

**IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA**

C. O'DARLING	:	
Petitioner/Appellant	:	
	:	
	:	
v.	:	No. DF-104107
	:	
	:	
S. O'DARLING	:	
Respondent/Appellee.	:	

**Concerning an Appeal from an Order Vacating Decree of Dissolution of Marriage and
Dismissing Petition for Dissolution of Marriage**

**(Appeal from Tulsa County District Court, No. FD-2006-2820,
Judge C. Michael Zacharias)**

Brief *Amicus Curiae* of the Becket Fund for Religious Liberty

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INTEREST OF *AMICUS CURIAE*

The Becket Fund for Religious Liberty is a nonpartisan, interfaith, public-interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of religious institutions to pursue their missions without excessive government regulation and entanglement.

The question presented in this appeal brings to the fore conflicts of law principles governing marriage. Although Oklahoma typically recognizes marriages contracted under the laws of another jurisdiction as valid here, comity principles are not absolute and this Court considers Oklahoma public policy in defining its boundaries. *See Bishop v. Oklahoma*, 447 F.Supp.2d 1239, 1248-1249 (N.D. Okla. 2006) (“the principle of comity applies in determining what effect a state [] will give to a foreign marriage and it is a discretionary decision.”); *see also Union Savings Ass’n v. Cummins*, 190 P. 869, 870 (Okla. 1920) (“comity [] does not require courts of this state to enforce a foreign contract which is repugnant to the public policy of this state.”). The Becket Fund’s *amicus* brief addresses a critical facet of this public policy question: the likely impact that a direct or indirect change to Oklahoma’s legal definition of “marriage” would have on religious liberty—an issue of paramount concern to this state.¹

¹ Indeed, Oklahoma’s protections for religious liberty significantly exceed those provided by the U.S. Constitution. *See N.H. v. Presbyterian Church U.S.A.*, 998 P.2d 592, 594 n.2 (Okla. 1999) (“The Free Exercise Clause of the First Amendment is applicable to the states through the Fourteenth Amendment. Oklahomans also have an additional guarantee of religious freedom. ‘Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship.’”) (quoting OKLA. CONST. ART. 1 § 2) (additional citation omitted.); *see also* OKLA. RELIGIOUS FREEDOM ACT, OKLA. STAT. tit. 51 § 251, *et seq.* (2001).

The Becket Fund has dedicated significant resources to the study of these issues in a neutral, academic manner. In December of 2005, we hosted a conference of noted First Amendment scholars from across the political and religious spectra to assess the religious freedom implications of legalized same-sex marriage, the ultimate result of which was an anthology of scholarly papers. Drafts are available online,² and final versions will soon be published by an academic press.

Although some of the scholars wholeheartedly support same-sex marriage and others oppose it, they all share one conclusion—changing the legal definition of “marriage” to include same-sex couples will create an unprecedented level of legal conflict under the Free Speech and Religion Clauses of the First Amendment. These conflicts will arise in manifold areas of law (such as public accommodation law, employment discrimination and employment benefits law, professional accreditation, government contracting, and many others) that routinely apply to a wide range of religious institutions (such as houses of worship, religious schools, religious hospitals, and other religious social service providers). Regardless of how these conflicts would ultimately be resolved, there can be no doubt that they would arise with great frequency if this Court (and others) were to take the step of expanding the legal definition of “marriage” to include couples that many religious groups cannot, in conscience, affirm or support as “married.”

Finally, *amicus* also submits its brief to counter the conclusory assertions of some legal activists who have claimed (and may claim before this honorable Court) that “the free exercise of religion is not constrained, but enhanced, by recognizing the civil right of marriage between same-sex partners.” See *Brief Amici Curiae of Iowa Faith Leaders et. al.*,

² See <http://www.becketfund.org/index.php/article/494.html>.

at 7 in *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. filed Jan. 29, 2007).³ That argument focuses exclusively on the unremarkable fact that legalizing same-sex marriage will not render traditional religious marriage ceremonies illegal. *Id.* at 8. This is plainly true and wholly uncontested, but this non-issue has nonetheless been raised in courts around the country to distract from the actual and numerous threats to religious freedom in other areas.⁴ Specifically, expanding legal marriage to include same-sex couples will trigger myriad government prohibitions and penalties against religious institutions that, as a matter of religious conscience, believe that marriage is limited to different-sex couples, and therefore cannot treat same-sex unions as morally equivalent.⁵

For all the above reasons, *amicus* believes that its brief *amicus curiae* will assist this Honorable Court in addressing important issues of public policy necessarily arising from this appeal.

³ See also Brief *Amici Curiae* of Certain Religious Organizations *et al.*, in *Kerrigan v. Comm'r of Pub. Health*, No. SC17716 (Md. filed Dec. 12, 2006) (making arguments identical to Iowa Faith Leaders' *amicus* brief).

⁴ As for the claim that legalizing same-sex marriage would “enhance” religious liberty, the activists cited above fail to identify a single burden to religious freedom that would be relieved by such a change. *Id.*

⁵ Notably, the signatories to those briefs consist exclusively of persons and groups that “support the dignity of loving, committed same-sex couples, and believe that same-sex couples should be permitted to enter civil marriage.” See Brief *Amici Curiae* of Iowa Faith Leaders at 8. These signatories, who have faced no threat to their religious liberty under the traditional legal definition of marriage, would face no greater threat if that definition changed since their theology *supports* same-sex marriage. But their brief ignores the many interests of religious groups (perhaps the majority) that theologically *oppose* same-sex marriage. And it is precisely those more traditional religious institutions whose religious liberty is threatened. One would hope that religious institutions that support same-sex marriage would nonetheless recognize and affirm the religious liberty of other religious institutions to hold a different view on that contested theological question without the risk of government sanction.

ARGUMENT

On November 18, 2003, the Massachusetts Supreme Judicial Court legalized same-sex marriage in that state in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003) and unleashed an unprecedented wave of legal and political controversy that has now spread to Oklahoma courts.⁶ *Amicus* writes now to explain how changing Oklahoma's legal definition of marriage would be contrary to Oklahoma public policy as it would threaten the religious liberty of people and groups who cannot, as a matter of religious conscience, treat same-sex and husband-wife marriage as moral equivalents, creating widespread church-state conflict as a result.

I. Legalizing Same-Sex Marriage Will Create the Risk of Civil Suits Against Religious Institutions That Refuse to Treat Legally Married Same-Sex Couples as Morally Equivalent to Husbands and Wives.

A. Religious institutions that reflect disapproval of same-sex marriage in their employment policies risk suits under employment anti-discrimination laws.

If current trends persist, religious institutions morally opposed to same-sex marriage will soon face the circumstance where one of their employees legally marries a same-sex partner. For many religious institutions, such a public act would represent a notorious repudiation of the institution's core religious beliefs. These employers may well terminate their relationship with employees out of a desire to stay faithful to their institution's moral and religious teachings, and to make clear that the institution does not condone certain

⁶ To date, every state high court that has considered the issue has refused to follow Massachusetts' lead. *See, e.g., Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (rejecting same-sex marriage as a constitutional right); *Hernandez v. Robles*, 7 N.Y.3d 338 (N.Y. 2006) (same). *See also Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (rejecting same-sex marriage as a constitutional right, but ordering legislative conferral of equivalent rights to same-sex couples); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (same).

behavior. Terminated persons, in turn, would be especially likely to sue under employment anti-discrimination statutes banning discrimination based on sex,⁷ and may use the example of other states to pursue theories based on marital status,⁸ and sexual orientation discrimination as well.⁹

While some religious employers may be willing to overlook or ignore an individual employee's same-sex marriage when making certain employment decisions, many would at the same time refuse, on religious grounds, to subsidize or otherwise treat *the union* as equivalent to husband-wife marriage when it comes to providing spousal benefits. If same-sex marriage is legalized, same-sex couples that were once denied spousal benefits (or had not yet requested them) would be expected to demand that their religious employers extend all spousal health and retirement benefits to their newly married partners in due course.

⁷ Oklahoma law bars discrimination in employment by sex under OKLA. STAT. tit. 25 § 1302. However, religious corporations are exempt from these provisions with respect to “work connected with . . . its religious activities.” *Id.* § 1307.

⁸ As of yet, Oklahoma statutes do not bar marital status discrimination in employment, *but cf.*, *McClure v. Sports & Health Club*, 370 N.W.2d 844 (Minn. 1985) (holding that employer illegally discriminated on the basis of marital status when it refused to hire unmarried cohabiting job applicants despite employer's sincere religious objections).

⁹ Other than as applied to the work of lawyers and judges, *see* OKLA. CODE JUD. COND. Can. 3, Oklahoma does not generally bar sexual orientation discrimination in employment. *But cf.*, *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212 (Cal. 2005) (private club that denied spousal benefits to domestic partners of club members engaged in impermissible marital status discrimination and may also be liable for sexual orientation discrimination); *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) (holding state employer's exclusion of same-sex couples from “spousal” health insurance benefits violated state constitution despite 1998 marriage amendment); *Catholic Charities of Maine v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity to either extend employee spousal benefit programs to registered same-sex couples or lose access to all city housing and community development funds).

Before *Goodridge*, courts generally did not require employers to extend benefits to same-sex partners absent specific language on the issue in state or municipal anti-discrimination statutes.¹⁰ But the reasoning in those cases suggests that, if marriage is redefined, decisions refusing to extend spousal benefits would be reconsidered. Religiously-affiliated employers may thereafter be automatically required to provide insurance to all legal “spouses”—both opposite-sex and same-sex—to comply with state and municipal laws that bar sex discrimination.

- B. *Religious institutions that refuse to extend housing benefits to same-sex couples on terms identical to those offered to husbands and wives risk suits under fair housing laws.*

Just as same-sex couples will seek employee benefits for their spouses from their religious employers, they will seek benefits from religious institutions in other contexts as well, such as housing. Religious colleges and universities frequently provide student housing and often give special priority, benefits, or subsidies to husbands and wives. However, conflict looms at those religious schools that oppose same-sex sexual conduct and will refuse in conscience to subsidize or otherwise condone homosexual cohabitation on their campus by extending housing benefits and services to same-sex couples, whatever the legal status of their unions.

¹⁰ See, e.g., *Lilly v. City of Minneapolis*, 1994 WL 315620 at *9 (Minn. Dist. Ct. 1994) (denial of government health insurance benefits to same-sex couples did not violate the Minnesota Human Rights Statute but “chang[ing] the marital status classification. . . . would have a great impact on employer benefit plans, which might have to cover homosexual partners.”).

In a handful of states, courts have forced landlords to facilitate the unmarried cohabitation of their tenants, over strong religious objections.¹¹ If *unmarried* couples cannot be discriminated against in housing due to marital status protections, legally *married* same-sex couples would have comparatively stronger protection, as public policy tends to favor and subsidize marriage as an institution.¹²

But one need not argue by analogy to see what lies in store for religious schools that will not accept homosexual cohabitation. The New York Court of Appeals decision in *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484 (N.Y. 2001), addressed the issue directly. In *Levin*, the court held that two lesbian students had stated a valid “disparate impact” claim of sexual-orientation discrimination after the university refused to provide married student housing benefits to unmarried same-sex couples.¹³ Thus, the right of religious universities to follow the beliefs they teach—particularly, to support and favor students that with husbands and wives—was already being challenged as illegally discriminatory before the parties sought recognition of same-sex marriage in this case. If this Court follows the reasoning of *Goodridge* and *Levin*, local bodies will be all the more likely to require religious schools to

¹¹ See *Smith v. Fair Employment & Housing Comm’n.*, 51 Cal. Rptr. 2d 700 (Cal. 1996) (finding no substantial burden of religion in forcing landlord to rent to unmarried couples despite sincere religious objections because landlord could avoid the burden by exiting the rental business). See also *Swanner v. Anchorage Equal Rights Comm’n.*, 874 P.2d 274 (Alaska 1994). But see *State by Cooper v. French*, 460 N.W.2d 2 (Minn.1990) (holding state constitutional protection of religious conscience exempted landlord from ban against marital status discrimination in housing).

¹² Oklahoma anti-discrimination law bars gender and familial status discrimination in housing, OKLA. STAT. tit. 25 § 1452, and provides no exemption for religious institutions from these restrictions. OKLA. STAT. tit. 25 § 1453 (providing exemption only from ban on discrimination by religion)

¹³ It does not appear that Yeshiva, a Jewish university, raised any religious liberty defenses.

violate their beliefs forcing them to subsidize and otherwise facilitate homosexual cohabitation.

C. *Religious institutions that refuse to extend their services or facilities to same-sex couples on terms identical to those offered to husbands and wives risk suits under public accommodation laws.*

From soup kitchens, to hospitals, to schools, to counseling, to marriage services, religious institutions provide a broad array of programs and facilities to their members and to the general public. Traditionally, religious institutions have enjoyed wide latitude in choosing what religiously-motivated services and facilities they will provide, and precisely to whom they will provide those services. However, changing the legal definition of marriage may require a reassessment of that understanding for two reasons.

First, states, like Oklahoma, have added sex as protected categories under public accommodations laws.¹⁴ Second, religious institutions and their related ministries are facing increased risk of being declared places of public accommodation, and thus being subject to legal regimes designed to regulate secular businesses. These two facts, when coupled with legalized same-sex marriage, would subject to widespread liability those ministries that refuse, for religious reasons, to provide identical services to married same-sex couples.¹⁵

This risk is especially acute for those religious institutions that have very open membership and service provision policies. Ironically, the more a religious institution seeks to minister to the general public (as opposed to coreligionists) out of religious impulse, the greater the risk that a service or facility will be regulated under public accommodation

¹⁴ See OKLA. STAT. tit. 25 § 1402.

¹⁵ A review of Oklahoma statutes has not revealed any religious exemptions to Oklahoma's ban on public accommodations discrimination.

statutes as a business “open to the public.” For example, in *Catholic Charities v. Superior Court of Sacramento*, 32 Cal. 4th 527 (2004), the California Supreme Court found that Catholic Charities was neither sufficiently staffed with co-religionists nor sufficiently inculcated religious values in its service provision to be exempt, for religious reasons, from laws requiring prescription contraception insurance coverage for its employees. In other words, an organization’s religious motivation for providing services that have secular counterparts is not enough to provide a religious-freedom defense to regulatory burdens, even if the organization has a religious identity such as being an “organ of the Catholic Church.” *Id.* at 539.

In addition to health care services, a few of the many religiously-motivated services that can potentially fall under this rubric include: marriage counseling, family counseling, soup kitchens, job training programs, day care, life coaching, schooling,¹⁶ adoption services,¹⁷ and even the use of wedding reception facilities.¹⁸ Of the numerous Oklahoma religious organizations that minister to the public in one or more of the ways mentioned

¹⁶ See *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (*en banc*) (holding that while the D.C. public accommodations statute did not require a Catholic university to give homosexual groups university “recognition,” it nevertheless required the university to allow them equivalent access to *all* university facilities.).

¹⁷ See *Butler v. Adoption Media*, 486 F.Supp.2d 1022 (N.D. Cal. 2007) (administrators of an Arizona adoption facilitation website found subject to California’s public accommodations statute because they refused, on religious grounds, to post profiles of same-sex couples as potential adoptive parents).

¹⁸ See *Harriet Bernstein et al., v. Ocean Grove Camp Meeting Assoc.*, No. PN34XB-03008 (NJ Dept. of Law and Public Safety, filed June 19, 2007) (seeking damages and injunction against religious organization that denied complainants use of wedding pavilion for civil union ceremony). See also *Smith v. Knights of Columbus*, 2005 B.C.H.R.T. 544 (British Columbia Human Rights Tribunal 2005) (fining Knights of Columbus for refusing to rent a hall for use for a same-sex couple’s wedding reception).

above, many simply want to avoid the appearance (and reality) of condoning or subsidizing same-sex marriage through their “family-based” services.¹⁹ Yet, it is possible that none of these institutions would be able to voice their religious objections to same-sex marriage in this way, because they risk being designated a public accommodation barred from discriminating on the basis of sex under Oklahoma law.

D. *Religious institutions that publicly express their religious disapproval of same-sex marriage risk hate-speech and hate-crime litigation.*

Suits under increasingly numerous state hate-crime laws are also potential avenues of civil or criminal liability for religious institutions that actively preach against homosexual marriage. General hate-crime statutes exist in at least 45 states²⁰ including Oklahoma.²¹ Of those, currently 32 states have added hate-crime laws referencing sexual orientation in recent years.²² If Oklahoma follows the national trend, ministers and preachers could conceivably face conspiracy or incitement suits under these laws if, after hearing a preacher’s strongly-worded (but non-violent) sermon against same-sex marriage, a congregant commits a hate crime against a person or business. This possibility, by itself, may chill controversial religious expression. Similarly, Oklahoma’s current civil ban on “incit[ing] . . . a person to engage in a discriminatory practice,” may likewise chill passionate preaching against same-

¹⁹ This is not to suggest that religious liberty interests have no limits. For example, a religiously-affiliated hospital should not be allowed to deny critical medical care to a person solely because they discover that the patient had at some point entered a same-sex marriage.

²⁰ See Human Rights Campaign, “State Hate Crimes Laws,” (2007) (available at http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19445) (last visited on August 20, 2007).

²¹ See OKLA. STAT. tit. 21 § 850

²² See *id.* This figure does not include the District of Columbia’s ban on sexual orientation-based hate crimes. *Id.*

sex marriage. *See* OKLA. STAT. tit. 25 § 1601. Some states have already taken the next step and banned sexual-orientation related hate speech *directly*, as in Massachusetts and Pennsylvania.²³ In fact, religious speakers have already been arrested (though not convicted) in Pennsylvania for the hate crime of peacefully opposing gay rights in public.²⁴ But even without statutory hate-speech prohibitions, suits over quintessentially religious speech opposing same-sex marriage are no longer conjectural in America.²⁵

²³ Pennsylvania's hate-crimes statute (18 PA. CONS. STAT. § 2710) bans "ethnic intimidation" (*i.e.*, hate-speech) on the basis of sexual orientation if the message is "motivated by hatred." Massachusetts' hate speech law (MASS. GEN. LAWS 151B § 4(4)(A)) makes it unlawful to "intimidate" another person in the "exercise or enjoyment" of the right to be free from sexual orientation discrimination in employment and housing, but currently exempts religious institutions, *see* MASS. GEN. LAWS 151B §§ 1(5), 4(18).

²⁴ In 2004, an organized group of Christians was arrested for "ethnic intimidation" under hate crimes laws for nonviolently protesting at a Philadelphia gay pride event, even though the event was open to the public and held on city streets and sidewalks. The criminal hate-crime charges against the protesters were eventually dismissed, as well as the protesters' subsequent civil suit against the city for violations of their civil rights. *See Startzell v. City of Philadelphia*, 2007 WL 172400, at *6 (E.D. Pa. 2007).

²⁵ In *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002), a church discovered that its youth minister had just had a civil commitment ceremony with her homosexual partner and responded by a series of parish discussions condemning the relationship and homosexual conduct generally as sinful, idolatrous, and incompatible with Scripture. The youth minister sued her church for sexual harassment in order to silence its religious speech.

II. Legalizing Same-Sex Marriage Will Create the Risk That Government Will Strip Its Benefits from Religious Institutions That Refuse to Treat Legally Married Same-Sex Couples as Morally Equivalent to Husbands and Wives.

As discussed above, legalizing same-sex marriage would generate extensive litigation over state anti-discrimination statutes that directly *regulate* religious institutions' marriage-related policies. But apart from this question awaits the controversy over whether governments may *withdraw* funding or access to government benefits from religious organizations they label as "discriminators" because of their long-standing opposition to same-sex marriage. Already, governments are arguing that law or public policy prevents them from providing government services to, or even associating with, such discriminatory religious organizations.

As discussed below, many government-funded programs require that fund recipients be organized "for the public good" or that they not act "contrary to public policy." Religious institutions that refuse to approve, subsidize, or perform state-sanctioned same-sex marriages could well be found to violate such general standards, and so lose their access to public fora, government funding, or tax exemptions. In states where courts and legislatures cannot force religious groups to accept same-sex marriage norms, revocation of special government benefits and accommodations may prove just as effective. The amount of government benefits at risk is large and only stands to grow in light of the increasing cooperation between faith-based organizations and state and federal governments through health, education, and "charitable choice" programs.

A. *Religious institutions that refuse to recognize same-sex marriages risk losing their traditional tax-exempt status.*

Since the overwhelming majority of religious institutions are tax-exempt, the potential exists for staggering financial loss from the revocation by government authorities—

potentially federal, but more likely state or local—of the tax-exemptions of religious institutions that refuse to affirm same-sex marriage. Activist efforts to punish objecting religious groups in this manner have not yet succeeded in court or at the ballot box, and are especially unlikely in the near future to succeed at the federal level. But if these targeted tax-revocations do eventually occur, First Amendment defenses to such attacks will likely be unavailing.²⁶

In *Bob Jones v. United States*, 461 U.S. 574 (1983), a religious university that banned interracial dating and marriage as part of its admissions policy lost its tax exemption, even though the policy stemmed directly from the school’s sincerely held religious beliefs. In affirming the IRS decision, and rejecting the school’s Free Exercise defense, the Supreme Court reasoned that

the Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.

Id. at 604. Where the political will supports it, legislative and executive acts will reflect the determination that houses of worship that hold fast to husband-wife marriage are, as in *Bob Jones*, “so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred,” and must therefore have their tax exemptions revoked. Although those institutions will be virtually defenseless in court under the First Amendment, taxing authorities need not go so far to instill conformity through fear. The

²⁶ “[P]rivate churches losing their tax exemptions for their opposition to homosexual marriages . . . are among the very dangers from the left against which I warned.” Richard A. Epstein, *Same-Sex Union Dispute: Right Now Mirrors Left*, WALL ST. J., July 28, 2004 at A13.

mere *threat* of losing tax-exempt status would compel many religious institutions to conform, rather than risk compromising so severely their ability to provide desperately needed social and spiritual services.

B. *Religious institutions that refuse to recognize same-sex marriages risk exclusion from competition for government-funded social service contracts.*

Even where houses of worship are not targeted as such, their religiously affiliated social service organizations could well be. As it stands, religious universities, charities and hospitals receive significant government funding, but that funding may one day be stripped away through lawsuits or the decisions of regulatory bodies.

In *Grove City College v. Bell*, 465 U.S. 555 (1984), a religious college was denied *all* federal student financial aid for failing to comply with Title IX's written anti-discrimination affirmation requirements, even though there was no evidence of actual discrimination.²⁷ Religious universities that reject same-sex marriage are open to similar funding attacks from state education agencies that choose to adopt an aggressive view of state law.²⁸

A related concern exists for religious institutions in the adoption context. Will state governments force religious institutions to place orphan children under the care of same-sex couples? It has already happened. In Massachusetts, Boston Catholic Charities, a large religious social-service organization, was forced out of the adoption business because it was forced to choose between placing foster children with homosexual couples (and violating its

²⁷ The U.S. Congress has since provided a legislative correction to the Department of Education's and the Supreme Court's application of Title IX. See CIVIL RIGHTS RESTORATION ACT OF 1987, 20 U.S.C. § 1687.

²⁸ OKLA. STAT. tit. 70 § 626.5 provides that "[s]tate tuition aid grants shall be awarded without regard to . . . sex."

religious convictions), or losing their state adoption agency license altogether.²⁹ In California, a lower court recently found administrators of an Arizona adoption facilitation website subject to *California's* public accommodations statute because they refused, as a matter of religious principle, to post profiles of same-sex couples as potential adoptive parents. *Butler v. Adoption Media*, 486 F.Supp.2d 1022 (N.D. Cal. 2007). As a result, the adoption site can no longer accept profiles from *any* California resident.³⁰

Finally, gay rights advocates have successfully fought and won legal battles by using municipal laws that require outsourced government service providers not to discriminate based on sexual orientation,³¹ and such efforts can be duplicated using a sex-discrimination theory as well. Cooperation with government service agencies—if done on or through houses of worship, religious hospitals, or religious schools—may run afoul of Oklahoma anti-sex discrimination laws if the houses of worship receive government funding and can be cast as government “contractors.”³²

²⁹ Patricia Wen, *Archdiocesan Agency Aids in Adoptions by Gays; Says it's Bound by Antibias Laws*, BOSTON GLOBE, October 22, 2005 (reporting on Catholic Charities having to “choose between its mission of helping the maximum number of foster children possible [hundreds of adoptions] and conforming to the Vatican’s position on homosexuality.”).

³⁰ See <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=4128> (last visited on August 20, 2007).

³¹ See, e.g., *Under 21 v. New York*, 126 Misc. 2d 629 (N.Y. Spec. Term 1984) (noting that funds cannot be used to support or encourage the discrimination on the basis of sexual orientation by others in the context of private providers of government services).

³² Oklahoma allows all government agencies to “terminate a contract” with parties found to have violated state anti-discrimination laws and to “refrain from entering into further contracts.” OKLA. STAT. tit. 25 § 1604

C. *Religious institutions that refuse to recognize same-sex marriages risk exclusion from government facilities and fora.*

Religious institutions will likely face challenges to their equal access to a diverse array of public subsidies on the one hand, and access to forums where they may freely discuss their religious beliefs on the other. A useful parallel is the retaliation that the Boy Scouts of America continue to face over their membership criteria. The Boy Scouts' controversial requirement—that members believe in God and not advocate for or engage in homosexual conduct—has resulted in numerous lawsuits by activists and municipalities seeking to deny the Boy Scouts *any* access to state benefits and public fora.

For example, the Boy Scouts had to fight to regain equal access to public after-school facilities,³³ and use of military resources for their annual Jamboree.³⁴ They appear to have *permanently* lost leases to city campgrounds,³⁵ a lease to a downtown headquarters building,³⁶ marina berths reserved for “public interest” groups,³⁷ and the right to participate in a state-facilitated charitable payroll deduction program.³⁸

³³ *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (preliminarily enjoining a school board from continuing to exclude the Boy Scouts from school facilities based on their negative views of homosexual conduct).

³⁴ *Winkler v. Gates*, 481 F.3d 977 (7th Cir. 2007) (vacating lower court Establishment Clause decision banning military loans of land and logistics for annual Scout Jamboree due to insufficient standing).

³⁵ *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (revoking use of publicly leased park land based to avoid violating the Establishment Clause based on the Scout's required belief in God), *question certified to state Supreme Court by Barnes-Wallace v. City of San Diego*, 471 F.3d 1038 (9th Cir. 2006).

³⁶ Joseph A. Slobodzian, *Council Votes to End City Lease with Boy Scouts*, PHILADELPHIA INQUIRER, June 1, 2007 at B1 (Noting city decision to evict Boy Scouts from their city-owned headquarters of 79 years due to their policy of excluding openly gay members).

Government ostracism of the Boy Scouts is merely a foretaste of what awaits religious organizations that persist in their traditional opposition to same-sex marriage, especially in jurisdictions where same-sex marriage is the law. These religious organizations will be forced to either change their policies and messages concerning same-sex marriage or risk an avalanche of lawsuits and municipal ordinances seeking their targeted exclusion from public privileges and benefits.³⁹

D. *Religious institutions that refuse to recognize same-sex marriages risk exclusion from the state function of licensing marriages.*

Religious institutions may soon face a stark choice: either abandon their religious principles regarding marriage, or be deprived of their ability to perform legally recognized ones. As courts push the civil definition of marriage into greater conflict with the common religious definition, controversy will inevitably grow over exactly *how* a civil marriage is solemnized, and exactly *who* can do the solemnizing.

If clergy act in the place of civil servants when legally marrying couples, they may soon be regulated just like civil servants. Vermont has already held that the free exercise rights of town clerks are not violated if they are fired for refusing to participate in the

³⁷ *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Scout's exclusion of atheist and openly gay members).

³⁸ *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state's workplace charitable contributions campaign for denying membership to the openly gay).

³⁹ *See, e.g., Catholic Charities of Maine v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity to either extend employee spousal benefit programs to registered same-sex couples, or lose access to all city housing and community development funds).

issuance of civil union licenses to same-sex couples for religious reasons.⁴⁰ And at least 12 dissenting Massachusetts justices of the peace have been forced to resign for refusing to perform same-sex marriages, despite the fact that they were perfectly willing and able to perform husband and wife marriages.⁴¹ Since clergy fulfill an important government function when legally solemnizing marriages, there may be a strong movement to strip all clergy who refuse to solemnize same-sex marriages of their authority to perform that civil function, over Free Exercise objections.

Some state legislation prohibits officials who conduct marriage ceremonies from discriminating in certain ways. The Texas Family Code, for example, forbids persons authorized to conduct a marriage ceremony – including clergy – “from discriminating on the basis of race.”⁴² Oklahoma’s marriage codes could easily be amended to follow the Texas model but also include a prohibition on discrimination by clergy based on sex or sexual orientation when solemnizing civil marriages.

CONCLUSION

In short, if this honorable Court directly or indirectly recognizes same-sex marriage as valid in Oklahoma, this state’s courts would face a wave of church-state litigation created by newly conflicting religious and legal definitions of “marriage;” if it does not, those new conflicts would not arise.

⁴⁰ *Brady v. Dean*, 173 Vt. 542, 547 (Vt. 2001).

⁴¹ Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004.

⁴² TEX. FAM. CODE § 2.205.

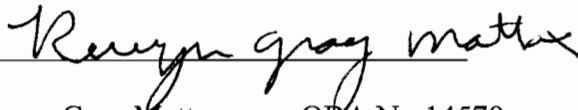
Respectfully submitted August 20, 2007,

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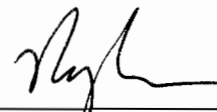
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I, Roger T. Severino, hereby certify that on the 20 day of August, 2007, a true and correct copy of the foregoing was served upon the following counsel by First Class Mail:

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