No. A15-____

In the
Supreme Court of the United States

Kim Davis,

Applicant,

v.

April Miller, Ph.D, Karen Ann Roberts, Shantel Burke, Stephen Napier, Jody Fernandez, Kevin Holloway, L. Aaron Skaggs, and Barry Spartman,

Respondents.

Emergency Application to Stay Preliminary Injunction Pending Appeal

DIRECTED TO THE HONORABLE ELENA KAGAN
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Applicant Kim Davis ("Applicant" or "Davis") respectfully applies for an emergency stay pending appeal of a preliminary injunction order entered by the United States District Court for the Eastern District of Kentucky on August 12, 2015 (hereinafter the "Injunction") (attached hereto as Appendix "A"). That Injunction enjoins Davis, the County Clerk for Rowan County, Kentucky, to issue by her authorization and under her name (not the State) marriage licenses to the four couples (including two same-sex couples) in this lawsuit, in derogation of her religious liberty and conscience that dictate to Davis that same-sex unions are not and cannot be "marriage." App. A. Similar requests for a stay have been denied by both the district court and the Sixth Circuit. App. B-D. The temporary stay of the Injunction entered by the district court expires on Monday, August 31, 2015. App. C.

INTRODUCTION

Nearly 70 years ago, on the heels of the Second World War, this Court proclaimed that the "struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual," and the "product of that struggle" is the "[f]reedom of religion guaranteed by the First Amendment."[1] After all, "[w]e are a religious people whose institutions presuppose a Supreme Being."[2] The individuals who fashioned those institutions firmly agreed, as the first Chief Justice of this Court proclaimed, that "security under our Constitution is given to the rights of conscience."[3] Indeed, those seeking freedom in matters

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1 *Girouard v. United States*, 328 U.S. 61, 68 (1946).

2 *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

3 B.F. Morris, *Christian Life and Character of the Civil Institutions of the United States, Developed in the Official and Historical Annals of the Republic* (Philadelphia: George W. Childs,

of conscience—though "driven from every other corner of the earth, direct their course to this happy country as their last asylum."[4] Davis seeks that asylum for her conscience, from this Court.

Davis, a devout Christian, has faithfully and devotedly served the public in the Rowan County clerk's office for nearly thirty years. She is one of 120 Kentucky County Clerks, and oversees one of approximately 137 marriage licensing locations spread throughout Kentucky. No marriage license can be issued from her office without her authorization and without her personally affixing thereto her name and endorsement. She has never once raised a religious conscience objection to performing a function in the county clerk's office, until now.

On June 26, 2015, immediately following this Court's decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the Kentucky Governor (a named party to that consolidated litigation) issued a directive (the "SSM Mandate") ordering all Kentucky County Clerks to authorize same-sex "marriage" ("SSM") licenses, without exception. But Davis' conscience forbids her from approving a SSM license—because the prescribed form mandates that she authorize the proposed union and issue a license bearing her own name and imprimatur. She holds an undisputed sincerely-held religious belief that marriage is a union between a man and a woman, only. Thus, in her belief, SSM is not, in fact, marriage. If a SSM license is issued with Davis' name, authorization, and approval, no one can unring that bell. That searing act of validation would

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1864) pp. 162-163 (quoting John Jay); *see also, e.g.*, James Madison, *The Writings of James Madison*, Gaillard Hunt, editor (New York: G. P. Putnam's Sons, 1906), Vol. VI, p. 102, "Property," from the *National Gazette*, Mar. 29, 1792 ("Government is instituted to protect property of every sort. . . . [and] conscience is the most sacred of all property."); Thomas Jefferson, *The Writings of Thomas Jefferson*, Andrew A. Lipscomb, editor (Washington, D.C.: The Thomas Jefferson Memorial Association, 1904), Vol. XVI, p. 332, letter to the Society of the Methodist Episcopal Church at New London, CT, Feb. 4, 1809 ("No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience."); Morris, *supra*, pp. 162-163 ("Consciences of men are not the objects of human legislation.") (quoting William Livingston).

[4] Samuel Adams, An Oration Delivered to the State House in Philadelphia (Aug. 1, 1776).

forever echo in her conscience. And yet, the SSM Mandate demands that she either fall in line (her conscience be damned) or leave office (her livelihood and job for three-decades in the clerk's office be damned). If Davis' religious objection cannot be accommodated when Kentucky marriage licenses are available in more than 130 marriage licensing locations, and many other less restrictive alternatives remain available, then elected officials have no real religious freedom when they take public office. But such individual rights and freedoms so fundamental to liberty are neither absolutely surrendered at the entry door of public service nor waived upon taking an oath of office. To suggest otherwise creates a religious (or anti-religious) test for holding office – which the United States and Kentucky Constitutions expressly forbid.

In the Injunction, the district court leaped over boundary lines recently set by this Court in deciding a religious conscience dispute arising in the context of another governmental mandate, by assessing the materiality and substantiality of Davis' belief while simultaneously conceding its sincerity. Moreover, the Sixth Circuit magnified the outright disregard for Davis' religious conscience by acting as if she does not retain any individual rights in her role as county clerk. But no court, and especially no third-party desiring to violate religious belief, is fit to set the contours of conscience. For if that were true, a person who religiously objects to wartime combat would be forced to shoulder a rifle regardless of their conscience or be refused citizenship; a person who religiously objects to work on the Sabbath day of their faith would be forced to accept such work regardless of their conscience or lose access to state unemployment benefits; a person who religiously objects to state-mandated schooling for their children would be forced to send their children to school regardless of their conscience or face criminal penalties; a person who religiously objects to state-approved messages would be forced to carry that message on their vehicles regardless of their conscience or face criminal penalties; a person who religiously objects

to capital punishment would be forced to participate in an execution regardless of their conscience or lose their job; a person who religiously objects to providing abortion-related and contraceptive insurance coverage to their employees would be forced to pay for such coverage regardless of their conscience or face staggering fines. Each of these prior examples illustrate that the majority who adhere to a general law (regardless of their motivation) do not control the dictates of individual conscience. And in most cases, this Court has been forced to step-in to ensure that the security afforded to conscience by the Constitution remains in place when the crucible of public law and multiple government actors are demanding strict adherence even though true conscience can be accommodated.

In the same way, a person who objects to SSM based upon religious beliefs that are measured-in-millenia, indisputably sincere and substantially burdened by threats of loss of job and three-decades-long livelihood, civil liabilities, punitive damages, and threats of sanctions, should not be forced to issue by her authorization and under her name a license to a same-sex couple "to join together in the state of matrimony." That searing act of personal validation would forever, and irreversibly, echo in her conscience—and, if it happened, there is no absolution or correction that any earthly court can provide to rectify it. A stay of the Injunction will halt the irreversible implications on Davis' conscience while this case undergoes appellate review, especially since multiple less restrictive alternatives are available that do not substantially burden Davis (or the Plaintiffs).

This case is a matter of first impression, left unaddressed following the nascent *Obergefell* decision, with far reaching implications across the country for religious liberty. *Obergefell* unanimously held that First Amendment protections for religious persons remain despite SSM. The district court has acknowledged that "this civil action" presents a constitutional "debate,"

"tension," and "conflict" between "two individual liberties held sacrosanct in American jurisprudence."[5] In the district court's view, Plaintiffs' rights trump Davis' religious rights. But Davis' individual liberties are enumerated in the United States and Kentucky Constitutions and a state Religious Freedom Restoration Act, which predate and survive this Court's ruling in *Obergefell*. Such rights deserve protection before the "demands of the State" irrevocably crush the "conscience of the individual."

JURISDICTION

Applicant seeks a stay pending appeal of a U.S. District Court's preliminary injunction dated August 12, 2015. The district court temporarily stayed the Injunction until August 31, 2015 to allow Applicant to seek similar relief from the Sixth Circuit, which Applicant did. App. B, C. But on August 26, 2015, the Sixth Circuit denied a stay pending appeal. App. D. The final judgment of the Sixth Circuit on appeal is subject to review by this Court under 28 U.S.C. § 1254(1), and this Court therefore has jurisdiction to entertain and grant a request for a stay pending appeal under 28 U.S.C. § 2101(f). *See, e.g.*, *San Diegans for the Mt. Soledad Nat'l War Memorial v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *Heckler v. Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers) (affirming that there is "no question" that this Court has jurisdiction to "grant a stay of the District Court's judgment pending appeal to the Ninth Circuit when the Ninth Circuit itself has refused to issue the stay"). Additionally, this Court has authority to issue stays and injunctions in aid of its own jurisdiction under 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 23.

[5] Justice Thomas expressly predicted this "inevitable" conflict as individuals "are confronted with demands to participate in and endorse civil marriages between same-sex couples." *Obergefell*, 135 S.Ct. at 2638 (Thomas, J., dissenting).

BACKGROUND AND PROCEDURAL HISTORY

I. Kentucky Governor Beshear's SSM Mandate.

On June 26, 2015, a 5-4 majority of this Court held that laws from four States (including Kentucky) that defined marriage as the union of a man and a woman were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell*, 135 S.Ct. at 2605. Almost immediately, Kentucky Governor Steven L. Beshear ("Gov. Beshear") issued his SSM Mandate commanding all county clerks that "[e]ffective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky," and effectively commandeered full control of Kentucky marriage law and policy post-*Obergefell*. *See* Verified Third-Party Complaint ("VC") (attached hereto as Appendix "E"), ¶¶ 25, 33, and Ex. C, Ltr. from Gov. Steven L. Beshear to Kentucky County Clerks, dated June 26, 2015 (hereinafter, "Beshear Letter").

Gov. Beshear further ordered that Kentucky clerks "must license and recognize the marriages of same-sex couples," and further instructed that "[n]ow that same-sex couples are entitled to the issuance of a marriage license, the Kentucky Department for Libraries and Archives will be sending a gender-neutral form to you today, along with instructions for its use." VC, ¶ 25, and Ex. C, Beshear Letter. Kentucky's democratically-approved marriage licensing scheme (enacted long before *Obergefell*) provides that "[e]ach county clerk shall use the form proscribed by the [KDLA] when issuing a marriage license," and states that the marriage form "shall be uniform throughout this state." KY. REV. STAT. §§ 402.100, 402.110. In response to Gov. Beshear's directive, the KDLA subsequently provided a new marriage form to county clerks, including Davis. VC, ¶ 26. The form retained all of the references to "marriage," as well as the

same name, signature and authorization requirements of the county clerk developed before *Obergefell*. VC, ¶ 26, and Exs. A, D.

Following Gov. Beshear's decree, county clerks across Kentucky began issuing SSM licenses on the new forms, with almost no exception. VC, ¶ 27. 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." *Id.* In these same pronouncements, Gov. Beshear stated that the "overwhelming majority of county clerks" are "iss[uing] marriage licenses regardless of gender" and only "two or three" county clerks (of 120) were "refusing" to issue such licenses due to their "personal beliefs" and "personal feelings." *Id*. In subsequent pronouncements, Gov. Beshear has maintained that county clerks must issue marriage licenses, including SSM licenses, despite their "own personal beliefs." VC, ¶ 28. For Gov. Beshear, the only options available to county clerks who oppose SSM on religious conscience grounds are (1) issue the licenses against their "personal convictions," or (2) resign. VC, ¶¶ 28, 36.[6]

[6] Notably, Gov. Beshear did not provide the same ultimatum to Kentucky Attorney General Jack Conway ("Atty. Gen. Conway") when he refused to defend the Kentucky Constitution and democratically-enacted marriage law. VC, ¶¶ 15, 34. According to Atty. Gen. Conway in his tearful and prayer-induced proclamation at the time, "There are those who believe it's my mandatory duty, regardless of my personal opinion, to continue to defend this case…**I can only say that I am doing what I think is right. In the final analysis, I had to make a decision that I could be proud of** – for me now, and my daughters' judgment in the future." VC, ¶ 14 (emphasis added). Gov. Beshear did not force Atty. Gen. Conway to abandon his "inescapable" conscience and instead hired outside counsel to represent Kentucky in defending its own Constitution and democratically-enacted laws—which cost the Commonwealth upwards of $200,000. VC, ¶¶ 14-15, 34-36.

II. Davis' sincerely-held religious beliefs about marriage.

Davis serves as the elected county clerk for Rowan County, Kentucky. VC, ¶ 5. Before taking office as the county clerk in January 2015, she worked at the Rowan County clerk's office as a deputy clerk for nearly thirty years. *Id.* Davis is a professing Apostolic Christian who attends church worship service multiple times per week, attends weekly Bible study, and leads a weekly Bible study with women at a local jail. VC, ¶ 16. As a Christian, Davis possesses a sincerely held religious belief that marriage is a union between one man and one woman, only. VC, ¶ 17. As county clerk, she authorizes all of the "marriage" licenses issued from her office, and they bear her name in multiple locations. VC, ¶ 18. But Davis cannot authorize the marriage of same-sex couples because it violates her religious beliefs and she cannot be a party to the issuance of SSM licenses: in her belief, authorization and her name endorsement equates to approval and agreement. VC, ¶ 18.[7]

[7] Under democratically-approved Kentucky marriage law before *Obergefell*, the specific form required by the KDLA consists of a marriage license that includes 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." KY. REV. STAT. § 402.100(1); *see also* VC, ¶ 11. Upon solemnization, the form is to be returned to the county clerk's office and "shall provide" certain "information as recorded on the license authorizing the marriage," including the "***the name of the county clerk under whose authority the license was issued***, and the county in which the license was issued." KY. REV. STAT. § 402.100(3) (emphasis added); *see also* VC, ¶ 11. Any county clerk must include their name and signature **four** times on any marriage licenses the clerk signs. *See* VC, Ex. A, KDLA-Approved Marriage Form Pre-*Obergefell*, and Ex. D, KDLA-Approved Marriage Form Post-*Obergefell*. But even on licenses that the county clerk does not sign, the form requires the clerk to place their name **no less than two times** on each and every marriage license issued in the clerk's county. VC, Exs. A, D. In other words, no marriage license is issued by a county clerk without their authorization and without their imprimatur. VC, ¶ 12. The KDLA-approved form describes the act being licensed as "marriage" at six places, and provides that the county clerk is authorizing the individuals to "join together" in "the state of matrimony." VC, ¶ 11, and Exs. A, D.

Before taking office as Rowan County clerk, Davis swore an oath to support the Constitutions and laws of the United States and Kentucky "so help me God." KY. CONST. § 228. Davis understood (and understands) this oath to mean that, in upholding the federal and state constitutions and laws, she would not act in contradiction to the moral law of God, natural law, and her sincerely held religious beliefs and convictions. VC, ¶ 19. Moreover, she also understood (and understands) that she swore to uphold the Constitutions and laws that incorporate enumerated protections for all individuals' fundamental, "inalienable," and "inviolate" rights of conscience, religious liberty, and speech, including her own. *See* VC, ¶ 19; *see also* U.S. CONST. art. VI & amend. I; KY. CONST. Preamble, and §§ 1, 5, 8, 26. Not only that, Kentucky marriage law at the time she took office (not to mention during her multi-decade tenure as a deputy clerk) perfectly aligned with her sincerely held religious beliefs about marriage. *See* VC, ¶¶ 8, 2.[8]

On June 27, 2015, following the *Obergefell* decision, Davis discontinued issuing **any** marriage licenses. VC, ¶ 29. This was not a "spur-of-the-moment decision" reached by Davis; to the contrary, it was something that, after exhorting legislators to provide conscience protection for county clerks, she "had prayed and fasted over weekly" in the weeks and months leading up to the *Obergefell* decision. VC, ¶ 29. In fact, before the *Obergefell* decision (and just one week after this Court granted certiorari), Davis wrote Kentucky legislators pleading with them to "get a bill on the floor to help protect clerks" who had a religious objection to authorizing SSM licenses. VC, ¶¶

[8] *See also* KY. CONST. § 233A ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky."); KY. REV. STAT. § 402.005 ("'[M]arriage refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex."); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. App. Ct. 1973) (holding that two Kentucky women who had applied for a marriage license in Kentucky were not entitled to one because marriage was "the union of a man and a woman").

21-22, and Ex. B, Ltr. From K. Davis to Ky. Sen. Robertson, dated Jan. 23, 2015. Following *Obergefell,* Davis sent a letter appealing to Gov. Beshear to uphold her religious conscience rights, and to call a special session of the Kentucky General Assembly to legislatively address the conflict between her religious beliefs and the SSM Mandate effected by Gov. Beshear. VC, ¶ 30, and Ex. E. To date, Davis has received no response to her letter.

Expressly to avoid disparate treatment of any couple and ensure that all individuals and couples were treated the same, Davis suspended the issuance of all marriage licenses in Rowan County. VC, ¶ 29. She instructed all deputy clerks to stop issuing marriage licenses because licenses are issued on her authority, and because every license requires her name to appear on the license as the authorizing person. During Davis's entire tenure in the Rowan County clerk's office, spanning nearly thirty years, neither Davis, any deputy clerk, nor Davis's predecessor in office ever asserted a religious objection to performing any other function of the clerk's office. VC, ¶ 31.

III. Plaintiffs' refusal to obtain a marriage license from someone other than Davis.

On July 2, 2015, less than one week after the Supreme Court decided *Obergefell v. Hodges* and Gov. Beshear issued his SSM Mandate, Plaintiffs filed this lawsuit demanding that a particular person (Davis) in a particular county (Rowan County) authorize and approve their Kentucky marriage licenses, despite widespread availability of licenses and Davis' undisputed religious conscience objection to SSM. Plaintiffs also filed a motion for preliminary injunction to bar Davis from "refusing to issue marriage licenses to any future marriage license applications submitted by the Named Plaintiffs." Evidentiary hearings on this motion were held in Ashland, Kentucky (60 miles from the Rowan County clerk's office), and in Covington, Kentucky (100 miles away), which were attended by multiple named Plaintiffs.

Under Kentucky marriage law predating *Obergefell*, individuals may obtain a marriage license from the county clerk in any of Kentucky's 120 counties, **irrespective of their county of residence**. KY. REV. STAT. § 402.080; *see also* VC, at ¶ 9. In fact, because some counties have multiple branch offices, there are a total of approximately 137 marriage licensing locations throughout Kentucky. VC, ¶ 9. Rowan County is bordered by 7 counties, and the clerk's offices in these counties are less than an hour from Rowan County clerk's office. App. A-3. More than ten other clerks' offices are within a one hour drive of the Rowan County office, and these counties are issuing marriage licenses, along with the two counties where preliminary injunction hearings were held in this matter. But Plaintiffs admitted that they have not even attempted (and do not intend to attempt) to obtain a license in any county other than Rowan County, despite having the economic means to do so and no physical handicap preventing such travel. *Id.*

On August 4, 2015, Davis filed a verified third-party Complaint against Steven L. Beshear, Governor of Kentucky ("Gov. Beshear"), the issuer of the SSM Mandate, and Wayne Onkst, Commissioner of Kentucky Department for Libraries and Archives, the state agency responsible for designing Kentucky marriage license forms. *See* App. E. On August 7, 2015, Davis filed a motion for preliminary injunction to enjoin enforcement of Gov. Beshear's SSM Mandate and obtain an exemption "from having to authorize the issuance of Kentucky marriage licenses." The grounds on which Davis seeks relief from Gov. Beshear are intertwined with the grounds on which she opposed Plaintiffs' request for an injunction against her. Notwithstanding, the district court entered its Injunction, rather than considering Davis' and Plaintiffs' requests together and allowing Davis to develop a further evidentiary record on her own request for individual accommodation from Gov. Beshear's SSM Mandate.

IV. The district court's Injunction.

The Injunction enjoins Davis "from applying her 'no marriage licenses' policy to future marriage license requests submitted by Plaintiffs." *See* App. A-28. The district court stated that "this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence," thereby conceding that Davis' religious rights are, in fact, being both "threaten[ed]" and "infringe[d]" by Plaintiffs' demands for her approval of their proposed unions, and by Gov. Beshear's SSM Mandate to provide exactly that or resign. *Id.* at 2. Notwithstanding, the district court granted Plaintiffs' motion for preliminary injunction.

According to the district court, even though Plaintiffs indisputably are able to obtain a Kentucky marriage license from more than 130 marriage licensing locations, including all nearby and surrounding counties, Plaintiffs were likely to succeed on the merits of their purported right to marry claims and were being irreparably harmed. *See id.* at 9-16. In reaching this decision, however, the district court considered "other Rowan County residents" not before the court on the Plaintiffs' motion (which was limited exclusively to the named Plaintiffs) and speculated about religious accommodation requests that might be made at unspecified times in the future by other county clerks also not before the court. *Id.* at 12.

The district court also rejected Davis' claims under the Kentucky Religious Freedom Restoration Act ("Kentucky RFRA"), KY. REV. STAT. § 446.350, the Free Exercise Clause, the Free Speech Clause, and the Religious Test Clause of the United States Constitution, and similar Kentucky Constitution provisions. *See* App. A-16 to A-28. In rejecting Davis' religious liberty, conscience, and speech claims, the district court incorrectly concluded that the Kentucky marriage license form "does not require the county clerk to condone or endorse same-sex marriage" and instead merely "asks the county clerk to certify that the information provided is accurate and that

the couple is qualified to marry under Kentucky law."[9] According to the district court, the burden on Davis' religious freedom is "more slight," and she "remains free to practice her Apostolic Christian beliefs" since she "may continue to attend church twice a week, participate in Bible Study and minister to female inmates at the Rowan County jail," and "believe that marriage is a union between one man and one woman." *Id.* at 27. But, according to the district court, "her religious convictions cannot excuse her" from authorizing SSM licenses. *See id.* at 27-28. Davis filed an immediate notice of appeal to the Sixth Circuit pursuant to 28 U.S.C. § 1292(a), and a motion to stay pending appeal.

V. Prior stay requests.

On August 17, 2015, the district court denied Davis' motion to stay the Injunction pending appeal, but granted a temporary stay pending the Sixth Circuit's review of a similar request. *See* App. B. In denying this stay request for the same reasons it granted a preliminary injunction, the district court nonetheless recognized (again) that "constitutional issues" are involved in this dispute and reiterated that a constitutional "debate" is present in the case at bar and therefore granted a temporary stay instead. *Id.* at 1, 7. On August 19, 2015, the district court ordered that its temporary stay will expire August 31, 2015 absent a contrary Order from the Sixth Circuit. *See* App. C. On that same day, Davis filed an emergency motion to stay the Injunction pending appeal with the Sixth Circuit.

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[9] *See* App. A-22; *see also id.* at 25 ("[T]he act of issuing a marriage license to a same-sex couple merely signifies that the couple has met the *legal requirements* to marry. It is not a sign of moral or religious approval.") (emphasis in original); *id.* at 27 ("Davis is simply being asked to signify that couples meet the legal requirements to marry. The State is not asking her to condone same-sex unions on moral or religious grounds, nor is it restricting her from engaging in a variety of religious activities.").

On August 26, 2015, the Sixth Circuit denied Davis' emergency motion to stay the Injunction pending appeal. *See* App. D. In denying the stay request, the Sixth Circuit stated that "[t]he injunction operates not against Davis personally, but against the holder of her office of Rowan County Clerk," and further stated that "[i]n light of the binding holding of *Obergefell*, it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." *Id.* at 2. Davis now timely applies for an emergency stay of the Injunction pending appeal.

ARGUMENT

The standards for granting a stay pending appellate review are "well settled." *Deauer v. United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers). As a preliminary matter, the Rules of this Court require an applicant for a stay to show that "the relief is not available from any other court or judge," U.S. Sup. Ct. R. 23—which is plainly satisfied in the case at bar because both the district court and the Sixth Circuit have refused to grant a stay pending appeal of the district court's preliminary injunction order.[10] With this showing, a stay is then appropriate if there is at least: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see also Maryland v. King*, 133 S.Ct. 1, 2 (2012) (Roberts, C.J., in chambers). Moreover, "[i]n close cases the Circuit Justice

[10] The Sixth Circuit's internal operating procedures do not permit a stay application addressed to the *en banc* court of that Circuit. *See* 6th Cir. I.O.P. 35(h) ("Petitions seeking rehearing *en banc* from other orders [including an order on a motion for stay] will be treated in the same manner as a petition for panel rehearing. They will be circulated only to the panel judges.").

or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Perry*, 558 U.S. at 190 (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); *accord, e.g.*, *Conkright v. Frommert*, 556 U.S. 1401, 1401 (2009) (Ginsburg, J., in chambers); *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302, 1305 (1991) (Scalia, J., in chambers). In reviewing an application for stay pending appeal, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans*, 548 U.S. at 1302 (granting stay pending appeal and quoting *INS v. Legalization Assistance Project of Los Angeles Cnty. Fed'n of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers). In this matter, each of the requisite factors weighs decisively in favor of a stay.

In prior marriage cases, this Court granted stays pending appeal, even though the effect of those stays was to absolutely prevent same-sex couples from obtaining marriage licenses or having their marriage licenses recognized. *See, e.g.*, *Herbert v. Kitchen*, 134 S.Ct. 893 (2014); *McQuigg v. Bostic*, 135 S.Ct. 32 (2014). Here, in contrast, Plaintiffs can indisputably marry whom they want in Kentucky and obtain a Kentucky marriage license from more than 130 marriage licensing locations. Moreover, prior cases did not implicate irreversible infringements upon an individual's enumerated rights of conscience, religious liberty, and speech, as are involved here.

I. If the Court of Appeals affirms the district court's Injunction, there is at least a reasonable probability that certiorari will be granted.

This first-in-the-nation case following *Obergefell* presents the inevitable conflict between SSM rights found by this Court under the Fourteenth Amendment, and enumerated constitutional

and statutory rights, including the First Amendment and state-based religious freedom laws.[11] The Injunction dictates that SSM trumps religious liberty but, in reaching that conclusion, it outright flouts the analysis that this Court has described as the "most demanding test known to constitutional law."[12] The *Obergefell* decision neither overruled the First Amendment or other critical religious liberty protections for persons nor compelled States to accomplish recognition (and equal treatment) of SSM by invading and trampling upon the conscience of individual county clerks (or other public employees).

In *Obergefell*, this Court unanimously agreed that First Amendment protections remain despite SSM. The majority recognized that religious freedoms continue unabated, notwithstanding the redefinition of marriage:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and **persons** are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Obergefell, 135 S.Ct. at 2607 (Kennedy, J., majority) (emphasis added). Moreover, the dissenting justices in *Obergefell* recognized that "[m]any good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion" is specifically "spelled out" in the First Amendment of the Constitution. *Obergefell*, 135 S.Ct. at 2625 (Roberts, C.J., dissenting).

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[11] More than forty percent of the States (twenty-one) have enacted state-based religious freedom restoration acts patterned after the federal Religious Freedom Restoration Act. Those states are: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia.

[12] *See City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (discussing the federal Religious Freedom Restoration Act).

Continuing, the dissenting justices noted that "[r]espect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice." *Id.*; *see also id.* at 2638 (explaining the historical significance of "religious liberty") (Thomas, J., dissenting). Thus, irrespective of the majority's conclusion about **States'** obligations to recognize SSM, following this Court's decision in *Obergefell*, Gov. Beshear was under no compulsion to order each and every individual Kentucky County Clerk to authorize and approve SSM marriage licenses bearing their individual name and requiring their individual approval, without providing any religious accommodation.

In light of the foregoing, this case raises fundamental religious liberty, conscience, and speech issues in the wake of *Obergefell* that merit consideration by this Court, including, *inter alia*:

- Whether religious liberty protections allow persons not to provide marriage-related services based on their religious beliefs about marriage, when those services are readily available on equal terms from other persons;
- Whether publicly elected officials possess individual free exercise and religious accommodation rights while holding public office, or whether they may be compelled to affix their individual name and endorsement to marriage licenses in violation of their religious beliefs; and
- Whether individuals possess a fundamental constitutional right to receive a marriage license in a particular county authorized by a particular person, irrespective of that person's religious beliefs.

After concluding Davis holds sincere beliefs and convictions, the district court nonetheless proceeded to become the arbiter of the burden placed upon Davis' religious beliefs, usurping and

contradicting clear precedent of this Court. Similar to the federal Religious Freedom Restoration Act, the religious liberty claims under the state RFRA at issue here ask whether a government mandate (such as Gov. Beshear's SSM Mandate) "imposes a substantial burden on the ability of the objecting parties" to act "in accordance with *their religious beliefs*," not whether Davis' religious beliefs about authorizing SSM licenses are reasonable. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2778 (2014) (emphasis in original).

Davis believes that providing the marriage authorization "demanded by" Gov. Beshear's SSM Mandate is "connected with" SSM "in a way that is sufficient to make it immoral" for her to authorize the proposed union and place her name on it. *See id.* Davis is not claiming that the mere "administrative" act of recording a document substantially burdens her religious freedom. County clerks are not mere scriveners for recording a marriage document. Instead, county clerks authorize the marriage license for the proposed union, place their name on each and every license they authorize, and call the union "marriage." *See* KY. REV. STAT. § 402.100(1)-(3). Such participation in and approval of SSM substantially burdens Davis' religious freedom because she is the person authorizing and approving a proposed union to be a "marriage," which, in her sincerely-held religious beliefs, is not a marriage. She can neither call a proposed union "marriage" which is not marriage in her belief, nor authorize that union. Importantly, Davis is not claiming a substantial burden on her religious freedom or free speech rights if ***someone else*** authorizes and approves a SSM license ***devoid of her name***. Davis is also not claiming that her religious freedom or free speech rights are substantially burdened if she must complete an opt-out form to be exempted from issuing SSM licenses, as Kentucky law already permits for other licensing schemes.

This is the line drawn by Davis' religious conscience, and it cannot be moved or re-drawn by a court. Accordingly, it is wrong for the district court to say that Davis' religious beliefs "are

mistaken or *insubstantial*," because the "'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." *Hobby Lobby*, 134 S.Ct. at 2778-79 (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)) (emphasis added). Here, Plaintiffs do not dispute that Davis holds sincerely-held religious beliefs about marriage and the district court agreed—the requisite "honest conviction." It is therefore improper to conclude that such beliefs are "more slight," App. A-27, for that is just another way of deeming Davis' religious beliefs as "flawed," which is a step that this Court has "repeatedly refused to take." *See Hobby Lobby*, 134 S.Ct. at 2778. But it is the exact leap that the district court took in error. By way of Gov. Beshear's SSM Mandate, Davis is being threatened by loss of job, civil liability, punitive damages, sanctions, and private lawsuits in federal court if she "refuse[s] to act in a manner motivated by a sincerely held religious belief." KY. REV. STAT. § 446.350. Certainly, religious liberty protections, including the First Amendment and the state RFRA here, are designed to protect a person from choosing between one's lifelong career in the county clerk's office and one's conscience, or between punitive damages and one's religious liberty.

Failing to stop this unseemly invasion into Davis' conscience and religious beliefs, the Sixth Circuit magnified the outright disregard for a person's religious liberty by acting as if the person does not exist. Contrary to the implications of the Sixth Circuit's opinion denying a stay, publicly-elected officials possess individual free exercise and speech rights. "Almost fifty years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 134 S.Ct. 2369, 2374 (2014). Indeed, this Court has "made clear that public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Although a citizen entering

government service must "by necessity" accept "certain limitations on his or her freedom," *id.* at 417, such person's constitutional rights are not circumscribed in their entirety. Instead, there are "some rights and freedoms so fundamental to liberty" that a citizen is "'not deprived of [these] fundamental rights by virtue of working for the government.'" *Borough of Duryea, Pa. v. Guarnieri*, 131 S.Ct. 2488, 2493-94 (2011) (citation omitted). Fundamental rights are implicated in this case, as the district court already acknowledged. Thus, contrary to the implications set forth in the Sixth Circuit order, a person's constitutional and statutory rights and liberties are not immediately eviscerated the moment they take their oath of office.

Not only that, this Court has concluded that "government may (and sometimes must) accommodate religious practices." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987). After all, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. Further, government may not "oppos[e] or show[] hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963). The First Amendment of the United States Constitution requires that government must not "prohibit[] the free exercise" of religion, U.S. CONST. amend I, and ensures that a person may "express himself in accordance with the dictates of his own conscience." *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). The Free Exercise Clause protects "not only belief and profession but the performance (or abstention from) physical acts." *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990).[13]

[13] The Kentucky Constitution also provides expansive constitutional protections for religious liberties and conscience. KY. CONST., § 1 (identifying the "inherent and inalienable rights" of persons, including the "right of worshipping Almighty God according to the dictates of their

Providing accommodation for religious conviction is not antithetical for public employees or inconsistent with governmental mandates. For instance, religious companies with conscience-based objections to governmental mandates and programs related to providing abortion-related insurance coverage may be exempted from generally applicable requirements. *See Hobby Lobby*, 134 S.Ct. at 2759 (holding that government mandate to force closely held corporations to provide health insurance coverage for methods of contraception that violated the sincerely-held religious beliefs of the companies' owners was an unlawful burden on religious exercise). Moreover, persons can be naturalized as citizens with conscience-based non-combatant objections, *Girouard*, 328 U.S. at 64-67, or religious-based objections to certain vaccinations, 8 U.S.C. § 1182(g). By way of further example, federal and state employees who have a "moral or religious" conviction against capital punishment are provided an exemption from "be[ing] in attendance at" or "participat[ing] in any prosecution or execution" performed under the Federal Death Penalty Act. 18 U.S.C. § 3597(b).

The foregoing examples illustrate that, in certain matters, the law already accounts for religious-based objections to generally applicable legal duties or mandates. In each of the foregoing areas (*i.e.*, abortion, capital punishment, non-combatant in wartime), there are well-established historical roots for the objection. For marriage, the nature of the objection is even more firmly established in history because the "meaning of marriage" as a union between one man and one woman "has persisted in every culture," "has formed the basis of human society for millennia," and has singularly "prevailed in the United States throughout our history." *Obergefell*, 135 S.Ct.

consciences"); *id.*, § 5 ("[T]he civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.").

at 2612-13 (Roberts, C.J., dissenting); *see also id.* at 2641 ("For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.") (Alito, J., dissenting). In fact, the majority in *Obergefell* understood that the institution of marriage as exclusively a union between a man and a woman "has existed for millennia and across civilizations," and acknowledged that this view "long has been held—**and continues to be held—in good faith by reasonable and sincere people here and throughout the world**." *Obergefell*, 135 S.Ct. at 2594 (Kennedy, J., majority) (emphasis added).

Accommodating a person's sincere religious beliefs and practices about marriage and ensuring that individual religious freedom is not substantially burdened promotes the religious pluralism and tolerance that have made this country distinctive. Of course, religious accommodations are not provided for each and every whim or scruple raised by a person, and merely stating a religious objection does not mean that any county clerk can deny a marriage license at any time for any reason. That is not this case. As noted above, Davis has served in the Rowan County clerk's office for thirty years, and, during this entire time period, this is the first instance in which she (or anyone else for that matter) has raised a religious objection to performing a function in the county clerk's office. *See* VC, ¶ 31. Plainly, this is not a situation where an accommodation of Davis' religious objections will swallow the general law on marriage and marriage licenses in Kentucky, because licenses are readily available in more than 130 marriage licensing locations spread across Kentucky. *See* VC, ¶¶ 9, 27.

Additionally, the lower courts cannot avoid the implications upon the religious and speech rights of Davis merely by ordering relief against Davis in her official capacity. The official capacity designation requires an individual person to occupy the office. It is not as if Kim Davis the individual stops existing while Kim Davis is performing her duties as Rowan County Clerk.

Moreover, Plaintiffs **sued Davis in her individual capacity** seeking punitive damages from her personally. By suing her individually, Plaintiffs concede the relevancy of Davis in her individual capacity as the person occupying the office of Rowan County clerk. Further, the injunctive relief Plaintiffs obtained against Davis in her official capacity (the issuance of a marriage license) necessarily implicates Davis in her individual capacity because of her personal involvement in the act of issuing, authorizing, endorsing, and participating in a marriage license. Lastly, Davis in her official capacity has an obligation to comply with all constitutional norms, protections, and obligations that affect individual persons—including her own individual capacity. It is thus an untenable judicial construct and fiction to claim that the individual conscience, religious, and speech protections afforded Davis are of no consequence to her official capacity conduct.

Further, the Injunction grants to Plaintiffs a newfound federal constitutional right—to obtain immediately a marriage license **in a particular county** authorized and signed **by a particular person**, irrespective of the burdens placed upon that individual's fundamental freedoms. But no precedent from this Court, including *Obergefell*, establishes such a fundamental constitutional right. This case is not about whom a person may marry under Kentucky law. No state-wide ban is absolutely preventing any Plaintiff from marrying whom they want to marry. This case is also not about whether Plaintiffs can obtain a Kentucky marriage license. They can. Such licenses, including SSM licenses, are readily available across Kentucky. This case is also not about whether Kentucky will recognize SSM. The Kentucky Governor has declared that Kentucky will. Instead, this case is about forcing an individual county clerk (Davis) to authorize and personally approve SSM in violation of her fundamental religious liberty and speech rights, now.

The right to marry cases from this Court do not create a fundamental right to receive a marriage license from a particular person. Critically, the cases of *Loving v. Virginia*, 388 U.S. 1

(1968), *Zablocki v. Redhail*, 434 U.S. 374 (1978), *Turner v. Safley*, 482 U.S. 78 (1987), and *Obergefell*, 135 S.Ct. 2584, all involved state-wide absolute (or near absolute) bans affecting marriage. *See, e.g.*, *Loving*, 388 U.S. at 11-12 (striking down Virginia ban on inter-racial marriages); *Zablocki*, 434 U.S. at 379, 390-91 (striking down Wisconsin law that required any resident with child support obligations to satisfy such obligations before marrying and to obtain a court order permitting the marriage); *Turner*, 482 U.S. at 81-82, 99 (striking down Missouri prison regulation that represented a near "almost complete ban" on inmate marriage); *Obergefell*, 135 S.Ct. at 2593, 2599-2605 (redefining marriage to include same-sex couples, and striking down Kentucky, Tennessee, Michigan and Ohio marriage laws to the contrary). Some of the restrictions also came with criminal penalties attached for violating the terms of the restrictions (*e.g.*, *Loving* and *Zablocki*). Furthermore, none of those cases also involved the religious conscience and First Amendment objections present here.

Finally, the Injunction short-circuits the legislative process in Kentucky and converts every marriage-related law in all fifty states into a constitutional matter subject to injunction practice in federal courts (before legislatures can even respond to this Court's decision in *Obergefell*), even though laws regarding "the definition and regulation of marriage" have "long been regarded as a virtually exclusive province of the States." *United States v. Windsor*, 133 S.Ct. 2675, 2689-91 (2013). State marriage laws differ across the country, and Kentucky marriage law is far less restrictive than other states.[14] Prior to *Obergefell*, most of the States' democratically-enacted

[14] For instance, some states require prospective couples to obtain a license in the county where the ceremony will occur, *see, e.g.*, MD. CODE ANN., FAM. LAW § 2-401(a), whereas others permit residents to obtain their license in one county and hold their ceremony in another county, *see, e.g.*, KY. REV. STAT. §§ 402.050, 402.080, 402.100; MINN. STAT. § 517.07. Some states require prospective couples to obtain their license in their home county, *see, e.g.*, MICH. COMP.

marriage laws and domestic relations legislation rested upon a definition of marriage as between a man and a woman, and state legislatures are only just beginning to respond to the comprehensive changes resulting from *Obergefell*. The legislatures must have time to craft democratically-approved solutions that protect a fundamental right to marry vis-à-vis other fundamental rights.

II. If the Court of Appeals affirms the district court's Injunction, there is at least a fair prospect of reversal.

As the district court concluded, this case presents a constitutional "debate," "conflict," and "tension" between "two individual liberties held sacrosanct in American jurisprudence"—one enumerated and express (Davis' religious freedom), and the other unenumerated (right to marry). *See* App. A-2, A-16; App. B-1 (reiterating the existence of a constitutional "debate"). The district court rendered a decision on the constitutional "debate" at issue—but that answer should not be forced upon Davis until her appeal is finally resolved. Under the precedent of this Court, Davis possesses a fair prospect of reversal of the district court Injunction. To ensure Davis' fundamental and "sacrosanct" rights remain protected during appellate review, a stay of the Injunction is appropriate.

A. The Constitutions of the United States and Kentucky, and a state-based RFRA law protect Davis' conscience and religious freedom from being coerced to authorize and approve SSM licenses bearing her name.

Davis' inability to authorize and approve SSM licenses bearing her imprimatur against her religious conscience is protected by the United States and Kentucky Constitutions, along with the Kentucky RFRA. *See* U.S. CONST., amend I; KY. CONST., §§ 1, 5; KY. REV. STAT. § 446.350. The

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LAWS § 551.101; OHIO REV. CODE ANN. § 3101.05(a), whereas others allow residents to obtain a license in any county, *see* KY. REV. STAT. § 402.080; TENN. CODE ANN. § 36-3-103. Some states require prospective couples to wait to receive their license upon application, *see, e.g.*, MICH. COMP. LAWS § 551.103a (3 days); MINN. STAT. § 517.08(a) (5 days), whereas others (*e.g.*, Kentucky, Ohio, Tennessee) have no waiting period.

Kentucky RFRA, which was enacted by an overwhelming majority in 2013 over Gov. Beshear's veto, protects a person's[15] "right to act or refuse to act in a manner motivated by a sincerely held religious belief," and this religious freedom right "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." KY. REV. STAT. § 446.350; *see also Smith*, 494 U.S. at 877 (explaining "the 'exercise of religion' often involves not only belief and profession but the performance (or abstention from) physical acts").[16] As such, this state RFRA protects not only a person's beliefs but also a person's actions (or non-actions) based thereon, and subjugates to the strictest scrutiny any governmental action (be it legislative or regulatory scheme, or executive action) infringing religiously-motivated actions (or non-actions).[17] The Kentucky RFRA is similar to (but goes even further in protecting religious liberties than) the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) & (b), which was enacted to "provide very broad protection for religious liberty," *Hobby Lobby*, 134 S.Ct. at 2760, and imposes "the most demanding test known to

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[15] The Kentucky RFRA protects the religious freedom of all "persons" in Kentucky. While "person" is not defined in the Kentucky RFRA, it is defined in Kentucky's general definitions statute to include "individuals," and **publicly elected officials are not excluded**. *See* KY. REV. STAT. § 446.010(33).

[16] Because Davis' free exercise claim is combined with a free speech claim, her free exercise claim is also subject to strict scrutiny. *See Smith*, 494 U.S. at 881.

[17] The Kentucky RFRA is housed under Chapter 446 of Kentucky's statutes, which is entitled "Construction of Statutes," and includes such other generally applicable provisions as "Definitions for Statutes Generally," "Computation of Time," "Severability," and "Titles, Headings, and Notes." KY. REV. STAT. §§ 446.010, 446.030, 446.090, 446.140. Even more specifically, the Kentucky RFRA is included under a section of Chapter 446 reserved for "Rules of Codification." As such, Kentucky marriage law cannot be interpreted without also considering and applying the Kentucky RFRA, an analysis which both the district court and Sixth Circuit have ignored. But this analysis is especially significant in the wake of *Obergefell* and Gov. Beshear's SSM Mandate.

constitutional law." *Boerne*, 521 U.S. at 534. Thus, Gov. Beshear's SSM Mandate—the state action here—must survive strict scrutiny.

1. Davis' religious freedom is being substantially burdened by the SSM Mandate.

As indicated above, the Kentucky RFRA protects a person's "right to act **or refuse to act** in a manner motivated by a sincerely held religious belief." As such, the Kentucky RFRA is not solely directed at what a person may believe—but also how those beliefs translate to actions (or non-actions). Davis indisputably holds sincere religious beliefs about marriage and her inability to issue SSM licenses is motivated by those convictions. *See* VTC, ¶¶ 17-18. The prescribed form under Gov. Beshear's SSM Mandate provided no opportunity for the religious objector Davis not to participate in endorsement and approval of SSM. Contrary to the district court's conclusion, the "authorization" or permission to marry unmistakably comes from Davis. **Davis is also required to put her name and imprimatur no less than two times on each and every marriage license she issues**. But Davis cannot authorize a union of two persons which, in her sincerely-held belief, is not marriage. To authorize a SSM license bearing her imprimatur sears her conscience because she would be endorsing the proposed union and calling something "marriage" that is not marriage according to her beliefs. *See* VTC, ¶¶ 17-18.

Forcing Davis to authorize SSM licenses substantially burdens her religious freedom. Gov. Beshear has flatly rejected Davis' request for religious exemption. In his view, Davis must either comply with his SSM Mandate, or resign from office. VTC, ¶¶ 28, 36.[18] Thus, Gov. Beshear is

[18] In addition to his unmitigated "approve or resign" rule, Gov. Beshear has ominously declared that "the courts" will deal with county clerks who do not comply with his SSM Mandate. *See* VTC, ¶ 35. Moreover, immediately after issuance of the SSM Mandate, Atty. Gen. Conway even threatened possible legal action against county clerks who did not comply with the SSM Mandate, even seemingly inviting this very lawsuit against Davis: "Any clerk that refuses to issue

imposing a direct and severe pressure on Davis by the SSM Mandate, forcing Davis "to choose between following the precepts of her religion and forfeiting benefits [her job], on the one hand, and abandoning one of the precepts of her religion in order to accept work [keep her job], on the other hand." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). This Hobson's choice places undue pressure on Davis to choose between her job and her religion. Loss of job. Civil liability. Sanctions. Private lawsuits in federal court. Davis is being threatened with all of the above if she chooses to adhere to her sincere religious beliefs. Certainly, religious liberty protections are designed to protect a person from such substantial burdens.

It is not for the district court to question the reasonableness or scriptural accuracy of Davis' beliefs about marriage. *Hobby Lobby*, 134 S.Ct. at 2779 (citing *Thomas*, 450 U.S. at 716). As indicated above, judges "are not arbiters of scriptural interpretation," and they are not tasked with determining who "more correctly" perceives their faith's commands; instead, the "narrow function" is to determine whether the line drawn reflects an "honest conviction". *Thomas*, 450 U.S. at 716. There is no dispute that the requisite "honest conviction" exists here, but the district court proceeded to decide that the burden on Davis is "more slight." *See* App. A-5, A-15, A-22, A-27. In concluding that the act of issuing SSM licenses would not severely burden Davis' religious convictions because such act would not implicate moral or religious approval of SSM,

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marriage licenses is opening himself or herself to potential legal liability and sanctions. Any couple or person denied a license may seek remedy in federal court, but should consult with a private attorney about their particular situation." *See, e.g.*, Several county clerks defy same-sex marriage ruling, refuse to issue marriage licenses, Lexington Herald-Leader, June 29, 2015, *available at* http://www.kentucky.com/2015/06/29/3923157_some-kentucky-county-clerks-refusing.html?rh=1 (last accessed August 28, 2015); Steve Beshear and Jack Conway: On refusing marriage licenses, WTVQ.com, June 30, 2015, *available at* http://www.wtvq.com/story/d/story/steve-beshear-and-jack-conway-on-refusing-marriage/39801/_4cM2DBkQ0aBolGpMeZz_A (last accessed August 28, 2015).

the district court essentially told Davis what her religious convictions **should** be, instead of recognizing the undisputed fact of what her religious convictions actually are, and that those convictions unmistakably bar her from issuing SSM licenses with her name plastered on them. That conclusion disregards this Court's precedent analyzing substantial burdens on religious freedom.

2. The SSM Mandate cannot survive strict scrutiny analysis.

To overcome this substantial burden on Davis' religious freedom, Gov. Beshear must demonstrate by clear and convincing evidence that Kentucky has (1) a compelling governmental interest in infringing Davis' religious conscience through the SSM Mandate and (2) it has used the least restrictive means to accomplish that interest. Under this strict scrutiny analysis, to be a compelling governmental interest, the SSM Mandate must further an interest "of the highest order," *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), and, "[i]f a less restrictive alternative would serve Government's purpose, the legislature **must** use that alternative." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (emphasis added).

Under the required strict scrutiny analysis, only a compelling governmental interest in infringing upon Davis' inability to authorize and approve SSM licenses will suffice—the specific act or refusal to act at issue. This "more focused" inquiry "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law '**to the person'**—the particular claimant whose sincere exercise of religions is being substantially burdened," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (emphasis added) (quoting 42 U.S.C. § 2000bb-1(b)), and further requires courts "to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of **granting specific**

exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing" the SSM Mandate in this case. *See Hobby Lobby*, 134 S.Ct. at 2779 (emphasis added) (quoting *O Centro*, 546 U.S. at 431); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (explaining that compelling interest determination "is not to be made in the abstract" but instead "in the circumstances of this case" and how the asserted interest is "addressed by the law at issue"). Here, there is no compelling government interest "beyond broadly formulated interests" in infringing upon Davis' inability to authorize SSM licenses, and no one has shown why granting a "specific exemption" to this "particular religious claimant," *O Centro*, 546 U.S. at 431, will commit a "grave[] abuse[], endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), that will endanger the Commonwealth of Kentucky, let alone Kentucky's marriage licensing scheme.

But even if this showing can be made, the infringement upon Davis must still satisfy the "exceptionally demanding" least-restrictive-means standard. *See Hobby Lobby*, 134 S.Ct. at 2780. No one has demonstrated that Kentucky "lacks other means" of issuing marriage licenses to same-sex couples "without imposing a substantial burden" on Davis' "exercise of religion." *Id*. Not only that, the least-restrictive-means test may "require the Government to expend additional funds" to accommodate "religious beliefs," *id.* at 2781. In this matter, even if the "desired goal" is providing Plaintiffs with Kentucky marriage licenses **in Rowan County**[19], *see id.*, **numerous less restrictive means are available** to accomplish it without substantially burdening Davis' religious freedom and conscience, such as:

- Providing an opt-out or exemption to the Kentucky marriage licensing scheme (as exists for the Kentucky fish and wildlife licensing scheme), KY. REV. STAT. §

[19] Nothing in *Obergefell* suggests that Plaintiffs have a fundamental right to receive a marriage license from a particular clerk, in a particular county.

150.195, and as other states, such as North Carolina, have enacted, *see*, *e.g.*, N.C. GEN. STAT. § 51-5.5 (permitting recusal of officials from "issuing" lawful marriage licenses "based upon any sincerely held religious objection");

- Deputizing a neighboring county clerk (or some other person) to issue Kentucky marriage licenses in Rowan County;

- Modifying the prescribed Kentucky marriage license form to remove the multiple references to Davis' name, and thus to remove the personal nature of the authorization that Davis must provide on the current form;

- Deeming Davis "absent" for purposes of issuing SSM licenses, based upon her moral and religious inability to issue them, and allowing those licenses to be issued by the chief executive of Rowan County, as specifically authorized by Kentucky law, *see* KY. REV. STAT. § 402.240;

- Distributing Kentucky marriage licenses at the state-level through an online or other state-wide licensing scheme; or

- Legislatively addressing Kentucky's entire marriage licensing scheme post-*Obergefell*,[20] whether immediately by calling a special legislative session or in three months in the next regular legislative session.

All of the foregoing options, and others, are available to avoid substantially burdening Davis' personal religious freedom in the wake of the redefinition of marriage in *Obergefell*.

Furthermore, Gov. Beshear is not applying Kentucky marriage law in a neutral and generally applicable manner through his SSM Mandate because it specifically targets county clerks like Davis who possesses certain religious beliefs about marriage. *See Lukumi*, 508 U.S. at 546. This targeting is demonstrated by the exemption Gov. Beshear granted to Atty. Gen. Conway when—after "pray[ing] over this decision"—he was unwilling to defend Kentucky's

[20] For instance, one prefiled bill for the next regular session expressly protects clerks such as Davis because it amends the Kentucky RFRA to state expressly that "[i]ssuing or recording a marriage license" to which "a person holds a sincere religious objection" shall be considered "a substantial burden for which there is no compelling government interest, and that person shall additionally be immune from any civil or criminal liability for declining to solemnize such a marriage." *See* An Act Relating to Marriage, Ky. House Bill 101 (2016 Reg. Sess.).

democratically-enacted marriage law pursuant to his own personal beliefs and feelings (his purported conscience) about "doing what I think is right" and "mak[ing] a decision that I could be proud of." *See* VC, ¶¶ 14-15, 34.

As such, Gov. Beshear is picking and choosing the conscience-based exemptions to marriage that he deems acceptable—which is constitutionally unacceptable. For instance, when Atty. Gen. Conway refused to defend the Kentucky Constitution on marriage, Gov. Beshear did not direct Conway that "Neither your oath nor the Supreme Court dictates what you must believe. But as elected officials, they do prescribe how we must act," but he did so direct county clerks like Davis. *See* VC, ¶ 35, and Ex. C, Beshear Letter. Gov. Beshear did not command Atty. Gen. Conway that "when you accepted this job and took that oath, it puts you on a different level," and "[y]ou have official duties now that the state law puts on you," but he did deliver this command to county clerks like Davis. *See* VC, ¶¶ 28, 35. Gov. Beshear did not publicly proclaim that Atty. Gen. Conway was "refusing to perform [his] duties" and failing to "follow[] the law and carry[] out [his] duty," and should instead "comply with the law regardless of [his] personal beliefs," but he did make this proclamation (repeatedly) about county clerks like Davis *See* VC, ¶¶ 27, 35. Gov. Beshear did not instruct Atty. Gen. Conway that "if you are at that point to where your personal convictions tell you that you simply cannot fulfill your duties that you were elected to do, than obviously the honorable course to take is to resign and let someone else step-in who feels that they can fulfill these duties," but he did issue this instruction to county clerks like Davis. *See* VC, ¶¶ 28, 35. Gov. Beshear did not ominously declare that "[t]he courts and voters will deal appropriately with" Atty. Gen. Conway, but he did so declare with the "two or three" county clerks who are not issuing marriage licenses. *See* VC, ¶¶ 27, 35. Thus, although Atty Gen. Conway was given a pass for his conscience about marriage without any threats of repercussion, Davis is being repeatedly

told by Gov. Beshear to abandon her religiously-informed beliefs or resign. There is no compelling reason, let alone an "interest of the highest order," *Lukumi*, 508 U.S. at 546, to impose this choice on Davis when no "substantial threat to public safety, peace or order" is at stake, *Sherbert*, 374 U.S. at 403-04.

3. The SSM Mandate also constitutes an impermissible religious test.

Further, compelling Davis to authorize marriages against her sincerely held religious beliefs about marriage constitutes an improper religious test for holding (or maintaining) public office. U.S. CONST. art. VI ("no religious test" permitted as a "qualification" for office). Davis is being arm-twisted to either participate in the issuance of SSM licenses or resign from the office where she has worked for nearly three-decades, since holding public office is her choice. But the fact "that a person is not compelled to hold office" is not an excuse for Gov. Beshear (or the district court) to impose constitutionally-forbidden, conscience-violating criteria for office. *See Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961). Indeed, the very idea that religious persons "need not apply" for these public positions that have historically been accessible to them constitutes an unmistakable religious litmus test that is "abhorrent to our tradition." *Girouard*, 328 U.S. at 68.

The case of *Girouard v. United States*, *supra*, is instructive here. In *Girouard*, a Canadian native filed a petition for naturalization and stated in his application that "he understood the principles of the government of the United States, believed in its form of government, and was willing to take the oath of allegiance," that included swearing an oath "to support and defend the Constitution . . . So help me God," that was "in no material respect different from" the oath of office for public officials. 328 U.S. at 62, 65. But in answering the question on his application regarding whether he was willing to take-up arms in defense of his country, he stated that his religious beliefs prevented him from "combatant military duty." *Id.* at 62. He was willing to serve

in the army, just not bearing arms. *Id.* The district court admitted him for citizenship, which the court of appeals reversed. The Supreme Court then reversed the court of appeals since "[o]ne may serve his country "faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle." *Id.* at 64. The fact that his role may be limited "by religious convictions" had no bearing "on his attachment to his country or on his willingness to support and defend it to his utmost." *Id.* at 65. In rejecting argument that the individual could not support and defend the Constitution, the Supreme Court concluded that "[i]t is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of state," acknowledging thereby that persons need not forsake their "religious scruples" to "sit in the high councils of state." *Id.* at 66. As further evidence of the parallels to be drawn in this scenario, the religious conscience objection was acceptable in light of the historical back-up for the belief. *See id.* at 64-65. Finally, the importance of protecting religious liberty in this country cannot be overemphasized:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard, 328 U.S. at 68. Like a non-combatant who cannot shoulder a rifle, a county clerk who cannot issue SSM licenses can still faithfully and devotedly serve this country, and their county.

In Gov. Beshear's view, which is apparently shared by Plaintiffs in the underlying action, Davis, who became county clerk before *Obergefell*, must either participate without exception in the issuance of SSM marriage licenses (her conscience be damned) or resign since holding public office is her choice (her livelihood, qualifications for office, and commitment to public service be damned). Thus, she is told to cast aside her deep religious convictions after entering the door of

public service, and those not yet serving in similar public roles are told to shed any such convictions before taking office. Imposing on all public employees—whether elected, appointed, or hired—a mandate to participate in SSM, without any reasonable accommodation for religious conscience (or even consideration of any requests for accommodation), violates the First Amendment and Religious Test Clause.

B. The Constitutions of the United States and Kentucky protect Davis from being forced to affix her name and endorsement to a SSM license.

The mandate commanding Davis **to affix her name** to SSM licenses also violates her fundamental free speech rights protected by the United States and Kentucky Constitutions. U.S. CONST. amend. I (government may not "abridg[e] the freedom of speech"); KY. CONST., § 1 (persons have an inalienable right of "freely communicating their thoughts and opinions"); *id.*, § 8 ("[e]very person may freely and fully speak"). The Free Speech Clause protects "both what to say and what ***not*** to say," *Riley v. Nat'l Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (emphasis added), and states may not "force[] an individual, as part of [their] daily life" to "be an instrument for fostering public adherence to an ideological point of view [he/she] finds unacceptable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1976).

The prescribed Kentucky marriage form adopted by Gov. Beshear's SSM Mandate uses the word "marriage" at six different places on the form, specifically states that the county clerk is authorizing a couple to be "join[ed] together in the state of matrimony," twice designates Davis by name ("KIM DAVIS") as the person authorizing the marriage license (not the State), and requires the stamping of her name and endorsement on the proposed union (not a State seal). *See See* VC, ¶¶ 11-12, and Exs. A, D; *see also* KY. REV. STAT. § 402.100(3). Unlike other governmental licensing or registration schemes that Kentucky provides (*e.g.*, driver's licenses, fishing and hunting licenses, motor vehicle registration, voter registration), the issuance of a marriage license

requires an individual person (the county clerk) to authorize, against individual religious convictions, a particular relationship between persons. As it currently stands, Davis' name and approval cannot be divorced from a SSM license.

Thus, even if the license entails government speech to a certain degree, it also necessarily implicates the private speech of Davis, whose imprimatur and authority must be stamped on every license she issues. *See Wooley*, 430 U.S. 705 (engraved message on standardized, state-issued license plates implicated driver's free speech rights). The compelled-speech doctrine protects Davis from being coerced into placing her imprimatur on a union that, in her belief, is not a marriage. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557 (2005) ("compelled-speech" doctrine applies when "an individual is obliged personally to express a message he disagrees with, imposed by the government."). For Gov. Beshear to state that Kentucky is issuing and recognizing SSM licenses is one thing. But commanding Davis to be an "instrument" for a message, view, and proposed union that she finds "morally objectionable" and "repugnant to [her] moral and religious beliefs" is altogether different, and violates not only her conscience, but also her free speech rights. *See Wooley*, 430 U.S. at 707.

C. No marriage right announced in *Obergefell* or this Court's prior decisions is violated by a statewide Kentucky marriage policy that treats all couples the same *and* rightfully accommodates the religious conscience rights of county clerks under the Kentucky RFRA and the United States and Kentucky Constitutions.

The merits of Plaintiffs' claims must be evaluated in terms of **Kentucky's** state-wide marriage licensing scheme and whether that scheme, which is currently providing more than 130 locations for Plaintiffs to obtain marriage licenses, directly and substantially burdens the Plaintiffs' rights to marry whom they choose. As shown above, *supra*, no precedent from this Court, including *Obergefell*, establishes a fundamental constitutional right to obtain immediately a marriage license

in a particular county authorized and signed **by a particular person**, irrespective of the burdens placed upon that person's freedoms. *See Loving*, *Zablocki*, *Turner*, *and Obergefell*, *supra*. Thus, a statewide policy that accommodates the individual freedoms of Davis under the Kentucky RFRA and the United States and Kentucky Constitutions, while leaving marriage licenses readily available to every couple throughout every region of the state, does not prevent any Plaintiff from marrying whom they want to marry.

III. Absent a stay pending appeal, Davis is likely—indeed certain—to face substantial and irreparable harm.

Absent a stay, Davis faces imminent, substantial, and irreversible harm if she is forced to authorize and approve even one SSM license with her name on it, against her religious conscience, for it is well-established law that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). There is no adequate or corrective relief that will be available at a later date of this litigation (including a permanent injunction in her favor) if Davis is forced to violate her religious conscience now. It is comparable to forcing the religious objecting nurse to perform an abortion, the religious objecting company or non-profit to pay for abortions or abortion-related insurance coverage, the religious objecting non-combatant to fire on an enemy soldier, or the religious objecting state official to participate in or attend the execution of a convicted prisoner. Ordering Davis to authorize and approve a SSM license is ***the act*** that violates her conscience and substantially burdens her religious freedom – an act which cannot be undone.

Additionally, the harm to Davis is not speculative but imminent. The searing act of her conscience is authorizing a SSM license bearing her imprimatur; Plaintiffs insist on having no one other than Davis approve their proposed union; and the district court has ordered Davis to approve SSM licenses. The Sixth Circuit refused to stay the Injunction pending appeal. This impending

harm to Davis' conscience outweighs any travel inconveniences on Plaintiffs, who can obtain (or could have already obtained) a marriage license from more than 130 licensing locations across Kentucky while the appeal is pending.

IV. The balancing of equities and public interest favor granting a stay.

The public has no interest in coercing Davis to irreversibly violate her conscience and religious freedom when ample less restrictive alternatives are readily available, and the balancing of the equities favors granting a stay. *See Hobby Lobby*, 134 S.Ct. at 2767, 2780-81; KY. REV. STAT. § 446.350.[21]

In stark contrast to the imminent and forever irreversible harm facing Davis, **Kentucky** is indisputably recognizing marriages, including SSM, so Plaintiffs can marry whom they want (even while this appeal is pending). Also, **Kentucky** is providing for the issuance of marriage licenses in more than 130 marriage licensing locations spread across the state, including many locations within 30-45 minutes of where Plaintiffs allegedly reside, so Plaintiffs can readily obtain Kentucky marriage licenses from any one of those locations (even while this appeal is pending). Nothing (and no one) is physically or economically preventing the named Plaintiffs in this case from obtaining a marriage license elsewhere in Kentucky. Accordingly, the merits of Plaintiffs' claims must be evaluated in terms of **Kentucky's** state-wide marriage licensing scheme and whether that scheme, which is currently providing more than 130 locations for Plaintiffs to obtain marriage licenses, directly and substantially burdens these Plaintiffs' right to marry. The Injunction significantly changes the relative position of the parties and, in fact, completely alters

[21] *See also* notes 1-4, *supra*.

(prematurely) the status quo existing between the parties at a time when there is ongoing public debate in Kentucky between the SSM Mandate and religious liberty.

Yet Plaintiffs demand (and the district court erred in finding) a newfound constitutional right to have a marriage license issued by a particular person in a particular county, irrespective of the burdens placed upon that individual's freedoms. Plaintiffs concede they can obtain Kentucky marriage licenses in another county and from someone other than Davis. They simply chose (and choose) not to. According to Plaintiffs' unprecedented view, and adopted in error by the district court, the mere act of traveling approximately 30 minutes equates to a federal constitutional violation of the right to marry and, not just that, but a violation purportedly so manifest that it trumps individual conscience and religious freedom protections that are enumerated in the United States and Kentucky Constitutions and a state RFRA. But this alleged burden is no more constitutionally suspect than having to drive 30 minutes to a government office (for any reason) in the first place. As such, Plaintiffs will not suffer irreparable and irreversible injury if resolution is postponed to await a decision on the merits of Davis' appeal. This conclusion comports with the stay orders pending appeal entered in prior marriage cases. But, since those stay orders prohibited the issuance of SSM licenses or recognition of SSM in their entirety, the potential purported harm to Plaintiffs here is far less.

Accordingly, the balancing of the equities and public interest favor granting a stay of the Injunction pending resolution of Davis' appeal.

CONCLUSION

The Applicant respectfully requests that the Circuit Justice issue the requested stay of the district court's preliminary injunction order pending appeal. The Applicant also requests that the Circuit Justice issue a temporary stay of the district court's preliminary injunction order while the merits of the stay application are being considered. If the Circuit Justice is either disinclined to grant the requested relief or simply wishes to have the input of the full Court on this application, Applicant respectfully requests that it be referred to the full Court.

Dated: August 28, 2015

Respectfully submitted:

/s/ Jonathan D. Christman

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2015 a true and correct copy of the foregoing Application for Stay was filed with the United States Supreme Court and served via electronic mail and United States first class mail on the following counsel of record:

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APPENDIX

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APPENDIX A –

MEMORANDUM OPINION AND ORDER

(DISTRICT COURT)

CASE NO. 0:15-CV-00044-DLB

AUGUST 12, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT ASHLAND

CIVIL ACTION NO. 15-44-DLB

APRIL MILLER, et al. **PLAINTIFFS**

vs. **MEMORANDUM OPINION AND ORDER**

KIM DAVIS, individually and in her official capacity, et al. **DEFENDANTS**

****

I. Introduction

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction (Doc. # 2). Plaintiffs are two same-sex and two opposite-sex couples seeking to enjoin Rowan County Clerk Kim Davis from enforcing her own marriage licensing policy. On June 26, 2015, just hours after the U.S. Supreme Court held that states are constitutionally required to recognize same-sex marriage, Davis announced that the Rowan County Clerk's Office would no longer issue marriage licenses to *any* couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Davis, an Apostolic Christian with a sincere religious objection to same-sex marriage, specifically sought to avoid issuing licenses to same-sex couples without discriminating against them. Plaintiffs now allege that this "no marriage licenses" policy substantially interferes with their right to marry because it effectively forecloses them from obtaining a license in their home county. Davis insists that her policy poses only an incidental burden on Plaintiffs' right to marry, which is justified by the need to protect her own free exercise rights.

The Court held preliminary injunction hearings on July 13, 2015 and July 20, 2015. Plaintiffs April Miller, Karen Roberts, Jody Fernandez, Kevin Holloway, Barry Spartman, Aaron Skaggs, Shantel Burke and Stephen Napier were represented by William Sharp of the Americans for Civil Liberties Union ("ACLU") and Daniel Canon. Jonathan Christman and Roger Gannam, both of the Liberty Counsel, and A.C. Donahue appeared on behalf of Defendant Kim Davis. Rowan County Attorney Cecil Watkins and Jeff Mando represented Defendant Rowan County. Official Court Reporters Peggy Weber and Lisa Wiesman recorded the proceedings. At the conclusion of the second hearing, the Court submitted the Motion pending receipt of the parties' response and reply briefs. The Court having received those filings (Docs. # 28, 29 and 36), this matter is now ripe for review.

At its core, this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence. One is the fundamental right to marry implicitly recognized in the Due Process Clause of the Fourteenth Amendment. The other is the right to free exercise of religion explicitly guaranteed by the First Amendment. Each party seeks to exercise one of these rights, but in doing so, they threaten to infringe upon the opposing party's rights. The tension between these constitutional concerns can be resolved by answering one simple question: Does the Free Exercise Clause likely excuse Kim Davis from issuing marriage licenses because she has a religious objection to same-sex marriage? For reasons stated herein, the Court answers this question in the negative.

II. Factual and Procedural Background

Plaintiffs April Miller and Karen Roberts have been in a committed same-sex relationship for eleven years. (Doc. # 21 at 25). After hearing about the *Obergefell* decision, they went to the Rowan County Clerk's Office and requested a marriage license

from one of the deputy clerks. (*Id.* at 25-26). The clerk immediately excused herself and went to speak with Kim Davis. (*Id.* at 28). When she returned, she informed the couple that the Rowan County Clerk's Office was not issuing any marriage licenses. (*Id.*). Plaintiffs Kevin Holloway and Jody Fernandez, a committed opposite-sex couple, had a similar experience when they tried to obtain a marriage license from the Rowan County Clerk's Office. (*Id.* at 36).

Both couples went straight to Rowan County Judge Executive Walter Blevins and asked him to issue their marriage licenses. (*Id.* at 30-32, 36). Blevins explained that, under Kentucky law, a county judge executive can only issue licenses when the elected county clerk is absent. *See* Ky. Rev. Stat. Ann. § 402.240. Because Davis continued to perform her other duties as Rowan County Clerk, Blevins concluded that she was not "absent" within the meaning of the statute. (*Id.*). Therefore, he did not believe that he had the authority to issue their marriage licenses. (*Id.*).

Plaintiffs Barry Spartman and Aaron Skaggs also planned to solemnize their long-term relationship post-*Obergefell*. (*Id.* at 42-44). Before going to the Rowan County Clerk's Office, they phoned ahead and asked for information about the marriage licensing process. (*Id.*). They wanted to make sure that they brought all necessary documentation with them. (*Id.*). One of the deputy clerks told the couple "not to bother coming down" because they would not be issued a license. (*Id.*).

Seven neighboring counties (Bath, Fleming, Lewis, Carter, Elliott, Morgan and Menifee) are currently issuing marriage licenses. (Doc. # 26 at 53). All are less than an hour away from the Rowan County seat of Morehead. (*Id.*). While Plaintiffs have the means to travel to any one of these counties, they have admittedly chosen not to do so.

(Doc. # 21 at 38, 48). They strongly prefer to have their licenses issued in Rowan County because they have significant ties to that community. (*Id.* at 28-29, 47). They live, work, socialize, vote, pay taxes and conduct other business in and around Morehead. (*Id.*). Quite simply, Rowan County is their home.

According to Kim Davis, the Rowan County Clerk's Office serves as a "pass through collection agency" for the State of Kentucky. (Doc. # 26 at 24-25). She and her six deputy clerks regularly handle delinquent taxes, oversee elections, manage voter registration and issue hunting and fishing licenses. (*Id.*). A portion of the fees collected in exchange for these services is used to fund the Office's activities throughout the year. (*Id.*). The remainder is remitted to the State. (*Id.*).

Under Kentucky law, county clerks are also responsible for issuing marriage licenses.[1] *See* Ky. Rev. Stat. Ann. § 402.080. The process is quite simple. The couple must first go to the county clerk's office and provide their biographical information to one of the clerks. *See* Ky. Rev. Stat. Ann. § 402.100. The clerk then enters the information into a computer-generated form, prints it and signs it. *Id.* This form signifies that the couple is licensed, or legally qualified, to marry.[2] *Id.* At the appropriate time, the couple presents this form to their officiant, who must certify that he or she performed a valid marriage ceremony. *Id.* The couple then has thirty days to return the form to the clerk's office for

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1) This task requires relatively few resources, at least in Rowan County. (Doc. # 26 at 24-30). Davis testified that her Office issued 212 marriage licenses in 2014. Marriage licenses cost $35.50. (*Id.*). Of that sum, the Office retains $21.17, and remits the remaining $14.33 to the State. (*Id.*). Thus, Rowan County Clerk's Office made about $4,500, or roughly 0.1% of its annual budget, from issuing marriage licenses in 2014. (*Id.*). Davis also estimated that the task of issuing marriage licenses occupies one hour of one deputy clerk's time per week. (*Id.*).

2) A couple is "legally qualified" to marry if both individuals are over the age of eighteen, mentally competent, unrelated to each other and currently unmarried. *See* Ky. Rev. Stat. Ann. §§ 402.010, 402.020(a)-(d), (f).

recording. *See* Ky. Rev. Stat. Ann. §§ 402.220, 402.230. The State will not recognize marriages entered into without a valid license therefor. *See* Ky. Rev. Stat. Ann. § 402.080.

The Kentucky Department of Libraries and Archives ("KDLA") prescribes the above-mentioned form, which must be used by all county clerks in issuing marriage licenses.[3] Ky. Rev. Stat. Ann. §§ 402.100, 402.110. It is composed of three sections, which correspond to the steps detailed above: (1) a marriage license, to be completed by a county or deputy clerk; (2) a marriage certificate, to be completed by a qualified officiant; and (3) a recording statement, to be completed by a county or deputy clerk. The marriage license section has the following components:

> (a) *An authorization statement of the county clerk issuing the license for any person or religious society authorized to perform marriage ceremonies to unite in marriage the persons named;*
>
> (b) Vital information for each party, including the full name, date of birth, place of birth, race, condition (single, widowed, or divorced), number of previous marriages, occupation, current residence, relationship to the other party, and full names of parents; and
>
> (c) The date and place the license is issued, and the signature of the county clerk or deputy clerk issuing the license.

See Ky. Rev. Stat. Ann. § 402.100(1) (emphasis added).

Davis does not want to issue marriage licenses to same-sex couples because they will bear the above-mentioned authorization statement. She sees it as an endorsement of same-sex marriage, which runs contrary to her Apostolic Christian beliefs. (*Id.* at 42). Four of Davis' deputy clerks share her religious objection to same-sex marriage, and another is

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3) Only one aspect of the form has changed since *Obergefell*–whereas the marriage applicants were once referred to as "Bride" and "Groom," they are now identified as "First Party" and "Second Party."

undecided on the subject. (*Id.* at 49). The final deputy clerk is willing to issue the licenses, but Davis will not allow it because her name and title still appear twice on licenses that she does not personally sign. (Doc. # 29-3 at 7).

In the wake of *Obergefell*, Governor Beshear issued the following directive to all county clerks:

> Effective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky. In accordance with my instruction, all executive branch agencies are already working to make any operational changes that will be necessary to implement the Supreme Court decision. Now that same-sex couples are entitled to the issuance of a marriage license, the Department of Libraries and Archives will be sending a gender-neutral form to you today, along with instructions for its use.

(Doc. # 29-3 at 11). He has since addressed some of the religious concerns expressed by some county clerks:

> You can continue to have your own personal beliefs but, you're also taking an oath to fulfill the duties prescribed by law, and if you are at that point to where your personal convictions tell you that you simply cannot fulfill your duties that you were elected to do, th[e]n obviously an honorable course to take is to resign and let someone else step in who feels that they can fulfill those duties.

(Doc. # 29-11). Davis is well aware of these directives. Nevertheless, she plans to implement her "no marriage licenses" policy for the remaining three and a half years of her term as Rowan County Clerk. (Doc. # 26 at 67).

III. Standard of Review

A district court must consider four factors when entertaining a motion for preliminary injunction:

(1) whether the movant has demonstrated a strong likelihood of success on the merits;

(2) whether the movant would suffer irreparable harm;

(3) whether an injunction would cause substantial harm to others; and

(4) whether the public interest would be served by the issuance of such an injunction.

See Suster v. Marshall, 149 F.3d 523, 528 (6th Cir. 1998). These "are factors to be balanced, and not prerequisites that must be met." *In re Eagle Picher Indus., Inc.*, 963 F.3d 855, 859 (6th Cir. 1992) (stating further that these factors "simply guide the discretion of the court").

IV. Analysis

A. Defendant Kim Davis in her official capacity

Plaintiffs are pursuing this civil rights action against Defendants Rowan County and Kim Davis, in her individual and official capacities, under 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

This statute "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal quotations omitted).

At this stage of the litigation, Plaintiffs seek to vindicate their constitutional rights by obtaining injunctive relief against Defendant Kim Davis, in her official capacity as Rowan County Clerk. Because official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent," one might assume that Plaintiffs are effectively pursuing injunctive relief against Rowan County. *Monell v. New*

York City Dep't of Soc. Serv., 436 U.S. 658, 690 n. 55 (1978). However, Rowan County can only be held liable under § 1983 if its policy or custom caused the constitutional deprivation. *Id.* at 694.

A single decision made by an official with final policymaking authority in the relevant area may qualify as a policy attributable to the entity. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986). Whether an official acted as a final policymaker is a question of state or local law. *Id.* However, courts must avoid categorizing an official as a state or municipal actor "in some categorical, 'all or nothing' manner." *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 785 (1997). They key inquiry is whether an official is a "final policymaker [ ] for the local government in a particular area, or on a particular issue." *Id.* Accordingly, the Court will focus on whether Davis likely acted as a final policymaker for Rowan County regarding the issuance of marriage licenses.

While Davis is the elected Rowan County Clerk, subject to very little oversight by the Rowan County Fiscal Court, there are no other facts in the record to suggest that she set marriage policy for Rowan County. After all, the State of Kentucky has "absolute jurisdiction over the regulation of the institution of marriage." *Pinkhasov v. Petocz*, 331 S.W.3d 285, 291 (Ky. Ct. App. 2011). The State not only enacts marriage laws, it prescribes procedures for county clerks to follow when carrying out those laws, right down to the form they must use in issuing marriage licenses. *Id.*; *see also* Ky. Rev. Stat. Ann. §§ 402.080, 402.100. Thus, Davis likely acts for the State of Kentucky, and not as a final policymaker for Rowan County, when issuing marriage licenses.

This preliminary finding does not necessarily foreclose Plaintiffs from obtaining injunctive relief against Davis. While the Eleventh Amendment typically bars Plaintiffs from

bringing suit against a state or its officials, "official-capacity actions for prospective relief are not treated as actions against the state." *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985). This narrow exception, known as the *Ex Parte Young* doctrine, permits a federal court to "enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979) (citing *Ex Parte Young*, 209 U.S. 123 (1908)). "It rests on the premise–less delicately called a 'fiction,'–that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes." *Va. Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). Because Plaintiffs seek to enjoin Davis from violating their federal constitutional rights, this Court has the power to grant relief under *Ex Parte Young*.[4]

B. Plaintiffs' Motion for Preliminary Injunction

1. Plaintiffs' likelihood of success on the merits

a. The fundamental right to marry

Under the Fourteenth Amendment, a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This "due process" clause has both a procedural component and a substantive component. *See EJS Prop., LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012). Procedural due process simply requires that the government provide a fair procedure when depriving an individual of life, liberty or property. *Id.* By contrast, substantive due process "protects a narrow class

4) In their reply brief, Plaintiffs argued that the Court need not decide whether Davis is a state actor or municipal policymaker in order to grant injunctive relief. The Court's preliminary finding on this matter does not necessarily foreclose Plaintiffs from arguing the "municipal policymaker" theory in the future. The Court simply seeks to ensure that it is indeed able to grant injunctive relief against Kim Davis in her official capacity.

of interests, including those enumerated in the Constitution, those so rooted in the traditions of the people as to be ranked fundamental, and the interest in freedom from government actions that 'shock the conscience.'" *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014).

Although the Constitution makes no mention of the right to marry, the U.S. Supreme Court has identified it as a fundamental interest subject to Fourteenth Amendment protection. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia's anti-miscegenation statutes as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment). After all, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id*. This right applies with equal force to different-sex and same-sex couples. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may not be deprived of that right and that liberty.").

If a state law or policy "significantly interferes with the exercise of a fundamental right[, it] cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). A state substantially interferes with the right to marry when some members of the affected class "are absolutely prevented from getting married" and "[m]any others, able in theory to satisfy the statute's requirements[,] will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry." *Id.* at 387 (invalidating a Wisconsin statute that required individuals with child support obligations to

obtain a court order before marrying).

However, "not every state action, 'which relates in any way to the incidents of or the prerequisites for marriage must be subjected to rigorous scrutiny.'" *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1134 (6th Cir. 1995) (quoting *Zablocki*, 434 U.S. at 386). States may impose "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship." *Id.* at 1135. If the statute does not create a "direct legal obstacle in the path of persons desiring to get married" or significantly discourage marriage, then it will be upheld so long as it is rationally related to a legitimate government interest. *Id.* (quoting *Zablocki* 434 U.S. at 387-88 n. 12); *see also Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977) (upholding a Social Security provision that terminated secondary benefits received by the disabled dependent child of a covered wage earner if that child married an individual who was not entitled to benefits).

The state action at issue in this case is Defendant Davis' refusal to issue *any* marriage licenses. Plaintiffs contend that Davis' "no marriage licenses" policy significantly interferes with their right to marry because they are unable to obtain a license in their home county. Davis insists that her policy does not significantly discourage Plaintiffs from marrying because they have several other options for obtaining licenses: (1) they may go to one of the seven neighboring counties that *are* issuing marriage licenses; (2) they may obtain licenses from Rowan County Judge Executive Walter Blevins; or (3) they may avail themselves of other alternatives being considered post-*Obergefell.*

Davis is correct in stating that Plaintiffs can obtain marriage licenses from one of the surrounding counties; thus, they are not totally precluded from marrying in Kentucky. However, this argument ignores the fact that Plaintiffs have strong ties to Rowan County.

They are long-time residents who live, work, pay taxes, vote and conduct other business in Morehead. Under these circumstances, it is understandable that Plaintiffs would prefer to obtain their marriage licenses in their home county. And for other Rowan County residents, it may be more than a preference. The surrounding counties are only thirty minutes to an hour away, but there are individuals in this rural region of the state who simply do not have the physical, financial or practical means to travel.[5]

This argument also presupposes that Rowan County will be the only Kentucky county not issuing marriage licenses. While Davis may be the only clerk currently turning away eligible couples, 57 of the state's 120 elected county clerks have asked Governor Beshear to call a special session of the state legislature to address religious concerns related to same-sex marriage licenses.[6] (Doc. # 29-9). If this Court were to hold that Davis' policy did not significantly interfere with the right to marry, what would stop the other 56 clerks from following Davis' approach? What might be viewed as an inconvenience for residents of one or two counties quickly becomes a substantial interference when applicable to approximately half of the state.

As for her assertion that Judge Blevins may issue marriage licenses, Davis is only partially correct. KRS § 402.240 provides that, "[i]n the absence of the county clerk, or

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5) The median household income in Rowan County is $35,236 and 28.6% of the population lives below the poverty line. *See* United States Census Bureau, http://quickfacts.census.gov/qfd/states/21/21205.html. For the entire state of Kentucky, the median household income is $43,036 and 18.8% of the population lives below the poverty line. *Id.*

6) *See also* Jack Brammer, 57 County Clerks Ask Governor for Special Session on Same-Sex Marriage Licenses, The Lexington Herald Leader (July 8, 2015), http://www.kentucky.com/2015/07/08/3936545_57-kentucky-county-clerks-ask.html?rh=1; Terry DeMio, Boone, Ky. Clerks Want Same-Sex License Law, Cincinnati Enquirer (July 9, 2015), http://www.cincinnati.com/story/news/local/northern-ky/2015/07/09/boone-clerk-wants-special-legislative-session-address-sex-marriage-issues-clerks/29919103/.

during a vacancy in the office, the county judge/executive may issue the license and, in so doing, he shall perform the duties and incur all the responsibilities of the clerk." The statute does not explicitly define "absence," suggesting that a traditional interpretation of the term is appropriate. *See* Merriam-Webster Online Dictionary, 2015, http://www.merriam-webster.com/, (describing "absence" as "a period of time when someone is not present at a place, job, etc."). However, Davis asks the Court to deem her "absent," for purposes of this statute, because she has a religious objection to issuing the licenses. While this is certainly a creative interpretation, Davis offers no legal precedent to support it.

This proposal also has adverse consequences for Judge Blevins. If he began issuing marriage licenses while Davis continued to perform her other duties as Rowan County Clerk, he would likely be exceeding the scope of his office. After all, KRS § 402.240 only authorizes him to issue marriage licenses when Davis is *unable* to do so; it does not permit him to assume responsibility for duties that Davis does not wish to perform. Such an arrangement not only has the potential to create tension between the next judge executive and county clerk, it sets the stage for further manipulation of statutorily defined duties.[7] Under these circumstances, the Court simply cannot count this as a viable option for Plaintiffs to obtain their marriage licenses.

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7) Even if the Court were inclined to accept Davis' interpretation of the term "absence," it would have doubts about the practicality of this approach. Judge Blevins is the highest elected official in Rowan County. (Doc. # 26 at 7). He is frequently out of the office on official business. (*Id.*). While Judge Blevins would not have to process a large number of marriage requests, he might not be regularly available for couples seeking licenses. Thus, the Court would be concerned about Judge Blevins' ability to perform this function as efficiently as Davis and her six deputy clerks.

Davis finally suggests that Plaintiffs will have other avenues for obtaining marriage licenses in the future. For example, county clerks have urged Governor Beshear to create an online marriage licensing system, which would be managed by the State of Kentucky. While these options may be available someday, they are not feasible alternatives at present. Thus, they have no impact on the Court's "substantial interference" analysis.

Having considered Davis' arguments in depth, the Court finds that Plaintiffs have one feasible avenue for obtaining their marriage licenses–they must go to another county. Davis makes much of the fact that Plaintiffs are able to travel, but she fails to address the one question that lingers in the Court's mind. Even if Plaintiffs are able to obtain licenses elsewhere, why should they be required to? The state has long entrusted county clerks with the task of issuing marriage licenses. It does not seem unreasonable for Plaintiffs, as Rowan County voters, to expect their elected official to perform her statutorily assigned duties. And yet, that is precisely what Davis is refusing to do. Much like the statutes at issue in *Loving* and *Zablocki*, Davis' "no marriage licenses" policy significantly discourages many Rowan County residents from exercising their right to marry and effectively disqualifies others from doing so. The Court must subject this policy apply heightened scrutiny.

b. The absence of a compelling state interest

When pressed to articulate a compelling state interest served by her "no marriage licenses" policy, Davis responded that it serves the State's interest in protecting her religious freedom. The State certainly has an obligation to "observe the basic free exercise rights of its employees," but this is not the extent of its concerns. *Marchi v. Bd. of Coop. Educ. Serv. of Albany*, 173 F.3d 469, 476 (2d. Cir. 1999). In fact, the State has some

priorities that run contrary to Davis' proffered state interest. Chief among these is its interest in preventing Establishment Clause violations. *See* U.S. Const. amend. I (declaring that "Congress shall make no law respecting the establishment of religion"). Davis has arguably committed such a violation by openly adopting a policy that promotes her own religious convictions at the expenses of others.[8] In such situations, "the scope of the employees' rights must [ ] yield to the legitimate interest of governmental employer in avoiding litigation." *Marchi*, 173 F.3d at 476.

The State also has a countervailing interest in upholding the rule of law. *See generally Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) ("The rule of law, evenly applied to minorities as well as majorities, . . . is the great mucilage that holds society together."). Our form of government will not survive unless we, as a society, agree to respect the U.S. Supreme Court's decisions, regardless of our personal opinions. Davis is certainly free to disagree with the Court's opinion, as many Americans likely do, but that does not excuse her from complying with it. To hold otherwise would set a dangerous precedent.

For these reasons, the Court concludes that Davis' "no marriage licenses" policy likely infringes upon Plaintiffs' rights without serving a compelling state interest. Because Plaintiffs have demonstrated a strong likelihood of success on the merits of their claim, this first factor weighs in favor of granting their request for relief.

2. Potential for irreparable harm to Plaintiffs

When a plaintiff demonstrates a likelihood of success on the merits of a

8) Although it is not the focus of this opinion, Plaintiffs have already asserted such an Establishment Clause claim against Kim Davis in her official capacity. (Doc. # 1 at 13).

constitutional deprivation claim, it follows that he or she will suffer irreparable injury absent injunctive relief. *See Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights."); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir .1998) (finding that the loss of First Amendment rights for a minimal period of time results in irreparable harm); *Ohio St. Conference of NAACP v. Husted*, 43 F. Supp. 3d 808, 851 (S.D. Ohio 2014) (recognizing that a restriction on the fundamental right to vote constitutes irreparable injury).

The Court is not aware of any Sixth Circuit case law explicitly stating that a denial of the fundamental right to marry constitutes irreparable harm. However, the case law cited above suggests that the denial of constitutional rights, enumerated or unenumerated, results in irreparable harm. It follows that Plaintiffs will suffer irreparable harm from Davis' "no marriage licenses" rule, absent injunctive relief. Therefore, this second factor also weighs in favor of granting Plaintiffs' Motion.

3. Potential for substantial harm to Kim Davis

a. The right to free exercise of religion

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*." *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the First Amendment to the states via the Fourteenth Amendment). This Free Exercise Clause "embraces two concepts,–freedom to believe and freedom to act." *Id.* at 304. "The first is absolute but, in the nature of things, the second cannot be." *Id.* Therefore, "[c]onduct remains subject to regulation for the

protection of society." *Id.*

Traditionally, a free exercise challenge to a particular law triggered strict scrutiny. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 407 (1963). A statute would only be upheld if it served a compelling government interest and was narrowly tailored to effectuate that interest. *Id.* However, the U.S. Supreme Court has retreated slightly from this approach. *See Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). While laws targeting religious conduct remain subject to strict scrutiny, "[a] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Babalu*, 508 U.S. at 532; *see also Smith*, 494 U.S. at 880 (stating further that an individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate").

"Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Babalu*, 508 U.S. at 532. A law is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533 (finding that a local ordinance forbidding animal sacrifice was not neutral because it focused on "rituals" and had built-in exemptions for most other animal killings). The Court has not yet "defined with precision the standard used to evaluate whether a prohibition is of general application." *Id.* at 543. However, it has observed that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment,' and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious

motivation." *Id.* at 542.

While *Smith* and *Babalu* do not explicitly mention the term "rational basis," lower courts have interpreted them as imposing a similar standard of review on neutral laws of general applicability. *See, e.g., Seger v. Ky. High Sch. Athletic Ass'n*, 453 F. App's 630, 634 (2011). Under rational basis review, laws will be upheld if they are "rationally related to furthering a legitimate state interest." *Id.* at 635 (noting that "[a] law or regulation subject to rational basis review is accorded a strong presumption of validity"); *see also F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (stating generally that laws subject to rational basis review must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

In response to *Smith* and *Babalu*, Congress enacted the Religious Freedom Restoration Act ("RFRA"). *See* 42 U.S.C. § 2000bb-1. It prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," except when the government demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Id.* Although Congress intended RFRA to apply to the states as well as the federal government, the Court held that this was an unconstitutional exercise of Congress' powers under Section Five of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). Free exercise challenges to federal laws remain subject to RFRA, while similar challenges to state policies are governed by *Smith*. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

For purposes of this inquiry, the state action at issue is Governor Beshear's post-*Obergefell* directive, which explicitly instructs county clerks to issue marriage licenses to

same-sex couples. Davis argues that the Beshear directive not only substantially burdens her free exercise rights by requiring her to disregard sincerely-held religious beliefs, it does not serve a compelling state interest. She further insists that Governor Beshear could easily grant her a religious exemption without adversely affecting Kentucky's marriage licensing scheme, as there are readily available alternatives for obtaining licenses in and around Rowan County.[9]

This argument proceeds on the assumption that Governor Beshear's policy is not neutral or generally applicable, and is therefore subject to strict scrutiny.[10] However, the text itself supports a contrary inference. Governor Beshear first describes the legal impact of the Court's decision in *Obergefell*, then provides guidance for all county clerks in implementing this new law. His goal is simply to ensure that the activities of the Commonwealth are consistent with U.S. Supreme Court jurisprudence.

While facial neutrality is not dispositive, Davis has done little to convince the Court that Governor Beshear's directive aims to suppress religious practice. She has only one piece of anecdotal evidence to demonstrate that Governor Beshear "is picking and choosing the conscience-based exemptions to marriage that he deems acceptable." (Doc. # 29 at 24). In 2014, Attorney General Jack Conway declined to appeal a federal district

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9) Davis further develops this argument in her own Motion for Preliminary Injunction (Doc. # 39) against Governor Beshear and KDLA Librarian Wayne Onkst. That Motion is not yet ripe for review.

10) In *Smith*, the U.S. Supreme Court indicated that free exercise claims involving neutral and generally applicable laws may still be subject to heightened scrutiny if asserted alongside another constitutional right. If the Court concludes that the Beshear directive is neutral and generally applicable, Davis argues that strict scrutiny must still apply because her free exercise claim is coupled with a free speech claim. (Doc. # 29 at 23). However, this proposal fails because Davis' free speech rights are qualified by virtue of her public employment. *See Draper v. Logan Cnty. Pub. Library*, 403 F. Supp. 2d 608, 621-22 (W.D. Ky. 2005) (applying the *Pickering* balancing test to a combined free exercise and free speech claim asserted by a public employee). The Court will discuss this concept further in the next section.

court decision striking down Kentucky's constitutional and statutory prohibitions on same-sex marriage. (Doc. # 29-12). He openly stated that he could not, in good conscience, defend discrimination and waste public resources on a weak case.[11] (*Id.*). Instead of directing Attorney General Conway to pursue the appeal, regardless of his religious beliefs, Governor Beshear hired private attorneys for that purpose. (Doc. # 29-13). He has so far refused to extend such an "exemption" to county clerks with religious objections to same-sex marriage. (Doc. # 29-11).

However, Davis fails to establish that her current situation is comparable to Attorney General Conway's position in 2014. Both are elected officials who have voiced strong opinions about same-sex marriage, but the comparison ends there. Governor Beshear did not actually "exempt" Attorney General Conway from pursuing the same-sex marriage appeal. Attorney General Conway's decision stands as an exercise of prosecutorial discretion on an unsettled legal question. By contrast, Davis is refusing to recognize the legal force of U.S. Supreme Court jurisprudence in performing her duties as Rowan County Clerk. Because the two are not similarly situated, the Court simply cannot conclude that Governor Beshear treated them differently based upon their religious convictions. There being no other evidence in the record to suggest that the Beshear directive is anything but neutral and generally applicable, it will likely be upheld if it is rationally related to a

11) Davis refers to the U.S. District Court for the Western District of Kentucky's decisions in *Bourke v. Beshear*, 996 F. Supp. 2d 542, 545 (W.D. Ky. 2014), and *Love v. Beshear*, 989 F. Supp. 2d 536, 539 (W.D. Ky. 2014). Judge John Heyburn held that Kentucky's constitutional and statutory prohibitions on same-sex marriages "violate[ ] the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review." *Bourke*, 996 F. Supp. 2d at 544. The Sixth Circuit Court of Appeals consolidated these cases with several similar matters originating from Ohio, Michigan and Tennessee and reversed them. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). The Supreme Court of the United States then granted certiorari on these cases, now collectively known as *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).

legitimate government purpose.

The Beshear directive certainly serves the State's interest in upholding the rule of law. However, it also rationally relates to several narrower interests identified in *Obergefell.* By issuing licenses to same-sex couples, the State allows them to enjoy "the right to personal choice regarding marriage [that] is inherent in the concept of individual autonomy" and enter into "a two-person union unlike any other in its importance to the committed individuals." 135 S. Ct. at 2599-2600. It also allows same-sex couples to take advantage of the many societal benefits and fosters stability for their children. *Id.* at 2600-01. Therefore, the Court concludes that it likely does not infringe upon Davis' free exercise rights.

b. The right to free speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Under the Free Speech Clause, an individual has the "right to utter or print, [as well as] the right to distribute, the right to receive and the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)(*citing Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)). An individual also has the "right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (invalidating a state law that required New Hampshire drivers to display the state motto on their license plates). After all, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.*

While the Free Speech Clause protects citizens' speech rights from government intrusion, it does not stretch so far as to bar the government "from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239,

2245-46 (2015). "[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and carries out its duties on their behalf." *Id.* That being said, the government's ability to express itself is not unlimited. *Id.* "[T]he Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech." *Id.* (stating further that "[c]onstitutional and statutory provisions outside of the Free Speech Clause may [also] limit government speech").

This claim also implicates the Beshear directive. Davis contends that this directive violates her free speech rights by compelling her to express a message she finds objectionable. Specifically, Davis must issue marriage licenses bearing her "imprimatur and authority" as Rowan County Clerk to same-sex couples . Doc. # 29 at 27). Davis views such an act as an endorsement of same-sex marriage, which conflicts with her sincerely-held religious beliefs.

As a preliminary matter, the Court questions whether the act of issuing a marriage license constitutes speech. Davis repeatedly states that the act of issuing these licenses requires her to "authorize" same-sex marriage. A close inspection of the KDLA marriage licensing form refutes this assertion. The form does not require the county clerk to condone or endorse same-sex marriage on religious or moral grounds. It simply asks the county clerk to certify that the information provided is accurate and that the couple is qualified to marry under Kentucky law. Davis' religious convictions have no bearing on this purely legal inquiry.

The Court must also acknowledge the possibility that any such speech is attributable to the government, rather than Davis. *See Walker*, 135 S. Ct. at 2248 (finding that

specialty license plates are government speech because the government has exercised final approval over the designs, and thus, chosen "how to present itself and its constituency"). The State prescribes the form that Davis must use in issuing marriage licenses. She plays no role in composing the form, and she has no discretion to alter it. Moreover, county clerks' offices issue marriage licenses on behalf of the State, not on behalf of a particular elected clerk.

Assuming *arguendo* that the act of issuing a marriage license is speech by Davis, the Court must further consider whether the State is infringing upon her free speech rights by compelling her to convey a message she finds disagreeable. However, the seminal "compelled speech" cases provide little guidance because they focus on private individuals who are forced to communicate a particular message on behalf of the government. *See, e.g., W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down a state law that required schoolchildren to recite the Pledge of Allegiance and salute the flag). Davis is a public employee, and therefore, her speech rights are different than those of a private citizen.[12] *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

"[T]he government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment," but it does have "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." *Connick v. Myers*, 461 U.S. 138, 156 (1983); *Waters v. Churchill*, 511 U.S. 661, 671

12) Most free speech cases involving public employees center on compelled silence rather than compelled speech. *See, e.g., Connick*, 461 U.S. at 147-48 (focusing on a district attorney's claim that she was fired in retaliation for exercising her free speech rights). "[I]n the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97.

(1994). Accordingly, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418; *see also U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, (1973) (stating that "neither the First Amendment nor any other provision of the Constitution" invalidates the Hatch Act's bar on partisan political conduct by federal employees).

"[T]wo inquiries [ ] guide interpretation of the constitutional protections accorded to public employee speech." *Garcetti*, 547 U.S. at 418 (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 563 (1968)). First, a court must determine "whether the employee spoke as a citizen on a matter of public concern." *Id.* (explaining further that this question often depends upon whether the employee's speech was made pursuant to his or her official duties). *Id.* at 421. If the answer is no, then the employee's speech is not entitled to First Amendment protection. *Id.* at 421 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."). If the answer is yes, a court must then consider "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* (stating further that the government's restrictions "must be directed at speech that has some potential to affect the entity's operations").

The Court must adapt this test slightly because Davis' claim focuses on her right *not* to speak. In this context, the first inquiry is whether Davis refused to speak (i.e. refused to issue marriage licenses) as a citizen on a matter of public concern. The logical answer to this question is no, as the average citizen has no authority to issue marriage licenses. Davis is only able to issue these licenses, or refuse to issue them, because she is the

Rowan County Clerk. Because her speech (in the form of her refusal to issue marriage licenses) is a product of her official duties, it likely is not entitled to First Amendment protection. The Court therefore concludes that Davis is unlikely to succeed on her compelled speech claim.

c. The prohibition on religious tests

Article VI, § 3 of the U.S. Constitution provides as follows:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Under this Clause, "[t]he fact [ ] that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso v. Watkins*, 367 U.S. 488 (1961) (striking down a state requirement that an individual declare his belief in God in order to become a notary public); *see also McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating a state law that prevented religious officials from serving in the state legislature).

Davis contends that "[c]ompelling all individuals who have any connection with the issuance of marriage licenses . . . to authorize, approve, and participate in that act against their sincerely held religious beliefs about marriage, without providing accommodation, amounts to an improper religious test for holding (or maintaining) public office." (Doc. # 29 at 20). The Court must again point out that the act of issuing a marriage license to a same-sex couple merely signifies that the couple has met the *legal requirements* to marry. It is not a sign of moral or religious approval. The State is not requiring Davis to express a

particular religious belief as a condition of public employment, nor is it forcing her to surrender her free exercise rights in order to perform her duties. Thus, it seems unlikely that Davis will be able to establish a violation of the Religious Test Clause.

Although Davis focuses on the Religious Test Clause, the Court must draw her attention to the first half of Article VI, Clause § 3. It requires all state officials to swear an oath to defend the U.S. Constitution. Davis swore such an oath when she took office on January 1, 2015. However, her actions have not been consistent with her words. Davis has refused to comply with binding legal jurisprudence, and in doing so, she has likely violated the constitutional rights of her constituents. When such "sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. " *Obergefell*, 135 S. Ct. at 2602. Such policies simply cannot endure.

d. The Kentucky Religious Freedom Act

Kentucky Constitution § 1 broadly declares that "[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he right of worshiping Almighty God according to the dictates of their consciences." Kentucky Constitution § 5 gives content to this guarantee:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall,

in any case whatever, control or interfere with the rights of conscience.

Kentucky courts have held that Kentucky Constitution § 5 does not grant more protection to religious practice than the First Amendment. *Gingerich v. Commonwealth*, 382 S.W.3d 835, 839-40 (Ky. 2012). Such a finding would normally permit the Court to collapse its analysis of state and federal constitutional provisions. However, the Kentucky Religious Freedom Act, patterned after the federal RFRA, subjects state free exercise challenges to heightened scrutiny:

> 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.

Ky. Rev. Stat. Ann. § 446.350.

Davis again argues that the Beshear directive substantially burdens her religious freedom without serving a compelling state interest. The record in this case suggests that the burden is more slight. As the Court has already pointed out, Davis is simply being asked to signify that couples meet the legal requirements to marry. The State is not asking her to condone same-sex unions on moral or religious grounds, nor is it restricting her from engaging in a variety of religious activities. Davis remains free to practice her Apostolic Christian beliefs. She may continue to attend church twice a week, participate in Bible Study and minister to female inmates at the Rowan County Jail. She is even free to believe that marriage is a union between one man and one woman, as many Americans do. However, her religious convictions cannot excuse her from performing the duties that she

took an oath to perform as Rowan County Clerk. The Court therefore concludes that Davis is unlikely to suffer a violation of her free exercise rights under Kentucky Constitution § 5.

4. Public interest

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F. 3d 1071, 1079 (6th Cir. 1994). Because Davis' "no marriage licenses" policy likely infringes upon Plaintiffs' fundamental right to marry, and because Davis herself is unlikely to suffer a violation of her free speech or free exercise rights if an injunction is issued, this fourth and final factor weighs in favor of granting Plaintiffs' Motion.

V. Conclusion

District courts are directed to balance four factors when analyzing a motion for preliminary injunction. In this case, all four factors weigh in favor of granting the requested relief. Accordingly, for the reasons set forth herein,

IT IS ORDERED that Plaintiffs' Motion for Preliminary Injunction (Doc. # 2) against Defendant Kim Davis, in her official capacity as Rowan County Clerk, is hereby **granted**.

IT IS FURTHER ORDERED that Defendant Kim Davis, in her official capacity as Rowan County Clerk, is hereby preliminarily enjoined from applying her "no marriage licenses" policy to future marriage license requests submitted by Plaintiffs.

This 12th day of August, 2015.

Signed By:
David L. Bunning
United States District Judge

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APPENDIX B –

ORDER DENYING MOTION TO STAY PENDING APPEAL AND GRANTING TEMPORARY STAY TO SEEK SIMILAR RELIEF FROM SIXTH CIRCUIT

(DISTRICT COURT)

CASE NO. 0:15-CV-00044-DLB

AUGUST 17, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT ASHLAND

CIVIL ACTION NO. 15-44-DLB

APRIL MILLER, et al. **PLAINTIFFS**

vs. **ORDER**

KIM DAVIS, both individually and in her official capacity, et al. **DEFENDANTS**

****

I. Introduction

This matter is before the Court on Defendant Kim Davis' Motion to Stay (Doc. # 45) the Court's Memorandum Opinion and Order of August 12, 2015 (Doc. # 43), in which it enjoined her from enforcing her "no marriage licenses" policy against Plaintiffs. Davis argues that a stay is necessary to protect her constitutional rights while the Sixth Circuit Court of Appeals entertains her interlocutory appeal of the Court's decision (Doc. # 44). Plaintiffs having submitted a Response in Opposition to the Motion (Doc. # 46), and Davis having filed her Reply (Doc. # 51), this matter is now ripe for the Court's review. After considering the record, the controlling law, and the parties' arguments, the Court concludes that a stay pending appeal is not warranted. Defendant Kim Davis' Motion to Stay (Doc. # 45) is therefore **denied**.

However, in recognition of the constitutional issues involved, and realizing that emotions are running high on both sides of the debate, the Court finds it appropriate to

temporarily stay this Order pending review of Defendant Davis' Motion to Stay (Doc. # 45) by the Sixth Circuit Court of Appeals.

II. Analysis

"While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c); *see also* Fed. R. App. P. 8(a)(1) (providing that "[a] party must ordinarily move first in the district court for . . . an order suspending modifying, restoring, or granting an injunction while an appeal is pending). To determine whether a stay is warranted, district courts must consider the following four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (noting that "the factors to be considered are the same for both a preliminary injunction and a stay pending appeal").

A movant "need not always establish a high probability of success on the merits" to justify the granting of a stay. *Id.*

> The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship however, is not without its limits; the movant is always required to demonstrate more than the mere "possibility" of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if a stay is granted, he is still required to show, at a minium, "serious questions going to the merits."

Id. at 153-54 (internal citations omitted).

Courts generally look to three factors in evaluating the harm that will occur absent a stay: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. *Id.* at 154. A movant must not only demonstrate that the harm alleged is "both certain and immediate, rather than speculative or theoretical," he or she "must provide some evidence that the harm has occurred in the past and is likely to occur again." *Id.*

In its Memorandum Opinion and Order, the Court held that Davis' "no marriage licenses" policy likely infringed upon Plaintiffs' fundamental right to marry, thus warranting injunctive relief. (Doc. # 43 at 28). The Court further found that Davis was unlikely to suffer a violation of her free exercise rights if an injunction was issued. (*Id.*). Although these findings suggest that Davis is unlikely to prevail on appeal, she insists that "[t]his case presents substantial legal matters of first impression for this (or any other) federal appeals court following the *Obergefell* decision from the United States Supreme Court." (Doc. # 45-1 at 10).

Davis cites to *United States v. Coffman* for the proposition that matters of first impression create serious questions going to the merits. *See* Civ. A. No. 5:09-181-KKC, 2010 WL 4683761 (E.D. Ky. Nov. 12, 2010). In that case, the Government moved the court to stay its previous order, which "requir[ed] the Government to remove *lis pendens* notices it placed on property listed in the superseding indictment as substitute assets, pending an appeal to the United States Court of Appeals for the Sixth Circuit." *Id.* at *1. Because the court was not aware of any precedent addressing "whether the Government has authority under Kentucky law to place *lis pendens* notices on a criminal defendant's substitute assets

prior to trial," it determined that the Government had more than a mere possibility of success on the merits on appeal. *Id.* at *2.

In this case, by contrast, the Court is not tasked with resolving an unsettled issue of state law. It is being asked to apply clearly established federal law, as enunciated in *Obergefell*. 135 S. Ct. 2584 (2015). Although the U.S. Supreme Court did not consider the more narrow issue before this Court–whether requiring a county clerk to issue marriage licenses to same-sex couples violates her free exercise rights–it was not silent as to the likely impact of its holding on religious freedom.

> The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. The rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choice and diminish their personhood to deny them this right.
>
> * * * * *
>
> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

Id. at 2602-03, 2607. These passages strongly suggest that Davis' "religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk." (Doc. # 43 at 27-28). With this guidance at hand, the Court finds that Davis has not established a likelihood of success on the merits on appeal. This factor weighs against staying the case.

Davis next argues that she is highly likely to suffer irreparable harm absent a stay, which compensates for the low likelihood of her success on appeal. Specifically, Davis contends that she will incur "significant, irrevocable, and irreversible harm if she is forced to authorize and approve a [same-sex marriage] license against her religious conscience." (Doc. # 45-1 at 12). She also points out that "[n]o one, and not even a permanent injunction in her favor, can reverse that action if she is compelled to violate her conscience." (*Id.* at 13).

While Davis is correct in stating that a violation of her free exercise rights would constitute irreparable harm, she has failed to show that she is likely to suffer a violation of her free exercise rights in the first place. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir .1998). As the Court pointed out in its Memorandum Opinion and Order, Davis is only being required to certify that couples meet the legal requirements to marry. She does not have to authorize or approve any unions on moral or religious grounds. Absent a likely constitutional violation, Davis is unlikely to suffer irreparable harm absent a stay.

The Court having found that Davis is unlikely to prevail on appeal or suffer irreparable harm absent a stay, it follows that Plaintiffs are likely to suffer harm if a stay is granted. The Court has already held that Plaintiffs are likely to succeed on the merits of

their claim and enjoined Davis from enforcing her "no marriage licenses" policy against them. If the Court decided to delay enforcement of its Order while Davis pursues an unpromising appeal, it would essentially give Plaintiffs a favorable legal ruling with no teeth and prolong the likely violation of their constitutional rights. Thus, this third factor also weighs against staying the Order.

Finally, the Court notes that it is in the public interest to prevent the violation of a party's constitutional rights. *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F. 3d 1071, 1079 (6th Cir. 1994). Because Davis' "no marriage licenses" policy likely infringes upon Plaintiffs' fundamental right to marry, and because Davis herself is unlikely to suffer a violation of her free exercise rights if compelled to issue marriage licenses, the Court concludes that the public interest is not served by granting a stay.

III. Conclusion

District courts are directed to balance four factors when analyzing a motion to stay. In this case, all four factors weigh in favor of denying the requested relief. Accordingly, for the reasons set forth herein,

IT IS ORDERED that Defendant Kim Davis' Motion to Stay (Doc. # 45) be, and is, hereby **DENIED**.

IT IS FURTHER ORDERED that **this Order denying Kim Davis' Motion to Stay** be, and is, hereby **TEMPORARILY STAYED** pending review of Defendant Davis' Motion to Stay (Doc. # 45) by the Sixth Circuit Court of Appeals.

This 17th day of August, 2015.

Signed By:
David L. Bunning
United States District Judge

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APPENDIX C –

ORDER SETTING EXPIRATION DATE ON TEMPORARY STAY AS AUGUST 31, 2015

(DISTRICT COURT)

CASE NO. 0:15-CV-00044-DLB

AUGUST 19, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT ASHLAND

CIVIL ACTION NO. 15-44-DLB

APRIL MILLER, et al. **PLAINTIFFS**

vs. **ORDER**

KIM DAVIS, both individually and in her official capacity, et al. **DEFENDANTS**

****

On August 17, 2015, this Court entered an Order (Doc. # 52) denying Defendant Kim Davis' motion to stay the Court's August 12, 2015 Order (Doc. # 43) granting Plaintiffs a preliminary injunction enjoining Defendant Davis from enforcing her "no marriage licenses" policy against Plaintiffs. However, in deference to the Sixth Circuit Court of Appeals, the Court temporarily stayed its August 12, 2015 Order to give the appellate court an opportunity to review, on an expedited basis, the August 17, 2015 Order denying the motion to stay.

Upon review of Federal Rule of Appellate Procedure 8(a)(2), governing stays of injunctions pending appeal, the Court finds it necessary to set an expiration date for the temporary stay. Accordingly,

IT IS ORDERED that the Court's temporary stay of its August 17, 2015 Order **shall expire on August 31, 2015**, absent an Order to the contrary by the Sixth Circuit Court of Appeals.

This 19th day of August, 2015.

Signed By:
David L. Bunning
United States District Judge

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APPENDIX D –

ORDER DENYING EMERGENCY MOTION
TO STAY PENDING APPEAL

(SIXTH CIRCUIT)

CASE NO. 15-5880

AUGUST 26, 2015

No. 15-5880

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL MILLER, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	O R D E R
	)	
KIM DAVIS, in her individual and official capacity as Rowan County Clerk,	)	
	)	
Defendant-Appellant.	)	
	)	

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

Defendant Kim Davis appeals the August 12, 2015 preliminary injunction enjoining her, in her official capacity, "from applying her 'no marriage licenses' policy to future marriage license requests submitted by the Plaintiffs." She moves for a stay of the preliminary injunction pending appeal. The district court denied a similar motion for a stay pending appeal on August 17, 2015. The plaintiffs oppose the motion for a stay pending appeal. Eagle Forum Education & Legal Defense Fund ("Eagle Forum") moves for leave to file an *amicus curiae* brief in support of the issuance of a stay pending appeal. We grant the motion to file the amicus brief, but deny the motion for a stay.

Davis "bears the burden of showing that the circumstances justify" the exercise of discretion to grant a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Four factors guide our consideration of her motion for a stay: (1) whether Davis has a strong likelihood of success on the merits; (2) whether she will suffer irreparable harm in the absence of

a stay; (3) whether the requested injunctive relief will substantially injure other interested parties; and (4) where the public interest lies. *Id*. at 434; *see also Ohio St. Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014); *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012). "The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. And the four "factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Husted*, 698 F.3d at 343 (internal quotation marks omitted).

As the County Clerk for Rowan County, Kentucky, Davis's official duties include the issuance of marriage licenses. In response to the Supreme Court's holding in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), that a state is not permitted "to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex," Davis unilaterally decided that her office would no longer issue any marriage licenses. According to Davis, the issuance of licenses to same-sex marriage couples infringes on her rights under the United States and Kentucky Constitutions as well as the Kentucky Freedom Restoration Act, KY. Rev. Stat. Ann. § 446.350. The Rowan County Clerk's office has since refused to issue marriage licenses to the plaintiffs, and this action ensued.

The request for a stay pending appeal relates solely to an injunction against Davis in her official capacity. The injunction operates not against Davis personally, but against the holder of her office of Rowan County Clerk. In light of the binding holding of *Obergefell*, it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court. There is thus little or no likelihood that the Clerk in her official capacity will prevail on appeal. *Cf. Garcetti v.*

Ceballos, 547 U.S. 410, 421 (2006); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. School Dist.*, 624 F.3d 332, 338 (6th Cir. 2010) (where a public employee's speech is made pursuant to his duties, "the relevant speaker [is] the government entity, not the individual").

Eagle Forum's motion for leave to file a brief in support of the motion for stay as *amicus curiae* is **GRANTED**. Davis's motion for a stay of the preliminary injunction pending appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
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Re: Case No. 15-5880, *April Miller, et al v. Kim Davis*
Originating Case No. : 0:15-cv-00044

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Michelle M. Davis
Case Manager
Direct Dial No. 513-564-7025

Enclosure

APPENDIX E –

VERIFIED THIRD-PARTY COMPLAINT
FILED BY KIM DAVIS

(DISTRICT COURT)

CASE NO. 0:15-CV-00044-DLB

AUGUST 4, 2015

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.	:	
	:	
STEVEN L. BESHEAR, in his official capacity as Governor of Kentucky, and WAYNE ONKST, in his official capacity as State Librarian and Commissioner, Kentucky Department for Libraries and Archives,	:	
	:	
Third-Party Defendants.	:	
	:	

VERIFIED THIRD-PARTY COMPLAINT OF DEFENDANT KIM DAVIS

Defendant and Third-Party Plaintiff, KIM DAVIS ("Davis"), for her third-party complaint pursuant to Rule 14, Fed. R. Civ. P., sues Third-Party Defendant STEVEN L. BESHEAR, in his official capacity as Governor of Kentucky ("Governor Beshear"), and Third-Party Defendant WAYNE ONKST, in his official capacity as State Librarian and Commissioner, Kentucky Department for Libraries and Archives ("Commissioner Onkst"), and alleges:

INTRODUCTION

1. 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.

JURISDICTION AND VENUE

2. This action arises under Article VI and the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, Sections 1, 3, 5, and 8 of the Constitution of Kentucky, and the Kentucky Religious Freedom Restoration Act, Ky. Rev. Stat. §§ 446.350 (the Kentucky "RFRA").

3. This Court has subject matter jurisdiction over Davis's federal law claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has subject matter jurisdiction over Davis's state law claims pursuant 28 U.S.C. § 1367.

4. This Court has jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

PARTIES

5. Davis is the County Clerk for Rowan County, Kentucky. She was elected to the office of County Clerk in November 2014, and officially took office January 1, 2015, for a four-

year term. Prior to taking office, Davis was a deputy clerk for her predecessor in office for nearly thirty years.

6. Governor Beshear is the Governor of the Commonwealth of Kentucky. As the highest executive officer of the Commonwealth, Governor Beshear has responsibility for effecting Kentucky marriage law, and has final policymaking authority over the enforcement of Kentucky marriage laws.

7. Commissioner Onkst is the State Librarian and Commissioner of the Kentucky Department for Libraries and Archives. The Kentucky Department for Libraries and Archives ("KDLA") is an executive branch department of Kentucky government "headed by a commissioner whose title shall be state librarian who shall be appointed by and serve at the pleasure of the Governor." Ky. Rev. Stat. § 171.130. Commissioner Onkst has responsibility for the design and provision of the official Kentucky marriage license form to be used by all county clerks in the issuance of marriage licenses, and has final policymaking authority over the design of the official Kentucky marriage license form to be used by all county clerks in the issuance of marriage licenses.

GENERAL ALLEGATIONS

Administration of Kentucky Marriage Policy before *Obergefell*

8. The Commonwealth of Kentucky has a body of democratically-enacted law memorializing the millennia-old, natural definition of marriage as the union of one man and one woman. In 1998, the Kentucky legislature codified at Ky. Rev. Stat. § 402.005 the natural definition of marriage, previously entrenched in Kentucky common law, that "'marriage' refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon

those whose association is founded on the distinction of sex." In 2004, the Kentucky legislature proposed a constitutional amendment, which was subsequently enacted on the approval of seventy-four percent (74%) of the voters, memorializing that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky" KY. CONST. § 233A.

9. The Commonwealth also has a body of legislation governing the issuance of marriage licenses in Kentucky. Under these Kentucky marriage laws, individuals may obtain a Kentucky marriage license in any of Kentucky's 120 counties, Ky. Rev. Stat. § 402.080, some of which have multiple branch offices. Thus, in total, there are approximately 137 marriage licensing locations in Kentucky.

10. Pursuant to Kentucky's marriage licensing scheme, "[e]ach county clerk shall use the form proscribed by the Department for Libraries and Archives when issuing a marriage license" which "shall be uniform throughout this state, and every license blank shall contain the identical words and figures provided in the form." Ky. Rev. Stat. §§ 402.100, 402.110. County clerks have no local discretion under Kentucky law to alter the composition or requirements of the KDLA-prescribed form.

11. The KDLA form must include both a "marriage license" and a "marriage certificate." Ky. Rev. Stat. § 402.100. The marriage license section must include 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." Ky. Rev. Stat. § 402.100(1). The marriage certificate section must include "the name of the county clerk under whose authority the license was issued, and the county in which the license was issued" and "[a] signed statement by the county clerk or a deputy county clerk of the county in

which the marriage license was issued that the marriage license was recorded." Ky. Rev. Stat. § 402.100(2), (3). The KDLA-prescribed form specifically uses the word "marriage" at six different places on the form (and one reference to "join[ing] together in the state of matrimony"). (A true and correct copy of a completed, KDLA-prescribed form of marriage license used in Rowan County prior to June 30, 2015, with personal information redacted, is attached hereto as Exhibit A.[1])

12. Thus, every marriage license must be issued and signed in the county clerk's name and by the county clerk's authority. In other words, no marriage license can be issued by a county clerk without her authorization and without her imprimatur.

13. As an alternative to a marriage license issued by a county clerk, Kentucky marriage law provides for the issuance of a marriage license by a county judge/executive, the highest elected officer in a county, upon the absence of the clerk or vacancy in the clerk's office. *See* Ky. Rev. Stat. § 402.240. This alternative procedure does not require the use of the KDLA marriage license form; rather, it authorizes the county judge/executive to issue a marriage license by "a memorandum thereof," which is recorded by the clerk in the same manner as a KDLA form. *See id.*

14. In February 2014, the Western District of Kentucky issued a decision holding Kentucky's definition of marriage unconstitutional.[2] In March 2014, Kentucky Attorney General Jack Conway, whose office had represented Kentucky in the case, tearfully proclaimed that after

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[1] The document attached as Exhibit A was admitted into evidence at the hearing on Plaintiffs' Motion for Preliminary Injunction (Doc. 2) as Defendant's Exhibit 2 ("Old version of marriage license from KDLA"). (Ex. and Witness List (Doc. 25).)

[2] *See Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014) (decided February 12, 2014).

prayer and consultation with his wife he could not continue defending Kentucky's marriage laws as an "inescapable" matter of conscience.[3] Conway said,

> There are those who believe it's my mandatory duty, regardless of my personal opinion, to continue to defend this case through the appellate process, and I have heard from many of them. However, I came to the inescapable conclusion that, if I did so, I would be defending discrimination. . . .
>
> That I will not do. . . .
>
> . . . .
>
> . . . . **I can only say that I am doing what I think is right. In the final analysis, I had to make a decision that I could be proud of** – for me now, and my daughters' judgment in the future.[4]

15. Within minutes of Conway's announcement, Governor Beshear announced the Commonwealth would hire private attorneys to pursue the appeal of the Western District's ruling, and to represent Kentucky in a companion Western District case.[5] Governor Beshear directed no adverse statements or actions towards Conway as a result of Conway's refusal to perform official duties due to his conscience, though Conway's refusal caused additional cost to the Commonwealth upwards of $200,000.00 for outside counsel. [6]

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[3] Beshear to hire $125-an-hour lawyer for gay marriage appeal after Conway bows out, Wave3 News, *available at* http://www.wave3.com/story/24886884/beshear-to-hire-125-an-hour-lawyer-for-gay-marriage-appeal-after-conway-bows-out (last accessed July 30, 2015) (quoting Plaintiffs' Counsel, Dan Canon, that Conway's conscientious objection to performing his duty to defend Kentucky's marriage laws gave him "hope.").

[4] Read and watch Jack Conway's statement on same-sex marriage, WKYT.com, dated Mar. 4, 2014, *available at* http://www.wkyt.com/home/headlines/Read--watch-Attorney-General-Conways-same-sex-statement-248381361.html (last accessed July 30, 2015) (emphasis added).

[5] *See supra*, n. 3. The Western District ruled against Kentucky in the second case, *see Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014). The Sixth Circuit reversed both district court decisions in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), which was ultimately reversed by the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[6] Ky. Pays $195K+ to defend gay-marriage ban, The Courier-Journal, dated May 20, 2015, *available at* http://www.courier-journal.com/story/news/local/2015/05/20/cost-gay-marriage-defense/27404461/ (last accessed July 30, 2015) (stating that Kentucky paid $195,400 to a

Davis's Sincerely Held Religious Beliefs About Marriage

16. Davis is a professing Christian who is heavily involved in her local church, attending weekly Bible study and worship services there, and who leads a weekly Bible study for women at a local jail.

17. As a Christian, Davis possesses a sincerely held religious belief and conviction, based upon the Bible which she believes to be the Word of God, that "marriage" is exclusively a union between one man and one woman. According to her beliefs, there is no arrangement of people other than one man and one woman that is, or can be called, "marriage."

18. As county clerk, as a matter of Kentucky law, Davis authorizes, and signifies her authorization and approval by affixing her name to, each and every marriage license issued from her office. But Davis can neither authorize nor approve the "marriage" of a same-sex couple according to her conscience, because even calling the relationship of a same-sex couple "marriage" would violate her deeply and sincerely held religious beliefs. Nor can Davis allow her name to appear as the source of authority and approval for any marriage license issued to a same-sex couple because providing such approval would violate her sincere religious beliefs and convictions.

19. Before taking office as County Clerk in January 2015, Davis swore an oath to support the constitutions and laws of the United States and the Commonwealth of Kentucky "so help me God." Davis understood (and understands) this oath to mean that, in upholding the federal and state constitutions and laws, she would not act in contradiction to the moral law of God, natural law, or her sincerely held religious beliefs and convictions. Davis also understood (and understands) the constitution and laws she swore to uphold to incorporate the constitutional

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private firm through March 31, 2015 to defend Kentucky's marriage law after Conway refused to do so).

and other legal protections of all individuals' rights to live and work according to their consciences, as informed by their sincerely held religious beliefs and convictions, including without limitation such rights she holds in her own individual capacity.

20. Davis's sincerely held religious belief regarding the definition of "marriage" was perfectly aligned with the prevailing marriage policy in Kentucky at the time she took office, as provided in the Kentucky Constitution, Kentucky statutes, and controlling court decisions, and as effected by the Commonwealth through Governor Beshear and Commissioner Onkst.

21. On January 16, 2015, just two weeks after Davis took office, the United States Supreme Court announced it would review the then-controlling Sixth Circuit decision upholding Kentucky's natural definition of marriage.

22. On January 23, Davis wrote Kentucky legislators exhorting them to "get a bill on the floor to help protect clerks" who had a religious objection to issuing marriage licenses to same-sex couples. (A true and correct copy of the form of letter sent to legislators is attached hereto as Exhibit B.[7])

23. Davis does not have a religious objection to issuing, signing, or otherwise approving a marriage license for any man and woman who otherwise satisfy all of the legal requirements for marriage under Kentucky law, regardless of the identities, orientations, or practices of the applicants, including sexual identities, orientations, and practices. Furthermore, Davis's religious beliefs do not compel her to inquire of such applicants as to any aspects of their identities, orientations, or practices beyond the information required to complete the prescribed marriage license form.

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[7] The document attached as Exhibit B was admitted into evidence at the hearing on Plaintiffs' Motion for Preliminary Injunction (Doc. 2) as Defendant's Exhibit 1 ("Letter to Senator Robertson from Kim Davis"). (Ex. and Witness List (Doc. 25).)

Administration of Kentucky Marriage Policy after *Obergefell*

24. On June 26, 2015, a five-to-four majority of the United States Supreme Court held that democratically-approved laws from Kentucky and three other states, defining marriage as the union of one man and one woman, were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell v. Hodges,* 135 S.Ct. 2584, 2605 (2015). According to the majority, the United States Constitution "does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Id.* at 2607.

25. The same day, Governor Beshear sent a letter to all "Kentucky County Clerks," including Davis, informing them that "[e]ffective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky." The letter stated that "Kentucky . . . must license and recognize the marriages of same-sex couples," and further instructed that "[n]ow that same-sex couples are entitled to the issuance of a marriage license, the Department of Libraries and Archives will be sending a gender-neutral form to you today, along with instructions for its use." (A true and correct copy of Governor Beshear's letter to county clerks is attached hereto as Exhibit C.[8])

26. On Governor Beshear's instructions, the KDLA provided county clerks with a new marriage license form, reflecting changes from the prior approved form to accommodate same-sex couples.[9] Critically, however, the new form retained all references to "marriage," and all references to the name, signature, and authorization requirements of the county clerk. (A true

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[8] The document attached as Exhibit C was admitted into evidence at the hearing on Plaintiffs' Motion for Preliminary Injunction (Doc. 2) as Defendant's Exhibit 4 ("6/26/15 Letter from Governor"). (Ex. and Witness List (Doc. 25).).

[9] The post-*Obergefell* marriage form eliminated references to "bride" and "groom" and replaced them with "first party" and "second party.

and correct copy of the new KDLA marriage license form is attached hereto as Exhibit D.[10]) Thus, Davis cannot issue a marriage license to a same-sex couple on the new form without violating her conscience, as informed by her sincerely held religious beliefs.

27. Following Governor Beshear's decree, county clerks across the Commonwealth began issuing same-sex marriage licenses. Governor Beshear reiterated, "government officials in Kentucky . . . must recognize same-sex marriages as valid and allow them to take place,"[11] and confirmed that "[s]ame-sex couples are now being married in Kentucky and such marriages from other states are now being recognized under Kentucky law."[12] In these same pronouncements, Governor Beshear stated that the "overwhelming majority of county clerks" are "iss[uing] marriage licenses regardless of gender" and only "two or three" county clerks (of 120) were "refusing" to issue such licenses due to their "personal beliefs" and "personal feelings."

28. In subsequent pronouncements, Governor Beshear has maintained that county clerks must issue marriage licenses, including to same-sex couples, despite any clerk's "own personal beliefs."[13] According to Governor Beshear, the only options available to county clerks who oppose issuing marriage licenses to same-sex couples, even due to conscience or sincerely held religious beliefs, are to either issue the licenses in violation of conscience, or resign.[14]

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[10] The document attached as Exhibit D was admitted into evidence at the hearing on Plaintiffs' Motion for Preliminary Injunction (Doc. 2) as Defendant's Exhibit 3 ("New version of marriage license from KDLA after S.Ct. 6/26/15 decision"). (Ex. and Witness List (Doc. 25).).

[11] Press Release, Gov. Beshear Statement on Today's Meeting with Casey County Clerk, dated July 9, 2015, *available at* http://migration.kentucky.gov/Newsroom /governor/20150707 statement.htm (last accessed July 29, 2015).

[12] Press Release, Gov. Beshear: No special session needed, dated July 7, 2015, *available at* http://migration.kentucky.gov/Newsroom/governor/20150707statement.htm (last accessed July 29, 2015);

[13] Gov. Beshear Tells County Clerks to Fulfill Their Duties or Resign, WMKY.com, dated July 21, 2015, *available at* http://wmky.org/post/gov-beshear-tells-county-clerks-fullfill-their-duties-or-resign (last accessed July 29. 2015).

[14] *See supra,* n. 13.

29. On June 27, 2015, Davis discontinued issuing marriage licenses in Rowan County. This was not a "spur-of-the-moment decision" reached by Davis. Rather, after exhorting legislators to provide conscience protection for county clerks upon taking office, Davis prayed and fasted during the months leading up to *Obergefell* over how she would respond to such a Supreme Court decision. Though Davis's religious objection is limited to issuing licenses to same-sex couples, she suspended the issuance of all licenses to ensure that all individuals and couples in Rowan County were treated the same.

30. On July 8, 2015, Davis sent a letter appealing to Governor Beshear to uphold her religious conscience rights, and to call a special session of the Kentucky General Assembly to legislatively address the conflict between her religious beliefs and Kentucky marriage policy as effected by Governor Beshear. (A true and correct copy of the letter is attached hereto as Exhibit E.[15]) Davis has received no response to her letter.

31. During Davis's entire tenure in the Rowan County Clerk's Office, spanning nearly thirty years, neither Davis, any deputy clerk, nor Davis's predecessor in office ever asserted a religious objection to performing any other function of the clerk's office.

32. The County Judge/Executive of Rowan County, Walter Blevins ("Judge Blevins"), would raise no religious objection to issuing marriage licenses to same-sex couples under the authority of Ky. Rev. Stat. § 402.240. However, Judge Blevins has refused to issue a marriage license to any of the Plaintiffs in the underlying action against Davis based on his belief that Davis's discontinuation of the issuance of all marriage licenses in Rowan County does not

[15] The document attached as Exhibit E was admitted into evidence at the hearing on Plaintiffs' Motion for Preliminary Injunction (Doc. 2) as Defendant's Exhibit 5 ("7/8/15 Letter from Kim Davis to Governor"). (Ex. and Witness List (Doc. 25).).

count as the "absence" of Davis for purposes of the issuance of marriage licenses under Ky. Rev. Stat. § 402.40.

Effect of Governor Beshear's Administration of Kentucky Marriage Policy and the Need for Immediate Relief

33. Governor Beshear took it upon himself after *Obergefell* to set and announce new Kentucky marriage license policies, and command county clerks to abide by such policies.

34. Governor Beshear's policies and directives are specifically targeting clerks like Davis who possess certain religious beliefs about marriage. This targeting is demonstrated by the exemption Governor Beshear granted to Attorney General Conway when he was unwilling to defend Kentucky's marriage laws—after "pray[ing] over this decision"—pursuant to Conway's own personal beliefs and feelings about "doing what I think is right" and "mak[ing] a decision that I could be proud of." (*See supra*, n.4.)

35. Governor Beshear is unlawfully picking and choosing the conscience-based exemptions to marriage that he deems acceptable. For instance, when Attorney General Conway refused to defend Kentucky's marriage laws, Beshear did not admonish Conway that "Neither your oath nor the Supreme Court dictates what you must believe. But as elected officials, they do prescribe how we must act," but Governor Beshear did so direct county clerks like Davis. (Ex. C.) Beshear did not command Conway that "when you accepted this job and took that oath, it puts you on a different level," and "[y]ou have official duties now that the state law puts on you," but he did deliver this command to county clerks like Davis. (*See supra*, n.13.) Beshear did not publicly proclaim that Conway was "refusing to perform [his] duties" and failing to "follow[] the law and carry[] out [his] duty," and should instead "comply with the law regardless of [his] personal beliefs," but he did make this proclamation (repeatedly) about county clerks like Davis (*See supra*, nn. 11, 12.) Beshear did not instruct Conway that "if you are at that point to where

your personal convictions tell you that you simply cannot fulfill your duties that you were elected to do, than obviously the honorable course to take is to resign and let someone else step-in who feels that they can fulfill these duties," but he did issue this instruction to county clerks like Davis. (*See supra,* n.13.) Beshear did not ominously declare that "[t]he courts will deal appropriately with" Conway, but he did so declare as to the "two or three" county clerks who are not issuing marriage licenses. (*See supra,* n.12.)

36. In no uncertain terms, Governor Beshear's policies and directives are intended to suppress religion—even worse, a particular religious belief. Thus, although Attorney General Conway was given a pass for his conscience about marriage without any threats of repercussion, clerks like Davis are being repeatedly told by their Governor to abandon their religiously-informed beliefs or resign. In doing so, Governor Beshear is forcing clerks like Davis to choose between following the precepts of her religion and forfeiting her position, on the one hand, and abandoning one of the precepts of her religion in order to keep her position, on the other hand.

37. Citing Governor Beshear's policies and directives to all county clerks to issue licenses to same-sex couples irrespective of their sincerely held religious beliefs, the Plaintiffs in the underlying action allege that they are entitled to Kentucky marriage licenses issued specifically by Davis, and claim that Davis's refusal to issue marriage licenses violates their constitutional rights.

38. Governor Beshear's targeted and discriminatory marriage policy pronouncements constitute government-imposed pressure on Davis to act contrary to her religious beliefs, and expose Davis to potential liability if she refuses to compromise her religious beliefs and violate her conscience.

39. Davis needs immediate relief from Governor Beshear's unlawful policies before this Court can properly adjudicate the Plaintiffs' claims against Davis in the underlying action.

40. At all relevant times, Governor Beshear and Commissioner Onkst acted under color of state law.

41. All conditions precedent to the commencement and maintenance of this action have been satisfied, have occurred, or have been waived.

COUNT I
Third-Party Liability

42. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

43. Plaintiffs' claims against Davis in the underlying action are based on Governor Beshear's unlawful policies and directives to Davis with respect to issuing Kentucky marriage licenses, including without limitation the failure of Governor Beshear to uphold and protect Davis's rights of religious conscience.

44. Governor Beshear is liable to Davis for all of any relief obtained by Plaintiffs against Davis in the underlying action.

45. If the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the religious conscience rights of Davis.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT II
Violation of Kentucky RFRA
Third-Party Liability

46. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

47. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

48. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, create government-imposed coercive pressure on Davis to change or violate her religious beliefs.

49. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, chill Davis's religious exercise.

50. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, expose Davis to liability to Plaintiffs and others.

51. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, impose a substantial burden on Davis's religious exercise.

52. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, further no compelling government interest.

53. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to any compelling government interest.

54. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not the least restrictive means of furthering any interest of Kentucky.

55. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by the Kentucky RFRA.

56. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the Kentucky RFRA.

57. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT III
Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Substantial Burden
Third-Party Liability

58. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

59. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

60. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not neutral.

61. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not generally applicable.

62. Governor Beshear has targeted and singled out Davis for discriminatory treatment under Kentucky's marriage policies, in order to suppress the religious exercise of Davis and others.

63. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, create government-imposed coercive pressure on Davis to change or violate her religious beliefs.

64. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, chill Davis's religious exercise.

65. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, expose Davis to liability to Plaintiffs and others.

66. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, impose a substantial burden on Davis's religious exercise.

67. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, further no compelling government interest.

68. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to any compelling government interest.

69. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not the least restrictive means of furthering any interest of Kentucky.

70. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by the Free Exercise Clause of the First Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

71. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the Free Exercise Clause of

the First Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

72. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT IV
Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Intentional Discrimination
Third-Party Liability

73. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

74. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

75. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, make it impossible for Davis to comply with both her religious beliefs and Kentucky's marriage policies.

76. Governor Beshear has targeted and singled out Davis for discriminatory treatment under Kentucky's marriage policies, in order to suppress the religious exercise of Davis and others.

77. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by the Free Exercise Clause of the

First Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

78. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the Free Exercise Clause of the First Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

79. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT V
Religious Discrimination—
Violation of the First and Fourteenth Amendments to the United States Constitution
Free Exercise and Establishment Clauses; Due Process and Equal Protection
Third-Party Liability

80. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

81. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

82. By design, Governor Beshear allows some religious and conscientious objections to compliance with Kentucky marriage laws but not others, resulting in discrimination among religious objectors.

83. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, vest Governor Beshear with unbridled discretion in deciding whether to allow exemptions from compliance with Kentucky marriage law to some persons.

84. Religious liberty is a fundamental right.

85. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, protect some religious objectors, but not Davis.

86. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

87. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

88. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT VI
Violation of the First Amendment to the United States Constitution
Freedom of Speech
Compelled Speech
Third-Party Liability

89. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

90. Davis believes and professes that issuing marriage licenses to same-sex couples violates her religious beliefs.

91. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, would compel Davis to cooperate in activities, through the issuance of marriage licenses under her name and approval, that are violations of Davis's religious beliefs.

92. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, would compel Davis to state her identification, authorization, and approval as "marriage" of same-sex relationships which cannot be "marriage" according to her religious beliefs.

93. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to a compelling governmental interest.

94. Kentucky's actions, as effected by Governor Beshear and Commissioner Onkst, thus violate Davis's right to be free from compelled speech as secured to her by the First Amendment to the United States Constitution.

95. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by the First Amendment to the United States Constitution.

96. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT VII
Violation of Article VI of the United States Constitution
Religious Test
Third-Party Liability

97. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

98. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

99. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, require persons with religious beliefs like those of Davis to renounce such beliefs as a condition to holding the office of county clerk, and thereby impose a religious test as a qualification to hold the office of county clerk.

100. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by Article VI of the United States Constitution and the Fourteenth Amendment to the United States Constitution.

101. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Article VI of the United States Constitution and the Fourteenth Amendment to the United States Constitution.

102. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT VIII
Violation of Sections 1 and 5 of the Kentucky Constitution
Religious Freedom and Rights of Conscience
Third-Party Liability

103. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

104. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

105. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not neutral.

106. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not generally applicable.

107. Governor Beshear has targeted and singled out Davis for discriminatory treatment under Kentucky's marriage policies, in order to suppress the religious exercise of Davis and others.

108. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, create government-imposed coercive pressure on Davis to change or violate her religious beliefs.

109. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, chill Davis's religious exercise.

110. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, expose Davis to liability to Plaintiffs and others.

111. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, impose a substantial burden on Davis's religious exercise.

112. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, further no compelling government interest.

113. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to any compelling government interest.

114. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not the least restrictive means of furthering any interest of Kentucky.

115. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights of religious freedom and conscience secured to her by Sections 1 and 5 of the Kentucky Constitution.

116. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Sections 1 and 5 of the Kentucky Constitution.

117. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT IX
Violation of Sections 1 and 5 of the Kentucky Constitution
Religious Discrimination
Third-Party Liability

118. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

119. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

120. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, make it impossible for Davis to comply with both her religious beliefs and Kentucky's marriage policies.

121. Governor Beshear has targeted and singled out Davis for discriminatory treatment under Kentucky's marriage policies, in order to suppress the religious exercise of Davis and others.

122. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights against religious discrimination secured to her by Sections 1 and 5 of the Kentucky Constitution.

123. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Sections 1 and 5 of the Kentucky Constitution.

124. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT X
Religious Discrimination—
Violation of Sections 1, 3, and 5 of the Kentucky Constitution
Religious Preference; Equality
Third-Party Liability

125. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

126. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

127. By design, Governor Beshear allows some religious and conscientious objections to compliance with Kentucky marriage laws but not others, resulting in discrimination among religious objectors.

128. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, vest Governor Beshear with unbridled discretion in deciding whether to allow exemptions from compliance with Kentucky marriage law to some persons.

129. Religious liberty is a fundamental right.

130. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, protect some religious objectors, but not Davis.

131. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights to equality and against religious discrimination and religious preferences secured to her by Sections 1, 3, and 5 of the Kentucky Constitution.

132. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to

Plaintiffs which does not violate the rights of Davis secured to her by Sections 1, 3, and 5 of the Kentucky Constitution.

133. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief

COUNT XI
Violation of the Sections 1 and 8 of the Kentucky Constitution
Freedom of Speech
Compelled Speech
Third-Party Liability

134. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

135. Davis believes and professes that issuing marriage licenses to same-sex couples violates her religious beliefs.

136. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, would compel Davis to cooperate in activities, through the issuance of marriage licenses under her name and approval, that are violations of Davis's religious beliefs.

137. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, would compel Davis to state her identification, authorization, and approval as "marriage" of same-sex relationships which cannot be "marriage" according to her religious beliefs.

138. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, are not narrowly tailored to a compelling governmental interest.

139. Kentucky's actions, as effected by Governor Beshear and Commissioner Onkst, thus violate Davis's right to be free from compelled speech as secured to her by Sections 1 and 8 of the Kentucky Constitution.

140. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Sections 1 and 8 of the Kentucky Constitution.

141. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

COUNT XII
Violation of Section 5 of the Kentucky Constitution
Religious Test
Third-Party Liability

142. Davis realleges and incorporates herein by this reference the allegations of paragraphs 1 through 41 above.

143. Davis's sincerely held religious beliefs prohibit her from issuing marriage licenses to same-sex couples. Davis's compliance with her religious beliefs is a religious exercise.

144. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, require persons with religious beliefs like those of Davis to renounce such beliefs as a condition to holding the office of county clerk, and thereby impose a religious test as a qualification to hold the office of county clerk.

145. Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Davis's rights secured to her by Section 5 of the Kentucky Constitution.

146. Given the foregoing violations of Davis's rights, if the Court determines Plaintiffs are entitled to a Kentucky marriage license issued in Rowan County, then Governor Beshear and Commissioner Onkst are liable to Davis to provide a means for issuance of marriage licenses to Plaintiffs which does not violate the rights of Davis secured to her by Section 5 of the Kentucky Constitution.

147. Absent injunction and declaratory relief against Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, Davis has been and will continue to be harmed.

WHEREFORE, Davis prays for relief against Governor Beshear and Commissioner Onkst as hereinafter set forth in her prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Davis respectfully requests that the Court:

a. Declare that Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate the Kentucky RFRA;

b. Declare that Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate the First Amendment and Fourteenth Amendment to the United States Constitution, and Article VI of the United States Constitution;

c. Declare that Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, violate Sections 1, 3, 5, and 8 of the Kentucky Constitution;

d. Issue a preliminary and permanent injunction prohibiting enforcement of Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst, against Davis;

e. Impose against or transfer to Governor Beshear and Commissioner Onkst any relief obtained by Plaintiffs against Davis in the underlying action;

f. Award Davis the costs of this action and reasonable attorney's fees; and

g. Award such other and further relief as the Court deems just and proper.

JURY DEMAND

Davis requests a trial by jury on all issues so triable.

Respectfully Submitted,

/s/ Roger K. Gannam
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Attorneys for Defendant and
Third-Party Plaintiff, Kim Davis

VERIFICATION

I, Kim Davis, state that I have read and reviewed the foregoing complaint and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed on: 8/4/2015

KIM DAVIS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's CM/ECF system, which will effectuate service through the Court's transmission facilities by notice of electronic filing to all counsel or parties of record:

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Attorneys for Rowan County

DATED: August 4, 2015

/s/ Roger K. Gannam
Roger K. Gannam
Attorney for Defendant Kim Davis

EXHIBIT A

EXPIRATION: 07/15/15

~~64~~ 44

392905

Marriage License

Valid ONLY in the
Commonwealth of Kentucky

ROWAN COUNTY

[redacted]

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

Bride's Full Name [redacted]
Current Residence
Groom's Full Name
Current Residence

	Bride	Groom
Date of Birth (Age)	[redacted]	[redacted]
Place of Birth		
Mother's Full Name (Including Maiden)		
Father's Full Name		
Condition (Single, widowed, divorced or annulled)		
No. of Previous Marriages		
Occupation		
Race		
Relationship to other party		

[redacted]

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

[redacted] (bride's signature) [redacted] (groom's signature)

Issued this 6 (mo.) / 16 (day) / 2015 (year) **in the office of** KIM DAVIS (name), ROWAN COUNTY (county)

County Clerk, MOREHEAD (city), **Kentucky by** BRIAN MASON (recorder's name) BM, DEPUTY CLERK (title)

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: [redacted] **and** [redacted]

Were united in marriage on the 27th **day of** June **at** Oakley (Bath County)
Kentucky, under the authority of the above license and in the presence of (Please PRINT witnesses name)

[redacted] **and** [redacted]

Given under my hand this 27th **day of** June, 2015.

[redacted] (Signature of person performing ceremony), Pastor (title), **of the** [redacted] (church, religion, or civil authority)

Note: Persons 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 July (mo.) / 2 (day) / 2015 (year) **in the office of** Kim Davis (clerk's name), Rowan (county name)

County Clerk, in Marriage Book [redacted], **page** [redacted].

Roberta H Earley (recorder's name), Deputy (recorder's title) **Clerk**

[redacted]

Printed on: 7/8/2015 2:09 PM

EXHIBIT B

Dear Senator Robertson,

I am contacting you in hope of support of possible legislation that would give county clerks the option to exempt themselves from issuing marriage license, not only to same sex couples but to all parties, as to not discriminate anyone. The LRC has determined in "the duties of the County Clerk", the Clerk may be exempted from selling other licenses, i.e....fishing and hunting license by applying with written notice to that department. I wanted to have the option, as a person who has deep moral conviction, to choose not to discriminate any party, by allowing a Clerk to apply for an exemption for the issuance of marriage licenses.

As a constitutional officer, elected by the people I personally feel the Commonwealth's Constitution should be upheld. In 2004, by an overwhelming vote of 3 to 1 in favor of defining marriage as a union between one man and one woman (Kentucky Constitution Section 233A), should be upheld. This should be an electoral issue not judicial. I cannot ask my deputies to issue or be a party to "the implementation of a contentious societal philosophy change" (per Florida Clerk with the same view) If I myself would not.

I know the deadline is close for the presentation of bills on the floor, but in light of the Supreme Court's decision to look at the issue in April, I feel it is imperative that we be ready to stand with our uncompromising convictions, holding strong to our morals, and beliefs.

I beseech you to give thoughtful consideration to this matter, as it is of vital importance, not only to me, as a new Clerk, but to the Kentucky County Clerk's Association who has formed a formal committee to address this issue.

EXHIBIT C

COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

STEVEN L. BESHEAR
GOVERNOR

700 CAPITOL AVENUE
SUITE 100
FRANKFORT, KY 40601
(502) 564-2611
FAX: (502) 564-2517

June 26, 2015

Dear Kentucky County Clerks:

Today, the United States Supreme Court issued its decision regarding the constitutionality of states' bans on same-sex marriage. The Court struck down those laws, finding that they were invalid under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

As elected officials, each of us has taken an oath to uphold the Constitution of the United States and the Constitution of Kentucky. The Obergefell decision makes plain that the Constitution requires that Kentucky – and all states - must license and recognize the marriages of same-sex couples. Neither your oath nor the Supreme Court dictates what you must believe. But as elected officials, they do prescribe how we must act.

Effective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky. In accordance with my instruction, all executive branch agencies are already working to make any operational changes that will be necessary to implement the Supreme Court decision. Now that same-sex couples are entitled to the issuance of a marriage license, the Department of Libraries and Archives will be sending a gender-neutral form to you today, along with instructions for its use.

You should consult with your county attorney on any particular aspects related to the implementation of the Supreme Court's decision. While there are certainly strongly held views on both sides of this issue, I know that Kentuckians are law-abiding people and will respect the rule of law. After all, the things that unite us as a people are much stronger than the things that divide us.

Thank you in advance for the valuable services you continue to render to the people of the Commonwealth.

Sincerely,

Steven L. Beshear

Plaintiffs' Exh. 3

EXHIBIT D

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 _____

	First Party	Second Party
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 ____ / ____ / ____ (mo.) (day) (year) in the office of _____ (name), _____ (county)

County Clerk, _____ (city), Kentucky by _____ (recorder's name), _____ (title)

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

County Clerk, in Marriage Book _____, page _____.

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

Certificate of Marriage

To be delivered to parties married

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
_____ and _____

Given under my hand this_____day of _____, _____.

_____, _____, of the _____

(signature of person performing ceremony) (Title) (Church, religion or civil authority)

Marriage Consent

By authorization of KRS 402.020, I do hereby give my consent to the marriage

of _____,

my_____, to_____

Given under my hand this _____of _____, _____
(day) (month) (year)

_____
father/ mother/ legal custodian

_____
joint custodial parent, if applicable

Sworn before me this _____day of_____,_____in the office of

_____, _____County Clerk.
(clerk's name) (county)

_____ ,_____.
(recorder's name) (recorder's title)

EXHIBIT E

Kim Davis
Rowan County Clerk

600 West Main Street
Room 102
Morehead, KY 40351

Office (606) 784-5212
Fax (606) 784-2923
http://rowancountyclerk.com

July 8, 2015

The Honorable Governor Steve Beshear
700 Capitol Avenue Suite 100
Frankfort, KY 40601

Dear Governor Beshear,

The recent *Obergefell* decision by the Supreme Court of the United States has not only impacted Kentucky's same sex marriage ban, but has put numerous County Clerks' moral and religious beliefs at odds with their current required duties. Many Clerks firmly believe that forcing County Clerk offices to issue same-sex marriage licenses when it is against their deeply held religious beliefs and traditions is a direct violation of the U.S. Constitution's First Amendment.

This dramatic and sudden change has caused some Clerks to go as far as to halt issuing marriage licenses to anyone rather than compromise their deeply held religious convictions. This position has ignited litigation and it is foreseeable that it may invite more lawsuits.

It appears the only timely and reasonable solution to this conflict is a legislative one. So for that reason, I respectfully request that you immediately call an extraordinary session of the General Assembly to address the issues that have been caused in this transition from traditional marriage being re-defined to include same-sex couples.

Legislators and Clerks of many political stripes working alongside other third parties have been drafting commonsense legislation that would modify Kentucky's marriage laws to satisfy the concerns of the majority of Clerks, while still abiding by the *Obergefell* ruling. It is my belief that our proposal could be passed by the General Assembly in an expedited timeframe of the absolute minimum of five days.

The potential cost to calling a special session is easily justified by the alleviation of future potential lawsuits and relieving the concerns of many County Clerks who serve their local communities. I ask that you not just consider the current litigation, but what litigation could be invited after the 2018 County Clerk elections are concluded, if the status quo is to remain in place.

Respectfully submitted,

"Thank you for the opportunity to serve Rowan County"