



# MEMORANDUM

TO: Maine Municipal Clerks Responsible for Issuing Marriage Licenses

FROM: Alliance Defending Freedom

DATE: November 9, 2012

RE: Ensuring Municipal Clerks Have Freedom to Follow their Religious Beliefs When Same-Sex Couples Request Marriage Licenses

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In light of Maine's recent redefinition of marriage to include same-sex couples, some municipal clerks might believe that they face a serious dilemma: either resign their positions or violate their sincerely held religious beliefs by issuing marriage licenses to same-sex couples. But municipal clerks, as explained herein, can readily resolve this potential religious conflict.

Municipal clerks in Maine are legally required to issue marriage licenses. *See* Me. Rev. Stat. tit. 19-A, § 652(1). But clerks whose sincere religious beliefs prevent them from issuing marriage licenses to same-sex couples may appoint one or more assistants to perform that specific task. *See* Me. Rev. Stat. tit. 30-A, § 2654. Indeed, in this regard, state law provides (1) that a municipal "clerk may appoint in writing one or more assistants who shall perform any duties of the office prescribed by the clerk," (2) that "[b]efore assuming the duties of office, an assistant clerk must be sworn" in at an open town meeting, and (3) that "[t]he assistant clerk serves at the will of the clerk." *Id.*

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Thus a municipal clerk faced with this religious conflict should appoint one or more assistant clerks with full authority to perform all acts necessary to issue, administer, and process the marriage licenses of same-sex couples. To do this, the clerk must make sure to create a writing that evidences the assistant clerks' appointment, to include in that writing the nature of the assistant clerks' duties, and to swear in the assistant clerks at an open town meeting before allowing them to assume the prescribed duties. Taking these steps should resolve the municipal clerk's religious conflict.

Even if municipal clerks, in their efforts to resolve this religious conflict, encounter resistance from their municipal governing body, state and federal law protects the clerks' rights to preserve their free exercise of religion. To begin with, the Maine Human Rights Act ensures the right of each clerk to have his or her religious convictions accommodated. That law prohibits all employers from discriminating against any employee because of religion. *See* Me. Rev. Stat. tit. 5, § 4572(1)(A). The Maine Human Rights Commission's regulation interpreting this provision states as follows:

The duty not to discriminate on religious grounds includes an obligation on the part of the employer . . . to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship to the conduct of the employer's business. Because of the particularly sensitive nature of refusing to hire or discharging an individual on account of his/her religious beliefs, the burden of proof that the accommodations required by the individual's religious needs impose an undue hardship to the conduct of the employer's business, is on the employer.

94-348-3 Me. Code R. § 3.10; *see also* *Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union AFL-CIO*, 383 A.2d 369, 378 (Me. 1978) (affirming this regulation as "a reasonable construction of the [Human Rights] Act"). Municipalities thus have an obligation to reasonably accommodate municipal clerks by allowing them to appoint one or more assistant clerks with full authority to

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perform all acts necessary to issue, administer, and process the marriage licenses of same-sex couples. State law envisions this sort of accommodation, and thus it would not cause any undue hardship. *See* Me. Rev. Stat. tit. 30-A, § 2654. At bottom, then, the Human Rights Act requires municipalities to allow their clerks to solve their religious conflicts by appointing one or more assistant clerks.

In addition to the Human Rights Act, the First Amendment also forbids state and municipal officials from thwarting a clerk’s attempt to preserve his or her free exercise of religion through the appointment of assistant clerks. The First Amendment prohibits 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”). Thus higher-ranking government officials may not frustrate a municipal clerk’s reasonable and legitimate efforts to resolve this limited religious conflict.

If municipal clerks face this crisis of conscience and want assistance in resolving their religious conflict, please contact Alliance Defending Freedom at 1-800-835-5233.

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