UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT ASHLAND
CIVIL ACTION NO. 15-cv-044-DLB

APRIL MILLER, PH.D., et al. PLAINTIFFS

v.

KIM DAVIS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ROWAN COUNTY CLERK, et al. DEFENDANTS

and **REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS THIRD-PARTY COMPLAINT**

KIM DAVIS THIRD-PARTY PLAINTIFF

v.

STEVEN L. BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY, et al. THIRD-PARTY DEFENDANTS

*** *** *** *** ***

Come the third-party defendants Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives (collectively "Third-Party Defendants"), by counsel, and pursuant to Federal Rule of Civil Procedure 12(b),[1] respectfully tender this Reply Memorandum in further support of their Motion to Dismiss the Third-Party Complaint (D.E. 92).

I. INTRODUCTION

In her Response to the Motion to Dismiss ("Response") (D.E. 123), Davis reiterates the very same arguments she has repeatedly made, which are the very same

[1] Third-Party Defendants' arguments for dismissal because of Eleventh Amendment immunity and lack of standing are premised upon Federal Rule of Civil Procedure 12(b)(1), while dismissal arguments for failure to state a claim are based on Rule 12(b)(6). Third-Party Defendants correctly set out the applicable standards for each argument. See Motion to Dismiss Memorandum at 4-5, 10-11 (D.E. 92).

arguments this Court, the Sixth Circuit, and the Supreme Court have repeatedly rejected.[2] The Third Party Complaint is nothing more than Davis' baseless attempt to conjure up a non-existent directive in an attempt to avoid compliance with the actual source of the requirement that the Office of the Rowan County Clerk issue marriage licenses—a final and binding decision of the United States Supreme Court. This Court should once again deny Davis' meritless assault on the rule of law. The Third-Party Complaint must be dismissed because it is barred by the Eleventh Amendment, lacks standing, and fails to state any actionable claim.

II. ARGUMENT

A. Davis' Arguments Are Premised Upon Fundamental Errors of Law and Fact.

Before turning to the specific grounds that compel dismissal of the Third-Party Complaint, it is necessary to correct several fundamental errors underlying Davis' argument. That Davis stubbornly repeats these inaccuracies does not make them true.

The first Davis inaccuracy involves the statutory requirements for issuing marriage licenses. First, "[e]ach county clerk shall use the form prescribed by the Department for Libraries and Archives ["KDLA"] when issuing a marriage license." KRS 402.100. The form is required to contain "[a]n 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." Id. at (1)(a). The form shall also include certain specified vital information and "the signature of the county

[2] See, e.g. Memorandum Opinion and Order (D.E. 43) (finding no likelihood of success on the merits of Davis' constitutional arguments); Sixth Circuit Order of 8-26-2015 (Exhibit 2 to D.E. 63) (finding "little or no likelihood that the Clerk in her official capacity will prevail on appeal"); Supreme Court Order of 8-31-2015 (denying Davis' request for a stay of preliminary injunction); Memorandum Order (D.E. 103) (finding that Davis is unlikely to succeed on her First Amendment claims against the Third-Party Defendants and finding that all other claims against them are barred by the Eleventh Amendment); Sixth Circuit Order of 9-15-2015 (attached as Exhibit 1) (finding that Davis is unlikely to succeed on her federal claims against the Third-Party Defendants and that the state claims are barred by the Eleventh Amendment).

clerk or deputy clerk issuing the license." Id. at (1)(a) and (1)(c). The form must include a certificate with "[a] signed statement by the county clerk or a deputy county clerk . . . that the marriage certificate was recorded" after the marriage has been solemnized. Id. at (2)(d). It must also include "the name of the county clerk under whose authority the license was issued." Id. at (3)(a).

The second Davis inaccuracy is that the statutory framework for the issuance of marriage licenses was obliterated by Obergefell v. Hodges, 135 S.Ct. 2584 (2015). That framework continues to exist today. Obergefell simply held that qualified same-sex couples cannot be excluded from marriage. "[T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." Id. at 2605. Obergefell did not invalidate any state marriage licensing schemes – it simply held that however a state chooses to issue licenses, it must issue them on the same terms to same-sex couples. The only Kentucky laws held invalid by Obergefell are KY.CONST. § 233A and the statutory provisions that purport to limit marriage to opposite-sex couples.

The third Davis inaccuracy is that the Third-Party Defendants can somehow relieve Davis of her statutory obligation to issue marriage licenses. Again, Davis is simply wrong. In Baker v. Fletcher, 204 S.W.3d 589, 593 (Ky. 2006), the Kentucky Supreme Court held that the Governor's attempt to suspend a statute through executive order was void *ab initio*. Indeed, only the General Assembly may suspend a statute. KY.CONST. § 15. The Kentucky statutory framework for issuing marriage licenses says what it says until and unless the legislature changes it.

Davis' fourth inaccuracy claims that the Third-Party Defendants have authority

over marriage licensing. Again, that claim is not true. Other than KDLA prescribing the license form, the Third-Party Defendants have no involvement whatsoever with issuing marriage licenses. The General Assembly has chosen to place the sole authority to issue marriage licenses with the county clerks and their deputies. "[W]hen the General Assembly has placed a function, power or duty in one place there is no authority in the Governor to move it elsewhere unless the General Assembly gives him that authority." Brown v. Barkley, 628 S.W.2d 616, 623 (Ky. 1982). Following Obergefell, the KDLA made a single change to the marriage license form: replacing "bride" and "groom" with "first party" and "second party." Davis does not allege that the updated form fails to comply with KRS 402.100 or that the form was otherwise incorrectly drafted.

Davis' fifth inaccuracy is her contention that the Third-Party Defendants possess authority over her. Davis has not cited a single authority in support of that position. The Governor has no supervisory authority over elected constitutional officers. See Brown, 628 S.W.2d 616; KY.CONST. § 99; see also Shipp v. Bradley, 275 S.W. 1, 7 (Ky. 1925) (elected county sheriffs are not state officials). The county fiscal court sets the salary of county clerks, and vacancies in the office of county clerk are filled by the county judge/executive. KRS 64.530, 63.220. Davis' forlorn attempt to dismiss Brown by stating that the case involved statewide elected officials is completely incorrect. A constitutional officer is a constitutional officer whether elected statewide or by county. The Governor has no supervisory authority over other constitutional officers except as expressly granted in the Constitution or by the legislature in conformity therewith, and this is just as true with respect to a County Clerk, the Commissioner of Agriculture, or

the Attorney General.[3] The Third-Party Defendants do not oversee the county clerks.

Finally, Davis inaccurately attempts to distract from her failure to perform the statutory duties of her office by alleging that the June 26, 2015 letter from Governor Beshear ("Beshear Letter") to county clerks set "marriage policies." Third-Party Complaint at ¶ 25 (D.E. 34). Even a cursory reading reveals that the Beshear Letter does not create any policy enforceable upon county clerks. See Exhibit 1 to D.E. 92. It merely states that KDLA will prescribe a gender-neutral marriage license form, which it did by replacing the words "bride" and "groom." Id. And, as explained above, Davis does not allege that the form was revised in a way inconsistent with KRS 402.100. With respect to their implementation of Obergefell, the Beshear Letter encourages county clerks to consult with their county attorney. Id.[4] Contrary to Davis' apparent position, not every word uttered by a state official constitutes state policy.

B. This Court Has Jurisdiction to Consider the Motion to Dismiss.

Davis erroneously contends that because she attempted to appeal from the August 25, 2015 Order (D.E. 58) staying briefing on her Motion for Preliminary Injunction, this Court is without jurisdiction to consider the Motion to Dismiss.[5] An

[3] Of course, Davis makes no effort to distinguish Brown in her irrelevant *ad hominem* attack on the exercise of prosecutorial discretion by the Attorney General.

[4] Davis misstates the Beshear Letter by taking quotes out of context and failing to provide the full citation in a way that manipulates the text. See Response to Motion to Dismiss at 10 (D.E. 123). She claims that "Gov. Beshear further ordered that Kentucky clerks 'must license and recognize the marriages of same-sex couples[.]'" Id. But what that sentence actually says is: "The Obergefell decision makes plain that the Constitution requires that Kentucky – and all states – must license and recognize the marriages of same-sex couples." Exhibit 1 to D.E. 92. This, of course, is a correct recitation of the Obergefell holding.

[5] The Order did not deny the requested injunction and therefore is not immediately appealable. See Motion to Dismiss Appeal (attached as Exhibit 2 and incorporated herein by reference). The Sixth Circuit passed a decision on the appealability issue to the merits panel because it "is intertwined with the merits of the appeal." See Order (Exhibit 1). An order "that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279 (1988). The district court is not divested of jurisdiction where a party attempts to appeal from a non-appealable order. United States v. Cannon, 715 F.2d 1228, 1231 (7th Cir. 1983).

interlocutory appeal deprives the district court of jurisdiction only as to those "matters forming the basis of the appeal." Island Creek Coal Sales Co. v. Gainesville, 764 F.2d 437, 439 (6th Cir. 1985). "[I]n an appeal from an order granting or denying a preliminary injunction, a district court may nevertheless proceed to determine the action on the merits." United States v. Price, 688 F.2d 204, 215 (3d Cir. 1982); accord Free Speech v. Fed. Election Comm'n, 720 F.3d 788, 791-92 (10th Cir. 2013); Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv., 937 F. Supp. 2d 18, 26 (D. D.C. 2013). Thus, Davis' attempted appeal of the August 25, 2015 Order – regardless of its defectiveness – does not divest this Court of jurisdiction to consider this dispositive motion.

C. The Third-Party Complaint Is Barred by the Eleventh Amendment.

Davis does not dispute Third-Party Defendants' position that the Eleventh Amendment bars any request for relief (including indemnity under Count I) that seeks anything other than prospective injunctive relief. See Motion to Dismiss Memorandum at Argument A(1) (D.E. 92); Response at 16 (D.E. 123). Therefore, all claims for relief other than a prospective injunction must be dismissed as conceded.

Davis' claim for injunctive relief likewise fails under the Eleventh Amendment because it does not meet the narrow exception set out in Ex Parte Young, 209 U.S. 123 (1908). In order for that exception to apply, the defendant official "must have some connection with the enforcement of the act." Id. at 157. Here, Davis has utterly failed to "allege facts showing how [Third-Party Defendants are] connected to, or [have] responsibility for, the alleged constitutional violations." Top Flight Entertainment, Ltd. v. Schuette, 729 F.3d 623, 634 (6th Cir. 2013). "Young does not reach state officials who lack a special relation to the particular statute and are not expressly directed to see to its enforcement." Russell v. Lundergan-Grimes, 784 F.3d 1037, 1047 (6th Cir. 2015)

(citation omitted). "And it requires more than a bare connection to administering a statute." Id. "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." Children's Healthcare is a Legal Duty v. Deters, 92 F.3d 1412, 1416 (6th Cir. 1996).

As explained above and in their opening memorandum, neither Governor Beshear nor Commissioner Onkst is responsible for setting or enforcing marriage licensing policy. Rather, the marriage licensing regime is statutorily enacted by the General Assembly, which has placed exclusive authority for issuing licenses with the county clerks and their deputies. The Third-Party Defendants do not supervise the county clerks or have authority to compel them to act. Their sole connection to marriage licensing is KDLA's obligation to prescribe the license form, which here, was limited to removing the words "bride" and "groom." Davis has not alleged and cannot show that the revised form was inconsistent with KRS 402.100 or otherwise unlawful. What Davis actually seeks is amendment of the marriage licensing statutes – relief the Third-Party Defendants cannot provide. For the Third-Party Defendants to exercise such a power would be an incursion on Kentucky's "double-barreled, positive-negative" separation of powers. See LRC v. Brown, 664 S.W.2d 907, 912 (Ky. 1984) (citing KY.CONST. §§ 27, 28). Therefore, the claim for injunctive relief against the Third-Party Defendants must be dismissed.

In addition to the fact that none of Davis' claims fit within the Ex Parte Young exception, the Eleventh Amendment bars any federal court claim for enforcement of state constitutional provisions and state statutes, including KRS 446.350. Pennhurst v. Halderman, 465 U.S. 89, 106 (1984). Davis attempts to subvert this black-letter law by

elevating KRS 446.350, Kentucky's Religious Freedom Restoration Act ("RFRA"), to federal law. This attempt fails.

First, KRS 446.350 does not create a liberty interest giving rise to a procedural due process right. For such a right to exist, a statute must contain "explicitly mandatory language in connection with requiring specific substantive predicates." Gibson v. McMurray, 159 F.3d 230, 233 (6th Cir. 1998) (citation omitted). The statute must also "mandate[] a specific outcome if the substantive predicates are met." Id. Where those requisites are met, the claimant's liberty may not be deprived without due process of law. Underwood v. Luoma, 107 Fed. Appx. 543, 545 (6th Cir. 2004). Davis cites no authority for the proposition that KRS 446.350 creates any liberty interest. KRS 446.350 does not require any mandatory action on the part of a government actor with specific outcomes so as to create a procedural due process right.[6] Further, any liberty interest Davis might possibly have as a private citizen does not extend to her role as a governmental official. Even if KRS 446.350 were somehow to apply to Davis, it cannot apply in her official capacity as the Rowan County Clerk because accommodating her in the manner she suggests would amount to a violation of the Establishment Clause.

Second, 42 U.S.C. § 1988(a) does not apply. That statute provides that federal law generally governs claims pursuant to 42 U.S.C. § 1983, but state law may be borrowed for an issue on which the federal law is silent and not inconsistent. The statute is essentially a gap-filler to ensure there are remedies to enforce federal rights. Wilson v. Garcia, 471 U.S. 261, 269 (1985). "Congress surely did not intend to assign

[6] Instead, she relies upon cases in which criminal defendants and prisoners claimed a liberty interest as a result of a statute or regulation requiring a government actor to allow certain things such as a paperback dictionary, court-appointed expert, or certain mail items. See Response at 17 (D.E. 123). These authorities are inapplicable to a statute that purports simply to establish a standard of review. Moreover, the analysis in these prisoner cases was abrogated in part by Sandin v. Conner, 515 U.S. 472 (1995).

to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." Id. The express terms of section 1988(a) prohibit a court from "replacing federal law with more favorable state law." Wilson v. Morgan, 477 F.3d 326, 332-33 (6th Cir. 2007). States cannot create federal constitutional rights actionable under section 1983. Harrill v. Blount County, 55 F.3d 1123, 1125-26 (6th Cir. 1995). Here, KRS 446.350 is plainly inconsistent with federal law because it purports to subject government action to scrutiny more rigorous than that required under federal law. The statute purports to require a government to show "by clear and convincing evidence" that its action furthers a "compelling governmental interest" in "the least restrictive means." KRS 446.350. However, federal law requires that such government action meet only rational basis review. See Employment Division of Oregon Dep't of Human Resources v. Smith, 494 U.S. 872 (1990). Therefore, because KRS 446.350 is inconsistent with federal law, it cannot be borrowed pursuant to 42 U.S.C. § 1988(a). Davis fails in her attempt to elevate KRS 446.350 into federal law.

D. The Third-Party Complaint Fails for Lack of Standing

Standing is "perhaps the most important" of jurisdictional principles, as it ensures that the federal courts confine decisions to actual "cases or controversies" as defined in Article III of the Constitution. Allen v. Wright, 468 U.S. 737, 751 (1984). A claimant lacks standing where there is no causal connection between the injury and the defendant's conduct or where the injury is not redressable by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Davis has failed to meet her burden of demonstrating either prong.

The Beshear Letter did not cause Davis' alleged constitutional injury. As explained above and in their opening memorandum, the Third-Party Defendants did not and cannot compel an elected constitutional officer such as Davis to act. Davis has not cited a single authority to establish that Third-Party Defendants exercise authority over her. In reality, Davis' injury as she has alleged it is traceable solely to the Obergefell decision, which held that marriage licenses must be issued to same-sex couples on the same terms as opposite-sex couples. The Third-Party Defendants do not posses the authority to excuse Davis from complying with Supreme Court precedent or the statutory framework for issuing marriage licenses.

Davis asserts that Governor Beshear could have stated that "any marriage licenses will be issued on his authority (not the county clerks' authority)…." See Response at 13 (D.E. 123). This statement demonstrates the absurdity of Davis' argument. Kentucky law is clear that "when the General Assembly has placed a function, power or duty in one place there is no authority in the Governor to move it elsewhere unless the General Assembly gives him that authority." Brown, 628 S.W.2d at 623. Davis' claim that she would be in a different position had the Beshear Letter not be issued is equally obtuse. See Response at 14. Had the Beshear Letter not been written, Davis would still have a statutory obligation to issue marriage licenses under the KRS Ch. 402 framework and, in light of Obergefell, she would have to do so for both same-sex and opposite-sex couples. This would be the case regardless of whether KDLA changed the words "bride" and "groom" on the marriage license form.[7]

[7] Davis asserts that had the Beshear Letter not been issued, the plaintiffs "would have had to sue Gov. Beshear (not Davis)" to obtain their marriage licenses. See Response at 14 (D.E. 123). This incredible statement demonstrates Davis' stubborn disregard for the rule of law. Obergefell held that the plaintiffs

In addition to a lack of causal connection, Davis lacks standing because her alleged injury is not redressable by a favorable decision and is moot. Lujan, 504 U.S. 560-61; United States Parole Comm'n v. Garaghty, 445 U.S. 388, 396-97 (1980). Obergefell makes clear that Davis has an obligation to issue marriage licenses to same-sex couples on identical terms as opposite-sex couples. This Court has already so held and ordered Davis to do just that. See Memorandum Opinion and Order (D.E. 43). If Davis were successful in her claim against the Third-Party Defendants to enjoin the Beshear Letter, Davis would still be required by the U.S. Supreme Court and this Court's Order to issue marriage licenses to same-sex couples. This reality highlights the fact that Davis' real quarrel is with Obergefell itself and not with any action or inaction on the part of the Third-Party Defendants.

E. The Third-Party Complaint Fails to State Actionable Claims.

Even if Davis could demonstrate an exception to Eleventh Amendment immunity or establish standing, her claims would still fail on the merits. A court must dismiss a complaint when it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). While Davis correctly asserts that the Court construes the well-pleaded facts in a light most favorable to her, the Court does not accept as true legal conclusions or conclusions couched as factual statements. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In addition to finding that well-pleaded facts do not give rise to an actionable claim, the Court decides legal questions on a motion to dismiss. Marshall County v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993). As this Court and the Sixth Circuit have repeatedly held, Davis has not alleged actionable claims for violation of any

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have a fundamental right to marriage. Following Obergefell, they should not have been required to sue anyone in order to exercise that right. Of course, Davis ensured that was not the case in Rowan County.

protected rights. Accordingly, the Third-Party Complaint must be dismissed.

1. Free Exercise Claim (Counts II, III, IV, V, VIII, IX, and X).

Government action that is neutral and generally applicable need only meet rational basis review to survive a free exercise challenge. Smith, 494 U.S. 872. The Beshear Letter does not constitute government action as applied to Davis because the Third-Party Defendants possess no authority to direct or supervise Davis' actions. The Third-Party Defendants have no role in the marriage licensing regime except to prescribe the license form, which Davis has not alleged is contrary to statute. The Third-Party Defendants do not have the ability to rewrite the marriage licensing statutes or exempt Davis from complying with them.

Even if the Beshear Letter did constitute government action, it is clearly neutral and generally applicable and passes rational basis review. The Beshear Letter simply announced the Obergerfell decision and stated the Executive Branch's (*i.e.* those executive agencies over which the Governor exercises control) intent to implement it. The Beshear Letter also announced that KDLA would issue a revised marriage license form in light of the Obergefell holding. This alleged "policy" neither facially nor practically targets religion but instead explains steps taken to comply with a binding decision of the United States Supreme Court. Government action subject to rational basis review is accorded a strong presumption of validity. FCC v. Beach Communications, 508 U.S. 307, 314 (1993). To pass, the action need only be "rationally related to furthering a legitimate state interest." Seger v. KHSAA, 453 Fed. Appx. 630, 635 (6th Cir. 2011). The Beshear Letter unquestionably furthers the important government interest in the orderly and uniform application of the rule of law

and the numerous interests identified in the Obgerfell decision. See, e.g. Papachristou v. Jacksonville, 405 U.S. 156, 171 (1972); Memorandum Opinion and Order at 21 (D.E. 43). Therefore, Davis' free exercise claim fails as a matter of law.

Davis argues that KRS 446.350 subjects the Beshear Letter to strict scrutiny. But as explained above, the Eleventh Amendment bars this Court from enjoining a state official to comply with state law. And the federal RFRA is not applicable to state government action. City of Boerne v. Flores, 521 U.S. 507 (1997). Moreover, KRS 446.350 does not apply to actions taken by public officials in their official capacity. When an official such as Davis acts in her official capacity to perform an obligation imposed by law, she is acting as the government. Cf. Kentucky v. Graham, 473 U.S. 159 (1985); KRS 62.210 ("[t]he office of county clerk, rather than the individual holder of the office, shall be liable for acts or omissions of deputy clerks"). At issue here are marriage licenses issued by the Office of Rowan County Clerk and not Kim Davis individually, as Kim Davis individually has no authority to issue such licenses. The Office of Rowan County Clerk does not have a right to free exercise of religion. If government officials were permitted to exercise religion in their official capacity, such action would directly violate the Establishment Clause, which prohibits governments from favoring or promoting one set of religious beliefs over another.

Even if KRS 446.350 did apply, it is obvious that the Beshear Letter does not "substantially burden" the free exercise of religion because it does not compel Davis – and indeed could not compel her – to do anything. Moreover, issuance of marriage licenses is one of Davis' statutory duties. See KRS Ch. 402. The statutes do not require Davis to condone, approve, or endorse any marriage. Rather, the Office of

Rowan County Clerk must simply certify that the legal prerequisites for issuance of a license have been met. Id. This purely ministerial function does not implicate her individual religious beliefs – let alone substantially burden them – any more than any action taken by a government official implicates his/her religious beliefs.[8]

2. Free Speech Claim (Counts VI and XI).

Davis wrongly asserts that the Beshear Letter violates her right to free speech by compelling her to express approval of same-sex marriage. Third-Party Complaint at ¶¶ 92, 137 (D.E. 34). As previously explained, the Beshear Letter does not compel Davis to do anything. Rather, KRS Ch. 402 as informed by Obergefell requires Davis to issue marriage licenses to same-sex couples on the same terms as opposite-sex couples. Moreover, issuing a government-sanctioned license is not protected speech attributable to Davis. Rather, it is a ministerial act statutorily required of the Office of Rowan County Clerk. The issuance of a marriage license simply certifies that the couple satisfies the legal prerequisites for marriage. KRS 402.100. To the extent the issuance of marriage licenses constitutes speech, it is attributable to the government and not Davis. See, e.g. Walker v. Texas Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015)

It is indisputable that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." Garcetti v. Ceballos, 547 U.S. 410, 419 (2006). To determine whether a government official has suffered a violation of her right of free expression, the Court considers whether the official spoke "as a citizen on a matter of public concern," and if yes, whether the government "had an adequate justification for treating the employee differently from any other member of the

[8] Even if the Beshear Letter did substantially burden Davis' free exercise, it would still pass strict scrutiny analysis. See Plaintiffs' Response to Davis Motion for Injunction Pending Appeal at 11-14 (attached as Exhibit 3 and incorporated herein by reference).

general public." Garcetti, 547 U.S. at 418. As the Court has previously concluded, Davis' allegations fail the first prong because the act of issuing marriage licenses is not speech as a citizen on a matter of public concern; indeed, ordinary citizens are not empowered to issue marriage licenses. "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." Garcetti, 547 U.S. at 421-22.

3. Religious Test Claim (Counts VII and XII).

Davis is wrong to allege that the Beshear Letter violates Article VI of the Constitution. That provision provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Const. art. VI. And while Davis is correct that both state- and federally-imposed religious tests fail under Article VI, the provision applies by its plain terms only to those offices created by federal law. See, e.g. U.S. Term Limits v. Thornton, 514 U.S. 779, 903 (1995) (Thomas, J., dissenting). It does not apply to the Office of the Rowan County Clerk. But even if Article VI did apply to Davis, her claim still fails. The statutory obligation to issue marriage licenses does not constitute any type of religious or moral approval. Rather, Davis and her deputies are required to perform the ministerial function of ascertaining that a putative married couple meets the legal perquisites for marriage. See KRS 402.100. Simply stated, Davis' role is a legal one – not a moral or religious one.

III. CONCLUSION

For the reasons set out above and in their opening memorandum, the Third-Party Defendants respectfully request entry of an Order dismissing the Third-Party Complaint with prejudice.

Respectfully submitted,

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COMMISSIONER WAYNE ONKST
IN THEIR OFFICIAL CAPACITIES

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing with the Court's ECF system on the 29th day of September 2015, which simultaneously serves a copy to the following via electronic mail:

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IN THEIR OFFICIAL CAPACITIES

119363.152876/4430775.14

No. 15-5961

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 15, 2015
DEBORAH S. HUNT, Clerk

APRIL MILLER, et al.,)
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Plaintiffs-Appellees,)
)
v.) O R D E R
)
KIM DAVIS, Individually,)
)
Third-Party Plaintiff-Defendant-Appellant,)
)
STEVEN L BESHEAR; WAYNE ONKST, in their official capacities,)
)
Third-Party Defendants-Appellees.)

Before: KEITH, ROGERS, and DONALD, Circuit Judges.

Third-Party Plaintiff Kim Davis appeals the August 25, 2015 order delaying briefing on her motion for a preliminary injunction against Third-Party Defendants Steven Beshear and Wayne Onkst (the "State Defendants"). She moves for an injunction against the State Defendants pending appeal. The Plaintiffs and the State Defendants oppose her motion, and Davis replies. The district court denied a similar motion for an injunction pending appeal on September 11, 2015. In addition, the State Defendants move to dismiss the appeal for lack of jurisdiction. Davis opposes the dismissal of her appeal.

Procedural rulings such as the order on appeal generally are not appealable under 28 U.S.C. § 1291, or otherwise. Davis argues that because she moved for immediate preliminary injunctive relief against the State Defendants, the order delaying consideration of her motion is

appealable under 28 U.S.C. § 1292(a)(1) as an order denying injunctive relief. An order that does not grant or deny injunctive relief, but has the practical effect of doing so, may be immediately appealable if it has "serious, perhaps irreparable, consequences" and can be "'effectually challenged' only by immediate appeal." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (citation omitted); *see Booher v. N. Ky. Univ. Bd. of Regents*, 163 F.3d 395, 397 (6th Cir. 1998). The August 25 order has the practical effect of denying immediate injunctive relief to Davis. *See Graves v. Mahoning Cty.*, 534 F. App'x 399, 403 (6th Cir. 2013). Whether the delay in considering the motion for a preliminary injunction has serious or irreparable consequences is intertwined with the merits of the appeal. We decline to dismiss the appeal for lack of jurisdiction at this time and defer consideration of the jurisdictional issue to a merits panel.

Davis "bears the burden of showing that the circumstances justify" our exercise of discretion to grant her injunctive relief pending appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009). In addressing her motion, we consider: (1) whether she a has strong likelihood of success on the merits; (2) whether she will suffer irreparable harm if the motion is not granted; (3) whether the requested injunctive relief will substantially injure other interested parties; and (4) where the public interest lies. *Id.*; *see also Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012).

As the Rowan County Clerk, Davis's duties include the issuance of marriage licenses. *See* Ky. Rev. Stat. §§ 402.080, 402.100(1). Davis seeks to enjoin Beshear and Onkst, in their respective official capacities as the Governor of Kentucky and the Commissioner of the Kentucky Department of Libraries and Archives, from enforcing against her a directive requiring all Kentucky county clerks to issue marriage licenses to same-sex couples and exempting her

from issuing marriage licenses pending her appeal. Davis maintains that the issuance of marriage licenses to same-sex couples burdens her sincerely held religious beliefs in violation of the U.S. Constitution, the Kentucky Constitution, and the Kentucky Religious Freedom Restoration Act. Davis has not demonstrated a substantial likelihood of success on her federal constitutional claims. We need not address the merits of her claims under Kentucky law because the Eleventh Amendment of the U.S. Constitution precludes the federal courts from compelling state officials to comply with state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105–06 (1984).

A balance of the equities involved does not support the issuance of an injunction pending appeal. The motion to dismiss the appeal for lack of jurisdiction is **DENIED** without prejudice to reconsideration by the panel assigned to hear the appeal on the merits. The motion for an injunction pending appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Case No. 15-5961

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 W. SPARTMAN
Plaintiffs/Appellees

v.

KIM DAVIS, INDIVIDUALLY
Third-Party Plaintiff/Defendant/Appellant

v.

STEVEN L. BESHEAR and WAYNE ONKST, IN THEIR OFFICIAL CAPACITIES
Third-Party Defendants/Appellees

Appeal from
United States District Court for the Eastern District of Kentucky
Case No. 15-cv-044-DLB
Honorable David L. Bunning, Presiding

MOTION TO DISMISS APPEAL

WILLIAM M. LEAR, JR.
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September 8, 2015

Come the appellees Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives, by counsel, and pursuant to 28 U.S.C. §§ 1291 and 1292, respectfully move the Court to dismiss the appeal of this action. Appellants have attempted to appeal from an interlocutory order that is not appealable. Accordingly, this action must be dismissed.

I. PROCEDURAL BACKGROUND

Plaintiff/Appellees are a group of same-sex and opposite-sex couples residing in Rowan County, Kentucky who filed suit against Kim Davis ("Davis"), the Rowan County Clerk, for violation of their constitutional rights as a result of Davis' refusal to issue marriage licenses. [DE 1, Complaint, Page ID 1-2]. Following briefing and hearings, the District Court entered a preliminary injunction that enjoins Davis in her official capacity from applying her "no marriage licenses" policy. [DE 43, Memorandum Opinion and Order, Page ID 1146-73]. The District Court temporarily stayed the effect of the injunction through August 31, 2015. [DE 52, Order, Page ID 1264-1270; DE 55, Order, Page ID 1283-84].

Davis has appealed the preliminary injunction to this Court where it is currently pending. See Case No. 15-5880. This Court denied Davis' request for a

stay pending appeal, finding that her position "cannot be defensibly argued" and that "[t]here is thus little or no likelihood" of success on appeal. [Case No. 15-5880 DE 28 at 3]. The United States Supreme Court likewise denied Davis' request for a stay of the preliminary injunction. [Case No. 15-5880 DE 30]. The first brief in the appeal of the preliminary injunction is due October 2, 2015. [Case No. 15-5880 DE 18]. Following expiration of the stay, Davis defied the preliminary injunction and persisted in her refusal to issue marriage licenses to qualified couples. [DE 67, Motion for Contempt, Page ID 1477-87]. The District Court found Davis in contempt. [DE 75, Minute Order, Page ID 1558-59].

While defending against the plaintiffs' claims below, Davis filed a Third-Party Complaint against Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives (collectively "State Appellees"). [DE 34, Third-Party Complaint, Page ID 745-92]. Davis alleges that "Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst" are unlawful actions for which she seeks declaratory and injunctive relief. [Id. at ¶¶ 46-147]. Specifically, Davis contends that "Kentucky marriage policies" violate her rights of free exercise of religion, free speech, and constitute an unlawful religious test for holding office. [Id.]. State Appellees have

until September 11, 2015 to plead in response to the Third-Party Complaint. [DE 61, Agreed Order, Page ID 1295-96].

Davis moved the District Court to enter a preliminary injunction against State Appellees that enjoins them from enforcing the Governor's alleged "mandate" that Davis issue marriage licenses to authorized individuals in conformity with Kentucky statute. [DE 39, Motion for Preliminary Injunction, Page ID 824-1130]. The District Court *sua sponte* ruled that briefing on Davis' motion for injunctive relief[1] is "stayed pending review of the Court's Memorandum Opinion and Order (Doc. #43) by the United States Court of Appeals for the Sixth Circuit." [DE 58, Order, Page ID 1289]. That is, the District Court held that it will consider Davis' Motion for Preliminary Injunction against these Appellees after this Court considers the appeal of the preliminary injunction entered against Davis (Sixth Circuit Case No. 15-5880). The District Court indicated that "a briefing schedule on the Motions will be set by subsequent order after the Sixth Circuit renders its decision." [Id.].

Davis now attempts to appeal from the District Court Order staying briefing on and consideration of her Motion for Preliminary Injunction. [DE 66, Notice of Appeal, Page ID 1471-76].

[1] The District Court also stayed briefing and consideration of Davis' Motion to Dismiss (DE 32).

II. ARGUMENT

The District Court Order of August 25, 2015 (hereinafter "August 25 Order") from which Davis appeals is plainly interlocutory. Generally, this Court has appellate jurisdiction over only final decisions of the district courts. 28 U.S.C. § 1291. There are limited circumstances in which a party may seek appellate review of an interlocutory order. 28 U.S.C. § 1292. The August 25 Order does not meet any of those limited exceptions. Accordingly, this appeal must be dismissed.

While Davis' Notice of Appeal offers no rationale for seeking review of a plainly unappealable order, her Emergency Motion for Immediate Consideration and Motion for Injunction Pending Appeal [DE 26] pending in this Court asserts that the August 25 Order can be appealed pursuant to 28 U.S.C. § 1292(a)(1) because it has the practical effect of denying an injunction. Such an argument is without merit. This statute provides for appellate review of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . ." Id. The August 25 Order does none of those things. Rather, it simply sets the process by which the District Court will consider Davis' Motion for Preliminary Injunction. It cannot be questioned that "a district court has broad discretion to stay proceedings as an incident to its power to control its own docket." Clinton v. Jones, 520 U.S. 681, 707 (1997). There is no authority

that requires a court to consider a motion for preliminary injunction at a certain time or in a certain sequence.

The Supreme Court has explained that 28 U.S.C. § 1292(a)(1) must be narrowly construed to keep with "the general congressional policy against piecemeal review." Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981). In order to invoke appellate review, the litigant must "show more than that the order has the practical effect of refusing an injunction." Id. That is because section 1292(a)(1) is not "a golden ticket litigants can use to take any decision affecting injunctive relief on a trip to the court of appeals." Edwards v. Prime Inc., 602 F.3d 1276, 1290 (11th Cir. 2010).

The August 25 Order does not have the "practical effect of refusing an injunction." Indeed, the August 25 Order does not address the merits of Davis' motion at all but rather sequences its briefing and consideration. This Court has explained that "[o]rders that have the practical effect of an injunction are subject to interlocutory appeal under section 1292(a)(1) ***only if*** the order has a serious, perhaps irreparable, consequence and the order can be effectively challenged only by means of an immediate appeal." Williamson v. Recovery Ltd. P'ship, 731 F.3d 608, 621 (6th Cir. 2013) (citations omitted) (emphasis added).[2] That is certainly

[2] In Williamson, the District Court had ordered the pre-judgment attachment of seven crates of artifacts, decreeing that "[t]hese crates are not to be moved, encumbered or sold without further order of this Court." Id. at 620. The Sixth

not the case here. The August 25 Order was issued *sua sponte* without consultation with the parties. Yet, Davis has made no effort to ask the District Court to reconsider the August 25 Order and let briefing commence. Surely, this would have been a far less drastic course than pursuing this meritless appeal.

Orders that are "restraints or directions . . . concerning the conduct of parties or their counsel, unrelated to the substantive relief sought" are not appealable under section 1292(a)(1). Pressman-Gutman Co. v. First Union Nat'l Bank, 459 F.3d 383, 393 (3d Cir. 2006). "[A] stay of proceedings in an action does not involve a determination of a substantive issue, and therefore it is not appealable as an injunction pursuant to section 1292(a)(1)." See Moore's Federal Practice at § 203.10[6][b][i]. An order that does "require[] or forbid[] any party to perform certain acts" is not appealable under section 1292(a)(1). Booher v. N. Ky. Univ. Bd. of Regents, 163 F.3d 395, 397 (6th Cir. 1998).

Delaying consideration of Davis' Motion for Preliminary Injunction does not cause a "serious, perhaps irreparable, consequence" such that the August 25 Order

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Circuit conceded that this Order is somewhat injunctive in nature but nonetheless found that it is not appealable under 28 U.S.C. § 1292(a)(1). Id. at 621. The Court noted that the appellants had not shown "how the order results in serious harm to them or why interlocutory appeal is the only avenue of relief available to them." Id. This Court further noted that the lower court had sought to make the order "as minimally invasive as possible, stating that though it was specifically ordering the artifacts to 'stay put,' the court would timely consider, and be inclined to grant, any reasonable request to make use of the artifacts." Id. Therefore, this Court found "no serious or irreparable consequence flowing from the attachment order, regardless of whether it had an injunctive element to it." Id.

may be immediately appealed. Davis' Motion for Preliminary Injunction seeks to enjoin Appellees from enforcing their alleged "mandate" that Davis issue marriage licenses to authorized individuals. [DE 39, Motion for Preliminary Injunction, Page ID 824-1130]. However, Davis is already under a separate legal obligation and Court Order to issue marriage licenses. [DE 43, Memorandum Opinion and Order, Page ID 1146-73]. Thus, even if Davis' Motion for Preliminary Injunction were granted, she still has to issue marriage licenses – the District Court has ordered Davis to do so, and her attempts to obtain a stay of that Order have been exhausted. Davis' Motion for Preliminary Injunction has no urgency. The August 25 Order does not constitute a denial of injunctive relief and therefore cannot be interlocutorily appealed.

III. CONCLUSION

For the reasons set out above, State Appellees respectfully request entry of an Order dismissing this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing with the Court's ECF system on the 8th day of September 2015, which simultaneously serves a copy to the following via electronic mail:

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Case No. 15-5961

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; BARRY SPARTMAN

***Plaintiffs-Appellees*,**

v.

KIM DAVIS

***Defendant-Appellant/Third-Party Plaintiff*,**

v.

STEVEN L. BESHEAR; WAYNE ONKST

***Third-Party Defendants-Appellees*.**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

PLAINTIFFS-APPELLEES' RESPONSE TO KIM DAVIS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

(*CONTINUED ON NEXT PAGE*)

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Pursuant to Federal Rule of Appellate Procedure 27(a)(3), Plaintiffs-Appellees, April Miller, Karen Roberts, Shantel Burke, Stephen Napier, Jody Fernandez, Kevin Holloway, L. Aaron Skaggs and Barry Spartman (collectively referred to as Plaintiffs), by counsel, submit their response opposing Defendant-Appellant/Third Party Plaintiff Kim Davis' emergency motion requesting a preliminary injunction against Third Party Defendants-Appellees Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, Commissioner of Kentucky's Department of Libraries and Archives.

Davis' motion seeks to re-litigate the district court's August 12, 2015 preliminary injunction in favor of Plaintiffs – a ruling that the district court, this Court, and the U.S. Supreme Court declined to stay pending Davis' appeal (No. 15-5880). For the same reasons this Court denied Davis' motion for a stay of the August 12, 2015 preliminary injunction and for the reasons that follow, this Court should deny Davis' emergency motion for a preliminary injunction pending appeal.

FACTS

On June 27, 2015 — one day after the U.S. Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) — Rowan County Clerk Kim Davis decided that her office would no longer issue marriage licenses

because she opposes marriage for same-sex couples due to her personal, religious beliefs. [Page ID #278: 7/20/15 Hrg. Transcript (RE #26).] Rather than issue marriage licenses to same-sex couples, Davis adopted a "no marriage license" policy that bars *all* qualified applicants from obtaining marriage licenses in Rowan County even though Kentucky law specifically imposes upon County Clerks the obligation to issue such licenses. [*Id.*] *See also* KRS § 402.080. Following Davis' adoption of the "no marriage license" policy, Plaintiffs — two same-sex and two opposite-sex couples who reside in Rowan County, Kentucky, and who intend to marry — were denied marriage licenses even though they were otherwise legally qualified to marry. [Page ID #123-25; #133-34; #140-42: 7/13/15 Hrg. Transcript (RE #21).] Plaintiffs filed a putative class-action suit challenging the policy under the First and Fourteenth Amendments, and they brought official-capacity claims against Davis seeking preliminary and permanent injunctive relief barring future enforcement of the policy. [Page ID #1: Complaint (RE #1); Page ID #34: Motion for Preliminary Injunction (RE #2).]

After an evidentiary hearing and full briefing by the parties, the District Court entered a preliminary injunction on August 12, 2015, barring Davis, in her official capacity, from enforcing the "no marriage license" policy against Plaintiffs. [Page ID #1173: Memo. Op. and Order (RE #43).]

Defendant timely filed a notice of appeal from that ruling [Page ID #1174: Notice of Appeal (RE #44)], and she also filed a motion with the District Court requesting a stay of its preliminary injunction ruling pending appeal. [Page ID #1207: Stay Motion (RE #45).]

The District Court denied Davis' motion to stay, but the court also stayed its denial of the motion pending review by this Court. [Page ID #1264: Order (RE #52).] Davis then requested a stay of the preliminary injunction from this Court, and it, too, was denied. Davis finally filed an emergency application for a stay of the preliminary injunction ruling with the U. S. Supreme Court, and that application was likewise denied.

Following the U.S. Supreme Court's denial of Davis' emergency stay application, Plaintiffs Miller and Roberts went to the Rowan County Clerk's office on September 1, 2015, for the purpose of obtaining their marriage license. Unfortunately, they were again denied by a deputy clerk who asserted that no marriage licenses would be issued "pending appeal" in this case. The same day, Plaintiffs filed a Motion to Hold Davis in Contempt [RE #67.] Plaintiffs also filed a motion to clarify that the Court's August 12, 2015, preliminary injunction applied not only to the four named Plaintiff couples in this action, but also to requests by other individuals who are legally eligible to marry in Kentucky. [RE #68.]

At a contempt hearing held on September 3, 2015, the District Court ruled that Davis was in civil contempt for her failure to follow the Court's August 12, 2015, Order by continuing to deny marriage licenses to Rowan County citizens and for directing her deputies to do likewise. After hearing testimony and determining that fines would be inadequate to compel Davis' compliance with the preliminary injunction, the Court ordered that she be "remanded to the custody of the United States Marshal pending compliance of the Court's Order of August 12, 2015, or until such time as the Court vacates the contempt Order." (RE #75).

At the September 3, 2015, hearing, five Rowan County Deputy Clerks affirmed to the Court that they would issue marriage licenses in compliance with the Court's August 12, 2015, Order.

On September 8, 2015, after receiving a status report from Plaintiffs (RE # 88), the District Court issued an Order noting that "Plaintiffs have obtained marriage licenses from the Rowan County Clerk's Office," and concluding that "the Rowan County Clerk's Office is fulfilling its obligation to issue marriage licenses to all legally eligible couples, consistent with the U.S. Supreme Court's holding in *Obergefell* and this Court's August 12, 2015 Order." (RE #98). The Court thus stated that "the prior contempt

sanction against Defendant Davis is hereby lifted" and ordered her release from the custody of the U.S. Marshal.

Davis now seeks an emergency preliminary injunction in connection with her third-party complaint against Governor Beshear and Commissioner Onskt while she appeals the district court's ruling granting a preliminary injunction to Plaintiffs. The third-party complaint alleges that the Kentucky governor is responsible for the Rowan County clerk's duty to issue marriage licenses in light of *Obergefell*. Davis argues that, absent an injunction against the Third-Party Defendants pending appeal, her rights will be violated. Her motion is based on the same arguments she (unsuccessfully) asserted in objecting to Plaintiffs' preliminary injunction and that she later (unsuccessfully) asserted in seeking a stay of that preliminary injunction. Plaintiffs now respond.

LEGAL STANDARD

This Court may grant preliminary injunctions pending appeal "to prevent irreparable harm to the party requesting such relief during the pendency of the appeal." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). In considering such requests, the Court "is to engage in the same analysis that it does in reviewing the grant or

denial of a motion for a preliminary injunction." *Id.* (citing *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir.1982)).

Thus, the consideration of Davis' motion for an emergency preliminary injunction focuses on: "(1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest." *Abney v. Amgen, Inc.*, 443 F.3d 540, 546 (6th Cir. 2006) (internal quotations omitted) (quoting *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nasvhille & Davidson Co.*, 274 F.3d 377, 400 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002)). These considerations "are factors to be balanced, not prerequisites that must be met." *Jones v. City of Monroei*, 341 F.3d 474, 476 (6th Cir. 2003) (citing *In re Delorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985)). As discussed below, *all* of the factors weigh in favor of denying Davis' motion for an emergency preliminary injunction.

ARGUMENT

I. DAVIS IS UNLIKELY TO SUCCEED ON THE MERITS OF HER CLAIMS.

A. Davis is unlikely to establish that performing the administrative task of issuing marriage licenses unlawfully burdens her free exercise of religion.

Davis' principal argument rests on her contention that her religious beliefs are substantially burdened because she is required, in her official capacity as the County Clerk, to issue marriage licenses to same-sex couples. Her third-party complaint alleges that this requirement emanates from Governor Beshear's directive that county clerks comply with state law in issuing marriage licenses. However, as this Court noted in previously denying Davis' request to stay Plaintiffs' preliminary injunction, "[t]here is thus little or no likelihood that the Clerk in her official capacity will prevail on appeal." [*Miller v. Davis*, No. 15-5880 (6th Cir. Aug. 26, 2015).] The unanimous panel that denied Davis' stay request further observed that "it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." [*Id.*]

Nothing about Davis' present emergency preliminary injunction motion compels a different conclusion. Here, Davis claims that the burden upon her religious beliefs flows from having to comply with Governor Beshear's "mandate" that she "personally authorize" same-sex marriage licenses. [Davis' Emergency Motion for Injunction Pending Appeal, No. 15-5961, at 3.] However, even a cursory review of Governor Beshear's letter

makes clear that he simply directed county clerks to comply with state law and the Supreme Court's holding in *Obergefell*. Nothing in that letter requires Davis, in her official capacity, to perform any duties not otherwise required of her office under Kentucky and federal law. [*Id.*, Exh. C: Governor Beshear's June 26, 2015 letter (Page ID #782).] Davis' true objection is to Kentucky state law and the U.S. Constitution as well as the district court's already-issued preliminary injunction entered on Plaintiffs' behalf. That fact is evident from the relief Davis seeks here in connection with her motion for an emergency preliminary injunction, which in essence requests a preliminary injunction exempting her from complying with the August 12, 2015 preliminary injunction. [*Compare* Davis' Emergency Motion for Injunction Pending Appeal, No. 15-5961, at 20 (requesting injunction "preliminary exempting her from authorizing marriage licenses") *with* Page ID #1173: Memo. Op and Order (RE #43) (enjoining Davis, "in her official capacity as Rowan County Clerk, . . . from applying her 'no marriage licenses' policy to future marriage license requests submitted by Plaintiffs"); Page ID #1557: Order (RE #74) (granting Plaintiffs' motion to modify preliminary injunction to enjoin "Davis, in her official capacity, . . . from applying her 'no marriage licenses' policy to future marriage license

requests submitted by Plaintiffs or by other individuals who are legally eligible to marry in Kentucky.").]

However, Davis is not relieved of her obligation to perform neutral and generally applicable duties in the performance of her government employment because she objects, on religious grounds, to doing so. Because Kentucky requires individuals to obtain marriage licenses in order to marry, it logically follows that the government, when acting as employer, enjoys more latitude to impose incidental burdens upon its employees' free exercise rights in order to ensure that this essential government service is provided to the public. "[W]hen a government employee asserts that his constitutional rights have been infringed, the court must strike a balance between the employee's interests as a citizen and 'the interest of the [government] as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Baz v. Walters*, 782 F.2d 701, 708 (7th Cir. 1986) (quoting *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968)); *see also Endres v. Ind. State Police*, 349 F.3d 922, 927 (7th Cir. 2003) (reclassification of police officer, over officer's religiously-based objection, to Gaming Commission Agent and subsequent termination of employment for insubordination, did not "violate[] the free exercise clause of the first amendment").

Moreover, even if Davis' free exercise claim were analyzed under the analytical framework used when the government is acting as a sovereign and not as employer, she is unlikely to prevail on the merits of her claim because the Free Exercise Clauses of the U.S. and Kentucky Constitutions do not entitle her to refuse to issue marriage licenses to otherwise qualified applicants.

In *Employment Division v. Smith*, the Supreme Court held that the federal Free Exercise Clause is not offended by a neutral law of general applicability. 494 U.S. 872, 885 (1990). Thus, laws that are neutral and generally applicable need only be rationally related to a legitimate government interest. This standard likewise applies to Davis' argument under the Kentucky Constitution. *See Gingerich v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012) (free exercise rights under Ky. Constitution coextensive with those under the First Amendment). Here, Kentucky's administrative scheme requires all county clerks to issue marriage licenses. It is undeniably neutral, as is the form required to do so, because it is intended to ensure that all qualified couples can exercise the fundamental right to marry. It is also generally applicable because it does not target religiously motivated conduct. That Davis' religious beliefs happen to be the basis for her refusal to perform the administrative tasks associated with her

job does not mean that her religious beliefs are somehow "targeted" by the laws mandating those tasks. Under the deferential rational basis standard, requiring Davis to carry out her job duties when acting in her official capacity does not violate her free exercise rights.

Kentucky's Religious Freedom Restoration Act does not change the result.[1] Kentucky has not just a legitimate interest, but a compelling one, in ensuring the freedom to marry for all qualified couples. As an initial matter, Kentucky's administrative scheme does not substantially burden Davis' religious exercise because she is not required to support, endorse, or participate in any wedding. But, even if issuing marriage licenses were deemed to substantially burden Davis' religious beliefs *and* the Court applied strict scrutiny to that requirement, it would also satisfy heightened review.

First, Kentucky has compelling interests in ensuring that qualified individuals may exercise their fundamental right to marry and in the uniform issuance and recording of marriage licenses and marriage-related data. *See Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (state's interest in "improving

[1] In addition to reasons set forth, Davis' request for injunctive relief under Kentucky's RFRA statute also fail because the Eleventh Amendment bars federal courts from enjoining state actors to comply with state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

the health, safety, morals and general well-being of [] citizens" warranted denying Jewish storeowners religious exemption from Sunday closing law); *United States v. Lee*, 455 U.S. 252, 260 (1982) ("broad public interest in maintaining a sound tax system"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) ("[G]overnment interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (a state's "commitment to eliminating discrimination" is a "goal . . . [that] plainly serves compelling state interests of the highest order"); KRS § 213.116 (mandating "collection, indexing, tabulation, and registration of data relating to marriages, divorces, and annulments" by Cabinet for health and Family Services); *see also Romer v. Evans*, 517 U.S. 620, 628 (1996) (state and local governments have the power to enact statutory schemes to prohibit discrimination on the basis of sexual orientation).

Moreover, the uniform system Kentucky has in place for ensuring that individuals satisfy the state's requirements for marriage would likewise satisfy the "least restrictive means" analysis because it ensures that all Kentuckians have equal access to the public officials responsible for issuing and recording those licenses free from discrimination. As the Supreme Court

has recognized, an assertion of entitlement to religious freedom does not justify exemptions that adversely impact others even under the strict scrutiny standard applied prior to *Smith*. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (noting that in analyzing religious exemptions, "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries");[2] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.18 (1989) (invalidating sales-tax exemption for religious periodicals in part because exemption would have "burden[ed] non-beneficiaries by increasing their tax bills"); *Thornton v. Caldor*, 472 U.S. 703, 710 (1985) ("The First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.") (internal quotation marks and citation omitted); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (exempting claimant from state unemployment benefits policy but noting that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties."); *Barnette*, 319 U.S.

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[2] *Cutter* was decided under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(1)(1), which prohibits government-imposed substantial burdens on religious exercise unless strict scrutiny is satisfied, just as the Supreme Court's pre-*Smith* free exercise cases did (and just as RFRA does today).

at 630 (excusing students from reciting Pledge of Allegiance, but noting that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so").

B. The administrative act of issuing, or allowing others to issue, marriage licenses does not implicate the compelled speech doctrine.

Davis is also unlikely to succeed regarding her asserted free speech claim, *i.e.*, that having her name, as the Rowan County Clerk, appear on the license as the issuing authority compels her to communicate a message of endorsement of marriage for same-sex couples (or any other couples). [Davis' Emergency Motion for Injunction Pending Appeal, No. 15-5961, at 17-18.] "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). As in *Garcetti*, the speech at issue here "owes its existence to a public employee's professional responsibilities" in the performance of her job duties. Thus, a restriction upon that speech "does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id*. at 421-22.

Similarly, this case does not implicate the compelled speech doctrine. County clerks are paid to carry out their official duties on behalf of the government, and their official acts are not expressions of their own viewpoint. The act of issuing a marriage license that includes Davis' name, in her official capacity as County Clerk, does not communicate any message from Davis, let alone her personal endorsement of anyone's marriage. Nor does it compel her "in effect 'to profess any statement of belief or to engage in any ceremony of assent'" to marriage for same-sex couples. *Troster v. Pennsylvania State Dep't of Corr.*, 65 F.3d 1086, 1091 (3d Cir. 1995) (quoting *West Virginia State Bd. of Education v. Barnette,* 319 U.S. 624, 634 (1943)). When Davis issues a marriage license, her doing so does not convey a message to the applicants that Davis personally shares in their joy or otherwise supports their intimate relationship. As the Supreme Court has recognized, even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (citing *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990) (plurality)). This distinction between government messages that are necessary for the delivery of governmental services versus the private speech of individuals

who are employed as government officials is equally applicable here. Thus, Davis' claim that the administrative task of affixing her name, as the County Clerk, to marriage licenses is akin to "forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' [] trivializes the freedom protected in *Barnette* and *Wooley*" and should be rejected. *Id*. at 62.

Finally, Davis remains free to express her views about marriage for same-sex couples, as she has done publicly throughout the pendency of this case. What she may not do is voluntarily assume public office and then use her government position to deny others access to public services to which they are entitled. Thus, requiring Davis to perform her job duties as a government official does not violate her right to free speech.

II. DENYING THE REQUESTED EMERGENCY PRELIMINARY INJUNCTION WOULD NOT RESULT IN IRREPARABLE INJURY TO DEFENDANT.

Plaintiffs do not dispute that Davis opposes same-sex marriage due to her personal religious beliefs, or that those beliefs are sincerely held. However, the administrative acts necessary for her office to issue marriage licenses, including marriage licenses to same-sex couples, do not impose a substantial burden upon her religious freedom. For example, courts have frequently rejected free exercise claims on the basis that the government-

compelled action did not impose a substantial burden upon the claimants' free exercise rights even under the strict scrutiny standard applied prior to *Smith*. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990) (collection and payment of sales and use tax did not substantially burden free exercise rights); *Bowen v. Roy*, 476 U.S. 693 (1986) (requirement that applicants possess a social security number in order to qualify for federal aid programs not a substantial burden upon free exercise rights); *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985) (application of labor laws to religious foundation's commercial activities did not substantially burden free exercise rights); *Bd. of Ed. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968) (no substantial burden on exercise of religion from non-coercive government action requiring free book loans to all public and private schools for elementary and secondary students).

Here, as in those instances, the burden upon Davis, in her official capacity, to perform (or allow her subordinates to perform) the administrative tasks associated with issuing marriage licenses does not rise to the level of a substantial burden upon her religious belief. *See, e.g., Little Sisters of the Poor v. Burwell*, --- F.3d ---, 2015 WL 4232096 at *30 (10th Cir. July 14, 2015) ("because the [Affordable Care Act's opt-out provision]

does not involve them in providing, paying for, facilitating, or causing contraceptive coverage . . . Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves."), *petition for cert. docketed*, (U.S. July 23, 2015) (No. 15-105). Thus, denying the requested emergency preliminary injunction would not impose irreparable harm. Moreover, as noted above, *see supra* § I.A., even if any such burden existed here, it would be fully justified by the government's compelling interests in guaranteeing qualified individuals the fundamental right to marry and in the uniform issuance of marriage licenses.

III. THE REQUESTED EMERGENCY PRELIMINARY INJUNCTION WOULD, IF GRANTED, WOULD RESULT IN ONGOING, IRREPARABLE HARM TO PLAINTIFFS.

Davis, in seeking an emergency preliminary injunction, seeks an exemption from the already-granted preliminary injunction entered on Plaintiffs' (and others') behalf. For the same reasons that Plaintiffs would have suffered irreparable injury absent their preliminary injunction, those who are covered by the preliminary injunction but have not yet obtained a marriage license will be irreparably harmed were Davis granted an exemption from having to comply with it. Specifically, the requested emergency preliminary injunction, if granted, would have the effect of re-instituting Davis' "no marriage license" policy thus directly and

substantially burdening individuals' fundamental right to marry. And, as noted before, the ongoing constitutional violations resulting from this policy are manifest. Prior to *Obergefell*, the Rowan County Clerk's office issued approximately two hundred marriage licenses per year thus enabling roughly four hundred people, annually, to exercise their fundamental right to marry. [Page ID #243: 7/20/15 Hrg. Transcript (RE #26) (212 licenses issued in 2014); *id*. (99 licenses issued in first half of 2015).] The requested emergency preliminary injunction would, if granted, impose a direct legal obstacle upon individuals' right to marry by forcing them to choose between traveling to another county to obtain a license or forgo their right altogether. As Plaintiffs stated in support of their Motion for Preliminary Injunction, both the Supreme Court and the Sixth Circuit have held that the infringement of protected freedoms constitutes an irreparable injury sufficient to justify the grant of a preliminary injunction. [Page ID #44-45: Plaintiffs' Memo. (RE #2-1).] "[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is *mandated*." *ACLU v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd*, *McCreary County v. ACLU*, 545 U.S. 844 (2005) (emphasis added); *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001).

IV. THE PUBLIC INTEREST FAVORS DENYING THE REQUESTED STAY.

Denying Davis' requested emergency preliminary injunction also serves the public interest, in that in ensures that qualified individuals remain able to seek (and obtain) marriage licenses in Rowan County during the pendency of Davis' appeals. *See Fed. Trade Comm'n v. E.M.A. Nationwide, Inc.*, No. 13-4169, 2014 WL 4401247, at *12 (6th Cir. Sept. 8, 2014) ("The public interest is furthered where individuals' injuries are remedied in a timely manner.").

CONCLUSION

Because all of the relevant factors weigh in favor of denying Davis' requested emergency preliminary injunction, including that Davis is unlikely to succeed on the merits of her claims and that she will not suffer a legally cognizable irreparable injury absent the injunction, Plaintiffs respectfully request that the emergency motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of **APPELLEES' RESPONSE OPPOSING EMERGENCY MOTION FOR PRELIMINARY INJUNCTION** to be served September 8, 2015, by operation of this Court's electronic filing system, on the following:

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