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.	:	
	:	

DEFENDANT/THIRD-PARTY PLAINTIFF KIM DAVIS' REPLY TO THIRD-PARTY DEFENDANTS' RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Defendant/Third-Party Plaintiff Kim Davis ("Davis"), by and through her undersigned counsel, hereby submits this Reply to Third-Party Defendants' Steven L. Beshear, Governor of Kentucky ("Gov. Beshear"), and Wayne Onkst, State Librarian and Commissioner of the Kentucky Department for Libraries and Archives ("Commr. Onkst") Response in Opposition to Davis' Emergency Motion for Injunction Pending Appeal of this Court's August 25, 2015 order.

I. INTRODUCTION

In opposing Davis' request for a religious accommodation pending appeal, Gov. Beshear continues 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 should act quickly to prevent further harm to Davis pending her appeal.

II. REPLY ARGUMENT

A. The Jurisdictional Arguments Raised By Gov. Beshear And Commr. Onkst Are Meritless Attempts To Avoid A Problem Gov. Beshear Created.

1. Gov. Beshear Has Authority To Provide An Accommodation Pending Appeal.

Contrary to Gov. Beshear's suggestion, he does, in fact, possess the authority to provide a simple accommodation to Davis—he just refuses to grant her request. Gov. Beshear disingenuously alleges that the Beshear Letter "does not instruct Davis or any other county clerk to do anything." D.E. 91, at 4. This litigation-generated contention collapses under the weight of the evidence, and contradicts this Court's conclusion (which Gov. Beshear ignores) that the Beshear Letter and Gov. Beshear's subsequent "directives" constitute state action. D.E. 43, at 6, 18-22, 27 (referring to the "Beshear directive").

The Beshear Letter is not a collection of gubernatorial musings that do not "command Davis to do anything." D.E. 91, at 4. 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." D.E. 34, Verified Third-Party Complaint ("VTC"), at ¶¶ 25, 33; D.E. 1-3, Beshear Letter. 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).[1] Gov. Beshear cannot seriously contend that he was not instructing the county clerks to comply with his SSM Mandate.[2]

Following issuance of the Beshear Letter, county clerks across Kentucky began authorizing SSM licenses on the new forms, with almost no exception. VTC, at ¶ 27. 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.

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[1] Shortly thereafter, the KDLA provided this new marriage form to county clerks, including Davis. VTC, at ¶ 26.

[2] Gov. Beshear contends that, as the highest officer in the Commonwealth of Kentucky, he exercises no supervisory authority over county clerks. D.E. 91, at 7-8, 10. The case of *Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982), cited by Gov. Beshear for this proposition, involves state-wide officials, not county officials.

Beshear has maintained that county clerks must issue SSM marriage licenses, despite their "own personal beliefs." *Id*. at ¶ 28. 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.* at ¶¶ 28, 36. 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.* at ¶ 35.

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").[3] 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.

Gov. Beshear incorrectly contends that "Kentucky statutes with respect to marriage licensing remain fully intact following *Obergefell*, except that same-sex couples must be treated equally as opposite-sex couples." *See* D.E. 91, at 9. 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.[4] This definition was found to be unconstitutional

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[3] *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.").

[4] *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.").

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**.[5] Until the 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, legislatively-enacted duties on marriage.[6] **But there *is* Gov. Beshear's SSM Mandate**.

Gov. Beshear has the power to grant the relief, because his 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

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

[6] Indeed, Kentucky Senate President Robert Stivers argued in an amicus filing in this Court 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." D.E. 73, at 2.

to join in, participate in, and approve of SSM regardless of their individual beliefs, and immediately without any consideration of religious accommodation. Yet it was his newly revised form that came with "**instructions**" for its use (VTC, Ex. D, Post-*Obergefell* Marriage License), and his SSM Mandate that county clerks "**must license**" (D.E. 1-3, Beshear Letter; emphasis added), that triggered the underlying lawsuit **against Davis**. *See* D.E. 1, Compl., at ¶¶ 32-33 (referring to the Beshear Letter as a "directive from the Chief Executive"); *see also* D.E. 2-1, at 6 (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* VTC, Ex. A, Pre-*Obergefell* Marriage License (designating "bride" and "groom"). Thus, rather than being in the "same position" if the Beshear Letter had never been handed down, as Gov. Beshear erroneously contends, *see* D.E. 91, at 4, Davis would have been in a very different position. To obtain a license, Plaintiffs 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, Gov. Beshear declares that Davis has a "statutory duty of issuing marriage licenses to qualified same-sex couples." *See* D.E. 91, at 2. One glaring problem with this statement, however, is that Gov. Beshear cannot identify any such **statutory** requirement; instead, to the extent Davis had a "requirement" to issue such licenses, it is one imposed by his SSM Mandate that failed to even consider religious accommodation requests. Not only that, Gov. Beshear further states that "[Kentucky] statutes provide the logistical scheme for issuing licenses, which only county clerks **or their deputies** may issue.") (emphasis added). *Id.* at 8. But no statutory authority allows deputy clerks to authorize the issuance of marriage licenses, and for Gov. Beshear to suggest otherwise is only further indication that he 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.[7] **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**.

2. This Court Has No Jurisdiction Over Gov. Beshear's Motion To Dismiss.

Gov. Beshear also argues that this Court should refuse Davis' accommodation pending appeal based upon reasons alleged in his Motion to Dismiss filed on September 8, 2015. *See* D.E. 91, at 4, 6, 10; *see also* D.E. 92. However, this Court is deprived of jurisdiction to consider that motion to dismiss. "As a general rule, an effective notice of appeal divests the district court of jurisdiction over the matter forming the basis for the appeal." *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987); *see also Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 378-79 (1985); *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437, 439 (6th Cir. 1985). Indeed, it is well-settled law that the notice of appeal divests this Court of jurisdiction "to act in a case, except on remedial matters unrelated to the merits of the appeal." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Resources*, 71 F.3d 1197, 1203 (6th

[7] 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, any suggestion that Kentucky marriage law imposes upon Davis the obligation to issue SSM licenses fails to consider the necessary Kentucky RFRA analysis embedded in any state-wide marriage licensing scheme.

Cir. 1995). Orders entered by a district court lacking jurisdiction over a matter while a case is on appeal are "null and void." *See U.S. v. Holloway*, 740 F.2d 1373, 1382 (1984).

In the case at bar, on August 31, 2015, Davis filed a notice of appeal of this Court's August 25, 2015 order to the Sixth Circuit pursuant to 28 U.S.C. § 1292(a), and applicable precedent. *See* D.E. 66.[8] This Court's August 25, 2015 order staying consideration on Davis' motion for preliminary injunction pending resolution of her Sixth Circuit appeal of this Court's August 12, 2015 injunction order effectively denied her request for preliminary injunction, and a "practical denial" of preliminary injunctive relief is immediately appealable under 28 U.S.C. § 1292(a). *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 such, Davis' notice of appeal deprives this Court of jurisdiction over non-remedial matters forming the basis of her appeal against Gov. Beshear and Commr. Onkst, such as motions to dismiss.[9] Thus, this Court has no jurisdiction to consider the motion to dismiss filed by Gov. Beshear and Commr. Onkst while the August 25, 2015 order is on appeal to the Sixth Circuit because such matters are non-remedial and related to the merits of the appeal.[10]

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

In his opposition to Davis' motion requesting an accommodation pending appeal, Gov. Beshear ignores entirely the applicability of the Kentucky RFRA, which indisputably applies to all "persons," including publicly elected officials. *See* KY. REV. STAT. § 446.350. Adopting a

[8] That appeal has been docketed in the Sixth Circuit as *April Miller, et al. v. Kim Davis, et al.*, Case No. 15-5961 (6th Cir.).

[9] The instant motion for injunction pending appeal is expressly permitted within this Court's jurisdiction pursuant to Fed. R. App. P. 8(a)(1).

[10] As a result, Davis objects to any further briefing on the motion to dismiss filed by Gov. Beshear and Commr. Onkst on September 8, 2015, let alone the expedited briefing schedule entered today on this Court's own motion, as exceeding the scope of this Court's jurisdiction. *See* D.E. 96. With that objection raised and herein preserved and not waived, Davis will respond to the motion to dismiss accordingly.

different construction endorses 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. The distinction that Davis may privately exercise her individual beliefs in a personal capacity, but is barred from exercising religious rights "in her official capacity" is not helpful. This distinction 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.[11] Importantly for Davis, it was not her "office" but herself, individually, that was jailed for six days as a result of her individual conscience.

Accepting the foregoing distinction 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 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.[12] 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. 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 beliefs, it is difficult to imagine what burden could ever be substantial enough to merit relief. The Kentucky RFRA, and First Amendment, clearly apply.

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[11] 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.

[12] "[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).

Additionally, Gov. Beshear fails to engage the substantial burden analysis required under the Kentucky RFRA and the First Amendment. Critically, neither Gov. Beshear nor, respectfully, this Court, are arbiters of the burden placed upon Davis' religious beliefs, and 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 whether Davis' religious beliefs about authorizing SSM licenses are reasonable. *See Hobby Lobby*, 134 S.Ct. at 2778 (2014) (emphasis in original). Thus, it is not for this 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)***.[13] 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

[13] It is 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.

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. There is no dispute that Davis holds sincerely-held religious beliefs about marriage—the requisite "honest conviction." Making judgments about whether that conviction itself is "more slight" than some other belief or practice (*see* D.E. 43 at 27) is the exact step that the Supreme Court has "repeatedly refused to take." *Hobby Lobby*, 134 S.Ct. at 2778.

The proffered compelling government interest that purportedly overcomes the burden on Davis' religious freedom (*i.e.*, protecting the right to marry, *see* D.E. 91, at 12) is the type of "broadly formulated" governmental interest that fails 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 does not prevent qualified individuals from uniformly acquiring Kentucky marriage licenses from more than 130 marriage licensing locations, especially if Gov. Beshear is ordered to deputize another individual in Rowan County to authorize marriage licenses that do not include Davis' name (or any other personal identifiers), and are clearly issued on someone else's authority. Moreover, 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 that the right to marry can be protected alongside religious liberty and free speech rights, *see, e.g.*, An Act Relating to Marriage, Ky. House Bill 101 (2016 Reg. Sess.).

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. Gov. Beshear's total 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.

Finally, Gov. Beshear repeatedly cites the August 26, 2015 decision from a motion panel of the Sixth Circuit denying an emergency motion to stay the Injunction enjoining Davis in her official capacity from applying a "no marriage license" policy to future license requests by the named Plaintiffs. *See* D.E. 91, at 2, 4-6, 11. That opinion is limited, and not controlling in this case for several reasons. First, the decision is not a merits determination. Second, the decision is limited in its reach because it found that the 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 this Court's error in rejecting Davis' religious liberty defenses to Plaintiffs' claims 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, Gov. Beshear and Commr. Onkst are not parties to that appeal, and thus, the decision does not involve Davis' claims for a simple accommodation from them.[14]

[14] Further, Gov. Beshear also repeatedly claims that Davis is simply repeating or seeking to re-litigate the "same" constitutional arguments or "identical" claims already rejected by this Court and the Sixth Circuit. D.E. 91, at 2-3, 5, 7. They are wrong. Although the arguments and relief sought are necessarily intertwined, they are not wholly overlapping, for the claims asserted against Gov. Beshear also directly involve **individual**-based claims, which the

C. Neither Plaintiffs Nor Third-Party Defendants Will 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 indicating that three of the four couples have chosen to obtain marriage licenses ordered by this Court without Davis' authorization. D.E. 84. These licenses do not bear Davis' name, but they specifically refer to the "Rowan County County Clerk." D.E. 84, 84-1. Again, these licenses 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.[15] 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.[16]

An accommodation pending appeal also does not harm Gov. Beshear and Commr. Onkst, 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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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 Injunction in their response, they omit from their discussion this Court's statement that Davis "further develops" her request for accommodation from Gov. Beshear and Commr. Onkst in her own motion for preliminary injunction, but that motion "is not yet ripe for review." *See* D.E 43, at 19.

[15] This Court acknowledged that without Davis' authorization the licenses may not even be valid. *See, e.g.*, D.E. 78, Hr'g Tr. (9/3/15), at 162:3-6 (licenses "may not be valid under Kentucky law"), 166:14-25 ("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."), 169:19-22, 170:21-25; *see also* D.E. 89 at 1 (acknowledging changes on marriage licenses made by deputy clerks but finding that such "alterations" still comply with this Court's September 3, 2015 order).

[16] Prior representations suggest this couple may not be interested in obtaining a license. D.E. 46, at 2 n.1.

D. 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].").

III. CONCLUSION

For all the foregoing reasons, and those set forth in Davis' prior briefing, Davis' Emergency Motion for Injunction Pending Appeal should be granted.

DATED: September 10, 2015

Respectfully submitted:

/s/ Jonathan D. Christman

A.C. Donahue
Donahue Law Group, P.S.C.
P.O. Box 659
Somerset, Kentucky 42502
Tel: (606) 677-2741; Fax: (606) 678-2977
ACDonahue@DonahueLawGroup.com

Roger K. Gannam
Jonathan D. Christman
Liberty Counsel
P.O. Box 540774
Orlando, Florida 32854
Tel: (800) 671-1776; Fax: (407) 875-0770
rgannam@lc.org/jchristman@lc.org

Attorneys for Defendant/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 ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

Daniel J. Canon
L. Joe Dunman
Laura E. Landenwich
CLAY DANIEL WALTON ADAMS, PLC
462 S. Fourth Street, Suite 101
Louisville, KY 40202
dan@justiceky.com
joe@justiceky.com
laura@justiceky.com

William Ellis Sharp
ACLU OF KENTUCKY
315 Guthrie Street, Suite 300
Louisville, KY 40202
sharp@aclu-ky.org
Attorneys for Plaintiffs

Jeffrey C. Mando
Claire Parsons
ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC
40 West Pike Street
Covington, KY 41011
jmando@aswdlaw.com
cparsons@aswdlaw.com
Attorneys for Rowan County

William M. Lear, Jr.
Palmer G. Vance II
STOLL KEENON OGDEN PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507-1380

Attorneys for Governor Steven L. Beshear and Commissioner Wayne Onkst

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