

No. 15-5880

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

APRIL MILLER, Ph.D; KAREN ANN ROBERTS; SHANTEL BURKE;
STEPHEN NAPIER; JODY FERNANDEZ; KEVIN HOLLOWAY; L. AARON
SKAGGS; and BARRY SPARTMAN,

Plaintiffs-Appellees,

v.

KIM DAVIS, Individually,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of Kentucky
In Case No. 15-cv-00044 Before The Honorable David L. Bunning

**APPELLANT KIM DAVIS' EMERGENCY MOTION FOR IMMEDIATE
CONSIDERATION AND MOTION TO STAY DISTRICT COURT'S
AUGUST 12, 2015 ORDER PENDING APPEAL**

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Pursuant to Fed. R. App. P. 8(a)(2) and 27, Appellant Kim Davis (“Davis”) hereby moves this Court, on an emergency basis, for a stay pending appeal of the district court’s August 12, 2015 order (D.E. 43)¹ (hereinafter the “Injunction”).

INTRODUCTION

The Injunction enjoins Davis, the County Clerk for Rowan County, Kentucky, to immediately authorize and issue under her name marriage licenses to the same-sex couples named in this lawsuit, in derogation of her conscience and religious liberty. Despite acknowledging that this case presents a constitutional “conflict” and “debate” between implicit and explicit rights, the district court has refused to grant Davis a stay of the Injunction pending appeal, electing instead to grant a temporary stay that expires on August 31, 2015. As it has already done in prior precedential marriage cases, this Court should grant an immediate stay of the Injunction.

A same-sex “marriage” (“SSM”) license issued on Davis’ authorization and bearing her name and imprimatur substantially and irreparably burdens Davis’ conscience and deeply-held, sincere religious beliefs, which dictate to Davis that such unions are not and cannot be “marriage.” That searing act of personal validation would forever echo in her conscience—and, if it happened, there is no absolution or correction that any earthly court can provide to rectify it. A stay of the Injunction will halt the irreversible implications on Davis’ conscience while this Court reviews

¹ Citations to the district court record are indicated by this format: “D.E. ___.”

Davis' appeal and the multiple less restrictive alternatives available that do not substantially burden Davis (or the Plaintiffs).

This case is a matter of first impression, left unaddressed following the nascent *Obergefell v. Hodges*. 135 S. Ct. 2584 (2015). Over against its redefinition of marriage, *Obergefell* unanimously held that First Amendment protections for religious persons remain despite same-sex "marriage." The district court has acknowledged that "this civil action" presents a constitutional "debate," "tension," and "conflict" between "two individual liberties held sacrosanct in American jurisprudence."² In the district court's view, Plaintiffs' rights trump Davis' religious rights. But, unlike Plaintiffs, Davis' individual liberties are enumerated (not emanations) in the United States and Kentucky Constitutions and the Kentucky Religious Freedom Restoration Act, and, moreover, they are natural liberties tied to religious beliefs that are measured in millennia (not weeks). Such rights deserve a full hearing in this Court. In light of the foregoing, this Court should stay the Injunction pending final resolution of this appeal.

STATEMENT OF FACTS

On July 2, 2015, less than one week after the Supreme Court decided *Obergefell v. Hodges* and the Kentucky Governor issued a directive ordering all

² Justice Thomas expressly predicted this "inevitable" conflict as individuals "are confronted with demands to participate in and endorse civil marriages between same-sex couples." *Obergefell*, 135 S.Ct. at 2638 (Thomas, J., dissenting).

county clerks to personally authorize SSM licenses (the “SSM Mandate”), Plaintiffs filed this lawsuit demanding that a particular person (Davis) in a particular county (Rowan County) authorize and approve their Kentucky marriage licenses, despite widespread availability of licenses and Davis’ undisputed religious conscience objection to SSM.³ *See* D.E. 1. Plaintiffs also filed a motion for preliminary injunction to bar Davis from “refusing to issue marriage licenses to any future marriage license applications submitted by the Named Plaintiffs.” *See* D.E. 2-2. Evidentiary hearings on this motion were held in Ashland, Kentucky (60 miles from the Rowan County clerk’s office), and in Covington, Kentucky (100 miles away), which were attended by multiple named Plaintiffs. *See* D.E. 21, 26.⁴

On August 4, 2015, Davis filed a verified third-party Complaint against Steven L. Beshear, Governor of Kentucky (“Gov. Beshear”), the issuer of the SSM Mandate, and Wayne Onkst, Commissioner of Kentucky Department for Libraries and Archives, the state agency responsible for designing Kentucky marriage license forms. *See* D.E. 34 (attached hereto as Exhibit “F”).⁵ On August 7, 2015, Davis filed

³ Expressly to avoid disparate treatment of any couple, Davis discontinued the issuance of all marriage licenses after *Obergefell*. Two plaintiff couples are different sex couples, to whom Davis has no religious objection to issuing marriage licenses.

⁴ A copy of the July 13, 2015 and July 20, 2015 hearing transcripts are attached hereto as Exhibits “D” and “E,” respectively.

⁵ On that same day, Davis filed a motion to dismiss Plaintiffs’ Complaint in its entirety. *See* D.E. 32.

a motion for preliminary injunction to enjoin enforcement of Gov. Beshear's SSM Mandate and obtain an exemption "from having to authorize the issuance of Kentucky marriage licenses." *See* D.E. 39-7. The grounds on which Davis seeks relief from Gov. Beshear are intertwined with the grounds on which she opposed Plaintiffs' request for an injunction against her. *See* D.E. 29, 39-1. Notwithstanding, the district court entered its Injunction, rather than considering Davis' and Plaintiffs' requests together and allowing Davis to develop a further evidentiary record on her own request for individual accommodation from Gov. Beshear's SSM Mandate.

The Injunction enjoins Davis "from applying her 'no marriage licenses' policy to future marriage license requests submitted by Plaintiffs." *See* D.E. 43 at 28 (attached hereto as Exhibit "B"). The district court stated that "this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence," thereby conceding that Davis' religious rights are, in fact, being both "threaten[ed]" and "infringe[d]" by Plaintiffs' demands for her approval of their proposed unions, and by Gov. Beshear's SSM Mandate to provide exactly that or resign. *Id.* at 2. Notwithstanding, without giving full consideration to Davis' own motion for injunctive relief and further development of an evidentiary record, the district court granted Plaintiffs' motion for preliminary injunction.

Even though Plaintiffs indisputably are able to obtain a Kentucky marriage license from more than 130 marriage licensing locations, including all nearby and

surrounding counties, the district court held that Plaintiffs were likely to succeed on the merits of their purported right to marry claims and were being irreparably harmed. *See id.* at 9-16. In reaching this decision, however, the district court considered “other Rowan County residents” not before the court on the Plaintiffs’ motion (which was limited exclusively to the named Plaintiffs) and speculated about religious accommodation requests that might be made at unspecified times in the future by other county clerks also not before the court. *Id.* at 12.

The district court also rejected Davis’ claims under the Kentucky Religious Freedom Restoration Act (“Kentucky RFRA”), KY. REV. STAT. § 446.350, the Free Exercise Clause, the Free Speech Clause, and the Religious Test Clause of the United States Constitution, and similar Kentucky Constitution provisions. *See* D.E. 43 at 16-28. In rejecting Davis’ religious liberty, conscience, and speech claims, the district court incorrectly concluded that the Kentucky marriage license form “does not require the county clerk to condone or endorse same-sex marriage” and instead merely “asks the county clerk to certify that the information provided is accurate and that the couple is qualified to marry under Kentucky law.”⁶ According to the district

⁶ *See* D.E. 43 at 22; *see also id.* at 25 (“[T]he act of issuing a marriage license to a same-sex couple merely signifies that the couple has met the *legal requirements* to marry. It is not a sign of moral or religious approval.”) (emphasis in original); *id.* at 27 (“Davis is simply being asked to signify that couples meet the legal requirements to marry. The State is not asking her to condone same-sex unions on moral or religious grounds, nor is it restricting her from engaging in a variety of religious activities.”).

court, the burden on Davis' religious freedom is "more slight," and she "remains free to practice her Apostolic Christian beliefs" since she "may continue to attend church twice a week, participate in Bible Study and minister to female inmates at the Rowan County jail," and "believe that marriage is a union between one man and one woman." *Id.* at 27. But, according to the district court, "her religious convictions cannot excuse her" from authorizing SSM licenses. *See id.* at 27-28. Facing an order enjoining her to authorize Kentucky marriage licenses in derogation of her religious conscience, Davis filed an immediate notice of appeal to this Court pursuant to 28 U.S.C. § 1292(a), *see* D.E. 44 (attached hereto as Exhibit "A"), and a motion to stay pending appeal or, in the alternative, to grant a temporary stay so that Davis may promptly apply to this Court for a stay pending appeal, *see* D.E. 45.

On August 17, 2015, the district court denied Davis' motion to stay the Injunction pending appeal, but granted a temporary stay pending this Court's review of a similar request. *See* D.E. 52 (attached hereto as Exhibit "C"). In denying this stay request for the same reasons it granted a preliminary injunction, the district court nonetheless recognized (again) that "constitutional issues" are involved in this dispute and reiterated that a constitutional "debate" is present in the case at bar and therefore granted a temporary stay instead. *Id.* at 1, 7. **On August 19, 2015, the district court ordered that its temporary stay will expire August 31, 2015 absent**

a contrary Order from this Court. See D.E. 55 (attached hereto as Exhibit “G”).

Davis now moves this Court to stay the Injunction pending her appeal to this Court.

ARGUMENT

In deciding a motion for stay pending appeal, this Court balances the same four factors that are traditionally considered in evaluating a motion for preliminary injunction: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

In prior marriage cases arising from Sixth Circuit district courts, this Court consistently entered stays pending a full appeal on the merits. For instance, in *April DeBoer, et al. v. Richard Snyder, et al.*, No. 14-1341 (6th Cir. Mar. 25, 2014), Judges Rogers and White, joined by Eastern District of Kentucky Judge Caldwell, granted an emergency motion to stay pending an appeal of the Eastern District of Michigan’s marriage decision in that case. In *Valeria Tanco, et al. v. William Haslam, et al.*, No. 14-5297 (6th Cir. Apr. 25, 2014), Judges Guy and Clay, joined by Eastern District of Kentucky Judge Bertelsman, overturned the Middle District of Tennessee’s refusal to grant a stay pending an appeal of the district court’s marriage decision.

Not long before this Court entered the above rulings, Western District of Kentucky Judge Heyburn in *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), granted a stay of his opinion invalidating Kentucky's democratically-approved and constitutionally-enacted natural definition of marriage, stating:

Perhaps it is difficult for Plaintiffs to understand how rights won can be delayed. It is a truth that our judicial system can act with stunning quickness, as this Court has; and then with sometimes maddening slowness. One judge may decide a case, but ultimately others have a final say. It is the entire process, however, which gives our judicial system and our judges such high credibility and acceptance. This is the way of our Constitution.

Id. at 558. That conclusion is only further warranted on this appeal, to a court with “final say” on the Constitutional “conflict” engendered herein.

In the foregoing marriage cases, the stays entered preserved natural marriage laws upheld by this Court in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), and **absolutely** barred same-sex couples from obtaining marriage licenses (or having marriage licenses recognized) until appeals were resolved. But here, the named Plaintiffs can indisputably obtain a Kentucky marriage license even with this Court's stay of the Injunction pending appeal, from more than 130 marriage licensing locations spread throughout Kentucky. Without dispute, nothing physically or economically prevents these named Plaintiffs from obtaining a marriage license from any of these locations. Moreover, Davis' claims are based upon enumerated

and individual Constitutional and statutory rights and protections that she holds as a person, which predate and survive *Obergefell*.

I. Davis has a sufficient likelihood of success on the merits of her appeal to warrant an immediate stay.

To support a motion for stay pending appeal, the moving party “need not always establish a high probability of success on the merits.” *Mich. Coal.*, 945 F.2d at 153; *see also Grutter v. Bollinger*, 247 F.3d 631, 632-33 (6th Cir. 2001). Instead, “[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the moving party] will suffer absent the stay. Simply stated, more of one excuses less of the other.” *Mich. Coal.*, 945 F.2d at 153 (internal citation omitted). In other words, “a stay may be granted with either a high probability of success and some injury or vice versa.” *State of Ohio v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987). The moving party must still show “more than the mere ‘possibility’ of success on the merits,” which can be done by identifying “serious questions going to the merits.” *Mich. Coal.*, 945 F.2d at 153-54 (internal quotations omitted). Critically, Davis “can satisfy this element where substantial legal questions or matters of first impression are at issue and the equities favor maintaining the status quo.” *See, e.g., Simon Prop. Group, Inc. v. Taubman Ctrs., Inc.*, 262 F. Supp. 2d 794, 798 (E.D. Mich. 2003); *see also United States v. Coffman*, No. 09-181, 2010 WL 4683761, at *1 (E.D. Ky. Nov. 12, 2010) (granting motion to stay pending appeal after finding that “this case will present the Sixth

Circuit with an issue of first impression”). Thus, to grant a stay, this Court need not conclude, at this point, that the district court was wrong on the merits. Instead, this Court need only conclude that this case raises “serious questions” going to the merits, or a matter of first impression, left unanswered by *Obergefell*—which did not overturn the First Amendment or overwrite other religious liberty protections.

This case presents substantial legal matters of first impression for this (or any other) federal appeals court following *Obergefell*. As the district court concluded, this case presents a constitutional “debate,” “conflict,” and “tension” between “two individual liberties held sacrosanct in American jurisprudence”—one enumerated and express (Davis’ religious freedom), and the other unenumerated (right to marry). *See* D.E. 43 at 2, 16; D.E. 52 at 1 (reiterating the existence of a constitutional “debate”); *see also, e.g.*, D.E. 21, Hr’g Tr. (7/13/15), at 84:3-4, 85:20-22, 98:19-22, 99:19-21, 103:15-18, 104:8-9 (prior statements from district court acknowledging that Davis’ fundamental rights are implicated in this case). The district court has now rendered a decision on the constitutional “debate” at issue—but that answer should not be forced upon Davis until her appeal is finally resolved. To ensure Davis’ fundamental and “sacrosanct” rights remain protected while this Court resolves the “conflict” identified (but wrongly decided) by the district court, a stay of the Injunction pending appeal is appropriate. This conclusion is only further compelled here, where Davis’ own motion for injunctive relief—specifically requesting an

accommodation from the SSM Mandate and a preliminary exemption “from having to authorize the issuance of Kentucky marriage licenses” (*see* D.E. 39-7)—was pending (but not decided) when the district court issued its Injunction.

Moreover, as will be further addressed in Davis’ subsequent appellate filings, Davis’ inability to authorize and approve SSM licenses bearing her imprimatur against her religious conscience is protected by the United States and Kentucky Constitutions, along with the Kentucky RFRA. *See* U.S. CONST., amend I; KY. CONST., §§ 1, 5; KY. REV. STAT. § 446.350. The Kentucky RFRA protects a person’s “right to act or refuse to act in a manner motivated by a sincerely held religious belief,” and this religious freedom right “may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.” KY. REV. STAT. § 446.350; *see also Prater v. City of Burnside, Ky.*, 289 F.3d 417, 427 (6th Cir. 2002) (Free Exercise Clause “protects not only the right to hold a particular religious belief, but also the right to engage in conduct motivated by that belief.”).⁷ As such, the Kentucky RFRA protects not only a person’s beliefs but also a person’s actions (or non-actions) based

⁷ Because Davis’ free exercise claim is combined with a free speech claim, her free exercise claim is also subject to strict scrutiny. *See Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990).

thereon, and subjugates to the strictest scrutiny any governmental action infringing religiously-motivated actions (or non-actions).

The Kentucky RFRA is similar to (but goes even further in protecting religious liberties than) the federal Religious Freedom Restoration Act (“Federal RFRA”), 42 U.S.C. § 2000bb-1(a) & (b), which was enacted to “provide very broad protection for religious liberty,” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2760 (2014), and imposes “the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Thus, Gov. Beshear’s SSM Mandate—the state action here—must survive strict scrutiny, which the district court acknowledged but failed to apply. *See* D.E. 43 at 18, 27.

Although the district court concluded that the burden on Davis is “more slight,” *see* D.E. 43 at 27, that conclusion is out-of-step with Supreme Court precedent analyzing substantial burdens on religious freedom under the analogous Federal RFRA, and also reaches a different result than a proposed Kentucky legislative act on what constitutes a substantial burden post-*Obergefell*.⁸ The prescribed form under Gov. Beshear’s SSM Mandate provided no opportunity for the religious objector Davis not to participate in endorsement and approval of SSM.

⁸ This bill would expressly protect clerks like Davis from having to issue SSM licenses, amending the Kentucky RFRA to state expressly that “[i]ssuing or recording” a SSM license can be considered a “substantial burden for which there is no compelling government interest.” *See* D.E. 39-6, An Act Relating to Marriage, Ky. House Bill 101 (2016 Reg. Sess.).

Contrary to the district court's conclusion, the "authorization" or permission to marry unmistakably comes from Davis. **Davis is also required to put her name and imprimatur no less than two times on each and every marriage license she issues.** But Davis cannot authorize a union of two persons which, in her sincerely-held belief, is not marriage.⁹ In concluding that the act of issuing SSM licenses would not severely burden Davis' religious convictions because such act would not implicate moral or religious approval of SSM, the district court essentially told Davis what her religious convictions **should** be, instead of recognizing the undisputed fact of what her religious convictions actually are, and that those convictions unmistakably bar her from issuing SSM licenses with her name plastered on them.¹⁰

Under the required strict scrutiny analysis, only a compelling governmental interest—in infringing upon Davis' inability to authorize and approve SSM licenses—which is "beyond broadly formulated interests" and shows harm in granting a "specific exemption" to this "particular religious claimant" will suffice.

See Gonzales v. O Centro Espirata Beneficente Uniao do Vegetal, 546 U.S. 418,

⁹ See D.E. 26, Hr'g Tr. (7/20/15), Davis Direct, at 31:7-14, 32:4-7, 38:9-17, 40:24-41:3, 41:24-42:1, 42:17-20 ("Because if I say that I authorize that, I'm saying I agree with it, and I can't."); *id.* at 43:2-5; Hr'g Tr. (7/20/15), Davis Cross, at 61:15-19, 62:10-12 ("[M]y religious beliefs can't condone issuing and being a party to the issuance of same-sex marriage licenses."), 67:5-7; *id.*, Davis Redirect, 75:16-19, 80:16-18; *see also id.*, Blevins Cross, at 17:3-6 ("[Davis] did tell me early on, before the decision was made, that if it was to allow same-sex marriage that she could not do that in her moral judgment. She just could not do it.").

¹⁰ See note 9, *supra*.

430-31 (2006). But even if this showing can be made, the infringement upon Davis must still satisfy the “exceptionally demanding” least-restrictive-means standard. *See Hobby Lobby*, 134 S.Ct. at 2780. This test may “require the Government to expend additional funds” to accommodate “religious beliefs.” *Hobby Lobby*, 134 S.Ct. at 2781. In this matter, even if the “desired goal” is providing Plaintiffs with Kentucky marriage licenses **in Rowan County**¹¹, *see Hobby Lobby*, 134 S.Ct. at 2780, **numerous less restrictive means are available** to accomplish it without substantially burdening Davis’ religious freedom and conscience, such as:

- Providing an opt-out or exemption to the Kentucky marriage licensing scheme (as exists for the Kentucky fish and wildlife licensing scheme), KY. REV. STAT. § 150.195, and as other states, such as North Carolina have enacted, *see, e.g.*, N.C. GEN. STAT. 51-5.5;
- Deputizing a neighboring county clerk (or some other person) to issue Kentucky marriage licenses in Rowan County;
- Modifying the prescribed Kentucky marriage license form to remove the multiple references to Davis’ name, and thus to remove the personal nature of the authorization that Davis must provide on the current form;
- Deeming Davis “absent” for purposes of issuing SSM licenses, based upon her moral and religious inability to issue them, and allowing those licenses to be issued by the chief executive of Rowan County, as specifically authorized by Kentucky law, *see* KY. REV. STAT. § 402.240;
- Distributing Kentucky marriage licenses at the state-level through an online or other state-wide licensing scheme; or

¹¹ Nothing in *Obergefell* suggests that Plaintiffs have a fundamental right to receive a marriage license from a particular clerk, in a particular county.

- Calling a special legislative session to address Kentucky's entire marriage licensing scheme post-*Obergefell*.

All of the foregoing options, and others, are available to avoid substantially burdening Davis' personal religious freedom in the wake of the redefinition of marriage in *Obergefell*. The nature of Davis' religious objection is more firmly established in history than perhaps any other religious conscience objection because the "meaning of marriage" as a union between one man and one woman "has persisted in every culture," "has formed the basis of human society for millennia," and has singularly "prevailed in the United States throughout our history." *Obergefell*, 135 S. Ct. at 2612-13 (Roberts, C.J., dissenting). In fact, the majority in *Obergefell* conceded that the institution of marriage as exclusively a union between a man and a woman "has existed for millennia and across civilizations" and this view "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.* at 2594 (Kennedy, J., majority) (emphasis added). Thus, although the traditional view of marriage was discarded by the majority in *Obergefell*, that long-held view of marriage provides the historical underpinnings for a religious exemption and accommodation from the redefinition of marriage under the First Amendment and Kentucky RFRA.

The mandate commanding Davis **to affix her name** to SSM licenses also violates her fundamental free speech rights protected by the United States and

Kentucky Constitutions. The Free Speech Clause protects “both what to say and what *not* to say,” *Riley v. Nat’l Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (emphasis added), and states may not “force[] an individual, as part of [their] daily life” to “be an instrument for fostering public adherence to an ideological point of view [he/she] finds unacceptable.” *Wooley v. Maynard*, 430 U.S. 705, 715 (1976). The Kentucky marriage form uses the word “marriage” at six different places on the form (not including the reference to “join[ing] together in the state of matrimony”), twice designates Davis as the person authorizing the marriage license, and requires the stamping of her name and endorsement on the proposed union. *See* KY. REV. STAT. § 402.100(3). For Gov. Beshear to state that Kentucky is issuing and recognizing SSM licenses is one thing. But commanding Davis to be an “instrument” for a message, view, and proposed union that she finds “morally objectionable” and “repugnant to [her] moral and religious beliefs” is altogether different, and violates not only her conscience, but also her free speech rights. *See Wooley*, 430 U.S. at 707.

Further, compelling Davis to authorize marriages against her sincerely held religious beliefs about marriage constitutes an improper religious test for holding (or maintaining) public office. Davis is being arm-twisted to either participate in the issuance of SSM licenses (her conscience be damned) or resign, since holding public office is her choice (her livelihood, qualifications, and public service be damned). But the fact “that a person is not compelled to hold office” is not an excuse for Gov.

Beshear to impose constitutionally-forbidden, conscience-violating criteria for office. *See Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961). Like a non-combatant whose “religious scruples” prevent him from shouldering a rifle, Davis may still “faithfully and devotedly” serve her county without approving SSM licenses. *See Girouard v. United States*, 328 U.S. 61, 64 (1946).

II. Davis is more harmed than Plaintiffs absent a stay pending appeal.

In weighing the harm that will occur as a result of granting or denying a stay, this Court generally considers three factors: “(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided.” *Mich. Coal.*, 945 F.2d at 154. The “key word” in this consideration is “irreparable,” and the harm must be “both certain and immediate, rather than speculative or theoretical.” *Id.* The impending harm to Davis satisfies this standard, and outweighs any purported harm to Plaintiffs.

Nothing is physically or economically preventing the named Plaintiffs in this case from obtaining a marriage license elsewhere in Kentucky. As a matter of Kentucky law, individuals may obtain a marriage license from the county clerk in any one of Kentucky’s 120 counties (and the more than 130 marriage licensing locations), irrespective of their county of residence. *See KY. REV. STAT. § 402.080.* Plaintiffs concede they can obtain Kentucky marriage licenses in another county and from someone other than Davis. They simply chose (and choose) not to. As such,

Plaintiffs will not suffer irreparable and irreversible injury if resolution is postponed to await this Court's decision on the merits. This conclusion comports with the stay orders pending appeal entered by this Court in *DeBoer* and *Tanco*, and by Western District of Kentucky Judge Heyburn in *Bourke*. But, since those stay orders prohibited the issuance of SSM licenses or recognition of same-sex "marriage" in their entirety, the potential purported harm to Plaintiffs here is far less.

In stark contrast, Davis faces significant, irrevocable, and irreversible harm if she is forced to authorize and approve even one SSM license with her name on it, against her religious conscience, for "it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). If such rights "are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

There is no "adequate compensatory or other corrective relief" that "will be available at a later date, in the ordinary course of litigation" (including a permanent injunction in her favor) if Davis is forced to violate her religious conscience now. *See Mich. Coal.*, 945 F.2d at 153. It is comparable to forcing the religious objecting nurse to perform an abortion, the religious objecting company or non-profit to pay for abortions or abortion-related insurance coverage, the religious objecting non-

combatant to fire on an enemy soldier, or the religious objecting state official to participate in or attend the execution of a convicted prisoner. Ordering Davis to authorize and approve a SSM license is *the act* that violates her conscience and substantially burdens her religious freedom – an act which cannot be undone. Importantly, Davis is not claiming a substantial burden on her religious freedom if *someone else* authorizes and approves a SSM license *devoid of her name*.

Finally, the harm to Davis is not speculative but imminent. The searing act of her conscience is authorizing a SSM license bearing her imprimatur (*see, e.g.*, D.E. 29 at 14-15, 18-20; D.E. 39-1 at 15-18, 21-25); Plaintiffs insist on having no one other than Davis approve their proposed union (*see* D.E. 21, Hr’g Tr. (7/13/15), Miller Direct, at 29:9-12; *id.*, Spartman Direct, at 47:8-10; D.E. 46, 46-2); and the district court has ordered Davis to approve SSM licenses (*see* D.E. 43). This impending harm to Davis’ conscience outweighs any travel inconveniences on Plaintiffs, who can obtain (or could have already obtained) a marriage license from more than 130 licensing locations across Kentucky while the appeal is pending.

III. The public interest favors granting a stay.

When it comes to the “protection of First Amendment liberties,” the public has a “significant interest.” *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995). Moreover, the Injunction significantly changes the relative position of the parties and, in fact, completely alters (prematurely) the

status quo existing between the parties at a time when there is ongoing public debate in Kentucky between the SSM Mandate and religious liberty. *See S. Milk Sales, Inc. v. Martin*, 924 F.2d 98, 102 (6th Cir. 1991) (an essential purpose of a preliminary injunction is “to preserve the relative positions of the parties until a trial on the merits can be held”) (citation omitted). This Court will have a chance to review the district court’s constitutional and statutory determinations. To ensure that Davis’ conscience and rights are not forever and irreversibly violated, this Court should stay the Injunction pending appeal.

RELIEF REQUESTED

Appellant Kim Davis respectfully requests that this Court: (1) grant immediate consideration and (2) enter an order staying the district court’s August 12, 2015 order pending final resolution of the appeal in this Court.

DATED: August 19, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2015, I caused the foregoing document to be filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service of the filed document upon the following:

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EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION**

APRIL MILLER, ET AL.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	0:15-CV-00044-DLB
	:	
KIM DAVIS, ET AL.,	:	DISTRICT JUDGE
	:	DAVID L. BUNNING
Defendants.	:	

KIM DAVIS,	:	
	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
STEVEN L. BESHEAR, in his official capacity as Governor of Kentucky, and WAYNE ONKST, in his official capacity as State Librarian and Commissioner, Kentucky Department for Libraries and Archives,	:	
	:	
Third-Party Defendants.	:	

NOTICE OF APPEAL

Notice is hereby given that Defendant/Third-Party Plaintiff Kim Davis (“Davis”), by and through her undersigned counsel, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the August 12, 2015 Memorandum Opinion and Order granting Plaintiffs’ Motion for Preliminary Injunction (D.E. 43).

A copy of the August 12, 2015 Memorandum Opinion and Order from which Davis appeals is attached hereto as Exhibit “A.”

Davis has paid by ECF online payment in the amount of \$505.00 for the notice of appeal fee specified by the United States District Court for the Eastern District of Kentucky's Fee Schedule.

The parties to the order appealed from and the names and addresses of their attorneys are as follows:

Plaintiffs: April Miller, Karen Ann Roberts, Shantel Burke, Stephen Napier, Jody Fernandez, Kevin Holloway, L. Aaron Skaggs, and Barry Spartman

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Defendant: Rowan County

Attorneys for Rowan County:

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Third-Party Defendants: Steven L. Beshear, Governor of Kentucky and Wayne Onkst, Commissioner of Kentucky Department for Libraries and Archives

Attorneys for Gov. Beshear and Commr. Onkst:

No appearances have yet been filed.

DATED: August 12, 2015

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Kim Davis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

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I also hereby certify that two (2) true and correct copies of the foregoing will be sent via U.S.P.S. first class mail to the Attorney General of Kentucky on behalf of Third-Party Defendants Steven L. Beshear, Governor of Kentucky, and Wayne Onkst, Commissioner of the Kentucky Department for Libraries and Archives, at the following location:

Attorney General Jack Conway
OFFICE OF THE ATTORNEY GENERAL
700 Capitol Avenue, Suite 118
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DATED: August 12, 2015

/s/ Jonathan D. Christman _____
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*Attorney for Defendant/Third-Party Plaintiff
Kim Davis*

EXHIBIT B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT ASHLAND**

CIVIL ACTION NO. 15-44-DLB

APRIL MILLER, et al.

PLAINTIFFS

vs.

MEMORANDUM OPINION AND ORDER

KIM DAVIS, individually and in her official capacity, et al.

DEFENDANTS

I. Introduction

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction (Doc. # 2). Plaintiffs are two same-sex and two opposite-sex couples seeking to enjoin Rowan County Clerk Kim Davis from enforcing her own marriage licensing policy. On June 26, 2015, just hours after the U.S. Supreme Court held that states are constitutionally required to recognize same-sex marriage, Davis announced that the Rowan County Clerk's Office would no longer issue marriage licenses to *any* couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Davis, an Apostolic Christian with a sincere religious objection to same-sex marriage, specifically sought to avoid issuing licenses to same-sex couples without discriminating against them. Plaintiffs now allege that this "no marriage licenses" policy substantially interferes with their right to marry because it effectively forecloses them from obtaining a license in their home county. Davis insists that her policy poses only an incidental burden on Plaintiffs' right to marry, which is justified by the need to protect her own free exercise rights.

The Court held preliminary injunction hearings on July 13, 2015 and July 20, 2015. Plaintiffs April Miller, Karen Roberts, Jody Fernandez, Kevin Holloway, Barry Spartman, Aaron Skaggs, Shantel Burke and Stephen Napier were represented by William Sharp of the Americans for Civil Liberties Union (“ACLU”) and Daniel Canon. Jonathan Christman and Roger Gannam, both of the Liberty Counsel, and A.C. Donahue appeared on behalf of Defendant Kim Davis. Rowan County Attorney Cecil Watkins and Jeff Mando represented Defendant Rowan County. Official Court Reporters Peggy Weber and Lisa Wiesman recorded the proceedings. At the conclusion of the second hearing, the Court submitted the Motion pending receipt of the parties’ response and reply briefs. The Court having received those filings (Docs. # 28, 29 and 36), this matter is now ripe for review.

At its core, this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence. One is the fundamental right to marry implicitly recognized in the Due Process Clause of the Fourteenth Amendment. The other is the right to free exercise of religion explicitly guaranteed by the First Amendment. Each party seeks to exercise one of these rights, but in doing so, they threaten to infringe upon the opposing party’s rights. The tension between these constitutional concerns can be resolved by answering one simple question: Does the Free Exercise Clause likely excuse Kim Davis from issuing marriage licenses because she has a religious objection to same-sex marriage? For reasons stated herein, the Court answers this question in the negative.

II. Factual and Procedural Background

Plaintiffs April Miller and Karen Roberts have been in a committed same-sex relationship for eleven years. (Doc. # 21 at 25). After hearing about the *Obergefell* decision, they went to the Rowan County Clerk’s Office and requested a marriage license

from one of the deputy clerks. (*Id.* at 25-26). The clerk immediately excused herself and went to speak with Kim Davis. (*Id.* at 28). When she returned, she informed the couple that the Rowan County Clerk's Office was not issuing any marriage licenses. (*Id.*). Plaintiffs Kevin Holloway and Jody Fernandez, a committed opposite-sex couple, had a similar experience when they tried to obtain a marriage license from the Rowan County Clerk's Office. (*Id.* at 36).

Both couples went straight to Rowan County Judge Executive Walter Blevins and asked him to issue their marriage licenses. (*Id.* at 30-32, 36). Blevins explained that, under Kentucky law, a county judge executive can only issue licenses when the elected county clerk is absent. See Ky. Rev. Stat. Ann. § 402.240. Because Davis continued to perform her other duties as Rowan County Clerk, Blevins concluded that she was not "absent" within the meaning of the statute. (*Id.*). Therefore, he did not believe that he had the authority to issue their marriage licenses. (*Id.*).

Plaintiffs Barry Spartman and Aaron Skaggs also planned to solemnize their long-term relationship post-*Obergefell*. (*Id.* at 42-44). Before going to the Rowan County Clerk's Office, they phoned ahead and asked for information about the marriage licensing process. (*Id.*). They wanted to make sure that they brought all necessary documentation with them. (*Id.*). One of the deputy clerks told the couple "not to bother coming down" because they would not be issued a license. (*Id.*).

Seven neighboring counties (Bath, Fleming, Lewis, Carter, Elliott, Morgan and Menifee) are currently issuing marriage licenses. (Doc. # 26 at 53). All are less than an hour away from the Rowan County seat of Morehead. (*Id.*). While Plaintiffs have the means to travel to any one of these counties, they have admittedly chosen not to do so.

(Doc. # 21 at 38, 48). They strongly prefer to have their licenses issued in Rowan County because they have significant ties to that community. (*Id.* at 28-29, 47). They live, work, socialize, vote, pay taxes and conduct other business in and around Morehead. (*Id.*) Quite simply, Rowan County is their home.

According to Kim Davis, the Rowan County Clerk's Office serves as a "pass through collection agency" for the State of Kentucky. (Doc. # 26 at 24-25). She and her six deputy clerks regularly handle delinquent taxes, oversee elections, manage voter registration and issue hunting and fishing licenses. (*Id.*) A portion of the fees collected in exchange for these services is used to fund the Office's activities throughout the year. (*Id.*) The remainder is remitted to the State. (*Id.*)

Under Kentucky law, county clerks are also responsible for issuing marriage licenses.¹ See Ky. Rev. Stat. Ann. § 402.080. The process is quite simple. The couple must first go to the county clerk's office and provide their biographical information to one of the clerks. See Ky. Rev. Stat. Ann. § 402.100. The clerk then enters the information into a computer-generated form, prints it and signs it. *Id.* This form signifies that the couple is licensed, or legally qualified, to marry.² *Id.* At the appropriate time, the couple presents this form to their officiant, who must certify that he or she performed a valid marriage ceremony. *Id.* The couple then has thirty days to return the form to the clerk's office for

1) This task requires relatively few resources, at least in Rowan County. (Doc. # 26 at 24-30). Davis testified that her Office issued 212 marriage licenses in 2014. Marriage licenses cost \$35.50. (*Id.*) Of that sum, the Office retains \$21.17, and remits the remaining \$14.33 to the State. (*Id.*) Thus, Rowan County Clerk's Office made about \$4,500, or roughly 0.1% of its annual budget, from issuing marriage licenses in 2014. (*Id.*) Davis also estimated that the task of issuing marriage licenses occupies one hour of one deputy clerk's time per week. (*Id.*)

2) A couple is "legally qualified" to marry if both individuals are over the age of eighteen, mentally competent, unrelated to each other and currently unmarried. See Ky. Rev. Stat. Ann. §§ 402.010, 402.020(a)-(d), (f).

recording. See Ky. Rev. Stat. Ann. §§ 402.220, 402.230. The State will not recognize marriages entered into without a valid license therefor. See Ky. Rev. Stat. Ann. § 402.080.

The Kentucky Department of Libraries and Archives (“KDLA”) prescribes the above-mentioned form, which must be used by all county clerks in issuing marriage licenses.³ Ky. Rev. Stat. Ann. §§ 402.100, 402.110. It is composed of three sections, which correspond to the steps detailed above: (1) a marriage license, to be completed by a county or deputy clerk; (2) a marriage certificate, to be completed by a qualified officiant; and (3) a recording statement, to be completed by a county or deputy clerk. The marriage license section has the following components:

- (a) *An authorization statement of the county clerk issuing the license for any person or religious society authorized to perform marriage ceremonies to unite in marriage the persons named;*
- (b) Vital information for each party, including the full name, date of birth, place of birth, race, condition (single, widowed, or divorced), number of previous marriages, occupation, current residence, relationship to the other party, and full names of parents; and
- (c) The date and place the license is issued, and the signature of the county clerk or deputy clerk issuing the license.

See Ky. Rev. Stat. Ann. § 402.100(1) (emphasis added).

Davis does not want to issue marriage licenses to same-sex couples because they will bear the above-mentioned authorization statement. She sees it as an endorsement of same-sex marriage, which runs contrary to her Apostolic Christian beliefs. (*Id.* at 42). Four of Davis’ deputy clerks share her religious objection to same-sex marriage, and another is

3) Only one aspect of the form has changed since *Obergefell*—whereas the marriage applicants were once referred to as “Bride” and “Groom,” they are now identified as “First Party” and “Second Party.”

undecided on the subject. (*Id.* at 49). The final deputy clerk is willing to issue the licenses, but Davis will not allow it because her name and title still appear twice on licenses that she does not personally sign. (Doc. # 29-3 at 7).

In the wake of *Obergefell*, Governor Beshear issued the following directive to all county clerks:

Effective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky. In accordance with my instruction, all executive branch agencies are already working to make any operational changes that will be necessary to implement the Supreme Court decision. Now that same-sex couples are entitled to the issuance of a marriage license, the Department of Libraries and Archives will be sending a gender-neutral form to you today, along with instructions for its use.

(Doc. # 29-3 at 11). He has since addressed some of the religious concerns expressed by some county clerks:

You can continue to have your own personal beliefs but, you're also taking an oath to fulfill the duties prescribed by law, and if you are at that point to where your personal convictions tell you that you simply cannot fulfill your duties that you were elected to do, th[e]n obviously an honorable course to take is to resign and let someone else step in who feels that they can fulfill those duties.

(Doc. # 29-11). Davis is well aware of these directives. Nevertheless, she plans to implement her "no marriage licenses" policy for the remaining three and a half years of her term as Rowan County Clerk. (Doc. # 26 at 67).

III. Standard of Review

A district court must consider four factors when entertaining a motion for preliminary injunction:

- (1) whether the movant has demonstrated a strong likelihood of success on the merits;
- (2) whether the movant would suffer irreparable harm;

- (3) whether an injunction would cause substantial harm to others; and
- (4) whether the public interest would be served by the issuance of such an injunction.

See *Suster v. Marshall*, 149 F.3d 523, 528 (6th Cir. 1998). These “are factors to be balanced, and not prerequisites that must be met.” *In re Eagle Picher Indus., Inc.*, 963 F.3d 855, 859 (6th Cir. 1992) (stating further that these factors “simply guide the discretion of the court”).

IV. Analysis

A. Defendant Kim Davis in her official capacity

Plaintiffs are pursuing this civil rights action against Defendants Rowan County and Kim Davis, in her individual and official capacities, under 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

This statute “is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred.” *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal quotations omitted).

At this stage of the litigation, Plaintiffs seek to vindicate their constitutional rights by obtaining injunctive relief against Defendant Kim Davis, in her official capacity as Rowan County Clerk. Because official capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent,” one might assume that Plaintiffs are effectively pursuing injunctive relief against Rowan County. *Monell v. New*

York City Dep't of Soc. Serv., 436 U.S. 658, 690 n. 55 (1978). However, Rowan County can only be held liable under § 1983 if its policy or custom caused the constitutional deprivation. *Id.* at 694.

A single decision made by an official with final policymaking authority in the relevant area may qualify as a policy attributable to the entity. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986). Whether an official acted as a final policymaker is a question of state or local law. *Id.* However, courts must avoid categorizing an official as a state or municipal actor “in some categorical, ‘all or nothing’ manner.” *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 785 (1997). The key inquiry is whether an official is a “final policymaker [] for the local government in a particular area, or on a particular issue.” *Id.* Accordingly, the Court will focus on whether Davis likely acted as a final policymaker for Rowan County regarding the issuance of marriage licenses.

While Davis is the elected Rowan County Clerk, subject to very little oversight by the Rowan County Fiscal Court, there are no other facts in the record to suggest that she set marriage policy for Rowan County. After all, the State of Kentucky has “absolute jurisdiction over the regulation of the institution of marriage.” *Pinkhasov v. Petocz*, 331 S.W.3d 285, 291 (Ky. Ct. App. 2011). The State not only enacts marriage laws, it prescribes procedures for county clerks to follow when carrying out those laws, right down to the form they must use in issuing marriage licenses. *Id.*; see also Ky. Rev. Stat. Ann. §§ 402.080, 402.100. Thus, Davis likely acts for the State of Kentucky, and not as a final policymaker for Rowan County, when issuing marriage licenses.

This preliminary finding does not necessarily foreclose Plaintiffs from obtaining injunctive relief against Davis. While the Eleventh Amendment typically bars Plaintiffs from

bringing suit against a state or its officials, “official-capacity actions for prospective relief are not treated as actions against the state.” *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985). This narrow exception, known as the *Ex Parte Young* doctrine, permits a federal court to “enjoin state officials to conform their future conduct to the requirements of federal law.” *Quern v. Jordan*, 440 U.S. 332, 337 (1979) (citing *Ex Parte Young*, 209 U.S. 123 (1908)). “It rests on the premise—less delicately called a ‘fiction,’—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes.” *Va. Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). Because Plaintiffs seek to enjoin Davis from violating their federal constitutional rights, this Court has the power to grant relief under *Ex Parte Young*.⁴

B. Plaintiffs’ Motion for Preliminary Injunction

1. Plaintiffs’ likelihood of success on the merits

a. The fundamental right to marry

Under the Fourteenth Amendment, a state may not “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. This “due process” clause has both a procedural component and a substantive component. See *EJS Prop., LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012). Procedural due process simply requires that the government provide a fair procedure when depriving an individual of life, liberty or property. *Id.* By contrast, substantive due process “protects a narrow class

4) In their reply brief, Plaintiffs argued that the Court need not decide whether Davis is a state actor or municipal policymaker in order to grant injunctive relief. The Court’s preliminary finding on this matter does not necessarily foreclose Plaintiffs from arguing the “municipal policymaker” theory in the future. The Court simply seeks to ensure that it is indeed able to grant injunctive relief against Kim Davis in her official capacity.

of interests, including those enumerated in the Constitution, those so rooted in the traditions of the people as to be ranked fundamental, and the interest in freedom from government actions that ‘shock the conscience.’” *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014).

Although the Constitution makes no mention of the right to marry, the U.S. Supreme Court has identified it as a fundamental interest subject to Fourteenth Amendment protection. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia’s anti-miscegenation statutes as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment). After all, “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Id.* This right applies with equal force to different-sex and same-sex couples. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may not be deprived of that right and that liberty.”).

If a state law or policy “significantly interferes with the exercise of a fundamental right[, it] cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). A state substantially interferes with the right to marry when some members of the affected class “are absolutely prevented from getting married” and “[m]any others, able in theory to satisfy the statute’s requirements[,] will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry.” *Id.* at 387 (invalidating a Wisconsin statute that required individuals with child support obligations to

obtain a court order before marrying).

However, “not every state action, ‘which relates in any way to the incidents of or the prerequisites for marriage must be subjected to rigorous scrutiny.’” *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1134 (6th Cir. 1995) (quoting *Zablocki*, 434 U.S. at 386). States may impose “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship.” *Id.* at 1135. If the statute does not create a “direct legal obstacle in the path of persons desiring to get married” or significantly discourage marriage, then it will be upheld so long as it is rationally related to a legitimate government interest. *Id.* (quoting *Zablocki* 434 U.S. at 387-88 n. 12); see also *Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977) (upholding a Social Security provision that terminated secondary benefits received by the disabled dependent child of a covered wage earner if that child married an individual who was not entitled to benefits).

The state action at issue in this case is Defendant Davis’ refusal to issue *any* marriage licenses. Plaintiffs contend that Davis’ “no marriage licenses” policy significantly interferes with their right to marry because they are unable to obtain a license in their home county. Davis insists that her policy does not significantly discourage Plaintiffs from marrying because they have several other options for obtaining licenses: (1) they may go to one of the seven neighboring counties that *are* issuing marriage licenses; (2) they may obtain licenses from Rowan County Judge Executive Walter Blevins; or (3) they may avail themselves of other alternatives being considered post-*Obergefell*.

Davis is correct in stating that Plaintiffs can obtain marriage licenses from one of the surrounding counties; thus, they are not totally precluded from marrying in Kentucky. However, this argument ignores the fact that Plaintiffs have strong ties to Rowan County.

They are long-time residents who live, work, pay taxes, vote and conduct other business in Morehead. Under these circumstances, it is understandable that Plaintiffs would prefer to obtain their marriage licenses in their home county. And for other Rowan County residents, it may be more than a preference. The surrounding counties are only thirty minutes to an hour away, but there are individuals in this rural region of the state who simply do not have the physical, financial or practical means to travel.⁵

This argument also presupposes that Rowan County will be the only Kentucky county not issuing marriage licenses. While Davis may be the only clerk currently turning away eligible couples, 57 of the state's 120 elected county clerks have asked Governor Beshear to call a special session of the state legislature to address religious concerns related to same-sex marriage licenses.⁶ (Doc. # 29-9). If this Court were to hold that Davis' policy did not significantly interfere with the right to marry, what would stop the other 56 clerks from following Davis' approach? What might be viewed as an inconvenience for residents of one or two counties quickly becomes a substantial interference when applicable to approximately half of the state.

As for her assertion that Judge Blevins may issue marriage licenses, Davis is only partially correct. KRS § 402.240 provides that, "[i]n the absence of the county clerk, or

5) The median household income in Rowan County is \$35,236 and 28.6% of the population lives below the poverty line. See United States Census Bureau, <http://quickfacts.census.gov/qfd/states/21/21205.html>. For the entire state of Kentucky, the median household income is \$43,036 and 18.8% of the population lives below the poverty line. *Id.*

6) See also Jack Brammer, 57 County Clerks Ask Governor for Special Session on Same-Sex Marriage Licenses, The Lexington Herald Leader (July 8, 2015), http://www.kentucky.com/2015/07/08/3936545_57-kentucky-county-clerks-ask.html?rh=1; Terry DeMio, Boone, Ky. Clerks Want Same-Sex License Law, Cincinnati Enquirer (July 9, 2015), <http://www.cincinnati.com/story/news/local/northern-ky/2015/07/09/boone-clerk-wants-special-legislative-session-address-sex-marriage-issues-clerks/29919103/>.

during a vacancy in the office, the county judge/executive may issue the license and, in so doing, he shall perform the duties and incur all the responsibilities of the clerk.” The statute does not explicitly define “absence,” suggesting that a traditional interpretation of the term is appropriate. See Merriam-Webster Online Dictionary, 2015, <http://www.merriam-webster.com/>, (describing “absence” as “a period of time when someone is not present at a place, job, etc.”). However, Davis asks the Court to deem her “absent,” for purposes of this statute, because she has a religious objection to issuing the licenses. While this is certainly a creative interpretation, Davis offers no legal precedent to support it.

This proposal also has adverse consequences for Judge Blevins. If he began issuing marriage licenses while Davis continued to perform her other duties as Rowan County Clerk, he would likely be exceeding the scope of his office. After all, KRS § 402.240 only authorizes him to issue marriage licenses when Davis is *unable* to do so; it does not permit him to assume responsibility for duties that Davis does not wish to perform. Such an arrangement not only has the potential to create tension between the next judge executive and county clerk, it sets the stage for further manipulation of statutorily defined duties.⁷ Under these circumstances, the Court simply cannot count this as a viable option for Plaintiffs to obtain their marriage licenses.

7) Even if the Court were inclined to accept Davis’ interpretation of the term “absence,” it would have doubts about the practicality of this approach. Judge Blevins is the highest elected official in Rowan County. (Doc. # 26 at 7). He is frequently out of the office on official business. (*Id.*). While Judge Blevins would not have to process a large number of marriage requests, he might not be regularly available for couples seeking licenses. Thus, the Court would be concerned about Judge Blevins’ ability to perform this function as efficiently as Davis and her six deputy clerks.

Davis finally suggests that Plaintiffs will have other avenues for obtaining marriage licenses in the future. For example, county clerks have urged Governor Beshear to create an online marriage licensing system, which would be managed by the State of Kentucky. While these options may be available someday, they are not feasible alternatives at present. Thus, they have no impact on the Court's "substantial interference" analysis.

Having considered Davis' arguments in depth, the Court finds that Plaintiffs have one feasible avenue for obtaining their marriage licenses—they must go to another county. Davis makes much of the fact that Plaintiffs are able to travel, but she fails to address the one question that lingers in the Court's mind. Even if Plaintiffs are able to obtain licenses elsewhere, why should they be required to? The state has long entrusted county clerks with the task of issuing marriage licenses. It does not seem unreasonable for Plaintiffs, as Rowan County voters, to expect their elected official to perform her statutorily assigned duties. And yet, that is precisely what Davis is refusing to do. Much like the statutes at issue in *Loving and Zablocki*, Davis' "no marriage licenses" policy significantly discourages many Rowan County residents from exercising their right to marry and effectively disqualifies others from doing so. The Court must subject this policy apply heightened scrutiny.

b. The absence of a compelling state interest

When pressed to articulate a compelling state interest served by her "no marriage licenses" policy, Davis responded that it serves the State's interest in protecting her religious freedom. The State certainly has an obligation to "observe the basic free exercise rights of its employees," but this is not the extent of its concerns. *Marchi v. Bd. of Coop. Educ. Serv. of Albany*, 173 F.3d 469, 476 (2d. Cir. 1999). In fact, the State has some

priorities that run contrary to Davis' proffered state interest. Chief among these is its interest in preventing Establishment Clause violations. See U.S. Const. amend. I (declaring that "Congress shall make no law respecting the establishment of religion"). Davis has arguably committed such a violation by openly adopting a policy that promotes her own religious convictions at the expenses of others.⁸ In such situations, "the scope of the employees' rights must [] yield to the legitimate interest of governmental employer in avoiding litigation." *Marchi*, 173 F.3d at 476.

The State also has a countervailing interest in upholding the rule of law. See generally *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) ("The rule of law, evenly applied to minorities as well as majorities, . . . is the great mucilage that holds society together."). Our form of government will not survive unless we, as a society, agree to respect the U.S. Supreme Court's decisions, regardless of our personal opinions. Davis is certainly free to disagree with the Court's opinion, as many Americans likely do, but that does not excuse her from complying with it. To hold otherwise would set a dangerous precedent.

For these reasons, the Court concludes that Davis' "no marriage licenses" policy likely infringes upon Plaintiffs' rights without serving a compelling state interest. Because Plaintiffs have demonstrated a strong likelihood of success on the merits of their claim, this first factor weighs in favor of granting their request for relief.

2. Potential for irreparable harm to Plaintiffs

When a plaintiff demonstrates a likelihood of success on the merits of a

⁸ Although it is not the focus of this opinion, Plaintiffs have already asserted such an Establishment Clause claim against Kim Davis in her official capacity. (Doc. # 1 at 13).

constitutional deprivation claim, it follows that he or she will suffer irreparable injury absent injunctive relief. See *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (“Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff’s constitutional rights.”); see also *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (finding that the loss of First Amendment rights for a minimal period of time results in irreparable harm); *Ohio St. Conference of NAACP v. Husted*, 43 F. Supp. 3d 808, 851 (S.D. Ohio 2014) (recognizing that a restriction on the fundamental right to vote constitutes irreparable injury).

The Court is not aware of any Sixth Circuit case law explicitly stating that a denial of the fundamental right to marry constitutes irreparable harm. However, the case law cited above suggests that the denial of constitutional rights, enumerated or unenumerated, results in irreparable harm. It follows that Plaintiffs will suffer irreparable harm from Davis’ “no marriage licenses” rule, absent injunctive relief. Therefore, this second factor also weighs in favor of granting Plaintiffs’ Motion.

3. Potential for substantial harm to Kim Davis

a. The right to free exercise of religion

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the First Amendment to the states via the Fourteenth Amendment). This Free Exercise Clause “embraces two concepts,—freedom to believe and freedom to act.” *Id.* at 304. “The first is absolute but, in the nature of things, the second cannot be.” *Id.* Therefore, “[c]onduct remains subject to regulation for the

protection of society.” *Id.*

Traditionally, a free exercise challenge to a particular law triggered strict scrutiny. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). A statute would only be upheld if it served a compelling government interest and was narrowly tailored to effectuate that interest. *Id.* However, the U.S. Supreme Court has retreated slightly from this approach. See *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). While laws targeting religious conduct remain subject to strict scrutiny, “[a] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Babalu*, 508 U.S. at 532; see also *Smith*, 494 U.S. at 880 (stating further that an individual’s religious beliefs do not “excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate”).

“Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.” *Babalu*, 508 U.S. at 532. A law is not neutral if its object “is to infringe upon or restrict practices because of their religious motivation.” *Id.* at 533 (finding that a local ordinance forbidding animal sacrifice was not neutral because it focused on “rituals” and had built-in exemptions for most other animal killings). The Court has not yet “defined with precision the standard used to evaluate whether a prohibition is of general application.” *Id.* at 543. However, it has observed that “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment,’ and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious

motivation.” *Id.* at 542.

While *Smith* and *Babalu* do not explicitly mention the term “rational basis,” lower courts have interpreted them as imposing a similar standard of review on neutral laws of general applicability. See, e.g., *Seeger v. Ky. High Sch. Athletic Ass’n*, 453 F. App’s 630, 634 (2011). Under rational basis review, laws will be upheld if they are “rationally related to furthering a legitimate state interest.” *Id.* at 635 (noting that “[a] law or regulation subject to rational basis review is accorded a strong presumption of validity”); see also *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (stating generally that laws subject to rational basis review must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”).

In response to *Smith* and *Babalu*, Congress enacted the Religious Freedom Restoration Act (“RFRA”). See 42 U.S.C. § 2000bb-1. It prohibits the government from “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability,” except when the government demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Id.* Although Congress intended RFRA to apply to the states as well as the federal government, the Court held that this was an unconstitutional exercise of Congress’ powers under Section Five of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). Free exercise challenges to federal laws remain subject to RFRA, while similar challenges to state policies are governed by *Smith*. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

For purposes of this inquiry, the state action at issue is Governor Beshear’s post-*Obergefell* directive, which explicitly instructs county clerks to issue marriage licenses to

same-sex couples. Davis argues that the Beshear directive not only substantially burdens her free exercise rights by requiring her to disregard sincerely-held religious beliefs, it does not serve a compelling state interest. She further insists that Governor Beshear could easily grant her a religious exemption without adversely affecting Kentucky's marriage licensing scheme, as there are readily available alternatives for obtaining licenses in and around Rowan County.⁹

This argument proceeds on the assumption that Governor Beshear's policy is not neutral or generally applicable, and is therefore subject to strict scrutiny.¹⁰ However, the text itself supports a contrary inference. Governor Beshear first describes the legal impact of the Court's decision in *Obergefell*, then provides guidance for all county clerks in implementing this new law. His goal is simply to ensure that the activities of the Commonwealth are consistent with U.S. Supreme Court jurisprudence.

While facial neutrality is not dispositive, Davis has done little to convince the Court that Governor Beshear's directive aims to suppress religious practice. She has only one piece of anecdotal evidence to demonstrate that Governor Beshear "is picking and choosing the conscience-based exemptions to marriage that he deems acceptable." (Doc. # 29 at 24). In 2014, Attorney General Jack Conway declined to appeal a federal district

9) Davis further develops this argument in her own Motion for Preliminary Injunction (Doc. # 39) against Governor Beshear and KDLA Librarian Wayne Onkst. That Motion is not yet ripe for review.

10) In *Smith*, the U.S. Supreme Court indicated that free exercise claims involving neutral and generally applicable laws may still be subject to heightened scrutiny if asserted alongside another constitutional right. If the Court concludes that the Beshear directive is neutral and generally applicable, Davis argues that strict scrutiny must still apply because her free exercise claim is coupled with a free speech claim. (Doc. # 29 at 23). However, this proposal fails because Davis' free speech rights are qualified by virtue of her public employment. See *Draper v. Logan Cnty. Pub. Library*, 403 F. Supp. 2d 608, 621-22 (W.D. Ky. 2005) (applying the *Pickering* balancing test to a combined free exercise and free speech claim asserted by a public employee). The Court will discuss this concept further in the next section.

court decision striking down Kentucky's constitutional and statutory prohibitions on same-sex marriage. (Doc. # 29-12). He openly stated that he could not, in good conscience, defend discrimination and waste public resources on a weak case.¹¹ (*Id.*). Instead of directing Attorney General Conway to pursue the appeal, regardless of his religious beliefs, Governor Beshear hired private attorneys for that purpose. (Doc. # 29-13). He has so far refused to extend such an "exemption" to county clerks with religious objections to same-sex marriage. (Doc. # 29-11).

However, Davis fails to establish that her current situation is comparable to Attorney General Conway's position in 2014. Both are elected officials who have voiced strong opinions about same-sex marriage, but the comparison ends there. Governor Beshear did not actually "exempt" Attorney General Conway from pursuing the same-sex marriage appeal. Attorney General Conway's decision stands as an exercise of prosecutorial discretion on an unsettled legal question. By contrast, Davis is refusing to recognize the legal force of U.S. Supreme Court jurisprudence in performing her duties as Rowan County Clerk. Because the two are not similarly situated, the Court simply cannot conclude that Governor Beshear treated them differently based upon their religious convictions. There being no other evidence in the record to suggest that the Beshear directive is anything but neutral and generally applicable, it will likely be upheld if it is rationally related to a

11) Davis refers to the U.S. District Court for the Western District of Kentucky's decisions in *Bourke v. Beshear*, 996 F. Supp. 2d 542, 545 (W.D. Ky. 2014), and *Love v. Beshear*, 989 F. Supp. 2d 536, 539 (W.D. Ky. 2014). Judge John Heyburn held that Kentucky's constitutional and statutory prohibitions on same-sex marriages "violate[] the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review." *Bourke*, 996 F. Supp. 2d at 544. The Sixth Circuit Court of Appeals consolidated these cases with several similar matters originating from Ohio, Michigan and Tennessee and reversed them. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). The Supreme Court of the United States then granted certiorari on these cases, now collectively known as *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).

legitimate government purpose.

The Beshear directive certainly serves the State's interest in upholding the rule of law. However, it also rationally relates to several narrower interests identified in *Obergefell*. By issuing licenses to same-sex couples, the State allows them to enjoy "the right to personal choice regarding marriage [that] is inherent in the concept of individual autonomy" and enter into "a two-person union unlike any other in its importance to the committed individuals." 135 S. Ct. at 2599-2600. It also allows same-sex couples to take advantage of the many societal benefits and fosters stability for their children. *Id.* at 2600-01. Therefore, the Court concludes that it likely does not infringe upon Davis' free exercise rights.

b. The right to free speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Under the Free Speech Clause, an individual has the "right to utter or print, [as well as] the right to distribute, the right to receive and the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)(citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)). An individual also has the "right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (invalidating a state law that required New Hampshire drivers to display the state motto on their license plates). After all, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.*

While the Free Speech Clause protects citizens' speech rights from government intrusion, it does not stretch so far as to bar the government "from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239,

2245-46 (2015). “[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and carries out its duties on their behalf.” *Id.* That being said, the government’s ability to express itself is not unlimited. *Id.* “[T]he Free Speech Clause itself may constrain the government’s speech if, for example, the government seeks to compel private persons to convey the government’s speech.” *Id.* (stating further that “[c]onstitutional and statutory provisions outside of the Free Speech Clause may [also] limit government speech”).

This claim also implicates the *Beshear* directive. Davis contends that this directive violates her free speech rights by compelling her to express a message she finds objectionable. Specifically, Davis must issue marriage licenses bearing her “imprimatur and authority” as Rowan County Clerk to same-sex couples . Doc. # 29 at 27). Davis views such an act as an endorsement of same-sex marriage, which conflicts with her sincerely-held religious beliefs.

As a preliminary matter, the Court questions whether the act of issuing a marriage license constitutes speech. Davis repeatedly states that the act of issuing these licenses requires her to “authorize” same-sex marriage. A close inspection of the KDLA marriage licensing form refutes this assertion. The form does not require the county clerk to condone or endorse same-sex marriage on religious or moral grounds. It simply asks the county clerk to certify that the information provided is accurate and that the couple is qualified to marry under Kentucky law. Davis’ religious convictions have no bearing on this purely legal inquiry.

The Court must also acknowledge the possibility that any such speech is attributable to the government, rather than Davis. See *Walker*, 135 S. Ct. at 2248 (finding that

specialty license plates are government speech because the government has exercised final approval over the designs, and thus, chosen “how to present itself and its constituency”). The State prescribes the form that Davis must use in issuing marriage licenses. She plays no role in composing the form, and she has no discretion to alter it. Moreover, county clerks’ offices issue marriage licenses on behalf of the State, not on behalf of a particular elected clerk.

Assuming *arguendo* that the act of issuing a marriage license is speech by Davis, the Court must further consider whether the State is infringing upon her free speech rights by compelling her to convey a message she finds disagreeable. However, the seminal “compelled speech” cases provide little guidance because they focus on private individuals who are forced to communicate a particular message on behalf of the government. See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down a state law that required schoolchildren to recite the Pledge of Allegiance and salute the flag). Davis is a public employee, and therefore, her speech rights are different than those of a private citizen.¹² *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

“[T]he government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment,” but it does have “a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large.” *Connick v. Myers*, 461 U.S. 138, 156 (1983); *Waters v. Churchill*, 511 U.S. 661, 671

12) Most free speech cases involving public employees center on compelled silence rather than compelled speech. See, e.g., *Connick*, 461 U.S. at 147-48 (focusing on a district attorney’s claim that she was fired in retaliation for exercising her free speech rights). “[I]n the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97.

(1994). Accordingly, “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.” *Garcetti*, 547 U.S. at 418; see also *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, (1973) (stating that “neither the First Amendment nor any other provision of the Constitution” invalidates the Hatch Act’s bar on partisan political conduct by federal employees).

“[T]wo inquiries [] guide interpretation of the constitutional protections accorded to public employee speech.” *Garcetti*, 547 U.S. at 418 (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 563 (1968)). First, a court must determine “whether the employee spoke as a citizen on a matter of public concern.” *Id.* (explaining further that this question often depends upon whether the employee’s speech was made pursuant to his or her official duties). *Id.* at 421. If the answer is no, then the employee’s speech is not entitled to First Amendment protection. *Id.* at 421 (“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.”). If the answer is yes, a court must then consider “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.” *Id.* (stating further that the government’s restrictions “must be directed at speech that has some potential to affect the entity’s operations”).

The Court must adapt this test slightly because Davis’ claim focuses on her right *not* to speak. In this context, the first inquiry is whether Davis refused to speak (i.e. refused to issue marriage licenses) as a citizen on a matter of public concern. The logical answer to this question is no, as the average citizen has no authority to issue marriage licenses. Davis is only able to issue these licenses, or refuse to issue them, because she is the

Rowan County Clerk. Because her speech (in the form of her refusal to issue marriage licenses) is a product of her official duties, it likely is not entitled to First Amendment protection. The Court therefore concludes that Davis is unlikely to succeed on her compelled speech claim.

c. The prohibition on religious tests

Article VI, § 3 of the U.S. Constitution provides as follows:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Under this Clause, “[t]he fact [] that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.” *Torcaso v. Watkins*, 367 U.S. 488 (1961) (striking down a state requirement that an individual declare his belief in God in order to become a notary public); see also *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating a state law that prevented religious officials from serving in the state legislature).

Davis contends that “[c]ompelling all individuals who have any connection with the issuance of marriage licenses . . . to authorize, approve, and participate in that act against their sincerely held religious beliefs about marriage, without providing accommodation, amounts to an improper religious test for holding (or maintaining) public office.” (Doc. # 29 at 20). The Court must again point out that the act of issuing a marriage license to a same-sex couple merely signifies that the couple has met the *legal requirements* to marry. It is not a sign of moral or religious approval. The State is not requiring Davis to express a

particular religious belief as a condition of public employment, nor is it forcing her to surrender her free exercise rights in order to perform her duties. Thus, it seems unlikely that Davis will be able to establish a violation of the Religious Test Clause.

Although Davis focuses on the Religious Test Clause, the Court must draw her attention to the first half of Article VI, Clause § 3. It requires all state officials to swear an oath to defend the U.S. Constitution. Davis swore such an oath when she took office on January 1, 2015. However, her actions have not been consistent with her words. Davis has refused to comply with binding legal jurisprudence, and in doing so, she has likely violated the constitutional rights of her constituents. When such “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.” *Obergefell*, 135 S. Ct. at 2602. Such policies simply cannot endure.

d. The Kentucky Religious Freedom Act

Kentucky Constitution § 1 broadly declares that “[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right of worshiping Almighty God according to the dictates of their consciences.”

Kentucky Constitution § 5 gives content to this guarantee:

No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall,

in any case whatever, control or interfere with the rights of conscience.

Kentucky courts have held that Kentucky Constitution § 5 does not grant more protection to religious practice than the First Amendment. *Gingerich v. Commonwealth*, 382 S.W.3d 835, 839-40 (Ky. 2012). Such a finding would normally permit the Court to collapse its analysis of state and federal constitutional provisions. However, the Kentucky Religious Freedom Act, patterned after the federal RFRA, subjects state free exercise challenges to heightened scrutiny:

Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

Ky. Rev. Stat. Ann. § 446.350.

Davis again argues that the Beshear directive substantially burdens her religious freedom without serving a compelling state interest. The record in this case suggests that the burden is more slight. As the Court has already pointed out, Davis is simply being asked to signify that couples meet the legal requirements to marry. The State is not asking her to condone same-sex unions on moral or religious grounds, nor is it restricting her from engaging in a variety of religious activities. Davis remains free to practice her Apostolic Christian beliefs. She may continue to attend church twice a week, participate in Bible Study and minister to female inmates at the Rowan County Jail. She is even free to believe that marriage is a union between one man and one woman, as many Americans do. However, her religious convictions cannot excuse her from performing the duties that she

took an oath to perform as Rowan County Clerk. The Court therefore concludes that Davis is unlikely to suffer a violation of her free exercise rights under Kentucky Constitution § 5.

4. Public interest

“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F. 3d 1071, 1079 (6th Cir. 1994). Because Davis’ “no marriage licenses” policy likely infringes upon Plaintiffs’ fundamental right to marry, and because Davis herself is unlikely to suffer a violation of her free speech or free exercise rights if an injunction is issued, this fourth and final factor weighs in favor of granting Plaintiffs’ Motion.

V. Conclusion

District courts are directed to balance four factors when analyzing a motion for preliminary injunction. In this case, all four factors weigh in favor of granting the requested relief. Accordingly, for the reasons set forth herein,

IT IS ORDERED that Plaintiffs’ Motion for Preliminary Injunction (Doc. # 2) against Defendant Kim Davis, in her official capacity as Rowan County Clerk, is hereby **granted**.

IT IS FURTHER ORDERED that Defendant Kim Davis, in her official capacity as Rowan County Clerk, is hereby preliminarily enjoined from applying her “no marriage licenses” policy to future marriage license requests submitted by Plaintiffs.

This 12th day of August, 2015.



Signed By:

David L. Bunning *DB*

United States District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT ASHLAND

CIVIL ACTION NO. 15-44-DLB

APRIL MILLER, et al.

PLAINTIFFS

vs.

ORDER

KIM DAVIS, both individually
and in her official capacity, et al.

DEFENDANTS

I. Introduction

This matter is before the Court on Defendant Kim Davis' Motion to Stay (Doc. # 45) the Court's Memorandum Opinion and Order of August 12, 2015 (Doc. # 43), in which it enjoined her from enforcing her "no marriage licenses" policy against Plaintiffs. Davis argues that a stay is necessary to protect her constitutional rights while the Sixth Circuit Court of Appeals entertains her interlocutory appeal of the Court's decision (Doc. # 44). Plaintiffs having submitted a Response in Opposition to the Motion (Doc. # 46), and Davis having filed her Reply (Doc. # 51), this matter is now ripe for the Court's review. After considering the record, the controlling law, and the parties' arguments, the Court concludes that a stay pending appeal is not warranted. Defendant Kim Davis' Motion to Stay (Doc. # 45) is therefore **denied**.

However, in recognition of the constitutional issues involved, and realizing that emotions are running high on both sides of the debate, the Court finds it appropriate to

temporarily stay this Order pending review of Defendant Davis' Motion to Stay (Doc. # 45) by the Sixth Circuit Court of Appeals.

II. Analysis

“While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.” Fed. R. Civ. P. 62(c); see also Fed. R. App. P. 8(a)(1) (providing that “[a] party must ordinarily move first in the district court for . . . an order suspending modifying, restoring, or granting an injunction while an appeal is pending). To determine whether a stay is warranted, district courts must consider the following four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (noting that “the factors to be considered are the same for both a preliminary injunction and a stay pending appeal”).

A movant “need not always establish a high probability of success on the merits” to justify the granting of a stay. *Id.*

The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship however, is not without its limits; the movant is always required to demonstrate more than the mere “possibility” of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minimum, “serious questions going to the merits.”

Id. at 153-54 (internal citations omitted).

Courts generally look to three factors in evaluating the harm that will occur absent a stay: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. *Id.* at 154. A movant must not only demonstrate that the harm alleged is “both certain and immediate, rather than speculative or theoretical,” he or she “must provide some evidence that the harm has occurred in the past and is likely to occur again.” *Id.*

In its Memorandum Opinion and Order, the Court held that Davis’ “no marriage licenses” policy likely infringed upon Plaintiffs’ fundamental right to marry, thus warranting injunctive relief. (Doc. # 43 at 28). The Court further found that Davis was unlikely to suffer a violation of her free exercise rights if an injunction was issued. (*Id.*). Although these findings suggest that Davis is unlikely to prevail on appeal, she insists that “[t]his case presents substantial legal matters of first impression for this (or any other) federal appeals court following the *Obergefell* decision from the United States Supreme Court.” (Doc. # 45-1 at 10).

Davis cites to *United States v. Coffman* for the proposition that matters of first impression create serious questions going to the merits. See Civ. A. No. 5:09-181-KKC, 2010 WL 4683761 (E.D. Ky. Nov. 12, 2010). In that case, the Government moved the court to stay its previous order, which “requir[ed] the Government to remove *lis pendens* notices it placed on property listed in the superseding indictment as substitute assets, pending an appeal to the United States Court of Appeals for the Sixth Circuit.” *Id.* at *1. Because the court was not aware of any precedent addressing “whether the Government has authority under Kentucky law to place *lis pendens* notices on a criminal defendant’s substitute assets

prior to trial,” it determined that the Government had more than a mere possibility of success on the merits on appeal. *Id.* at *2.

In this case, by contrast, the Court is not tasked with resolving an unsettled issue of state law. It is being asked to apply clearly established federal law, as enunciated in *Obergefell*. 135 S. Ct. 2584 (2015). Although the U.S. Supreme Court did not consider the more narrow issue before this Court—whether requiring a county clerk to issue marriage licenses to same-sex couples violates her free exercise rights—it was not silent as to the likely impact of its holding on religious freedom.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. The rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. 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. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choice and diminish their personhood to deny them this right.

* * * * *

[I]t 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.

Id. at 2602-03, 2607. These passages strongly suggest that Davis’ “religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk.” (Doc. # 43 at 27-28). With this guidance at hand, the Court finds that Davis has not established a likelihood of success on the merits on appeal. This factor weighs against staying the case.

Davis next argues that she is highly likely to suffer irreparable harm absent a stay, which compensates for the low likelihood of her success on appeal. Specifically, Davis contends that she will incur “significant, irrevocable, and irreversible harm if she is forced to authorize and approve a [same-sex marriage] license against her religious conscience.” (Doc. # 45-1 at 12). She also points out that “[n]o one, and not even a permanent injunction in her favor, can reverse that action if she is compelled to violate her conscience.” (*Id.* at 13).

While Davis is correct in stating that a violation of her free exercise rights would constitute irreparable harm, she has failed to show that she is likely to suffer a violation of her free exercise rights in the first place. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). As the Court pointed out in its Memorandum Opinion and Order, Davis is only being required to certify that couples meet the legal requirements to marry. She does not have to authorize or approve any unions on moral or religious grounds. Absent a likely constitutional violation, Davis is unlikely to suffer irreparable harm absent a stay.

The Court having found that Davis is unlikely to prevail on appeal or suffer irreparable harm absent a stay, it follows that Plaintiffs are likely to suffer harm if a stay is granted. The Court has already held that Plaintiffs are likely to succeed on the merits of

their claim and enjoined Davis from enforcing her “no marriage licenses” policy against them. If the Court decided to delay enforcement of its Order while Davis pursues an unpromising appeal, it would essentially give Plaintiffs a favorable legal ruling with no teeth and prolong the likely violation of their constitutional rights. Thus, this third factor also weighs against staying the Order.

Finally, the Court notes that it is in the public interest to prevent the violation of a party’s constitutional rights. *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F. 3d 1071, 1079 (6th Cir. 1994). Because Davis’ “no marriage licenses” policy likely infringes upon Plaintiffs’ fundamental right to marry, and because Davis herself is unlikely to suffer a violation of her free exercise rights if compelled to issue marriage licenses, the Court concludes that the public interest is not served by granting a stay.

III. Conclusion

District courts are directed to balance four factors when analyzing a motion to stay. In this case, all four factors weigh in favor of denying the requested relief. Accordingly, for the reasons set forth herein,

IT IS ORDERED that Defendant Kim Davis’ Motion to Stay (Doc. # 45) be, and is, hereby **DENIED**.

IT IS FURTHER ORDERED that **this Order denying Kim Davis’ Motion to Stay** be, and is, hereby **TEMPORARILY STAYED** pending review of Defendant Davis’ Motion to Stay (Doc. # 45) by the Sixth Circuit Court of Appeals.

This 17th day of August, 2015.



Signed By:

David L. Bunning *DB*

United States District Judge

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EXHIBIT D

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
ASHLAND, KENTUCKY

APRIL MILLER, Ph.D.,)	Ashland Civil
KAREN ANN ROBERTS,)	Action No. 15-44
SHANTEL BURKE,)	
STEPHEN NAPIER,)	
JODY FERNANDEZ,)	
KEVIN HOLLOWAY,)	
L. AARON SKAGGS,)	
BARRY W. SPARTMAN,)	
)	
Plaintiffs,)	At Ashland, Kentucky
)	
-vs-)	
)	
KIM DAVIS, Individually,)	
KIM DAVIS, In her official)	
capacity as ROWAN COUNTY CLERK,)	
ROWAN COUNTY, KENTUCKY,)	
)	July 13, 2015
Defendants.)	12:00 p.m.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING PROCEEDINGS
BEFORE THE HONORABLE DAVID L. BUNNING

Court Reporter:	Peggy W. Weber, RPR
	Official Court Reporter
	U.S. District Court
	P.O. Box 362
	Lexington, Kentucky 40588
	(859) 421-0814

Proceedings recorded by mechanical stenography,
transcript produced by computer.

1 Appearances of Counsel:

2 On behalf of Plaintiffs: WILLIAM ELLIS SHARP, ESQ.
3 ACLU of Kentucky
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4 Suite 300
Louisville, Kentucky 40202

5 -and- DANIEL J. CANON, ESQ.
6 Clay Daniel Walton Adams, PLC
462 South Fourth Street
7 Suite 101
Louisville, Kentucky 40202

8 On behalf of Defendant: ROGER K. GANNAM, ESQ.
(Kim Davis) JONATHAN D. CHRISTMAN, ESQ.
9 Liberty Counsel - Orlando
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10 Orlando, Florida 32854

11 -and- ANTHONY CHARLES DONAHUE, ESQ.
12 Donahue Law Group, PSC
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14 On behalf of Defendant: CECIL R. WATKINS, ESQ.
(Rowan County, Kentucky) Rowan County Attorney
15 600 West Main Street
Morehead, Kentucky 40351

16 -and- Jeffrey C. Mando, ESQ.
17 Adams Stepner
Woltermann & Dusing, PLLC
18 40 West Pike Street
P.O. Box 861
19 Covington, Kentucky 41012

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1 (Whereupon, the Preliminary Injunction Hearing
2 proceedings commenced on Monday, July 13, 2015, at
3 12:00 p.m., on the record in open court, as follows.)

4 THE COURT: All right. Madam Clerk, if you
5 could call the case set for noon, please.

6 THE CLERK: Yes, Your Honor.

7 Ashland Civil Action 15cv44, April Miller,
8 et al., versus Kim Davis, et al., this being called for a
9 preliminary injunction hearing.

10 THE COURT: All right. If we could start with
11 entries of appearance, please, and if you'd identify who
12 you're here representing.

13 We'll start over here.

14 MR. WATKINS: Cecil Watkins on behalf of
15 Rowan County, Your Honor.

16 THE COURT: All right.

17 MR. MANDO: Jeff Mando on behalf of
18 Rowan County, Your Honor.

19 MR. DONAHUE: A.C. Donahue on behalf of
20 Kim Davis by special appearance.

21 MR. CHRISTMAN: Jonathan Christman also on
22 behalf of Kim Davis by special appearance.

23 MR. GANNAM: Roger Gannam on behalf of
24 Kim Davis by special appearance.

25 MR. SHARP: Good morning, Your Honor.

1 Bill Sharp on behalf of Ms. April Miller and
2 the other plaintiffs.

3 MR. CANON: Dan Canon on behalf of the
4 plaintiffs.

5 THE COURT: All right. I'm glad to see we have
6 someone representing the county.

7 Did you enter your appearance today, Mr. Mando?

8 MR. MANDO: Yeah, Your Honor, we were just
9 served the end of last week.

10 MR. WATKINS: Thursday, Your Honor.

11 THE COURT: Okay. And, Mr. Watkins, you're
12 with whom?

13 MR. WATKINS: I'm the Rowan County attorney.

14 THE COURT: You are the county attorney.
15 That's what I thought.

16 MR. WATKINS: Yes.

17 THE COURT: I just wanted to make sure.

18 Okay. Well, as you know, this matter is set
19 for a preliminary injunction hearing.

20 Answers haven't been filed. I don't know if
21 there's been an answer prepared. You haven't responded
22 to the motion. I know by local rule you have a certain
23 time to respond.

24 My hope today is to take whatever evidence
25 you-all want to submit on either side for purposes of the

1 preliminary injunction motion.

2 This was filed as a motion for preliminary
3 injunction, not a motion for TRO, so that told me when it
4 was filed that I would be able to allow for written
5 response. And you chose to file it the way you wanted to
6 so that was your decision.

7 I hope to allow for proof to be put on today,
8 and then, if necessary, I'll -- well, not if necessary, I
9 do plan on hearing argument. I have some questions of my
10 own.

11 The case is not about whether or not we agree
12 or disagree with what the Supreme Court ruled a couple
13 weeks ago because that's the Supreme Court's business.
14 Only the Supreme Court can overrule the Supreme Court.

15 So if anybody is in here looking for me to
16 reverse the Supreme Court, that's not going to happen. I
17 think I would quickly be reversed, and I don't really
18 enjoy doing that.

19 So we're here to hear the evidence necessary
20 for the preliminary injunction motion, and then I'll give
21 you an opportunity to orally make whatever argument you
22 want to make.

23 You can still file written response if you
24 wish. Mr. Mando, you can file a written response if you
25 wish.

1 So, I guess, the burden is on the plaintiff.
2 So I'll give you the opportunity to call witnesses. I
3 mean, there may be an opportunity to stipulate to facts.
4 The facts seem fairly straightforward.

5 I've read a little bit about what's in the
6 pleadings. The public statements, I think, there's
7 public statements that the Defendant Davis made within
8 the pleadings. Of course, that's not under oath so I
9 don't know if that would be the testimony that she would
10 give today.

11 But, Mr. Gannam -- is it Gannam?

12 MR. GANNAM: Yes, Your Honor.

13 THE COURT: All right. Do you wish to say
14 something, sir?

15 MR. GANNAM: Yes, Your Honor. On a preliminary
16 matter, Kim Davis, the defendant, has not been served;
17 and, therefore, this Court does not currently have
18 jurisdiction over her.

19 I have authorities providing that when a
20 preliminary injunction motion is called for hearing and
21 the defendant hasn't been served yet, the Court is
22 without jurisdiction, and the motion should be denied
23 without prejudice with the opportunity to refile it once
24 the defendant is served.

25 But Kim Davis has not been served; and,

1 therefore, this Court does not currently have
2 jurisdiction over her.

3 THE COURT: Well, I have jurisdiction over the
4 complaint. We'll just hear evidence on -- I'm going to
5 hear evidence today regardless because everybody is here.

6 MR. GANNAM: Well, Your Honor, may I just ask
7 then that we would move to suspend the hearing and
8 request the Court to certify that ruling that we'll
9 proceed even though she has not been served for an
10 immediate appeal under 28 USC 1292(b)?

11 THE COURT: So you're going to come back
12 tomorrow?

13 MR. GANNAM: Your Honor, we are --

14 THE COURT: I mean, I'm here. I mean, you
15 don't know my -- I'm in -- I usually am in Covington. I
16 had a regular docket today, so I just set this for
17 hearing today because I was going to be here.

18 MR. GANNAM: Understood, Your Honor. And I
19 would just say that the case law that --

20 THE COURT: Trying to save everybody some time.

21 MR. GANNAM: The case law makes it clear the
22 burden to accomplish service is on point.

23 THE COURT: Well, I recognize that. Why hasn't
24 she been served?

25 MR. SHARP: Your Honor, if I may.

1 THE COURT: Sure.

2 MR. SHARP: It's been sent out via certified
3 mail, returned delivery, signature confirmation. We
4 are -- obviously, we drove here last night, which is
5 obviously a three-hour drive so we haven't been in the
6 office today to see if the confirmation on service has
7 come back.

8 I would point out that counsel for Ms. Davis
9 e-mailed me on June -- July the 7th --

10 THE COURT: So six days ago.

11 MR. SHARP: -- with their entry of appearance.
12 They formally filed their entry of appearance in this
13 case on July the 8th. It's unfortunate that after having
14 driven three hours yesterday to be here that this is the
15 first time we're hearing about it.

16 THE COURT: Well, I'm not surprised. I mean,
17 if they're -- they're going to raise arguments that
18 they're going to raise. I mean, they don't have to raise
19 arguments with you. They can -- I mean, I'm not -- I'm
20 trying to get the -- and the only -- I look out here
21 among the lawyers that I recognize, and Mr. Mando appears
22 before me regularly in Covington, and he knows one of my
23 favorite things is to see what we can all agree about.

24 MR. SHARP: If I may, Your Honor.

25 THE COURT: Yes.

1 MR. SHARP: If it please the Court, I mean, we
2 would consider asking the Court to convert the motion for
3 preliminary injunction to a motion for TRO. We're
4 prepared to present evidence on that request today.

5 THE COURT: How about that, if they convert it?

6 MR. GANNAM: Your Honor, it --

7 THE COURT: If I orally grant their motion, and
8 we convert it to a TRO motion, I mean, I can grant that
9 without notice.

10 MR. GANNAM: The TR -- they haven't filed a
11 motion for TRO.

12 THE COURT: I know, but if I allow them to do
13 it orally, and we have a temporary restraining order
14 hearing today, it wouldn't be a preliminary injunction.
15 It could only be good for 10 days.

16 MR. GANNAM: Yes, Your Honor. But the rule for
17 TRO requires, first of all, that a sworn pleading or an
18 affidavit be provided to the Court establishing the facts
19 in which the TRO would be based. I also --

20 THE COURT: Well, the --

21 MR. GANNAM: It also requires written statement
22 from the attorneys explaining why service wasn't possible
23 before the hearing. And we're prepared to provide a
24 declaration to the Court that in the second case that was
25 filed against Kim Davis the attorneys filed the case on

1 July 10th, and accomplished service by hand delivery at
2 her office on the same day.

3 So the plaintiffs cannot show that it was
4 impractical or impossible or that they were unable to
5 effect service prior to today's hearing that they've
6 known about.

7 And we believe that it was incumbent on the
8 plaintiff to notify the Court that they didn't have
9 service and couldn't proceed today.

10 THE COURT: Well, the notice that's required --
11 well, Rule 65, which is the rule that governs TROs, if
12 you want to receive injunctive -- temporary injunctive
13 relief, you have to submit an affidavit showing why the
14 other side should not be notified. And you've been
15 notified of this hearing.

16 Now, the service thing is a quandary to me
17 because I think the lawyer representing the plaintiff in
18 15-46 -- I just was able to review that Friday -- was a
19 lawyer from Lexington, as I recall.

20 MR. SHARP: Yes, sir.

21 THE COURT: And I haven't received any notice
22 of the service in ECF as of this weekend.

23 Do you take a position on this, Mr. Mando, this
24 request to continue the hearing? I don't want to
25 continue the hearing because we're all here.

1 MR. MANDO: We prefer not to continue the
2 hearing just for a matter of convenience, and the fiscal
3 court's position is a little bit different than
4 Ms. Davis's.

5 THE COURT: I would -- I would suspect it would
6 be.

7 MR. MANDO: Because we have no authority,
8 Your Honor, to tell the clerk what to do when it comes to
9 issuing those marriage licenses. We can't order her to
10 issue one. We can't tell her -- to forebear her from
11 issuing one under Kentucky law.

12 THE COURT: Well, what is the -- what is the
13 process? It's been awhile since I've gotten married.
14 But I remember I lived in Fayette County at the time, and
15 I went into the clerk's office and paid \$25 or whatever
16 it was and walked out with an envelope, sealed envelope,
17 that I -- it's still in my house, probably still sealed.

18 Is that the process? And I realize we're --
19 you're probably not -- maybe you might --

20 MR. MANDO: The county attorney might be able
21 to --

22 THE COURT: -- know, Mr. Watkins.

23 MR. MANDO: -- give the specifics of that than
24 I can, Your Honor.

25 MR. WATKINS: Well, afterwards, Your Honor,

1 they're going to have to come back in and do their proper
2 filing of their marriage. But, I mean, initially I think
3 you're correct what you need to do.

4 THE COURT: Okay. Well, I think what I'm going
5 to do -- get my rule book out. Let's see here.

6 MR. SHARP: Your Honor, if we could take a
7 five-minute recess, we'll check with the office to see if
8 service has been returned as of this morning.

9 THE COURT: And can I see your cases that
10 you've cited? Are they all Sixth Circuit, I guess?

11 MR. GANNAM: I'm sorry, Your Honor, I didn't
12 hear you.

13 THE COURT: You were citing some authority
14 earlier.

15 MR. GANNAM: Well, your Honor, I can provide --
16 I have -- have it all here if I may approach and provide
17 the Court, please.

18 THE COURT: Well, you can hand it to the court
19 security officer.

20 MR. GANNAM: Your Honor, the first case is
21 Schuh versus Michigan Department of Corrections.

22 Your Honor, these cases are all over the place
23 in terms of providing the basic proposition. In this
24 case it's on the second page in the highlighted portion.
25 It simply provides, "When a preliminary injunction is

1 sought under Rule 65(a), service of the summons and the
2 complaint is required. It is well settled that without
3 service of process a Court has no jurisdiction over
4 defendants named in a lawsuit."

5 THE COURT: Well, I agree that service is
6 ultimately required. I mean, if you don't get served,
7 you can't have notice of the proceeding. You can't
8 receive due process. I mean, you have to. I mean, as
9 far as no service, formal service, of course, if she
10 hasn't been formally served, the Court is not without --
11 is without jurisdiction to order her to do anything until
12 she's properly served. And I don't plan on ordering her
13 to do anything today. I don't plan on ruling today. I
14 plan on hearing evidence today so that I can ultimately
15 make an informed decision. That's all I'm here to do is
16 to hear evidence today.

17 So I understand that it's well settled that
18 without service of process, a Court has no jurisdiction
19 over defendants named in a lawsuit.

20 I have dismissed lawsuits without -- what is
21 it -- Rule 12 -- 12(b) -- I can't remember off the top of
22 my head, one of the subsections. But, at any rate, I
23 recognize that. I mean, you-all traveled here from
24 Florida. I mean, I don't want to have to bring you back
25 for another hearing.

1 MR. GANNAM: Well, Your Honor, we're not
2 concerned about our own travels.

3 THE COURT: Well, I'm concerned because I think
4 it's important that we try to to the extent that everyone
5 can save resources of whatever entity is representing
6 them, we're all here. I mean, whether there's service or
7 not, I don't know how I -- why I can't hear evidence of
8 the case.

9 MR. GANNAM: Your Honor, in --

10 THE COURT: And the complaint has been filed.
11 I have jurisdiction over the civil rights complaint.

12 MR. GANNAM: That's correct, Your Honor. The
13 proper procedure if -- if you only have jurisdiction over
14 the plaintiffs would be a TRO procedure if they can show
15 there's a reason why they couldn't get notice.

16 And under Rule 65 notice includes at least
17 service of the summons and complaint and the motion
18 papers.

19 I can provide -- I can point to other cases in
20 here that -- where summons -- where the service had not
21 been accomplished, the appropriate step was to deny the
22 motion for preliminary injunction and have the plaintiffs
23 refile it.

24 THE COURT: Well, I can pull the names. We're
25 going to get to the merits.

1 MR. GANNAM: Your Honor --

2 THE COURT: We will all get to the merits. I
3 mean, your client would love to get to the merits.

4 MR. GANNAM: Your Honor, we would --

5 THE COURT: Mr. Mando's client would love to
6 get to the merits, as would the plaintiffs. To the
7 extent we can expedite this, it helps everyone.

8 MR. GANNAM: Your Honor, we believe it would be
9 more appropriate to allow service to be accomplished,
10 allow Ms. Davis a regular standard briefing schedule to
11 be able to respond to this motion for preliminary
12 injunction, and then have a hearing on the merits of the
13 preliminary injunction motion after we've had an
14 opportunity to develop somewhat of a record.

15 THE COURT: Well, that's what we're here today
16 to do is develop a record.

17 MR. GANNAM: I mean, develop a record before
18 the hearing so that we're not presenting witnesses for
19 the first time at the hearing, but rather have the
20 opportunity perhaps to take a little discovery or do
21 whatever -- do whatever we can do within the regular
22 21-day briefing period that the rule already provides.

23 THE COURT: Well, the motion -- there was a
24 motion filed. Mr. Sharp, do you have that?

25 MR. SHARP: I do, Your Honor. July the 2nd.

1 THE COURT: July 2nd. So your response is due
2 on the 23rd. Well, actually, it's the 26th, three days
3 for mailing. That's always been a --

4 MR. GANNAM: Your Honor, it will be due 21 days
5 after service, and it has not been served yet.

6 MR. SHARP: Your Honor, I'm a -- I'm a little
7 perplexed given that counsel has entered their appearance
8 in the case.

9 THE COURT: Well, again, we're dealing with a
10 situation where there's not going to be any agreements so
11 everybody is going to have to comply with all the rules
12 and the procedures, which is fine. If that's how
13 everybody wants to have everything work, that's -- I
14 presided over that type of case, and I've presided over
15 cases where people are more conciliatory. So it
16 really -- it doesn't matter to me.

17 But if everybody is going to be required to
18 cross every T and dot every I, that's fine. I'm going to
19 hear the evidence today. I'm going to allow the proof to
20 be put on today. Whatever proof you want to put on,
21 we're going to put it on today. You'll have time to file
22 written response, as will you if you wish to file written
23 response.

24 I have some questions myself. I take it
25 Ms. Davis is not here because she wasn't served. Is that

1 fair? I'm just guessing based upon the conversation.

2 MR. GANNAM: She's not currently in the
3 courthouse, Your Honor. She is available, but she is not
4 here.

5 THE COURT: Okay. She is available?

6 MR. GANNAM: Yes, Your Honor.

7 THE COURT: Okay. All right. Well, so let me
8 make sure I have the record that needs to be completely
9 clear.

10 There is an oral motion -- you make your oral
11 motion, and then I'll let you make your oral motion, and
12 then we can make sure the minutes reflect exactly what we
13 want here.

14 What's your oral motion, Mr. Gannam? Is it
15 Gannon or Gannam?

16 MR. GANNAM: Gannam, Your Honor.

17 THE COURT: Gannam. G-A-N-N-O-M?

18 MR. GANNAM: A-M.

19 THE COURT: A-M, okay. All right. Thank you.

20 MR. GANNAM: Well, Your Honor, our initial
21 objection was lack of service and therefore lack of
22 jurisdiction.

23 THE COURT: So oral motion to dismiss. Not
24 dismiss but -- was it -- it wasn't to dismiss. It was
25 oral motion to what?

1 MR. GANNAM: No, Your Honor. We object to
2 proceeding with the hearing on a PI motion when there has
3 not been service.

4 THE COURT: The oral motion to what?

5 MR. GANNAM: Well, in light of the Court's
6 ruling to move forward despite there not being service.

7 THE COURT: Okay. I mean, it will be
8 defendants -- Defendant Davis's objection to the hearing
9 in absence of service. Is that fair?

10 MR. GANNAM: That's correct, Your Honor.

11 THE COURT: Okay. All right. That will be
12 overruled.

13 All right. What's your other request?

14 MR. GANNAM: In light of overruling that
15 objection and proceeding forward, we request the Court to
16 suspend the hearing and immediately certify that issue
17 for an immediate appeal under 28 USC 1292(b).

18 THE COURT: Okay. That's going to be denied.

19 MR. GANNAM: And I would -- if I just may point
20 out in the same case I read from earlier, Your Honor, the
21 Court there held that to the extent plaintiff seeks an
22 ex parte preliminary injunction, which is what this
23 proceeding will now be --

24 THE COURT: It's not ex parte.

25 MR. GANNAM: -- that that's procedurally

1 improper.

2 THE COURT: It's not ex parte. Ex parte would
3 be if -- obviously, we have lots of folks in the back and
4 lots of folks here. I mean, it's not ex parte. I mean,
5 you've been -- you have notice. You haven't formally
6 been served. I mean, under Rule 65 a temporary
7 restraining order under subsection (b)(1), without --
8 without notice. The Court may issue a TRO without
9 written notice or oral notice to the adverse party only
10 if. Now, you have notice. This doesn't talk about
11 service. This talks about notice.

12 MR. GANNAM: But notice as a legal matter
13 includes at least service, Your Honor. That's our point
14 is that notice has legal significance. And in a case
15 where there has been no service there has been no notice.

16 And, therefore, under the TRO ruling reading it
17 with that interpretation, which we think is the correct
18 one, the plaintiff has to show why not providing notice,
19 which is at least service, is -- is permissible or
20 excusable under all of the circumstances. And what we're
21 willing to show --

22 THE COURT: The other case they served, they
23 walked over --

24 MR. GANNAM: -- is that there was no --

25 THE COURT: -- and hand delivered, which is

1 what should have been done here, but it wasn't.

2 Road blocks to getting to the merits. I --
3 which is certainly -- I want to give everyone a decision,
4 an informed decision, as quickly as possible, but I want
5 to make sure that everybody has a right to argue whatever
6 they want to argue for.

7 So your two requests are overruled, denied.

8 What was your request to convert it, an oral
9 motion to convert the hearing to a TRO hearing?

10 MR. SHARP: Yes, Your Honor.

11 THE COURT: All right. Well, we're going to
12 take a five-minute recess. I want you to take a gander
13 at finding out if there's been formal service by way of
14 certified mail, and then we'll reconvene at 12:30.

15 Do you mind if I keep these, Mr. Gannam? I'll
16 read them.

17 MR. GANNAM: You may keep them.

18 THE COURT: Thank you.

19 (Whereupon, a recess was taken at 12:20 p.m., and
20 the proceedings continued at 12:30 p.m., on the record in
21 open court, as follows.)

22 THE COURT: All right. I will go ahead and
23 give these cases back to you, Mr. Gannam. I see one of
24 them was one of my cases.

25 All right. Mr. Sharp, what did you find out?

1 MR. SHARP: Your Honor, if I may. We have not
2 been able to confirm that Ms. Davis has, in fact, been
3 served. Speaking with Mr. Mando, it seems like the
4 county's service was perfected Thursday night. Mr. Canon
5 is looking into an alternative option. But at this point
6 we cannot represent that she's been served.

7 THE COURT: Well, I'm certainly not going to
8 enter any formal order until she's been served. I think
9 that would be inappropriate. But I'm here. I do want to
10 hear the evidence today while I'm here.

11 I don't think it's necessary either to convert
12 the hearing to a TRO hearing. I plan on giving the
13 defendants 21 days from the date that you entered your
14 appearance to file a response. Because you entered your
15 appearance last week. I know the local rules say 21 days
16 from date of service of the motion. I think service of
17 the motion on counsel was the date you entered your
18 appearance. You would have known about it -- getting on
19 ECF you would have known when the complaint was filed.
20 You would have gotten notice of the motion filing as of
21 the date you entered your appearance.

22 So a written response to the motion for the
23 preliminary injunction will be due on July 30th.

24 MR. GANNAM: Your Honor, may I be heard on the
25 point of appearance? We -- to be clear, we have not

1 filed a general appearance. We filed -- Mr. Christman
2 and I filed in our individual capacities motions for
3 pro hac vice admission, which was necessary for us to
4 even come to court and argue anything, whether it's
5 jurisdiction or anything else. But we have not entered
6 an appearance for Ms. Davis as such. It's simply a
7 motion for pro hac vice.

8 THE COURT: Okay. Well, I granted that.

9 Well, okay, I'll rephrase.

10 MR. SHARP: If I may, Your Honor.

11 THE COURT: Both defendants -- yes.

12 MR. SHARP: I'm looking at record entry
13 number 8 and number 7. The, "Wherefore, undersigned
14 counsel will be permitted to appear and practice in this
15 court as counsel for Defendant Kim Davis in the
16 above-referenced case." Those motions is identical
17 language in both. Those are granted. I mean, that's --

18 THE COURT: Right. I granted those by gavel
19 order last week. I did.

20 What did you find out, sir, anything?

21 MR. CANON: We're working on it, Judge. Yeah,
22 as far as I know, the county was served on --

23 THE COURT: Please stand, please.

24 MR. CANON: Yes, I'm sorry.

25 The county was served on Thursday. Apparently

1 service went out on Monday, last Monday. The county was
2 served on Thursday.

3 So as far as where the service is, stands for
4 as far as Ms. Davis goes personally, I assume it's
5 sitting in her mailbox.

6 THE COURT: Well, she's apparently not in
7 Rowan County right now. She's in Boyd County. So she
8 probably doesn't have access to her mailbox.

9 At any rate, here's what I'm going to do.
10 Whether or not you were here just for -- to argue the
11 case, you will be arguing Mr. Gannan -- Gannam -- I'm
12 having a hard time with that. Is it Gannam?

13 MR. GANNAM: Gannam.

14 THE COURT: Gannam, okay. A written response
15 by either the county or the Defendant Davis individually
16 will be due on July 30th. I can always shorten or
17 lengthen the time by local rule by order, and I'm doing
18 that. So the responses will be due on the 30th of July.

19 Your oral motion to convert the hearing to a
20 TRO motion will be denied. I don't think it's necessary.

21 I'm going to hear the evidence today. So you
22 can call your first witness.

23 MR. SHARP: Thank you, Your Honor.

24 The plaintiffs call Dr. April Miller.

25 THE COURT: All right. Come around.

1 (Whereupon, the witness, APRIL MILLER, Ph.D., was
2 placed under oath by the clerk of the Court.)

3 THE COURT: Good afternoon.

4 THE WITNESS: Hi.

5 THE COURT: You may proceed.

6 MR. SHARP: Thank you, Your Honor.

7 APRIL MILLER,

8 having been first duly placed under oath, was examined
9 and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. SHARP:

12 Q. Ma'am, can you please identify yourself for the
13 Court?

14 A. April Miller.

15 Q. And do you have a professional title?

16 A. I have a Ph.D., so my professional title is doctor.

17 Q. Would you please spell your last name for the Court?

18 A. Miller, M-I-L-L-E-R.

19 Q. Dr. Miller, where do you live?

20 A. I live in Morehead, Kentucky.

21 Q. And how long have you lived there?

22 A. Nine years.

23 Q. Dr. Miller, I'm now going to ask you some questions
24 about your personal life. First, are you currently in a
25 committed relationship?

1 A. Yes.

2 Q. With whom?

3 A. Karen Roberts.

4 Q. How did the two of you meet?

5 A. We were work colleagues at the University of
6 Southern Mississippi.

7 Q. And how long have the two of you been in a
8 relationship?

9 A. A relationship, 11 years.

10 Q. Dr. Miller, do you and your partner intend to get
11 married?

12 A. Yes.

13 Q. When did the two of you decide to do so?

14 A. We talked about it on the 26th of June after the
15 Supreme Court ruling.

16 Q. Now, this may seem like an obvious question, but why
17 do the two of you want to get married?

18 A. Because we love each other, and we want to get
19 married.

20 Q. Are there any reasons why the two of you cannot
21 legally get married?

22 A. No.

23 Q. Are you both over the age of 18?

24 A. Yes.

25 Q. Neither of you are currently married to someone

1 else?

2 A. Correct.

3 Q. And the two of you are not related by blood?

4 A. No.

5 Q. Now, I'm going to ask you a few questions about what
6 dealings, if any, you and your partner have had with the
7 Rowan County Clerk's office.

8 First, have you or your partner had an occasion to
9 seek a marriage license --

10 MR. GANNAM: Objection.

11 THE COURT: Overruled.

12 BY MR. SHARP:

13 Q. Have you or your partner had an occasion to seek a
14 marriage license from the Rowan County Clerk's office?

15 A. Yes. We went on June the 30th to seek a marriage
16 license.

17 Q. Did you do that in person?

18 A. Yes, we were both there.

19 Q. Before you sought the marriage license, were you
20 aware that the Rowan County Clerk's office had made
21 public statements about any policies regarding the
22 issuance of marriage licenses?

23 A. Yes. On Monday, the 29th of June, there were
24 media -- media outlets had said -- stated that Kim Davis
25 had said she was not issuing licenses.

1 Q. In these media reports was there any indication of
2 the reasons why that was the case?

3 MR. GANNAM: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: I believe they stated that it was
6 her religious beliefs that kept her from issuing
7 licenses.

8 BY MR. SHARP:

9 Q. And those beliefs kept her from issuing licenses to
10 whom?

11 A. To all couples in Rowan County.

12 Q. Can you please explain the circumstances
13 specifically under which you and your partner went to
14 seek a marriage license that day?

15 A. On the 26th of June when the Supreme Court ruled
16 that we now had the right to marry in all 50 states, my
17 partner and I talked about finally getting married and
18 having that right.

19 And on Monday when I heard that Kim Davis was not
20 issuing licenses --

21 MR. GANNAM: Objection.

22 THE COURT: Overruled.

23 THE WITNESS: -- my partner and I decided to go
24 down to the courthouse on Tuesday morning ourselves to
25 see if that was true or to see if on Tuesday she was

1 issuing licenses. It had not been confirmed Tuesday when
2 we were there that anybody had been denied that morning,
3 so we went in and requested a marriage license on
4 Tuesday, the 30th.

5 BY MR. SHARP:

6 Q. Were you able to obtain a marriage license that day?

7 A. No.

8 Q. Did anyone from the clerk's -- did you interact with
9 anyone from the clerk's office in seeking to obtain a
10 marriage license?

11 A. We walked into the clerk's office. We walked to the
12 desk, requested a marriage license from the person
13 sitting at the counter.

14 She got up and went to the back to speak with
15 Kim Davis in her office. Spoke to Kim Davis.

16 She turned around and came back, and she said to us,
17 we are not issuing any marriage licenses at this time.

18 Q. Did they identify any reasons why that was the case?

19 A. No.

20 Q. How did it make you feel to be denied a marriage
21 license in your county of residence?

22 A. I was pretty furious.

23 Q. Have you or your partner sought to obtain a marriage
24 license in any other county?

25 A. No.

1 Q. Why not?

2 A. We live in Morehead, Kentucky. We live in
3 Rowan County. This is where we do our business all the
4 time. This is the same county clerk's office where we
5 purchase our car tags, and we register to vote, and this
6 is where we do our business. I think it would be
7 degrading to have to go somewhere else to get my license
8 because of this.

9 Q. Dr. Miller, if you were able to obtain a marriage
10 license in Rowan County, would you and your partner then
11 get married?

12 A. Yes.

13 MR. SHARP: Nothing further, Your Honor.

14 THE COURT: Cross?

15 Mr. Christman.

16 MR. CHRISTMAN: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. CHRISTMAN:

19 Q. Good afternoon, Ms. Miller.

20 My name is Jonathan Christman. I represent
21 Ms. Davis in this case.

22 A. Hi.

23 Q. Ms. Miller, you did not try to obtain a marriage
24 license from Rowan County Judge/Executive Walter Blevins;
25 correct?

1 A. I did speak with Walter Blevins on July 1st.

2 Q. Did you try to obtain a marriage license from
3 Mr. Blevins?

4 A. I was one of the people in the office at the time
5 that did ask for a marriage license, but other plaintiffs
6 and myself did request a license, yes, on July 1st.

7 Q. From Mr. Blevins?

8 A. Yes.

9 Q. Who else was there with you?

10 A. Plaintiffs Jody Fernandez and Kevin Holloway.

11 THE COURT: This is the Rowan County
12 Judge/Executive?

13 THE WITNESS: Rowan County Judge/Executive
14 Walter "Doc" Blevins.

15 THE COURT: So you were able to get a license
16 from him?

17 THE WITNESS: No, we did not get a license from
18 him. We requested one from him.

19 THE COURT: Oh, you requested one from him, but
20 he didn't give it to you?

21 THE WITNESS: We did not receive licenses from
22 him.

23 THE COURT: Okay. All right. Thank you. I
24 wanted to make sure that was correct. Thank you.

25 THE WITNESS: Thank you.

1 BY MR. CHRISTMAN:

2 Q. You did not attempt to obtain a marriage license
3 from another county; correct?

4 A. Correct.

5 Q. Rowan County is bordered by seven other counties
6 in -- of Kentucky; correct?

7 A. I'm not sure how many.

8 Q. And you decided to get married after the
9 Supreme Court's ruling in Obergefell; correct?

10 A. Yes. Previous to that I did not have the right to
11 get married in my state.

12 Q. And then you went to the Rowan County Clerk's office
13 to get married after hearing of Ms. Davis's deep
14 religious convictions?

15 A. I went to the Rowan County Clerk's office to get a
16 marriage license on July -- or June the 30th.

17 Had I heard about her convictions and that she was
18 not issuing marriage licenses? Yes.

19 MR. CHRISTMAN: No further questions.

20 THE COURT: Thank you. Any redirect?

21 MR. SHARP: No, Your Honor.

22 THE COURT: All right. May this witness be
23 finally excused?

24 MR. MANDO: Your Honor --

25 MR. SHARP: Yes, sir.

1 MR. MANDO: Your Honor, excuse me.

2 THE COURT: Oh, I'm sorry.

3 MR. MANDO: I did -- I did have one question,
4 Your Honor.

5 THE COURT: That's fine, Mr. Mando. Go ahead,
6 sir.

7 CROSS-EXAMINATION

8 BY MR. MANDO:

9 Q. Good afternoon, ma'am.

10 A. Hi.

11 Q. My name is Jeff Mando. I represent Rowan County.

12 You mentioned you spoke with Judge/Executive
13 Walter Blevins after you were denied a marriage license
14 by the clerk's office.

15 Is that correct, ma'am?

16 A. Yes.

17 Q. And when you spoke with Judge/Executive Blevins, did
18 he tell you that he could not issue a marriage license to
19 you because he did not have the authority to do so?

20 A. He told Jody and Kevin and myself that because
21 Kim Davis was not absence -- was not absent that he could
22 not issue a license.

23 Q. All right. And did he explain to you that there was
24 a statute that only allows him to issue a marriage
25 license in the absence of the clerk, and since she was

1 not absent from the county, he could not issue that
2 marriage license?

3 A. Correct.

4 MR. MANDO: Thank you, ma'am.

5 THE COURT: All right. Thank you.

6 Anything else?

7 MR. SHARP: Nothing further, Your Honor.

8 MR. CHRISTMAN: No further questions.

9 THE COURT: No, all right.

10 You may step down. Thank you.

11 THE WITNESS: Thank you.

12 THE COURT: All right. Next witness, please.

13 MR. SHARP: Your Honor, the plaintiffs call

14 Jody Fernandez.

15 THE COURT: All right.

16 (Whereupon, the witness, JODY FERNANDEZ, was placed
17 under oath by the clerk of the Court.)

18 THE COURT: Good afternoon.

19 THE WITNESS: Good afternoon.

20 THE COURT: You may proceed.

21 MR. SHARP: Thank you, Your Honor.

22 JODY FERNANDEZ,

23 having been first duly placed under oath, was examined
24 and testified as follows:

25 DIRECT EXAMINATION

1 BY MR. SHARP:

2 Q. Ma'am, could you please identify yourself for the
3 Court?

4 A. My name is Jody Fernandez.

5 Q. And could you please spell your last name?

6 A. F, as in Frank, E-R-N-A-N-D-E-Z.

7 Q. Ms. Fernandez, where do you live?

8 A. I live in Morehead, Kentucky.

9 Q. That's in Rowan County?

10 A. That is in Rowan County.

11 Q. And how long have you lived there?

12 A. I have lived there since 2008.

13 Q. Ms. Fernandez, I'm now going to ask you some
14 questions about your personal life as well.

15 Are you currently in a committed relationship with
16 another person?

17 A. Yes, I am, with Kevin Holloway.

18 Q. Is Kevin one of the other plaintiffs in this case?

19 A. Yes.

20 Q. Okay. How did the two of you first meet?

21 A. We met in 2005 in -- while we lived in Florida. We
22 all lived in the same neighborhood.

23 Q. Okay. And how long have the two of you been in a
24 relationship together?

25 A. Since 2006.

1 Q. Ms. Fernandez, do you and Mr. Holloway intend to get
2 married?

3 A. Yes.

4 Q. Again, I'm afraid I have to ask. Why?

5 A. Because we love each other.

6 Q. Are there any reasons why the two of you cannot get
7 married?

8 MR. GANNAM: Objection.

9 THE COURT: Overruled.

10 THE WITNESS: No.

11 BY MR. SHARP:

12 Q. You're both over the age of 18?

13 A. Yes.

14 Q. Neither of you are currently married to someone
15 else?

16 A. No.

17 Q. The two of you are not related by blood?

18 A. No.

19 Q. Now, I'm going to ask you about any dealings you may
20 have had with the Rowan County Clerk's office.

21 Have you --

22 A. Go ahead.

23 Q. I'm sorry. Have you or Mr. Holloway had an occasion
24 to seek a marriage license from the Rowan County Clerk's
25 office?

1 MR. GANNAM: Objection.

2 THE WITNESS: Yes.

3 THE COURT: Overruled.

4 THE WITNESS: Yes. We went on July 1st to seek
5 a marriage license. Both of us went to the office.

6 BY MR. SHARP:

7 Q. And can you please describe for the Court the
8 circumstances of what happened when -- did you go in
9 person?

10 A. We both went in person. We entered the room. We
11 asked the -- there was no one sitting at the desk so we
12 asked someone else about getting a marriage license.

13 And she went back to the office and got Kim Davis,
14 and Kim Davis came out and told us she was not issuing
15 marriage licenses.

16 Q. Did Ms. Davis explain to you why that was the case?

17 A. No.

18 Q. What did you and Kevin do after that?

19 A. After that we walked down the hall, we went to
20 Dr. Blevins -- Judge Blevins's office, and requested a
21 marriage license from him.

22 Q. Okay. And what did -- what were you informed there?

23 A. That he was unable to give us a license because
24 Kim Davis was available in the building.

25 Q. Is that the meeting that Dr. Miller just talked

1 about?

2 A. Yes.

3 Q. Did -- other than this explanation for why the
4 county judge/executive could not issue a marriage
5 license, did Judge Blevins explain, give you any reasons
6 why the county clerk was not issuing marriage licenses?

7 A. No, he did not.

8 MR. GANNAM: Objection.

9 THE COURT: Overruled.

10 BY MR. SHARP:

11 Q. How did it make you feel to be denied a marriage
12 license on two occasions in the same day?

13 A. We were -- I was quite upset. That date was --
14 would have been my father's 81st birthday, and it was an
15 important date for me.

16 Q. Have you or Kevin sought to obtain a marriage
17 license in any other county?

18 A. No.

19 Q. Why not?

20 A. We live in Rowan County; we work in Rowan County; we
21 pay taxes in Rowan County; we live walking distance to
22 the courthouse in Rowan County. There seemed to be no
23 need for us to drive to another county to get married.

24 Q. If you were able to obtain a marriage license in
25 Rowan County, would you and Kevin get married?

1 A. Absolutely.

2 MR. SHARP: Nothing further, Your Honor.

3 THE COURT: Any cross?

4 MR. CHRISTMAN: Yes, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. CHRISTMAN:

7 Q. Good afternoon, Ms. Fernandez.

8 My name is Jonathan Christman.

9 A. Good afternoon.

10 Q. If you were able to obtain a marriage license in
11 another county in Kentucky, would you and Kevin get
12 married?

13 A. We plan to get married, but we wanted to get married
14 in our county.

15 Q. So if you got a marriage license from Boyd County,
16 you would get married; correct?

17 A. Yes.

18 Q. And how far did you drive to today's hearing?

19 A. From Morehead it took about an hour. Mileage I
20 don't know.

21 MR. CHRISTMAN: No further questions.

22 THE COURT: Mr. Mando.

23 CROSS-EXAMINATION

24 BY MR. MANDO:

25 Q. Just briefly about this short meeting with

1 Judge/Executive Blevins.

2 As I understand it, ma'am, he explained to you that
3 he was restricted by law. He could not issue the license
4 because Ms. Davis was present in the county?

5 A. That's correct.

6 MR. MANDO: All right. Thank you, ma'am.

7 THE COURT: You may step down. Thank you.

8 All right. Next witness.

9 MR. SHARP: Your Honor, if I may, defense
10 counsel previously indicated the defendant Kim Davis was
11 not in the courthouse and was available. The Court later
12 seemed to indicate that she was in Boyd County.

13 THE COURT: No, I just thought because Boyd --
14 that she was in Boyd County because I thought she was
15 here for the hearing.

16 MR. SHARP: Well --

17 THE COURT: That was my supposition I suppose.

18 MR. SHARP: -- based on defense counsel's
19 representation that she wasn't in the courthouse, she was
20 available, we would call Defendant Kim Davis to the
21 stand, Your Honor.

22 THE COURT: Is she here?

23 MR. GANNAM: Your Honor, Ms. Davis is not
24 available to testify. We believe that her appearance
25 today would potentially waive her objection to service

1 and this Court's jurisdiction; and, therefore, she will
2 not be here.

3 THE COURT: All right.

4 MR. SHARP: Your Honor, I mean, we're prepared
5 to serve counsel for Ms. Davis.

6 THE COURT: Well, they're not going to
7 accept service. I mean, unless he's changed his tune,
8 which I -- are you willing to accept service on her
9 behalf?

10 MR. GANNAM: Your Honor, the rules provide a
11 quid pro quo. If waiver of service is requested, it
12 provides more time to the defendant to respond. We
13 would --

14 THE COURT: To respond to -- for the answer,
15 sure, but not for the motion.

16 MR. GANNAM: Your Honor, we are not willing to
17 accept service at this point.

18 THE COURT: No.

19 MR. SHARP: I mean, I --

20 THE COURT: Do you have any other witnesses to
21 call?

22 MR. SHARP: We do, Your Honor.

23 THE COURT: Why don't you call your other
24 witnesses then?

25 MR. SHARP: Thank you.

1 We now call Barry Spartman, Your Honor.

2 THE COURT: All right. Come around, sir.

3 BARRY SPARTMAN,

4 having been first duly placed under oath, was examined
5 and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. CANON:

8 Q. Good afternoon, Mr. Spartman.

9 A. Good afternoon.

10 Q. Would you please identify yourself, and state your
11 full name for the Court?

12 A. Yes. My name is Barry Spartman.

13 Q. Can you spell your last name, please?

14 A. Yes. It's S-P-A-R-T-M-A-N.

15 Q. And, Mr. Spartman, how are you employed?

16 A. I work in Rowan County at Morehead State University.

17 Q. And do you also live in Rowan County?

18 A. Yes.

19 Q. And how long have you lived there?

20 A. I have lived in Rowan County for over 20 years.

21 Q. Very good. And are you currently in a committed
22 relationship with anybody?

23 A. Yes.

24 Q. Can you tell the Court who that is?

25 A. Yes. That is Aaron Skaggs.

1 Q. And is Mr. Skaggs also a plaintiff in this case?

2 A. Yes.

3 Q. And how did the two of you first meet?

4 A. We met in college through mutual friends.

5 Q. And do you know approximately when that was?

6 A. It was around '98.

7 Q. And so the two -- how long have the two -- let me
8 ask you this. How long have the two of you been in a
9 committed relationship?

10 A. We've been together for 21 years.

11 Q. And have you-all developed the intention to get
12 married?

13 A. Yes.

14 Q. And I know this seems like a silly question, but why
15 do you want to get married?

16 A. We've been in a very long-term relationship, and we
17 love each other, and we do want to spend the rest of our
18 lives together.

19 Q. And I think you said you've been living as a couple
20 for 21 years?

21 A. Yes.

22 Q. When did you first decide to get married?

23 A. We've talked about it before the Supreme Court
24 decision on and off.

25 Q. In --

1 A. After the decision came down, that's when we
2 realized that if it actually come to be, that we would be
3 married.

4 Q. And is there -- is there any reason why the two of
5 you can't be married that you know of?

6 A. No.

7 Q. Now that the Obergefell decision is in?

8 A. No.

9 Q. You're not related by blood?

10 A. No.

11 Q. You're both over the age of 18?

12 A. Yes.

13 Q. And you're not currently married to someone else,
14 are you?

15 A. No.

16 Q. And let me ask you a couple of questions about the
17 dealings that you've had with the Rowan County Clerk's
18 office. Have you spoken to anybody in that office
19 personally?

20 A. Yes. We were prepared to go to the courthouse to
21 get a marriage license, and beforehand we called the
22 courthouse.

23 Q. Let me stop you there. What day was that?

24 A. It was Tuesday, June 30th.

25 Q. Okay. Go on.

1 A. We wanted to -- since this was completely new to us,
2 we wanted to make sure that we had the correct documents
3 or anything that we may need to get the license rather
4 than go to the courthouse and not have what was
5 necessary.

6 Q. And what happened?

7 A. The person on the phone basically said that they
8 were not issuing licenses --

9 MR. GANNAM: Objection.

10 THE WITNESS: -- to anyone.

11 THE COURT: Overruled.

12 Who did you call?

13 THE WITNESS: The clerk's office.

14 THE COURT: The Rowan County Clerk's office?

15 THE WITNESS: Rowan County Clerk's office,
16 that's correct.

17 THE COURT: And were told what by whoever
18 answered the phone?

19 THE WITNESS: They said that they weren't
20 issuing any marriage licenses and don't bother coming
21 down.

22 THE COURT: All right. Overruled.

23 BY MR. CANON:

24 Q. And so did you go down there anyway after that?

25 A. After that we were pretty disappointed and

1 frustrated.

2 Q. Now, prior to that time had you received any
3 information that the Rowan County Clerk's office had
4 stopped issuing marriage licenses?

5 A. We had seen an article, yes.

6 Q. Okay. And did you -- did you have any reason to
7 think what those -- what the reasons were for the clerk's
8 refusal to issue licenses?

9 MR. GANNAM: Objection.

10 THE COURT: What was the question?

11 MR. CANON: The question was, did he have any
12 basis to believe -- for -- to understand what the reasons
13 were for the clerk to refuse to issue licenses.

14 THE COURT: Okay. Overruled.

15 THE WITNESS: Yes. There -- it was clearly
16 quoted that it was because of her deep religious beliefs.

17 BY MR. CANON:

18 Q. And you say it was quoted. You saw news articles,
19 or --

20 A. Yes.

21 Q. -- tell the Court about that.

22 A. That's correct.

23 Q. Okay. And any other reasons you can think of?

24 A. No. Basically -- I'm sorry. There was also she
25 would not issue licenses that, therefore, she wasn't

1 discriminating.

2 Q. And I take it you've not been able to obtain a
3 marriage license in Rowan County since then?

4 A. No.

5 Q. Did you attempt to obtain a license from the
6 county judge/executive?

7 A. No, we did not. We did contact his office but did
8 not physically go there.

9 Q. Well, what happened when you contacted his office?

10 A. Basically the same response, that he could not
11 issue --

12 MR. GANNAM: Objection.

13 THE COURT: Overruled.

14 THE WITNESS: He could not issue a marriage
15 license.

16 BY MR. CANON:

17 Q. And did he tell you why?

18 A. Because Kim Davis was not absent from her job.

19 Q. How did that make you feel to not be able to get a
20 marriage license in the county where you work and live
21 and pay taxes?

22 A. Pretty frustrated, kind of furious.

23 Q. Do you know if you can obtain a marriage license in
24 any other county?

25 A. Yes, I'm aware that we can.

1 Q. Have you tried to do that?

2 A. No.

3 Q. Why not?

4 A. Because we pay taxes. We've lived in Rowan County
5 and Morehead since the beginning of our relationship.

6 And that's our home, and that's where we want to obtain
7 that license and get married.

8 Q. Now, if you could get a license in Rowan County, you
9 would go get it, wouldn't you?

10 A. Yes.

11 MR. CANON: Nothing further.

12 THE COURT: Cross?

13 MR. CHRISTMAN: Yes, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. CHRISTMAN:

16 Q. Good afternoon, Mr. Spartman.

17 My name is John Christman.

18 A. Good afternoon.

19 Q. Mr. Spartman, there's nothing preventing you from
20 staying in a committed relationship, as you said, with
21 Mr. Skaggs; is that correct?

22 A. No. Yes, that's correct, there's nothing.

23 Q. And nobody has stopped you from having a commitment
24 ceremony; correct?

25 A. That's correct.

1 Q. And you haven't gone to any other county to try to
2 obtain a marriage license, that's correct?

3 A. Yes.

4 Q. Okay. None of the neighboring counties around
5 Rowan County?

6 A. Correct.

7 Q. And you haven't come to Boyd County to try and
8 obtain a marriage license?

9 A. No. It would be very inconvenient to drive an hour
10 for something we could get in our own home county.

11 Q. If you could get a marriage license from another
12 county, would you and Mr. Skaggs attempt to get married?

13 A. Yes, we would.

14 MR. CHRISTMAN: No further questions.

15 Thank you.

16 THE COURT: Mr. Mando.

17 MR. MANDO: No questions, Your Honor.

18 THE COURT: All right. You may step down.

19 Thank you.

20 Next witness.

21 MR. SHARP: No further witnesses, Your Honor.

22 THE COURT: All right. Any witnesses?

23 MR. GANNAM: No, Your Honor.

24 THE COURT: All right. We're going to set a --

25 we're going to recess the evidentiary portion of this

1 hearing in progress.

2 As soon as you file a notice of service of
3 Kim Davis, 24 hours after she's served we'll reconvene
4 this hearing in Covington. So whenever that is. The
5 only conflict would be tomorrow afternoon. I'm going to
6 the All-Star game so I'm not going to be hearing it at
7 8:00 tomorrow night.

8 So we'll give you -- we'll have 24-hour notice,
9 and then we'll have the hearing in Covington whenever
10 she's served.

11 MR. SHARP: Thank you, Your Honor.

12 THE COURT: All right.

13 MR. GANNAM: Your Honor --

14 THE COURT: Yes, sir.

15 MR. GANNAM: -- may I request that that be
16 48 instead of 24, just because of the time it takes to
17 travel from our office in Florida to Covington?

18 And I would secondly request that should this
19 process coincide with this Thursday and Friday of this
20 week, I am due in Washington, D.C., for a deposition in
21 another case. We just ask the Court to accommodate those
22 two requests as part of this process.

23 THE COURT: Will the attorneys approach the
24 bench, please?

25 (Whereupon, a bench conference was had with the

1 Court and counsel out of the hearing of the open court,
2 as follows.)

3 THE COURT: All right. Let the record reflect
4 we're at the bench.

5 And I'm trying to be as accommodating as I can.
6 The service thing, I recognize that she hasn't been
7 served right now.

8 Is Ms. Davis, did you say she's not going to
9 testify today? Is she available today?

10 MR. GANNAM: Well, we won't produce her today,
11 Your Honor.

12 THE COURT: You won't produce her. Do you know
13 where she is?

14 MR. GANNAM: I do know where she is, yes,
15 Your Honor.

16 THE COURT: Okay. You --

17 MR. GANNAM: Well, actually, I don't know where
18 she is. I know how to get in touch with her.

19 THE COURT: Well, I'm just trying to -- and I
20 brought this up because I know Mr. Mando has heard me say
21 this. I try to just -- I'm trying to get the train on
22 the tracks. I'm trying to get the ball down the field.
23 I'm trying to get the evidence in that is necessary one
24 way or the other. And we're all here.

25 I mean, you're asking me to accommodate your

1 request, and I want to accommodate the lawyers as much as
2 I can because I want to be a judge that's accommodating,
3 not a judge that's obstructionist, not that I know any
4 that are. But ultimately if she's here -- if we could
5 get her here to testify, it would help everyone.

6 MR. GANNAM: I understand, Your Honor, and --

7 THE COURT: And eventually she's going to be
8 served, and eventually we're going to hear the evidence.
9 I mean, it's a -- well, I mean, she can be hit by a truck
10 tomorrow and die and never appear. I mean, that could be
11 a -- it could happen.

12 MR. GANNAM: Your Honor, we also do not desire
13 to be an obstructionist.

14 THE COURT: I'm not saying that you are.

15 MR. GANNAM: But in this case this is a
16 complaint filed where they've sued her individually.
17 Their seeking punitive damages against her. It's
18 certainly not --

19 THE COURT: Are you seeking punitive damages?

20 MR. SHARP: No, Your Honor.

21 THE COURT: Okay. I haven't --

22 MR. GANNAM: -- her responsibility to assist
23 the plaintiffs in their obligation to serve us.

24 THE COURT: No, I know you're not, but we're
25 trying to accommodate everyone here, and --

1 MR. GANNAM: Your Honor, we believe that her
2 appearing here today will prejudice her rights to object
3 to the Court not having jurisdiction over the prelim, and
4 that's the reason why.

5 THE COURT: Okay. Well, eventually she'll --
6 well --

7 MR. GANNAM: She will -- she will appear,
8 Your Honor, and she will have to, and we want that day to
9 occur, but we don't want it to occur prematurely. And we
10 will -- we will produce her at the appropriate time when
11 she's been served, and we have the ability for her to be
12 subject to the Court's jurisdiction.

13 MR. WATKINS: Judge, I will --

14 THE COURT: You need to speak into the
15 microphone. I'm sorry.

16 MR. WATKINS: I will be out of town July 25th
17 through August 2nd, if we can at least have a hearing
18 prior to then.

19 THE COURT: Well, Mr. Mando would be --
20 hopefully you're not going anywhere.

21 MR. MANDO: No, sir.

22 THE COURT: Well, I'm going to be in Columbia,
23 Kentucky, on Thursday. We can recess this in
24 Adair County, but I don't think we'll want to do that.

25 Well -- and the service thing, I mean, I'm

1 not -- this could have been prevented just with personal
2 service. I'm just -- it's -- so there's --

3 MR. SHARP: Your Honor --

4 THE COURT: -- enough to kind of -- there's
5 gifts for everyone here at the bench. But I'm a little
6 bit --

7 MR. SHARP: Your Honor, with all due respect,
8 we had -- we had no reason to suspect that
9 Ms. Davis wouldn't pick up her mail as did the
10 county judge/executive.

11 THE COURT: Well, if it's -- do you believe --

12 MR. SHARP: I mean --

13 THE COURT: -- that she just didn't pick up her
14 mail?

15 MR. SHARP: Well, I don't know. When we find
16 out, we'll -- when we get her here, we'll certainly ask
17 her. Well, I mean, the county was served.

18 THE COURT: Well, but once she's served she's
19 served. I don't think it's -- it seems kind of petty. I
20 mean, if everybody wants their --

21 MR. SHARP: And we don't want to -- we're not
22 interested in fighting over issues that are not worthy of
23 fighting over, Your Honor.

24 THE COURT: Well, all right. We're going to
25 hear argument. I know we're recessing it, and I do want

1 to hear kind of a preliminary -- your preliminary
2 thoughts on some issues that I have to raise with
3 counsel.

4 But what we'll do, your 48-hour request will be
5 granted. I won't set anything earlier than next Monday.

6 MR. GANNAM: Thank you, Your Honor.

7 THE COURT: And what we'll do, if you would
8 file a notice of service -- and you can object to the
9 service if you think that it's not appropriate under the
10 rules, and then we'll litigate the service. But once
11 she's formally served, file a notice within -- forthwith.
12 We'll contact -- we'll put on an order not earlier than
13 48 hours from that date. It won't be this week. It will
14 be no earlier than Monday. But you're leaving on the
15 25th --

16 MR. WATKINS: 25th.

17 THE COURT: -- which would be --

18 MR. WATKINS: That's a Saturday.

19 THE COURT: So probably a day next week in
20 Covington.

21 All right. Very well. Thank you.

22 MR. WATKINS: Thank you, Your Honor.

23 MR. GANNAM: Thank you, Your Honor.

24 (Whereupon, the bench conference concluded, and
25 the proceedings continued on the record in open court,

1 as follows.)

2 THE COURT: Okay. Well, we are going to
3 reconvene the hearing in progress in Covington after
4 Ms. Davis is formally served.

5 As I indicated here at the bench, we'll set
6 that matter for a date not earlier than next Monday to
7 accommodate counsels' schedules.

8 Now, let me turn to my questions here.

9 And I will allow a written response. I've
10 already indicated that will be due on the 30th of July.

11 All right. In Obergefell -- is that the right
12 pronunciation of that?

13 MR. CANON: O-ber-ge-fell, Judge.

14 THE COURT: Ober --

15 MR. CANON: Ge-fell.

16 THE COURT: Obergefell?

17 MR. CANON: Yes.

18 THE COURT: Okay. Obergefell, okay.

19 I've read that case a couple of times, the four
20 dissents a couple of times. It's clear that whether or
21 not anybody individually disagrees with the ruling, the
22 ruling is individuals have a fundamental constitutional
23 right to marry under the Fourth -- Fourteenth Amendment.

24 In this particular case we have a defendant who
25 has made public comments that she, because of her

1 religious convictions, is not going to be issuing any
2 marriage licenses at all, which, I guess, takes equal
3 protection issue off the table potentially, but not the
4 fundamental right issue under the Fourteenth Amendment.

5 What is the government's compelling state
6 interest in her refusal to issue marriage licenses?

7 Either one of -- I mean, from the defendant's
8 standpoint. I mean, that's your -- we've got a
9 fundamental right. I mean, all of us have taken
10 Con Law 1 from law school, depending on whether or not it
11 impinges on what type of right it impinges on, that
12 dictates the standard of review under the case law.

13 We've got a fundamental right involved. I
14 mean, we're not contesting that. That's what the
15 Supreme Court has held. So what is the compelling state
16 interest?

17 MR. CHRISTMAN: Your Honor, the fundamental
18 right --

19 THE COURT: Please stand, please. Thank you.

20 MR. CHRISTMAN: The compelling state interest
21 is only applicable in the context where strict scrutiny
22 would apply, and there are cases that plaintiffs cited in
23 their motion for preliminary injunction that the
24 fundamental right to marry, the strict scrutiny analysis
25 requiring a compelling government interest is a direct

1 and substantial burden on the fundamental right to marry.

2 THE COURT: Okay. What's the substan -- what's
3 the compelling state interest?

4 MR. CHRISTMAN: Again, that's assuming --

5 THE COURT: No, what's the compelling state
6 interest?

7 MR. CHRISTMAN: We would argue that it's not a
8 compelling government interest that --

9 THE COURT: Okay. What's the standard that --

10 MR. CHRISTMAN: -- needs to apply.

11 THE COURT: -- applies then?

12 MR. CHRISTMAN: The standard that should apply
13 here with respect to plaintiffs' request would be a
14 rational basis first.

15 THE COURT: Why, if it involves a fundamental
16 right?

17 MR. CHRISTMAN: Because the fundamental right
18 to marriage cases you get the strict scrutiny if it's a
19 direct and substantial burden on the fundamental right to
20 marry. Not every --

21 THE COURT: Okay. They've gone down to get a
22 license in the county they live, and she refuses to give
23 it. Why isn't that a direct burden on their right?

24 MR. CHRISTMAN: Because it's not --

25 THE COURT: Because they can go over to

1 Carter County or Fayette County and get the license?

2 MR. CHRISTMAN: Correct, Your Honor.

3 THE COURT: Is that why?

4 MR. CHRISTMAN: They can go to the neighboring
5 counties. They can go to the --

6 THE COURT: Why do they need to go to the
7 neighboring county?

8 MR. CHRISTMAN: Well, I'm explaining and
9 answering your question as to why it's not a direct and
10 substantial burden. It calls for a substantial burden
11 analysis themselves on why their fundamental right to
12 marry is being directly and substantially burdened. They
13 can go to neighboring counties. They can go to numerous
14 other counties --

15 THE COURT: So does the county --

16 MR. CHRISTMAN: -- across the state.

17 THE COURT: Does the county reimburse them for
18 going to the neighboring county? Is Kim Davis going to
19 write them a check for mileage to go to the other county?

20 MR. CHRISTMAN: Well, they haven't -- they
21 haven't made the attempt. As the plaintiffs conceded,
22 none of them have even attempted to go to another county
23 to try to obtain a license. All they've done is
24 exclusively try to go to the Rowan County Clerk's office.

25 A few of them testified that they did even try

1 to go to Chief Judge/Executive Walter Blevins.

2 And I would submit to the Court that under
3 Kentucky Revised Statute 402.240 it says that in the
4 absence of the county clerk or the vacancy of the office,
5 that the county judge or executive may issue marriage
6 licenses.

7 So that statute already -- under Kentucky law
8 there's already a provision for if the county clerk
9 cannot issue a license that --

10 THE COURT: Why can't she issue the license?

11 MR. CHRISTMAN: Which license?

12 THE COURT: Why can't Kim Davis issue the
13 marriage licenses? Why?

14 MR. CHRISTMAN: Well, it depends on which
15 plaintiff we're talking about because for --

16 THE COURT: Okay. Well, let's say Plaintiff
17 April Miller, why can't she issue the license to
18 April Miller?

19 MR. CHRISTMAN: For Ms. Miller -- overall
20 Ms. Davis stopped issuing all marriage licenses because
21 she wanted to ensure that people who were coming to seek
22 marriage licenses were treated equally, that they were
23 given the same treatment by --

24 THE COURT: Okay. But why can't -- why can't
25 she issue the one to Miller?

1 MR. CHRISTMAN: For -- in addition to that why
2 she can't issue the license to Miller is because
3 Ms. Miller wanted to be married to another woman. And
4 the count -- the mandated form from Kentucky from the
5 Department of Libraries and Archives, the marriage form
6 itself, Ms. Davis has no choice, no discretion over the
7 license that has to be issued to a couple. It's
8 prescribed from the governor's office through the
9 Kentucky Department of Libraries and Archives, and it's
10 that form. It's uniform under Kentucky statute. I can
11 provide the citation.

12 THE COURT: Okay. What's wrong with the form?

13 MR. CHRISTMAN: So the form requires the county
14 clerk on four occasions, or at a minimum at least two,
15 for every license that the county clerk issues she has to
16 give her approval at least two times on that license with
17 her name and affixing her signature, name, her sign of
18 approval for the marriage license.

19 THE COURT: But is it a sign of approval, or is
20 it more a ministerial act?

21 MR. CHRISTMAN: It's a sign of approval --

22 THE COURT: Approval.

23 MR. CHRISTMAN: -- because it's her name. So
24 as a -- as a public record when that marriage license is
25 issued, it becomes solemnized by someone that can

1 solemnize the marriage, and then comes back to be
2 recorded. It's a public record in Rowan County that the
3 Rowan County Clerk's office has issued, is the one with
4 the authority to bless, approve, sign the marriage
5 license.

6 And that form requires Ms. Davis when two
7 individuals come in, or whoever comes in, asking for a
8 marriage license requires her, even -- and I said there
9 were two or four. So the deputy clerks in her office
10 there is -- for four of the spaces that require her name
11 or signature to be on, two of those under Kentucky law
12 can be completed by the deputy clerks in a Kentucky
13 county office.

14 THE COURT: Why -- in the absence of a clerk,
15 like if I go to my home county Campbell -- and we have a
16 new clerk. Jim Luersen is the new clerk. I think the
17 only time I've been down there is to vote absentee and to
18 get my driver's license. The clerk -- I don't think I've
19 ever had any act -- ever -- I've never had any
20 interaction with the clerk himself. I think it was
21 Tom Calme before that. I never saw the clerk. The
22 deputies would take my money and my information and then
23 issue my driver's license. I mean, it may be signed by
24 the clerk, but it's not -- I mean, it's stamped by the
25 clerk.

1 MR. CHRISTMAN: Yeah. There are --

2 THE COURT: What are you -- what are you
3 talking about here?

4 MR. CHRISTMAN: There are --

5 THE COURT: You said two or four. You're
6 confusing me here.

7 MR. CHRISTMAN: Right. And, I mean, I could --
8 we could show at the appropriate time what --

9 THE COURT: How about now?

10 MR. CHRISTMAN: -- a license --

11 THE COURT: I think now is the appropriate
12 time.

13 MR. CHRISTMAN: Yes, Your Honor. We
14 actually -- we actually have a copy of what the license
15 looked like immediately prior to the Obergefell decision
16 on June 26th, and then on June 30th with the governor of
17 Kentucky said, "I'm going to instruct and direct my
18 Kentucky Department of Libraries and Archives to issue a
19 new form --"

20 THE COURT: Okay.

21 MR. CHRISTMAN: "-- because Kentucky is now
22 going to recognize and issue marriage licenses to
23 same-sex couples."

24 THE COURT: Right. So now we're -- I think the
25 one that's really relevant now is the one that's

1 post-6/30/2015.

2 MR. CHRISTMAN: Right. And there's very little
3 that was changed. We just wanted to show that to
4 Your Honor that there is very little that changed before
5 and after.

6 But there are four spots. You'll see in the
7 middle of the form with the one that is redacted because
8 it was easier to draw your attention to.

9 THE COURT: Yes.

10 MR. CHRISTMAN: Where it says, issued this
11 month, day, year, in the office of, and then it says,
12 name, comma, county. And in those spots on every form is
13 Kim Davis. Every marriage license form that comes out of
14 Rowan County has to have her name right there. That's
15 prescribed by -- Kentucky marriage law requires her name
16 there.

17 Immediately below that is where it says
18 recorder's name, and that is a spot that under Kentucky
19 marriage law allows either the county clerk's name to be
20 there or a deputy clerk.

21 THE COURT: Okay. So if the statute was
22 amended to allow for a deputy clerk to sign off on all of
23 this, would that change all of your opinion of this case?

24 MR. CHRISTMAN: What -- what it would change if
25 you take -- if you take Kim Davis's requirement of having

1 affix her name and approval of that marriage off of the
2 license and put it onto the hands and the authority of
3 somebody else, that's not her name, it's not her
4 approval, she doesn't have to bless that marriage,
5 then --

6 THE COURT: Well, she's not blessing anything.
7 She's just signing it as a representative of the county.

8 MR. CHRISTMAN: Yeah, she's approving. Under
9 the statute is what it says, that --

10 THE COURT: Well, you keep using the word
11 "bless." I mean --

12 MR. CHRISTMAN: -- under the authority --

13 THE COURT: -- blessing is something we talk
14 about in church. I mean, she's signing it because she's
15 the county clerk.

16 MR. CHRISTMAN: She's authorized. The statutes
17 use the word authorized --

18 THE COURT: Right.

19 MR. CHRISTMAN: -- approved.

20 THE COURT: Right.

21 MR. CHRISTMAN: And so, yeah, if you remove --
22 if the State of Kentucky or the Commonwealth of Kentucky
23 removes the statutory requirement that a county clerk
24 must authorize and approve these licenses, then that
25 would eliminate for Ms. Davis -- when Ms. Miller walked

1 in for a marriage license, that would eliminate the
2 religious conscientious objection that Ms. Davis has to
3 having her name, signature, and approval on that license.

4 There are -- there are other ways -- again,
5 there are less restrictive means, other ways in which
6 Ms. Davis's religious objection can be accommodated. For
7 example --

8 THE COURT: Well, is that the --

9 MR. CHRISTMAN: -- you were actually talking
10 about your driver's license. There are numbers of things
11 that people can get in a county. In fact, one of them is
12 a fishing license. Well --

13 THE COURT: I do that online.

14 MR. CHRISTMAN: You can do it online, and
15 that's certainly an option that's out there. Other --
16 other states across the country have done this where they
17 move marriage out of a particular county clerk's office
18 and put it in the hands of the state or the Commonwealth
19 that people sitting in their living room, you know, can
20 go on their iPad and get a marriage license as long as
21 they verify who they are, and they pay the fee.

22 THE COURT: No, those are -- these are all
23 prospective things that could impact this case. I mean,
24 if the state were to go to online marriage licenses and
25 have the -- I guess it would be the -- is there a

1 commissioner of that particular -- who was it that prints
2 out these forms?

3 MR. CHRISTMAN: It comes from the Kentucky
4 Department of Libraries and Archives. It's a branch --

5 THE COURT: Yeah. Is there a commissioner of
6 Department of Libraries --

7 MR. CHRISTMAN: There is --

8 THE COURT: -- and Archives?

9 MR. CHRISTMAN: There is a commissioner.
10 There's a commissioner that --

11 THE COURT: That commissioner would sign off on
12 all of those I suppose. If you went to an online system,
13 I would assume that that's what would be who would sign
14 that.

15 MR. CHRISTMAN: And the -- yeah, the license
16 would come issued and --

17 THE COURT: All right.

18 MR. CHRISTMAN: -- approved out of the
19 Commonwealth's office. There are several other exempt --
20 there are --

21 THE COURT: You're going to have to keep your
22 voice up because it's getting hot in here. Why don't you
23 come over to the podium so we can hear you.

24 MR. CHRISTMAN: That -- Your Honor, that was --
25 that's one of the options that's available.

1 And actually I was briefly about to mention
2 that there are several other licenses, different things,
3 that people can get from a county, and one of them is a
4 fishing license. And Kentucky actually has an exemption
5 for county clerks that they can choose to submit
6 something in writing to this -- to the Commonwealth that
7 they can exempt themselves from their requirement to
8 actually issue a fishing license.

9 The cite for that would be Kentucky Revised
10 Statute 150.195. So you --

11 THE COURT: Why would they ever to that? Do
12 they have an objection to issuing a fishing license?

13 MR. CHRISTMAN: Well, people might have
14 different kinds of objection to different things. And
15 what it shows, and evidence is, is that the legislature
16 and the governor know how to sit down and figure out how
17 to accommodate different exemptions.

18 THE COURT: Is that something that can be done
19 by executive order?

20 MR. CHRISTMAN: Actually --

21 THE COURT: Does anybody know?

22 MR. CHRISTMAN: Yes. In this country there are
23 two examples at least already in Louisiana, not too far
24 from here, where Governor Jindal--

25 THE COURT: Well, it's pretty far from here.

1 MR. CHRISTMAN: I'm coming from Florida so
2 Louisiana is not too far from here.

3 Where Bobby Jindal, the governor in that state,
4 actually issued an executive order that was entitled
5 Marriage and Conscience Order giving exemptions to a
6 whole litany of different people that would qualify.

7 Recently, after the Obergefell decision,
8 Governor Brownback in Kansas also issued an executive
9 order related to religious conscience and religious
10 exemption. Both of the gubernatorial candidates in this
11 state in recent news articles have talked about when --

12 THE COURT: In what state?

13 MR. CHRISTMAN: Kentucky.

14 THE COURT: We only have one now. I mean,
15 Bevin, didn't he win the primary? Who's the other one?

16 MR. CHRISTMAN: I believe it was Bevin is the
17 republican candidate, and the --

18 THE COURT: Oh, Jack Conway.

19 MR. CHRISTMAN: -- current attorney general
20 is --

21 THE COURT: Oh, okay, Jack Conway, okay, okay.

22 MR. CHRISTMAN: -- running for governor.

23 THE COURT: I was just thinking Republicans
24 because --

25 MR. CHRISTMAN: I apologize for devolving into

1 Kentucky politics for the moment. I'm certainly not
2 an --

3 THE COURT: I'm familiar with Kentucky
4 politics.

5 MR. CHRISTMAN: -- expert on them. But both --
6 both of them have made public statements that related to
7 religious conscience about the legislature taking this
8 up, thinking about it to both work with what the
9 Supreme Court has said in Obergefell, but also then work
10 with a person like Kim Davis who has to affix her name
11 and approval on every license. And that's -- that's
12 what's at issue here. We're not talking about -- as
13 plaintiffs conceded and admitted in their testimony, they
14 can get a license other places. They can obtain it.

15 The Commonwealth of Kentucky is not here saying
16 we're not going to issue you a license. That's not what
17 Kentucky says.

18 In fact, what Kentucky says through
19 Governor Beshear, through Attorney General Conway, is
20 that we are recognizing same-sex marriages, both those
21 here in Kentucky, as well as all of the other states, if
22 you move to Kentucky, we will recognize your same-sex
23 marriage.

24 So Kentucky is not saying you can't get a
25 marriage license. And that's what's different going back

1 to some of those --

2 THE COURT: The county -- well, what's
3 happening here is the county clerk is saying she's not
4 going to issue it.

5 MR. CHRISTMAN: Because of -- because -- she's
6 not issuing any licenses right now because she wants to
7 comply with her obligations and duties to treat people
8 equally.

9 THE COURT: Well, by doing that she's denying
10 the rights to anyone to get a marriage license in her
11 county.

12 MR. CHRISTMAN: Well, it goes back to the
13 direct and substantial burden, and is that fundamental
14 right to marry being directly and substantially burdened?
15 They can go to these other counties. They'll get -- they
16 can get licenses there. They can go to Rowan County and
17 go to the chief -- the county judge, the county
18 executive, who under Kentucky law, under current Kentucky
19 law, he may issue the license.

20 THE COURT: Even if she's sitting downstairs?

21 MR. CHRISTMAN: What the statute says is in the
22 absence of --

23 THE COURT: Or upstairs, wherever it is.

24 MR. CHRISTMAN: Any absence of the county
25 clerk, the county -- the county judge or executive may --

1 THE COURT: How is that defined absence?

2 MR. CHRISTMAN: -- issue the license. The
3 statute --

4 THE COURT: Is that an absence, physically
5 absent, or just because she has a conscientious objection
6 to issuing a license?

7 MR. CHRISTMAN: Your Honor, I think it's both.
8 The statute does not define absence so it's left for
9 interpretation. It says, "in the absence of county clerk
10 or vacancy in the office." So vacancy in the office
11 needs to be treated separately.

12 In other words, there's an instance where we
13 can have a gap in time where there's nobody in the
14 position of county clerk. That's vacancy. So in the
15 absence --

16 THE COURT: Someone resigns.

17 MR. CHRISTMAN: Someone resigns.

18 THE COURT: Right.

19 MR. CHRISTMAN: Various things could happen
20 that somebody -- there's nobody in the office, you have
21 to call special election.

22 Absence can happen in several different ways.
23 Somebody could be absent for a medical reason. Somebody
24 could be absent because of a religious conscientious
25 objection. They could be absent because they're on

1 vacation. There are several ways in which somebody could
2 be absent from being able to be the county clerk who
3 issues the license.

4 And what Kentucky marriage law then provides
5 is if the county clerk is absent, you can go to the
6 chief judge and that chief judge may then issue a license
7 to you through a memorandum.

8 And what the plaintiffs have testified to
9 is that they went to the chief judge, the county
10 judge/executive, and he said no.

11 THE COURT: Okay. Let me ask this. Let me ask
12 this question. You represent Ms. Davis in her individual
13 and official capacity to the extent that she's ultimately
14 going to be served, both official and individual
15 capacity; correct?

16 MR. GANNAM: Yes, Your Honor.

17 THE COURT: Okay. If you bring -- you brought
18 this action under 1983 and have requested attorneys'
19 fees; correct?

20 MR. SHARP: Yes, Your Honor.

21 THE COURT: All right. All right.

22 MR. CHRISTMAN: Your Honor, so there is no
23 evidence that -- other than the admission now that the
24 plaintiffs actually tried the option in Rowan County. So
25 there was another option that the law provided to them,

1 that Mr. Blevins chose not to issue the license.
2 Mr. Blevins isn't before this Court so I'm not going to
3 presume upon his reasons for not issuing the license.
4 But there is that option, along with all these other
5 counties.

6 And by the governor's own statements that this
7 issue about individuals within Kentucky their inability
8 to obtain a marriage license, again, it's not -- this is
9 not the pre-Obergefell world. If a same-sex couple
10 walked into one of the 120 Kentucky counties on
11 June 25th, 2015, not a single one of them could have
12 gotten a marriage license from Kentucky on that day.

13 Because why? At that point the Kentucky
14 Constitution said what marriage was between one man and
15 one woman. Kentucky statute said that.

16 THE COURT: Well, that's --

17 MR. CHRISTMAN: Kentucky Supreme Court, so --

18 THE COURT: That's all well and good, but
19 that's pre-Supreme Court decision.

20 MR. CHRISTMAN: Right. And so it's to show
21 that -- and that county clerk in that instance
22 couldn't -- wasn't even permitted under the law, didn't
23 have any ability to issue the license.

24 Now the governor has come out, Kentucky has
25 come out and said we're recognizing and we're issuing

1 marriage licenses to same-sex couples, and here's the
2 form you must use, mandatory, prescribed. And that form
3 requires Kim Davis to put her name and her approval on
4 it.

5 The governor said this is not a widespread
6 issue, that this is limited in terms of the counties
7 where the county clerks, one of whom is Ms. Davis, is
8 unwilling to issue the marriage license. This is a much
9 different world from before. And that's why it goes back
10 to the fundamental right to marry is not being
11 substantially burden because --

12 THE COURT: Well --

13 MR. CHRISTMAN: -- in those cases it was to a
14 class. It was to classes of people on statewide
15 policies. And in --

16 THE COURT: Well, they filed a motion for
17 class cert -- well, you filed it as a purported class
18 action. I mean, the class is very small right now
19 potentially --

20 MR. CHRISTMAN: Right.

21 THE COURT: -- because of 119 other counties
22 are not objecting.

23 Is that fair?

24 MR. SHARP: Your Honor, the proposed class is
25 defined in the complaint as present and future

1 individuals who would seek to obtain a marriage license
2 in Rowan County. The proposed classes would not be
3 statewide.

4 THE COURT: It would just be one county?

5 MR. SHARP: One county.

6 THE COURT: Right.

7 MR. CHRISTMAN: Kentucky law does not require
8 these couples to get a marriage license in Rowan County.
9 Kentucky law --

10 THE COURT: I understand that.

11 MR. CHRISTMAN: -- let's them go wherever.

12 THE COURT: I understand that, I do.

13 MR. CHRISTMAN: Loving versus Virginia, all
14 these fundamental right-to-marry cases all dealt with
15 statewide policies that prohibited groups of people by
16 class identification from being married. Loving versus
17 Virginia was a Virginia law, a ban on interracial
18 marriages.

19 THE COURT: Right, right.

20 MR. CHRISTMAN: Zablocki was a Wisconsin law
21 that prevented parents who had support obligations still
22 owed to children that they had support -- child support
23 obligations to, if that wasn't paid in full, they
24 couldn't get a license. It was a statewide policy.

25 In the Turner v. Safley case, which they cited

1 in their papers, it was a Missouri statewide regulation.

2 In the case that was up at the Supreme Court in
3 Obergefell rising from Kentucky, it was a statewide
4 answer.

5 Here we're not talking about statewide. What's
6 statewide as the general policy and the general rule is
7 what Governor Beshear said, what Attorney General Conway
8 said, is that marriage for any two people, subject to
9 some other requirements, that it's open for all, that
10 here's the form. You can walk -- you can go get married,
11 and we'll recognize your marriage. We'll give all the
12 privileges, all the benefits that come from marriage.
13 Kentucky can do it. These people can -- these plaintiffs
14 can go to the neighboring counties. They can go to these
15 other things.

16 THE COURT: Well, why should they have to? Why
17 should they have to?

18 MR. CHRISTMAN: Four -- there are four sets of
19 couples who are plaintiffs in this case. Again, I'll go
20 back to as my initial answer the reason for four is
21 because Ms. Davis does not want to issue -- does not want
22 to make any steps that would be seen as not treating
23 couples equally so --

24 THE COURT: Right. Now, how many --

25 MR. CHRISTMAN: -- she does --

1 THE COURT: Hold on, hold on. When was she
2 elected?

3 MR. CHRISTMAN: She was elected in November of
4 2014 and --

5 THE COURT: So she has --

6 MR. CHRISTMAN: -- took office --

7 THE COURT: Is it a four-year term?

8 MR. CHRISTMAN: It's a four-year term.

9 THE COURT: So for the next four years no
10 marriage licenses at all in Rowan County? Is that -- is
11 that what's going to happen?

12 MR. CHRISTMAN: I believe -- I believe that
13 there's an easier solution, and there are -- and it --

14 THE COURT: Well, what's the --

15 MR. CHRISTMAN: -- can be easily resolved.

16 THE COURT: -- easier solution?

17 MR. CHRISTMAN: Well, we talked about some
18 other less restrictive alternatives and means that can
19 happen, is the -- remember, in Rowan County they can get
20 a license. They can get one from Judge Blevins as well.

21 THE COURT: Well, that's something I want to --

22 MR. CHRISTMAN: Apparently they're saying --

23 THE COURT: That's something I want to explore
24 at some point with Mr. Mando.

25 MR. CHRISTMAN: We'll cabin that.

1 So another option is that, as I mentioned
2 earlier, there are other legislative and executive
3 options that are available that as that --

4 THE COURT: Well, they may not --

5 MR. CHRISTMAN: -- other states --

6 THE COURT: -- be available now.

7 MR. CHRISTMAN: They're not available today,
8 but states are already working to take steps, and both of
9 the candidates have indicated that this is something that
10 they want to --

11 THE COURT: Well, that's probably not going to
12 happen --

13 MR. CHRISTMAN: -- to take up and address.

14 THE COURT: -- until the spring anyway. That
15 wouldn't happen until the spring.

16 MR. CHRISTMAN: Yeah.

17 THE COURT: I can't imagine them calling a
18 legislative session for this one issue. That would seem
19 a little --

20 MR. CHRISTMAN: And the current --

21 THE COURT: -- bit expensive.

22 MR. CHRISTMAN: Admittedly, the current
23 governor has said that he will not call a current -- a
24 special session right now for it.

25 But there are other -- there are other ways for

1 licenses to begin to get issued because the governor can
2 work with the KDLA --

3 THE COURT: Okay.

4 MR. CHRISTMAN: -- to revise the form in the
5 interim and, again, going back to the four couples.

6 So that's why everybody -- that's why no one is
7 getting a marriage license with Kim Davis's authorization
8 and signature right now.

9 Now, for the two couples who came -- there is
10 one couple that was two women and another couple that was
11 two men. For those two couples Ms. Davis has a sincerely
12 held religious belief and a religious conscience
13 objection that prevents her name and her affixing her
14 name and signature to those licenses. She does not --
15 we'll present evidence that she does not have a
16 religious -- a sincerely held religious belief,
17 conscientious objection, to issuing a license to a couple
18 that's one man and one woman because --

19 THE COURT: Do you know what religion she is?

20 MR. CHRISTMAN: She's a professing Christian,
21 Your Honor.

22 THE COURT: She's a Christian, okay. All
23 right, all right.

24 MR. CHRISTMAN: And when she took office as the
25 elected county clerk, she -- at the time -- the day she

1 took office it was January 1st, 2015. Or maybe it wasn't
2 the 1st. It was the first Monday of January in the new
3 year. When she took office at that moment, what marriage
4 was in Kentucky was one man, one woman. The
5 constitutional amendment, the legislative act, the
6 Sixth Circuit case at that point had overruled
7 Judge Heyburn's decision from the Western District, had
8 reversed that.

9 So there was no question at that point what the
10 law of marriage in Kentucky was. And that law comported
11 with what Ms. Davis's sincerely held religious beliefs
12 were at that moment.

13 After she took office, and only after, is when
14 the Supreme Court even granted certiorari in the
15 Obergefell case. That happened on January 16th of 2015.

16 And we'll present evidence from Ms. Davis that
17 from the moment the Obergefell decision, the cert
18 petition was granted, knowing that Kentucky's law there
19 was going to be a decision on it, that Ms. Davis began to
20 take steps that she could to alert legislators in
21 Kentucky, representatives, that depending on how this
22 goes, this is going to be a real issue for me because of
23 my religious, conscientious objection and what I believe
24 marriage to be.

25 She swore an oath to the Constitution, the

1 United States Constitution, the Kentucky Constitution, so
2 help me God, that the entire oath was an oath that was --
3 it's built into the oath is inherent inalienable
4 protections for her conscience, for her religious
5 liberties, for her freedom.

6 THE COURT: Well, she -- didn't she -- you
7 mentioned the oath. Did the oath require her to uphold
8 the Constitution?

9 MR. CHRISTMAN: And she is upholding the
10 Constitution.

11 THE COURT: Well, now, the --

12 MR. CHRISTMAN: What she took an oath --

13 THE COURT: -- definition of fundamental right
14 to marry has changed in the last two weeks.

15 MR. CHRISTMAN: The Supreme --

16 THE COURT: Well, the Supreme Court hasn't
17 changed. It's been --

18 MR. CHRISTMAN: The Supreme --

19 THE COURT: -- the Supreme Court has upheld the
20 Fourteenth Amendment due process, fundamental right to
21 marry same-sex couples. That's different now than it was
22 in March of this year. So the Constitution -- she took
23 an oath to uphold the Constitution. The Constitution has
24 now been expanded, if you will, to include same-sex
25 marriage.

1 MR. CHRISTMAN: Your Honor, I would submit that
2 the Constitution only expands by way of amendment and --

3 THE COURT: Well, okay. Listen, we're --

4 MR. CHRISTMAN: -- she took an oath. I don't
5 want --

6 THE COURT: -- not going to --

7 MR. CHRISTMAN: -- to -- you said --

8 COURT REPORTER: I can only take one at a time.

9 THE COURT: Yes, thank you.

10 From the standpoint -- you're talking to
11 somebody who generally speaking is -- I look at the
12 Constitution and somebody can say it changes, it's a
13 living, breathing document. Some people say that. Some
14 people say it's what it says is what it should be. And
15 we probably got lots of people in this room that agree
16 with one or the other.

17 Now, I took an oath to uphold the law 13 plus
18 years ago. The Supreme Court in matters like this has
19 the last say.

20 Now, from a -- in a civilized society we set it
21 up that way. We've got district courts, we have
22 appellate courts, and then we have the Supreme Court.

23 And if you get to the Supreme Court and they
24 make a final ruling -- and I apologize for using the word
25 amendment because I know how the constitutional amendment

1 process works. I did go to law school. I'm pretty
2 familiar with that. I'm sure you're aware of it as well.

3 But the Supreme Court made its ruling. That's
4 what from a constitutional Fourteenth Amendment
5 perspective there's a fundamental right to marry to
6 both same and opposite-sex couples. That's what the
7 Supreme Court says the Constitution includes now, whether
8 it be -- it's not an amendment to the Constitution, but
9 it's held to be a fundamental right.

10 I'm here to uphold the Constitution, among
11 other things. Individuals who take oaths who are there
12 to uphold the Constitution have to do that as well.

13 MR. CHRISTMAN: Yes.

14 THE COURT: So, I mean, I'm trying to follow
15 your point. I mean, she took this oath to uphold the
16 Constitution. The Constitution may not be what it was
17 when she took office.

18 MR. CHRISTMAN: Yes, Your Honor, that's correct
19 in terms of how the Supreme Court is interpreting the
20 Constitution.

21 THE COURT: Correct, correct.

22 MR. CHRISTMAN: But what was also in effect on
23 January 1st, as well June 26th and today, was the
24 First Amendment of the United States.

25 THE COURT: All right. So we have a

1 conflict --

2 MR. CHRISTMAN: So there are --

3 THE COURT: -- First Amendment versus
4 Fourteenth Amendment. We're getting somewhere.

5 MR. CHRISTMAN: And what the Supreme Court said
6 in Obergefell --

7 THE COURT: Page 27. I've read it multiple
8 times.

9 MR. CHRISTMAN: -- the one unanimous -- the one
10 unanimous ruling from that court was that religious
11 liberties, religious freedoms are still protected in this
12 country.

13 THE COURT: Right, pastors --

14 MR. CHRISTMAN: And that when --

15 THE COURT: -- and churches, all agree.

16 MR. CHRISTMAN: Well, I mean, there's -- how
17 far does religious freedom and religious liberty go?

18 Religious conscience objections have been and
19 are accepted constitutionally for public employees, for
20 public officials that -- when you take office, you don't
21 waive and suddenly shed your constitutional rights,
22 freedoms, and liberties at the door of the government
23 courthouse --

24 THE COURT: Sometimes you have to.

25 MR. CHRISTMAN: -- when you walk in. There --

1 THE COURT: I mean, if I'm telling -- if I'm
2 picking a jury, I got to be careful what I say sometimes.

3 When I'm in this courtroom, I've got to be
4 careful what I say sometimes. I mean, I can't profess
5 religion from this bench. I would never try to because
6 that would be inappropriate.

7 I recognize that there's a conflict here. The
8 Supreme Court recognizes a conflict. If you read
9 Justice Thomas's dissent, I mean, he may very well be a
10 prophet. I mean, he --

11 MR. CHRISTMAN: Your Honor, he predicted this
12 very --

13 THE COURT: -- says, "It appears all but
14 inevitable that the two will come into conflict." That
15 is being these two Fourteenth and First Amendment.
16 "Government and religious institutions, particularly as
17 individuals and churches are confronted with demands to
18 participate and endorse civil marriages between same-sex
19 couples."

20 So this is just the first, according to
21 Justice Thomas, of many situations where there may be a
22 conflict going forward.

23 MR. CHRISTMAN: That's correct, Your Honor.

24 THE COURT: So, I mean, I'm -- I'm aware of
25 that. I am trying to get -- I would love for this to be

1 a situation where if Kim Davis has a conflict, a deeply
2 held religious belief, that she can't sign off on these
3 marriage licenses, they go down the hall to the
4 judge/executive, and he signs it. Then we don't have to
5 worry about an attorney fee petition where Rowan County
6 might be on the hook to sign -- to pay their attorneys'
7 fees. I mean, there's a lot in play here potentially. I
8 recognize that.

9 So, I mean, I'm going to go back to the very
10 first question that I asked that you then, as a good
11 advocate will, you kind of answered in a way that didn't
12 really answer the question.

13 But is there a compelling state interest in her
14 denying these marriage licenses?

15 MR. CHRISTMAN: Yes, there is, and that
16 compelling --

17 THE COURT: What is that?

18 MR. CHRISTMAN: -- state interest is protecting
19 the individual religious freedoms of every person in the
20 Commonwealth of Kentucky. One of those people is
21 Kim Davis.

22 THE COURT: Okay. So that's your answer?

23 MR. CHRISTMAN: That is a -- that is the
24 compelling interest of the highest degree because it goes
25 to the very first freedoms that are articulated in the

1 United States Constitution, as well as the Kentucky
2 Constitution, which says, "The civil rights, privileges,
3 or capacities of no person shall not be taken away, or in
4 anywise diminished or enlarged, on account of his belief
5 or disbelief of any religious tenet, dogma, or teaching.
6 No human authorities shall, in any case whatever, control
7 or interfere with the rights of conscience."

8 That Kentucky has a compelling government
9 interest of upholding the rights of conscience, the
10 rights of religious freedom, rights of religious liberty,
11 free speech implications here because she's actually
12 putting her name and signature again on a form.

13 It is a -- if Kentucky is forcing her to do it,
14 Kentucky is compelling her, forcing her to speak as to a
15 view, a message, an idea, that -- a belief that she does
16 not agree with.

17 In addition to the constitutional protections,
18 in Kentucky enacted in 2013 over Governor Beshear's veto
19 overwhelmingly -- I think the votes were approximately
20 75 plus percent or 80 percent over the veto -- enacting a
21 Religious Freedom Restoration Act, which prevents the
22 government, prevents Kentucky, from burdening a person's
23 religious freedom.

24 THE COURT: Now, a --

25 MR. CHRISTMAN: They --

1 THE COURT: -- person's religious freedom in
2 what regard?

3 MR. CHRISTMAN: The statute goes on. "To act
4 or refuse to act motivated by a sincerely held religious
5 belief."

6 So when you get to the same-sex couple that
7 wants Ms. Davis personally to affix her name and approval
8 on it, and Kentucky is saying you must do it because this
9 is the form, and that's the only acceptable form, and
10 nothing else can be a marriage license in the
11 Commonwealth of Kentucky, what the government of Kentucky
12 is doing is saying to Kim Davis you have to act in a way
13 that violates your sincerely held religious belief.

14 And she says, no, the Kentucky Religious
15 Freedom Restoration Act protects me from refusing to act
16 in a certain way, motivated by a sincerely held religious
17 belief, which we will present and demonstrate at the
18 appropriate time, unless -- now, there is an unless.

19 When Ms. Davis says, I have a sincerely held
20 religious belief, I have a conscious objection, that
21 doesn't end this case. Because the government of
22 Kentucky then can prove by a compelling, clear and
23 convincing evidence that it has a compelling government
24 interest and has used the least restrictive means.

25 So when Ms. Davis steps up and says, I submit

1 that I have a sincerely held religious belief that
2 prevents me from putting my name and signature and
3 approval on this license, the government of Kentucky can
4 come in and make an argument that as a state, if they
5 want to argue, and I don't think they do, because the
6 candidates have said they want to recognize religious
7 conscience, but they would have to make some argument
8 that the Kentucky has a compelling government interest to
9 force Ms. Davis to violate her individual religious
10 liberties, protections. But they have to do it in the
11 least restrictive means. Not only do they have to show a
12 compelling government interest, they have to do it in the
13 least restrictive means.

14 In the Supreme Court's Hobby Lobby case from a
15 year ago, they interpreted the federal RFRA, which is
16 very similar and analogous to what Kentucky enacted. But
17 the Kentucky statute even puts government on a higher
18 burden. It's clear and convincing is what the burden of
19 proof is for Kentucky to show.

20 And in the Hobby Lobby case, it talked very
21 much about how -- how invasive and difficult it is to
22 satisfy the least restrictive means, that Kentucky is
23 going to have to show that there was no other way for
24 these four couples to get a license unless Kim Davis
25 personally signs, approves, and do it, that there's no

1 other least restrictive means because --

2 THE COURT: Well, I don't know why. I'm
3 still -- you pointed --

4 MR. CHRISTMAN: -- they've already --

5 THE COURT: -- to this form, marriage
6 certificate. How many clerk's deputies does she have, do
7 you know?

8 MR. CHRISTMAN: Your Honor, she has -- she has
9 six deputy clerks currently employed. The numbers --

10 THE COURT: Okay. How many share --

11 MR. CHRISTMAN: -- sometimes fluctuate.

12 THE COURT: How many share her deep religious
13 conscientious objection?

14 MR. CHRISTMAN: Your Honor, I don't know the
15 answer to that question.

16 THE COURT: Because you only represent her?

17 MR. CHRISTMAN: That's correct, Your Honor.

18 THE COURT: Okay. Do you know the answer to
19 that, Mr. Mando?

20 MR. MANDO: I'm sorry?

21 THE COURT: Do you know how many of her six
22 deputies share her religious convictions?

23 MR. MANDO: No, I do not, Your Honor.

24 THE COURT: Do not?

25 MR. MANDO: No.

1 MR. CHRISTMAN: Okay. Your Honor --

2 THE COURT: That might be an answer you might
3 want to get when she testifies --

4 MR. CHRISTMAN: What I -- what I --

5 THE COURT: -- the next hearing.

6 MR. CHRISTMAN: -- would also submit is if
7 those deputy clerks also themselves have a sincerely held
8 religious belief, that Kim Davis in that case as the
9 employer of those individuals has a compelling government
10 interest herself to protect the individual consciences
11 and rights of those employees because of Kentucky Civil
12 Rights laws and other -- and constitutional protections
13 that she has. She swore an oath to the Constitution --

14 THE COURT: Okay.

15 MR. CHRISTMAN: -- to protect her religious
16 liberties but also others. And so if an employee of hers
17 steps up and says, well, I have a religious conscientious
18 objection as well, as the employer in that instance
19 Ms. Davis would have to figure out a way, or try to
20 figure out a way, to accommodate that interest.

21 But here again, I go back to the other -- the
22 other ways in which Kentucky can --

23 THE COURT: Well, we've talked --

24 MR. CHRISTMAN: -- issue a license without --

25 THE COURT: -- about that ad nauseam.

1 MR. CHRISTMAN: So those individuals are not
2 currently before this Court.

3 THE COURT: No, they're not, they're not. But
4 I'm -- part of my job is to try to figure out a way to
5 resolve all of this without lots of paper being burned,
6 with briefs, and lots of potential attorneys' fees being
7 litigated. And I'm thinking of that as I listen to you
8 argue of ways to try to resolve this.

9 MR. CHRISTMAN: And I go back to what we talked
10 about earlier about this is not -- this is not -- again,
11 it's not a statewide policy or mandate --

12 THE COURT: No, we're limited to one --

13 MR. CHRISTMAN: -- that's at issue. We're
14 talking about --

15 THE COURT: -- county, in --

16 MR. CHRISTMAN: We're talking about --

17 THE COURT: -- Rowan County, yes, sir.

18 MR. CHRISTMAN: -- one county. So, again, if
19 there is a scenario in place where there is a county
20 clerk that has a religious objection and demonstrates
21 that, and that government hasn't shown a compelling
22 government interest or a least restrictive means to
23 overturn it, and it turns out in the facts and the record
24 to be demonstrated later on that other deputy clerks also
25 have a sincerely held belief --

1 THE COURT: So are you thinking --

2 MR. CHRISTMAN: -- over this --

3 THE COURT: -- that the other six are going to
4 have the same belief she has?

5 MR. CHRISTMAN: I -- again, I don't know.

6 They're not before this Court. The plaintiffs --

7 THE COURT: It sounds to me like you think they
8 all will have it.

9 MR. CHRISTMAN: I don't think that, Your Honor.

10 THE COURT: You don't think that?

11 MR. CHRISTMAN: I don't.

12 THE COURT: Okay. So you think there may be a
13 deputy clerk in Rowan County that would be willing to
14 issue a license to a same-sex marriage?

15 MR. CHRISTMAN: More importantly than a deputy
16 clerk is the chief judge, the county executive who --

17 THE COURT: Well, that's something --

18 MR. CHRISTMAN: -- publicly on record --

19 THE COURT: Okay. Well, let's --

20 MR. CHRISTMAN: -- as saying he would.

21 THE COURT: I think I've heard enough from you
22 here. I mean, I don't -- not that I'm mad at you. I
23 just want to give the others an opportunity --

24 MR. CHRISTMAN: I'm not --

25 THE COURT: -- to speak.

1 MR. CHRISTMAN: -- going to take that as a slap
2 across the face, Your Honor.

3 THE COURT: It's not a slap across the face,
4 sir. I just want to give these other --

5 MR. CHRISTMAN: I appreciate --

6 THE COURT: -- folks an opportunity to talk.

7 MR. CHRISTMAN: -- it. Thank you very much,
8 Your Honor.

9 THE COURT: All right. Thank you.

10 Mr. Mando, clear up this statute thing. I
11 wasn't prepared to discuss this particular statute that
12 you referenced, or Mr. Christman mentioned about the
13 judge/executive having the ability to issue licenses in
14 the absence of the clerk herself.

15 MR. MANDO: Right. I believe the statute,
16 Your Honor -- and I don't have it with me -- but I think
17 it's 402.240.

18 THE COURT: Russ, could you turn down the air,
19 please?

20 Thank you.

21 MR. MANDO: And that statute, Your Honor,
22 provides that the judge/executive may issue a marriage
23 license in the -- when there's a vacancy in office or the
24 absence of the county clerk.

25 In this particular case the evidence that I've

1 heard from the bench -- from the witness stand so far is
2 that Ms. Davis was, in fact, present when the plaintiffs
3 called and/or visited the office to secure the license.

4 And the testimony from the witness stand was is
5 that judge/executive understood what the limitations on
6 his authority were, that he could not issue that if, in
7 fact, Ms. Davis was not absent.

8 THE COURT: Okay.

9 MR. MANDO: And she wasn't.

10 THE COURT: Is absence -- I don't think absence
11 is defined though.

12 MR. MANDO: I don't believe it is, but it's --
13 absence to me is she's not there.

14 THE COURT: Okay.

15 MR. MANDO: She's gone.

16 THE COURT: Well, if -- so if these two
17 same-sex couples hypothetically were to go to Morehead on
18 a day that she was at lunch, or not at the courthouse for
19 whatever reason, doctor appointment, medical appointment
20 with a child, something, vacation, and Walter Blevins was
21 there, he could -- he would issue a license to them in
22 her absence?

23 MR. MANDO: It depends on -- in that
24 particular situation, I mean -- again, I think absence
25 means she's not there. I think the interprets of the

1 General Assembly would be if she is out of the country,
2 if she is incapacitated in some way.

3 THE COURT: Right.

4 MR. MANDO: It doesn't mean, I don't think,
5 from trying to get commonsense from what the General
6 Assembly is trying to say, I don't think it means she's
7 simply out for lunch. In that case they should come back
8 at 1 o'clock and secure their licenses.

9 THE COURT: I understand that. I was being a
10 little bit flippant.

11 MR. MANDO: But the statute says that he --
12 that he met. He doesn't have to issue that particular
13 license.

14 THE COURT: Are you aware of any conscientious,
15 religious deeply held belief that the judge/executive has
16 on this issue? Has he made any public comments at all?

17 MR. MANDO: No.

18 THE COURT: No?

19 MR. MANDO: No. The county's position on this,
20 Your Honor, is that they have no authority except for
21 this limited exception in the statute for the
22 judge/executive. The county itself has no authority to
23 issue marriage licenses to people who apply or to
24 restrict the clerk to forebear from issuing licenses when
25 they are sought.

1 Instead, the county clerk is a separate
2 constitutional office under the Kentucky Constitution.

3 The fiscal court of Carter -- of Rowan County
4 and Judge/Executive Blevins have no authority to weigh in
5 here and tell her what not to do or what to do with
6 regard to her religious objections to issuing these
7 licenses.

8 THE COURT: Okay. Who -- hypothetically, if
9 the plaintiffs prevail in this case, who would be
10 responsible for the attorneys' fees under the statute?
11 Would it be the county? Would it be --

12 MR. MANDO: There's two potentials there,
13 Your Honor. Because the more I've listened to the
14 testimony today and thought about this, hearing the
15 evidence, it sounds to me like there's potential that the
16 county clerk in terms of issuing this license could be
17 considered a state actor. Because, according to the
18 evidence I heard today, the license forms come from the
19 KDLA, Kentucky Department of Libraries and Archives, an
20 executive branch of Kentucky state government.

21 The governor issued a directive to the county
22 clerks to issue -- for the clerks to issue the licenses.

23 Those types of forms, directives are not coming
24 from the fiscal court. And, therefore, if that ends up
25 being the proof, that's not a policy, custom, or practice

1 of the county, which would expose the county to that
2 attorney fee exposure.

3 I do, however, acknowledge the counter-argument
4 that she is a separately elected county clerk, and there
5 is certainly a potential exposure that the county, the
6 county clerk's office, her budget could be at risk if
7 attorney fees are awarded.

8 THE COURT: All right. Thank you.

9 MR. MANDO: Thank you.

10 THE COURT: All right. I'm not going to let
11 you off without some questions here, Mr. Sharp.

12 Could the defendants comply with Obergefell by
13 having someone else in the clerk's office issue the
14 license?

15 MR. SHARP: That's not the world we live in,
16 Your Honor.

17 THE COURT: Well, is it? I mean, I finally got
18 Mr. Christman to answer a question after a little bit of
19 discussion. But, I mean, is that -- I know other states
20 are trying to accommodate the religious conflict that
21 exists here between the First Amendment and the
22 Fourteenth Amendment. And there's -- history is littered
23 with situations where you've got one constitutional claim
24 pitted up against another constitutional claim. And we
25 have that to a certain extent here. I mean, they've

1 raised it.

2 Now, whether or not she has a legitimate
3 religious conviction or not, I mean, they say she does.

4 So -- and on page 27 of the decision that I
5 quoted from earlier, this is the majority. I mean, this
6 is Kennedy writing. "The First Amendment ensures that
7 religious organizations and persons are given proper
8 protection as they seek to teach the principles that are
9 so fulfilling and so central to their lives and faiths
10 and to their own deep aspirations to continue the family
11 structure that they have long revered."

12 It goes on to state, "It must be emphasized
13 that the religion -- that religions and those who adhere
14 to religious doctrines, may continue to advocate with
15 utmost, sincere conviction that, by divine precepts,
16 same-sex marriage should not be condoned."

17 So, I mean, that -- I've read the decision
18 multiple times, and there are going to be situations
19 where it's difficult to reconcile a -- in this case, a
20 particular defendant's First Amendment right as set forth
21 in -- well, reconcile the fundamental right that the
22 Supreme Court in Obergefell found with that
23 First Amendment right.

24 I mean, it -- there is -- even the
25 Supreme Court seemed to recognize that there could be

1 conflicts.

2 MR. SHARP: I don't think it's as complicated
3 as that, Your Honor. The -- Justice Kennedy's opinion
4 says that, you know, they may continue to advocate, not
5 that they may continue to impose their religious beliefs
6 on others when they are, in fact, employed and an actor
7 of the government.

8 This case is really quite simple. And the
9 political proposals that have been offered by opposing
10 counsel about solutions to this, you know, that's for the
11 General Assembly. That's for the political branches of
12 government.

13 Today we're dealing with a very simple
14 situation, and that is whether or not it is unlawful for
15 a government official for personal religious reasons to
16 impose a substantial burden on individuals' right to
17 marry by withholding an essential government service.
18 And that's really what this is about.

19 I mean, aside from the legally articulated
20 interest of protecting, you know, all the clerks' right
21 to the free exercise of religion, I mean, Ms. Davis
22 herself has said she opposes on religious grounds
23 same-sex marriage. She has said she would never affix
24 her name to a same-sex marriage license.

25 Opposite-sex couples got swept up in

1 Ms. Davis's policy because she said she didn't want to
2 discriminate against same-sex couples. So she broadened
3 the class of individuals whose rights she decided to
4 violate.

5 She does not get to impose her religious views
6 on others. It's as simple as that. They have a
7 fundamental right to marry. And she, as a government
8 official, crosses the line when for personal religious
9 reasons she withholds a government benefit that they are
10 otherwise entitled to receive.

11 Particularly, where, as here, the government
12 entitlement is a legally required prerequisite for those
13 individuals to exercise their own constitutionally
14 protected fundamental right to marry.

15 THE COURT: So if -- going back to the original
16 question I asked you though, if someone else in the
17 clerk's office would sign off on that marriage license,
18 would that be enough?

19 MR. SHARP: Your Honor, I will tell you that I
20 think that would depend largely on the facts because
21 there is a -- there would very much be an equal
22 protection concern insofar as separate but equal.

23 You know, the notion that Kim Davis could with
24 a wink and a nod go on break, and this other clerk deal
25 with the same-sex couples is offensive insofar as --

1 THE COURT: Okay. If it's offensive, there's
2 a --

3 MR. SHARP: I mean, to the extent the same-sex
4 couples have to accommodate Kim Davis's schedule, be it
5 vacation or break or lunch so they can avail themselves
6 of their fundamental --

7 THE COURT: I understand.

8 MR. SHARP: -- right to marry, that's not what
9 the First Amendment free exercise provides.

10 THE COURT: Well, I know that some states are
11 allowing that to occur.

12 MR. SHARP: If --

13 THE COURT: Some counties, I guess, are
14 allowing that to occur; not in Kentucky but in other
15 places.

16 MR. SHARP: If the General Assembly crafted
17 such a thing, I mean, it would be impossible for me to
18 offer any conjecture about what that would look like at
19 this point.

20 THE COURT: Well, it seems like the license
21 itself -- and I'm not trying to -- I mean, obviously, the
22 choice of the sacrament of marriage and getting married
23 is much more important than making sure you have your
24 fishing license to go fish at Cave Run there in Zilpo
25 in Rowan County. Make sure -- I mean, there are two

1 different -- there's two licenses. One you pay whatever,
2 \$25 or whatever the fee is, and you go fish. The other
3 one is something that lasts a lifetime, much more
4 significant.

5 But at the end of the day the piece of paper,
6 the license itself, is just a piece paper that's signed
7 by whoever the clerk happens to be. So it's -- that's
8 why these ideas of making it just online, if you're
9 really just dealing with a piece of paper, it seems like
10 that would be the best way to do it.

11 Now, again, that's a legislative choice, an
12 executive choice. We're here in the judicial branch, so
13 those are all things that could impact potentially this
14 case going forward.

15 But I'm -- the idea of trying to accommodate
16 the defendant's First Amendment right, which even the
17 Supreme Court says, she does have a First Amendment
18 right. Now, whether or not she -- it allows her to
19 exercise that in her capacity as the Rowan County Clerk,
20 I mean, the Supreme Court talks about individuals and
21 churches. It talks about -- let's see. Well, I'm just
22 not so sure that -- like, for instance, pastors who want
23 to not -- who don't want to officiate over same-sex
24 marriage, I don't think that this case requires a pastor
25 in a church to officiate over same sex. They still can

1 say, no, I don't want to do it.

2 And I have someone I knew from college who just
3 officiated over a same-sex marriage in Covington, one of
4 the district judges, a family court judge. And that was
5 her right to do that if she wanted to. Now, I don't know
6 if you could compel her to do that. But she's a judge.
7 No one has asked me one way or the other.

8 But I'm just thinking that her First Amendment
9 right I'm going to need to -- hopefully you can address
10 this in your written filing. I mean, you finally
11 answered my question about what the substantial
12 government interest is when you were talking earlier
13 about her individual First Amendment right. I mean, and
14 the government has a compelling interest in allowing that
15 to occur. I mean, that seems to be her individual right,
16 not the state's right, but --

17 MR. SHARP: Your Honor, that -- and I think
18 that's exactly correct. I mean, we're not talking
19 about we're -- that analysis, whether it be strict
20 scrutiny, compelling interest, intermediate scrutiny,
21 important interest, or rational basis, legitimate
22 interest --

23 THE COURT: It's not rational basis. It has to
24 be something higher than that.

25 MR. SHARP: It's state -- exactly. It's state

1 interest. What is the state interest at stake?

2 What we have here is Ms. Davis's personal
3 interest. Her personal religious beliefs conflict with
4 her obligations to issue same-sex marriage licenses on
5 the same terms as opposite-sex couples.

6 I mean, it's evident in her own public
7 statements. It's not coincidence that this blanket
8 prohibition on issuing marriage licenses occurred after
9 Obergefell.

10 So -- and to the extent that opposing counsel
11 suggest, well, the plaintiffs can simply drive to another
12 county or they can walk down the hall. I mean, A, they
13 have walked down the hall, and the county judge/executive
14 has said, I'm in charge of enforcing or applying this
15 statute, she's not absent, can't, won't issue you a
16 marriage license.

17 Ms. Davis through her religious beliefs does
18 not get to impose those on the plaintiff. She does not
19 get to dictate the manner in which they have to exercise
20 their own fundamental right.

21 When she voluntarily seeked public office,
22 elected or employment or otherwise, she is no longer
23 acting as citizen vis-a-vis government sovereign. She's
24 acting as government herself, vis-a-vis the residence of
25 Rowan County.

1 And when she has to comply with the legal
2 requirements of her office, that is her employment.

3 And the cases cited about, you know, burden on
4 the right to marry, you know, and whether it's a
5 substantial and direct, I mean, it doesn't get more
6 substantial and direct than when the county clerk
7 responsible for issuing marriage licenses refuses to
8 issue them, particularly where the plaintiffs have to
9 obtain those in order to avail themselves of the right to
10 marry in the first place.

11 The suggestion that they should simply go to
12 another county is totally inadequate and misses the
13 point.

14 It then confers on county clerks the apparent
15 authority, you know, at what point does the Court decide
16 whether or not there's enough counties available to issue
17 marriage licenses?

18 I mean, the media has reported, you know,
19 somewhere in the neighborhood of 60 county clerks who
20 have indicated that perhaps they have objections.

21 But, you know, in any event, Ms. Davis's legal
22 obligations to perform the functions of her office,
23 though conflicting with her personal religious beliefs,
24 is not -- her personal religious beliefs or opposition to
25 it is not in and of itself a state interest.

1 THE COURT: Okay. One of the things I want
2 someone to produce, and I don't know if it's going to be
3 Ms. Davis or the county itself or both, what are her
4 obligations as the county clerk? What are her, I guess,
5 job duties, if you will? Is there a --

6 MR. SHARP: Vis-a-vis marriage licenses or more
7 broadly?

8 THE COURT: No, just -- well, I mean, vis-a-vis
9 marriage licenses. I mean, just something that if you
10 have something -- if it's like a job description, or I
11 don't know if it would be a regulation or administrative
12 regulation, I don't know what it would be. Perhaps --
13 and that can be produced the next time we meet. You
14 don't have to produce it today.

15 I -- is there anything else you want to say? I
16 don't want to keep everybody too long.

17 MR. SHARP: Your Honor, I believe -- again, the
18 focus here is on whether or not Ms. Davis can withhold
19 government benefits based on her religious beliefs. The
20 fact that she has included in this blanket policy
21 opposite sex couples is of no consequence. It's the
22 interest that's served by her policy is personal,
23 personal religious beliefs. And it simply is untenable
24 in so far as it imposes an unlawful burden on plaintiffs'
25 right to get married.

1 Thank you.

2 THE COURT: All right. Okay. Well, here is
3 what we're going to do. This -- the evidentiary portion
4 of this hearing will be continued in progress. Like I
5 said, as soon as we find that -- or learn that she has
6 been properly served, file a notice of that with the
7 Court. We'll set a follow-up evidentiary hearing in
8 Covington not earlier than Monday of next week. I do
9 have Court on the 21st. I know of a final pretrial in an
10 employment case. I'm not sure what time that is.

11 Do you recall what time that is set, morning?

12 LAW CLERK: 10:00.

13 THE COURT: 10:00, okay. It will be no earlier
14 than Monday. I'll have my clerk contact counsel.

15 Are you going to enter a formal entry of
16 appearance?

17 MR. MANDO: I will make sure that's done
18 tomorrow as soon as I return to the office.

19 THE COURT: Okay, great. And then we'll
20 contact counsel just by phone just to get a time that
21 will work. I want to try to expedite this as much as I
22 can.

23 All right. Can I see counsel -- oh, yes, sir.

24 MR. MANDO: Just one more thing, Your Honor.

25 The county is interested in reducing expense,

1 being efficient as we possibly can. We know there's
2 another lawsuit that was filed. I think it was filed by
3 Attorney Joe Buckles who's out of Lexington.

4 THE COURT: Right.

5 MR. MANDO: I haven't had a chance to get it
6 downloaded yet. I think it was maybe filed Friday.

7 THE COURT: I have a copy in my office if you
8 want a copy of it.

9 MR. MANDO: I'm not sure if it's -- if they've
10 asked for injunctive relief.

11 THE COURT: They have not.

12 MR. MANDO: All right. I'm just saying that if
13 there -- we would be interested in some consolidation,
14 again, to minimize expense to the county, to save
15 resources.

16 THE COURT: Okay. Any objection to that? It's
17 15-46.

18 MR. SHARP: I'm sorry, Your Honor, consolidate
19 the later filed case?

20 THE COURT: Well, it's assigned to me.
21 Judge Wilhoit refused in that case as well so -- in fact,
22 it's related.

23 MR. SHARP: No objection.

24 MR. GANNAM: Your Honor, I think we would have
25 to -- there's complexities with the punitive class action

1 on one hand and an individual action on the other. Would
2 they be class reps? I just think we would need to see a
3 proper motion for consolidation.

4 THE COURT: Well, I'm thinking that this case
5 is going to be resolved well before we get to any motion
6 for class certification.

7 MR. SHARP: Your Honor, if I may. The proposed
8 class is 23(b)(2), prospective injunctive relief.

9 THE COURT: It would likely include them
10 anyway.

11 MR. SHARP: They are only seeking damages
12 actions in that subsequent case. I mean, yes, they would
13 presumably be class members unless and until they get
14 married. But they would have an independent cause of
15 action for their damages claims aside from the class
16 action.

17 THE COURT: Well --

18 MR. CHRISTMAN: Your Honor, those plaintiffs
19 haven't asked for injunctive relief so if they're going
20 to be joined in the action in any way, Your Honor, we
21 would ask that they, you know, have to file their own
22 motion in order to be --

23 THE COURT: Well, since they are both assigned
24 to me, they are related. I'm not necessarily going to
25 join them at this point. It makes sense to at least

1 consider that at some point.

2 I would like to see the attorneys in my office
3 after this hearing.

4 MR. SHARP: If I may, Your Honor.

5 THE COURT: Yes, sir.

6 MR. SHARP: One final thing. I think the Court
7 had ordered that the response be due July the 30th
8 presuming -- July 30. We would just ask for an expedited
9 reply time of --

10 THE COURT: Seven days?

11 MR. SHARP: Seven days is fine.

12 THE COURT: All right. Seven days.

13 MR. SHARP: Thank you.

14 THE COURT: Very well. We will be in recess.

15 MR. SHARP: Thank you.

16 (Whereupon, the proceedings adjourned at 12:20 p.m.)

17 C E R T I F I C A T E

18 I, Peggy W. Weber, certify that the foregoing is a
19 correct transcript from the record of proceedings in the
20 above-entitled matter.

21

22

23 July 16, 2015
DATE

s/Peggy W. Weber
PEGGY W. WEBER, RPR

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W I T N E S S E S

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EXHIBIT E

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25 Proceedings recorded by mechanical stenography,
transcript produced with computer.

1 (Proceedings commenced at 9:59 a.m.)

2 THE COURT: Good morning. Madam Clerk, if you would
3 call the matter for preliminary injunction hearing.

4 DEPUTY CLERK: Ashland Civil 15-44, April Miller,
5 et al., versus Kim Davis, et al.

6 THE COURT: Why don't we have entries of appearance,
7 please.

8 MR. SHARP: Your Honor, Bill Sharp on behalf of
9 plaintiffs.

10 MR. CANON: Judge, Dan Canon here for the plaintiffs.

11 MR. GANNAM: Roger Gannam for the defendant, Kim
12 Davis.

13 MR. CHRISTMAN: Good morning, Your Honor. John
14 Christman also for Kim Davis.

15 MR. DONAHUE: A.C. Donahue on behalf of the
16 defendant, Kim Davis, Your Honor.

17 MR. MANDO: Jeff Mando for the defendant, Rowan
18 County, Your Honor.

19 MR. WATKINS: Cecil Watkins for the defendant, Rowan
20 County, Your Honor.

21 THE COURT: You're Miss Davis?

22 THE DEFENDANT: Yes.

23 THE COURT: We continued the hearing today because
24 you had not been formally served last week. Your attorneys
25 made some motions regarding that, which the Court previously

1 denied. But we're here now. You're here. You've been
2 served.

3 The purpose of today's hearing is to hear any proof that
4 you have or that Rowan County has on behalf of either yourself
5 or the county.

6 I had asked, I think it was you, Mr. Mando, last week
7 about the oath of the duties of the county clerk, if there was
8 something formal that I could see. I know we had talked
9 generally about that. I can't remember if it was you or
10 Mr. Gannam's client. Someone was going to bring today
11 something that showed the formal duties of the clerk.

12 I can't remember who I left that with at the end of the
13 hearing.

14 MR. MANDO: Your Honor, I took that -- I apologize,
15 but I took that upon Miss Davis and her lawyer, since she is
16 the county clerk, to provide the list of duties. I do have
17 some statutes that I think we would all agree apply to the
18 county clerk for issuing of marriage licenses.

19 THE COURT: You had sent me that or shown me that
20 last week. That was just the one that allowed the county
21 judge, in her absence, to act.

22 MR. MANDO: 402.240 that talks about the permissive
23 nature of the judge executive to issue a marriage license in
24 the absence of the county clerk or in the vacancy of the
25 office. We talked about that and I showed you a copy.

1 THE COURT: You did. This is a separate statute
2 you're referring to?

3 MR. MANDO: There are two other statutes that I think
4 also I would talk about, which would be KRS 402.080, which
5 talks about the issuance of the marriage license shall be
6 issued by the county clerk. And 402.100 talks about the form
7 that must be used by the county clerk as prescribed by the
8 State Department of Library and Archives.

9 THE COURT: I recall that. And someone submitted --
10 I think it was you, Mr. Gannam -- the actual form itself, and
11 it had some blocked-out sections. There's a new one that had
12 first party, second party that's, I guess, being used now
13 since the Supreme Court's decision.

14 MR. GANNAM: That's correct, Your Honor. We're
15 prepared to, through Miss Davis, put on testimony today of all
16 her duties as well as formally admit the forms into evidence.

17 THE COURT: That's fine. I just couldn't remember
18 who I left that task with. I guess it's you, Mr. Gannam.
19 We'll allow you to call your first witness.

20 MR. GANNAM: Your Honor, before we begin, I wanted to
21 say that the defendant is prepared to argue at this point that
22 the motion could be denied based on the plaintiffs' failure to
23 carry their burden of proving the elements necessary for a
24 preliminary injunction. If the Court would hear argument on
25 that point now, before we proceed to put on our evidence,

1 we're prepared to do that.

2 THE COURT: That motion will be denied.

3 MR. GANNAM: Thank you, Your Honor. We will call our
4 first witness, who will be County Judge Executive Blevins.

5 THE COURT: All right. Come around, sir.

6 WALTER BLEVINS, JR., DEFENSE WITNESS, SWORN

7 THE COURT: You may proceed.

8 Good morning, sir.

9 THE WITNESS: Good morning.

10 DIRECT EXAMINATION

11 BY MR. GANNAM:

12 Q. Good morning. My name is Roger Gannam. I'm one of the
13 attorneys representing Kim Davis in this lawsuit. Will you
14 please state your full name for the record?

15 A. Walter Blevins, Jr.

16 Q. And what is your title?

17 A. Rowan County Judge Executive.

18 Q. And what is your business address, Judge Blevins?

19 A. 600 West Main Street, Morehead, Kentucky, 40351.

20 Q. Is your position as county judge executive an elected
21 position?

22 A. Yes, sir.

23 Q. When were you elected?

24 A. November of last year. I don't know the exact date. I
25 think it was maybe the 8th.

1 Q. And how long is your term?

2 A. Four-year term.

3 Q. Judge Blevins, can you just generally describe the
4 duties, responsibilities of your office?

5 A. Well, I'm kind of like the mayor of the county. I'm the
6 chairman of the board, more or less, in the fiscal court
7 meetings. My job really is to advocate to the county and to
8 try to bring, hopefully, jobs and opportunity to the
9 community, help in any kind of disasters that occur, and just
10 try to do the duties of the judge.

11 Q. You mentioned presiding over the fiscal court. Are there
12 any other boards or committees that you preside over?

13 A. Yeah, there's several. I'm on the Gateway Ad Board. I'm
14 on the Gateway Services Community Board. I'm on the -- I
15 appoint many of the boards and attend many of the board
16 meetings. The airport board, I serve on it, or attend the
17 meetings. The district health board, the county health board.
18 I'm on several boards.

19 Q. Would it be fair to say that you are the highest elected
20 official in Rowan County?

21 A. Yes.

22 Q. I'm going to read to you from Kentucky Revised Statute
23 402.240 and then ask you some questions about it. The title
24 of the statute is County Judge Executive to Issue License in
25 Absence of Clerk. It reads, In the absence of the county

1 clerk, or during a vacancy in the office, the county judge
2 executive may issue the license and, in so doing, he shall
3 perform the duties and incur all the responsibilities of the
4 clerk. The county judge executive shall return a memorandum
5 thereof to the clerk and the memorandum shall be recorded as
6 if the license was issued by the clerk. Are you familiar with
7 this statute, Judge Blevins?

8 A. Yes.

9 Q. And according to the statute, is it your understanding
10 that you have authority to issue a marriage license in the
11 absence of the county clerk?

12 A. According to the statute. I don't know if it's been used
13 by any other judge executive, though.

14 Q. What is your understanding of the word "absence" in the
15 term, "in the absence of the county clerk"?

16 A. Since she has deputy clerks, and I know that at least her
17 mother at times, when she was gone on vacation, she would
18 allow the deputy clerks to perform that duty. So I don't
19 think the judge executive office, as far as I know, has ever
20 done that.

21 Q. So but when it says in the absence of the county clerk,
22 what would have to occur for the county clerk to be absent,
23 based on your understanding of that statute?

24 A. Say that again. Let me make sure I understand the
25 question.

1 Q. Where the statute says, "in the absence of the county
2 clerk, the county judge executive may issue a marriage
3 license," what is your understanding of what the word
4 "absence" means?

5 A. I would say absent would be due to health reasons, due to
6 being out of office or if the clerk passed away or something
7 like that, it would absent then.

8 Q. The statute also talks about a vacancy in office, which I
9 would submit would occur if the clerk were to die, as you
10 said, or were to leave office completely. Apart from that,
11 you talked about an absence for health reasons. Are there any
12 other circumstances that you would understand to mean "absent"
13 as it's used in that statute?

14 A. If she was in the hospital or if she was on vacation, I
15 would assume she would be absent. But again, the judge
16 executive, as far as I know, has never performed that duty.
17 I'm in and out of the office quite often. I'm not there on a
18 regular, eight-hour day because of meetings and going to
19 Frankfort and continuing education, of course, I have to take.

20 So in that respect, when she's not there, her clerks are
21 there to -- the office is still open. Her clerks are there
22 performing those duties.

23 Q. During the regular business hours of the clerk's office,
24 are you aware of any time that the clerk, Kim Davis, has not
25 been there but that there were not deputy clerks there to

1 perform her duties?

2 A. I can't, I can't remember a time that's occurred.

3 Q. Is your understanding of the meaning of that statute, KRS
4 402.240, based on any court decision that you've read or
5 received?

6 A. Again, I can't remember any of those.

7 Q. Have you received an opinion of the attorney general of
8 the Commonwealth of Kentucky regarding interpretation of that
9 statute?

10 A. Yes. I think I had a conversation, a telephone
11 conversation with the county attorney and some people out of
12 the attorney general's office.

13 Q. When did that conversation occur?

14 A. That was shortly after this case became prominent in the
15 newspaper that marriage licenses were not going to be given
16 out in Rowan County. And we're basically on new ground. I
17 wanted to find out as much as I could about this issue.

18 Q. Who did you speak with in the attorney general's office?

19 A. I can't remember their -- county attorney might remember
20 who he had on the phone when I talked to him. Also, I talked
21 to my KACO attorney, and he basically said that there was no
22 way that -- county judges are not there to perform that duty.
23 And in an absence, if it was that kind of an absence, that I
24 would appoint someone to perform those duties.

25 Q. Have are you received any kind of formal, written opinion

1 from the attorney general's office?

2 A. No, I have not.

3 Q. Are you aware that the Rowan County Clerk, Kim Davis, is
4 not issuing any marriage licenses?

5 A. Yes, I am.

6 Q. Are you aware that she has directed her deputy clerks
7 also not to issue marriage licenses?

8 A. Yes, I am.

9 Q. Since Kim Davis discontinuing -- discontinued issuing
10 marriage licenses out of her office, have you been requested
11 to issue any marriage licenses?

12 A. I have people -- one couple came by the office after
13 being denied and asked if I could do it. I said, well, she's
14 not absent. I cannot do that.

15 Q. Any besides that one couple?

16 A. That's the only couple I remember that came actually to
17 the office. I think she -- they were accompanied by another
18 individual who I think she's one of the plaintiff -- or I
19 guess, yeah, one of the plaintiffs in the case. She was with
20 them.

21 Q. Is your interpretation of the word "absent" as used in
22 KRS 402.240 the only reason why you did not issue the license
23 upon that request?

24 A. Well, I've never issued a license like that. I'm not
25 sure I would have the proper paperwork to even do it. So I --

1 that would be one of the main reasons is not having any
2 knowledge of how to do -- how to fill it out and the proper
3 procedure I'd have to go through.

4 Q. Do you agree that there are circumstances where,
5 according to the statute, you would have the legal authority
6 to issue a marriage license?

7 A. Again, I would probably appoint someone to take those
8 duties over. So it would basically be if she was absent for
9 an extended period of time or if for some reason she wasn't
10 able to perform her duties, then I would appoint someone.

11 Q. I'm going to read to you another statute. It's
12 KRS 63.220, Vacancies in County Offices. It says, A vacancy
13 in the office of sheriff, coroner, surveyor, county clerk,
14 county attorney, jailer, or constable shall be filled by the
15 county judge executive or by the mayor in a consolidated local
16 government.

17 Are you familiar with that statute?

18 A. Yes.

19 Q. Would that be the statute that you would rely upon to
20 fill a vacancy in the clerk's office?

21 A. Yes. That's how -- that's the same statute that I would
22 use for any -- any of those individuals or elected office
23 holders, it would be up to me to appoint someone to fill
24 their -- fulfill their duties until another election.

25 Q. Are you aware of any statute that gives you the authority

1 to appoint a replacement clerk if she is merely absent but not
2 vacant from office?

3 A. I think those -- I'm really not. I think those clerks
4 are basically under her purview. When she's not there, they
5 take over the duties.

6 Q. So going back to -- we've covered that you have the
7 authority to appoint someone to fill a vacancy in the clerk's
8 office. But in a circumstance where the clerk is merely
9 absent, as that's defined in the statute, would you agree that
10 you have authority in that situation to issue the license
11 yourself?

12 A. I'm not sure on that myself because I don't have those --
13 the software to print it. I asked my secretary about this.
14 She said we don't have the software to print them out. I
15 would have to go to the clerk's office, I assume get one of
16 the deputies.

17 I don't understand why I -- the deputies normally take
18 over her job description when she's absent, like an illness or
19 vacation, so I assume continue with them.

20 Q. Are you aware that there's a statute dictating that the
21 form of marriage license to be used by the clerk's office is
22 created by the Kentucky Department of Library and Archives?

23 A. Yes, I found that out about a week or two ago.

24 Q. Are you aware of any statute that dictates who provides
25 the form of memorandum that's mentioned in the statute giving

1 the county judge executive authority to issue a marriage
2 license in the absence or vacancy of the clerk?

3 A. No, I'm not, sir.

4 Q. Assuming there is a situation where you do have the
5 authority to issue a marriage license, would you have a
6 religious objection to issuing that license to a same-sex
7 couple?

8 MR. MANDO: Objection.

9 THE COURT: Overruled.

10 THE WITNESS: I would follow the law. If the law
11 says I have to give them to everyone, I would do that. But
12 morally, it's a tough decision for me, because I'm taught in
13 my Bible that marriage is between a man and a woman. I would
14 still follow the law.

15 BY MR. GANNAM:

16 Q. And so is your answer that yes, you would issue that
17 license to a same-sex couple?

18 A. I would issue those license.

19 MR. GANNAM: No further questions, Your Honor.

20 THE COURT: I guess processing-wise, do you all want
21 to ask any questions, Mr. Mando? Then I'll turn to the
22 plaintiffs.

23 MR. MANDO: I just have a couple questions, Your
24 Honor.

25 THE COURT: All right.

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CROSS-EXAMINATION

BY MR. MANDO:

Q. First, Judge Blevins, to clarify something, when you had the conversation with the county attorney and some state officials, you said it was the attorney general's. Could that have been the Department of Local Government that you had the conversation with?

A. I'd have to ask my counsel over there to make sure, because I've had a lot of phone calls and discussions with people.

Do you remember, Cecil?

Q. You just have to answer based on your own recollection.

A. It could have been the Department of Local Government. It could have been the attorney general's office. I'm not positive on that, no.

Q. When the plaintiffs -- when the plaintiffs in this case came to see you about securing a marriage license late June, early July, at that time, was Kim Davis absent from the county or absent from her office?

A. No, she was not.

Q. Did you feel you had the authority, in that situation, to issue the license?

A. No, I did not.

Q. Had you ever issued a marriage license in the past?

A. No, I have not.

BLEVINS - Cross

16

1 Q. And as you read the statute, are you required to issue
2 the marriage license?

3 A. Only in her absence, and I felt with the deputy clerks
4 she has, it would not be -- they take over when she's not
5 there so it would still be in her office's duties.

6 Q. Is it your understanding that the county clerk is a
7 separately elected constitutional office under the -- in
8 Kentucky?

9 A. That's correct.

10 MR. MANDO: No further questions at this time, Your
11 Honor.

12 THE COURT: Cross.

13 MR. SHARP: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. SHARP:

16 Q. Judge Executive Blevins, good morning. Let me ask you,
17 how did you first learn of the policy that you've testified
18 about in the clerk's office?

19 A. It was after the denial of a marriage license by Miss
20 Davis.

21 Q. Did you learn about it from Miss Davis herself?

22 A. No, I don't believe I did.

23 Q. Did she send you a memorandum telling you what the policy
24 was?

25 A. I don't remember receiving anything.

BLEVINS - Cross

17

1 Q. Did she consult with you prior to adopting the policy for
2 your input?

3 A. Kim and I have conversations, and she did tell me early
4 on, before the decision was made, that if it was to allow
5 same-sex marriage that she could not do that in her moral
6 judgment. She just could not do it.

7 Q. And when did you have this conversation with her?

8 A. It's been -- it was probably shortly after we got sworn
9 in, I think she brought the issue to me and talked about it.
10 And she did tell me also that I think she -- I don't know if
11 it was that early in the process, but I know she later told me
12 she had contacted all the state representatives and all the
13 state senators in regards to this issue, that she was hoping
14 something would be done because morally, she just could not do
15 it.

16 Q. When you said you spoke with her about this after the
17 decision, are you talking about the *Obergefell* decision?

18 A. Yes.

19 Q. Let's talk a little bit about the clerk's office. How
20 many deputy clerks are employed in the Rowan County Clerk's
21 Office?

22 A. I don't have the exact number, but there's probably six
23 or seven, at least.

24 Q. And how is that office funded?

25 A. It's funded through their fees. They collect fees for

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1 marriage license, for hunting, fishing license, for any kind
2 of registration of vehicles, all those types of different
3 things that they perform, those type of duties. And they get
4 a fee for that, and that's basically how they're funded.

5 Q. And what role, if any, does the Rowan County Fiscal Court
6 have in the county clerk's budget?

7 A. We approve their budget, and that's about all. The only,
8 really, power we have is she submits a budget. And along with
9 myself and four magistrates, we pass the budget.

10 Q. So the funding mechanism is from county funds, then?

11 MR. MANDO: Objection.

12 THE COURT: Grounds?

13 MR. MANDO: He just said the funds we are generated
14 through fees that were issued.

15 THE COURT: So asked and answered?

16 MR. MANDO: Yes.

17 THE COURT: Sustained.

18 BY MR. SHARP:

19 Q. Am I correct the county would be responsible for any
20 judgment levied against the county clerk's office?

21 MR. MANDO: Objection. Calls for a conclusion of
22 law.

23 THE COURT: Sustained.

24 BY MR. SHARP:

25 Q. Now, you're familiar also with the directive that the

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1 Governor of Kentucky sent to all the county clerks on June 26,
2 correct?

3 A. Yes, I am.

4 Q. And you're aware that the policy that's been adopted by
5 Rowan County Clerk's Office is in direct conflict with the
6 governor's directive?

7 A. Yes, it is.

8 Q. Do you have any authority to sanction or otherwise
9 censure the elected county clerk?

10 A. Not that I know of.

11 Q. Prior to the *Obergefell* decision, were there any problems
12 with the Rowan County Clerk's Office issuing marriage
13 licenses?

14 A. No, not that I know of.

15 Q. When you had this conversation with Miss Davis following
16 the *Obergefell* decision, did she explain why she intended to
17 adopt this policy?

18 MR. CHRISTMAN: Objection. Misstates testimony.

19 THE COURT: Overruled.

20 THE WITNESS: Can you repeat the question?

21 MR. SHARP: Sure.

22 BY MR. SHARP:

23 Q. When you had this conversation with Miss Davis following
24 the *Obergefell* decision, did she explain why she was adopting
25 this policy?

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1 A. Yes. We talked for quite a while, and Kim's very
2 religious, and she was not going to issue any license to
3 anyone because she didn't want to, basically, not issue them
4 to one group that are man and woman versus same-sex marriages,
5 and she just wasn't going to issue any licenses because she
6 didn't want to discriminate in that respect.

7 She was concerned that the -- a 5-to-4 decision is a very
8 close decision by the Supreme Court, and she was concerned --
9 she had some question, I think she told me it was 30 days
10 after their decision, they could actually make a change in
11 that decision if they -- if other information was brought
12 forward. And she was concerned that -- I think she even said
13 some of the Supreme Court members probably should have excused
14 themselves from the ruling.

15 THE COURT: Did she explain why she thinks that
16 Supreme Court justices should have recused themselves from the
17 ruling?

18 THE WITNESS: I don't think she got into detail on
19 that, but she did have some concerns that some of them maybe
20 should have recused themselves. I don't know if we actually
21 talked about the details on it. She can probably answer that
22 better than me.

23 THE COURT: All right, go ahead.

24 BY MR. SHARP:

25 Q. So am I correct her religious objection went to issuing

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1 marriage licenses to same-sex couples?

2 A. Yes, I would say that's correct.

3 Q. And her decision to stop issuing them altogether, even to
4 opposite-sex couples, was so as to not discriminate?

5 A. I would say that's correct.

6 Q. The conversation that you had, was that generally
7 consistent with the statements she made to the media following
8 that conversation?

9 A. I would say they are.

10 Q. As far as you are aware, is this policy still in place in
11 Rowan County?

12 A. Yes, it is.

13 Q. Have you issued any marriage licenses in her stead since
14 it was adopted?

15 A. No, I have not.

16 Q. Let me ask you some specific questions about absence.

17 Since June the 26th, are you aware of whether or not

18 Mrs. Davis has been to work?

19 A. As far as I know, she's there every day. If she's missed
20 a day, I wasn't aware of it. Of course, I'm gone pretty often
21 to meetings. I'm just not there in the courthouse at times.

22 I wouldn't be absolutely sure. I know she was absent on the
23 last court date. Of course, I was out of the office as well,

24 went to attend the court hearing, let the judge know I was

25 concerned about this issue as well. I didn't want to be --

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1 the county to be sued and not show up for court. And today,
2 she's absent from the court and so am I.

3 Q. Now, when she's not physically in the office, does the
4 office -- does the county clerk's office close?

5 A. No. It remains open. At least it has in past years.
6 I'm not sure -- I would assume it would continue to be open
7 when she's not there.

8 Q. Other than the marriage licenses, does the county clerk's
9 office in Rowan County continue to do business and perform its
10 other duties?

11 A. Yes.

12 Q. Has Miss Davis been on extended leave since June the
13 26th?

14 A. Not that I know of.

15 Q. Has she otherwise been unable to perform her job duties
16 since June the 26th?

17 A. No. She's been available and able.

18 MR. SHARP: Nothing further, Your Honor.

19 THE COURT: Any redirect?

20 MR. GANNAM: No, Your Honor.

21 THE COURT: May this witness be finally excused?

22 MR. MANDO: Yes, sir.

23 MR. SHARP: Your Honor, we would ask --

24 MR. GANNAM: As far as we're concerned, yes, Your
25 Honor.

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1 MR. SHARP: Your Honor, we would ask him to be
2 subject to recall, pending Miss Davis's testimony.

3 THE COURT: Can you stick around?

4 THE WITNESS: Yes, sir.

5 THE COURT: Thank you. Next witness, please.

6 MR. GANNAM: Your Honor, the defense calls Kim Davis.

7 THE COURT: All right. Come around, ma'am.

8 KIMBERLY DAVIS, DEFENDANT, SWORN

9 THE COURT: Good morning, ma'am.

10 THE WITNESS: Good morning.

11 THE COURT: You may proceed.

12 DIRECT EXAMINATION

13 BY MR. GANNAM:

14 Q. Good morning, Miss Davis.

15 A. Good morning.

16 Q. Please state your full name for the record.

17 A. Kimberly Davis.

18 THE COURT: Try to keep your voice up, please.

19 THE WITNESS: Yes, sir.

20 THE COURT: Thank you.

21 BY MR. GANNAM:

22 Q. What is your title, Miss Davis?

23 A. I'm the Rowan County Clerk.

24 Q. And your business address?

25 A. 600 West Main Street, Room 102, Morehead, Kentucky,

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1 40351.

2 Q. When were you elected to the position of Rowan County
3 Clerk?

4 A. Final election was November 4th of 2014, and took office
5 in January.

6 Q. January of this year?

7 A. January 5th, yes, sir.

8 Q. Were you an employee of the clerk's office prior to being
9 elected as the clerk?

10 A. Yes.

11 Q. How long did you work in the clerk's office?

12 A. Almost 27 years.

13 Q. Can you describe generally what are the functions of the
14 county clerk?

15 A. The clerk is a pass-through collection agency for many
16 departments; Department of Revenue, Transportation Cabinet,
17 Fish and Wildlife. We -- I bring archives, we record deeds,
18 mortgages, all land records. We're responsible for
19 maintaining voter registration records, overseeing elections.

20 There's just a plethora of stuff we do. Motor vehicle
21 registration, delinquent taxes. We generate property tax
22 bills, franchise tax bills for collection and then we -- those
23 fees that we collect, we send out every month by the -- you
24 know, the reports are due the 10th of the month.

25 But at the end of that month prior, you know, we have to

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1 allocate all those monies out and write checks to every taxing
2 district to Frankfort for all the fees we've collected for
3 them. There's daily reports, weekly reports, monthly reports,
4 quarterly reports, end of year reports.

5 Q. And does the clerk's office retain a portion of what it
6 collects as compensation or as its own fees?

7 A. Yeah. The clerk's office is a fee office. Every year,
8 starting on January 1, we start out with zero dollars. So
9 every penny that comes into the clerk's office is money that
10 we have generated and collected from our services.

11 Q. So does the clerk's office receive checks from the
12 Commonwealth of Kentucky, for example?

13 A. No.

14 Q. Does the clerk's office receive any other checks other
15 than from fees that it collects itself?

16 A. No. We get -- we do get a check for preparing tax bills
17 from the Department of Revenue, which is a fee of our office
18 and just goes into our office, but we don't get any money from
19 anyone else.

20 The Secretary of State, State Board of Elections also
21 gives us so much money for each registered voter. I think
22 this year, I got \$162.

23 Q. For all registered voters in Rowan County?

24 A. Um-hmm.

25 Q. Does the clerk's office also issue marriage licenses?

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1 A. We do.

2 Q. What is the fee collected by the clerk's office for a
3 marriage license?

4 A. It's \$35.50.

5 Q. And out of that fee, how does that break down?

6 A. The clerk retains \$21.17, and the state gets \$14.33.

7 Q. So does the clerk's office receive fees for marriage
8 licenses other than the license that it issues itself?

9 A. No.

10 Q. Does the clerk's office receive any funding on the
11 subject of marriage other than from the licenses that it
12 issues itself?

13 A. No.

14 Q. How many employees do you have in the clerk's office?

15 A. I have six full-time employees. I have one girl that's
16 hired on a 1099 to do grant work for me.

17 Q. And what do -- your full-time employees, are those called
18 deputy clerks?

19 A. They are.

20 Q. What is the total revenue in your 2015 budget?

21 A. We had budgeted \$4.2 million.

22 Q. And year-to-date, is your office carrying a surplus or a
23 deficit?

24 A. We're actually 700 -- as of the end of June, we were \$733
25 above on our receipts and everything. So our office is really

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1 very -- doing very well.

2 Q. Did you mean 733,000?

3 A. 733,000, yes, sir.

4 Q. So that's a surplus currently?

5 A. It is.

6 Q. If you get to the end of the year and you have a surplus,
7 what happens to those funds?

8 A. Those fees are turned over to the county -- the fiscal
9 court as excess fees.

10 Q. Do you know how much revenue your office collected from
11 the issuance of marriage licenses last year?

12 A. The total that we took in was \$4,500. We sold 212
13 licenses in 2014.

14 Q. So if, in 2015, if you were to hit that same, that same
15 number, is my math correct that that would be 0.1 percent of
16 the total budget for the clerk's office?

17 A. Yeah.

18 Q. Is that a yes?

19 A. Yes.

20 Q. How many licenses did the clerk's office issue in the
21 first half of this year?

22 A. Ninety-nine.

23 Q. So compared to 212 for all of last year, would you say
24 that it's comparable?

25 A. Yeah. Yes.

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1 Q. Do all six of the deputy clerks perform the task of
2 issuing marriage licenses?

3 A. Yes.

4 Q. If you just limited that task to one of your deputy
5 clerks, approximately how many hours a week would that deputy
6 spend issuing marriage licenses?

7 A. Maybe one hour.

8 Q. One hour a week for one employee?

9 A. Um-hmm.

10 Q. And that would handle all marriage licenses issued by the
11 Rowan County Clerk's Office?

12 A. Yes.

13 Q. Now, I trust that the volume of marriage licenses that
14 your office issues isn't exactly the same every month, right?

15 A. No, it's not.

16 Q. What is the busiest month this year, to date?

17 A. May and June were very close.

18 Q. And in those months, those were the busiest so far this
19 year?

20 A. Um-hmm.

21 Q. And in, let's just say June, for example, in the month of
22 June, with that increased volume, would one employee in your
23 office still be able to handle all of that volume?

24 A. Yes. It only takes about five to seven minutes to issue
25 a marriage license, to get the information, populate it in the

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1 computer system, print it out, have them proof it, sign it,
2 collect their money, and they're gone.

3 Q. And in these months of May and June, where the volume is
4 higher, approximately how many licenses were issued in each of
5 those months?

6 A. Probably 18, 20 at the most.

7 Q. Miss Davis, I want to ask you now about your religious
8 practices. First of all, what religion do you practice?

9 A. I'm Apostolic.

10 Q. And is Apostolic, is that a subset of the Christian
11 religion?

12 A. It is.

13 Q. As part of your Christian faith, do you attend a church?

14 A. I do.

15 Q. How often?

16 A. Every time the doors are open.

17 Q. At least weekly, then?

18 A. We have Bible study on Tuesday, church on Wednesday,
19 church on Sunday.

20 Q. And was that your practice before taking office as the
21 Rowan County Clerk?

22 A. Yes.

23 Q. Has that been your continued practice since taking
24 office?

25 A. Yes.

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1 Q. Do you participate in any Christian ministries outside of
2 your church itself?

3 A. I do.

4 Q. Give me an example.

5 A. Every Monday night, since October of 2013, I go to the
6 jail, visit the ladies there, do Bible study with them.

7 Q. Are you aware of some of the offenses committed by the
8 women in the jail --

9 MR. SHARP: Objection, Your Honor. Relevance.

10 THE COURT: Sustained.

11 MR. GANNAM: Your Honor, the plaintiffs have alleged
12 in this case that Miss Davis has treated them with malice, and
13 I believe that her activities according to her religious
14 beliefs are relevant to the question of whether she is not
15 issuing licenses based out of malice.

16 THE COURT: She goes to the jail, ministers to women
17 at the jail. I think that's sufficient. What they're in for,
18 I'm sure they're in for Class D felonies or on pretrial
19 detention for more serious offenses. I don't think the actual
20 offenses are really relevant.

21 MR. GANNAM: I'll move on, Your Honor.

22 THE COURT: Thank you.

23 BY MR. GANNAM:

24 Q. Miss Davis, do you get paid for visiting the jail?

25 A. No.

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1 Q. How do you feel towards these women who you minister to
2 there?

3 A. I love them. They're the best part of my Monday.

4 Q. Does the fact that they've done bad things, perhaps even
5 felonies, affect how you feel towards them?

6 A. No, not at all.

7 Q. Miss Davis, do your Christian beliefs include a belief
8 about the definition of marriage?

9 A. Yes, they do.

10 Q. And according to your Christian beliefs, what is the
11 definition of marriage?

12 A. Marriage is a union between one man and one woman.

13 Q. And what do you base that definition on?

14 A. The Bible.

15 Q. And what do you believe the Bible to be?

16 A. God's holy word.

17 Q. So according to your Christian belief, can the union of
18 two men be a marriage?

19 A. No.

20 Q. Can the union of two women be a marriage?

21 A. No.

22 Q. How about three men?

23 A. No.

24 Q. How about a person and an animal?

25 MR. SHARP: Objection, Your Honor.

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1 THE WITNESS: No.

2 THE COURT: Sustained. We don't have that here.

3 BY MR. GANNAM:

4 Q. According to your religious beliefs, Miss Davis, is there
5 any arrangement of people other than one man and one woman
6 which can be called a marriage?

7 A. No.

8 Q. Miss Davis, according to your Christian beliefs, do you
9 believe it is a sin for a man and a woman who are not married
10 to have sex?

11 A. Yes.

12 Q. Do you believe it is a sin for two men to have sex?

13 A. Yes.

14 Q. Do you believe it is a sin for two women to have sex?

15 A. Yes.

16 Q. Do you believe all sex outside of man and woman marriage
17 is a sin?

18 A. Yes.

19 Q. During the almost 30 years total that you've spent in the
20 clerk's office, either as a deputy clerk or as the elected
21 clerk, have you ever asked a marriage license applicant what
22 kind of sins they've committed prior to applying?

23 A. No.

24 Q. Have you ever asked marriage license applicants what
25 kinds of sins they plan to commit after getting married?

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1 A. No.

2 Q. Is it your religious belief that you are required to ask
3 applicants for marriage licenses what kinds of sins they
4 committed?

5 A. No.

6 Q. Is it your religious belief that you're required to ask
7 applicants for marriage what kind of sins they might commit
8 after marriage?

9 A. No.

10 Q. Is it your religious belief that sin disqualifies a
11 person from being married?

12 A. No.

13 Q. When did your office stop issuing marriage licenses this
14 year?

15 A. We issued one on the 26th. So we were open the 27th of
16 June, so June 27th would have been when we stopped.

17 Q. And are you aware that June 26 is the date that the
18 United States Supreme Court decision in *Obergefell* was handed
19 down?

20 A. I am.

21 Q. Your office was open on June 27?

22 A. We were.

23 Q. Did you issue any licenses then?

24 A. No.

25 Q. And was that pursuant to a decision you had made as of

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1 June 27 not to issue licenses?

2 A. When I first took office, when he went to -- the clerks
3 had a legislative meeting in January, and they formed a
4 committee in regard to this Supreme Court decision that was --
5 in light that it was going to be heard in April.

6 After that meeting, I came back and I directed a letter
7 to every senator and every legislator that I could get an
8 email address to and asked them, pleaded with them to, while
9 there was still time, to get a bill on the floor to help
10 protect clerks who had a moral issue in this regard.

11 I emailed every person. I'm not sure. It was
12 January 23rd was the date that I emailed them, and I emailed
13 every person and our legislators at LRC that I could get an
14 email address to. This is not something I decided because of
15 this decision that came down. It was something that was a
16 forethought and that I had prayed and fasted over weekly.

17 So it wasn't just a spur-of-the-moment decision. It was
18 thought out and, you know, I sought God on it.

19 MR. GANNAM: Your Honor, may I approach the witness
20 to provide an exhibit?

21 THE COURT: Sure. What are you showing her?

22 MR. GANNAM: This is a copy of the letter she's just
23 testified to.

24 THE COURT: That's fine. Do you have a copy,
25 Mr. Sharp?

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1 MR. SHARP: Yes, sir.

2 MR. GANNAM: Your Honor, would you like a copy?

3 THE COURT: Yes, thank you. Mark this as Defendant's
4 Exhibit 1?

5 MR. GANNAM: I marked the version I gave to the
6 witness.

7 BY MR. GANNAM:

8 Q. Miss Davis, I've just handed you a document I've marked
9 as Defendant's Exhibit 1. It has a salutation, Dear Senator
10 Robertson. Is this a copy of the letter you just testified to
11 that you sent to multiple legislators in January?

12 A. It is.

13 Q. The first sentence says, I am contacting you in hope of
14 support of possible legislation that would give county clerks
15 the option to exempt themselves from issuing marriage license.
16 Are those your words, Miss Davis?

17 A. It is.

18 Q. And in the last sentence of that paragraph, I wanted to
19 have the option, as a person who has deep moral conviction, to
20 choose not to discriminate any party by allowing a clerk to
21 apply for an exemption for the issuance of marriage licenses.
22 Are those also your words?

23 A. They are.

24 Q. This was sent to legislators in January of 2015?

25 A. Yeah, January 23rd.

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1 Q. And has your position regarding the issuance of marriage
2 licenses changed between January 23rd of this year and today?

3 A. No.

4 Q. Miss Davis, I'd like to talk about the marriage license
5 form itself.

6 MR. GANNAM: Your Honor, may I approach the witness?

7 THE COURT: You may. Are you moving to admit
8 Exhibit 1?

9 MR. GANNAM: Yes, Your Honor. Thank you.

10 THE COURT: Any objection?

11 MR. SHARP: No objection.

12 THE COURT: Let it be received without objection.

13 BY MR. GANNAM:

14 Q. Miss Davis, I've handed you an exhibit, which will be
15 Defendant's Exhibit 2. Do you recognize this document?

16 A. I do.

17 Q. Can you describe what it is?

18 A. It is the old version of the marriage license that was
19 prescribed by the KDLA for us to use for the issuance of
20 marriage applications.

21 Q. When you say old version, do you mean the version prior
22 to the Supreme Court decision?

23 A. Yes, sir.

24 Q. So this would be the form of marriage license used by
25 your office up until June 26 of this year?

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1 A. Yes.

2 Q. I wanted to point out for you the very first sentence
3 after the heading that says Marriage License, Valid Only in
4 the Commonwealth of Kentucky. It says, To any person or
5 religious society qualified to perform marriages per
6 KRS 402.050, you are hereby authorized to join together in the
7 state of matrimony, according to the laws of the Commonwealth
8 of Kentucky. Do you see that language?

9 A. I do.

10 Q. And when this license says "you are authorized," who do
11 you understand to be authorizing the people on this license to
12 be getting married?

13 A. That would be me, the clerk.

14 Q. And is it your understanding that that is dictated by the
15 law of the Commonwealth of Kentucky?

16 A. Yes.

17 Q. And did you prepare this form yourself?

18 A. No.

19 Q. Who prepared or created this form?

20 A. The Kentucky Department of Library and Archives.

21 Q. I want to call your attention down to the middle of the
22 form. And just for the record, there are areas blacked out of
23 this form that would contain the personal information of
24 whoever these applicants are. The original forms would not
25 contain those black boxes, correct?

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1 A. Correct.

2 Q. So in the middle of the form, it says, We hereby certify
3 the above information is true to the best of our knowledge.
4 And it has spaces for, on this form, the bride and groom to
5 sign. Directly under that, it says, Issued this June 16,
6 2015, and the office of Kim Davis, Rowan County, County Clerk.
7 Do you see that language?

8 A. I do.

9 Q. Who puts that information on the form, your name and your
10 title as Rowan County Clerk?

11 A. It populates from our software.

12 Q. Do you have any control over that?

13 A. No.

14 Q. So when your software in your office is used to create a
15 marriage license, does it automatically put your name and
16 title into every marriage license?

17 A. It does.

18 Q. According to your understanding, who does this license
19 say is issuing the marriage license?

20 A. It was issued by my office.

21 Q. And underneath, in the next line, it says By, and there's
22 a name here, Brian Mason, Deputy Clerk. Is that a deputy
23 clerk in your office?

24 A. It is.

25 Q. Do deputy clerks have the authority to sign marriage

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1 licenses?

2 A. They have authority to sign it, yes.

3 Q. Whose authority are they exercising when they sign it?

4 A. Mine.

5 Q. Are you aware of any marriage license currently available
6 in the Commonwealth of Kentucky in Rowan County that would not
7 require you to authorize it?

8 A. No.

9 Q. And do you have the discretion to create a different kind
10 of license that would not require your authorization for it to
11 be issued?

12 A. No.

13 MR. GANNAM: Your Honor, I move to admit Defendant's
14 Exhibit 2 into evidence.

15 THE COURT: Any objection?

16 MR. SHARP: No objection.

17 THE COURT: Let it be received without objection.

18 MR. GANNAM: May I approach again, Your Honor?

19 THE COURT: You may.

20 BY MR. GANNAM:

21 Q. Miss Davis, I've shown you a document that's been marked
22 as Defendant's Exhibit 3. Are you familiar with this
23 document?

24 A. I am.

25 Q. What is this document?

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1 A. It is the marriage license that KDLA has prescribed that
2 we use after the Supreme Court decision on June 26th.

3 Q. And I want to draw your attention to the language at the
4 beginning, To any person or religious society qualified to
5 perform marriages per KRS 402.050, you are hereby authorized
6 to join together in the state of matrimony, according to the
7 laws of the Commonwealth of Kentucky -- I'll stop right there.
8 Is this language the same as was on the prior form marriage
9 license?

10 A. Yes.

11 Q. And under this new version of the marriage license who,
12 do you understand, is authorizing the people named in the
13 license to be getting married?

14 A. That would be me, the clerk.

15 Q. In moving down to the middle section of the form, after
16 where the party information would be filled in, it says, We
17 hereby certify the above information is true to the best of
18 our knowledge, and then there are lines for signatures of
19 first party and second party, correct?

20 A. Yes.

21 Q. Now, on the prior form, that said bride and groom,
22 correct?

23 A. That is correct.

24 Q. Now, below that it says issued this -- there's a blank
25 for the date, and the office of. There's a space for a name

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1 and then a county. When this form is used in your office,
2 what would go in that space for name and county?

3 A. That would be my name, Rowan County.

4 Q. And is it your understanding that this signifies that the
5 office would be -- the license would be issued under your
6 authority?

7 A. Yes.

8 Q. Moving down to the part that reads Marriage Certificate,
9 the third line down, it says -- I'm sorry, let me just read
10 that whole section under Marriage Certificate. It says, I do
11 certify that blank and blank were united in marriage on the --
12 there's a space for a date and location -- under the authority
13 of the above license and in the presence of, please print
14 witnesses' names. Do you see that language?

15 A. I do.

16 Q. What is your understanding to be the authority of the
17 above license that it's referring to?

18 A. That would be me.

19 Q. And since the change in the form following the *Obergefell*
20 decision, are you aware of any option in Rowan County to issue
21 a marriage license form that's not issued under your
22 authority?

23 A. No.

24 Q. Are you aware of any option for a marriage license form
25 that would not show your name on it?

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1 A. No.

2 Q. Apart from the sort of aesthetic differences in this form
3 and the prior form marked as Exhibit 2 and the change in
4 designation of parties from bride and groom to first party and
5 second party, is there any substantive difference between the
6 old form and the new form?

7 A. No.

8 MR. GANNAM: Your Honor, I move to admit Defendant's
9 Exhibit 3 into evidence.

10 THE COURT: Any objection?

11 MR. SHARP: No objection, Your Honor.

12 THE COURT: Let it be received without objection.

13 BY MR. GANNAM:

14 Q. Miss Davis, we've covered your religious belief about
15 what marriage is, and we've covered the licensing scheme where
16 the licenses are issued in Rowan County under your authority.

17 I want to ask you specifically, why does authorizing the
18 marriage of same-sex couples violate your religious beliefs?

19 A. Because if I say that I authorize that, I'm saying I
20 agree with it, and I can't.

21 Q. And to be clear, is your religious objection to
22 authorizing a marriage license for a same-sex couple based on
23 any sin that you believe this couple may have committed?

24 A. No.

25 Q. Is it based on any sin you believe they might commit?

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1 A. No.

2 Q. Is your religious objection to authorizing a marriage
3 license for a same-sex couple based on any religious objection
4 other than what you believe the definition of marriage is?

5 A. No.

6 Q. Miss Davis, understanding that your religious objection
7 prevents you from issuing licenses to same-sex couples, why
8 did you decide not to issue licenses to any couples?

9 A. I didn't want to discriminate against anybody.

10 Q. Is that consistent with the position you took in January,
11 when you sent the letter to legislators asking them to provide
12 you an opt-out from issuing any licenses at all?

13 A. Yes.

14 Q. And has that position ever changed since that letter in
15 January?

16 A. No.

17 Q. Miss Davis, when the Supreme Court decided the *Obergefell*
18 case in June, after that, did you receive any guidance from
19 the Governor of Kentucky on issuing marriage licenses?

20 A. He issued a directive that came over the email, and I
21 later got a hard copy that said we may not agree with it,
22 but -- morally, you know, you may not agree with it, but we
23 had to issue them regardless.

24 MR. GANNAM: May I approach again, Your Honor?

25 THE COURT: You may. This will be Exhibit 4?

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1 MR. GANNAM: Yes, Your Honor.

2 BY MR. GANNAM:

3 Q. Miss Davis, I've just handed you what has been marked as
4 Defendant's Exhibit 4. This appears to be a letter on the
5 letterhead of the Office of the Governor dated June 26, 2015.
6 This also appears in the complaint in this case as Plaintiff's
7 Exhibit Number 3. Is this the letter you were just referring
8 to?

9 A. It is.

10 Q. And what did you understand this letter to be directing
11 you to do as a clerk of court or as the county clerk?

12 A. Well, it simply states, says, Neither your oath nor the
13 Supreme Court dictates what you must believe. But as elected
14 officials, they do prescribe how we must act.

15 And we were instructed that Kentucky would recognize as
16 valid all same-sex marriages performed in other states, and we
17 were to start issuing license.

18 Q. Was there any doubt in your mind that the governor was
19 communicating to all the county clerk that they should issue
20 the marriage licenses regardless of what they believe?

21 A. Yes.

22 Q. Have you sent any communications back to the governor
23 after this letter was sent to you?

24 A. I have.

25 THE COURT: You have or you have not?

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1 THE WITNESS: I have.

2 THE COURT: You have, all right. Thank you.

3 MR. GANNAM: Before I get to that, I would move to
4 admit Defendant's Exhibit 4 into evidence.

5 THE COURT: Any objection?

6 MR. SHARP: No objection, Your Honor.

7 THE COURT: Let it be received.

8 MR. GANNAM: May I approach, Your Honor?

9 THE COURT: You may.

10 MR. GANNAM: Your Honor, I apologize, I don't have a
11 final copy of this one.

12 THE COURT: That's fine.

13 BY MR. GANNAM:

14 Q. Miss Davis, I just handed you a document marked as
15 Defendant's Exhibit 5. Do you recognize this document?

16 A. I do.

17 Q. What is this document?

18 A. It's a letter that not just myself but many clerks had
19 sent to the governor just trying to compel him to call a
20 special session or to do something in order to help the clerks
21 who had objections to issuing the same-sex marriage license on
22 grounds of conscience, that he would do something to try to
23 help us.

24 Q. I want to read from the letter. The first paragraph, the
25 last sentence says, Many clerks firmly believe that forcing

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1 county clerk offices to issue same-sex marriage licenses, when
2 it is against their deeply held religious beliefs and
3 traditions, is a direct violation of the U.S. Constitution's
4 First Amendment.

5 Are those the words you sent to the governor?

6 A. It is.

7 Q. And do you believe that to be the case?

8 A. I do.

9 Q. The next paragraph says, This dramatic and sudden change
10 has caused some clerks to go as far as to halt issuing
11 marriage licenses to anyone rather than compromise their
12 deeply held religious convictions.

13 Would that include you, Miss Davis?

14 A. Yes, it does.

15 Q. Next sentence says, This position has ignited litigation,
16 and it is foreseeable that it may invite more lawsuits.

17 How many times have you been sued so far, Miss Davis?

18 A. Twice.

19 Q. Finally, next paragraph says, It appears the only timely
20 and reasonable solution to this conflict is a legislative one.
21 So for that reason, I respectfully request that you
22 immediately call an extraordinary session of General Assembly
23 to address the issues that have been caused in this transition
24 from traditional marriage being redefined to include same-sex
25 couples.

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1 Are those your words to the governor, Miss Davis?

2 A. They are.

3 Q. Have you received any direct response from the governor?

4 A. No.

5 Q. Are you aware of press reports of conversations between
6 your counterpart in Casey County, Clerk Casey Davis, and the
7 governor?

8 A. I am.

9 Q. And are you aware of what's been reported as the
10 governor's answer to Mr. Davis's similar objection, that he
11 should simply issue the licenses or resign?

12 A. I am.

13 Q. Miss Davis, is resigning an option for you?

14 A. No, sir.

15 Q. Why not?

16 A. Because if I resign, that leaves my deputies to deal with
17 this. It leaves another clerk to deal with it. They may not
18 have an issue with it, but the people that work for me have
19 issue with this also. And if I resign, that solves nothing.
20 It helps nobody. And there is a solution out there that
21 everybody can be happy, and it can be done so that nobody has
22 to be compromised in any way.

23 Q. Would you say that you've done a good job as the clerk of
24 Rowan County?

25 A. I think so, yes, sir.

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1 Q. Is that based in part on the, for example, the three
2 quarters of a million dollar surplus you've generated since
3 you've been the clerk?

4 A. Yes.

5 Q. And all those funds, if there's a surplus at the end of
6 the year, go back to the county?

7 MR. SHARP: Objection, Your Honor. Relevance.

8 THE COURT: Overruled.

9 BY MR. GANNAM:

10 Q. My question was, those funds would go back to the county
11 if there's a surplus at the end of the year, correct?

12 A. That's correct.

13 MR. GANNAM: Your Honor, I would move to admit
14 Defendant's Exhibit 5 into evidence.

15 THE COURT: Any objection to 5?

16 MR. SHARP: No objection, Your Honor.

17 THE COURT: Let it be received without objection.

18 BY MR. GANNAM:

19 Q. You mentioned some of your deputy clerks may share the
20 same objection. Out of your six deputy clerks, how many do
21 you know would have a similar religious objection to signing
22 off on a marriage license to a same-sex couple?

23 A. I know for certainty four.

24 Q. And out of the other two, do you know their positions?

25 A. One --

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1 MR. SHARP: Objection, Your Honor.

2 THE COURT: Overruled. If you have a reason to know
3 why. I mean, first of all, have you spoken with the other six
4 clerks about the issuance of marriage licenses post-Supreme
5 Court decision?

6 THE DEFENDANT: Yes.

7 THE COURT: You have spoken with them?

8 THE DEFENDANT: Yes.

9 THE COURT: The four that you've identified as having
10 objections, did they tell you they had objections?

11 THE WITNESS: Yes.

12 THE COURT: What about the other two?

13 THE WITNESS: One said they would be willing to issue
14 the license, wouldn't have any problem with it, one is kind of
15 ambiguous, just kind of straddling the fence.

16 THE COURT: So there would be one that would be
17 willing to issue the licenses?

18 THE WITNESS: Yes, sir.

19 THE COURT: And would that individual be able to
20 issue the licenses without any repercussions from you?

21 THE WITNESS: My name would be on that license.

22 THE COURT: Okay. I understand that. But as far as
23 that individual would be able to issue the licenses without
24 any repercussions from you?

25 THE WITNESS: That deputy would not have my authority

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1 to issue a license if I did not grant that authority.

2 THE COURT: All right. If the authority was required
3 to be granted, would that deputy be able to issue the license
4 without any repercussions from you?

5 THE WITNESS: Repercussions as far as maybe firing
6 that deputy?

7 THE COURT: Correct.

8 THE WITNESS: I don't know how to answer that,
9 because that causes me to speculate that if there was a form
10 that was generated that didn't have my name on it --

11 THE COURT: Is it the marriage license -- I know your
12 attorney asked to read this section. To any person or
13 religious society qualified to perform marriages pursuant to
14 KRS Section 402.050. Are you such a person authorized or
15 qualified to perform marriages?

16 THE WITNESS: No. I'm the authority --

17 THE COURT: You don't perform marriages, correct?

18 THE WITNESS: No.

19 THE COURT: All right.

20 THE WITNESS: I'm the authorizing agent of that
21 license.

22 THE COURT: But you're not a person qualified to
23 perform the marriages, correct?

24 THE WITNESS: No.

25 THE COURT: All right. You may proceed.

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1 BY MR. GANNAM:

2 Q. Miss Davis, knowing what you do, that there is an
3 employee who is willing to issue the licenses, have you taken
4 any adverse employment action against that employee?

5 A. No.

6 Q. Do you have any intention of doing that?

7 A. No.

8 Q. Do you consider that employee to be a good employee?

9 A. Very loyal, very dedicated, very good employee.

10 Q. And I believe you testified earlier that -- could a
11 single employee handle all of the volume of Rowan County
12 marriage licenses, if called upon to do so?

13 A. Yes.

14 Q. I believe you testified that might take an hour a week?

15 MR. SHARP: Objection. Asked and answered.

16 THE COURT: Sustained.

17 BY MR. GANNAM:

18 Q. In the almost 30 years that you've been at the clerk's
19 office, have you ever objected on religious grounds to doing
20 any of the clerk's office functions apart from this marriage
21 license issue?

22 A. No.

23 Q. In your almost 30 years in the clerk's office, have you
24 ever witnessed another deputy clerk or the elected clerk make
25 a religious objection to performing some function of the

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1 clerk's office?

2 A. No.

3 Q. Are you aware of types of licenses that some clerk's
4 offices issue and some clerk's offices don't?

5 A. I am.

6 Q. Can you give an example?

7 A. Not all county clerks sell hunting and fishing licenses.
8 You can opt out of selling those, just by giving a written
9 explanation to the Department of Fish and Wildlife.

10 Q. And was that a directive or a law that was created by the
11 Department of Fish and Wildlife?

12 MR. SHARP: Objection. Relevance, Your Honor.

13 THE COURT: I'm going to overrule the objection.

14 THE WITNESS: I'm not sure how that law is. It's in
15 our duties that it says that a clerk can opt out from selling
16 hunting and fishing licenses.

17 BY MR. GANNAM:

18 Q. Is there anything else that's issued out of your office
19 or filed in your office that doesn't depend on your authority?

20 A. No.

21 Q. Let me give you an example what I'm talking about. If
22 someone brings a document to you to be recorded, you're not
23 required to authorize or approve of whatever that document
24 says; is that correct?

25 A. That's correct.

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1 Q. Your duty would be limited to just recording it in the
2 public records?

3 A. As long as it meets the statutory requirements for that
4 particular type of document, we would record it.

5 Q. Approximately how many counties surround Rowan County,
6 immediately surround it?

7 A. About seven.

8 Q. Would those be Lewis, Fleming, Bath, Menifee, Morgan,
9 Elliott and Carter Counties?

10 A. Yes.

11 Q. To your knowledge, are all marriage licenses being issued
12 in those seven counties?

13 MR. SHARP: Objection. Speculation.

14 THE COURT: Overruled. If she knows.

15 THE WITNESS: They are.

16 BY MR. GANNAM:

17 Q. And what would be the longest distance one would have to
18 drive, approximately, from Rowan County to one of those seven
19 surrounding counties?

20 A. Maybe 30 minutes at the most.

21 Q. That would be for any of those seven?

22 A. Yes.

23 Q. Are there other --

24 THE COURT: Probably longer to Vanceburg.

25 THE WITNESS: Might be if you go over --

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1 THE COURT: Go ahead.

2 BY MR. GANNAM:

3 Q. Are there even more counties within a 60-minute drive of
4 Rowan County?

5 A. Oh, yes.

6 Q. And to your knowledge, are any of the counties within a
7 60-minute drive of Rowan County not issuing marriage licenses?

8 A. Not that I'm aware of.

9 Q. When we were in court in Ashland last week, do you know
10 what county we were in?

11 A. We were in Boyd.

12 Q. And to your knowledge, is Boyd County issuing all
13 marriage licenses?

14 A. They are.

15 Q. And today, we're sitting in what county?

16 A. Kenton, I believe.

17 Q. And to your knowledge, is Kenton County issuing marriage
18 licenses?

19 A. Yes, they are.

20 Q. Miss Davis, when you took office in January of 2015, did
21 you swear out an oath?

22 A. I did.

23 Q. And did that oath include an oath to uphold the United
24 States Constitution and laws?

25 A. It did.

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1 Q. And did it include an oath to uphold the Kentucky
2 Constitution and laws?

3 A. Yes, it did.

4 Q. Have you kept that oath since taking office?

5 A. Yes.

6 Q. How do you explain the not issuing marriage licenses and
7 upholding, for example, the United States Constitution and
8 laws?

9 A. I think the First Amendment right gives me a right to
10 religious freedom.

11 Q. So have you ever made a decision that you're not going to
12 uphold the U.S. Constitution?

13 A. No.

14 Q. And how about under the Kentucky Constitution and laws.
15 How are you upholding those when you're not issuing marriage
16 licenses?

17 A. Well, so far, our Kentucky Constitution hasn't been
18 rewritten. I think it takes an act of legislation to do that,
19 and it still states and has defined, as we voted on in 2004,
20 to define marriage as a union between one man and one woman.

21 Q. Are you aware of any things that would be called
22 conscience protections in the Kentucky Constitution?

23 A. Yes. Our Bill of Rights.

24 Q. And so have you ever made a decision not to follow the
25 Kentucky Constitution?

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1 A. No.

2 Q. And in connection with your current policy on marriage
3 licenses, have you ever made a decision that you were not
4 going to follow the Kentucky Constitution and laws?

5 A. No.

6 MR. GANNAM: No further questions, Your Honor.

7 THE COURT: Any questions, Mr. Mando?

8 MR. MANDO: I do have a few questions, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. MANDO:

11 Q. Good morning, Miss Davis. I introduced myself to you
12 earlier this morning. My name is Jeff Mando. I represent
13 Rowan County. I just have a few questions.

14 A. Yes.

15 Q. It's my understanding you occupy the office of county
16 clerk in Rowan County, correct?

17 A. I do.

18 Q. As you understand it, that's a constitutional office,
19 created and recognized by the Kentucky Constitution?

20 A. Yes.

21 Q. And with regard to marriage licenses, you are directed by
22 state statute as a county clerk to issue marriage licenses,
23 correct?

24 A. I am.

25 Q. In fact, issuance of marriage licenses requires you to

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1 remit the fee for the marriage licenses, part of it back to
2 the state, correct?

3 A. It is.

4 Q. And then you have to report to the state so that the
5 state Department of Vital Statistics can gather and publish
6 information about marriages state-wide, correct?

7 A. Yes.

8 Q. Also, with regard to marriage licenses, the forms that
9 you are required to utilize come from the state Department of
10 Libraries and Archives; is that correct?

11 A. That's correct.

12 Q. That is a state agency that reports to the governor?

13 A. I would assume they do.

14 Q. And that state agency, the Department of Libraries and
15 Archives, to your knowledge, directs all clerks to issue
16 marriage licenses on this prescribed form? It's uniform?

17 A. That's correct.

18 Q. All right. I'm sorry, that was two questions. It's a
19 uniform form, correct?

20 A. Yes.

21 Q. And it's directed by the Department of Library and
22 Archives that all county clerks use this state form?

23 A. That's correct.

24 Q. The employees in your office, you hire the employees in
25 your office, correct?

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1 A. I do.

2 Q. And you retain the authority to discharge and discipline
3 the employees in your office, correct?

4 A. I do.

5 Q. And you retain the authority to set the salaries for the
6 employees in your office, correct?

7 A. I do.

8 Q. That's not a fiscal court function?

9 A. The fiscal court has authority over my maximum allowable
10 salaries and benefits that I pay my deputies as a total, but
11 they do not have control over what each individual one makes.

12 Q. So they have approval over the total budget, and you
13 decide how to apportion it among your staff?

14 A. Yes.

15 Q. You mentioned that as county clerk, you viewed your job
16 as one where you're -- I think I wrote this down -- a
17 pass-through collection -- you viewed it as a pass-through
18 clerk's agency is the words I heard you say.

19 A. Yes.

20 Q. And you're a pass-through for the state, correct?

21 A. Yes.

22 Q. Because you remit funds to the Department of
23 Transportation, state Department of Revenue, state Department
24 of Fish and Wildlife, state motor vehicle registration,
25 correct?

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1 A. Yes.

2 Q. All right. And after the *Obergefell* decision came down,
3 it was the state Department of Libraries and Archives that
4 sent you the revised form and other county clerks across the
5 state to use, correct?

6 A. It is.

7 Q. All right. And it was the governor who issued a letter
8 that was introduced by your lawyer, referred to you by your
9 lawyer. It was the governor who issued a letter directing you
10 to comply with that decision and issue these licenses?

11 A. It is.

12 MR. MANDO: Thank you, ma'am. No further questions.

13 THE COURT: Cross-examination.

14 CROSS-EXAMINATION

15 BY MR. CANON:

16 Q. Good morning, Miss Davis.

17 A. Good morning.

18 Q. My name is Dan Canon. I represent the plaintiffs here.
19 The good news is that both Mr. Mando and Mr. Gannam have asked
20 you most of the questions I was planning to ask you anyway. I
21 promise not to be too long with you.

22 You testified you were elected on November the 4th, 2014;
23 is that right?

24 A. Yes.

25 Q. And you took office on January 1?

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1 A. 5th.

2 Q. The 5th of 2015. When did you first register to run for
3 that office?

4 A. I filed an intent in -- it was either the last part of
5 June, the first part of July of 2013.

6 Q. Okay. And Mr. Gannam asked you about the oath that you
7 took at the time that you took office. At the time that you
8 were elected to that office on November the 4th, were you
9 aware of a district court opinion by Judge Heyburn that struck
10 down the constitutionality of the portion of the Kentucky
11 Constitution that you testified about before?

12 A. Yes.

13 Q. Okay. And Mr. Gannam asked you whether or not you made a
14 decision not to follow the Constitution of Kentucky, and you
15 said no.

16 Did you make a conscious decision not to follow the
17 Constitution of the United States?

18 MR. GANNAM: Objection, Your Honor. Asked and
19 answered.

20 MR. CANON: I don't think it's been asked.

21 THE COURT: Overruled.

22 THE WITNESS: Say again, please.

23 BY MR. CANON:

24 Q. Did you make a conscious decision not to follow the
25 Constitution of the United States?

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1 A. No.

2 Q. Okay. And so did you believe that you were following the
3 Constitution of the United States on June 26, when you stopped
4 issuing marriage licenses?

5 A. We issued a license on June 26. It was June 27.

6 Q. June 27, then. Sorry.

7 A. I still feel I'm following the Constitution, knowing my
8 First Amendment rights are constitutional.

9 Q. Okay. So let's back up. You've got the ability to make
10 the rules for the Rowan County Clerk's Office, right?

11 A. For my office.

12 Q. You set policies, practices, all that good stuff for
13 Rowan County, right?

14 A. Yes.

15 Q. So even if you've got a deputy clerk that's willing to
16 issue licenses, issue marriage licenses, you can tell them no,
17 right?

18 A. As long as my name is issued -- is on that license, I'm
19 not going to ask them to do something I wouldn't do myself.

20 Q. You believe you've got the discretion to tell them not to
21 issue those licenses even if they're willing to do it; is that
22 right?

23 A. Yes.

24 Q. Okay. And that's, in fact, what you've done here, isn't
25 it?

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1 A. (No response.)

2 Q. Yes?

3 A. Yes.

4 Q. Okay. And in what way did you first institute that
5 policy? Did you sit down with your deputy clerks and have a
6 talk with them, or did you distribute a memo, or how did that
7 happen?

8 A. After the doors closed, we had a meeting.

9 Q. Tell me about that meeting.

10 A. Just simply stated that my religious beliefs can't
11 condone issuing and being a party to the issuance of a
12 same-sex marriage license. And I told them that we weren't
13 going to be issuing license, period, so we didn't discriminate
14 against any party.

15 Q. Okay. And was there any reason, other than your personal
16 religious beliefs, for refusing to issue those licenses?

17 A. No.

18 Q. And do you believe that county clerks have the discretion
19 to refuse to issue marriage licenses in general if they
20 believe that doing so runs contrary to their religious
21 beliefs?

22 A. Yes.

23 Q. Mr. Gannam asked you about, if you'll look at Defense
24 Exhibit 2, you'll recall that Mr. Gannam asked you about a
25 litmus test that you may or may not go through. Said you

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1 didn't go through whether you asked applicants for marriage
2 licenses whether they had engaged in any kind of sinful
3 behavior. Do you remember that line of questioning?

4 A. I do.

5 Q. You do ask applicants whether or not they've been
6 divorced, don't you?

7 A. I do.

8 Q. Okay. And do you have any religious objection to
9 somebody getting remarried once they've been divorced?

10 A. That's between them and God.

11 Q. Okay. But you don't have -- you don't personally have a
12 religious objection to issuing a license to somebody who's
13 been divorced?

14 A. No.

15 Q. And if a clerk has that religious objection, can they
16 then refuse to issue a license on that basis? Any clerk.

17 A. I don't know. I can't speak for them.

18 Q. Well, I'm asking about your conception of the discretion
19 that you have as a county clerk to deny the issuance of
20 marriage licenses. Do you understand?

21 A. My denial of a marriage license is the basis of what
22 marriage is defined.

23 Q. I understand. And the definition of marriage is based
24 upon your religious beliefs, right?

25 A. The word of God, yes.

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1 Q. So if a clerk has a religious belief that someone who is
2 divorced should not be able to get remarried, can that clerk
3 then refuse to issue a license on that basis?

4 A. I can't speak for them.

5 Q. Okay. What if a clerk has a religious objection to an
6 interracial marriage. Can they then refuse to issue a license
7 to an interracial couple?

8 A. I can't speak for them.

9 Q. So would you acknowledge --

10 A. If you would like me to answer that, I can answer it.

11 Q. Would you acknowledge -- do you have a religious
12 objection to an interracial marriage?

13 A. No.

14 Q. Are you aware if any clerks do?

15 A. Not that I'm aware of.

16 Q. But if a clerk did have that religious objection, they'd
17 be able to not issue a marriage license?

18 A. I don't know. I can't speak for them.

19 Q. I just want to understand what your concept of your
20 discretion as a county clerk is. How far does that go?

21 MR. GANNAM: Objection, Your Honor. Calls for a
22 legal conclusion.

23 THE COURT: That's really not a question, how far
24 does it go. Why don't you ask a more specific question.

25 MR. CANON: Sure.

DAVIS - Direct

65

1 BY MR. CANON:

2 Q. If I've got a personal belief -- if I'm a county clerk,
3 I've got a personal belief that interracial marriage is
4 unBiblical and I don't want to authorize it, can I refuse to
5 authorize it?

6 A. I don't know. That would be up to you.

7 Q. Okay. You understand if somebody doesn't have a marriage
8 license, they can't have their marriage recognized by the
9 state, correct?

10 A. Yes.

11 Q. And you --

12 THE COURT: Why don't you ask one question at a time.

13 MR. CANON: I'm sorry?

14 THE COURT: You were starting to ask a compound
15 question.

16 MR. CANON: I didn't intend to.

17 THE COURT: You understand if someone doesn't have a
18 marriage license, they can't have their marriage recognized by
19 the state, correct?

20 Did you say yes?

21 THE WITNESS: I did.

22 THE COURT: I'm sorry. Go ahead.

23 BY MR. CANON:

24 Q. Have you been in the clerk's office every work day since
25 June 27?

DAVIS - Direct

66

1 A. Last Monday, I was out for court.

2 Q. When we were in court in Ashland?

3 A. I was there.

4 Q. Okay.

5 A. Not there --

6 Q. You were in the courthouse?

7 A. No, I wasn't at the courthouse. I was in Ashland. And
8 Wednesday, I had a clerk's meeting in Lexington, and then I'm
9 not there today.

10 Q. Okay. But generally speaking, you've been available; is
11 that right?

12 A. Yes.

13 Q. And you heard Mr. Blevins testify that you haven't been
14 unavailable at any point in time, as far as he's concerned, to
15 issue those licenses. Do you disagree with anything he said?

16 A. No. I'm always there at my office.

17 Q. Have you been personally present when any couples came to
18 apply for a license?

19 A. I have.

20 Q. And what did you tell them?

21 A. I didn't speak to any of the parties involved, I think,
22 except maybe Miss Miller, the couple that you sat back behind
23 the bench. I don't know who they were.

24 Q. That's okay. Any couples. Do you recall --

25 A. There was one in this case.

DAVIS - Direct

67

1 Q. And you recall personally turning them away?

2 A. I do.

3 Q. Okay. And what did you tell them?

4 A. I just told them that at the present time, we weren't
5 issuing marriage licenses. Didn't feel that I could put my
6 name to a marriage license that was issued to a same-sex
7 couple, and I didn't want to discriminate.

8 And I asked -- I told them that if what they were trying
9 to accomplish was to receive a marriage license, that they
10 could go to any of the surrounding counties and that they
11 could get a marriage license. They could actually come back
12 and get married in Rowan County if they wanted to, but that we
13 weren't issuing them, and I apologized for their
14 inconvenience.

15 Q. Now, how long is your term?

16 A. Four years.

17 Q. And assuming that you're not reelected for a second term,
18 do you intend not to issue marriage licenses during that
19 entire four-year duration?

20 A. Yes.

21 Q. And you had testified before that you think that that's
22 not a violation of the United States Constitution. You
23 understand that you swore an oath to uphold the United States
24 Constitution, right?

25 A. I did.

DAVIS - Direct

68

1 Q. How do you determine what the Constitution of the United
2 States means?

3 A. Well, I'm not a lawyer.

4 Q. Right.

5 A. But I do know that the First Amendment right gives me the
6 right to my religious freedom.

7 Q. Very good. And your religious freedom, in your
8 conception, trumps the right -- you understand that the
9 couples in this case have a right to get a marriage license,
10 correct?

11 MR. GANNAM: Objection, Your Honor. Calls for a
12 legal conclusion.

13 THE COURT: Overruled.

14 BY MR. CANON:

15 Q. Is that your understanding of the law?

16 A. My understanding is that the U.S. Supreme Court redefined
17 marriage.

18 Q. And you don't want to abide by that definition, correct?

19 A. It's not the definition that I believe in.

20 Q. But you understand when the Supreme Court says that,
21 that's an issue of constitutional interpretation. That's the
22 law of the land. You do understand that?

23 A. I suppose.

24 Q. Okay. And you also understand that a marriage license
25 isn't quite the same thing as a hunting or a fishing license,

DAVIS - Direct

69

1 don't you?

2 A. They're still a license.

3 Q. Well, is there any --

4 A. It's still giving authority to do something.

5 Q. Is there any difference in the rank of importance to you
6 between hunting and fishing and marriage?

7 A. They're a license.

8 Q. So they're all the same? Hunting, fishing, getting
9 married, all the same thing?

10 A. I think marriage is a sacred union.

11 Q. I agree. Aside from traveling to another county and
12 going to the judge executive's office, which we've already
13 talked about, are there any alternatives available for anybody
14 in Rowan County that wants to actually have their marriage
15 licensed in Rowan County right now?

16 A. Not unless the legislation can enact something.

17 Q. So that's a no?

18 A. Not unless the legislation can enact something.

19 Q. And they haven't enacted anything, right?

20 A. Uh-uh.

21 Q. And if Judge Bunning orders you to start issuing marriage
22 licenses as a result of the proceedings we've had here today,
23 are you going to do it?

24 A. I can't tell you.

25 Q. You can't tell me?

DAVIS - Direct

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1 A. Because you're asking me to speculate on something that
2 hasn't happened.

3 Q. You understand that it's a possibility that he could
4 order you to do that, right?

5 A. He could.

6 Q. Have you thought about what that possibility might look
7 like for you?

8 A. I have.

9 Q. Okay. And have you made a decision as to what you're
10 going to do if you are ordered to start issuing licenses?

11 A. I'll deal with that when the time comes.

12 Q. And you testified a little bit about the seven counties
13 that surround Rowan County. Now, you understand that once
14 somebody has their marriage license, they've got to also
15 travel back and have that marriage license filed?

16 A. They can mail it.

17 Q. Okay, very good. Now, you're not -- you testified about
18 this a little bit before. You're not denying licenses to
19 opposite-sex couples based on your religious beliefs, right?

20 A. No. I just didn't want to discriminate.

21 MR. CANON: Nothing further, Your Honor.

22 THE COURT: Any redirect? Because I have a few
23 questions myself.

24 MR. DONAHUE: Your Honor, may I be excused?

25 THE COURT: Yes. We were told you would have to be

DAVIS - Redirect

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1 in Louisville this afternoon. You may be excused, sir.

2 MR. DONAHUE: Thank you.

3 (Mr. Donahue exited the courtroom.)

4 THE COURT: Mr. Gannam.

5 REDIRECT EXAMINATION

6 BY MR. GANNAM:

7 Q. I want to clarify, the oath of office that you took, you
8 said that you pledged to uphold the United States
9 Constitution; is that correct?

10 A. I did.

11 Q. Did you pledge to abide by the United States Supreme
12 Court's decisions?

13 A. No.

14 Q. So that wasn't a specific part of your oath?

15 A. No.

16 Q. Mr. Canon referenced a federal district court decision
17 invalidating Kentucky's marriage laws at the end of last year.
18 Are you familiar with that?

19 A. Yes.

20 Q. Were you also aware that a federal appellate court, the
21 Sixth Circuit Court of Appeals, reversed that decision?

22 A. I am.

23 Q. At the time you took office in January of 2015 and swore
24 your oath, was same-sex marriage permitted in the Commonwealth
25 of Kentucky?

DAVIS - Recross

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1 A. No.

2 MR. GANNAM: No further question, Your Honor.

3 THE COURT: Anything else, Mr. Mando?

4 MR. MANDO: No, sir.

5 RE-CROSS-EXAMINATION

6 BY MR. CANON:

7 Q. Ma'am, do you get to interpret what the Constitution
8 means?

9 A. No.

10 Q. Who has the final say on what the United States
11 Constitution means?

12 MR. GANNAM: Objection, Your Honor. Calls for a
13 legal conclusion.

14 THE COURT: I can answer that. It's not me.

15 BY MR. CANON:

16 Q. I'll ask it a different way. Who do you understand has
17 the final say as to what the United States Constitution says?

18 A. (No response.)

19 Q. Do you know?

20 A. I don't know.

21 Q. And the Sixth Circuit opinion that Mr. Gannam referenced,
22 do you know what day that came down?

23 A. No.

24 Q. If I told you November the 6th, would you have any reason
25 to dispute that?

DAVIS - Recross

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1 A. I assume you wouldn't lie to me.

2 Q. I would not, ma'am.

3 THE COURT: I can take judicial notice of that.

4 MR. CANON: Very good.

5 BY MR. CANON:

6 Q. And the prior opinion that you and I discussed, the
7 opinion striking down the portion of the Kentucky Constitution
8 that prohibits same-sex marriage, you knew about that the
9 entire time you were on the campaign trail, didn't you?

10 A. It was there.

11 MR. CANON: Nothing further.

12 THE COURT: All right. Can I have Exhibit 3? Now, I
13 asked you earlier, ma'am, about the marriage license. Now I'm
14 looking at the one that was prepared by the state Department
15 of Library and Archives. You should have Defendant's
16 Exhibit 3 there.

17 THE WITNESS: I do.

18 THE COURT: I asked you earlier about this KRS
19 section referenced in the top, 402.050. And this includes, in
20 the definitional section -- it's not on the form, but it
21 includes ministers of the gospel and priests, justices and
22 judges of the court, county judge executives, justices of the
23 peace, and fiscal court commissioners authorized by the
24 governor or county judge and any religious society with no
25 minister.

DAVIS - Recross

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1 Those are the -- where it says to any person qualified to
2 perform marriages, that list I just gave you, that's the list.

3 THE WITNESS: Right.

4 THE COURT: County clerks aren't on that list. So if
5 Jane Doe and Richard Roe came in and said will you marry us,
6 like formally, you take this person, you take this person, et
7 cetera, you don't do that?

8 THE WITNESS: No.

9 THE COURT: Okay. So where it says you are
10 authorized to join together in the state of matrimony
11 according to the laws of the Commonwealth of Kentucky, you're
12 not authorized to join together in the state of matrimony
13 because you're not included in that definition?

14 THE WITNESS: But I'm authorizing the license of --

15 THE COURT: I understand that, but he read this.
16 "You are hereby authorized to join together." You're not
17 authorized to join them together?

18 THE WITNESS: No.

19 THE COURT: As an official of the marriage?

20 THE WITNESS: That's correct.

21 THE COURT: Now, when two individuals come in to seek
22 to get the license, the top part, above where it says "we
23 hereby certify," is that already filled out?

24 THE WITNESS: No.

25 THE COURT: So the deputy or the clerk would help

1 them fill that out?

2 THE WITNESS: Yeah. We ask the information, type it
3 in.

4 THE COURT: So they come in across the counter and
5 they ask -- it's actually typed into some sort of template
6 form, then printed out?

7 THE WITNESS: Um-hmm.

8 THE COURT: At the bottom of Exhibit 2, where it says
9 issued June 16, 2015, the office of Kim Davis, Rowan County,
10 Morehead, and then Brian makes -- you referenced him. These
11 initials, these are Brian Mason's initials?

12 THE WITNESS: They are.

13 THE COURT: So the individual filling this out, that
14 typewritten portion would be based on whoever's typing the
15 information into the computer; is that fair?

16 THE WITNESS: Yeah. His name, he types his name in,
17 but my name is already populated in there.

18 THE COURT: Yours is just part of the form?

19 THE WITNESS: Yes.

20 THE COURT: Now, at the bottom of the marriage
21 certificate itself, this is handwritten, said recorded this
22 July 2, 2015, and the office in Kim Davis, Rowan County Clerk,
23 says Roberta H. -- is it --

24 THE WITNESS: Earley.

25 THE COURT: Earley, deputy clerk. Is that actually

1 handwritten in by the deputy clerk?

2 THE WITNESS: It is.

3 THE COURT: In this case, why would Brian Mason be
4 different than Roberta Earley?

5 THE WITNESS: Because you're catching the license at
6 two different times. Brian Mason issued the license. Then
7 the center section where it says Marriage Certificate is
8 filled out by the person performing the ceremony. Then once
9 it's performed and completed, then the license is turned back
10 into the clerk's office, and then that's the recording of the
11 bottom part down here. That is the actual recording of the
12 document into our permanent records and indexing system.

13 THE COURT: And who fills that out, the bottom
14 portion?

15 THE WITNESS: The very bottom would be my clerk, my
16 deputy.

17 THE COURT: The clerk would fill that out, all right.

18 Let me check my notes here. That's all the questions I
19 have. Any further questions of the witness?

20 MR. SHARP: No, Your Honor.

21 MR. GANNAM: Your Honor, just briefly on the form.

22 FURTHER REDIRECT EXAMINATION

23 BY MR. GANNAM:

24 Q. Miss Davis, going back to Defendant's Exhibit 3, the
25 marriage license, the new marriage license, where it reads to

1 any person or religious society qualified to perform
2 marriages, it says who it's to. What is your understanding of
3 who it's from?

4 A. It's from me.

5 Q. When it says "you are hereby authorized," who is the
6 "you" referring to?

7 A. "You" is talking about the people performing the
8 ceremony.

9 Q. And who is telling them that they are authorized?

10 A. Me, the clerk.

11 Q. So who is it that is authorizing them to do it?

12 A. It would be me, the clerk.

13 MR. GANNAM: No further questions, Your Honor.

14 THE COURT: And you believe that, even though the
15 statute doesn't include you? The statute I read to you
16 doesn't include the deputy clerk.

17 THE WITNESS: Right. But if you read after the
18 semicolon, it says you. The people you talked about in the
19 KRS that you read, it says you are authorized to join together
20 in the state of matrimony according to the laws of Kentucky.
21 I'm the one that's authorizing that marriage license. I'm the
22 one giving the authority because they can't get a marriage
23 license online, or they can't, you know -- it's actually the
24 clerk that's authorizing -- I'm saying that these people meet
25 the qualifications, and that they're not related, that

1 they're -- that they meet the age requirements and everything.
2 That's the authority that I'm given through the statutes to
3 issue the marriage license and that's what --

4 THE COURT: The statute you referenced earlier before
5 we got started, Mr. Mando, those are the statutes she's
6 referring to?

7 MR. MANDO: The statute I was referring to, Your
8 Honor, was 402.080, talks about issuing -- the license shall
9 be issued by the clerk.

10 THE COURT: The license itself.

11 MR. MANDO: The license is issued by the clerk. The
12 ceremony is performed by one of those in the statute.

13 THE COURT: The individuals authorized to perform the
14 ceremonies are the 402.050?

15 MR. MANDO: Correct.

16 THE WITNESS: Um-hmm.

17 MR. CHRISTMAN: Your Honor, if I can interject as
18 well, Section 402.100 is actually the section that walks the
19 clerk through what the clerk needs to do in order to issue a
20 license, and it's the form that says each -- I'm reading
21 directly out of the statute.

22 Each county clerk shall use the form prescribed by the
23 Department For Libraries and Archives when issuing a marriage
24 license. This form shall provide for the entering of all the
25 information required in this section and may also provide for

1 the entering of additional information prescribed by the
2 Department For Libraries and Archives.

3 The form shall consist of, and then it identifies what
4 has to be on the license. A marriage license which provides
5 for the entering of an authorization statement of the county
6 clerk issuing the license.

7 THE COURT: So you are authorizing the -- you are, in
8 essence, telling the state that the information provided on
9 this is accurate?

10 THE WITNESS: Um-hmm.

11 THE COURT: Is that what you're doing?

12 THE WITNESS: The information that's given, they
13 presented their information, and we applied it to the
14 prescribed document. And if they meet those statutory
15 requirements, then we're authorizing someone who is eligible,
16 like what you had stated earlier, to perform a ceremony, to
17 take this license that we've issued and actually marry
18 someone.

19 THE COURT: So once the couple, if you will, leaves
20 the courthouse with this, takes it, gets married, brings it
21 back or mails it back --

22 THE WITNESS: Or mails it back, yes.

23 THE COURT: So you're, in essence, signing off on the
24 accuracy of the information provided? Is that kind of what
25 this is?

1 THE WITNESS: Well, we are verifying the information,
2 yes, as true and correct. And by our signature and the
3 issuance of it, we're saying that they're authorized to take
4 this and go to someone who is legally able to perform a
5 marriage, and they can present this form to them and that they
6 can have their ceremony performed and then bring it back in to
7 us for recording.

8 THE COURT: All right.

9 MR. CHRISTMAN: Your Honor, if I could continue with
10 the statute. Further down, with the marriage certificate
11 portion of the statute, it then says that the name it refers
12 to -- all the information that needs to be listed again, and
13 it refers to authority, and says the name of the county clerk
14 under whose authority the license was issued. That's why her
15 name is required on every license in those two places.

16 THE COURT: All right. You just object to your name
17 being on the license?

18 THE WITNESS: My name and my county, yeah.

19 THE COURT: Well, your county, you're elected by the
20 county. But if it said Rowan County and listed a deputy
21 clerk -- let's say the deputy clerk that would be permitted
22 to, or has agreed that he or she would not be religiously
23 opposed to issuing the license, if it just was the deputy
24 clerk's name with Rowan County and not your name, would you
25 object to that?

1 THE WITNESS: It is still my authority as county
2 clerk that issues it through my deputy.

3 THE COURT: All right. Very well.

4 You may step down. Thank you.

5 Any further proof?

6 MR. GANNAM: No, Your Honor.

7 THE COURT: All right. Mr. Mando, any proof from the
8 county's perspective?

9 MR. MANDO: No, sir.

10 THE COURT: All right. Any rebuttal?

11 MR. SHARP: No rebuttal evidence, Your Honor.

12 THE COURT: We have a response which is due on the
13 30th, and then the reply is due seven days after that.

14 MR. SHARP: That's correct.

15 THE COURT: Well, I think the earliest I would have a
16 decision -- I start a trial in Ashland on the 11th -- probably
17 the week of the 11th at some point. The response is due on
18 Thursday, the 7th, so I'll get a decision out as quickly as I
19 can on the motion.

20 We'll be in recess.

21 (Proceedings concluded at 11:43 a.m.)

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C E R T I F I C A T E

I, LISA REED WIESMAN RDR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case.

\s\ Lisa Reed Wiesman
LISA REED WIESMAN, RDR-CRR
Official Court Reporter

July 23, 2015
Date of Certification

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DEFENSE EXHIBITS

Exhibit No. 1, Letter to Senator Robertson

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EXHIBIT F

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION**

APRIL MILLER, ET AL.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	0:15-CV-00044-DLB
	:	
KIM DAVIS, ET AL.,	:	DISTRICT JUDGE
	:	DAVID L. BUNNING
Defendants.	:	

KIM DAVIS,	:	
	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
STEVEN L. BESHEAR, in his official capacity as Governor of Kentucky, and WAYNE ONKST, in his official capacity as State Librarian and Commissioner, Kentucky Department for Libraries and Archives,	:	
	:	
Third-Party Defendants.	:	

VERIFIED THIRD-PARTY COMPLAINT OF DEFENDANT KIM DAVIS

Defendant and Third-Party Plaintiff, KIM DAVIS (“Davis”), for her third-party complaint pursuant to Rule 14, Fed. R. Civ. P., sues Third-Party Defendant STEVEN L. BESHEAR, in his official capacity as Governor of Kentucky (“Governor Beshear”), and Third-Party Defendant WAYNE ONKST, in his official capacity as State Librarian and Commissioner, Kentucky Department for Libraries and Archives (“Commissioner Onkst”), and alleges:

INTRODUCTION

1. The Commonwealth of Kentucky, acting through Governor Beshear, has deprived Davis of her religious conscience rights guaranteed by the United States and Kentucky Constitutions and laws, by insisting that Davis issue marriage licenses to same-sex couples contrary to her conscience, based on her sincerely held religious beliefs. Because of Governor Beshear's open declaration that Davis has no such rights, Governor Beshear has exposed Davis to the Plaintiffs' underlying lawsuit, in which the Plaintiffs claim a constitutional right to a Kentucky marriage license issued specifically by Davis. Governor Beshear is not only liable to Davis for Plaintiffs' claims, but is also obligated to effect Kentucky marriage licensing policies that uphold Davis's rights of religious conscience.

JURISDICTION AND VENUE

2. This action arises under Article VI and the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, Sections 1, 3, 5, and 8 of the Constitution of Kentucky, and the Kentucky Religious Freedom Restoration Act, Ky. Rev. Stat. §§ 446.350 (the Kentucky "RFRA").

3. This Court has subject matter jurisdiction over Davis's federal law claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has subject matter jurisdiction over Davis's state law claims pursuant 28 U.S.C. § 1367.

4. This Court has jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

PARTIES

5. Davis is the County Clerk for Rowan County, Kentucky. She was elected to the office of County Clerk in November 2014, and officially took office January 1, 2015, for a four-

year term. Prior to taking office, Davis was a deputy clerk for her predecessor in office for nearly thirty years.

6. Governor Beshear is the Governor of the Commonwealth of Kentucky. As the highest executive officer of the Commonwealth, Governor Beshear has responsibility for effecting Kentucky marriage law, and has final policymaking authority over the enforcement of Kentucky marriage laws.

7. Commissioner Onkst is the State Librarian and Commissioner of the Kentucky Department for Libraries and Archives. The Kentucky Department for Libraries and Archives (“KDLA”) is an executive branch department of Kentucky government “headed by a commissioner whose title shall be state librarian who shall be appointed by and serve at the pleasure of the Governor.” Ky. Rev. Stat. § 171.130. Commissioner Onkst has responsibility for the design and provision of the official Kentucky marriage license form to be used by all county clerks in the issuance of marriage licenses, and has final policymaking authority over the design of the official Kentucky marriage license form to be used by all county clerks in the issuance of marriage licenses.

GENERAL ALLEGATIONS

Administration of Kentucky Marriage Policy before *Obergefell*

8. The Commonwealth of Kentucky has a body of democratically-enacted law memorializing the millennia-old, natural definition of marriage as the union of one man and one woman. In 1998, the Kentucky legislature codified at Ky. Rev. Stat. § 402.005 the natural definition of marriage, previously entrenched in Kentucky common law, that “‘marriage’ refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon

those whose association is founded on the distinction of sex.” In 2004, the Kentucky legislature proposed a constitutional amendment, which was subsequently enacted on the approval of seventy-four percent (74%) of the voters, memorializing that “[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky” KY. CONST. § 233A.

9. The Commonwealth also has a body of legislation governing the issuance of marriage licenses in Kentucky. Under these Kentucky marriage laws, individuals may obtain a Kentucky marriage license in any of Kentucky’s 120 counties, Ky. Rev. Stat. § 402.080, some of which have multiple branch offices. Thus, in total, there are approximately 137 marriage licensing locations in Kentucky.

10. Pursuant to Kentucky’s marriage licensing scheme, “[e]ach county clerk shall use the form proscribed by the Department for Libraries and Archives when issuing a marriage license” which “shall be uniform throughout this state, and every license blank shall contain the identical words and figures provided in the form.” Ky. Rev. Stat. §§ 402.100, 402.110. County clerks have no local discretion under Kentucky law to alter the composition or requirements of the KDLA-prescribed form.

11. The KDLA form must include both a “marriage license” and a “marriage certificate.” Ky. Rev. Stat. § 402.100. The marriage license section must include an “authorization statement of the county clerk issuing the license” and “[t]he date and place the license is issued, and the signature of the county clerk or deputy clerk issuing the license.” Ky. Rev. Stat. § 402.100(1). The marriage certificate section must include “the name of the county clerk under whose authority the license was issued, and the county in which the license was issued” and “[a] signed statement by the county clerk or a deputy county clerk of the county in

which the marriage license was issued that the marriage license was recorded.” Ky. Rev. Stat. § 402.100(2), (3). The KDLA-prescribed form specifically uses the word “marriage” at six different places on the form (and one reference to “join[ing] together in the state of matrimony”). (A true and correct copy of a completed, KDLA-prescribed form of marriage license used in Rowan County prior to June 30, 2015, with personal information redacted, is attached hereto as Exhibit A.¹)

12. Thus, every marriage license must be issued and signed in the county clerk’s name and by the county clerk’s authority. In other words, no marriage license can be issued by a county clerk without her authorization and without her imprimatur.

13. As an alternative to a marriage license issued by a county clerk, Kentucky marriage law provides for the issuance of a marriage license by a county judge/executive, the highest elected officer in a county, upon the absence of the clerk or vacancy in the clerk’s office. *See* Ky. Rev. Stat. § 402.240. This alternative procedure does not require the use of the KDLA marriage license form; rather, it authorizes the county judge/executive to issue a marriage license by “a memorandum thereof,” which is recorded by the clerk in the same manner as a KDLA form. *See id.*

14. In February 2014, the Western District of Kentucky issued a decision holding Kentucky’s definition of marriage unconstitutional.² In March 2014, Kentucky Attorney General Jack Conway, whose office had represented Kentucky in the case, tearfully proclaimed that after

¹ The document attached as Exhibit A was admitted into evidence at the hearing on Plaintiffs’ Motion for Preliminary Injunction (Doc. 2) as Defendant’s Exhibit 2 (“Old version of marriage license from KDLA”). (Ex. and Witness List (Doc. 25).)

² *See Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014) (decided February 12, 2014).

prayer and consultation with his wife he could not continue defending Kentucky’s marriage laws as an “inescapable” matter of conscience.³ Conway said,

There are those who believe it’s my mandatory duty, regardless of my personal opinion, to continue to defend this case through the appellate process, and I have heard from many of them. However, I came to the inescapable conclusion that, if I did so, I would be defending discrimination. . . .

That I will not do. . . .

. . . .

. . . . **I can only say that I am doing what I think is right. In the final analysis, I had to make a decision that I could be proud of** – for me now, and my daughters’ judgment in the future.⁴

15. Within minutes of Conway’s announcement, Governor Beshear announced the Commonwealth would hire private attorneys to pursue the appeal of the Western District’s ruling, and to represent Kentucky in a companion Western District case.⁵ Governor Beshear directed no adverse statements or actions towards Conway as a result of Conway’s refusal to perform official duties due to his conscience, though Conway’s refusal caused additional cost to the Commonwealth upwards of \$200,000.00 for outside counsel.⁶

³ Beshear to hire \$125-an-hour lawyer for gay marriage appeal after Conway bows out, Wave3 News, *available at* <http://www.wave3.com/story/24886884/beshear-to-hire-125-an-hour-lawyer-for-gay-marriage-appeal-after-conway-bows-out> (last accessed July 30, 2015) (quoting Plaintiffs’ Counsel, Dan Canon, that Conway’s conscientious objection to performing his duty to defend Kentucky’s marriage laws gave him “hope.”).

⁴ Read and watch Jack Conway’s statement on same-sex marriage, WKYT.com, dated Mar. 4, 2014, *available at* <http://www.wkyt.com/home/headlines/Read--watch-Attorney-General-Conways-same-sex-statement-248381361.html> (last accessed July 30, 2015) (emphasis added).

⁵ *See supra*, n. 3. The Western District ruled against Kentucky in the second case, *see Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014). The Sixth Circuit reversed both district court decisions in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), which was ultimately reversed by the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁶ Ky. Pays \$195K+ to defend gay-marriage ban, The Courier-Journal, dated May 20, 2015, *available at* <http://www.courier-journal.com/story/news/local/2015/05/20/cost-gay-marriage-defense/27404461/> (last accessed July 30, 2015) (stating that Kentucky paid \$195,400 to a

Davis's Sincerely Held Religious Beliefs About Marriage

16. Davis is a professing Christian who is heavily involved in her local church, attending weekly Bible study and worship services there, and who leads a weekly Bible study for women at a local jail.

17. As a Christian, Davis possesses a sincerely held religious belief and conviction, based upon the Bible which she believes to be the Word of God, that “marriage” is exclusively a union between one man and one woman. According to her beliefs, there is no arrangement of people other than one man and one woman that is, or can be called, “marriage.”

18. As county clerk, as a matter of Kentucky law, Davis authorizes, and signifies her authorization and approval by affixing her name to, each and every marriage license issued from her office. But Davis can neither authorize nor approve the “marriage” of a same-sex couple according to her conscience, because even calling the relationship of a same-sex couple “marriage” would violate her deeply and sincerely held religious beliefs. Nor can Davis allow her name to appear as the source of authority and approval for any marriage license issued to a same-sex couple because providing such approval would violate her sincere religious beliefs and convictions.

19. Before taking office as County Clerk in January 2015, Davis swore an oath to support the constitutions and laws of the United States and the Commonwealth of Kentucky “so help me God.” Davis understood (and understands) this oath to mean that, in upholding the federal and state constitutions and laws, she would not act in contradiction to the moral law of God, natural law, or her sincerely held religious beliefs and convictions. Davis also understood (and understands) the constitution and laws she swore to uphold to incorporate the constitutional

private firm through March 31, 2015 to defend Kentucky’s marriage law after Conway refused to do so).

and other legal protections of all individuals' rights to live and work according to their consciences, as informed by their sincerely held religious beliefs and convictions, including without limitation such rights she holds in her own individual capacity.

20. Davis's sincerely held religious belief regarding the definition of "marriage" was perfectly aligned with the prevailing marriage policy in Kentucky at the time she took office, as provided in the Kentucky Constitution, Kentucky statutes, and controlling court decisions, and as effected by the Commonwealth through Governor Beshear and Commissioner Onkst.

21. On January 16, 2015, just two weeks after Davis took office, the United States Supreme Court announced it would review the then-controlling Sixth Circuit decision upholding Kentucky's natural definition of marriage.

22. On January 23, Davis wrote Kentucky legislators exhorting them to "get a bill on the floor to help protect clerks" who had a religious objection to issuing marriage licenses to same-sex couples. (A true and correct copy of the form of letter sent to legislators is attached hereto as Exhibit B.⁷)

23. Davis does not have a religious objection to issuing, signing, or otherwise approving a marriage license for any man and woman who otherwise satisfy all of the legal requirements for marriage under Kentucky law, regardless of the identities, orientations, or practices of the applicants, including sexual identities, orientations, and practices. Furthermore, Davis's religious beliefs do not compel her to inquire of such applicants as to any aspects of their identities, orientations, or practices beyond the information required to complete the prescribed marriage license form.

⁷ The document attached as Exhibit B was admitted into evidence at the hearing on Plaintiffs' Motion for Preliminary Injunction (Doc. 2) as Defendant's Exhibit 1 ("Letter to Senator Robertson from Kim Davis"). (Ex. and Witness List (Doc. 25).)

Administration of Kentucky Marriage Policy after *Obergefell*

24. On June 26, 2015, a five-to-four majority of the United States Supreme Court held that democratically-approved laws from Kentucky and three other states, defining marriage as the union of one man and one woman, were “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” *Obergefell v. Hodges*, 135 S.Ct. 2584, 2605 (2015). According to the majority, the United States Constitution “does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.” *Id.* at 2607.

25. The same day, Governor Beshear sent a letter to all “Kentucky County Clerks,” including Davis, informing them that “[e]ffective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky.” The letter stated that “Kentucky . . . must license and recognize the marriages of same-sex couples,” and further instructed that “[n]ow that same-sex couples are entitled to the issuance of a marriage license, the Department of Libraries and Archives will be sending a gender-neutral form to you today, along with instructions for its use.” (A true and correct copy of Governor Beshear’s letter to county clerks is attached hereto as Exhibit C.⁸)

26. On Governor Beshear’s instructions, the KDLA provided county clerks with a new marriage license form, reflecting changes from the prior approved form to accommodate same-sex couples.⁹ Critically, however, the new form retained all references to “marriage,” and all references to the name, signature, and authorization requirements of the county clerk. (A true

⁸ The document attached as Exhibit C was admitted into evidence at the hearing on Plaintiffs’ Motion for Preliminary Injunction (Doc. 2) as Defendant’s Exhibit 4 (“6/26/15 Letter from Governor”). (Ex. and Witness List (Doc. 25).).

⁹ The post-*Obergefell* marriage form eliminated references to “bride” and “groom” and replaced them with “first party” and “second party.”

and correct copy of the new KDLA marriage license form is attached hereto as Exhibit D.¹⁰) Thus, Davis cannot issue a marriage license to a same-sex couple on the new form without violating her conscience, as informed by her sincerely held religious beliefs.

27. Following Governor Beshear's decree, county clerks across the Commonwealth began issuing same-sex marriage licenses. Governor Beshear reiterated, "government officials in Kentucky . . . must recognize same-sex marriages as valid and allow them to take place,"¹¹ and confirmed that "[s]ame-sex couples are now being married in Kentucky and such marriages from other states are now being recognized under Kentucky law."¹² In these same pronouncements, Governor Beshear stated that the "overwhelming majority of county clerks" are "iss[uing] marriage licenses regardless of gender" and only "two or three" county clerks (of 120) were "refusing" to issue such licenses due to their "personal beliefs" and "personal feelings."

28. In subsequent pronouncements, Governor Beshear has maintained that county clerks must issue marriage licenses, including to same-sex couples, despite any clerk's "own personal beliefs."¹³ According to Governor Beshear, the only options available to county clerks who oppose issuing marriage licenses to same-sex couples, even due to conscience or sincerely held religious beliefs, are to either issue the licenses in violation of conscience, or resign.¹⁴

¹⁰ The document attached as Exhibit D was admitted into evidence at the hearing on Plaintiffs' Motion for Preliminary Injunction (Doc. 2) as Defendant's Exhibit 3 ("New version of marriage license from KDLA after S.Ct. 6/26/15 decision"). (Ex. and Witness List (Doc. 25)).

¹¹ Press Release, Gov. Beshear Statement on Today's Meeting with Casey County Clerk, dated July 9, 2015, *available at* <http://migration.kentucky.gov/Newsroom/governor/20150707statement.htm> (last accessed July 29, 2015).

¹² Press Release, Gov. Beshear: No special session needed, dated July 7, 2015, *available at* <http://migration.kentucky.gov/Newsroom/governor/20150707statement.htm> (last accessed July 29, 2015);

¹³ Gov. Beshear Tells County Clerks to Fulfill Their Duties or Resign, WMKY.com, dated July 21, 2015, *available at* <http://wmky.org/post/gov-beshear-tells-county-clerks-fulfill-their-duties-or-resign> (last accessed July 29, 2015).

¹⁴ *See supra*, n. 13.

29. On June 27, 2015, Davis discontinued issuing marriage licenses in Rowan County. This was not a “spur-of-the-moment decision” reached by Davis. Rather, after exhorting legislators to provide conscience protection for county clerks upon taking office, Davis prayed and fasted during the months leading up to *Obergefell* over how she would respond to such a Supreme Court decision. Though Davis’s religious objection is limited to issuing licenses to same-sex couples, she suspended the issuance of all licenses to ensure that all individuals and couples in Rowan County were treated the same.

30. On July 8, 2015, Davis sent a letter appealing to Governor Beshear to uphold her religious conscience rights, and to call a special session of the Kentucky General Assembly to legislatively address the conflict between her religious beliefs and Kentucky marriage policy as effected by Governor Beshear. (A true and correct copy of the letter is attached hereto as Exhibit E.¹⁵) Davis has received no response to her letter.

31. During Davis’s entire tenure in the Rowan County Clerk’s Office, spanning nearly thirty years, neither Davis, any deputy clerk, nor Davis’s predecessor in office ever asserted a religious objection to performing any other function of the clerk’s office.

32. The County Judge/Executive of Rowan County, Walter Blevins (“Judge Blevins”), would raise no religious objection to issuing marriage licenses to same-sex couples under the authority of Ky. Rev. Stat. § 402.240. However, Judge Blevins has refused to issue a marriage license to any of the Plaintiffs in the underlying action against Davis based on his belief that Davis’s discontinuation of the issuance of all marriage licenses in Rowan County does not

¹⁵ The document attached as Exhibit E was admitted into evidence at the hearing on Plaintiffs’ Motion for Preliminary Injunction (Doc. 2) as Defendant’s Exhibit 5 (“7/8/15 Letter from Kim Davis to Governor”). (Ex. and Witness List (Doc. 25)).

count as the “absence” of Davis for purposes of the issuance of marriage licenses under Ky. Rev. Stat. § 402.40.

**Effect of Governor Beshear’s Administration of Kentucky Marriage Policy
and the Need for Immediate Relief**

33. Governor Beshear took it upon himself after *Obergefell* to set and announce new Kentucky marriage license policies, and command county clerks to abide by such policies.

34. Governor Beshear’s policies and directives are specifically targeting clerks like Davis who possess certain religious beliefs about marriage. This targeting is demonstrated by the exemption Governor Beshear granted to Attorney General Conway when he was unwilling to defend Kentucky’s marriage laws—after “pray[ing] over this decision”—pursuant to Conway’s own personal beliefs and feelings about “doing what I think is right” and “mak[ing] a decision that I could be proud of.” (*See supra*, n.4.)

35. Governor Beshear is unlawfully picking and choosing the conscience-based exemptions to marriage that he deems acceptable. For instance, when Attorney General Conway refused to defend Kentucky’s marriage laws, Beshear did not admonish Conway that “Neither your oath nor the Supreme Court dictates what you must believe. But as elected officials, they do prescribe how we must act,” but Governor Beshear did so direct county clerks like Davis. (Ex. C.) Beshear did not command Conway that “when you accepted this job and took that oath, it puts you on a different level,” and “[y]ou have official duties now that the state law puts on you,” but he did deliver this command to county clerks like Davis. (*See supra*, n.13.) Beshear did not publicly proclaim that Conway was “refusing to perform [his] duties” and failing to “follow[] the law and carry[] out [his] duty,” and should instead “comply with the law regardless of [his] personal beliefs,” but he did make this proclamation (repeatedly) about county clerks like Davis (*See supra*, nn. 11, 12.) Beshear did not instruct Conway that “if you are at that point to where

your personal convictions tell you that you simply cannot fulfill your duties that you were elected to do, than obviously the honorable course to take is to resign and let someone else step in who feels that they can fulfill these duties,” but he did issue this instruction to county clerks like Davis. (*See supra*, n.13.) Beshear did not ominously declare that “[t]he courts will deal appropriately with” Conway, but he did so declare as to the “two or three” county clerks who are not issuing marriage licenses. (*See supra*, n.12.)

36. In no uncertain terms, Governor Beshear’s policies and directives are intended to suppress religion—even worse, a particular religious belief. Thus, although Attorney General Conway was given a pass for his conscience about marriage without any threats of repercussion, clerks like Davis are being repeatedly told by their Governor to abandon their religiously-informed beliefs or resign. In doing so, Governor Beshear is forcing clerks like Davis to choose between following the precepts of her religion and forfeiting her position, on the one hand, and abandoning one of the precepts of her religion in order to keep her position, on the other hand.

37. Citing Governor Beshear’s policies and directives to all county clerks to issue licenses to same-sex couples irrespective of their sincerely held religious beliefs, the Plaintiffs in the underlying action allege that they are entitled to Kentucky marriage licenses issued specifically by Davis, and claim that Davis’s refusal to issue marriage licenses violates their constitutional rights.

38. Governor Beshear’s targeted and discriminatory marriage policy pronouncements constitute government-imposed pressure on Davis to act contrary to her religious beliefs, and expose Davis to potential liability if she refuses to compromise her religious beliefs and violate her conscience.

39. Davis needs immediate relief from Governor Beshear's unlawful policies before this Court can properly adjudicate the Plaintiffs' claims against Davis in the underlying action.

40. At all relevant times, Governor Beshear and Commissioner Onkst acted under color of state law.

41. All conditions precedent to the commencement and maintenance of this action have been satisfied, have occurred, or have been waived.

COUNT I
Third-Party Liability

42. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

43. Plaintiffs' claims against Davis in the underlying action are based on Governor Beshear's unlawful policies and directives to Davis with respect to issuing Kentucky marriage licenses, including without limitation the failure of Governor Beshear to uphold and protect Davis's rights of religious conscience.

44. Governor Beshear is liable to Davis for all of any relief obtained by Plaintiffs against Davis in the underlying action.

45. If the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the religious conscience rights of Davis.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT II
Violation of Kentucky RFRA
Third-Party Liability

46. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

47. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

48. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, create government-imposed coercive pressure on Davis to change or violate her religious beliefs.

49. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, chill Davis's religious exercise.

50. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, expose Davis to liability to Plaintiffs and others.

51. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, impose a substantial burden on Davis's religious exercise.

52. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, further no compelling government interest.

53. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to any compelling government interest.

54. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not the least restrictive means of furthering any interest of Kentucky.

55. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by the Kentucky RFRA.

56. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the Kentucky RFRA.

57. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT III
Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Substantial Burden
Third-Party Liability

58. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

59. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

60. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not neutral.

61. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not generally applicable.

62. Governor Beshear has targeted and singled out Davis for discriminatory treatment under Kentucky's marriage policies, in order to suppress the religious exercise of Davis and others.

63. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, create government-imposed coercive pressure on Davis to change or violate her religious beliefs.

64. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, chill Davis's religious exercise.

65. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, expose Davis to liability to Plaintiffs and others.

66. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, impose a substantial burden on Davis's religious exercise.

67. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, further no compelling government interest.

68. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to any compelling government interest.

69. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not the least restrictive means of furthering any interest of Kentucky.

70. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by the Free Exercise Clause of the First Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

71. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the Free Exercise Clause of

the First Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

72. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT IV
Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Intentional Discrimination
Third-Party Liability

73. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

74. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

75. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, make it impossible for Davis to comply with both her religious beliefs and Kentucky's marriage policies.

76. Governor Beshear has targeted and singled out Davis for discriminatory treatment under Kentucky's marriage policies, in order to suppress the religious exercise of Davis and others.

77. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by the Free Exercise Clause of the

First Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

78. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the Free Exercise Clause of the First Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

79. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT V
Religious Discrimination—
Violation of the First and Fourteenth Amendments to the United States Constitution
Free Exercise and Establishment Clauses; Due Process and Equal Protection
Third-Party Liability

80. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

81. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

82. By design, Governor Beshear allows some religious and conscientious objections to compliance with Kentucky marriage laws but not others, resulting in discrimination among religious objectors.

83. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, vest Governor Beshear with unbridled discretion in deciding whether to allow exemptions from compliance with Kentucky marriage law to some persons.

84. Religious liberty is a fundamental right.

85. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, protect some religious objectors, but not Davis.

86. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

87. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

88. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT VI
Violation of the First Amendment to the United States Constitution
Freedom of Speech
Compelled Speech
Third-Party Liability

89. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

90. Davis believes and professes that issuing marriage licenses to same-sex couples violates her religious beliefs.

91. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, would compel Davis to cooperate in activities, through the issuance of marriage licenses under her name and approval, that are violations of Davis's religious beliefs.

92. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, would compel Davis to state her identification, authorization, and approval as "marriage" of same-sex relationships which cannot be "marriage" according to her religious beliefs.

93. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to a compelling governmental interest.

94. Kentucky's actions, as effected by Governor Beshear and Commissioner Onkst, thus violate Davis's right to be free from compelled speech as secured to her by the First Amendment to the United States Constitution.

95. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the First Amendment to the United States Constitution.

96. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT VII
Violation of Article VI of the United States Constitution
Religious Test
Third-Party Liability

97. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

98. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

99. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, require persons with religious beliefs like those of Davis to renounce such beliefs as a condition to holding the office of county clerk, and thereby impose a religious test as a qualification to hold the office of county clerk.

100. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by Article VI of the United States Constitution and the Fourteenth Amendment to the United States Constitution.

101. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Article VI of the United States Constitution and the Fourteenth Amendment to the United States Constitution.

102. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT VIII
Violation of Sections 1 and 5 of the Kentucky Constitution
Religious Freedom and Rights of Conscience
Third-Party Liability

103. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

104. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

105. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not neutral.

106. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not generally applicable.

107. Governor Beshear has targeted and singled out Davis for discriminatory treatment under Kentucky's marriage policies, in order to suppress the religious exercise of Davis and others.

108. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, create government-imposed coercive pressure on Davis to change or violate her religious beliefs.

109. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, chill Davis's religious exercise.

110. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, expose Davis to liability to Plaintiffs and others.

111. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, impose a substantial burden on Davis's religious exercise.

112. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, further no compelling government interest.

113. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to any compelling government interest.

114. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not the least restrictive means of furthering any interest of Kentucky.

115. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights of religious freedom and conscience secured to her by Sections 1 and 5 of the Kentucky Constitution.

116. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Sections 1 and 5 of the Kentucky Constitution.

117. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT IX
Violation of Sections 1 and 5 of the Kentucky Constitution
Religious Discrimination
Third-Party Liability

118. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

119. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

120. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, make it impossible for Davis to comply with both her religious beliefs and Kentucky's marriage policies.

121. Governor Beshear has targeted and singled out Davis for discriminatory treatment under Kentucky's marriage policies, in order to suppress the religious exercise of Davis and others.

122. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights against religious discrimination secured to her by Sections 1 and 5 of the Kentucky Constitution.

123. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Sections 1 and 5 of the Kentucky Constitution.

124. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT X
Religious Discrimination—
Violation of Sections 1, 3, and 5 of the Kentucky Constitution
Religious Preference; Equality
Third-Party Liability

125. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

126. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

127. By design, Governor Beshear allows some religious and conscientious objections to compliance with Kentucky marriage laws but not others, resulting in discrimination among religious objectors.

128. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, vest Governor Beshear with unbridled discretion in deciding whether to allow exemptions from compliance with Kentucky marriage law to some persons.

129. Religious liberty is a fundamental right.

130. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, protect some religious objectors, but not Davis.

131. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights to equality and against religious discrimination and religious preferences secured to her by Sections 1, 3, and 5 of the Kentucky Constitution.

132. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to

Plaintiffs which does not violate the rights of Davis secured to her by Sections 1, 3, and 5 of the Kentucky Constitution.

133. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief

COUNT XI
Violation of the Sections 1 and 8 of the Kentucky Constitution
Freedom of Speech
Compelled Speech
Third-Party Liability

134. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

135. Davis believes and professes that issuing marriage licenses to same-sex couples violates her religious beliefs.

136. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, would compel Davis to cooperate in activities, through the issuance of marriage licenses under her name and approval, that are violations of Davis's religious beliefs.

137. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, would compel Davis to state her identification, authorization, and approval as "marriage" of same-sex relationships which cannot be "marriage" according to her religious beliefs.

138. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to a compelling governmental interest.

139. Kentucky's actions, as effected by Governor Beshear and Commissioner Onkst, thus violate Davis's right to be free from compelled speech as secured to her by Sections 1 and 8 of the Kentucky Constitution.

140. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Sections 1 and 8 of the Kentucky Constitution.

141. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT XII
Violation of Section 5 of the Kentucky Constitution
Religious Test
Third-Party Liability

142. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

143. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

144. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, require persons with religious beliefs like those of Davis to renounce such beliefs as a condition to holding the office of county clerk, and thereby impose a religious test as a qualification to hold the office of county clerk.

145. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by Section 5 of the Kentucky Constitution.

146. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Section 5 of the Kentucky Constitution.

147. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Davis respectfully requests that the Court:

- a. Declare that Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate the Kentucky RFRA;
- b. Declare that Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate the First Amendment and Fourteenth Amendment to the United States Constitution, and Article VI of the United States Constitution;
- c. Declare that Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Sections 1, 3, 5, and 8 of the Kentucky Constitution;

- d. Issue a preliminary and permanent injunction prohibiting enforcement of Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, against Davis;
- e. Impose against or transfer to Governor Beshear and Commissioner Onkst any relief obtained by Plaintiffs against Davis in the underlying action;
- f. Award Davis the costs of this action and reasonable attorney's fees; and
- g. Award such other and further relief as the Court deems just and proper.

JURY DEMAND

Davis requests a trial by jury on all issues so triable.

Respectfully Submitted,

/s/ Roger K. Gannam

Roger K. Gannam (Fla. 240450)[†]

rgannam@LC.org

court@LC.org

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(800) 671-1776 Telephone

(407) 875-0770 Facsimile

[†]Admitted *pro hac vice*

Attorneys for Defendant and
Third-Party Plaintiff, Kim Davis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's CM/ECF system, which will effectuate service through the Court's transmission facilities by notice of electronic filing to all counsel or parties of record:

Daniel J. Canon
L. Joe Dunman
Laura E. Landenwich
CLAY DANIEL WALTON ADAMS, PLC
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ACLU OF KENTUCKY
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Attorneys for Plaintiffs

DATED: August 4, 2015

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Attorneys for Rowan County

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Defendant Kim Davis

EXHIBIT A

EXPIRATION: 07/15/15

392905

54
44

Marriage License

Valid **ONLY** in the

Commonwealth of Kentucky

ROWAN COUNTY

To Any Person or Religious Society Qualified to Perform Marriages per KRS 402.050: You are hereby authorized to join together in the state of matrimony, according to the laws of the Commonwealth of Kentucky

Bride's Full Name _____
 Current Residence _____
 Groom's Full Name _____
 Current Residence _____

Bride

Groom

Date of Birth (Age)	_____	_____
Place of Birth	_____	_____
Mother's Full Name (Including Maiden)	_____	_____
Father's Full Name	_____	_____
Condition (Single, widowed, divorced or annulled)	_____	_____
No. of Previous Marriages	_____	_____
Occupation	_____	_____
Race	_____	_____
Relationship to other party	_____	_____

We hereby certify the above information is true to the best of our knowledge.

(bride's signature) _____
(groom's signature)

Issued this 6 / 16 / 2015 in the office of KIM DAVIS ROWAN COUNTY
(mo.) (day) (year) (name) (county)

County Clerk, MOREHEAD, Kentucky by BRIAN MASON DEPUTY CLERK
(city) (recorder's name) (title)

Note: License valid for 30 days only, including the date it is issued, per KRS 402.105!

Marriage Certificate

(type or print with black ink ball-point pen only)

I do certify that: _____ and _____

Were united in marriage on the 27th day of June at Oakley (Bath County)
 Kentucky, under the authority of the above license and in the presence of (Please PRINT witnesses name)

 _____ and _____

Given under my hand this 27th day of June, 2015.

(Signature of person performing ceremony) , Pastor (title) , of the _____ (church, religion, or civil authority)

Note: Persons failing to return this Certificate to the Clerk of the County in which it was issued within one month shall be guilty of a violation per KRS 402.990(11).

Recorded this July 2 / 2015 in the office of Kim Davis Rowan
(mo.) (day) (year) (clerk's name) (county name)

County Clerk, in Marriage Book _____, page _____
Roberta H. Earley Deputy Clerk
(recorder's name) (recorder's title)

EXHIBIT B

Dear Senator Robertson,

I am contacting you in hope of support of possible legislation that would give county clerks the option to exempt themselves from issuing marriage license, not only to same sex couples but to all parties, as to not discriminate anyone. The LRC has determined in "the duties of the County Clerk", the Clerk may be exempted from selling other licenses, i.e....fishing and hunting license by applying with written notice to that department. I wanted to have the option, as a person who has deep moral conviction, to choose not to discriminate any party, by allowing a Clerk to apply for an exemption for the issuance of marriage licenses.

As a constitutional officer, elected by the people I personally feel the Commonwealth's Constitution should be upheld. In 2004, by an overwhelming vote of 3 to 1 in favor of defining marriage as a union between one man and one woman (Kentucky Constitution Section 233A), should be upheld. This should be an electoral issue not judicial. I cannot ask my deputies to issue or be a party to "the implementation of a contentious societal philosophy change" (per Florida Clerk with the same view) If I myself would not.

I know the deadline is close for the presentation of bills on the floor, but in light of the Supreme Court's decision to look at the issue in April, I feel it is imperative that we be ready to stand with our uncompromising convictions, holding strong to our morals, and beliefs.

I beseech you to give thoughtful consideration to this matter, as it is of vital importance, not only to me, as a new Clerk, but to the Kentucky County Clerk's Association who has formed a formal committee to address this issue.

EXHIBIT C



COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

STEVEN L. BESHEAR
GOVERNOR

700 CAPITOL AVENUE
SUITE 100
FRANKFORT, KY 40601
(502) 564-2611
FAX: (502) 564-2517

June 26, 2015

Dear Kentucky County Clerks:

Today, the United States Supreme Court issued its decision regarding the constitutionality of states' bans on same-sex marriage. The Court struck down those laws, finding that they were invalid under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

As elected officials, each of us has taken an oath to uphold the Constitution of the United States and the Constitution of Kentucky. The Obergefell decision makes plain that the Constitution requires that Kentucky - and all states - must license and recognize the marriages of same-sex couples. Neither your oath nor the Supreme Court dictates what you must believe. But as elected officials, they do prescribe how we must act.

Effective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky. In accordance with my instruction, all executive branch agencies are already working to make any operational changes that will be necessary to implement the Supreme Court decision. Now that same-sex couples are entitled to the issuance of a marriage license, the Department of Libraries and Archives will be sending a gender-neutral form to you today, along with instructions for its use.

You should consult with your county attorney on any particular aspects related to the implementation of the Supreme Court's decision. While there are certainly strongly held views on both sides of this issue, I know that Kentuckians are law-abiding people and will respect the rule of law. After all, the things that unite us as a people are much stronger than the things that divide us.

Thank you in advance for the valuable services you continue to render to the people of the Commonwealth.

Sincerely,

Steven L. Beshear

Plaintiffs' Exh. 3

EXHIBIT D

Marriage License

Valid ONLY in the
Commonwealth of Kentucky

To Any Person or Religious Society Qualified to Perform Marriages per KRS 402.050: You are hereby authorized to join together in the state of matrimony, according to the laws of the Commonwealth of Kentucky

First Party Full Name _____
Current Residence _____
Second Party Full Name _____
Current Residence _____

First Party

Second Party

Date of Birth (Age) _____
Place of Birth _____
Mother's Full Name
(Including Maiden) _____
Father's Full Name _____
Condition (Single,
widowed, divorced,
annulled) _____
No. of Previous
Marriages _____
Occupation _____
Race _____
Relationship to
other party _____

We hereby certify the above information is true to the best of our knowledge.

(First Party Signature) _____ (Second Party Signature)
Issued this ____ / ____ / ____ in the office of _____,
(mo.) (day) (year) (name) (county)
County Clerk, _____, Kentucky by _____,
(city) (recorder's name) (title)

Note: License valid for 30 days only, including the date it is issued, per KRS 402.105!

Marriage Certificate

(type or print with black ink ball-point pen only)

I do certify that: _____ and _____
were united in marriage on the _____ day of _____, at _____
Kentucky, under the authority of the above license and in the presence of (Please PRINT witnesses' names)

_____ and _____
Given under my hand this _____ day of _____,
_____, of the _____
(Signature of person performing ceremony) (title) (church, religion, or civil authority)

Note: Person failing to return this Certificate to the Clerk of the County in which it was issued within one month shall be guilty of a violation per KRS 402.990(11).

Recorded this ____ / ____ / ____ in the office of _____,
(mo.) (day) (year) (name) (county name)
County Clerk, in Marriage Book _____, page _____.
_____, Clerk
(recorder's signature) (recorder's title)

Certificate of Marriage

To be delivered to parties married

I do certify that: _____ and _____

were united in marriage on the _____ day of _____, _____, at _____

Kentucky, under the authority of the above license and in the presence of
_____ and _____

Given under my hand this _____ day of _____, _____.

_____, of the _____
(signature of person performing ceremony) (Title) (Church, religion or civil authority)

Marriage Consent

By authorization of KRS 402.020, I do hereby give my consent to the marriage

of _____,

my _____, to _____

Given under my hand this _____ of _____, _____
(day) (month) (year)

father/ mother/ legal custodian

joint custodial parent, if applicable

Sworn before me this _____ day of _____, _____ in the office of

_____, _____ County Clerk.
(clerk's name) (county)

_____, _____
(recorder's name) (recorder's title)

EXHIBIT E



Kim Davis
Rowan County Clerk

600 West Main Street
Room 102
Morehead, KY 40351

Office (606) 784-5212
Fax (606) 784-2923
<http://rowancountyclerk.com>

July 8, 2015

The Honorable Governor Steve Beshear
700 Capitol Avenue Suite 100
Frankfort, KY 40601

Dear Governor Beshear,

The recent *Obergefell* decision by the Supreme Court of the United States has not only impacted Kentucky's same sex marriage ban, but has put numerous County Clerks' moral and religious beliefs at odds with their current required duties. Many Clerks firmly believe that forcing County Clerk offices to issue same-sex marriage licenses when it is against their deeply held religious beliefs and traditions is a direct violation of the U.S. Constitution's First Amendment.

This dramatic and sudden change has caused some Clerks to go as far as to halt issuing marriage licenses to anyone rather than compromise their deeply held religious convictions. This position has ignited litigation and it is foreseeable that it may invite more lawsuits.

It appears the only timely and reasonable solution to this conflict is a legislative one. So for that reason, I respectfully request that you immediately call an extraordinary session of the General Assembly to address the issues that have been caused in this transition from traditional marriage being re-defined to include same-sex couples.

Legislators and Clerks of many political stripes working alongside other third parties have been drafting commonsense legislation that would modify Kentucky's marriage laws to satisfy the concerns of the majority of Clerks, while still abiding by the *Obergefell* ruling. It is my belief that our proposal could be passed by the General Assembly in an expedited timeframe of the absolute minimum of five days.

The potential cost to calling a special session is easily justified by the alleviation of future potential lawsuits and relieving the concerns of many County Clerks who serve their local communities. I ask that you not just consider the current litigation, but what litigation could be invited after the 2018 County Clerk elections are concluded, if the status quo is to remain in place.

Respectfully submitted,

"Thank you for the opportunity to serve Rowan County"

AO 441 (Rev. 07/10) Summons on Third-Party Complaint

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)
Plaintiff)
v.) Civil Action No.
_____)
Defendant, Third-party plaintiff)
v.)
_____)
Third-party defendant)

SUMMONS ON A THIRD-PARTY COMPLAINT

To: (Third-party defendant's name and address)

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what the defendant may owe to the plaintiff _____.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff and on the defendant an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant or defendant's attorney, whose name and address are:

It must also be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date: _____

CLERK OF COURT

Signature of Clerk or Deputy Clerk

AO 441 (Rev. 07/10) Summons on Third-Party Complaint (Page 2)

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____
_____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 441 (Rev. 07/10) Summons on Third-Party Complaint

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)
Plaintiff)
v.) Civil Action No.
_____)
Defendant, Third-party plaintiff)
v.)
_____)
Third-party defendant)

SUMMONS ON A THIRD-PARTY COMPLAINT

To: (Third-party defendant's name and address)

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what the defendant may owe to the plaintiff _____.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff and on the defendant an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant or defendant's attorney, whose name and address are:

It must also be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date: _____

CLERK OF COURT

_____)
Signature of Clerk or Deputy Clerk

AO 441 (Rev. 07/10) Summons on Third-Party Complaint (Page 2)

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____
_____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

EXHIBIT G

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT ASHLAND**

CIVIL ACTION NO. 15-44-DLB

APRIL MILLER, et al.

PLAINTIFFS

vs.

ORDER

**KIM DAVIS, both individually
and in her official capacity, et al.**

DEFENDANTS

On August 17, 2015, this Court entered an Order (Doc. # 52) denying Defendant Kim Davis' motion to stay the Court's August 12, 2015 Order (Doc. # 43) granting Plaintiffs a preliminary injunction enjoining Defendant Davis from enforcing her "no marriage licenses" policy against Plaintiffs. However, in deference to the Sixth Circuit Court of Appeals, the Court temporarily stayed its August 12, 2015 Order to give the appellate court an opportunity to review, on an expedited basis, the August 17, 2015 Order denying the motion to stay.

Upon review of Federal Rule of Appellate Procedure 8(a)(2), governing stays of injunctions pending appeal, the Court finds it necessary to set an expiration date for the temporary stay. Accordingly,

IT IS ORDERED that the Court's temporary stay of its August 17, 2015 Order **shall expire on August 31, 2015**, absent an Order to the contrary by the Sixth Circuit Court of Appeals.

This 19th day of August, 2015.



Signed By:

David L. Bunning *DB*

United States District Judge

G:\DATA\ORDERS\Ashland Civil\2015\15-44 Order re Temporary Stay.wpd