



STATE OF ARKANSAS  
THE ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2015-075

August 5, 2015

The Honorable Bruce Maloch  
State Senator  
650 Columbia Road 258  
Magnolia, Arkansas 71753

Dear Senator Maloch,

I am writing in response to your request for an opinion regarding the authority of justices of the peace to solemnize weddings. You ask eight questions:

1. If a **current** justice of the peace (“JP”) or county judge (“Judge”) chooses to solemnize marriages pursuant to Ark. Code Ann. § 9-11-213, must the official adopt an “all or nothing” policy—marrying all couples who request the service?
2. If a **current** JP or Judge chooses to solemnize marriages pursuant to Ark. Code Ann. § 9-11-213, may the official choose to solemnize some marriages, while declining to solemnize others?
3. If the answer to question 1 is “yes,” and a current JP or Judge chooses a general policy of not solemnizing marriages, may the official make occasional exceptions to marry family members or close friends?
4. If a **former** JP or Judge chooses to solemnize marriages pursuant to Ark. Code Ann. § 9-11-213, must the official adopt an “all or nothing” policy—marrying all couples who request the service?
5. If a **former** JP or Judge chooses to solemnize marriages pursuant to Ark. Code Ann. § 9-11-213, may the official choose to solemnize some marriages while declining to solemnize others?
6. If the answer to question 4 is “yes,” and a former JP or Judge chooses a general policy of not solemnizing marriages, may the official make occasional exceptions to marry family members or close friends?

7. If a *current* JP or Judge is also a minister of the gospel and properly registered to solemnize marriages as a minister of the gospel pursuant to Ark. Code Ann. § 9-11-214, may the official choose, as a minister of the gospel, to solemnize some marriages, while declining to solemnize others?
8. If a *former* JP or Judge permitted to perform marriages under Ark. Code Ann. § 9-11-213 is also a minister of the gospel and properly registered to solemnize marriages as a minister of the gospel pursuant to Ark. Code Ann. § 9-11-214, may the official choose, as a minister of the gospel, to solemnize some marriages, while declining to solemnize others?

## RESPONSE

Given your questions' context—especially because your last two questions ask about ministers—I take your questions to be asking whether JPs who object (on religious grounds) to solemnizing same-sex marriages would be subject to liability. While, under current state law, it is not clear how such a lawsuit would be brought, I will address how a court faced with such a suit would likely proceed. In my opinion, an Arkansas court would have to interpret and apply Arkansas's Religious Freedom Restoration Act (ARFRA). The analysis, which would be substantially the same for Questions 1–6, would turn on how an Arkansas court would handle the key circuit splits among federal courts that have interpreted the same provisions in the federal RFRA. The answer to Questions 7 and 8 depends on the capacity in which the JP/minister is solemnizing the marriage. If the JP/minister would be solemnizing the marriage in his or her capacity as a minister, then the JP/minister certainly can decline to solemnize same-sex marriages.

## DISCUSSION

Justices of the peace (JPs) are authorized but not required to solemnize civil marriages.<sup>1</sup> Taken on their face, your questions ask whether JPs who choose to solemnize civil marriages must officiate at the weddings of anyone who asks. The answer to that question is clearly “no.” There could be scheduling conflicts that make it impossible for a JP to officiate at the weddings of two different couples. It could also be that the couple requests a time for the ceremony that is incompatible with the JPs other duties. But given the context for your questions—especially because your last two questions ask about ministers—I take your questions to be asking whether JPs who choose to solemnize

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<sup>1</sup> You also ask about “county judges.” I will (for the sake of brevity) simply refer to JPs. Though individual facts may affect the outcome of any given case, the analytical framework explained in this opinion is essentially identical for any civil official listed in Ark. Code Ann. § 9-11-213.

marriages may refuse to solemnize the marriages of same-sex couples. Taken in the abstract, this question is difficult to answer with any degree of certainty. Accordingly, in what follows, I will address whether JPs can be held liable in a civil suit (for damages or an injunction).<sup>2</sup> The answer to that question is more complex, requiring me to explain a general legal framework within which a court would likely reach the answer to that question.

Before turning to your specific questions, I will explain the general law that, in my opinion, a court would use to resolve your questions. I will discuss the role of JPs in Arkansas marriage laws and how that role differs from clerks who issue marriage licenses. I will then discuss state laws that a court faced with your question would address, especially Act 975 of 2015—Arkansas’s Religious Freedom Restoration Act (ARFRA). I will explain the framework that a court must use to interpret the ARFRA. With this general law in place, I will then turn to address your specific questions.

### **I. Justices of the peace and Arkansas’s marriage laws**

Arkansas law establishes two requirements for a marriage entered into in this state to be valid. First, the marriage must be solemnized. Second, the solemnization must be conducted by one of the persons authorized to do so in the following statute:

For the purpose of being registered and perpetuating the evidence thereof, marriage shall be solemnized only by the following persons:

- (1) The Governor;
- (2) Any former justice of the Supreme Court;
- (3) Any judges of the courts of record within this state, including any former judge of a court of record who served at least four (4) years or more;
- (4) Any justice of the peace, including any former justice of the peace who served at least two (2) terms since the passage of Arkansas Constitution, Amendment 55;
- (5) Any regularly ordained minister or priest of any religious sect or denomination;
- (6) The mayor of any city or town;

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<sup>2</sup> Under current Arkansas law, it is not clear how such a lawsuit would be brought in state court. For purposes of this opinion, I will take as a given that such a suit could be filed, and I will assess how a court might resolve the dispute. I will also note that if a private party sued a JP in federal court under 42 U.S.C. § 1983, the analysis might be different.

- (7) Any official appointed for that purpose by the quorum court of the county where the marriage is to be solemnized; or
- (8) Any elected district court judge and any former municipal or district court judge who served at least four (4) years.<sup>3</sup>

JPs, like others on the list, are authorized *but not required* to solemnize marriages. This means that JPs differ from those who issue marriage licenses (i.e. county clerks) in two ways. First, unlike those public officials whose statutory duty is to issue marriage licenses, solemnizing marriages is not an inherent or official part of a JP's duties. Second, unlike the nondiscretionary task of issuing marriage licenses, JPs have discretion about whether they will solemnize marriages at all.

As I understand your questions, you are asking whether JPs who do solemnize marriages can be liable for refusing to solemnize same-sex marriages. There is no general statute that authorizes JPs (or others) to refuse to solemnize same-sex marriages. Thus, whether JPs can be liable for refusing to solemnize same-sex marriages likely depends on those to whom the ARFRA applies. Consequently, I will explain some of the background that led to the ARFRA as helpful context before turning to how the ARFRA is likely to be interpreted.

## II. State RFRA's

### a. RFRA's generally

Many states have their own Religious Freedom Restoration Acts. State RFRA's developed because of the U.S. Supreme Court's interpretation of the Free Exercise Clause to the First Amendment. The modern approach to Free Exercise Clause effectively began with the 1963 case of *Sherbert v. Verner*.<sup>4</sup> In *Sherbert*, a Seventh-day Adventist was fired because she refused to work on Saturday. Her refusal was motivated by her religious belief that she was required to avoid work on Saturdays. Her application for unemployment compensation was denied because, to receive unemployment benefits, her state's law required a person be "available to work."<sup>5</sup> The administrative panel that rejected her application found that Sherbert's unwillingness to work on Saturdays meant she refused suitable work. She sued to overturn the panel's decision, arguing that it violated her free-exercise rights.

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<sup>3</sup> Ark. Code Ann. § 9-11-213(a) (Repl. 2009).

<sup>4</sup> 374 U.S. 398 (1963).

<sup>5</sup> *Id.* at 400.

The Supreme Court agreed with *Sherbert*. The Court held that the employment law, when applied to her, “force[d] her to [choose] between following the precepts of her religion and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”<sup>6</sup> This type of forced decision, the Court held, “puts the same kind of burden upon free exercise of religion as would a fine imposed against” *Sherbert* for worshipping on Saturday.<sup>7</sup> As a consequence of this burden on free exercise, the Court analyzed the law under strict scrutiny, which required the government to show that its legislation furthered a compelling government interest and was narrowly tailored to achieve that aim.<sup>8</sup> In summary, *Sherbert* established the highest standard of review—strict scrutiny—for laws that impinged on a citizen’s religious exercise. For nearly the next 30 years, the Court applied *Sherbert* in free-exercise challenges, with some statutes failing the review<sup>9</sup> and others passing the review.<sup>10</sup>

In 1990, the Court abandoned the *Sherbert* test.<sup>11</sup> In *Employment Division v. Smith*, the Court considered whether an Oregon drug law violated the religious exercise of two Native Americans. The law prohibited certain drugs, including a hallucinogenic called peyote.<sup>12</sup> The two men ingested peyote “for sacramental purposes at a ceremony of the Native American Church, of which both are members.”<sup>13</sup> Later, they were both fired from their jobs at a private drug-rehabilitation clinic. Their subsequent applications for unemployment compensation were denied because the two men “were determined to be

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<sup>6</sup> *Id.* at 404.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 406. . If a law is subject to strict scrutiny, the government must show that it has a compelling interest in the goal it intends to further by the legislation and the legislation is narrowly tailored to achieve that goal. *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 546 (1993). Sometimes, the strict-scrutiny standard also includes the additional requirement that government regulation be the least restrictive alternative. There are two exceptions to *Smith*’s general rule that need not concern us here.

<sup>9</sup> *E.g. Wisconsin v. Yoder*, 406 U.S. 205 (1971).

<sup>10</sup> *E.g. United States v. Lee*, 455 U.S. 252 (1982).

<sup>11</sup> *See Employment v. Smith*, 494 U.S. 872. Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* vol. 1, 31 (Princeton Univ. Press 2006).

<sup>12</sup> *Id.* at 874.

<sup>13</sup> *Id.*

ineligible for benefits because they had been discharged for work-related “misconduct.”<sup>14</sup> The two men sued alleging that the drug law violated their free-exercise rights under the First Amendment.

The Court disagreed with the two men. The Court held that when a law is neutral and generally applicable, the law does not violate the Free Exercise Clause even though it may burden a person’s exercise of their religion. The Court cautioned, however, that if a law *targeted* a specific religious group or religious practice, the law would be subject to strict scrutiny.<sup>15</sup>

Congress believed that *Smith* eroded important constitutional protections. So Congress immediately began working on what came to be called the “Religious Freedom Restoration Act (RFRA).” In 1993, the law passed with virtual unanimity. Congress intended the RFRA, which specifically returned to the *Sherbert* standard, to apply to all levels of government. But, in 1997, in *City of Boerne v. Flores*, the Supreme Court declared that Congress lacked the power to apply the RFRA to the states.<sup>16</sup> Thus, under current Supreme Court jurisprudence, states are still subject to the lesser free-exercise protections explained in *Smith*.

The Court’s decision in *Flores* spurred many states to enact their own RFRA, which were mostly modeled on the RFRA. Today, at least 17 other states have enacted some version of their own RFRA.<sup>17</sup> Earlier this year, Arkansas enacted its own RFRA—Act

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 877–78

<sup>16</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997). The RFRA was later held to be constitutional as applied to the federal government. *See Cutter v. Wilkinson*, 544 U.S. 709 (2005).

<sup>17</sup> Ariz. Rev. Stat. Ann. §§ 41-1493 to -1493.02 (enacted in 2009); Conn. Gen. Stat. § 52-571b (enacted in 1993); Fla. Stat. Ann. §§ 761.01-.05 (enacted in 1998); Idaho Gen. Ann. §§73-401 to -404 (enacted in 2000); Ill. Comp. Stat. Ann. 35/1-99 (enacted in 1998); Indiana Act No. 101 of 2015 (to be codified at IC 34-13-9) (enacted in 2015); Mo. Ann. Stat. §§ 1.302-.307 (enacted in 2004); N.M. Stat. §§ 28-22-1 to 28-22-5 (enacted in 2000); Okla. Stat. Ann. Title 51, §§ 251-258 (enacted in 2000); Penn. Cons. Stat. Ann. §§ 2401–2407 (enacted in 2002); R.I. Gen. Laws §§ 42-80.1-1 to -4 (enacted in 1998); S.C. Code Ann. §§ 1-32-10 to -60 (enacted in 1999); Tenn. Code Ann. § 4-1-407 (enacted in 2009); Tex. Civ. Prac. & Rem. Code Ann. §110.003(b) (enacted in 1999); Utah Code Ann. §63L-5-101 to -404 (enacted in 2008); Va. Code Ann. §§ 57-1 to -2.02 (enacted in 2007). Alabama has enacted a RFRA into its state constitution. *See Ala. Const. art. 1, §3.01. See generally* Christopher C. Lund, *Religious Liberty After Gonzales: A look at State RFRA*s, 55 S.D. L. Rev. 466 (2010) (collecting states and state cases).

975 of 2015—which mirrors the FRFRA. Any court faced with your questions will have to interpret ARFRA.

***b. Interpreting Arkansas’s RFRA***

There are no Arkansas appellate cases or Attorney General Opinions interpreting the ARFRA. But the ARFRA requires that an Arkansas court interpret it in a way that is “consistent with the [FRFRA], federal case law, and federal jurisprudence.”<sup>18</sup> The U.S. Supreme Court and the various federal circuit courts of appeal have established a clear framework within which FRFRA cases are adjudicated. But there are circuit splits on several key questions. An Arkansas court faced with your questions would certainly apply this FRFRA framework. But it is less clear how a court would navigate the several important circuit splits.

Under the clear FRFRA framework, an Arkansas court faced with your questions would have to address five primary questions: (1) Does the ARFRA apply in suits between private parties? (2) What persons or entities are covered by the ARFRA? (3) What is the range of activities covered by the ARFRA? (4) What is the burden necessary to trigger ARFRA’s protection? (5) If the ARFRA claimant meets that threshold burden, what must the other party show to justify the burden?

**1. Suits between private parties.** The threshold question any Arkansas court would have to address is whether ARFRA applies in suits between private parties. While the federal circuits are split on whether the FRFRA can be used in suits between private parties, the majority hold that the FRFRA can be used in suits between private parties.<sup>19</sup> In my

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<sup>18</sup> Acts 2015, No. 975, § 1 (to be codified at Ark. Code Ann. § 16-123-402(2)).

<sup>19</sup> The **Sixth** and **Seventh** Circuits hold that the FRFRA cannot be used in private-party suits. *General Conference Corp. of Seventh Day Adventists v. McGill*, 617 F.3d 402, 410–11 (6th Cir. 2010); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006). The **Second**, **Eighth**, and **D.C.** Circuits hold that the FRFRA can be used in private-party suits. *See Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006); *In re Young v. Crystal Evangelical Free Church*, 141 F.3d 854, 863 (8th Cir. 1998) (holding that a church could assert the FRFRA as a defense against a trustee in a bankruptcy proceeding); *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 468–69 (D.C. Cir. 1996). While it is not entirely clear, the **Ninth** Circuit has either refused to take a position on this question or falls into the grouping of the Second, Eighth, and D.C. circuits. *See Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1120–21 (9th Cir. 2000) (allowing church to raise FRFRA as affirmative defense but then finding that the “substantial burden” threshold was not met), *but see Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, 171 F. Supp. 2d 1101, 1115 (D. Idaho, 2010) (characterizing the Ninth Circuit as having “declined to address whether [F]RFRA applied [in a private-party suit], holding instead that even if the RFRA did apply, the defendant had not demonstrated” the threshold burden).

opinion, an Arkansas court would probably also conclude that the ARFRA can be used in suits between private parties. There are at least two reasons for this. First, a sizable majority of the federal circuits, including the Eighth Circuit Court of Appeals, agree that the FRFRA can be used between private parties.<sup>20</sup> Because ARFRA requires that it be interpreted according to the FRFRA, a court would most likely follow the majority here. Second, the underlying *reasons* why the majority of circuits hold that the FRFRA can be used between private parties are themselves likely to persuade an Arkansas court. There are many such reasons, based in the FRFRA’s text, statutory history, and policy. An examination of those reasons here is impracticable (as it would significantly lengthen this opinion). Therefore, I simply refer the reader to further commentary on this point.<sup>21</sup>

**2. Persons covered by ARFRA.** The next question is whether JPs are persons who are covered by the ARFRA. The ARFRA states that “a government shall not substantially burden a person’s exercise of religion....” The term “person” is not separately defined, but it would certainly encompass individuals. And there is no reason to believe, from the text of the ARFRA, that “persons” excludes civil servants. The typical dispute regarding the term “person” is whether it can plausibly be read to cover business associations such as corporations. Recently, the U.S. Supreme Court answered that question affirmatively—at least with respect to certain corporations.<sup>22</sup>

**3. Activities covered by ARFRA.** The answers to the two previous questions jointly established that JPs could assert the ARFRA in a private-party suit. The next question is whether the ARFRA provides any protection to the JP in such a suit specifically for refusing to solemnize a same-sex marriage. The ARFRA protects “a person’s exercise of religion.” So a court would have to find that a given JP who objected to solemnizing same-sex marriages did so because he or she held a sincere religious belief that he or she was prohibited from solemnizing same-sex marriages. This is essentially a factual inquiry.

**4. Burden on the ARFRA claimant.** The ARFRA, like its federal counterpart, requires that an ARFRA claimant bear the initial burden of proof to show that the state law “substantially burdens” the claimant’s religious exercise. The federal circuits are split

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<sup>20</sup> *See, supra*, note 19.

<sup>21</sup> For more information on use of the FRFRA in private-party suits, please see Shruti Chaganti, *Why the Religious Freedom Restoration Act Provides A Defense in Suits By Private Parties*, 99 Va. L. Rev. 343 (2013).

<sup>22</sup> *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

into two groups<sup>23</sup> regarding what qualifies as a “substantial burden.”<sup>24</sup> The groups are as follows:

- ***The compulsion test.*** Under this standard, a FRFRA claimant can only show that his or her religious exercise has been “substantially burdened” if the government action (a) infringes on a practice that is mandated by the claimant’s religion; or (b) requires the claimant to engage in conduct prohibited by the claimant’s religion. The Fourth, Ninth, and Eleventh Circuits hold that this is the proper test.<sup>25</sup>
- ***The religiously-motivated test.*** Under this standard, a FRFRA claimant can only show that his or her religious exercise has been “substantially burdened” if the governmental action compels the claimant to refrain from religiously-motivated conduct. The Seventh, Eighth, and Tenth Circuits hold that this is the proper test.<sup>26</sup>

An Arkansas court faced with interpreting and applying ARFRA would have to determine which of the two standards is most consistent with the General Assembly’s

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<sup>23</sup> There is, arguably, a third group (represented by the Sixth Circuit) that applies what some call a “centrality test.” Under this test, the FRFRA claimant must establish that the practice in question is “central” to the claimant’s religious beliefs. See *Abdur-Rahman v. Michigan Dept. of Corrections*, 65 F.3d 489, 492 (6th Cir. 1995) (finding no substantial burden because the practice was not “fundamental” to the claimant’s religion). The Tenth Circuit seems to apply both the centrality test and the religiously-motivated test. See *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995); *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). I do not discuss the centrality test here because, notwithstanding the foregoing cases, the test is almost certainly in conflict with some U.S. Supreme Court decisions, which have discredited this test because it would “require [the Court] to rule that some religious adherents misunderstand their own religious beliefs... [and that to do so] would cast the Judiciary in a role that we were never intended to play.” *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457–58 (1988); see also *Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990) (“It is no more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field, than it would be for them to determine the “importance” of ideas before applying the “compelling interest” test in the free speech field....***Repeatedly and in many different contexts we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.***”) (emphasis added).

<sup>24</sup> See generally Steven C. Seeger, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 Mich. L. Rev. 1472 (1997).

<sup>25</sup> See *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995); but see *Droz v. Commissioner*, 48 F.3d 1120, 1121 (9th Cir. 1995) (seeming to apply the religiously-motivated test); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995).

<sup>26</sup> *Mack v. O’Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996); *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995).

intent. In my opinion, an Arkansas court would probably follow the Eighth Circuit in holding that ARFRA requires the religiously-motivated test. This is because, first, an Arkansas court is likely to be influenced by the fact that the test is endorsed by the Eighth Circuit. Second, the test is supported by its own, independent analysis that a court is likely to find persuasive.<sup>27</sup>

**5. Nature of protection ARFRA provides.** If the ARFRA claimant can meet the threshold burden of showing that the law “substantially burdens” the claimant’s religious exercise, then the opposing party must show that the law is “[i]n furtherance of a compelling government interest” and that the burden on the claimant is the “least restrictive means of furthering that compelling governmental interest.”<sup>28</sup>

### III. Application to the Questions

With the general ARFRA framework in place, we are now in a position to examine how a court would likely use the ARFRA to resolve your questions.

#### *Questions 1-3*

Your first two questions ask whether *current* JPs who solemnize marriages would be liable for refusing to solemnize a same-sex marriage. Given the framework explained above, I believe an Arkansas court would hold that JPs with sincerely-held religious-objection could assert (as a claim or defense to a claim) the ARFRA in a private-party suit. The threshold question would be whether a JP in this circumstance could successfully show that requiring him or her to solemnize a same-sex marriage would be a “substantial burden” on the JP’s religious exercise.

In my opinion, the question of substantial burden is the most difficult to answer in this context. Whether the JP would be able to establish the “substantial burden” depends on which of the two tests (discussed above) an Arkansas court adopted. If the court followed the Fourth, Ninth, and Eleventh Circuits and adopted the compulsion test, then a JP would probably not be able to show a substantial burden. The fundamental reason for this is that JPs are not *required* to solemnize marriages. They are not receiving a public benefit that they must choose to either forgo or violate their religious beliefs. So the JP would probably not be able to argue that he or she was being *compelled* to violate his or her religious beliefs. The JP could simply not solemnize marriages at all. In contrast, if the court followed the Seventh, Eighth, and Tenth circuits, then the JP would have a

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<sup>27</sup> For further explanation of the bases for the religiously-motivated test, please see Seeger, *Restoring Rights to Rites*, 95 Mich. L. Rev. 1472 (1997); Lund, *supra*, note 17.

<sup>28</sup> Acts 2015, No. 975, §1 (to be codified at Ark. Code Ann. § 16-123-404(a)).

greater likelihood of showing a “substantial burden.” I cannot be definitive on the outcome of a religiously-motivated test when applied to JPs as it is likely that any given case will depend on its own facts.

If a JP were able to meet the “substantial burden” standard, then the opposing party would have to prove that requiring the JP to solemnize same-sex marriages served a compelling state interest and was the least restrictive means to further that interest. In my opinion, a court would probably hold that forcing JPs to solemnize weddings when other authorized civil officials are available and have no objection is not the least restrictive means to ensure that same-sex couples have adequate access to civil officials to solemnize marriages.<sup>29</sup>

Your third question asks whether, if current JPs must be open to solemnizing the marriages of all who ask, an objecting JP can simply refuse to solemnize any marriages except those of family members and close friends. This question presents a scenario that is substantially the same as Questions 1 and 2. Therefore, in my opinion, a court would probably answer this question in the same way it would answer those two questions.

#### ***Questions 4-6***

Your fourth and fifth questions ask whether *former* JPs who solemnize weddings would be liable for refusing to solemnize same-sex weddings. In my opinion, the analysis and resulting answer to Questions 4 and 5 are essentially the same as those I offered for Questions 1 and 2, above. While the fact that the JP is a *former* public official may slightly affect the ways the “substantial burden” and least-restrictive-alternative tests are applied, I do not think that the analysis will be so altered as to alter a court’s conclusions. In other words, if a court determines that a current JP cannot successfully assert the ARFRA, then that will be the most likely conclusion for former JPs too.

Your sixth question asks whether, if former JPs must be open to solemnizing the marriages of all who ask, an objecting JP can simply refuse to solemnize any marriages except those of family members and close friends. This question presents a scenario that is substantially the same as Questions 4 and 5. Therefore, in my opinion, a court would probably answer this question in the same way it would answer those two questions.

#### ***Questions 7-8***

Your final two questions ask whether a JP (whether current or former) who is also a minister must choose to either not solemnize any marriages at all or solemnize the

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<sup>29</sup> The Texas Attorney General recently reached a similar conclusion. *See* Tex. Atty. Gen. Op. No. KP-0025 (June 28, 2015).

marriages of anyone who asks. The answer to this question depends on the capacity in which the JP/minister is solemnizing the marriage. If the JP is solemnizing the marriage in his or her capacity as a civil official, then the answer is the same as the responses to Questions 1, 2, 4, and 5. But if the JP/minister is solemnizing the marriage in his or her capacity as a minister, then, in my opinion, a court would hold that the JP/minister may refuse to solemnize the marriages of same-sex couples. If the court were to rule otherwise, then the court would effectively be holding that a minister could not perform his or her religious duties simply because of the current or former public service. This would be a gross infringement on the minister's religious exercise that would easily satisfy the substantial-burden test

Further, the capacity in which the JP/minister solemnizes any particular marriage would be clear for one of two reasons. First, as a practical matter, the context in which the JP/minister is asked to solemnize the marriage will probably show the capacity in which the JP/minister solemnizes the marriage. Second, this capacity will also be clear because a separate statute—Ark. Code Ann. 9-11-214(b)—requires a cleric who solemnizes a marriage to record, on the marriage license, the county in which the cleric's registration has been filed. In contrast, JPs, like all others authorized to solemnize marriages are subject to the less detailed requirement of Ark. Code Ann. 20-18-501(c), requiring that “[e]very person who performs a marriage shall certify the fact of the marriage and return the record [i.e. the marriage license] to the official who issued the license within fifteen (15) days after the ceremony.”

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,



Leslie Rutledge  
Attorney General

LR/RO:cyh