No. 15-5978

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-Appellees,

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

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APPELLANT KIM DAVIS' EMERGENCY MOTION FOR IMMEDIATE CONSIDERATION AND MOTION TO STAY DISTRICT COURT'S SEPTEMBER 3, 2015 CONTEMPT ORDER PENDING APPEAL

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Pursuant to Fed. R. App. P. 8(a)(2) and 27, Appellant Kim Davis ("Davis") hereby moves this Court, on an emergency basis, for a stay pending appeal of the district court's September 3, 2015 contempt order.

INTRODUCTION

In an extraordinary and unprecedented act in American legal history, the district court has imprisoned a person for, of all things, adhering to her undisputed religious beliefs about marriage as the union of one man and one woman. Such unparalleled action unravels central tenets of American law, eviscerates fundamental due process in the federal court system, commandeers an office run by a Kentucky elected official, and compels immediate action by this Court to reign in an overreaching district court. Believing that marriage is the union of a man and a woman, only, and acting in accordance with those beliefs, **are not crimes** in Kentucky, or elsewhere. To prosecute Davis as if she is a criminal is wrong, and, to do so without guaranteeing her the rights of one so accused, is still worse. Remarkably, the district court placed Davis in federal custody so that it could conduct an inquisition of her employees under threat of similar punishment and **force the issuance of marriage licenses that the district court acknowledged may not even be valid without Davis' authorization**.[1] Certainly, the contempt power is

[1] *See, e.g.*, R.78, Contempt Hr'g, PgID 1724 (licenses "may not be valid under Kentucky law"), 1728 ("I'm not saying it is [lawful] or it isn't [lawful]. I haven't

not a wand to be waved so hastily and carelessly by district courts. There is too much at stake in imprisonment for the district court to be uncertain of the lawfulness of its own order. Indeed, the district court's questions about the lawfulness of marriage licenses without Davis' authorization calls into further question the validity of the underlying injunction, and compels a stay of any purported contempt based thereon.[2]

The district court's contempt order incarcerating Davis like a criminal is reckless and oppressive, eviscerated her constitutional due process rights, twisted and contorted Kentucky law, invaded the prerogative of a Kentucky public office holder, and ignored Davis' individual religious rights under the federal Religious Freedom Restoration Act. This Court should stay the contempt order, and any enforcement of it, pending this appeal on the merits.

STATEMENT OF FACTS

Nearly thirty years ago, Davis began working as a deputy clerk in the Rowan County clerk's office in Kentucky, and she took office as the county clerk in January 2015. *See* R.34, Third Party Compl., PgID 746-47. At that time, Kentucky marriage law perfectly aligned with her undisputed sincerely-held religious beliefs. *Id.*, PgID 752. Now, within a mere two months of the Supreme Court's *Obergefell v. Hodges*,

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looked into the point. I'm trying to get compliance with my order."), 1731-32 (attached hereto as Exhibit "B").

[2] Davis will address the merits of the underlying injunction in her opening brief on the merits, to be filed with this Court at the appropriate time.

135 S.Ct. 2584 (2015), decision—which unanimously recognized that First Amendment rights still exist for persons opposed to same-sex "marriage" ("SSM")—Davis is **incarcerated** for exercising her undisputed religious beliefs.

On September 1, 2015, Plaintiffs filed a motion to hold Davis in contempt for violating the district court's August 12, 2015 order (hereinafter, the "Injunction") by failing to authorize a marriage license to one Plaintiff couple. R.67, Pls.' Contempt Mot., PgID 1477-87. Within minutes of that filing, the district court scheduled a contempt hearing to occur two days later, ordered Davis and all of her deputy clerks to be present at the hearing, and limited Davis to filing a 5-page opposition by close of business the next day, which Davis did. R.69, Sept. 1, 2015 Order, PgID 1496-97; *see also* R.72, Resp. to Pls.' Contempt Mot., PgID 1540-46.

On September 3, 2015, the district court held a contempt proceeding in Ashland, Kentucky. There, the district court decided that Davis should be a prisoner of her conscience and incarcerated, even though: (1) Davis has a pending motion to dismiss Plaintiffs' Complaint in its entirety that has been stayed without decision by the district court, *see* R.32, Mot. to Dismiss, PgID 663-700; R.58, Aug. 25, 2015 Order, PgID 1289; (2) Davis' motion to dismiss includes dismissal of the official capacity claims against her as duplicative of the claims against Rowan County[3]; (3)

[3] For that proposition, Davis cited multiple Sixth Circuit cases, including a decision authored by the district court. R.32, Mot. to Dismiss, PgID 682-83 (citing

the underlying injunction against Davis in this matter was based, in substantial part, upon an evidentiary hearing that occurred over counsel's objection without Davis even being served with the Plaintiffs' Complaint—which the district court deemed "roadblocks to getting to the merits," *see* R.21, July 13 Hr'g Tr., PgID 117-19; (4) before the Injunction, Davis filed a third-party complaint alleging that any liability she may incur on Plaintiffs' claims was the responsibility of Gov. Beshear, R.34, Third Party Compl., PgID 745-774, and also filed her own motion for preliminary injunction that that would exempt her from issuing marriage licenses and/or accommodate her religious conscience, R.39, Mot. for Prelim. Inj., PgID 824-1130, but the district court refused to consider and thus effectively denied this motion, R.58, Aug. 25, 2015 Order, PgID 1289; (5) before the contempt proceeding, Davis filed a motion for injunction pending appeal seeking similar relief as the prior-referenced injunction, but the district court has not decided it and expressly stated this motion will not be decided any earlier than eight days after Davis' imprisonment began, *see* Mot. for Inj. Pending Appeal, PgID 1498-1533; (6) Davis has two pending appeals in this Court on the merits of her claims and defenses in the underlying action, docketed at Case Nos. 15-5880, 15-5961; (7) only two business days had passed since the temporary stay of the Injunction (which was limited

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Kraemer v. Luttrell, 189 Fed. App'x 361, 366 (6th Cir. 2006); *Horn v. City of Covington*, 2015 WL 4042154, at *3 (E.D. Ky. July 1, 2015) (Bunning, J.)).

exclusively to the named Plaintiffs) had expired; (8) apparently only one Plaintiff couple (the only persons to whom the Injunction applied) tried to obtain a marriage license and was denied after August 31, 2015, *see* R.78, Contempt Hr'g, Miller Direct, PgID 1638-39; (9) Plaintiffs' contempt motion requested the imposition of "financial penalties sufficiently serious and increasingly onerous" to compel compliance **but specifically excluded any request for compliance "through incarceration,"** R.67, Pls.' Contempt Mot., PgID 1483 (emphasis added); (10) Davis was imprisoned before she was given any opportunity for subsequent compliance, *see* R.78, Contempt Hr'g, PgID 1661-62; and, (11) leading Kentucky legislators and both gubernatorial candidates uniformly agree that individual rights of Kentucky County Clerks, such as Davis, need to be protected, accommodated or, at the very least, respected, *see*, *e.g.*, R.73, Stivers Amicus, PgID 1547-1555.

Notwithstanding the foregoing, after taking testimony and argument, the district court read from the bench a decision presumably written before the September 3, 2015 hearing even began, and committed Davis to federal custody. *See* R.78, Contempt Hr'g, PgID 1651-1662. The district court subsequently entered a minute entry order granting Plaintiffs' contempt motion and ordering that "Davis shall be remanded to the custody of the United States Marshal pending compliance of the Court's Order of August 12, 2015, or until such time as the Court vacates the contempt Order." *See* R.75, Contempt Order, PgID 1559. The district court denied

oral motions to stay the contempt order and the enforcement of any sanctions pending appeal or, in the alternative, to suspend any sentence until the Kentucky legislature convenes to address Kentucky marriage law and licensing scheme in light of the Supreme Court's decision in *Obergefell*. *See* R.75, Contempt Order, PgID 1559. On September 8, 2015, Davis filed a notice of appeal of the contempt order. *See* R.83, Notice of Appeal, PgID 1791-97 (attached hereto as Exhibit "A"). Davis now moves this Court for an order staying the contempt order pending appeal.

ARGUMENT

The contempt power is uniquely "liable to abuse," *Bloom v. Illinois*, 391 U.S. 194, 202 (1968) (citation omitted), for contempt proceedings "leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994). Alleged contempt 'often strikes at the most vulnerable and human qualities of a judge's temperament,' and its fusion of legislative, executive, and judicial powers 'summons forth . . . the prospect of 'the most tyrannical licentiousness." *Bagwell*, 512 U.S. at 831 (citation omitted).

Appeals of contempt orders are reviewed for an abuse of discretion[4], which is defined as a "'definite and firm conviction that the trial court committed a clear error

[4] Criminal contempt orders are immediately appealable. *Marese v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985). Moreover, although not usually immediately reviewable, this Court permits immediate appeals from civil contempt orders arising from challenged preliminary injunction orders already on appeal.

of judgment.'" *Elec. Workers Pension Trust Fund of Local Union #58 v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003) (citation omitted). "The magnitude of the sanctions imposed should be assessed by weighing the harm caused by noncompliance, 'and the probable effectiveness of any suggested sanction in bringing about the result desired.'" *Glover v. Johnson*, 199 F.3d 310, 312 (6th Cir. 1999) (citing *U.S. v. United Mine Workers*, 330 U.S. 258, 304 (1947)). The exercise of contempt is a "delicate one," and "care is needed to avoid arbitrary or oppressive conclusions." *Cooke v. U.S.*, 267 U.S. 517, 539 (1925). The Supreme Court has cautioned that "'[t]he least possible power adequate to the end proposed' should be used in contempt cases." *U.S. v. Wilson*, 421 U.S. 309, 319 (1975) (citation omitted).

In deciding this motion to stay pending appeal, this Court balances the same factors that are traditionally considered in evaluating a motion for preliminary injunction: (1) the likelihood that Davis will prevail on the merits of the appeal of the contempt order; (2) the likelihood that Davis will be irreparably harmed absent a stay; (3) the prospect that Plaintiffs will be harmed if this Court grants a stay of the

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Blaylock v. Cheker Oil Co., 547 F.2d 962, 965-66 (6th Cir. 1976); *see also Cousins v. Bray*, 137 Fed. App'x 755, 756 (6th Cir. 2005); *U.S. v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1398 (6th Cir. 1991); *Peabody Coal Co. v. Local Unions Nos. 1734, 1508 & 1548, United Mine Workers of Am.*, 484 F.2d 78, 82-85 (6th Cir. 1973).

contempt order; and (4) the public interest in granting the stay. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).[5]

I. Davis Has A Strong Likelihood Of Success On The Merits Of Her Appeal Of The Contempt Order.

A. The Contempt Order Eviscerated Davis' Constitutional Due Process Rights.

The district court's fast-tracked September 3, 2015 contempt proceeding and preconceived contempt order violated Davis' constitutional due process rights. The Supreme Court has held that "[s]ummary adjudication of indirect contempts [occurring out of court] is prohibited, and criminal contempt sanctions are entitled to full criminal process." *Bagwell*, 512 U.S. at 833 (internal citation omitted). Because criminal contempt is a crime, "'criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings,'" including, *inter alia*, a right to a jury trial, proof beyond a reasonable doubt, proof of criminal intent. *Id.* at 826 (internal citations omitted). Even civil contempt proceedings must also include "procedural safeguards afforded by the due process clause." *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 589 (6th Cir. 1987); *see also Consolidation Coal Co. v. Local Union No. 1784*, 514 F.2d

[5] To support a motion for stay pending appeal, the moving party "need not always establish a high probability of success on the merits." *Mich. Coal.*, 945 F.2d at 153. Instead, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [Davis] will suffer absent the stay. Simply stated, more of one excuses less of the other." *Id.* (internal citation omitted).

763, 765 (6th Cir. 1975) ("Like any civil litigant, a civil contemnor [sic] is . . . clearly entitled to those due process rights applicable to every judicial proceeding, of proper notice and an impartial hearing with an opportunity to present a defense.").

Determining whether a contempt is civil or criminal depends on the "character and purpose" of the sanction imposed by a court. *Bagwell*, 512 U.S. at 827 (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)). A contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, **to vindicate the authority of the court**." *Gompers*, 221 U.S. at 441 (emphasis added). Imprisonment is "punitive and criminal if it is imposed retrospectively for a 'completed act of disobedience,' such that the contemnor cannot avoid or abbreviate the confinement through later compliance." *Bagwell*, 512 U.S. at 828-29 (citation omitted)).

Even though the district court rejected notions that it was holding a criminal proceeding, R.78, Contempt Hr'g, PgID 1596, 1610, 1654, 1656, 1715, at the very outset of the contempt hearing, and throughout, the district court repeatedly cited the criminal contempt section (18 U.S.C. § 401) as the authority for its contempt proceeding, *id.*, PgID 1568, 1595, 1657-58. The district court had pre-arranged for each of the six deputy clerks of the Rowan County clerk's office to be appointed a federal public defender under the federal **Criminal** Justice Act. *See* R.78, Contempt Hr'g, PgID 1667, 1673. Furthermore, the district court stated that "This case, at its

core, is about individuals following the Court's order." *Id.*, PgID 1667; *see also id.*, PgID 1723 ("[A]t its very core, the hearing is about compliance with the Court's orders."). But it was an emphasis on "compliance" without also determining that the licenses being ordered without Davis' authorization were even lawful. This calls into question statements that the district court intended only to issue a remedial order and coerce compliance (as in a civil contempt proceeding), and instead suggests that the district court sought to vindicate its own authority and punish Davis for past actions. Thus, Davis is entitled to heightened due process, which she did not receive.

In the case at bar, even under lesser due process standards applicable to civil contempt proceedings, the district court still failed to provide requisite constitutional protections. Fundamentally, the district court provided **no notice** that it would significantly expand and alter its Injunction at the hearing, the merits of which were already on appeal, and then confine Davis to prison based upon this expanded and substantially altered preliminary injunction.[6] This act by the district court—taken without any notice and over Davis' objections, *see* R.78, Contempt Hr'g, PgID 1571, 1574-75—had the effect of placing Davis in confinement without keys for she had no opportunity to comply with the expanded Injunction.

[6] Davis will also be filing a motion to stay the order expanding the Injunction, which the district court had no jurisdiction to enter.

B. The District Court Invaded The Province And Affairs Of An Office Run By A Publicly Elected Official.

In an act rejecting established principles of federalism and comity, the district court usurped the role of a publicly elected official in the Commonwealth of Kentucky and invaded the province, discretion, and affairs of that official's office. In devising remedies, federal courts are to "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). Indeed, it is incumbent upon federal district courts that sanctions imposed against state officials should be the "least intrusive" remedy available. *See Kendrick v. Bland*, 740 F.2d 432, 438 (6th Cir. 1984); *Spallone v. U.S.*, 493 U.S. 265, 276 (1990).

Ignoring appropriate considerations of federalism, the district court ordered the immediate and ongoing incarceration of Davis, Contempt Order, PgID 1559, a far greater intrusion than any fine. *See Hutto v. Finney*, 437 U.S. 678, 691 (1978) (noting that fines are less intrusive than imprisonment). Then, without permitting any time to allow this most powerful sanction to have any effect on Davis' compliance with the Injunction, the district court hastily proceeded to prosecute her six deputy clerks (all non-parties) through a one-by-one inquisition on whether each of them will implement the Injunction after they just watched Davis be remanded to U.S. marshal custody. *See* R.78, Contempt Hr'g, PgID 1667-1736.

By imprisoning Davis, the district court effectively removed the public officeholder from her office, even though (1) she is a publicly elected official who can be removed from her office term only through a state-based impeachment process, *see* KY. CONST. §§ 66-68; (2) marriage licensing constituted a quantitatively small part of the Rowan County clerk's office pre-*Obergefell* business—approximately one-tenth of one percent of the county clerk's office receipts, or a mere $4,500 out of a budget exceeding $4 million—and, if handled by only one person, would only take about 1 hour of their week, *see* R.26, July 20 Hr'g Tr., Davis Direct, PgID 242-44; (3) the Rowan County clerk's office is closed more than 100 days per year (holidays and most weekends) so no marriage licenses can even be issued during more than one-third of each calendar year; and (4) leading Kentucky legislators from both parties in both houses 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. In fact, Kentucky Senate President Robert Stivers filed an amicus brief asking the district court to specifically withhold contempt because "the provisions governing the issuance of marriage licenses in Kentucky have been, for the most part, judicially repealed by *Obergefell* and [Davis] cannot be reasonably expected to determine her duties until such time as either the Governor by Executive Order or the General Assembly by legislation provides guidance and clarification."

See R.73, Stivers Amicus, PgID 1548. Such prudence and caution fell on deaf ears to a district court interested primarily in vindicating its own authority, but they support a stay of the contempt order, to avoid even further irreversible harm to Davis.

The district court's annexation of the Rowan County clerk's office is only further baffling in light of its abject failure to determine whether the marriage licenses it ordered to be issued over Davis' objection and without her authorization were even valid under Kentucky law. *See, e.g.*, R.78, Contempt Hr'g, PgID 1724, 1728, 1731-32. The district court was incessantly committed to enforcing its order to punish Davis personally—only to relinquish any responsibility regarding whether such licenses are valid. Any contempt sanction—and especially imprisonment—should not be handed down so flippantly, and the fact that it was done to a duly elected public servant in Kentucky further evidences the improper nature of the intrusive ruling.

C. The District Court Discarded Davis' RFRA Rights Without Conducting Strict Scrutiny Review.

The district court found Davis in contempt and sent her to prison in violation of the federal Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1 *et seq*., which was enacted in 1993 to "provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2760 (2014).[7] RFRA

[7] RFRA provides that "Government [defined to include any "branch" or "official" of the United States] shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the

may be asserted "as a claim or a defense in a judicial proceeding," 42 U.S.C. § 2000bb-1(c), including contempt proceedings. *See U.S. v. Ali*, 682 F.3d 705, 709-11 (8th Cir. 2012) (vacating contempt sanction by federal judge for failure to evaluate whether court order violated RFRA).

It is not for the district court or any court to question the reasonableness or scriptural accuracy of Davis' beliefs about marriage, to which she testified at the contempt hearing. *Hobby Lobby*, 134 S.Ct. at 2779 (citing *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981)); *see also* R.78, Contempt Hr'g, Davis Direct, PgID 1613-14. Indeed, judges should not 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 Davis possesses the requisite "honest conviction." *See* R.78, Contempt Hr'g, PgID 1648-50.

At the contempt hearing, Davis was threatened by contempt sanctions, and she continues to face severe consequences of adhering to that conviction—**ongoing imprisonment**. Thus, by imprisoning Davis, the district court imposed direct

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government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a) & (b), (2).

pressure and a substantial burden on Davis by forcing her "to choose between following the precepts of her religion and forfeiting [her personal freedom], on the one hand, and abandoning one of the precepts of her religion in order to [keep her freedom], on the other hand." *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also Hobby Lobby*, 134 S.Ct. at 2778 (substantial burden analysis turns on whether the government action "imposes a substantial burden on the ability of the objecting parties" to act "in accordance with *their religious beliefs*," not whether those beliefs are reasonable). This Hobson's choice placed (and still exerts) undue pressure on Davis to choose between her livelihood and her religion, her freedom from imprisonment and her sincere convictions. This substantial burden is only magnified here, where this choice is posed before Davis' individual claims are finally decided. As such, the district court's conclusion that no substantial burden is presented here is wrong and out-of-step with Supreme Court and Sixth Circuit precedent.[8]

Moreover, the compelling government interest inquiry, which the district court omitted in its contempt order, "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

[8] *See also Holt v. Hobbs*, 135 S.Ct. 853, 862 (2015) (government places a "substantial burden" on religious exercise if government action 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).

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). Accordingly, the district court's proverbial "slippery slope" suggestion that "like minded" exemptions require denial of Davis' exemption does not withstand scrutiny under precedent from the Supreme Court and Sixth Circuit. *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"). RFRA "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)). With Davis' reasonable accommodation request still

pending, and not decided, there is no compelling government interest to punish Davis for contempt, and imprison her conscience.

But even if the requisite showing of a compelling government interest can be made, the infringement upon Davis' religious liberty must still satisfy the "exceptionally demanding" least-restrictive-means standard. *See Hobby Lobby*, 134 S.Ct. at 2780. The district court did not consider, let alone demonstrate, that it "lack[ed] other means" of enforcement "without imposing a substantial burden" on Davis' "exercise of religion," by incarcerating her. *Id.* Not only that, the least-restrictive-means test may "require the Government to expend additional funds" to accommodate "religious beliefs." *Id.* at 2781. Notwithstanding, the district court refused to consider the imposition of fines. Because RFRA applies to contempt proceedings in federal court, and the district court failed to conduct a strict scrutiny analysis, Davis is likely to prevail on the merits of this defense to contempt.

II. Davis Is Facing Irreparable Daily Harm And Substantial Loss Of Freedoms Without A Stay Of The Contempt Order Pending Appeal.

There is no question that Davis faces ongoing irreparable harm. **She remains in prison**, suffering a substantial loss of personal liberty and dignity because she refused to act based upon her sincerely-held religious beliefs about marriage. In weighing the harm that will occur as a result of granting or denying a stay, this Court generally considers three factors: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Mich.*

Coal., 945 F.2d at 154. The "key word" in this consideration is "irreparable," and the harm must be "both certain and immediate, rather than speculative or theoretical." *Id*. This test is easily satisfied in this case, where Davis sits in jail and continues to suffer daily substantial injury to her personal liberty and dignity.

III. Plaintiffs Will Not Suffer Irreparable Harm If This Court Stays The Contempt Order Pending Appeal.

In stark contrast to the grave injustice facing Davis as she remains incarcerated waiting for relief from and an impartial audience in this Court on her appeals, Plaintiffs will suffer no harm if the contempt order is stayed pending appeal. Media reports following the September 3, 2015 contempt proceeding have indicated that at least one (if not more) of the four Plaintiff couples in this case (Plaintiffs Miller and Roberts) have now secured marriage licenses, albeit without the authorization and approval of Kim Davis, the Rowan County Clerk.[9]

Any purported harm to the remaining Plaintiff couples pales in comparison to the incalculable harm currently being suffered by Davis in prison. For whatever reason the remaining Plaintiff couples did not obtain the unauthorized marriage licenses on Friday, September 3, 2015, it calls into question their prior representations through counsel in multiple prior filings that they were purportedly facing substantial and irreparable harm as a result of their inability to obtain a

[9] The district court ordered Plaintiffs to provide a status report on any marriage licenses issued to them by today. *See* R.80, Sept. 7, 2015 Order, PgID 1781.

marriage license in Rowan County. If they are refusing to obtain an unauthorized marriage license, they are admitting that Davis must authorize the licenses to ensure their validity. But if they are refusing to obtain an unauthorized marriage license because Friday, September 3, 2015 was an inconvenient day for them[10], such minor inconveniences cannot hold Davis hostage in jail, for she faces irreversible and substantial harm every day for choosing to adhere to her honest and undisputed convictions about marriage as the union between one man and one woman, only.

IV. The Public Interest Favors Granting A Stay.

The public has no interest in keeping Davis locked up as if she is a criminal for exercising her religious liberty. Holding persons hostage and robbing them of their personal freedoms for following their undisputed conscience is a disgrace upon the courts; for, rather than upholding the enforcement mechanism for courts, the district court's extremist and preconceived action has, in fact, undermined the authority vested in courts. The district court usurped the role and power of an elected office (the Rowan County Clerk), shredded principles of federalism, and penalized Davis for abiding by her conscience while the merits of her religious liberty appeals are considered. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d

[10] Further, at least one Plaintiff couple may not even be interested in obtaining a marriage license. *See* R.46, Pls.' Resp. to Mot. to Stay Prelim. Inj., PgID 1235. In fact, Plaintiffs Burke and Napier have never supplied verified proof that they are qualified to obtain a marriage license, a prerequisite to injunctive relief. *See* R.29, Resp. to Pls.' Mot. for Prelim. Inj., PgID 359.

1474, 1490 (6th Cir. 1995) (finding that the public has a "significant interest" in the "protection of First Amendment liberties"); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (noting that if First Amendment "'rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.'") (citation omitted). The district court's power trip sets a dangerous precedent and institutes a severe chilling effect upon persons looking to assert First Amendment and RFRA-based claims and defenses to SSM-related mandates in the future, without a merits-decision from any appellate court.

RELIEF REQUESTED

Appellant Kim Davis respectfully requests that this Court: (1) grant immediate consideration and (2) enter an order staying the district court's September 3, 2015 contempt order pending final resolution of the appeal in this Court.

DATED: September 8, 2015

Respectfully submitted:

/s/ Jonathan D. Christman

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I hereby certify that on this 8th 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:

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