

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

APRIL MILLER, ET AL.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	0:15-CV-00044-DLB
	:	
KIM DAVIS, ET AL.,	:	DISTRICT JUDGE
	:	DAVID L. BUNNING
Defendants.	:	

KIM DAVIS,	:	
	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
MATTHEW G. BEVIN, 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’ NOTICE OF
SUPPLEMENTAL AUTHORITY IN OPPOSITION TO THIRD-PARTY DEFENDANTS’
MOTION TO DISMISS HER THIRD-PARTY COMPLAINT AND PLAINTIFFS’
MOTION TO ENFORCE SEPTEMBER 3 AND SEPTEMBER 8 ORDERS**

Defendant/Third-Party Plaintiff Kim Davis (“Davis”), by and through her undersigned counsel, hereby provides Notice to this Court of supplemental authority in opposition to the Third-Party Defendants’ motion to dismiss her third-party complaint and Plaintiffs’ motion to enforce

this Court's September 3 and September 8 Orders.¹ The supplemental authority is an executive order issued by Third-Party Defendant Kentucky Governor Matthew G. Bevin ("Gov. Bevin") that constitutes a significant legal and factual development in this litigation with important implications on matters before this Court and the related consolidated appeals pending in the United States Court of Appeals for the Sixth Circuit, which are briefly addressed below.

Governor Bevin's Executive Order 2015-048
Relating To The Commonwealth's Marriage License Form

On December 22, 2015, Gov. Bevin issued Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form, which states, *inter alia*, that "the issuance of marriage licenses on the form currently prescribed by the Kentucky Department for Libraries and Archives ('KDLA') creates a substantial burden on the freedom of religion of some County Clerks and employees of their offices because the current form bears the name of the issuing County Clerk, and some County Clerks and their employees sincerely believe that the presence of their name on the form implies their personal endorsement of, and participation in, same-sex marriage, which conflicts with their sincerely held religious beliefs," that "KRS 446.350 requires use of the least restrictive means available to carry out compelling governmental interests, and there are less restrictive means available to further the governmental interest of issuing marriage licenses to all applicants who qualify than the form that is currently being used," that "there is no compelling governmental interest, particularly under the heightened 'clear and convincing evidence' standard required by KRS 446.350, necessitating that the name and signature of County Clerks be present

¹ On September 24, 2015, Defendant/Third-Party Plaintiff Kim Davis ("Davis") filed her response in opposition to the Third-Party Defendants' motion to dismiss her third-party complaint. *See* D.E. 123. On October 13, 2015, Davis filed her response in opposition to Plaintiffs' motion to enforce this Court's September 3 and September 8 Orders. *See* D.E. 133. The aforementioned motions are fully briefed, and have been submitted to the Court. As stated in Davis' opposition briefs to the foregoing motions, and reiterated here, Davis maintains, among other arguments supporting denial of both motions, that the Court does not have jurisdiction to enter the relief sought by the movants in either motion and thus such motions should be denied. *See* D.E. 123 at 17-18; *see also* D.E. 133 at 18-19.

on the marriage license form used in the Commonwealth,” that the KDLA “can readily prescribe a different form that reasonably accommodates the interests protected by KRS 446.350” and does not substantially burden the “free exercise of religion” by County Clerks and their employees “who hold sincerely-held religious beliefs that conflict with same-sex marriage,” and, pursuant to the authority vested in Gov. Bevin by Section 69 of the Kentucky Constitution and the Kentucky Religious Freedom Restoration Act, orders and directs that the KDLA “shall forthwith create, prescribe and publish to all County Clerks in the Commonwealth a marriage license form substantially identical to the form attached hereto, henceforth to be used by the offices of all County Clerks in the Commonwealth.” A true and correct copy of Executive Order 2015-048, along with the revised marriage license form cited therein, is attached to this filing as Exhibit “A.”

Applicability Of Governor Bevin’s Executive Order 2015-048 To This Action²

As discussed in Davis’ opposition to the Third-Party Defendants’ motion to dismiss (and other prior filings), and now confirmed by Gov. Bevin in Executive Order 2015-048 Relating to the Commonwealth’s Marriage License Form, Davis, as County Clerk, possesses constitutional and statutory rights and religious liberties that should be recognized and protected. Also, as is evidently clear from Executive Order 2015-048 Relating to the Commonwealth’s Marriage License Form, Gov. Bevin has declared that some county clerks’ (like Davis’) sincerely held religious beliefs and religious freedoms are substantially burdened in the issuance of marriage licenses on the marriage license form that former Gov. Beshear and the KDLA Commissioner designed and created without considering religious accommodation after the Supreme Court’s opinion in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Moreover, Executive Order 2015-048

² The following discussion of Executive Order 2015-048 Relating to the Commonwealth’s Marriage License Form is included in this Notice to state, briefly, the reasons for providing it as pertinent and significant supplemental authority in opposition to the Third-Party Defendants’ motion to dismiss her third-party complaint and Plaintiffs’ motion to enforce this Court’s September 3 and September 8 Orders.

Relating to the Commonwealth's Marriage License Form demonstrates that, in law and fact, the Kentucky Governor had the authority, and duty, to fix Davis' situation by providing a simple accommodation in accordance with the Kentucky Religious Freedom Restoration Act that removes her name, other personal identifiers, and authorization from Kentucky marriage licenses. The foregoing acknowledgments and concessions represented in and by Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form fundamentally contradict the Third-Party Defendants' motion to dismiss with respect to issues of standing, immunity, and Davis' purported failure to state an actionable claim under the United States and Kentucky Constitutions and the Kentucky Religious Freedom Restoration Act. In fact, Davis has standing to pursue her claims, the Third-Party Defendants are not immune, and Davis pleaded viable third-party constitutional and statutory claims against the Third-Party Defendants. Accordingly, Third-Party Defendants' motion to dismiss Davis' third-party complaint should be denied.

Additionally, Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form provides further grounds for rendering Plaintiffs' motion to enforce moot due to the change in the law.³ Throughout their briefing on the motion to enforce, and in the specific relief sought by Plaintiffs in said motion, they referred to, and allegedly desired a return to, the issuance of marriage licenses "in the same form and manner as those that were issued on or before September 8, 2015." *See generally* D.E. 120. But, pursuant to Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form, Plaintiffs' motion to enforce is now also moot because all Kentucky marriage licenses are to be issued on the newly revised marriage license forms. In short, in light of Gov. Bevin's official actions, there are no other marriage license forms

³ A change in the law can engender mootness. *See U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1940); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990).

to be used in the Commonwealth of Kentucky other than the new Commonwealth marriage license form. These official actions by Gov. Bevin constitute an executive remedy that accommodates and protects Davis' (and others') sincerely-held religious beliefs, and also maintains a uniform marriage licensing scheme and creates a new uniform marriage license form that is authorized by executive order and also plainly valid and indisputably recognized throughout the Commonwealth of Kentucky.⁴ Accordingly, Plaintiffs' motion to enforce is moot and should be denied.⁵

For all foregoing reasons, and those set forth in Davis' responses in opposition to the Third-Party Defendants' motion to dismiss her third-party complaint and Plaintiffs' motion to enforce the September 3 and September 8 orders, said motions should be denied by the Court.

DATED: December 24, 2015

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

Respectfully submitted:

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

*Attorneys for Defendant/Third-Party Plaintiff
Kim Davis*

⁴ At the September 3, 2015 contempt hearing, this Court expressed hope for a legislative or executive accommodation of the kind granted by Gov. Bevin in Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form: "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 (emphasis added).

⁵ Furthermore, in light of Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form, Plaintiffs' request in their motion to enforce for the imposition of civil fines, contempt, or the entry of a receivership is entirely unnecessary and improper. Indeed, any attempt to impose these sanctions at this point would constitute punishment in the nature of a crime, and Davis would be entitled to all the rights and protections afforded those accused of a crime.

CERTIFICATE OF SERVICE

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

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

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

Attorneys for Plaintiffs

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

Attorneys for Defendant Rowan County

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

*Attorneys for Third-Party Defendants
Matthew G. Bevin, Governor of Kentucky,
and Wayne Onkst, State Librarian and
Commissioner for Kentucky Department for
Libraries and Archives*

DATED: December 24, 2015

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

EXHIBIT A



MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2015-048
December 22, 2015

**RELATING TO THE COMMONWEALTH'S
MARRIAGE LICENSE FORM**

WHEREAS, the Constitution of the Commonwealth of Kentucky, Section 233a states: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized"; and

WHEREAS, on June 26, 2015, the Supreme Court of the United States issued a decision styled *Obergefell v. Hodges*, 135 S. Ct. 2584, holding that a fundamental right to marry is guaranteed to same-sex couples under the United States Constitution; and

WHEREAS, the Kentucky Constitution, Section 233a, is now in conflict with the Constitution of the United States; and

WHEREAS, as a result of the Supreme Court decision in *Obergefell v. Hodges*, the offices of the County Clerks of the Commonwealth are now required to issue marriage licenses in accordance with KRS Chapter 402 to all eligible applicants, including those intending to enter into same-sex marriages; and

WHEREAS, KRS 446.350 (the Kentucky Religious Freedom Restoration Act, or "RFRA"), states:

KRS 446.350 – Prohibition upon government substantially burdening freedom of religion – Showing of compelling governmental interest – Description of "burden." Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities; and



MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2015-048
December 22, 2015

WHEREAS, the issuance of marriage licenses on the form currently prescribed by the Kentucky Department for Libraries and Archives (“KDLA”) creates a substantial burden on the freedom of religion of some County Clerks and employees of their offices because the current form bears the name of the issuing County Clerk, and some County Clerks and their employees sincerely believe that the presence of their name on the form implies their personal endorsement of, and participation in, same-sex marriage, which conflicts with their sincerely held religious beliefs; and

WHEREAS, KRS 446.350 requires use of the least restrictive means available to carry out compelling governmental interests, and there are less restrictive means available to further the governmental interest of issuing marriage licenses to all applicants who qualify than the form that is currently being used; and

WHEREAS, there is no compelling governmental interest, particularly under the heightened “clear and convincing evidence” standard required by KRS 446.350, necessitating that the name and signature of County Clerks be present on the marriage license form used in the Commonwealth; and

WHEREAS, the KDLA can readily prescribe a different form that reasonably accommodates the interests protected by KRS 446.350, while at the same time complying with the United States Constitution, *i.e.*, that allows for County Clerks to issue marriage licenses to same-sex couples, thereby satisfying the compelling governmental interest and complying with the decision in *Obergefell*, without substantially burdening the free exercise of religion by those County Clerks and their employees who hold sincerely-held religious beliefs that conflict with same-sex marriage.



MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2015-048
December 22, 2015

NOW, THEREFORE, in consideration of the foregoing and by virtue of the authority vested in me by Section 69 of the Constitution of the Commonwealth of Kentucky and KRS 446.350, I, Matthew G. Bevin, Governor of the Commonwealth of Kentucky, do hereby Order and Direct the following effective immediately:

- I. That the Kentucky Department for Libraries and Archives, through its duly appointed commissioner or other authorized officials, shall forthwith create, prescribe and publish to all County Clerks in the Commonwealth a marriage license form substantially identical to the form attached hereto, henceforth to be used by the offices of all County Clerks in the Commonwealth.
- II. This Executive Order requires modification only to the existing "Marriage License" form but not to the existing "Marriage Certificate" form and "Certificate of Marriage" form.


MATTHEW G. BEVIN, GOVERNOR
Commonwealth of Kentucky


ALISON LUNDERGAN GRIMES
Secretary of State

Marriage License

Valid ONLY in the Commonwealth of Kentucky

To Any Person or Religious Society Qualified to Perform Marriages per KRS 402.050: You are hereby authorized to join together in the state of matrimony, according to the laws of the Commonwealth of Kentucky.

First Party Full Name _____
 Current Residence _____
 Second Party Full Name _____
 Current Residence _____

	<u>First Party</u>	<u>Second Party</u>
Date of Birth (Age)	_____	_____
Place of Birth	_____	_____
Mother's Full Name (Including Maiden)	_____	_____
Father's Full Name	_____	_____
Condition (Single, widowed, divorced, annulled)	_____	_____
No. of Previous Marriages	_____	_____
Occupation	_____	_____
Race	_____	_____
Relationship to other party	_____	_____

We hereby certify the above information is true to the best of our knowledge.

 (First Party Signature) (Second Party Signature)

Issued this ____/____/____ pursuant to KRS Ch. 402 in _____
 (mo.) (day) (year) (county name)

County, _____, Kentucky by _____
 (city) (name of issuing official) (title of issuing official)

Note: License valid for 30 days only, including the date it is issued, per KRS 402.105!

Marriage Certificate

(type or print with black ink ball-point pen only)

I do certify that: _____ and _____
 were united in marriage on the _____ day of _____, at _____ Kentucky, under the
 authority of the above license and in the presence of (Please PRINT witnesses' names)

_____ and _____

Given under my hand this _____ day of _____.

 (Signature of person performing ceremony) (title) (church, religion, or civil authority)

Note: Person failing to return this Certificate to the Clerk of the County in which it was issued within one month shall be guilty of a violation per KRS 402.990(11).

Recorded this ____/____/____ in the office of _____
 (mo.) (day) (year) (name) (county name)

County Clerk, in Marriage Book _____, page _____.

 (recorder's signature) (recorder's title) Clerk