

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION**

APRIL MILLER, ET AL.,

Plaintiffs,

V.

KIM DAVIS, ET AL.,

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’
RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION TO ENFORCE
SEPTEMBER 3 AND SEPTEMBER 8 ORDERS**

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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 Enforce this Court’s September 3, 2015 and September 8, 2015 Orders (D.E. 120).

I. INTRODUCTION

Plaintiffs’ motion to “enforce” this Court’s September 3, 2015 and September 8, 2015 orders is another meritless attempt to challenge the current status quo in Rowan County regarding 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. As they did in their motion to reopen class certification proceedings, Plaintiffs conveniently fail to acknowledge (again) 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 are reason enough to deny Plaintiffs’ motion. Nonetheless, Plaintiffs’ motion to “enforce,” including its request for attorneys’ fees, should also be denied for the following additional reasons.

Since Plaintiffs already possess marriage licenses that have also been approved as valid and recognized by the Kentucky Governor and Kentucky Attorney General, they have no standing to bring the motion to enforce, especially when they seek relief that has absolutely no effect upon their individual claims. Also, because this Court had no jurisdiction to enter the expanded injunction that underlies this Court’s September 3, 2015 and September 8, 2015 orders, Plaintiffs cannot attempt to enforce orders dependent upon it. This Court only has authority to enforce orders it had jurisdiction to enter.

But even if Plaintiffs can overcome these justiciability concerns, the motion to enforce should be denied. Critically, Plaintiffs have failed to demonstrate any violation of this Court's September 3, 2015 and September 8, 2015 orders. To demonstrate contempt—which is really what Plaintiffs seek in their motion—they must show that Davis violated a definite and specific order by performing or refraining from performing a particular act or acts. Plaintiffs can identify no actions (or non-actions) that clearly and unambiguously violate this Court's Orders. Additionally, Davis has taken all reasonable steps and good faith efforts to substantially comply with this Court's September 3, 2015 and September 8, 2015 orders, even though this Court had no jurisdiction to enter the Expanded Injunction.

Finally, imposing civil monetary sanctions against Davis and a receivership upon the Rowan County Clerk's Office is extreme, unnecessary, and improper under the circumstances of this case. As noted above, Davis has taken reasonable steps and good faith efforts to substantially comply with this Court's orders, and marriage licenses are being issued in Rowan County that are authorized, approved, and recognized as valid by Kentucky's highest elected officials. As such, there is no cause for this Court to punish Davis with civil fines or take the "extraordinary measure" of annexing the Rowan County Clerk's Office through the intrusive remedy of a receivership. This sanction is reserved exclusively for situations of last resort—not a hammer to be used while Davis' motion to dismiss Plaintiffs' Complaint has been stayed, her consolidated appeals are pending in the Sixth Circuit, and licenses that are recognized as valid by the Kentucky Governor and Kentucky Attorney General are being issued in Rowan County. For all the foregoing reasons, as more fully explained below, Plaintiffs' motion to "enforce" 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 to "enforce" the Court's September 3, 2015 and September 8, 2015 orders.

A. This Court's September 3, 2015 Order.

On September 3, 2015, this Court granted Plaintiffs' motion to "clarify" this Court's August 12, 2015 injunction, expanded the injunction already on appeal to the Sixth Circuit, and preliminarily enjoined Davis "from applying her 'no marriage licenses' policy to future marriage license requests submitted by Plaintiffs or by other individuals who are legally eligible to marry in Kentucky." D.E. 74, Exp. Inj. Order, PgID.1557.

On that same day, 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. 78, Contempt Hr'g Tr. (9/3/2015), at PgID.1659:22-1661:25; *see also* D.E. 75, Contempt Order, PgID.1558-1559. 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. D.E. 78, Contempt Hr'g Tr. (9/3/2015), PgID.1661:18-1662:16.

B. This Court's September 8, 2015 Order.

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.¹ D.E. 84, Status Report,

¹ 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, at PgID.1798 (indicating that Plaintiffs Burke and Napier did

PgID.1798-1803. Following the status report, this Court ordered Davis to be released, stating in its order that 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, that “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).

C. The Status Quo In Rowan County Regarding The Issuance Of Marriage Licenses.

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 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 (nearly one month 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. This Court,

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, at 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.

apparently satisfied with the carrying out of its orders in the Rowan County Clerk's Office, has recently substantially decreased the reporting requirements for deputy clerks, requiring said clerks to submit status reports every thirty days, rather than every two weeks. *See* D.E. 130, Order (10/6/2015), PgID.2446.

D. Plaintiffs' Motion To "Enforce" This Court's September 3 And September 8 Orders.

Notwithstanding their own receipt and acceptance of marriage licenses, the ongoing availability of marriage licenses to lawfully eligible couples in Rowan County, and the express validation of these licenses by Kentucky's highest elected officials, Plaintiffs filed a motion to "enforce" this Court's September 3 and September 8 orders on September 21, 2015. *See* D.E. 120, Pls.' Mot. to Enforce, PgID.2312-2328. In their motion, Plaintiffs baldly allege that the Rowan County Clerk's Office is not in compliance with this Court's prior orders. *Id.* at PgID.2313. Plaintiffs allege that Davis has "obstruct[ed]" and "significantly interfere[d]" with the process for issuing marriage licenses in Rowan County upon her return to the Rowan County Clerk's Office on September 14, 2015. *Id.* at PgID.2316-2317, 2319. Plaintiffs further allege that Davis has "so materially altered" marriage licenses that "they create a two-tier system of marriage licenses throughout the state," and these so-called "adulterated marriage licenses received by Rowan County couples will effectively feature a stamp of animus against the LGBT community," absent intervention by this Court. *Id.* at PgID.2319. **Critically, Plaintiffs do not (and cannot) allege that Rowan County has issued or is issuing marriage licenses to the "LGBT community" that are in any way different from licenses issued to the "non-LGBT community."** *Id.*

As relief in their motion, Plaintiffs ask this Court to "expressly direct Defendant Davis to refrain from interfering with the Deputy Clerk's issuance of marriage licenses in the same form or manner as those that were issued on or before September 8, 2015" and to provide notice to Davis

that “any violation of this Order will result in civil sanctions, including but not limited to (a) the placement of the Rowan County Clerk’s Office into a receivership for the limited purposes of issuing marriage licenses, and (b) the imposition of civil monetary fines as appropriate and necessary to coerce Davis’ compliance with this Court’s Order.” *Id.* at PgID.2313; *see also id.* at PgID.2321.² Davis now timely responds to Plaintiffs’ motion to “enforce” this Court’s September 3 and September 8 orders.

III. ARGUMENT

A. **Plaintiffs’ Motion To Enforce 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 “enforce” this Court’s September 3 and September 8 orders should be denied because those orders are already being “enforced”: marriage licenses recognized as valid in the Commonwealth of Kentucky 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 for any enforcement proceedings related to this Court’s prior orders.

After setting aside Plaintiffs’ bluster and rhetoric in the motion to enforce, the following facts are undisputed: (1) licenses are being issued to all eligible couples in the Rowan County Clerk’s Office; (2) there are no differences between licenses issued to same-sex and different-sex

² With respect to the deputy clerks, Plaintiffs ask this Court to direct them to “issue marriage licenses in the same form and manner as those that were issued on or before September 8, 2015,” to “disregard any instruction or order from Defendant Kim Davis that would require them to issue any marriage license in a form or manner other than the form and manner of licenses that were issued on or before September 8, 2015,” to continue to file status reports, and to “re-issue, *nunc pro tunc*, any marriage licenses that have been issued since September 14, 2015, in the same form or manner as those that were issued on or before September 8, 2015.” *Id.* at PgID.2312-2313; *see also id.* at PgID.2320.

couples in Rowan County – all licenses are the same; (3) Davis is not interfering with the issuance of licenses by her deputy clerks to legally eligible couples; (4) couples who are legally eligible to receive marriage licenses are receiving those licenses and are deeming them valid and acceptable to them; and (5) 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 both their motion to reopen class certification proceedings, and their motion to enforce, *see generally* D.E. 115 and 120).³ In addition, these licenses also accommodate Davis’ sincerely-held religious beliefs.

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’ repeated suggestions to the contrary, *see, e.g.*, D.E. 120, Pls.’ Mot. to Enforce, PgID.2317, 2319, 2321, 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.⁴

³ 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.**

⁴ *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. 13 2015).

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. in Supp. of 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.

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.”⁵ Therefore, the purported “substantial and material alterations” (*see, e.g.*, D.E. 120, Pls.’ Mot. to Enforce, PgID.2317; *see also id.* at PgID.2319-2321) made by Davis to the marriage licenses that have been issued in Rowan County since September 14, 2015 have been

⁵ *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. 13, 2015) (emphasis added).

approved, and recognized as valid in the Commonwealth of Kentucky by the highest elected officials in Kentucky who possess the authority to make such declarations.⁶ As such, according to the Kentucky Governor and Kentucky Attorney General, the alterations are neither “substantial” nor “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 no way can it be said that Davis is “interfering with the Deputy Clerk’s issuance of marriage licenses” or “obstructing” the process of issuing marriage licenses pursuant to this Court’s orders (D.E. 120, Pls.’ Mot. to Enforce, PgID.2316, 2319), 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—a fact which this Court previously found to be significant.⁷ For instance, in an interview with NBC, Shannon Oceana Wampler-Collins (a recipient of a license issued to a same-sex couple on September 14, 2015, and an individual 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**

⁶ 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.

⁷ 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.

to have her signature for it to be valid for me,” while her partner, 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.”⁸

These same statements also debunk Plaintiffs’ newfound myth of a “two-tier system of marriage licenses” throughout Kentucky consisting of so-called “adulterated marriage licenses received by Rowan County couples [that] will effectively feature a stamp of animus against the LGBT community.” *See* D.E. 120, Pls.’ Mot. to Enforce, PgID.2319, 2321. Plaintiffs’ specious attempt to manufacture “significant burden and injury” must be rejected by this Court. The foregoing statements from Ms. Wampler-Collins and Ms. Collins demonstrate that marriage licenses deemed valid and acceptable to their actual recipients are being issued in Rowan County. In fact, the example “materially altered” marriage license attached to Plaintiffs’ motion to enforce—which purportedly forces “Plaintiffs and members of the putative class” to “endure the humiliation and stigma associated with the receipt of marriage licenses that are effectively imprinted with Davis’ opprobrium” (D.E. 120, Pls.’ Mot. to Enforce, PgID.2319; *see also* D.E. 120-1, License, PgID.2326)—**is the license for the very same couple (Ms. Wampler-Collins and Ms. Collins) who declared the license to be valid without Davis’ authorization, and the**

⁸ *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 (last accessed Oct. 13, 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. 13, 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. 13, 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 (“The women said they were satisfied that their marriage license was legally valid.”) (last accessed Oct. 13, 2015).

same couple who proclaimed to be “pretty excited” and “really happy,” upon obtaining that license in Rowan County. Nothing in these admissions can be described as “humiliation,” “stigma,” “second-class” citizenship, “animus,” or any other fabricated description by Plaintiffs.

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. In fact, Plaintiffs cite no dissent or objection to these marriage licenses (except their own) after the Kentucky Governor and Kentucky Attorney General approved, authorized, and recognized these marriage licenses as valid in the Commonwealth of Kentucky. Accordingly, the only real problem that Plaintiffs have is that Davis has effectively been granted the simple religious accommodation she has sought and requested from the outset of this litigation.

At bottom, 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. The persons who actually receive those licenses (not Plaintiffs or Plaintiffs’ Counsel) deem them acceptable. And 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.⁹ Plaintiffs’ motion to

⁹ 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. *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

enforce this Court's September 3 and September 8 orders is therefore without merit, and should be denied.

B. Plaintiffs' Motion To Enforce Should Be Denied Because This Court Has No Jurisdiction To Enforce The Expanded Injunction Underlying Its September 3 And September 8 Orders.

Plaintiffs cannot seek enforcement of this Court's September 3 and September 8 orders because they necessarily depend upon the validity of this Court's Expanded Injunction, which this Court had no jurisdiction to enter.¹⁰ Entertaining a motion to enforce the Expanded Injunction would only compound this Court's prior error in granting the Expanded Injunction without jurisdiction. *See U.S. v. Lucido*, 612 F.3d 871, 873 (6th Cir. 2010) ("As 'courts of limited jurisdiction,' federal courts 'possess only that power authorized by Constitution and statute' and may not expand that power 'by judicial decree.'") (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

This Court has no authority to enforce orders it had no jurisdiction to enter. *See N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 591 (6th Cir. 1987) (enforcement requires jurisdiction); *Am. Town Ctr. v. Hall 83 Assocs.*, 912 F.2d 104, 110-11 (6th Cir. 1990) (same); *see also Garrison v. Cassens Transport Co.*, 334 F.3d 528, 532 (6th Cir. 2003) (finding that reversal of error in underlying judgment "necessarily" means "that the civil contempt order can no longer stand").

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. 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.

¹⁰ Davis acknowledges that this Court previously denied Davis' arguments that this Court had no jurisdiction to enter the expanded injunction order dated September 3, 2015 (hereinafter, the "Expanded Injunction"). *See* D.E. 121, Sept. 23, 2015 Order, PgID.2329-2333. However, this issue is now on appeal to the Sixth Circuit, and Davis respectfully maintains that this Court had no jurisdiction to enter the Expanded Injunction. As support for her arguments, Davis incorporates by reference here her prior motion to stay the district court's September 3, 2015 expanded injunction order and related briefing. *See* D.E. 113, Mot. to Stay Exp. Inj., PgID.2200-2292.

Because this Court had no jurisdiction to enter the Expanded Injunction, it correspondingly has no jurisdiction to enforce it, and therefore, Plaintiffs' Motion to Enforce should be denied.¹¹

C. Plaintiffs Lack Standing To Bring Their Motion To Enforce.

Plaintiffs have no standing to bring their motion to “enforce” this Court’s September 3, 2015 and September 8, 2015 orders. To have Article III standing, plaintiffs must show: “(1) [they] ha[ve] suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Standing requirements are “an indispensable part of the plaintiff’s case” and each element must be supported “with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561. Indeed, a plaintiff “must demonstrate standing separately for each form of relief sought.” *Friends of the Earth*, 528 U.S. at 185. Furthermore, the Supreme Court has “consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Lujan*, 504 U.S. at 573-74.

In the case at bar, Plaintiffs have failed to demonstrate that they have satisfied the “injury in fact” test at this stage of the litigation. The “injury in fact” test “requires more than an injury to a cognizable interest. **It requires that the party seeking review be himself among the**

¹¹ Although Davis continues to challenge this Court’s jurisdiction to enter the Expanded Injunction, 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.**

injured.” *Lujan*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 733-35 (1972) (emphasis added). **Plaintiffs have already received marriage licenses.** Therefore, irrespective of the status quo in Rowan County regarding the issuance of marriage licenses, Plaintiffs can point to no concrete, particularized, and actual (or imminent) injury that they face based upon that status quo, because they will not even receive the licenses they now challenge. Yet Plaintiffs allege that they suffer “humiliation” and “stigma” based upon marriage licenses issued **to other persons**. *See* D.E. 120, Pls.’ Mot. to Enforce, PgID.2319. As their alleged support for this claim, Plaintiffs attach a marriage license (*see* D.E. 120-1, License, PgID.2326) which the actual recipients were “really happy” and “pretty excited” to receive, and they themselves deem valid and acceptable. Moreover, those couples who are legally eligible to marry are receiving marriage licenses without interference or obstruction. *See* D.E. 114, 116, 117, 118, 119, 122, 125, 126, 127, 128, 129, 131, Deputy Clerk Status Reports. Plaintiffs go so far as to claim that they are “substantial[ly]” injured “even if” the marriage licenses are valid. *See id.* at PgID.2321. This statement demonstrates the absurdity of Plaintiffs’ contention, since even valid marriage licenses that are available to all legally eligible couples purportedly constitute a “substantial injury” in their view. Accordingly, Plaintiffs’ purported “significant burden and injury” collapses under the weight of legal authority requiring an injury-in-fact to be concrete, particularized, and actual, and the evidentiary record that is devoid of any such injury.

Having failed to demonstrate an injury, Plaintiffs similarly fail to satisfy the causation and redressability elements to establish standing on their motion to enforce. As noted above, Plaintiffs already possess marriage licenses, they have indicated such licenses are acceptable to them, and they have certainly waived any opportunity to now challenge those licenses. In fact, Plaintiffs do not even seek to challenge the licenses they received – they only seek to challenge the licenses

received by other persons and the purported harms attached to those licenses. But any decision affecting other persons' marriage licenses has no bearing on Plaintiffs or their own marriage licenses. Indeed, ordering the re-issuance of someone else's marriage licenses (part of the relief Plaintiffs seek) has no effect whatsoever on their own licenses.

Even if Plaintiffs possess standing to pursue their motion to enforce (and they do not), the doctrine of mootness also prohibits the relief they now seek against Davis. 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). "The 'personal stake' aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving." *Geraghty*, 445 U.S. at 397. Specifically, Plaintiffs have asked for relief in which they have no personal stake because they possess marriage licenses that are acceptable to them and this Court, and which have been deemed valid and recognized by the highest elected officials in Kentucky, similar to the marriage licenses that are currently available in Rowan County. Thus, for Plaintiffs to establish any personal stake in a motion to enforce, the basis for doing so must be as purported class representatives. However, as discussed extensively in Davis' response in opposition to Plaintiffs' motion to reopen class certification proceedings and incorporated by reference here (D.E. 132, Resp. to Pls.' Mot.

to Reopen Class Cert., PgID.2449-2477) as support for her arguments, Plaintiffs lack standing to pursue class-wide relief.

Under binding Sixth Circuit precedent, “[o]nce a class is certified, the mootness 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 v. Univ. of Toledo*, 822 F.2d 26, 27 (6th Cir. 1987) (“**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).¹² Thus, where individual claims are moot before certification—as in the case at bar—Plaintiffs cannot even maintain class certification, let alone pursue relief on behalf of others not before the Court that depends upon such certification. To “enforce” orders based upon allegations by purported class representatives whose own claims are moot would engender further litigation that is reversible on appeal for lack of jurisdiction.

¹² As noted in Davis’ response to Plaintiffs’ motion to reopen class certification proceedings, there is significant federal appellate authority supporting the applicability of the mootness doctrine in the case at bar because 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.”).

Plaintiffs have indisputably secured and accepted marriage licenses 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).**¹³ 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. Also, any individual damages claims still being pursued in this matter by the named Plaintiffs do not provide a personal stake in class-based issues 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.**¹⁴

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,

¹³ *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, Prelim. Inj. 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).

¹⁴ *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 come-pensatory [*sic*] and punitive against Kim Davis, in her individual capacity, **are not class-claims.**”) (emphasis added).

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 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 were moot before this Court has even rendered a decision on class certification, Plaintiffs cannot now serve as class representatives to pursue any relief on behalf of others not before the Court.

Further, as discussed in Davis' response to Plaintiffs' motion to reopen class certification proceedings, and incorporated by reference here, none of the exceptions to the mootness doctrine as applied to class actions serve to prop up Plaintiffs' lack of standing to pursue class-based relief.

Plaintiffs also cannot 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. As a result, Plaintiffs have no standing to allege claims on behalf of persons not parties to this case, and Plaintiffs' Motion to Enforce should be denied.

D. Plaintiffs Have Failed To Demonstrate Any Violation Of This Court's September 3 And September 8 Orders.

Plaintiffs have failed to demonstrate any violation of this Court's Orders by Davis, or by any individual deputy clerk for that matter. Though not styled as a motion for contempt, Plaintiffs are nonetheless effectively asking this Court to find Davis in contempt, again. However, "[i]n order to hold a litigant in contempt, the movant must produce clear and convincing evidence that shows that 'he violated **a definite and specific order** of the court requiring him to perform or refrain from performing **a particular act or acts** with knowledge of the court's order.'" *Elec. Workers Pension Trust Fund of Local Union #58 v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003) (emphasis added) (citing *Cincinnati Bronze*, 829 F.2d at 591). Indeed, Sixth Circuit precedent "requires that the prior order be 'clear and unambiguous' to support a finding of contempt." *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 550-51 (6th Cir. 2006) (citing *Grace v. Ctr. for Auto Safety*, 72 F.3d 1236, 1241 (6th Cir. 1996)). Any ambiguities must be resolved in favor of the person facing contempt charges. *Liberte Capital*, 462 F.3d at 551.

In the case at bar, on September 3, 2015, this Court expanded its August 12, 2015 injunction to enjoin Davis "from applying her 'no marriage licenses' policy to future marriage license requests submitted by Plaintiffs or by other individuals who are legally eligible to marry in Kentucky," D.E. 74, Exp. Inj. Order, PgID.1557, and also found Davis in contempt of its August 12, 2015 injunction order and ordered that Davis "shall be remanded to the custody of the United

States Marshal pending compliance of the Court's Order of August 12, 2015, or until such time as the Court vacates the contempt Order," D.E. 75, Contempt Order, PgID.1558-1559. On September 8, 2015, this Court found that "Plaintiffs have obtained marriage licenses from the Rowan County Clerk's Office," stated that it was "satisfied that the Rowan County Clerk's Office is fulfilling its obligation to issue marriage licenses to all legally eligible couples" consistent with this Court's August 12, 2015 injunction order, lifted the prior contempt sanction against Davis, and ordered that Davis be released from the custody of the United States Marshall. D.E. 89, Release Order, PgID.1827-1828. In the Release Order, this Court further ordered that 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. If Defendant Davis should interfere in any way with their issuance, that will be considered a violation of this Order and appropriate sanctions will be considered." *Id.* at PgID.1828 (emphasis in original). In the weeks following the issuance of these orders, the deputy clerks have uniformly reported in their status reports to this Court that couples who are eligible to receive marriage licenses in Rowan County have, in fact, received them since Davis returned to work. *See* D.E. 114, 116, 117, 118, 119, 122, 125, 126, 127, 128, 129, 131, Deputy Clerk Status Reports.

The record demonstrates that the aforementioned orders of this Court are not being violated by Davis. As discussed above, without any dispute, marriage licenses are being issued in the Rowan County Clerk's Office by deputy clerks to all legally eligible couples. As such, notwithstanding Davis' challenge to this Court's jurisdiction to enter the Expanded Injunction while the original August 12, 2015 injunction was on appeal, the Expanded Injunction is being complied with: marriage licenses are being issued to any individual who is "legally eligible to marry in Kentucky." *See* D.E. 74, Exp. Inj. Order, PgID.1557. Moreover, notwithstanding Davis'

challenge to this Court’s original August 12, 2015 injunction and any contempt sanctions related thereto, the Release Order is also being complied with: Davis is not interfering “with the efforts of her deputy clerks to issue marriage licenses to all legally eligible couples.” *See* D.E. 89, Release Order, PgID.1828. Indisputably, couples who are legally eligible to receive marriage licenses are receiving those licenses in Rowan County. Plaintiffs have pointed to no evidence that a single couple who was legally eligible to receive a marriage license was turned away or unable to obtain a marriage license in Rowan County. Indeed, Davis has not delayed, inhibited, restricted, hindered, obstructed, blocked, impeded, or hampered a couple’s ability to obtain, or a deputy clerk’s issuance of, a marriage license in Rowan County. *See, e.g.,* Black’s Law Dictionary (10th ed. 2014) (defining “interference” as “[a]n obstruction or hindrance”).¹⁵

Additionally, the purported alterations to the marriage licenses issued beginning September 14, 2015, and continuing thereafter to this day, do not constitute particular acts definitively and expressly forbidden by this Court’s orders dated September 3 and September 8. This Court’s orders forbade Davis from barring the issuance of marriage licenses in Rowan County to lawfully eligible couples. No such prohibition has occurred, and therefore, no violation of this Court’s Orders has been proven by Plaintiffs. This Court said nothing about the particular details of the marriage licenses that were required to be issued. In fact, this Court has already permitted “alterations” to the marriage licenses, and has further held that such alterations did not “impact the Court’s finding that the deputy clerks complied with the Court’s Order.” *See* D.E. 89, Release Order, PgID.1827.¹⁶

¹⁵ *See also* Oxford English Dictionary Online, OXFORD UNIVERSITY PRESS, *available at* http://www.oxforddictionaries.com/us/definition/american_english/interfere (listing synonyms for “interfere”) (last accessed Oct. 13, 2015); Merriam-Webster Online, MERRIAM-WEBSTER, *available at* <http://www.merriam-webster.com/dictionary/interfere> (same) (last accessed Oct. 13, 2015).

¹⁶ Plaintiffs concede, as they must, that alterations to the marriage licenses were made. *See* D.E. 120, Pls.’ Mot. to Enforce, PgID.2315-2316; *see also* D.E. 84, Status Report, PgID.1798. As with subsequent alterations, the form itself was not modified.

Thus, Plaintiffs' newfound attempt to manufacture dispute and controversy regarding any other "alterations" fails to account for the alterations this Court already permitted for the marriage licenses they received in this case. Indeed, as discussed above, the purported "material alterations" made by Davis to the marriage licenses that have been issued in Rowan County since September 14, 2015 have been approved, authorized and recognized as valid in the Commonwealth by the highest elected officials in Kentucky who possess the authority to make such declarations. Moreover, as a result of this approval, the marriage licenses currently being issued in Rowan County are effectively still being issued on marriage license forms designed and approved by the Kentucky Governor and KDLA. Thus, no modification to the form itself has occurred, as Plaintiffs suggest. Therefore, according to the Kentucky Governor and Kentucky Attorney General, the subsequent alterations are neither "substantial" nor "material" in a way that affects the lawfulness, validity, or recognition of the marriage licenses, according to the Kentucky Governor and Kentucky Attorney General, and therefore are not material in any way that can be deemed a violation of this Court's orders.

Furthermore, in ordering Davis to jail on September 3, 2015, this Court acknowledged that it was forcing the issuance of marriage licenses that may not even be valid without Davis' authorization.¹⁷ Notwithstanding, this Court ordered Davis to jail knowing that marriage licenses would be issued in Rowan County without Davis' authority, or her authorization. The Kentucky Governor and Kentucky Attorney General stated that these prior marriage licenses (issued while Davis was incarcerated) were valid, approved, and recognized by the Commonwealth of Kentucky.

¹⁷ See, e.g., D.E. 78, Contempt Hr'g Tr. (9/3/2015), PgID.1724 (licenses "may not be valid under Kentucky law"); *id.* at PgID.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."); *id.* at PgID.1731-32.

For example, Gov. Beshear stated that “Those marriage licenses are legal,”¹⁸ and “These folks got a license, they got married, and that’s that.”¹⁹ In a similar fashion, the Kentucky Governor and Kentucky Attorney General have answered whether the marriage licenses issued upon Davis’ return to work are valid and recognized by the Commonwealth. Lawfully eligible couples continue to receive marriage licenses in Rowan County—without interference from Davis.

Despite the foregoing declarations, Plaintiffs now proclaim that the validity of the licenses without Davis’ authorization are “questionable at best” and the alterations “do not comport with the legal requirements for a valid license.” *See* D.E. 120, Pls.’ Mot. to Enforce, PgID.2317, 2321. But these hollow allegations omit any discussion of the prior statements by this Court, the Kentucky Governor, and the Kentucky Attorney General. In fact, representations regarding the validity of marriage licenses by the Kentucky Attorney General and Rowan County attorney (let alone the Kentucky Governor) were previously sufficient and acceptable to Plaintiffs: “The Kentucky Attorney General and counsel for Rowan County have said the marriage licenses are valid. We are relying on those representations, and our clients look forward to proceeding with their plans to marry.”²⁰ Plaintiffs have failed to address how similar representations made by the Kentucky Governor and Kentucky Attorney General with respect to the marriage licenses issued since September 14, 2015 are suddenly inconsequential and irrelevant.

¹⁸ *See* Governor Steve Beshear says Rowan Co. marriage licenses are legal, WKYT.com, Sept. 8, 2015, available at <http://www.wkyt.com/home/headlines/Governor-Steve-Beshear-reacts-to-Kim-Davis-release-from-jail-325792911.html> (quoting Gov. Beshear) (last accessed Oct. 13, 2015).

¹⁹ *See, e.g.*, Marriage licenses issued since Friday in Rowan County were altered to remove Kim Davis’ name, LEXINGTON HERALD-LEADER, Sept. 8, 2015, available at http://www.kentucky.com/2015/09/08/4025586_marriage-licenses-issued-friday.html?rh=1 (quoting Gov. Beshear) (last accessed Oct. 13, 2015); *see also* Davis freed from Carter jail, THE MOREHEAD NEWS, Sept. 8, 2015, available at http://www.themoreheadnews.com/news/davis-freed-from-carter-jail/article_bde16e3c-5664-11e5-81f3-e3b97c080ece.html (“Allison Martin, a spokeswoman for Kentucky Attorney General Jack Conway, confirmed Tuesday that the office evaluated the licenses issued in Davis’ absence and believes they are valid”) (last accessed Oct. 13, 2015).

²⁰ *See* Press Release, Rowan Clerk Release From Jail, Ordered Not To Interfere With Marriage Licensing, ACLU, Sept. 8, 2015, available at <http://www.aclu-ky.org/articles/rowan-clerk-released-from-jail-ordered-not-to-interfere-with-marriage-licensing/> (last accessed Oct. 13, 2015) (quoting Plaintiffs’ Counsel).

Finally, Plaintiffs' reliance upon the case of *Pinkhasov v. Petocz*, 331 S.W.3d 285 (Ky. App. 2011), is also misplaced. *Pinkhasov* addressed the question of whether a purely religious marriage ceremony solemnized by a religious officiant created a legally valid civil marriage under Kentucky law when the ceremony occurred "**without prior issuance of a civil marriage license.**" *Id.* at 290 (emphasis added). In *Pinkhasov*, the parties to the dispute "knowingly and intentionally evaded and disregarded statutory mandates for establishing a legally valid civil marriage, **particularly including their duty to initially obtain a license to be civilly married within Kentucky.**" *Id.* at 291 (emphasis added). Thus, in *Pinkhasov*, there was no marriage license ever issued. *Id.* at 294. As such, the case does not squarely address the validity of marriage licenses since no license even existed in that case. That is quite different from the circumstances here, where marriage licenses are available in Rowan County, marriage licenses are being received by legally eligible couples who appear in the Rowan County Clerk's Office and indicate their intent to be married, and the marriage licenses are approved, authorized, and recognized as valid by the Commonwealth of Kentucky. Because they have failed to demonstrate that Davis performed a particular act or acts that specifically violated an order of this Court, Plaintiffs' Motion to Enforce should be denied.

E. Davis Has Taken Reasonable Steps And Good Faith Efforts To Comply With This Court's September 3 And September 8 Orders.

But even if Plaintiffs can demonstrate a prima facie case that Davis violated this Court's Orders (which they cannot), when evaluating contempt based upon a purported failure to comply with a court order, the Sixth Circuit also considers whether the alleged contemnor "'took all reasonable steps within [her] power to comply with the court's order.'" *Elec. Workers*, 340 F.3d at 379 (citing *Peppers v. Barry*, 873 F.2d 967, 969 (6th Cir. 1989)); *see also Satyam Computer Servs., Ltd. v. Venture Global Eng'g, LLC*, 323 Fed. App'x 421, 430 (6th Cir. 2009); *Appalachian*

Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co., No. 12-114, 2012 WL 2905525, at *4 (E.D. Ky. July 16, 2012) (Forester, J.); *Fortune Hi-Tech Mktg., Inc. v. Isaacs*, No. 10-123, 2010 WL 5391533, at *2 (E.D. Ky. Dec. 21, 2010) (Forester, J.). In the case at bar, Davis “took all reasonable steps to achieve substantial compliance” with this Court’s Orders. *See Peppers*, 873 F.2d at 969.

As discussed above, since her return to the office on September 14, 2015, Davis has not interfered with, hindered, blocked, or obstructed the issuance of any marriage licenses by her deputy clerks to couples who are legally eligible to marry in Kentucky. Instead, marriage licenses approved, authorized, and recognized as valid in the Commonwealth of Kentucky are being issued without delay to eligible couples. Any “alterations” made by Davis constitute reasonable steps taken to ensure compliance with the Court’s orders, because these steps ensure that marriage licenses will be issued in Rowan County, while also accommodating her sincerely-held religious beliefs and convictions. These reasonable steps taken by Davis have effectively been approved by the Kentucky Governor and Kentucky Attorney General in their validation and recognition of the marriage licenses being issued in Rowan County. Because Davis has taken all reasonable steps and good faith efforts to comply with this Court’s Orders, Plaintiffs’ Motion to Enforce should be denied.

F. Imposing Civil Monetary Fines And A Receivership Are Extreme, Unnecessary, And Improper Sanctions In This Case.

Imposing monetary sanctions and a receivership are extreme, unnecessary, and improper sanctions under the circumstances of this case. As an initial matter, although civil monetary fines are a remedy available to district courts to sanction non-compliance with its orders, *Elec. Workers*, 340 F.3d at 385; *Glover v. Johnson*, 199 F.3d 310, 312 (6th Cir. 1999), such fines are not warranted in this case. As noted above, Davis has taken reasonable and good faith efforts to substantially

comply with this Court's orders, and marriage licenses are being issued in Rowan County that are authorized, approved, and recognized as valid by the Commonwealth of Kentucky. As such, there is no cause for which to punish Davis with civil sanctions and monetary fines.

There are also no grounds for imposing a receivership on the Rowan County Clerk's Office. The Sixth Circuit has described the imposition of a receivership as an "extraordinary measure" that requires a factual showing of "exceptional circumstances" necessary "for the imposition of such an intrusive remedy." *Glover v. Johnson*, 855 F.2d 277, 286 (6th Cir. 1988) (finding that district court abused its discretion in appointing a "court supervised administrator with powers to secure to the plaintiffs the constitutional rights guaranteed them under the 1981 order"). Additionally, because Davis is a publicly elected official, it necessarily raises federalism and comity concerns that dictate to this Court that it should be reticent "to attempt to administer" an office she oversees. *See id.* at 287. Plaintiffs have come nowhere close to establishing that Davis' authority "should be suspended and, indeed, supplanted by a court supervised administrator," *id.* at 287, when licenses are being issued in Rowan County that are approved, authorized, and recognized as valid in the Commonwealth by Kentucky's highest elected officials, and Davis' appeals are being litigated in the Sixth Circuit.

The cases cited by Plaintiffs as support for a receivership in this matter are easily distinguishable, and fail to establish grounds for displacing the implicated federalism and comity concerns. As noted above, the institution of a receivership—an "extraordinary measure"—is a remedy of "last resort." It is not a remedy to be applied here, when marriage licenses are, in fact, available in Rowan County and multiple appeals are pending in the Sixth Circuit. In stark contrast to the case at bar, Plaintiffs rely upon cases that involve years (in some cases, more than a decade) of non-compliance with orders and judgments. *See Dixon v. Barry*, 967 F. Supp. 535, 552 (D.D.C.

1997) (“In twenty two years the local authorities in this case have repeatedly failed to comply with the Court’s orders.”); *Shaw v. Allen*, 771 F. Supp. 760, 763(S.D. W.Va. 1990) (“It has been nearly eight (8) years since the entry of the Court’s comprehensive Order and yet the McDowell County Jail still remains in substantial noncompliance.”); *Newman v. Alabama*, 466 F. Supp. 628, 635 (M.D. Ala. 1979) (“Time does not stand still, but the Board of Corrections and the Alabama Prison System have for six years. Their time has now run out.”); *cf. U.S. v. Bradley*, 644 F.3d 1213, 1310-11 (11th Cir. 2011) (concluding that district court abused its discretion “in appointing a receiver to perform the Government’s work”).

Other cases arising within the Sixth Circuit confirm that a receivership, or a similar appointment of a judicially-approved administrator, is a remedy of last resort reserved, if at all, for years of non-compliance. *See, e.g., Glover v. Johnson*, 934 F.2d 703, 705, 715 (6th Cir. 1991) (finding appointment of special administrator to oversee Michigan correctional facilities finally warranted in “eleven-year-old prisoner rights litigation” despite federalism concerns); *U.S. v. Production Plated Plastics, Inc.*, 61 F.3d 904, *1, *6-7 (6th Cir. 1995) (affirming appointment of receiver to identify defendants’ assets and liquidate them to achieve compliance with environmental statutes after six years of litigation, and entry of permanent injunction) (unpublished).

Finally, Plaintiffs’ request for a receivership belies their contention that unknown and unidentified persons are purportedly suffering harm resulting from a “two-tier system of marriage licenses” issued in Kentucky. *See* D.E. 120, Pls.’ Mot. to Enforce, PgID.2319, 2321. Plaintiffs fail to explain how imposing a receivership over a single county clerk’s office (out of 120 counties) would eliminate the purported “humiliation” and “stigma” allegedly being suffered by unknown and unidentified individuals. Licenses issued pursuant to a receivership would still lack Davis’

authorization and authority, and they would still be issued in accordance with a different “process”—in fact, a process that would entail specific judicial oversight. This inconsistency demonstrates that Plaintiffs’ true interest in filing their motion to “enforce” is not simply to punish and denigrate Davis at any turn, but also, to remove the accommodation that she has effectively received, so as to force her to violate her conscience. Because the imposition of monetary fines and a receivership are completely unnecessary and improper under the circumstances of this case, Plaintiffs’ Motion to Enforce should be denied.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs’ Motion to Enforce September 3 and September 8 Orders, including their request for attorneys’ fees, should be denied.

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CERTIFICATE OF SERVICE

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

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