

***Public Rights/Private Conscience Project***

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M E M O R A N D U M

TO: INTERESTED PARTIES

FROM: PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT<sup>1</sup>

RE: PROPOSED CONSCIENCE OR RELIGION-BASED EXEMPTION FOR  
PUBLIC OFFICIALS AUTHORIZED TO SOLEMNIZE MARRIAGES

DATE: JUNE 30, 2015

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The Supreme Court's June 26th decision in *Obergefell v. Hodges* constitutionalized a right to civil marriage for same-sex couples in the entire United States, thus lifting a ban on same-sex couples access to civil marriage in 33 states. The immediate response of some state attorneys general and other public officials has been to claim that public officials should be granted an exemption from officiating over civil marriages and/or issuing marriage licenses if doing so would offend their conscience or sincerely held religious beliefs.

In anticipation of the Supreme Court's ruling on this issue, the North Carolina legislature enacted a law setting forth that "[e]very magistrate has the right to recuse from performing all lawful marriages under this Chapter based upon any sincerely held religious objection."<sup>2</sup> The North Carolina law provides that magistrate may not assert religious objections to performing marriages on a case-by-case basis, or a categorical basis (like all same-sex marriages), but rather if they seek to be exempt from performing weddings for sincerely held religious reasons they must decline to officiate any wedding for at least six months. Furthermore, the new law provides that the Administrative Office of the Courts shall ensure that a magistrate is available in all jurisdictions for performance of marriages, even if some magistrates have recused themselves from doing so for religious reasons.

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<sup>1</sup> The analysis provided in this memorandum was aided by the comments of Professors Ira Lupu, F. Elwood & Eleanor Davis Professor of Law, Emeritus, George Washington University Law School; Professor Nelson Tebbe, Brooklyn Law School; and Professor Elizabeth Sepper, Washington University School of Law.

<sup>2</sup> S.L. 2015-75, available at: <http://www.ncleg.net/Sessions/2015/Bills/Senate/PDF/S2v4.pdf>.

Two days after the *Obergefell* ruling was issued, Texas Attorney General Ken Paxton, for example, issued a statement that:

- “County clerks and their employees retain religious freedoms that may allow accommodation of their religious objections to issuing same-sex marriage licenses. The strength of any such claim depends on the particular facts of each case.
- Justices of the peace and judges similarly retain religious freedoms, and may claim that the government cannot force them to conduct same-sex wedding ceremonies over their religious objections, when other authorized individuals have no objection, because it is not the least restrictive means of the government ensuring the ceremonies occur. The strength of any such claim depends on the particular facts of each case.”<sup>3</sup>

Louisiana Governor Bobby Jindal has similarly promised that “court clerks won’t have to issue licenses to gay couples if they have religious objections.”<sup>4</sup> His executive counsel issued a ruling on June 29th indicating “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.”<sup>5</sup>

These new laws and policies claim to lawfully balance the constitutional rights of same-sex couples to marry with the religious liberty rights of public officials. While there are a number of similar proposals being put forward in jurisdictions across the country, we will refer to them collectively in this memorandum as “marriage license exemption proposals.”<sup>6</sup>

This legal memorandum analyzes the legality of these “marriage license exemption proposals” under the First and Fourteenth Amendments to the U.S. Constitution and Title VII of the Civil Rights Act of 1964. (The memorandum does not examine their legality under the federal Religious Freedom Restoration Act, or RFRA, as RFRA does not apply to state or local

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<sup>3</sup> Memorandum Re: Rights of government officials involved with issuing same-sex marriage licenses and conducting same-sex wedding ceremonies (RQ-0031-KP); available at:

<https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf>.

<sup>4</sup> Julia O’Donoghue, “Bobby Jindal says there is protection for government workers who object to same-sex marriage, though it may be limited,” *The Times-Picayune*, June 29, 2015,

[http://www.nola.com/politics/index.ssf/2015/06/louisiana\\_clerks\\_marriage\\_lice.html](http://www.nola.com/politics/index.ssf/2015/06/louisiana_clerks_marriage_lice.html).

<sup>5</sup> “Governor Jindal Executive Counsel Issues Memo On Religious Liberty Implications In Light Of SCOTUS Ruling,” available at:

<http://media.nola.com/politics/other/Governor%20Jindal%20Executive%20Counsel%20Issues%20Memo%20On%20Religious%20Liberty%20Implications%20In%20Light%20Of%20SCOTUS%20Ruling.pdf>.

<sup>6</sup> See for example, Patrick Svitek, “Cruz: Clerks Should be Able to Opt Out of Gay Marriage Licenses,” *The Texas Tribune*, June 29, 2015, [www.texastribune.org/2015/06/27/cruz-clerks-should-be-able-to-opt-out-of-gay-marriage-lic/](http://www.texastribune.org/2015/06/27/cruz-clerks-should-be-able-to-opt-out-of-gay-marriage-lic/); Eric Ethington, “Same-Sex Marriage and the Attack on Religious Freedom,” *utahpolitico.hub*, October 24, 2014, available at: <http://utahpolitico.hub.com/sex-marriage-attack-religious-freedom-hub-debate/>; Rachel Zoll, “Next gay-marriage fight: Religious exemptions,” *Las Vegas Sun*, October 14, 2014, available at: <http://www.lasvegassun.com/news/2014/oct/14/next-gay-marriage-fight-religious-exemptions/>; Ashley Cusick, “AZ Clerks Objecting to Gay Marriage Urged by Religious Right Not to Issue Licenses,” *Phoenix New Times*, October 23, 2014, available at: [http://blogs.phoenixnewtimes.com/valleyfever/2014/10/clerks\\_office\\_licensing\\_surge.php](http://blogs.phoenixnewtimes.com/valleyfever/2014/10/clerks_office_licensing_surge.php); “ADF offers guidance to NC, Ariz., Idaho, Nev. officials responsible for issuing marriage licenses,” available at: <http://www.adfmedia.org/News/PRDetail/9372>.

employees.<sup>7</sup>) The memorandum concludes that nothing in the Constitution or in Title VII requires such exemptions. Instead, adopting such exemptions by statute or policy would violate fundamental constitutional rights to liberty and equality as well as the First Amendment's prohibition against the establishment of religion.

The "marriage license exemption proposals" are unprecedented, not only in their breadth but in their lack of constitutional foundation or justification. No reasonable reading of the existing legal principles of religious liberty either justifies or requires a procedure permitting a public official to decline to perform his or her statutorily required duties. Rather than "lawfully balancing" conflicting rights, these provisions would entrench a form of unconstitutional discrimination against same-sex couples immediately after that right has been acknowledged by the U.S. Supreme Court. It would create a new constitutional injury whereby same-sex couples would face indignity, stigma, humiliation, delay, and uncertainty about whether they can appear, without fear of facing rejection on the basis of their sexual orientation, before a public official responsible for officiating over a civil marriage and/or issuing a marriage license. The exemption proposals would make the efficacy of same-sex couples' constitutional right to marry contingent upon their being able to find a public official who has no objection to their having such a right.

In fact, many of the "marriage license exemption proposals" are drawn so broadly as to apply to an impossibly wide range of circumstances in which a public official might articulate a religion or conscience-based objection to issuing the marriage license. They invite "conscience creep" in which government officials refuse to provide lawful government services in a range of other contexts.<sup>8</sup> Those circumstances could well include, but not be limited to, objections to interracial marriages, marriages between people of different religions, second marriages, and marriages between people who have conceived a child while unmarried.

This broader scenario is far from speculation. As recently as 2009 Keith Bardwell, a Louisiana justice of the peace, was forced to resign his office after he refused to marry an interracial couple.<sup>9</sup> He, like the proponents of the current exemptions, argued that the couple could find another justice of the peace to marry them, one whose conscience was not burdened by the immorality of interracial marriage. When state officials advised him that could not continue to discriminate while holding public office, he commented: "I found out I can't be a justice of the peace and have a conscience."<sup>10</sup> In this observation Justice Bardwell is wrong. When he was sworn into office as a Justice of the Peace he pledged an oath to uphold the laws of

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<sup>7</sup> 42 U.S.C. § 2000bb et seq.; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>8</sup> Julie D. Cantor, *Conscientious Objection Gone Awry: Restoring Selfless Professionalism in Medicine*, 360 N.ENG. J. MED. 1484, 1485 (2009) (using the term "conscience creep" to describe the phenomenon in the healthcare field).

<sup>9</sup> Bardwell is not alone in refusing to marry interracial couples. See also: David Greenberg, "White Weddings: The incredible staying power of the laws against interracial marriage," *Slate*, June 17, 2008; Michael Biesecker, "GOP leader: NC officials can refuse to marry gays," *The News and Observer online* (Raleigh, North Carolina), October 21, 2014 ("In 1977, AP reported that two Forsyth County magistrates refused to marry a black man and a white woman, nearly 10 years after the U.S. Supreme Court declared state bans on interracial marriage unconstitutional.").

<sup>10</sup> "Louisiana Justice Who Refused Interracial Marriage Resigns," CNN.com, November 3, 2009, available at: <http://www.cnn.com/2009/US/11/03/louisiana.interracial.marriage/index.html?iref=24hours>.

the state of Louisiana and the U.S. Constitution.<sup>11</sup> His private beliefs, religious or otherwise, cannot be used to trump his public responsibilities to uphold and enforce duly enacted laws, and nor should the private beliefs of public officials asked to preside over marriages of same-sex couples.

## **I. Public Officials Have a Duty to Serve All Members of the Public Impartially**

Public officials and employees who are charged with issuing marriage licenses have a duty to serve all impartially. This duty is required by state codes of judicial conduct,<sup>12</sup> oaths of office,<sup>13</sup> state constitutions,<sup>14</sup> and the federal constitution.<sup>15</sup> Public officials must perform their legal duties in keeping with the requirements of law. Well-established precedent rejects any effort to deviate from the impartial provision of services to the public on account of the official's personal beliefs.<sup>16</sup> State officials may not discharge their legal duties and/or provide services to the public in a way that favors or disfavors some members of the public over others on account of the public official's personal viewpoints, including religiously motivated viewpoints.

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<sup>11</sup> Oath of Office, Secretary of State of the State of Louisiana: "I, \_\_\_\_\_, do solemnly (Print or Type Name) swear (or affirm) that I will support the constitution and laws of the United States and the constitution and laws of this state and that I will faithfully and impartially discharge and perform all the duties incumbent on me ... according to the best of my ability, so help me God." available at:

<http://www.sos.la.gov/electionsandvoting/publisheddocuments/oathofoffice.pdf>.

<sup>12</sup> See for example: Ariz. Code of Jud. Conduct, Rule 2.2 (*see* Comment 2, "Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."); Ariz. Code of Jud. Conduct, Rule 2.3 (A)-(B) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including...based upon...sexual orientation."). *See also* Ariz. Code of Conduct for Judicial Employees, Rule 2.3; Nev. Code of Jud. Conduct, Rule 2.2-2.3; Idaho Code of Jud. Conduct, Canon 3 (6); North Carolina Code of Jud. Conduct, Canon 3.

<sup>13</sup> ID. CODE ANN. § 59-401 ("I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Idaho, and that I will faithfully discharge the duties of [my office] according to the best of my ability."). *See also* A.Z. CONST., art. VI, § 26; N.C. GEN. STAT. ANN. § 11-7 ("I, \_\_\_\_\_, do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God."); N.C. GEN. STAT. ANN. § 11-11; N.V. CONST. art. XV, § 2.

<sup>14</sup> See e.g.: North Carolina State Constitution, Art 1, sec. 19: ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws.")

<sup>15</sup> *NYC Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979) ("The Equal Protection Clause of the Fourteenth Amendment provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The Clause announces a fundamental principle: the State must govern impartially.")

<sup>16</sup> *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) and *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)); *NYC Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979) ("The Equal Protection Clause of the Fourteenth Amendment provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The Clause announces a fundamental principle: the State must govern impartially.").

Proponents of religion or conscience-based exemptions for public officials empowered to issue marriage licenses argue that the general duty to serve all must yield when the performance of a public function conflicts with private religious belief or conscience. Advocates of this view provide no legal authority for this proposition. Nor can they find any such support in constitutional or statutory law. Professors Robert Tuttle and Ira Lupu, highly respected scholars of religious liberty, have written, “under both the equal protection clause of the 14th Amendment, and related equality provisions of state constitutions, [] state officers have duties of equal respect to all persons within the state. It is very difficult to see how one can square such a duty with a right, religion-based or otherwise, to refuse to provide public services to a particular class of individuals.”<sup>17</sup>

In fact, state commissions on judicial conduct have not hesitated to admonish judges and other public officials who have refused to issue marriage licenses to same-sex couples because of their religious beliefs. Just last fall, the State of Washington Commission on Judicial Conduct found that Judge Gary Tabor had blatantly violated the state’s code of judicial conduct when he publically refused to marry same-sex couples immediately after the state had legally authorized such marriages.<sup>18</sup> The Commission based its judgment against Judge Tabor on the principle that “[i]n order to maintain the public’s confidence in judicial decisions, a judge must not only be, but appear to be, free from bias and prepared to rule based strictly on the law and facts that come before the court, regardless of the extraneous characteristics of the parties.”<sup>19</sup>

### **a. The First Amendment’s Free Exercise Clause Does Not Require A Conscience Or Religion-Based Exemption For Public Officials Charged With Issuing Marriage Licenses**

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court ruled that a mandatory accommodation or exemption is not required in cases where burdens on religious exercise are imposed by religiously neutral, generally applicable laws (such as a law empowering certain public officials to issue marriage licenses). In cases very similar to those anticipated by the “marriage license exemption proposals,” courts have repeatedly ruled that public employees are not entitled to an exemption from performing their regular duties when their religious beliefs or conscience in some way conflicts with those duties.

A leading example of this firm and settled principle is *Ryan v. U.S. Dept. of Justice*,<sup>20</sup> in which an FBI agent refused, on the basis of his Catholic religious beliefs, an order to investigate pacifist groups that destroyed governmental property to express their opposition to war. The Seventh Circuit rejected his free exercise claim, concluding that after the Supreme Court’s decision in *Employment Division v. Smith*, “any argument that failure to accommodate Ryan’s

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<sup>17</sup> Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality And Religious Freedom*, 5 NW J. L. & Soc. Pol’y 274, 294 (2010).

<sup>18</sup> “Stipulation, Agreement and Order of Admonishment,” *In Re the Matter of: The Honorable Gary Tabor, Thurston County Superior Court Judge*, Commission on Judicial Conduct of the State of Washington, October 4, 2013, available at: <http://www.cjc.state.wa.us/Case%20Material/2013/7251%20Tabor%20Stip%20FINAL.pdf>.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> 950 F.2d 458 (7<sup>th</sup> Cir. 1991).

religiously motivated acts violates the free exercise clause of the first amendment is untenable.”<sup>21</sup> Similarly, in *Parrott v. District of Columbia*, the court held that a police department is not under a legal duty to make a reasonable accommodation of an officer’s religious attitudes about abortion and relieve him of duty to protect abortion clinic.<sup>22</sup> Citing *Employment Division v. Smith*, the court reasoned that the Supreme Court “has made clear that religious beliefs do not entitle one to accommodations from ‘compliance with an otherwise valid law.’ To permit every individual to decide for himself which valid, rational laws could be ignored due to personal religious beliefs would ‘permit every citizen to become a law unto himself.’”<sup>23</sup>

The Supreme Court’s opinion in *Obergefell* affirms the clear rule that public officials do not have a constitutional right to opt out of their otherwise obligatory statutory duties. Justice Kennedy concludes the Court’s ruling with the following discussion of religion-based objections to same-sex couples marrying:

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 same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.<sup>24</sup>

This language strongly supports the rights of all persons to advocate that their value system (whether or not based in religion) does not condone the rights of same-sex couples to marry and to engage those who disagree with their view on the merits of marriage equality. The majority opinion also acknowledges that religious conviction may support positions both in favor of and in opposition to the rights of same-sex couples to marry. But it goes no further, and in no way requires or authorizes the state to create a safe harbor for public officials who possess religion-based objections to the marriage rights of same-sex couples.

Thus the arguments advanced by the advocates of “marriage license exemption proposals” that such exemptions are required by the First Amendment clearly misstate the current state of the law.

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<sup>21</sup> *Id.* at 461.

<sup>22</sup> 1991 WL 126020 (D.D.C. 1991) (“The MPD requirement that he serve such duty were valid, uniformly applied, non-discriminatory directives which plaintiff is not excused from obeying.”)

<sup>23</sup> *Id.* at 4. See also *Gillette v. United States*, 401 U.S. 437, 461 (1971) (“Our cases do not at the farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.”).

<sup>24</sup> *Obergefell v. Hodges*, 576 U. S. \_\_\_\_ (2015), slip op. at 27.

## **b. The Proposed “Marriage License Exemptions” Violate the Fourteenth Amendment’s Equal Protection Clause**

Noted legal scholar William Eskridge has written that “there is nothing new about civil equality-religious liberty clashes.”<sup>25</sup> Just as public officials have sought, in some jurisdictions, to avoid marrying interracial couples or couples from different faiths, the current resistance to marrying same-sex couples amounts to no less than an attempt to justify an otherwise unconstitutional practice with an appeal to religious liberty. This maneuver figures the objector at the center of the legal question and minimizes the discrimination experienced by the couples seeking to exercise a constitutionally protected right.<sup>26</sup>

Lost from discussions of these exemptions are the rights of same-sex couples to marriage licenses on the same terms and conditions as different-sex couples. The discrimination, degradation, and stigmatization that they will encounter when a public official is allowed to refuse to issue a license or solemnize their marriage are ignored. These injuries are constitutional in nature as the Supreme Court in *U.S. v. Windsor*<sup>27</sup> and *Obergefell v. Hodges*<sup>28</sup> and many circuit courts have recognized.

The Supreme Court ruled in *Obergefell* “that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”<sup>29</sup> This ruling echoed Justice Kennedy’s reasoning in *Windsor* with respect to the effects of the Defense of Marriage Act (DOMA), that religion/conscience-based exemptions “principal effect is to identify a subset of state-sanctioned marriages and make them unequal.”<sup>30</sup> Like DOMA and the pre-*Obergefell* laws banning same-sex couples from marrying, the proposed exemptions would impose a disability on a class of persons whose relationships were otherwise entitled to recognition by the state, and those persons would be stigmatized thereby. It is all the more injurious that a state official, in the name of the public, would be the instrument of the stigma. The Court held just that in *Obergefell*:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.<sup>31</sup>

These “marriage license exemption proposals” offer same-sex couples (and presumably a

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<sup>25</sup> William N. Eskridge, Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L.Rev. 657 (2011).

<sup>26</sup> See generally, Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 Ind. L.J. 703 (2014).

<sup>27</sup> *U.S. v. Windsor*, 133 S.Ct. 2675, 2694 (2013).

<sup>28</sup> *Obergefell v. Hodges*, 576 U. S. \_\_\_\_ (2015).

<sup>29</sup> *Id.* at 18.

<sup>30</sup> *U.S. v. Windsor*, 133 S.Ct. 2675, 2694 (2013).

<sup>31</sup> *Obergefell v. Hodges*, 576 U. S. \_\_\_\_ (2015), slip op. at 19.

much larger set of couples whose marriages, such as interracial marriages, interfaith marriages, second marriages, etc., might offend the religious beliefs or conscience of a public official charged with issuing to them a marriage license) a “half-baked constitutional right,” a right which would fully materialize if, and only if, they were able to find a public official whose personal religious beliefs or conscience were not offended by such a union. The contingency of such a right violates the very notion of right altogether, having it turn on the willingness of individual state actors to recognize its integrity. Either same-sex couples have a right to marry or they don’t. The “marriage license exemption proposals” undermine the very idea, as well as the living practice, of the rule of law and the force of the Fourteenth Amendment’s Equal Protection Clause.

Policies that allow or require an objecting official to delegate to another person the task of marrying couples whose marriage they find objectionable do not, thereby, avoid offense to the notion of equal protection of the laws. The Court’s ruling in *Obergefell* rejects this purported accommodation of a competing right, instead noting that it amounts to another form of state-sponsored discrimination.

To allow couples to exercise that fundamental right if and only if a public official who does not find their marriage offensive is available reinforces the kind of stigma that the Court found constitutionally suspect in *Obergefell*. This constitutional injury would not be avoided by creating a system whereby public officials who object to marrying certain couples on the grounds of religion or conscience might step aside and find a colleague who does not hold similar beliefs to marry these couples. The humiliation caused by judgment, discrimination and stigma from an official acting on the state’s behalf is not erased when the state successfully completes a search for an official willing to marry a couple already so judged. The constitutional right to marry necessarily entails access to the administrative infrastructure of the state to issue marriage licenses on an impartial and neutral basis. The rights of same-sex couples cannot be made contingent upon the state’s capacity to find another official who does not object to their marriage on religious or conscience grounds.

North Carolina’s new law allows public officials to elect not to perform *any* marriages if they object to performing same-sex marriages, requiring a six-month abstention from all marriage duties. But the law *also* requires that the state make available a public official that can issue marriage licenses to all qualified applicants even if some officials have objected to doing so for religious reasons. The harms created by this scheme may be different or less likely to occur from that where a couple seeking a license is confronted by personal rejection from the official asserting a religious refusal, or where the couple is unable to find any public official willing to issue them a marriage license. This difference, however, does not render the North Carolina approach entirely inoffensive to the constitution, as the likelihood of a seamless accommodation scheme is unlikely as a practical matter. Just as the Supreme Court’s accommodation of the religious liberty rights at stake in the *Burwell v. Hobby Lobby*<sup>32</sup> case, in reality on the ground, has not resulted in a “win-win” because the employees of the companies in question are still waiting

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<sup>32</sup> 134 S.Ct. 2751, 2760 (2014)(“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.”).

for active contraceptive insurance coverage,<sup>33</sup> so too it is unclear whether the public entities responsible for issuing marriage licenses will be able to staff the relevant offices sufficiently such that it can “ensure [that] all applicants for marriage licenses to be issued a license upon satisfaction”<sup>34</sup> of the relevant legal criteria. Even if they are able to do so, there are important stigma, humiliation and dignitary harms created by a public government accommodation of public employees who object to an individual or group’s fundamental rights.

When state law or policy authorizes the likelihood that members of the public will not be able to obtain a marriage license for which they constitutionally qualify, these license seekers rights to due process and equal protection have been undermined. The Supreme Court’s opinions in *U.S. v. Windsor* and *Obergefell v. Hodges* cannot be read to tolerate such an aggravated and state-sponsored risk. The fundamental right to marry secured by the constitution would be rendered a mockery by the enactment of the proposed exemptions, given the broad discretion they would grant to public officials to refuse the issuance of a marriage license on the basis of private disapproval of the union.

### **c. Title VII Does Not Require a Conscience or Religion-Based Exemption For Public Officials Charged With Issuing Marriage Licenses**

Public officials who seek to avoid marrying same-sex couples based on religious beliefs or conscience might argue that Title VII mandates that their employer accommodate their religious beliefs.<sup>35</sup> This claim is misplaced, as 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.

Title VII prohibits employers from terminating or discriminating against an employee because of his or her religion.<sup>36</sup> It further obliges an employer to accommodate an employee’s religious observance or practice, unless doing so would impose an undue hardship on the conduct of the employer’s business. An undue hardship exists, as a matter of law, when an employer incurs anything more than a *de minimis* cost to reasonably accommodate an employee’s religious beliefs.<sup>37</sup> The statute does not permit an employee to pick and choose that duties he or she will perform based upon their religious or other convictions.<sup>38</sup>

The kind of blanket accommodation for public officials from performing legally mandated duties anticipated by the “marriage license exemption proposals” has been consistently rejected by federal courts as exceeding the religious accommodation requirement of Title VII

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<sup>33</sup> Nelson Tebbe, Richard Schragger, and Micah Schwartzman, *Hobby Lobby’s Bitter Anniversary*, available at <http://balkin.blogspot.com/2015/06/hobby-lobbys-bitter-anniversary.html>.

<sup>34</sup> S.L. 2015-75, available at: <http://www.ncleg.net/Sessions/2015/Bills/Senate/PDF/S2v4.pdf>.

<sup>35</sup> Civil Rights Act of 1964, §§ 701(j), 703(a)(1), 42 U.S.C.A. §§ 2000e(j), 2000e–2(a)(1).

<sup>36</sup> 42 U.S.C. §§ 2000e5 2(a)(1).

<sup>37</sup> *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); 29 C.F.R. 1605.1(b)(c) (1967), *quoted in* 29 C.F.R. Pt. 1605, app. A (2001).

<sup>38</sup> *Id.*

because it imposes an undue hardship on the employer.<sup>39</sup> For example, courts have not recognized a right to religious accommodation under Title VII when an FBI agent refused on religious grounds to investigate anti-war activists,<sup>40</sup> or when a police officer cited his religious attitudes about abortion as the ground for being relieved from duty to protect abortion clinics.<sup>41</sup>

Similarly, in a case in which a police officer brought a claim under Title VII in connection with her termination for refusing, on religious grounds, an assignment as Gaming Commission agent at a casino, the Seventh Circuit held that “it would be unreasonable to require the state to allow an officer to choose which crimes he would investigate and which potential victims he would protect.”<sup>42</sup> Rejecting this interpretation of Title VII’s religious accommodation provision, the Court explained:

Many officers have religious scruples about particular activities: to give just a few examples, Baptists oppose liquor as well as gambling, Roman Catholics oppose abortion, Jews and Muslims oppose the consumption of pork, and a few faiths (such as the one at issue in *Smith*) include hallucinogenic drugs in their worship and thus oppose legal prohibitions of those drugs. If [the plaintiff here] is right, all of these faiths, and more, must be accommodated by assigning believers to duties compatible with their principles. Does § 701(j) require the State Police to assign Unitarians to guard the abortion clinic, Catholics to prevent thefts from liquor stores, and Baptists to investigate claims that supermarkets mis-weigh bacon and shellfish? Must prostitutes be left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?<sup>43</sup>

The answer to these questions, of course, is no.

The cases in which courts have rejected public sector employees’ requests for religion-based accommodations have relied not only on the finding of a more than *de minimus* burden on the employer, but also because of the negative impact on public confidence in officials. “The objection is to the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect.”<sup>44</sup>

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<sup>39</sup> See, for example, *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 85 (1977) (“[W]e will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”); *George v. Home Depot*, 2001 WL 1558315 (E.D.La.2001) (allowing employees to decide which days they will work is not a reasonable accommodation and reasonable accommodations do not need to be only on the employee’s terms.)

<sup>40</sup> *Ryan v. Dep’t of Justice*, 950 F.2d 458 (7th Cir. 1991).

<sup>41</sup> *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) (Posner, J. concurring) (“The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty.”)<sup>41</sup>

<sup>42</sup> *Endres v. Indiana State Police*, 349 F.3d 922, 925 (7th Cir. 2003).

<sup>43</sup> *Id.* Judge Frank Easterbrook, writing for the Seventh Circuit, noted: “as judges take an oath to enforce *all* laws, without regard to their (or the litigants’) social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical.” *Id.* at 927.

<sup>44</sup> *Rodriguez v. City of Chicago*, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, J., concurring).

Title VII jurisprudence also rejects as a form of legally mandated accommodation a public employee's request that another official step in to issue a marriage license should the original official have a conscience-based objections to doing so. In a range of contexts courts have rejected Title VII religious accommodation claims where the requested accommodation "would force other employees, against their wishes, to modify their work schedules to accommodate the religious beliefs of a particular employee, because that constitutes an undue hardship."<sup>45</sup> Title VII does not require accommodations that shift burdens to employers or other employees. This kind of accommodation has been uniformly found by courts to impose an undue burden on the employer and on other employees.<sup>46</sup>

What is more, accommodation requirements contained in Title VII are appropriately "measured so that [they do] not override other significant interests."<sup>47</sup> Clearly the state's interests in providing marriage licenses to the public in a manner that conforms to the requirements of the Fourteenth Amendment's Equal Protection clause amounts to another significant interest that overrides the unworkable, inflexible, and unpredictable demand that all public officials empowered to issue marriage licenses be permitted to decline to perform their duties when they confront a conflict with their sincerely held religious beliefs or conscience.

Thus, Title VII neither justifies nor requires the proposed accommodations for religious or conscience-based objections to issuing marriage licenses. To the contrary, under Title VII public employers would be protected in a decision to terminate a public official who refuses to issue a marriage license on the ground that it would offend his or her religious beliefs or conscience to do so. Because of the negative impact on public confidence in state and local officials, such requests for accommodation or exemption from duty would clearly impose an undue burden on their employers far more onerous than the *de minimus* threshold anticipated by Title VII.

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<sup>45</sup> *Vaughn v. Waffle House, Inc.*, 263 F.Supp.2d 1075, 1085 (N.D.Tex. 2003). See also, *Eversley v. MBank Dallas*, 843 F.2d 172, 176 (5<sup>th</sup> Cir. 1988).

<sup>46</sup> For example, in *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495 (5<sup>th</sup> Cir. 2001), a mental health counselor claimed that her religious beliefs justified her refusal to provide counseling to anyone in a gay relationship, or anyone in an unmarried, sexual relationship, or, for that matter, anyone on any subject that might offend her religion. The Fifth Circuit sided with her employer, saying: "Considering that Bruff's expressed requirement to be excused from counseling on any subjects that might conflict with her religious beliefs essentially would give her unlimited authority to determine what those conflicts are, and when she must be accommodated, more conflicts would appear to be givens." *Id.* at 501. Given that it would be impossible in advance to anticipate the circumstances in which a counseling session might uncover a topic that offended Ms. Bruff's religious beliefs, the court concluded that the burden that this clearly placed on the employer "to schedule multiple counselors for sessions, or additional counseling sessions to cover areas Bruff declined to address, [her request for accommodation] would also clearly involve more than *de minimis* cost." *Id.* See also: *E.E.O.C. v. Aldi, Inc.*, 2009 WL 3183077, 15, 107 Fair Empl.Prac.Cas. (BNA) 714 (W.D.Pa. 2009)("[C]ourts have consistently held that Title VII does not require an employer to force other employees to work on a particular day in order to accommodate a specific employee's desire to observe a religious holiday or Sabbath."). See also, *EEOC v. Bridgestone/Firestone, Inc.*, 95 F. Supp 2d 913, 924 (C.D.Ill.2000); *Moore v. A.E. Staley Mfg. Co.*, 727 F.Supp. 1156, 1162-63 (N.D.Ill.1989); *EEOC v. Carbie Hilton Int'l*, 597 F.Supp. 1007, 1013 (D.P.R.1984).

<sup>47</sup> *Prise v. Alderwoods Group, Inc.*, 657 F.Supp.2d 564, 603 (W.D.Pa. 2009), citing *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2009).

## II. A Broad Religion or Conscience-Based Exemption For Public Officials Empowered to Issue Marriage Licenses Would Create a Violation of the First Amendment’s Establishment Clause

As argued above, the religion/conscience-based exemption of public officials from issuing marriage licenses is not required by the Constitution or Title VII. By its imposition of harm on same-sex couples (and perhaps others) seeking to marry, the “marriage license exemption proposals” also raise a serious Establishment Clause problem.

The First Amendment’s Establishment Clause requires, among other things, that governmental entities exercise authority in a religiously neutral way.<sup>48</sup> This commitment to the principle that civil power must be exercised in a manner neutral to religion means “government should not prefer one religion to another, or religion to irreligion.”<sup>49</sup>

The proposed accommodation risks creating the very Establishment Clause problem that the Supreme Court’s jurisprudence has condemned in a range of settings. Here, the requested exemption extends beyond the legitimate accommodation of a legitimate burden on religious belief or practice, where no harm is imposed on third parties. Much more, it builds a preference for religion into the law itself by granting the religious views of some public officials special protection.

The special protection for religion that raises an Establishment Clause problem pertains to the cost-shifting consequences created by the “marriage license exemption proposals.” The Supreme Court has condemned accommodations on Establishment Clause grounds “when the accommodations impose significant burdens on third parties who do not believe or participate in the accommodated practice.”<sup>50</sup> Time and again the Court has found an Establishment Clause violation where the state protects believers at the expense of others in secular environments. The leading case on this principle is *Estate of Thornton v. Caldor*,<sup>51</sup> in which the Court invalidated a state statute that granted employees an absolute right not to work on their chosen Sabbath, irrespective of the costs their choices might impose on their employer and coworkers:

This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . : The First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.<sup>52</sup>

The Justices invoked the same reading of the Establishment Clause to invalidate a

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<sup>48</sup> *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 703 (1994).

<sup>49</sup> *Id.*, citing *See Wallace v. Jaffree*, 472 U.S., at 52–54, 105 S.Ct., at 2487–2488; *Epperson v. Arkansas*, 393 U.S., at 104, 89 S.Ct., at 270; *School Dist. of Abington Township v. Schempp*, 374 U.S., at 216–217, 83 S.Ct., at 1568.

<sup>50</sup> Frederick M. Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV.C.R.-C.L.L.REV. 343, 348 (2014).

<sup>51</sup> 472 U.S. 703 (1985).

<sup>52</sup> *Id.* at 710 (quoting *Otten v. Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)) (internal quotation marks omitted).

permissive state sales-tax exemption in *Texas Monthly v. Bullock*.<sup>53</sup> They reasoned that the state had increased the sales-tax burden of secular newspapers and magazines subject to the tax in violation of the Establishment Clause when it restricted the exemption to religious newspapers and magazines.<sup>54</sup>

Most recently, in *Cutter v. Wilkinson*,<sup>55</sup> the Court considered whether an Establishment Clause violation arose from the Religious Land Use and Institutionalized Persons Act,<sup>56</sup> (RLUIPA), which prohibits government from interfering with the religious exercise of prison inmates without compelling justification. The Court unanimously held that to avoid a collision with the Establishment Clause, in interpreting the RLUIPA “courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries” and the Court cited both *Caldor* and *Texas Monthly* to support that proposition.<sup>57</sup> This concern for the burdens imposed on third parties applies with equal force to the Texas RFRA and any other state law that purports to authorize an accommodation for public officials with religious objections to same sex marriage.

Thus, the “marriage license exemption proposals” would violate well-established Supreme Court jurisprudence condemning, on Establishment Clause grounds, policies or practices that impose significant burdens on third parties who do not believe or participate in the accommodated practice.

### III. Conclusion

For all the foregoing reasons, the “marriage license exemption proposals” that are being put forward in jurisdictions across the country should be rejected. Their rejection should be based not in a hostility to religious liberty, but rather out of respect for well-established traditions and principles that protect both the free exercise of religion and the equal protection of the laws in a democracy. The case that is made for the “marriage license exemption proposals” is not justified in either well-established constitutional law or in statutes that prohibit discrimination on the basis of religion. Rather, these proposals will violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, and the Establishment Clause of the First Amendment.

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<sup>53</sup> 489 U.S. 1, 2 (1989)(plurality opinion).

<sup>54</sup> *Id.* at 15, 18 n.8 (reasoning that “[w]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that ... burdens nonbeneficiaries,” it has unconstitutionally endorsed the accommodated religion).

<sup>55</sup> 544 U.S. 709, 709 (2005).

<sup>56</sup> 42 U.S.C. §§ 2000cc-2000cc-5 (2006).

<sup>57</sup> *Cutter*, 544 U.S. at 720 (citing with approval *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985)). “In *Caldor*, the Court struck down a Connecticut law that “arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath.” We held the law invalid under the Establishment Clause because it “unyielding[ly] weigh[ted]” the interests of Sabbatarians “over all other interests.” *Id.* at 722. See also, Gedicks & Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV.C.R.-C.L.L.REV. 343, 357-58 (2014).