



Kentucky (“Gov. Bevin”), and WAYNE ONKST, in his official capacity as State Librarian and Commissioner, Kentucky Department for Libraries and Archives (“Commr. Onkst”).

### **INTRODUCTION**

Third-Party Defendants seek a remedy that this Court has no jurisdiction to grant, and which is otherwise 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 Third-Party Defendant in this ongoing case, the newly-elected Gov. Bevin, has by his official statements and acts opposed the legal positions taken in this case and related appeals by his predecessor party, the former Governor Steven Beshear (“Gov. Beshear”). But rather than correct the now incongruous legal positions submitted to both this Court and the Sixth Circuit by the two governors, Third-Party Defendants seek the incongruous and premature 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 uncorrected before this Court and the Sixth Circuit. It does not follow that Davis’ claims are moot simply because she has finally been granted the religious accommodation to which she was always entitled.<sup>1</sup>

Third-Party Defendants now seek refuge under the mootness doctrine to dispose of Davis’ third-party claims seeking a religious accommodation from Gov. Beshear’s mandate to issue

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<sup>1</sup> Third-Party Defendants also raise Eleventh Amendment immunity in their Motion as a ground for dismissal of Davis’ claims. However, their Eleventh Amendment arguments were already fully briefed to this Court in connection with their first, still-pending motion to dismiss Davis’ claims. (D.E. 92, Mot. Dismiss Third-Party Compl; D.E. 92-1, Mem. Supp. Mot. Dismiss, PgID.1851-55; D.E. 123, Resp. Opp. Mot. Dismiss, PgID.2359-2362; D.E. 124, Reply Supp. Mot. Dismiss, PgID.2390-93.) Moreover, this Court lacks jurisdiction to entertain their instant Motion. (*See infra*, n.5; § I; *see also* D.E. 123, Resp. Opp. Mot. Dismiss, PgID.2352-53.) Accordingly, Third-Party Defendants are out of order in raising Eleventh Amendment immunity (again) in their instant Motion. This Court should consider their Eleventh Amendment arguments, if at all, when and if the Sixth Circuit relinquishes jurisdiction to this Court to do so.

marriage licenses to same-sex couples (D.E. 157-1, Mem. Supp. Mot. Dismiss, PgID.2611), which claims are asserted in both the Verified Third-Party Complaint of Defendant Kim Davis<sup>2</sup> (“VTC”) (D.E. 34, PgID.746, 773-74), and Davis’ Motion for Preliminary Injunction (D.E. 39, PgID.825), both of which were filed before this Court entered its August 12, 2015 injunction. Third-Party

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<sup>2</sup> In addition to seeking a religious accommodation from Gov. Beshear’s mandate, Davis’ Third-Party Complaint also seeks to impose against or transfer to Third-Party Defendants any relief obtained by Plaintiffs against Davis in Plaintiffs’ underlying action. (D.E. 34, VTC, PgID.746, 773-74.) Third-Party Defendants assert Eleventh Amendment immunity in the instant Motion, not mootness, as their ground for dismissal of these third-party claims. (D.E. 157-1, Mem. Supp. Mot. Dismiss, PgID.2610.). But, as shown in n.1, *supra*, assertion of Eleventh Amendment immunity in the instant Motion is improper. Furthermore, Third-Party Defendants mischaracterize the nature of Davis’ third-party liability claims as “the indemnity claim.” (*Id.*) To be sure, Davis’ third-party claims comprise more:

The “essential criterion” of a third-party claim is that a defendant is “attempting to transfer the liability asserted against him by the original plaintiff to the third-party defendant.” *American Zurich*, 512 F.3d at 805; *see also Budsgunshop.com, LLC v. Security Safe Outlet, Inc.*, No. 10-390, 2012 WL 1899851, at \*4 (E.D. Ky. May 23, 2012). A third-party claim is “in the nature” of an indemnity or contribution claim but need not only be such claims—a standard which can thus be satisfied where the third-party claims are said to be “derivative” of or “dependent upon” the underlying claim. *American Zurich*, 512 F.3d at 806; *see also Budsgunshop*, 2012 WL 1899851, at \*7 (discussing the purposes of Rule 14 and finding that “it is better to err on the side of promoting judicial efficiency and permit SSO’s third-party claims under Rule 14”). In the case at bar, Davis alleges that her claims against the Third-Party Defendants derive from, and are the result of, the Plaintiffs’ underlying claims against her, because those claims are only brought against her as a result of Gov. Beshear’s SSM Mandate and subsequent refusal to grant a simple accommodation to Davis pursuant to her own constitutional and statutory rights. Moreover, it will promote judicial economy and efficiency to keep all of these claims in a single action, to avoid needless overlap in litigation, including duplicative discovery and the risk of inconsistent decisions.

(D.E. 123, Mem. Opp. Mot. Dismiss, PgID.2363-64.) Importantly, so long as Plaintiffs have claims for relief pending against Davis, Davis’ third-party claims against Third-Party Defendants are not moot.

Defendants' essential defenses to Davis' religious accommodation claims (conceived under Gov. Beshear's administration) are that Third-Party Defendants lack the authority to grant the accommodation, and that no accommodation is due. (D.E. 92-1, Mem. Supp. Mot. Dismiss, PgID.1853-868.) But 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 Third-Party Defendants' essential defenses to Davis's religious accommodation and third-party claims, reciting both Gov. Bevin's authority, and the Commonwealth of Kentucky's duty, to accommodate Davis' religious conscience. (D.E. 156, Davis Notice Suppl. Auth., PgID.2594-98; D.E. 156-1, Marriage Licensing Executive Order, PgID.2601-04.) But having repudiated, by executive order outside the Court, the very legal positions now before this Court and the Sixth Circuit, Third-Party Defendants nonetheless have taken no action to withdraw from consideration or otherwise correct their unflagging legal positions in either court which concede liability on Davis' third-party claims, opting instead to seek the ill-fitting remedy of dismissal for mootness.<sup>3</sup>

Yet Gov. Bevin's official actions and Marriage Licensing Executive Order effectively admit responsibility for Davis' harms and confirm the validity of her theory of third-party liability against the Governor, rendering dismissal of Davis' claims wholly improper while Plaintiffs' underlying claims remain pending. As Davis explained in opposing Third-Party Defendants' first motion to dismiss her third-party claims:

But for Gov. Beshear's edict directing Kentucky County Clerks, including Davis, to authorize same-sex "marriage" ("SSM") licenses bearing their own name without exception, on a marriage

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<sup>3</sup> Third-Party Defendants have simultaneously sought the same incongruous remedy from the Sixth Circuit. (D.E. 157-1, Mem. Supp. Mot. Dismiss, PgID.2609 n.1.) Even if this Court had jurisdiction to consider the instant Motion (*see infra*, n.5; § I), such consideration would be premature in light of Third-Party Defendants' submission of the same issue to the Sixth Circuit.

license form he deemed valid under Kentucky law, Plaintiffs' underlying lawsuit would be against him, not her. In her third-party complaint, Davis alleges that a SSM license issued on her authorization and bearing her name and imprimatur substantially and irreparably burdens her conscience and sincerely-held religious beliefs, which dictate to Davis that such unions are not and cannot be "marriage." Because of these beliefs, Davis sought a simple religious accommodation from the state-wide SSM Mandate issued by Gov. Beshear which, until recently, had gone completely unresponded to by the Governor. Indeed, Davis has faced the underlying lawsuit, in significant part, because Gov. Beshear refused to take elementary steps to accommodate Davis' undisputed, sincerely-held religious beliefs about marriage.

Importantly, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court neither overwrote the First Amendment or other critical religious liberty protections for persons nor compelled States to accomplish recognition of SSM by invading and trampling upon the consciences of individual county clerks. Thus, coercing an individual county clerk (Davis) to authorize and personally approve SSM in violation of her religious liberty and speech rights, as Gov. Beshear did under the SSM Mandate, is wrong. That is especially true here, where Davis took office when Kentucky marriage law perfectly aligned with her deep religious convictions, and there are multiple alternatives available (including the current status quo in Rowan County) by which individuals can obtain SSM licenses without voiding Davis' conscience and stripping Davis of her liberties.

In the case at bar, Davis has sufficiently alleged that any potential liability that Davis faces in the underlying lawsuit is the result of Gov. Beshear's SSM Mandate that provided no religious accommodation to Davis.

(D.E. 123, Resp. Opp. Mot. Dismiss, PgID.2345-2346.) The Marriage Licensing Executive Order does not erase this third-party liability—it concedes it.

### **RELEVANT BACKGROUND**

This Court is well-versed in the procedural history of this case, so Davis includes here only the background relevant to deciding the discrete issue presented by Third-Party Defendants'

instant Motion—whether, in light of the Marriage Licensing Executive Order, Davis’ religious accommodation and third-party claims against Third-Party Defendants are moot.

**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,<sup>4</sup> using “the form proscribed by the Department for Libraries and Archives [KDLA].” (D.E. 34, VTC, PgID.748.) *See also* Ky. Rev. Stat. §§ 402.080, 402.100;. The KDLA is an executive branch department headed by a commissioner (Commr. Onkst) appointed by the Governor. (D.E. 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 license is issued, and the signature of the county clerk or deputy clerk issuing the license.” (D.E. 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. (D.E. 34, VTC, PgID.749; D.E. 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

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<sup>4</sup> Because some counties have multiple branch offices, there are approximately 137 marriage licensing locations throughout Kentucky. (D.E. 34, Verified Third-Party Complaint, PgID.748.)

individuals to “join together” in “the state of matrimony.” (*Id.* PgID.748-749; *see also* D.E. 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.” (D.E. 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. (D.E. 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* D.E. 34-1, Pre-*Obergefell* Marriage License, PgID.778; D.E. 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.” (D.E. 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.* 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. (D.E. 26, Prelim. Inj. Hr'g (7/20/2015), Davis Testimony, PgID.247-248; D.E. 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. (D.E. 26, Prelim. Inj. Hr'g (7/20/2015), Davis Testimony, PgID.253-257, 266, 293-294; D.E. 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. (D.E. 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); D.E. 34, VTC, PgID.751.)

On June 27, 2015, following the SSM Mandate, Davis obeyed her conscience and discontinued authorizing marriage licenses. (D.E. 26, Prelim. Inj. Hr'g (7/20/2015), Davis Testimony, PgID.249; D.E. 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. (D.E. 26, Prelim. Inj. Hr'g (7/20/2015), Davis Testimony, PgID.259, 278, 283, 286; D.E. 34, VTC, PgID.755.)

**C. Davis' Claims against Third-Party Defendants.**

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. (D.E. 1, Compl., PgID.9.) Plaintiffs moved to preliminarily enjoin Davis “from enforcing the challenged policy of refusing to issue marriage licenses against them,” (D.E. 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.” (D.E. 2-2, Proposed Prelim. Inj. Order, PgID.48 (emphasis added).)

As support for their claims and injunctive relief, Plaintiffs pointed to the SSM Mandate. (D.E. 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”); D.E. 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.

(D.E. 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.**” (D.E. 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.” (D.E. 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.” (D.E. 39-1, Mem. Supp. Mot. Prelim. Inj., PgID.848.)
- “Forcing Davis to authorize SSM licenses substantially burdens her religious freedom.” (*Id.* PgID.849.) And, “county clerks actually authorize the marriage license. Such participation in and approval of SSM substantially burdens her religious freedom.” (*Id.* PgID.852.)
- “There is no compelling governmental interest in forcing Davis to violate her religious freedom.” (*Id.* 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.* 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.* PgID.860.)

**D. Denial of Davis’ Motion for Preliminary Injunction and Davis’ Appeal.**

On August 25, 2015, this Court *sua sponte* entered an order staying any consideration of Davis’ motion for preliminary injunction against Third-Party Defendants pending review by the Sixth Circuit in a separate appeal of this Court’s August 12, 2015 injunction order. (D.E. 58, Aug. 25, 2015 Order, PgID.1259.) The practical effect of this order was to deny or refuse Davis’ request for preliminary injunctive relief against Third-Party Defendants. As a result, on August 31, 2015, Davis timely filed a notice of appeal of this Court’s August 25, 2015 order.<sup>5</sup> (D.E. 66, Not. Appeal, PgID.1471-76.)

**E. Governor Beshear’s Opposition to Davis’ Religious Freedom Claims.**

Nearly five months ago, on the same day Davis was released from incarceration, Third-Party Defendants moved to dismiss Davis’ VTC against them. (D.E. 92, Mot. Dismiss.) In their memorandum in support of their motion to dismiss (D.E. 92-1), specifically in response to Davis’ religious freedom claims, Third-Party Defendants’ (under Gov. Beshear) repeatedly denied both the authority and the duty to accommodate Davis’ sincerely held religious beliefs:

- Gov. Beshear rejected the claim that he had any authority to accommodate Davis’ (and other clerks’) religious liberties. (*See, e.g.*, D.E. 92-1, Mem. Supp. Mot. Dismiss, PgID.1854 (“[N]either Governor Beshear nor Commissioner Onkst is responsible for setting or enforcing ‘Kentucky marriage policies,’ and neither has authority to compel

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<sup>5</sup> Third-Party Defendants moved to dismiss the appeal on Eleventh Amendment grounds, but the Sixth Circuit motions panel denied the motion, reserving the Eleventh Amendment issue for the court’s merits panel. (*See Exhibit 1*, 6th Cir. Order, Sep. 15, 2015.) Thus, Third-Party Defendants’ Eleventh Amendment immunity defense is pending before the Sixth Circuit, depriving this Court of jurisdiction to consider it. (*Cf. supra*, n.1.)

Davis to act.”), PgID. 1860 (“As explained above, Governor Beshear 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.*, D.E. 92-1, Mem. Supp. Mot. Dismiss, PgID.1859 (“Kim Davis as a citizen has a greater right to free exercise than does Kim Davis as Rowan County Clerk.”), PgID.1863 (“Davis fails to appreciate the critical distinction between actions taken in her personal capacity and those in her official capacity as Rowan County Clerk”)).)
- Gov. Beshear rejected that Davis’ religious beliefs were substantially burdened by the SSM Mandate. (*See, e.g.*, D.E. 92-1, Mem. Supp. Mot. Dismiss, PgID.1863 (“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)), PgID.1868 (“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.*,

D.E. 92-1, Mem. Supp. Mot. Dismiss PgID.1863 (“[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.”), PgID.1864 (“By refusing to issue marriage licenses on the basis of her personal religious beliefs, Davis has established those beliefs as the policy of the Rowan County Clerk and thereby herself violated the First Amendment”).)

**F. 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 and third-party causes of action against the Governor, 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.

(D.E. 156-1, Marriage Licensing Executive Order, Pg.ID.2601-604 (emphasis added).)

### **ARGUMENT**

#### **I. THIS COURT IS DEPRIVED OF JURISDICTION TO CONSIDER THE THIRD-PARTY DEFENDANTS' NEW MOTION TO DISMISS.**

As an initial matter, this Court is deprived of jurisdiction to consider the Third-Party Defendants' new Motion to Dismiss while this Court's practical denial of Davis' preliminary injunction against the Third-Party Defendants is on appeal. "As a general rule, an effective notice of appeal divests the district court of jurisdiction over the matter forming the basis for the appeal." *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987); *see also Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 378-79 (1985); *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437, 439 (6th Cir. 1985); *Keohane v. Swarco, Inc.*, 320 F.2d 429, 432 (6th Cir. 1963) ("The taking of the appeal even though from an interlocutory nonappealable order nevertheless transferred jurisdiction to the Court of Appeals."). Indeed, it is well-settled law that the notice of appeal divests this Court of jurisdiction "to act in a case, **except on remedial**

**matters unrelated to the merits of the appeal.”** *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Resources*, 71 F.3d 1197, 1203 (6th Cir. 1995) (emphasis added). Orders entered by a district court lacking jurisdiction over a matter while a case is on appeal are “null and void.” *U.S. v. Holloway*, 740 F.2d 1373, 1382 (1984).

As noted above, Davis appealed this Court’s August 25, 2015 order staying consideration on Davis’ motion for preliminary injunction pending resolution of her Sixth Circuit appeal of this Court’s August 12, 2015 injunction order. That order effectively and practically denied her request for preliminary injunction, which is immediately appealable.<sup>6</sup> Davis’ notice of appeal, therefore, deprives this Court of jurisdiction over **non-remedial matters** forming the basis of her appeal against Third-Party Defendants, including their instant Motion. Thus, this Court has no jurisdiction to consider the Third-Party Defendants’ Motion while this Court’s August 25, 2015 order is on appeal to the Sixth Circuit because that matter is non-remedial and related to the merits of the appeal.

**II. GOV. BEVIN’S EXECUTIVE ORDER CANNOT BE RECONCILED WITH GOV. BESHEAR’S PRIOR POSITIONS WHICH ARE INHERITED BY THIRD-PARTY DEFENDANTS AND STILL BEFORE THIS COURT, AND THE ORDER EFFECTIVELY CONCEDES DAVIS’ THIRD-PARTY CLAIMS.**

As consistently asserted in Davis’ filings, and confirmed by Gov. Bevin in the 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

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<sup>6</sup> See *Gillis v. U.S. Dep’t of Health & Human Servs.*, 759 F.2d 565, 567 (6th Cir. 1985); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981).

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.<sup>7</sup>

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 and third-party claims, and as a matter of candor, counsel for Davis sent urgent e-mail correspondence to counsel for Third-Party Defendants on three separate occasions—on December 23 and 24, and January 6—requesting the immediate withdrawal of Third-Party Defendants' first Motion to Dismiss (D.E. 92) and related briefing, which are at odds with the official public statements and actions of Gov. Bevin.<sup>8</sup> But counsel for Third-Party Defendants never took action to withdraw or otherwise correct the filings, though their content had become misleading and misrepresentative.

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<sup>7</sup> At the contempt hearing on September 3, 2015, counsel for the Third-Party Defendants was specifically asked by the Court: "Is this something where he [the Governor] can just change the form by executive order?" (*See* D.E. 78, Contempt Hr'g (9/3/15), PgID.1648.) In direct response to the Court's question, counsel for Third-Party Defendants answered: "No, Your Honor, because the requirements or the composition of marriage license is dictated by statute, and the governor cannot change the statute." (*Id.*) At that time, counsel for Davis explained that this position was wrong under the law, and also under the facts of this case. (*Id.* PgID.1649-651.) Through his official actions, Gov. Bevin, has now agreed with Davis and demonstrated the falsity of Third-Party Defendants' prior litigation positions.

<sup>8</sup> To that end, Davis also filed a Notice of Supplemental Authority in opposition to the Third-Party Defendants' first Motion to Dismiss her Third-Party Complaint, based upon the Marriage Licensing Executive Order. (*See* D.E. 156.)

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.<sup>9</sup> 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 this Court ever entered its original August 12, 2015 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 this Court's Injunctions.

But the persistence of Third-Party Defendants' inconsistent prior filings—which remain before this Court and the Sixth Circuit—despite the repeated and urgent requests to Third-Party Defendants' counsel to withdraw them in light of the Marriage Licensing Executive Order, makes it not at all clear that Davis' religious accommodation claims against Third-Party Defendants are moot in the way Third-Party Defendants describe. 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

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<sup>9</sup> 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 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.” (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.* PgID.1659:3-5 (emphasis added).)

facially and absolutely repudiated Third-Party Defendants’ 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, Third-Party Defendants have not “voluntarily” given Davis what she asked for; Third-Party Defendants—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, Third-Party Defendants’ 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,<sup>10</sup> and has now provided as Governor. This confidence, however, makes it all the more difficult to conceive what obstacle now prevents Third-Party Defendants from correcting their papers in this Court and the Sixth Circuit to rescind their baseless contentions defending Gov.

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<sup>10</sup> 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/us-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.”).

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.

Gov. Bevin cannot effectively admit liability on the part of the Governor through his official actions set forth in the Marriage Licensing Executive Order and then avoid liability in this action on Davis’ third party claims. The acceptance of responsibility triggers the obligations resulting therefrom. Indeed, it is now conclusively demonstrated that the Third-Party Defendants were, in fact, necessary parties from the outset of this litigation, with both the power and the duty to fix Davis’ situation<sup>11</sup>. Moreover, it is also indisputably established that the former Governor was responsible for Plaintiffs’ underlying claims due to his imposition of the SSM Mandate and the revised marriage license forms that substantially burdened Davis’ religious freedoms.<sup>12</sup>

Given the glaring admissions contained in Gov. Bevin’s official actions and Marriage Licensing Executive Order regarding the SSM Mandate and revised marriage license forms,

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<sup>11</sup> One of the several grounds set forth in Davis’ motion to dismiss Plaintiffs’ Complaint—which was never ruled upon by the Court and was stayed in the same August 25, 2015 order practically denying Davis’ motion for preliminary injunctive relief against the Third-Party Defendants—was the need to add the Kentucky Governor and KDLA Commissioner to this lawsuit as parties. (*See* D.E. 32; *see also* D.E. 32-1, PgID.694-697.) In that motion, Davis specifically explained that “Plaintiffs are demanding that Davis personally approve and authorize with her name and imprimatur *Kentucky* marriage licenses without considering all of Kentucky marriage law, including the Kentucky Religious Freedom Restoration Act . . . and the enumerated United States and Kentucky Constitutional protections for conscience, religious liberty, and speech. Davis has expressly requested religious accommodation from the Kentucky Governor’s mandate and directive to all ‘Kentucky County Clerks’ to issue SSM Licenses.” (*Id.* at PgID.695-696 (emphasis in original).)

<sup>12</sup> “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.” (D.E. 156-1, Marriage Licensing Executive Order, PgID.2602 (emphasis added).)

Kentucky marriage policies, and Davis’ individual religious freedom rights, the Third-Party Defendants cannot now exit this litigation through an escape hatch to avoid liability and remaining obligations. Rather, the Third-Party Defendants—who have conceded a substantial burden on Davis’ “freedom of religion” (Kentucky RFRA language) and her “free exercise” of religion (First Amendment language) (*see* D.E. 156-1, Marriage Licensing Executive Order, PgID.2602)—must remain in this case for as long as Plaintiffs continue to pursue claims against Davis because they (as a result of the former Governor’s actions) are liable for any relief obtained by Plaintiffs against Davis on Plaintiffs’ underlying claims.

### CONCLUSION

Third-Party Defendants’ Motion seeks a premature remedy which this Court has no jurisdiction to grant, and which in any event lacks the capacity and necessary precision to unwind the misleading and contradictory positions now before the Court which were inherited from Gov. Beshear. For these and all the foregoing reasons, Third-Party Defendants’ Motion 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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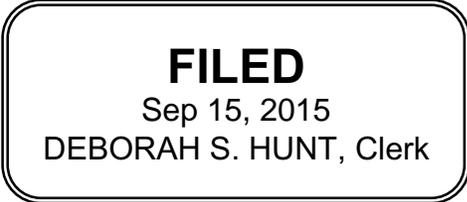
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DATED: February 4, 2015

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No. 15-5961

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT



APRIL MILLER, et al., )  
 )  
Plaintiffs-Appellees, )  
 )  
v. )  
 )  
KIM DAVIS, Individually, )  
 )  
Third-Party Plaintiff-Defendant-Appellant, )  
 )  
STEVEN L BESHEAR; WAYNE ONKST, in their )  
official capacities, )  
 )  
Third-Party Defendants-Appellees. )

ORDER

Before: KEITH, ROGERS, and DONALD, Circuit Judges.

Third-Party Plaintiff Kim Davis appeals the August 25, 2015 order delaying briefing on her motion for a preliminary injunction against Third-Party Defendants Steven Beshear and Wayne Onkst (the “State Defendants”). She moves for an injunction against the State Defendants pending appeal. The Plaintiffs and the State Defendants oppose her motion, and Davis replies. The district court denied a similar motion for an injunction pending appeal on September 11, 2015. In addition, the State Defendants move to dismiss the appeal for lack of jurisdiction. Davis opposes the dismissal of her appeal.

Procedural rulings such as the order on appeal generally are not appealable under 28 U.S.C. § 1291, or otherwise. Davis argues that because she moved for immediate preliminary injunctive relief against the State Defendants, the order delaying consideration of her motion is

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appealable under 28 U.S.C. § 1292(a)(1) as an order denying injunctive relief. An order that does not grant or deny injunctive relief, but has the practical effect of doing so, may be immediately appealable if it has “serious, perhaps irreparable, consequences” and can be “‘effectually challenged’ only by immediate appeal.” *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (citation omitted); see *Booher v. N. Ky. Univ. Bd. of Regents*, 163 F.3d 395, 397 (6th Cir. 1998). The August 25 order has the practical effect of denying immediate injunctive relief to Davis. See *Graves v. Mahoning Cty.*, 534 F. App’x 399, 403 (6th Cir. 2013). Whether the delay in considering the motion for a preliminary injunction has serious or irreparable consequences is intertwined with the merits of the appeal. We decline to dismiss the appeal for lack of jurisdiction at this time and defer consideration of the jurisdictional issue to a merits panel.

Davis “bears the burden of showing that the circumstances justify” our exercise of discretion to grant her injunctive relief pending appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009). In addressing her motion, we consider: (1) whether she has a strong likelihood of success on the merits; (2) whether she will suffer irreparable harm if the motion is not granted; (3) whether the requested injunctive relief will substantially injure other interested parties; and (4) where the public interest lies. *Id.*; see also *Serv. Emps. Int’l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012).

As the Rowan County Clerk, Davis’s duties include the issuance of marriage licenses. See Ky. Rev. Stat. §§ 402.080, 402.100(1). Davis seeks to enjoin Beshear and Onkst, in their respective official capacities as the Governor of Kentucky and the Commissioner of the Kentucky Department of Libraries and Archives, from enforcing against her a directive requiring all Kentucky county clerks to issue marriage licenses to same-sex couples and exempting her

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from issuing marriage licenses pending her appeal. Davis maintains that the issuance of marriage licenses to same-sex couples burdens her sincerely held religious beliefs in violation of the U.S. Constitution, the Kentucky Constitution, and the Kentucky Religious Freedom Restoration Act. Davis has not demonstrated a substantial likelihood of success on her federal constitutional claims. We need not address the merits of her claims under Kentucky law because the Eleventh Amendment of the U.S. Constitution precludes the federal courts from compelling state officials to comply with state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105–06 (1984).

A balance of the equities involved does not support the issuance of an injunction pending appeal. The motion to dismiss the appeal for lack of jurisdiction is **DENIED** without prejudice to reconsideration by the panel assigned to hear the appeal on the merits. The motion for an injunction pending appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk