NO. A15-_____

In the
Supreme Court of the United States

Kim Davis,

Applicant,

v.

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

Respondents.

Emergency Application to Stay Preliminary Injunction Pending Appeal

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION

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

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

BACKGROUND AND PROCEDURAL HISTORY

I. Kentucky Governor Beshear's SSM Mandate.

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

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

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

Following Gov. Beshear's decree, county clerks across Kentucky began issuing SSM licenses on the new forms, with almost no exception. VC, ¶ 27. According to Gov. Beshear, "government officials in Kentucky . . . must recognize same-sex marriages as valid and allow them to take place," and "[s]ame-sex couples are now being married in Kentucky and such marriages from other states are now being recognized under Kentucky law." *Id.* In these same pronouncements, Gov. Beshear stated that the "overwhelming majority of county clerks" are "iss[uing] marriage licenses regardless of gender" and only "two or three" county clerks (of 120) were "refusing" to issue such licenses due to their "personal beliefs" and "personal feelings." *Id*. In subsequent pronouncements, Gov. Beshear has maintained that county clerks must issue marriage licenses, including SSM licenses, despite their "own personal beliefs." VC, ¶ 28. For Gov. Beshear, the only options available to county clerks who oppose SSM on religious conscience grounds are (1) issue the licenses against their "personal convictions," or (2) resign. VC, ¶¶ 28, 36.[6]

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. The district court's Injunction.

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

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

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

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

V. Prior stay requests.

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The SSM Mandate cannot survive strict scrutiny analysis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: August 28, 2015

Respectfully submitted:

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CERTIFICATE OF SERVICE

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

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