

Freedom of Religion and Freedom from Discrimination, Including the Right to Marry for Same-Sex Couples

Frequently Asked Questions

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Introduction

This document discusses two very important civil rights: the freedom of religion and the right of all citizens to be treated fairly and participate equally in society. In particular, as discrimination against lesbian and gay couples starts to end, and states allow them to marry, a few cries that the sky will fall on everyone if such couples are allowed to marry are shifting to a few cries that the sky will fall in one spot, on religious freedom. As important as the freedom of religion is, it is also important to have some limits when the imposition of religious beliefs on others causes them unacceptable harm. The debate, especially in the media, relies on inaccuracies, including the failure to clarify that in some cases religious groups use taxpayer money to discriminate. Further, conflicts between different people's civil rights have been around for a long time, and while there are a few hard cases, we have developed as a society well-established rules that attempt to work things out for the best of everyone as a whole. Those rules have already applied to discrimination based on race, sex, and religion, and also have applied for many years to discrimination based on sexual orientation. These time-tested rules against discrimination should not change because states have decided to stop discriminating against gay couples in marriage. Arguments to the contrary have gone so far as to even put at risk the important protections against discrimination based on religion.

Will all religious groups have to marry gay couples in states where there is the freedom to marry?

No. Qualified religious clergy who wish to marry gay couples will be able to, just like government officials like justices of the peace. While many religious clergy already solemnize gay couples' marriages, and more look forward to their state opening up the possibility of marrying couples, other clergy retain the right they've always had to refuse to marry couples. For instance, some

religious groups refuse to marry a couple unless both people are of that group's particular faith. Other religious groups refuse to marry people who have been previously married and divorced. Ending the exclusion of gay couples from marriage does not change that important religious freedom to say "no."

Increasingly, clergy use their religious freedom to affirm gay couples' lifelong commitments because religious values often govern the commitments people make in life, and marriage is one of the most

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profound commitments. For instance, Maureen Kilian, a church administrator and devout Episcopalian who was a plaintiff in Lambda Legal’s New Jersey case seeking access to marriage for gay couples, gave the following testimony: “For me, being married also tells people about your values and your faith, because it is an incredibly important commitment that has a spiritual side. . . . Straight couples whose belief systems place a priority on commitment can, by getting married, show that their actions match the words of their beliefs.” Allowing Kilian to marry her partner of over 30 years actually would *respect* her religious freedom to have her actions match the words of her beliefs. At the same time, it would not interfere with the important religious freedom of faith groups that do not wish to marry gay couples, divorced individuals, persons of a different faith, or anyone else.

Will religious groups have to accept legally married gay people into the congregation, or as clergy?

No, the law can’t require that of them, if they are indeed religious groups. Of course many religious groups have decided to welcome lesbian and gay members and leaders, and others are engaged in controversial internal debates about whether to do the same, but that’s about their own religious law that governs just them, and not about the “civil” law that governs all of us.

But what about decisions that religious groups make about hiring people or providing services to people—can they discriminate then?

It depends. For example, if they are hiring a spiritual leader, they can discriminate on some grounds. But if they discriminate in providing services like substance abuse counseling, either while using taxpayer money or as part of a commercial activity, then their religious views can unacceptably harm others. There are rules that apply to everyone when it comes to the

unacceptable harm of discrimination, and the rules don’t change just because the harm is for a religious reason rather than some other reason. Religious beliefs are very important, but those who hold such beliefs have to play by the same rules as everyone else. Occasionally there are hard cases, but the principles that apply are well-established, and have been resolving these matters for many years. In fact, those principles for quite awhile have been resolving matters involving discrimination based on sexual orientation.

What’s the basis for these rules against discrimination?

We agree as a society that to make sure everyone has an equal opportunity to make as much of a contribution as anyone else, to their families and communities, certain personal characteristics of an individual should not be used to interfere with that individual’s opportunity. Equal opportunity is an important investment in society; promoting the best contributions from everyone is good for everyone. In anti-discrimination laws, legislators have listed personal characteristics that are irrelevant to a person’s ability to contribute, but that have been used often to deny opportunities. The lists of such characteristics can include race, sex, sexual orientation, disability, national origin, and religion. Under such laws no taxpayer-funded hospital or for-profit landlord can discriminate against black people, women, gay people, differently-abled people, Irish people or Jewish people, and that’s true even if there are religious reasons behind the discrimination. Again, for those who claim there should be different rules for religious groups when it comes to their treatment of married gay couples, here is a question for them to answer: “Why for gay married people and not for others, like an unmarried pregnant woman, or heterosexuals who choose to cohabit but not marry, or those heterosexuals who intermarry across faiths, like a Christian and a Jewish person?”

But don't religious beliefs get special treatment?

Yes, except when acting on those beliefs unacceptably harms others. The special treatment is because the freedom of religion is rightly cherished and respected in this country. After all, one of the many reasons we founded our country was to free ourselves from others imposing their beliefs on us. Holding a religious belief is among the American values accorded the highest possible constitutional protection. For instance, the Supreme Court has ruled that parents can, on the basis of religious beliefs, get an exception to compulsory education laws for their children, and that a state cannot deny unemployment benefits because a Christian turns down a job that conflicts with the Biblical rule against working on the Sabbath. In addition, we give religious groups a certain type of tax-exempt status without subjecting them to the requirements other groups face. And Congress has passed several laws protective of religious freedom, including one prompted by the goal to ensure recognition of Christian students' non-curricular clubs in public high schools.

The tragic irony is that religious freedom is endangered by those who raise false alarms about how the freedom to marry for gay couples will somehow undermine religious freedom. They suggest that the well-established rules and principles should change for resolving conflicts between the freedom of religion and freedom from harmful discrimination. But if the rules and principles change with regard to protecting gay people from discrimination, they can change with regard to protecting others from discrimination, including discrimination based on religion itself. For example, in our *Bellmore* case described in more detail below, Lambda Legal sued the taxpayer-funded United Methodist Children's Home because they fired a highly-qualified lesbian simply because she is a lesbian and further refused to hire a highly-qualified Jewish person simply because he is Jewish. If there were a gay exception to the law to accommodate religious objections, why wouldn't

there be a similar Jewish exception? Similarly, in our *Benitez* case, the medical group that denied treatment to a lesbian argues that freedom of religion means California's anti-discrimination law does not apply to them. But that also means they and others could on religious grounds discriminate against a Jewish person, or a Muslim, or a Christian. Those who argue for a gay exception to law open the door to other exceptions that allow for discrimination based on a person's religion.

But haven't there been reports of "problem lawsuits" for religious liberty?

We've seen that list of lawsuits, too, because many people have used it without checking the facts. For example, there is often reference to a New York case called *Levin v. Yeshiva University*, which involved the denial of marital housing to a lesbian couple. But the university, which had a gay student organization, said there was no religious reason for the denial—so it's not a case about religious liberty at all. Another "lawsuit" often mentioned involves the matter of Catholic Charities of Boston. But there never was a lawsuit; instead Catholic Charities decided to stop its practice of placing adoptive children with gay couples, which it had been doing for years, and then further decided to pull out of the adoption business altogether because it couldn't continue to use taxpayer money to discriminate. Often the inaccurate reporting fails to clarify that taxpayer money was used as part of the discrimination. Another commonly mentioned matter is the pending *Ocean Grove* matter in New Jersey, where a Methodist group rented an ocean-side pavilion to the general public for several things, including weddings. But to get a tax exemption for the pavilion, the group had promised the state it would keep the pavilion open to the public on an equal basis, and then refused to rent to a lesbian couple.

Below is a list of these and other key matters that may help bring clarity to this important discussion.

Summaries of Some Key Matters

Pending Matter

Ocean Grove Camp Mtg. Ass'n v. Vespa-Papaleo, No. 07-3802, 2007 WL 3349787 (D.N.J. Nov. 7, 2007), *appeal docketed*, No. 07-4543 (3d Cir. Nov. 30, 2007).

A New Jersey religious group owned an outdoor pavilion that it made available to the public either for use as a rest area or to rent for purposes such as weddings, but refused on religious grounds to rent the pavilion to a gay couple for a civil union ceremony. The couple filed a complaint with the appropriate state agency, but then the religious group sued in federal court to stop the state agency from investigating the complaint. The federal court refused to stop the investigation and dismissed the suit, and, after the religious group filed an appeal, the state submitted papers asserting that the group, in order to avoid taxes, had repeatedly assured state officials that the pavilion would be “open to the public on equal terms.”

Resolved Matters

Bellmore v. United Methodist Children's Home and Department of Human Resources of Georgia, No. 2002CV56474 (Ga. Super. Ct. filed July 31, 2002) (settled pre-trial).

Lambda Legal sued a taxpayer-funded home for foster youth, asserting it fired a counselor because she is lesbian, refused to hire a Jewish person because he is Jewish, and tried to change children's sexual orientation to conform to its religious beliefs. The matter ended in a ground-breaking settlement, with the State of Georgia agreeing not to fund religious groups that would use public money to discriminate, and the Methodist Home agreeing to follow policies prohibiting discrimination in hiring and services.

Board of Education of Westside Community School v. Mergens, 496 U.S. 226 (1990).

A Christian student group sued under the federal Equal Access Act to have the same access in public high school as other student clubs. The Court, noting that “the Act was intended to address perceived widespread discrimination against religious speech in public schools,” held that the school was required to recognize the Christian student group.

Catholic Charities of Boston (contrary to inaccurate media reports, this matter was not a lawsuit).

For several years, Catholic Charities of Boston ran a state-funded program that placed children who needed parents with gay couples. But their practice was made public after Massachusetts started marrying gay couples, and then Catholic Charities eliminated such couples from the pool of parents available for needy children. This conflicted with the non-discrimination requirements for accepting state money. To resolve the conflict, they made the surprise announcement on March 10, 2006 that they were ending their adoption program altogether, rather than resume their long-standing practice of including gay couples to the pool of adoptive parents.

Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989).

The state disqualified a claimant from receipt of unemployment benefits because as a Christian he followed a Biblical rule and refused to work on the Sabbath. The Court held that the action violated the claimant's freedom of religion.

Levin v. Yeshiva University, 96 N.Y.2d 484 (2001).

The University denied “married” housing to two students who were lesbian life partners. The couple and the university’s lesbian and gay students’ organization challenged the denial under New York City’s anti-discrimination statute. The court held that the couple had a claim for sexual orientation discrimination based on disparate impact. Contrary to many inaccurate reports, the University did *not* assert religious beliefs as a defense, so religion was not at all part of the case.

North Coast Women’s Medical Care Group, Inc., v. San Diego County Superior Court, 189 P.3d 159 (Cal. 2008).

A medical group held an exclusive contract with an employer’s health plan to provide certain services and do so in compliance with state non-discrimination law. A lesbian patient covered by the health plan sought services, but the medical group refused on religious grounds to treat her as it treats other patients. The patient sued and the medical group argued that the state’s anti-discrimination law must yield in all instances to the freedom of religion, which would mean the anti-discrimination law could not in those circumstances even protect *religious believers*, as well as members of racial and ethnic minorities and lesbian and gay people. The Supreme Court of California held that the burden on religious expression was insufficient to allow for the discrimination, and “[t]o avoid any conflict between their religious beliefs and the state . . . antidiscrimination provisions, defendant physicians can simply refuse to perform the IUI medical procedure at issue here for *any* patient.” (emphasis added).

Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska 1994).

A landlord refused to rent to an unmarried straight couple, and the couple challenged the refusal as marital status discrimination under municipal and state anti-discrimination laws. The landlord asserted that he should not be forced to facilitate a “sin” against his religious beliefs. But the court held that the burden was not on his religious beliefs, but rather on his choice to enter into a commercial activity regulated by anti-discrimination laws, and that the legislature was serving a compelling interest in avoiding housing discrimination that “degrades individuals, affronts human dignity, and limits one’s opportunities.”

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Wisconsin prosecuted parents for keeping their children out of public school, in violation of the state’s compulsory education laws. The parents asserted their right to freedom of religion in raising their children in accordance with their religious beliefs, and the Court held for the parents.