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To: Governmental Employers of Clerks Issuing Marriage Licenses
From: Americans United for Separation of Church and State
Date: January 8, 2015
Re: Obligation of Clerks to Issue Marriage Licenses to Same-Sex Couples

INTRODUCTION

As more and more states recognize same-sex marriages, government employees who have religious objections to these marriages are seeking methods by which to refuse services to same-sex couples. For example, a government clerk in North Carolina resigned after being asked to issue marriage licenses to same-sex couples. *Berger to Introduce Legislation Protecting First Amendment Rights, Jobs of N.C. Magistrates, Registers of Deeds*, PHIL BERGER (Oct. 21, 2014) http://www.philberger.com/news/entry/berger-to-introduce-legislation-protecting-first-amendment-rights-jobs-of-n-c-magistrates-registers-of-deeds. In response, North Carolina Senator Phil Berger announced his intention to propose legislation that would give government clerks a religion-based exemption from issuing same-sex marriage licenses. *Id.* Clerks in Yellowstone County, Montana, recently were granted temporary exemptions from having to process same-sex marriage licenses. Associated Press, *Some clerks raise objections to granting same-sex marriage licenses*, GREAT FALLS TRIBUNE (Nov. 22, 2014), http://www.greatfalls tribune.com/story/news/local/2014/11/22/clerks-raise-objections-granting-sex-marriage-licenses/19408291/. In addition, the Christian law firm Alliance Defending Freedom sent legal memoranda to several states contending that clerks have a right to refuse to issue marriage licenses to same-sex couples on account of the clerks' religious beliefs. *See* Alliance Defending Freedom, *ADF offers guidance to VA., Okla. Officials responsible for issuing marriage licenses*, ALLIANCE DEFENDING FREEDOM (Oct. 13, 2014), http://www.adfmedia.org/News/PRDetail/9350. ADF argues that clerks are entitled to delegate the task to a deputy clerk or, if no deputy is available, to a judge. *Id.* If the clerk's employer does not permit this proposed accommodation, ADF asserts, the employer would be subject to legal liability. *Id.*

Proponents of religious exemptions for government clerks rely on Title VII, the Free Exercise Clause, state constitutional provisions, and state Religious Freedom Restoration Acts ("RFRAs"). *See, e.g.*, *ADF Memo*, *supra*. None of these provisions, however, gives government clerks an unmitigated right to an exemption from the legal requirement that they treat same-sex couples no differently than different-sex couples. We write to clarify the law in this area, and to offer *pro bono* representation to governmental employers who face litigation if they deny clerks' requests for exemptions of this kind.

I. Title VII Imposes Only Minimal Obligations on Employers to Provide Religious Exemptions for Clerks Who Wish to Discriminate Against Same-Sex Couples.

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 obligates employers to

reasonably accommodate an employee's religious observance, practice, or belief. 42 U.S.C. §2000e(j). When approached by an objecting employee, an employer has a duty to determine whether there is a reasonable accommodation that would address the employee's objection. *See Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776 (9th Cir. 1986); *Slater v. Douglas Cnty.*, 743 F. Supp. 2d 1188, 1193-94 (D. Or. 2010). A reasonable accommodation is one that does not impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j). This standard is relatively lenient on employers; a burden that triggers more than a *de minimis* cost imposes an undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Employers also are not required to accept the employee's proposed accommodation; they can provide an alternate accommodation that preserves the employee's employment status. *Am. Postal Workers Union*, 781 F.2d at 776-77.

A. An Employer Need Not Provide Any Accommodation That Would Impose Logistical or Resource Burdens on the Employer or Other Employees.

When approached by an objecting clerk, an employer should consider whether the clerk can be moved to a window that does not handle marriage licenses or transferred to an office that does not issue marriage licenses. *See Am. Postal Workers Union*, 781 F.2d 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 (not all accommodations for objecting clerks will risk violating the First Amendment).

If however, a change of this kind cannot be made without imposing logistical, resource, or other burdens on the employer or other employees, the employer is not obligated to provide the accommodation. A disproportionate distribution of work among employees, the assumption of extra costs, or needing to cater to myriad religious objections have all been found to cause the kind of undue hardship that obviates an employer's obligation under Title VII 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 Fed. Appx. 581 (7th Cir. 2007) (unpublished) (undue hardship would be caused by 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 imposed by permitting police officer to avoid policing casinos, because proposed accommodation would result in disproportionate workload among officers and would expose employer to myriad requests from officers of diverse religious beliefs); *Ryan v. U.S. Dept. of Justice*, 950 F.2d 458 (7th Cir. 1991) (undue hardship to allow 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). Accordingly, an employer that denies a proposed accommodation that would impose a disproportionate workload on other employees, require the employer to hire additional staff or

otherwise assume extra costs, or impose logistical challenges, could easily demonstrate undue hardship.

B. An Employer Should Deny Any Accommodation That Would Cause Injury or Inconvenience to Same-Sex Couples.

In addition to denying any accommodation that would impose logistical or resource burdens on an employer or other employees, employers should likewise deny any accommodation that would be made known to same-sex couples seeking licenses, or that would impose delay or inconvenience on such couples. Such accommodations would expose the employer to legal liability—a risk that Title VII does not obligate them to undertake. *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); *Tagore v. United States*, 735 F.3d 324, 329 (5th Cir. 2013) (IRS employee has no Title VII right to wear religious blade because accommodation would require employer to violate statutory prohibition against dangerous weapons in federal buildings); *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000) (per curiam) (employee has no Title VII right to refuse to provide social security number to employer because accommodation would require the employer to violate the Internal Revenue Code); *Berry v. Dept. 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) (noting that employer suffers undue hardship when accommodation would create significant legal risks); *Cherry v. Sunoco, Inc.*, 2009 WL 2518221, *6 (E.D. Pa. Aug. 17, 2009) (unreported) (finding undue hardship in exposing employer to risk of violating governmental regulations); *cf. Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1489-92 (10th Cir. 1989) (employer has Title VII duty to accommodate when accommodation functionally eliminates risk of legal violation).

As discussed below, granting clerks an accommodation that would expose same-sex couples to a stigmatic injury, subject couples to delay in receiving their licenses, or direct them to other counters of government offices, would force the governmental employer to risk violating both the Establishment Clause and the Equal Protection Clause. Consequently, governmental entities need not provide such accommodations.

1. An Employer That Allows Clerks to Discriminate Against Same-Sex Couples Risks Violating the Establishment Clause.

The Establishment Clause precludes religious exemptions that come at the expense of innocent third parties. *See generally*, Frederick Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014). For example, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the U.S. Supreme Court struck down a state law that granted employees a statutory right not to work on their Sabbath because the accommodation failed to consider the burdens that would be imposed on the employer and other employees. *Id.* at 709-10. Similarly, the U.S. Supreme Court struck down a sales-tax exemption for religious periodicals in part because of the burden third parties would experience in raised tax bills. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989). The Court observed that, when government provides a religious

accommodation "that is not required by the Free Exercise Clause and that . . . burdens nonbeneficiaries markedly . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." *Id.* at 15 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring)). Subsequently, the Court unanimously held that an accommodation "must take adequate account of the burdens [that would be] impose[d] on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Any accommodation "must be measured so that it does not override other significant interests." *Id.* at 722. More recently, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), Justice Kennedy, whose vote created the Court's bare majority in that case, wrote separately to note that an individual's religious exercise cannot unduly restrict another individual's interests. *Id.* at 2786-87 (Kennedy, J., concurring).

A religious exemption that would allow a clerk to summarily dismiss a same-sex couple to another counter, or to another building altogether, would impose substantial practical and dignitary harms on the affected individuals. Not only would the couple face the logistical harm of undue delay, but they also would be subjected to the sting of unequal and inferior treatment. Accordingly, an employer that chooses to accommodate an objecting clerk, at the expense of same-sex couples' interests, runs a substantial risk of committing an Establishment Clause violation by failing to take "adequate account" of the burdens same-sex couples would experience. *Cutter*, 544 U.S. at 720.

Granting such an accommodation would also run afoul of the Establishment Clause for a second reason: it would authorize an action that is primarily motivated by a religious purpose. *See McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (Establishment Clause prohibits government from acting with predominantly religious purpose). Should an on-duty clerk, with permission from her employer, direct a same-sex couple to another counter for religious reasons, "a religious objective [would] permeate[her] action." *Id.* at 863. Because the action would have been authorized by her employer, the employer would be legally liable for it. *See Bd. of Cnty. Com'rs v. Brown*, 520 U.S. 397, 405 (1997) (employer responsible for actions that it authorizes). This provides another reason that employers are well-advised to deny such accommodations.

2. An Employer That Gives Clerks License to Discriminate Risks Violating the Equal Protection Clause.

The risk of violating the Equal Protection Clause would exacerbate the undue hardship that acquiescing employers would face. Courts have overwhelmingly recognized that the state lacks a legitimate justification for treating same-sex couples differently than different-sex couples in the issuance of marriage licenses. *See, e.g., Bostic v. Schaefer*; 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter*, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).[1] "[Such] differentiation

[1] The Sixth Circuit recently concluded, against the overwhelming weight of contrary authority, that same-sex couples may constitutionally be denied the right to marry. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. Nov. 6, 2014). The court relied on the government's interests in maintaining tradition and in incentivizing unmarried parents to

demeans the [same-sex] couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (internal quotations omitted). Allowing a government clerk to discriminate against same-sex couples in issuing marriage licenses would authorize the very kind of disparate treatment that lacks a legitimate justification under the Equal Protection Clause.

II. Neither the Free Exercise Clause Nor State Provisions Gives Clerks a Right to Refuse to Issue Marriage Licenses to Same-Sex Couples.

Proponents of religious exemptions for governmental clerks have cited several other statutes and constitutional provisions—including the federal Free Exercise Clause, state constitutional free-exercise clauses, and state RFRAs—to support their arguments. *See, e.g.*, *ADF memo*, *supra*. Contrary to their assertions, none of these provisions gives clerks the right to discriminate in the name of religion.

A. The Federal Free Exercise Clause Does Not Require Clerks to Be Exempted from Issuing Marriage Licenses to Same-Sex Couples.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause does not mandate religious exemptions from neutral and generally applicable laws. *Id.* at 879. A law is neutral and generally applicable if it is not intended to restrict religious practices, and 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 ordinance).

The requirement that a government clerk issue a marriage license to all couples legally entitled to one is a neutral and generally applicable law. It does not single out a religious practice for dissimilar treatment; indeed, it is not intended to affect any religious practices at all. *See, e.g.*, *Elane Photography*, 309 P.3d at 72-75 (ordinance requiring businesses to serve same-sex couples is neutral and generally applicable). The Free Exercise Clause thus does not entitle government clerks to a religious exemption from the legal obligation to issue marriage licenses to qualifying same-sex couples.

B. State Constitutional and Statutory Provisions Likewise Do Not Require Religious Clerks to Be Exempted from Issuing Marriage Licenses to Same-Sex Couples.

Some states have constitutional or statutory provisions that provide greater religious-freedom protections than the federal Constitution offers. *See, e.g.*, Okla. Stat. Ann. tit. 51, §§

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form long-lasting family units. *Id.* at 399-408. These arguments, however, are not applicable to a clerk's issuance of marriage licenses once the State has decided to permit same-sex couples to enter the legal institution of marriage.

251-258 (West 2014); Va. Code Ann. § 57-2.02 (West 2014); *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 107 (Tenn. 1975) (noting that Tennessee's state constitution "contains a substantially stronger guaranty of religious freedoms"). Such provisions typically require the State to demonstrate a compelling interest for the government's imposition of a burden on a religious practice, even when the burden arises from a neutral and generally applicable law. *See, e.g.*, *Hill-Murray Fed'n of Teachers. v. Hill-Murray High Sch.*, 487 N.W.2d 857, 864-65 (Minn. 1992).

These provisions do not give governmental clerks a right to refuse to issue licenses to same-sex couples because the State has a compelling interest in avoiding violations of the U.S. Constitution. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) (finding a compelling state interest in complying with the 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), *cert. denied*, 502 U.S. 864 (1991) (avoiding violation of the Establishment Clause is a compelling state interest). Indeed, some courts have held that the government has a compelling interest in avoiding even the *risk* of an Establishment Clause violation. *See, e.g.*, *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 40 (2d Cir. 2011) (concluding that state has compelling interest for denying church's request when it has a strong basis for concern that approval would violate the Establishment Clause); *cf. Shaw v. Hunt*, 517 U.S. 899, 908, n.4 (1996) (avoiding substantial risk of violating the Voting Rights Act may be a compelling interest). Because allowing a clerk to refuse to serve same-sex couples would subject the affected couples to Establishment and Equal Protection Clause violations, as discussed above, an employer would be well within its rights to decline such a request.

CONCLUSION

Municipalities are well within their rights to deny government clerks' requests for an exemption from a requirement that they issue marriage licenses to same-sex couples when the requested exemption would impose logistical or resource burdens on the employer or other employees, or would impose injury or inconvenience on same-sex couples. Accordingly, Americans United stands ready to provide *pro bono* representation to any governmental entity that is sued by a clerk who is denied a religious exemption from a directive to treat same-sex couples no differently than different-sex ones.