Written by **Warren Mass** on June 29, 2015

Texas AG: "Reach of Court's Opinion Stops at the Door of the First Amendment"

Texas Attorney General Ken Paxton (shown) released a statement on June 28 offering guidance to Texas public officials who seek to reconcile adhering to their religious beliefs with upholding the law following the Supreme Court's decision in *Obergefell v. Hodges*, mandating recognition of same-sex marriage in all 50 states.

In a summary of his opinion, the full text of which was written as a memo to Lieutenant Governor Dan Patrick, Paxton stated that the Supreme Court had "ignored the text and spirit of the Constitution to manufacture a right that simply does not exist" and had "weakened itself and weakened the rule of law."

Paxton spoke of the confusion stemming from the High Court's' ruling and that "hundreds of Texas public officials are seeking guidance on how to implement what amounts to a lawless decision by an activist Court while adhering both to their respective faiths and their responsibility to uphold and defend the U.S. Constitution." He noted that immediately following *Obergefell v. Hodges*, the U.S. District Court for the Western District of Texas issued an injunction against the enforcement of Texas marriage laws that define marriage as one man and one woman and that county clerks and justices of the peace were effectively banned from enforcing those laws. However, noted Paxton, "despite the injunction, there is not a court order in place in Texas to issue any particular license whatsoever."

Furthermore, said Paxton, "the reach of the Court's opinion stops at the door of the First Amendment and our laws protecting religious liberty."

In response to a question that Patrick had asked in advance of the High Court's ruling — whether, in the event the Texas definition of marriage is overturned, state officials such as county clerks, justices of the peace, and judges may refuse to issue same-sex marriage licenses, or conduct same-sex marriage ceremonies if doing so would violate their religious beliefs — Paxton replied,

> In recognizing a constitutional right to same-sex marriage, the Supreme Court acknowledged the continuing vitality of the religious liberties people continue to possess. *Id*., slip op. at 27 ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."). In recognizing a new constitutional right in 2015, the Supreme Court did not diminish, overrule, or call into question the rights of religious liberty that formed the first freedom in the Bill of Rights in 1791. This newly minted federal constitutional right to same-sex marriage can and should peaceably coexist with longstanding constitutional and statutory rights, including the rights

to free exercise of religion and freedom of speech.

This opinion concludes:

• County clerks and their employees retain religious freedoms that may allow accommodation of their religious objections to issuing same-sex marriage licenses. The strength of any such claim depends on the particular facts of each case.

• Justices of the peace and judges similarly retain religious freedoms, and may claim that the government cannot force them to conduct same-sex wedding ceremonies over their religious objections, when other authorized individuals have no objection, because it is not the least restrictive means of the government ensuring the ceremonies occur. The strength of any such claim depends on the particular facts of each case.

That quote from *Obergefell v. Hodges* seems plain enough that Paxton feels comfortable in advising Texas authorities that they should stand fast in defending their religious liberty. Of course, when federal judges get involved in interpreting the law, all bets are off.

Naturally, homosexual rights groups disagree with Paxton. Shannon Minter, legal director for the National Center for Lesbian Rights, said in response:

> Public officials have no constitutional or statutory right to discriminate in providing public services. This opinion is wrong on the law, and it does a disservice to officials who need clear, reliable guidance about their duty to follow the law and to provide marriage licenses to all qualified couples.

Minter's statement demonstrates the selectivity with which those advocating for preferential "rights," choose to deny others even more fundamental long-standing rights. As we noted, *Obergefell v. Hodges* itself acknowledges that county clerks and their employees and justices of the peace can retain religious freedoms despite the ruling.

Texas Governor Greg Abbott wrote a memo on June 26 making the same point, stating that "despite the Supreme Court's rulings, Texans' fundamental right to religious liberty remains protected." In his memo to all state agency heads, Abbott cited the First Amendment to the U.S. Constitution; Article I of the Texas Constitution, which provides that "[n]o human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion"; and Chapter 110 of the Texas Civil Practice and Remedies Code (referred to as the Texas Religious Freedom Restoration Act), which provides that the state of Texas, its agencies, its political subdivisions, and municipalities "may not substantially burden a person's free exercise of religion" unless the agency can prove that the burden "is in furtherance of a compelling governmental interest … and is the least restrictive means of furthering that interest."

Abbott wrote in his memo:

> Texans of all faiths must be absolutely secure in the knowledge that their religious freedom is beyond the reach of government. Renewing and reinforcing that promise is all the more important in light of the Supreme Court's decision in *Obergefell v. Hodges*.

Again citing the First Amendment, Article I of the Texas Constitution, and the Texas Religious Freedom Restoration Act, Abbot ordered that "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."

Before *Obergefell v. Hodges*, 14 states prohibited same-sex marriage. It remains to be seen if the governors and attorneys general in those states will defend the religious freedom of their citizens as vigorously as Governor Abbott and Attorney General Paxton.

Photo of Texas Attorney General Ken Paxton: AP Images

Warren Mass writes from Texas.

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