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Defendant/Third-Party Plaintiff Kim Davis (“Davis”), by and through her undersigned counsel, respectfully submits this Response in Opposition to Plaintiffs’ Motion to Reopen Briefing and Expedite Consideration of Plaintiffs’ Class Certification Motion (D.E. 115).

**I. INTRODUCTION**

Plaintiffs’ motion to reopen class-based proceedings is a thinly-veiled attempt to upend the status quo in Rowan County with respect to the issuance of marriage licenses, needlessly create controversy where it does not currently exist, and unnecessarily multiply the proceedings in this Court while Davis’ consolidated appeals in the Sixth Circuit are resolved on their merits. In their motion, Plaintiffs conveniently fail to acknowledge that marriage licenses are being issued in Rowan County which the Kentucky Governor and Kentucky Attorney General have approved as valid, which are recognized by the Commonwealth of Kentucky, and which are deemed acceptable by the couples who received them. These undisputed facts alone are reason enough to deny Plaintiffs’ motion.

Given the foregoing, any class-based proceedings in this matter remain premature and needlessly multiply the litigation in this Court while Davis’ consolidated appeals are decided by the Sixth Circuit. Moreover, because Plaintiffs actually possess marriage licenses before any class has been certified, they no longer have a personal stake in class certification proceedings seeking injunctive or declaratory relief. Even if Plaintiffs can overcome these mootness concerns to pursuing class relief, Plaintiffs’ proposed class has many deficiencies that will need to be addressed through significant class-based discovery and extensive briefing on class certification. Among these deficiencies requiring discovery and briefing are Plaintiffs’ inability to serve as class representatives due to the fact that their claims are not typical, adequate, or representative of the

persons they seek to represent (*i.e.*, persons who are eligible to receive marriage licenses) because Plaintiffs, in fact, obtained marriage licenses.

From the outset of this case, Davis has consistently argued that there were multiple alternatives by which her sincerely-held religious beliefs could be accommodated, without being burdened, while simultaneously allowing individuals to obtain valid marriage licenses in Rowan County.<sup>1</sup> One of those proposed solutions is now in place, with the approval and authorization of the Kentucky Governor, and this current status quo also embodies the reasonable steps and good faith efforts taken by Davis to comply with this Court's orders without violating her conscience. But, unsatisfied with the status quo, Plaintiffs are apparently looking to stir up controversy where it does not exist, perhaps to drive-up their own attorneys' fees in this litigation. For all the foregoing reasons, Plaintiffs' motion to reopen and expedite consideration of class certification proceedings should be denied.

## **II. RELEVANT BACKGROUND**

This Court is well-versed in the procedural history of this case and thus Davis includes here only the background relevant to deciding the discrete issue presented by Plaintiffs' instant motion—whether, in light of the status quo in Rowan County regarding the issuance of marriage licenses, to reopen class certification proceedings while Davis' consolidated appeals are finally resolved by the Sixth Circuit.

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<sup>1</sup> See, *e.g.*, D.E. 21, Prelim. Inj. Hr'g Tr. (7/13/15), PgID.162-69, 176-78, 187-89; D.E. 26, Prelim. Inj. Hr'g Tr. (7/20/15), PgID.261-63; D.E. 29, Resp. to Pls.' Mot. for Prelim. Inj., PgID.337-39, 350-54; D.E. 34, Verified Third-Party Complaint; D.E. 39-1, Memo. in Supp. of Mot. for Prelim. Inj., PgID.859-63; D.E. 54, Prelim. Inj. Hr'g Tr. (8/10/15), PgID.1281; D.E. 72, Resp. to Mot. for Contempt, PgID.1544-45; D.E. 78, Contempt Hr'g Tr. (9/3/15), PgID.1646-47, 1709.



**A. Plaintiffs' Motion For Class Certification.**

On August 2, 2015, Plaintiffs filed a motion for class certification. D.E. 31, Pls.' Mot. Class Cert. On August 11, 2015, Davis filed a motion for extension of time to respond to Plaintiffs' class certification motion, requesting that the Court set a response date for ninety (90) days after this Court ruled on all of the motions pending before this Court at that time.<sup>2</sup> D.E. 42, Mot. Ext. Time Respond. **Plaintiffs filed no written opposition to this motion in the time allotted under the Local Rules.** On August 24, 2015, Davis filed a reply brief after Plaintiffs' time to oppose expired, showing that "Plaintiffs' failure to file a timely written opposition constitutes a waiver of any opposition to Davis' motion for extension of time." D.E. 56, Reply Br. Supp. Mot. Ext. Time Respond, PgID.1289.

On August 25, 2015, this Court granted Davis' motion for extension of time. D.E. 57, Virtual Order Aug. 25, 2015 ("**Plaintiffs having filed no opposition to the MOTION, IT IS ORDERED** that Defendant Davis' response to said motion is due 30 days after the Sixth Circuit Court of Appeals renders its decision on the appeal of the Court's granting of Plaintiffs' motion for a preliminary injunction.") (emphasis added). The effect of this order was to stay all proceedings on Plaintiffs' class certification motion until the Sixth Circuit decided Davis' appeal of this Court's August 12, 2015 injunction on the merits.

**B. Davis' Incarceration, Plaintiffs' Receipt Of Marriage Licenses, And Davis' Subsequent Release From Jail.**

On September 3, 2015, this Court ordered Davis to jail as a contempt sanction for Davis' refusal to issue a marriage license, in violation of her conscience, to one Plaintiff couple. *See* D.E.

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<sup>2</sup> These pending motions included Plaintiffs' motion for preliminary injunction (D.E. 2), Davis' motion to dismiss Plaintiffs' Complaint (D.E. 32), and Davis' motion for preliminary injunction (D.E. 39). Davis' motion to dismiss Plaintiffs' Complaint in its entirety is still pending before this Court, but briefing was stayed on that motion on August 25, 2015. *See* D.E. 58, Aug. 25, 2015 Order, PgID.1289.

78, Contempt Hr'g Tr. (9/3/2015), at PgID.1659:22-1661:25. The stated condition for Davis' release from imprisonment was her compliance with this Court's new (and expanded) injunction entered on September 3, 2015, not the original injunction limited only to the named Plaintiffs. *Id.* at PgID.1661:18-1662:16; *see also* D.E. 74, Exp. Inj. Order, PgID. PgID.1557.

On September 8, 2015, the sixth day of Davis' incarceration, Plaintiffs filed a status report pursuant this Court's Order dated September 7, 2015 (D.E. 80), showing this Court that the Plaintiffs had received marriage licenses from the deputy clerks.<sup>3</sup> D.E. 84, Status Report, PgID.1798-1803. Following the status report, this Court ordered Davis released, stating in its order the court was "satisfied that the Rowan County Clerk's Office is fulfilling its obligation to issue marriage licenses," and that "Plaintiffs have obtained marriage licenses from the Rowan County Clerk's Office." D.E. 89, Sept. 8, 2015 Order, PgID.1827-28 (hereinafter, the "Release Order"). The Release Order commands, however, "Davis **shall not interfere** in any way, directly or indirectly, with the efforts of her deputy clerks to issue marriage licenses" to "all legally eligible couples," on pain of new sanctions. *Id.* at PgID.1827-1828 (emphasis in original).

On September 14, 2015, Davis returned to work at the Rowan County Clerk's Office. On that day, she provided a public statement regarding the issuance of marriage licenses in Rowan County. Davis explained that she would not interfere with her deputy clerks' issuance of marriage licenses, but the licenses would accommodate her sincerely-held religious beliefs by omitting her

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<sup>3</sup> The status report showed that three of the four Plaintiff couples had received marriage licenses. D.E.84, Status Report, PgID.1798. The lone exceptions are Plaintiffs Burke and Napier but, as indicated previously, they are no longer even interested in obtaining a marriage license in Rowan County. *See* D.E. 6, Pls.' Resp. to Mot. to Stay Prelim. Inj., PgID.1235; *see also* D.E. 84, Status Report, PgID.1798 (indicating that Plaintiffs Burke and Napier did not choose to obtain a marriage license in Rowan County even though the other three Plaintiff couples did and despite Plaintiffs' Counsel's prior representations that they were allegedly facing substantial and irreparable harm each and every day they could not receive a marriage license in Rowan County); D.E. 113-3, PgID.2247 (acknowledging, again, that Plaintiffs Burke and Napier have "not yet" sought and received a marriage license). In fact, Plaintiffs Burke and Napier did not testify at the preliminary injunction hearings held by this Court, and they have never supplied verified proof that they are even qualified to obtain a marriage license, a prerequisite to injunctive relief. *See* D.E. 29, Resp. to Pls.' Mot. for Prelim. Inj., PgID.359; *see also generally* D.E. 21 and 26, Prelim. Inj. Hr. Tr. (7/13/2015 and 7/20/2015).

name, title, and authority. Immediately that same day, the Kentucky Governor and Kentucky Attorney General both inspected the new licenses and publicly stated that they were valid and will be recognized as valid by the Commonwealth of Kentucky. Since her return to work on September 14, 2015, and to date (more than three weeks later), marriage licenses deemed valid by the highest elected officials in Kentucky continue to be issued in Rowan County by deputy clerks to lawfully eligible couples without any interference or interruption. *See* D.E. 114, 116, 117, 118, 119, 122, 125, 126, 127, 128, 129, 131, Deputy Clerk Status Reports.

**C. Plaintiffs' Motion To Reopen Class Certification Proceedings.**

Notwithstanding their receipt and acceptance of marriage licenses, the ongoing availability of marriage licenses in Rowan County, and the express validation of these licenses by Kentucky's highest elected officials, Plaintiffs filed a motion to reopen class certification proceedings on September 18, 2015. *See* D.E. 115, Pls.' Mot. to Reopen Class Cert. In that motion, Plaintiffs allege that there is "good cause" based upon "principles of equity" for this Court to reconsider its Order staying briefing and consideration of Plaintiffs' motion for class certification. *Id.* at PgID.2299-2300. Plaintiffs allege (without any evidentiary support) that "[m]embers of the putative class" will "suffer substantial and irreparable harm to their constitutional rights" absent class-wide relief, and that licenses are available to couples supposedly "only because of this Court's September 3 Order applying the August 12 preliminary injunction to all eligible marriage applicants." *Id.* at PgID.2299-2300. Plaintiffs further allege (without any evidentiary support) that Davis made "material alterations" to marriage licenses that "call into question the validity of the marriage licenses issued, create an unconstitutional two-tier system of marriage licenses issued in Kentucky, and do not comply with this Court's September 3 Order prohibiting Davis from interfering with

the issuance of marriage licenses.” *Id.* at PgID.2299-2301. Davis now timely responds to Plaintiffs’ motion.

### III. ARGUMENT

#### A. **Plaintiffs’ Motion To Reopen Class Certification Proceedings Should Be Denied Because Marriage Licenses Are Being Issued In Rowan County, Which The Kentucky Governor And Kentucky Attorney General Have Approved As Valid, And Which Are Recognized By The Commonwealth Of Kentucky.**

Plaintiffs’ motion to reopen class certification proceedings should be denied because marriage licenses are being issued in Rowan County. Thus, there is no longer a “no marriage licenses” policy in effect at the Rowan County Clerk’s Office, and Davis is not interfering with the issuance of marriage licenses by her deputy clerks to all legally eligible couples. In short, there is absolutely no need, let alone an emergent one, for any class certification proceedings. The following facts are undisputed: (1) licenses are being issued in the Rowan County Clerk’s Office; (2) Davis is not interfering with the issuance of licenses by her deputy clerks to legally eligible couples; (3) couples who are legally eligible to receive marriage licenses are receiving those licenses and are deeming them valid and acceptable to them; and (4) the highest elected officials in the Commonwealth of Kentucky, including the Kentucky Governor and Kentucky Attorney General, have now validated and authorized those licenses (a critical fact that Plaintiffs omit entirely from their motion).<sup>4</sup> Not only that, these licenses also accommodate Davis’ sincerely-held religious beliefs.

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<sup>4</sup> The hearsay-laden notice filed by counsel for deputy clerk Brian Mason is similarly deficient, and includes glaring omissions. *See* D.E. 114, Deputy Clerk Status Report. Despite frivolously claiming that the changes made to the licenses are “in some attempt to circumvent the court’s orders and may have raised to the level of interference against the court’s orders” and claiming further that the office may be “issuing invalid marriage licenses,” *id.*, PgID.2294, **counsel for Mr. Mason does not even bring to this Court’s attention the express and unambiguous statements made by the Kentucky Governor and Kentucky Attorney General regarding the validity and authority for these licenses.**

Specifically, after these licenses were issued effective the morning of September 14, 2015, Gov. Beshear stated that they “substantially complied” with Kentucky law and are “going to be recognized as valid in the Commonwealth.” These statements not only conclusively rebut Plaintiffs’ suggestions to the contrary, but also, they confirm that Davis’ religious objections were (and are), in fact, able to be accommodated in the issuance of marriage licenses. In a clear and unambiguous statement made on Monday, September 14, 2015, Gov. Beshear stated:

**I’m . . . confident and satisfied that the licenses that were issued last week (and) this morning substantially comply with the law in Kentucky. . . And they’re going to be recognized as valid in the Commonwealth.**<sup>5</sup>

These forceful proclamations come from Gov. Beshear, who, as a named defendant in one of the cases consolidated in the Supreme Court’s *Obergefell* decision, was identified as one of the “state officials responsible for enforcing the [marriage] laws in question.” *Obergefell v. Hodges*, 135 S.Ct. 2584, 2593 (2015). Moreover, by his own admission in this Court, Gov. Beshear is responsible for Kentucky marriage license forms. *See, e.g.*, D.E. 92-1, Memo. Beshear Mot. to Dismiss, PgID.1854-1855. Furthermore, he previously declared that “Effective today [June 26, 2015], Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky,” that “Kentucky – and all states – must license and recognize the marriages of same-sex couples,” and that he would direct the KDLA to modify the marriage license form. *See* D.E. 1-3, Beshear Letter, PgID.26. Accordingly, Gov. Beshear is empowered to authorize, approve, validate, and recognize marriage licenses, as he has done with respect to the marriage licenses presently being issued in Rowan County.

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<sup>5</sup> *See, e.g.*, Kim Davis stands ground, but same-sex couple get marriage license, CNN.COM, Sept. 14, 2015, available at <http://www.cnn.com/2015/09/14/politics/kim-davis-same-sex-marriage-kentucky/> (quoting Gov. Beshear) (last accessed Oct. 9, 2015).

The Kentucky Governor is not alone in his assessment, authorization, approval, validation and recognition of these licenses under Kentucky law. Kentucky Attorney General Jack Conway also agrees that the licenses issued in the Rowan County Clerk's Office since September 14, 2015 are valid. Although Atty. Gen. Conway has not been asked to issue a formal opinion on the validity of the licenses, he reportedly "reviewed marriage licenses issued in Rowan County" and "believes that those issued while clerk Kim Davis was in jail and the one issued so far since her return to work are valid."<sup>6</sup> Therefore, the purported "material alterations" (*see* D.E. 115, Pls.' Mot. to Reopen Class Cert., PgID.2299-2301) made by Davis to the marriage licenses that have been issued in Rowan County since September 14, 2015 have been deemed valid, approved, and recognized by the highest elected officials in Kentucky who possess the authority to make such declarations.<sup>7</sup> As such, according to the Kentucky Governor and Kentucky Attorney General, the alterations are not "material" in a way that affects their lawfulness, validity, or recognition.

**And nothing has changed for the licenses that have gone out from the Rowan County Clerk's Office since the foregoing statements were made by Kentucky's chief executive officer and Kentucky's chief legal officer.** Plaintiffs' attempts to suggest otherwise are baseless, and spuriously engender controversy that does not currently exist in light of the Governor's and Attorney General's statements on the marriage licenses that accommodate Davis' sincerely-held religious beliefs. In no way can it be said that Davis is "not comply[ing] with this Court's

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<sup>6</sup> *See, e.g.*, The Latest: State AG believes Kentucky marriage licenses are valid without Kim Davis, JOHNSON CITY PRESS, Sept. 14, 2015, *available at* <http://www.johnsoncitypress.com/Nation/2015/09/14/The-Latest-State-AG-believes-marriage-licenses-are-valid.html?ci=stream&lp=6&p=1> (quoting Allison Gardner Martin, spokeswoman for Atty. Gen. Conway) (last accessed Oct. 9, 2015) (emphasis added).

<sup>7</sup> At the September 3, 2015 contempt hearing, this Court expressed hope for a legislative or executive accommodation of the kind effectively given by the Kentucky Governor and Kentucky Attorney General: "I recognize, and I mentioned this when we first came out earlier this morning, that the legislative and executive branches do have the ability to make changes. And those changes may be beneficial to everyone. Hopefully, changes are made." *See* D.E. 78, Contempt Hr'g Tr. (9/3/15), PgID.1658:5-9. "If legislative or executive remedies . . . come to fruition, as I stated, better for everyone." *Id.* at PgID.1659:3-5.

September 3 Order prohibiting Davis from interfering with the issuance of marriage licenses” (D.E. 115, Pls.’ Mot. to Reopen Class Cert., PgID.2299-2301) when, in fact, marriage licenses deemed valid and authorized in the Commonwealth of Kentucky are being issued in Rowan County.

Furthermore, individuals who have received these licenses personally accept, and do not challenge, the validity and recognition of these licenses.<sup>8</sup> For instance, in an interview with NBC, Shannon Oceana Wampler-Collins (a recipient of a license on September 14, 2015 who is not even a resident of Rowan County) publicly declared that **“My license is valid. And it’s valid because of the court order in effect that the clerks are issuing licenses. It doesn’t have to have her signature for it to be valid for me,”** while Carmen Marie Collins similarly proclaimed that “We’re pretty excited . . . We’re just really happy . . . [and] what we have heard from everybody...is they will be seen as valid licenses.”<sup>9</sup> These same statements also debunk Plaintiffs’ newfound myth of an “unconstitutional two-tier system of marriage licenses issued in Kentucky,” *see* D.E. 115, Pls.’ Mot. to Reopen Class Cert., PgID.2299, and instead demonstrates that marriage licenses deemed valid and acceptable to their actual recipients are being issued in Rowan County.

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<sup>8</sup> In its September 8, 2015 order, this Court found that the named Plaintiffs “have obtained marriage licenses from the Rowan County Clerk’s Office,” “have not alleged that the alterations affect the validity of the license” they received, and that the alterations made to the licenses did not “impact” this Court’s finding of compliance with its order. *See* D.E. 89, Sept. 8, 2015 Order, PgID.1827.

<sup>9</sup> *See, e.g.*, Kim Davis Couldn’t Stop Her Office From Giving This Couple A Marriage License, HUFFINGTON POST, Sept. 14, 2015, online video *available at* [http://www.huffingtonpost.com/entry/kim-davis-gay-marriage-license\\_55f6f815e4b063ecbfa507b6](http://www.huffingtonpost.com/entry/kim-davis-gay-marriage-license_55f6f815e4b063ecbfa507b6) (last accessed Oct. 9, 2015); *see also* Kim Davis’ backers disappointed by remedy, COURIER-JOURNAL, Sept. 14, 2015, *available at* <http://www.courier-journal.com/story/news/local/2015/09/11/kim-davis-expected-back-work-monday/72079360/> (“The couple said they don’t have any concerns over validity since Gov. Steve Beshear, Attorney General Jack Conway and many others argue that the forms are legitimate.”) (last accessed Oct. 9, 2015); Ky. Clerk Kim Davis doesn’t interfere as marriage license issued, USA TODAY, Sept. 14, 2015, *available at* <http://www.usatoday.com/story/news/politics/2015/09/14/kentucky-clerk-kim-davis-returns-work/72242438/> (“They said they don’t have any concerns about the validity of the license since most experts seem to argue that the forms are legitimate.”) (last accessed Oct. 9, 2015); Kim Davis allows deputy to issue ‘unauthorized’ marriage license to Lexington couple, LEXINGTON HERALD-LEADER, Sept. 14, 2015, *available at* [http://www.kentucky.com/2015/09/14/4035866\\_kim-davis-deputies-can-issue-marriage.html?rh=1](http://www.kentucky.com/2015/09/14/4035866_kim-davis-deputies-can-issue-marriage.html?rh=1) (“The women said they were satisfied that their marriage license was legally valid.”) (last accessed Oct. 9, 2015).

Moreover, **the status reports submitted by the deputy clerks over the past several weeks uniformly confirm that couples who were eligible to receive marriage licenses in Rowan County have, in fact, received them.** *See* D.E. 114, 116, 117, 118, 119, 122, 125, 126, 127, 128, 129, 131, Deputy Clerk Status Reports. Apparently satisfied with the implementation of its Orders in Rowan County, this Court has recently modified the deputy clerks' reporting obligations to this Court, extending the period between reports from two weeks to thirty days. *See* D.E. 130, Order (10/6/2015), PgID.2446.

Notwithstanding, Plaintiffs have gone so far as to speculate that Davis' office "is currently issuing licenses to all couples . . . only because of this Court's September 3 Order applying the August 12 preliminary injunction to all eligible marriage applicants," and claim that "Davis' conduct mak[es] clear that she only continues to issue the licenses to all couples because of this Court's Order" and that Davis "seeks to impose" serious and irreparable harm on "members of the putative class," thereby suggesting (without any evidentiary support) that Davis intends to cease the issuance of all marriage licenses being issued in Rowan County if no class certification order is entered. *See* D.E. 115, Pls.' Mot. to Reopen Class Cert., PgID.2299-2300. Plaintiffs are wrong, and have absolutely no proof to support this groundless attack on Davis. Rather, as indicated above, Davis has taken reasonable steps and good faith efforts to substantially comply with this Court's orders, and, effective September 14, 2015, marriage licenses are being issued in the Rowan County Clerk's Office to lawfully eligible couples that both accommodate Davis' religious objections and are validated and authorized by the Kentucky Governor and Kentucky Attorney General. Not only that, the persons who actually receive those licenses (not Plaintiffs or Plaintiffs' Counsel) deem them acceptable. Accordingly, the accommodating solution that is in place **will remain in place** because it is the kind of simple accommodation Davis has been requesting from the outset of this



litigation. Since marriage licenses are being issued in the Rowan County Clerk's Office, Plaintiffs' motion to reopen class certification proceedings—a thinly-veiled request to drive-up their own attorneys' fees and engender needless controversy—should be denied.

**B. Any Class-Based Proceedings Are Premature And Needlessly Multiply The Proceedings In This Court.**

Given the foregoing, any class-based proceedings in this Court are premature and needlessly multiply the proceedings in this Court—especially when Davis' consolidated appeals on the merits of the underlying injunction and other related orders by this Court are pending in the Sixth Circuit.<sup>10</sup> As discussed above, this is the status quo that currently exists in Rowan County with respect to marriage licenses: effective September 14, 2015, marriage licenses that both accommodate Davis' religious objections and are validated, authorized, and recognized by the Kentucky Governor and Kentucky Attorney General are being issued in Rowan County by deputy clerks to eligible couples. Yet Plaintiffs (really, Plaintiffs' Counsel) are looking to disrupt and dislodge this status quo with premature class-based proceedings that will likely only engender further discovery disputes and motion practice burdening this Court while Davis' consolidated appeals are decided on their merits.

As discussed above, **this Court's staying of class-based proceedings occurred without any opposition by Plaintiffs.** Plaintiffs now seek to reverse course, and reopen class certification proceedings, but they have failed to demonstrate (or even address), the standard for granting a motion for reconsideration.<sup>11</sup> In fact, staying class certification proceedings is only further

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<sup>10</sup> Davis' multiple appeals, docketed in the Sixth Circuit at Case Nos. 15-5880, 15-5961, and 15-5978, have been consolidated for briefing and submission to the appellate court. Under the consolidated briefing schedule, Davis' opening brief on appeal is due no later than November 2, 2015, Plaintiffs' and Third-Party Defendants' respective consolidated briefs are due no later than December 2, 2015, and Davis' consolidated reply is due seventeen days after the response briefs are filed.

<sup>11</sup> Motions for reconsideration are traditionally only granted “when there is (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice.”

warranted in the case at bar, where Davis has four consolidated appeals in the Sixth Circuit and marriage licenses are being issued in Rowan County to legally eligible couples. Plaintiffs' newfound desire to multiply these proceedings and provoke more litigation is not "good cause" for reopening class-based proceedings that they effectively agreed to stay. *See Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847, 853 (W.D. Ky. 2007) (concluding that "further litigation" of Plaintiff's claim "would be pointless and only work to accumulate further attorneys' fees for no good reason" and finding that the "doctrine of mootness operates to close this claim").

Furthermore, Plaintiffs' motion to reopen class-based proceedings and expedite consideration of same is an obvious attempt to circumvent the jurisdictional deficiencies inherent in this Court's expanded injunction order entered September 3, 2015, which purportedly applies to any "individuals who are legally eligible to marry in Kentucky." *See* D.E. 74, Exp. Inj. Order, PgID.1557.<sup>12</sup> Although Davis continues to challenge this Court's jurisdiction to enter the expanded injunction order<sup>13</sup>, now that her religious convictions are being accommodated, **Davis has no interest or intent to change the status quo, and to reinstate any "no marriage licenses" policy, even if the expanded injunction order is nullified by the Sixth Circuit.** Class certification

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*Rodriguez v. Tenn. Laborers Health & Welfare Fund*, 89 Fed. App'x 949, 959 (6th Cir. 2004) (identifying standard for reconsideration of interlocutory orders); *see also Anestis v. U.S.*, No. 11-28, 2014 WL 6804232, at \*1 (E.D. Ky. Dec. 3, 2014) (Bunning, J.); *Louisville/Jefferson Cnty. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 389 (6th Cir. 2009). This standard is essentially the same as the legal standard for reconsidering judgments and appealable orders. *See Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005).

<sup>12</sup> These jurisdictional defects have been fully briefed. *See* D.E. 113, Mot. to Stay Exp. Inj., PgID.2200-2292. *See also N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987); *Am. Town Ctr. v. Hall 83 Associates*, 912 F.2d 104, 110-11 (6th Cir. 1990); *U.S. v. State of Mich.*, Nos. 94-2391, 95-1258, 1995 WL 469430, at \*18 (6th Cir. 1995); *City of Cookeville, Tenn. v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 388, 394 (6th Cir. 2007) ("The district court did not have jurisdiction to issue the injunction because the injunction sought to expand the district court's previous order.").

<sup>13</sup> On October 2, 2015, Davis filed in the Sixth Circuit a renewed motion to stay this Court's expanded injunction order.

therefore would do nothing to change the current status quo in Rowan County, except to engender needless litigation. Accordingly, there is no good cause to reopen class-based proceedings.

**C. Plaintiffs Lack Standing To Pursue Class-Wide Relief.**

Plaintiffs lack standing to pursue class-wide injunctive or declaratory relief because their claims are moot now that they have received marriage licenses. Mootness has been described as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quoting *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980)). Plaintiffs “must continue to have a ‘personal stake in the outcome’ of the lawsuit,” *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 478 (1990) (citation omitted), which is more than “just an ‘abstract disagree[men]t[.]’” over the legality of an action, *id.* at 479 (citation omitted). *See also Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013). “If a case in federal court loses its character as an actual, live controversy at any point during its pendency, it is said to be moot.” *Pettrey v. Enter. Title Agency, Inc.*, 584 F.3d 701, 703 (6th Cir. 2009); *see also Ahmed v. Univ. of Toledo*, 822 F.2d 26, 27 (6th Cir. 1987) (“It is fundamental that we may not decide moot issues.”). Class actions present unique mootness concerns that turn on the timing of certification.

Under binding Sixth Circuit precedent, “[o]nce a class is certified, the mooting of the named plaintiff’s claim does not moot the action, the court continues to have jurisdiction to hear the merits of the action if a controversy between any class member and the defendant exists.” *Brunet v. City of Columbus*, 1 F.3d 390, 399 (6th Cir. 1993) (emphasis in original) (citing *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)). **But where a “named plaintiff’s claim becomes moot before certification, dismissal of the action is required.”** *Brunet*, 1 F.3d at 399 (bold emphasis added; italicized emphasis in original) (citing *Bd. of Sch. Comm’rs v. Jacobs*, 420 U.S. 128 (1975)); *see*

*also Ahmed*, 822 F.2d at 27 (“**The plaintiffs’ efforts at resuscitation cannot succeed here because the purported class was never certified under Rule 23.**”) (emphasis added); *Gawry v. Countrywide Home Loans, Inc.*, 395 Fed. App’x 152, 155 (6th Cir. 2010); *City of Parma, Ohio v. Cingular Wireless, LLC*, 278 Fed. App’x 636, 642 (6th Cir. 2008). Thus, where individual claims are moot before certification—as in the case at bar—Plaintiffs cannot even maintain class certification, let alone pursue it in the first place. Therefore, to reopen class certification proceedings with proposed class representatives whose claims are moot would engender further and extensive litigation that is reversible on appeal for lack of jurisdiction.

In addition to the foregoing Sixth Circuit precedent, there is significant federal appellate authority supporting the applicability of the mootness doctrine in the case at bar, where no class certification ruling has been made and Plaintiffs’ individual claims are moot. *See, e.g., Cruz v. Farquharson*, 252 F.3d 530, 533-34 (1st Cir. 2001); *Egan v. Davis*, 118 F.3d 1148, 1150 (7th Cir. 1997); *Rocky v. King*, 900 F.2d 864, 868 (5th Cir. 1990) (citing to courts of appeals holding “a complaint filed in the form of a class action to be moot where the named plaintiff’s individual claim became moot before denial of class certification”); *Tucker v. Phyfer*, 819 F.2d 1030, 1033 (11th Cir. 1987) (“In a class action, the claim of the named plaintiff, who seeks to represent the class, must be live both at the time he brings suit and when the district court determines whether to certify the putative class.”); *Inmates of the Lincoln Intake & Detention Facility v. Boosalis*, 705 F.2d 1021, 1023 (8th Cir. 1983) (“A named plaintiff must have a personal stake in the outcome of the case at the time the district court rules on the class certification in order to prevent mootness of the action.”).

In the case at bar, Plaintiffs have indisputably secured and accepted a marriage license in Rowan County that they deemed valid and acceptable, before any class was certified in this matter.

See D.E. 84, Status Report, PgID.1798; *see also* D.E. 89, Release Order, PgID.1827. Also, as noted above, there is no longer a “no marriage licenses” policy in place in the Rowan County Clerk’s Office. Moreover, **Plaintiffs limited their pursuit of a class action to Rule 23(b)(2)-based certification for injunctive or declaratory relief, rather than a “damages” class under Rule 23(b)(3).**<sup>14</sup> Because Plaintiffs now possess marriage licenses (by their own choice) and the current and unabated status quo in Rowan County is that licenses that are recognized by Kentucky’s highest elected officials are being issued to lawfully eligible couples, Plaintiffs’ claims are moot. Further, any individual damages claims still being pursued in this matter by the named Plaintiffs do not provide a personal stake in class certification under Rule 23(b)(2), because **Plaintiffs have repeatedly confirmed that they do not seek class certification for any damages claims, and that their damages claims are strictly individual on behalf of the named Plaintiffs only.**<sup>15</sup>

Supreme Court cases permitting class certification, once granted (or denied), to be maintained (or pursued on appeal) after a named plaintiff’s claim becomes moot, *see, e.g., Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326 (1980); *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980); *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Sosna v. Iowa*, 419 U.S. 393 (1975), are readily distinguishable from the case at bar, where Plaintiffs effectively agreed to stay class proceedings, no ruling on class certification has been decided, and the Plaintiffs’ claims became moot (by their own choice) **before** any

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<sup>14</sup> See D.E. 1, Compl., Request for Relief, PgID.14 (“1) **Certify this case as a class action under Fed. R. Civ. P. 23(a) and (b)(2)**”) (emphasis added); *see also* D.E. 21, Hr’g Tr. (7/13/15), PgID.209:7-8 (“Your Honor, if I may. **The proposed class is 23(b)(2), prospective injunctive relief.**”) (quoting Plaintiffs’ Counsel) (emphasis added); D.E. 31-1, Pls.’ Mot. for Class Cert., PgID.660 (“Here, **Plaintiffs request class certification under Fed. R. Civ. P. 23(b)(2).**”) (emphasis added).

<sup>15</sup> See D.E. 1, Compl., Request for Relief, PgID.14 (“5) Judgment for damages . . . in an amount to be proven by the evidence against Defendant Davis for violating the **named Plaintiffs’** rights under the United States Constitution. . .”) (emphasis added); *see also* D.E. 31-1, Pls.’ Memo. in Supp. of Mot. for Class Cert., PgID.652 (“Plaintiffs’ claims for damages (compensatory against the County and comepensatory [*sic*] and punitive against Kim Davis, in her individual capacity, **are not class-claims.**”) (emphasis added).

certification could now be granted. “Only when a class is certified does the class acquire a legal status independent of the interest asserted by the named plaintiffs—and only then is the holding in *Sosna* implicated.” *Cruz*, 252 F.3d at 534. “If the named plaintiff has no personal stake in the outcome at the time class certification is denied,” as in the case at bar, “relation back of appellate reversal of that denial still would not prevent mootness of the action.” *Geraghty*, 445 U.S. at 404, n.11; *see also Rocky*, 900 F.2d at 868-69 (plaintiff does not satisfy personal stake requirement to pursue class certification because his claims were moot). “If the class action is to be maintained, therefore, there must be a named plaintiff who has such a case or controversy at the time the complaint is filed **and at the time the class action is certified.**” *Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper, Inc.*, 382 F.3d 587, 597 (6th Cir. 2004) (citation and internal quotation marks omitted) (emphasis added); *see also Sosna*, 419 U.S. at 403 (“A litigant must be a member of the class which he or she seeks to represent **at the time the class action is certified by the district court.**”) (emphasis added); *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (“[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.”). Accordingly, because Plaintiffs’ claims are moot before this Court has even rendered a decision on class certification, Plaintiffs cannot now serve as class representatives and seek certification.

Furthermore, exceptions to the mootness doctrine as applied to class actions also fail to save Plaintiffs’ standing to pursue class-wide injunctive or declaratory relief. For example, Plaintiffs cannot establish the well-recognized but narrow exception for wrongs that are “capable of repetition, yet evading review.” *See Rosales-Garcia v. J.T. Holland*, 322 F.3d 386, 396 (6th Cir. 2008). This exception applies where: “(1) the challenged action [is] in its duration too short to be

fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that **the same complaining party [will] be subjected to the same action again.**” *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (emphasis added). Indeed, in cases where no class has been certified, the exception applies only if there is “some demonstrated probability that the same controversy, involving the same parties, will reoccur.” *Cruz*, 252 F.3d at 534 (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), and *Weinstein*, 423 U.S. at 149). Thus, to satisfy this exception, Plaintiffs cannot lean on whether anyone (in the proposed class) would potentially suffer a similar injury but instead whether they themselves will suffer the same injury, again. Plaintiffs now possess marriage licenses, obtained in Rowan County. *See* D.E. 84-1, Plaintiffs’ Marriage Licenses, PgID.1801-1803. They do not need another marriage license, and they have not alleged that they will need another one.

Moreover, the “theoretical possibility” that these couples may later be “divorced” and then seek to “marry” again thereafter (in Rowan County) is pure speculation and does not show a “demonstrated probability” that the same controversy will reoccur for these same Plaintiffs. *See Murphy*, 455 U.S. at 482. The Supreme Court has stated that “[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,” eliminating any live controversy. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 189 (2000). As discussed extensively above, Plaintiffs possess marriage licenses, and the current and unabated status quo is that marriage licenses are being issued in Rowan County that are validated, approved, authorized and recognized by Kentucky’s highest elected officials and which also accommodate of Davis’ sincerely-held religious beliefs. Therefore, Plaintiffs fail to establish this exception because they cannot demonstrate that they will “be subjected to the same action again.” *See Weinstein*, 423 U.S. at 149.

Neither can Plaintiffs establish the “inherently transitory” exception to mootness in class actions. The Sixth Circuit recognizes that “[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires. In such cases, the relation back doctrine is properly invoked to preserve the merits of the case for judicial resolution.” *Gawry*, 395 Fed. App’x at 158 (citing *Riverside*, 500 U.S. at 52). “However, “the crux of the ‘inherently transitory’ exception is the uncertainty about the length of time a claim will remain alive.” *Gawry*, 395 Fed. App’x at 158-69 (citation omitted). There was nothing about their claims that made them inherently transitory, such that this Court would not have had enough time to rule on a motion for class certification. To the contrary, in the case at bar, Plaintiffs **did not oppose** shelving the class certification proceedings. *See* D.E. 57, Virtual Order Aug. 25, 2015. Therefore, under these circumstances, Plaintiffs cannot now claim that their purported injuries were “so inherently transitory” that this Court was prevented from ruling on Plaintiffs’ Motion for Class Certification before their individual claims expired.

Finally, Plaintiffs’ individual claims for **damages** against Davis do not provide sufficient standing to pursue class-wide **injunctive or declaratory relief**. *Friends of the Earth*, 528 U.S. at 185 (a plaintiff “must demonstrate standing separately **for each form of relief sought**”) (emphasis added); *see also Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (“[S]tanding is not dispensed in gross.”). Indeed, Plaintiffs cannot use standing on one claim for relief (individual damages) to establish standing for another claim for relief (class-wide injunctive relief). *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (holding that plaintiff who has standing to bring damages claim does not automatically possess standing for injunctive relief claim arising from same set of facts); *see also, e.g., Tucker*, 819 F.2d at 1035 (plaintiff’s “live claim for money damages” did not



preserve standing on his claim for “declaratory and injunctive relief” on behalf of a class after his claim for such relief was mooted). Accordingly, because their claims for injunctive relief are moot, Plaintiffs lack standing to pursue class-wide relief irrespective of whether they possess standing to pursue individual money damages’ claims.<sup>16</sup>

**D. Plaintiffs’ Proposed Class Has Many Deficiencies That Will Require Significant Class-Based Discovery And Extensive Class Certification Briefing.**

Plaintiffs’ proposed class has many deficiencies that will need to be addressed through significant class-based discovery and extensive briefing on class certification, including but not limited to the fundamental mootness issues discussed above.<sup>17</sup> Even if Plaintiffs can overcome these justiciability concerns (which they cannot), Plaintiffs must still satisfy all of the Rule 23(a) requirements for class certification.<sup>18</sup> However, the record does not currently support such certification, and further discovery will demonstrate and confirm the fatal problems and deficiencies Plaintiffs have with respect to each of the requisite factors—all of which must be proven by Plaintiffs to establish certification.

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<sup>16</sup> The foregoing section does not represent any acknowledgment that Plaintiffs actually possess appropriate constitutional standing on their individual damages claims, or that such claims overcome Davis’ defenses. Accordingly, Davis reasserts by reference here her prior objections to Plaintiffs’ Complaint, including her pending Motion to Dismiss, and any defenses that she will raise, if necessary, at the appropriate time, including qualified immunity.

<sup>17</sup> Davis emphasizes here that the following section is merely illustrative, not an exhaustive recitation, of the problems and deficiencies accompanying Plaintiffs’ proposed class and their Motion for Class Certification, particularly in light of the changed circumstances that currently exist compared to when Plaintiffs filed their original motion for class certification, which was stayed by this Court. These issues will require class-based discovery, including written discovery and depositions, and, more than likely, discovery disputes regarding same. Davis therefore preserves herein all of her rights and defenses to challenge any purported class certification sought by Plaintiffs, at the appropriate time. Yet, as this Court previously indicated, and it remains true to this day: “[T]his case is going to be resolved well before we get to any motion for class certification.” *See* D.E. 21, Prelim. Inj. Hr’g Tr. (7/13/15), PgID.209:4-6.

<sup>18</sup> Federal Rule of Civil Procedure 23(a) provides the following prerequisites to certifying a class action: “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a).

This Court cannot certify a class without undertaking the “rigorous analysis” required by binding precedent from the Supreme Court and Sixth Circuit. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011); *In re: Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851 (6th Cir. 2013); *Reeb v. Ohio Dep’t of Rehabilitation & Correction*, 435 F.3d 639, 644 (6th Cir. 2006). The four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequate representation—“serve to limit class claims to those that are fairly encompassed within the claims of the named plaintiffs because **class representatives must share the same interests and injury as the class members.**” *Whirlpool*, 722 F.3d at 850 (citing *Wal-Mart*, 131 S.Ct. at 2550) (emphasis added).<sup>19</sup> Indeed, critically relevant in the case at bar, Rule 23(a) “ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate.” *Wal-Mart*, 131 S.Ct. at 2550.

As an initial matter, Plaintiffs cannot establish numerosity. As noted above, marriage licenses are, in fact, being issued in Rowan County and there is no longer a “no marriage licenses” policy in place. Thus, because no legally eligible couple is being denied a license in Rowan County, Plaintiffs cannot sufficiently demonstrate that any couples who are legally eligible to marry are being denied marriage licenses, let alone a number of couples sufficiently large to make joinder impracticable. *See Golden v. City of Columbus*, 404 F.3d 950, 965-66 (6th Cir. 2005) (impracticability of joinder must be affirmatively shown, and “cannot be speculative”).<sup>20</sup>

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<sup>19</sup> In addition to fulfilling the Rule 23(a) requirements, a proposed class action must also satisfy at least one of the Rule 23(b) requirements. *Whirlpool*, 722 F.3d at 850. As noted above, Plaintiffs have sought to certify only a Rule 23(b)(2) class. Certification under Rule 23(b)(2) requires proof that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b); *see also Reeb*, 435 F.3d at 645.

<sup>20</sup> In fact, this inability to identify additional plaintiffs raises concerns about the ascertainability of any proposed class as well. The Sixth Circuit has held that “[b]efore a court may certify a class pursuant to Rule 23, ‘the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class.’” *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-38

Neither can Plaintiffs establish that the named Plaintiffs have typical claims, raise common questions of law, or serve as adequate class representatives. “To demonstrate commonality, plaintiffs must show that class members have suffered the same injury,” and to establish typicality, class members’ claims must be “fairly encompassed by the named plaintiffs’ claims.” *Whirlpool*, 722 F.3d at 852. Indeed, to find typicality and commonality, the Sixth Circuit has held that “the precise nature of the various claims must be examined.” *Reeb*, 435 F.3d at 644; *see also Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (“The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.”). A Rule 23(b)(2) class is “designed to permit only classes with homogenous interests.” *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 447 (6th Cir. 2002).

However, in the case at bar, the named Plaintiffs applied for marriage licenses when a “no marriage licenses” (this Court’s words) policy was in effect. That policy is no longer in effect, and their past claims are neither typical nor representative of any individual’s present or future encounter with the Rowan County Clerk’s Office. Whereas the named Plaintiffs brought to this Court emotionally-laden stories of purportedly insufferable grief after being denied marriage licenses, subsequent applicants can only report that they are “excited” and “just really happy” because they are receiving, have been receiving, and will continue to receive, marriage licenses in Rowan County. *See* note 9, *supra*. This is because, effective September 14, 2015, marriage licenses validated, approved, authorized and recognized by the Kentucky Governor and Kentucky Attorney General are being issued in Rowan County. Moreover, the named Plaintiffs have already received marriage licenses, which they have accepted as sufficient, even without the authorization and

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(6th Cir. 2012) (citation omitted); *see also Romberio v. UnumProvident Corp.*, 385 Fed. App’x 423, 431 (6th Cir. 2009) (individualized fact finding prevents the finding of an ascertainable class, even under Rule 23(b)(2)).

approval of Davis. *See* D.E. 84, Status Report, PgID.1798; *see also* D.E. 89, Sept. 8, 2015 Order, PgID.1827 (“Plaintiffs have obtained marriage licenses from the Rowan County Clerk’s Office.”). Thus, Plaintiffs do not possess typical, common, or representative claims of other couples who have either obtained marriage licenses since September 14, 2015, or will receive such marriage licenses. *See, e.g., Reeb*, 435 F.3d at 645 (finding that the “typicality requirement is not met if the named plaintiffs do not represent an adequate cross-section of the claims asserted by the rest of the class”).<sup>21</sup> Accordingly, because Plaintiffs’ proposed class has many deficiencies that will need to be addressed through significant class-based discovery and extensive briefing on class certification, Plaintiffs’ motion to reopen class certification proceedings at this time should be denied.

#### IV. CONCLUSION

For all the foregoing reasons, Plaintiffs’ Motion to Reopen Briefing and Expedite Consideration of Plaintiffs’ Class Certification Motion should be denied.

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<sup>21</sup> In addition to the foregoing complicating factors on class certification, further discovery is warranted on issues relating to, *inter alia*, allegations about the purported importance to couples of obtaining a marriage license “in Rowan County,” allegations about couples’ geographic proximity to the Rowan County Clerk’s Office (*i.e.*, some residents of Rowan County may live closer to another county’s clerk’s office), facts related to whether Davis is considered a state or municipal actor in her official capacity, and facts related to Gov. Beshear’s issuance of the SSM mandate and subsequent directives in connection therewith immediately after the Supreme Court’s decision in *Obergefell*, to name a few.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

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