

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 SPARTMAN,

Plaintiffs,

v.

KIM DAVIS, individually,

Defendant-Third-Party Plaintiff-Appellant.

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-Appellees.

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 FOR INJUNCTION PENDING
APPEAL**

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Pursuant to Fed. R. App. P. 8(a)(2) and 27, and 6th Cir. Rule 27(c), Appellant Kim Davis (“Davis”) hereby moves this Court, on an emergency basis, for an injunction pending appeal of the district court’s August 25, 2015 order effectively denying Davis’ request for a preliminary injunction against Third-Party Defendants-Appellees Steven L. Beshear, in his official capacity as Governor of Kentucky (“Gov. Beshear”) and Wayne Onkst, State Librarian and Commissioner, Kentucky Department for Libraries and Archives (KDLA) (“Commr. Onkst”) (D.E. 66)¹.

INTRODUCTION

In an assault upon her individual liberty and dignity, **Davis currently sits incarcerated in the Carter County Detention Center (Kentucky)**, in significant part, because Gov. Beshear has refused to take elementary steps to accommodate Davis’ undisputed, sincerely-held religious beliefs about marriage. Her incarceration could have been avoided if the district court had acted on her request for preliminary injunctive relief against Gov. Beshear and Commr. Onkst. In fact, but for Gov. Beshear’s edict directing Kentucky County Clerks, including Davis, to authorize same-sex “marriage” (“SSM”) licenses bearing their own name, Plaintiffs’ underlying lawsuit would be against him, not her. From the outset of this case, Davis has proposed numerous simple options that resolve the parties’ conflict, and protect Davis’ sincerely-held religious beliefs. These less restrictive solutions are readily

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

available, and easily accomplished by Gov. Beshear and the KDLA, the state agency responsible for designing the revised marriage form at issue in this litigation.

Over against the decision to redefine marriage in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the Supreme Court neither overwrote the First Amendment or other critical religious liberty protections for persons nor compelled States to accomplish recognition of SSM by invading and trampling upon the consciences of individual county clerks. Thus, coercing an individual county clerk (Davis) to authorize and personally approve SSM in violation of her religious liberty and speech rights, as Gov. Beshear has done, is wrong. That is especially true here, where Davis took office when Kentucky marriage law perfectly aligned with her deep religious convictions, and there are multiple alternatives available by which individuals can obtain SSM licenses without voiding Davis' conscience and stripping Davis of her liberties. As a prisoner of her conscience, Davis continues to request a simple accommodation and exemption from Gov. Beshear, who is overseeing Kentucky marriage policy. Granting an injunction pending appeal of the district court's August 25, 2015 order will ensure that Davis' individual rights are not continually, and forever, irreversibly harmed by Gov. Beshear's own inactions.

STATEMENT OF FACTS

On June 26, 2015, only moments after the Supreme Court decided *Obergefell*, and without permitting any legislative response or action, Gov. Beshear issued a

directive ordering all Kentucky county clerks to personally authorize SSM licenses (the “SSM Mandate”). This SSM Mandate triggered Plaintiffs’ lawsuit after a particular county clerk (Davis) in a particular county (Rowan County) refused to authorize and approve their Kentucky marriage licenses based upon her religious conscience objection to SSM. *See* D.E. 1. Plaintiffs filed a motion to enjoin Davis from “refusing to issue marriage licenses to any future marriage license applications submitted by the Named Plaintiffs.” D.E. 2-2.

Facing potential liability on Plaintiffs’ claims due to the SSM Mandate, Davis filed a verified third-party Complaint against Gov. Beshear, the issuer of the SSM Mandate, and Commr. Onkst, who oversees the KDLA, *see* D.E. 34, Verified Third-Party Complaint (“VTC”) (attached hereto as Exhibit “B”), and a motion to enjoin enforcement of Gov. Beshear’s SSM Mandate and obtain an exemption “from having to authorize the issuance of Kentucky marriage licenses.” D.E. 39-7.

Importantly, the grounds on which Davis sought preliminary injunctive relief against Gov. Beshear are necessarily intertwined with the grounds on which she opposed Plaintiffs’ request for preliminary injunction against her, *see* D.E. 29, 39-1, but even the district court acknowledged the “further develop[ment]” of Davis’ religious conscience exemption request against Gov. Beshear. D.E. 43 at 19, n. 9. But rather than considering Davis’ and Plaintiffs’ requests together and allowing Davis to develop a further evidentiary record on her own request for individual

exemption and accommodation from Gov. Beshear's SSM Mandate, the district court granted Plaintiffs their injunctive relief against Davis on August 12, 2015 (hereinafter, the "Injunction"). The Injunction enjoins Davis "from applying her 'no marriage licenses' policy to future marriage license requests submitted by Plaintiffs," without fully considering Davis' own injunctive relief. *Id.* at 28.²

On August 25, 2015, the district court entered an order, on its own motion, staying any consideration of Davis' motion for preliminary injunction against Gov. Beshear "pending review" of the Injunction by this Court, thereby effectively denying Davis' request for preliminary injunctive relief. D.E. 58. That "practical denial" of injunctive relief is immediately appealable under 28 U.S.C. § 1292(a).³ On August 31, 2015, Davis filed a notice of appeal of the district court's August 25, 2015 order to this Court. D.E. 66 (attached hereto as Exhibit "A").

On September 2, 2015, Davis filed a motion for injunction pending appeal in the district court. D.E. 70. The district court refused to decide that motion before sending Davis to jail for contempt. D.E. 75. In fact, the district court stated it would **not** rule on the motion for injunction pending appeal before September 11, 2015, more than one week after incarcerating Davis. *See* Hr'g Tr. (9/3/2015), at 29:2-30:17

² Facing an order enjoining her to authorize marriage licenses in derogation of her religious conscience, Davis filed a notice of appeal of the Injunction to this Court, D.E. 44, docketed as Case No. 15-5880.

³ *Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 567 (6th Cir. 1985); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981).

(excerpts attached hereto as Exhibit “C”). Due to the emergency circumstances presented by Davis’ incarceration and the substantial loss of personal liberties she faces every day without an injunction pending appeal, time is of the essence and a ruling from the district court is therefore “impracticable” under Fed. R. App. P. 8(a)(2)(A)(i). Accordingly, Davis now seeks that relief in this Court.

ARGUMENT

In granting an injunction pending appeal, this Court “engages in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction.” *Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 572 (6th Cir. 2002). The relevant factors are: “(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction.” *Id.* at 573.

I. Davis Has A Strong Likelihood Of Succeeding On The Merits Of Her Claims Against Gov. Beshear And Commr. Onkst.

Davis’ inability to personally 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, which was enacted by an overwhelming majority in 2013 over Gov. Beshear’s veto, protects a

person's⁴ "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 (emphasis added); *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.").⁵ The statute thus protects not only a person's beliefs but also a person's actions (or non-actions) based thereon, and subjugates to the strictest scrutiny any governmental action (be it legislative or regulatory scheme, or executive action) infringing religiously-motivated actions (or non-actions).⁶

⁴ The Kentucky RFRA protects the religious freedom of all "persons" in Kentucky. While "person" is not defined in the Kentucky RFRA, it is defined in Kentucky's general definitions statute to include "individuals," and **publicly elected officials are not excluded**. *See* KY. REV. STAT. § 446.010(33).

⁵ 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).

⁶ The Kentucky RFRA is housed under Chapter 446 of Kentucky's statutes, which is entitled "Construction of Statutes," and includes such other generally applicable provisions as "Definitions for Statutes Generally," "Computation of Time," "Severability," "Titles, Headings, and Notes," KY. REV. STAT. §§ 446.010, 446.030, 446.090, 446.140. Even more specifically, the Kentucky RFRA is included under a section of Chapter 446 reserved for "Rules of Codification." As such,

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.

A. Davis’ Religious Beliefs Are Substantially Burdened By Gov. Beshear’s SSM Mandate.

Supreme Court and Sixth Circuit precedent, along with post-*Obergefell* pending legislation in Kentucky and the undisputed evidentiary record on this appeal, support the conclusion that Davis’ religious beliefs are substantially burdened by Gov. Beshear’s SSM Mandate forcing her to authorize SSM licenses.

Davis indisputably holds sincere religious beliefs about marriage and her inability to issue SSM licenses is motivated by those convictions. VTC, ¶¶ 17-18. In her belief, marriage is the sacred union of a man and a woman, only. VTC, ¶ 17. The prescribed marriage license form required under Gov. Beshear’s SSM Mandate provides no opportunity for the religious objector (Davis) not to participate in endorsement and approval of SSM. The specific form uses the word “marriage” at

Kentucky marriage law cannot be interpreted without also considering and applying the Kentucky RFRA.

six different places, requires Davis' name to be on the license at two different places (at least) for any license issued in Rowan County, Kentucky, and also requires her to authorize the "join[ing] together in the state of matrimony" a proposed union that she cannot approve. VTC, ¶ 11, and Exs. A, D. But Davis cannot authorize a union of two persons which, in her sincerely-held belief, is not marriage. VTC, ¶¶ 17-18.

Gov. Beshear has flatly rejected Davis' request for religious exemption. In his view, Davis must either comply with his SSM Mandate, or resign from office. VTC, ¶¶ 28, 36. On Gov. Beshear's own initiative, the KDLA prepared a revised marriage form in response to his SSM Mandate, which was then distributed to county clerks for them to begin using immediately, without exception, per Gov. Beshear's directive. VTC, ¶¶ 25-26, and Ex. C. This form provided no opportunity for county clerks with religious objections to SSM *not* to participate in endorsement and approval of SSM. On this new form constructed by Gov. Beshear and the KDLA, the "authorization" to marry (even on licenses she does not personally sign) still unmistakably comes from Davis herself. VTC, ¶ 12, and Ex. C. As in the old forms, the new KDLA-approved form requires Davis to put her imprimatur no less than two times on each and every marriage license issued in her county. VTC, ¶¶ 11, 26, and Ex. C.⁷ However, as noted above, to authorize a SSM license bearing her imprimatur

⁷ By legislative enactment predating *Obergefell*, this form included: (1) an "authorization statement of the county clerk issuing the license"; (2) "the signature of the county clerk or deputy clerk issuing the license"; (3) "[a] signed

sears her conscience because she would be endorsing the proposed union and calling something “marriage” that is not marriage according to her beliefs. VTC, ¶¶ 17-18.

Thus, Gov. Beshear is imposing a direct, severe, and substantial pressure on Davis by the SSM Mandate when he forces Davis “to choose between following the precepts of her religion and forfeiting benefits [her job], on the one hand, and abandoning one of the precepts of her religion in order to accept work [keep her job], on the other hand.” *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).⁸ This Hobson’s choice places undue pressure on Davis to choose between her job and her religion.

In addition to his unmitigated “approve or resign” rule, Gov. Beshear has ominously declared that “the courts” will deal with county clerks who do not comply with his SSM Mandate. VTC, ¶ 35. Moreover, immediately after issuance of the SSM Mandate, Atty. Gen. Conway even threatened possible legal action against county clerks who did not comply with the SSM Mandate, even seemingly inviting

statement by the county clerk or a deputy county clerk of the county in which the marriage license was issued”; and (4) the “*the name of the county clerk under whose authority the license was issued.*” KY. REV. STAT. § 402.100(1)-(3) (emphasis added). As county clerk, Davis is provided this form by the KDLA, and she has no local discretion in the composition and requirements of that prescribed form. VTC, ¶¶ 7, 10.

⁸ See also *Holt v. Hobbs*, 135 S.Ct. 853, 862 (2015) (government places a “substantial burden” on religious exercise if policy requires person “to ‘engage in conduct that seriously violates [her] religious beliefs’ or ‘contravene that policy and . . . face serious disciplinary action’”); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) (government places a “substantial burden” on religious belief when it “‘place[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,’ or ‘effectively bar[s] his sincere faith-based conduct’”).

this very lawsuit against Davis: “Any clerk that refuses to issue marriage licenses is opening himself or herself to potential legal liability and sanctions. Any couple or person denied a license may seek remedy in federal court, but should consult with a private attorney about their particular situation.”⁹ Loss of job. Civil liability. Sanctions. Private lawsuits in federal court. Contempt motions. Imprisonment. Davis is being threatened with (and experiencing) all of the above by choosing to adhere to her sincere religious beliefs. Certainly, religious liberty protections, including the Kentucky RFRA, are designed to protect a person from such substantial burdens upon their religious freedom.¹⁰

It is not for the district court or, respectfully, even this Court, to question the reasonableness or scriptural accuracy of Davis’ beliefs about marriage. *Hobby Lobby*, 134 S.Ct. at 2779 (citing *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981)). Judges “are not arbiters of scriptural interpretation,” and they are not tasked with determining who “more correctly”

⁹ This statement attributed to Atty. Gen Conway was contemporaneously reported by multiple news sources. *See, e.g.*, Several county clerks defy same-sex marriage ruling, refuse to issue marriage licenses, LEXINGTON HERALD-LEADER, June 29, 2015; Steve Beshear and Jack Conway: On refusing marriage licenses, WTVQ.COM, June 30, 2015.

¹⁰ A proposed Kentucky legislative act on what constitutes a substantial burden in the marriage license context post-*Obergefell* agrees with Davis. 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* An Act Relating to Marriage, Ky. House Bill 101 (2016 Reg. Sess.).

perceives their faith's commands. *Thomas*, 450 U.S. at 716. Moreover, it is not for any court to determine whether Davis' religious beliefs are "mistaken" or "insubstantial." *Hobby Lobby*, 134 S.Ct. at 2779. Instead, the "'narrow function' . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" *Id.* (quoting *Thomas*, 450 U.S. at 716). There is no dispute that the requisite "honest conviction" exists here, and she is facing severe consequences of adhering to that conviction.

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*. For example, Davis is not claiming that her religious freedom is substantially burdened if she must complete an opt-out form to be exempted from issuing SSM licenses. Davis is also not claiming that a SSM license authorized by the Rowan County Judge/Executive and devoid of her name and authority substantially burdens her religious freedom. Davis is also not claiming that her religious freedom is substantially burdened if the license were issued by someone else in Rowan County (*e.g.*, a deputy clerk), so long as that license is not issued under her name or on her authority. But as it stands now, and through no fault of her own, no marriage license can be issued from the Rowan County clerk's office without Davis' authorization and without her name and imprimatur on the license. Davis is also not claiming that the mere administrative act of recording substantially burdens her religious freedom.

But county clerks are not mere scribes for a marriage. Instead, county clerks actually authorize the marriage license. *See* KY. REV. STAT. § 402.100(1)-(3).

B. The SSM Mandate Will Not Survive Strict Scrutiny Review.

To overcome this substantial burden on Davis’ religious freedom, Gov. Beshear must demonstrate by clear and convincing evidence that he has (1) a compelling governmental interest in infringing Davis’ religious conscience through the SSM Mandate and (2) used the least restrictive means to accomplish that interest. Under this strict scrutiny analysis, to be a compelling governmental interest, the SSM Mandate must further an interest “of the highest order,” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), and, “[i]f a less restrictive means is available for the Government to achieve its goals, the Government **must** use it.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 815 (2000) (emphasis added).

There is no compelling governmental interest in forcing Davis to violate her religious freedom. This inquiry “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘**to the person**’—the particular claimant whose sincere exercise of religions is being substantially burdened,” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (emphasis added) (quoting 42 U.S.C. § 2000bb-1(b)), and further requires courts “to ‘loo[k] beyond broadly formulated

interests’ and to ‘scrutiniz[e] the asserted harm of **granting specific exemptions to particular religious claimants**’—in other words, to look to the marginal interest in enforcing” the SSM Mandate in this case. *See Hobby Lobby*, 134 S.Ct. at 2779 (emphasis added) (quoting *O Centro*, 546 U.S. at 431). Here, Gov. Beshear cannot show that granting a specific exemption to Davis will endanger the Commonwealth of Kentucky, let alone Kentucky’s marriage licensing scheme.

Gov. Beshear’s claim that “like minded” exemptions require denial of Davis’ exemption does not withstand scrutiny under precedent from the Supreme Court and Sixth Circuit.¹¹ Rather, the Kentucky RFRA, like its federal counterpart, “operates by mandating consideration, under the compelling interest test, of exceptions to ‘rule[s] of general applicability,’” and provides ““a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”” *See O Centro*, 546 U.S. at 436 (citing 42 U.S.C. §§ 2000bb–1(a), 2000bb(a)(5)). Of course, religious accommodations are not provided for each and every whim or scruple raised by a person, and merely stating a religious objection does not mean that any county clerk can deny a marriage license at any time for any

¹¹ *See Haight*, 763 F.3d at 562 (rejecting prison warden’s “like-minded” contention that if he grants one prisoner an accommodation he will then “have to grant others, having set a precedent with the ‘first’ accommodation”); *see also O Centro*, 546 U.S. at 436 (finding under RFRA that this kind of argument represents “the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions”); *Holt*, 135 S.Ct. at 866.

reason. That is not this case. As noted above, Davis has served in the county clerk's office for thirty years, and, during this entire time period, this is the first instance in which she (or anyone else for that matter) has raised a religious objection to performing a function in the county clerk's office. VTC, ¶ 31. Plainly, this is not a situation where accommodating Davis' religious objections will swallow the rule, because licenses are readily available in more than 130 marriage licensing locations spread across Kentucky. VTC, ¶¶ 9, 27.

Additionally, the SSM Mandate decreed by Gov. Beshear was neither expressly nor impliedly compelled by *Obergefell*, and leaves no room for individual county clerks' religious freedoms. Contrary to Gov. Beshear's suggestion that Davis must apply his SSM Mandate, Davis does not shed her personal convictions and individual rights at the entry door of public service. It is well-established law that a person's constitutional and statutory rights and liberties are not immediately eviscerated the moment they take their oath of office.¹²

But even if the requisite showing of a compelling government interest showing can be made, the infringement upon Davis must still satisfy the

¹² “Almost fifty years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment.” *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014). There are “some rights and freedoms so fundamental to liberty” that a citizen is “not deprived of [these] fundamental rights by virtue of working for the government.” *Borough of Duryea, Pa. v. Guarnieri*, 131 S.Ct. 2488, 2493-94 (2011) (citation omitted).

“exceptionally demanding” least-restrictive-means standard. *See Hobby Lobby*, 134 S.Ct. at 2780. Gov. Beshear cannot demonstrate that he “lacks other means” of issuing marriage licenses to same-sex couples “without imposing a substantial burden” on Davis’ “exercise of religion.” *Id.* Not only that, the least-restrictive-means test may “require the Government to expend additional funds” to accommodate “religious beliefs.” *Id.* at 2781. Thus, even if proposed less restrictive alternatives require additional costs in applying Kentucky marriage law, such costs are specifically envisioned by the Kentucky RFRA to ensure that a person’s religious freedom is protected.

In this matter, even if the “desired goal” is providing Plaintiffs with Kentucky marriage licenses **in Rowan County**¹³, *see id.*, **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 (permitting recusal of officials from “issuing” lawful marriage licenses “based upon any sincerely held religious objection”);
- 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 office, and thus to remove

¹³ Nothing in *Obergefell* suggests that individuals have a fundamental right to receive a marriage license from a particular clerk, in a particular county.

the personal nature of the authorization that Davis must provide on the current form¹⁴;

- 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, KY. REV. STAT. § 402.240;
- Distributing Kentucky marriage licenses at the state-level through an online or other state-wide licensing scheme, such as through the Department of Vital Statistics; or
- Legislatively addressing Kentucky’s entire marriage licensing scheme post-*Obergefell*, whether immediately by calling a special legislative session or in three months in the next regular legislative session. Leading Kentucky legislators from both parties uniformly agree that Davis’ religious beliefs should be protected, and both gubernatorial candidates in Kentucky have indicated an intent to address this issue in a way that supports county clerks’ individual rights.

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*. But Gov. Beshear appears not to have evaluated, let alone even considered, any of the foregoing less restrictive alternatives before issuing his SSM Mandate. However, government’s failure to actually “consider[] and reject[] alternatives more tailored” to its alleged interests “cannot withstand” the least restrictive means test. *Haight*, 763 F.3d at 564. Here, the ink was barely dry from the *Obergefell* decision when Gov. Beshear issued his SSM Mandate to all Kentucky County Clerks on June 26, 2015—the same day the *Obergefell* decision was

¹⁴ The Kentucky County Clerks Association have made a similar proposal. In fact, Atty. Gen. Conway has publicly stated that he is “fine” with that proposal.

announced. VTC, ¶¶ 24-25, and Ex. C. Yet the entire Kentucky marriage licensing scheme is founded upon the millennia-old natural definition of marriage. Gov. Beshear could have (and still can) take steps that both recognize SSM and protect county clerks' religious conscience rights in response to the redefinition of marriage in *Obergefell*. In fact, Gov. Beshear recently stated in a press briefing that "I'm sure if they [the Kentucky legislature] want to make a change that they'll be able to come up with something . . . There's a number of different ways, I'm sure, if they want to change the way marriage licenses are issued, then they can do so."¹⁵ This recent statement not only debunks the myth that Kentucky has a compelling government interest in forcing Davis to violate her conscience, but also, it serves as an admission that there are a number of available options for addressing marriage licenses in a way that alleviates the religious liberty concerns of Davis.

C. The SSM Mandate Violates Davis' Free Speech Rights.

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]

¹⁵ Gov. Beshear can issue an executive order on marriage licensing which can be ratified by the Kentucky legislature. *See* Ky. Rev. Stat. § 12.028.

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 (“KIM DAVIS”) and endorsement on the proposed union. *See* KY. REV. STAT. § 402.100(3); *see also* VTC, Exs. A, D. Unlike other governmental licensing or registration schemes that Kentucky provides (*e.g.*, driver’s licenses, fishing and hunting licenses, motor vehicle registration, voter registration), the issuance of a marriage license requires an individual person (Davis) to authorize a particular relationship between persons against her religious convictions. As it currently stands, Davis’ name and approval cannot be divorced from a SSM license. Thus, pursuant to Gov. Beshear’s SSM Mandate, Davis is being told to validate and affirm on the prescribed KDLA form a view that violates her religious beliefs. *See Wooley*, 430 U.S. at 707. 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” is altogether different, and violates not only her conscience, but also her free speech rights. *See id.*

II. The Remaining Factors Favor Granting An Injunction Pending Appeal.

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 (including a permanent injunction in her favor) if Davis is forced to violate her religious conscience now. 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 public has no interest in coercing Davis to violate her conscience and religious freedom. *See, e.g., Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (finding that the public has a “significant interest” in the “protection of First Amendment liberties”); *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (“[P]ursuant to RFRA, there is a strong public interest in the free exercise of religion even where that interest may conflict with [another legislative scheme].”).

RELIEF REQUESTED

Appellant Kim Davis respectfully requests that this Court: (1) grant immediate consideration and (2) enter an injunction enjoining enforcement of Gov. Beshear’s SSM Mandate against her and preliminarily exempting her from authorizing marriage licenses pending final resolution of the appeal in this Court.

DATED: September 7, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 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 25, 2015 Order entered on the district court’s own motion staying briefing on and consideration of Davis’ Motion for Preliminary Injunction against 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, Kentucky Department for Libraries

and Archives pending appellate review of the district court's Memorandum Opinion and Order dated August 12, 2015 (D.E. 58).

A copy of the August 25, 2015 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:

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:

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

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DATED: August 31, 2015

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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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DATED: August 31, 2015

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Kim Davis

EXHIBIT A

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

Upon the Court's own Motion,

IT IS ORDERED that briefing on Defendant Kim Davis' Motion to Dismiss (Doc. # 32) and Motion for Preliminary Injunction (Doc. # 39) be, and is, hereby **STAYED** pending review of the Court's Memorandum Opinion and Order (Doc. # 43) by the United States Court of Appeals for the Sixth Circuit. A briefing schedule on the Motions will be set by subsequent order after the Sixth Circuit renders its decision.

This 25th day of August, 2015.



Signed By:

David L. Bunning

DB

United States District Judge

EXHIBIT B

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)[†]

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Orlando, FL 32854-0774

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[†]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:

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L. Joe Dunman
Laura E. Landenwich
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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

64
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 (recorder's name) , Deputy (recorder's title) Clerk

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"

EXHIBIT C

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

APRIL MILLER, et al.,
Plaintiffs,

VS.

KIM DAVIS, et al.,
Defendants.

Docket No. 0:15-CV-44
At Ashland, Kentucky
Thursday, September 3, 2015
10:59 a.m.

TRANSCRIPT OF HEARING ON MOTION BEFORE
DAVID L. BUNNING
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

1 MR. SHARP: Thank you, Your Honor.

2 MR. CHRISTMAN: Your Honor --

3 THE COURT: Yes, sir?

4 MR. CHRISTMAN: -- if I could ask for a slight
5 clarification.

6 THE COURT: All right.

7 MR. CHRISTMAN: By -- by what you've just
8 ordered and directed, does that mean that you will not
9 have an order on the motion for injunction pending
10 appeal prior to September 11th?

11 THE COURT: On your motion?

12 MR. CHRISTMAN: On the motion for injunction
13 pending appeal. I mean, you absolutely will not rule
14 on the motion for injunction?

15 THE COURT: No. I will make not a ruling
16 until I get a response, clearly.

17 And I think -- this motion was filed
18 yesterday. That would give me nine days. I think the
19 last motion took 45 days to adjudicate. So I'm not
20 planning on ruling on Docket 70 before the 11th. Is
21 that what you're asking?

22 MR. CHRISTMAN: Yes. Just wanted to ask for
23 that clarification for the record.

24 THE COURT: I'm not going to rule on the
25 motion Docket 70 until it becomes ripe. And I'll give

1 -- how much time would you like to respond?

2 MR. CHRISTMAN: We filed the motion, Your
3 Honor. You're asking for --

4 THE COURT: Well, but you can file a reply.
5 I mean ...

6 MR. CHRISTMAN: Correct. It's -- Your Honor,
7 to be honest, it's to clear up the record. As I said
8 earlier, that the Federal Rules of Appellate Procedure
9 ordinarily direct you to file in the district court,
10 but if it's deemed impractical to get the relief that
11 you're asking for, which we believe is emergent, that
12 then we are --

13 THE COURT: Well, I will do my level best
14 to -- I understand that anything filed under Rule 65
15 takes precedence over any other case, other than a
16 case of similar nature, I think is what the law says.
17 So I will work on that as expeditiously as I can.

18 I know you have an expedited briefing
19 schedule at the Circuit on the underlying substance of
20 the merits of the appeal. Perhaps that may need to be
21 modified. I'll try to get that order out as soon as
22 you -- if you want to file a reply within seven days,
23 is that ...

24 MR. CHRISTMAN: That's fine, Your Honor.

25 THE COURT: Okay. Seven days, Mr. Vance, or