



# Faith and Law: Understanding Same-Sex Marriage and Transgender Law

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Featuring James A. Friedman,  
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# JAMES A. FRIEDMAN

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James A. Friedman is an attorney with extensive experience in insurance, reinsurance, and constitutional law.

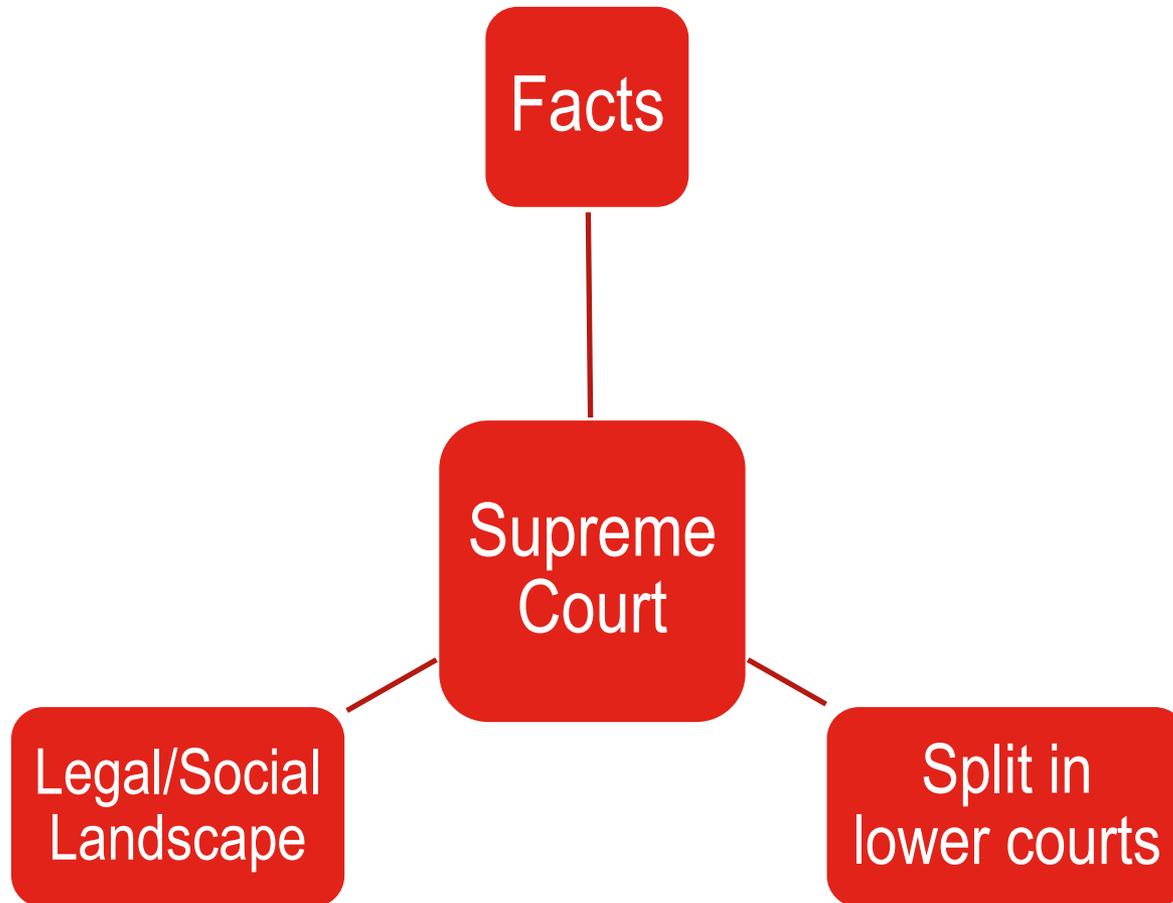
He is the leader of the Insurance & Reinsurance Working Group and a co-leader of the Litigation Team at the Madison, WI law office of Godfrey & Kahn, S.C.

He practices in the civil litigation area with an emphasis on insurance coverage, insurance liquidation and guaranty fund work, media law, and appellate litigation.



James earned his undergraduate degree from Georgia Tech. He graduated with honors from the University of Wisconsin Law School and he received a Master of Public Affairs from the University of Wisconsin.

# GETTING TO THE SUPREME COURT



# SUPREME COURT RULING 2015

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- Landmark 5-4 decision on June 26, 2015: *Obergefell v. Hodges*
  - Same-sex couples can marry nationwide
  - State law that limits this right is unconstitutional and void
- Affected 13 states that continued to define marriage solely as a union between one man and one woman

# SUPREME COURT RULING 2015

What the Court decided, and what it did not address:

<b>Decided</b>	<b>Did Not Address</b>
States are required to license marriages of same sex couples	Whether members of the clergy are required to perform same sex marriage ceremonies
States are required to recognize marriages of same sex couples that were licensed in other states	Effect on existing anti-discrimination or public accommodation laws
Contrary state laws are unconstitutional	Effect on insurance coverage for claims under those laws

# RULING RAISES QUESTIONS

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- Private vendors question ruling
  - Oregon baker
  - Washington florist
- Public officials decline to perform duties
  - Alabama Supreme Court Chief Justice Roy Moore
    - Ordered judges to not perform wedding ceremonies for same sex couples
  - Kentucky county clerk, Kim Davis
    - Refused to sign marriage licenses for same sex couples
  - Magistrates –Wyoming and North Carolina
    - Judges refused to perform wedding ceremonies for same sex couples

# CAN RULING BE OVERTURNED?

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- Could current President influence this? No.
  - Supreme Court is final arbiter on interpretation of the U.S. Constitution; only Supreme Court could change the law
  - Current Administration: “It’s law. It was settled in the Supreme Court”
- Could changes on Supreme Court influence this? Not likely.
  - Neil Gorsuch (replacing Justice Scalia who dissented)
  - Three Justices nearing retirement; but unlikely to do so soon

# KEY AREAS OF RISK

- Request to perform marriage ceremony for same-sex couples
- Breach of fiduciary duty
  - *Green v. Heritage Insurance*, 655 N.W.2d 147 (Wis. Ct. App. 2002)
- Use of facility or other services for same-sex marriage ceremony/reception; place of public accommodation
- Employment benefits for same-sex spouse
  - Texas Supreme Court to decide

# MARRIAGE EQUALITY UPDATE

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Some states are challenging the U.S. Supreme Court based on federalism/state's rights

- Tennessee Natural Marriage Defense Act
- Arkansas and North Carolina Bills to ban same-sex marriage
- Mississippi Religious Liberty Bill
  - Would provide protections against liability for discrimination based on religious beliefs

# MARRIAGE EQUALITY UPDATE

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Other jurisdictions have attempted to incorporate *Obergefell* by legislation

- Nevada
- Osage Indian Nation

# IN SUMMARY

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- The right of same sex couples to marry is the law
- It is unsettled whether same sex couples have a right to a religious marriage ceremony
- It is unsettled whether same sex couples have a right to use facilities and services for their weddings if the vendors object on religious grounds

# FAITH AND LAW: GENDER IDENTITY

# BACKGROUND

## Federal Law

- Title IX of the Education Amendments of 1972 prohibits sex discrimination in education
- President Obama interpreted Title IX to prohibit discrimination based on a student's gender identity
- Transgender student in Virginia, GG, sued his school board for the right to use the school bathrooms that aligned with his gender identity
- Several states sued the federal government over Obama Administration interpretation of Title IX

## State and Local Law

- Some states and municipalities have laws prohibiting discrimination based on gender identity (see *Fort Des Moines Church of Christ v. Jackson* challenging state statute and local ordinance)
- North Carolina statute (HB 2) required people to use bathrooms consistent with the sex identified on their birth certificate; Justice Department sued

# RECENT DEVELOPMENTS

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- Trump administration issued a new interpretation of Title IX, withdrawing the support of transgender students using the bathrooms corresponding with their gender identity
- The Justice Department withdrew its lawsuit against North Carolina (HB 2)
- The Supreme Court sent the Virginia case, GG, back to the Court of Appeals
- The states dropped their lawsuits against the federal government
- North Carolina partially repealed bathroom law

# REPERCUSSIONS

- More than 50 large corporations filed a brief supporting GG's challenge to his Virginia school district
- North Carolina lost nearly \$200,000,000 in revenue from cancelled conventions, concerts, and sporting events in 2016; the state was projected to lose more than a half a billion dollars by the end of 2017
- States backing off anti-transgender Bathroom Bills:
  - Montana
  - Tennessee
  - Arkansas
  - Texas
  - Pennsylvania
- Many businesses moving to single occupancy, unisex bathrooms; governments looking at similar legislation

# KEY AREAS OF RISK

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- Permitting transgender person to use bathroom of his/her choosing
- Prohibiting transgender person from using bathroom of his/her choosing
- Hiring/firing/disciplining employees based on transgender status
- Refusing to permit use of facilities by transgender persons

# RISK MANAGEMENT AND MITIGATION

- Be familiar with state and local discrimination laws
- 1<sup>st</sup> Amendment free exercise clause, RFRA (42 U.S.C. §§ 2000bb *et seq.*), *etc.*
  - See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014)
- Church may not be a place of public accommodation subject to certain discrimination laws
- Confirm bylaws, policies, *etc.*, consistent with church doctrine
- Enforce bylaws, policies, *etc.*, consistently
- Align use of facilities by members and/or non-members to bylaws, policies, *etc.*, consistently
- Document decisions and reasons
- Consult with your attorney and insurance professionals
- Insurance coverage

# FAITH and LAW

Insurance coverage is a solid risk mitigation strategy

- However, insurance coverage will not mitigate all risk

Every claim and coverage decision is unique

- Based on specific facts and specific policy language

Review all policies

- Multi-Peril/General Liability Coverage
- Professional Liability
  - Directors, Officers & Trustees Liability
  - Employment Practices Liability
- Legal Defense Coverage
- Umbrella Coverage

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#### Other Credits

James Friedman is the author of the chapter “Creative Strategies and Responses to Changes in Insurance Coverage Law” of the book *Inside the Minds: Recent Developments in Insurance Coverage Litigation*

Co-author of the chapter “Understanding Traditional and Non-Traditional Bad Faith Claims” of the book *Inside the Minds: Extracontractual Claims Against Insurers*

Co-Author of the article “State Constitutions: The Shopping Mall Cases” published in the 1998 *Wisconsin Law Rev*

