



LEGAL MEMORANDUM

TO: Idaho County Recorders Responsible for Issuing Marriage Licenses

FROM: Alliance Defending Freedom

DATE: October 22, 2014

RE: Rights of Conscience Pertaining to the Issuance of Marriage Licenses

On October 6, 2014, the U.S. Supreme Court declined to review the Fourth, Seventh, and Tenth Circuit Courts of Appeals' decisions that declared unconstitutional five states' laws defining marriage as the union of one man and one woman. On October 7, 2014, the Ninth Circuit Court of Appeals declared unconstitutional Idaho's marriage laws, and issued an order that government officials cease enforcement of the state's marriage laws. However, Idaho officials have requested that the Ninth Circuit delay its ruling, and filed a petition for rehearing *en banc* before the Ninth Circuit on October 21, 2014. If the Ninth Circuit denies the motion, a petition for review may be filed with the U.S. Supreme Court. Needless to say, the full legal impact of the court's decision, including whether it undermines other traditional restrictions on marriage, like bigamy or consanguinity, is not yet known.

In the meantime, however, some county recorders might believe that they face a serious dilemma: either resign their positions or violate their sincerely held religious or moral beliefs about marriage by being forced to issue marriage licenses to relationships inconsistent with those beliefs. But county recorders, as explained herein, can resolve this potential conflict.

County recorders¹ have the authority to issue marriage licenses. *See* IDAHO CODE ANN. § 32-401 (2014).² But county recorders whose sincere religious or moral beliefs prevent them from issuing certain marriage licenses have the ability to appoint a deputy to perform that task. *See* IDAHO CONST. art. XVIII, § 6 (2014). A county recorder thus should appoint a deputy with full authority to perform all acts necessary to issue, administer, or process marriage licenses

¹ The Idaho Constitution provides for the election of a clerk of the district court for each county, and that one of roles the clerk holds is county recorder. *See* IDAHO CONST. art. V, § 16; art. XVIII, § 6 (2014). Notably, the judicial branch does not have power or control over the office of the clerk of the district court when she is carrying out her duties of recorder. *See Crooks v. Maynard*, 732 P.2d 281 (Idaho 1987).

² Applicants seeking a marriage license do not have to be residents of the county in which they apply for a license, or even be residents of Idaho, but can obtain a marriage license from any county recorder. *See, e.g.*, http://www.idaho.gov/family_records/marriage.html (last visited Oct. 21, 2014); <http://www.canyonco.org/Departments/Clerk/Recorder/Obtaining-a-Marriage-License/Marriage-License-FAQ.aspx>. (last visited Oct. 21, 2014).



should a conflict of conscience arise. This should resolve the situation and facilitate all parties' interests.

Should a county recorder encounter resistance to their efforts to resolve a conflict, the First Amendment to the United States Constitution ensures that neither state nor county officials may impede recorders' free exercise of religion. The First Amendment prohibits any government officials from "penaliz[ing] or discriminat[ing] against individuals . . . because they hold [particular] religious views." *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"). Additionally, Idaho law provides that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" as the "[f]ree exercise of religion is a fundamental right that applies in this state." IDAHO CODE ANN. § 73-402 (2014). And given that state law already prescribes other means for recorders to ensure that parties seeking marriage licenses receive them, government officials may not prevent a recorder's reasonable and legitimate effort to resolve his or her limited conflict. Indeed, a refusal by the State of Idaho and its government subdivisions to protect a recorder who cannot issue a marriage license in violation of his or her conscience suggests an unconstitutional, discriminatory intent on the part of the state or others demanding that the official violate their conscience.³

In addition, ensuring that recorders are not forced to issue licenses contrary to their conscience is consistent with Title VII's requirements that employers, including governmental employers, must reasonably accommodate the religious beliefs or practices of their employees.⁴ In other words, an employer must make reasonable adjustments to the work environment, or to the employee's job requirements, to ensure that the employee's ability to maintain his or her religious conscience remains unimpeded. County recorders are certainly no exception to this rule.

If county recorders face legal difficulties regarding their duties as they pertain to issuing marriage licenses, and would like legal advice in resolving their conflict, please contact Alliance Defending Freedom at 1-800-835-5233. All such calls are strictly confidential and protected by the attorney/client privilege even if Alliance Defending Freedom is not hired to represent the caller.

³ See *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

⁴ See Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2012). See also *E.E.O.C. v. AutoNation USA Corp.*, 52 F. App'x 327, 328 (9th Cir. 2002) ("Title VII of the Civil Rights Act of 1964 requires that employers provide reasonable accommodation to employees who have religious beliefs that conflict with their employment responsibilities, unless the employer can show that the accommodation would either unduly burden the employer or other employees."); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (Employer has "affirmative duty under Title VII to reasonably accommodate employees' religious beliefs.").