

Nos. 15-5880, 15-5961, 15-5978

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

APRIL MILLER, Ph.D; KAREN ANN ROBERTS; SHANTEL BURKE;
STEPHEN NAPIER; JODY FERNANDEZ; KEVIN HOLLOWAY; L. AARON
SKAGGS; and BARRY SPARTMAN,

Plaintiffs-Appellees,

v.

KIM DAVIS, individually,

Defendant-Third-Party Plaintiff-Appellant,

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-Appellees.

On Appeal From The United States District Court
For The Eastern District of Kentucky
In Case No. 15-cv-00044 Before The Honorable David L. Bunning

**APPELLANT KIM DAVIS' RESPONSE
TO MOTION TO DISMISS CLAIMS ON APPEAL AGAINST STATE
APPELLEES AND MOTION FOR EXPEDITED CONSIDERATION**

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Appellant, KIM DAVIS (“Davis”), pursuant to Fed. R. App. P. 27(a)(3), responds to the Motion to Dismiss Claims on Appeal Against State Appellees and Motion for Expedited Consideration (the “Motion”) filed by Appellees MATTHEW G. BEVIN, in his official capacity as Governor of Kentucky (“Gov. Bevin”), and WAYNE ONKST, in his official capacity as State Librarian and Commissioner, Kentucky Department for Libraries and Archives and (“Commr. Onkst”) (Gov. Bevin and Commr. Onkst, collectively, “State Appellees”).

INTRODUCTION

State Appellees seek a remedy that is out of line with their own legal positions in this case. To be sure, the context of their Motion is an unusual situation, where the substituted appellee in this ongoing appeal, the newly-elected Gov. Bevin, has by his official statements and acts opposed the legal positions taken in the appeal by his predecessor appellee, the former Governor Steven Beshear (“Gov. Beshear”). But rather than correct the now incongruous legal positions previously submitted to the Court by Gov. Beshear, State Appellees seek the incongruous remedy of dismissal of Davis’ claims as moot. The prior inconsistent positions of Gov. Beshear, though now opposed by Gov. Bevin, are nonetheless currently attributable to Gov. Bevin and remain before the Court on the merits. It does not follow that Davis’ claims are moot.

Davis' claims against State Appellees in this appeal, which State Appellees claim are moot, arise from the district court's denial of Davis' motion for preliminary injunction against State Appellees (under Gov. Beshear's administration), by which Davis sought a religious accommodation from Gov. Beshear's mandate to issue marriage licenses to same-sex couples. (Doc.61, Consol. Opening Br. at 32-33, 90-92.¹) State Appellees' essential defenses to Davis' religious accommodation claims are that they lack the authority to grant the accommodation, and that no accommodation is due. (Doc.66, Br. Appellees Beshear and Onkst at 40-56.) Gov. Bevin, however, has now issued the Marriage Licensing Executive Order Relating to the Commonwealth's Marriage License Form (the "Marriage Licensing Executive Order"), which by its plain language repudiates State Appellees' essential defenses to Davis's religious accommodation claims, reciting both Gov. Bevin's authority, and the Commonwealth of Kentucky's duty, to accommodate Davis' religious conscience. (R.156, Davis Notice Suppl. Auth., PgID.2594-98; R.156-1, Marriage Licensing Executive Order, PgID.2601-04.) But having repudiated, by executive order outside the Court, the very legal positions now before the Court on the merits, State Appellees nonetheless have taken no action to withdraw from consideration or

¹ Page number references for documents filed in this Court correspond to the page numbering assigned by the Court's ECF system.

otherwise correct their unflagging legal positions in this Court, opting instead to seek the ill-fitting remedy of dismissal for mootness.

RELEVANT BACKGROUND

A. Governor Beshear’s SSM Mandate.

Prior to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Kentucky’s constitution and statutes defined “marriage” exclusively as the union between one man and one woman. Ky. Const. § 233A; Ky. Rev. Stat. § 402.005. The entire Kentucky marriage licensing scheme turns on this natural and historical definition of marriage. The licensing statutes further provide for the issuance of marriage licenses by the county clerks in Kentucky’s 120 counties,² using “the form proscribed by the Department for Libraries and Archives [KDLA].” Ky. Rev. Stat. §§ 402.080, 402.100; R.34, Verified Third-Party Complaint (hereinafter, “VTC”), PgID.748. The KDLA is an executive branch department headed by a commissioner (Commr. Onkst) appointed by the Governor. (R.34, VTC, PgID.747.) *See also* Ky. Rev. Stat. § 171.130.

The pre-*Obergefell* marriage license form included an “authorization statement of the county clerk issuing the license” and “[t]he date and place the

² Because some counties have multiple branch offices, there are approximately 137 marriage licensing locations throughout Kentucky. (R.34, Verified Third-Party Complaint, PgID.748.)

license is issued, and the signature of the county clerk or deputy clerk issuing the license.” (R.34, VTC, PgID.748-749.) *See also* Ky. Rev. Stat. § 402.100(1). Thus, pursuant to this marriage licensing scheme enacted before *Obergefell*, each and every marriage license was to be issued by, in the name of, and on the authorization of an elected county clerk. No marriage license could be issued in any county without the clerk’s authorization and imprimatur. (R.34, VTC, PgID.749; R.34-1, Pre-*Obergefell* Marriage License, PgID.778.) The KDLA-approved form described the act being authorized and licensed as “marriage” at six places, and further specified that the county clerk is authorizing the individuals to “join together” in “the state of matrimony.” (*Id.* at PgID.748-749; *see also* R.34-1, Pre-*Obergefell* Marriage License, PgID.778.)

On June 26, 2015, only moments after the Supreme Court decided *Obergefell*, Gov. Beshear issued a directive to all Kentucky county clerks (hereinafter, the “SSM Mandate”) ordering that “[e]ffective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky.” (R.1-3, Beshear Letter, PgID.26.) In this SSM Mandate, Gov. Beshear further commanded that “Kentucky . . . must license and recognize the marriages of same-sex couples,” and directed county clerks that “[n]ow that same-sex couples are entitled to the issuance of a marriage license, the [KDLA] will be sending a gender-neutral form to you today, along with instructions for its use.” (*Id.*) The KDLA subsequently provided

this new marriage form to county clerks, including Davis. (R.34, VTC, PgID.753-754.) The form retained all of the references to “marriage,” as well as the name, signature and authorization requirements of the county clerk. (*Id.*; *see also* R.34-1, *Pre-Obergefell* Marriage License, PgID.778; R.34-4, *Post-Obergefell* Marriage License, PgID.784.)

Thereafter, according to Gov. Beshear, “government officials in Kentucky . . . must recognize same-sex marriages as valid and allow them to take place,” and “[s]ame-sex couples are now being married in Kentucky and such marriages from other states are now being recognized under Kentucky law.” (R.34, VTC, PgID.754.) In subsequent pronouncements, Gov. Beshear maintained that county clerks must issue marriage licenses, including SSM licenses, despite their “own personal beliefs.” (*Id.*) As far as Gov. Beshear was concerned, the only options available to county clerks who were subject to his SSM Mandate but opposed SSM were (1) issue the licenses against their “personal convictions,” or (2) resign. (*Id.* at PgID.754, 757.)

B. Davis’ Sincerely-Held Religious Beliefs About Marriage and Conscientious Objection to Governor Beshear’s SSM Mandate.

As a Christian, Davis possesses a sincerely-held religious belief that marriage is a union between one man and one woman, only. (R.26, Prelim. Inj. Hr’g (7/20/2015), Davis Testimony, PgID.247-248; R.34, VTC, PgID.751.) As county clerk before the SSM Mandate, she authorized all of the “marriage” licenses issued

from her office, and they bore her name in multiple locations. (R.26, Prelim. Inj. Hr’g (7/20/2015), Davis Testimony, PgID.253-257, 266, 293-294; R.34, VTC, PgID.749, 751.) But Davis cannot authorize the marriage of same-sex couples because it violates her core religious beliefs and she cannot be a party to the issuance of SSM licenses: in her sincere belief, the endorsement of her name and authorization equates to approval and agreement. (R.26, Prelim. Inj. Hr’g (7/20/2015), Davis Testimony, PgID.254-258 (“**Because if I say that I authorize that, I’m saying I agree with it, and I can’t.**”), 277-278 (“**[M]y religious beliefs can’t condone issuing and being a party to the issuance of same-sex marriage licenses.**”), 283, 291, 296 (emphasis added); R.34, VTC, PgID.751.)

On June 27, 2015, following the SSM Mandate, Davis obeyed her conscience and discontinued authorizing marriage licenses. (R.26, Prelim. Inj. Hr’g (7/20/2015), Davis Testimony, PgID.249; R.34, VTC, PgID.755.) Expressly to avoid disparate treatment of any couple and to ensure that all individuals and couples were treated the same, Davis withdrew her authorization to issue any marriage license in her name to any couple – same-sex or opposite sex. (R.26, Prelim. Inj. Hr’g (7/20/2015), Davis Testimony, PgID.259, 278, 283, 286; R.34, VTC, PgID.755.)

C. Plaintiffs’ Claims against State Appellees.

On July 2, 2015, less than one week after Gov. Beshear issued his SSM Mandate, Plaintiffs (four couples; two same-sex and two opposite sex) filed this

lawsuit demanding that Davis authorize and approve their Kentucky marriage licenses on the new state forms supplied by the KDLA. Plaintiffs filed the action on behalf of themselves and a putative class consisting of “all present and future individuals who, though legally eligible to marry in Kentucky, will be denied a marriage license pursuant to the Defendants’ policy,” in Rowan County. (R.1, Compl., PgID.9.) Plaintiffs moved to preliminarily enjoin Davis “from enforcing the challenged policy of refusing to issue marriage licenses against them,” (R.2, Pls.’ Mot. Prelim. Inj., PgID.34 (emphasis added)), and sought to enjoin Davis “from enforcing the policy of refusing to issue marriage licenses to any future marriage license applications submitted by the Named Plaintiffs.” (R.2-2, Proposed Prelim. Inj. Order, PgID.48 (emphasis added).)

As support for their claims and injunctive relief, Plaintiffs pointed to the SSM Mandate. (R.1, Compl., PgID.7-8 (referring to the June 26, 2015 “directive from the Chief Executive [Gov. Beshear]” that was sent to “all of Kentucky’s County Clerks”); R.2-1, Memo. Supp. Pls.’ Mot. Prelim. Inj., PgID.42 (contending that Davis’ refusal to act “is contrary to the direct admonition of the Governor”).)

Davis filed a verified third-party complaint on August 4, 2015 against Gov. Beshear, the issuer of the SSM Mandate, and Commr. Onkst, who oversees the KDLA, asserting constitutional and statutory claims:

The Commonwealth of Kentucky, acting through Governor Beshear, has deprived Davis of her religious

conscience rights guaranteed by the United States and Kentucky Constitutions and laws, by insisting that Davis issue marriage licenses to same-sex couples contrary to her conscience, based on her sincerely held religious beliefs. Because of Governor Beshear's open declaration that Davis has no such rights, Governor Beshear has exposed Davis to the Plaintiffs' underlying lawsuit, in which the Plaintiffs claim a constitutional right to a Kentucky marriage license issued specifically by Davis. Governor Beshear is not only liable to Davis for Plaintiffs' claims, but is also obligated to effect Kentucky marriage licensing policies that uphold Davis's rights of religious conscience.

(R.34, VTC, PgID.746.)

Davis also filed a motion for preliminary injunction to enjoin enforcement of the SSM Mandate and obtain an exemption “from **having to authorize the issuance of Kentucky marriage licenses.**” (R.39-7, Proposed Prelim. Inj. Order, PgID.1129-1130 (emphasis added).) As asserted in Davis' preliminary injunction motion, the SSM Mandate “violates her religious liberty and conscience rights protected by the Kentucky Religious Freedom Restoration Act and the Constitutions of the United States and Kentucky.” (R.39, Mot. Prelim. Inj., PgID.825.) Specifically, under the Kentucky Religious Freedom Restoration Act (“Kentucky RFRA”), Davis showed the following:

- “[T]he undisputed evidence is that Davis holds sincere religious beliefs about marriage and her inability to issue SSM license is motivated by those convictions. She cannot license, authorize and approve a union that is not

‘marriage,’ according to her religious beliefs.” (R.39-1, Mem. Supp. Mot. Prelim. Inj., at PgID.848.)

- “Forcing Davis to authorize SSM licenses substantially burdens her religious freedom.” (*Id.* at PgID.849.) And, “county clerks actually authorize the marriage license. Such participation in and approval of SSM substantially burdens her religious freedom.” (*Id.* at PgID.852.)
- “There is no compelling governmental interest in forcing Davis to violate her religious freedom.” (*Id.* at PgID.853.)
- “[F]orcing Davis to sign, issue, and approve SSM licenses over and against her sincere religious objections also is not the least restrictive means of obtaining a Kentucky marriage license.” (*Id.* at PgID.859.) “In this matter, several less restrictive means are available to accomplish the goal of providing Plaintiffs with Kentucky marriage licenses . . . without substantially burdening Davis’ religious freedom and conscience.” (*Id.* at PgID.860.)

D. Governor Beshear’s Opposition to Davis’ Religious Freedom Claims.

In their answer brief, in response to Davis’ religious freedom claims, State Appellees’ (under Gov. Beshear) repeatedly denied both the authority and the duty to accommodate Davis’ sincerely held religious beliefs:³

- Gov. Beshear rejected the claim that he had any authority to accommodate Davis’ (and other clerks’) religious liberties. (*See, e.g.*, Doc.66, Br. Appellees Beshear and Onkst, at 24 (“[N]either Governor Beshear nor Commissioner Onkst is responsible for setting or enforcing ‘Kentucky marriage policies,’ and neither has authority to compel Davis to act.”), 36 n.7 (“The State Appellees have no supervisory authority over another elected official such as Davis and have no ability to exempt her from the statutory obligation to issue marriage licenses.”), 41 (“The State Appellees do not possess the authority to either compel or excuse Davis from complying with Supreme Court precedent or the statutory framework for issuing marriage licenses.”), 43 (“As explained above, Governor Beshear

³ State Appellees’ answer brief also asserts, *inter alia*, Eleventh Amendment immunity as a defense to Davis’ claims. (Doc.66, Br. Appellees Beshear and Onkst, at 11-20.) Davis addressed the issue in her opening brief. (Doc.61, Consol. Opening Br., at 90-92.) Thus, the Eleventh Amendment issue is fully briefed for the Court’s determination on the merits, and State Appellees are out of order in raising Eleventh Amendment immunity (again) in their instant Motion. The Court should consider State Appellees’ Eleventh Amendment arguments, if at all, when the Court decides this appeal on the merits.

and Commissioner Onkst do not have authority over the issuance of marriage licenses, and they cannot compel an elected county clerk such as Davis to act in particular manner with respect to marriage licensing.”.)

- Gov. Beshear rejected that Davis can claim religious rights at all. (*See, e.g.*, Doc.66, Br. Appellees Beshear and Onkst, at 41-42 (“The District Court correctly rejected Davis’ [religious liberty] arguments in the context of Plaintiffs’ Motion for Preliminary Injunction.”), 42 (“Kim Davis as a citizen has a greater right to free exercise than does Kim Davis as Rowan County Clerk. As Rowan County Clerk, Kim Davis *is* the government.”), 48 n.9 (“Government officials acting in their official capacity do not have the ability to cite personal religious beliefs in picking and choosing which statutory duties their office will fulfill.”), 49 (“Davis fails to appreciate the distinction between actions taken in her official capacity as county clerk and those in her individual capacity as a citizen.”).)
- Gov. Beshear rejected that Davis’ religious beliefs were substantially burdened by the SSM Mandate. (*See, e.g.*, Doc.66, Br. Appellees Beshear and Onkst, at 47-48 (“The Beshear Letter does not substantially burden Davis’ free exercise because it does not compel her – and indeed could not compel her – to do anything. More fundamentally, the issuance of marriage licenses is one of Davis’ statutory duties The statutes do not require

- Davis to condone, approve, or endorse any marriage. Rather, Davis must simply certify that the legal prerequisites for issuance of a license have been met. This purely ministerial function does not implicate her religious beliefs – let alone substantially burden them – any more than any action taken by a government official implicates his/her religious beliefs.” (citations omitted)), 54 (“Davis’ obligation to issue marriage licenses does not constitute any type of religious or moral approval. . . . The issuance of a marriage license to [*sic*] couple entitled to marry does not convey any religious approval of the union”).)
- Gov. Beshear rejected any public or compelling interest in protecting Davis’ (and other clerks’) religious liberties, and any responsibility for protecting those liberties. (*See, e.g.*, Doc.66, Br. Appellees Beshear and Onkst, at 28-29 (“[A]ny liberty interest Davis might possibly have as a private citizen does not extend to her role as a government official. Even if [Kentucky RFRA] were somehow to apply to Davis, it cannot apply in her official capacity as the Rowan County Clerk because accommodating her in the manner she suggests would amount to a violation of the Establishment Clause.”), 46-47 (“[I]nterpreting statutes such as [Kentucky RFRA] to apply to free exercise by public officials acting in their official capacities would run directly into the Establishment Clause, which

prohibits governments from favoring or promoting one set of religious beliefs over another.”), 47 (“As Rowan County Clerk, any action by Davis to apply her own religious beliefs to any of her official duties is a direct violation of the Establishment Clause.”).)

E. Governor Bevin’s Executive Order.

On December 22, 2015, Gov. Bevin issued the Marriage Licensing Executive Order, which vindicated Davis’ consistently argued religious freedom positions, while systematically repudiating Gov. Beshear’s arguments against Davis’ religious freedom claims:

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, [Kentucky RFRA] **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

[Kentucky RFRA], 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 [Kentucky RFRA] . . . **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.

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 [Kentucky RFRA], I, Matthew G. Bevin, Governor of the Commonwealth of Kentucky, do hereby Order and Direct the following effective immediately:

- I. 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.

(R.156-1, Marriage Licensing Executive Order, Pg.ID.2601-04 (emphasis added).)

ARGUMENT

I. GOV. BEVIN'S EXECUTIVE ORDER CANNOT BE RECONCILED WITH GOV. BESHEAR'S PRIOR POSITIONS WHICH ARE INHERITED BY STATE APPELLEES AND STILL BEFORE THIS COURT.

As consistently asserted in Davis' briefs, and confirmed by Gov. Bevin in Marriage Licensing Executive Order, Davis possesses constitutional and statutory rights and religious liberties that should be recognized and protected. Gov. Bevin

has also, by the Marriage Licensing Executive Order, 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 Gov. Beshear and Commr. Onkst designed and created as part of Gov. Beshear's SSM Mandate, without considering religious accommodation. Moreover, the Marriage Licensing Executive Order demonstrates that, in law and fact, the office of Kentucky Governor always had the authority, and duty, to fix Davis' situation by providing a simple accommodation in accordance with the Kentucky RFRA that removes her name, other personal identifiers, and authorization from Kentucky marriage licenses.

The foregoing acknowledgments and concessions represented in and by the Marriage Licensing Executive Order fundamentally contradict the critical positions previously asserted by Gov. Beshear, and now inherited by Gov. Bevin. Thus, given Gov. Bevin's unequivocal endorsement of Davis' religious freedom claims, and as a matter of candor, counsel for Davis sent urgent e-mail correspondence to counsel for State Appellees on three separate occasions—on December 23 and 24, and January 6—requesting the immediate withdrawal of State Appellees answer brief, or at least the portions of the brief which were at odds with the official public statements and actions of Gov. Bevin. But counsel for State Appellees never took

action to correct the brief, though its content had become misleading and misrepresentative.

The Marriage Licensing Executive Order constitutes 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 Kentucky law and indisputably recognized throughout the Commonwealth of Kentucky.⁴ Importantly, the Marriage Licensing Executive Order thus acknowledges fault for Davis' situation and also evidently provides Davis the accommodation which Davis sought from Gov. Beshear as preliminary injunctive relief before the district court ever entered its original Injunction: removal of her name and authorization from Kentucky marriage licenses. Thus, understood correctly, the Marriage Licensing Executive Order unravels both Plaintiffs' Complaint against Davis and the district court's Injunctions.

But the persistence of State Appellees' inconsistent prior filings—which remain before this Court on the merits—despite the repeated and urgent requests to

⁴ At the September 3, 2015 contempt hearing below, the district court expressed hope for a legislative or executive accommodation of the kind granted by Gov. Bevin in the Marriage Licensing Executive Order: “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* R.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).)

State Appellees’ counsel to withdraw or correct them in light of the Marriage Licensing Executive Order, makes it not at all clear that Davis’ claims on appeal against State Appellees’ are moot. The Marriage Licensing Executive Order is not the typical “voluntary cessation” of a challenged policy, where the government changes policy without conceding any obligation to do so, *i.e.*, voluntarily. *See, e.g., Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 980-982 (6th Cir. 2012) (discussing “voluntary cessation” mootness doctrine). Rather, the change in policy represented by the Marriage Licensing Executive Order facially and absolutely repudiated State Appellees’ essential legal positions with respect to Davis’ religious liberty claims: that the Governor had no authority to effect the accommodation requested by Davis, and that Kentucky owed no duty to Davis to accommodate her free exercise of religious conscience. In other words, State Appellees have not “voluntarily” given Davis what she asked for; State Appellees—according to the plain language of the Marriage Licensing Executive Order—were required to give Davis what she asked for (and had the authority to give it) all along. In effect, then, State Appellees’ instant Motion does not invoke mootness by “voluntary cessation,” but rather by the heretofore unknown doctrine of mootness by *admission*.

To be sure, Davis believes Gov. Bevin intends to maintain the relief he promised as a candidate,⁵ and has now provided as Governor. This confidence, however, makes it all the more difficult to conceive what obstacle now prevents State Appellees' from correcting their papers in this Court to rescind their baseless contentions defending Gov. Beshear's SSM Mandate (which opened the door for Plaintiffs' claims), and to remove the stain and ongoing harm that such positions have placed on Davis in defending against Plaintiffs' claims.

⁵ See, e.g., Steve Bittenbender, *Governor-elect to remove clerk names from Kentucky marriage licenses*, REUTERS (Nov. 6, 2015, 5:17 PM), <http://www.reuters.com/article/usa-gaymarriage-kentucky-idUSL1N13127720151106> (“One thing I will take care of right away is we will remove the names of the county clerks from the marriage form.”); Phil Pendleton, *Bevin: ‘Utterly unnecessary’ to jail Rowan County Clerk*, WKYT (Sept. 3, 2015, 5:42 PM) <http://www.wkyt.com/home/headlines/GOP-nominee-for-governor-says-he-supports-county-clerk-refusing-to-issue-marriage-licenses-323833381.html> (“[O]ne of his first acts as governor would be to remove the responsibility of county clerks to issue marriage licenses.”); Phillip M. Bailey, *Kim Davis gets Matt Bevin’s ‘absolute’ backing*, Courier-Journal (Sept. 2, 2015, 8:48 AM) <http://www.courier-journal.com/story/news/politics/2015/09/01/matt-bevin-defends-rowan-clerk-kim-davis/71514564/> (“I absolutely support her willingness to stand on her First Amendment rights Without any question I support her”); Joseph Gerth, *Bevin calls for executive order on gay marriage*, Courier-Journal (Aug. 14, 2015, 11:32 PM) <http://www.courier-journal.com/story/news/politics/elections/2015/08/14/bevin-calls-executive-order-gay-marriage/31745305/> (“Republican gubernatorial nominee Matt Bevin said Friday that elected officials have freedom of religion protections even when doing their jobs and that Gov. Steve Beshear should issue an executive order ‘to clarify that’ and relieve county clerks of the responsibility of issuing marriage licenses.”).

Finally, State Appellees' invalid positions have metastasized. Plaintiffs/Appellees, in their answer brief, expressly invoked against Davis the now repudiated arguments of the State Appellees. (*See* Doc.68, Br. Pls.-Appellees, at 47 n.13 ("But, as correctly noted in the State Defendants' brief"), 66 ("For those reasons, as well as those contained in the State Defendants' brief").) *Amicus Curiae* Americans United for Separation of Church and State asserted similar positions against Davis. (Doc.76, Br. *Amicus Curiae*, at 23-34.) State Appellees' Motion seeks a remedy which lacks the capacity and necessary precision to unwind the misleading and contradictory positions now before the Court which were inherited from Gov. Beshear and now adopted by other litigants.

CONCLUSION

For all of the foregoing reasons, Davis requests that the Court enter an appropriate order addressing State Appellees' now repudiated positions which remain before the Court, and otherwise abating consideration of State Appellees' Motion until the Court considers the merits of this appeal.

DATED: January 28, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2016 I caused the foregoing document to be filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service of the filed document upon the following:

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