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OPINION

■ SAME-SEX MARRIAGE ■

Other rights are at stake

By *Anthony R. Picarello Jr.* SPECIAL TO THE NATIONAL LAW JOURNAL

IN THE DEBATE over same-sex marriage, only those in favor have been able to claim the civil rights mantle—so far.

Now that same-sex marriage has become the law in some jurisdictions, religious people and groups that refuse to recognize or perform gay marriages will run afoul of those laws. And these conscientious objectors will assert their First Amendment rights to free speech, freedom of association and free exercise of religion in support of their resistance.

The result will be lawsuits marked by competing claims of civil liberty: the right to same-sex marriage v. the right to religious freedom. The disputes, already emerging, fall into four categories.

First, as employers, educators and service providers, religious institutions often provide special benefits to married couples. But if those benefits aren't now extended to legally married gay couples, discrimination claims will soon follow. In Massachusetts, for example, which has had court-ordered same-sex marriage since May 17, Catholic colleges are examining whether the schools must now provide married-student housing to legally married gay couples. Must religious employers hire or retain employees who obtain same-sex marriages? Some religious groups have started discussing the possibility of discharging them.

Must religious employers extend health and retirement benefits to same-sex spouses? Now that Massachusetts and federal law define marriage differently, disputes over the notoriously mind-numbing topic of Employee Retirement Income Security Act pre-emption will suddenly grab headlines.

Second, resisting churches may face targeted exclusion from public facilities, public funding

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streams and other government benefits. The Boy Scouts' experience is illustrative. In *Boy Scouts v. Dale*, the U.S. Supreme Court upheld the Boy Scouts' First Amendment right to exclude openly gay men from leadership.

That decision prompted gay rights advocates to change tack by pressuring state and local governments to exclude the scouts from public benefits they have long enjoyed. As a result, scouts have been excluded from a charitable-giving payroll-deduction program in Connecticut, and from free access to a public mooring in Berkeley, Calif. Similar measures to exclude churches and other religious institutions are close behind.

For example, religious groups have already been excluded from public contracts. New York City has passed a law requiring any contractor doing more than \$100,000 in business with the city to extend health benefits to same-sex domestic partners. Groups such as the Salvation Army—which has provided the city with millions in contract services for the needy—will be excluded from participation in those contracts because of their religious convictions.

Third, churches have faced legal threats, of both direct liability and targeted withdrawal of benefits, for opposing gay marriage in their preaching. For example, the Internal Revenue Service has already been asked to revoke the tax-exempt status of the Catholic Diocese of Colorado Springs because its bishop recently taught that same-sex marriage is “inherently evil,” and that this value should inform Catholics' political choices.

A Montana gay rights group similarly complained to the state's Commission of Political Practices against a Baptist church because it showed congregants a video that advocated against same-sex marriage and urged them to petition for a state constitutional amendment supporting traditional marriage.

Pennsylvania's hate crimes law has been amended to add the crime of “harassment by

communication” and the impermissible motive of “sexual orientation.” As a result, hate crime prosecutions could be based on speech alone, and could include speech reflecting perceived “animus” against homosexuality—such as preaching against gay marriage. This isn't as far off as it may seem: Following similar cases in Europe, Canadian officials have recently used similar laws to target religious preaching against homosexual conduct as “hate speech.”

Licensing issues

Finally, objecting religious groups could be stripped of the marriage licensing function. A Massachusetts justice of the peace was forced to resign because she could not in good conscience perform same-sex marriages. What are the implications for priests, rabbis or other religious ministers who are also authorized by the state to witness legal marriages, but who object to performing gay marriages? It is, of course, exceedingly unlikely that local governments could ever force religious ministers to perform same-sex marriages. It is likely, however, that government could force a choice: Either agree (like all others who hold state authority to solemnize marriages legally) to perform gay marriages, or relinquish that authority.

In sum, making gay marriage a legal right will likely impose serious constraints on religious speech, assembly and worship; once gay marriage becomes the law, those who oppose it become outlaws. And as same-sex unions gain new legal rights, traditional religious adherents will be forced into a new struggle for civil rights: for the right to associate (or exclude) based on shared beliefs, the right to preach beliefs without the risk of government sanction and the right not to be disqualified from government benefits based on religious belief.

While the outcome is uncertain, the battle will certainly be rough and, indeed, has already been joined. **NLJ**