



LEGAL MEMORANDUM

TO: Wisconsin Clerks Responsible for Issuing Marriage Licenses

FROM: Alliance Defending Freedom

DATE: October 14, 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 Seventh Circuit Court of Appeals' decision that declared unconstitutional Wisconsin's laws defining marriage as the union of one man and one woman since 1849. The full legal impact of this decision, and whether it undermines other traditional restrictions on marriage, like bigamy or consanguinity, is not yet known. Some clerks 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 clerks, as explained herein, can resolve this potential conflict.

County clerks are responsible for issuing marriage licenses. *See* WIS. STAT. ANN. §§ 765.05 and 59.23 (2014). But clerks 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* WIS. STAT. ANN. § 59.23 (2014). Indeed, the deputy clerk can be "clothed with all the statutory powers" to perform the clerk's duties. *Gilkey v. Cook*, 18 N.W. 639, 639 (Wis. 1884).¹ A clerk thus should appoint a deputy with full authority to perform all acts necessary to issue, administer, or process marriage licenses should a conflict of conscience arise. This should resolve the situation and facilitate all parties' interests.

Moreover, under Wisconsin law, five days must elapse between when a couple applies for a marriage license and when the clerk may issue the license. *See* WIS. STAT. ANN. § 765.08 (2014). Therefore, if a clerk is asked to issue a license in conflict with her conscience, ample time exists to identify a substitute within the required five-day period. The government has no compelling governmental interest in instantaneous license issuance that would outweigh its obligation to protect the First Amendment rights of its employees.

Should a clerk 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

¹ *See also* 22 Op. Att'y. Gen. 878 (1933) (Deputy county clerks may issue licenses under direction of county clerks in any part of county.).



impede clerks' 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, Wisconsin law provides that "[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed . . . nor shall any control of, or interference with, the rights of conscience be permitted." WIS. CONST. art. I, § 18 (2014). And given that state law already prescribes other means for clerks to ensure that parties seeking marriage licenses receive them, government officials may not prevent a clerk's reasonable and legitimate effort to resolve his or her limited conflict. Indeed, a refusal by the State of Wisconsin and its government subdivisions to protect a clerk who cannot issue a marriage license in violation of his or her conscience suggests an unconstitutional discriminatory intent.²

In addition, ensuring that clerks 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.³ 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. Clerks are certainly no exception to this rule.

If clerks 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.

² See *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

³ See Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2012). See also *Porter v. City of Chicago*, 700 F.3d 944, 951 (7th Cir. 2012) ("These provisions of Title VII prohibit an employer from intentionally discriminating against an employee based on the employee's religion, and require an employer to make reasonable efforts to accommodate the religious practices of employees unless doing so would cause the employer undue hardship."); *Rodriguez v. City of Chicago*, 156 F.3d 771, 775 (7th Cir. 1998) ("Under Title VII, therefore, an employer must reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business.").