

## LEGAL MEMORANDUM

DATE: July 28, 2015

TO: Government Officials Involved in the Issuance of Marriage Licenses or the Solemnization of Marriages in Louisiana

FROM: Mike Johnson, Freedom Guard CEO & Chief Counsel

RE: Rights of Conscience Protections for Officials Opposed to Same-Sex Marriage

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On June 26, 2015, the U.S. Supreme Court held in *Obergefell v. Hodges* that the federal Constitution includes the right to marry a person of the same sex. All states across the country are now prohibited from enforcing their laws that define marriage as the union of one man and one woman. This includes Louisiana's state constitutional amendment (La. Const. art. XII, § 15), which was adopted by 77.78 percent of Louisiana voters in 2004, and which the author of this memorandum helped successfully defend against previous court challenges over the past decade.

In the wake of *Obergefell*, some state and local government officials, such as parish clerks of court and their employees, judges, justices of the peace, and magistrate judges, believe they now face a serious dilemma: either resign their positions or compromise their faith by issuing marriage licenses or solemnizing marriages under circumstances that conflict with their sincerely held religious beliefs. As explained in this memorandum, these government officials have constitutional and statutory protections that should enable them to successfully resolve this potential conflict.

### I. Introduction

Freedom Guard is a not-for-profit public interest law firm headquartered in Louisiana and dedicated to the defense of religious liberty in the courts and in the court of public opinion. Our organization exists to educate citizens and the government about important constitutional rights, particularly the freedom of religious expression. Over the past two decades, our attorneys have successfully litigated these issues on behalf of religious persons and organizations in federal and state courts nationwide, and have also been called upon to assist and successfully defend the State of Louisiana, as well as many other governmental bodies and public officials on a variety of related matters. Freedom Guard's services are provided *pro bono*.

For more than two centuries, our nation has successfully balanced the inalienable right to religious conviction with other important legal and social interests. The Bill of Rights recognizes the free exercise of religion as our first freedom, and Americans have enacted more than 2,000 other federal and state laws to safeguard it. These longstanding constitutional and statutory protections for religious liberty are essential to who we are as a people, and their continued vitality should not be called into question now that the U.S. Supreme Court has declared a new right to same-sex marriage. This new right must peaceably coexist with religious liberty. The sincerely held religious beliefs of all

conscientious citizens must be protected, including government officials responsible for issuing marriage licenses or solemnizing marriages.

## II. Current Status of the Law in Louisiana

The *Obergefell* opinion on June 26, 2015, mooted the many same-sex marriage cases that were still pending in lower courts around the country. Louisiana had two pending cases on appeal at the time. (The author of this memorandum served in both cases as co-counsel for the State, *pro bono*.)

In the first Louisiana case, *Robicheaux v. Caldwell*, the State was forced to reluctantly acknowledge in an advisory letter to the U.S. Court of Appeals for the Fifth Circuit on June 30, 2015, that *Obergefell* required a reversal of the State's previous federal district court victory. The State's letter noted Louisiana "agrees with the four dissenting Justices in *Obergefell* that [that] case is wrongly decided."

The Fifth Circuit returned the *Robicheaux* case to the district court on July 1, 2015, but the Fifth Circuit added the following important note to its reversal mandate: "We express no view on how controversies involving the intersection of these rights should be resolved, but instead leave that to the robust operation of our system of laws and the good faith of those who are impacted by them." The Fifth Circuit mandate also quoted the following excerpt from the *Obergefell* majority:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

The second Louisiana case that was mooted by *Obergefell* was pending at the Louisiana Supreme Court. On July 7, 2015, the Louisiana Supreme Court thus dismissed that appeal in *Costanza v. Caldwell*, and explained: "In light of the United States Supreme Court's opinion in *Obergefell* and the action of the federal district court in *Robicheaux*... there is no longer a justiciable controversy for this court to resolve." After *Costanza*, Louisiana agencies are now required to recognize same-sex marriage status in matters such as state tax returns, birth certificates, and the like.

In the Louisiana Supreme Court's *per curiam* opinion of July 7, some justices expressed their deep disagreement with the majority in *Obergefell*. Justice Jeannette Knoll, for example, called the *Obergefell* majority's decision a "mockery of rights" and an "utter travesty," and wrote of the "horrific impact these five lawyers have made on the democratic rights of the American people to define marriage." In his dissent, Justice Jefferson Hughes insisted the definition of marriage "cannot be changed by legalisms," and that he does "not concede the reinterpretation of every statute premised upon traditional marriage."

The marriage debate is far from over, and like these courts, most Americans are still very much divided on the issue. Regardless, on July 14, 2015, the Louisiana Supreme Court Committee on Judicial Ethics issued a surprising majority opinion letter, ostensibly to answer the question: "Is it ethically permissible

for a judge of a court of record [or justice of the peace] to refuse to conduct same-sex marriages while continuing to perform opposite-sex marriages?” The committee opined:

Although performance of marriage ceremonies is not a mandatory judicial function, refusing to perform same-sex marriages while continuing to perform opposite-sex marriages shows bias or prejudice, in violation of Canon 3A(4). Additionally, such refusal could be seen as a violation of Canon 1’s mandate to uphold the integrity and independence of the judiciary, as well as Canon 2’s imperative that judges respect and comply with the law and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Judges [and justices of the peace] should be mindful of the fact that if they once performed marriages and now choose not to, they could then receive motions to recuse from gay or lesbian individuals who perceive such refusal as indicative of animus.

The committee further suggested that refusal by a Louisiana judge, based on his or her sincerely held belief that marriage is the union of one man and one woman, “to sit on matters involving same-sex spouses is a direct violation of the Code of Judicial Conduct and could open a judge to a recommendation of sanction or removal by the Judiciary Commission.”

It appears from this letter that a majority of the Committee on Judicial Ethics wishes to silence the debate and foreclose the opportunity—anticipated by the federal Fifth Circuit and the U.S. Supreme Court—to utilize “the robust operation of our system of laws and the good faith of those who are impacted by them” to carefully determine “how controversies involving the intersection of these rights should be resolved.” Based upon the information presented below, *we do not believe the opinion by the Committee on Judicial Ethics should withstand a legal challenge.*

### **III. Government Officials with Authority to Issue Marriage Licenses**

According to LSA-R.S. 9:221, a license authorizing an officiant to perform a marriage ceremony in Louisiana must be issued by the clerk of court in any parish (or, if in Orleans Parish, by the state registrar of vital records or a judge of the city court). LSA-R.S. 13:910 provides authority for clerks of court to appoint deputy clerks to perform some of their tasks, and the duty to issue marriage licenses is routinely shared in this way.

For this reason, if a clerk of court’s religious beliefs prohibit him personally from issuing marriage licenses under certain circumstances, he should simply appoint a deputy with full authority to perform that duty instead. This action would enable the clerk to resolve his internal conflict while simultaneously ensuring that his office fulfills its duty to issue marriage licenses. Even in rare situations where delegation is not feasible, various constitutional and statutory provisions provide an additional level of protection for these government officials, as discussed in Section V below.

#### **IV. Government Officials Authorized to Solemnize Marriages**

Pursuant to LSA-R.S. 9:202, in addition to religious clergy, state judges and justices of the peace in Louisiana are authorized to solemnize marriages. As in most states, these officials *may* perform marriage ceremonies, but are not *required* to do so. They should always be allowed this discretion, because the government has no interest in requiring jurists to preside over marriages that conflict with their convictions.

Judges and justices of the peace should be free to decline to solemnize a marriage when such participation would violate their conscience—especially when other judges, justices of the peace, and scores of clergy are willing and readily available to perform the duty upon request. Indeed, it is difficult to imagine a situation today where a marriage-eligible couple would be unable to find an authorized individual ready and willing to solemnize their union.

Since same-sex marriage first became legal in Massachusetts in 2004, we are aware of no circumstance anywhere in the nation where a same-sex couple has been unable to find someone to solemnize their marriage. Recognizing this, states that have legislatively redefined marriage have also routinely adopted conscience protections for government officials tasked with solemnizing marriages. This reflects true tolerance—where Americans with differing beliefs on an important topic can live at peace with one another and where no one is unnecessarily forced to give up their livelihood.

#### **V. Legal Protections Available to Government Officials**

Should government officials encounter resistance to their efforts to resolve a conflict, the First Amendment to the U.S. Constitution and our corresponding Article 1, Section 8 of the Louisiana Constitution protect their religious freedom. According to the U.S. Supreme Court, the First Amendment prohibits state and local governments 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”). Indeed, it was “historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.” *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.).

In addition to the constitutional protections, Louisiana, like 20 other states, has enacted statutory religious liberty safeguards in our “Preservation of Religious Freedom Act” (LSA-R.S. 13:5231, *et seq.*). This law ensures that courts carefully scrutinize government action that burdens or substantially burdens a person’s free exercise of religion. In other words, Louisiana law forbids the government from overriding the free exercise of religion unless (1) the government has a compelling reason for doing so and (2) the government has no means to achieve its interest other than violating people’s free-exercise rights.

Today, if the government seeks to compel officials to issue a marriage license or solemnize a marriage in conflict with their sincerely held beliefs, our Preservation of Religious Freedom Act should protect those officials from such government coercion. This is particularly true since, as discussed above, there

are generally many other accessible officials who are willing and authorized to issue marriage licenses and solemnize marriages in circumstances where a colleague experiences a religious quandary. Thus, the government would have difficulty arguing that it must force particular officials to violate their consciences in order to achieve alleged state interests.

Other statutory protections should apply in this context as well. For example, federal and state employment laws generally require employers to reasonably accommodate the religious beliefs or practices of employees whenever an accommodation would not impose an undue hardship. In federal law, Title VII of the Civil Rights Act imposes this accommodation obligation on many government employers. *See* 42 U.S.C. §§ 2000e(j), 2000e-2 (2015). In Louisiana, La. Const. art. X, § 8(B) provides in relevant part: “No classified [state or city government] employee shall be discriminated against because of his political or religious beliefs...”

These laws include some limitations. First, Title VII does not protect officials who work for government employers that have less than fifteen “employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 42 U.S.C. § 2000e(b). Second, Title VII does not protect “any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.” 42 U.S.C. § 2000e(f). But these elected or appointed officials excluded from Title VII’s scope do “not include employees subject to the civil service laws of a State government . . . or political subdivision.” *Id.* While La. Const. art. X, § 2 excludes elected clerks of court and some other high level officials from the scope of Louisiana’s civil service laws, the protections of Art. X, § 8(B) should still apply to most of their employees.

## **VI. Public Policy in Louisiana**

Louisiana enjoys a deep religious heritage and our laws and public policy reflect that history. As the legislative findings provision of our Preservation of Religious Freedom Act explains at LSA-R.S. 13:5232(1): “The legislature finds and declares that... [the] [f]ree exercise of religion is a fundamental right of the highest order in this state.” Echoing this sentiment, Executive Order No. BJ 2015-8, issued by Governor Bobby Jindal on May 19, 2015, notes, in relevant part, “it is of preeminent importance that government take no adverse action against a person, wholly or partially, on the basis that such person acts in accordance with his religious belief that marriage is or should be recognized as the union of one man and one woman.” We expect that additional statutory protections will be added by the Louisiana Legislature and the U.S. Congress in the coming months.

## **VII. Conclusion and Offer of Assistance**

In Louisiana, we love our neighbors as ourselves, and we agree that every person is entitled to dignity and respect. Yet, we also believe the right of conscience of each individual is fundamental, and no one should ever be forced by the government to violate their sincerely held religious convictions about marriage. This principle of mutual respect and co-existence is essential to maintain a free marketplace of ideas, and it remains at the heart of what it means to be a freedom-loving American.

The implementation of same-sex marriage throughout the country should not alter government officials' rights to live and work according to their sincerely held beliefs. Simple steps can be taken in each situation in a courteous manner that respects the rights of all involved. While the strength of a particular official's case will depend on the relevant facts and applicable state laws, the constitutional and statutory authority discussed above should provide some measure of protection for government officials who face these religious dilemmas.

On June 29, 2015, Governor Jindal's executive counsel issued a memo asserting that "appropriate accommodations may be made for state employees who express a religious objection to involvement in issuance of same-sex marriage licenses, and judges and justices of the peace may not be forced to officiate a same-sex wedding ceremony when other authorized individuals who have no religious objection are available." The memo continues, "If any such state employee or official who asserts a religious objection is faced with a legal challenge for doing so, numerous attorneys have committed to defend their rights free of charge, subject to the facts of each case." *We are those attorneys.*

***If officials charged with issuing marriage licenses or solemnizing marriages encounter the legal difficulties discussed in this memorandum, they are encouraged to contact our offices at Freedom Guard at (318) 658-9456.*** Our attorneys will review the specific facts and qualifications of each case, and offer our representation in appropriate situations. As a not-for-profit public interest law firm, the services of Freedom Guard are always provided free of charge, and all such correspondence is held strictly confidential and protected by the attorney-client privilege.

As the full implications of the *Obergefell* decision are sorted out over the coming months and years, let us resolve to protect the inalienable rights of all our citizens. Freedom Guard will do its part. For further information or legal assistance, please do not hesitate to contact us.

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*Freedom Guard's Chief Counsel, Mike Johnson, serves in that capacity and submits this memorandum in his personal and professional capacity, and not in his role as a Member of the Louisiana House of Representatives.*