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

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APPELLANT KIM DAVIS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR IMMEDIATE CONSIDERATION AND MOTION FOR INJUNCTION PENDING APPEAL

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A.C. Donahue
DONAHUE LAW GROUP, P.S.C.
P.O. Box 659
Somerset, Kentucky 42502
(606) 677-2741
ACDonahue@DonahueLawGroup.com

Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Jonathan D. Christman
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
(800) 671-1776
court@lc.org / hmihet@lc.org /
rgannam@lc.org / jchristman@lc.org

Counsel for Appellant Kim Davis

Appellant Kim Davis ("Davis") submits this Reply in support of her motion for an injunction pending appeal of the district court's August 25, 2015 order.[1]

INTRODUCTION

In opposing Davis' request for a religious accommodation pending appeal, Appellees continue to ignore the mandatory requirements of the Kentucky Religious Freedom Restoration Act and the First Amendment of the United States Constitution. There are numerous accommodations that could resolve this entire dispute and, despite holding the keys to grant any of those accommodations, Gov. Beshear chooses instead to do nothing. But Gov. Beshear cannot continue to run from a problem he created by redesigning a marriage license form and ordering all Kentucky County Clerks to authorize SSM licenses bearing their name, irrespective of their sincerely-held religious beliefs. Davis spent six days incarcerated in the Carter County (Kentucky) Detention Center as a prisoner of her conscience, in significant part, because Gov. Beshear acted urgently to force individual county clerks to comply with his SSM Mandate, but has since refused to take the simple steps to accommodate Davis' undisputed, sincerely-held religious beliefs about marriage. This Court must act quickly to prevent further harm to Davis during the pendency of this appeal.

[1] Under Fed. R. App. P. 27(d)(2), replies are typically limited to 10 pages. Because both Appellees filed separate 20-page responses (which entitle Davis to two 10-page replies), Davis files instead a single 20-page reply to both responses.

REPLY ARGUMENT

I. Gov. Beshear's Jurisdictional Arguments Are Meritless Attempts To Avoid A Problem He Created.

A. The State-Appellees Have Authority To Provide An Accommodation Pending Appeal.

Contrary to State-Appellees' suggestion, they do, in fact, possess the authority to provide a simple accommodation to Davis—they just refuse to grant her request. State-Appellees disingenuously allege that the Beshear Letter "does not set any policy or instruct Davis to do anything" and does not "institute[] official policy or command her to do something." State-Appellees' Resp., at 9. This litigation-generated contention collapses under the weight of the evidence, and contradicts the district court's conclusion (which State-Appellees ignore) that the Beshear Letter and Gov. Beshear's subsequent "directives" constitute state action. R.43, Injunction, PgID 1151, 1163-67, 1172 (referring to the "Beshear directive").

The Beshear Letter is not a collection of gubernatorial musings that do not "compel Davis to do anything." State-Appellees' Resp., at 9, 17-18. To the contrary, it is a **directive** issued from the chief executive officer in the Commonwealth of Kentucky written on official letterhead to all Kentucky County Clerks. The letter commands all county clerks that "[e]ffective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky." R.34, Verified Third-Party Complaint ("VTC"), PgID 753, 756; R.1-3, Beshear Letter, PgID 26. Gov. Beshear further ordered that Kentucky clerks "**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 [KDLA] will be sending **a gender-neutral form to you today, along with instructions for its use**." *Id.* (emphasis added).[2] Gov. Beshear cannot seriously contend that he was not instructing the county clerks to comply with his SSM Mandate.[3]

Following issuance of the Beshear Letter, county clerks across Kentucky began authorizing SSM licenses on the new forms, with almost no exception. *See* R.34, VTC, PgID 754. In subsequent public statements, Gov. Beshear further implemented the directives in the Beshear Letter, stating that "government officials in Kentucky . . . must recognize same-sex marriages as valid and allow them to take place," and "[s]ame-sex couples are now being married in Kentucky and such marriages from other states are now being recognized under Kentucky law." *Id*. Gov. Beshear also 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." *Id*. In subsequent pronouncements, Gov. Beshear has

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[2] Shortly thereafter, the KDLA provided this new marriage form to county clerks, including Davis. R.34, VTC, PgID 753-54.

[3] Gov. Beshear contends that, as the Chief Executive and highest officer in the Commonwealth of Kentucky, he exercises no supervisory authority over county clerks. *See* State-Appellees' Resp., at 10, 14. The case of *Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982), cited by State-Appellees for this proposition, involves state-wide officials, not county officials.

maintained that county clerks must issue SSM marriage licenses, despite their "own personal beliefs." *Id*. For Gov. Beshear, the only options available to county clerks who oppose SSM are (1) issue the licenses against their "personal convictions," or (2) resign. *Id.*, PgID 754, 757. In addition to his "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. *Id.*, PgID 756-57.

Although the Beshear Letter is not a formal executive order issued under Chapter 12 of Kentucky's revised statutes, it effectively operates as one, directing county clerks to take certain actions and providing instructions on the issuance of marriage licenses and recognition of same-sex "marriages." *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 937 (1982) (holding that state action occurs when the conduct allegedly depriving the claimant of constitutional rights is fairly attributable to the state, which arises when the deprivation is caused by "a rule of conduct imposed by the state or by a person for whom the State is responsible").[4] This directive—issued before the ink was even dry from the Supreme Court's decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)—installs Gov. Beshear as the controlling policymaker of Kentucky marriage law post-*Obergefell*, at least until the General Assembly has an opportunity to meet.

[4] *See also Lopez v. Vanderwater*, 620 F.2d 1229, 1236 (7th Cir. 1980) ("Action taken by a state official who is cloaked with official power and who purports to be acting under color of official right is state action.").

Gov. Beshear incorrectly contends that "KRS Chapter 402 remains fully intact following *Obergefell*, except that same-sex couples must be treated equally as opposite-sex couples." *See* State-Appellees Resp., at 11. In fact, **the entire Kentucky marriage licensing scheme turns on the definition of "marriage,"** which is defined at the very beginning of Chapter 402 of Kentucky's revised statutes.[5] This definition was found to be unconstitutional by the majority in *Obergefell*. But *Obergefell* did not replace that definition with a new legislatively-enacted definition for "marriage" in Kentucky, or consider the implications of its ruling on legislative marriage schemes. Every provision that follows § 402.005 in Chapter 402, including the penalty provisions, depend upon the prior definition of marriage, which has been found unconstitutional **but not yet replaced**.[6] Until the

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[5] *See* KY. REV. STAT. § 402.005 ("'[M]arriage 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.").

[6] *See, e.g.*, KY. REV. STAT. § 402.020 ("**Marriage** is prohibited and void: . . .") (emphasis added); KY. REV. STAT. § 402.080 ("No **marriage** shall be solemnized without a license therefor.") (emphasis added); KY. REV. STAT. § 402.100 ("Each county clerk shall use the form prescribed by the Department for Libraries and Archives when issuing a **marriage** license") (referring to "marriage" or "married" **21 times**) (emphasis added); KY. REV. STAT. § 402.110 ("The form of **marriage** license prescribed in KRS 402.100 shall be uniform throughout this state…") (emphasis added); KY. REV. STAT. § 402.230 (noting that "**marriage**" certificate must be "filed in the county clerk's office") (emphasis added); KY. REV. STAT. § 402.990(6) ("Any clerk who knowingly issues a **marriage** license to any persons prohibited by this chapter from marrying shall be guilty of a Class A misdemeanor and removed from office by the judgment of the court in which he is convicted.") (emphasis added); KY. REV. STAT. § 402.990(7) ("Any clerk who knowingly issues

General Assembly has an opportunity to reconvene (which Gov. Beshear refuses to do through a special session pursuant to KY. CONST. § 80, despite bipartisan requests) and address Kentucky's marriage law, there is no absolutely clear or necessarily operative legislative duties on marriage.[7] **But there *is* Gov. Beshear's SSM Mandate**.

State-Appellees have the power to grant the relief, because their actions are actually responsible for this litigation. At the initiative of Gov. Beshear, the KDLA designed and approved a post-*Obergefell* marriage license form. Gov. Beshear certainly was under no obligation to issue the **modified** form that he ultimately did. He also could have stated that, in light of *Obergefell*, any marriage licenses will be issued on his authority (not the county clerks' authority) until the Kentucky Legislature has an opportunity to address the legislative scheme. Rather than wait even a single business day, he fired off the Beshear Letter and commandeered individual county clerks to join in, participate in, and approve of SSM regardless of their individual beliefs, and immediately without any consideration of religious

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a **marriage** license in violation of his duty under this chapter shall be guilty of a Class A misdemeanor.") (emphasis added).

[7] Indeed, in the district court, Kentucky Senate President Robert Stivers argued in an amicus filing that "the concept of marriage as between a man and a woman is so interwoven into KRS Chapter 402 that the defendant County Clerk cannot reasonably determine her duties until such time as the General Assembly has clarified the impact of *Obergefell* by revising KRS Chapter 402 through legislation," or "[a]lternatively the clerk's duties could be clarified by Executive Order of the Governor under KRS Chapter 12." R.73, Stivers Amicus, PgID 1548.

accommodation. Yet it was his newly revised form that came with "**instructions**" for its use (R. 34-4, Post-*Obergefell* Marriage License, PgID 784), and his SSM Mandate that county clerks "**must license**" (R.1-3, Beshear Letter, PgID 26; emphasis added), that triggered the underlying lawsuit **against Davis**. *See* R.1., Compl., PgID 7-8 (referring to the Beshear Letter as a "directive from the Chief Executive"); *see also* R.2-1, Pls.' Mot. for Prelim. Inj., PgID 42 (identifying the Beshear Letter as a "direct admonition of the Governor"). Indeed, without this new form available, there would have been no gender-neutral license for Plaintiffs to even obtain. *See* R.34-1, Pre-*Obergefell* Marriage License, PgID 778 (designating "bride" and "groom"). To obtain a license, they would have had to sue Gov. Beshear (not Davis) and seek injunctive relief from him in the form of a modified license issued on his authority.

To avoid this logical conclusion, State-Appellees declare that the "Kentucky General Assembly has placed the duty to issue marriage licenses on county clerks . . . **or their deputy clerks**. Governor Beshear does not possess the authority to rewrite those statutes to reassign those duties elsewhere." *See* State-Appellees Resp., at 2-3 (emphasis added); *see also id.* at 10 ("Those statutes provide the logistical scheme for issuing licenses, which only county clerks **or their deputies** may issue.") (emphasis added). But no statutory authority allows deputy clerks to authorize the issuance of marriage licenses, and for the State-Appellees to suggest otherwise is

only further indication that Gov. Beshear has usurped control of Kentucky marriage law post-*Obergefell*. Indeed, if deputy clerks are now authorized to issue marriage licenses on their authority (or, better said, on the authority of Gov. Beshear), then Gov. Beshear has deputized new individuals who are able to authorize marriage licenses under Kentucky law. And if he can deputize additional authorizing agents, he is similarly empowered to exempt others. By extension, he is also equipped to revise the form (which he has already done previously) to reflect this new authority and ensure that Davis' name and title are removed from any marriage license issued in Rowan County.[8] **With this simple relief, this case would be over, and Davis would no longer be required to violate the core of her conscience as a condition for avoiding another jail sentence**.

B. The Accommodation Pending Appeal Is Not Barred By Sovereign Immunity.

Appellees contend that the accommodation pending appeal is barred on sovereign immunity grounds under the Eleventh Amendment. *See* State-Appellees Resp., at 9; Pls.' Resp., at 13. These arguments should be rejected. The

[8] Kentucky marriage law cannot be interpreted without also considering and applying the Kentucky RFRA, for its statutory placement requires its application in conjunction with every Kentucky legislative scheme. Thus, Plaintiffs' declarations that "Kentucky law specifically imposes upon County Clerks the obligation to issue" SSM licenses and "Kentucky's administrative scheme requires all county clerks to issue marriage licenses," *see* Pls.' Resp., at 4, 12, fail to consider the necessary Kentucky RFRA analysis embedded in any state-wide marriage licensing scheme.

accommodation pending appeal is appropriate under the Kentucky RFRA *and* the First Amendment of the United States Constitution. Federal constitutional-based claims are not barred by state sovereign immunity. *See Tate v. Frey*, 735 F.2d 986, 989-90 (6th Cir. 1984) (permitting third-party complaint and preliminary injunction by county officials against state officials for underlying claims brought by inmates at the county jail). In fact, Appellees concede that Davis has also asserted constitutional-based claims and defenses, *see* State-Appellees Resp., at 3, 5-6, 8, 13; Pls.' Resp., at 12, 16, thereby obviating any sovereign immunity concerns under the *Ex Parte Young* doctrine. *See Ernst v. Rising*, 427 F.3d 351, 358-59 (6th Cir. 2005).

Additionally, sovereign immunity does not preclude state law claims based upon violations of state statutes that compel nondiscretionary duties, as are involved here. The Kentucky RFRA mandates an analysis for all government action, and is not discretionary in its terms. *See* Ky. Rev. Stat. § 446.350 ("Government **shall not** substantially burden a person's freedom of religion.") (emphasis added). As such, the Kentucky RFRA creates a liberty interest protected by the Fourteenth Amendment's Due Process Clause and thus a violation of it constitutes an unconstitutional denial of liberty without due process. *See Spruyette v. Walters*, 753 F.2d 498 506 (6th Cir. 1985); *see also, e.g.*, *Jackson v. Ylst*, 921 F.2d 882, 886 (9th Cir. 1990); *Kalosho v. Kapture*, 868 F. Supp. 882, 889 (E.D. Mich. 1994) (state

statutes provide protected liberty interests if they contain mandatory terms such as "shall" or "will").

C. The August 25, 2015 Order Is Appealable.

As will be set forth in further detail in Davis' response to State-Appellees' motion to dismiss the appeal, the State-Appellees' contention that the August 25, 2015 order is not appealable is baseless. Supreme Court and Sixth Circuit precedent directly on point provide the grounds for taking this appeal under 28 U.S.C. § 1292(a), as a "practical denial" of Davis' motion for preliminary injunction against the State-Appellees. *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). As this Court is well aware, by deciding that Davis' own motion should be pushed-off until this Court conducts a merits-review of the Injunction, the district court delayed decision by six to nine months at least (if not more), at great harm to Davis who is facing immediate, substantial, and irreparable harm, including incarceration. The purpose of preliminary injunctive relief is for **immediate** relief, not relief nine months or later down the road.

II. Davis Faces Irreparable Harm To Her Individual Rights Absent An Accommodation Pending Appeal.

In opposing an accommodation pending appeal, Appellees fundamentally misconstrue the applicability of the Kentucky RFRA, which indisputably applies to all "persons," including publicly elected officials. *See* KY. REV. STAT. § 446.350. As

an initial matter, State-Appellees erroneously suggest that the Kentucky RFRA does not apply, stating that it only applies "to private citizens and not individuals acting in their official governmental capacities." *See* State-Appellees' Resp., at 15. This misses the mark, and adopts a religious freedom-limiting understanding of "person" that the Supreme Court rejected in an analogous situation in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (federal RFRA).

In *Hobby Lobby*, those seeking to limit religious freedom argued that companies (who are legal "persons") did not possess religious rights under the federal RFRA—that only individuals had religious rights. Rejecting this notion, however, the Court held that a closely-held corporation did, in fact, have religious liberty protections as a "person" under the federal Religious Freedom Restoration Act, because the individuals taking actions on behalf of the company (which can only take actions with individuals acting on its behalf) had religious rights that must be protected. *See Hobby Lobby*, 134 S.Ct. at 2759.

In a similar vein, a public official has religious liberty protections under the First Amendment and, in this case, the Kentucky RFRA, as a person. Courts have developed the legal fictions of "official capacity" and "individual capacity" for purposes of addressing immunity doctrines and determining liabilities and potential remedies against persons who work for government, but those distinctions do not prohibit a person (who is a public official) from exercising their religious beliefs.

The official capacity designation requires an individual person to occupy the office, and the elected official cannot take action without the individual himself or herself taking certain action. In other words, it is not as if Davis the individual stops existing while Davis is performing her duties as Rowan County Clerk. Yet under Appellees' view, Davis may only privately exercise her individual beliefs in a personal capacity, and she is barred from exercising religious rights "in her official capacity." This distinction is not helpful, however, for it answers the religious liberty question by determining whether the person's action (or non-action) at issue is taken (or not taken) in an official capacity or an individual capacity.[9] Importantly for Davis, it was not her "office" but herself, individually, that was jailed for six days as a result of her individual conscience.

Appellees' argument is similar to arguing that actions taken by a company (such as providing insurance coverage), do not implicate the individual religious rights of the persons who take actions on behalf of the company. According to this logic (which the Supreme Court rejected in *Hobby Lobby*), the actions taken by a public official do not implicate the individual religious rights of the person who takes those actions as the public official. This approach would lead to the conclusion that

[9] Moreover, Plaintiffs **sued Davis in her individual capacity** seeking punitive damages from her personally. By suing her individually, Plaintiffs concede the relevancy of Davis in her individual capacity as the person occupying the office of Rowan County clerk.

any action (or non-action) by a public official is not afforded religious liberty protections. But that is not the law. Public officials neither shed their individual religious freedom when they take their oath of office, nor surrender such freedom at the door of government building.[10]

In the case at bar, an individual person (who also happens to be the Rowan County Clerk) is being asked to authorize and approve something that violates her undisputed sincerely-held religious beliefs, and, moreover, to place her name and imprimatur on that historical record.[11] The consequences of, and threats associated with, not performing this task are grave: Loss of job. Civil liability. Sanctions. Private lawsuits in federal court. Contempt motions. Imprisonment. Criminal complaint charges. If this is not an obvious substantial burden on undisputed sincere

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[10] "[C]itizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 134 S.Ct. 2369, 2374 (2014), and "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).

[11] Appellees' reliance upon *Garcetti v. Ceballos*, 547 U.S. 410 (2006), is misplaced. The speech limitations accepted in that case protected the government's interests as an employer, so that it can discipline employees without having to conduct strict scrutiny speech panels. The speech at issue here is of an entirely different sort. Davis is being compelled to place her **name**—not a Commonwealth seal or a generic governmental stamp—on a proposed union that does not constitute marriage according to her undisputed religious beliefs. Her name is personal to her, and its usage on state-issued forms implicates her private speech rights in a fashion similar to the state-issued license plates in *Wooley v. Maynard*, 430 U.S. 705 (1976). There, the compelled speech was being forced to carry a message against a person's beliefs. Here, the compelled speech is being forced to have one's name and title branded on a proposed union that violates sincerely-held beliefs.

beliefs, it is difficult to imagine what burden could ever be substantial enough to merit relief. The Kentucky RFRA, and First Amendment, clearly apply.

Additionally, Appellees rewrite the substantial burden analysis required under the Kentucky RFRA and the First Amendment. Critically, neither the district court nor Appellees are arbiters of the burden placed upon Davis' religious beliefs, and their attempts to occupy that position usurp and contradict clear Supreme Court precedent. Similar to the federal RFRA, the Kentucky RFRA asks whether a government mandate (such as Gov. Beshear's SSM Mandate) "imposes a substantial burden on the ability of the objecting parties" to act "in accordance with *their religious beliefs*," not, as Appellees suggest, whether Davis' religious beliefs about authorizing SSM licenses are reasonable. *See Hobby Lobby*, 134 S.Ct. at 2778 (2014) (emphasis in original). Accordingly, it is not for Appellees or the district court to say that Davis' religious beliefs "are mistaken or *insubstantial*," but instead the "'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." *Id.* at 2778-79 (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)) (emphasis added).

Davis believes that providing the marriage authorization "demanded by" Gov. Beshear's SSM Mandate is "connected with" SSM "in a way that is sufficient to make it immoral" for her to authorize the proposed union and place her name on it.

See id. Davis is not claiming that the mere "administrative" act of recording a document substantially burdens her religious freedom. Davis is also not claiming a substantial burden on her religious freedom or free speech rights if ***someone else*** authorizes and approves a SSM license ***devoid of her name and similar personal identifiers (e.g., title)***.[12] Davis is also not claiming that her religious freedom or free speech rights are substantially burdened if she must complete an opt-out form to be exempted from issuing SSM licenses, as Kentucky law already permits for other licensing schemes. But she is substantially burdened if she must authorize and approve a SSM license bearing her name and imprimatur because she can neither call a proposed union "marriage" which is not marriage in her sincerely-held religious beliefs, nor authorize that union. Plaintiffs do not dispute that Davis holds sincerely-held religious beliefs about marriage (*see* Pls.' Resp., at 18)—the requisite "honest conviction." It is therefore improper to conclude that such beliefs are "incidental," "not ris[ing] to the level" of a substantial burden, or "not implicate[d]." *See id.* at 11, 18, 19; *see also* State-Appellees' Resp., at 16. These judgments are thinly-veiled declarations that Davis' religious beliefs are "flawed," which is a step

[12] It no "accommodation" at all for deputy clerks in Rowan County to issue marriage licenses bearing Davis' name and/or title ***if*** such licenses appear to be, or can be deemed to be, issued on Davis' authority. To accommodate her religious briefs, Davis' name must be removed from any such licenses, and the authorization and approval must come from another person, such as Gov. Beshear.

that the Supreme Court has "repeatedly refused to take." *See Hobby Lobby*, 134 S.Ct. at 2778. But it is the exact leap that Appellees invite.

The proffered compelling government interests that purportedly overcome the burden on Davis' religious freedom (*i.e.*, eradicating discrimination, uniformity in the issuance and recording of marriage licenses, providing same-sex couples benefits, *see* State-Appellees' Resp., at 15; Pls.' Resp., at 13-14) are the type of "broadly formulated" governmental interests that fail to satisfy RFRA-based strict scrutiny because they do not show any actual harm in granting a "specific exemption" to a "particular religious claimant." *See Gonzales v. O Centro Espirata Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). Providing accommodation to Davis—who is treating all persons the same—neither endorses discrimination nor prevents qualified individuals from uniformly acquiring Kentucky marriage licenses from more than 130 marriage licensing locations.

Even if a compelling interest can be shown, this Court cannot ignore application of the "exceptionally demanding" least-restrictive-means standard, and the many less restrictive alternatives that achieve Kentucky's marriage goals and protect Davis' religious freedom. Appellees' silence on these numerous alternatives does not mute their availability, even if they cost more. *Hobby Lobby*, 134 S.Ct. at 2780. The Kentucky RFRA requires clear and convincing proof of **both** a particularized compelling government interest in infringing Davis' religious

freedom *and* the least restrictive means for achieving that interest. In Appellees' view, only a "uniform system" that provides **no** religious accommodation whatsoever is possible, and permissible. Pls.' Resp., at 13-14, 20; State-Appellees Resp., at 10, 20. But legislative enactments in other states, such as North Carolina and Utah, *see*, *e.g.*, N.C. GEN. STAT. § 51-5.5, and Utah S.B. 297 (2015 Gen. Sess.), and proposals in this state, demonstrate the intolerance and manifest error of this view, *see*, *e.g.*, An Act Relating to Marriage, Ky. House Bill 101 (2016 Reg. Sess.).

Finally, in their responses, Appellees repeatedly cite the August 26, 2015 decision from a motion panel of this Court in Case No. 15-5880, denying an emergency motion to stay the district court's Injunction enjoining Davis in her official capacity from applying a "no marriage license" policy to future license requests by the named Plaintiffs. *See* State-Appellees Resp., at 4, 13; Pls.' Resp., at 3, 5, 9. That opinion is limited, and not controlling in this appeal for several reasons. First, the decision is not a merits determination. Second, the decision is limited in its reach because it found that the district court's Injunction "relates solely to an injunction against Davis **in her official capacity**" and "**operates not against Davis personally**, but against the holder of her office of Rowan County Clerk." *See Miller v. Davis*, No. 15-5880 (6th Cir. Aug. 25, 2015). Third, the decision wrongly divides the personhood of Davis, as discussed extensively above, and ignores the reality that Davis personally (not her "office") was hauled to jail for her conscience. The stay

decision magnified the district court's outright disregard for Davis' religious liberty by acting as if Davis the person does not exist when she acts as Davis the Rowan County Clerk. Contrary to the implications of the opinion denying a stay, elected officials possess individual free exercise and speech rights. Fourth, the State-Appellees are not parties to that appeal, and thus, the decision does not involve Davis' claims for a simple accommodation from the State-Appellees.[13]

III. Appellees Will Not Suffer Irreparable Harm If Davis Is Granted An Accommodation Pending Appeal.

The Plaintiffs will suffer no harm if Davis is granted an accommodation pending appeal. On September 8, 2015, Plaintiffs filed a status report in the district court indicating that three of the four couples have chosen to obtain marriage licenses ordered by the district court without Davis' authorization. R.84, Status Report, PgID 1798. These licenses do not bear Davis' name, but they specifically refer to the "Rowan County County Clerk." *Id.*, PgID 1798, 1801-1803. Again, these licenses

[13] Further, Appellees also repeatedly claim that Davis is simply repeating or seeking to "re-litigate" the "same" constitutional arguments or "identical" claims already rejected by the district court and this Court. State-Appellees Resp., at 5-6, 8; Pls.' Resp., at 3, 7, 10, 20-21. They are wrong. Although the arguments and relief sought are necessarily intertwined, they are not wholly overlapping, for the claims asserted against the State-Appellees also directly involve **individual**-based claims, which the motions panel did not even consider in its opinion denying a stay of the Injunction against Davis in her official capacity. Moreover, despite constantly citing the district court's Injunction in their responses, they omit from their discussion the district court statement that Davis "further develops" her request for accommodation from the State-Appellees in her own motion for preliminary injunction, but that motion "is not yet ripe for review." *See* R.43, Injunction, PgID 1164.

were issued over Davis' objection and without her authorization, but Plaintiffs appear to have accepted the risk of the invalidity of those licenses under Kentucky law without the requisite authorization and with unauthorized alterations.[14]

As such, only one Plaintiff couple appears not to have obtained a marriage license in Rowan County. Any purported harm to this couple pales in comparison to the harm to be suffered by Davis if she is not accommodated pending appeal. For whatever reason the remaining Plaintiff couple have not yet obtained the unauthorized marriage licenses, it raises questions about representations in prior filings that they were allegedly facing irreparable harm each and every day as a result of their inability to obtain a marriage license in Rowan County.[15]

An accommodation pending appeal also does not harm the State-Appellees, who have failed to identify any cognizable harm in allowing this simple accommodation for Davis pending appeal. Upholding the rule of law is a governmental interest, but, it cannot be forgotten that the relevant "law" here also includes the Kentucky RFRA and First Amendment.

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[14] The district court acknowledged that without Davis' authorization the licenses may not even be valid. *See, e.g.*, R.78, Contempt Hr'g, PgID 1724 (licenses "may not be valid under Kentucky law"), 1728 ("I'm not saying it is [lawful] or it isn't [lawful]. I haven't looked into the point. I'm trying to get compliance with my order."), 1731-32; *see also* R.89, Release Order, PgID 1827 (acknowledging changes on marriage licenses made by deputy clerks but finding that such "alterations" still comply with the district court's order).

[15] Prior representations suggest that this couple may not even be interested in obtaining a license. R.46, Pls.' Resp. to Mot. to Stay Prelim. Inj., PgID 1235.

IV. Public Interest Favors A Simple Accommodation Pending Appeal.

The public has no interest in coercing Davis to irreversibly violate her conscience and religious freedom when ample less restrictive alternatives, and simple accommodations, are readily available. *See*, *e.g.*, *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (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

For the reasons set forth above and in prior briefing, Davis respectfully requests that this Court enjoin enforcement of Gov. Beshear's SSM Mandate and preliminarily exempt her from authorizing marriage licenses pending appeal.

DATED: September 10, 2015

Respectfully submitted:

/s/ Jonathan D. Christman

Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Jonathan D. Christman
Liberty Counsel, P.O. Box 540774
Orlando, Florida 32854
(800) 671-1776
court@lc.org / hmihet@lc.org /
rgannam@lc.org / jchristman@lc.org

Counsel for Appellant Kim Davis

A.C. Donahue
Donahue Law Group, P.S.C.
P.O. Box 659
Somerset, Kentucky 42502
(606) 677-2741
ACDonahue@DonahueLawGroup.com

CERTIFICATE OF SERVICE

I hereby certify that on this 10th 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:

William Ellis Sharp
ACLU of Kentucky
315 Guthrie Street, Suite 300
Louisville, KY 40202
sharp@aclu-ky.org

Daniel J. Canon
Laura E. Landenwich
Leonard Joe Dunman
Clay Daniel Walton Adams, PLC
462 S. Fourth Street, Suite 101
Louisville, KY 40202
dan@justiceky.com
laura@justiceky.com
joe@justiceky.com

Daniel Mach
Heather L. Weaver
ACLU Foundation
915 15th Street, NW, Suite 6th Floor
Washington, DC 20005
dmach@aclu.org
hweaver@aclu.org

James D. Esseks
Ria Tabacco Mar
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
jesseks@aclu.org
rmar@aclu.org

Counsel for Plaintiffs-Appellees

William M. Lear, Jr.
Palmer G. Vance II
Stoll Keenon Ogden PLLC
300 West Vine Street, Suite 2100
Lexington, KY 40507-1380
william.lear@skofirm.com
gene.vance@skofirm.com

Counsel for Third Party Defendants-Appellees

/s/ Jonathan D. Christman
Jonathan D. Christman
Liberty Counsel, P.O. Box 540774
Orlando, Florida 32854
(800) 671-1776; jchristman@lc.org