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Anti-Gay Wedding Venue's First Amendment Claims Advance

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BY ARTHUR S. LEONARD



Stephen Tennes, with his family, is trying to protect his right to participate in the farmer's market in East Lansing, Michigan, even while his nearby farm discriminates against same-sex couples wishing to avail themselves of the venue's wedding services. | ALLIANCE DEFENDING FREEDOM

A federal judge in Michigan has refused to dismiss a farmer's lawsuit claiming he was unconstitutionally excluded from participating in a farmer's market because of his policy against allowing same-sex couples to marry on his farm, which also serves as a popular wedding venue.

The case presents an unusual example of "extraterritorial" application of a city's anti-discrimination law.

Stephen Tennes is the proprietor of Country Mill Farms, LLC, in Charlotte, Michigan, about 22 miles from East Lansing. He operates a working farm that hosts weddings in its orchard.

Country Mill started participating in East Lansing's farmer's market in 2011 and did so through the 2016 season. However, in 2014, Tennes turned down two women who wanted to have their wedding in his orchard. His religious beliefs, he said, are opposed to same-sex marriage and "promoting and participating" in a same-sex wedding would violate those beliefs. He referred the women to another orchard in the area that also hosted weddings, and he thought that was the end of the matter.

Proprietor barred from farmer's market by local bias ordinance finds sympathetic US judge

But, according to a November 16 opinion by District Judge Paul L. Maloney, one of the women on August 22 of last year posted a message on Facebook "discouraging people from patronizing Country Mill because Tennes had declined to host her wedding."

That posting quickly came to Tennes' attention. Two days later, he posted a statement about his religious beliefs on Facebook, expressing the view that marriage is a "sacramental union between one man and one woman" and that he honored this belief by hosting and participating in different-sex weddings on his farm. He said he would refer requests for same-sex weddings to another orchard in the area that was happy to host them.

Two days later, Tennes claims, he received a phone call from the East Lansing Parks and Recreation director asking that Country Mill not attend the scheduled farmer's market on August 28. Then, Tennes said, "under pressure from the city," he decided to temporarily stop booking any weddings at Country Mill, posting his decision on Facebook and informing East Lansing officials, as well. The city did not rescind its request that he refrain from participating in the farmer's market, but he continued to attend for the remainder of the season.

Last December 16, Tennes posted a lengthier statement of policy on the farm's Facebook page, explaining his belief that his business has a First Amendment right to "express and act upon its beliefs."

Around the same time, East Lansing amended the vendor guidelines governing the farmer's market to require that all participants comply with the city's civil rights ordinance and public policy against discrimination "while at the Farmer's Market and as a general business practice." Since Country Mill could not attest to that on its vendor license application, it was formally excluded from the 2017 farmer's market, prompting this lawsuit. In a letter to Tennes, the city referred to his December 16 Facebook post to explain why it rejected his application.

Country Mill is outside the East Lansing city limits, so it is not formally subject to its civil rights laws, and because the state of Michigan does not ban sexual orientation discrimination by places of public accommodation, same-sex couples denied access to the farm for their marriage have no legal recourse. (Interestingly, the East Lansing ban on sexual orientation discrimination was one of the earliest to be enacted in the US — dating back to 1972 — and now protects all LGBTQ people.)

Tennes filed a multi-count complaint in federal court, alleging speech and religion violations of the First Amendment and due process and equal protection violations of the 14th Amendment. The city filed a motion to dismiss the complaint in its entirety, pointing to numerous decisions by courts in many states that have rejected claims by businesses that they have a constitutional right to refuse wedding-related services to same-sex couples.

But this is an unusual case, and Judge Maloney found those decisions to be relevant to some of Tennes' claims but not to others.

Maloney allowed Tennes to pursue a challenge under the First Amendment, focusing on provisions of the ordinance that on their face could be characterized as "content and viewpoint

speech regulation,” noting particularly the anti-harassment provisions, which broadly sweep in activities including printing and publishing “certain statements and signs based on their content.” Maloney found that at this early stage of the litigation, the city “has not articulated a compelling reason” to dismiss this facial challenge.

The judge also found that the city had not “identified an ultimately persuasive reason” for dismissing Tennes’ claim that the ordinance was overly broad by defining “harassment” to “include communication, not just conduct.”

“The ordinance would be implicated by negative statements made by [farmer’s market] vendors against same-sex couples and interracial couples and negative statements against evangelical Christians and Muslims, to name a few verboten topics,” wrote Maloney. “The statements would be communicative. The statements could be demeaning. The statements would have the effect of making the ELFM [East Lansing Farmer’s Market] a hostile or intimidating environment. And, the statements would implicate characteristics listed in the Ordinance.” The city’s contention that the ordinance only regulated conduct, not speech, then, in Maloney’s view, was not correct, and the ordinance could have a “chilling effect” on constitutionally protected speech.

However, Maloney agreed with the city that the argument about East Lansing’s ordinance being overbroad did not apply to the ban on discrimination by public accommodations. This, the judge found, was aimed only at prohibited conduct, not speech. He noted that although the ordinance also prohibited statements of discriminatory policy, this was merely an incidental burden on speech, intended to enforce the ban on discriminatory conduct, and as such is not protected by the First Amendment.

Still, he refused to dismiss Tennes’ claim he had suffered unconstitutional retaliation in response to his constitutionally protected publication on Facebook of his views concerning same-sex marriage.

Perhaps more significantly, Maloney was open to Tennes’ claim that the city’s enforcement of vendor guidelines to exclude him from participating in the farmer’s market could plausibly be a violation of the Free Exercise Clause of the First Amendment. Though the requirement that applicants signify their compliance with the city’s nondiscrimination ordinance appears on its face to be neutral and not to be targeting religion, Maloney focused on the fact that it was adopted in reaction to Tennes’ Facebook post last December.

Maloney wrote, “After the City learned that Plaintiffs would not hold same-sex weddings on their farm because of Plaintiffs’ religious beliefs, the City amended the Vendor Guidelines to incorporate the neutral and generally applicable law and applied it to Plaintiffs. As pled, the City’s action is a ‘veiled cover for targeting belief or a faith-based practice.’”

He also found that Tennes’ complaint states a potentially viable claim under the Establishment Clause.

“The facts in the complaint allow the Court to infer that the predominant purpose of the changes to the Vendor Guidelines was motivated by the disapproval of Plaintiffs’ religious beliefs,” Maloney wrote. “Specifically, the changes to the Vendor Guidelines were intended to target Plaintiffs’ religiously-motivated choices.”

The judge rejected Tennes’ claim that East Lansing had violated its home rule powers by attempting to enforce its anti-discrimination ordinance against a business that was not located within the city.

The court, then, while dismissing several of Tennes' claims, left standing much of his complaint. Summarizing his holding, Maloney wrote, "Assuming the allegations are true, the sequence of events permits the inference that the City targeted Tennes' speech and religious beliefs and, therefore, most of Plaintiff's claims are plausible" and should not be dismissed at this early stage in the litigation.

This case arises under an unusual set of facts, and does not necessarily pose a danger to the enforcement of local ordinances that effectively forbid discrimination against same-sex couples by businesses that provide wedding-related goods and services. But it does challenge, with potential success, an attempt by a city to act consistently with its anti-discrimination policy to deny participation in municipal activities to businesses that engage in their discriminatory conduct outside the city limits, especially when that exclusion is based on the business' expression of policy inconsistent with the city's anti-discrimination policy.

Maloney was appointed to the court in 2007 by President George W. Bush.

Tennes is represented by Alliance Defending Freedom, an anti-LGBTQ litigation organization.

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