



## LEGAL MEMORANDUM

TO: Government Officials Involved in the Issuance of Marriage Licenses or the Solemnization of Marriages

DATE: July 3, 2015

RE: Rights of Conscience Pertaining to the Issuance of Marriage Licenses and the Solemnization of Marriage Ceremonies

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On June 26, 2015, the U.S. Supreme Court held in *Obergefell v. Hodges* that the federal Constitution includes the right to marry a person of the same sex. All states across the country are now prohibited from enforcing their laws that define marriage as the union of one man and one woman.

State and local government officials like county clerks and their employees, registrars, judges, justices of the peace, and magistrate judges might believe that they now face a serious dilemma: either resign their positions or compromise their faith by issuing marriage licenses or solemnizing marriages under circumstances that conflict with their sincerely held religious beliefs. But such government officials, as explained herein, have constitutional and statutory protections that oftentimes enable them to successfully resolve this potential conflict.

The American experience represents a 200-year history of successfully balancing a variety of religious beliefs with other important legal and social interests. That experience has produced over 2,000 state and federal laws that protect the free exercise of religion without compromising the public interest. This track record demonstrates how this new right to same-sex marriage can peaceably coexist with longstanding constitutional and statutory safeguards for religious liberty.

This memo addresses the legal protections available to government officials who issue marriage licenses or solemnize marriages.

### **I. Government Officials with the Authority to Issue Marriage Licenses**

Designated government officials in every state have the authority to issue marriage licenses.<sup>1</sup> These officials generally are authorized under state or local law to appoint a deputy to perform some of their tasks. Should they find that their religious beliefs prohibit them from issuing marriage licenses under certain circumstances, they should appoint a deputy with full authority to perform all acts necessary to complete the work that their conscience forbids.<sup>2</sup> Doing this often enables officials to resolve their conflict while simultaneously ensuring that their office fulfills its duty to issue marriage

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<sup>1</sup> The title of those officials responsible for issuing marriage licenses varies from state to state (in Idaho, county recorders; in Texas, county clerks; in Arizona, clerks of the superior court; and in North Carolina, registers of deeds).

<sup>2</sup> In many states, these officials have legal authority to delegate their duties, including their duty to issue marriage license, to another Individual. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 11-409, 25-126, 25-127 (2015); N.C. Gen. Stat. Ann. §§ 161-6, 51-6 (2015); Va. Code Ann. §§ 15.2-1603, 20-14 (2015).



licenses. Even in situations where delegation is not permitted or feasible, various constitutional and statutory provisions provide an additional level of protection for these government officials, as discussed in Section III below.

## II. Government Officials Authorized to Solemnize Marriages

States generally authorize a large number of government officials to solemnize marriages; these officials include judges, justices of the peace, and magistrate judges, among others.<sup>3</sup> In most states, officials so authorized *may* perform marriage ceremonies, but are not *required* to do so.<sup>4</sup> Those officials should thus be free to decline to solemnize a marriage that conflicts with their conscience.

The government does not have an interest in requiring solemnizers to preside over marriages that conflict with their convictions. Indeed, it is difficult to imagine a situation where a marriage-eligible couple is unable to find an authorized individual ready and willing to solemnize their union. Since same-sex marriage first became legal in Massachusetts in 2004, we are aware of no circumstance anywhere in the nation where a same-sex couple was unable to find someone to solemnize their marriage. Recognizing this, states that have legislatively redefined marriage have routinely adopted conscience protections for solemnizers.<sup>5</sup>

If officials are presented with a request to solemnize marriages that conflict with their conscience, they should be able to refer the request to one of the many other individuals who are authorized to solemnize weddings. This reflects true tolerance—where Americans with differing beliefs on an important topic live at peace with one another and where no one is unnecessarily forced to give up their livelihood.

## III. Legal Protections Available to Government Officials

Should government officials encounter resistance to their efforts to resolve a conflict, the First Amendment protects their religious freedom. That bedrock constitutional protection prohibits state and local governments from “penaliz[ing] or discriminat[ing] against individuals . . . because they hold [particular] religious views.”<sup>6</sup> Indeed, it was “historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.”<sup>7</sup> This guarantee against religious intolerance is not only enshrined in the federal Constitution; it is also found in every state Constitution, each of which provides free-exercise protections to the same degree as, if not greater than, the federal Constitution.

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<sup>3</sup> See, e.g., Cal. Fam. Code § 400.

<sup>4</sup> See, e.g., Tex. Fam. Code § 2.203(a).

<sup>5</sup> See, e.g., 18 V.S.A. § 5144(b).

<sup>6</sup> *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); accord *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (the First Amendment prohibits the government from “impos[ing] special disabilities on the basis of religious views”).

<sup>7</sup> *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.).



Additionally, twenty-one states<sup>8</sup> have adopted Religious Freedom Restoration Acts (“RFRA”). RFRA ensures that courts carefully scrutinize government action that burdens or substantially burdens a person’s free exercise of religion. In other words, RFRA forbids the government from overriding the free exercise of religion unless (1) the government has a compelling reason for doing so and (2) the government has no means to achieve its interest other than violating people’s free-exercise rights.<sup>9</sup> Thus, if the government seeks to compel officials to issue a marriage license or solemnize a marriage in conflict with their sincerely held beliefs, RFRA might protect those officials from such government coercion. This is particularly true since, as discussed above, there are generally many other accessible officials who are willing and authorized to issue marriage licenses and solemnize marriages in circumstances where others have religious conflicts. Thus, the government would have difficulty arguing that it must force particular officials to violate their conscience in order to achieve its alleged interests.

Furthermore, employment laws provide additional protections for many religiously conflicted officials. They do this by requiring their employers to reasonably accommodate their religious beliefs or practices whenever an accommodation would not impose an undue hardship. While state employment laws vary, a federal law known as Title VII imposes this accommodation obligation on many government employers.<sup>10</sup> Those employers thus are required to make reasonable adjustments to the work environment, or to their employees’ job requirements, to remove their employees’ religious-based conflicts.

Title VII has two limitations that might require some officials to seek protection under a state employment law. First, Title VII does not protect officials who work for government employers that have less than fifteen “employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”<sup>11</sup> Second, Title VII does not protect “any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.”<sup>12</sup> But these elected or appointed officials excluded from Title VII’s scope do “not include employees subject to the civil service laws of a State government . . . or political subdivision.”<sup>13</sup> Any official falling outside Title VII’s reach might nevertheless find similar legal rights under state employment laws.

In conclusion, the implementation of same-sex marriage throughout the country should not alter government officials’ rights to live and work according to their sincerely held beliefs. While the strength of a particular official’s case will depend on the relevant facts and applicable state laws, the constitutional and statutory authority discussed above should provide some measure of protection for government

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<sup>8</sup> Those states are Alabama, Arkansas, Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia.

<sup>9</sup> In addition to the 21 states that have adopted this standard through RFRA, seven state supreme courts employ this same (or a similar) standard in interpreting their state constitutions. Those states are Alaska, Maine, Massachusetts, Minnesota, Ohio, Washington, and Wisconsin.

<sup>10</sup> See 42 U.S.C. §§ 2000e(j), 2000e-2 (2015); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (finding that employer has statutory obligation to accommodate religious beliefs of employees).

<sup>11</sup> 42 U.S.C. § 2000e(b).

<sup>12</sup> 42 U.S.C. § 2000e(f).

<sup>13</sup> *Id.*



officials who face these religious conflicts. If officials charged with issuing marriage licenses or solemnizing marriages encounter the legal difficulties outlined in this memorandum, please contact Alliance Defending Freedom at 1-800-835-5233. All such calls are strictly confidential and protected by the attorney-client privilege.