

Multiple Documents

Part	Description
1	4 pages
2	Memorandum in Support of Defendant/Third-Party Plaintiff Kim Davis' Motion
3	Exhibit A: Verified Third-Party Complaint of Defendant Kim Davis
4	Exhibit B: July 13, 2015 Hearing Transcript
5	Exhibit C: July 20, 2015 Hearing Transcript
6	Exhibit D: Kentucky LRC Reports on Kentucky RFRA
7	Exhibit E: Prefiled Kentucky House Bill for January 2016 general session to prot
8	Proposed Order Granting Defendant/Third-Party Plaintiff Kim Davis' Motion

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

APRIL MILLER, ET AL.,

Plaintiffs,

V.

KIM DAVIS, ET AL.,

Defendants.

CIVIL ACTION

0:15-CV-00044-DLB

DISTRICT JUDGE
DAVID L. BUNNING

HEARING REQUESTED

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.

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65 and Local Rule 7.1, Defendant/Third-Party Plaintiff Kim Davis (“Davis”), by and through her undersigned counsel, hereby moves for an order from this Court entering preliminary injunctive relief against Third-Party Defendants Steven L. Beshear, Governor of Kentucky (“Gov. Beshear”) and Wayne Onkst, Commissioner of the Kentucky Department for Libraries and Archives (“Commissioner Onkst”).

As more fully described in Davis' supporting memorandum of law, which is incorporated by reference here, Davis is entitled to preliminary injunctive relief against Gov. Beshear and Commissioner Onkst. Davis is likely to succeed on the merits of her claims because Gov. Beshear's mandate directing Davis to authorize and approve all Kentucky marriage licenses, including same-sex "marriage" ("SSM") licenses, violates her religious liberty and conscience rights protected by the Kentucky Religious Freedom Restoration Act and the Constitutions of the United States and Kentucky. Also, granting the preliminary injunctive relief will prevent irreparable harm to Davis but will not irreversibly harm others, including the Third-Party Defendants here or the Plaintiffs in the underlying action. Finally, it is in the public's interest to grant the injunction to protect Davis' religious freedom in the ongoing and fluid public debate regarding religious liberty and SSM, in Kentucky and elsewhere.

Davis also specifically requests that this Court grant an evidentiary hearing on her Motion for Preliminary Injunction.

WHEREFORE, Defendant/Third-Party Plaintiff Kim Davis respectfully requests that this Court enter an order for preliminary injunctive relief against Third-Party Defendants Steven L. Beshear, Governor of Kentucky and Wayne Onkst, Commissioner of the Kentucky Department for Libraries and Archives, in the form of the proposed order attached hereto.

DATED: August 7, 2015

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

Respectfully submitted:

/s/ Jonathan D. Christman

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

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

CERTIFICATE OF SERVICE

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

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

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

Attorneys for Plaintiffs

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

Attorneys for Rowan County

I also hereby certify that two (2) true and correct copies of the foregoing will be sent via Fedex and U.S.P.S. first class mail to the Attorney General of Kentucky on behalf of Third-Party Defendants Steven L. Beshear, Governor of Kentucky, and Wayne Onkst, Commissioner of the Kentucky Department for Libraries and Archives, at the following location:

Attorney General Jack Conway
OFFICE OF THE ATTORNEY GENERAL
700 Capitol Avenue, Suite 118
Frankfort, KY 40601-3449

DATED: August 7, 2015

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

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
FACTUAL BACKGROUND.....	3
A. Kentucky Marriage Licensing Scheme	3
B. Gov. Beshear’s SSM Mandate.....	5
C. Davis’ Sincerely Held Religious Beliefs About Marriage.....	7
D. Procedural History	10
STANDARD OF REVIEW	10
ARGUMENT	11
A. Davis Has A Strong Likelihood Of Succeeding On The Merits.....	11
1. The Mandate Ordering Davis To Authorize SSM Violates The Kentucky Religious Freedom Restoration Act	11
a. Davis’ inability to authorize SSM licenses is motivated by her sincerely-held religious beliefs about marriage.....	13
b. Forcing Davis to authorize SSM licenses substantially burdens her religious freedom	14
c. The SSM Mandate does not survive strict scrutiny	17
i. The SSM Mandate furthers no compelling governmental interest in infringing upon Davis’ religious freedom.....	18
ii. Many less restrictive alternatives are available for furthering Gov. Beshear’s purported interests.....	24
2. The Mandate Directing Davis To Authorize SSM Licenses Violates Her Fundamental Rights Of Religious Freedom And Conscience Protected By The United States And Kentucky Constitutions.....	28

3. The Mandate Commanding Davis To Affix Her Name And Approval To SSM Licenses Violates Her Fundamental Free Speech Rights Protected By The United States And Kentucky Constitutions	32
4. The Mandate Requiring Davis To Affirm A Definition Of Marriage Contrary To Her Religious Belief Violates The Religious Test Clause	34
B. Preliminary Relief Protects Davis From Irreparable Harm	36
C. Granting Preliminary Relief Will Not Cause Irreversible Harm To Others	37
D. An Injunction To Protect Davis Is In The Public Interest	40
CONCLUSION.....	40

TABLE OF AUTHORITIES

Cases

State

<i>Hardin v. Savageau</i> , 906 S.W.2d 356 (Ky. 1995)	12
<i>Jones v. Hallahan</i> , 501 S.W.2d 588 (Ky. App. 1973)	5, 20

Federal

<i>ACLU v. Mercer County, Ky.</i> , 432 F.3d 624 (6th Cir. 2005)	21
<i>Borough of Duryea, Pa. v. Guarnieri</i> , 131 S.Ct. 2488 (2011)	20
<i>Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, Ky.</i> , 258 F. Supp. 2d 667 (E.D. Ky. 2003)	10
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 134 S.Ct. 2751 (2014)	<i>passim</i>
<i>Cal. Democratic Party v. Jones</i> , 530 U.S. 567 (2000)	18
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)	17, 29, 30, 31
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	18
<i>Connection Distributing Co. v. Reno</i> , 154 F.3d 281 (6th Cir. 1998)	36
<i>Dayton Area Visually Impaired Persons, Inc. v. Fisher</i> , 70 F.3d 1474 (6th Cir. 1995)	40
<i>DeBoer v. Snyder</i> , 772 F.3d 388 (6th Cir. 2014)	5, 20
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	36

<i>Employment Div., Dep’t of Human Resources of Oregon v. Smith</i> , 494 U.S. 872 (1990).....	29
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006).....	20
<i>Girouard v. United States</i> , 328 U.S. 61 (1946).....	22, 34, 35, 36
<i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006).....	18, 19
<i>Hobbie v. Unemployment Appeals Comm’n of Fla.</i> , 480 U.S. 136 (1987).....	21
<i>In re: Backer</i> , 51 Fed. App’x 522 (6th Cir. 2002)	12
<i>Johanns v. Livestock Marketing Ass’n</i> , 544 U.S. 550 (2005).....	32
<i>Kikumura v. Hurley</i> , 242 F.3d 950 (10th Cir. 2001)	36
<i>Lane v. Franks</i> , 134 S.Ct. 2369 (2014).....	20
<i>Loving v. Virginia</i> , 388 U.S. 1 (1968).....	38
<i>Mich. Catholic Conf. & Catholic Family Servs. v. Burwell</i> , 755 F.3d 372 (6th Cir. 2014), judgment vacated on other grounds, 135 S.Ct. 1914 (2015)...	13
<i>Newsom v. Norris</i> , 888 F.2d 371 (6th Cir. 1989)	36, 37
<i>O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft</i> , 389 F.3d 973 (10th Cir. 2004)	40
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	<i>passim</i>
<i>Prater v. City of Burnside, Ky.</i> , 289 F.3d 417 (6th Cir. 2002)	28, 29
<i>Riley v. Nat’l Federation of Blind of N.C., Inc.</i> , 487 U.S. 781 (1988).....	32

<i>Sch. Dist. Of Abington, Twp., Pa. v. Schempp</i> , 374 U.S. 203 (1963).....	34
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	16, 29, 31
<i>Slater v. Douglas County</i> , 743 F. Supp. 2d 1188 (D. Or. 2010)	21
<i>Stormans, Inc. v. Selecky</i> , 844 F. Supp. 2d 1172 (W.D. Wash. 2012).....	22
<i>Suster v. Marshall</i> , 149 F.3d 523 (6th Cir. 1998)	10
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	19
<i>Thomas v. Review Bd. of Indiana Employment Security Div.</i> , 450 U.S. 707 (1981).....	13, 14
<i>Torcaso v. Watkins</i> , 367 U.S. 488 (1961).....	36
<i>Turner v. Safley</i> , 482 U.S. 78 (1987).....	38
<i>United States v. Edward Rose & Sons</i> , 384 F.3d 258 (6th Cir. 2004)	37
<i>United States v. Playboy Entm't Group, Inc.</i> , 529 U.S. 803 (2000).....	18
<i>Vaughn v. Lawrenceburg Power Sys.</i> , 269 F.3d 703 (6th Cir. 2001)	38
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	28
<i>West Va. State Bd. of Ed. v. Barnette</i> , 319 U.S. 624 (1943).....	32, 33
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	29
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1976).....	32, 33

<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978).....	38

<i>Zorach v. Clauson</i> , 343 U.S. 306 (1952).....	21

Constitutional Provisions

State

KY. CONST. Preamble	20
KY. CONST. § 1	20, 29, 32
KY. CONST. § 5	20, 29
KY. CONST. § 8	20, 32
KY. CONST. § 26	20
KY. CONST. § 99	34
KY. CONST. § 100	34
KY. CONST. § 228	8, 21
KY. CONST. § 233A.....	5, 20

Federal

U.S. CONST. amend. I	<i>passim</i>
U.S. CONST. art. VI	20, 34

Statutes

State

Kentucky Religious Freedom Restoration Act, 2013 Kentucky Laws Ch. 111 (HB 279)	11
KY. REV. STAT. § 150.195	25
KY. REV. STAT. § 171.130	3
KY. REV. STAT. § 402.005	5, 20
KY. REV. STAT. § 402.080	3, 39

KY. REV. STAT. § 402.100	<i>passim</i>
KY. REV. STAT. § 402.110	3, 14, 28
KY. REV. STAT. § 402.240	4, 5, 28
KY. REV. STAT. § 446.010	11
KY. REV. STAT. § 446.030	11
KY. REV. STAT. § 446.090	11
KY. REV. STAT. § 446.140	11
KY. REV. STAT. § 446.350	<i>passim</i>
N.C. GEN. STAT. § 51-5.5.....	25

Federal

8 U.S.C. § 1182(g)	22
18 U.S.C. § 3597.....	22
42 U.S.C. § 2000bb-1	12, 18
42 U.S.C. § 2000bb-2(4) (1994 ed.)	12
42 U.S.C. § 2000cc-3(g)	12
42 U.S.C. § 2000cc-5(7)(A).....	12

Defendant/Third-Party Plaintiff Kim Davis (“Davis”), by and through her undersigned counsel, respectfully submits this Memorandum of Law in Support of her Motion for Preliminary Injunction against Third-Party Defendants Steven L. Beshear, Governor of Kentucky (“Gov. Beshear”) and Wayne Onkst, Commissioner of the Kentucky Department for Libraries and Archives (“Commr. Onkst”).

I. INTRODUCTION

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, Gov. Beshear issued a directive (the “SSM Mandate”) ordering all Kentucky County Clerks to issue same sex “marriage” (“SSM”) licenses, without exception. But Davis’ conscience forbids her from approving a SSM license based upon her authority and bearing her imprimatur. She holds a sincerely-held religious belief and conviction that marriage is a union between a man and a woman, only. Thus, in her view, 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 forever echo in her conscience. And yet, Gov. Beshear’s SSM Mandate demands that she either fall in line (her conscience be damned) or leave office (her livelihood, qualifications for office, and commitment to public service be damned).

Irrespective of what “five lawyers” opined in *Obergefell v. Hodges*, 135 S.Ct. 2584, 2612, 2624 (2015) (Roberts, C.J., dissenting) about States’ recognition of SSM—that decision neither

overwrote the First Amendment or other critical religious liberty protections for persons nor compelled States to accomplish recognition of SSM by invading and trampling upon the conscience of individual county clerks. Coercing an individual county clerk (Davis) to authorize and personally approve SSM in violation of her fundamental religious liberty and speech rights, especially when that individual took office when Kentucky marriage law perfectly aligned with her deep religious convictions, is wrong. That is especially true here, where there are numerous less restrictive alternatives available by which individuals can obtain SSM licenses, without eradicating Davis from public service or rendering her conscience null and void.

The intolerance of the SSM Mandate is further shown by Gov. Beshear's stated reason for it—*i.e.*, each county clerk's "duty" as an elected official. But, just 16 months ago, when another publicly elected official in Kentucky refused to defend the Kentucky Constitution and natural marriage laws based upon that official's purported conscience, Gov. Beshear issued no similar call to duty to that state-wide official, at great financial cost to the Commonwealth. The United States and Kentucky Constitutions, along with the Kentucky Religious Freedom Restoration Act (which overwhelmingly passed over his veto), prohibit Gov. Beshear from substantially burdening Davis' religious freedom and discriminating among conscience claims based upon his own predilections.

If Davis' religious objection cannot be accommodated under the circumstances of this case, then elected officials have no real religious freedom when they take public office. But contrary to Gov. Beshear's SSM Mandate, 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.

II. FACTUAL BACKGROUND

A. Kentucky Marriage Licensing Scheme.

Kentucky has a body of legislation that governs the issuance of marriage licenses. Under Kentucky marriage law, 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* D.E. 34, Verified Third-Party Complaint (hereinafter, "VTC") (a copy of which is attached hereto, with its five accompanying exhibits, as Exhibit "A"), at ¶ 9. In fact, because some counties have multiple branch offices, there are a total of approximately 137 marriage licensing locations throughout Kentucky. *See* VTC, ¶ 9. Pursuant to Kentucky's marriage licensing scheme, "[e]ach county clerk shall use the form proscribed by the Department for Libraries and Archives [KDLA] when issuing a marriage license." KY. REV. STAT. § 402.100; *see also* VTC, ¶ 10. Kentucky marriage law further requires that "[t]he form of marriage licensed prescribed in KRS 402.100 shall be uniform throughout this state." KY. REV. STAT. § 402.110; *see also* VTC, ¶ 10. The designer of the mandatory license form (KDLA) is an executive branch department "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; *see also* VTC, ¶ 7. County clerks have no discretion in the composition of this prescribed form. *See* VTC, at ¶¶ 7, 10; *see also* Hr'g Tr. (7/20/15), Davis Direct, at 37:17-20, 38:9-17, 39:9-12, 75:18-19; *id.*, Davis Cross, 57:8-23.¹

Under Kentucky marriage law, the specific form required by the KDLA "shall consist 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

¹ The July 13, 2015 and July 20, 2015 hearing transcripts, *see* D.E. 21 and 26, are attached hereto as Exhibits "B" and "C," respectively.

deputy clerk issuing the license.” KY. REV. STAT. § 402.100(1); *see also* VTC, ¶ 11. This form “shall” also include a “marriage certificate” that includes “[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); *see also* VTC, ¶ 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* VTC, ¶ 11. Thus, any county clerk must include their name and signature **four** times on any marriage licenses the clerk signs. *See* VTC, 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. *See* VTC, Exs. A, D. In other words, no marriage license is issued by a county clerk without their authorization and without their imprimatur. *See* VTC, ¶ 12; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 37:10-16, 38:9-17, 40:11-41:23, 50:20-21, 77:9-78:3. The KDLA-approved form describes the act being licensed as “marriage” at six places. *See* VTC, ¶ 11, and Exs. A, D.

Kentucky marriage law also provides an alternative procedure for the issuance of marriage licenses “[i]n the absence of the county clerk, or during a vacancy in the office.” KY. REV. STAT. § 402.240; *see also* VTC, ¶ 13. According to this option, the county judge/executive for each county “may issue the license” instead of the county clerk “and, in so doing, he shall perform the duties and incur all the responsibilities of the clerk. The county judge/executive shall return a

memorandum thereof to the clerk, and the memorandum shall be recorded as if the license had been issued by the clerk.” KY. REV. STAT. § 402.240; *see also* VTC, ¶ 13.

B. Gov. Beshear’s SSM Mandate.

Kentucky also has democratically-enacted law regarding the definition of marriage. Among other things, in 2004, the Kentucky legislature proposed a constitutional amendment on marriage that was approved by seventy-four (74%) of the voters, and enacted in the Commonwealth’s basic charter affirming that “[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky.” *See* KY. CONST. § 233A; *see also* 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. 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”); *DeBoer v. Snyder*, 772 F.3d 388, 397, 421 (6th Cir. 2014) (reversing Kentucky federal district court opinion that Kentucky’s statutes and constitutional amendment violated the United States Constitution); VTC, ¶ 8.

But on June 26, 2015, a majority of the Supreme 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 v. Hodges*, 135 S.Ct. 2584, 2605 (2015). Almost immediately, 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.” *See* VTC, ¶¶ 25, 33, and Ex. C, Ltr. from Gov. Steven L. Beshear to Kentucky County

Clerks, dated June 26, 2015 (hereinafter, “Beshear Letter”); *see also* Hr’g Tr. (7/20/15), Davis Direct, at 44:3-17, and Davis Cross, at 59:9-11.

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 [KDLA] will be sending a gender-neutral form to you today, along with instructions for its use.” *See* VTC, Ex. C, Beshear Letter; *see also* VTC, ¶ 25. The KDLA subsequently provided this new marriage form to county clerks, including Davis. Hr’g Tr. (7/20/15), Davis Direct, at 39:21-40:2; *see also* VTC, ¶ 26. The form retained all of the references to “marriage,” as well as the name, signature and authorization requirements of the county clerk. *Id.* at 40:11-42:7; *see also* VTC, ¶ 26, and Exs. A, D.

Following Gov. Beshear’s decree, county clerks across Kentucky began issuing SSM licenses, with almost no exception. *See* VTC, ¶ 27; *see also, e.g.*, Hr’g Tr. (7/20/15), Davis Direct, at 54:9-19. 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.” *See* VTC, ¶ 27. 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.” *See* VTC, ¶ 28. For Gov. Beshear, the only options available to county clerks who oppose SSM are (1) issue the licenses against their “personal convictions,” or (2) resign. *See* VTC, ¶¶ 28, 36; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 47:5-12.

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. *See* VTC, ¶¶ 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.” *See* VTC, ¶ 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. *See* VTC, ¶¶ 14-15, 34-36.

C. Davis’ Sincerely Held Religious Beliefs About Marriage.

Davis serves as the elected county clerk for Rowan County, Kentucky. *See* VTC, ¶ 5; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 24:2-5. 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. *See* VTC, ¶ 5; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 24:6-12. Davis is a professing Apostolic Christian who attends church “[e]very time the doors are open,” attends weekly Bible study and worship services, and leads a weekly Bible study with women at a local jail. Hr’g Tr. (7/20/15), Davis Direct, at 29:8-30:6; *see also* VTC, ¶ 16; Hr’g Tr. (7/20/15), Blevins Cross, at 20:1-2 (describing Davis as “very religious”).

As a Christian, Davis possesses a sincerely held religious belief that “[m]arriage is a union between one man and one woman,” only. Hr’g Tr. (7/20/15), Davis Direct, at 31:7-14, 32:4-7; *see also* VTC, ¶ 17. As county clerk, she authorizes the “marriage” licenses issued from her office.

See VTC, ¶ 18; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 37:10-16, 38:9-17, 40:11-14, 41:4-7, 41:16-23, 50:20-21, 77:9-12, 77:21-78:3. But Davis cannot authorize the marriage of same-sex couples because it violates her religious beliefs and convictions. See VTC, ¶ 18; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 42:17-20 (“Because if I say that I authorize that, I’m saying I agree with it, and I can’t.”); *id.* at 43:2-5; Hr’g Tr. (7/20/15), Davis Cross, at 62:10-12 (“[M]y religious beliefs can’t condone issuing and being a party to the issuance of same-sex marriage licenses.”); *see also id.*, Blevins Cross, at 17:3-6 (“[Davis] did tell me early on, before the decision was made, that if it was to allow same-sex marriage that she could not do that in her moral judgment. She just could not do it.”). Moreover, her name appears on every marriage license issued from the Rowan County clerk’s office, and she cannot have her name on a SSM license because her name equates to approval. See VTC, ¶ 18; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 38:9-17, 40:24-41:3, 41:24-42:1; *id.*, Davis Cross, 61:15-19, 67:5-7; *id.*, Davis Redirect, 75:16-19, 80:16-18.

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. See VTC, ¶ 19. Moreover, she also understood (and understands) that she swore to uphold the Constitutions and laws that incorporate enumerated protections for all individuals’ fundamental rights of conscience, religious liberty, and speech, including her own. See VTC, ¶ 19; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 54:20-56:5. Not only that, Kentucky marriage law at the time she took office (not to mention during her multi-decade tenure as a deputy clerk) unequivocally aligned with her sincerely held religious beliefs about marriage. See VTC, ¶ 20; *see also* Hr’g Tr. (7/20/15), Davis Redirect, at 71:23-72:1.

On June 27, 2015, following the *Obergefell* decision, Davis discontinued issuing **any** marriage licenses. See VTC, ¶ 29; see also Hr’g Tr. (7/20/15), Davis Direct, at 33:13-24. 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; she “sought God on it.” Hr’g Tr. (7/20/15), Davis Direct, at 34:14-18; see also VTC, ¶ 29. In fact, before the *Obergefell* decision (and just one week after the Supreme 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. Hr’g Tr. (7/20/15), Davis Direct, at 34:2-14, 35:8-36:3; see also VTC, ¶¶ 21-22, and Ex. B, Ltr. From K. Davis to Ky. Sen. Robertson, dated Jan. 23, 2015. Her views about marriage have not changed. Hr’g Tr. (7/20/15), Davis Direct, at 36:1-3, 43:14-16. To ensure that all individuals and couples were treated the same, Davis suspended the issuance of all marriage licenses in Rowan County. See VTC, ¶ 29; see also Hr’g Tr. (7/20/15), Davis Direct, at 43:6-9; *id.*, Davis Cross, at 62:13-14, 67:7, 70:17-20; see also *id.*, Blevins Cross, 20:5-6, 21:3-5. Even though one of her deputy clerks (and perhaps two) is (or are) willing to issue a SSM license, she instructed all deputy clerks to stop issuing marriage licenses because licenses are issued on her authority (not the deputy clerk’s), and because every license requires her name to appear on the license as the authorizing person (even if signed by a deputy clerk). See Hr’g Tr. (7/20/15), Davis Direct, at 38:25-39:4, 48:19-49:18; *id.*, Davis Cross, at 61:15-19, 62:4-12; *id.*, Davis Redirect, 81:1-2.

On July 8, 2015, 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.

See VTC, ¶ 30, and Ex. E. To date, Davis has received no response to her letter. 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. See VTC, ¶ 31.

D. Procedural History.

Plaintiffs filed their Complaint against Davis and Rowan County on July 2, 2015. See D.E. 1. They simultaneously filed a motion seeking preliminary injunctive relief. See D.E. 2. This Court held hearings on July 13, 2015 and July 20, 2015 in connection with Plaintiffs' motion. Davis and Rowan County submitted their written oppositions to Plaintiffs' motion on July 30, 2015. See D.E. 28, 29. On August 4, 2015, Davis filed a motion to dismiss Plaintiffs' Complaint. See D.E. 32. On that same day, Davis also filed a Verified Third-Party Complaint against Gov. Beshear and Commr. Onkst. See D.E. 34. Davis now files this motion seeking preliminary injunctive relief.

III. STANDARD OF REVIEW

District courts reviewing motions for preliminary injunction relief consider the following four factors: "(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 injunction." *Suster v. Marshall*, 149 F.3d 523, 528 (6th Cir. 1998); see also *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County, Ky.*, 258 F. Supp. 2d 667, 679 (E.D. Ky. 2003) (Bunning, J.).

IV. ARGUMENT

A. Davis Has A Strong Likelihood Of Succeeding On The Merits.

1. The Mandate Ordering Davis To Authorize SSM Licenses Violates The Kentucky Religious Freedom Restoration Act.

Davis' inability to authorize and approve SSM licenses pursuant to Gov. Beshear's SSM Mandate is protected by the Kentucky Religious Freedom Restoration Act, 2013 Kentucky Laws Ch. 111 (HB 279) (hereinafter, "Kentucky RFRA").² Specifically, the Kentucky RFRA protects her right to act *or refuse to act* in a way motivated by a sincerely held religious belief. The Kentucky RFRA was enacted by an overwhelming majority in 2013, *over Governor Beshear's veto*,³ and provides that:

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.

KY. REV. STAT. § 446.350. Davis is entitled to assert claims under the Kentucky RFRA because the statute protects the religious freedom of all "persons" in Kentucky.⁴ Therefore, Gov. Beshear and Commr. Onkst may not substantially burden Davis' religious freedom unless they demonstrate

² 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," "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. And, as recognized by Plaintiffs in the underlying action, Davis' purported obligations with respect to issuing marriage licenses are matters of Kentucky law. *See, e.g.*, D.E. 1, Compl., at ¶¶ 31-33; D.E. 2-1 at 6; D.E. 36, at 4-5, 11.

³ The Kentucky Legislature overrode Gov. Beshear's veto by votes of 79-15 in the state House and 32-6 in the state Senate.

⁴ While "person" is not defined in the Kentucky RFRA, it is defined in Kentucky's general definitions statute to include "bodies-politic and corporate, societies, communities, the public generally, **individuals**, partnerships, joint stock companies, and limited liability companies." *See* KY. REV. STAT. § 446.010(33) (emphasis added). There is no exception for individuals who are publicly elected officials.

the existence of a compelling governmental interest and the least restrictive means were used to further that interest.

The Kentucky RFRA is similar to the Federal Religious Freedom Restoration Act (“Federal RFRA”), 42 U.S.C. § 2000bb-1(a) & (b), which was enacted in 1993 to “provide very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2760 (2014).⁵ As broad as the protections are under the Federal RFRA, however, the Kentucky RFRA goes even further in protecting religious liberties because it (1) protects **any act or refusal to act** based upon a sincerely held religious belief, (2) requires that government show a compelling government interest “in infringing the specific act or refusal to act” at issue (thus, broadly construed interests will not suffice), and (3) imposes a “clear and convincing” evidentiary standard on the government for demonstrating both the required compelling government interest and the least restrictive means to achieve that interest.⁶ Therefore, in this case, Gov. Beshear and Commr. Onkst must demonstrate **by clear and convincing evidence** that they have a compelling governmental interest in infringing Davis’ religious conscience through the SSM Mandate and they must also demonstrate **by clear and convincing evidence** that they have used the least restrictive means to accomplish that interest.

⁵ The Federal RFRA provides that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(a) & (b). In its original form, Federal RFRA defined the “exercise of religion” to mean “the exercise of religion under the First Amendment.” 42 U.S.C. § 2000bb-2(4) (1994 ed.). In subsequent years, Congress amended the Federal RFRA definition for “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” 42 U.S.C. § 2000cc-5(7)(A), and mandated that this concept “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. § 2000cc-3(g). *See also Hobby Lobby*, 134 S.Ct. at 2761-62, 2772-73.

⁶ *See In re: Backer*, 51 Fed. App’x 522, 531 (6th Cir. 2002) (“Clear and convincing evidence requires a party with the burden of proof to present evidence that is more persuasive than a mere preponderance, but proof which need not rise to the level of beyond a reasonable doubt.”) (citing *Hardin v. Savageau*, 906 S.W.2d 356, 357-58 (Ky. 1995)).

Davis establishes a prima facie case under the Kentucky RFRA by showing a substantial burden on her “right to act or refuse to act in a manner motivated by a sincerely held religious belief.” See *Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 384 (6th Cir. 2014) (discussing elements of prima facie Federal RFRA claim), *judgment vacated on other grounds*, 135 S.Ct. 1914 (2015). Upon this showing, the burden then shifts to the government to satisfy a particularized compelling interest test accomplished by the least restrictive means, *id.*—and, under the Kentucky RFRA, by a heightened standard of proof, see KY. REV. STAT. § 446.350.

a. Davis’ inability to authorize SSM licenses is motivated by her sincerely-held religious beliefs about marriage.

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). In the case at bar, the undisputed evidence is that Davis holds sincere religious beliefs about marriage and her inability to issue SSM licenses is motivated by those convictions. See VTC, ¶¶ 17-18; see also Hr’g Tr. (7/20/15), Davis Direct, at 31:13-16; *id.*, Davis Cross, at 62:10-17, 63:21-25. In her view, marriage is the sacred union of a man and a woman, only. See VTC, ¶ 17; see also Hr’g Tr. (7/20/15), Davis Direct, at 31:10-12, 32:4-7; *id.*, Davis Cross, at 69:10. She cannot license, authorize and approve a union that is not “marriage,” according to her religious beliefs. See VTC, ¶¶ 17-18; see also Hr’g Tr. (7/20/15), Davis Direct, at 42:17-20; *id.*, Davis Cross, 62:10-12. 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.

It is not for this Court to question the reasonableness or scriptural accuracy of Davis’ beliefs about marriage. *Hobby Lobby*, 134 S.Ct. at 2779 (citing *Thomas v. Review Bd. of Indiana*

Employment Security Div., 450 U.S. 707, 716 (1981)). Indeed, judges “are not arbiters of scriptural interpretation,” and they are not tasked with determining who “more correctly” perceives their faith’s commands. *Thomas*, 450 U.S. at 716. Moreover, it is not for this Court to determine whether Davis’ religious beliefs are “mistaken” or “insubstantial.” *Hobby Lobby*, 134 S.Ct. at 2779. Instead, the “‘narrow function’ . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction.’” *Id.* (quoting *Thomas*, 450 U.S. at 716). Davis, who has never before raised a religious objection to the performance of any tasks in the county clerk’s office over the course of three decades, see VTC, ¶ 31, has unquestionably demonstrated an honest conviction against about marriage, and her sincerely held religious beliefs about marriage are the impetus behind her inability to issue SSM licenses. See VTC, ¶¶ 18, 29. Therefore, Davis has shown that her “right to act *or refuse to act*” is “motivated by a sincerely held religious belief.”

b. Forcing Davis to authorize SSM licenses substantially burdens her religious freedom.

Forcing Davis to authorize SSM licenses substantially burdens her religious freedom. As indicated above, Kentucky marriage law predating *Obergefell* requires that “each county clerk” use the same prescribed form to issue a marriage license. KY. REV. STAT. §§ 402.100, 402.110. As county clerk, Davis is provided this form by the KDLA, and she has no local discretion in the composition and requirements of that prescribed form. See VTC, ¶¶ 7, 10; see also Hr’g Tr. (7/20/15), Davis Direct, at 37:17-20, 38:9-17, 39:9-12, and Davis Cross, 57:8-23. By legislative enactment predating *Obergefell*, this form included: (1) an “**authorization statement of the county clerk issuing the license**”; (2) “the **signature of the county clerk** or deputy clerk issuing the license”; (3) “[a] **signed statement by the county clerk** or a deputy county clerk of the county in which the marriage license was issued”; and (4) the “**the name of the county clerk under whose authority the license was issued.**” KY. REV. STAT. § 402.100(1)-(3) (emphasis added). Thus,

before *Obergefell*, as county clerk, Davis had to include her name, signature, and approval four times on marriage licenses she signed. See VTC, ¶ 11, and Ex. A. Even on licenses that she did not sign, the KDLA-approved form required Davis to put her imprimatur no less than two times on each and every marriage license issued in her county. See VTC, ¶ 11, and Ex. A. When marriage licenses were being authorized by Davis bearing her name and endorsement exclusively to couples consisting of one man and one woman, she had (and has) no religious objection to authorizing those marriages and placing her imprimatur on their marriage licenses. See VTC, ¶ 23.

But on Gov. Beshear's own initiative, the KDLA prepared a revised mandatory form in response to his SSM Mandate, which was then circulated to county clerks for them to begin using immediately, without exception. See VTC, ¶¶ 25-26, and Ex. C. This form provided no opportunity for county clerks (or deputy clerks for that matter) with religious objections to SSM *not* to participate in endorsement and approval of SSM. On this new form, as constructed by Gov. Beshear and Commr. Onkst, the "authorization" or permission to marry (even on licenses she does not personally sign) still unmistakably comes from Davis herself. See VTC, ¶ 12, and Ex. C; see also Hr'g Tr. (7/20/15), Davis Direct, at 37:10-16, 38:9-17, 40:11-14, 41:4-7, 41:16-23, 50:20-21, 77:9-12, 77:21-78:3. As in the old forms, the new KDLA-approved form requires Davis to put her imprimatur no less than two times on each and every marriage license issued in her county. See VTC, ¶¶ 11, 26, and Ex. C.

But Davis cannot sanction, endorse, and approve a union of two persons which, in her sincerely-held belief, is not marriage. See VTC, ¶ 18; see also Hr'g Tr. (7/20/15), Davis Direct, at 31:10-12, 32:4-7; 42:17-20, and Davis Cross, at 62:10-12 ("[M]y religious beliefs can't condone issuing and being a party to the issuance of same-sex marriage licenses."); see also *id.*, Blevins Cross, at 17:5-6 (confirming that "[Davis] just could not do it"). The marriage licenses Davis

authorizes become permanent records stating the marriage was endorsed by her, which she cannot do. *See* Hr’g Tr. (7/20/15), Davis Direct, at 42:19-20 (“Because if I say that I authorize that, I’m saying I agree with it, and I can’t.”), and Davis Cross, 67:5-7 (“I could [not] put my name to a marriage license that was issued to a same-sex couple.”).

Gov. Beshear has flatly rejected Davis’ request for religious exemption. In his view, Davis must either comply with his SSM Mandate, or resigns from office. *See* VTC, ¶¶ 28, 36; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 47:5-12. In doing so, Gov. Beshear is 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.

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 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.”⁷ Loss of job. Civil liability. Sanctions. Private lawsuits

⁷ This statement attributed to Atty. Gen Conway was contemporaneously reported by multiple news sources. *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 7, 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 7, 2015).

in federal court. Davis is being threatened with all of the above. Certainly, the Kentucky RFRA is designed to protect a person from such substantial burdens upon their religious freedom.

Importantly, Davis is not claiming a substantial burden on her religious freedom if **someone else** authorizes and approves a SSM license. For example, Davis is not claiming that her religious freedom is substantially burdened if she must complete an opt-out form to be exempted from issuing SSM licenses. Davis is also not claiming that a SSM license authorized by the Rowan County Judge/Executive and devoid of her name and authority substantially burdens her religious freedom. Davis is also not claiming that her religious freedom is substantially burdened if the license were issued by someone else in Rowan County (*e.g.*, a deputy clerk), so long as that license is not issued under her name or on her authority. But as it stands now, and through no fault of her own, no marriage license can be issued from the Rowan County clerk's office without Davis' authorization and without her imprimatur. Davis is also not claiming that the mere administrative act of recording substantially burdens her religious freedom. But county clerks are not mere scribes for a marriage. Instead, county clerks actually authorize the marriage license. *See* KY. REV. STAT. § 402.100(1)-(3). Such participation in and approval of SSM substantially burdens her religious freedom.

c. The SSM Mandate does not survive strict scrutiny.

As a result of the above, Gov. Beshear and Commr. Onkst must demonstrate by clear and convincing evidence that they have (1) a compelling governmental interest in infringing Davis' religious conscience through the SSM Mandate and (2) they have 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). Indeed, the Federal RFRA imposes “the most demanding test known to constitutional law,” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)—notwithstanding, as discussed above, the Kentucky RFRA is only more demanding.

i. The SSM Mandate furthers no compelling governmental interest in infringing upon Davis’ religious freedom.

There is no compelling governmental interest in forcing Davis to violate her religious freedom. In *Hobby Lobby*, the Supreme Court emphasized that the similar Federal RFRA “contemplates a ‘more focused’ inquiry” in considering government’s purported interests. See *Hobby Lobby*, 134 S.Ct. at 2779. This 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”).

In applying the Kentucky RFRA, a similar (but even more exacting) particularized inquiry is necessary, for the statute requires a compelling governmental interest “in infringing the specific act or refusal to act” at issue to be shown by clear and convincing evidence. Thus, to overcome Davis’ religious freedom claim, Gov. Beshear and Commr. Onkst must demonstrate a compelling

government interest in infringing upon Davis' inability to authorize SSM licenses that is "beyond broadly formulated interests" and shows 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). Gov. Beshear cannot show that granting a specific exemption to Davis will endanger this Commonwealth, let alone Kentucky's marriage licensing scheme.

Reviewing Gov. Beshear's edicts, he appears to be professing essentially three governmental interests in his SSM Mandate, none of which satisfy this exacting scrutiny. First, Gov. Beshear implemented his SSM Mandate based upon a misreading of what the *Obergefell* decision "makes plain." See VTC, Ex. C. Immediately following *Obergefell*, Gov. Beshear, on his own initiative, decreed his SSM Mandate, which was neither expressly nor impliedly compelled by the Supreme Court's decision in *Obergefell*. The SSM Mandate leaves no room for individual county clerks' religious freedoms. But **in *Obergefell*, the Court unanimously agreed that First Amendment protections remain despite same-sex "marriage."** Specifically, 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). Continuing, these 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). **The majority opinion also recognized that religious freedoms continue unabated even as they redefined 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). Gov. Beshear was thus under no compulsion to order each and every individual Kentucky County Clerk to authorize and approve SSM marriage.

Second, Gov. Beshear claims that county clerks must apply his SSM Mandate because their oath of office purportedly requires them to leave their personal convictions at the door of public service and “prescribes” how they must act once in office. Gov. Beshear is wrong. A person’s constitutional and statutory rights and liberties are not immediately eviscerated the moment they take their oath of office.⁸ This is further demonstrated in the circumstances of this case, where Davis took an oath of office to support a Kentucky Constitution that perfectly aligned with her religious beliefs about marriage. *See* VTC, ¶¶ 18-20; Hr’g Tr. (7/20/15), Davis Redirect, at 71:23-72:1; *see also* KY. CONST. § 233A; KY. REV. STAT. § 402.005; *Jones*, 501 S.W.2d 588 (Ky. App. 1973); *DeBoer*, 772 F.3d at 397, 421. Moreover, Davis took an oath to “support the Constitution of the United States and the Constitution of this Commonwealth” that, in their enumerated provisions, expressly protect her “inalienable” and “inviolable” rights of conscience, religious liberty, and speech, *see* U.S. CONST. art. VI & amend. I; KY. CONST. Preamble, and §§ 1, 5, 8, 26,

⁸ “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, the Supreme 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 this Court already acknowledged. *See, e.g.*, Hr’g Tr. (7/13/15), at 84:3-4, 85:20-22, 98:19-22, 99:19-21, 103:15-18, 104:8-9.

as well as the fundamental rights of others. See VTC, ¶ 19; see also Hr’g Tr. (7/20/15), Davis Direct, at 54:20-56:5. Furthermore, and always omitted from Gov. Beshear’s discussion, Davis swore an oath to faithfully execute the office of County Clerk “according to law. . . **so help me God,**” thereby further incorporating her sincerely held religious beliefs. KY. CONST. § 228 (emphasis added). Thus, contrary to Gov. Beshear’s view, the oath does not require her to set aside her conscience and beliefs outright.

Third, and related the foregoing, Gov. Beshear appears to suggest that his SSM Mandate is necessary based upon his narrow conception of a public official’s “duty.” Gov. Beshear is, again, mistaken. His deliberately circumscribed perspective ignores entirely any consideration of the Kentucky RFRA, or religious accommodation generally. As such, Gov. Beshear shirks the Supreme Court’s conclusion that “government may (and sometimes must) accommodate religious practices,” *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144-45 (1987), and repudiates the Sixth Circuit’s finding that “[o]ur Nation’s history is replete with . . . accommodation of religion.” *ACLU v. Mercer County, Ky.*, 432 F.3d 624, 639 (6th Cir. 2005). After all, “[w]e are a religious people whose institutions presuppose a Supreme Being,” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Providing accommodation for religious conviction is not antithetical for public employees or inconsistent with governmental mandates. See, e.g., *Slater v. Douglas County*, 743 F. Supp. 2d 1188, 1192-95 (D. Or. 2010) (denying summary judgment to county defendant that only proposed to reassign a county clerk employee who refused on religious grounds to issue same-sex domestic partnership registrations rather than accommodating her request). 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). In a similar fashion, medical providers (and other persons) with conscience-based objections to governmental mandates and programs related to providing abortions, abortion-related drugs, and abortion-related insurance coverage may also be exempted from generally applicable requirements. *See, e.g., Stormans, Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1188-93 (W.D. Wash. 2012) (pharmacists with religious objection based upon sincerely held beliefs against providing certain abortion-related drugs did not have to comply with government’s mandate to carry those drugs); *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 v. United States*, 328 U.S. 61, 64-67 (1946), or religious-based objections to certain vaccinations, 8 U.S.C. § 1182(g).

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. 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* conceded that the institution of marriage as

exclusively a union between a man and a woman “has existed for millennia and across civilizations” and 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). Thus, although the traditional view of marriage was discarded in *Obergefell*, that long-held view of marriage provides the historical underpinnings for a religious exemption and accommodation from the redefinition of marriage.

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, Gov. Beshear’s view notwithstanding. 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* VTC, ¶ 31; *see also* Hr’g Tr. (7/20/15), Davis Direct, at 51:18-52:2. 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* VTC, ¶¶ 9, 27. Thus, “[e]ven a compelling interest may be outweighed in some circumstances by another even weightier consideration.” *Hobby Lobby*, 134 S.Ct. at 2780.

**ii. Many less restrictive alternatives are available for
furthering Gov. Beshear’s purported interests.**

Yet even if Gov. Beshear and Commr. Onkst demonstrate by clear and convincing evidence a compelling government interest in infringing upon Davis’ religious freedom, forcing Davis to sign, issue, and approve SSM licenses over and against her sincere religious objections also is not the least restrictive means of obtaining a Kentucky marriage license. This is evidenced here by the simple fact that Gov. Beshear did not even wait for the ink to dry from the *Obergefell* opinion before issuing his SSM Mandate to all Kentucky County Clerks on June 26, 2015—the same day the *Obergefell* decision was announced. See VTC, ¶¶ 24-25, and Ex. C.

“The least-restrictive-means standard is exceptionally demanding.” *Hobby Lobby*, 134 S. Ct. at 2780. Gov. Beshear and Commr. Onkst cannot demonstrate that they “lack[] other means” of issuing marriage licenses to same-sex couples “without imposing a substantial burden” on Davis’ “exercise of religion.” See *Hobby Lobby*, 134 S. Ct. at 2780. Not only that, the least restrictive means test may “require the Government to expend additional funds to accommodate citizens’ religious beliefs.” *Hobby Lobby*, 134 S. Ct. at 2781. This is consistent with the Kentucky Legislative Research Commission’s (“KYLRC”) fiscal impact reports provided to Kentucky legislators prior to enacting the Kentucky RFRA. In those reports, the KYLRC noted that the least restrictive alternative requirements “may be minimal . . . or significant, for example, if it requires hiring additional staff or paying overtime for other staff to do a job that an employee declines to do because of religious beliefs.” See Kentucky LRC, Local Mandate Fiscal Impact Estimates, Ky. House Bill 279 (2013 Reg. Sess.), dated Feb. 26, 2013 and Mar. 6, 2013 (copies attached hereto as Exhibit “D”). Thus, even if proposed less restrictive alternatives require additional costs in applying Kentucky marriage law, such costs are specifically envisioned by the Kentucky RFRA to ensure that a person’s religious freedom is protected.

In this matter, several less restrictive means are available to accomplish the goal of providing Plaintiffs with Kentucky marriage licenses (if that is the “desired goal,” *Hobby Lobby*, 134 S.Ct. at 2780) without substantially burdening Davis’ religious freedom and conscience. Indeed, because the entire Kentucky marriage licensing scheme is founded upon the millennia-old natural definition of marriage, Gov. Beshear and Commr. Onkst can take steps that both recognize SSM and protect county clerks’ religious conscience rights in response to the redefinition of marriage in *Obergefell*.

First, Gov. Beshear and Commr. Onkst can provide an opt-out or exemption to county clerks who have a religious objection to issuing SSM licenses. Other states, such as North Carolina, have provided precisely this type of remedy to conscientious objectors to same-sex “marriage.” *See, e.g.*, N.C. GEN. STAT. § 51-5.5. Indeed, Kentucky law itself already provides to county clerks an exemption from issuing fishing and hunting licenses, which any county clerk may claim simply by submitting a written memorandum. KY. REV. STAT. § 150.195. Thus, if Kentucky is able to accommodate personal beliefs and conscientious objection regarding something that is (to some) as trivial as fishing and hunting, surely Gov. Beshear and Commr. Onkst can and must provide similar accommodation for deeply held beliefs about the fundamental nature of marriage. Exempting Davis from issuing marriage licenses still leaves more than 130 marriage licensing locations spread across the Commonwealth of Kentucky.

Second, Gov. Beshear and Commr. Onkst can deputize a neighboring county clerk who is willing to issue the Rowan County licenses as well. There are already multiple counties in Kentucky that have multiple branch offices issuing marriage licenses. *See* VTC, ¶ 9 (in Kentucky, there are 120 counties, but approximately 137 marriage licensing locations). The county clerk in those counties cannot be at multiple locations at one time, but marriage licenses are nonetheless

still issued with their authority and bearing their name from locations where they are not physically present. In the case at bar, the seven counties bordering Rowan County are issuing marriage licenses. *See* Hr’g Tr. (7/20/15), Davis Direct, at 53:5-15. Any one of those county clerks can be empowered to authorize and approve marriage licenses in Rowan County.

Third, Gov. Beshear and Commr. Onkst can designate and deputize other persons who are able to authorize SSM licenses in a particular county in the event the county clerk in that county has a religious objection to issuing such licenses. For example, at least one (and perhaps two) of Davis’ deputy clerks in Rowan County is willing to issue, authorize, and approve SSM licenses if they were permitted to issue it on their own authority (rather than Davis’) and bearing their own (rather than Davis’) imprimatur. *See* Hr’g Tr. (7/20/15), Davis Direct, at 48:20-49:11.

Fourth, Gov. Beshear and Commr. Onkst can modify the SSM Mandate and prescribed KDLA-approved form to remove the personal nature of the authorization, approval, and imprimatur that a county clerk must provide on the current form for any marriage license.

Fifth, Gov. Beshear and Commr. Onkst can keep the issuance of marriage licenses at the state-level through an online or other state-wide, state-based licensing scheme rather than deputizing county clerks as state agents for authorizing and approving SSM.

Sixth, Gov. Beshear can call a special legislative session to address Kentucky’s entire marriage licensing scheme, which will naturally include consideration of the ongoing debate between religious liberty and SSM. In fact, the Kentucky political branches have already indicated an intent to address this matter with a legislative solution, ***after Gov. Beshear is out of office***. Specifically, gubernatorial candidates from both parties in Kentucky have indicated an intent to address this issue—to “protect[] religious freedoms” (Matt Bevin) or to “allow county clerks some

flexibility” (Atty. Gen. Conway)—when the legislature returns to session in January 2016.⁹ In fact, two bills addressing religious freedom have already been pre-filed for that general session, and one of those bills expressly protects clerks such as Davis from having to issue SSM licenses. This bill amends the Kentucky RFRA to state expressly that “[i]ssuing or recording a marriage license, or solemnizing a marriage, to which a person holds a sincere religious objection or which is contrary to that person’s faith tradition due to the marriage being between persons of the same sex 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.) (emphasis added) (copy attached hereto as Exhibit “E”). But Gov. Beshear does not have to wait until January; he can call the special session now, and any additional costs associated therewith (which Kentucky RFRA envisions) are comparable to the hundreds of thousands of dollars incurred in outside counsel fees when Atty. Gen. Conway refused to defend the Kentucky Constitution and laws on marriage.

Seventh, Gov. Beshear and Commr. Onkst can instruct the KDLA to design a form “memorandum” to be used by county judge/executives for the issuance of marriage licenses when county clerks are rendered legally absent from their office for purposes of marriage licensing based upon a religious conscience objection. As explained further in Davis’ opposition to Plaintiffs’ Motion for Preliminary Injunction, see D.E. 29 at 45-48, incorporated by reference here, an alternative to a marriage license issued by a county clerk under Kentucky marriage law is a marriage license issued by a county judge/executive, the highest elected officer in a county, when

⁹ See Bevin: Kentucky should stop issuing marriage licenses, Washington Times, July 10, 2015, available at <http://www.washingtontimes.com/news/2015/jul/10/bevin-kentucky-should-stop-issuing-marriage-licenses/> (last accessed August 7, 2015).

a county clerk is deemed absent. *See* KY. REV. STAT. § 402.240. This alternative procedure does not require the use of the KDLA marriage license form referred to in KY. REV. STAT. §§ 402.100, 402.110; 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* KY. REV. STAT. § 402.240. At present, the County Judge/Executive of Rowan County, Walter 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 count as the “absence” of Davis for purposes of the issuance of marriage licenses under this statute. *See* VTC, ¶ 32. However, Judge Blevins has also admitted that he would raise no religious objection to issuing marriage licenses to same-sex couples if he were authorized to issue licenses. *See* VTC, ¶ 32 Hr’g Tr. (7/20/15), Blevins Direct, at 14:16-18. Gov. Beshear can interpret this statutory provision to include absences based upon religious conscience objection, and, along with Commr. Onskt, provide a KDLA-approved marriage memorandum to county judge/executives to remove any uncertainty about this alternative process.

All of these options, and certainly others as well, are available to avoid substantially burdening Davis’ religious freedom.

2. The Mandate Directing Davis To Authorize SSM Licenses Violates Her Fundamental Rights Of Religious Freedom And Conscience Protected By The United States And Kentucky Constitutions.

Davis is also protected by fundamental rights of religious freedom and conscience that are firmly enshrined in the United States and Kentucky Constitutions. 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 the right to hold a particular religious belief, but also the right to engage

in conduct motivated by that belief.” *Prater v. City of Burnside, Ky.*, 289 F.3d 417, 427 (6th Cir. 2002). 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 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**.”).

Most cases with free exercise claims are considered under the framework established by the Supreme Court in *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). According to this well-established framework, a neutral and generally applicable law does not violate the Free Exercise Clause “even if the law has the incidental effect of burdening a particular religious practice.” *Lukumi*, 508 U.S. at 531; *Smith*, 494 U.S. at 878-80. However, if the free exercise claim is combined with another constitutional right, as involved here, *see* Section IV.A.3 (free speech rights), *infra*, the standard of protection is at its constitutional zenith. *Smith*, 494 U.S. at 881. Thus, similar to the Kentucky RFRA analysis set forth above, a successful free exercise challenge can be made if the individual demonstrates that (1) a sincerely held religious belief (2) was burdened by a governmental action, and the government cannot show that it had (3) a compelling reason for burdening the religious belief and (4) it used the least restrictive means to achieve its interest. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. 398. “Many laws will not meet the test.” *Smith*, 494 U.S. at 888. As discussed extensively above, there is no compelling interest in withholding an exemption from Davis, and Kentucky’s marriage licensing

scheme will not be thwarted in the least by accommodating an exemption for Davis, particularly where other alternatives for licensing are readily available both within and without Rowan County.

Moreover, by directing county clerks to disregard their religious beliefs in no uncertain terms, Gov. Beshear is not applying Kentucky marriage law in a neutral and generally applicable manner through his SSM Mandate. A law or policy “burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny,” and laws or policies that “target religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.” *Lukumi*, 508 U.S. at 546. The SSM Mandate specifically targets county clerks like Davis who possesses certain religious beliefs about marriage. 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 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 VTC, ¶¶ 14-15, 34.

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 VTC, ¶ 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 VTC, ¶¶ 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* VTC, ¶¶ 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* VTC, ¶¶ 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* VTC, ¶¶ 27, 35

In no uncertain terms, the SSM Mandate being implemented by Gov. Beshear has “as [its] object the suppression of religion,” *Lukumi*, 508 U.S. at 542—even worse, a particular religious belief. Thus, although Atty Gen. Conway was given a pass for his conscience about marriage without any threats of repercussion, clerks like Davis are being repeatedly told by Gov. Beshear to abandon their 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. The Free Exercise Clause “commits government itself to religious tolerance,” and this Court must not permit Gov. Beshear to abdicate his “own high duty to the Constitution and to the rights it secures,” *Lukumi*, 508 U.S. at 547, including the religious freedom of persons like Davis. Accordingly, Davis possesses a viable free exercise claim that must be protected.

3. The Mandate Commanding Davis To Affix Her Name And Approval To SSM Licenses Violates Her Fundamental Free Speech Rights Protected By The United States And Kentucky Constitutions.

The United States and Kentucky Constitutions also protect the free speech rights of Davis. 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 of the First Amendment protects “the decision of 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 in original). Indeed, “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Wooley v. Maynard*, 430 U.S. 705, 714 (1976) (citing *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)). In *Wooley*, a religious individual objected to carrying the New Hampshire state motto of “Live Free or Die” on his state-issued license plate. *Wooley*, 430 U.S. at 707, 715. In *Barnette*, religious individuals objected to a West Virginia statute requiring public school students to affirmatively salute the flag. *Barnette*, 319 U.S. at 636. In both cases, the objecting individuals prevailed because the State improperly “invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Barnette*, 319 U.S. at 642; *Wooley*, 430 U.S. at 715.

This “compelled-speech” doctrine applies when “an individual is obliged personally to express a message he disagrees with, imposed by the government.” *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 557 (2005). In this matter, this Court is faced with a state measure that “forces an individual, as part of [her] daily life” to “be an instrument for fostering public adherence to an ideological point of view [she] finds unacceptable.” *See Wooley*, 430 U.S. at 715. The single-page KDLA-approved form uses the word “marriage” at six different places on the document (not including the reference to “join[ing] together in the state of matrimony”), and twice

designates Davis as the person authorizing the marriage license. See VTC, ¶¶ 11-12, and Exs. A, D. 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 a particular relationship between persons against their religious convictions. Thus, pursuant to Gov. Beshear’s SSM Mandate, Davis is being told to validate and affirm on the prescribed KDLA form a view and message that she finds “morally objectionable” and “repugnant to [her] moral and religious beliefs.” See *Wooley*, 430 U.S. at 707. As it currently stands, her name and approval cannot be divorced from a SSM license. The principles enshrined in *Wooley* and *Barnette* therefore protect Davis from being coerced into placing her imprimatur on a union that, in her view, is not a marriage. To hold otherwise forces Davis to agree with a message and point of view she finds abhorrent and unconstitutionally “invades” her “intellect and spirit.”

Further, even if the KDLA-approved form is state-issued, state-designed, and identified with the state, the form still requires personal speech from a person (the county clerk) to validate, authorize and approve the marriage. The KDLA form identifies “Kim Davis” by name in several places and further designates her as the individual under whose “authority” the license was issued. KY. REV. STAT. § 402.100(3); see also VTC, Exs. A, D. 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). If Gov. Beshear now wants Kentucky to issue SSM licenses and recognize SSM licenses from other States following *Obergefell* that is one thing. But if Gov. Beshear, through his

SSM Mandate, commandeers Davis to be an “instrument” for a message that she finds objectionable and repulsive, it is another thing altogether and violates her free speech rights.

4. The Mandate Requiring Davis To Affirm A Definition Of Marriage Contrary To Her Religious Belief Violates The Religious Test Clause.

In addition to First Amendment protections, Davis’ religious conscience is further protected by the Religious Test Clause of the Constitution, which mandates that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI. Compelling all individuals who have any connection with the issuance of marriage licenses (*e.g.*, a county clerk like Davis) 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.

The Kentucky Constitution includes a limited number of requirements for county clerks to hold office, including age and Kentucky residency. KY. CONST. §§ 99, 100. None of the requirements pertain to religious belief or practice. Gov. Beshear, through his SSM Mandate, is importing a newly minted qualification to the Kentucky Constitution’s prescribed qualifications for county clerks: approval of SSM. But at the time she took public office in January 2015 for a four-year term, Davis’ religious beliefs and convictions about marriage undeniably conformed to the law of Kentucky. *See* VTC, ¶¶ 19-20. To require Davis to now participate in the issuance of SSM licenses is repugnant and antithetical to her religious convictions and conscience. However, 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 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,” implying 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, religious persons like 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. But the 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, 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 829. Imposing on all public officials—whether elected or appointed—a mandate to participate in SSM, without any protection for religious conscience, violates the First Amendment and Religious Test Clause.

B. Preliminary Relief Protects Davis From Irreparable Harm.

In the Sixth Circuit, “it is well-settled that ‘loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.’” *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); see also *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (noting that “courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA”). In fact, the Sixth Circuit has expressly found that “[t]he Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury[.]”

Newsom v. Norris, 888 F.2d 371, 378 (6th Cir. 1989). The stringent protection of First Amendment rights is due to the “‘intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.’” *Id.* (citation omitted).

Davis is facing imminent harms absent a preliminary injunction. Gov. Beshear has already issued his SSM Mandate, and repeatedly instructed county clerks to either comply with the SSM Mandate, or resign. Not only that, Davis is facing multiple lawsuits from individuals seeking to enforce the SSM Mandate. *See* D.E. 1, Compl., at ¶¶ 32-33 (referring to the June 26, 2015 “directive from the Chief Executive [Gov. Beshear]” that was sent to “all of Kentucky’s County Clerks”); D.E. 2-2 at 6 (contending that Davis’ refusal to act “is contrary to the direct admonition of the Governor”); *see also David Ermold, et al. v. Kim Davis, et al.*, No. 0:15-cv-00046 (E.D. Ky. July 10, 2015) (D.E. 1, Compl., at ¶¶ 11-12) (referring to “Governor Beshear’s directives” and alleging that “Kentucky Governor Steve Beshear directed all County Clerks to recognize same sex marriages effective June 26, 2015”). Also, Plaintiffs in the underlying action are seeking their own preliminary injunctive relief to enjoin Davis to authorize and approve SSM licenses. *See* D.E. 2-2. Accordingly, this factor weighs strongly in providing Davis with preliminary injunctive relief.

C. Granting Preliminary Relief Will Not Cause Irreversible Harm To Others.

Granting Davis preliminary injunctive relief will simply prevent enforcement of the SSM mandate against Davis in particular, thereby preserving the status quo between all parties to this action. *See United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004) (noting that “purpose” of a preliminary injunction is “simply to preserve the status quo” until a trial on the merits). In this matter, Kentucky County Clerks are, overwhelmingly, applying the SSM mandate from Gov. Beshear. Thus, Kentucky marriage licenses, including SSM licenses, are readily available across the Commonwealth of Kentucky in nearly all of its 120 counties. *See* VTC, ¶ 27;

see also VTC, Ex. C, Beshear Letter. Therefore, barring Gov. Beshear and Commr. Onskt from enforcing the SSM mandate against Davis would not substantially harm them.

Neither will the Plaintiffs in this action suffer permanent or irrevocable harm if Davis obtains her requested preliminary injunctive relief against Gov. Beshear and Commr. Onskt. The preliminary injunctive relief requested by Davis herein will not substantially harm Plaintiffs' purported right to marry because no "absolute barrier" has been constructed that "absolutely or largely prevent[s]" Plaintiffs from marrying **whom** they want to marry. *See Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001). The lack of marriage licenses authorized and approved by Davis "does not change the essential fact" that Plaintiffs are not barred "from getting married, nor did it prevent them from marrying a large portion of population even in [Rowan] County." *Vaughn*, 269 F.3d at 712.¹⁰

Additionally, this case is neither the same case as *Obergefell* nor controlled by it. Before *Obergefell*, Plaintiffs were "absolutely prevented" from obtaining a Kentucky marriage license if they wanted to marry a person of the same sex. No same-sex couple was able to obtain a Kentucky marriage license in any one of Kentucky's 120 counties. And even if Plaintiffs had gotten "married" in a different state, their "marriages" would not have been recognized in Kentucky. But now individuals desiring SSM licenses can obtain them due to the application of the SSM mandate

¹⁰ The right to marry cases relied upon by Plaintiffs in the underlying action do not compel a different conclusion. 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 involve state-wide 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 religious conscience and First Amendment objections that are present in the case at bar.

by nearly all Kentucky County Clerks. *Obergefell* does not mandate that a person obtain a marriage license in their home county that is approved by a particular individual.

As noted above, because marriage licenses are readily available throughout Kentucky, and have been for more than forty days as of the date of this filing, Plaintiffs have failed to demonstrate that they will suffer any irreparable harm without **Davis** personally signing, issuing, approving, and authorizing their proposed unions. Importantly, Plaintiffs have admitted that they can obtain a Kentucky marriage license elsewhere and are not required to obtain a marriage license in the county where they reside, *see* KY. REV. STAT. § 402.080, but they also have uniformly conceded that, although they are aware of these facts, they intentionally have not even tried to secure a license from another county.¹¹ This includes the seven counties neighboring Rowan County, all of whom are issuing marriage licenses, Hr’g Tr. (7/20/15), Davis Direct, at 53:5-15, along with Boyd and Kenton Counties, where the July 13, 2015 and July 20, 2015 hearings were held in this matter (and attended by multiple Plaintiffs). Hr’g Tr. (7/20/15), Davis Direct, at 54:9-19.¹² Plaintiffs’ actual desire to be married is apparently less important than having Davis participate in and approve of their desired union. Accordingly, in stark contrast to the foregoing minimal (at most) harm to others, Davis faces severe, immediate, and irreversible harm.

¹¹ See Hr’g Tr. (7/13/15), Miller Direct, at 28:23-25, and Miller Cross, at 31:2-4, 31:10-11; *id.*, Fernandez Direct, at 37:16-18; *id.*, Fernandez Cross, at 38:10-17; *id.*, Spartman Direct, at 46:23-25, 47:1-2, and Spartman Cross, at 48:1-6, 48:11-13.

¹² Thus, Plaintiffs are willing and able to drive approximately 60 miles to the Ashland federal courthouse (the distance from the Rowan County clerk’s office) and more than 100 miles to the Covington federal courthouse for Court hearings, but they cannot drive to any of the dozens of nearby and surrounding counties issuing marriage licenses to obtain a Kentucky marriage license. More than fifteen (15) Kentucky county clerk’s offices are within 60 miles of the Rowan County clerk’s office, and more than sixty (60) county clerk’s offices are within 100 miles of the Rowan County clerk’s office.

D. An Injunction To Protect Davis Is In The Public Interest.

Finally, a preliminary injunction will uphold the public interest by protecting Davis' constitutional and Kentucky RFRA rights. The public has no interest in enforcement of the SSM Mandate to coerce Davis to violate her conscience and religious freedom. *See, e.g., Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (finding that the public has a "significant interest" in the "protection of First Amendment liberties"); *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) ("[P]ursuant to RFRA, there is a strong public interest in the free exercise of religion even where that interest may conflict with [another legislative scheme].").

V. CONCLUSION

For all the foregoing reasons, Davis' Motion for Preliminary Injunction against Third Party Defendants Gov. Beshear and Commr. Onkst should be granted.

DATED: August 7, 2015

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

Respectfully submitted:

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

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

CERTIFICATE OF SERVICE

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

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

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

Attorneys for Plaintiffs

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

Attorneys for Rowan County

I also hereby certify that two (2) true and correct copies of the foregoing will be sent via Fedex and U.S.P.S. first class mail to the Attorney General of Kentucky on behalf of Third-Party Defendants Steven L. Beshear, Governor of Kentucky, and Wayne Onkst, Commissioner of the Kentucky Department for Libraries and Archives, at the following location:

Attorney General Jack Conway
OFFICE OF THE ATTORNEY GENERAL
700 Capitol Avenue, Suite 118
Frankfort, KY 40601-3449

DATED: August 7, 2015

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

EXHIBIT A

To Defendant/Third Party
Plaintiff Kim Davis’
Motion for Preliminary
Injunction

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

APRIL MILLER, ET AL.,

Plaintiffs,

V.

KIM DAVIS, ET AL.,

Defendants.

CIVIL ACTION

0:15-CV-00044-DLB

DISTRICT JUDGE

DAVID L. BUNNING

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

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

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

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.

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

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

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/20150707statement.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-fulfill-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

Roger K. Gannam (Fla. 240450)[†]

rgannam@LC.org

court@LC.org

Jonathan D. Christman (Pa. 306634)[†]

jchristman@LC.org

LIBERTY COUNSEL

P.O. BOX 540774

Orlando, FL 32854-0774

(800) 671-1776 Telephone

(407) 875-0770 Facsimile

[†]Admitted *pro hac vice*

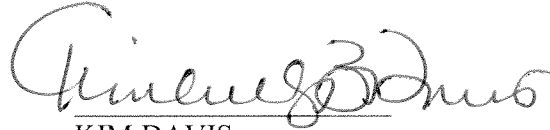
Attorneys for Defendant and

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:

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

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

Attorneys for Plaintiffs

DATED: August 4, 2015

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

Attorneys for Rowan County

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

EXHIBIT A

EXPIRATION: 07/15/15

392905

Marriage LicenseValid ONLY in the

Commonwealth of Kentucky

ROWAN COUNTY

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 _____
 Current Residence _____
 Groom's Full Name _____
 Current Residence _____

Bride**Groom**

Date of Birth (Age) _____
 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 _____

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

 (bride's signature) _____

 (groom's signature) _____
 Issued this 6 / 16 / 2015 in the office of KIM DAVIS ROWAN COUNTY
 (mo.) (day) (year) (name) (county)
 County Clerk, MOREHEAD, Kentucky by BRIAN MASON Deputy Clerk
 (city) (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 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)
 _____ and _____

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

 (Signature of person performing ceremony) Pastor (title), of the _____ (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 2 / 2015 in the office of Kim Davis Rowan
 (mo.) (day) (year) (clerk's name) (county name)

County Clerk, in Marriage Book _____, page _____
Robert H. Earley Deputy Clerk
 (recorder's name) (recorder's title)

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,

A handwritten signature in black ink, appearing to read "Steven L. Beshear".

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

County Clerk, _____, Kentucky by _____,
(city) (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 _____,
_____, of the _____
(Signature of person performing ceremony) (title) (church, religion, or civil authority)

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

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

County Clerk, in Marriage Book _____, page _____.

(recorder's signature) _____ 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



600 West Main Street
Room 102
Morehead, KY 40351

Kim Davis
Rowan County Clerk

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"

EXHIBIT B

To Defendant/Third Party
Plaintiff Kim Davis'
Motion for Preliminary
Injunction

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

APRIL MILLER, Ph.D.,) Ashland Civil
KAREN ANN ROBERTS,) Action No. 15-44
SHANTEL BURKE,)
STEPHEN NAPIER,)
JODY FERNANDEZ,)
KEVIN HOLLOWAY,)
L. AARON SKAGGS,)
BARRY W. SPARTMAN,)
Plaintiffs,) At Ashland, Kentucky
-vs-)
KIM DAVIS, Individually,)
KIM DAVIS, In her official)
capacity as ROWAN COUNTY CLERK,)
ROWAN COUNTY, KENTUCKY,)
Defendants.) July 13, 2015
12:00 p.m.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING PROCEEDINGS
BEFORE THE HONORABLE DAVID L. BUNNING

Court Reporter: Peggy W. Weber, RPR
Official Court Reporter
U.S. District Court
P.O. Box 362
Lexington, Kentucky 40588
(859) 421-0814

Proceedings recorded by mechanical stenography,
transcript produced by computer.

1 Appearances of Counsel:

2 On behalf of Plaintiffs: WILLIAM ELLIS SHARP, ESQ.
3 ACLU of Kentucky
315 Guthrie Street
4 Suite 300
Louisville, Kentucky 40202

5 -and- DANIEL J. CANON, ESQ.
6 Clay Daniel Walton Adams, PLC
462 South Fourth Street
7 Suite 101
Louisville, Kentucky 40202

8 On behalf of Defendant: ROGER K. GANNAM, ESQ.
(Kim Davis) JONATHAN D. CHRISTMAN, ESQ.
9 Liberty Counsel - Orlando
P.O. Box 540774
10 Orlando, Florida 32854

11 -and- ANTHONY CHARLES DONAHUE, ESQ.
12 Donahue Law Group, PSC
410 South Main Street
13 P.O. Box 659
Somerset, Kentucky 42502

14 On behalf of Defendant: CECIL R. WATKINS, ESQ.
(Rowan County, Kentucky) Rowan County Attorney
15 600 West Main Street
Morehead, Kentucky 40351

16 -and- Jeffrey C. Mando, ESQ.
17 Adams Stepner
Woltermann & Dusing, PLLC
18 40 West Pike Street
P.O. Box 861
19 Covington, Kentucky 41012

20

21

22

23

24

25

1 (Whereupon, the Preliminary Injunction Hearing
2 proceedings commenced on Monday, July 13, 2015, at
3 12:00 p.m., on the record in open court, as follows.)

4 THE COURT: All right. Madam Clerk, if you
5 could call the case set for noon, please.

6 THE CLERK: Yes, Your Honor.

7 Ashland Civil Action 15cv44, April Miller,
8 et al., versus Kim Davis, et al., this being called for a
9 preliminary injunction hearing.

10 THE COURT: All right. If we could start with
11 entries of appearance, please, and if you'd identify who
12 you're here representing.

13 We'll start over here.

14 MR. WATKINS: Cecil Watkins on behalf of
15 Rowan County, Your Honor.

16 THE COURT: All right.

17 MR. MANDO: Jeff Mando on behalf of
18 Rowan County, Your Honor.

19 MR. DONAHUE: A.C. Donahue on behalf of
20 Kim Davis by special appearance.

21 MR. CHRISTMAN: Jonathan Christman also on
22 behalf of Kim Davis by special appearance.

23 MR. GANNAM: Roger Gannam on behalf of
24 Kim Davis by special appearance.

25 MR. SHARP: Good morning, Your Honor.

1 Bill Sharp on behalf of Ms. April Miller and
2 the other plaintiffs.

3 MR. CANON: Dan Canon on behalf of the
4 plaintiffs.

5 THE COURT: All right. I'm glad to see we have
6 someone representing the county.

7 Did you enter your appearance today, Mr. Mando?

8 MR. MANDO: Yeah, Your Honor, we were just
9 served the end of last week.

10 MR. WATKINS: Thursday, Your Honor.

11 THE COURT: Okay. And, Mr. Watkins, you're
12 with whom?

13 MR. WATKINS: I'm the Rowan County attorney.

14 THE COURT: You are the county attorney.
15 That's what I thought.

16 MR. WATKINS: Yes.

17 THE COURT: I just wanted to make sure.

18 Okay. Well, as you know, this matter is set
19 for a preliminary injunction hearing.

20 Answers haven't been filed. I don't know if
21 there's been an answer prepared. You haven't responded
22 to the motion. I know by local rule you have a certain
23 time to respond.

24 My hope today is to take whatever evidence
25 you-all want to submit on either side for purposes of the

1 preliminary injunction motion.

2 This was filed as a motion for preliminary
3 injunction, not a motion for TRO, so that told me when it
4 was filed that I would be able to allow for written
5 response. And you chose to file it the way you wanted to
6 so that was your decision.

7 I hope to allow for proof to be put on today,
8 and then, if necessary, I'll -- well, not if necessary, I
9 do plan on hearing argument. I have some questions of my
10 own.

11 The case is not about whether or not we agree
12 or disagree with what the Supreme Court ruled a couple
13 weeks ago because that's the Supreme Court's business.
14 Only the Supreme Court can overrule the Supreme Court.

15 So if anybody is in here looking for me to
16 reverse the Supreme Court, that's not going to happen. I
17 think I would quickly be reversed, and I don't really
18 enjoy doing that.

19 So we're here to hear the evidence necessary
20 for the preliminary injunction motion, and then I'll give
21 you an opportunity to orally make whatever argument you
22 want to make.

23 You can still file written response if you
24 wish. Mr. Mando, you can file a written response if you
25 wish.

1 So, I guess, the burden is on the plaintiff.
2 So I'll give you the opportunity to call witnesses. I
3 mean, there may be an opportunity to stipulate to facts.
4 The facts seem fairly straightforward.

5 I've read a little bit about what's in the
6 pleadings. The public statements, I think, there's
7 public statements that the Defendant Davis made within
8 the pleadings. Of course, that's not under oath so I
9 don't know if that would be the testimony that she would
10 give today.

11 But, Mr. Gannam -- is it Gannam?

12 MR. GANNAM: Yes, Your Honor.

13 THE COURT: All right. Do you wish to say
14 something, sir?

15 MR. GANNAM: Yes, Your Honor. On a preliminary
16 matter, Kim Davis, the defendant, has not been served;
17 and, therefore, this Court does not currently have
18 jurisdiction over her.

19 I have authorities providing that when a
20 preliminary injunction motion is called for hearing and
21 the defendant hasn't been served yet, the Court is
22 without jurisdiction, and the motion should be denied
23 without prejudice with the opportunity to refile it once
24 the defendant is served.

25 But Kim Davis has not been served; and,

1 therefore, this Court does not currently have
2 jurisdiction over her.

3 THE COURT: Well, I have jurisdiction over the
4 complaint. We'll just hear evidence on -- I'm going to
5 hear evidence today regardless because everybody is here.

6 MR. GANNAM: Well, Your Honor, may I just ask
7 then that we would move to suspend the hearing and
8 request the Court to certify that ruling that we'll
9 proceed even though she has not been served for an
10 immediate appeal under 28 USC 1292(b)?

11 THE COURT: So you're going to come back
12 tomorrow?

13 MR. GANNAM: Your Honor, we are --

14 THE COURT: I mean, I'm here. I mean, you
15 don't know my -- I'm in -- I usually am in Covington. I
16 had a regular docket today, so I just set this for
17 hearing today because I was going to be here.

18 MR. GANNAM: Understood, Your Honor. And I
19 would just say that the case law that --

20 THE COURT: Trying to save everybody some time.

21 MR. GANNAM: The case law makes it clear the
22 burden to accomplish service is on point.

23 THE COURT: Well, I recognize that. Why hasn't
24 she been served?

25 MR. SHARP: Your Honor, if I may.

1 THE COURT: Sure.

2 MR. SHARP: It's been sent out via certified
3 mail, returned delivery, signature confirmation. We
4 are -- obviously, we drove here last night, which is
5 obviously a three-hour drive so we haven't been in the
6 office today to see if the confirmation on service has
7 come back.

8 I would point out that counsel for Ms. Davis
9 e-mailed me on June -- July the 7th --

10 THE COURT: So six days ago.

11 MR. SHARP: -- with their entry of appearance.
12 They formally filed their entry of appearance in this
13 case on July the 8th. It's unfortunate that after having
14 driven three hours yesterday to be here that this is the
15 first time we're hearing about it.

16 THE COURT: Well, I'm not surprised. I mean,
17 if they're -- they're going to raise arguments that
18 they're going to raise. I mean, they don't have to raise
19 arguments with you. They can -- I mean, I'm not -- I'm
20 trying to get the -- and the only -- I look out here
21 among the lawyers that I recognize, and Mr. Mando appears
22 before me regularly in Covington, and he knows one of my
23 favorite things is to see what we can all agree about.

24 MR. SHARP: If I may, Your Honor.

25 THE COURT: Yes.

1 MR. SHARP: If it please the Court, I mean, we
2 would consider asking the Court to convert the motion for
3 preliminary injunction to a motion for TRO. We're
4 prepared to present evidence on that request today.

5 THE COURT: How about that, if they convert it?

6 MR. GANNAM: Your Honor, it --

7 THE COURT: If I orally grant their motion, and
8 we convert it to a TRO motion, I mean, I can grant that
9 without notice.

10 MR. GANNAM: The TR -- they haven't filed a
11 motion for TRO.

12 THE COURT: I know, but if I allow them to do
13 it orally, and we have a temporary restraining order
14 hearing today, it wouldn't be a preliminary injunction.
15 It could only be good for 10 days.

16 MR. GANNAM: Yes, Your Honor. But the rule for
17 TRO requires, first of all, that a sworn pleading or an
18 affidavit be provided to the Court establishing the facts
19 in which the TRO would be based. I also --

20 THE COURT: Well, the --

21 MR. GANNAM: It also requires written statement
22 from the attorneys explaining why service wasn't possible
23 before the hearing. And we're prepared to provide a
24 declaration to the Court that in the second case that was
25 filed against Kim Davis the attorneys filed the case on

1 July 10th, and accomplished service by hand delivery at
2 her office on the same day.

3 So the plaintiffs cannot show that it was
4 impractical or impossible or that they were unable to
5 effect service prior to today's hearing that they've
6 known about.

7 And we believe that it was incumbent on the
8 plaintiff to notify the Court that they didn't have
9 service and couldn't proceed today.

10 THE COURT: Well, the notice that's required --
11 well, Rule 65, which is the rule that governs TROs, if
12 you want to receive injunctive -- temporary injunctive
13 relief, you have to submit an affidavit showing why the
14 other side should not be notified. And you've been
15 notified of this hearing.

16 Now, the service thing is a quandary to me
17 because I think the lawyer representing the plaintiff in
18 15-46 -- I just was able to review that Friday -- was a
19 lawyer from Lexington, as I recall.

20 MR. SHARP: Yes, sir.

21 THE COURT: And I haven't received any notice
22 of the service in ECF as of this weekend.

23 Do you take a position on this, Mr. Mando, this
24 request to continue the hearing? I don't want to
25 continue the hearing because we're all here.

1 MR. MANDO: We prefer not to continue the
2 hearing just for a matter of convenience, and the fiscal
3 court's position is a little bit different than
4 Ms. Davis's.

5 THE COURT: I would -- I would suspect it would
6 be.

7 MR. MANDO: Because we have no authority,
8 Your Honor, to tell the clerk what to do when it comes to
9 issuing those marriage licenses. We can't order her to
10 issue one. We can't tell her -- to forebear her from
11 issuing one under Kentucky law.

12 THE COURT: Well, what is the -- what is the
13 process? It's been awhile since I've gotten married.
14 But I remember I lived in Fayette County at the time, and
15 I went into the clerk's office and paid \$25 or whatever
16 it was and walked out with an envelope, sealed envelope,
17 that I -- it's still in my house, probably still sealed.

18 Is that the process? And I realize we're --
19 you're probably not -- maybe you might --

20 MR. MANDO: The county attorney might be able
21 to --

22 THE COURT: -- know, Mr. Watkins.

23 MR. MANDO: -- give the specifics of that than
24 I can, Your Honor.

25 MR. WATKINS: Well, afterwards, Your Honor,

1 they're going to have to come back in and do their proper
2 filing of their marriage. But, I mean, initially I think
3 you're correct what you need to do.

4 THE COURT: Okay. Well, I think what I'm going
5 to do -- get my rule book out. Let's see here.

6 MR. SHARP: Your Honor, if we could take a
7 five-minute recess, we'll check with the office to see if
8 service has been returned as of this morning.

9 THE COURT: And can I see your cases that
10 you've cited? Are they all Sixth Circuit, I guess?

11 MR. GANNAM: I'm sorry, Your Honor, I didn't
12 hear you.

13 THE COURT: You were citing some authority
14 earlier.

15 MR. GANNAM: Well, your Honor, I can provide --
16 I have -- have it all here if I may approach and provide
17 the Court, please.

18 THE COURT: Well, you can hand it to the court
19 security officer.

20 MR. GANNAM: Your Honor, the first case is
21 Schuh versus Michigan Department of Corrections.

22 Your Honor, these cases are all over the place
23 in terms of providing the basic proposition. In this
24 case it's on the second page in the highlighted portion.
25 It simply provides, "When a preliminary injunction is

1 sought under Rule 65(a), service of the summons and the
2 complaint is required. It is well settled that without
3 service of process a Court has no jurisdiction over
4 defendants named in a lawsuit."

5 THE COURT: Well, I agree that service is
6 ultimately required. I mean, if you don't get served,
7 you can't have notice of the proceeding. You can't
8 receive due process. I mean, you have to. I mean, as
9 far as no service, formal service, of course, if she
10 hasn't been formally served, the Court is not without --
11 is without jurisdiction to order her to do anything until
12 she's properly served. And I don't plan on ordering her
13 to do anything today. I don't plan on ruling today. I
14 plan on hearing evidence today so that I can ultimately
15 make an informed decision. That's all I'm here to do is
16 to hear evidence today.

17 So I understand that it's well settled that
18 without service of process, a Court has no jurisdiction
19 over defendants named in a lawsuit.

20 I have dismissed lawsuits without -- what is
21 it -- Rule 12 -- 12(b) -- I can't remember off the top of
22 my head, one of the subsections. But, at any rate, I
23 recognize that. I mean, you-all traveled here from
24 Florida. I mean, I don't want to have to bring you back
25 for another hearing.

1 MR. GANNAM: Well, Your Honor, we're not
2 concerned about our own travels.

3 THE COURT: Well, I'm concerned because I think
4 it's important that we try to to the extent that everyone
5 can save resources of whatever entity is representing
6 them, we're all here. I mean, whether there's service or
7 not, I don't know how I -- why I can't hear evidence of
8 the case.

9 MR. GANNAM: Your Honor, in --

10 THE COURT: And the complaint has been filed.
11 I have jurisdiction over the civil rights complaint.

12 MR. GANNAM: That's correct, Your Honor. The
13 proper procedure if -- if you only have jurisdiction over
14 the plaintiffs would be a TRO procedure if they can show
15 there's a reason why they couldn't get notice.

16 And under Rule 65 notice includes at least
17 service of the summons and complaint and the motion
18 papers.

19 I can provide -- I can point to other cases in
20 here that -- where summons -- where the service had not
21 been accomplished, the appropriate step was to deny the
22 motion for preliminary injunction and have the plaintiffs
23 refile it.

24 THE COURT: Well, I can pull the names. We're
25 going to get to the merits.

1 MR. GANNAM: Your Honor --

2 THE COURT: We will all get to the merits. I
3 mean, your client would love to get to the merits.

4 MR. GANNAM: Your Honor, we would --

5 THE COURT: Mr. Mando's client would love to
6 get to the merits, as would the plaintiffs. To the
7 extent we can expedite this, it helps everyone.

8 MR. GANNAM: Your Honor, we believe it would be
9 more appropriate to allow service to be accomplished,
10 allow Ms. Davis a regular standard briefing schedule to
11 be able to respond to this motion for preliminary
12 injunction, and then have a hearing on the merits of the
13 preliminary injunction motion after we've had an
14 opportunity to develop somewhat of a record.

15 THE COURT: Well, that's what we're here today
16 to do is develop a record.

17 MR. GANNAM: I mean, develop a record before
18 the hearing so that we're not presenting witnesses for
19 the first time at the hearing, but rather have the
20 opportunity perhaps to take a little discovery or do
21 whatever -- do whatever we can do within the regular
22 21-day briefing period that the rule already provides.

23 THE COURT: Well, the motion -- there was a
24 motion filed. Mr. Sharp, do you have that?

25 MR. SHARP: I do, Your Honor. July the 2nd.

1 THE COURT: July 2nd. So your response is due
2 on the 23rd. Well, actually, it's the 26th, three days
3 for mailing. That's always been a --

4 MR. GANNAM: Your Honor, it will be due 21 days
5 after service, and it has not been served yet.

6 MR. SHARP: Your Honor, I'm a -- I'm a little
7 perplexed given that counsel has entered their appearance
8 in the case.

9 THE COURT: Well, again, we're dealing with a
10 situation where there's not going to be any agreements so
11 everybody is going to have to comply with all the rules
12 and the procedures, which is fine. If that's how
13 everybody wants to have everything work, that's -- I
14 presided over that type of case, and I've presided over
15 cases where people are more conciliatory. So it
16 really -- it doesn't matter to me.

17 But if everybody is going to be required to
18 cross every T and dot every I, that's fine. I'm going to
19 hear the evidence today. I'm going to allow the proof to
20 be put on today. Whatever proof you want to put on,
21 we're going to put it on today. You'll have time to file
22 written response, as will you if you wish to file written
23 response.

24 I have some questions myself. I take it
25 Ms. Davis is not here because she wasn't served. Is that

1 fair? I'm just guessing based upon the conversation.

2 MR. GANNAM: She's not currently in the
3 courthouse, Your Honor. She is available, but she is not
4 here.

5 THE COURT: Okay. She is available?

6 MR. GANNAM: Yes, Your Honor.

7 THE COURT: Okay. All right. Well, so let me
8 make sure I have the record that needs to be completely
9 clear.

10 There is an oral motion -- you make your oral
11 motion, and then I'll let you make your oral motion, and
12 then we can make sure the minutes reflect exactly what we
13 want here.

14 What's your oral motion, Mr. Gannam? Is it
15 Gannon or Gannam?

16 MR. GANNAM: Gannam, Your Honor.

17 THE COURT: Gannam. G-A-N-N-O-M?

18 MR. GANNAM: A-M.

19 THE COURT: A-M, okay. All right. Thank you.

20 MR. GANNAM: Well, Your Honor, our initial
21 objection was lack of service and therefore lack of
22 jurisdiction.

23 THE COURT: So oral motion to dismiss. Not
24 dismiss but -- was it -- it wasn't to dismiss. It was
25 oral motion to what?

1 MR. GANNAM: No, Your Honor. We object to
2 proceeding with the hearing on a PI motion when there has
3 not been service.

4 THE COURT: The oral motion to what?

5 MR. GANNAM: Well, in light of the Court's
6 ruling to move forward despite there not being service.

7 THE COURT: Okay. I mean, it will be
8 defendants -- Defendant Davis's objection to the hearing
9 in absence of service. Is that fair?

10 MR. GANNAM: That's correct, Your Honor.

11 THE COURT: Okay. All right. That will be
12 overruled.

13 All right. What's your other request?

14 MR. GANNAM: In light of overruling that
15 objection and proceeding forward, we request the Court to
16 suspend the hearing and immediately certify that issue
17 for an immediate appeal under 28 USC 1292(b).

18 THE COURT: Okay. That's going to be denied.

19 MR. GANNAM: And I would -- if I just may point
20 out in the same case I read from earlier, Your Honor, the
21 Court there held that to the extent plaintiff seeks an
22 ex parte preliminary injunction, which is what this
23 proceeding will now be --

24 THE COURT: It's not ex parte.

25 MR. GANNAM: -- that that's procedurally

1 improper.

2 THE COURT: It's not ex parte. Ex parte would
3 be if -- obviously, we have lots of folks in the back and
4 lots of folks here. I mean, it's not ex parte. I mean,
5 you've been -- you have notice. You haven't formally
6 been served. I mean, under Rule 65 a temporary
7 restraining order under subsection (b)(1), without --
8 without notice. The Court may issue a TRO without
9 written notice or oral notice to the adverse party only
10 if. Now, you have notice. This doesn't talk about
11 service. This talks about notice.

12 MR. GANNAM: But notice as a legal matter
13 includes at least service, Your Honor. That's our point
14 is that notice has legal significance. And in a case
15 where there has been no service there has been no notice.

16 And, therefore, under the TRO ruling reading it
17 with that interpretation, which we think is the correct
18 one, the plaintiff has to show why not providing notice,
19 which is at least service, is -- is permissible or
20 excusable under all of the circumstances. And what we're
21 willing to show --

22 THE COURT: The other case they served, they
23 walked over --

24 MR. GANNAM: -- is that there was no --

25 THE COURT: -- and hand delivered, which is

1 what should have been done here, but it wasn't.

2 Road blocks to getting to the merits. I --
3 which is certainly -- I want to give everyone a decision,
4 an informed decision, as quickly as possible, but I want
5 to make sure that everybody has a right to argue whatever
6 they want to argue for.

7 So your two requests are overruled, denied.

8 What was your request to convert it, an oral
9 motion to convert the hearing to a TRO hearing?

10 MR. SHARP: Yes, Your Honor.

11 THE COURT: All right. Well, we're going to
12 take a five-minute recess. I want you to take a gander
13 at finding out if there's been formal service by way of
14 certified mail, and then we'll reconvene at 12:30.

15 Do you mind if I keep these, Mr. Gannam? I'll
16 read them.

17 MR. GANNAM: You may keep them.

18 THE COURT: Thank you.

19 (Whereupon, a recess was taken at 12:20 p.m., and
20 the proceedings continued at 12:30 p.m., on the record in
21 open court, as follows.)

22 THE COURT: All right. I will go ahead and
23 give these cases back to you, Mr. Gannam. I see one of
24 them was one of my cases.

25 All right. Mr. Sharp, what did you find out?

1 MR. SHARP: Your Honor, if I may. We have not
2 been able to confirm that Ms. Davis has, in fact, been
3 served. Speaking with Mr. Mando, it seems like the
4 county's service was perfected Thursday night. Mr. Canon
5 is looking into an alternative option. But at this point
6 we cannot represent that she's been served.

7 THE COURT: Well, I'm certainly not going to
8 enter any formal order until she's been served. I think
9 that would be inappropriate. But I'm here. I do want to
10 hear the evidence today while I'm here.

11 I don't think it's necessary either to convert
12 the hearing to a TRO hearing. I plan on giving the
13 defendants 21 days from the date that you entered your
14 appearance to file a response. Because you entered your
15 appearance last week. I know the local rules say 21 days
16 from date of service of the motion. I think service of
17 the motion on counsel was the date you entered your
18 appearance. You would have known about it -- getting on
19 ECF you would have known when the complaint was filed.
20 You would have gotten notice of the motion filing as of
21 the date you entered your appearance.

22 So a written response to the motion for the
23 preliminary injunction will be due on July 30th.

24 MR. GANNAM: Your Honor, may I be heard on the
25 point of appearance? We -- to be clear, we have not

1 filed a general appearance. We filed -- Mr. Christman
2 and I filed in our individual capacities motions for
3 pro hac vice admission, which was necessary for us to
4 even come to court and argue anything, whether it's
5 jurisdiction or anything else. But we have not entered
6 an appearance for Ms. Davis as such. It's simply a
7 motion for pro hac vice.

8 THE COURT: Okay. Well, I granted that.

9 Well, okay, I'll rephrase.

10 MR. SHARP: If I may, Your Honor.

11 THE COURT: Both defendants -- yes.

12 MR. SHARP: I'm looking at record entry
13 number 8 and number 7. The, "Wherefore, undersigned
14 counsel will be permitted to appear and practice in this
15 court as counsel for Defendant Kim Davis in the
16 above-referenced case." Those motions is identical
17 language in both. Those are granted. I mean, that's --

18 THE COURT: Right. I granted those by gavel
19 order last week. I did.

20 What did you find out, sir, anything?

21 MR. CANON: We're working on it, Judge. Yeah,
22 as far as I know, the county was served on --

23 THE COURT: Please stand, please.

24 MR. CANON: Yes, I'm sorry.

25 The county was served on Thursday. Apparently

1 service went out on Monday, last Monday. The county was
2 served on Thursday.

3 So as far as where the service is, stands for
4 as far as Ms. Davis goes personally, I assume it's
5 sitting in her mailbox.

6 THE COURT: Well, she's apparently not in
7 Rowan County right now. She's in Boyd County. So she
8 probably doesn't have access to her mailbox.

9 At any rate, here's what I'm going to do.
10 Whether or not you were here just for -- to argue the
11 case, you will be arguing Mr. Gannan -- Gannam -- I'm
12 having a hard time with that. Is it Gannam?

13 MR. GANNAM: Gannam.

14 THE COURT: Gannam, okay. A written response
15 by either the county or the Defendant Davis individually
16 will be due on July 30th. I can always shorten or
17 lengthen the time by local rule by order, and I'm doing
18 that. So the responses will be due on the 30th of July.

19 Your oral motion to convert the hearing to a
20 TRO motion will be denied. I don't think it's necessary.

21 I'm going to hear the evidence today. So you
22 can call your first witness.

23 MR. SHARP: Thank you, Your Honor.

24 The plaintiffs call Dr. April Miller.

25 THE COURT: All right. Come around.

1 (Whereupon, the witness, APRIL MILLER, Ph.D., was
2 placed under oath by the clerk of the Court.)

3 THE COURT: Good afternoon.

4 THE WITNESS: Hi.

5 THE COURT: You may proceed.

6 MR. SHARP: Thank you, Your Honor.

7 APRIL MILLER,
8 having been first duly placed under oath, was examined
9 and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. SHARP:

12 Q. Ma'am, can you please identify yourself for the
13 Court?

14 A. April Miller.

15 Q. And do you have a professional title?

16 A. I have a Ph.D., so my professional title is doctor.

17 Q. Would you please spell your last name for the Court?

18 A. Miller, M-I-L-L-E-R.

19 Q. Dr. Miller, where do you live?

20 A. I live in Morehead, Kentucky.

21 Q. And how long have you lived there?

22 A. Nine years.

23 Q. Dr. Miller, I'm now going to ask you some questions
24 about your personal life. First, are you currently in a
25 committed relationship?

1 A. Yes.

2 Q. With whom?

3 A. Karen Roberts.

4 Q. How did the two of you meet?

5 A. We were work colleagues at the University of
6 Southern Mississippi.

7 Q. And how long have the two of you been in a
8 relationship?

9 A. A relationship, 11 years.

10 Q. Dr. Miller, do you and your partner intend to get
11 married?

12 A. Yes.

13 Q. When did the two of you decide to do so?

14 A. We talked about it on the 26th of June after the
15 Supreme Court ruling.

16 Q. Now, this may seem like an obvious question, but why
17 do the two of you want to get married?

18 A. Because we love each other, and we want to get
19 married.

20 Q. Are there any reasons why the two of you cannot
21 legally get married?

22 A. No.

23 Q. Are you both over the age of 18?

24 A. Yes.

25 Q. Neither of you are currently married to someone

1 else?

2 A. Correct.

3 Q. And the two of you are not related by blood?

4 A. No.

5 Q. Now, I'm going to ask you a few questions about what
6 dealings, if any, you and your partner have had with the
7 Rowan County Clerk's office.

8 First, have you or your partner had an occasion to
9 seek a marriage license --

10 MR. GANNAM: Objection.

11 THE COURT: Overruled.

12 BY MR. SHARP:

13 Q. Have you or your partner had an occasion to seek a
14 marriage license from the Rowan County Clerk's office?

15 A. Yes. We went on June the 30th to seek a marriage
16 license.

17 Q. Did you do that in person?

18 A. Yes, we were both there.

19 Q. Before you sought the marriage license, were you
20 aware that the Rowan County Clerk's office had made
21 public statements about any policies regarding the
22 issuance of marriage licenses?

23 A. Yes. On Monday, the 29th of June, there were
24 media -- media outlets had said -- stated that Kim Davis
25 had said she was not issuing licenses.

1 Q. In these media reports was there any indication of
2 the reasons why that was the case?

3 MR. GANNAM: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: I believe they stated that it was
6 her religious beliefs that kept her from issuing
7 licenses.

8 BY MR. SHARP:

9 Q. And those beliefs kept her from issuing licenses to
10 whom?

11 A. To all couples in Rowan County.

12 Q. Can you please explain the circumstances
13 specifically under which you and your partner went to
14 seek a marriage license that day?

15 A. On the 26th of June when the Supreme Court ruled
16 that we now had the right to marry in all 50 states, my
17 partner and I talked about finally getting married and
18 having that right.

19 And on Monday when I heard that Kim Davis was not
20 issuing licenses --

21 MR. GANNAM: Objection.

22 THE COURT: Overruled.

23 THE WITNESS: -- my partner and I decided to go
24 down to the courthouse on Tuesday morning ourselves to
25 see if that was true or to see if on Tuesday she was

1 issuing licenses. It had not been confirmed Tuesday when
2 we were there that anybody had been denied that morning,
3 so we went in and requested a marriage license on
4 Tuesday, the 30th.

5 BY MR. SHARP:

6 Q. Were you able to obtain a marriage license that day?

7 A. No.

8 Q. Did anyone from the clerk's -- did you interact with
9 anyone from the clerk's office in seeking to obtain a
10 marriage license?

11 A. We walked into the clerk's office. We walked to the
12 desk, requested a marriage license from the person
13 sitting at the counter.

14 She got up and went to the back to speak with
15 Kim Davis in her office. Spoke to Kim Davis.

16 She turned around and came back, and she said to us,
17 we are not issuing any marriage licenses at this time.

18 Q. Did they identify any reasons why that was the case?

19 A. No.

20 Q. How did it make you feel to be denied a marriage
21 license in your county of residence?

22 A. I was pretty furious.

23 Q. Have you or your partner sought to obtain a marriage
24 license in any other county?

25 A. No.

1 Q. Why not?

2 A. We live in Morehead, Kentucky. We live in
3 Rowan County. This is where we do our business all the
4 time. This is the same county clerk's office where we
5 purchase our car tags, and we register to vote, and this
6 is where we do our business. I think it would be
7 degrading to have to go somewhere else to get my license
8 because of this.

9 Q. Dr. Miller, if you were able to obtain a marriage
10 license in Rowan County, would you and your partner then
11 get married?

12 A. Yes.

13 MR. SHARP: Nothing further, Your Honor.

14 THE COURT: Cross?

15 Mr. Christman.

16 MR. CHRISTMAN: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. CHRISTMAN:

19 Q. Good afternoon, Ms. Miller.

20 My name is Jonathan Christman. I represent
21 Ms. Davis in this case.

22 A. Hi.

23 Q. Ms. Miller, you did not try to obtain a marriage
24 license from Rowan County Judge/Executive Walter Blevins;
25 correct?

1 A. I did speak with Walter Blevins on July 1st.

2 Q. Did you try to obtain a marriage license from
3 Mr. Blevins?

4 A. I was one of the people in the office at the time
5 that did ask for a marriage license, but other plaintiffs
6 and myself did request a license, yes, on July 1st.

7 Q. From Mr. Blevins?

8 A. Yes.

9 Q. Who else was there with you?

10 A. Plaintiffs Jody Fernandez and Kevin Holloway.

11 THE COURT: This is the Rowan County
12 Judge/Executive?

13 THE WITNESS: Rowan County Judge/Executive
14 Walter "Doc" Blevins.

15 THE COURT: So you were able to get a license
16 from him?

17 THE WITNESS: No, we did not get a license from
18 him. We requested one from him.

19 THE COURT: Oh, you requested one from him, but
20 he didn't give it to you?

21 THE WITNESS: We did not receive licenses from
22 him.

23 THE COURT: Okay. All right. Thank you. I
24 wanted to make sure that was correct. Thank you.

25 THE WITNESS: Thank you.

1 BY MR. CHRISTMAN:

2 Q. You did not attempt to obtain a marriage license
3 from another county; correct?

4 A. Correct.

5 Q. Rowan County is bordered by seven other counties
6 in -- of Kentucky; correct?

7 A. I'm not sure how many.

8 Q. And you decided to get married after the
9 Supreme Court's ruling in Obergefell; correct?

10 A. Yes. Previous to that I did not have the right to
11 get married in my state.

12 Q. And then you went to the Rowan County Clerk's office
13 to get married after hearing of Ms. Davis's deep
14 religious convictions?

15 A. I went to the Rowan County Clerk's office to get a
16 marriage license on July -- or June the 30th.

17 Had I heard about her convictions and that she was
18 not issuing marriage licenses? Yes.

19 MR. CHRISTMAN: No further questions.

20 THE COURT: Thank you. Any redirect?

21 MR. SHARP: No, Your Honor.

22 THE COURT: All right. May this witness be
23 finally excused?

24 MR. MANDO: Your Honor --

25 MR. SHARP: Yes, sir.

1 MR. MANDO: Your Honor, excuse me.

2 THE COURT: Oh, I'm sorry.

3 MR. MANDO: I did -- I did have one question,
4 Your Honor.

5 THE COURT: That's fine, Mr. Mando. Go ahead,
6 sir.

7 CROSS-EXAMINATION

8 BY MR. MANDO:

9 Q. Good afternoon, ma'am.

10 A. Hi.

11 Q. My name is Jeff Mando. I represent Rowan County.

12 You mentioned you spoke with Judge/Executive
13 Walter Blevins after you were denied a marriage license
14 by the clerk's office.

15 Is that correct, ma'am?

16 A. Yes.

17 Q. And when you spoke with Judge/Executive Blevins, did
18 he tell you that he could not issue a marriage license to
19 you because he did not have the authority to do so?

20 A. He told Jody and Kevin and myself that because
21 Kim Davis was not absent -- was not absent that he could
22 not issue a license.

23 Q. All right. And did he explain to you that there was
24 a statute that only allows him to issue a marriage
25 license in the absence of the clerk, and since she was

1 not absent from the county, he could not issue that
2 marriage license?

3 A. Correct.

4 MR. MANDO: Thank you, ma'am.

5 THE COURT: All right. Thank you.

6 Anything else?

7 MR. SHARP: Nothing further, Your Honor.

8 MR. CHRISTMAN: No further questions.

9 THE COURT: No, all right.

10 You may step down. Thank you.

11 THE WITNESS: Thank you.

12 THE COURT: All right. Next witness, please.

13 MR. SHARP: Your Honor, the plaintiffs call

14 Jody Fernandez.

15 THE COURT: All right.

16 (Whereupon, the witness, JODY FERNANDEZ, was placed
17 under oath by the clerk of the Court.)

18 THE COURT: Good afternoon.

19 THE WITNESS: Good afternoon.

20 THE COURT: You may proceed.

21 MR. SHARP: Thank you, Your Honor.

22 JODY FERNANDEZ,

23 having been first duly placed under oath, was examined
24 and testified as follows:

25 DIRECT EXAMINATION

1 BY MR. SHARP:

2 Q. Ma'am, could you please identify yourself for the
3 Court?

4 A. My name is Jody Fernandez.

5 Q. And could you please spell your last name?

6 A. F, as in Frank, E-R-N-A-N-D-E-Z.

7 Q. Ms. Fernandez, where do you live?

8 A. I live in Morehead, Kentucky.

9 Q. That's in Rowan County?

10 A. That is in Rowan County.

11 Q. And how long have you lived there?

12 A. I have lived there since 2008.

13 Q. Ms. Fernandez, I'm now going to ask you some
14 questions about your personal life as well.

15 Are you currently in a committed relationship with
16 another person?

17 A. Yes, I am, with Kevin Holloway.

18 Q. Is Kevin one of the other plaintiffs in this case?

19 A. Yes.

20 Q. Okay. How did the two of you first meet?

21 A. We met in 2005 in -- while we lived in Florida. We
22 all lived in the same neighborhood.

23 Q. Okay. And how long have the two of you been in a
24 relationship together?

25 A. Since 2006.

1 Q. Ms. Fernandez, do you and Mr. Holloway intend to get
2 married?

3 A. Yes.

4 Q. Again, I'm afraid I have to ask. Why?

5 A. Because we love each other.

6 Q. Are there any reasons why the two of you cannot get
7 married?

8 MR. GANNAM: Objection.

9 THE COURT: Overruled.

10 THE WITNESS: No.

11 BY MR. SHARP:

12 Q. You're both over the age of 18?

13 A. Yes.

14 Q. Neither of you are currently married to someone
15 else?

16 A. No.

17 Q. The two of you are not related by blood?

18 A. No.

19 Q. Now, I'm going to ask you about any dealings you may
20 have had with the Rowan County Clerk's office.

21 Have you --

22 A. Go ahead.

23 Q. I'm sorry. Have you or Mr. Holloway had an occasion
24 to seek a marriage license from the Rowan County Clerk's
25 office?

1 MR. GANNAM: Objection.

2 THE WITNESS: Yes.

3 THE COURT: Overruled.

4 THE WITNESS: Yes. We went on July 1st to seek
5 a marriage license. Both of us went to the office.

6 BY MR. SHARP:

7 Q. And can you please describe for the Court the
8 circumstances of what happened when -- did you go in
9 person?

10 A. We both went in person. We entered the room. We
11 asked the -- there was no one sitting at the desk so we
12 asked someone else about getting a marriage license.

13 And she went back to the office and got Kim Davis,
14 and Kim Davis came out and told us she was not issuing
15 marriage licenses.

16 Q. Did Ms. Davis explain to you why that was the case?

17 A. No.

18 Q. What did you and Kevin do after that?

19 A. After that we walked down the hall, we went to
20 Dr. Blevins -- Judge Blevins's office, and requested a
21 marriage license from him.

22 Q. Okay. And what did -- what were you informed there?

23 A. That he was unable to give us a license because
24 Kim Davis was available in the building.

25 Q. Is that the meeting that Dr. Miller just talked

1 about?

2 A. Yes.

3 Q. Did -- other than this explanation for why the
4 county judge/executive could not issue a marriage
5 license, did Judge Blevins explain, give you any reasons
6 why the county clerk was not issuing marriage licenses?

7 A. No, he did not.

8 MR. GANNAM: Objection.

9 THE COURT: Overruled.

10 BY MR. SHARP:

11 Q. How did it make you feel to be denied a marriage
12 license on two occasions in the same day?

13 A. We were -- I was quite upset. That date was --
14 would have been my father's 81st birthday, and it was an
15 important date for me.

16 Q. Have you or Kevin sought to obtain a marriage
17 license in any other county?

18 A. No.

19 Q. Why not?

20 A. We live in Rowan County; we work in Rowan County; we
21 pay taxes in Rowan County; we live walking distance to
22 the courthouse in Rowan County. There seemed to be no
23 need for us to drive to another county to get married.

24 Q. If you were able to obtain a marriage license in
25 Rowan County, would you and Kevin get married?

1 A. Absolutely.

2 MR. SHARP: Nothing further, Your Honor.

3 THE COURT: Any cross?

4 MR. CHRISTMAN: Yes, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. CHRISTMAN:

7 Q. Good afternoon, Ms. Fernandez.

8 My name is Jonathan Christman.

9 A. Good afternoon.

10 Q. If you were able to obtain a marriage license in
11 another county in Kentucky, would you and Kevin get
12 married?

13 A. We plan to get married, but we wanted to get married
14 in our county.

15 Q. So if you got a marriage license from Boyd County,
16 you would get married; correct?

17 A. Yes.

18 Q. And how far did you drive to today's hearing?

19 A. From Morehead it took about an hour. Mileage I
20 don't know.

21 MR. CHRISTMAN: No further questions.

22 THE COURT: Mr. Mando.

23 CROSS-EXAMINATION

24 BY MR. MANDO:

25 Q. Just briefly about this short meeting with

1 Judge/Executive Blevins.

2 As I understand it, ma'am, he explained to you that
3 he was restricted by law. He could not issue the license
4 because Ms. Davis was present in the county?

5 A. That's correct.

6 MR. MANDO: All right. Thank you, ma'am.

7 THE COURT: You may step down. Thank you.

8 All right. Next witness.

9 MR. SHARP: Your Honor, if I may, defense
10 counsel previously indicated the defendant Kim Davis was
11 not in the courthouse and was available. The Court later
12 seemed to indicate that she was in Boyd County.

13 THE COURT: No, I just thought because Boyd --
14 that she was in Boyd County because I thought she was
15 here for the hearing.

16 MR. SHARP: Well --

17 THE COURT: That was my supposition I suppose.

18 MR. SHARP: -- based on defense counsel's
19 representation that she wasn't in the courthouse, she was
20 available, we would call Defendant Kim Davis to the
21 stand, Your Honor.

22 THE COURT: Is she here?

23 MR. GANNAM: Your Honor, Ms. Davis is not
24 available to testify. We believe that her appearance
25 today would potentially waive her objection to service

1 and this Court's jurisdiction; and, therefore, she will
2 not be here.

3 THE COURT: All right.

4 MR. SHARP: Your Honor, I mean, we're prepared
5 to serve counsel for Ms. Davis.

6 THE COURT: Well, they're not going to
7 accept service. I mean, unless he's changed his tune,
8 which I -- are you willing to accept service on her
9 behalf?

10 MR. GANNAM: Your Honor, the rules provide a
11 quid pro quo. If waiver of service is requested, it
12 provides more time to the defendant to respond. We
13 would --

14 THE COURT: To respond to -- for the answer,
15 sure, but not for the motion.

16 MR. GANNAM: Your Honor, we are not willing to
17 accept service at this point.

18 THE COURT: No.

19 MR. SHARP: I mean, I --

20 THE COURT: Do you have any other witnesses to
21 call?

22 MR. SHARP: We do, Your Honor.

23 THE COURT: Why don't you call your other
24 witnesses then?

25 MR. SHARP: Thank you.

1 We now call Barry Spartman, Your Honor.

2 THE COURT: All right. Come around, sir.

3 BARRY SPARTMAN,

4 having been first duly placed under oath, was examined
5 and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. CANON:

8 Q. Good afternoon, Mr. Spartman.

9 A. Good afternoon.

10 Q. Would you please identify yourself, and state your
11 full name for the Court?

12 A. Yes. My name is Barry Spartman.

13 Q. Can you spell your last name, please?

14 A. Yes. It's S-P-A-R-T-M-A-N.

15 Q. And, Mr. Spartman, how are you employed?

16 A. I work in Rowan County at Morehead State University.

17 Q. And do you also live in Rowan County?

18 A. Yes.

19 Q. And how long have you lived there?

20 A. I have lived in Rowan County for over 20 years.

21 Q. Very good. And are you currently in a committed
22 relationship with anybody?

23 A. Yes.

24 Q. Can you tell the Court who that is?

25 A. Yes. That is Aaron Skaggs.

1 Q. And is Mr. Skaggs also a plaintiff in this case?

2 A. Yes.

3 Q. And how did the two of you first meet?

4 A. We met in college through mutual friends.

5 Q. And do you know approximately when that was?

6 A. It was around '98.

7 Q. And so the two -- how long have the two -- let me
8 ask you this. How long have the two of you been in a
9 committed relationship?

10 A. We've been together for 21 years.

11 Q. And have you-all developed the intention to get
12 married?

13 A. Yes.

14 Q. And I know this seems like a silly question, but why
15 do you want to get married?

16 A. We've been in a very long-term relationship, and we
17 love each other, and we do want to spend the rest of our
18 lives together.

19 Q. And I think you said you've been living as a couple
20 for 21 years?

21 A. Yes.

22 Q. When did you first decide to get married?

23 A. We've talked about it before the Supreme Court
24 decision on and off.

25 Q. In --

1 A. After the decision came down, that's when we
2 realized that if it actually come to be, that we would be
3 married.

4 Q. And is there -- is there any reason why the two of
5 you can't be married that you know of?

6 A. No.

7 Q. Now that the Obergefell decision is in?

8 A. No.

9 Q. You're not related by blood?

10 A. No.

11 Q. You're both over the age of 18?

12 A. Yes.

13 Q. And you're not currently married to someone else,
14 are you?

15 A. No.

16 Q. And let me ask you a couple of questions about the
17 dealings that you've had with the Rowan County Clerk's
18 office. Have you spoken to anybody in that office
19 personally?

20 A. Yes. We were prepared to go to the courthouse to
21 get a marriage license, and beforehand we called the
22 courthouse.

23 Q. Let me stop you there. What day was that?

24 A. It was Tuesday, June 30th.

25 Q. Okay. Go on.

1 A. We wanted to -- since this was completely new to us,
2 we wanted to make sure that we had the correct documents
3 or anything that we may need to get the license rather
4 than go to the courthouse and not have what was
5 necessary.

6 Q. And what happened?

7 A. The person on the phone basically said that they
8 were not issuing licenses --

9 MR. GANNAM: Objection.

10 THE WITNESS: -- to anyone.

11 THE COURT: Overruled.

12 Who did you call?

13 THE WITNESS: The clerk's office.

14 THE COURT: The Rowan County Clerk's office?

15 THE WITNESS: Rowan County Clerk's office,
16 that's correct.

17 THE COURT: And were told what by whoever
18 answered the phone?

19 THE WITNESS: They said that they weren't
20 issuing any marriage licenses and don't bother coming
21 down.

22 THE COURT: All right. Overruled.

23 BY MR. CANON:

24 Q. And so did you go down there anyway after that?

25 A. After that we were pretty disappointed and

1 frustrated.

2 Q. Now, prior to that time had you received any
3 information that the Rowan County Clerk's office had
4 stopped issuing marriage licenses?

5 A. We had seen an article, yes.

6 Q. Okay. And did you -- did you have any reason to
7 think what those -- what the reasons were for the clerk's
8 refusal to issue licenses?

9 MR. GANNAM: Objection.

10 THE COURT: What was the question?

11 MR. CANON: The question was, did he have any
12 basis to believe -- for -- to understand what the reasons
13 were for the clerk to refuse to issue licenses.

14 THE COURT: Okay. Overruled.

15 THE WITNESS: Yes. There -- it was clearly
16 quoted that it was because of her deep religious beliefs.

17 BY MR. CANON:

18 Q. And you say it was quoted. You saw news articles,
19 or --

20 A. Yes.

21 Q. -- tell the Court about that.

22 A. That's correct.

23 Q. Okay. And any other reasons you can think of?

24 A. No. Basically -- I'm sorry. There was also she
25 would not issue licenses that, therefore, she wasn't

1 discriminating.

2 Q. And I take it you've not been able to obtain a
3 marriage license in Rowan County since then?

4 A. No.

5 Q. Did you attempt to obtain a license from the
6 county judge/executive?

7 A. No, we did not. We did contact his office but did
8 not physically go there.

9 Q. Well, what happened when you contacted his office?

10 A. Basically the same response, that he could not
11 issue --

12 MR. GANNAM: Objection.

13 THE COURT: Overruled.

14 THE WITNESS: He could not issue a marriage
15 license.

16 BY MR. CANON:

17 Q. And did he tell you why?

18 A. Because Kim Davis was not absent from her job.

19 Q. How did that make you feel to not be able to get a
20 marriage license in the county where you work and live
21 and pay taxes?

22 A. Pretty frustrated, kind of furious.

23 Q. Do you know if you can obtain a marriage license in
24 any other county?

25 A. Yes, I'm aware that we can.

1 Q. Have you tried to do that?

2 A. No.

3 Q. Why not?

4 A. Because we pay taxes. We've lived in Rowan County
5 and Morehead since the beginning of our relationship.

6 And that's our home, and that's where we want to obtain
7 that license and get married.

8 Q. Now, if you could get a license in Rowan County, you
9 would go get it, wouldn't you?

10 A. Yes.

11 MR. CANON: Nothing further.

12 THE COURT: Cross?

13 MR. CHRISTMAN: Yes, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. CHRISTMAN:

16 Q. Good afternoon, Mr. Spartman.

17 My name is John Christman.

18 A. Good afternoon.

19 Q. Mr. Spartman, there's nothing preventing you from
20 staying in a committed relationship, as you said, with
21 Mr. Skaggs; is that correct?

22 A. No. Yes, that's correct, there's nothing.

23 Q. And nobody has stopped you from having a commitment
24 ceremony; correct?

25 A. That's correct.

1 Q. And you haven't gone to any other county to try to
2 obtain a marriage license, that's correct?

3 A. Yes.

4 Q. Okay. None of the neighboring counties around
5 Rowan County?

6 A. Correct.

7 Q. And you haven't come to Boyd County to try and
8 obtain a marriage license?

9 A. No. It would be very inconvenient to drive an hour
10 for something we could get in our own home county.

11 Q. If you could get a marriage license from another
12 county, would you and Mr. Skaggs attempt to get married?

13 A. Yes, we would.

14 MR. CHRISTMAN: No further questions.

15 Thank you.

16 THE COURT: Mr. Mando.

17 MR. MANDO: No questions, Your Honor.

18 THE COURT: All right. You may step down.

19 Thank you.

20 Next witness.

21 MR. SHARP: No further witnesses, Your Honor.

22 THE COURT: All right. Any witnesses?

23 MR. GANNAM: No, Your Honor.

24 THE COURT: All right. We're going to set a --

25 we're going to recess the evidentiary portion of this

1 hearing in progress.

2 As soon as you file a notice of service of
3 Kim Davis, 24 hours after she's served we'll reconvene
4 this hearing in Covington. So whenever that is. The
5 only conflict would be tomorrow afternoon. I'm going to
6 the All-Star game so I'm not going to be hearing it at
7 8:00 tomorrow night.

8 So we'll give you -- we'll have 24-hour notice,
9 and then we'll have the hearing in Covington whenever
10 she's served.

11 MR. SHARP: Thank you, Your Honor.

12 THE COURT: All right.

13 MR. GANNAM: Your Honor --

14 THE COURT: Yes, sir.

15 MR. GANNAM: -- may I request that that be
16 48 instead of 24, just because of the time it takes to
17 travel from our office in Florida to Covington?

18 And I would secondly request that should this
19 process coincide with this Thursday and Friday of this
20 week, I am due in Washington, D.C., for a deposition in
21 another case. We just ask the Court to accommodate those
22 two requests as part of this process.

23 THE COURT: Will the attorneys approach the
24 bench, please?

25 (Whereupon, a bench conference was had with the

1 Court and counsel out of the hearing of the open court,
2 as follows.)

3 THE COURT: All right. Let the record reflect
4 we're at the bench.

5 And I'm trying to be as accommodating as I can.
6 The service thing, I recognize that she hasn't been
7 served right now.

8 Is Ms. Davis, did you say she's not going to
9 testify today? Is she available today?

10 MR. GANNAM: Well, we won't produce her today,
11 Your Honor.

12 THE COURT: You won't produce her. Do you know
13 where she is?

14 MR. GANNAM: I do know where she is, yes,
15 Your Honor.

16 THE COURT: Okay. You --

17 MR. GANNAM: Well, actually, I don't know where
18 she is. I know how to get in touch with her.

19 THE COURT: Well, I'm just trying to -- and I
20 brought this up because I know Mr. Mando has heard me say
21 this. I try to just -- I'm trying to get the train on
22 the tracks. I'm trying to get the ball down the field.
23 I'm trying to get the evidence in that is necessary one
24 way or the other. And we're all here.

25 I mean, you're asking me to accommodate your

1 request, and I want to accommodate the lawyers as much as
2 I can because I want to be a judge that's accommodating,
3 not a judge that's obstructionist, not that I know any
4 that are. But ultimately if she's here -- if we could
5 get her here to testify, it would help everyone.

6 MR. GANNAM: I understand, Your Honor, and --

7 THE COURT: And eventually she's going to be
8 served, and eventually we're going to hear the evidence.
9 I mean, it's a -- well, I mean, she can be hit by a truck
10 tomorrow and die and never appear. I mean, that could be
11 a -- it could happen.

12 MR. GANNAM: Your Honor, we also do not desire
13 to be an obstructionist.

14 THE COURT: I'm not saying that you are.

15 MR. GANNAM: But in this case this is a
16 complaint filed where they've sued her individually.
17 Their seeking punitive damages against her. It's
18 certainly not --

19 THE COURT: Are you seeking punitive damages?

20 MR. SHARP: No, Your Honor.

21 THE COURT: Okay. I haven't --

22 MR. GANNAM: -- her responsibility to assist
23 the plaintiffs in their obligation to serve us.

24 THE COURT: No, I know you're not, but we're
25 trying to accommodate everyone here, and --

1 MR. GANNAM: Your Honor, we believe that her
2 appearing here today will prejudice her rights to object
3 to the Court not having jurisdiction over the prelim, and
4 that's the reason why.

5 THE COURT: Okay. Well, eventually she'll --
6 well --

7 MR. GANNAM: She will -- she will appear,
8 Your Honor, and she will have to, and we want that day to
9 occur, but we don't want it to occur prematurely. And we
10 will -- we will produce her at the appropriate time when
11 she's been served, and we have the ability for her to be
12 subject to the Court's jurisdiction.

13 MR. WATKINS: Judge, I will --

14 THE COURT: You need to speak into the
15 microphone. I'm sorry.

16 MR. WATKINS: I will be out of town July 25th
17 through August 2nd, if we can at least have a hearing
18 prior to then.

19 THE COURT: Well, Mr. Mando would be --
20 hopefully you're not going anywhere.

21 MR. MANDO: No, sir.

22 THE COURT: Well, I'm going to be in Columbia,
23 Kentucky, on Thursday. We can recess this in
24 Adair County, but I don't think we'll want to do that.

25 Well -- and the service thing, I mean, I'm

1 not -- this could have been prevented just with personal
2 service. I'm just -- it's -- so there's --

3 MR. SHARP: Your Honor --

4 THE COURT: -- enough to kind of -- there's
5 gifts for everyone here at the bench. But I'm a little
6 bit --

7 MR. SHARP: Your Honor, with all due respect,
8 we had -- we had no reason to suspect that
9 Ms. Davis wouldn't pick up her mail as did the
10 county judge/executive.

11 THE COURT: Well, if it's -- do you believe --

12 MR. SHARP: I mean --

13 THE COURT: -- that she just didn't pick up her
14 mail?

15 MR. SHARP: Well, I don't know. When we find
16 out, we'll -- when we get her here, we'll certainly ask
17 her. Well, I mean, the county was served.

18 THE COURT: Well, but once she's served she's
19 served. I don't think it's -- it seems kind of petty. I
20 mean, if everybody wants their --

21 MR. SHARP: And we don't want to -- we're not
22 interested in fighting over issues that are not worthy of
23 fighting over, Your Honor.

24 THE COURT: Well, all right. We're going to
25 hear argument. I know we're recessing it, and I do want

1 to hear kind of a preliminary -- your preliminary
2 thoughts on some issues that I have to raise with
3 counsel.

4 But what we'll do, your 48-hour request will be
5 granted. I won't set anything earlier than next Monday.

6 MR. GANNAM: Thank you, Your Honor.

7 THE COURT: And what we'll do, if you would
8 file a notice of service -- and you can object to the
9 service if you think that it's not appropriate under the
10 rules, and then we'll litigate the service. But once
11 she's formally served, file a notice within -- forthwith.
12 We'll contact -- we'll put on an order not earlier than
13 48 hours from that date. It won't be this week. It will
14 be no earlier than Monday. But you're leaving on the
15 25th --

16 MR. WATKINS: 25th.

17 THE COURT: -- which would be --

18 MR. WATKINS: That's a Saturday.

19 THE COURT: So probably a day next week in
20 Covington.

21 All right. Very well. Thank you.

22 MR. WATKINS: Thank you, Your Honor.

23 MR. GANNAM: Thank you, Your Honor.

24 (Whereupon, the bench conference concluded, and
25 the proceedings continued on the record in open court,

1 as follows.)

2 THE COURT: Okay. Well, we are going to
3 reconvene the hearing in progress in Covington after
4 Ms. Davis is formally served.

5 As I indicated here at the bench, we'll set
6 that matter for a date not earlier than next Monday to
7 accommodate counsels' schedules.

8 Now, let me turn to my questions here.

9 And I will allow a written response. I've
10 already indicated that will be due on the 30th of July.

11 All right. In Obergefell -- is that the right
12 pronunciation of that?

13 MR. CANON: O-ber-ge-fell, Judge.

14 THE COURT: Ober --

15 MR. CANON: Ge-fell.

16 THE COURT: Obergefell?

17 MR. CANON: Yes.

18 THE COURT: Okay. Obergefell, okay.

19 I've read that case a couple of times, the four
20 dissents a couple of times. It's clear that whether or
21 not anybody individually disagrees with the ruling, the
22 ruling is individuals have a fundamental constitutional
23 right to marry under the Fourth -- Fourteenth Amendment.

24 In this particular case we have a defendant who
25 has made public comments that she, because of her

1 religious convictions, is not going to be issuing any
2 marriage licenses at all, which, I guess, takes equal
3 protection issue off the table potentially, but not the
4 fundamental right issue under the Fourteenth Amendment.

5 What is the government's compelling state
6 interest in her refusal to issue marriage licenses?

7 Either one of -- I mean, from the defendant's
8 standpoint. I mean, that's your -- we've got a
9 fundamental right. I mean, all of us have taken
10 Con Law 1 from law school, depending on whether or not it
11 impinges on what type of right it impinges on, that
12 dictates the standard of review under the case law.

13 We've got a fundamental right involved. I
14 mean, we're not contesting that. That's what the
15 Supreme Court has held. So what is the compelling state
16 interest?

17 MR. CHRISTMAN: Your Honor, the fundamental
18 right --

19 THE COURT: Please stand, please. Thank you.

20 MR. CHRISTMAN: The compelling state interest
21 is only applicable in the context where strict scrutiny
22 would apply, and there are cases that plaintiffs cited in
23 their motion for preliminary injunction that the
24 fundamental right to marry, the strict scrutiny analysis
25 requiring a compelling government interest is a direct

1 and substantial burden on the fundamental right to marry.

2 THE COURT: Okay. What's the substan -- what's
3 the compelling state interest?

4 MR. CHRISTMAN: Again, that's assuming --

5 THE COURT: No, what's the compelling state
6 interest?

7 MR. CHRISTMAN: We would argue that it's not a
8 compelling government interest that --

9 THE COURT: Okay. What's the standard that --

10 MR. CHRISTMAN: -- needs to apply.

11 THE COURT: -- applies then?

12 MR. CHRISTMAN: The standard that should apply
13 here with respect to plaintiffs' request would be a
14 rational basis first.

15 THE COURT: Why, if it involves a fundamental
16 right?

17 MR. CHRISTMAN: Because the fundamental right
18 to marriage cases you get the strict scrutiny if it's a
19 direct and substantial burden on the fundamental right to
20 marry. Not every --

21 THE COURT: Okay. They've gone down to get a
22 license in the county they live, and she refuses to give
23 it. Why isn't that a direct burden on their right?

24 MR. CHRISTMAN: Because it's not --

25 THE COURT: Because they can go over to

1 Carter County or Fayette County and get the license?

2 MR. CHRISTMAN: Correct, Your Honor.

3 THE COURT: Is that why?

4 MR. CHRISTMAN: They can go to the neighboring
5 counties. They can go to the --

6 THE COURT: Why do they need to go to the
7 neighboring county?

8 MR. CHRISTMAN: Well, I'm explaining and
9 answering your question as to why it's not a direct and
10 substantial burden. It calls for a substantial burden
11 analysis themselves on why their fundamental right to
12 marry is being directly and substantially burdened. They
13 can go to neighboring counties. They can go to numerous
14 other counties --

15 THE COURT: So does the county --

16 MR. CHRISTMAN: -- across the state.

17 THE COURT: Does the county reimburse them for
18 going to the neighboring county? Is Kim Davis going to
19 write them a check for mileage to go to the other county?

20 MR. CHRISTMAN: Well, they haven't -- they
21 haven't made the attempt. As the plaintiffs conceded,
22 none of them have even attempted to go to another county
23 to try to obtain a license. All they've done is
24 exclusively try to go to the Rowan County Clerk's office.

25 A few of them testified that they did even try

1 to go to Chief Judge/Executive Walter Blevins.

2 And I would submit to the Court that under
3 Kentucky Revised Statute 402.240 it says that in the
4 absence of the county clerk or the vacancy of the office,
5 that the county judge or executive may issue marriage
6 licenses.

7 So that statute already -- under Kentucky law
8 there's already a provision for if the county clerk
9 cannot issue a license that --

10 THE COURT: Why can't she issue the license?

11 MR. CHRISTMAN: Which license?

12 THE COURT: Why can't Kim Davis issue the
13 marriage licenses? Why?

14 MR. CHRISTMAN: Well, it depends on which
15 plaintiff we're talking about because for --

16 THE COURT: Okay. Well, let's say Plaintiff
17 April Miller, why can't she issue the license to
18 April Miller?

19 MR. CHRISTMAN: For Ms. Miller -- overall
20 Ms. Davis stopped issuing all marriage licenses because
21 she wanted to ensure that people who were coming to seek
22 marriage licenses were treated equally, that they were
23 given the same treatment by --

24 THE COURT: Okay. But why can't -- why can't
25 she issue the one to Miller?

1 MR. CHRISTMAN: For -- in addition to that why
2 she can't issue the license to Miller is because
3 Ms. Miller wanted to be married to another woman. And
4 the count -- the mandated form from Kentucky from the
5 Department of Libraries and Archives, the marriage form
6 itself, Ms. Davis has no choice, no discretion over the
7 license that has to be issued to a couple. It's
8 prescribed from the governor's office through the
9 Kentucky Department of Libraries and Archives, and it's
10 that form. It's uniform under Kentucky statute. I can
11 provide the citation.

12 THE COURT: Okay. What's wrong with the form?

13 MR. CHRISTMAN: So the form requires the county
14 clerk on four occasions, or at a minimum at least two,
15 for every license that the county clerk issues she has to
16 give her approval at least two times on that license with
17 her name and affixing her signature, name, her sign of
18 approval for the marriage license.

19 THE COURT: But is it a sign of approval, or is
20 it more a ministerial act?

21 MR. CHRISTMAN: It's a sign of approval --

22 THE COURT: Approval.

23 MR. CHRISTMAN: -- because it's her name. So
24 as a -- as a public record when that marriage license is
25 issued, it becomes solemnized by someone that can

1 solemnize the marriage, and then comes back to be
2 recorded. It's a public record in Rowan County that the
3 Rowan County Clerk's office has issued, is the one with
4 the authority to bless, approve, sign the marriage
5 license.

6 And that form requires Ms. Davis when two
7 individuals come in, or whoever comes in, asking for a
8 marriage license requires her, even -- and I said there
9 were two or four. So the deputy clerks in her office
10 there is -- for four of the spaces that require her name
11 or signature to be on, two of those under Kentucky law
12 can be completed by the deputy clerks in a Kentucky
13 county office.

14 THE COURT: Why -- in the absence of a clerk,
15 like if I go to my home county Campbell -- and we have a
16 new clerk. Jim Luersen is the new clerk. I think the
17 only time I've been down there is to vote absentee and to
18 get my driver's license. The clerk -- I don't think I've
19 ever had any act -- ever -- I've never had any
20 interaction with the clerk himself. I think it was
21 Tom Calme before that. I never saw the clerk. The
22 deputies would take my money and my information and then
23 issue my driver's license. I mean, it may be signed by
24 the clerk, but it's not -- I mean, it's stamped by the
25 clerk.

1 MR. CHRISTMAN: Yeah. There are --

2 THE COURT: What are you -- what are you
3 talking about here?

4 MR. CHRISTMAN: There are --

5 THE COURT: You said two or four. You're
6 confusing me here.

7 MR. CHRISTMAN: Right. And, I mean, I could --
8 we could show at the appropriate time what --

9 THE COURT: How about now?

10 MR. CHRISTMAN: -- a license --

11 THE COURT: I think now is the appropriate
12 time.

13 MR. CHRISTMAN: Yes, Your Honor. We
14 actually -- we actually have a copy of what the license
15 looked like immediately prior to the Obergefell decision
16 on June 26th, and then on June 30th with the governor of
17 Kentucky said, "I'm going to instruct and direct my
18 Kentucky Department of Libraries and Archives to issue a
19 new form --"

20 THE COURT: Okay.

21 MR. CHRISTMAN: "-- because Kentucky is now
22 going to recognize and issue marriage licenses to
23 same-sex couples."

24 THE COURT: Right. So now we're -- I think the
25 one that's really relevant now is the one that's

1 post-6/30/2015.

2 MR. CHRISTMAN: Right. And there's very little
3 that was changed. We just wanted to show that to
4 Your Honor that there is very little that changed before
5 and after.

6 But there are four spots. You'll see in the
7 middle of the form with the one that is redacted because
8 it was easier to draw your attention to.

9 THE COURT: Yes.

10 MR. CHRISTMAN: Where it says, issued this
11 month, day, year, in the office of, and then it says,
12 name, comma, county. And in those spots on every form is
13 Kim Davis. Every marriage license form that comes out of
14 Rowan County has to have her name right there. That's
15 prescribed by -- Kentucky marriage law requires her name
16 there.

17 Immediately below that is where it says
18 recorder's name, and that is a spot that under Kentucky
19 marriage law allows either the county clerk's name to be
20 there or a deputy clerk.

21 THE COURT: Okay. So if the statute was
22 amended to allow for a deputy clerk to sign off on all of
23 this, would that change all of your opinion of this case?

24 MR. CHRISTMAN: What -- what it would change if
25 you take -- if you take Kim Davis's requirement of having

1 affix her name and approval of that marriage off of the
2 license and put it onto the hands and the authority of
3 somebody else, that's not her name, it's not her
4 approval, she doesn't have to bless that marriage,
5 then --

6 THE COURT: Well, she's not blessing anything.
7 She's just signing it as a representative of the county.

8 MR. CHRISTMAN: Yeah, she's approving. Under
9 the statute is what it says, that --

10 THE COURT: Well, you keep using the word
11 "bless." I mean --

12 MR. CHRISTMAN: -- under the authority --

13 THE COURT: -- blessing is something we talk
14 about in church. I mean, she's signing it because she's
15 the county clerk.

16 MR. CHRISTMAN: She's authorized. The statutes
17 use the word authorized --

18 THE COURT: Right.

19 MR. CHRISTMAN: -- approved.

20 THE COURT: Right.

21 MR. CHRISTMAN: And so, yeah, if you remove --
22 if the State of Kentucky or the Commonwealth of Kentucky
23 removes the statutory requirement that a county clerk
24 must authorize and approve these licenses, then that
25 would eliminate for Ms. Davis -- when Ms. Miller walked

1 in for a marriage license, that would eliminate the
2 religious conscientious objection that Ms. Davis has to
3 having her name, signature, and approval on that license.

4 There are -- there are other ways -- again,
5 there are less restrictive means, other ways in which
6 Ms. Davis's religious objection can be accommodated. For
7 example --

8 THE COURT: Well, is that the --

9 MR. CHRISTMAN: -- you were actually talking
10 about your driver's license. There are numbers of things
11 that people can get in a county. In fact, one of them is
12 a fishing license. Well --

13 THE COURT: I do that online.

14 MR. CHRISTMAN: You can do it online, and
15 that's certainly an option that's out there. Other --
16 other states across the country have done this where they
17 move marriage out of a particular county clerk's office
18 and put it in the hands of the state or the Commonwealth
19 that people sitting in their living room, you know, can
20 go on their iPad and get a marriage license as long as
21 they verify who they are, and they pay the fee.

22 THE COURT: No, those are -- these are all
23 prospective things that could impact this case. I mean,
24 if the state were to go to online marriage licenses and
25 have the -- I guess it would be the -- is there a

1 commissioner of that particular -- who was it that prints
2 out these forms?

3 MR. CHRISTMAN: It comes from the Kentucky
4 Department of Libraries and Archives. It's a branch --

5 THE COURT: Yeah. Is there a commissioner of
6 Department of Libraries --

7 MR. CHRISTMAN: There is --

8 THE COURT: -- and Archives?

9 MR. CHRISTMAN: There is a commissioner.
10 There's a commissioner that --

11 THE COURT: That commissioner would sign off on
12 all of those I suppose. If you went to an online system,
13 I would assume that that's what would be who would sign
14 that.

15 MR. CHRISTMAN: And the -- yeah, the license
16 would come issued and --

17 THE COURT: All right.

18 MR. CHRISTMAN: -- approved out of the
19 Commonwealth's office. There are several other exempt --
20 there are --

21 THE COURT: You're going to have to keep your
22 voice up because it's getting hot in here. Why don't you
23 come over to the podium so we can hear you.

24 MR. CHRISTMAN: That -- Your Honor, that was --
25 that's one of the options that's available.

1 And actually I was briefly about to mention
2 that there are several other licenses, different things,
3 that people can get from a county, and one of them is a
4 fishing license. And Kentucky actually has an exemption
5 for county clerks that they can choose to submit
6 something in writing to this -- to the Commonwealth that
7 they can exempt themselves from their requirement to
8 actually issue a fishing license.

9 The cite for that would be Kentucky Revised
10 Statute 150.195. So you --

11 THE COURT: Why would they ever to that? Do
12 they have an objection to issuing a fishing license?

13 MR. CHRISTMAN: Well, people might have
14 different kinds of objection to different things. And
15 what it shows, and evidence is, is that the legislature
16 and the governor know how to sit down and figure out how
17 to accommodate different exemptions.

18 THE COURT: Is that something that can be done
19 by executive order?

20 MR. CHRISTMAN: Actually --

21 THE COURT: Does anybody know?

22 MR. CHRISTMAN: Yes. In this country there are
23 two examples at least already in Louisiana, not too far
24 from here, where Governor Jindal--

25 THE COURT: Well, it's pretty far from here.

1 MR. CHRISTMAN: I'm coming from Florida so
2 Louisiana is not too far from here.

3 Where Bobby Jindal, the governor in that state,
4 actually issued an executive order that was entitled
5 Marriage and Conscience Order giving exemptions to a
6 whole litany of different people that would qualify.

7 Recently, after the Obergefell decision,
8 Governor Brownback in Kansas also issued an executive
9 order related to religious conscience and religious
10 exemption. Both of the gubernatorial candidates in this
11 state in recent news articles have talked about when --

12 THE COURT: In what state?

13 MR. CHRISTMAN: Kentucky.

14 THE COURT: We only have one now. I mean,
15 Bevin, didn't he win the primary? Who's the other one?

16 MR. CHRISTMAN: I believe it was Bevin is the
17 republican candidate, and the --

18 THE COURT: Oh, Jack Conway.

19 MR. CHRISTMAN: -- current attorney general
20 is --

21 THE COURT: Oh, okay, Jack Conway, okay, okay.

22 MR. CHRISTMAN: -- running for governor.

23 THE COURT: I was just thinking Republicans
24 because --

25 MR. CHRISTMAN: I apologize for devolving into

1 Kentucky politics for the moment. I'm certainly not
2 an --

3 THE COURT: I'm familiar with Kentucky
4 politics.

5 MR. CHRISTMAN: -- expert on them. But both --
6 both of them have made public statements that related to
7 religious conscience about the legislature taking this
8 up, thinking about it to both work with what the
9 Supreme Court has said in Obergefell, but also then work
10 with a person like Kim Davis who has to affix her name
11 and approval on every license. And that's -- that's
12 what's at issue here. We're not talking about -- as
13 plaintiffs conceded and admitted in their testimony, they
14 can get a license other places. They can obtain it.

15 The Commonwealth of Kentucky is not here saying
16 we're not going to issue you a license. That's not what
17 Kentucky says.

18 In fact, what Kentucky says through
19 Governor Beshear, through Attorney General Conway, is
20 that we are recognizing same-sex marriages, both those
21 here in Kentucky, as well as all of the other states, if
22 you move to Kentucky, we will recognize your same-sex
23 marriage.

24 So Kentucky is not saying you can't get a
25 marriage license. And that's what's different going back

1 to some of those --

2 THE COURT: The county -- well, what's
3 happening here is the county clerk is saying she's not
4 going to issue it.

5 MR. CHRISTMAN: Because of -- because -- she's
6 not issuing any licenses right now because she wants to
7 comply with her obligations and duties to treat people
8 equally.

9 THE COURT: Well, by doing that she's denying
10 the rights to anyone to get a marriage license in her
11 county.

12 MR. CHRISTMAN: Well, it goes back to the
13 direct and substantial burden, and is that fundamental
14 right to marry being directly and substantially burdened?
15 They can go to these other counties. They'll get -- they
16 can get licenses there. They can go to Rowan County and
17 go to the chief -- the county judge, the county
18 executive, who under Kentucky law, under current Kentucky
19 law, he may issue the license.

20 THE COURT: Even if she's sitting downstairs?

21 MR. CHRISTMAN: What the statute says is in the
22 absence of --

23 THE COURT: Or upstairs, wherever it is.

24 MR. CHRISTMAN: Any absence of the county
25 clerk, the county -- the county judge or executive may --

1 THE COURT: How is that defined absence?

2 MR. CHRISTMAN: -- issue the license. The
3 statute --

4 THE COURT: Is that an absence, physically
5 absent, or just because she has a conscientious objection
6 to issuing a license?

7 MR. CHRISTMAN: Your Honor, I think it's both.
8 The statute does not define absence so it's left for
9 interpretation. It says, "in the absence of county clerk
10 or vacancy in the office." So vacancy in the office
11 needs to be treated separately.

12 In other words, there's an instance where we
13 can have a gap in time where there's nobody in the
14 position of county clerk. That's vacancy. So in the
15 absence --

16 THE COURT: Someone resigns.

17 MR. CHRISTMAN: Someone resigns.

18 THE COURT: Right.

19 MR. CHRISTMAN: Various things could happen
20 that somebody -- there's nobody in the office, you have
21 to call special election.

22 Absence can happen in several different ways.
23 Somebody could be absent for a medical reason. Somebody
24 could be absent because of a religious conscious
25 objection. They could be absent because they're on

1 vacation. There are several ways in which somebody could
2 be absent from being able to be the county clerk who
3 issues the license.

4 And what Kentucky marriage law then provides
5 is if the county clerk is absent, you can go to the
6 chief judge and that chief judge may then issue a license
7 to you through a memorandum.

8 And what the plaintiffs have testified to
9 is that they went to the chief judge, the county
10 judge/executive, and he said no.

11 THE COURT: Okay. Let me ask this. Let me ask
12 this question. You represent Ms. Davis in her individual
13 and official capacity to the extent that she's ultimately
14 going to be served, both official and individual
15 capacity; correct?

16 MR. GANNAM: Yes, Your Honor.

17 THE COURT: Okay. If you bring -- you brought
18 this action under 1983 and have requested attorneys'
19 fees; correct?

20 MR. SHARP: Yes, Your Honor.

21 THE COURT: All right. All right.

22 MR. CHRISTMAN: Your Honor, so there is no
23 evidence that -- other than the admission now that the
24 plaintiffs actually tried the option in Rowan County. So
25 there was another option that the law provided to them,

1 that Mr. Blevins chose not to issue the license.
2 Mr. Blevins isn't before this Court so I'm not going to
3 presume upon his reasons for not issuing the license.
4 But there is that option, along with all these other
5 counties.

6 And by the governor's own statements that this
7 issue about individuals within Kentucky their inability
8 to obtain a marriage license, again, it's not -- this is
9 not the pre-Obergefell world. If a same-sex couple
10 walked into one of the 120 Kentucky counties on
11 June 25th, 2015, not a single one of them could have
12 gotten a marriage license from Kentucky on that day.

13 Because why? At that point the Kentucky
14 Constitution said what marriage was between one man and
15 one woman. Kentucky statute said that.

16 THE COURT: Well, that's --

17 MR. CHRISTMAN: Kentucky Supreme Court, so --

18 THE COURT: That's all well and good, but
19 that's pre-Supreme Court decision.

20 MR. CHRISTMAN: Right. And so it's to show
21 that -- and that county clerk in that instance
22 couldn't -- wasn't even permitted under the law, didn't
23 have any ability to issue the license.

24 Now the governor has come out, Kentucky has
25 come out and said we're recognizing and we're issuing

1 marriage licenses to same-sex couples, and here's the
2 form you must use, mandatory, prescribed. And that form
3 requires Kim Davis to put her name and her approval on
4 it.

5 The governor said this is not a widespread
6 issue, that this is limited in terms of the counties
7 where the county clerks, one of whom is Ms. Davis, is
8 unwilling to issue the marriage license. This is a much
9 different world from before. And that's why it goes back
10 to the fundamental right to marry is not being
11 substantially burden because --

12 THE COURT: Well --

13 MR. CHRISTMAN: -- in those cases it was to a
14 class. It was to classes of people on statewide
15 policies. And in --

16 THE COURT: Well, they filed a motion for
17 class cert -- well, you filed it as a purported class
18 action. I mean, the class is very small right now
19 potentially --

20 MR. CHRISTMAN: Right.

21 THE COURT: -- because of 119 other counties
22 are not objecting.

23 Is that fair?

24 MR. SHARP: Your Honor, the proposed class is
25 defined in the complaint as present and future

1 individuals who would seek to obtain a marriage license
2 in Rowan County. The proposed classes would not be
3 statewide.

4 THE COURT: It would just be one county?

5 MR. SHARP: One county.

6 THE COURT: Right.

7 MR. CHRISTMAN: Kentucky law does not require
8 these couples to get a marriage license in Rowan County.
9 Kentucky law --

10 THE COURT: I understand that.

11 MR. CHRISTMAN: -- let's them go wherever.

12 THE COURT: I understand that, I do.

13 MR. CHRISTMAN: Loving versus Virginia, all
14 these fundamental right-to-marry cases all dealt with
15 statewide policies that prohibited groups of people by
16 class identification from being married. Loving versus
17 Virginia was a Virginia law, a ban on interracial
18 marriages.

19 THE COURT: Right, right.

20 MR. CHRISTMAN: Zablocki was a Wisconsin law
21 that prevented parents who had support obligations still
22 owed to children that they had support -- child support
23 obligations to, if that wasn't paid in full, they
24 couldn't get a license. It was a statewide policy.

25 In the Turner v. Safley case, which they cited

1 in their papers, it was a Missouri statewide regulation.

2 In the case that was up at the Supreme Court in
3 Obergefell rising from Kentucky, it was a statewide
4 answer.

5 Here we're not talking about statewide. What's
6 statewide as the general policy and the general rule is
7 what Governor Beshear said, what Attorney General Conway
8 said, is that marriage for any two people, subject to
9 some other requirements, that it's open for all, that
10 here's the form. You can walk -- you can go get married,
11 and we'll recognize your marriage. We'll give all the
12 privileges, all the benefits that come from marriage.
13 Kentucky can do it. These people can -- these plaintiffs
14 can go to the neighboring counties. They can go to these
15 other things.

16 THE COURT: Well, why should they have to? Why
17 should they have to?

18 MR. CHRISTMAN: Four -- there are four sets of
19 couples who are plaintiffs in this case. Again, I'll go
20 back to as my initial answer the reason for four is
21 because Ms. Davis does not want to issue -- does not want
22 to make any steps that would be seen as not treating
23 couples equally so --

24 THE COURT: Right. Now, how many --

25 MR. CHRISTMAN: -- she does --

1 THE COURT: Hold on, hold on. When was she
2 elected?

3 MR. CHRISTMAN: She was elected in November of
4 2014 and --

5 THE COURT: So she has --

6 MR. CHRISTMAN: -- took office --

7 THE COURT: Is it a four-year term?

8 MR. CHRISTMAN: It's a four-year term.

9 THE COURT: So for the next four years no
10 marriage licenses at all in Rowan County? Is that -- is
11 that what's going to happen?

12 MR. CHRISTMAN: I believe -- I believe that
13 there's an easier solution, and there are -- and it --

14 THE COURT: Well, what's the --

15 MR. CHRISTMAN: -- can be easily resolved.

16 THE COURT: -- easier solution?

17 MR. CHRISTMAN: Well, we talked about some
18 other less restrictive alternatives and means that can
19 happen, is the -- remember, in Rowan County they can get
20 a license. They can get one from Judge Blevins as well.

21 THE COURT: Well, that's something I want to --

22 MR. CHRISTMAN: Apparently they're saying --

23 THE COURT: That's something I want to explore
24 at some point with Mr. Mando.

25 MR. CHRISTMAN: We'll cabin that.

1 So another option is that, as I mentioned
2 earlier, there are other legislative and executive
3 options that are available that as that --

4 THE COURT: Well, they may not --

5 MR. CHRISTMAN: -- other states --

6 THE COURT: -- be available now.

7 MR. CHRISTMAN: They're not available today,
8 but states are already working to take steps, and both of
9 the candidates have indicated that this is something that
10 they want to --

11 THE COURT: Well, that's probably not going to
12 happen --

13 MR. CHRISTMAN: -- to take up and address.

14 THE COURT: -- until the spring anyway. That
15 wouldn't happen until the spring.

16 MR. CHRISTMAN: Yeah.

17 THE COURT: I can't imagine them calling a
18 legislative session for this one issue. That would seem
19 a little --

20 MR. CHRISTMAN: And the current --

21 THE COURT: -- bit expensive.

22 MR. CHRISTMAN: Admittedly, the current
23 governor has said that he will not call a current -- a
24 special session right now for it.

25 But there are other -- there are other ways for

1 licenses to begin to get issued because the governor can
2 work with the KDLA --

3 THE COURT: Okay.

4 MR. CHRISTMAN: -- to revise the form in the
5 interim and, again, going back to the four couples.

6 So that's why everybody -- that's why no one is
7 getting a marriage license with Kim Davis's authorization
8 and signature right now.

9 Now, for the two couples who came -- there is
10 one couple that was two women and another couple that was
11 two men. For those two couples Ms. Davis has a sincerely
12 held religious belief and a religious conscience
13 objection that prevents her name and her affixing her
14 name and signature to those licenses. She does not --
15 we'll present evidence that she does not have a
16 religious -- a sincerely held religious belief,
17 conscientious objection, to issuing a license to a couple
18 that's one man and one woman because --

19 THE COURT: Do you know what religion she is?

20 MR. CHRISTMAN: She's a professing Christian,
21 Your Honor.

22 THE COURT: She's a Christian, okay. All
23 right, all right.

24 MR. CHRISTMAN: And when she took office as the
25 elected county clerk, she -- at the time -- the day she

1 took office it was January 1st, 2015. Or maybe it wasn't
2 the 1st. It was the first Monday of January in the new
3 year. When she took office at that moment, what marriage
4 was in Kentucky was one man, one woman. The
5 constitutional amendment, the legislative act, the
6 Sixth Circuit case at that point had overruled
7 Judge Heyburn's decision from the Western District, had
8 reversed that.

9 So there was no question at that point what the
10 law of marriage in Kentucky was. And that law comported
11 with what Ms. Davis's sincerely held religious beliefs
12 were at that moment.

13 After she took office, and only after, is when
14 the Supreme Court even granted certiorari in the
15 Obergefell case. That happened on January 16th of 2015.

16 And we'll present evidence from Ms. Davis that
17 from the moment the Obergefell decision, the cert
18 petition was granted, knowing that Kentucky's law there
19 was going to be a decision on it, that Ms. Davis began to
20 take steps that she could to alert legislators in
21 Kentucky, representatives, that depending on how this
22 goes, this is going to be a real issue for me because of
23 my religious, conscientious objection and what I believe
24 marriage to be.

25 She swore an oath to the Constitution, the

1 United States Constitution, the Kentucky Constitution, so
2 help me God, that the entire oath was an oath that was --
3 it's built into the oath is inherent inalienable
4 protections for her conscience, for her religious
5 liberties, for her freedom.

6 THE COURT: Well, she -- didn't she -- you
7 mentioned the oath. Did the oath require her to uphold
8 the Constitution?

9 MR. CHRISTMAN: And she is upholding the
10 Constitution.

11 THE COURT: Well, now, the --

12 MR. CHRISTMAN: What she took an oath --

13 THE COURT: -- definition of fundamental right
14 to marry has changed in the last two weeks.

15 MR. CHRISTMAN: The Supreme --

16 THE COURT: Well, the Supreme Court hasn't
17 changed. It's been --

18 MR. CHRISTMAN: The Supreme --

19 THE COURT: -- the Supreme Court has upheld the
20 Fourteenth Amendment due process, fundamental right to
21 marry same-sex couples. That's different now than it was
22 in March of this year. So the Constitution -- she took
23 an oath to uphold the Constitution. The Constitution has
24 now been expanded, if you will, to include same-sex
25 marriage.

1 MR. CHRISTMAN: Your Honor, I would submit that
2 the Constitution only expands by way of amendment and --

3 THE COURT: Well, okay. Listen, we're --

4 MR. CHRISTMAN: -- she took an oath. I don't
5 want --

6 THE COURT: -- not going to --

7 MR. CHRISTMAN: -- to -- you said --

8 COURT REPORTER: I can only take one at a time.

9 THE COURT: Yes, thank you.

10 From the standpoint -- you're talking to
11 somebody who generally speaking is -- I look at the
12 Constitution and somebody can say it changes, it's a
13 living, breathing document. Some people say that. Some
14 people say it's what it says is what it should be. And
15 we probably got lots of people in this room that agree
16 with one or the other.

17 Now, I took an oath to uphold the law 13 plus
18 years ago. The Supreme Court in matters like this has
19 the last say.

20 Now, from a -- in a civilized society we set it
21 up that way. We've got district courts, we have
22 appellate courts, and then we have the Supreme Court.

23 And if you get to the Supreme Court and they
24 make a final ruling -- and I apologize for using the word
25 amendment because I know how the constitutional amendment

1 process works. I did go to law school. I'm pretty
2 familiar with that. I'm sure you're aware of it as well.

3 But the Supreme Court made its ruling. That's
4 what from a constitutional Fourteenth Amendment
5 perspective there's a fundamental right to marry to
6 both same and opposite-sex couples. That's what the
7 Supreme Court says the Constitution includes now, whether
8 it be -- it's not an amendment to the Constitution, but
9 it's held to be a fundamental right.

10 I'm here to uphold the Constitution, among
11 other things. Individuals who take oaths who are there
12 to uphold the Constitution have to do that as well.

13 MR. CHRISTMAN: Yes.

14 THE COURT: So, I mean, I'm trying to follow
15 your point. I mean, she took this oath to uphold the
16 Constitution. The Constitution may not be what it was
17 when she took office.

18 MR. CHRISTMAN: Yes, Your Honor, that's correct
19 in terms of how the Supreme Court is interpreting the
20 Constitution.

21 THE COURT: Correct, correct.

22 MR. CHRISTMAN: But what was also in effect on
23 January 1st, as well June 26th and today, was the
24 First Amendment of the United States.

25 THE COURT: All right. So we have a

1 conflict --

2 MR. CHRISTMAN: So there are --

3 THE COURT: -- First Amendment versus
4 Fourteenth Amendment. We're getting somewhere.

5 MR. CHRISTMAN: And what the Supreme Court said
6 in Obergefell --

7 THE COURT: Page 27. I've read it multiple
8 times.

9 MR. CHRISTMAN: -- the one unanimous -- the one
10 unanimous ruling from that court was that religious
11 liberties, religious freedoms are still protected in this
12 country.

13 THE COURT: Right, pastors --

14 MR. CHRISTMAN: And that when --

15 THE COURT: -- and churches, all agree.

16 MR. CHRISTMAN: Well, I mean, there's -- how
17 far does religious freedom and religious liberty go?

18 Religious conscience objections have been and
19 are accepted constitutionally for public employees, for
20 public officials that -- when you take office, you don't
21 waive and suddenly shed your constitutional rights,
22 freedoms, and liberties at the door of the government
23 courthouse --

24 THE COURT: Sometimes you have to.

25 MR. CHRISTMAN: -- when you walk in. There --

1 THE COURT: I mean, if I'm telling -- if I'm
2 picking a jury, I got to be careful what I say sometimes.

3 When I'm in this courtroom, I've got to be
4 careful what I say sometimes. I mean, I can't profess
5 religion from this bench. I would never try to because
6 that would be inappropriate.

7 I recognize that there's a conflict here. The
8 Supreme Court recognizes a conflict. If you read
9 Justice Thomas's dissent, I mean, he may very well be a
10 prophet. I mean, he --

11 MR. CHRISTMAN: Your Honor, he predicted this
12 very --

13 THE COURT: -- says, "It appears all but
14 inevitable that the two will come into conflict." That
15 is being these two Fourteenth and First Amendment.
16 "Government and religious institutions, particularly as
17 individuals and churches are confronted with demands to
18 participate and endorse civil marriages between same-sex
19 couples."

20 So this is just the first, according to
21 Justice Thomas, of many situations where there may be a
22 conflict going forward.

23 MR. CHRISTMAN: That's correct, Your Honor.

24 THE COURT: So, I mean, I'm -- I'm aware of
25 that. I am trying to get -- I would love for this to be

1 a situation where if Kim Davis has a conflict, a deeply
2 held religious belief, that she can't sign off on these
3 marriage licenses, they go down the hall to the
4 judge/executive, and he signs it. Then we don't have to
5 worry about an attorney fee petition where Rowan County
6 might be on the hook to sign -- to pay their attorneys'
7 fees. I mean, there's a lot in play here potentially. I
8 recognize that.

9 So, I mean, I'm going to go back to the very
10 first question that I asked that you then, as a good
11 advocate will, you kind of answered in a way that didn't
12 really answer the question.

13 But is there a compelling state interest in her
14 denying these marriage licenses?

15 MR. CHRISTMAN: Yes, there is, and that
16 compelling --

17 THE COURT: What is that?

18 MR. CHRISTMAN: -- state interest is protecting
19 the individual religious freedoms of every person in the
20 Commonwealth of Kentucky. One of those people is
21 Kim Davis.

22 THE COURT: Okay. So that's your answer?

23 MR. CHRISTMAN: That is a -- that is the
24 compelling interest of the highest degree because it goes
25 to the very first freedoms that are articulated in the

1 United States Constitution, as well as the Kentucky
2 Constitution, which says, "The civil rights, privileges,
3 or capacities of no person shall not be taken away, or in
4 anywise diminished or enlarged, on account of his belief
5 or disbelief of any religious tenet, dogma, or teaching.
6 No human authorities shall, in any case whatever, control
7 or interfere with the rights of conscience."

8 That Kentucky has a compelling government
9 interest of upholding the rights of conscience, the
10 rights of religious freedom, rights of religious liberty,
11 free speech implications here because she's actually
12 putting her name and signature again on a form.

13 It is a -- if Kentucky is forcing her to do it,
14 Kentucky is compelling her, forcing her to speak as to a
15 view, a message, an idea, that -- a belief that she does
16 not agree with.

17 In addition to the constitutional protections,
18 in Kentucky enacted in 2013 over Governor Beshear's veto
19 overwhelmingly -- I think the votes were approximately
20 75 plus percent or 80 percent over the veto -- enacting a
21 Religious Freedom Restoration Act, which prevents the
22 government, prevents Kentucky, from burdening a person's
23 religious freedom.

24 THE COURT: Now, a --

25 MR. CHRISTMAN: They --

1 THE COURT: -- person's religious freedom in
2 what regard?

3 MR. CHRISTMAN: The statute goes on. "To act
4 or refuse to act motivated by a sincerely held religious
5 belief."

6 So when you get to the same-sex couple that
7 wants Ms. Davis personally to affix her name and approval
8 on it, and Kentucky is saying you must do it because this
9 is the form, and that's the only acceptable form, and
10 nothing else can be a marriage license in the
11 Commonwealth of Kentucky, what the government of Kentucky
12 is doing is saying to Kim Davis you have to act in a way
13 that violates your sincerely held religious belief.

14 And she says, no, the Kentucky Religious
15 Freedom Restoration Act protects me from refusing to act
16 in a certain way, motivated by a sincerely held religious
17 belief, which we will present and demonstrate at the
18 appropriate time, unless -- now, there is an unless.

19 When Ms. Davis says, I have a sincerely held
20 religious belief, I have a conscious objection, that
21 doesn't end this case. Because the government of
22 Kentucky then can prove by a compelling, clear and
23 convincing evidence that it has a compelling government
24 interest and has used the least restrictive means.

25 So when Ms. Davis steps up and says, I submit

1 that I have a sincerely held religious belief that
2 prevents me from putting my name and signature and
3 approval on this license, the government of Kentucky can
4 come in and make an argument that as a state, if they
5 want to argue, and I don't think they do, because the
6 candidates have said they want to recognize religious
7 conscience, but they would have to make some argument
8 that the Kentucky has a compelling government interest to
9 force Ms. Davis to violate her individual religious
10 liberties, protections. But they have to do it in the
11 least restrictive means. Not only do they have to show a
12 compelling government interest, they have to do it in the
13 least restrictive means.

14 In the Supreme Court's Hobby Lobby case from a
15 year ago, they interpreted the federal RFRA, which is
16 very similar and analogous to what Kentucky enacted. But
17 the Kentucky statute even puts government on a higher
18 burden. It's clear and convincing is what the burden of
19 proof is for Kentucky to show.

20 And in the Hobby Lobby case, it talked very
21 much about how -- how invasive and difficult it is to
22 satisfy the least restrictive means, that Kentucky is
23 going to have to show that there was no other way for
24 these four couples to get a license unless Kim Davis
25 personally signs, approves, and do it, that there's no

1 other least restrictive means because --

2 THE COURT: Well, I don't know why. I'm
3 still -- you pointed --

4 MR. CHRISTMAN: -- they've already --

5 THE COURT: -- to this form, marriage
6 certificate. How many clerk's deputies does she have, do
7 you know?

8 MR. CHRISTMAN: Your Honor, she has -- she has
9 six deputy clerks currently employed. The numbers --

10 THE COURT: Okay. How many share --

11 MR. CHRISTMAN: -- sometimes fluctuate.

12 THE COURT: How many share her deep religious
13 conscientious objection?

14 MR. CHRISTMAN: Your Honor, I don't know the
15 answer to that question.

16 THE COURT: Because you only represent her?

17 MR. CHRISTMAN: That's correct, Your Honor.

18 THE COURT: Okay. Do you know the answer to
19 that, Mr. Mando?

20 MR. MANDO: I'm sorry?

21 THE COURT: Do you know how many of her six
22 deputies share her religious convictions?

23 MR. MANDO: No, I do not, Your Honor.

24 THE COURT: Do not?

25 MR. MANDO: No.

1 MR. CHRISTMAN: Okay. Your Honor --

2 THE COURT: That might be an answer you might
3 want to get when she testifies --

4 MR. CHRISTMAN: What I -- what I --

5 THE COURT: -- the next hearing.

6 MR. CHRISTMAN: -- would also submit is if
7 those deputy clerks also themselves have a sincerely held
8 religious belief, that Kim Davis in that case as the
9 employer of those individuals has a compelling government
10 interest herself to protect the individual consciences
11 and rights of those employees because of Kentucky Civil
12 Rights laws and other -- and constitutional protections
13 that she has. She swore an oath to the Constitution --

14 THE COURT: Okay.

15 MR. CHRISTMAN: -- to protect her religious
16 liberties but also others. And so if an employee of hers
17 steps up and says, well, I have a religious conscientious
18 objection as well, as the employer in that instance
19 Ms. Davis would have to figure out a way, or try to
20 figure out a way, to accommodate that interest.

21 But here again, I go back to the other -- the
22 other ways in which Kentucky can --

23 THE COURT: Well, we've talked --

24 MR. CHRISTMAN: -- issue a license without --

25 THE COURT: -- about that ad nauseam.

1 MR. CHRISTMAN: So those individuals are not
2 currently before this Court.

3 THE COURT: No, they're not, they're not. But
4 I'm -- part of my job is to try to figure out a way to
5 resolve all of this without lots of paper being burned,
6 with briefs, and lots of potential attorneys' fees being
7 litigated. And I'm thinking of that as I listen to you
8 argue of ways to try to resolve this.

9 MR. CHRISTMAN: And I go back to what we talked
10 about earlier about this is not -- this is not -- again,
11 it's not a statewide policy or mandate --

12 THE COURT: No, we're limited to one --

13 MR. CHRISTMAN: -- that's at issue. We're
14 talking about --

15 THE COURT: -- county, in --

16 MR. CHRISTMAN: We're talking about --

17 THE COURT: -- Rowan County, yes, sir.

18 MR. CHRISTMAN: -- one county. So, again, if
19 there is a scenario in place where there is a county
20 clerk that has a religious objection and demonstrates
21 that, and that government hasn't shown a compelling
22 government interest or a least restrictive means to
23 overturn it, and it turns out in the facts and the record
24 to be demonstrated later on that other deputy clerks also
25 have a sincerely held belief --

1 THE COURT: So are you thinking --

2 MR. CHRISTMAN: -- over this --

3 THE COURT: -- that the other six are going to
4 have the same belief she has?

5 MR. CHRISTMAN: I -- again, I don't know.
6 They're not before this Court. The plaintiffs --

7 THE COURT: It sounds to me like you think they
8 all will have it.

9 MR. CHRISTMAN: I don't think that, Your Honor.

10 THE COURT: You don't think that?

11 MR. CHRISTMAN: I don't.

12 THE COURT: Okay. So you think there may be a
13 deputy clerk in Rowan County that would be willing to
14 issue a license to a same-sex marriage?

15 MR. CHRISTMAN: More importantly than a deputy
16 clerk is the chief judge, the county executive who --

17 THE COURT: Well, that's something --

18 MR. CHRISTMAN: -- publicly on record --

19 THE COURT: Okay. Well, let's --

20 MR. CHRISTMAN: -- as saying he would.

21 THE COURT: I think I've heard enough from you
22 here. I mean, I don't -- not that I'm mad at you. I
23 just want to give the others an opportunity --

24 MR. CHRISTMAN: I'm not --

25 THE COURT: -- to speak.

1 MR. CHRISTMAN: -- going to take that as a slap
2 across the face, Your Honor.

3 THE COURT: It's not a slap across the face,
4 sir. I just want to give these other --

5 MR. CHRISTMAN: I appreciate --

6 THE COURT: -- folks an opportunity to talk.

7 MR. CHRISTMAN: -- it. Thank you very much,
8 Your Honor.

9 THE COURT: All right. Thank you.

10 Mr. Mando, clear up this statute thing. I
11 wasn't prepared to discuss this particular statute that
12 you referenced, or Mr. Christman mentioned about the
13 judge/executive having the ability to issue licenses in
14 the absence of the clerk herself.

15 MR. MANDO: Right. I believe the statute,
16 Your Honor -- and I don't have it with me -- but I think
17 it's 402.240.

18 THE COURT: Russ, could you turn down the air,
19 please?

20 Thank you.

21 MR. MANDO: And that statute, Your Honor,
22 provides that the judge/executive may issue a marriage
23 license in the -- when there's a vacancy in office or the
24 absence of the county clerk.

25 In this particular case the evidence that I've

1 heard from the bench -- from the witness stand so far is
2 that Ms. Davis was, in fact, present when the plaintiffs
3 called and/or visited the office to secure the license.

4 And the testimony from the witness stand was is
5 that judge/executive understood what the limitations on
6 his authority were, that he could not issue that if, in
7 fact, Ms. Davis was not absent.

8 THE COURT: Okay.

9 MR. MANDO: And she wasn't.

10 THE COURT: Is absence -- I don't think absence
11 is defined though.

12 MR. MANDO: I don't believe it is, but it's --
13 absence to me is she's not there.

14 THE COURT: Okay.

15 MR. MANDO: She's gone.

16 THE COURT: Well, if -- so if these two
17 same-sex couples hypothetically were to go to Morehead on
18 a day that she was at lunch, or not at the courthouse for
19 whatever reason, doctor appointment, medical appointment
20 with a child, something, vacation, and Walter Blevins was
21 there, he could -- he would issue a license to them in
22 her absence?

23 MR. MANDO: It depends on -- in that
24 particular situation, I mean -- again, I think absence
25 means she's not there. I think the interprets of the

1 General Assembly would be if she is out of the country,
2 if she is incapacitated in some way.

3 THE COURT: Right.

4 MR. MANDO: It doesn't mean, I don't think,
5 from trying to get commonsense from what the General
6 Assembly is trying to say, I don't think it means she's
7 simply out for lunch. In that case they should come back
8 at 1 o'clock and secure their licenses.

9 THE COURT: I understand that. I was being a
10 little bit flippant.

11 MR. MANDO: But the statute says that he --
12 that he met. He doesn't have to issue that particular
13 license.

14 THE COURT: Are you aware of any conscientious,
15 religious deeply held belief that the judge/executive has
16 on this issue? Has he made any public comments at all?

17 MR. MANDO: No.

18 THE COURT: No?

19 MR. MANDO: No. The county's position on this,
20 Your Honor, is that they have no authority except for
21 this limited exception in the statute for the
22 judge/executive. The county itself has no authority to
23 issue marriage licenses to people who apply or to
24 restrict the clerk to forbear from issuing licenses when
25 they are sought.

1 Instead, the county clerk is a separate
2 constitutional office under the Kentucky Constitution.

3 The fiscal court of Carter -- of Rowan County
4 and Judge/Executive Blevins have no authority to weigh in
5 here and tell her what not to do or what to do with
6 regard to her religious objections to issuing these
7 licenses.

8 THE COURT: Okay. Who -- hypothetically, if
9 the plaintiffs prevail in this case, who would be
10 responsible for the attorneys' fees under the statute?
11 Would it be the county? Would it be --

12 MR. MANDO: There's two potentials there,
13 Your Honor. Because the more I've listened to the
14 testimony today and thought about this, hearing the
15 evidence, it sounds to me like there's potential that the
16 county clerk in terms of issuing this license could be
17 considered a state actor. Because, according to the
18 evidence I heard today, the license forms come from the
19 KDLA, Kentucky Department of Libraries and Archives, an
20 executive branch of Kentucky state government.

21 The governor issued a directive to the county
22 clerks to issue -- for the clerks to issue the licenses.

23 Those types of forms, directives are not coming
24 from the fiscal court. And, therefore, if that ends up
25 being the proof, that's not a policy, custom, or practice

1 of the county, which would expose the county to that
2 attorney fee exposure.

3 I do, however, acknowledge the counter-argument
4 that she is a separately elected county clerk, and there
5 is certainly a potential exposure that the county, the
6 county clerk's office, her budget could be at risk if
7 attorney fees are awarded.

8 THE COURT: All right. Thank you.

9 MR. MANDO: Thank you.

10 THE COURT: All right. I'm not going to let
11 you off without some questions here, Mr. Sharp.

12 Could the defendants comply with Obergefell by
13 having someone else in the clerk's office issue the
14 license?

15 MR. SHARP: That's not the world we live in,
16 Your Honor.

17 THE COURT: Well, is it? I mean, I finally got
18 Mr. Christman to answer a question after a little bit of
19 discussion. But, I mean, is that -- I know other states
20 are trying to accommodate the religious conflict that
21 exists here between the First Amendment and the
22 Fourteenth Amendment. And there's -- history is littered
23 with situations where you've got one constitutional claim
24 pitted up against another constitutional claim. And we
25 have that to a certain extent here. I mean, they've

1 raised it.

2 Now, whether or not she has a legitimate
3 religious conviction or not, I mean, they say she does.

4 So -- and on page 27 of the decision that I
5 quoted from earlier, this is the majority. I mean, this
6 is Kennedy writing. "The First Amendment ensures that
7 religious organizations and persons are given proper
8 protection as they seek to teach the principles that are
9 so fulfilling and so central to their lives and faiths
10 and to their own deep aspirations to continue the family
11 structure that they have long revered."

12 It goes on to state, "It must be emphasized
13 that the religion -- that religions and those who adhere
14 to religious doctrines, may continue to advocate with
15 utmost, sincere conviction that, by divine precepts,
16 same-sex marriage should not be condoned."

17 So, I mean, that -- I've read the decision
18 multiple times, and there are going to be situations
19 where it's difficult to reconcile a -- in this case, a
20 particular defendant's First Amendment right as set forth
21 in -- well, reconcile the fundamental right that the
22 Supreme Court in Obergefell found with that
23 First Amendment right.

24 I mean, it -- there is -- even the
25 Supreme Court seemed to recognize that there could be

1 conflicts.

2 MR. SHARP: I don't think it's as complicated
3 as that, Your Honor. The -- Justice Kennedy's opinion
4 says that, you know, they may continue to advocate, not
5 that they may continue to impose their religious beliefs
6 on others when they are, in fact, employed and an actor
7 of the government.

8 This case is really quite simple. And the
9 political proposals that have been offered by opposing
10 counsel about solutions to this, you know, that's for the
11 General Assembly. That's for the political branches of
12 government.

13 Today we're dealing with a very simple
14 situation, and that is whether or not it is unlawful for
15 a government official for personal religious reasons to
16 impose a substantial burden on individuals' right to
17 marry by withholding an essential government service.
18 And that's really what this is about.

19 I mean, aside from the legally articulated
20 interest of protecting, you know, all the clerks' right
21 to the free exercise of religion, I mean, Ms. Davis
22 herself has said she opposes on religious grounds
23 same-sex marriage. She has said she would never affix
24 her name to a same-sex marriage license.

25 Opposite-sex couples got swept up in

1 Ms. Davis's policy because she said she didn't want to
2 discriminate against same-sex couples. So she broadened
3 the class of individuals whose rights she decided to
4 violate.

5 She does not get to impose her religious views
6 on others. It's as simple as that. They have a
7 fundamental right to marry. And she, as a government
8 official, crosses the line when for personal religious
9 reasons she withholds a government benefit that they are
10 otherwise entitled to receive.

11 Particularly, where, as here, the government
12 entitlement is a legally required prerequisite for those
13 individuals to exercise their own constitutionally
14 protected fundamental right to marry.

15 THE COURT: So if -- going back to the original
16 question I asked you though, if someone else in the
17 clerk's office would sign off on that marriage license,
18 would that be enough?

19 MR. SHARP: Your Honor, I will tell you that I
20 think that would depend largely on the facts because
21 there is a -- there would very much be an equal
22 protection concern insofar as separate but equal.

23 You know, the notion that Kim Davis could with
24 a wink and a nod go on break, and this other clerk deal
25 with the same-sex couples is offensive insofar as --

1 THE COURT: Okay. If it's offensive, there's
2 a --

3 MR. SHARP: I mean, to the extent the same-sex
4 couples have to accommodate Kim Davis's schedule, be it
5 vacation or break or lunch so they can avail themselves
6 of their fundamental --

7 THE COURT: I understand.

8 MR. SHARP: -- right to marry, that's not what
9 the First Amendment free exercise provides.

10 THE COURT: Well, I know that some states are
11 allowing that to occur.

12 MR. SHARP: If --

13 THE COURT: Some counties, I guess, are
14 allowing that to occur; not in Kentucky but in other
15 places.

16 MR. SHARP: If the General Assembly crafted
17 such a thing, I mean, it would be impossible for me to
18 offer any conjecture about what that would look like at
19 this point.

20 THE COURT: Well, it seems like the license
21 itself -- and I'm not trying to -- I mean, obviously, the
22 choice of the sacrament of marriage and getting married
23 is much more important than making sure you have your
24 fishing license to go fish at Cave Run there in Zilpo
25 in Rowan County. Make sure -- I mean, there are two

1 different -- there's two licenses. One you pay whatever,
2 \$25 or whatever the fee is, and you go fish. The other
3 one is something that lasts a lifetime, much more
4 significant.

5 But at the end of the day the piece of paper,
6 the license itself, is just a piece paper that's signed
7 by whoever the clerk happens to be. So it's -- that's
8 why these ideas of making it just online, if you're
9 really just dealing with a piece of paper, it seems like
10 that would be the best way to do it.

11 Now, again, that's a legislative choice, an
12 executive choice. We're here in the judicial branch, so
13 those are all things that could impact potentially this
14 case going forward.

15 But I'm -- the idea of trying to accommodate
16 the defendant's First Amendment right, which even the
17 Supreme Court says, she does have a First Amendment
18 right. Now, whether or not she -- it allows her to
19 exercise that in her capacity as the Rowan County Clerk,
20 I mean, the Supreme Court talks about individuals and
21 churches. It talks about -- let's see. Well, I'm just
22 not so sure that -- like, for instance, pastors who want
23 to not -- who don't want to officiate over same-sex
24 marriage, I don't think that this case requires a pastor
25 in a church to officiate over same sex. They still can

1 say, no, I don't want to do it.

2 And I have someone I knew from college who just
3 officiated over a same-sex marriage in Covington, one of
4 the district judges, a family court judge. And that was
5 her right to do that if she wanted to. Now, I don't know
6 if you could compel her to do that. But she's a judge.
7 No one has asked me one way or the other.

8 But I'm just thinking that her First Amendment
9 right I'm going to need to -- hopefully you can address
10 this in your written filing. I mean, you finally
11 answered my question about what the substantial
12 government interest is when you were talking earlier
13 about her individual First Amendment right. I mean, and
14 the government has a compelling interest in allowing that
15 to occur. I mean, that seems to be her individual right,
16 not the state's right, but --

17 MR. SHARP: Your Honor, that -- and I think
18 that's exactly correct. I mean, we're not talking
19 about we're -- that analysis, whether it be strict
20 scrutiny, compelling interest, intermediate scrutiny,
21 important interest, or rational basis, legitimate
22 interest --

23 THE COURT: It's not rational basis. It has to
24 be something higher than that.

25 MR. SHARP: It's state -- exactly. It's state

1 interest. What is the state interest at stake?

2 What we have here is Ms. Davis's personal
3 interest. Her personal religious beliefs conflict with
4 her obligations to issue same-sex marriage licenses on
5 the same terms as opposite-sex couples.

6 I mean, it's evident in her own public
7 statements. It's not coincidence that this blanket
8 prohibition on issuing marriage licenses occurred after
9 Obergefell.

10 So -- and to the extent that opposing counsel
11 suggest, well, the plaintiffs can simply drive to another
12 county or they can walk down the hall. I mean, A, they
13 have walked down the hall, and the county judge/executive
14 has said, I'm in charge of enforcing or applying this
15 statute, she's not absent, can't, won't issue you a
16 marriage license.

17 Ms. Davis through her religious beliefs does
18 not get to impose those on the plaintiff. She does not
19 get to dictate the manner in which they have to exercise
20 their own fundamental right.

21 When she voluntarily sought public office,
22 elected or employment or otherwise, she is no longer
23 acting as citizen vis-a-vis government sovereign. She's
24 acting as government herself, vis-a-vis the residence of
25 Rowan County.

1 And when she has to comply with the legal
2 requirements of her office, that is her employment.

3 And the cases cited about, you know, burden on
4 the right to marry, you know, and whether it's a
5 substantial and direct, I mean, it doesn't get more
6 substantial and direct than when the county clerk
7 responsible for issuing marriage licenses refuses to
8 issue them, particularly where the plaintiffs have to
9 obtain those in order to avail themselves of the right to
10 marry in the first place.

11 The suggestion that they should simply go to
12 another county is totally inadequate and misses the
13 point.

14 It then confers on county clerks the apparent
15 authority, you know, at what point does the Court decide
16 whether or not there's enough counties available to issue
17 marriage licenses?

18 I mean, the media has reported, you know,
19 somewhere in the neighborhood of 60 county clerks who
20 have indicated that perhaps they have objections.

21 But, you know, in any event, Ms. Davis's legal
22 obligations to perform the functions of her office,
23 though conflicting with her personal religious beliefs,
24 is not -- her personal religious beliefs or opposition to
25 it is not in and of itself a state interest.

1 THE COURT: Okay. One of the things I want
2 someone to produce, and I don't know if it's going to be
3 Ms. Davis or the county itself or both, what are her
4 obligations as the county clerk? What are her, I guess,
5 job duties, if you will? Is there a --

6 MR. SHARP: Vis-a-vis marriage licenses or more
7 broadly?

8 THE COURT: No, just -- well, I mean, vis-a-vis
9 marriage licenses. I mean, just something that if you
10 have something -- if it's like a job description, or I
11 don't know if it would be a regulation or administrative
12 regulation, I don't know what it would be. Perhaps --
13 and that can be produced the next time we meet. You
14 don't have to produce it today.

15 I -- is there anything else you want to say? I
16 don't want to keep everybody too long.

17 MR. SHARP: Your Honor, I believe -- again, the
18 focus here is on whether or not Ms. Davis can withhold
19 government benefits based on her religious beliefs. The
20 fact that she has included in this blanket policy
21 opposite sex couples is of no consequence. It's the
22 interest that's served by her policy is personal,
23 personal religious beliefs. And it simply is untenable
24 in so far as it imposes an unlawful burden on plaintiffs'
25 right to get married.

1 Thank you.

2 THE COURT: All right. Okay. Well, here is
3 what we're going to do. This -- the evidentiary portion
4 of this hearing will be continued in progress. Like I
5 said, as soon as we find that -- or learn that she has
6 been properly served, file a notice of that with the
7 Court. We'll set a follow-up evidentiary hearing in
8 Covington not earlier than Monday of next week. I do
9 have Court on the 21st. I know of a final pretrial in an
10 employment case. I'm not sure what time that is.

11 Do you recall what time that is set, morning?

12 LAW CLERK: 10:00.

13 THE COURT: 10:00, okay. It will be no earlier
14 than Monday. I'll have my clerk contact counsel.

15 Are you going to enter a formal entry of
16 appearance?

17 MR. MANDO: I will make sure that's done
18 tomorrow as soon as I return to the office.

19 THE COURT: Okay, great. And then we'll
20 contact counsel just by phone just to get a time that
21 will work. I want to try to expedite this as much as I
22 can.

23 All right. Can I see counsel -- oh, yes, sir.

24 MR. MANDO: Just one more thing, Your Honor.

25 The county is interested in reducing expense,

1 being efficient as we possibly can. We know there's
2 another lawsuit that was filed. I think it was filed by
3 Attorney Joe Buckles who's out of Lexington.

4 THE COURT: Right.

5 MR. MANDO: I haven't had a chance to get it
6 downloaded yet. I think it was maybe filed Friday.

7 THE COURT: I have a copy in my office if you
8 want a copy of it.

9 MR. MANDO: I'm not sure if it's -- if they've
10 asked for injunctive relief.

11 THE COURT: They have not.

12 MR. MANDO: All right. I'm just saying that if
13 there -- we would be interested in some consolidation,
14 again, to minimize expense to the county, to save
15 resources.

16 THE COURT: Okay. Any objection to that? It's
17 15-46.

18 MR. SHARP: I'm sorry, Your Honor, consolidate
19 the later filed case?

20 THE COURT: Well, it's assigned to me.
21 Judge Wilhoit refused in that case as well so -- in fact,
22 it's related.

23 MR. SHARP: No objection.

24 MR. GANNAM: Your Honor, I think we would have
25 to -- there's complexities with the punitive class action

1 on one hand and an individual action on the other. Would
2 they be class reps? I just think we would need to see a
3 proper motion for consolidation.

4 THE COURT: Well, I'm thinking that this case
5 is going to be resolved well before we get to any motion
6 for class certification.

7 MR. SHARP: Your Honor, if I may. The proposed
8 class is 23(b)(2), prospective injunctive relief.

9 THE COURT: It would likely include them
10 anyway.

11 MR. SHARP: They are only seeking damages
12 actions in that subsequent case. I mean, yes, they would
13 presumably be class members unless and until they get
14 married. But they would have an independent cause of
15 action for their damages claims aside from the class
16 action.

17 THE COURT: Well --

18 MR. CHRISTMAN: Your Honor, those plaintiffs
19 haven't asked for injunctive relief so if they're going
20 to be joined in the action in any way, Your Honor, we
21 would ask that they, you know, have to file their own
22 motion in order to be --

23 THE COURT: Well, since they are both assigned
24 to me, they are related. I'm not necessarily going to
25 join them at this point. It makes sense to at least

1 consider that at some point.

2 I would like to see the attorneys in my office
3 after this hearing.

4 MR. SHARP: If I may, Your Honor.

5 THE COURT: Yes, sir.

6 MR. SHARP: One final thing. I think the Court
7 had ordered that the response be due July the 30th
8 presuming -- July 30. We would just ask for an expedited
9 reply time of --

10 THE COURT: Seven days?

11 MR. SHARP: Seven days is fine.

12 THE COURT: All right. Seven days.

13 MR. SHARP: Thank you.

14 THE COURT: Very well. We will be in recess.

15 MR. SHARP: Thank you.

16 (Whereupon, the proceedings adjourned at 12:20 p.m.)

17 C E R T I F I C A T E

18 I, Peggy W. Weber, certify that the foregoing is a
19 correct transcript from the record of proceedings in the
20 above-entitled matter.

21

22

23 July 16, 2015
DATE

s/Peggy W. Weber
PEGGY W. WEBER, RPR

24

25

W I T N E S S E S

Pages

PROOF ON BEHALF OF THE PLAINTIFFS:

Testimony of APRIL MILLER, Ph.D.	
Direct Examination by Mr. Sharp	24
Cross-Examination by Mr. Christman	29
Cross-Examination by Mr. Mando	32
Testimony of JODY FERNANDEZ	
Direct Examination by Mr. Sharp	34
Cross-Examination by Mr. Christman	38
Cross-Examination by Mr. Mando	38
Testimony of BARRY W. SPARTMAN	
Direct Examination by Mr. Canon	41
Cross-Examination by Mr. Christman	47
Certificate of Reporter	111
Index of Witnesses	112

EXHIBIT C

To Defendant/Third Party
Plaintiff Kim Davis'
Motion for Preliminary
Injunction

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

- - -

APRIL MILLER, et al., : Docket No. 15-CV-44
:
Plaintiffs, : **Covington, Kentucky**
:
versus : Monday, July 20, 2015
:
KIM DAVIS, et al., : 10:00 a.m.
:
Defendants.:
:

- - -

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE DAVID L. BUNNING
UNITED STATES DISTRICT COURT JUDGE

- - -

APPEARANCES:

For the Plaintiffs: WILLIAM ELLIS SHARP, ESQ.
ACLU of Kentucky
315 Guthrie Street
Suite 300
Louisville, KY 40202

DANIEL J. CANON, ESQ.
Clay Daniel Walton Adams, PLC
462 S. Fourth Street
Suite 101
Louisville, KY 40202

For the Defendant, ROGER K. GANNAM, ESQ.
Kim Davis: JONATHAN D. CHRISTMAN, ESQ.
Liberty Counsel - Orlando
P.O. Box 540774
Orlando, FL 32854

ANTHONY CHARLES DONAHUE, ESQ.
Donahue Law Group, P.S.C.
410 S. Main Street
P.O. Box 659
Somerset, KY 42502-0659

1 For the Defendant,
2 Rowan County:

JEFFREY C. MANDO, ESQ.
Adams Stepmen Woltermann & Dusing
40 W. Pike Street
P.O. Box 861
Covington, KY 41011

4 CECIL R. WATKINS, ESQ.
Rowan County Attorney
5 600 W. Main Street
6 Morehead, KY 40351

7 Court Reporter:

LISA REED WIESMAN, RDR-CRR
Official Court Reporter
35 W. Fifth Street
Covington, KY 41012
(859) 291-4410

24 Proceedings recorded by mechanical stenography,
25 transcript produced with computer.

1 (Proceedings commenced at 9:59 a.m.)

2 THE COURT: Good morning. Madam Clerk, if you would
3 call the matter for preliminary injunction hearing.

4 DEPUTY CLERK: Ashland Civil 15-44, April Miller,
5 et al., versus Kim Davis, et al.

6 THE COURT: Why don't we have entries of appearance,
7 please.

8 MR. SHARP: Your Honor, Bill Sharp on behalf of
9 plaintiffs.

10 MR. CANON: Judge, Dan Canon here for the plaintiffs.

11 MR. GANNAM: Roger Gannam for the defendant, Kim
12 Davis.

13 MR. CHRISTMAN: Good morning, Your Honor. John
14 Christman also for Kim Davis.

15 MR. DONAHUE: A.C. Donahue on behalf of the
16 defendant, Kim Davis, Your Honor.

17 MR. MANDO: Jeff Mando for the defendant, Rowan
18 County, Your Honor.

19 MR. WATKINS: Cecil Watkins for the defendant, Rowan
20 County, Your Honor.

21 THE COURT: You're Miss Davis?

22 THE DEFENDANT: Yes.

23 THE COURT: We continued the hearing today because
24 you had not been formally served last week. Your attorneys
25 made some motions regarding that, which the Court previously

1 denied. But we're here now. You're here. You've been
2 served.

3 The purpose of today's hearing is to hear any proof that
4 you have or that Rowan County has on behalf of either yourself
5 or the county.

6 I had asked, I think it was you, Mr. Mando, last week
7 about the oath of the duties of the county clerk, if there was
8 something formal that I could see. I know we had talked
9 generally about that. I can't remember if it was you or
10 Mr. Gannam's client. Someone was going to bring today
11 something that showed the formal duties of the clerk.

12 I can't remember who I left that with at the end of the
13 hearing.

14 MR. MANDO: Your Honor, I took that -- I apologize,
15 but I took that upon Miss Davis and her lawyer, since she is
16 the county clerk, to provide the list of duties. I do have
17 some statutes that I think we would all agree apply to the
18 county clerk for issuing of marriage licenses.

19 THE COURT: You had sent me that or shown me that
20 last week. That was just the one that allowed the county
21 judge, in her absence, to act.

22 MR. MANDO: 402.240 that talks about the permissive
23 nature of the judge executive to issue a marriage license in
24 the absence of the county clerk or in the vacancy of the
25 office. We talked about that and I showed you a copy.

1 THE COURT: You did. This is a separate statute
2 you're referring to?

3 MR. MANDO: There are two other statutes that I think
4 also I would talk about, which would be KRS 402.080, which
5 talks about the issuance of the marriage license shall be
6 issued by the county clerk. And 402.100 talks about the form
7 that must be used by the county clerk as prescribed by the
8 State Department of Library and Archives.

9 THE COURT: I recall that. And someone submitted --
10 I think it was you, Mr. Gannam -- the actual form itself, and
11 it had some blocked-out sections. There's a new one that had
12 first party, second party that's, I guess, being used now
13 since the Supreme Court's decision.

14 MR. GANNAM: That's correct, Your Honor. We're
15 prepared to, through Miss Davis, put on testimony today of all
16 her duties as well as formally admit the forms into evidence.

17 THE COURT: That's fine. I just couldn't remember
18 who I left that task with. I guess it's you, Mr. Gannam.
19 We'll allow you to call your first witness.

20 MR. GANNAM: Your Honor, before we begin, I wanted to
21 say that the defendant is prepared to argue at this point that
22 the motion could be denied based on the plaintiffs' failure to
23 carry their burden of proving the elements necessary for a
24 preliminary injunction. If the Court would hear argument on
25 that point now, before we proceed to put on our evidence,

1 we're prepared to do that.

2 THE COURT: That motion will be denied.

3 MR. GANNAM: Thank you, Your Honor. We will call our
4 first witness, who will be County Judge Executive Blevins.

5 THE COURT: All right. Come around, sir.

6 WALTER BLEVINS, JR., DEFENSE WITNESS, SWORN

7 THE COURT: You may proceed.

8 Good morning, sir.

9 THE WITNESS: Good morning.

10 DIRECT EXAMINATION

11 BY MR. GANNAM:

12 Q. Good morning. My name is Roger Gannam. I'm one of the
13 attorneys representing Kim Davis in this lawsuit. Will you
14 please state your full name for the record?

15 A. Walter Blevins, Jr.

16 Q. And what is your title?

17 A. Rowan County Judge Executive.

18 Q. And what is your business address, Judge Blevins?

19 A. 600 West Main Street, Morehead, Kentucky, 40351.

20 Q. Is your position as county judge executive an elected
21 position?

22 A. Yes, sir.

23 Q. When were you elected?

24 A. November of last year. I don't know the exact date. I
25 think it was maybe the 8th.

1 Q. And how long is your term?

2 A. Four-year term.

3 Q. Judge Blevins, can you just generally describe the
4 duties, responsibilities of your office?

5 A. Well, I'm kind of like the mayor of the county. I'm the
6 chairman of the board, more or less, in the fiscal court
7 meetings. My job really is to advocate to the county and to
8 try to bring, hopefully, jobs and opportunity to the
9 community, help in any kind of disasters that occur, and just
10 try to do the duties of the judge.

11 Q. You mentioned presiding over the fiscal court. Are there
12 any other boards or committees that you preside over?

13 A. Yeah, there's several. I'm on the Gateway Ad Board. I'm
14 on the Gateway Services Community Board. I'm on the -- I
15 appoint many of the boards and attend many of the board
16 meetings. The airport board, I serve on it, or attend the
17 meetings. The district health board, the county health board.
18 I'm on several boards.

19 Q. Would it be fair to say that you are the highest elected
20 official in Rowan County?

21 A. Yes.

22 Q. I'm going to read to you from Kentucky Revised Statute
23 402.240 and then ask you some questions about it. The title
24 of the statute is County Judge Executive to Issue License in
25 Absence of Clerk. It reads, In the absence of the county

1 clerk, or during a vacancy in the office, the county judge
2 executive may issue the license and, in so doing, he shall
3 perform the duties and incur all the responsibilities of the
4 clerk. The county judge executive shall return a memorandum
5 thereof to the clerk and the memorandum shall be recorded as
6 if the license was issued by the clerk. Are you familiar with
7 this statute, Judge Blevins?

8 A. Yes.

9 Q. And according to the statute, is it your understanding
10 that you have authority to issue a marriage license in the
11 absence of the county clerk?

12 A. According to the statute. I don't know if it's been used
13 by any other judge executive, though.

14 Q. What is your understanding of the word "absence" in the
15 term, "in the absence of the county clerk"?

16 A. Since she has deputy clerks, and I know that at least her
17 mother at times, when she was gone on vacation, she would
18 allow the deputy clerks to perform that duty. So I don't
19 think the judge executive office, as far as I know, has ever
20 done that.

21 Q. So but when it says in the absence of the county clerk,
22 what would have to occur for the county clerk to be absent,
23 based on your understanding of that statute?

24 A. Say that again. Let me make sure I understand the
25 question.

1 Q. Where the statute says, "in the absence of the county
2 clerk, the county judge executive may issue a marriage
3 license," what is your understanding of what the word
4 "absence" means?

5 A. I would say absent would be due to health reasons, due to
6 being out of office or if the clerk passed away or something
7 like that, it would absent then.

8 Q. The statute also talks about a vacancy in office, which I
9 would submit would occur if the clerk were to die, as you
10 said, or were to leave office completely. Apart from that,
11 you talked about an absence for health reasons. Are there any
12 other circumstances that you would understand to mean "absent"
13 as it's used in that statute?

14 A. If she was in the hospital or if she was on vacation, I
15 would assume she would be absent. But again, the judge
16 executive, as far as I know, has never performed that duty.
17 I'm in and out of the office quite often. I'm not there on a
18 regular, eight-hour day because of meetings and going to
19 Frankfort and continuing education, of course, I have to take.

20 So in that respect, when she's not there, her clerks are
21 there to -- the office is still open. Her clerks are there
22 performing those duties.

23 Q. During the regular business hours of the clerk's office,
24 are you aware of any time that the clerk, Kim Davis, has not
25 been there but that there were not deputy clerks there to

1 perform her duties?

2 A. I can't, I can't remember a time that's occurred.

3 Q. Is your understanding of the meaning of that statute, KRS
4 402.240, based on any court decision that you've read or
5 received?

6 A. Again, I can't remember any of those.

7 Q. Have you received an opinion of the attorney general of
8 the Commonwealth of Kentucky regarding interpretation of that
9 statute?

10 A. Yes. I think I had a conversation, a telephone
11 conversation with the county attorney and some people out of
12 the attorney general's office.

13 Q. When did that conversation occur?

14 A. That was shortly after this case became prominent in the
15 newspaper that marriage licenses were not going to be given
16 out in Rowan County. And we're basically on new ground. I
17 wanted to find out as much as I could about this issue.

18 Q. Who did you speak with in the attorney general's office?

19 A. I can't remember their -- county attorney might remember
20 who he had on the phone when I talked to him. Also, I talked
21 to my KACO attorney, and he basically said that there was no
22 way that -- county judges are not there to perform that duty.
23 And in an absence, if it was that kind of an absence, that I
24 would appoint someone to perform those duties.

25 Q. Have are you received any kind of formal, written opinion

1 from the attorney general's office?

2 A. No, I have not.

3 Q. Are you aware that the Rowan County Clerk, Kim Davis, is
4 not issuing any marriage licenses?

5 A. Yes, I am.

6 Q. Are you aware that she has directed her deputy clerks
7 also not to issue marriage licenses?

8 A. Yes, I am.

9 Q. Since Kim Davis discontinuing -- discontinued issuing
10 marriage licenses out of her office, have you been requested
11 to issue any marriage licenses?

12 A. I have people -- one couple came by the office after
13 being denied and asked if I could do it. I said, well, she's
14 not absent. I cannot do that.

15 Q. Any besides that one couple?

16 A. That's the only couple I remember that came actually to
17 the office. I think she -- they were accompanied by another
18 individual who I think she's one of the plaintiff -- or I
19 guess, yeah, one of the plaintiffs in the case. She was with
20 them.

21 Q. Is your interpretation of the word "absent" as used in
22 KRS 402.240 the only reason why you did not issue the license
23 upon that request?

24 A. Well, I've never issued a license like that. I'm not
25 sure I would have the proper paperwork to even do it. So I --

1 that would be one of the main reasons is not having any
2 knowledge of how to do -- how to fill it out and the proper
3 procedure I'd have to go through.

4 Q. Do you agree that there are circumstances where,
5 according to the statute, you would have the legal authority
6 to issue a marriage license?

7 A. Again, I would probably appoint someone to take those
8 duties over. So it would basically be if she was absent for
9 an extended period of time or if for some reason she wasn't
10 able to perform her duties, then I would appoint someone.

11 Q. I'm going to read to you another statute. It's
12 KRS 63.220, Vacancies in County Offices. It says, A vacancy
13 in the office of sheriff, coroner, surveyor, county clerk,
14 county attorney, jailer, or constable shall be filled by the
15 county judge executive or by the mayor in a consolidated local
16 government.

17 Are you familiar with that statute?

18 A. Yes.

19 Q. Would that be the statute that you would rely upon to
20 fill a vacancy in the clerk's office?

21 A. Yes. That's how -- that's the same statute that I would
22 use for any -- any of those individuals or elected office
23 holders, it would be up to me to appoint someone to fill
24 their -- fulfill their duties until another election.

25 Q. Are you aware of any statute that gives you the authority

1 to appoint a replacement clerk if she is merely absent but not
2 vacant from office?

3 A. I think those -- I'm really not. I think those clerks
4 are basically under her purview. When she's not there, they
5 take over the duties.

6 Q. So going back to -- we've covered that you have the
7 authority to appoint someone to fill a vacancy in the clerk's
8 office. But in a circumstance where the clerk is merely
9 absent, as that's defined in the statute, would you agree that
10 you have authority in that situation to issue the license
11 yourself?

12 A. I'm not sure on that myself because I don't have those --
13 the software to print it. I asked my secretary about this.
14 She said we don't have the software to print them out. I
15 would have to go to the clerk's office, I assume get one of
16 the deputies.

17 I don't understand why I -- the deputies normally take
18 over her job description when she's absent, like an illness or
19 vacation, so I assume continue with them.

20 Q. Are you aware that there's a statute dictating that the
21 form of marriage license to be used by the clerk's office is
22 created by the Kentucky Department of Library and Archives?

23 A. Yes, I found that out about a week or two ago.

24 Q. Are you aware of any statute that dictates who provides
25 the form of memorandum that's mentioned in the statute giving

1 the county judge executive authority to issue a marriage
2 license in the absence or vacancy of the clerk?

3 A. No, I'm not, sir.

4 Q. Assuming there is a situation where you do have the
5 authority to issue a marriage license, would you have a
6 religious objection to issuing that license to a same-sex
7 couple?

8 MR. MANDO: Objection.

9 THE COURT: Overruled.

10 THE WITNESS: I would follow the law. If the law
11 says I have to give them to everyone, I would do that. But
12 morally, it's a tough decision for me, because I'm taught in
13 my Bible that marriage is between a man and a woman. I would
14 still follow the law.

15 BY MR. GANNAM:

16 Q. And so is your answer that yes, you would issue that
17 license to a same-sex couple?

18 A. I would issue those license.

19 MR. GANNAM: No further questions, Your Honor.

20 THE COURT: I guess processing-wise, do you all want
21 to ask any questions, Mr. Mando? Then I'll turn to the
22 plaintiffs.

23 MR. MANDO: I just have a couple questions, Your
24 Honor.

25 THE COURT: All right.

CROSS-EXAMINATION

BY MR. MANDO:

Q. First, Judge Blevins, to clarify something, when you had the conversation with the county attorney and some state officials, you said it was the attorney general's. Could that have been the Department of Local Government that you had the conversation with?

A. I'd have to ask my counsel over there to make sure, because I've had a lot of phone calls and discussions with people.

Do you remember, Cecil?

Q. You just have to answer based on your own recollection.

A. It could have been the Department of Local Government. It could have been the attorney general's office. I'm not positive on that, no.

Q. When the plaintiffs -- when the plaintiffs in this case came to see you about securing a marriage license late June, early July, at that time, was Kim Davis absent from the county or absent from her office?

A. No, she was not.

Q. Did you feel you had the authority, in that situation, to issue the license?

A. No, I did not.

Q. Had you ever issued a marriage license in the past?

A. No, I have not.

BLEVINS - Cross

16

1 Q. And as you read the statute, are you required to issue
2 the marriage license?

3 A. Only in her absence, and I felt with the deputy clerks
4 she has, it would not be -- they take over when she's not
5 there so it would still be in her office's duties.

6 Q. Is it your understanding that the county clerk is a
7 separately elected constitutional office under the -- in
8 Kentucky?

9 A. That's correct.

10 MR. MANDO: No further questions at this time, Your
11 Honor.

12 THE COURT: Cross.

13 MR. SHARP: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. SHARP:

16 Q. Judge Executive Blevins, good morning. Let me ask you,
17 how did you first learn of the policy that you've testified
18 about in the clerk's office?

19 A. It was after the denial of a marriage license by Miss
20 Davis.

21 Q. Did you learn about it from Miss Davis herself?

22 A. No, I don't believe I did.

23 Q. Did she send you a memorandum telling you what the policy
24 was?

25 A. I don't remember receiving anything.

BLEVINS - Cross

17

1 Q. Did she consult with you prior to adopting the policy for
2 your input?

3 A. Kim and I have conversations, and she did tell me early
4 on, before the decision was made, that if it was to allow
5 same-sex marriage that she could not do that in her moral
6 judgment. She just could not do it.

7 Q. And when did you have this conversation with her?

8 A. It's been -- it was probably shortly after we got sworn
9 in, I think she brought the issue to me and talked about it.
10 And she did tell me also that I think she -- I don't know if
11 it was that early in the process, but I know she later told me
12 she had contacted all the state representatives and all the
13 state senators in regards to this issue, that she was hoping
14 something would be done because morally, she just could not do
15 it.

16 Q. When you said you spoke with her about this after the
17 decision, are you talking about the *Obergefell* decision?

18 A. Yes.

19 Q. Let's talk a little bit about the clerk's office. How
20 many deputy clerks are employed in the Rowan County Clerk's
21 Office?

22 A. I don't have the exact number, but there's probably six
23 or seven, at least.

24 Q. And how is that office funded?

25 A. It's funded through their fees. They collect fees for

BLEVINS - Cross

18

1 marriage license, for hunting, fishing license, for any kind
2 of registration of vehicles, all those types of different
3 things that they perform, those type of duties. And they get
4 a fee for that, and that's basically how they're funded.

5 Q. And what role, if any, does the Rowan County Fiscal Court
6 have in the county clerk's budget?

7 A. We approve their budget, and that's about all. The only,
8 really, power we have is she submits a budget. And along with
9 myself and four magistrates, we pass the budget.

10 Q. So the funding mechanism is from county funds, then?

11 MR. MANDO: Objection.

12 THE COURT: Grounds?

13 MR. MANDO: He just said the funds we are generated
14 through fees that were issued.

15 THE COURT: So asked and answered?

16 MR. MANDO: Yes.

17 THE COURT: Sustained.

18 BY MR. SHARP:

19 Q. Am I correct the county would be responsible for any
20 judgment levied against the county clerk's office?

21 MR. MANDO: Objection. Calls for a conclusion of
22 law.

23 THE COURT: Sustained.

24 BY MR. SHARP:

25 Q. Now, you're familiar also with the directive that the

BLEVINS - Cross

19

1 Governor of Kentucky sent to all the county clerks on June 26,
2 correct?

3 A. Yes, I am.

4 Q. And you're aware that the policy that's been adopted by
5 Rowan County Clerk's Office is in direct conflict with the
6 governor's directive?

7 A. Yes, it is.

8 Q. Do you have any authority to sanction or otherwise
9 censure the elected county clerk?

10 A. Not that I know of.

11 Q. Prior to the *Obergefell* decision, were there any problems
12 with the Rowan County Clerk's Office issuing marriage
13 licenses?

14 A. No, not that I know of.

15 Q. When you had this conversation with Miss Davis following
16 the *Obergefell* decision, did she explain why she intended to
17 adopt this policy?

18 MR. CHRISTMAN: Objection. Misstates testimony.

19 THE COURT: Overruled.

20 THE WITNESS: Can you repeat the question?

21 MR. SHARP: Sure.

22 BY MR. SHARP:

23 Q. When you had this conversation with Miss Davis following
24 the *Obergefell* decision, did she explain why she was adopting
25 this policy?

BLEVINS - Cross

20

1 A. Yes. We talked for quite a while, and Kim's very
2 religious, and she was not going to issue any license to
3 anyone because she didn't want to, basically, not issue them
4 to one group that are man and woman versus same-sex marriages,
5 and she just wasn't going to issue any licenses because she
6 didn't want to discriminate in that respect.

7 She was concerned that the -- a 5-to-4 decision is a very
8 close decision by the Supreme Court, and she was concerned --
9 she had some question, I think she told me it was 30 days
10 after their decision, they could actually make a change in
11 that decision if they -- if other information was brought
12 forward. And she was concerned that -- I think she even said
13 some of the Supreme Court members probably should have excused
14 themselves from the ruling.

15 THE COURT: Did she explain why she thinks that
16 Supreme Court justices should have recused themselves from the
17 ruling?

18 THE WITNESS: I don't think she got into detail on
19 that, but she did have some concerns that some of them maybe
20 should have recused themselves. I don't know if we actually
21 talked about the details on it. She can probably answer that
22 better than me.

23 THE COURT: All right, go ahead.

24 BY MR. SHARP:

25 Q. So am I correct her religious objection went to issuing

BLEVINS - Cross

21

1 marriage licenses to same-sex couples?

2 A. Yes, I would say that's correct.

3 Q. And her decision to stop issuing them altogether, even to
4 opposite-sex couples, was so as to not discriminate?

5 A. I would say that's correct.

6 Q. The conversation that you had, was that generally
7 consistent with the statements she made to the media following
8 that conversation?

9 A. I would say they are.

10 Q. As far as you are aware, is this policy still in place in
11 Rowan County?

12 A. Yes, it is.

13 Q. Have you issued any marriage licenses in her stead since
14 it was adopted?

15 A. No, I have not.

16 Q. Let me ask you some specific questions about absence.
17 Since June the 26th, are you aware of whether or not
18 Mrs. Davis has been to work?

19 A. As far as I know, she's there every day. If she's missed
20 a day, I wasn't aware of it. Of course, I'm gone pretty often
21 to meetings. I'm just not there in the courthouse at times.
22 I wouldn't be absolutely sure. I know she was absent on the
23 last court date. Of course, I was out of the office as well,
24 went to attend the court hearing, let the judge know I was
25 concerned about this issue as well. I didn't want to be --

BLEVINS - Cross

22

1 the county to be sued and not show up for court. And today,
2 she's absent from the court and so am I.

3 Q. Now, when she's not physically in the office, does the
4 office -- does the county clerk's office close?

5 A. No. It remains open. At least it has in past years.
6 I'm not sure -- I would assume it would continue to be open
7 when she's not there.

8 Q. Other than the marriage licenses, does the county clerk's
9 office in Rowan County continue to do business and perform its
10 other duties?

11 A. Yes.

12 Q. Has Miss Davis been on extended leave since June the
13 26th?

14 A. Not that I know of.

15 Q. Has she otherwise been unable to perform her job duties
16 since June the 26th?

17 A. No. She's been available and able.

18 MR. SHARP: Nothing further, Your Honor.

19 THE COURT: Any redirect?

20 MR. GANNAM: No, Your Honor.

21 THE COURT: May this witness be finally excused?

22 MR. MANDO: Yes, sir.

23 MR. SHARP: Your Honor, we would ask --

24 MR. GANNAM: As far as we're concerned, yes, Your
25 Honor.

DAVIS - Direct

23

1 MR. SHARP: Your Honor, we would ask him to be
2 subject to recall, pending Miss Davis's testimony.

3 THE COURT: Can you stick around?

4 THE WITNESS: Yes, sir.

5 THE COURT: Thank you. Next witness, please.

6 MR. GANNAM: Your Honor, the defense calls Kim Davis.

7 THE COURT: All right. Come around, ma'am.

8 KIMBERLY DAVIS, DEFENDANT, SWORN

9 THE COURT: Good morning, ma'am.

10 THE WITNESS: Good morning.

11 THE COURT: You may proceed.

12 DIRECT EXAMINATION

13 BY MR. GANNAM:

14 Q. Good morning, Miss Davis.

15 A. Good morning.

16 Q. Please state your full name for the record.

17 A. Kimberly Davis.

18 THE COURT: Try to keep your voice up, please.

19 THE WITNESS: Yes, sir.

20 THE COURT: Thank you.

21 BY MR. GANNAM:

22 Q. What is your title, Miss Davis?

23 A. I'm the Rowan County Clerk.

24 Q. And your business address?

25 A. 600 West Main Street, Room 102, Morehead, Kentucky,

DAVIS - Direct

24

1 40351.

2 Q. When were you elected to the position of Rowan County
3 Clerk?

4 A. Final election was November 4th of 2014, and took office
5 in January.

6 Q. January of this year?

7 A. January 5th, yes, sir.

8 Q. Were you an employee of the clerk's office prior to being
9 elected as the clerk?

10 A. Yes.

11 Q. How long did you work in the clerk's office?

12 A. Almost 27 years.

13 Q. Can you describe generally what are the functions of the
14 county clerk?

15 A. The clerk is a pass-through collection agency for many
16 departments; Department of Revenue, Transportation Cabinet,
17 Fish and Wildlife. We -- I bring archives, we record deeds,
18 mortgages, all land records. We're responsible for
19 maintaining voter registration records, overseeing elections.

20 There's just a plethora of stuff we do. Motor vehicle
21 registration, delinquent taxes. We generate property tax
22 bills, franchise tax bills for collection and then we -- those
23 fees that we collect, we send out every month by the -- you
24 know, the reports are due the 10th of the month.

25 But at the end of that month prior, you know, we have to

DAVIS - Direct

25

1 allocate all those monies out and write checks to every taxing
2 district to Frankfort for all the fees we've collected for
3 them. There's daily reports, weekly reports, monthly reports,
4 quarterly reports, end of year reports.

5 Q. And does the clerk's office retain a portion of what it
6 collects as compensation or as its own fees?

7 A. Yeah. The clerk's office is a fee office. Every year,
8 starting on January 1, we start out with zero dollars. So
9 every penny that comes into the clerk's office is money that
10 we have generated and collected from our services.

11 Q. So does the clerk's office receive checks from the
12 Commonwealth of Kentucky, for example?

13 A. No.

14 Q. Does the clerk's office receive any other checks other
15 than from fees that it collects itself?

16 A. No. We get -- we do get a check for preparing tax bills
17 from the Department of Revenue, which is a fee of our office
18 and just goes into our office, but we don't get any money from
19 anyone else.

20 The Secretary of State, State Board of Elections also
21 gives us so much money for each registered voter. I think
22 this year, I got \$162.

23 Q. For all registered voters in Rowan County?

24 A. Um-hmm.

25 Q. Does the clerk's office also issue marriage licenses?

DAVIS - Direct

26

1 A. We do.

2 Q. What is the fee collected by the clerk's office for a
3 marriage license?

4 A. It's \$35.50.

5 Q. And out of that fee, how does that break down?

6 A. The clerk retains \$21.17, and the state gets \$14.33.

7 Q. So does the clerk's office receive fees for marriage
8 licenses other than the license that it issues itself?

9 A. No.

10 Q. Does the clerk's office receive any funding on the
11 subject of marriage other than from the licenses that it
12 issues itself?

13 A. No.

14 Q. How many employees do you have in the clerk's office?

15 A. I have six full-time employees. I have one girl that's
16 hired on a 1099 to do grant work for me.

17 Q. And what do -- your full-time employees, are those called
18 deputy clerks?

19 A. They are.

20 Q. What is the total revenue in your 2015 budget?

21 A. We had budgeted \$4.2 million.

22 Q. And year-to-date, is your office carrying a surplus or a
23 deficit?

24 A. We're actually 700 -- as of the end of June, we were \$733
25 above on our receipts and everything. So our office is really

DAVIS - Direct

27

1 very -- doing very well.

2 Q. Did you mean 733,000?

3 A. 733,000, yes, sir.

4 Q. So that's a surplus currently?

5 A. It is.

6 Q. If you get to the end of the year and you have a surplus,
7 what happens to those funds?

8 A. Those fees are turned over to the county -- the fiscal
9 court as excess fees.

10 Q. Do you know how much revenue your office collected from
11 the issuance of marriage licenses last year?

12 A. The total that we took in was \$4,500. We sold 212
13 licenses in 2014.

14 Q. So if, in 2015, if you were to hit that same, that same
15 number, is my math correct that that would be 0.1 percent of
16 the total budget for the clerk's office?

17 A. Yeah.

18 Q. Is that a yes?

19 A. Yes.

20 Q. How many licenses did the clerk's office issue in the
21 first half of this year?

22 A. Ninety-nine.

23 Q. So compared to 212 for all of last year, would you say
24 that it's comparable?

25 A. Yeah. Yes.

DAVIS - Direct

28

1 Q. Do all six of the deputy clerks perform the task of
2 issuing marriage licenses?

3 A. Yes.

4 Q. If you just limited that task to one of your deputy
5 clerks, approximately how many hours a week would that deputy
6 spend issuing marriage licenses?

7 A. Maybe one hour.

8 Q. One hour a week for one employee?

9 A. Um-hmm.

10 Q. And that would handle all marriage licenses issued by the
11 Rowan County Clerk's Office?

12 A. Yes.

13 Q. Now, I trust that the volume of marriage licenses that
14 your office issues isn't exactly the same every month, right?

15 A. No, it's not.

16 Q. What is the busiest month this year, to date?

17 A. May and June were very close.

18 Q. And in those months, those were the busiest so far this
19 year?

20 A. Um-hmm.

21 Q. And in, let's just say June, for example, in the month of
22 June, with that increased volume, would one employee in your
23 office still be able to handle all of that volume?

24 A. Yes. It only takes about five to seven minutes to issue
25 a marriage license, to get the information, populate it in the

DAVIS - Direct

29

1 computer system, print it out, have them proof it, sign it,
2 collect their money, and they're gone.

3 Q. And in these months of May and June, where the volume is
4 higher, approximately how many licenses were issued in each of
5 those months?

6 A. Probably 18, 20 at the most.

7 Q. Miss Davis, I want to ask you now about your religious
8 practices. First of all, what religion do you practice?

9 A. I'm Apostolic.

10 Q. And is Apostolic, is that a subset of the Christian
11 religion?

12 A. It is.

13 Q. As part of your Christian faith, do you attend a church?

14 A. I do.

15 Q. How often?

16 A. Every time the doors are open.

17 Q. At least weekly, then?

18 A. We have Bible study on Tuesday, church on Wednesday,
19 church on Sunday.

20 Q. And was that your practice before taking office as the
21 Rowan County Clerk?

22 A. Yes.

23 Q. Has that been your continued practice since taking
24 office?

25 A. Yes.

DAVIS - Direct

30

1 Q. Do you participate in any Christian ministries outside of
2 your church itself?

3 A. I do.

4 Q. Give me an example.

5 A. Every Monday night, since October of 2013, I go to the
6 jail, visit the ladies there, do Bible study with them.

7 Q. Are you aware of some of the offenses committed by the
8 women in the jail --

9 MR. SHARP: Objection, Your Honor. Relevance.

10 THE COURT: Sustained.

11 MR. GANNAM: Your Honor, the plaintiffs have alleged
12 in this case that Miss Davis has treated them with malice, and
13 I believe that her activities according to her religious
14 beliefs are relevant to the question of whether she is not
15 issuing licenses based out of malice.

16 THE COURT: She goes to the jail, ministers to women
17 at the jail. I think that's sufficient. What they're in for,
18 I'm sure they're in for Class D felonies or on pretrial
19 detention for more serious offenses. I don't think the actual
20 offenses are really relevant.

21 MR. GANNAM: I'll move on, Your Honor.

22 THE COURT: Thank you.

23 BY MR. GANNAM:

24 Q. Miss Davis, do you get paid for visiting the jail?

25 A. No.

DAVIS - Direct

31

1 Q. How do you feel towards these women who you minister to
2 there?

3 A. I love them. They're the best part of my Monday.

4 Q. Does the fact that they've done bad things, perhaps even
5 felonies, affect how you feel towards them?

6 A. No, not at all.

7 Q. Miss Davis, do your Christian beliefs include a belief
8 about the definition of marriage?

9 A. Yes, they do.

10 Q. And according to your Christian beliefs, what is the
11 definition of marriage?

12 A. Marriage is a union between one man and one woman.

13 Q. And what do you base that definition on?

14 A. The Bible.

15 Q. And what do you believe the Bible to be?

16 A. God's holy word.

17 Q. So according to your Christian belief, can the union of
18 two men be a marriage?

19 A. No.

20 Q. Can the union of two women be a marriage?

21 A. No.

22 Q. How about three men?

23 A. No.

24 Q. How about a person and an animal?

25 MR. SHARP: Objection, Your Honor.

DAVIS - Direct

32

1 THE WITNESS: No.

2 THE COURT: Sustained. We don't have that here.

3 BY MR. GANNAM:

4 Q. According to your religious beliefs, Miss Davis, is there
5 any arrangement of people other than one man and one woman
6 which can be called a marriage?

7 A. No.

8 Q. Miss Davis, according to your Christian beliefs, do you
9 believe it is a sin for a man and a woman who are not married
10 to have sex?

11 A. Yes.

12 Q. Do you believe it is a sin for two men to have sex?

13 A. Yes.

14 Q. Do you believe it is a sin for two women to have sex?

15 A. Yes.

16 Q. Do you believe all sex outside of man and woman marriage
17 is a sin?

18 A. Yes.

19 Q. During the almost 30 years total that you've spent in the
20 clerk's office, either as a deputy clerk or as the elected
21 clerk, have you ever asked a marriage license applicant what
22 kind of sins they've committed prior to applying?

23 A. No.

24 Q. Have you ever asked marriage license applicants what
25 kinds of sins they plan to commit after getting married?

DAVIS - Direct

33

1 A. No.

2 Q. Is it your religious belief that you are required to ask
3 applicants for marriage licenses what kinds of sins they
4 committed?

5 A. No.

6 Q. Is it your religious belief that you're required to ask
7 applicants for marriage what kind of sins they might commit
8 after marriage?

9 A. No.

10 Q. Is it your religious belief that sin disqualifies a
11 person from being married?

12 A. No.

13 Q. When did your office stop issuing marriage licenses this
14 year?

15 A. We issued one on the 26th. So we were open the 27th of
16 June, so June 27th would have been when we stopped.

17 Q. And are you aware that June 26 is the date that the
18 United States Supreme Court decision in *Obergefell* was handed
19 down?

20 A. I am.

21 Q. Your office was open on June 27?

22 A. We were.

23 Q. Did you issue any licenses then?

24 A. No.

25 Q. And was that pursuant to a decision you had made as of

DAVIS - Direct

34

1 June 27 not to issue licenses?

2 A. When I first took office, when he went to -- the clerks
3 had a legislative meeting in January, and they formed a
4 committee in regard to this Supreme Court decision that was --
5 in light that it was going to be heard in April.

6 After that meeting, I came back and I directed a letter
7 to every senator and every legislator that I could get an
8 email address to and asked them, pleaded with them to, while
9 there was still time, to get a bill on the floor to help
10 protect clerks who had a moral issue in this regard.

11 I emailed every person. I'm not sure. It was
12 January 23rd was the date that I emailed them, and I emailed
13 every person and our legislators at LRC that I could get an
14 email address to. This is not something I decided because of
15 this decision that came down. It was something that was a
16 forethought and that I had prayed and fasted over weekly.

17 So it wasn't just a spur-of-the-moment decision. It was
18 thought out and, you know, I sought God on it.

19 MR. GANNAM: Your Honor, may I approach the witness
20 to provide an exhibit?

21 THE COURT: Sure. What are you showing her?

22 MR. GANNAM: This is a copy of the letter she's just
23 testified to.

24 THE COURT: That's fine. Do you have a copy,
25 Mr. Sharp?

DAVIS - Direct

35

1 MR. SHARP: Yes, sir.

2 MR. GANNAM: Your Honor, would you like a copy?

3 THE COURT: Yes, thank you. Mark this as Defendant's
4 Exhibit 1?

5 MR. GANNAM: I marked the version I gave to the
6 witness.

7 BY MR. GANNAM:

8 Q. Miss Davis, I've just handed you a document I've marked
9 as Defendant's Exhibit 1. It has a salutation, Dear Senator
10 Robertson. Is this a copy of the letter you just testified to
11 that you sent to multiple legislators in January?

12 A. It is.

13 Q. The first sentence says, I am contacting you in hope of
14 support of possible legislation that would give county clerks
15 the option to exempt themselves from issuing marriage license.
16 Are those your words, Miss Davis?

17 A. It is.

18 Q. And in the last sentence of that paragraph, I wanted to
19 have the option, as a person who has deep moral conviction, to
20 choose not to discriminate any party by allowing a clerk to
21 apply for an exemption for the issuance of marriage licenses.
22 Are those also your words?

23 A. They are.

24 Q. This was sent to legislators in January of 2015?

25 A. Yeah, January 23rd.

DAVIS - Direct

36

1 Q. And has your position regarding the issuance of marriage
2 licenses changed between January 23rd of this year and today?

3 A. No.

4 Q. Miss Davis, I'd like to talk about the marriage license
5 form itself.

6 MR. GANNAM: Your Honor, may I approach the witness?

7 THE COURT: You may. Are you moving to admit
8 Exhibit 1?

9 MR. GANNAM: Yes, Your Honor. Thank you.

10 THE COURT: Any objection?

11 MR. SHARP: No objection.

12 THE COURT: Let it be received without objection.

13 BY MR. GANNAM:

14 Q. Miss Davis, I've handed you an exhibit, which will be
15 Defendant's Exhibit 2. Do you recognize this document?

16 A. I do.

17 Q. Can you describe what it is?

18 A. It is the old version of the marriage license that was
19 prescribed by the KDLA for us to use for the issuance of
20 marriage applications.

21 Q. When you say old version, do you mean the version prior
22 to the Supreme Court decision?

23 A. Yes, sir.

24 Q. So this would be the form of marriage license used by
25 your office up until June 26 of this year?

DAVIS - Direct

37

1 A. Yes.

2 Q. I wanted to point out for you the very first sentence
3 after the heading that says Marriage License, Valid Only in
4 the Commonwealth of Kentucky. It says, To any person or
5 religious society qualified to perform marriages per
6 KRS 402.050, you are hereby authorized to join together in the
7 state of matrimony, according to the laws of the Commonwealth
8 of Kentucky. Do you see that language?

9 A. I do.

10 Q. And when this license says "you are authorized," who do
11 you understand to be authorizing the people on this license to
12 be getting married?

13 A. That would be me, the clerk.

14 Q. And is it your understanding that that is dictated by the
15 law of the Commonwealth of Kentucky?

16 A. Yes.

17 Q. And did you prepare this form yourself?

18 A. No.

19 Q. Who prepared or created this form?

20 A. The Kentucky Department of Library and Archives.

21 Q. I want to call your attention down to the middle of the
22 form. And just for the record, there are areas blacked out of
23 this form that would contain the personal information of
24 whoever these applicants are. The original forms would not
25 contain those black boxes, correct?

DAVIS - Direct

38

1 A. Correct.

2 Q. So in the middle of the form, it says, We hereby certify
3 the above information is true to the best of our knowledge.
4 And it has spaces for, on this form, the bride and groom to
5 sign. Directly under that, it says, Issued this June 16,
6 2015, and the office of Kim Davis, Rowan County, County Clerk.
7 Do you see that language?

8 A. I do.

9 Q. Who puts that information on the form, your name and your
10 title as Rowan County Clerk?

11 A. It populates from our software.

12 Q. Do you have any control over that?

13 A. No.

14 Q. So when your software in your office is used to create a
15 marriage license, does it automatically put your name and
16 title into every marriage license?

17 A. It does.

18 Q. According to your understanding, who does this license
19 say is issuing the marriage license?

20 A. It was issued by my office.

21 Q. And underneath, in the next line, it says By, and there's
22 a name here, Brian Mason, Deputy Clerk. Is that a deputy
23 clerk in your office?

24 A. It is.

25 Q. Do deputy clerks have the authority to sign marriage

DAVIS - Direct

39

1 licenses?

2 A. They have authority to sign it, yes.

3 Q. Whose authority are they exercising when they sign it?

4 A. Mine.

5 Q. Are you aware of any marriage license currently available
6 in the Commonwealth of Kentucky in Rowan County that would not
7 require you to authorize it?

8 A. No.

9 Q. And do you have the discretion to create a different kind
10 of license that would not require your authorization for it to
11 be issued?

12 A. No.

13 MR. GANNAM: Your Honor, I move to admit Defendant's
14 Exhibit 2 into evidence.

15 THE COURT: Any objection?

16 MR. SHARP: No objection.

17 THE COURT: Let it be received without objection.

18 MR. GANNAM: May I approach again, Your Honor?

19 THE COURT: You may.

20 BY MR. GANNAM:

21 Q. Miss Davis, I've shown you a document that's been marked
22 as Defendant's Exhibit 3. Are you familiar with this
23 document?

24 A. I am.

25 Q. What is this document?

DAVIS - Direct

40

1 A. It is the marriage license that KDLA has prescribed that
2 we use after the Supreme Court decision on June 26th.

3 Q. And I want to draw your attention to the language at the
4 beginning, To any person or religious society qualified to
5 perform marriages per KRS 402.050, you are hereby authorized
6 to join together in the state of matrimony, according to the
7 laws of the Commonwealth of Kentucky -- I'll stop right there.
8 Is this language the same as was on the prior form marriage
9 license?

10 A. Yes.

11 Q. And under this new version of the marriage license who,
12 do you understand, is authorizing the people named in the
13 license to be getting married?

14 A. That would be me, the clerk.

15 Q. In moving down to the middle section of the form, after
16 where the party information would be filled in, it says, We
17 hereby certify the above information is true to the best of
18 our knowledge, and then there are lines for signatures of
19 first party and second party, correct?

20 A. Yes.

21 Q. Now, on the prior form, that said bride and groom,
22 correct?

23 A. That is correct.

24 Q. Now, below that it says issued this -- there's a blank
25 for the date, and the office of. There's a space for a name

DAVIS - Direct

41

1 and then a county. When this form is used in your office,
2 what would go in that space for name and county?

3 A. That would be my name, Rowan County.

4 Q. And is it your understanding that this signifies that the
5 office would be -- the license would be issued under your
6 authority?

7 A. Yes.

8 Q. Moving down to the part that reads Marriage Certificate,
9 the third line down, it says -- I'm sorry, let me just read
10 that whole section under Marriage Certificate. It says, I do
11 certify that blank and blank were united in marriage on the --
12 there's a space for a date and location -- under the authority
13 of the above license and in the presence of, please print
14 witnesses' names. Do you see that language?

15 A. I do.

16 Q. What is your understanding to be the authority of the
17 above license that it's referring to?

18 A. That would be me.

19 Q. And since the change in the form following the *Obergefell*
20 decision, are you aware of any option in Rowan County to issue
21 a marriage license form that's not issued under your
22 authority?

23 A. No.

24 Q. Are you aware of any option for a marriage license form
25 that would not show your name on it?

DAVIS - Direct

42

1 A. No.

2 Q. Apart from the sort of aesthetic differences in this form
3 and the prior form marked as Exhibit 2 and the change in
4 designation of parties from bride and groom to first party and
5 second party, is there any substantive difference between the
6 old form and the new form?

7 A. No.

8 MR. GANNAM: Your Honor, I move to admit Defendant's
9 Exhibit 3 into evidence.

10 THE COURT: Any objection?

11 MR. SHARP: No objection, Your Honor.

12 THE COURT: Let it be received without objection.

13 BY MR. GANNAM:

14 Q. Miss Davis, we've covered your religious belief about
15 what marriage is, and we've covered the licensing scheme where
16 the licenses are issued in Rowan County under your authority.

17 I want to ask you specifically, why does authorizing the
18 marriage of same-sex couples violate your religious beliefs?

19 A. Because if I say that I authorize that, I'm saying I
20 agree with it, and I can't.

21 Q. And to be clear, is your religious objection to
22 authorizing a marriage license for a same-sex couple based on
23 any sin that you believe this couple may have committed?

24 A. No.

25 Q. Is it based on any sin you believe they might commit?

DAVIS - Direct

43

1 A. No.

2 Q. Is your religious objection to authorizing a marriage
3 license for a same-sex couple based on any religious objection
4 other than what you believe the definition of marriage is?

5 A. No.

6 Q. Miss Davis, understanding that your religious objection
7 prevents you from issuing licenses to same-sex couples, why
8 did you decide not to issue licenses to any couples?

9 A. I didn't want to discriminate against anybody.

10 Q. Is that consistent with the position you took in January,
11 when you sent the letter to legislators asking them to provide
12 you an opt-out from issuing any licenses at all?

13 A. Yes.

14 Q. And has that position ever changed since that letter in
15 January?

16 A. No.

17 Q. Miss Davis, when the Supreme Court decided the *Obergefell*
18 case in June, after that, did you receive any guidance from
19 the Governor of Kentucky on issuing marriage licenses?

20 A. He issued a directive that came over the email, and I
21 later got a hard copy that said we may not agree with it,
22 but -- morally, you know, you may not agree with it, but we
23 had to issue them regardless.

24 MR. GANNAM: May I approach again, Your Honor?

25 THE COURT: You may. This will be Exhibit 4?

DAVIS - Direct

44

1 MR. GANNAM: Yes, Your Honor.

2 BY MR. GANNAM:

3 Q. Miss Davis, I've just handed you what has been marked as
4 Defendant's Exhibit 4. This appears to be a letter on the
5 letterhead of the Office of the Governor dated June 26, 2015.
6 This also appears in the complaint in this case as Plaintiff's
7 Exhibit Number 3. Is this the letter you were just referring
8 to?

9 A. It is.

10 Q. And what did you understand this letter to be directing
11 you to do as a clerk of court or as the county clerk?

12 A. Well, it simply states, says, Neither your oath nor the
13 Supreme Court dictates what you must believe. But as elected
14 officials, they do prescribe how we must act.

15 And we were instructed that Kentucky would recognize as
16 valid all same-sex marriages performed in other states, and we
17 were to start issuing license.

18 Q. Was there any doubt in your mind that the governor was
19 communicating to all the county clerk that they should issue
20 the marriage licenses regardless of what they believe?

21 A. Yes.

22 Q. Have you sent any communications back to the governor
23 after this letter was sent to you?

24 A. I have.

25 THE COURT: You have or you have not?

DAVIS - Direct

45

1 THE WITNESS: I have.

2 THE COURT: You have, all right. Thank you.

3 MR. GANNAM: Before I get to that, I would move to
4 admit Defendant's Exhibit 4 into evidence.

5 THE COURT: Any objection?

6 MR. SHARP: No objection, Your Honor.

7 THE COURT: Let it be received.

8 MR. GANNAM: May I approach, Your Honor?

9 THE COURT: You may.

10 MR. GANNAM: Your Honor, I apologize, I don't have a
11 final copy of this one.

12 THE COURT: That's fine.

13 BY MR. GANNAM:

14 Q. Miss Davis, I just handed you a document marked as
15 Defendant's Exhibit 5. Do you recognize this document?

16 A. I do.

17 Q. What is this document?

18 A. It's a letter that not just myself but many clerks had
19 sent to the governor just trying to compel him to call a
20 special session or to do something in order to help the clerks
21 who had objections to issuing the same-sex marriage license on
22 grounds of conscience, that he would do something to try to
23 help us.

24 Q. I want to read from the letter. The first paragraph, the
25 last sentence says, Many clerks firmly believe that forcing

DAVIS - Direct

46

1 county clerk offices to issue same-sex marriage licenses, when
2 it is against their deeply held religious beliefs and
3 traditions, is a direct violation of the U.S. Constitution's
4 First Amendment.

5 Are those the words you sent to the governor?

6 A. It is.

7 Q. And do you believe that to be the case?

8 A. I do.

9 Q. The next paragraph says, This dramatic and sudden change
10 has caused some clerks to go as far as to halt issuing
11 marriage licenses to anyone rather than compromise their
12 deeply held religious convictions.

13 Would that include you, Miss Davis?

14 A. Yes, it does.

15 Q. Next sentence says, This position has ignited litigation,
16 and it is foreseeable that it may invite more lawsuits.

17 How many times have you been sued so far, Miss Davis?

18 A. Twice.

19 Q. Finally, next paragraph says, It appears the only timely
20 and reasonable solution to this conflict is a legislative one.
21 So for that reason, I respectfully request that you
22 immediately call an extraordinary session of General Assembly
23 to address the issues that have been caused in this transition
24 from traditional marriage being redefined to include same-sex
25 couples.

DAVIS - Direct

47

1 Are those your words to the governor, Miss Davis?

2 A. They are.

3 Q. Have you received any direct response from the governor?

4 A. No.

5 Q. Are you aware of press reports of conversations between
6 your counterpart in Casey County, Clerk Casey Davis, and the
7 governor?

8 A. I am.

9 Q. And are you aware of what's been reported as the
10 governor's answer to Mr. Davis's similar objection, that he
11 should simply issue the licenses or resign?

12 A. I am.

13 Q. Miss Davis, is resigning an option for you?

14 A. No, sir.

15 Q. Why not?

16 A. Because if I resign, that leaves my deputies to deal with
17 this. It leaves another clerk to deal with it. They may not
18 have an issue with it, but the people that work for me have
19 issue with this also. And if I resign, that solves nothing.
20 It helps nobody. And there is a solution out there that
21 everybody can be happy, and it can be done so that nobody has
22 to be compromised in any way.

23 Q. Would you say that you've done a good job as the clerk of
24 Rowan County?

25 A. I think so, yes, sir.

DAVIS - Direct

48

1 Q. Is that based in part on the, for example, the three
2 quarters of a million dollar surplus you've generated since
3 you've been the clerk?

4 A. Yes.

5 Q. And all those funds, if there's a surplus at the end of
6 the year, go back to the county?

7 MR. SHARP: Objection, Your Honor. Relevance.

8 THE COURT: Overruled.

9 BY MR. GANNAM:

10 Q. My question was, those funds would go back to the county
11 if there's a surplus at the end of the year, correct?

12 A. That's correct.

13 MR. GANNAM: Your Honor, I would move to admit
14 Defendant's Exhibit 5 into evidence.

15 THE COURT: Any objection to 5?

16 MR. SHARP: No objection, Your Honor.

17 THE COURT: Let it be received without objection.

18 BY MR. GANNAM:

19 Q. You mentioned some of your deputy clerks may share the
20 same objection. Out of your six deputy clerks, how many do
21 you know would have a similar religious objection to signing
22 off on a marriage license to a same-sex couple?

23 A. I know for certainty four.

24 Q. And out of the other two, do you know their positions?

25 A. One --

DAVIS - Direct

49

1 MR. SHARP: Objection, Your Honor.

2 THE COURT: Overruled. If you have a reason to know
3 why. I mean, first of all, have you spoken with the other six
4 clerks about the issuance of marriage licenses post-Supreme
5 Court decision?

6 THE DEFENDANT: Yes.

7 THE COURT: You have spoken with them?

8 THE DEFENDANT: Yes.

9 THE COURT: The four that you've identified as having
10 objections, did they tell you they had objections?

11 THE WITNESS: Yes.

12 THE COURT: What about the other two?

13 THE WITNESS: One said they would be willing to issue
14 the license, wouldn't have any problem with it, one is kind of
15 ambiguous, just kind of straddling the fence.

16 THE COURT: So there would be one that would be
17 willing to issue the licenses?

18 THE WITNESS: Yes, sir.

19 THE COURT: And would that individual be able to
20 issue the licenses without any repercussions from you?

21 THE WITNESS: My name would be on that license.

22 THE COURT: Okay. I understand that. But as far as
23 that individual would be able to issue the licenses without
24 any repercussions from you?

25 THE WITNESS: That deputy would not have my authority

DAVIS - Direct

50

1 to issue a license if I did not grant that authority.

2 THE COURT: All right. If the authority was required
3 to be granted, would that deputy be able to issue the license
4 without any repercussions from you?

5 THE WITNESS: Repercussions as far as maybe firing
6 that deputy?

7 THE COURT: Correct.

8 THE WITNESS: I don't know how to answer that,
9 because that causes me to speculate that if there was a form
10 that was generated that didn't have my name on it --

11 THE COURT: Is it the marriage license -- I know your
12 attorney asked to read this section. To any person or
13 religious society qualified to perform marriages pursuant to
14 KRS Section 402.050. Are you such a person authorized or
15 qualified to perform marriages?

16 THE WITNESS: No. I'm the authority --

17 THE COURT: You don't perform marriages, correct?

18 THE WITNESS: No.

19 THE COURT: All right.

20 THE WITNESS: I'm the authorizing agent of that
21 license.

22 THE COURT: But you're not a person qualified to
23 perform the marriages, correct?

24 THE WITNESS: No.

25 THE COURT: All right. You may proceed.

DAVIS - Direct

51

1 BY MR. GANNAM:

2 Q. Miss Davis, knowing what you do, that there is an
3 employee who is willing to issue the licenses, have you taken
4 any adverse employment action against that employee?

5 A. No.

6 Q. Do you have any intention of doing that?

7 A. No.

8 Q. Do you consider that employee to be a good employee?

9 A. Very loyal, very dedicated, very good employee.

10 Q. And I believe you testified earlier that -- could a
11 single employee handle all of the volume of Rowan County
12 marriage licenses, if called upon to do so?

13 A. Yes.

14 Q. I believe you testified that might take an hour a week?

15 MR. SHARP: Objection. Asked and answered.

16 THE COURT: Sustained.

17 BY MR. GANNAM:

18 Q. In the almost 30 years that you've been at the clerk's
19 office, have you ever objected on religious grounds to doing
20 any of the clerk's office functions apart from this marriage
21 license issue?

22 A. No.

23 Q. In your almost 30 years in the clerk's office, have you
24 ever witnessed another deputy clerk or the elected clerk make
25 a religious objection to performing some function of the

DAVIS - Direct

52

1 clerk's office?

2 A. No.

3 Q. Are you aware of types of licenses that some clerk's
4 offices issue and some clerk's offices don't?

5 A. I am.

6 Q. Can you give an example?

7 A. Not all county clerks sell hunting and fishing licenses.
8 You can opt out of selling those, just by giving a written
9 explanation to the Department of Fish and Wildlife.

10 Q. And was that a directive or a law that was created by the
11 Department of Fish and Wildlife?

12 MR. SHARP: Objection. Relevance, Your Honor.

13 THE COURT: I'm going to overrule the objection.

14 THE WITNESS: I'm not sure how that law is. It's in
15 our duties that it says that a clerk can opt out from selling
16 hunting and fishing licenses.

17 BY MR. GANNAM:

18 Q. Is there anything else that's issued out of your office
19 or filed in your office that doesn't depend on your authority?

20 A. No.

21 Q. Let me give you an example what I'm talking about. If
22 someone brings a document to you to be recorded, you're not
23 required to authorize or approve of whatever that document
24 says; is that correct?

25 A. That's correct.

DAVIS - Direct

53

1 Q. Your duty would be limited to just recording it in the
2 public records?

3 A. As long as it meets the statutory requirements for that
4 particular type of document, we would record it.

5 Q. Approximately how many counties surround Rowan County,
6 immediately surround it?

7 A. About seven.

8 Q. Would those be Lewis, Fleming, Bath, Meniffee, Morgan,
9 Elliott and Carter Counties?

10 A. Yes.

11 Q. To your knowledge, are all marriage licenses being issued
12 in those seven counties?

13 MR. SHARP: Objection. Speculation.

14 THE COURT: Overruled. If she knows.

15 THE WITNESS: They are.

16 BY MR. GANNAM:

17 Q. And what would be the longest distance one would have to
18 drive, approximately, from Rowan County to one of those seven
19 surrounding counties?

20 A. Maybe 30 minutes at the most.

21 Q. That would be for any of those seven?

22 A. Yes.

23 Q. Are there other --

24 THE COURT: Probably longer to Vanceburg.

25 THE WITNESS: Might be if you go over --

DAVIS - Direct

54

1 THE COURT: Go ahead.

2 BY MR. GANNAM:

3 Q. Are there even more counties within a 60-minute drive of
4 Rowan County?

5 A. Oh, yes.

6 Q. And to your knowledge, are any of the counties within a
7 60-minute drive of Rowan County not issuing marriage licenses?

8 A. Not that I'm aware of.

9 Q. When we were in court in Ashland last week, do you know
10 what county we were in?

11 A. We were in Boyd.

12 Q. And to your knowledge, is Boyd County issuing all
13 marriage licenses?

14 A. They are.

15 Q. And today, we're sitting in what county?

16 A. Kenton, I believe.

17 Q. And to your knowledge, is Kenton County issuing marriage
18 licenses?

19 A. Yes, they are.

20 Q. Miss Davis, when you took office in January of 2015, did
21 you swear out an oath?

22 A. I did.

23 Q. And did that oath include an oath to uphold the United
24 States Constitution and laws?

25 A. It did.

DAVIS - Direct

55

1 Q. And did it include an oath to uphold the Kentucky
2 Constitution and laws?

3 A. Yes, it did.

4 Q. Have you kept that oath since taking office?

5 A. Yes.

6 Q. How do you explain the not issuing marriage licenses and
7 upholding, for example, the United States Constitution and
8 laws?

9 A. I think the First Amendment right gives me a right to
10 religious freedom.

11 Q. So have you ever made a decision that you're not going to
12 uphold the U.S. Constitution?

13 A. No.

14 Q. And how about under the Kentucky Constitution and laws.
15 How are you upholding those when you're not issuing marriage
16 licenses?

17 A. Well, so far, our Kentucky Constitution hasn't been
18 rewritten. I think it takes an act of legislation to do that,
19 and it still states and has defined, as we voted on in 2004,
20 to define marriage as a union between one man and one woman.

21 Q. Are you aware of any things that would be called
22 conscience protections in the Kentucky Constitution?

23 A. Yes. Our Bill of Rights.

24 Q. And so have you ever made a decision not to follow the
25 Kentucky Constitution?

DAVIS - Direct

56

1 A. No.

2 Q. And in connection with your current policy on marriage
3 licenses, have you ever made a decision that you were not
4 going to follow the Kentucky Constitution and laws?

5 A. No.

6 MR. GANNAM: No further questions, Your Honor.

7 THE COURT: Any questions, Mr. Mando?

8 MR. MANDO: I do have a few questions, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. MANDO:

11 Q. Good morning, Miss Davis. I introduced myself to you
12 earlier this morning. My name is Jeff Mando. I represent
13 Rowan County. I just have a few questions.

14 A. Yes.

15 Q. It's my understanding you occupy the office of county
16 clerk in Rowan County, correct?

17 A. I do.

18 Q. As you understand it, that's a constitutional office,
19 created and recognized by the Kentucky Constitution?

20 A. Yes.

21 Q. And with regard to marriage licenses, you are directed by
22 state statute as a county clerk to issue marriage licenses,
23 correct?

24 A. I am.

25 Q. In fact, issuance of marriage licenses requires you to

DAVIS - Direct

57

1 remit the fee for the marriage licenses, part of it back to
2 the state, correct?

3 A. It is.

4 Q. And then you have to report to the state so that the
5 state Department of Vital Statistics can gather and publish
6 information about marriages state-wide, correct?

7 A. Yes.

8 Q. Also, with regard to marriage licenses, the forms that
9 you are required to utilize come from the state Department of
10 Libraries and Archives; is that correct?

11 A. That's correct.

12 Q. That is a state agency that reports to the governor?

13 A. I would assume they do.

14 Q. And that state agency, the Department of Libraries and
15 Archives, to your knowledge, directs all clerks to issue
16 marriage licenses on this prescribed form? It's uniform?

17 A. That's correct.

18 Q. All right. I'm sorry, that was two questions. It's a
19 uniform form, correct?

20 A. Yes.

21 Q. And it's directed by the Department of Library and
22 Archives that all county clerks use this state form?

23 A. That's correct.

24 Q. The employees in your office, you hire the employees in
25 your office, correct?

DAVIS - Direct

58

1 A. I do.

2 Q. And you retain the authority to discharge and discipline
3 the employees in your office, correct?

4 A. I do.

5 Q. And you retain the authority to set the salaries for the
6 employees in your office, correct?

7 A. I do.

8 Q. That's not a fiscal court function?

9 A. The fiscal court has authority over my maximum allowable
10 salaries and benefits that I pay my deputies as a total, but
11 they do not have control over what each individual one makes.

12 Q. So they have approval over the total budget, and you
13 decide how to apportion it among your staff?

14 A. Yes.

15 Q. You mentioned that as county clerk, you viewed your job
16 as one where you're -- I think I wrote this down -- a
17 pass-through collection -- you viewed it as a pass-through
18 clerk's agency is the words I heard you say.

19 A. Yes.

20 Q. And you're a pass-through for the state, correct?

21 A. Yes.

22 Q. Because you remit funds to the Department of
23 Transportation, state Department of Revenue, state Department
24 of Fish and Wildlife, state motor vehicle registration,
25 correct?

DAVIS - Direct

59

1 A. Yes.

2 Q. All right. And after the *Obergefell* decision came down,
3 it was the state Department of Libraries and Archives that
4 sent you the revised form and other county clerks across the
5 state to use, correct?

6 A. It is.

7 Q. All right. And it was the governor who issued a letter
8 that was introduced by your lawyer, referred to you by your
9 lawyer. It was the governor who issued a letter directing you
10 to comply with that decision and issue these licenses?

11 A. It is.

12 MR. MANDO: Thank you, ma'am. No further questions.

13 THE COURT: Cross-examination.

14 CROSS-EXAMINATION

15 BY MR. CANON:

16 Q. Good morning, Miss Davis.

17 A. Good morning.

18 Q. My name is Dan Canon. I represent the plaintiffs here.
19 The good news is that both Mr. Mando and Mr. Gannam have asked
20 you most of the questions I was planning to ask you anyway. I
21 promise not to be too long with you.

22 You testified you were elected on November the 4th, 2014;
23 is that right?

24 A. Yes.

25 Q. And you took office on January 1?

DAVIS - Direct

60

1 A. 5th.

2 Q. The 5th of 2015. When did you first register to run for
3 that office?

4 A. I filed an intent in -- it was either the last part of
5 June, the first part of July of 2013.

6 Q. Okay. And Mr. Gannam asked you about the oath that you
7 took at the time that you took office. At the time that you
8 were elected to that office on November the 4th, were you
9 aware of a district court opinion by Judge Heyburn that struck
10 down the constitutionality of the portion of the Kentucky
11 Constitution that you testified about before?

12 A. Yes.

13 Q. Okay. And Mr. Gannam asked you whether or not you made a
14 decision not to follow the Constitution of Kentucky, and you
15 said no.

16 Did you make a conscious decision not to follow the
17 Constitution of the United States?

18 MR. GANNAM: Objection, Your Honor. Asked and
19 answered.

20 MR. CANON: I don't think it's been asked.

21 THE COURT: Overruled.

22 THE WITNESS: Say again, please.

23 BY MR. CANON:

24 Q. Did you make a conscious decision not to follow the
25 Constitution of the United States?

DAVIS - Direct

61

1 A. No.

2 Q. Okay. And so did you believe that you were following the
3 Constitution of the United States on June 26, when you stopped
4 issuing marriage licenses?

5 A. We issued a license on June 26. It was June 27.

6 Q. June 27, then. Sorry.

7 A. I still feel I'm following the Constitution, knowing my
8 First Amendment rights are constitutional.

9 Q. Okay. So let's back up. You've got the ability to make
10 the rules for the Rowan County Clerk's Office, right?

11 A. For my office.

12 Q. You set policies, practices, all that good stuff for
13 Rowan County, right?

14 A. Yes.

15 Q. So even if you've got a deputy clerk that's willing to
16 issue licenses, issue marriage licenses, you can tell them no,
17 right?

18 A. As long as my name is issued -- is on that license, I'm
19 not going to ask them to do something I wouldn't do myself.

20 Q. You believe you've got the discretion to tell them not to
21 issue those licenses even if they're willing to do it; is that
22 right?

23 A. Yes.

24 Q. Okay. And that's, in fact, what you've done here, isn't
25 it?

DAVIS - Direct

62

1 A. (No response.)

2 Q. Yes?

3 A. Yes.

4 Q. Okay. And in what way did you first institute that
5 policy? Did you sit down with your deputy clerks and have a
6 talk with them, or did you distribute a memo, or how did that
7 happen?

8 A. After the doors closed, we had a meeting.

9 Q. Tell me about that meeting.

10 A. Just simply stated that my religious beliefs can't
11 condone issuing and being a party to the issuance of a
12 same-sex marriage license. And I told them that we weren't
13 going to be issuing license, period, so we didn't discriminate
14 against any party.

15 Q. Okay. And was there any reason, other than your personal
16 religious beliefs, for refusing to issue those licenses?

17 A. No.

18 Q. And do you believe that county clerks have the discretion
19 to refuse to issue marriage licenses in general if they
20 believe that doing so runs contrary to their religious
21 beliefs?

22 A. Yes.

23 Q. Mr. Gannam asked you about, if you'll look at Defense
24 Exhibit 2, you'll recall that Mr. Gannam asked you about a
25 litmus test that you may or may not go through. Said you

DAVIS - Direct

63

1 didn't go through whether you asked applicants for marriage
2 licenses whether they had engaged in any kind of sinful
3 behavior. Do you remember that line of questioning?

4 A. I do.

5 Q. You do ask applicants whether or not they've been
6 divorced, don't you?

7 A. I do.

8 Q. Okay. And do you have any religious objection to
9 somebody getting remarried once they've been divorced?

10 A. That's between them and God.

11 Q. Okay. But you don't have -- you don't personally have a
12 religious objection to issuing a license to somebody who's
13 been divorced?

14 A. No.

15 Q. And if a clerk has that religious objection, can they
16 then refuse to issue a license on that basis? Any clerk.

17 A. I don't know. I can't speak for them.

18 Q. Well, I'm asking about your conception of the discretion
19 that you have as a county clerk to deny the issuance of
20 marriage licenses. Do you understand?

21 A. My denial of a marriage license is the basis of what
22 marriage is defined.

23 Q. I understand. And the definition of marriage is based
24 upon your religious beliefs, right?

25 A. The word of God, yes.

DAVIS - Direct

64

1 Q. So if a clerk has a religious belief that someone who is
2 divorced should not be able to get remarried, can that clerk
3 then refuse to issue a license on that basis?

4 A. I can't speak for them.

5 Q. Okay. What if a clerk has a religious objection to an
6 interracial marriage. Can they then refuse to issue a license
7 to an interracial couple?

8 A. I can't speak for them.

9 Q. So would you acknowledge --

10 A. If you would like me to answer that, I can answer it.

11 Q. Would you acknowledge -- do you have a religious
12 objection to an interracial marriage?

13 A. No.

14 Q. Are you aware if any clerks do?

15 A. Not that I'm aware of.

16 Q. But if a clerk did have that religious objection, they'd
17 be able to not issue a marriage license?

18 A. I don't know. I can't speak for them.

19 Q. I just want to understand what your concept of your
20 discretion as a county clerk is. How far does that go?

21 MR. GANNAM: Objection, Your Honor. Calls for a
22 legal conclusion.

23 THE COURT: That's really not a question, how far
24 does it go. Why don't you ask a more specific question.

25 MR. CANON: Sure.

DAVIS - Direct

65

1 BY MR. CANON:

2 Q. If I've got a personal belief -- if I'm a county clerk,
3 I've got a personal belief that interracial marriage is
4 unBiblical and I don't want to authorize it, can I refuse to
5 authorize it?

6 A. I don't know. That would be up to you.

7 Q. Okay. You understand if somebody doesn't have a marriage
8 license, they can't have their marriage recognized by the
9 state, correct?

10 A. Yes.

11 Q. And you --

12 THE COURT: Why don't you ask one question at a time.

13 MR. CANON: I'm sorry?

14 THE COURT: You were starting to ask a compound
15 question.

16 MR. CANON: I didn't intend to.

17 THE COURT: You understand if someone doesn't have a
18 marriage license, they can't have their marriage recognized by
19 the state, correct?

20 Did you say yes?

21 THE WITNESS: I did.

22 THE COURT: I'm sorry. Go ahead.

23 BY MR. CANON:

24 Q. Have you been in the clerk's office every work day since
25 June 27?

DAVIS - Direct

66

1 A. Last Monday, I was out for court.

2 Q. When we were in court in Ashland?

3 A. I was there.

4 Q. Okay.

5 A. Not there --

6 Q. You were in the courthouse?

7 A. No, I wasn't at the courthouse. I was in Ashland. And
8 Wednesday, I had a clerk's meeting in Lexington, and then I'm
9 not there today.

10 Q. Okay. But generally speaking, you've been available; is
11 that right?

12 A. Yes.

13 Q. And you heard Mr. Blevins testify that you haven't been
14 unavailable at any point in time, as far as he's concerned, to
15 issue those licenses. Do you disagree with anything he said?

16 A. No. I'm always there at my office.

17 Q. Have you been personally present when any couples came to
18 apply for a license?

19 A. I have.

20 Q. And what did you tell them?

21 A. I didn't speak to any of the parties involved, I think,
22 except maybe Miss Miller, the couple that you sat back behind
23 the bench. I don't know who they were.

24 Q. That's okay. Any couples. Do you recall --

25 A. There was one in this case.

DAVIS - Direct

67

1 Q. And you recall personally turning them away?

2 A. I do.

3 Q. Okay. And what did you tell them?

4 A. I just told them that at the present time, we weren't
5 issuing marriage licenses. Didn't feel that I could put my
6 name to a marriage license that was issued to a same-sex
7 couple, and I didn't want to discriminate.

8 And I asked -- I told them that if what they were trying
9 to accomplish was to receive a marriage license, that they
10 could go to any of the surrounding counties and that they
11 could get a marriage license. They could actually come back
12 and get married in Rowan County if they wanted to, but that we
13 weren't issuing them, and I apologized for their
14 inconvenience.

15 Q. Now, how long is your term?

16 A. Four years.

17 Q. And assuming that you're not reelected for a second term,
18 do you intend not to issue marriage licenses during that
19 entire four-year duration?

20 A. Yes.

21 Q. And you had testified before that you think that that's
22 not a violation of the United States Constitution. You
23 understand that you swore an oath to uphold the United States
24 Constitution, right?

25 A. I did.

DAVIS - Direct

68

1 Q. How do you determine what the Constitution of the United
2 States means?

3 A. Well, I'm not a lawyer.

4 Q. Right.

5 A. But I do know that the First Amendment right gives me the
6 right to my religious freedom.

7 Q. Very good. And your religious freedom, in your
8 conception, trumps the right -- you understand that the
9 couples in this case have a right to get a marriage license,
10 correct?

11 MR. GANNAM: Objection, Your Honor. Calls for a
12 legal conclusion.

13 THE COURT: Overruled.

14 BY MR. CANON:

15 Q. Is that your understanding of the law?

16 A. My understanding is that the U.S. Supreme Court redefined
17 marriage.

18 Q. And you don't want to abide by that definition, correct?

19 A. It's not the definition that I believe in.

20 Q. But you understand when the Supreme Court says that,
21 that's an issue of constitutional interpretation. That's the
22 law of the land. You do understand that?

23 A. I suppose.

24 Q. Okay. And you also understand that a marriage license
25 isn't quite the same thing as a hunting or a fishing license,

DAVIS - Direct

69

1 don't you?

2 A. They're still a license.

3 Q. Well, is there any --

4 A. It's still giving authority to do something.

5 Q. Is there any difference in the rank of importance to you
6 between hunting and fishing and marriage?

7 A. They're a license.

8 Q. So they're all the same? Hunting, fishing, getting
9 married, all the same thing?

10 A. I think marriage is a sacred union.

11 Q. I agree. Aside from traveling to another county and
12 going to the judge executive's office, which we've already
13 talked about, are there any alternatives available for anybody
14 in Rowan County that wants to actually have their marriage
15 licensed in Rowan County right now?

16 A. Not unless the legislation can enact something.

17 Q. So that's a no?

18 A. Not unless the legislation can enact something.

19 Q. And they haven't enacted anything, right?

20 A. Uh-uh.

21 Q. And if Judge Bunning orders you to start issuing marriage
22 licenses as a result of the proceedings we've had here today,
23 are you going to do it?

24 A. I can't tell you.

25 Q. You can't tell me?

DAVIS - Direct

70

1 A. Because you're asking me to speculate on something that
2 hasn't happened.

3 Q. You understand that it's a possibility that he could
4 order you to do that, right?

5 A. He could.

6 Q. Have you thought about what that possibility might look
7 like for you?

8 A. I have.

9 Q. Okay. And have you made a decision as to what you're
10 going to do if you are ordered to start issuing licenses?

11 A. I'll deal with that when the time comes.

12 Q. And you testified a little bit about the seven counties
13 that surround Rowan County. Now, you understand that once
14 somebody has their marriage license, they've got to also
15 travel back and have that marriage license filed?

16 A. They can mail it.

17 Q. Okay, very good. Now, you're not -- you testified about
18 this a little bit before. You're not denying licenses to
19 opposite-sex couples based on your religious beliefs, right?

20 A. No. I just didn't want to discriminate.

21 MR. CANON: Nothing further, Your Honor.

22 THE COURT: Any redirect? Because I have a few
23 questions myself.

24 MR. DONAHUE: Your Honor, may I be excused?

25 THE COURT: Yes. We were told you would have to be

DAVIS - Redirect

71

1 in Louisville this afternoon. You may be excused, sir.

2 MR. DONAHUE: Thank you.

3 (Mr. Donahue exited the courtroom.)

4 THE COURT: Mr. Gannam.

5 REDIRECT EXAMINATION

6 BY MR. GANNAM:

7 Q. I want to clarify, the oath of office that you took, you
8 said that you pledged to uphold the United States
9 Constitution; is that correct?

10 A. I did.

11 Q. Did you pledge to abide by the United States Supreme
12 Court's decisions?

13 A. No.

14 Q. So that wasn't a specific part of your oath?

15 A. No.

16 Q. Mr. Canon referenced a federal district court decision
17 invalidating Kentucky's marriage laws at the end of last year.
18 Are you familiar with that?

19 A. Yes.

20 Q. Were you also aware that a federal appellate court, the
21 Sixth Circuit Court of Appeals, reversed that decision?

22 A. I am.

23 Q. At the time you took office in January of 2015 and swore
24 your oath, was same-sex marriage permitted in the Commonwealth
25 of Kentucky?

DAVIS - Recross

72

1 A. No.

2 MR. GANNAM: No further question, Your Honor.

3 THE COURT: Anything else, Mr. Mando?

4 MR. MANDO: No, sir.

5 RECROSS-EXAMINATION

6 BY MR. CANON:

7 Q. Ma'am, do you get to interpret what the Constitution
8 means?

9 A. No.

10 Q. Who has the final say on what the United States
11 Constitution means?

12 MR. GANNAM: Objection, Your Honor. Calls for a
13 legal conclusion.

14 THE COURT: I can answer that. It's not me.

15 BY MR. CANON:

16 Q. I'll ask it a different way. Who do you understand has
17 the final say as to what the United States Constitution says?

18 A. (No response.)

19 Q. Do you know?

20 A. I don't know.

21 Q. And the Sixth Circuit opinion that Mr. Gannam referenced,
22 do you know what day that came down?

23 A. No.

24 Q. If I told you November the 6th, would you have any reason
25 to dispute that?

DAVIS - Recross

73

1 A. I assume you wouldn't lie to me.

2 Q. I would not, ma'am.

3 THE COURT: I can take judicial notice of that.

4 MR. CANON: Very good.

5 BY MR. CANON:

6 Q. And the prior opinion that you and I discussed, the
7 opinion striking down the portion of the Kentucky Constitution
8 that prohibits same-sex marriage, you knew about that the
9 entire time you were on the campaign trail, didn't you?

10 A. It was there.

11 MR. CANON: Nothing further.

12 THE COURT: All right. Can I have Exhibit 3? Now, I
13 asked you earlier, ma'am, about the marriage license. Now I'm
14 looking at the one that was prepared by the state Department
15 of Library and Archives. You should have Defendant's
16 Exhibit 3 there.

17 THE WITNESS: I do.

18 THE COURT: I asked you earlier about this KRS
19 section referenced in the top, 402.050. And this includes, in
20 the definitional section -- it's not on the form, but it
21 includes ministers of the gospel and priests, justices and
22 judges of the court, county judge executives, justices of the
23 peace, and fiscal court commissioners authorized by the
24 governor or county judge and any religious society with no
25 minister.

DAVIS - Recross

74

1 Those are the -- where it says to any person qualified to
2 perform marriages, that list I just gave you, that's the list.

3 THE WITNESS: Right.

4 THE COURT: County clerks aren't on that list. So if
5 Jane Doe and Richard Roe came in and said will you marry us,
6 like formally, you take this person, you take this person, et
7 cetera, you don't do that?

8 THE WITNESS: No.

9 THE COURT: Okay. So where it says you are
10 authorized to join together in the state of matrimony
11 according to the laws of the Commonwealth of Kentucky, you're
12 not authorized to join together in the state of matrimony
13 because you're not included in that definition?

14 THE WITNESS: But I'm authorizing the license of --

15 THE COURT: I understand that, but he read this.
16 "You are hereby authorized to join together." You're not
17 authorized to join them together?

18 THE WITNESS: No.

19 THE COURT: As an official of the marriage?

20 THE WITNESS: That's correct.

21 THE COURT: Now, when two individuals come in to seek
22 to get the license, the top part, above where it says "we
23 hereby certify," is that already filled out?

24 THE WITNESS: No.

25 THE COURT: So the deputy or the clerk would help

1 them fill that out?

2 THE WITNESS: Yeah. We ask the information, type it
3 in.

4 THE COURT: So they come in across the counter and
5 they ask -- it's actually typed into some sort of template
6 form, then printed out?

7 THE WITNESS: Um-hmm.

8 THE COURT: At the bottom of Exhibit 2, where it says
9 issued June 16, 2015, the office of Kim Davis, Rowan County,
10 Morehead, and then Brian makes -- you referenced him. These
11 initials, these are Brian Mason's initials?

12 THE WITNESS: They are.

13 THE COURT: So the individual filling this out, that
14 typewritten portion would be based on whoever's typing the
15 information into the computer; is that fair?

16 THE WITNESS: Yeah. His name, he types his name in,
17 but my name is already populated in there.

18 THE COURT: Yours is just part of the form?

19 THE WITNESS: Yes.

20 THE COURT: Now, at the bottom of the marriage
21 certificate itself, this is handwritten, said recorded this
22 July 2, 2015, and the office in Kim Davis, Rowan County Clerk,
23 says Roberta H. -- is it --

24 THE WITNESS: Earley.

25 THE COURT: Earley, deputy clerk. Is that actually

1 handwritten in by the deputy clerk?

2 THE WITNESS: It is.

3 THE COURT: In this case, why would Brian Mason be
4 different than Roberta Earley?

5 THE WITNESS: Because you're catching the license at
6 two different times. Brian Mason issued the license. Then
7 the center section where it says Marriage Certificate is
8 filled out by the person performing the ceremony. Then once
9 it's performed and completed, then the license is turned back
10 into the clerk's office, and then that's the recording of the
11 bottom part down here. That is the actual recording of the
12 document into our permanent records and indexing system.

13 THE COURT: And who fills that out, the bottom
14 portion?

15 THE WITNESS: The very bottom would be my clerk, my
16 deputy.

17 THE COURT: The clerk would fill that out, all right.

18 Let me check my notes here. That's all the questions I
19 have. Any further questions of the witness?

20 MR. SHARP: No, Your Honor.

21 MR. GANNAM: Your Honor, just briefly on the form.

22 FURTHER REDIRECT EXAMINATION

23 BY MR. GANNAM:

24 Q. Miss Davis, going back to Defendant's Exhibit 3, the
25 marriage license, the new marriage license, where it reads to

1 any person or religious society qualified to perform
2 marriages, it says who it's to. What is your understanding of
3 who it's from?

4 A. It's from me.

5 Q. When it says "you are hereby authorized," who is the
6 "you" referring to?

7 A. "You" is talking about the people performing the
8 ceremony.

9 Q. And who is telling them that they are authorized?

10 A. Me, the clerk.

11 Q. So who is it that is authorizing them to do it?

12 A. It would be me, the clerk.

13 MR. GANNAM: No further questions, Your Honor.

14 THE COURT: And you believe that, even though the
15 statute doesn't include you? The statute I read to you
16 doesn't include the deputy clerk.

17 THE WITNESS: Right. But if you read after the
18 semicolon, it says you. The people you talked about in the
19 KRS that you read, it says you are authorized to join together
20 in the state of matrimony according to the laws of Kentucky.
21 I'm the one that's authorizing that marriage license. I'm the
22 one giving the authority because they can't get a marriage
23 license online, or they can't, you know -- it's actually the
24 clerk that's authorizing -- I'm saying that these people meet
25 the qualifications, and that they're not related, that

1 they're -- that they meet the age requirements and everything.
2 That's the authority that I'm given through the statutes to
3 issue the marriage license and that's what --

4 THE COURT: The statute you referenced earlier before
5 we got started, Mr. Mando, those are the statutes she's
6 referring to?

7 MR. MANDO: The statute I was referring to, Your
8 Honor, was 402.080, talks about issuing -- the license shall
9 be issued by the clerk.

10 THE COURT: The license itself.

11 MR. MANDO: The license is issued by the clerk. The
12 ceremony is performed by one of those in the statute.

13 THE COURT: The individuals authorized to perform the
14 ceremonies are the 402.050?

15 MR. MANDO: Correct.

16 THE WITNESS: Um-hmm.

17 MR. CHRISTMAN: Your Honor, if I can interject as
18 well, Section 402.100 is actually the section that walks the
19 clerk through what the clerk needs to do in order to issue a
20 license, and it's the form that says each -- I'm reading
21 directly out of the statute.

22 Each county clerk shall use the form prescribed by the
23 Department For Libraries and Archives when issuing a marriage
24 license. This form shall provide for the entering of all the
25 information required in this section and may also provide for

1 the entering of additional information prescribed by the
2 Department For Libraries and Archives.

3 The form shall consist of, and then it identifies what
4 has to be on the license. A marriage license which provides
5 for the entering of an authorization statement of the county
6 clerk issuing the license.

7 THE COURT: So you are authorizing the -- you are, in
8 essence, telling the state that the information provided on
9 this is accurate?

10 THE WITNESS: Um-hmm.

11 THE COURT: Is that what you're doing?

12 THE WITNESS: The information that's given, they
13 presented their information, and we applied it to the
14 prescribed document. And if they meet those statutory
15 requirements, then we're authorizing someone who is eligible,
16 like what you had stated earlier, to perform a ceremony, to
17 take this license that we've issued and actually marry
18 someone.

19 THE COURT: So once the couple, if you will, leaves
20 the courthouse with this, takes it, gets married, brings it
21 back or mails it back --

22 THE WITNESS: Or mails it back, yes.

23 THE COURT: So you're, in essence, signing off on the
24 accuracy of the information provided? Is that kind of what
25 this is?

1 THE WITNESS: Well, we are verifying the information,
2 yes, as true and correct. And by our signature and the
3 issuance of it, we're saying that they're authorized to take
4 this and go to someone who is legally able to perform a
5 marriage, and they can present this form to them and that they
6 can have their ceremony performed and then bring it back in to
7 us for recording.

8 THE COURT: All right.

9 MR. CHRISTMAN: Your Honor, if I could continue with
10 the statute. Further down, with the marriage certificate
11 portion of the statute, it then says that the name it refers
12 to -- all the information that needs to be listed again, and
13 it refers to authority, and says the name of the county clerk
14 under whose authority the license was issued. That's why her
15 name is required on every license in those two places.

16 THE COURT: All right. You just object to your name
17 being on the license?

18 THE WITNESS: My name and my county, yeah.

19 THE COURT: Well, your county, you're elected by the
20 county. But if it said Rowan County and listed a deputy
21 clerk -- let's say the deputy clerk that would be permitted
22 to, or has agreed that he or she would not be religiously
23 opposed to issuing the license, if it just was the deputy
24 clerk's name with Rowan County and not your name, would you
25 object to that?

1 THE WITNESS: It is still my authority as county
2 clerk that issues it through my deputy.

3 THE COURT: All right. Very well.

4 You may step down. Thank you.

5 Any further proof?

6 MR. GANNAM: No, Your Honor.

7 THE COURT: All right. Mr. Mando, any proof from the
8 county's perspective?

9 MR. MANDO: No, sir.

10 THE COURT: All right. Any rebuttal?

11 MR. SHARP: No rebuttal evidence, Your Honor.

12 THE COURT: We have a response which is due on the
13 30th, and then the reply is due seven days after that.

14 MR. SHARP: That's correct.

15 THE COURT: Well, I think the earliest I would have a
16 decision -- I start a trial in Ashland on the 11th -- probably
17 the week of the 11th at some point. The response is due on
18 Thursday, the 7th, so I'll get a decision out as quickly as I
19 can on the motion.

20 We'll be in recess.

21 (Proceedings concluded at 11:43 a.m.)

22 - - -
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, LISA REED WIESMAN RDR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case.

\s\ Lisa Reed Wiesman
LISA REED WIESMAN, RDR-CRR
Official Court Reporter

July 23, 2015
Date of Certification

INDEX

DEFENSE WITNESSES

WALTER BLEVINS, JR.

Direct Examination..... Page 6

Cross-examination by Mr. Mando..... Page 15

Cross-examination by Mr. Sharp..... Page 16

KIMBERLY DAVIS

Direct Examination..... Page 23

Cross-examination by Mr. Mando..... Page 56

Cross-examination by Mr. Canon..... Page 59

Redirect Examination..... Page 71

Recross-examination by Mr. Canon..... Page 72

Further redirect examination..... Page 76

- - -

DEFENSE EXHIBITS

Exhibit No. 1, Letter to Senator Robertson

Identified..... Page 35

Admitted..... Page 36

Exhibit No. 2, Redacted marriage license

Identified..... Page 36

Admitted..... Page 39

Exhibit No. 3, Marriage license

Identified..... Page 40

Admitted..... Page 42

Exhibit No. 4, 6/26/15 letter

Identified..... Page 44

Admitted..... Page 45

Exhibit No. 5, 7/8/15 letter

Identified..... Page 45

Admitted..... Page 48

- - -

EXHIBIT D

To Defendant/Third Party
Plaintiff Kim Davis'
Motion for Preliminary
Injunction

**Local Mandate Fiscal Impact Estimate
Kentucky Legislative Research Commission
2013 Regular Session**

Part I: Measure Information

Bill Request #: 1299

Bill #: HB 279 HCS 1

Bill Subject/Title: AN ACT relating to the construction of the law.

Sponsor: Rep. Bob Damron

Unit of Government: X City X County X Urban-County
Unified Local
X Charter County X Consolidated Local X Government

Office(s) Impacted: Any local government office; jails; healthcare facilities

Requirement: X Mandatory Optional

Effect on

Powers & Duties: Modifies Existing X Adds New Eliminates Existing

Part II: Purpose and Mechanics

HB 279 HCS 1 retains the original provisions of the bill but removes religious organizations from the language, making the impact of the bill applicable only to the religious freedom of individuals. HB 279 HCS 1 prohibits governments, including local governments, from burdening a person's freedom of religion, and does not allow a government entity in any way to burden a person's right to act or refuse to act in any manner based upon a person's sincerely held religious beliefs without the government proving a compelling government interest in infringing on a specific act or refusal to act and shows that it has used the least restrictive means to further that interest.

As HB 279 HCS 1 does not exclude any government entity, the language would apply to all local government offices, but may particularly have an effect on locally owned, operated, or financially supported health care facilities in which any employee may claim the right to refuse some health care function because of religious beliefs, including participating in vaccinations, obstetrics and gynecology, end of life care, certain types of disease fighting treatments, or the dispensing of certain pharmaceuticals, and on local jail facilities that may have to accommodate a prisoner's beliefs as it relates to dietary needs, or scheduling around prayer times or other forms of worship. Also, any local government employee who provides any form of food service may need to be accommodated so that

the employee does not have to interact with certain types of foods that may be restricted by that person's religious beliefs.

Part III: Fiscal Explanation, Bill Provisions, and Estimated Cost

HB 279 HCS 1 has the same impact as the original bill. The fiscal impact of HB 279 HCS 1 on local governments is an indeterminable cost. There is no way to estimate how many employees of local government entities or citizens receiving local government services may, through a claim of freedom of religion, require action on the part of a local government entity to provide that service in a least burdensome manner. Additionally, the least restrictive alternative required of the local government may be minimal, for example, in adjusting the timing of certain events in a jail, or significant, for example, if it requires hiring additional staff or paying overtime for other staff to do a job that an employee declines to do because of religious beliefs.

Data Source(s): LRC staff

Preparer: Erica Warren **Reviewer:** MCY **Date:** 2/26/13

**Local Mandate Fiscal Impact Estimate
Kentucky Legislative Research Commission
2013 Regular Session**

Part I: Measure Information

Bill Request #: 1299

Bill #: HB 279 GA

Bill Subject/Title: AN ACT relating to the construction of the law.

Sponsor: Rep. Bob Damron

Unit of Government: **X** City **X** County **X** Urban-County
 Unifed Local
X Charter County **X** Consolidated Local **X** Government

Office(s) Impacted: Any local government office; jails; healthcare facilities

Requirement: **X** Mandatory Optional

Effect on

Powers & Duties:	Modifies Existing	X	Adds New	Eliminates Existing

Part II: Purpose and Mechanics

HB 279 GA prohibits governments, including local governments, from substantially burdening a person's freedom of religion, and does not allow a government entity in any way to burden a person's right to act or refuse to act in any manner based upon a person's sincerely held religious beliefs without the government proving a compelling government interest in infringing on a specific act or refusal to act and shows that it has used the least restrictive means to further that interest.

As HB 279 GA does not exclude any government entity, the language would apply to all local government offices, but may particularly have an effect on locally owned, operated, or financially supported health care facilities in which any employee may claim the right to refuse some health care function because of religious beliefs, including participating in vaccinations, obstetrics and gynecology, end of life care, certain types of disease fighting treatments, or the dispensing of certain pharmaceuticals, and on local jail facilities that may have to accommodate a prisoner's beliefs as it relates to dietary needs, or scheduling around prayer times or other forms of worship. Also, any local government employee who provides any form of food service may need to be accommodated so that the employee does not have to interact with certain types of foods that may be restricted by that person's religious beliefs.

Part III: Fiscal Explanation, Bill Provisions, and Estimated Cost

The fiscal impact of HB 279 GA on local governments is an indeterminable cost.

There is no way to estimate how many employees of local government entities or citizens receiving local government services may, through a claim of freedom of religion, require action on the part of a local government entity to provide that service in a least burdensome manner. Additionally, the least restrictive alternative required of the local government may be minimal, for example, in adjusting the timing of certain events in a jail, or significant, for example, if it requires hiring additional staff or paying overtime for other staff to do a job that an employee declines to do because of religious beliefs.

Whether a burden is “substantial” or not and whether the government interest is shown by “clear and convincing evidence” to be a “compelling” government interest are all issues would likely require the determination of a court, adding potential litigation costs to any other costs a local government entity may entail due to HB 279 GA.

Data Source(s): LRC staff

Preparer: Erica Warren **Reviewer:** MCY **Date:** 3/6/13

EXHIBIT E

To Defendant/Third Party
Plaintiff Kim Davis'
Motion for Preliminary
Injunction



Kentucky Legislature



BR101

16RS

WWW Version

BR 101 - Representative Stan Lee, Representative David Meade, Representative Richard Heath (07/16/15)

AN ACT relating to marriage.

Amend KRS 344.130, 402.050, and 446.350 to exempt persons, officials, and institutions with religious objections to same-sex marriage from any requirement to solemnize, or to issue or record licenses for, such marriages.

(Prefiled by the sponsor(s).)

[Legislature Home Page](#) | [Prefiled Page](#)

AN ACT relating to marriage.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 344.130 is amended to read as follows:

As used in this chapter, unless the context requires otherwise, "place of public accommodation, resort, or amusement" includes any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds, except that:

- (1) A private club is not a "place of public accommodation, resort, or amusement" if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests;
- (2) "Place of public accommodation, resort, or amusement" does not include a rooming or boarding house containing not more than one (1) room for rent or hire and which is within a building occupied by the proprietor as his residence; and
- (3) "Place of public accommodation, resort, or amusement" does not include a religious organization and its activities and facilities if the application of KRS 344.120 would not be consistent with the religious tenets of the organization, subject to paragraphs (a), (b), ~~[and]~~ (c), **and (d)** of this subsection.
 - (a) Any organization that teaches or advocates hatred based on race, color, or national origin shall not be considered a religious organization for the purposes of this subsection.
 - (b) A religious organization that sponsors nonreligious activities that are operated and governed by the organization, and that are offered to the general public, shall not deny participation by an individual in those activities on the ground of disability, race, color, religion, or national origin.
 - (c) A religious organization shall not, under any circumstances, discriminate in its activities or use of its facilities on the ground of disability, race, color, or

national origin.

(d) The secular aspects of marriage solemnization and licensing shall not be construed to make marriage solemnization and its celebration a nonreligious activity.

➔Section 2. KRS 402.050 is amended to read as follows:

- (1) Marriage shall be solemnized only by:
 - (a) Ministers of the gospel or priests of any denomination in regular communion with any religious society;
 - (b) Justices and judges of the Court of Justice, retired justices and judges of the Court of Justice except those removed for cause or convicted of a felony, county judges/executive, and such justices of the peace and fiscal court commissioners as the Governor or the county judge/executive authorizes; or
 - (c) A religious society that has no officiating minister or priest and whose usage is to solemnize marriage at the usual place of worship and by consent given in the presence of the society, if either party belongs to the society.
- (2) At least two (2) persons, in addition to the parties and the person solemnizing the marriage, shall be present at every marriage.

(3) No person authorized by subsection (1) of this section to solemnize a marriage shall be subject to civil liability or criminal prosecution for refusing to solemnize a marriage between persons of the same sex.

➔Section 3. KRS 446.350 is amended to read as follows:

- (1)** 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.

(2) Issuing or recording a marriage license, or solemnizing a marriage, to which a person holds a sincere religious objection or which is contrary to that person's faith tradition due to the marriage being between persons of the same sex 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.

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

APRIL MILLER, ET AL.,

Plaintiffs,

V.

KIM DAVIS, ET AL.,

Defendants.

A

CIVIL ACTION

0:15-CV-00044-DLB

DISTRICT JUDGE

DAVID L. BUNNING

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.

.....

[PROPOSED] ORDER

This Court, having reviewed Defendant/Third-Party Plaintiff Kim Davis' Motion for Preliminary Injunction against Third-Party Defendants Steven L. Beshear, Governor of Kentucky, and Wayne Onkst, Commissioner of the Kentucky Department for Libraries and Archives, in their official capacities, and any responses thereto, and having considered the evidence submitted at an evidentiary hearing on this matter, and for good cause shown, GRANTS Kim Davis' Motion for Preliminary Injunction.

IT IS HEREBY ORDERED that Third-Party Defendants Governor Beshear and Commissioner Onkst, in their official capacities, are preliminarily enjoined from enforcing Governor Beshear's mandate directing Kim Davis to authorize the issuance of Kentucky marriage licenses.

IT IS FURTHER ORDERED that Kim Davis is preliminarily exempted from having to authorize the issuance of Kentucky marriage licenses.

HON. DAVID L. BUNNING
DISTRICT JUDGE

General Information

Court	United States District Court for the Eastern District of Kentucky; United States District Court for the Eastern District of Kentucky
Federal Nature of Suit	Civil Rights - Other[440]
Docket Number	0:15-cv-00044