Case No. 15-5961

IN THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APRIL MILLER, PH.D., KAREN ANN ROBERTS, SHANTEL BURKE, STEPHEN NAPIER, JODY FERNANDEZ, KEVIN HOLLOWAY, L. AARON SKAGGS, and BARRY W. SPARTMAN
Plaintiffs/Appellees

v.

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

v.

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

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

RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR IMMEDIATE CONSIDERATION AND MOTION FOR INJUNCTION PENDING APPEAL [DE 26]

WILLIAM M. LEAR, JR.
PALMER G. VANCE II
STOLL KEENON OGDEN PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507
Counsel for Steven L. Beshear and Wayne Onkst in their Official Capacities

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Come the appellees Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives, by counsel, and respectfully tender their response in opposition to the Motion for Immediate Consideration and Motion for Injunction Pending Appeal (the "Motion") [DE 26] of the appellant Kim Davis. The Motion is without merit and must be denied.

I. INTRODUCTION

Appellant Kim Davis ("Davis") erroneously asserts that she is in jail because of Governor Beshear. [Motion at 1]. Since the filing of the Motion, the District Court has released Davis from custody because Rowan County Deputy Clerks have agreed to issue marriage licenses to qualified couples as ordered. [DE 89, Order, Page ID 1827]. Davis had been in custody because of her own refusal to comply with the law and the Order of the District Court below—nothing more, nothing less. Governor Beshear issued no "edict directing Kentucky County Clerks, including Davis, to authorize same-sex marriage . . . licenses bearing their own name." [Id.] Davis concedes as much, acknowledging that Kentucky statute – not Governor Beshear – sets forth the requirements of marriage laws. [Id. at n.7]. The Kentucky General Assembly has placed the duty to issue marriage licenses on county clerks – separately elected constitutional officials – or their deputy clerks. Governor Beshear does not possess the authority to rewrite those statutes to

reassign those duties elsewhere. Davis' argument – and indeed her entire defense – is simply a misguided effort to register displeasure with the Supreme Court decision Obergefell v. Hodges, 135 S. Ct. 2584 (2015). Meanwhile, there has been needless litigation, significantly multiplied by Davis herself, while the citizens of Rowan County have been denied access to their fundamental right to marriage.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff/Appellees are a group of same-sex and opposite-sex couples residing in Rowan County, Kentucky ("Plaintiffs") who filed suit against Kim Davis, the Rowan County Clerk, for violation of their constitutional rights as a result of Davis' refusal to issue any marriage licenses. [DE 1, Complaint, Page ID 1-2]. Davis raised constitutional rights as defenses to Plaintiffs' claim. [DE 29, Davis Response to Motion for Preliminary Injunction, Page ID 318-646]. Specifically, Davis asserted that issuing marriage licenses to same-sex couples violates her rights to free exercise of religion, free speech, and to be free from religious tests for holding office. [Id.]. Following briefing and hearings, the District Court entered a preliminary injunction that enjoins Davis in her official capacity from applying her "no marriage licenses" policy. [DE 43, Memorandum Opinion and Order ("Preliminary Injunction"), Page ID 1146-73]. The District Court thoughtfully analyzed each of Davis' constitutional defenses and found each to be without merit. [Id. at 16-28, Page ID 1161-73]. The Court below then

temporarily stayed the effect of the injunction through August 31, 2015. [DE 52, Order, Page ID 1264-1270; DE 55, Order, Page ID 1283-84].

Davis has appealed the preliminary injunction to this Court where it is currently pending. See Case No. 15-5880.[1] This Court denied Davis' request for a stay of the preliminary injunction pending appeal, finding that her position "cannot be defensibly argued" and that "[t]here is thus little or no likelihood" of success on appeal. [Case No. 15-5880 DE 28 at 3]. The United States Supreme Court likewise denied Davis' request for a stay of the preliminary injunction. [Case No. 15-5880 DE 30]. The first brief in the appeal of the preliminary injunction is due October 2, 2015. [Case No. 15-5880 DE 18].

Following expiration of the temporary stay, Davis willfully defied the preliminary injunction and persisted in her refusal to issue marriage licenses to qualified couples. [DE 67, Motion for Contempt, Page ID 1477-87]. The District Court found Davis to be in contempt and remanded her to federal custody until she complies with the preliminary injunction. [DE 75, Order, Page ID 1558-59].

While defending against Plaintiffs' claims below, Davis filed a Third-Party Complaint against Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and

[1] Davis today filed subsequent Notices of Appeal seeking review of an Order clarifying the scope of the preliminary injunction and the Order holding Davis in contempt for her willful refusal to comply with the preliminary injunction. [DE 82, Notice of Appeal, Page ID 1785; DE 83, Notice of Appeal, Page ID 1791].

Commissioner of Kentucky Department for Libraries and Archives (collectively "State Appellees"). [DE 34, Third-Party Complaint, Page ID 745-92]. Davis alleges that "Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst" are unlawful actions for which she seeks declaratory and injunctive relief. [Id. at ¶¶ 46-147]. Davis contends that "Kentucky marriage policies" violate her rights of free exercise of religion, free speech, and constitute an unlawful religious test for holding office. [Id.]. Notably, these are the ***same constitutional allegations*** raised as defenses to Plaintiffs' claims. State Appellees are timely moving to dismiss the Third-Party Complaint on numerous grounds, including Eleventh Amendment, lack of standing, and failure to state a claim upon which relief can be granted. [See Motion to Dismiss Third-Party Complaint].

Davis moved the District Court to enter a preliminary injunction against State Appellees that enjoins them from enforcing the Governor's alleged "mandate" that Davis issue marriage licenses to authorized individuals in conformity with Kentucky statute. [DE 39, Motion for Preliminary Injunction, Page ID 824-1130]. The District Court *sua sponte* ruled that briefing on Davis' motion for injunctive relief is "stayed pending review of the Court's Memorandum Opinion and Order (Doc. #43) by the United States Court of Appeals for the Sixth

Circuit." [DE 58, Order, Page ID 1289].[2] That is, the District Court held that it will consider Davis' Motion for Preliminary Injunction against the State Appellees after this Court considers the appeal of the preliminary injunction entered against Davis (Sixth Circuit Case No. 15-5880). This briefing plan is an efficient use of judicial resources, given that Davis' constitutional claims against the State Appellees are the ***identical arguments*** raised as defenses to Plaintiffs' Motion for Preliminary Injunction. [Compare DE 29, Davis Response to Motion for Preliminary Injunction, Page ID 318-646 with DE 34, Third-Party Complaint, Page ID 745-92]. The District Court indicated that "a briefing schedule on the Motions will be set by subsequent order after the Sixth Circuit renders its decision." [Id.].

In the present appeal, Davis attempts to seek review of the District Court Order staying briefing on and consideration of her Motion for Preliminary Injunction. [DE 66, Notice of Appeal, Page ID 1471-76]. This appeal is improper because the briefing Order is interlocutory. Thus, the State Appellees have moved to dismiss the appeal. [DE 27, Motion to Dismiss Appeal].

Though her constitutional arguments have been rejected by the District Court, this Court, and the Supreme Court, Davis has re-filed her Motion for Preliminary Injunction against the State Appellees (the one the District Court has already stayed briefing on pending this Court's review of the preliminary

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

injunction) with the District Court. This time, Davis has styled it as an Emergency Motion for Injunction Pending Appeal. [DE 70, Emergency Motion for Injunction Pending Appeal, Page ID 1498-1533]. The District Court has expedited briefing on that motion. [DE 75, Order, Page ID 1558-59]. State Appellees are timely responding in opposition. [See Response to Emergency Motion for Injunction Pending Appeal].

Undeterred, Davis has filed the same request for relief against the State Appellees a third time – this time as the present Motion – and before the District Court has considered her first two attempts. [DE 26, Motion for Immediate Consideration and Motion for Injunction Pending Appeal]. The latest iteration of Davis' request for injunctive relief against the State Appellees is as flawed as the first two attempts. Accordingly, the Motion must be denied.

III. ARGUMENT

A. The Motion Must Be Denied Because This Court is Without Jurisdiction Over This Interlocutory Appeal.

The District Court Order of August 25, 2015 (hereinafter "August 25 Order") from which Davis appeals is plainly interlocutory. The August 25 Order does not meet the exception to the final judgment rule set out in 28 U.S.C. § 1292(a)(1) because it does not have the "practical effect" of refusing Davis' request for injunctive relief. Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981). Rather, the August 25 Order sequences the Court's consideration of identical

constitutional issues that Davis already has on appeal to this Court in Case No. 15-5880. "[A] district court has broad discretion to stay proceedings as an incident to its power to control its own docket." Clinton v. Jones, 520 U.S. 681, 707 (1997).

Moreover, even if the August 25 Order did have the "practical effect" of refusing an injunction, it nonetheless cannot be immediately appealed because it does not cause "a serious, perhaps irreparable, consequence" that can be "effectively challenged only by immediate appeal." Carson, 450 U.S. at 84. Davis is already under a preliminary injunction requiring her to issue marriage licenses. After considering the same constitutional arguments Davis asserts here, the District Court, this Court, and the Supreme Court have all rejected attempts to stay that injunction. The State Appellees' arguments in this regard are more fully set forth in their Motion to Dismiss Appeal (DE 27), which is incorporated herein by reference. Because the August 25 Order is not appealable, this Court is without jurisdiction over this action. Therefore, the Motion must be denied.

B. The Motion Must Be Denied Because the State Appellees are Entitled to Dismissal of the Third-Party Complaint.

State Appellees are timely moving the District Court to dismiss Davis' Third-Party Complaint against them on numerous grounds, including Eleventh Amendment, lack of standing, and failure to state a claim upon which relief can be granted. [See Motion to Dismiss Third-Party Complaint]. State Appellees are entitled to a ruling on their Motion to Dismiss before this Court considers Davis'

present motion both because it would be dispositive of all claims against the State Appellees and because Eleventh Amendment immunity has been raised. See, e.g. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (immunity must be resolved "at the earliest possible stage in litigation"). The State Appellees' arguments are more fully set forth in their Motion to Dismiss Third Party Complaint, which is incorporated herein by reference. Because the State Appellees are entitled to dismissal of Davis' claims against them, the Motion must be denied.

C. The Motion Must Be Denied Because the Requested Injunction Will Not Grant Davis the Relief She Seeks.

When a party seeks an order that will not grant relief for its alleged injury, the claim is moot. U.S. Parole Comm'n v. Garaghty, 445 U.S. 388, 396 (1980). The mootness doctrine ensures that "federal courts are presented with disputes they are capable of resolving." Id. at 397 (citation omitted). Here, Davis seeks an injunction against Governor Beshear and Commissioner Onkst enjoining them from enforcing the so-called "mandate" contained in the Beshear Letter[3] and

[3] The Beshear Letter is June 26, 2015 letter from Governor Beshear to Kentucky's county clerks. [DE 34, Third-Party Complaint at ¶ 25 and Exh. C, Page ID 782 (attached as Exh. 1)]. Contrary to Davis' assertion, a cursory reading reveals that the Beshear Letter does not set any policy or instruct Davis to do anything. Rather, it acknowledges the Obergefell decision, explains the Commonwealth's actions to assist county clerks with their statutory obligations to issue marriage licenses, and reminds the county clerks of their obligations as elected constitutional officers. [Id.] Davis' entire claim against the State Appellees collapses because it is built upon the premise that the Beshear Letter somehow instituted official policy or commanded her to do something. It did neither.

"exempting her from authorizing marriage licenses" pending appeal of the August 25 briefing order. [DE 26, Motion at 20]. The Motion is moot because the State Appellees cannot provide this relief. First, Appellees possess no authority over Davis and cannot "exempt" her from following the law. Second, Davis is under a separate Order to issue marriage licenses to qualified couples, and State Appellees do not have authority to relieve Davis of a Court-imposed obligation.

Kentucky law regarding the issuance of marriage licenses is set out at KRS Chapter 402, as Davis concedes. [DE 34, Third-Party Complaint at ¶¶ 9-11, Page ID 748-49]. Those statutes provide the logistical scheme for issuing licenses, which only county clerks or their deputies may issue. KRS 402.080 ("[t]he license shall be issued by the clerk of the county . . ."); see also KRS 402.100, 402.110, 402.210, 402.230.[4] The State Appellees cannot relieve county clerks of the legislatively-imposed duty to issue marriage licenses.

The State Appellees do not possess supervisory authority over an elected constitutional officer such as Davis. See Brown v. Barkley, 628 S.W.2d 616, 618 (Ky. 1982). Likewise, the State Appellees have no authority to suspend a Kentucky statute by Executive Order or otherwise. Baker v. Fletcher, 204 S.W.3d 589, 593 (Ky. 2006); Ky. Const. § 15.

[4] In the limited circumstance in which the county clerk is absent or his/her office vacant, the county judge/executive may issue a license. See KRS 402.240.

Davis is flatly wrong in suggesting that Obergefell discarded all marriage licensing statutes. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). The Court held that "the State laws challenged by Petitioners in these cases are now held invalid ***to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples***." Id. at 2605 (emphasis added). "The Constitution, however, does not permit the State to bar same-sex couples from marriage ***on the same terms as accorded to couples of the opposite sex***." Id. at 2607 (emphasis added). Thus, the Supreme Court merely struck down statutes and state constitutional provisions that defined marriage as exclusively between one man and one woman. The Court did not overturn marriage licensing schemes. To the contrary, the Court expressly held that however a state provides a license to an opposite-sex couple, it must provide it in the same manner to a same-sex couple. Thus, KRS Chapter 402 remains fully intact following Obergefell, except that same-sex couples must be treated equally as opposite-sex couples.

The State Appellees cannot "exempt" Davis from her statutory obligation to issue marriage licenses. Nor can the State Appellees create new marriage licensing statutes as Davis argues. Davis cites a litany of ways in which the marriage licensing statutes could be amended. [DE 26, Motion at 15-16]. Those arguments must be addressed to the Kentucky General Assembly. See Ky. Const. §§ 28, 29. The State Appellees cannot grant Davis the legislative relief she seeks.

Finally, the State Appellees cannot be enjoined to "exempt" Davis "from authorizing marriage licenses" pending appeal of the August 25 briefing order. [DE 26, Motion at 20]. This is because the District Court has already ordered Davis to do exactly the opposite. [DE 43, Preliminary Injunction, Page ID 1146]. While the State Appellees do not possess supervisory authority over Davis, even if they did, they could not authorize her to violate an Order of the District Court.

At bottom, this Motion is an impermissible collateral attack on the preliminary injunction entered against Davis. Davis has appealed the injunction and exhausted her efforts to have its effect stayed pending appeal. Now, Davis has dressed her constitutional defenses as affirmative claims against State Appellees and presented them to this Court in an improper interlocutory "appeal" of rulings the District Court has not yet made. Davis' legal maneuvers are vexatious, baseless, and have unreasonably multiplied these proceedings.

Because the requested injunction cannot grant Davis the relief she requests, the Motion must be denied.

D. The Motion Must Be Denied Because Davis Has Not Met the High Standard for Injunctive Relief.

An injunction is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." Leary v. Daeschner, 228 F.3d 729, 739 (6th Cir. 2000) (citations omitted). Davis bears the burden of meeting this high threshold. Id.

1. Davis Has Not Demonstrated a Strong Likelihood of Success on the Merits.

The standard for obtaining a preliminary injunction is higher than the standard for withstanding a motion for summary judgment. Leary, 228 F.3d at 739. Davis cannot meet this standard because her arguments fail on the merits. Davis alleges that "Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst" violate her rights of free exercise of religion, free speech, and to be free from religious tests for public office.[5] [DE 34, Third-Party Complaint at ¶¶ 46-147, Page ID 759-73]. The District Court carefully considered and rejected these constitutional arguments before entering the preliminary injunction requiring Davis to issue marriage licenses. [DE 43, Preliminary Injunction at 16-28, Page ID 1161-73]. This Court agreed, finding that Davis' position "cannot be defensibly argued" and that "[t]here is thus little or no likelihood" of success. [Case No. 15-5880 DE 28 at 3]. This Court should again reach the same conclusion on these same arguments.

i. Davis' Free Exercise Claim

The District Court correctly concluded that Davis' free exercise claim is subject to rational basis review. That is because the Beshear Letter is neutral and

[5] The free exercise and free speech analysis is identical under the United States and Kentucky Constitutions, as the Kentucky appellate courts have explained that the latter offers no greater protection than the former. Gingerich v. Commonwealth, 382 S.W.3d 835, 844, 839 (Ky. 2012).

generally applicable as opposed to targeting religion. Employment Division of Oregon Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

First, as explained above, the State Appellees have taken no actionable "government action." Davis' obligations to issue marriage licenses are set forth in KRS Chapter 402, and the State Appellees cannot create new statutes or exempt Davis – a separately elected constitutional official – from complying with those that exist. The Beshear Letter does not create any "mandate" as against Davis because the State Appellees do not possess supervisory authority over Davis with respect to marriage licenses. Indeed, even if the Beshear Letter had never been transmitted and the marriage license form had never been revised, Davis would nevertheless be legally bound to issue marriage licenses to all qualified couples regardless of their sexual orientation. Without state action, there is no actionable free exercise claim.

Second, if the Beshear Letter did constitute government action as to Davis, it is clearly neutrally and generally applicable. [Exh. 1]. The Beshear Letter correctly announced the holding of Obergefell and stated that Executive Branch agencies under the Governor's control will recognize same-sex marriages performed in other states as Obergefell compels. [Id.]. The Beshear Letter states that KDLA will, as required by KRS 402.100, prescribe a revised marriage license and certificate form. [Id.]. With respect to Davis' legal obligations, the Beshear

Letter merely encourages county clerks to "consult with [their] county attorney." [Id.]. Clearly, this alleged "mandate" is neutral and does not target religion.

Third, the Beshear Letter easily passes rational basis examination because it is subject to a strong presumption of validity and because Davis has failed to carry her "burden to negative every conceivable basis which might support it." FCC v. Beach Communications, 508 U.S. 307, 314-15 (1993). The Beshear Letter furthers the important government interest in orderly and uniform application of the rule of law. See, e.g. Papachristou v. Jacksonville, 405 U.S. 156, 171 (1972). In addition, the District Court correctly concluded that the Beshear Letter is rationally related to several interests identified in Obergefell such as "individual autonomy" and allowing "same sex-couples to take advantage of the many societal benefits [or marriage] and foster[ing] stability for their children." [DE 43, Preliminary Injunction at 21, Page ID 1166].

Fourth, Davis' reliance on KRS 446.350 is severely misplaced. The statute applies to private citizens and not individuals acting in their official governmental capacities. Were it otherwise, KRS 446.350 would authorize state officials to impose religious beliefs in violation of the Establishment Clause. See, e.g. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989). "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) (citation omitted).

This maxim holds even more weight when the individual is an elected constitutional officer.

Fifth, even if KRS 446.350 could be deemed to excuse a government official from performing a legally imposed duty, it would only apply when the government action "substantially burden[s]" one's free exercise. Id. The Beshear Letter does not substantially burden Davis' free exercise because it does not compel her – and indeed could not compel her – to do anything. More fundamentally, the issuance of marriage licenses is one of Davis' statutory duties. See KRS Ch. 402. As the District Court correctly held, the statutes do not require Davis to condone, approve, or endorse any marriage. Rather, Davis must simply certify that the legal prerequisites for issuance of a license have been met. Id. This purely ministerial function does not implicate her religious beliefs – let alone substantially burden them – any more than any action taken by a government official implicates his/her religious beliefs. Davis is free to practice her religion in any manner when she is not acting under color of law.

Davis fails to appreciate the distinction between actions taken in her official capacity as county clerk and those in her individual capacity as a citizen. The scope of a public employee's right to free exercise "must sometimes yield to the legitimate interest of the government employer." Marchi v. Board of Coop. Educ. Servs., 173 F.3d 469, 476 (2d Cir. 1999). "[T]here is no constitutional right to

public office." Napolitano v. Ward, 317 F. Supp. 83, 85 (N.D. Ill. 1970). Statements and actions taken by public employees pursuant to their official duties are not statements and actions by private citizens for First Amendment purposes. Garcetti, 547 U.S. at 421. The United States Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Smith, 494 U.S. at 878-79. The Constitution does not "support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." Id. at 882 (citation omitted).

Davis fails to demonstrate a strong likelihood of success on her free exercise claim. Accordingly, the Motion must be denied.

ii. Davis' Free Speech Claim

The District Court correctly concluded that the act of issuing a government-sanctioned license is not protected speech attributable to Davis. Rather, it is a statutorily-required ministerial duty signifying that the couple has met the legal prerequisites for marriage. See KRS 402.100. To the extent the issuance of marriage licenses constitutes speech, it is attributable to the government and not Davis personally. Walker v. Texas Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2249 (2015) (statements on license plates likely convey that "the State has endorsed that message"). Moreover, the Beshear Letter does not compel Davis to

do anything. Rather, she is under a separate statutory (KRS Ch. 402) and constitutional (Obergefell) obligation to issue marriage licenses to all qualified couples.

Because a government official performing a required task is acting on behalf of the government and not herself, the individual's right to free expression is necessarily limited. Garcetti, 547 U.S. at 419. To determine whether a government official's right of free expression has been violated, the Court must consider two questions. First, did the official speak "as a citizen on a matter of public concern?" Garcetti, 547 U.S. at 418 (citing the test in Pickering v. Board of Education, 391 U.S. 563 (1968)). If not, "the employee has no First Amendment cause of action." Id. If yes, the Court must then determine whether the government "had an adequate justification for treating the employee differently from any other member of the general public." Id.

The District Court correctly concluded that Davis' allegations fail the first prong of this analysis. [DE 43, Preliminary Injunction at 24-25, Page ID 1169-70]. The act of issuing marriage licenses is not speech as a citizen on a matter of public concern because ordinary citizens are not empowered to issue marriage licenses. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." Garcetti, 547 U.S. at 421-22. Davis is empowered to issue

licenses only because she is cloaked with the statutory requirement to do so. Such "speech" is a product of her official duties, and therefore is not entitled to First Amendment protection.

Davis fails to demonstrate a strong likelihood of success on her free speech claim. Accordingly, the Motion must be denied.

iii. Davis' Religious Test Claim

The District Court correctly concluded that issuing marriage licenses does not constitute an impermissible religious test for holding office. [DE 43, Preliminary Injunction at 25-26, Page ID 1170-71]. Article VI of the United States Constitution[6] applies only to offices created under federal law – not state officials such as Davis. To the extent article VI does apply to Davis, her claim under it still fails because the obligation to issue marriage licenses does not constitute any type of religious or moral approval, let alone religious litmus test. Rather, Davis is required to perform the ministerial function of ascertaining that a couple seeking a license meets the legal perquisites for marriage. See KRS 402.100. Simply stated, Davis' role is a legal one – not a moral or religious one. The issuance of a

[6] Davis also asserted the religious test claim under Section 5 of the Kentucky Constitution. However, that provision does not expressly prohibit a "religious test" for holding public office but rather generally provides for freedom of religious exercise. See Ky. Const. § 5. The Kentucky Supreme Court has held that Section 5 provides no greater protection than the rights conveyed by the First Amendment to the United States Constitution. Gingerich, 382 S.W.3d at 844. As explained above, Davis' free exercise claim likewise fails.

marriage license to a couple entitled to marry does not convey any religious approval of the union, just as the recording of a deed does not convey any religious approval of the conveyance of property.

Davis fails to demonstrate a strong likelihood of success on her religious test claim. Accordingly, the Motion must be denied.

2. Davis Will Not Suffer Irreparable Harm If the Requested Injunction is Denied.

Having failed to demonstrate strong likelihood of success on the merits, Davis' claim for injunctive relief collapses. City of Pontiac v. Schimmel, 751 F.3d 427, 430 (6th Cir. 2014). Davis' argument that she will suffer the loss of constitutional rights if the requested injunction is denied is flatly wrong. As explained above, the State Appellees cannot grant Davis an "exemption" from her statutory obligation to issue marriage licenses. See supra Argument C. Even if the State Appellees were enjoined from enforcing the Beshear Letter – which does not constitute any mandate – Davis would still be under separate statutory, constitutional, and injunctive obligations to issue marriage licenses to all qualified couples. Thus, the second factor weighs against issuance of an injunction.

3. The Requested Injunction Would Cause Substantial Harm to Others and to the Public Interest.

As explained above, the requested injunction would have no effect because the State Appellees cannot "exempt" Davis from performing her obligations under

statute and the preliminary injunction. Even if the State Appellees could excuse Davis from complying with the law, such an injunction would cause substantial harm to others, including those qualified citizens in Rowan County who wish to exercise their fundamental right to marriage. [DE 43, Preliminary Injunction at 15-16, Page ID 1160-61 (finding that Plaintiffs would suffer irreparable harm if Davis were permitted to refuse marriage licenses)]. Likewise, the public interest would be harmed if the requested injunction were issued, as "it is always in the public interest to prevent the violation of a party's constitutional rights," such as Plaintiffs' fundamental right of marriage. G&V Lounge v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994). Accordingly, the third and fourth factors weigh against issuance of an injunction.

All four factors guiding the Court's injunction analysis weigh against an injunction to enjoin the State Appellees. Accordingly, the Motion must be denied.

IV. CONCLUSION

For the reasons set forth above, the State Appellees respectfully request entry of an Order denying Davis' Emergency Motion for Immediate Consideration and Motion for Injunction Pending Appeal [DE 26].

Respectfully submitted,

STOLL KEENON OGDEN PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507-1380
(859) 231-3000
(859) 253-1093 facsimile

By: /s/ Palmer G. Vance II
William M. Lear, Jr.
Palmer G. Vance II

Counsel for Appellees Governor Steven L. Beshear and Commissioner Wayne Onkst in their Official Capacities

CERTIFICATE OF SERVICE

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

Daniel J. Canon
Laura E. Landenwich
Leonard Joe Dunman
CLAY DANIEL WALTON ADAMS, PLC
dan@dancanonlaw.com
laura@justiceky.com
joe@justiceky.com
COUNSEL FOR PLAINTIFFS

William Ellis Sharp
ACLU OF KENTUCKY
sharp@aclu-ky.org
COUNSEL FOR PLAINTIFFS

James D. Esseks
Ria Tabacco Mar
Daniel Mach
Heather Weaver
AMERICAN CIVIL LIBERTIES UNION
jesseks@aclu.org
rmar@aclu.org
dmach@aclu.org
hweaver@aclu.org
COUNSEL FOR PLAINTIFFS

Anthony Charles Donahue
DONAHUE LAW GROUP, PSC
acdonahue@donahuelawgroup.com
COUNSEL FOR KIM DAVIS

Mathew D. Staver
Horatio G. Mihet
Roger K. Gannam
Jonathan D. Christman
LIBERTY COUNSEL
court@lc.org
hmihet@lc.org
rgannam@lc.org
jchristman@lc.org
COUNSEL FOR KIM DAVIS

/s/ Palmer G. Vance II
Counsel for Appellees Governor Steven L. Beshear and Commissioner Wayne Onkst in their Official Capacities

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EXHIBIT 1

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