Written by **Warren Mass** on September 11, 2015

North Carolina Magistrates Refuse Same-sex "Marriages"

Four magistrates in McDowell County, North Carolina — Hilary Hollifield, Thomas Atkinson, Debbie Terrell and Chad Johnson — have exercised their rights under a state law passed in June that that allows court officials to refuse to perform same-sex "marriages" because of conflict with their religious beliefs.

Chief District Judge Randy Pool confirmed to WLOS-TV News 13 in Ashville, North Carolina, on September 10:

> Every single one has said they will opt out and won't do the marriages. They have arranged for Rutherford County magistrates to devote ten hours to performing marriages here. They are following the law and cannot perform marriages of any kind for six months, just as long as we do ten hours a week, which is what the law requires.

WLOS reported that there are 32 magistrates across North Carolina who have taken advantage of the new law to recuse themselves from performing all marriages.

The law, which was passed by both houses of the state legislature over Governor Pat McCrory's veto, requires the chief District Court judge in the region to make provisions for substitute magistrates to preside over marriages if no magistrates are available because of recusals. If the judge deems it necessary to accomplish this objective, he or she can assign magistrates from other counties within the geographic region. In this case, magistrates from neighboring Rutherford County come to Pool's office three afternoons a week to perform marriages.

North Carolina is not the only state where legal protections exist to protect the religious convictions of those whose refuse to perform same-sex "marriage" because it violates their beliefs. Such protections were deemed necessary after the Supreme Court's June 26 decision in *Obergefell v. Hodges*, which struck down state laws affirming marriage as being only between one man and one woman.

Kansas Governor Sam Brownback issued an executive order on July 7 that prohibits the state government from taking any action against any individual clergy, religious leader, or religious organization that "acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman."

Texas Governor Greg Abbott issued a similar memo on June 26 to all agency heads in his state, granting state employees who object on moral grounds to same-sex marriage some protection against the federally mandated requirements concerning marriage. Abbott's memo stated: "All state agency heads should ensure that no one acting on behalf of their agency takes any adverse action against any person, as defined in Chapter 311 of the Texas Government Code, on account of the person's act or refusal to act that is substantially motivated by sincere religious belief."

The county official who received the greatest national attention for refusing to perform same-sex marriage after *Obergefell v. Hodges* was Rowan County, Kentucky clerk Kim Davis, who stopped issuing all marriage licenses after the decision was handed down. This led two homosexual and two

heterosexual couples to sue her, and U.S. District Judge David Bunning then ordered Davis to issue the licenses.

Davis, explaining that she believes that same-sex marriage is a sin, and that it would also be a sin for her to issue a marriage license to a same-sex couple, told the judge that "God's moral law conflicts with my job duties."

After she persisted in refusing to issue those licenses, the judge subsequently jailed her for contempt of court. She stayed there for five days.

After her case received national attention and sympathizers staged demonstrations outside the jail where she was being held, Bunning lifted his own contempt of court order against Davis on September 8, but warned he would send her back to jail should she interfere with the issuance of marriage licenses by her deputies.

In standing firm by refusing to issue same-sex marriage licenses, Davis followed not only her religious beliefs, but Kentucky state law, which she took an oath to uphold when she took her position. In 2004, 75 percent of the voters in Kentucky gave approval to amending the state's constitution, making it unconstitutional for the state to recognize or perform a same-sex marriage. The amended constitution reads: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky." Consequently, Davis was simply following her oath of office.

Should the five justices who wrote the majority opinion in *Obergefell v. Hodges* have the right to overrule state law? In their dissent, Justice Antonin Scalia said the opinion was "lacking even a thin veneer of law." Justice Samuel Alito said, "The Constitution leaves that question to be decided by the people of each State," and Chief Justice John Roberts wrote that the "court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us."

Indeed it should not, since marriage is not mentioned anywhere in the Constitution and the 10th Amendment quite plainly states that powers not delegated to the federal government are reserved to the states or the people.

While legal action such as North Carolina's law, Kansas Governor Brownback's executive order, and Texas Governor Abbott's executive memo offer some relief to conscientious objectors to the court's decision, a more promising solution in the long run is nullification. The concept of nullification was supported by no less an authority on the Constitution than Thomas Jefferson, who stated in the Kentucky Resolutions:

> That the several states who formed that instrument [the Constitution], being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy.

One of the strongest statements suggesting nullification came from former House Majority Leader Tom DeLay (R-Texas), who said on Newsmax TV's *The Steve Malzberg Show* shortly before the High Court handed down its decision that the states should ignore any Supreme Court ruling in favor of same-sex marriage.

DeLay proposed: "… If the states would just invoke the 10th Amendment and assert their sovereignty, they can defy a ruling by the Supreme Court. It's in the Constitution. We can tell the court what cases they can hear."

What DeLay described regarding telling the federal courts which cases they can hear is governed not by the 10th Amendment, which protects the sovereignty of the states, but by Article III, Section 2 of the Constitution, which gives Congress the power to make exceptions to and regulate the jurisdiction of the federal courts.

Invoking such power made more practical sense when DeLay mentioned it prior to *Obergefell v. Hodges* being decided. Now that the court has ruled, it would be difficult to rescind its jurisdiction to decide on marriage cases retroactively. However it is not too late to use the other tool that DeLay recommended, the 10th Amendment, to which Justice Alito alluded when he said, "The Constitution leaves that question to be decided by the people of each State."

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