

No. 15-5961

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

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

Plaintiffs,

v.

KIM DAVIS, individually,

Defendant-Third-Party Plaintiff-Appellant.

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-Appellees.

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

**APPELLANT KIM DAVIS' EMERGENCY MOTION FOR IMMEDIATE
CONSIDERATION AND MOTION FOR INJUNCTION PENDING
APPEAL**

(continued on next page)

(continued from prior page)

A.C. Donahue
DONAHUE LAW GROUP, P.S.C.
P.O. Box 659
Somerset, Kentucky 42502
(606) 677-2741
ACDonahue@DonahueLawGroup.com

Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Jonathan D. Christman
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
(800) 671-1776
court@lc.org / hmihet@lc.org /
rgannam@lc.org / jchristman@lc.org

Counsel for Appellant Kim Davis

Pursuant to Fed. R. App. P. 8(a)(2) and 27, and 6th Cir. Rule 27(c), Appellant Kim Davis (“Davis”) hereby moves this Court, on an emergency basis, for an injunction pending appeal of the district court’s August 25, 2015 order effectively denying Davis’ request for a preliminary injunction against Third-Party Defendants-Appellees Steven L. Beshear, in his official capacity as Governor of Kentucky (“Gov. Beshear”) and Wayne Onkst, State Librarian and Commissioner, Kentucky Department for Libraries and Archives (KDLA) (“Commr. Onkst”) (D.E. 66)¹.

INTRODUCTION

In an assault upon her individual liberty and dignity, **Davis currently sits incarcerated in the Carter County Detention Center (Kentucky)**, in significant part, because Gov. Beshear has refused to take elementary steps to accommodate Davis’ undisputed, sincerely-held religious beliefs about marriage. Her incarceration could have been avoided if the district court had acted on her request for preliminary injunctive relief against Gov. Beshear and Commr. Onkst. In fact, but for Gov. Beshear’s edict directing Kentucky County Clerks, including Davis, to authorize same-sex “marriage” (“SSM”) licenses bearing their own name, Plaintiffs’ underlying lawsuit would be against him, not her. From the outset of this case, Davis has proposed numerous simple options that resolve the parties’ conflict, and protect Davis’ sincerely-held religious beliefs. These less restrictive solutions are readily

¹ Citations to the district court record are indicated by this format: “D.E. ___.”

available, and easily accomplished by Gov. Beshear and the KDLA, the state agency responsible for designing the revised marriage form at issue in this litigation.

Over against the decision to redefine marriage in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the Supreme Court neither overwrote the First Amendment or other critical religious liberty protections for persons nor compelled States to accomplish recognition of SSM by invading and trampling upon the consciences of individual county clerks. Thus, coercing an individual county clerk (Davis) to authorize and personally approve SSM in violation of her religious liberty and speech rights, as Gov. Beshear has done, is wrong. That is especially true here, where Davis took office when Kentucky marriage law perfectly aligned with her deep religious convictions, and there are multiple alternatives available by which individuals can obtain SSM licenses without voiding Davis' conscience and stripping Davis of her liberties. As a prisoner of her conscience, Davis continues to request a simple accommodation and exemption from Gov. Beshear, who is overseeing Kentucky marriage policy. Granting an injunction pending appeal of the district court's August 25, 2015 order will ensure that Davis' individual rights are not continually, and forever, irreversibly harmed by Gov. Beshear's own inactions.

STATEMENT OF FACTS

On June 26, 2015, only moments after the Supreme Court decided *Obergefell*, and without permitting any legislative response or action, Gov. Beshear issued a

directive ordering all Kentucky county clerks to personally authorize SSM licenses (the “SSM Mandate”). This SSM Mandate triggered Plaintiffs’ lawsuit after a particular county clerk (Davis) in a particular county (Rowan County) refused to authorize and approve their Kentucky marriage licenses based upon her religious conscience objection to SSM. *See* D.E. 1. Plaintiffs filed a motion to enjoin Davis from “refusing to issue marriage licenses to any future marriage license applications submitted by the Named Plaintiffs.” D.E. 2-2.

Facing potential liability on Plaintiffs’ claims due to the SSM Mandate, Davis filed a verified third-party Complaint against Gov. Beshear, the issuer of the SSM Mandate, and Commr. Onkst, who oversees the KDLA, *see* D.E. 34, Verified Third-Party Complaint (“VTC”) (attached hereto as Exhibit “B”), and a motion to enjoin enforcement of Gov. Beshear’s SSM Mandate and obtain an exemption “from having to authorize the issuance of Kentucky marriage licenses.” D.E. 39-7.

Importantly, the grounds on which Davis sought preliminary injunctive relief against Gov. Beshear are necessarily intertwined with the grounds on which she opposed Plaintiffs’ request for preliminary injunction against her, *see* D.E. 29, 39-1, but even the district court acknowledged the “further develop[ment]” of Davis’ religious conscience exemption request against Gov. Beshear. D.E. 43 at 19, n. 9. But rather than considering Davis’ and Plaintiffs’ requests together and allowing Davis to develop a further evidentiary record on her own request for individual

exemption and accommodation from Gov. Beshear's SSM Mandate, the district court granted Plaintiffs their injunctive relief against Davis on August 12, 2015 (hereinafter, the "Injunction"). The Injunction enjoins Davis "from applying her 'no marriage licenses' policy to future marriage license requests submitted by Plaintiffs," without fully considering Davis' own injunctive relief. *Id.* at 28.²

On August 25, 2015, the district court entered an order, on its own motion, staying any consideration of Davis' motion for preliminary injunction against Gov. Beshear "pending review" of the Injunction by this Court, thereby effectively denying Davis' request for preliminary injunctive relief. D.E. 58. That "practical denial" of injunctive relief is immediately appealable under 28 U.S.C. § 1292(a).³ On August 31, 2015, Davis filed a notice of appeal of the district court's August 25, 2015 order to this Court. D.E. 66 (attached hereto as Exhibit "A").

On September 2, 2015, Davis filed a motion for injunction pending appeal in the district court. D.E. 70. The district court refused to decide that motion before sending Davis to jail for contempt. D.E. 75. In fact, the district court stated it would **not** rule on the motion for injunction pending appeal before September 11, 2015, more than one week after incarcerating Davis. *See* Hr'g Tr. (9/3/2015), at 29:2-30:17

² Facing an order enjoining her to authorize marriage licenses in derogation of her religious conscience, Davis filed a notice of appeal of the Injunction to this Court, D.E. 44, docketed as Case No. 15-5880.

³ *Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 567 (6th Cir. 1985); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981).

(excerpts attached hereto as Exhibit “C”). Due to the emergency circumstances presented by Davis’ incarceration and the substantial loss of personal liberties she faces every day without an injunction pending appeal, time is of the essence and a ruling from the district court is therefore “impracticable” under Fed. R. App. P. 8(a)(2)(A)(i). Accordingly, Davis now seeks that relief in this Court.

ARGUMENT

In granting an injunction pending appeal, this Court “engages in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction.” *Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 572 (6th Cir. 2002). The relevant factors are: “(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction.” *Id.* at 573.

I. Davis Has A Strong Likelihood Of Succeeding On The Merits Of Her Claims Against Gov. Beshear And Commr. Onkst.

Davis’ inability to personally authorize and approve SSM licenses bearing her imprimatur against her religious conscience is protected by the United States and Kentucky Constitutions, along with the Kentucky RFRA. *See* U.S. CONST., amend I; KY. CONST., §§ 1, 5; KY. REV. STAT. § 446.350. The Kentucky RFRA, which was enacted by an overwhelming majority in 2013 over Gov. Beshear’s veto, protects a

person's⁴ "right to act *or refuse to act* in a manner motivated by a sincerely held religious belief," and this religious freedom right "may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest." KY. REV. STAT. §446.350 (emphasis added); *see also Prater v. City of Burnside, Ky.*, 289 F.3d 417, 427 (6th Cir. 2002) (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.").⁵ The statute thus protects not only a person's beliefs but also a person's actions (or non-actions) based thereon, and subjugates to the strictest scrutiny any governmental action (be it legislative or regulatory scheme, or executive action) infringing religiously-motivated actions (or non-actions).⁶

⁴ The Kentucky RFRA protects the religious freedom of all "persons" in Kentucky. While "person" is not defined in the Kentucky RFRA, it is defined in Kentucky's general definitions statute to include "individuals," and **publicly elected officials are not excluded**. *See* KY. REV. STAT. § 446.010(33).

⁵ Because Davis' free exercise claim is combined with a free speech claim, her free exercise claim is also subject to strict scrutiny. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990).

⁶ 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,

The Kentucky RFRA is similar to (but goes even further in protecting religious liberties than) the federal Religious Freedom Restoration Act (“Federal RFRA”), 42 U.S.C. § 2000bb-1(a) & (b), which was enacted to “provide very broad protection for religious liberty,” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2760 (2014), and imposes “the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Thus, Gov. Beshear’s SSM Mandate—the state action here—must survive strict scrutiny.

A. Davis’ Religious Beliefs Are Substantially Burdened By Gov. Beshear’s SSM Mandate.

Supreme Court and Sixth Circuit precedent, along with post-*Obergefell* pending legislation in Kentucky and the undisputed evidentiary record on this appeal, support the conclusion that Davis’ religious beliefs are substantially burdened by Gov. Beshear’s SSM Mandate forcing her to authorize SSM licenses.

Davis indisputably holds sincere religious beliefs about marriage and her inability to issue SSM licenses is motivated by those convictions. VTC, ¶¶ 17-18. In her belief, marriage is the sacred union of a man and a woman, only. VTC, ¶ 17. The prescribed marriage license form required under Gov. Beshear’s SSM Mandate provides no opportunity for the religious objector (Davis) not to participate in endorsement and approval of SSM. The specific form uses the word “marriage” at

Kentucky marriage law cannot be interpreted without also considering and applying the Kentucky RFRA.

six different places, requires Davis' name to be on the license at two different places (at least) for any license issued in Rowan County, Kentucky, and also requires her to authorize the "join[ing] together in the state of matrimony" a proposed union that she cannot approve. VTC, ¶ 11, and Exs. A, D. But Davis cannot authorize a union of two persons which, in her sincerely-held belief, is not marriage. VTC, ¶¶ 17-18.

Gov. Beshear has flatly rejected Davis' request for religious exemption. In his view, Davis must either comply with his SSM Mandate, or resign from office. VTC, ¶¶ 28, 36. On Gov. Beshear's own initiative, the KDLA prepared a revised marriage form in response to his SSM Mandate, which was then distributed to county clerks for them to begin using immediately, without exception, per Gov. Beshear's directive. VTC, ¶¶ 25-26, and Ex. C. This form provided no opportunity for county clerks with religious objections to SSM *not* to participate in endorsement and approval of SSM. On this new form constructed by Gov. Beshear and the KDLA, the "authorization" to marry (even on licenses she does not personally sign) still unmistakably comes from Davis herself. VTC, ¶ 12, and Ex. C. 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. VTC, ¶¶ 11, 26, and Ex. C.⁷ However, as noted above, to authorize a SSM license bearing her imprimatur

⁷ 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

sears her conscience because she would be endorsing the proposed union and calling something “marriage” that is not marriage according to her beliefs. VTC, ¶¶ 17-18.

Thus, Gov. Beshear is imposing a direct, severe, and substantial pressure on Davis by the SSM Mandate when he forces 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).⁸ 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. 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

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). 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. VTC, ¶¶ 7, 10.

⁸ See also *Holt v. Hobbs*, 135 S.Ct. 853, 862 (2015) (government places a “substantial burden” on religious exercise if policy requires person “to ‘engage in conduct that seriously violates [her] religious beliefs’ or ‘contravene that policy and . . . face serious disciplinary action’”); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) (government places a “substantial burden” on religious belief when it “‘place[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,’ or ‘effectively bar[s] his sincere faith-based conduct’”).

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.”⁹ Loss of job. Civil liability. Sanctions. Private lawsuits in federal court. Contempt motions. Imprisonment. Davis is being threatened with (and experiencing) all of the above by choosing to adhere to her sincere religious beliefs. Certainly, religious liberty protections, including the Kentucky RFRA, are designed to protect a person from such substantial burdens upon their religious freedom.¹⁰

It is not for the district court or, respectfully, even 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)). Judges “are not arbiters of scriptural interpretation,” and they are not tasked with determining who “more correctly”

⁹ 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; Steve Beshear and Jack Conway: On refusing marriage licenses, WTVQ.COM, June 30, 2015.

¹⁰ A proposed Kentucky legislative act on what constitutes a substantial burden in the marriage license context post-*Obergefell* agrees with Davis. This bill would expressly protect clerks like Davis from having to issue SSM licenses, amending the Kentucky RFRA to state expressly that “[i]ssuing or recording” a SSM license can be considered a “substantial burden for which there is no compelling government interest.” *See* An Act Relating to Marriage, Ky. House Bill 101 (2016 Reg. Sess.).

perceives their faith's commands. *Thomas*, 450 U.S. at 716. Moreover, it is not for any 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). There is no dispute that the requisite "honest conviction" exists here, and she is facing severe consequences of adhering to that conviction.

Importantly, Davis is not claiming a substantial burden on her religious freedom if *someone else authorizes* and approves a SSM license *devoid of her name*. 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 name and imprimatur on the license. 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).

B. The SSM Mandate Will Not Survive Strict Scrutiny Review.

To overcome this substantial burden on Davis’ religious freedom, Gov. Beshear must demonstrate by clear and convincing evidence that he has (1) a compelling governmental interest in infringing Davis’ religious conscience through the SSM Mandate and (2) 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 means is available for the Government to achieve its goals, the Government **must** use it.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 815 (2000) (emphasis added).

There is no compelling governmental interest in forcing Davis to violate her religious freedom. 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). Here, Gov. Beshear cannot show that granting a specific exemption to Davis will endanger the Commonwealth of Kentucky, let alone Kentucky’s marriage licensing scheme.

Gov. Beshear’s claim that “like minded” exemptions require denial of Davis’ exemption does not withstand scrutiny under precedent from the Supreme Court and Sixth Circuit.¹¹ Rather, the Kentucky RFRA, like its federal counterpart, “operates by mandating consideration, under the compelling interest test, of exceptions to ‘rule[s] of general applicability,’” and provides ““a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”” *See O Centro*, 546 U.S. at 436 (citing 42 U.S.C. §§ 2000bb–1(a), 2000bb(a)(5)). 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

¹¹ *See Haight*, 763 F.3d at 562 (rejecting prison warden’s “like-minded” contention that if he grants one prisoner an accommodation he will then “have to grant others, having set a precedent with the ‘first’ accommodation”); *see also O Centro*, 546 U.S. at 436 (finding under RFRA that this kind of argument represents “the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions”); *Holt*, 135 S.Ct. at 866.

reason. That is not this case. As noted above, Davis has served in the 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. VTC, ¶ 31. Plainly, this is not a situation where accommodating Davis' religious objections will swallow the rule, because licenses are readily available in more than 130 marriage licensing locations spread across Kentucky. VTC, ¶¶ 9, 27.

Additionally, the SSM Mandate decreed by Gov. Beshear was neither expressly nor impliedly compelled by *Obergefell*, and leaves no room for individual county clerks' religious freedoms. Contrary to Gov. Beshear's suggestion that Davis must apply his SSM Mandate, Davis does not shed her personal convictions and individual rights at the entry door of public service. It is well-established law that a person's constitutional and statutory rights and liberties are not immediately eviscerated the moment they take their oath of office.¹²

But even if the requisite showing of a compelling government interest showing can be made, the infringement upon Davis must still satisfy the

¹² “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). 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).

“exceptionally demanding” least-restrictive-means standard. *See Hobby Lobby*, 134 S.Ct. at 2780. Gov. Beshear cannot demonstrate that he “lacks other means” of issuing marriage licenses to same-sex couples “without imposing a substantial burden” on Davis’ “exercise of religion.” *Id.* Not only that, the least-restrictive-means test may “require the Government to expend additional funds” to accommodate “religious beliefs.” *Id.* at 2781. 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, even if the “desired goal” is providing Plaintiffs with Kentucky marriage licenses **in Rowan County**¹³, *see id.*, **numerous less restrictive means** are available to accomplish it without substantially burdening Davis’ religious freedom and conscience, such as:

- Providing an opt-out or exemption to the Kentucky marriage licensing scheme (as exists for the Kentucky fish and wildlife licensing scheme), KY. REV. STAT. § 150.195, and as other states, such as North Carolina, have enacted, *see, e.g.*, N.C. GEN. STAT. § 51-5.5 (permitting recusal of officials from “issuing” lawful marriage licenses “based upon any sincerely held religious objection”);
- Deputizing a neighboring county clerk (or some other person) to issue Kentucky marriage licenses in Rowan County;
- Modifying the prescribed Kentucky marriage license form to remove the multiple references to Davis’ name and office, and thus to remove

¹³ Nothing in *Obergefell* suggests that individuals have a fundamental right to receive a marriage license from a particular clerk, in a particular county.

the personal nature of the authorization that Davis must provide on the current form¹⁴;

- Deeming Davis “absent” for purposes of issuing SSM licenses, based upon her moral and religious inability to issue them, and allowing those licenses to be issued by the chief executive of Rowan County, as specifically authorized by Kentucky law, KY. REV. STAT. § 402.240;
- Distributing Kentucky marriage licenses at the state-level through an online or other state-wide licensing scheme, such as through the Department of Vital Statistics; or
- Legislatively addressing Kentucky’s entire marriage licensing scheme post-*Obergefell*, whether immediately by calling a special legislative session or in three months in the next regular legislative session. Leading Kentucky legislators from both parties uniformly agree that Davis’ religious beliefs should be protected, and both gubernatorial candidates in Kentucky have indicated an intent to address this issue in a way that supports county clerks’ individual rights.

All of the foregoing options, and others, are available to avoid substantially burdening Davis’ personal religious freedom in the wake of the redefinition of marriage in *Obergefell*. But Gov. Beshear appears not to have evaluated, let alone even considered, any of the foregoing less restrictive alternatives before issuing his SSM Mandate. However, government’s failure to actually “consider[] and reject[] alternatives more tailored” to its alleged interests “cannot withstand” the least restrictive means test. *Haight*, 763 F.3d at 564. Here, the ink was barely dry from the *Obergefell* decision when Gov. Beshear issued his SSM Mandate to all Kentucky County Clerks on June 26, 2015—the same day the *Obergefell* decision was

¹⁴ The Kentucky County Clerks Association have made a similar proposal. In fact, Atty. Gen. Conway has publicly stated that he is “fine” with that proposal.

announced. VTC, ¶¶ 24-25, and Ex. C. Yet the entire Kentucky marriage licensing scheme is founded upon the millennia-old natural definition of marriage. Gov. Beshear could have (and still can) take steps that both recognize SSM and protect county clerks' religious conscience rights in response to the redefinition of marriage in *Obergefell*. In fact, Gov. Beshear recently stated in a press briefing that "I'm sure if they [the Kentucky legislature] want to make a change that they'll be able to come up with something . . . There's a number of different ways, I'm sure, if they want to change the way marriage licenses are issued, then they can do so."¹⁵ This recent statement not only debunks the myth that Kentucky has a compelling government interest in forcing Davis to violate her conscience, but also, it serves as an admission that there are a number of available options for addressing marriage licenses in a way that alleviates the religious liberty concerns of Davis.

C. The SSM Mandate Violates Davis' Free Speech Rights.

The mandate commanding Davis **to affix her name** to SSM licenses also violates her fundamental free speech rights protected by the United States and Kentucky Constitutions. The Free Speech Clause protects "both what to say and what *not* to say," *Riley v. Nat'l Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (emphasis added), and states may not "force[] an individual, as part of [their]

¹⁵ Gov. Beshear can issue an executive order on marriage licensing which can be ratified by the Kentucky legislature. *See* Ky. Rev. Stat. § 12.028.

daily life” to “be an instrument for fostering public adherence to an ideological point of view [he/she] finds unacceptable.” *Wooley v. Maynard*, 430 U.S. 705, 715 (1976).

The Kentucky marriage form uses the word “marriage” at six different places on the form (not including the reference to “join[ing] together in the state of matrimony”), twice designates Davis as the person authorizing the marriage license, and requires the stamping of her name (“KIM DAVIS”) and endorsement on the proposed union. *See* KY. REV. STAT. § 402.100(3); *see also* VTC, 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 (Davis) to authorize a particular relationship between persons against her religious convictions. As it currently stands, Davis’ name and approval cannot be divorced from a SSM license. Thus, pursuant to Gov. Beshear’s SSM Mandate, Davis is being told to validate and affirm on the prescribed KDLA form a view that violates her religious beliefs. *See Wooley*, 430 U.S. at 707. For Gov. Beshear to state that Kentucky is issuing and recognizing SSM licenses is one thing. But commanding Davis to be an “instrument” for a message, view, and proposed union that she finds “morally objectionable” is altogether different, and violates not only her conscience, but also her free speech rights. *See id.*

II. The Remaining Factors Favor Granting An Injunction Pending Appeal.

Davis faces significant, irrevocable, and irreversible harm if she is forced to authorize and approve even one SSM license with her name on it, against her religious conscience, for “it is well-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)). If such rights “are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.” *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

There is no adequate compensatory or other corrective relief that will be available at a later date (including a permanent injunction in her favor) if Davis is forced to violate her religious conscience now. It is comparable to forcing the religious objecting nurse to perform an abortion, the religious objecting company or non-profit to pay for abortions or abortion-related insurance coverage, the religious objecting non-combatant to fire on an enemy soldier, or the religious objecting state official to participate in or attend the execution of a convicted prisoner. Ordering Davis to authorize and approve a SSM license is *the act* that violates her conscience and substantially burdens her religious freedom – an act which cannot be undone. Importantly, Davis is not claiming a substantial burden on her religious freedom if *someone else authorizes* and approves a SSM license *devoid of her name*.

Finally, the public has no interest in coercing 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].”).

RELIEF REQUESTED

Appellant Kim Davis respectfully requests that this Court: (1) grant immediate consideration and (2) enter an injunction enjoining enforcement of Gov. Beshear’s SSM Mandate against her and preliminarily exempting her from authorizing marriage licenses pending final resolution of the appeal in this Court.

DATED: September 7, 2015

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

Respectfully submitted:

/s/ Jonathan D. Christman
Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Jonathan D. Christman
Liberty Counsel, P.O. Box 540774
Orlando, Florida 32854
(800) 671-1776
court@lc.org / hmihet@lc.org /
rgannam@lc.org / jchristman@lc.org
Counsel for Appellant Kim Davis

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2015, I caused the foregoing document to be filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service of the filed document upon the following:

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

Daniel J. Canon
Laura E. Landenwich
Leonard Joe Dunman
Clay Daniel Walton Adams, PLC
462 S. Fourth Street, Suite 101
Louisville, KY 40202
dan@justiceky.com
laura@justiceky.com
joe@justiceky.com

Daniel Mach
Heather L. Weaver
ACLU Foundation
915 15th Street, NW, Suite 6th Floor
Washington, DC 20005
dmach@aclu.org
hweaver@aclu.org

James D. Esseks
Ria Tabacco Mar
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
jesseks@aclu.org
rmar@aclu.org

Counsel for Plaintiffs-Appellees

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

Counsel for Third Party Defendants-Appellees

/s/ Jonathan D. Christman

Jonathan D. Christman

Liberty Counsel, P.O. Box 540774

Orlando, Florida 32854

(800) 671-1776; jchristman@lc.org