alene, Idaho, for more than 25 years. They are ordained ministers who perform religious wedding ceremonies at their facility. In 2013, the City of Coeur d'Alene passed sexual orientation non-discrimination laws. Shortly thereafter, Idaho's constitutional amendment providing that marriage was between a man and a woman was held unconstitutional by the courts. The Knapps were then approached to perform a same-sex wedding ceremony at The Hitching Post Wedding Chapel, which they respectfully declined because of their religious beliefs.

City officials made it known that the Knapps were in violation of the sexual orientation non-discrimination law. The City indicated that, unless the Knapps agreed to perform same-sex ceremonies at their chapel, they would be subject to up to 180 days in jail and up to \$1,000 in fines for the initial violation and each day thereafter if it continued.

The Knapps filed a lawsuit to protect their sincerely held religious beliefs. The City argued that the Knapps were subject to the sexual orientation non-discrimination laws because The Hitching Post Wedding Chapel was a for-profit business. However, as public scrutiny and criticism grew, the City informed the Knapps that they would not be prosecuted. However, the matter is still pending because the City refused to amend the ordinance to make it clear that it does not apply to for-profit businesses operated according to religious beliefs.

It is important to note that most churches and ministries do not operate as a "for-profit business" as The Hitching Post is. This is clearly a distinguishing characteristic. However, it is highly unlikely that the couple who first approached the Knapps to perform a same-sex ceremony knew that it was a for-profit business. Instead, they likely observed that the Knapps were ministers who perform religious ceremonies. Accordingly, churches and ministries are not immune from these challenges.

B. Bernstein, et al. v. Ocean Grove Camp Meeting Association (2012)

The Ocean Grove Camp Meeting Association is a religious retreat founded by Methodists just after the Civil War. The campus includes a wooden auditorium, constructed in 1869, that is a national historical landmark. There is also a half-mile of boardwalk running alongside the beach, with an open-air pavilion. In early 2007, the State of New Jersey legalized same-sex civil unions. Couples began asking to use the Ocean Grove pavilion to perform same-sex ceremonies, which Ocean Grove respectfully declined based on its sincerely held religious beliefs. Thereafter, same-sex couples filed discrimination complaints with the New Jersey Division on Civil Rights.

The couples argued that Ocean Grove's pavilion was a place of public accommodation subject to the state's non-discrimination laws.

The State of New Jersey agreed. Although the pavilion was on the ministry's property, the State eventually declared that the pavilion was NOT a religious facility, but an area of public accommodation. Ocean Grove was found to have engaged in unlawful discrimination. In the end, the only solution that would not require Ocean Grove to violate its sincerely held religious beliefs was to stop hosting weddings of any kind in its pavilion.

C. Gifford, et al. v. McCarthy, et al. (2015)

Cynthia and Robert Gifford own nearly 100 acres of farmland in upstate New York where they operate Liberty Ridge Farm, LLC. The farm is a for-profit company that harvests and sells crops, and rents portions of the farm to the public as a venue for various celebrations, including weddings and receptions.

In the fall of 2012, Cynthia Gifford received a phone call from Melissa McCarthy requesting that her wedding ceremony and reception be held at the farm. Ms. McCarthy recorded the approximately three minute telephone conversation in which she disclosed that her partner was of the same gender. Ms. Gifford responded that there was "a problem" in that the farm did "not hold same-sex marriages." Ms. Gifford explained that "it's a decision that my husband and I have made that that's not what we wanted to have on the farm." The Giffords did, however, offer to allow the reception to take place on the farm, just not the wedding ceremony.

The McCarthys thereafter filed a complaint with the New York State Division of Human Rights alleging that the Giffords engaged in unlawful discriminatory practices based on sexual orientation. The Division of Human Rights agreed, finding that the Giffords' farm was a place of public accommodation subject to the state's non-discrimination laws.

The Giffords were ordered to pay \$3,000 in damages to the McCarthys, pay a \$10,000 fine, establish anti-discrimination training on their premise, and cease and desist unlawful discrimination immediately.

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The matter was appealed and New York's highest court affirmed the decision of the Division of Human Rights. The Giffords now must allow same-sex marriages to occur on their property if they wish to remain in business.

D. In re Jared Woodfill, et al. (2015)

In mid-2014, the City of Houston's mayor and city council implemented a sexual orientation/gender identity law that, among other things, prohibited gender identity discrimination in public restrooms. A large majority of Houston residents opposed this law. Accordingly, a petition was circulated throughout the city in order to have the law placed on the ballot for Houston residents to vote on. The petition required approximately 18,000 signatures, but more than 50,000 people signed the petition. The city secretary legally certified the petition, which required the city council to repeal the law or put the law to a vote of Houston residents. Instead, the mayor and city attorney refused to recognize the certification.

In response to the mayor's actions, a group of citizen's filed suit to require the City to honor the petition. As that case proceeded, the City served subpoenas on five local pastors which specifically requested the pastors' sermons related to: 1) the petition, 2) the mayor, 3) homosexuality, or 4) gender identity. The subpoenas also requested any personal communications the pastors may have had with church members or others about these issues.

Although neither the pastors nor their churches were involved in the litigation, the City apparently wanted to examine their involvement with the petition and determine whether the pastors had ever opposed or criticized them.

At one point, Houston's mayor posted on social media, "If the five pastors used pulpits for politics, their sermons are fair game."

The mayor's statement seemed to equate a biblically based sermon on homosexuality or gender identity to political speech. This, of course, was particularly troubling since a non-profit organization could lose its tax-exempt status for political speech and activity. While it is not clear if this was the actual intent of the City, at a minimum, the subpoenas appeared to be an attempt to put political pressure on the pastors regarding what they might preach about social issues.

Due to the public outcry, the City withdrew the subpoenas. Recently, the Supreme Court of Texas also held that the petition was properly certified. Houston's city council is now required to repeal the law or place the issue on the November ballot.

E. Christian Schools and Transgender/Sexual Orientation Cases

There have been a number of recent lawsuits involving Christian high schools' and colleges' reactions to transgender and homosexual issues. These cases typically center on whether a school's sincerely held religious beliefs take precedence over state and federal requirements for educational institutions. To date, courts have historically favored Christian schools' rights. Here are a few cases that speak to this issue:

- **California Baptist University** expelled a student after it learned that the student fraudulently reported his gender. The student had listed female on his college application, but it was later revealed that the student was a transgender male. The transgender student filed suit under several theories, including violation of his civil rights. The court held that the school was permitted to expel the student from on-campus activities, but required the school to allow the student to attend off-campus services that are open to the public. The school was also ordered to pay the transgender student's attorney fees and allow him to take online classes.
- **George Fox University** was sued by a transgender student alleging violation of Title IX (a federal law that prohibits discrimination on the basis of sex in schools that receive federal funding). The University prohibited the transgender student from living on campus with roommates of the opposite sex. The University offered to allow the transgender student to room on campus with no roommates, but he refused. The court recognized the University's religious exemption under Title IX, which allowed the University to "preserve the right to draw on its religious convictions to handle situations."
- **Preston High School**, a Catholic school in Queens, New York, was sued after it expelled two girls for fighting at the school. One of the students claimed that her expulsion for fighting was a pretext. She claimed that she was actually expelled because she brought another girl to a school-sanctioned dance and identifies as a lesbian. During the early stages of the litigation, the court found in favor of the student and issued a temporary restraining order that required the school to readmit the student.

Potential Solutions and Protections

I. What steps can a ministry take to protect itself if it wishes to avoid activities, events, or the use of its premises that run counter to the beliefs of the ministry?

While churches and ministry leaders may seem to be at the mercy of the changing legal and judicial winds, there are a few steps that ministries can take to help reduce the likelihood they will be required to violate their sincerely held religious beliefs.

It is important for ministry leaders to develop policies and procedures in a way that provides broad religious freedom protections while also referencing Scripture to support such positions.

A. Governing Documents/Bylaws.

Governing documents, including constitutions and bylaws, are essentially rules that govern an organization's major decisions and key activities. Generally, bylaws define and describe the rights and responsibilities of members, leaders, staff, and others related to the organization. The best practice is to carefully draft and implement bylaws that accurately describe your ministry's practices and beliefs.

With regard to issues related to same-sex marriage, it is wise to specifically state the ministry's position (along with other sincerely held religious beliefs) in the ministry's constitution or bylaws. Stating the ministry's beliefs along with applicable references to Scripture can help the ministry operate according to these beliefs and avoid claims of improper discrimination. If a ministry makes it clear—via governing documents and otherwise—that the ministry's position on same-sex marriage is a sincerely held religious belief, courts will typically not interfere with the ministry practicing its beliefs.

Accordingly, to provide the broadest protection, it is generally recommended that the bylaws include a:

1. **Purpose Statement** – The purpose statement should be designed to state the spiritual and religious beliefs of the ministry. The statement should reference Scripture as a basis for any behavior that is prohibited or discouraged. From a legal standpoint, citing supporting Scripture will strengthen the ministry's First Amendment position in the event of any litigation.
2. **Marriage, Intimacy, and Appropriate Behavior Provision** – This provision is designed to state the ministry's expectations for employees, volunteers, and others with respect to marriage and interpersonal relationships. A bylaw provision that clearly explains the ministry's position on marriage, intimacy, and appropriate behavior can be helpful regardless of the ministry's specific beliefs. Again, it is very important to reference Scripture as a basis for any behavior that is prohibited or discouraged.

B. Operational Documents.

It is important to make sure that behavioral expectations of those involved in a ministry are clearly spelled out. Operational documents should specifically state that those who join the ministry as members, use ministry facilities, or serve as ministry workers are expected to support, observe, and follow the ministry's spiritual purpose and beliefs.

1. **Facility Use Agreement** – If a ministry rents out a meeting hall to the general public for a fee, courts may be more likely to require the ministry to rent the facility to all individuals or groups who seek to reserve the facility, regardless of the practices or beliefs of the group.

Ministry leaders should consider the possibility of updating ministry policies with respect to facilities use by requiring that those who wish to use ministry facilities be members in good standing of the ministry. They also should consider developing a statement of beliefs—which includes the ministry's position on marriage—for prospective members to read and consent to prior to joining the ministry. In this way, ministries may be able to improve their ability to defend against claims of discrimination that might be brought by outside individuals or groups which do not share the ministry's beliefs.

2. **Employee and Volunteer Handbook** – In a secular employment law context, employers are prohibited from making decisions based on an employee's spiritual beliefs and practices. As a faith-based organization, however, ministry leaders can take steps to ensure that employees (or volunteers) are acting in accordance with the ministry's beliefs.

It is a good idea to clearly state the ministry's positions in a statement of faith or morals clause that can be placed in the ministry's employee handbook and volunteer policies. The purpose of a morals clause is to state the lifestyle expectations for employees and volunteers. Referencing Scripture in these documents in support of the ministry's expected moral conduct can help reinforce the religious nature of the ministry's position. It is important that the ministry consistently enforces its statement of faith or moral clause.

With respect to the employment process, ministry leaders also may want to consider including a question on the ministry's employment application that asks something to the effect of "Do you agree with the ministry's statement of faith, and do you agree to abide by the statement of biblical conduct?" Employment applicants should be provided with a copy of the statement of faith and biblical conduct along with the employment application. Of course, ministry leaders will need to verify with a locally licensed attorney whether or not this approach is permitted in the ministry's state.

C. Respond with Sensitivity.

It is important to train your clergy, staff, and volunteers to approach individual needs and requests with empathy. Since you cannot satisfy every request or demand, the manner in which you express your response is sometimes as important as the message you are conveying.

D. Consult with Local Counsel.

When revising organizational documents, policies, and procedures, ministries should involve a local attorney. A wide variety of federal, state, and local laws apply to employer/employee relations, in particular. Consulting with a local attorney can provide guidance on any state-specific and local legal issues that you may encounter. Always contact your attorney and your insurance agent if you anticipate a lawsuit against your church or ministry. These professionals can help walk you through the situation.

Resources on BrotherhoodMutual.com

[Employment Decisions Based on Religious Beliefs](#)

[Sample Policy—Purpose Statements](#) (Biblical Foundation and Creedal Foundation samples)

[Sample Policy—Morals Clause](#)

[Sample Facility Use Agreement](#)

[Sample Policy—Marriage, Intimacy, and Appropriate Behavior Provision](#)

[Lending Church Facilities: Facility Use Agreements](#)

[Lending Your Church Facilities: Guidelines and Preparation](#)

[Risk Management Issues Associated with Lending Church Facilities](#)

Specific Religious Freedom Issues

I. How do ministries balance their sincerely held religious beliefs with current cultural trends, which in some cases run counter to biblical teaching?

As ministry operations intersect with changing cultural trends, a number of potential risk exposures may arise, some of which involve same-sex marriage, faith-based employment decisions, and transgender issues. It is important to note that various churches, ministries, and individuals fall on either side of these current issues, but the following information is intended to assist ministries that hold sincerely held religious beliefs on these types of issues.

A. Same-Sex Marriage

1. External Legal Climate

Many of the recent societal changes center on the issue of same-sex marriage. Under the Obergefell decision, previously discussed, it's currently unlikely that a lawsuit filed against a nonprofit ministry for refusing to marry a same-sex couple would succeed.

Ministries and clergy have historically been exempted from any requirements to condone or perform same-sex marriages. Before the Obergefell decision last year, the states that had legalized same-sex marriage had provided exemptions for churches and clergy. The Obergefell decision seems to provide a similar carve-out, although the strength of the carve-out remains somewhat unclear. As Chief Justice Roberts warned, due to the various questions left unanswered in the Obergefell decision, there likely will be several other same-sex marriage and religious freedom cases that make their way back up to the Supreme Court.

2. Internal Ministry Procedures

If your ministry has sincerely held beliefs regarding the sanctity and definition of marriage, there are steps that ministry leaders can take to protect their sincerely held beliefs.

As noted previously, it is a good idea to specifically include a purpose statement, and perhaps a marriage, intimacy, and appropriate behavior provision, within the ministry's governing and/or operational documents.

Courts typically do not want to interfere with a ministry practicing its beliefs. This is especially true if the ministry has made clear its biblically based position. Courts will go out of their way to avoid interpreting Scripture or judging the sincerity of a ministry's religious beliefs.

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It's also important to examine whether weddings are performed on your premises as a ministry use or simply as a facility use. The facility use consideration is often evidenced by: 1) charging a fee that looks like a profit; 2) allowing weddings to be officiated by persons not affiliated with the ministry; or 3) allowing individuals not affiliated with your ministry to get married on the premises. Regardless of the purpose—ministry or simple facility use—it's a good idea to enact a facility use agreement that requires users to affirm that they will not use your facility for a purpose contrary to the ministry's statement of beliefs.

3. Practical Response Considerations

Ensure that front-line staff are appropriately trained to respond to same-sex marriage inquiries. Develop talking points for receptionists and others who are likely to be fielding inquiries. Let front-line staff know that the response, "Let me check on this and get back to you," is an acceptable response. It's also a good idea to designate one person to serve as the spokesperson to handle all inquiries from the news media.

B. Faith-Based Employment Decisions

1a. External Legal Climate (Statutory)

Federal and state laws prohibit various forms of discrimination in areas such as employment. Federal and state laws provide equal employment opportunities for individuals, regardless of race, color, religion, gender, or national origin. Local ordinances can be even broader, extending protection to individuals based on sexual orientation or gender identity.

The First Amendment of the United States Constitution prohibits Congress from enacting any laws that impede the free exercise of religion.

The First Amendment is designed to prevent government interference with religious beliefs. The First Amendment generally should prevail in the event of a conflict with federal, state, or local statutes. Accordingly, a ministry is generally not required to employ an individual who does not share its religious beliefs.

1b. External Legal Climate (Case Law)

In 2012, the Supreme Court provided further support for religious freedom protection in employment. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), the Court formally recognized a "ministerial exception" to employment claims that clergy bring against a church. Several lower court rulings had recognized a "ministerial exception" for religious institutions, and in *Hosanna-Tabor*, the Court made this the law of the land.

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The ministerial exception permits ministries to make hiring and firing decisions based on a ministerial employee's beliefs and practices. Under this exception, courts will generally assume that hiring and firing decisions of ministry organizations are undertaken in accordance with the sincerely held religious beliefs of the organization, and will refrain from second-guessing these decisions.

Although the Supreme Court did not specifically define what a "ministerial employee" is, the Court made clear that the "ministerial exception" applies only to "ministerial employees." From what the Court did say, it appears that "ministerial employees" are those whose job includes the communication of spiritual beliefs to others, such as senior pastors, associate pastors, worship leaders, etc. "Non-ministerial employees" include those engaged in purely operational activities, such as bookkeepers, receptionists, or custodians.

2. Internal Ministry Procedures

Ministry leaders can implement policies and procedures to help ensure that both ministerial and non-ministerial employees are aligned with the ministry's beliefs. During the application process, it's a good idea to have the ministry's beliefs prominently displayed in a statement of beliefs. Encourage applicants to review the statement of beliefs and include a question on the employment application that asks, "Do you agree with the statement of beliefs?"

Ministry leaders are encouraged to consider how each position fulfills the ministry's purpose. When drafting the job description, tie the duties and responsibilities to the ministry's purpose. It's also a good idea to include a morals clause in the ministry's employee handbook. Similar to the statement of beliefs, ministry leaders might ask employees if they agree to abide by the morals clause (or statement of conduct).

3. Practical Response Considerations

As previously discussed, it is imperative that the ministry's beliefs are woven into the employee handbook, code of conduct, and other operational documents so that applicants and employees are well aware of the ministry's sincerely held beliefs. Of course, ministry leaders must live out the stated beliefs and code of conduct. As such, it is paramount that ministry leaders apply policies and procedures equally and consistently to all employees.

When interacting with employees, it is also important to document all interactions, including disciplinary issues, and include such documentation in the employee's personnel file. Finally, before terminating an employee, it is important to consult with a local attorney to ensure compliance with all applicable state, local, and federal laws.

C. Ministry Volunteers

1. External Legal Climate

Many of the local, state, and federal employment laws discussed previously do not apply to volunteers. Most anti-discrimination statutes and other worker protections apply only in the employer/employee context.

In general, then, ministries can freely determine whom they are comfortable appointing as volunteers.

If a prospective volunteer does not align with the ministry's beliefs regarding approved conduct, ministry leaders are generally free to prohibit that person from volunteering within the ministry.

2. Internal Ministry Procedures

Although there are few statutory restrictions in the volunteer context, it is still a good idea to approach volunteer appointment with similar employment procedures to avoid any type of claims or disagreements. The more ministry leaders do on the front end, the less likely there will be an issue involving a volunteer not being aligned with the ministry's sincerely held beliefs.

Accordingly, it is a good idea to notify volunteers of the ministry's core beliefs and to confirm that volunteers in key ministry positions are supportive of those beliefs. Publishing the ministry's purpose statement and core beliefs on the ministry's website is a good way to ensure that volunteers have the opportunity to see the purpose of the ministry and to ensure the alignment of key volunteers.

3. Practical Response Considerations

Generally, ministry leaders expect clergy, employees, and leaders to be aligned with the ministry's sincerely held religious beliefs. However, they often want to take a somewhat different approach with volunteers.

Ministry leaders want people to become part of the ministry. One of the easiest and fastest ways for people to become part of ministry is to get them plugged into volunteer opportunities. But in some cases, a volunteer's views, beliefs, and lifestyle may not be aligned with the ministry's sincerely held religious beliefs when they first attend.

Accordingly, it is important for ministry leaders to consider which volunteer positions require people who are more closely aligned with the ministry's sincerely held beliefs. For instance, ministry leaders might require any volunteer who speaks on behalf of the ministry to follow the morals clause or statement of conduct policy.

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This might include elders, Sunday School teachers, small group leaders, volunteers at the information desk who field questions, etc. A more entry-level volunteer position (e.g., parking lot attendant, door greeter, usher, tool-belt ministry volunteer, etc.) may not necessarily need to be perfectly aligned with the ministry's sincerely held beliefs.

What's important is to identify and document the ministry's rationale for assigning someone who does not align with the ministry's belief. Develop criteria for all volunteer positions that make it clear which positions can accept non-aligned volunteers, and what factors would exclude a non-aligned volunteer. It's easy to overlook, but ministries should ensure that staff and clergy are on the same page with respect to which volunteer positions require alignment and why.

D. Transgender and Other Sexual Identity Issues

1a. External Legal Climate (Statutory)

According to a 2011 survey, about 700,000 Americans believe that their gender is at variance with their biological birth gender. Although that number represents less than a quarter of a percent of the total population in the United States, transgender and gender identity issues have been garnering more attention in the media and in the courts.

Currently, gender identity and sexual orientation are not protected classes under federal law. However, some states and localities have extended anti-discrimination laws to individuals who identify as transgender or homosexual.

Twenty states have non-discrimination employment laws for both sexual orientation and gender identity, with another three states having such laws for sexual orientation only. In states that do not have such non-discrimination laws, nearly 200 cities have sexual orientation and/or gender identity non-discrimination laws. These local ordinances can apply in employment, housing, and even areas of public accommodation.

Generally speaking, even where such statutes and ordinances exist, ministries are still permitted to limit or prohibit an individual's involvement in ministry activities. Many statutes and ordinances specifically exempt religious institutions from such requirements. Even if the statutes or ordinances are silent, religious institutions may still rely upon the First Amendment protections to religious freedom.

1b. External Legal Climate (Case law)

In *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000), the Supreme Court recognized that the forced inclusion of unwanted persons in ministry activities may infringe upon the ministry's freedom of expressive association. Accordingly, to balance these competing interests, the Court found that three key components had to be examined:

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- 1) *Whether the ministry engages in expressive association;*
- 2) *Whether forced inclusion of a transgender or homosexual significantly affects the ministry's ability to advocate public or private viewpoints; and*
- 3) *Whether the ministry's interest in expressive association would outweigh the state's interest in eradicating discrimination.*

Under this ruling, a ministry will generally be permitted to exclude transgender or homosexual individuals if including the individuals would interfere with the viewpoints (sincerely held beliefs) of the ministry. This case was decided more than 15 years ago. It's unclear how the Supreme Court would rule on this same case if it were decided today, but at this point, the *Boy Scouts of Am. v. Dale* decision remains controlling law. Of course, recent lower court decisions involving public schools have generally held in favor of accommodating transgender individuals.

2. Internal Ministry Procedures

As with all aspects of religious freedom protection, having the ministry's purpose and beliefs clearly articulated and communicated can help in several respects. It will serve to: 1) advise individuals, both inside and outside the ministry, why the ministry exists and what its beliefs are; 2) facilitate a unified understanding of the ministry's core beliefs among pastors, staff, and lay leaders; and 3) convey to governmental agencies, state and federal courts, and other outside institutions that the ministry embraces a set of sincerely held religious beliefs. Ministry leaders might consider including their core beliefs and statements on human sexuality in various operational documents.

3. Practical Response Considerations

The transgender/gender identity issue is a particularly thorny topic, involving difficult decisions from youth programming, to restroom configuration, to overnight activities. The modern trend is to affirm adults and children who self-identify as transgender. Ministries naturally want to welcome everyone, but it can be difficult when considering how to accommodate transgender individuals.

Accommodation could mean allowing access to restrooms and locker rooms for the gender that the person self-identifies with. Ministry leaders also have to consider with whom a transgender youth stays with on overnight retreats. The interests and needs of other participants must be taken into account, particularly in youth settings.

Regardless of how a ministry decides to proceed, it's important that leaders, staff, and front-line volunteers know where the ministry stands on this topic. It's also important to have a process in place to quickly address issues that may arise without much warning.

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In the current landscape, a ministry likely can still decide legally: (1) who can be involved in its activities; (2) who will be permitted on its property; and (3) how its facilities can be used. While a lawsuit is always possible when a ministry limits access based on sincerely held religious beliefs, the bottom line is, as of now, a ministry is likely permitted to do so. Of course, ministry leaders must be cautious and thorough as times seem to be changing and there's growing litigation in this area.

E. Targeted Governmental Actions

1. External Legal Climate

The Free Exercise Clause of the U.S. Constitution, as well as various state constitutions, have historically protected ministry organizations from extensive intrusion by governmental agencies with respect to infringement on ministry beliefs. As ministries seek to uphold and promote their sincerely held religious beliefs, governmental agencies seek uniform anti-discrimination treatment by all organizational institutions. Accordingly, there is a greater risk for clashes between ministry organizations and governmental agencies as anti-discrimination laws and regulations continue to proliferate.

With the Supreme Court's decision on same-sex marriage, there are likely to be a number of challenges to ministries' tax-exempt status.

Many cite the Supreme Court's decision, *Bob Jones University v. U.S.*, 461 U.S. 574 (1982), as possibly being applied in the same-sex marriage context. In *Bob Jones University*, the Supreme Court held, in an 8 to 1 decision, that the Internal Revenue Service could revoke an institution's tax-exempt status to prohibit racial discrimination as protected under the Fourteenth Amendment.

The Court held, "the government has a fundamental, overriding interest in eradicating racial discrimination in education ... which substantially outweighs whatever burden the denial of tax benefits places on the University's exercise of their religious beliefs."

There's concern among constitutional scholars that the Supreme Court's reasoning in *Bob Jones University* could be argued to apply to ministry organizations that discriminate based on other factors, such as same-sex marriage, gender identity, or other related issues.

For instance, in Obergefell, the Solicitor General stated that "the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage." Moreover, just two days after the Obergefell decision, Time Magazine published an article entitled, "Now's the time to end tax exemptions for religious institutions."

The author cited the *Bob Jones University* decision as support for ending all tax exemptions for religious institutions.

2. Internal Ministry Procedures

As with all aspects of religious freedom protection, it is important to publish your ministry's purpose statement and statement of beliefs in a way that allows governmental agencies to see what the ministry stands for. Again, governmental agencies typically do not want to be in the business of interpreting Scripture or examining whether the ministry's beliefs are supported. However, it must be noted that the internal procedures of ministries may not be as helpful in this area as in others.

3. Practical Response Considerations

In light of current trends, it may be only a matter of time before religious organizations have their tax-exempt status challenged. From a financial and budgeting perspective, ministry leaders should begin to consider what impact future potential government actions could have on their ministry, and how they might be able to overcome this impact.

There also are several other areas in which governmental agencies have affected, or will likely begin affecting, the rights or benefits of ministry organizations. Ministries could face challenges regarding state and local property tax exemptions and/or education-related benefits (which may include student financial aid, academic accreditation, athletic scholarships, etc.). There also is a possibility that there will be challenges in the form of health insurance and other employee benefit mandates.

Insurance Considerations

I. How have insurance companies responded to ministries that stand up for their sincerely held religious beliefs?

When evaluating an insurance company, ministry leaders also should consider whether the company can meet the unique needs of ministries. Churches and ministries do not typically receive much attention from the wider insurance industry. The wider insurance industry generally has not taken the time to understand the unique issues, concerns, or exposures that churches and ministries have. Accordingly, the wider insurance market will generally view a church the same way it views a general contractor or business.

As a ministry-focused insurer, Brotherhood Mutual has specialized knowledge and skills to assist churches and ministries. We have been insuring churches and ministries for more than 95 years, and share a common mission to advance the kingdom by serving the Church. As such, we understand the unique needs of ministry.

Every year, we work with thousands of Christian camps, colleges, schools, and churches. Our insurance can be tailored to fit any ministry, large or small. You won't find such coverage—or care—anywhere else. We have also been an innovator in developing cutting-edge coverages to meet the dynamic needs of ministries. This includes coverage for counseling acts, alleged sexual acts, alleged discriminatory acts, cyber liability, worldwide liability, and religious freedom protection—just to name a few.

It is also important to note that not every ministry-focused insurance company is created equal, either. Following the Supreme Court's decision on same-sex marriage, many insurance companies were flooded with questions regarding whether their insured churches would have insurance coverage if they were sued for refusing to marry a same-sex couple.

One church-focused insurance company that insures more than 8,400 churches and ministries initially responded that it would NOT provide any liability coverage when a church or ministry is sued for standing up for its sincerely held religious beliefs.

Another ministry-focused insurance company that insures more than 43,000 churches also initially responded that it would NOT normally provide any liability coverage in this situation. The insurance company specifically stated:

A faith-based decision to refuse to marry same-sex couples, or provide contraceptive care, is a carefully considered deliberate act and not an accident. Therefore, it will be an unusual and rare circumstance when a faith-based decision may be properly characterized as a Commercial General Liability (CGL) "occurrence."

Additionally, CGL policies usually cover damages related to bodily injury, property damage, and "personal and advertising" injury. These types of damages would not normally result simply from a faith-based refusal to marry or provide contraceptives.

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If these ministry-focused insurance companies are stating that liability policies do not provide coverage for ministries standing up for their sincerely held religious beliefs, it's a fairly safe assumption that the wider insurance market also will not cover such claims. Insurance company responses like these caused Pastor John MacArthur of Grace Community Church in California to note:

Insurance companies that provide liability insurances for churches so that we're protected against lawsuits are beginning to say, "We will not accept responsibility for lawsuits on homosexual or same-sex marriage issues." The church is out there on its own.

II. What is Brotherhood Mutual's approach to religious freedom claims?

While Pastor MacArthur's statement may be true for nearly all other insurance companies, this is not the case when it comes to Brotherhood Mutual.

Brotherhood Mutual foresaw the expanding need for coverage in this area more than a year before the Obergefell decision, and created the Religious Freedom Protection Coverage endorsement (BGL-66). Brotherhood Mutual's Religious Freedom Protection Coverage offers the broadest available protection to churches and ministries in response to concerns regarding their belief-based decisions.

The Religious Freedom Protection Coverage endorsement provides coverage for emotional injury claims that result from alleged discrimination, religious communication, or religious activities. This is true even if there is no underlying physical injury.

An alleged act of discrimination would include, "any disparate impact sustained by any person because of that person's race, religion, gender, sexual orientation, age, nationality, criminal background, physical impairment, or disability; [as well as] any conduct characterized or interpreted as being discriminatory in nature by a person against whom such conduct is directed."

Brotherhood Mutual is proud to be the leader in developing this coverage to protect ministries in this current cultural landscape. Another ministry-focused insurer recently announced that it will offer a type of "religious expression" coverage that generally imitates Brotherhood Mutual's Religious Freedom Protection Coverage endorsement. However, that insurer's coverage does not appear to extend all of the benefits that are included in Brotherhood Mutual's Religious Freedom Protection endorsement.

Unlike any other insurer, Brotherhood Mutual's Religious Freedom Protection Coverage endorsement provides coverage for challenges to a ministry's tax-exempt status, reimbursement for declaratory judgment actions that a ministry may initiate in order to protect its right to pursue a belief-based decision or practice, and legal defense reimbursement coverage for targeted actions by administrative agencies.

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