**SUPREME COURT RECOGNIZES SAME SEX MARRIAGES**
**ASSOCIATION'S NEED TO REVIEW EMPLOYMENT AND MEETING PRACTICES**

By Steven John Fellman, Esquire

On June 26, 2015, in a bitter 5 to 4 decision, the U.S. Supreme Court ruled that states must permit same sex marriages and states must recognize same sex marriages performed in other states. For associations, this decision has both long term and short term affects.

*Short Term Affects*

In the short term, associations must evaluate their employment and meeting practices.

In the employment area, it has been clear that Title VII of the Civil Rights Acts prohibits discrimination based on sexual preferences. This new decision, *Obergefell v. Hodges*, No. 14-556, essentially redefines the historic definition of marriage which had always described a legal relationship between a man and a woman. The Supreme Court's holding is that one of the basic liberties guaranteed by the 14th Amendment of the U.S. Constitution is the right to be married regardless of whether the parties involved are of the same sex or of opposite sexes.

In the employment area, certain employers provide benefits to "married" employees. The Supreme Court opinion makes it clear that those benefits must be made available to all married employees whether the marriage is a marriage of a man and a woman or a same sex marriage. Associations as employers need to review their employee benefits programs to make sure that all married employees are treated in the same manner. Associations must also review their employee handbooks to ensure that appropriate language is included to make it clear that the employer will not discriminate between employees involved in opposite sex marriages and employees involved in same sex marriages.

In arranging conventions and meetings, many associations have a parallel series of events planned while business meetings are scheduled. Originally listed as "Wives Tours," then changed to "Spouses Tours" and finally changed to "Significant Others" Tours, these events have evolved from gender oriented activities to typical tourist type activities. Associations should review the language in their meeting promotional materials and the types of activities planned for those who are guests of members attending the meeting for business or professional purposes. We suggest that these activities be listed as "Guest Tours" and include gender neutral events such as a tour of a city's historic district, a museum tour, or a nature tour.

For most associations, the Supreme Court's decision will not necessitate major short term changes. If your association has been using good governance practices, you should be aware that associations cannot discriminate based on sexual preferences and you should have already modified your employment practices and your convention and meeting programs to eliminate gender specific discrimination.

*Long Term Affects*

The major effect of this opinion on associations will be with regards to advocacy efforts. The *Obergefell* decision was a five to four decision. The majority opinion written by Justice Kennedy argued that under both the Due Process clause of the 14th Amendment and the Equal Protection clause of the 14th Amendment, same sex marriages must be permitted by the states. Kennedy noted that the concept of marriage has evolved over the years as the status of women evolved from being subordinate to being equal partners. However, a commonality that has always been maintained is that the condition of marriage is a recognition of a permanent relationship basic to the strength of a family. According to the majority opinion, the Constitution guarantees that the people will be entitled to basic freedoms and one of those freedoms is the right to marry. This freedom cannot be denied based on the gender of the parties seeking to marry. The majority held that the right of people of the same sex to marry is not a new freedom but the extension of an old freedom that is protected by the Constitution. Justice Kennedy, with great passion, argued that it is the Supreme Court's obligation to preserve the rights of the people under the 14th Amendment.

Four Justices, led by Justice Roberts, dissented. However, all four of the dissenters wrote individual dissents. They argued that the majority was creating new law which the Court is not authorized to do. Under the concept of separation of powers, it is the legislative branch of the government, not 5 Justices of the Supreme Court, which is entitled to make laws. The dissenters also traced the history of marriage claiming that in all societies from the beginning of time until approximately 15 years ago, the definition of marriage involved a relationship between a man and a woman. If the people of the U.S. wanted to change that definition, they could do so through the legislative process. The minority pointed to the many instances in the past 15 years where state legislatures considered the question of same sex marriages and in certain instances passed laws recognizing the right of people of the same sex to marry under state law and in other cases, denying that right under state law. The dissenters chastised the majority for over stepping the authority of the Court and writing an opinion based on what the five Justices thought should be required under the law rather than what the law actually required.

In the week after the *Obergefell* decision, the Supreme Court issued a series of five to four decisions which highlight the serious split in the Court that seems in many ways, to mirror the split in the U.S. Congress.

For associations, the *Obergefell* decision indicates that the current majority of the Supreme Court will actively consider expanding old legal boundaries in light of new economic and social realities. The majority will be less inclined to follow old precedents and more willing to do what they think is right

based on the belief that the Constitution is a living document which provides the Court with some latitude. This brings into play the issue of what do the five Justices and indeed all nine Justices, think is "right." The dissenters all argued with great force that the Constitution did not give the Court the power to create law based on what the Justices thought was "right."

In recognition of the "expansionist" attitude of the majority, it appears that associations will see more litigation by liberal interests trying to open current legal restrictions. Associations which traditionally have had a conservative view will be called upon to get involved in this litigation to defend their positions.

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