



## LEGAL MEMORANDUM

TO: Arizona Clerks Responsible for Issuing Marriage Licenses

FROM: Alliance Defending Freedom

DATE: October 31, 2014

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

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On October 17, 2014, a federal district court in Arizona declared unconstitutional Arizona's marriage laws, and Attorney General Tom Horne has instructed clerks of the superior courts to issue marriage licenses to same-sex couples that otherwise qualify for the receipt of a marriage license under Arizona law.<sup>1</sup> In light of this, 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 issuing marriage licenses under circumstances that conflict with those beliefs. But clerks, as explained herein, can resolve this potential conflict.

Clerks of the superior courts are responsible for issuing marriage licenses. *See* ARIZ. REV. STAT. ANN. § 25-121 (2014).<sup>2</sup> 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* ARIZ. REV. STAT. ANN. § 11-409 (2014); *see also* *Royston v. Pima Cnty.*, 106 Ariz. 249, 475 (1970). Clerks of the superior courts also have the authority to designate a justice of the peace to issue a marriage license in that county, as well as the authority to allow the city or town clerk to issue marriage licenses. *See* ARIZ. REV. STAT. ANN. §§ 25-126, 25-127 (2014). 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.

Should a clerk encounter resistance to their efforts to resolve a conflict, the First Amendment to the United States Constitution ensures that no government officials may 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,

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<sup>1</sup> *See, e.g.*, <http://courts.yavapai.us/clerk/files/2012/01/Donna-McQuality-letter.pdf> (last visited Oct. 21, 2014).

<sup>2</sup> 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 Arizona, but can obtain a marriage license from any clerk of the superior court in any county. *See, e.g.*, <https://www.cochise.az.gov/clerk-superior-court/marriage-licenses> (last visited Oct. 21, 2014); <http://courts.yavapai.us/clerk/marriage-licenses/> (last visited Oct. 21, 2014).



Arizona 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.” ARIZ. REV. STAT. ANN. § 41-1493.01 (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.

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.<sup>3</sup> 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.

The well-established legal principles discussed above ensure that the rights and deeply held beliefs of all citizens will be protected and affirmed.

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<sup>3</sup> 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.”).