To: State Attorneys General and Local Governmental Employers

From: Americans United for Separation of Church and State

Date: July 8, 2015

Re: Government Officials' Obligations to Provide Service to Same-Sex Couples

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In *Obergefell v. Hodges*, __ S. Ct. __, 2015 WL 2473451 (June 26, 2015), the United States Supreme Court held that the federal Constitution requires state and local governments to issue marriage licenses to same-sex couples "on the same terms and conditions as opposite-sex couples." *Id.* at *19. State and local governments across the country are now complying with these constitutional requirements.

Some Attorneys General and other government officials have suggested that government officials who issue marriage licenses or serve couples seeking to get married in government offices may withhold service on the basis of a religious objection. The Attorney General of Texas opined that objecting employees "may" be entitled to have another employee fulfill the task of issuing licenses to same-sex couples, "depend[ing] on the particular facts of each case." *See* Tex. Att'y. Gen. Op. No. KP-0025 (June 28, 2015) at 1, 3, 4, *available at* http://tinyurl.com/TexasAGmemo. South Dakota's Attorney General stated that "county employees with religious objections to same-sex marriages could ask someone else to issue marriage licenses to a gay couple." Associated Press, *Jackley, Other AGs Send Religious Liberty Letter to Congress*, SFGate, July 3, 2015, http://tinyurl.com/SDAGrefusal. And a same-sex couple in Ohio had to wait to get married after being told that the judge on duty "didn't perform 'these types of marriages.'" Lauren Lindstrom, *Toledo Same-Sex Couple's Marriage Delayed*, Toledo Blade, July 7, http://tinyurl.com/OHjudgerefusal.

Despite these and other suggestions, religious accommodations for objecting government officials may not be granted as a matter of course. Instead, accommodations may be granted only if they would not burden same-sex couples or other employees. If a government employee can be relieved of the obligation to serve same-sex couples without burdening either the couples or other employees, he or she may be offered that accommodation. But a government employee may not remain on marriage duty while refusing to serve same-sex couples. Government employees may not, under any circumstances, ask same-sex couples to visit another office, come back later (or another day), or obtain service from someone else.

As with an interracial couple, imposing such burdens on a same-sex couple would burden, demean, and stigmatize the couple in a manner that violates the Constitution and other laws. Thus, allowing accommodations in these circumstances would subject government entities and officials to legal liability.

Discussion

The question of religious accommodations for objecting government employees turns on three key principles:

First, as announced by the Supreme Court in *Obergefell*, the federal Equal Protection Clause and Due Process Clause require government officials to serve same-sex couples on the same terms as opposite-sex couples. As a result, government officials who issue marriage licenses may not withhold licenses from same-sex couples, and government officials responsible for performing marriage ceremonies at government offices may not decline to serve same-sex couples—for religious reasons or otherwise.

Second, the federal Establishment Clause prohibits the government from providing religious accommodations that would harm third parties or deprive them of their rights—including the right of a same-sex couple to receive government services on the same terms as an opposite-sex couple.

Third, although certain statutory and constitutional provisions either permit or require religious accommodations in some circumstances, none requires or authorizes accommodations that would impose practical or stigmatic harm on same-sex couples or burden other government employees.

In light of these requirements, a government employer should consider whether an objecting employee can be removed altogether from interacting with members of the public who visit a government office to seek a marriage license or ceremony. But employers may and must reject any accommodation that would allow a government employee to ask same-sex couples to step aside and wait for another employee to serve them.

A. Government Employees' Obligations Under the U.S. Constitution

Any analysis of government officials' religious objections to serving same-sex couples must start with the federal Constitution. Government officials who turn away same-sex couples on religious grounds would violate the Constitution's Equal Protection Clause, Due Process Clause, and Establishment Clause.

1. Equal Protection and Due Process

Same-sex couples have a constitutional right, under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, to get married "on the same terms and conditions as opposite-sex couples." *Obergefell*, 2015 WL 2473451, at *19. In reaching this conclusion, the U.S. Supreme Court rejected the argument that religious disapproval is a legitimate basis for the government to override these couples' rights. The Court acknowledged that some people have sincere religious objections to marriages between same-sex couples, and that objectors "may continue

to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.* at *22. But despite these religious objections, "[t]he Constitution … does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Id.*; *see also Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (rejecting religious justifications for government bans on sexual activity between same-sex couples). Even the Texas Attorney General conceded that, whatever the religious beliefs of government clerks, if no employee were made available to provide a license to a same-sex couple then "it is conceivable that an applicant for a same-sex marriage license may claim a violation of the constitution." Tex. Att'y Gen. Op. at 4.

The Fourteenth Amendment, as interpreted by the Supreme Court in *Obergefell*, would also prohibit any scheme that imposes practical burdens or dignitary harms on same-sex couples. Requiring a same-sex couple to come back later, visit another office, or get service from a different official would cause delay and inconvenience. It would also "demean[ ] the couple, whose moral and sexual choices the Constitution protects...." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013). This type of disfavored treatment would be inconsistent with the Supreme Court's admonition in *Obergefell*: "[Same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right." 2015 WL 2473451, at *23.

2. Establishment Clause

A religious exemption that allows government employees to turn away, inconvenience, or otherwise delay service to same-sex couples would also violate the First Amendment's Establishment Clause, which prohibits religious exemptions that come at the expense of innocent third parties. For example, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Supreme Court invalidated a statute that gave employees an unqualified right to time off on the Sabbath day of their choosing. *Id.* at 705–08. The Court held that the statute violated the Establishment Clause because it "would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id.* at 710. The Court reiterated this limitation in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), when it considered an Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act. The Act complied with the Establishment Clause only because, in applying the statute, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720 (citing *Caldor*, 472 U.S. 703).

The Supreme Court acknowledged this principle yet again in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which held that the Religious Freedom Restoration Act exempted certain companies from compliance with federal contraception-coverage requirements. In holding that closely held for-profit companies were entitled to withhold contraception coverage from their employees, the Court pointed to a work-around that the government had already created to

protect employees of nonprofit organizations. The Court explained that "[t]he effect of the [government]-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero," and that "these women would still be entitled to all FDA-approved contraceptives without cost sharing." *Id.* at 2760. Justice Kennedy, who supplied the decisive vote in *Hobby Lobby*, wrote separately to emphasize that one entity's religious exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2786–87 (Kennedy, J., concurring).

Because same-sex couples must be allowed to get married on terms equal to those offered to opposite-sex couples, any accommodation for government officials that imposes unique burdens on same-sex couples would also violate the Establishment Clause.

B. Possible Bases for Accommodating Objecting Government Officials

Not only does the U.S. Constitution affirmatively prohibit religious accommodations resulting in unequal treatment of same-sex couples, but there is no constitutional provision or statute that requires such accommodations.

1. Free Exercise Clause/Religious Freedom Restoration Act

The First Amendment's Free Exercise Clause prohibits restrictions on the free exercise of religion. Most state constitutions include analogous provisions, many of which have been interpreted to mirror the federal Free Exercise Clause. *See, e.g.*, *Mefford v. White*, 770 N.E.2d 1251, 1260 (Ill. Ct. App. 2002); *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 670–71 (Colo. 1982). But the federal Free Exercise Clause does not give anyone—let alone government officials required to serve the public—the right to an exemption from a neutral law of general applicability. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court held that the federal Free Exercise Clause does not entitle religious objectors to religious exemptions from laws that apply generally and do not single out religious conduct for regulation.

Smith prevents any Free Exercise challenge to requirements that a government official provide services to same-sex couples and opposite-sex couples on equal terms; this requirement is neutral and generally applicable. A law is neutral and generally applicable if it imposes a burden on conduct generally, rather than on religiously motivated conduct alone. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–34 (1993). Under this standard, nondiscrimination laws, zoning ordinances, and home-schooling regulations have all been deemed neutral and generally applicable. *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 241–44 (3d Cir. 2008) (home-schooling laws); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649–55 (10th Cir. 2006) (zoning); *Elane*

Photography, LLC v. Willcock, 309 P.3d 53, 72–75 (N.M. 2013) (nondiscrimination statute). Laws requiring government officials to provide service to same-sex couples do not single out a religious practice for dissimilar treatment; indeed, these laws do not speak directly to any religious practices at all. *See, e.g.*, *Elane Photography*, 309 P.3d at 72–75 (law requiring businesses to serve same-sex couples is neutral and generally applicable). As a result, the federal Free Exercise Clause, as well as any state free-exercise clauses that have been interpreted consistently with their federal counterpart, do not entitle government officials to a religious exemption from their legal obligations to provide services to same-sex couples.

Some states, however, have interpreted their own constitutions to provide greater coverage than the federal Free Exercise Clause. *See, e.g.*, *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 107 (Tenn. 1975). Other states have enacted statutes known as Religious Freedom Restoration Acts (RFRAs), which require the government to justify any substantial burden on religion by demonstrating that it is serving a compelling interest in the least restrictive fashion, even when the burden arises from a law that is neutral and generally applicable. *See, e.g.,* Okla. Stat. tit. 51, §§ 251–258; Va. Code § 57-2.02. The federal government, too, has enacted a RFRA that provides greater religious-freedom protections than the federal Constitution offers, but this statute does not apply to state or local laws, and in any event does not trump the requirements of the U.S. Constitution. *See* 42 U.S.C. § 2000bb; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

It is unclear whether state free-exercise clauses and RFRAs even apply to a government employer. For instance, several courts have held that the federal RFRA does not apply in that context. *See, e.g., Harrell v. Donahue*, 638 F.3d 975, 982–84 (8th Cir. 2011) (RFRA does not apply to claims by government employees seeking accommodations from their employer); *Francis v. Mineta*, 505 F.3d 266, 269–72 (3d Cir. 2007) (same). And the Vermont Supreme Court deemed it "highly questionable" that a state free-exercise clause would authorize a town clerk who objected to serving same-sex couples to continue to "retain public office while refusing to perform a generally applicable duty of that office on religious grounds." *Brady v. Dean*, 790 A.2d 428, 434 (Vt. 2001).

Even if these provisions did apply, however, they would not entitle a government employee to any accommodation that would burden same-sex couples or other employees, because the government has compelling interests in complying with the U.S. Constitution and avoiding legal liability. *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995) (government has compelling interest in complying with Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("interest of the University in complying with its constitutional obligations may be characterized as compelling"); *Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 930 F.2d 363, 369–70 (4th Cir. 1991) (government has compelling interest in avoiding violation of Establishment Clause). Indeed, some courts have held that the government has a compelling interest in avoiding even *the risk* of a

constitutional violation. *See, e.g.*, *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 40 (2d Cir. 2011) (state had compelling interest in denying church's request to hold worship services in public school buildings given strong basis for concern that approval would violate Establishment Clause).

In light of the constitutional requirements described above in Section A, a government employer would be advancing a compelling interest if it were to reject an accommodation that would burden same-sex couples or other employees. If the employer has offered the objecting official other work, or has legitimately determined that other work cannot be offered without imposing burdens on same-sex couples or other employees, the employer would have used the least restrictive means of avoiding legal liability. Even if stringent free-exercise provisions or RFRA-type statutes did apply, they would not call for accommodations that come at the expense of same-sex couples or other employees.

2. Title VII of the Civil Rights Act

Nor are government employees entitled to turn away same-sex couples under Title VII of the federal Civil Rights Act. Referring to Title VII and its state analogues, the Texas Attorney General argued, "state and federal employment laws allow [government employees] to seek reasonable accommodation for a religious objection to issuing same-sex marriage licenses." Tex. Att'y Gen. Op. at 3. Title VII prohibits employers with more than fifteen employees from discriminating on the basis of religion. 42 U.S.C. §§ 2000e(b), 2000e-2. The statute also requires employers to reasonably accommodate an employee's religious observance, practice, or belief. 42 U.S.C. § 2000e(j).

But the right to workplace accommodations is limited. Accommodations must be reasonable, and an accommodation is not reasonable if it imposes an "undue hardship on the conduct of the employer's business." *Id.* An accommodation imposes an undue hardship, moreover, if it imposes more than *de minimis* cost. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Employers also are not required to accept an employee's proposed accommodation; they may provide an alternate accommodation that preserves the employee's terms of employment. *See Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776–77 (9th Cir. 1986).

Thus, when approached by an objecting official, a government employer should consider whether that official can be moved to a window or office that does not provide services to same-sex couples seeking to get married. *See id.* at 777 (remanding so district court can determine if transferring objecting employee to a position that does not handle draft registration forms will preserve the employee's employment status); *McGinnis v. U.S. Postal Serv.*, 512 F. Supp. 517, 523 (N.D. Cal. 1980) (adjusting an objecting employee's schedule and/or assignments to avoid handling draft registration forms may be reasonable accommodation); *cf. Slater*, 743 F. Supp. 2d at 1194–95 (government employer errs when it fails even to consider

accommodations for clerk with religious objection to issuing marriage licenses to same-sex couples).

But if this kind of change cannot be made without imposing logistical, resource, or other burdens on the employer or other employees, the employer is not required to provide the accommodation. A disproportionate distribution of work among employees or the assumption of extra costs would cause the kind of undue hardship that obviates an employer's obligation to accommodate an objecting employee. *See, e.g.*, *Bruff v. N. Miss. Health Servs. Inc.*, 244 F.3d 495 (5th Cir. 2001) (undue hardship in allowing counselor to turn away clients who desire counseling on same-sex relationships, because accommodation would result in disproportionate workload among employees); *Noesen v. Med. Staffing Network*, 232 F. App'x 581 (7th Cir. 2007) (unpublished) (undue hardship in allowing pharmacist to avoid serving customers seeking contraception, because accommodation would result in disproportionate workload among employees); *Endres v. Ind. State Police*, 349 F.3d 922 (7th Cir. 2003) (undue hardship in permitting police officer to avoid policing casinos, because proposed accommodation would result in disproportionate workload among officers); *Ryan v. U.S. Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991) (undue hardship in allowing FBI agent to halt investigation assignments related to domestic security and terrorism, because of vital need for such investigations and difficulty of accommodating requests from various agents of diverse religious beliefs).

Likewise, a government employer need not offer an accommodation when doing so would burden the rights of same-sex couples seeking service from the government. Such an accommodation would expose the employer to legal liability, and thus cause the employer an "undue hardship." *See, e.g.*, *United States v. Bd. of Educ.*, 911 F.2d 882, 891 (3d Cir. 1990) (employee has no Title VII right to wear religious attire because accommodation would require school board to risk violating legal prohibition on such conduct); *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) (public employer has no obligation to allow employee to display religious items in cubicle because accommodation would expose employer to risk of violating Establishment Clause); *Finnie v. Lee Cnty.*, 907 F. Supp. 2d 750, 778 (N.D. Miss. 2012) (employer suffers undue hardship when accommodation would create significant legal risks).

Accordingly, Title VII and its state analogues do not entitle employees to any accommodation that would impose burdens on other employees, the employer, or same-sex couples seeking services.

Conclusion

A government employer asked to provide an accommodation to an employee with a religious objection to serving same-sex couples should consider whether the employee can be removed altogether from interacting with members of the public

who visit the office seeking to get married. But employers can and must reject any accommodation that would allow a government employee to ask same-sex couples to step aside and wait for another employee to serve them, or that would otherwise burden same-sex couples or other employees.