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July 8, 2015

Re: Religion-Based Exemptions for Public Officials Authorized to Issue Marriage Licenses

Dear Attorney General Jackley,

We write to you regarding a hypothetical situation described in the July 2, 2015, ARGUS LEADER. In the article, you are quoted as saying that South Dakota county officials may permit another employee to issue a marriage license to a same-sex couple if the county employee authorized to issue a license has a religion-based objection to doing so. See Assoc. Press, *Workers can have someone else issue marriage license*, ARGUS LEADER, July 2, 2015. You go on to state that if no other county official is authorized to issue the license, another county or the state could do so. *Id.* The article goes to quote you describing this as a “commonsense solution” to the hypothetical that would not violate the rights of the couple seeking a license or the county employee. *Id.*

Your statements suggest that the Constitution requires and authorizes the state to create a safe harbor for public officials and employees who have religion-based objections to the marriage rights of same sex couples. As described more fully below, government offices should be equally open to all couples, including same sex couples. County officials who have a duty to uphold the law are not able to discriminate against individuals based upon their own religious beliefs. They have a duty to impartially administer the law to all citizens.

As you are aware, in *Obergefell v. Hodges*, the United States Supreme Court struck down state bans on same-sex marriage as unconstitutional. *S. Ct.*, WL 2473451 (June 26, 2015). The Court held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment require marriage for same sex couples to be afforded "on the same terms as accorded to couples of the opposite sex." *Id.*, slip op. at 27. Thus, same-sex couples are entitled to the same right to marry as opposite-sex couples, and South Dakota and those acting on its behalf must honor that right.



You have implicitly acknowledged that the *Obergefell* ruling imposes a duty to permit same-sex couples to marry, but your suggestion that this duty is met if other county or state officials issue a marriage license misses the mark. To state the obvious, forcing same-sex couples to drive to a separate county to obtain services that heterosexual couples can access in their home county is not equal treatment. All county officials and public employees must abide by the U.S. Constitution. County clerks, like all public officers in South Dakota, take an oath swearing to “support the Constitution of the United States and of this state and” to “faithfully and impartially discharge the duties of his office”. S.D.C.L. 3-1-5. As dictated by *Obergefell*, the Constitution requires equal treatment of same-sex couples. *Obergefell*, slip op. at 22. All county officials and employees are subject to this oath and must accord equal treatment to same-sex couples, regardless of their personal beliefs. See S.D.C.L. 3-1-10 (defining “office” and “officer” to mean and ‘apply to any executive or administrative officer of the state; to any county, municipality, township, or school district; and to any district, board, bureau, commission, department, or other body or office, exercising executive or administrative powers as part of the government, or any arm of the government, of the state.’).

We recognize that religious liberty is a fundamental American value protected by the First Amendment, but that liberty has never meant that government officials can rely on their personal religious beliefs to discriminate against citizens seeking vital government services. Although county clerks have every right to advocate their personal views when acting as private citizens, public officials *acting in their official capacity* do not have unfettered First Amendment rights. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006) (concluding that acts taken in official capacity are not protected by First Amendment). While people of faith "may continue to advocate" and "teach" contrary views on marriage, *Obergefell* at 27, government officers are not free to ignore the Court's directive when acting in their official capacity.

Because all county officials are bound to uphold the Constitution of the United States and the Supreme Court has clarified that failure to permit same-sex couples the right to marry is a violation of the Equal Protection Clause, county officials may not discriminate against same-sex couples based on their personal religious beliefs.

Moreover, although some officials may argue their religious beliefs must be accommodated under Title VII, that argument is misplaced. Title VII does not require the accommodation of public employees who refuse, on account of a religious objection, to perform their duties for all citizens equally. For example, courts have rejected claims for a religious accommodation under Title VII when an FBI agent refused on religious grounds to investigate anti-war activists, *see Ryan v. Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991), or when a police officer cited his religious attitudes about abortion as the ground for refusing to protect abortion



clinics, *see Parrott v. District of Columbia*, 1991 WL 126020 (D.D.C. 1991); *Rodriguez v. City of Chicago*, 156 F.3d 771, 779 (7th Cir. 1998). Thus, Title VII neither justifies nor requires the proposed accommodations for religious or conscience-based objections to issuing marriage licenses.

The ACLU of South Dakota defends the rights of all citizens to worship-or not-according to the dictates of conscience. As Americans, religious liberty is our birthright. Our First Amendment guarantees that no religious cleric or house of worship can ever be compelled to participate in the solemnization of a marriage that is contrary to the dictates of that faith, nor can opponents of same-sex marriage be prevented from advocating their views zealously in the marketplace of ideas. However, a public official's personally held religious beliefs are not superior to the right of all citizens to be treated equally under the law.

Sincerely,

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