Idaho City Backs Down In Dispute With Ministers Over Same-Sex Marriage

By Doug Mataconis
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Last week, I noted that a couple in Coeur d.Alene, Idaho had filed a suit against the city due to threats from the city that it would apply the city's anti-discrimination law to them and their business, a wedding chapel, if they refused to perform same-sex wedding ceremonies now that such marriages are legal under Idaho law. As I said at the time, it appeared that the couple had a strong case based on the facts presented in the case, and the post generated a long and contentious comment thread. Now, it appears that the case is over as Boise State Public Radio's Jessica Robinson is reporting that the City Attorney for Coeur D'Alene has announced that it will not pursue any case against either the Knapps or their business for refusal to perform same-sex wedding ceremonies:

The city of Coeur d'Alene, Idaho, said a for-profit wedding chapel owned by two ministers doesn't have to perform same-sex marriages.

The city has been embroiled in controversy ever since the owners of the Hitching Post sued the city. They say a city anti-discrimination law threatened to force them to marry same-sex couples now that gay marriage is legal in Idaho.

The story lit up conservative and gay-rights blogs. Wedding chapel owners Donald and Evelyn Knapp said they feared jail time or fines if they declined marriage services to a same-sex couple.

Initially, the city said its anti-discrimination law did apply to the Hitching Post, since it is a commercial business. Earlier this week, Coeur d'Alene city attorney Mike Gridley sent a letter to the Knapps' attorneys at the Alliance Defending Freedom saying the Hitching Post would have to become a not-for-profit to be exempt.

But Gridley said after further review, he determined the ordinance doesn't specify non-profit or for-profit.

In addition, the organization that helped draft the city's anti-discrimination law, the Kootenai County Task Force on Human Relations, said the following about the the case in a letter to the city:

As the initiator of the proposed ordinance beginning on February 4, 2013, we were and continue to be committed to its purpose and enforcement in preventing discrimination that targets this particular minority in our community. We commend the Coeur d'Alene City Council for meeting their constitutional and moral responsibilities on June 4, 2013 with the adoption of this ordinance removing the second-class status of this sexual minority.
It has always been our position that the ordinance would exempt religious institutions recognizing their First Amendment rights when it comes to establishing facilities or sanctuaries where they conduct religious services, practice their faith, study and advocate their religious tenants, hire and supervise the employees for example at their church, temple, synagogue, or mosque. They are also free to establish and operate a religious school for their families. We respect and defend those religious freedoms.
Having said that, we oppose the argument that one can use one's religious beliefs to discriminate against, for example a sexual minority, in the public secular arena in housing, businesses/employment and public accommodations. For government to allow such exceptions based on religious grounds, would literally open the door to all forms of discrimination in violation of the U. S. Constitution's Fourteenth Amendment.
We find the question of the Hitching Post Chapel and the city ordinance a more complex question. That being the case, we have spent the past few days in discussion with some prominent national organizations and constitutional lawyers.

The facts seem to be that there are two ordained ministers solely providing a service limited to wedding ceremonies at the Hitching Post Chapel.

With these facts in mind, we received the following opinion and advice from our constitutional experts:

"When they are performing a religious activity like marrying people, ministers performing marriages. So, if the only service offered is a religious wedding ceremony performed by a minister, then the law would not apply. But that reasonable exception doesn't change the general rule that businesses that open their doors to the public to provide services, including services related to weddings, cannot turn people away just because of who they are."

Based upon these facts and findings, we believe the City of Coeur d'Alene Anti-Discrimination Ordinance due to the religious exemption is not at issue and is not impacted regarding performing weddings by ordained ministers at the Hitching Post Chapel in Coeur d'Alene.have the right to choose which marriages they will solemnize. That's why we don't think the public accommodation law applies to ministers making choices about

This news came after several developments in the case that arguably favored both sides of the argument and, to some extent at least, cast some doubt on the legal claims that were raised in the Complaint filed on behalf of the Knapps. For example as Walter Olson noted on his blog Overlawyered, it appears that the Knapps had only recently organized the Hitching Post as a Limited Liability Company with an explicitly religious mission and, around the same time, had removed from the business's website language indicating that they performed both religious and non-religious wedding ceremonies. To no small degree, of course, this news cuts into the argument that the Complaint makes that the business, although being a for-profit operation, had

an exclusively religious mission and made it appear as if the Knapps had taken steps to strengthen their case against the city prior to filing the suit. If that was the case, though, it was a move that wasn't exactly done in the quietest manner possible. If all of this was done to help strentghen a lawsuit that they had been planning for some time, then it would have at least looked better had it been done months ago, after Idaho's same-sex marriage ban was initially struck down by a Federal District Court Judge for example, rather than barely a month before the lawsuit was filed. Additionally, I'm not certain that the fact that such changes were made would have been dispositive in the case that the Knapps had filed. As the sole owners of the business, they are free to change their business plans and policies at any time, and while the timing of the change would have arguably gone to their credibility at trial, in and of itself it's unlikely that it would have defeated their claim.

The other major development in the case came on Wednesday when the City Attorney said in a letter that it was his position that even the reorganized Hitching Post would still be covered by the city's anti-discrimination law, because the exemption in the law only applies, in his legal opinion, to not-for-profit religious corporations. Importantly, the letter is silent as to the City's position regarding Mr. and Mrs. Knapp and whether they personally would be required to perform ceremonies under the law or whether they would simply be required to make their facilities and its amenities available to such ceremonies performed by outside officiants. As I noted in my initial post on this subject, it strikes me that this is an important distinction because, regardless of what one thinks about whether or not The Hitching Post, L.L.C. has rights under the First Amendment or Idaho's Religious Freedom Restoration Act, the idea of requiring an ordained minister to perform even a non-religious ceremony would violate the law notwithstanding the business's for-profit status. Additionally, as Eugene Volokh observed, this interpretation of the law raised some serious questions:

Under the same logic, a minister who officiated at weddings on the side, for a fee, could also be required to conduct same-sex ceremonies. The particular Coeur d'Alene ordinance might not apply to such an itinerant officiant, since it covers only "place[s]," and that might be limited to brick-and-mortar establishments; but similar ordinances in other places cover any "establishment," and if a wedding photography service is an "establishment" then a minister who routinely takes officiating commissions would be covered as well.

This strikes me as inconsistent with the Free Speech Clause and the Idaho RFRA, for the reasons I mentioned in my earlier post. Let me focus here on the Free Speech Clause: The Supreme Court held, in upholding a person's right to tape over a slogan on a license plate, that,

[T]he proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education v. Barnette*, 319 U.S. 624, 633-634 (1943) [the case securing a right not to salute the flag -EV]. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." This is illustrated by the recent case of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where we held unconstitutional a

Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized.

The same, I think, applies here. The First Amendment protects the right to speak the words in a wedding ceremony — words that have deep meaning to many officiants as well as to the parties — and the right to refrain from speaking the words.

Reason's Scott Shackelford makes a similar point, and also points out what this case is distinguishable from those involving other for-profit businesses that are generally open to the public:

The reasons why the Knapps don't want to marry any couple and their status as a profit or a non-profit or whether they also offered civil ceremonies should not matter. The only thing that should matter is that they didn't want to marry a couple for whatever reason they declared.

Why? Because the idea that a wedding ceremony is a public accommodation is absolutely absurd. Is there a service that is any less of a public accommodation than an actual wedding ceremony? The whole idea of a public accommodation laws (and don't read this as a general endorsement) is that the identity of the customer is irrelevant to the business transaction. A business operator's opinions on race or religion should have no reason to come into play when selling somebody gum or a hamburger or a ticket to see a movie. But a wedding is literally hiring somebody to tell you that you and your partner are awesome and are going to be happy and to enjoy life. A wedding ceremony is *literally speech*. The actual marriage certification process with the state is something else entirely. Marriage is a right. A wedding ceremony is not.

Shackelford and Volokh are largely correct, of course. Even accepting the legitimacy of public accommodation laws and the idea that the idea of expanding them to cover discrimination based on sexual orientation, there is something unique and different about a wedding ceremony conducted by an ordained minister. Even if that ceremony is not religious in nature in and of itself, the fact that it is being performed by a minister means that the law needs to take into consideration the religious beliefs of the individuals that would be impacted by it. After all, as Volokh notes, to interpret it otherwise would mean that any minister who performs a ceremony for a small stipend would potentially be covered by such a law, and that would clearly run afoul of both the Idaho version of the Religious Freedom Restoration Act, which mirrors the Federal Law at issue in the *Hobby Lobby* case, and the First Amendment itself. In either case, forcing the minister to perform the ceremony notwithstanding any doctrinal objections they may have to do so would impose a substantial burden on their religious liberty More importantly, such compulsion would not be accomplishing the state's goal of promoting equal access to a public accommodation in the least intrusive means possible. In fact, such compulsion would be highly intrusive, and the fact that there are other ministers, as well as non-ministers who are authorized by law to perform civil ceremonies would mean that there would be not be any rational reason to allow the state to force a minister to do something that violates their religious beliefs.

This would seem to be the end of this case. There are some reports that at least one couple has complained about the Hitching Post's policies, however the law at issue her does not provide for a private cause of action and, since the city is saying they are not going to pursue any action

against either the Knapps or the Hitching Post, there doesn't appear to be anything further to say about this particular case. That being said, this is hardly the end of this particular issue. We have already seen, in states such as New Mexico, Colorado, and New York, examples of businesses owner by people who claimed to have a religious objection to same-sex marriage facing charges under an anti-discrimination law. Some of those cases, it strikes me, may be stronger than others, For example, the case involving the New Mexico photographer raised First Amendment issues that were not addressed in any of the litigation but which seem to me to be quite strong. By contrast, the claims of a baker, florist, or someone who rents out their property for weddings or receptions without regard to the religious affiliation. That being said, with same-sex marriage now legal in a majority of the states, and the rest of the country likely soon to follow, these are issues that are likely to be making their way through the court system, and become a point of contention politically, for some time to come.