

No. 15-5880

**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-Appellant.

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

**APPELLANT KIM DAVIS' EMERGENCY MOTION FOR IMMEDIATE
CONSIDERATION AND MOTION TO STAY DISTRICT COURT'S
SEPTEMBER 3, 2015 INJUNCTION 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 injunction order. (R.74.)

INTRODUCTION

This appeal began with the district court’s entry of its August 12, 2015 preliminary injunction ordering Davis to issue marriage licenses to the named Plaintiffs. (R.43 (the “Injunction”).) Davis immediately filed a notice of appeal of the Injunction, bringing it within this Court’s jurisdiction, and depriving the district court of jurisdiction to alter or expand the Injunction’s scope.¹ (R.44 (Injunction and notice of appeal attached hereto as Exhibit A).) But the district court did just that, without fair notice or hearing, by entering a new injunction order that materially expanded the original Injunction while it was already on appeal to this Court. (R.74 (the “Expanded Injunction”).) The district court’s Expanded Injunction lays waste to well-established principles of jurisdiction and due process in the federal court system while an appeal is pending. And, under color of the Expanded Injunction, the district court has coopted a supervisory role over the operations of the Rowan County, Kentucky Clerk’s Office.

¹ Davis presented substantial arguments against the merits of the Injunction in its motion to stay the Injunction pending appeal filed herein. (Doc. 15-1.) Davis will fully address the merits of the Injunction in her opening brief on the merits, to be filed with this Court at the appropriate time.

Davis timely appealed the Expanded Injunction. (R.82 (Expanded Injunction and notice of appeal attached hereto as Exhibit B).) Quite apart from Davis' religious liberty interests involved in her appeal of the original Injunction on the merits, her appeal of the Expanded Injunction, and this request for stay, involve only the issue of the district court's acting without jurisdiction. The district court's far-reaching expansion of the original Injunction must be reversed, and should be stayed pending this Court's decision on the merits.

STATEMENT OF FACTS

The Injunction

On July 2, 2015, less than one week after the Supreme Court decided *Obergefell v. Hodges* and the Kentucky Governor issued a directive ordering all county clerks to personally authorize the issuance of Kentucky marriage licenses to same-sex couples, Plaintiffs filed this lawsuit demanding that Davis authorize and approve their Kentucky marriage licenses, despite widespread availability of licenses and Davis' undisputed religious conscience objection to same-sex "marriage."² (R.1, Compl.)

² Expressly to avoid disparate treatment of any couple, Davis discontinued the issuance of all marriage licenses after *Obergefell*. (R.26, Prelim. Inj. Hr'g Tr. July 20, 2015, PgID 259:6-16.)

Plaintiffs filed the action on behalf of themselves and a putative class consisting of “all present and future individuals who, though legally eligible to marry in Kentucky, will be denied a marriage license pursuant to the Defendant’s policy.” (R.1, Compl., PgID 9.) “**Named Plaintiffs**” also moved for a preliminary injunction to bar Davis “from enforcing the challenged policy of refusing to issue marriage licenses **against them**” (R.2, Pls.’ Mot. Prelim. Inj., PgID 34 (emphasis added)), and submitted a proposed Order enjoining Davis “from enforcing the policy of refusing to issue marriage licenses to any future marriage license applications **submitted by the Named Plaintiffs**” (R.2-2, Proposed Prelim. Inj. Order (emphasis added)).

The district court hastily scheduled a full evidentiary hearing on the injunction motion, to occur on July 13, 2015—just eleven days after the motion was filed. (R.5, Order.) Plaintiffs did not, however, obtain service of process on Davis prior to the hearing. (R.21, Prelim. Inj. Hr’g Tr. July 13, 2015, PgID 105:15-107:7.) Thus, Davis’ counsel appeared specially and objected to the district court’s proceeding with the hearing, without having obtained jurisdiction over Davis through service of process. (R.21, Prelim. Inj. Hr’g Tr. July 13, 2015, PgID 102:19-24, 105:15-106:2, 117:1-10.) Deeming the fundamental jurisdictional defects mere “Road blocks to getting to the merits,” the district court overruled counsel’s objection to proceeding without Davis, took evidence, and heard argument on Plaintiffs’ preliminary injunction motion. (R.21, Prelim. Inj. Hr’g Tr. July 13, 2015, PgID 117:1-119:7.)

After allowing all of Plaintiffs' evidence and hearing argument, the district court "continued in progress" the July 13, 2015 hearing (R.21, Prelim. Inj. Hr'g Tr. July 13, 2015, PgID 207:2-4), and concluded the hearing on July 20, 2015 (R.26, Prelim. Inj. Hr'g Tr. July 20, 2015). Plaintiffs' evidence at both hearings was limited exclusively to the named Plaintiffs' claims.³

On August 12, 2015, the district court granted Plaintiffs' motion for preliminary injunction by its Memorandum Opinion and Order (R.43 (the "Injunction").) Exactly as requested by Plaintiffs in their motion and proposed order (R.2, 2-2), the Injunction enjoins Davis "from applying her 'no marriage licenses' policy to future marriage license requests **submitted by Plaintiffs.**" (R.43, Inj., PgID 1173 (emphasis added).) Thus, there was complete agreement between what Plaintiffs requested and what the district court ordered.⁴

³ Because the relief sought by Plaintiffs in their preliminary injunction motion was personal to them, no evidence was presented on their Complaint's class allegations or request for class-wide relief. Plaintiffs did not file their motion for class certification until August 2, 2015.

⁴ In contrast to the expedited treatment of Plaintiffs' preliminary injunction motion against Davis, the district court brushed away any urgency regarding Davis' own motion for preliminary injunction against Third-Party Defendant Governor Beshear (R.39), and effectively denied the motion by ordering a stay (on the court's own motion) of all proceedings on Davis' motion pending this Court's decision on the merits of Davis' appeal of the Injunction against her. (R.58, Order Aug. 25, 2015, PgID 1289.) Davis appealed to this Court the district court's effectual denial of her preliminary injunction motion (R.66, Notice of Appeal), which appeal is docketed at Case No. 15-5961.

Plaintiffs' Request For Class Certification

On August 2, 2015, Plaintiffs filed a motion for class certification. (R.31, Pls.' Mot. Class Cert.). On August 11, 2015, Davis filed a motion for extension of time to respond to Plaintiffs' class certification motion, requesting that the Court set a response date for ninety (90) days after the district court ruled on all of the motions pending before the district court at that time.⁵ (R.42, Mot. Ext. Time Respond.)

Plaintiffs filed no written opposition to this motion in the time allotted under the Local Rules. On August 24, 2015, Davis filed a reply brief after Plaintiffs' time to oppose expired, showing that "Plaintiffs' failure to file a timely written opposition constitutes a waiver of any opposition to Davis' motion for extension of time." (R.56, Reply Br. Supp. Mot. Ext. Time Respond, PgID 1289.)

On August 25, 2015, the district court granted Davis' motion for extension of time. (R.57, Virtual Order Aug. 25, 2015 ("Plaintiffs having filed no opposition to the MOTION, IT IS ORDERED that Defendant Davis' response to said motion is due 30 days after the Sixth Circuit Court of Appeals renders its decision on the appeal of the Court's granting of Plaintiffs' motion for a preliminary injunction.").)

⁵ These pending motions included Plaintiffs' motion for preliminary injunction (R.2), Davis' motion to dismiss Plaintiffs' Complaint (R.32), and Davis' motion for preliminary injunction (R.39).

The effect of this order was to stay all proceedings on Plaintiffs' class certification motion until this Court decides the appeal of the Injunction on the merits.

Plaintiffs' Motion to "Clarify" the Injunction and the "Hearing"

Despite the unambiguous agreement between what Plaintiffs requested in their motion for preliminary injunction and what the district court granted in the Injunction, Plaintiffs manufactured a disingenuous motion to "clarify" the Injunction to encompass a class of persons not covered by the Injunction. (R.68, Pls.' Mot. "Clarify" Prelim. Inj.) Specifically, Plaintiffs moved:

for an order to clarify or, in the alternative, to modify the preliminary injunction to state unambiguously that the preliminary injunction applies **not only to future marriage license requests submitted by the four named Plaintiff couples in this action, but also to requests submitted by other individuals who are legally eligible to marry in Kentucky.**

(R.68, Pls.' Mot. "Clarify" Prelim. Inj., PgID 1488 (emphasis added).) Thus, rather than a motion to "clarify," Plaintiffs actually sought to convert the Injunction's relief, which was limited and personal to them by their own request, into a **class-wide** preliminary injunction even though (1) they had never previously requested a class-wide injunction (R.2-2, Proposed Prelim. Inj. Order), (2) they presented no actual evidence regarding the purported "other members of the putative class" (R.68, Pls.' Mot. "Clarify" Prelim. Inj., PgID 1489); and (3) their actual motion for class certification was stayed. (R.57, Virtual Order Aug. 25, 2015.)

Plaintiffs filed their motion to “clarify” the Injunction on September 1, 2015, **three weeks after** the district court entered its Injunction. (R.68, Pls.’ Mot. “Clarify” Prelim. Inj., PgID 1488-91.) Moreover, Plaintiffs’ motion to “clarify” was filed on the heels of, or “contemporaneously with” (Plaintiffs’ words), their motion to hold Davis in contempt of court for violating the Injunction by failing to authorize a marriage license for one Plaintiff couple. (R.67, Pls.’ Contempt Mot.) Within minutes of Plaintiffs’ filing the contempt motion, 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 five-page opposition by close of business the next day (which Davis did).⁶ (R.69, Order Sept. 1, 2015, PgID 1496; *see also* R.72, Contempt Resp., PgID 1540-46.)

Approximately forty-eight hours later, on September 3, 2015, the district court commenced the hearing it had exclusively noticed for Plaintiffs’ contempt motion. (R.69, Order Sept. 1, 2015, PgID 1496 (“IT IS ORDERED that this matter be, and is, hereby set for a hearing on Plaintiff’s Motion to Hold Defendant Kim Davis in Contempt of Court DE[67] on Thursday, September 3, 2015 at 11:00 a.m. in Ashland, Kentucky.”); R.78, Contempt Hr’g (the hearing transcript, attached hereto

⁶ In her response brief opposing Plaintiffs’ contempt motion, Davis specifically stated that she opposed Plaintiffs’ thinly-veiled motion to “clarify” the Injunction, and intended to file a written opposition in accordance with the Local Rules (21 days after service). (R.72, Contempt Resp., PgID 1542.)

as Exhibit C).) Before taking up the contempt motion, however, and without any advance notice to Davis, the district court called up Plaintiffs' motion to "clarify" the Injunction. (R.78, Contempt Hr'g, PgID 1570:21-1571:22, 1572:19-1573:19.) Davis' counsel objected to proceeding on the motion to "clarify" due to lack of fair notice, and due to the district court's lack of jurisdiction to expand the Injunction because it was already on appeal. (R.78, Contempt Hr'g, PgID 1573:20-1580:19.)

The district court acknowledged that the motion to "clarify" was not noticed for hearing. (R.78, Contempt Hr'g, PgID 1571:18-20 ("The case wasn't noticed for that hearing.").) The district court also acknowledged that the so-called "clarification" sought by Plaintiffs was, in fact, to add relief to the Injunction which was not sought by Plaintiffs in their motion for preliminary injunction. (R.78, Contempt Hr'g, PgID 1578:20-25 ("**I recognize they did not request it in the original motion.**" (emphasis added)).) Nonetheless, over Davis' objection, and without taking any evidence to support this class-wide relief, the district court granted the expansion of the Injunction. (R.78, Contempt Hr'g, PgID 1580:3-15.) After expanding the Injunction, the court immediately passed the issue to this Court. (R.78, Contempt Hr'g, PgID 1580-81 ("We'll just include that as part of the appeal. . . . And the Sixth Circuit can certainly decide if that's appropriate.").)

Having expanded the Injunction, the district court then proceeded with hearing the only motion the court noticed for hearing, Plaintiffs' contempt motion.

(R.78, Contempt Hr’g, PgID 1581:18-19 (“Let me now turn to the actual merits of the matter that’s before the Court.”).) The court ordered Davis to jail as a contempt sanction for Davis’ refusal to issue a marriage license, in violation of her conscience, to one Plaintiff couple.⁷ (R.78, Contempt Hr’g, PgID 1659:22-1661:25.) The condition for Davis’ release would be her compliance with the Expanded Injunction, not the original Injunction (R.78, Contempt Hr’g, PgID 1661:18-1662:16.) The district court then appointed criminal defense counsel for each of Davis’ deputy clerks—all of whom had been summoned in advance to the hearing—and interrogated each deputy clerk as to whether each of them would issue marriage licenses without Davis’ authorization. (R.78, Contempt Hr’g, PgID 1667:19-

⁷ The district court memorialized this most severe of contempt sanctions against Davis by a mere “minutes” order (R.75 (the “Contempt Order”)); no formal written order has been entered. (R.78, Contempt Hr’g, PgID 1651:21-24 (“I haven’t decided if I’m going to enter a written order or not. I probably will enter some sort of written order following up the Court’s decision.”).) Davis separately appealed the Contempt Order to this Court (R. 83, Contempt Order Notice of Appeal), which appeal has been docketed as Case No. 15-5978. Davis also filed therein, on September 8, 2015, an emergency motion to stay the Contempt Order pending appeal. As shown in Davis’ emergency motion to stay the Contempt Order, and as will be more fully developed in Davis’ brief on the merits of that order at the appropriate time, the district court failed to provide Davis requisite due process in the contempt proceedings. Among other fundamental errors, the district court provided no notice that it would significantly expand and alter its Injunction at the contempt hearing, while the Injunction was already on appeal, and then confine Davis to prison based upon the *ultra vires* and expanded preliminary injunction.

1730:6.) All but one (Davis' son) were coerced by the threat of contempt sanctions to answer "yes."⁸ (*Id.*)

On September 8, 2015, the sixth day of Davis' incarceration, Plaintiffs filed a status report, showing the district court that the Plaintiffs had received marriage licenses from the deputy clerks.⁹ (R.84, Status Report.) Following the status report, the district court ordered Davis released, stating in its order the court was "satisfied that the Rowan County Clerk's Office is fulfilling its obligation to issue marriage licenses" under the Injunction. (R.89 (the "Release Order"), PgID 1827-28.) The Release Order commands, however, "Davis **shall not interfere** in any way, directly

⁸ One deputy clerk, Kristie Plank, has the primary responsibility within the Rowan County Clerk's Office for servicing automobile dealers, a critical position within the office which does not include the issuance of marriage licenses. (R.78, Contempt Hr'g, PgID 1698:25-1705:5.) She expressed concern with assenting to the issuance of marriage licenses to the extent it would interfere with her legitimate existing responsibilities. (*Id.*) Another deputy clerk, Melissa Thompson, tearfully agreed to issue licenses under the court's order, but was clearly under duress, stating, "I don't really want to, but I will comply with the law. I'm a preacher's daughter, and this is the hardest thing I've ever done in my life None of us hate anybody. It's just hard." (R.78, Contempt Hr'g, 1692:17-1697:8.)

⁹ The status report showed that three of the four Plaintiff couples had received marriage licenses. (R.84, Status Report, PgID 1798.) Plaintiffs had previously shown the court, however, that as of August 13, 2015, Plaintiffs Burke and Napier were "making new wedding arrangements." (R.46, Pls.' Resp. Mot. Stay Prelim. Inj., PgID 1235.) This fourth couple has never testified in this case or otherwise supplied verified proof that they are qualified to obtain a marriage license, or that they have not received one, both prerequisites to injunctive relief. (R.29, Resp. Pls.' Mot. Prelim. Inj., PgID 359.) Moreover, based on the status report, the district court found, "Plaintiffs have obtained marriage licenses" (R.89, Release Order, PgID 1827.)

or indirectly, with the efforts of her deputy clerks to issue marriage licenses,” on pain of new sanctions for contempt. (R.89, Release Order, PgID 1828.) The order also requires the deputy clerks, through their appointed criminal defense counsel, to file status reports with the district court every fourteen days. (R.89, Release Order, PgID 1828.)

Emergency Motion to Stay

Davis now moves this Court for an order staying the September 3, 2015 Expanded Injunction pending appeal. Seeking a ruling from the district court on a stay request is “impracticable” under Fed. R. App. P. 8(a)(2)(A)(i), due to the extraordinary doggedness of the district court to expand the Injunction, without jurisdiction or fair notice and opportunity to be heard, and the district court’s haste to pass the matter to this Court for determination—“the Sixth Circuit can certainly decide if that’s appropriate” (R.78, Contempt Hr’g, PgID 1580-81). Accordingly, Davis now seeks a stay from this Court.

ARGUMENT

In deciding a motion for stay pending appeal, this Court balances the same four factors that are traditionally considered in evaluating a motion for preliminary injunction: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants

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

I. Davis has a sufficient likelihood of success on the merits of her appeal to warrant an immediate stay of the Expanded Injunction.

The district court had no jurisdiction to enter the Expanded Injunction. Thus, it is a nullity. There is no doubt as to Davis’ likelihood of success in obtaining reversal of the Expanded Injunction on the merits.

“[A] district court may not alter or enlarge the scope of its judgment pending appeal” *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987). “The standard for jurisdiction after the filing of the notice of appeal . . . is that a district court may enforce its judgment **but not expand upon it.**” *Am. Town Ctr. v. Hall 83 Associates*, 912 F.2d 104, 110-11 (6th Cir. 1990) (emphasis added); *cf. United States v. State of Mich.*, Nos. 94-2391, 95-1258, 1995 WL 469430, *18 (6th Cir. 1995) (“[S]ince the district court’s . . . orders were already on appeal, the district court lacked jurisdiction . . . **to reduce** the number of mental health beds which it had required defendants to provide in its . . . orders.” (emphasis added)).

Any amendment of an order without jurisdiction is a “nullity.” *Workman v. Tate*, 958 F.2d 164, 168 (6th Cir. 1992) (“Since the district court was without jurisdiction to amend its order . . . the Amended Order . . . is a nullity.”); *United States v. Holloway*, 740 F.2d 1373, 1382 (6th Cir. 1984) (“In the present case, the

district court's order is ‘null and void since that court was without jurisdiction . . . after the appeal had been taken.’”).

Plaintiffs’ Motion for Preliminary Injunction expressly, and only, sought to enjoin Davis to issue licenses to the “Named Plaintiffs.” The resulting Injunction enjoined Davis to issue licenses, expressly and only, to the “Plaintiffs.” The scope of the Injunction could not be clearer. There is no “confusion as to the Order’s scope,” as Plaintiffs facetiously allege in their thinly-veiled motion to “clarify.” (R.68, Pls.’ Mot. “Clarify” Prelim. Inj., PgID 1489.) Thus, expanding the class of persons entitled to licenses pursuant to the Injunction—to include anyone in the world who wants a marriage license in Rowan County—can in no way be described as a clarification. The expansion of the class is an expansion of the Injunction, which the district court had no jurisdiction to do. Thus, the Expanded Injunction is a nullity, and unquestionably is due to be reversed on the merits.

II. Davis is substantially more harmed than the named Plaintiffs absent a stay of the Expanded Injunction pending appeal.

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.” *Michigan 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.*

Given the strength of Davis’ position on the merits, her required showing on irreparable injury is reduced. “The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the moving party] will suffer absent the stay. Simply stated, more of one excuses less of the other.” *Mich. Coal.*, 945 F.2d at 153 (internal citation omitted). In other words, “a stay may be granted with either a high probability of success and some injury or vice versa.” *State of Ohio v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987). Nonetheless, Davis’s harm from the denial of a stay will be both real and irreparable.

Pursuant to the Release Order, the district court is now supervising the operations and personnel of the Rowan County Clerk’s Office, including Davis as the Clerk, and her deputy clerks. (R.89, Release Order, PgID 1828.) Far from being straightforward, however, the Release Order’s command that “Davis shall not interfere in any way, directly or indirectly, with the efforts of her deputy clerks to issue marriage licenses” substantially and ambiguously interferes with Davis’ ability to manage the legitimate affairs of her office which are unrelated to her individual position on marriage licensing.

For example, Davis’ management judgment to assign a particular deputy clerk or clerks exclusively to non-marriage-licensing duties—based on the needs of the

office¹⁰—could be deemed “interfere[nce] . . . in any way, directly or indirectly, with the efforts of her deputy clerks to issue marriage licenses” (R.89, Release Order, PgID 1828.) Furthermore, the Release Order’s directive conflicts with Davis’ own legal duty, as an employer, to consider and grant as appropriate any deputy clerk’s request for religious accommodation relating to marriage licenses¹¹ under laws like Title VII and the Kentucky RFRA. These ambiguous burdens on Davis’ management of the affairs of her office all carry the specter of new (and presumably, more severe) contempt sanctions, and the threat is indefinite because the Expanded Injunction opens the Injunction’s relief to everyone (in the world) who may desire a Kentucky marriage license issued in Rowan County. The harm from having to operate under this constant threat is irreparable, for even success on the merits of Davis’ appeals cannot restore the months of constant strain imposed on Davis, her office, and her employees by the district court’s intrusive supervision.

The foregoing burdens and threats of contempt sanctions are more than hypothetical; **Davis has already spent six days in jail** that Plaintiffs could obtain the relief ordered by the original Injunction (while its merits are still on appeal). But, such burdens and threats are unnecessary and improper. As an order of enforcement, the Release Order serves no purpose with respect to the original Injunction because

¹⁰ See *supra*, n. 8.

¹¹ See *supra*, n. 8.

only the Plaintiffs were granted relief in the original Injunction, and the district court is already “satisfied” that Plaintiffs have received their ordered relief. (R.89, Release Order, PgID 1827-28.) Thus, the district court only has an enforcement interest under the Expanded Injunction which, as shown herein, is null and void as exceeding the district court’s jurisdiction. Only a stay of the Expanded Injunction pending Davis’ appeal will avoid this onerous and improper exercise of enforcement power.

In stark contrast to the threat of sanctions hanging over Davis each day she enters her office while waiting for relief from an impartial audience in this Court on her appeals, Plaintiffs will suffer no harm if the Expanded Injunction is stayed pending appeal. Plaintiffs have already received the benefits of the Injunction, to the “satisfaction” of the district court. (R.89, Release Order, PgID 1827-28.) Plaintiffs received no additional relief from the Expanded Injunction; staying its enforcement pending Davis’s appeal cannot harm them.

III. The public interest favors granting a stay.

No public interest is served by upholding an order exceeding a district court’s jurisdiction. To the contrary, the public is only served by the disregard of any such order, which is “null and void.” *See Holloway*, 740 F.2d at 1382.

Furthermore, the federal court supervision over Davis’ office imposed by the Release Order, in enforcement of the Expanded Injunction, violates established principles of federalism and comity, usurping the role of a publicly elected official

in the Commonwealth of Kentucky and invading the province, discretion, and affairs of her office. It is also contrary to contempt principles, for in devising enforcement 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). The public is not served by the violation of such principles for any length of time.

As shown herein, from the commencement of this case, Plaintiffs have received procedural preferences, notwithstanding even fundamental jurisdictional defects. Davis has received the opposite, culminating in incarceration for conscience, and the threat of more severe sanctions under an invalid order which the district court had no jurisdiction to enter. For all of the foregoing reasons, Davis requests the following:

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 Expanded Injunction pending final resolution of the appeal in this Court.

DATED: September 10, 2015

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th 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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EXHIBIT A

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

APRIL MILLER, ET AL.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	0:15-CV-00044-DLB
	:	
KIM DAVIS, ET AL.,	:	DISTRICT JUDGE
	:	DAVID L. BUNNING
Defendants.	:	

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

NOTICE OF APPEAL

Notice is hereby given that Defendant/Third-Party Plaintiff Kim Davis (“Davis”), by and through her undersigned counsel, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the August 12, 2015 Memorandum Opinion and Order granting Plaintiffs’ Motion for Preliminary Injunction (D.E. 43).

A copy of the August 12, 2015 Memorandum Opinion and Order from which Davis appeals is attached hereto as Exhibit “A.”

Davis has paid by ECF online payment in the amount of \$505.00 for the notice of appeal fee specified by the United States District Court for the Eastern District of Kentucky's Fee Schedule.

The parties to the order appealed from and the names and addresses of their attorneys are as follows:

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

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Third-Party Defendants: Steven L. Beshear, Governor of Kentucky and Wayne Onkst, Commissioner of Kentucky Department for Libraries and Archives

Attorneys for Gov. Beshear and Commr. Onkst:

No appearances have yet been filed.

DATED: August 12, 2015

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CERTIFICATE OF SERVICE

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

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

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EXHIBIT A

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

CIVIL ACTION NO. 15-44-DLB

APRIL MILLER, et al.

PLAINTIFFS

vs.

MEMORANDUM OPINION AND ORDER

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

DEFENDANTS

I. Introduction

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

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

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

II. Factual and Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Standard of Review

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

- (1) whether the movant has demonstrated a strong likelihood of success on the merits;
- (2) whether the movant would suffer irreparable harm;

- (3) whether an injunction would cause substantial harm to others; and
- (4) whether the public interest would be served by the issuance of such an injunction.

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

IV. Analysis

A. Defendant Kim Davis in her official capacity

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

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

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

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

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

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

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

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

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

B. Plaintiffs’ Motion for Preliminary Injunction

1. Plaintiffs’ likelihood of success on the merits

a. The fundamental right to marry

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

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

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

Although the Constitution makes no mention of the right to marry, the U.S. Supreme Court has identified it as a fundamental interest subject to Fourteenth Amendment protection. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia’s anti-miscegenation statutes as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment). After all, “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”

Id. This right applies with equal force to different-sex and same-sex couples. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may not be deprived of that right and that liberty.”).

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

obtain a court order before marrying).

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

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

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

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

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

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

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

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

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

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

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

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

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

b. The absence of a compelling state interest

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

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

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

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

2. Potential for irreparable harm to Plaintiffs

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

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

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

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

3. Potential for substantial harm to Kim Davis

a. The right to free exercise of religion

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

protection of society.” *Id.*

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

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

motivation.” *Id.* at 542.

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

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

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

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

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

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

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

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

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

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

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

legitimate government purpose.

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

b. The right to free speech

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. The prohibition on religious tests

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

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

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

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

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

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

d. The Kentucky Religious Freedom Act

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

Kentucky Constitution § 5 gives content to this guarantee:

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

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

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

Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

Ky. Rev. Stat. Ann. § 446.350.

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

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

4. Public interest

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

V. Conclusion

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

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

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

This 12th day of August, 2015.



Signed By:

David L. Bunning

DB

United States District Judge

EXHIBIT B

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

APRIL MILLER, ET AL.,

Plaintiffs,

V.

KIM DAVIS, ET AL.,

Defendants.

KIM DAVIS,

Third-Party Plaintiff,

V.

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

Third-Party Defendants.

NOTICE OF APPEAL

Notice is hereby given that Defendant/Third-Party Plaintiff Kim Davis (“Davis”), by and through her undersigned counsel, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the September 3, 2015 Order granting Plaintiffs’ Motion Pursuant to Rule 62(c) to Clarify the Preliminary Injunction Pending Appeal (D.E. 74). A copy of the September 3, 2015 Order from which Davis appeals is attached hereto as Exhibit “A.”

Davis has paid by ECF online payment in the amount of \$505.00 for the notice of appeal fee specified by the United States District Court for the Eastern District of Kentucky's Fee Schedule.

The parties to the order appealed from and the names and addresses of their attorneys are as follows:

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

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CERTIFICATE OF SERVICE

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

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DATED: September 8, 2015

/s/ Jonathan D. Christman
Jonathan D. Christman
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Kim Davis*

EXHIBIT A

Eastern District of Kentucky

FILED

SEP - 3 2015

AT ASHLAND
ROBERT R. CARR
CLERK U.S. DISTRICT COURT

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

APRIL MILLER, *et al.*,

Plaintiffs,

Case No. 0:15-cv-00044-DLB

v.

KIM DAVIS, *et al.*,

Defendants.

ORDER

Motion having been made, and the Court being sufficiently advised,

IT IS HEREBY ORDERED:

Plaintiffs' Motion Pursuant to Rule 62(c) to Clarify the Preliminary Injunction

Pending Appeal is hereby **GRANTED**.

IT IS FURTHER ORDERED:

The Court's August 12, 2015 preliminary injunction order, RE #43, is hereby modified to state that Defendant Kim Davis, in her official capacity as Rowan County Clerk, is hereby preliminarily enjoined from applying her "no marriage licenses" policy to future marriage license requests submitted by Plaintiffs or by other individuals who are legally eligible to marry in Kentucky.

9/3/15



Signed By:

David L. Bunning

United States District Judge

EXHIBIT C

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

APRIL MILLER, et al.,

Plaintiffs,

VS.

KIM DAVIS, et al.,

Defendants.

Docket No. 0:15-CV-44
At Ashland, Kentucky
Thursday, September 3, 2015
10:59 a.m.

TRANSCRIPT OF HEARING ON MOTION BEFORE
DAVID L. BUNNING
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

1 [IN OPEN COURT]

2 THE COURT: All right. Madam Clerk, if you
3 would call the matter set for 11, please.

4 DEPUTY CLERK: Yes, Your Honor. Ashland
5 Civil Action 15-44, April Miller, et al. versus Kim
6 Davis, et al., this being called for a hearing on
7 motion.

8 THE COURT: Okay. Why don't we go ahead and
9 start with entries of appearance first, and then we'll
10 proceed to address the matters pending. Counsel.

11 MR. SHARP: Your Honor, William Sharp on
12 behalf of the plaintiffs.

13 MR. CANON: Judge, Dan Canon here for the
14 plaintiffs.

15 MS. LANDENWICH: Laura Landenwich for the
16 plaintiffs.

17 THE COURT: All right.

18 MR. GANNAM: Good morning, Your Honor. Roger
19 Gannam, Liberty Counsel, for defendant, Kim Davis.

20 MR. CHRISTMAN: Good morning, Your Honor.
21 Jon Christman, also for Ms Davis.

22 MR. DONAHUE: Good morning, Your Honor. A.
23 C. Donahue on behalf of the defendant, Kim Davis.

24 MS. PARSONS: Claire --

25 THE COURT: Go ahead.

1 MS. PARSONS: Claire Parsons on behalf of
2 defendant, Rowan County.

3 THE COURT: All right.

4 MR. WATKINS: Cecil Watkins on behalf of
5 Rowan County.

6 MR. VANCE: Good morning, Your Honor. Gene
7 Vance on behalf of the third-party defendants,
8 Governor Beshear and Commissioner Onkst.

9 THE COURT: Okay. Now, we did have someone
10 from the Kentucky Senate. Robert Stivers had made a
11 motion for --

12 MR. FLEENOR: Yes, Your Honor.

13 THE COURT: Yes. I -- we didn't have enough
14 seats. I apologize for you sitting in the back, but I
15 just wanted to make sure that you were recognized.

16 MR. FLEENOR: David Fleenor representing
17 Kentucky Senate President Robert Stivers.

18 THE COURT: Okay. Thank you. Well,
19 Mr. Donahue, I'm glad you're wearing your bow tie.

20 MR. DONAHUE: Thank you, Your Honor.

21 THE COURT: I don't feel like I'm out of
22 place now.

23 All right. Well, I want to just kind of set
24 the tone for this hearing.

25 Before we get started with the contempt

1 hearing, this is a civil contempt hearing pursuant to
2 18 U.S. Code, Section 401, I feel like a couple of
3 brief comments are necessary, given the large volume
4 of folks that are here this morning.

5 As you know, this case has seemed to generate
6 a lot of interest both locally and nationally, and has
7 kind of galvanized a number of organized interest
8 groups.

9 In the past two days, the Court's received
10 about 2,000 calls, give or minus a thousand, in the
11 Covington chambers. In fact, I've had to turn the
12 phone off to voice mail to make sure I can actually
13 get other work done.

14 I've got three lawyers that work in my
15 office, and the phone was ringing off the hook for and
16 against everyone in this case, so we just decided that
17 it would be best not to listen to those calls. We
18 started to, but it actually just took up too much of
19 the Court's time.

20 So apparently, according to my staff, who's
21 much more socially media savvy than I, someone posted
22 the office number on some social media site, which
23 caused all the volume to probably increase.

24 So while the Court appreciates the public
25 interest in the case and the issues raised, public

1 opinion and someone's personal opinion, including my
2 own, simply aren't relevant today.

3 The contempt issue will be decided on the
4 law, and will be designed to obtain compliance with
5 the Court's lawfully issued order. Because after all,
6 that's what this hearing is about, to gain compliance
7 with the Court's order.

8 Both sides of the debate are somewhat -- and
9 I -- when I say both sides, I'm referring to the
10 parties and the lawyers. And I'm not including you,
11 Mr. Vance, or counsel for the Senate President because
12 I don't believe there's been a whole lot from you in
13 the public arena, but the primary parties, the
14 plaintiffs and the defendant, Ms. Davis, and to a
15 lesser extent, Rowan County, have tried to keep this
16 debate going in the public arena.

17 As I stated, the Court cannot and will not be
18 swayed by what is happening outside court or outside
19 the court record. There's a lot of things that are
20 part of the public record that are not part of the
21 court record, and I'm speaking now of lawyers know
22 what the difference is.

23 Many of the individuals who perhaps are in
24 the gallery or will be reading about this
25 instantaneously or tomorrow. Some of us still get a

1 newspaper and read it, but I understand that's behind
2 by about 24 hours today.

3 The court record is what the Court's deciding
4 the issues on, not the public record.

5 There's a reason why the individual woman
6 holding the scales is blindfolded. We've got to
7 consider the case based upon the law and the facts as
8 set forth here in the courtroom.

9 And then finally, I'm going to expect all
10 litigants and supporters of both sides to exhibit
11 proper decorum during the hearing. We're in federal
12 court. Whether or not you're down at -- in
13 Catlettsburg at the Boyd Circuit Court or here in this
14 court, every judge and the proceedings that go on in
15 his or her courtroom expects the parties and the
16 public to exhibit proper decorum, so I will not
17 tolerate any outbursts. And if there are any
18 outbursts, one way or the other, I'll be asking you,
19 with the assistance of some marshals, to escort you
20 from the courtroom.

21 Okay. We have several motions that are
22 pending. The motion that we're here to decide is
23 Docket 67, the motion to hold Ms. Davis in contempt.
24 There was a response filed yesterday. There was also
25 a motion filed on Tuesday.

1 Today's the 3rd, right, Madam Clerk? Is that
2 right?

3 DEPUTY CLERK: Yes, Your Honor.

4 THE COURT: Okay. Tuesday of this week, a
5 motion pursuant to Rule 62(c) of the Federal Rules of
6 Civil Procedure to clarify the preliminary injunction
7 pending appeal.

8 And then just yesterday there was a motion
9 filed by defendant, Davis for an injunction pending
10 appeal, as well as a motion by Senate President Robert
11 Stivers, which I've mentioned earlier, for leave to
12 file a brief as an amicus.

13 Mr. Gannam, Mr. Christman, I know you had
14 indicated in your response in a footnote -- I think
15 it's footnote 2 to Docket 72, that you want to file a
16 written response to the motion filed by plaintiffs on
17 Tuesday.

18 We're here today. The case wasn't noticed
19 for that hearing. However, I think it makes sense to
20 take that motion up today. So whatever you would file
21 in a written response, I'm going to go ahead and let
22 you be heard on that today.

23 One other thing I want to mention, there was
24 a footnote -- I think it's also in that same
25 response -- where you objected to the page limitation.

1 I'm not going to hold you to the page limitation. I'm
2 not just going to consider the first five pages. You
3 filed seven pages in your response. They filed seven
4 pages in their motion. I'm considering the seven
5 pages of the motion, as well as the seven pages of
6 your response. So your objection as it relates to the
7 length of the pages is sustained.

8 So I know you had objected formally to that,
9 but I read through that, and I just want to make sure
10 that you appreciate I'm going to consider your entire
11 response.

12 And I have read your response. And it was
13 just filed yesterday. There's been a lot of paperwork
14 filed in a very short amount of time, and we have been
15 meeting, I don't want to say around the clerk, as some
16 of us have to have a little bit of sleep, but we have
17 been trying to prepare for this hearing as best we
18 can.

19 So I want to go ahead and hear you from now
20 on Docket 6 -- I think it's 68, which, in essence, for
21 everyone in attendance, as you know, procedurally, the
22 Court granted the plaintiffs' motion for the
23 preliminary injunction back on August 12th, enjoining
24 Ms. Davis from applying her "no marriage licenses"
25 policy to future marriage licenses requested by the

1 plaintiffs in this case.

2 The motion itself seeks to clarify pursuant
3 to Rule 62(c) of the Federal Rules of Civil Procedure,
4 to have that injunction include any future marriage
5 license requests submitted by plaintiffs or any other
6 individuals who are legally eligible to marry. That
7 was filed on the 1st.

8 There are a couple of companion cases, 46 and
9 I think 49? 51? I can't remember the numbers, but
10 there are three cases now pending with various
11 plaintiffs.

12 You represent the defendant on all those
13 other cases; do you not, Mr. Gannam?

14 MR GANNAM: We do, Your Honor.

15 THE COURT: Okay. So I want to just let
16 you -- I want to give you a chance to be heard, and
17 then I'll give you a chance, Mr. Sharp. Because I
18 want to take up this issue, and then we'll move on to
19 the contempt issue.

20 MR. GANNAM: Thank you, Your Honor. We
21 object to proceeding on the motion to clarify or
22 modify the injunction that's already been issued.
23 First of all, just because of the timing. This
24 hearing was called quickly. That motion was filed,
25 and we simply haven't had adequate time to prepare

1 to -- to argue against that motion.

2 THE COURT: Well, I've had very little time
3 to prepare myself, so I'm -- the issues are the same.
4 All the issues you've raised in 1544, the defenses
5 that your client has raised, the responses, I'm sure,
6 would all be the same. It's the same issue for each
7 case.

8 If I were to -- for instance, if the order
9 only applies to the four plaintiffs -- I guess eight
10 plaintiffs in this case -- it would be -- it would not
11 be a violation perhaps of the Court's order dated
12 8-12-2015, if your client, or any of the deputies, did
13 not issue a marriage license to anyone eligible to
14 marry who aren't these plaintiffs because that's not
15 covered under the order. Would you agree with that?

16 MR. GANNAM: I agree that would not be a
17 violation of the order, yes, Your Honor.

18 THE COURT: Okay. So why would there be --
19 why should I parse this out? And I realize from the
20 very beginning, and you have in your written
21 pleadings, seemed to take issue with the Court's
22 attempt to try to expeditiously take up its docket in
23 this case. Why doesn't it make sense to consider all
24 of the cases together, at least as it relates to the
25 other plaintiffs who would be eligible to marry?

1 MR. GANNAM: Your Honor, first of all, the --

2 THE COURT: Well, your objection to not
3 taking it up today will be overruled because I really
4 want to hear you on this.

5 MR. GANNAM: The plaintiffs moved for
6 preliminary injunctive relief against -- with respect
7 to themselves only. They have --

8 THE COURT: I understand that.

9 MR. GANNAM: And the --

10 THE COURT: At that time, I think they were
11 the only plaintiffs that had been potentially
12 identified.

13 MR. GANNAM: They have a -- a pending motion
14 for class certification --

15 THE COURT: That I stayed.

16 MR. GANNAM: -- which has been stayed.
17 They're essentially seeking a class-wide --

18 THE COURT: I don't think -- I'm not going to
19 certify a statewide class. I'm -- I'm interested in
20 the Rowan County Clerk because she's a defendant in
21 all three of the cases that have been filed on my
22 docket here in Ashland.

23 MR. GANNAM: Well, their class that they've
24 alleged is the class consisting of Rowan County
25 residents. And so to grant the injunction, it would

1 apply to all Rowan County residents would essentially
2 be granting a class-wide injunction based on the facts
3 that they've alleged here.

4 THE COURT: Well, why shouldn't -- wouldn't
5 it seem rather odd to only have an injunction that
6 applies to four couples versus -- if you had John Doe
7 and someone other than John Doe who would be eligible
8 to marry Jane Roe, or what have you, same-sex,
9 opposite-sex, why wouldn't they -- doesn't it seem a
10 little bit unusual to have an order that would apply
11 to some, but not others?

12 MR. GANNAM: Your Honor, that's the motion
13 that the plaintiffs filed.

14 THE COURT: I understand, but they're not
15 seeking to amend that.

16 MR. GANNAM: And, Your Honor, our objection
17 is not only on the timing, but also as to the fact
18 that the prior order is on appeal. And what they're
19 essentially seeking to do is to change that order and
20 to do something else, to expand it. And this Court
21 does not have jurisdiction to -- to do anything with
22 respect to that prior injunction while it's on appeal,
23 so this would have been treated as a new injunction.

24 THE COURT: Would you prefer that I order
25 that my 8-12-2015 order, change the caption and just

1 enter a preliminary injunction as it relates to those
2 plaintiffs without -- it's not my intention to do
3 that, but the issues are exactly -- well, seem to be
4 fairly consistent throughout the three cases, this one
5 and the two companion cases.

6 MR. GANNAM: Well, the difference, Your
7 Honor, is in the plaintiffs' case, they could each
8 allege and put on evidence as to their eligibility to
9 marry, for example.

10 THE COURT: And I think they have done that.

11 MR. GANNAM: Whereas they're now seeking to
12 expand an injunction to cover unnamed members of the
13 putative class --

14 THE COURT: Who would otherwise be eligible
15 to marry.

16 MR. GANNAM: But we have -- unless it's a
17 class-wide injunction, they're essentially asserting
18 rights that haven't been established yet in this
19 court.

20 THE COURT: Okay. All right. What's your
21 response?

22 MR. SHARP: Your Honor, 62(c) specifically
23 contemplates and authorizes this Court to modify the
24 injunction while an interlocutory appeal from the
25 preliminary injunction ruling is pending.

1 The Court is correct that it does retain
2 jurisdiction to actually grant plaintiffs' motion. The
3 Court is also correct insofar as the legal issues and
4 the relevant facts regarding the disposition of
5 plaintiffs' motion to modify or amend that preliminary
6 injunction ruling are identical, not only as to the
7 plaintiffs in this case, but to any other individuals
8 who would otherwise be qualified to marry.

9 We're not asking the Court to compel the
10 Rowan County Clerk's office to issue marriage licenses
11 on request, but rather upon certification that other
12 legal requirements are met.

13 As the Court's aware, prior to *Obergefell*,
14 the Rowan County Clerk's office issued 99 marriage
15 licenses this year, 214 last year. Obviously, we're
16 talking about hundreds of people who are affected and
17 are continuing to be denied marriage licenses because
18 of the "no marriage license" policy.

19 THE COURT: All right. A brief reply.

20 MR. GANNAM: Your Honor, essentially, they're
21 seeking to get relief that they didn't request in the
22 original motion and --

23 THE COURT: I know. They're requesting it
24 now. I recognize they did not request it in the
25 original motion.

1 MR. GANNAM: And so it can't be a
2 clarification or a modification of that prior order
3 because it would be -- it would be an expansion of
4 that prior order, which is -- which is improper while
5 it's on appeal, so this must be treated as a new
6 motion for preliminary injunction. And we would
7 maintain our objection that it would be improper to
8 proceed on that today with the -- the little notice
9 that we've had and without the opportunity to -- to
10 again, put on evidence as we deem necessary to
11 establish our defense to it.

12 THE COURT: All right. And I want to give
13 you all an opportunity to be heard, to the extent you
14 wish to be heard on this. Ms. Parsons?

15 MS. PARSONS: The County has no position on
16 this, Judge.

17 THE COURT: All right. Mr. Watkins?

18 MR. WATKINS: No, Judge.

19 THE COURT: Mr. Vance?

20 MR. VANCE: No, Your Honor.

21 THE COURT: All right. I must apologize --
22 I'm -- you've cited Rule 62(c) in your motion. I may
23 have an older version, and I have to apologize; I have
24 a cataract, so my right eye is not as good as it could
25 be.

1 All right. Thank you. I did have an older
2 version.

3 All right. Over the plaintiffs' objection --
4 defendant's objection, I'm going to grant the motion,
5 finding that the prior injunction be modified to
6 reflect that it preliminarily enjoins Ms. Davis in her
7 official capacity from applying her "no marriage
8 license" policy to any future marriage license
9 requests submitted by the named plaintiffs in this
10 case, or -- and this is the modification -- or by any
11 other individuals who are legally eligible to marry in
12 the Commonwealth of Kentucky.

13 And here's the order. We'll go ahead and
14 enter the order. I have signed it dated today. Madam
15 Clerk. Thank you.

16 DEPUTY CLERK: Thank you, Your Honor.

17 THE COURT: And I'll rely upon on Rule 62(c).

18 MR. GANNAM: Your Honor, may I make a --

19 THE COURT: And your objection's overruled.

20 MR. GANNAM: May I make a request for a
21 certification for immediate appeal of this order?

22 THE COURT: You can appeal that, yes. That's
23 part of the appeal. We'll just include that as part
24 of the appeal.

25 Any objection to that?

1 MR. SHARP: No objection, Your Honor.

2 THE COURT: Okay. Very well. So you can
3 include that. And I'm sure someone has already
4 requested the transcript of this proceeding. And the
5 Sixth Circuit can certainly decide if that's
6 appropriate.

7 I do find, in granting that relief that's
8 requested at Docket 68, the Court finds that given the
9 fact that it does have two companion cases that
10 involve, in essence, the very same allegations with
11 the same lawyers, it just makes judicial sense to have
12 the Circuit review the decision for all three of them.

13 I'm not granting a class certification
14 motion. But I do believe that allowing the injunction
15 as it currently exists to apply to some, but not
16 others, simply doesn't make practical sense, so that's
17 the Court's ruling.

18 All right. Let me now turn to the actual
19 merits of the matter that's before the Court.

20 Well, let me take up one additional thing.
21 Unfortunately, we have other motions.

22 I am going to grant -- first of all, is there
23 any objection to -- let me find it here -- to Docket
24 73? That's the motion -- the amicus motion.

25 I know the Sixth Circuit, when it was

1 reviewing the Court's -- the motion to stay, the order
2 pending appeal had an amicus brief filed, and they
3 went ahead and granted that. Mr. Fleenor had filed a
4 motion for leave of Senate President Robert Stivers to
5 file an amicus brief.

6 I, just this morning, since this was filed
7 late yesterday, I've just this morning had an
8 opportunity to review this. I read it on my phone
9 last night, small print, though. I was able to print
10 it out and read it earlier this morning. Any
11 objection to that?

12 MR. SHARP: No objection, Your Honor.

13 THE COURT: Any objection -- they favor your
14 side, so I wouldn't think you would object.

15 MR GANNAM: No, Your Honor.

16 MR. WATKINS: No, Your Honor.

17 MR. VANCE: No, Your Honor.

18 THE COURT: Okay. Mr. Fleenor, I'll go ahead
19 and grant your motion and --

20 MR. FLEENOR: Thank you, Your Honor.

21 THE COURT: -- have it filed as the -- the
22 attachment, which is 73-1, Madam Clerk, will be the
23 amicus brief of Senate President Robert Stivers.

24 All right. Now --

25 MR. GANNAM: Your Honor, may I ask one more

1 question?

2 THE COURT: Yes.

3 MR. GANNAM: Will the Court take up our
4 emergency motion, pending appeal time?

5 THE COURT: Well, I am going to take that up
6 as well, actually right now.

7 MR. GANNAM: Okay.

8 THE COURT: I'm not sure if I'm going to rule
9 on it today because it seems to raise many of the same
10 things that were raised previously. This is Docket 70
11 filed yesterday. The defendant Davis's motion for an
12 injunction pending appeal seeks to have several of the
13 same issues that were previously raised adjudicated
14 again.

15 You haven't had a chance to respond to that,
16 but this seems to be more substantive than Docket 68.

17 Now, you, of course, will disagree with that,
18 and I recognize that, and I've given my rulings
19 granting 68.

20 But 70 itself -- Mr. Gannam, I don't know if
21 you or Mr. Christman's going to be arguing this one,
22 but why isn't this simply her attempt to have another
23 bite at the same apple? It seems like many of the
24 arguments you raised in your response to the
25 substantive preliminary injunction motion are raised

1 here again.

2 MR. GANNAM: Your Honor, Mr. Christman will
3 argue that motion.

4 THE COURT: All right. Mr. Christman. I'm
5 sorry.

6 MR. CHRISTMAN: Good morning, Your Honor.

7 THE COURT: Thank you, sir.

8 MR. CHRISTMAN: The motion to ask for an
9 injunction pending appeal against Governor Beshear and
10 Commissioner Onkst, the issues and substance are
11 certainly intertwined and interrelated with what the
12 Court has already decided on the plaintiffs' motion
13 for preliminary injunction, but not entirely
14 overlapping.

15 Ms. Davis asked for her own affirmative
16 preliminary injunction against the third-party
17 defendants. That was a motion that was effectively
18 and practically denied by this Court in its August
19 25th, 2015 order, which has now been taken up on
20 appeal, and that --

21 THE COURT: And that order being the motion
22 to the stay -- the motion to hold those motions in
23 abeyance; which one are you referring to?

24 MR. CHRISTMAN: Correct. The August 25th
25 order that -- the practical effect of that order was

1 to deny Ms. Davis the preliminary injunctive relief
2 against the third-party defendants.

3 THE COURT: Right. And frankly, my reason --
4 and I'll explain that for the parties. The issue --
5 it seems as if the Sixth Circuit's decision on the
6 review of this Court's August 12, 2015 order --
7 memorandum, opinion and order -- the resolution of
8 that will have, whether the parties agree or disagree
9 with this statement, at least in this Court's view,
10 will have some impact on the resolution of that
11 motion, of perhaps other motions.

12 So it made sense to the Court -- this, of
13 course, isn't the Court's only case -- to give the
14 Circuit, and you have -- you immediately appealed, I
15 think, the same day it went on, that order, which you
16 have a right to do under the rule. But I really
17 thought it was appropriate to have the Circuit look at
18 that because that will have a very real impact on the
19 Court's adjudication of these other issues. And if we
20 get a resolution of that by the Circuit, that will --
21 the decision will be germane to these other motions,
22 so that's why I stayed that.

23 Do you think -- and I understand you want to
24 be heard on that today, but some of the issues raised
25 in that -- in your Docket Entry 70, and it's 30 pages.

1 I am impressed with the ability to crank out very
2 substantive briefs, and I appreciate the table of
3 contents; I really do. It does help in reviewing the
4 pleadings that are filed. But unlike a two-page
5 order, which is relatively straightforward, this is a
6 30-page motion with -- involving the third-party
7 defendant.

8 Mr. Vance, you, of course, haven't had a
9 chance to respond at all. But would you
10 acknowledge -- I think you have acknowledged that some
11 of the issues are intertwined?

12 MR. CHRISTMAN: Your Honor, the reason --
13 respectfully, the reason that the motion was first
14 filed in front of Your Honor, rather than filing that
15 motion for injunction pending appeal and the appeal
16 that we took up, that second notice of appeal that was
17 filed, the Federal Rules of Appellate Procedure say
18 that ordinarily and generally, you ask for the relief
19 first --

20 THE COURT: Oh, I completely agree,
21 completely agree.

22 MR. CHRISTMAN: -- first from the district
23 court, unless it would be impracticable to obtain it.
24 We decided that under these general circumstances that
25 rather than first going to the Sixth Circuit, we would

1 seek the injunction pending appeal in her claims
2 vis-a-vis the third-party defendants in this case.

3 The original appeal that was taken up of the
4 August 25th, 2015 order is Ms. Davis's rights and
5 claims and defenses vis-a-vis the plaintiffs in this
6 case. The governor and Commissioner Onkst are not
7 parties to that first appeal.

8 THE COURT: Correct.

9 MR. CHRISTMAN: Ms. Davis, on the same day
10 that she filed her motion to dismiss plaintiffs'
11 complaint in its entirety, the arguments of which have
12 not been taken up, also brought a third-party
13 complaint against Governor Beshear and Commissioner
14 Onkst essentially arguing that any liability that
15 Ms. Davis has in this case is really the liability of
16 the third-party defendants. And so asserted those
17 claims, and then within three days filed a motion for
18 preliminary injunction against Governor Beshear and
19 Commissioner Onkst, again, raising certainly many of
20 the same substantive arguments and issues, but it's
21 from a different approach as her as an individual.
22 That motion was filed and her third-party complaint
23 was filed before this Court even entered its original
24 injunction order.

25 THE COURT: That's correct. And the Court

1 worked as quickly as it could to resolve that.

2 I -- I recognize that. I don't think I'm
3 prepared to make a ruling on that today. I want to
4 give Mr. Vance's client an opportunity to respond to
5 that, as well as the plaintiffs, if they wish to.

6 Mr. Vance?

7 MR. VANCE: Judge, thank you. On behalf of
8 the governor and Commissioner Onkst, we would say, as
9 the Court has noted, the motion's not ripe for
10 consideration. We have not filed a responsive
11 pleading as yet, and it is not due, per agreement of
12 the parties, until September the 11th.

13 We're in the process of preparing a motion to
14 dismiss because we believe the third-party complaint
15 is wholly without merit as per the Eleventh Amendment,
16 among other reasons. And certainly we believe that
17 the request for injunctive relief against the governor
18 and Mr. Onkst is likewise without merits, and we will
19 respond to that at the appropriate time, and respond
20 further on the merits now, if you wish.

21 THE COURT: No, I don't -- I have some other
22 things we need to take up today, and I don't want to
23 be here all afternoon.

24 But as far as the responsive pleading that
25 you have to file, and I do think that I have

1 continuing jurisdiction to address these other issues
2 while the other case is on appeal. Does everybody
3 agree with that?

4 MR. SHARP: Yes, Your Honor.

5 THE COURT: Everybody's nodding
6 affirmatively. Mr. Christman?

7 MR. CHRISTMAN: Your Honor used the phrase
8 "these issues", and I'd just ask for clarification of
9 what issues.

10 THE COURT: Okay. This motion, your motion,
11 your motion Docket 70.

12 MR. CHRISTMAN: Certainly, Your Honor, we
13 filed it in front of you so we believe you have
14 jurisdiction.

15 THE COURT: Okay. I figured you would since
16 you filed it here.

17 Here's what we're going to do. If you would,
18 you can file the Rule 12 motion that you believe is
19 appropriate on behalf of your clients. If you think
20 that the response to Docket 70 is otherwise covered,
21 if you will, by your motion, you can file a response
22 indicating such. If there are certain things in the
23 motion itself that you believe need to be specifically
24 addressed in the response, you can address them that
25 way.

1 I'm not going to take that motion up on the
2 merits today because it has some things in it -- while
3 there is some intertwined issues, clearly, and I think
4 it would be perhaps -- the Court would be served by
5 getting a decision by the Circuit on the appeal of the
6 preliminary injunction that was granted, and I think
7 it would be helpful to do it in that way.

8 Would you be able to do that?

9 MR. VANCE: Yes, Your Honor.

10 THE COURT: To file your -- file your motion
11 by the 11th, I think, by agreement --

12 MR. VANCE: Yes.

13 THE COURT: -- and then any response you
14 would have to Docket 70, you can file by that date as
15 well?

16 MR. VANCE: We will do that, Your Honor. And
17 I suspect you're exactly right; we should be able to
18 incorporate it a little bit by reference and limit the
19 amount of paper --

20 THE COURT: All right. Thank you.

21 MR. VANCE: -- or electronic material that is
22 filed.

23 THE COURT: Yes. And if you want to file a
24 written response to that, you can, by the same date,
25 the 11th.

1 MR. SHARP: Thank you, Your Honor.

2 MR. CHRISTMAN: Your Honor --

3 THE COURT: Yes, sir?

4 MR. CHRISTMAN: -- if I could ask for a slight
5 clarification.

6 THE COURT: All right.

7 MR. CHRISTMAN: By -- by what you've just
8 ordered and directed, does that mean that you will not
9 have an order on the motion for injunction pending
10 appeal prior to September 11th?

11 THE COURT: On your motion?

12 MR. CHRISTMAN: On the motion for injunction
13 pending appeal. I mean, you absolutely will not rule
14 on the motion for injunction?

15 THE COURT: No. I will make not a ruling
16 until I get a response, clearly.

17 And I think -- this motion was filed
18 yesterday. That would give me nine days. I think the
19 last motion took 45 days to adjudicate. So I'm not
20 planning on ruling on Docket 70 before the 11th. Is
21 that what you're asking?

22 MR. CHRISTMAN: Yes. Just wanted to ask for
23 that clarification for the record.

24 THE COURT: I'm not going to rule on the
25 motion Docket 70 until it becomes ripe. And I'll give

1 -- how much time would you like to respond?

2 MR. CHRISTMAN: We filed the motion, Your
3 Honor. You're asking for --

4 THE COURT: Well, but you can file a reply.
5 I mean ...

6 MR. CHRISTMAN: Correct. It's -- Your Honor,
7 to be honest, it's to clear up the record. As I said
8 earlier, that the Federal Rules of Appellate Procedure
9 ordinarily direct you to file in the district court,
10 but if it's deemed impractical to get the relief that
11 you're asking for, which we believe is emergent, that
12 then we are --

13 THE COURT: Well, I will do my level best
14 to -- I understand that anything filed under Rule 65
15 takes precedence over any other case, other than a
16 case of similar nature, I think is what the law says.
17 So I will work on that as expeditiously as I can.

18 I know you have an expedited briefing
19 schedule at the Circuit on the underlying substance of
20 the merits of the appeal. Perhaps that may need to be
21 modified. I'll try to get that order out as soon as
22 you -- if you want to file a reply within seven days,
23 is that ...

24 MR. CHRISTMAN: That's fine, Your Honor.

25 THE COURT: Okay. Seven days, Mr. Vance, or

1 any other interested party, can file a response by the
2 11th of September. Any reply would be due on the
3 18th.

4 MR. CHRISTMAN: And in light of these
5 rulings, Your Honor, we would also move to reconsider
6 the Court's prior order not giving us an opportunity
7 to respond to plaintiffs' motion filed under Rule 65
8 to modify and enlarge this Court's prior order.

9 We would ask for the same amount of time that
10 the governor will have to respond to our motion for
11 injunction pending appeal.

12 THE COURT: I'm going to deny that.

13 MR. CHRISTMAN: Thank you, Your Honor.

14 THE COURT: I think you've been heard here
15 for that.

16 Okay. Let's see. We have -- oh. We're
17 going to go now -- turn to -- all right.

18 All right. As everyone knows, the Court
19 denied Ms. Davis's motion to stay the Court's August
20 12th, 2015 preliminary injunction pending appeal, but
21 did stay that order until August 31st, to give her an
22 opportunity to ask the Sixth Circuit to review the
23 motion to stay.

24 And a little clarification. I initially had
25 not put a deadline in the order. And then after

1 speaking with my law clerks, I realized that the
2 practical impact of that would be, it's just a
3 definite. And you probably all realized that. If
4 there's no other order, we're not in violation of
5 that.

6 So I felt like a -- approximately a two-week
7 window to give the appellate courts an opportunity to
8 take that up, kind of a period of time, let the
9 appellate judges, three of them, review it, and then
10 as everyone knows, there was a petition to the Supreme
11 Court as well on the stay issue.

12 On August 26th of this year, a panel of the
13 Sixth Circuit unanimously denied her motion to stay.
14 In its decision, the Court of Appeals stated that
15 there was little to no likelihood that Ms. Davis in
16 her official capacity will prevail on appeal. And
17 that's the language of three appellate judges, not
18 mine.

19 She then filed an emergency petition with the
20 Supreme Court seeking a stay. And as everyone knows,
21 on Monday of this week, Justice Kagan referred that
22 petition to stay to the entire court, and the petition
23 was denied.

24 So the procedural options that she has to
25 stay the prior order have now been exhausted, at least

1 those that I think are available.

2 We're here on the plaintiffs' motion to hold
3 her in contempt for not complying with the Court's
4 prior order.

5 Contempt proceedings, for those of you who
6 are not of a legal mind, are brought under 18 U.S.
7 Code, Section 401. 18 U.S. Code is the federal
8 criminal code, although it does contain in various
9 provisions and some civil directions on civil cases as
10 well, and this case falls within that example. It
11 does give the Court the power to enforce compliance
12 with its lawful orders.

13 Now, I'm sure there are some that think that
14 the Court's order wasn't lawful. Well, here in
15 America when a judge issues an order, it's -- unless
16 it's otherwise illegal -- and I think most of us
17 district judges like to avoid issuing illegal
18 orders -- lawful orders are orders signed by judges.
19 State court judges sign lawful orders all the time.

20 "Courts do have the power to punish or
21 fine -- punish by fine or imprisonment, or both, at
22 its discretion, such contempt of its authority and
23 none other as disobedience or resistance to its lawful
24 orders."

25 So at this point, both sides have filed a

1 motion and a response. I'm going to waive the time
2 for filing and reply because I went ahead and set this
3 matter today at the request of counsel.

4 In your response -- I don't know who's going
5 to take this one, Mr. Christman or Mr. Gannam?

6 MR. GANNAM: Mr. Christman.

7 THE COURT: Mr. Christman. You state that
8 she has a present inability to comply with the Court's
9 order -- and again, I'm paraphrasing, trying to keep
10 it -- kind of summarizing the argument -- that she has
11 a present inability to comply due to her religious
12 beliefs. I mean, that's kind of -- and there's more
13 to it than that, but that's kind of in a generic
14 sense, that's what you're arguing.

15 The law in the Sixth Circuit -- and frankly,
16 there's not a whole lot of law on civil contempt. And
17 if you think about it, the reason for that is most of
18 the time when an order goes on, there is compliance
19 with the order. So it's probably a good thing in our
20 society that there's not a lot of law in this area.
21 Because most of the time you get compliance and you
22 don't have to compel the action of a party, or perhaps
23 a non-party, who's acting as an agent of a party, to
24 comply with an order.

25 But doesn't the Sixth Circuit, Mr. Christman,

1 seem to require more than just someone's statement
2 that they don't wish to comply?

3 I've got this First Amendment right, I've got
4 this Kentucky constitutional right to exercise my
5 religion, and I'm -- I can't comply because of that.
6 Doesn't it require more like a physical or a factual
7 impossibility to not comply? If so, why not?

8 MR. CHRISTMAN: Your Honor, it does. It is a
9 factual impossibility --

10 THE COURT: Okay. Why is it factually
11 impossible here?

12 MR. CHRISTMAN: It's factually impossible for
13 Ms. Davis to authorize the union of a same-sex couple
14 and place her name and approval by that on that union.

15 THE COURT: Okay. What -- go ahead.

16 MR. CHRISTMAN: She cannot do it in her
17 conscience.

18 THE COURT: Okay. What -- what would prevent
19 --

20 MR. CHRISTMAN: It's factually impossible
21 that she's unable to do.

22 THE COURT: What would prevent -- I'm from
23 northern Kentucky, and I know Kentucky is a melting
24 pot of religions. There's a lot of Baptists, there's
25 a lot of Catholics in northern Kentucky and this area,

1 and down in Owensboro, a lot of other religions.

2 I'm Catholic. Part of Catholicism says that
3 if you're married and get divorced and you want to get
4 married in the Catholic church, you need to get an
5 annulment before you get remarried. I mean, that's
6 how -- some Catholics follow that, some don't.
7 Whether they do or they don't, that's really not
8 relevant. But the question is, what would prevent a
9 Catholic clerk from -- if I were to not -- if I were
10 to agree with your client's position on this contempt
11 motion, what would prevent a Catholic clerk from, when
12 two, let's say, same-sex or opposite-sex couples come
13 in, and they're gathering the information, what's your
14 name, how old are you, have you been married before?
15 Yes, I've been married before. Has that -- are you --
16 he's Catholic and he asks, or she asks, "Well, has
17 that marriage been annulled?" And either they refuse
18 to answer or they say, "No, it hasn't."

19 That clerk may say, "Well, gosh, I'm not
20 going to issue that because I'm -- in my Catholic
21 beliefs, I can't issue a marriage license because that
22 individual has been -- that marriage hasn't been
23 annulled, and you can't get married. In essence, it's
24 still a marriage in the eyes of the -- some Catholics.

25 How is that any different than this? Or it

1 may not be different, I ...

2 MR. CHRISTMAN: The difference, Your Honor,
3 is that if someone would step up and assert that and
4 make that argument, which --

5 THE COURT: You would defend them?

6 MR. CHRISTMAN: -- there is no -- there is no
7 evidence that anybody has. I'm sure if there were
8 discovery in this case on that issue, that we could
9 find Catholic clerks who have served in the role who
10 have been faced with those situations, and maybe
11 they've said, "I believe one thing, but I'm -- I'm
12 willing to issue this license."

13 THE COURT: So in that case, it wouldn't be
14 factually impossible because they're willing to do it?

15 MR. CHRISTMAN: It wouldn't be factually
16 impossible. Because what person is saying is they
17 might believe one thing, but what -- their conscience
18 is not directing upon them that they are unable to
19 issue the license.

20 What's different for Ms. Davis is she's not
21 just willy-nilly spur of the moment saying, "I just
22 don't want do it, Judge, and I just -- it's no big
23 deal. I don't -- I just don't want to do it."

24 We would not -- we would not be where we are
25 today and be through everything that we've been

1 through, Your Honor, with all the different
2 proceedings and the different hearings. And as this
3 Court has been inundated with calls, that is, you
4 know, just scraping the surface of what Ms. Davis has
5 had to personally endure because of her compulsion to
6 follow her conscience. That this is not a matter of,
7 "I just don't want to issue a license to a couple
8 that's been divorced because I have a problem with
9 divorce." That's not the -- that's not the religious
10 belief, that's not the conscience issue that's --

11 THE COURT: So it's -- there's certain things
12 that are -- there's certain things that are
13 conscious-driven and certain things that aren't from
14 her perspective? Like someone who's previously
15 divorced is not that important?

16 MR. CHRISTMAN: Correct. We don't have that
17 here.

18 THE COURT: Okay.

19 MR. CHRISTMAN: What we have here is a
20 request -- and as we've said and tried to articulate
21 before, is that Ms. Davis does not have a religious
22 conscience objection to an opposite-sex couple being
23 married. She has no problem giving that
24 authorization, putting her name on that license. The
25 reason to date that she's yet been able to --

1 THE COURT: Well, that's been
2 well-established; she doesn't want to violate their
3 equal protection rights, she's -- I understand.

4 MR. CHRISTMAN: Right. But I'm putting that
5 out there to say she is not factually unable to issue
6 that license for conscience reasons. She's factually
7 unable to issue the license to the opposite-sex couple
8 right now because her conscience prevents her from
9 issuing a license to a same-sex couple. And her
10 understandings and applications and adherence of the
11 law coming down saying "same-sex couples have to be
12 treated the same as opposite-sex couples," then her
13 interpretation and understanding of Kentucky marriage
14 law as it exists in the statutes now and as is being
15 applied is that as she's operating and acting through
16 that scheme and those requirements, that she has to
17 treat couples the same, and so she's factually
18 prevented from doing it.

19 In a lot of cases in the contempt world, what
20 arises on the factual impossibility side is -- is a
21 bank account that has zero dollars.

22 THE COURT: Right, but they can't actually
23 comply with it. And I've read pretty much every Sixth
24 Circuit case on civil contempt in the last 24 hours,
25 so I recognize that.

1 MR. CHRISTMAN: And by analogy, Your Honor,
2 we're not in the -- this case is not about money, at
3 all. Her bank account of conscience, she -- she
4 cannot -- that it is as if asking -- you know,
5 ordering somebody to write a \$1,000 check from a bank
6 account that has no money. She has no ability, no
7 conscience -- no money in her conscience bank to write
8 the check that would come from the order.

9 THE COURT: All right.

10 MR. CHRISTMAN: And yes, Your Honor's
11 correct, you know, out of the Sixth Circuit cases that
12 are out there to date, you know, they're -- we're not
13 going to be able to point you to a Sixth Circuit case
14 that says --

15 THE COURT: Neither side is.

16 MR. CHRISTMAN: -- because *Obergefell* just
17 came down months ago and has redefined the institution
18 of marriage. And as was actually argued by the amicus
19 party, that the -- the legislators need to look at the
20 entire scheme because the entire scheme has been
21 rewritten and overturned by what the Supreme Court
22 did.

23 THE COURT: Right. And I'll say that --
24 civics lesson -- we've got executive and legislative
25 branches and you've got -- and you have our branch --

1 thank you. If you would escort someone. Thank you.
2 Thank you.

3 [INTERRUPTION IN THE COURTROOM]

4 THE COURT: As I was saying, the other
5 branches are designed for that type of thing. The
6 other branches generally, having seen it firsthand for
7 many years, generally have to be responsive to those
8 types of changes by their constituencies because they
9 have to -- if they aren't, perhaps they don't get
10 re-elected.

11 This Court acts by motion. This Court has
12 limited jurisdiction. This Court does not engage in
13 social policy.

14 December of 2001, I took an oath to the
15 Senators that I would follow the law and not let my
16 personal opinions impact my decisions. And I
17 generally do that every day. It's not every day I get
18 to do it in such a public forum with so much people
19 watching, but frankly, that's part of what is
20 happening today.

21 The law does change. If the -- as
22 Mr. Stivers indicates in his amicus brief, if there
23 are legislative fixes, if you will, I use that term
24 loosely, which would enable someone to apply for -- I
25 don't think the plaintiffs necessarily have an issue

1 with the legislative fix which would allow them in
2 Rowan County to get their marriage license from
3 another entity, if that entity would be available to
4 issue the license going forward. If there's a change
5 in the law by the legislature, I'm sure they wouldn't
6 care about that. In fact, they probably would applaud
7 that because that ultimately -- the Court would like
8 that too because it would perhaps resolve this
9 litigation, to some extent.

10 I'm sure there'll be corollary motions that
11 are filed at some point for various relief, but that's
12 not the Court's job.

13 This issue of willfulness in a civil contempt
14 proceeding, I mean, do you agree that it's not an
15 element under the Sixth Circuit law?

16 MR. CHRISTMAN: Willfulness is not an element
17 to the finding of contempt itself --

18 THE COURT: Correct. It would be to the
19 sanction perhaps.

20 MR. CHRISTMAN: -- but it is a consideration
21 in terms of the -- the extent or the breadth of -- if
22 a contempt finding is made and in determining what the
23 --

24 THE COURT: Appropriate sanction would be.

25 MR. CHRISTMAN: -- the appropriate sanction

1 --

2 THE COURT: I agree with that. That's what
3 that *Rolex Watch* case says in the Sixth Circuit.

4 MR. CHRISTMAN: Intent and willfulness is a
5 consideration that the Court can -- can make.

6 And on the issue of willfulness and intent, I
7 think the Court would recall the testimony that
8 Ms. Davis has -- has already given and is prepared to
9 give in her defense to establish the factual
10 impossibility that -- you know, there is certainly no
11 intent here whatsoever to harm or injure or burden the
12 plaintiffs in this case.

13 THE COURT: All right.

14 MR. CHRISTMAN: And I know that there may be
15 characterizations and say, you know, that that is
16 exactly what she wants to do, but ...

17 THE COURT: I haven't made any of those
18 characterizations.

19 MR. CHRISTMAN: No. Those characterizations
20 have come from elsewhere. That -- that is not her
21 intent in any way.

22 It's also not her intent to violate or
23 disregard or ignore or disobey the Court's orders,
24 that that is not her intent.

25 Her intent is to adhere and follow what her

1 conscience is commanding and compelling that she must
2 do. That here I stand, I can do no other. That she
3 cannot do anything but what she is doing, faithfully
4 applying her duties and obligations and understanding
5 of the law, Kentucky Religious Freedom Restoration
6 Act, a Kentucky marriage scheme that's been
7 obliterated. And then Governor Beshear comes over the
8 top and says, "Legislature's not in session. I'm not
9 calling them. Here's what you must do, clerks.
10 Without any exception, you must issue this license on
11 a form I'm going to revise, but I'm not going to
12 revise it in a way that accommodates any religious
13 beliefs or concerns."

14 And so again, that dovetails and goes back to
15 why Ms. Davis -- part -- also part of her defense is
16 that she has not been given due process fully for
17 contempt because any liability that she is claiming,
18 she's saying, "I have a claim against the governor.
19 And the governor has issued this directive." The
20 legislature's ready to act and solve the problems, but
21 the governor says, "No."

22 THE COURT: Are they ready to act?

23 MR. CHRISTMAN: They are, Your Honor.

24 THE COURT: Okay. Well, they haven't acted
25 yet.

1 MR. CHRISTMAN: Because they can't because it
2 requires a special session by which Governor Beshear
3 exercises the unilateral authority to call.

4 THE COURT: Well, maybe he's waiting for the
5 new governor.

6 MR. CHRISTMAN: He may very well may be. And
7 both gubernatorial candidates, both Mr. Bevin and
8 Attorney General Conway have indicated an intent to do
9 something to protect the religious liberties and
10 objections.

11 In fact, Attorney General Conway, in response
12 to the Kentucky Clerks Association's proposal to
13 remove the name, said he's fine with that.

14 So there is -- and again, it goes to this
15 idea this is premature to take an action to hold her
16 in contempt when she's filed a motion to dismiss her
17 complaint in its entirety. She's filed preliminary
18 injunctive relief against the governor seeking relief.
19 Her conscience does not allow it. She's entitled to
20 due process to be heard on all of those claims before
21 the Court could reach a conclusion that says, "You're
22 in contempt. You're disobeying my order."

23 THE COURT: Well, again, this -- due process
24 in this contempt proceeding. That's -- she's had
25 notice of this hearing, and she's being given an

1 opportunity to be heard by you.

2 I mean, the motion to dismiss you've raised,
3 and I guess I'll -- he brought it up, so I'll raise it
4 with you, Mr. Sharp, Mr. Cannon. Many of the issues
5 raised in the motion to dismiss were intertwined with
6 the decision the Court made on the preliminary
7 injunction order.

8 We have all these various motions raising a
9 number of things. Again, the Sixth Circuit's decision
10 on the issue before the Sixth Circuit, the substantive
11 merits appeal, that decision will have some --
12 hopefully, will be instructive on other issues before
13 the Court.

14 I appreciate your -- I -- you're -- I know
15 you want to put your client on as a witness -- or in
16 defense of the contempt issue, and I'm going to give
17 her a chance to do that. But let me ask you, what's
18 your response about this present -- you can sit down.
19 Thank you. What's your response to this present
20 inability to comply, because you really didn't have a
21 chance to file a reply. I want to give you a chance
22 to be heard on that.

23 MR. SHARP: Thank you, Your Honor. Despite
24 their arguments to the contrary, what they're really
25 trying to do is redefine factual impossibility as

1 unwillingness. I mean, it's analogous to the free
2 speech realm in which an individual self-censors their
3 speech because of some anti-harassment policy.

4 You know, whether or not the speech would
5 actually violate the policy, you know, the Court would
6 need specific facts in that regard. Here, it --
7 there's not a factual impossibility to comply with the
8 Court order. It's an unwillingness to comply because
9 of sincerely-held religious beliefs.

10 As Ms. Davis testified during the preliminary
11 injunction hearing, she was specifically asked on
12 cross-examination, "If the preliminary injunction
13 hearing in this case were issued, what would you do?"
14 Ms. Davis testified at that time, "I'll cross that
15 bridge when I get to it."

16 After the Supreme Court denied the
17 application for a stay, Ms. Davis was noted as saying
18 that she was going to pray about what she was going to
19 do the following day, given the exhaustion of stay
20 requests.

21 And when she went to work on Tuesday morning,
22 we think the evidence will clearly show that she made
23 a choice, and the fact that that choice was motivated
24 by a sincerely-held belief does not render it anything
25 other than a choice.

1 It's not a factual impossibility for someone
2 to choose a course of action because of a
3 sincerely-held religious belief, but that is
4 insufficient as a defense to contempt.

5 THE COURT: All right. Now, in your motion,
6 you seem to ask for fines in this case. The statute
7 gives the Court the discretion, depending on the
8 circumstances, what the Court believes is necessary to
9 gain compliance by the defendant herself or perhaps
10 agents of the defendant.

11 Do you expect her to comply with your order
12 if the Court imposes a fine only?

13 MR. SHARP: Your Honor, it's our hope that
14 the Court can fashion a remedy that would secure
15 compliance in ways --

16 THE COURT: Because that -- frankly, that's
17 what this hearing is about --

18 MR. SHARP: Exactly. We wanted to --

19 THE COURT: -- to coerce compliance -- this
20 is a civil contempt hearing. Nobody's seeking
21 remedial -- we have coercion of the party to comply,
22 or a remedial contempt. Remedial contempt's not what
23 we're -- no one's asking for money here; they're
24 asking for compliance. This is not -- this is civil
25 contempt, not criminal contempt.

1 All right. Do you want -- how do you wish to
2 proceed now? Do you wish to call her as a witness or
3 --

4 MR. GANNAM: Yes, Your Honor. We'd like to
5 put her on the stand.

6 THE COURT: All right. That's fine. You can
7 do that. Come around, please.

8 [KIM DAVIS, having been first placed
9 under oath, was examined and testified as
10 follows:]

11 THE COURT: Here's a water, ma'am.

12 THE WITNESS: I don't want any.

13 THE COURT: Are you sure? All right.

14 THE WITNESS: Do you have any tissues?

15 THE COURT: No, I don't have they of those.
16 Here we go. Here, take this just in case. You might
17 need that. There you go. Thank you.

18 MR. GANNAM: And for clarification, Your
19 Honor, will the Court be relying on the entire record
20 that's already been developed in this case for
21 purposes of today?

22 THE COURT: I -- I will, yes. Anything that
23 was previously testified to at the hearing or was part
24 of the record, you all can rely upon it freely in
25 making your positions known.

1 Good afternoon, ma'am.

2 THE WITNESS: Good afternoon.

3 THE COURT: All right. You may proceed, sir.

4 MR. GANNAM: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY: MR. GANNAM:

7 Q. Ms. Davis, what is your -- your current
8 religious denomination?

9 A. I'm Christian Apostolic.

10 Q. And when did you become a Christian?

11 A. 2011 is when I had dedicated my life to
12 God, January, 2011.

13 Q. Do you remember the day that you became a
14 Christian?

15 A. Yes. January 23rd. It was the day my
16 mother-in-law passed away. She died about 6:00 that
17 morning, and she wanted all of her family to go to
18 church that night. She's a Godly woman. And we went
19 -- all went that evening.

20 Q. At the time that you went to church that
21 night, was there any reason, other than her request,
22 her dying wish, that you went to church that night?

23 MR. SHARP: Objection, relevance.

24 THE COURT: Overruled.

25 A. It was out of respect for her.

1 Q. Did you wake up that day and simply
2 decide, "I'm going to become a Christian tonight?"

3 A. No.

4 Q. When you became a Christian, can you --
5 describe as best you can, you know, why you believed
6 at that moment, if you can remember it.

7 A. I haven't always been a very good person.
8 I did a lot of vile and wicked things in my time. And
9 it was through my mother-in-law's death, seeing the
10 way God's people just surrounded her with loving
11 kindness and -- God's mercy touched me that night.
12 And I know it will never be the same. I promised to
13 love Him with my whole heart, mind, body and soul,
14 because I want to make heaven my home.

15 Q. Ms. Davis, when you experienced what you
16 experienced that night and believed what you believed
17 that night, could you make a decision to unbelieve
18 that?

19 A. You can't be separated from something
20 that's in your heart and in your soul.

21 Q. And that belief that you acquired that
22 night that you became a Christian, is that the same
23 belief that motivates your -- your actions today?

24 A. Every day.

25 Q. And as part of that belief, do you have a

1 belief about what marriage is?

2 A. Yeah.

3 Q. And what is marriage, according to that
4 belief?

5 A. Marriage is a union between one man and
6 one woman.

7 Q. Do you have the ability to believe that
8 marriage is anything else?

9 A. No.

10 Q. Is there anything preventing you from
11 issuing marriage licenses currently, other than that
12 belief as to what marriage is?

13 A. No.

14 Q. And is that belief, to be clearer, is it a
15 religious belief?

16 A. It is.

17 Q. Ms. Davis, if I asked you the question:
18 Do you -- do you approve of same-sex marriage, what
19 would your answer be?

20 A. No. It's not of God.

21 Q. And are you able to -- to change your mind
22 about that?

23 A. No.

24 Q. And is there any circumstance that you can
25 envision where you could authorize a marriage of a

1 same-sex couple based on your religious belief?

2 A. No.

3 Q. Can you change your conscience on this
4 matter?

5 A. I cannot.

6 Q. Ms. Davis, if there were any way for a
7 Rowan County marriage license to be issued that did
8 not depend on your authorization and did not bear your
9 name, would you have any objection to that?

10 MR. SHARP: Objection. Relevance.

11 THE COURT: Overruled. I don't think it
12 matters, but -- go ahead. You may answer.

13 A. Ask the question again, please.

14 Q. If there were a way to issue a marriage
15 license from Rowan County that did not depend on your
16 authorization and bear your name, would you have any
17 objection to that?

18 A. No.

19 Q. Do you -- apart from those things, your
20 authorization and your name being on the license, do
21 you have any objection to the plaintiffs obtaining a
22 marriage license anywhere?

23 A. No.

24 Q. Ms. Davis, are you aware of any change by
25 the legislature in the marriage licensing statutes

1 that, at least prior to the *Obergefell* decision,
2 controlled your duties and your authority to issue
3 marriage licenses?

4 A. Can you restate -- can you ask that again.
5 I'm sorry.

6 Q. Are you aware of any action by the
7 Kentucky General Assembly, Kentucky Legislature, to
8 change the marriage laws in effect at the time the
9 Supreme Court issued its *Obergefell* decision?

10 A. No.

11 Q. And are you aware of any executive orders
12 issued by the Governor of Kentucky that dictate what
13 the marriage laws and policies are in Kentucky since
14 the *Obergefell* decision?

15 A. No.

16 Q. And as you sit here today, apart from the
17 existing Kentucky law at the time the *Obergefell*
18 decision came down and the *Obergefell* decision itself,
19 are you aware of any other controlling law on the
20 issuance of marriage licenses in Kentucky?

21 A. No.

22 MR. GANNAM: I have no further questions,
23 Your Honor.

24 THE COURT: Any cross?

25 MR. SHARP: Thank you, Your Honor.

1 CROSS-EXAMINATION

2 BY: MR. SHARP:

3 Q. Good afternoon, Ms. Davis.

4 A. Good afternoon.

5 Q. You are, of course, aware of the
6 preliminary injunction ruling that was issued in this
7 case?

8 A. I am.

9 Q. You testified at a hearing about that in
10 Covington a few weeks ago?

11 A. I did.

12 Q. And after that preliminary injunction
13 ruling was entered on August the 12th, you and your
14 attorneys sought to have its execution stayed,
15 correct?

16 A. Correct.

17 Q. First in this court?

18 A. Yes.

19 Q. Then in the Court of Appeals?

20 A. Yes.

21 Q. And then finally, in the United States
22 Supreme Court?

23 A. Yes.

24 Q. And on each occasion, your request to stay
25 that injunction was denied?

1 A. Yes.

2 Q. I'm sorry?

3 A. Yes.

4 Q. When you testified on July the 20th, in
5 connection with that preliminary injunction motion,
6 you were asked what you would do if the Court issued a
7 preliminary injunction?

8 A. Yes.

9 Q. Do you recall your response?

10 A. I think you said earlier that I said I
11 would have to wait until that time came, pretty much.

12 Q. Was that an accurate recitation of how you
13 testified?

14 A. I don't have the transcript in front of
15 me, but I believe that you wouldn't say something that
16 was not on it.

17 Q. And after the Supreme Court's decision was
18 handed down on Monday, did you make a statement about
19 what you would do then?

20 A. You mean on the first?

21 Q. Yes, ma'am.

22 A. Did I make a statement of what I was going
23 to do?

24 Q. Were you asked by the media what you were
25 going to do after the Supreme Court issued its

1 decision?

2 A. I've been inundated with media and stuff.
3 I can't recall.

4 Q. Let me refresh your recollection. Do you
5 recall telling the press that after the Supreme
6 Court's decision, you were going to have to pray about
7 what to do following the stay denial?

8 A. I pray every day, Mr. Sharp.

9 Q. Do you recall telling the press that?

10 A. I don't know if I -- if you said I did, I
11 probably did.

12 Q. So after the Supreme Court denied the stay
13 application, did you have to think about what you were
14 going to do when you went to work the next day about
15 the "no marriage license" policy?

16 A. Did I have to think about it?

17 Q. Yes, ma'am.

18 A. I didn't have to think about it. There
19 was no choice there.

20 Q. When you denied the marriage licenses on
21 Tuesday, you said that no marriage licenses would be
22 issued, pending your appeals in this case, correct?

23 A. Correct, yes.

24 Q. Did you really mean to say that no
25 marriage licenses would issue unless you won this

1 case?

2 A. No, sir.

3 Q. Well, then if you lose this case, will you
4 go back to issuing marriage licenses?

5 A. Hopefully, our legislator will get
6 something -- legislature will get something taken care
7 of, sir.

8 Q. On July 20th then, did you know then that
9 if a preliminary injunction ruling was issued, that
10 you would not comply with it?

11 A. No, because it hadn't happened.

12 Q. On Tuesday, you went to work, correct?

13 A. Yes.

14 Q. And you met with your deputy clerks?

15 A. We probably did meet. I don't know if
16 they -- if all of them got there early or not.

17 Q. You notified them about the Supreme
18 Court's decision?

19 A. They all knew.

20 Q. And you told them that notwithstanding the
21 Supreme Court's decision, your office was not going to
22 issue any marriage licenses?

23 A. We are not issuing marriage licenses.

24 Q. I'm sorry?

25 A. We are not issuing marriage licenses.

1 Q. You told them that irrespective of the
2 Supreme Court's decision, your "no marriage license"
3 policy remained in place?

4 A. Correct.

5 Q. Despite the fact that the preliminary
6 injunction contradicted that?

7 A. Correct.

8 Q. When one of the couples was denied a
9 marriage license on Tuesday, you told them that you
10 were denying the marriage license or not issuing them
11 under God's authority?

12 A. That's right.

13 Q. Because to your religious beliefs, God's
14 authority supersedes this Court's authority?

15 A. He supersedes everything, sir.

16 Q. And that includes this Court's authority?

17 A. Yes, sir.

18 Q. You interpret the Court's preliminary
19 injunction ruling as contrary to God's will?

20 A. I do.

21 Q. As contrary to God's law?

22 A. I do.

23 Q. As contrary to what you've described as
24 natural law?

25 A. I do.

1 Q. But you chose to disobey this Court's
2 order because of your sincerely-held religious
3 beliefs?

4 A. I have.

5 Q. On Tuesday morning, two of the plaintiffs
6 in this case, Dr. April Miller and Karen Roberts, went
7 to your office to get a marriage license, correct?

8 A. They said they were there. I don't -- I
9 didn't see them. That doesn't mean they weren't
10 there.

11 Q. The deputy clerks that were there that day
12 continued to follow your directive of not issuing
13 marriage licenses?

14 A. That's correct.

15 Q. This may seem like an obvious question,
16 Ms. Davis, but other than your religious beliefs, are
17 there any other reasons why your office cannot issue
18 marriage licenses?

19 A. Not presently, no.

20 Q. Your office was certainly capable of doing
21 so before the Supreme Court's *Obergefell* decision?

22 A. Correct.

23 Q. Your office issued 99 marriage licenses
24 this year alone before that decision was handed down?

25 A. You're correct.

1 Q. And issued 214 last year?

2 A. That's correct.

3 Q. You've got the equipment to issue marriage
4 licenses?

5 A. We do.

6 Q. You've got the personnel?

7 A. I do.

8 Q. So there's nothing physically preventing
9 you from -- or your office, from issuing marriage
10 licenses as to eligible applicants?

11 A. Presently you are correct.

12 Q. Am I correct that you have six deputy
13 clerks?

14 A. There are eight that work in -- or seven
15 that work in my office, and six that are front line --
16 five that are front line.

17 Q. And of those, how many are able and
18 qualified to issue marriage licenses?

19 A. The five that work the front line.

20 Q. Those five deputy clerks, when they issue
21 a marriage license, do you physically have to sign or
22 otherwise handle the marriage license application
23 itself?

24 A. No.

25 Q. You've previously indicated that you

1 object to your name as the Rowan County Clerk
2 appearing on those licenses, right?

3 A. That's correct.

4 Q. If you're not handling or signing the
5 licenses yourself, is your name being populated on
6 those forms by the software?

7 A. It is.

8 Q. Ms. Davis, of course, you're aware that
9 we're here today on plaintiffs' motion to hold you in
10 contempt?

11 A. I am.

12 Q. You are aware that if found in contempt,
13 the Court could impose fines or other relief against
14 you?

15 A. I am.

16 Q. Based on your earlier testimony, am I
17 correct that your religious beliefs have not changed
18 since Tuesday?

19 A. They have not.

20 Q. And you continue to refuse to comply with
21 the Court's preliminary injunction ruling?

22 A. My conscience will not allow me.

23 Q. Ms. Davis, if the Judge were to order the
24 imposition of fines, what's your understanding of who
25 would be responsible for paying those?

1 MR. GANNAM: Objection, Your Honor. It calls
2 for a legal conclusion from the witness.

3 THE COURT: Overruled.

4 THE WITNESS: That means I have to answer it?

5 THE COURT: You need to answer, ma'am.

6 A. I guess me.

7 Q. In the three weeks since the Court issued
8 its preliminary injunction ruling, have you talked
9 with anyone about obtaining financial assistance to
10 pay for any contempt fines that may result in this
11 case?

12 A. No.

13 Q. Are you aware if anyone has offered or
14 agreed to provide financial assistance to you in the
15 event that you incur contempt fines in this case?

16 A. There's people calling the office all the
17 time wanting to know where we can -- where they can
18 send money.

19 Q. And what do you tell them?

20 A. Send them to my counsel.

21 Q. Liberty Counsel?

22 A. There's funds set up through the Family
23 First Foundation and -- I don't know. People want to
24 set up Go Funds, and I don't know what to tell them.
25 It's not my -- I don't have anything to do with that.

1 THE COURT: Those Go Funds, I've seen those
2 before like for individuals who -- like I know I've
3 had situations where individuals have children who are
4 killed and put money into a bank, and it's raised for
5 funeral expenses, et cetera.

6 Is that kind of what we're talking about
7 here, something like that?

8 THE WITNESS: Uh-huh (affirmatively), yeah.

9 THE COURT: Okay. I've heard of that before.

10 A. I, myself, have not solicited any money
11 from anybody.

12 Q. How much money has been raised on your
13 behalf?

14 A. I couldn't tell you.

15 Q. How'd you find out about the efforts to
16 raise money for you?

17 A. People calling, people coming in.

18 Q. Do you expect that the county's insurance
19 carrier would pay any fines associated that you might
20 incur as a result of this contempt hearing?

21 A. No. I was told that KaCO has dropped me
22 like a hot potato.

23 Q. And who told you that?

24 A. County Attorney.

25 Q. Ms. Davis, has there been a change in your

1 staffing since you testified in July within the
2 clerk's office?

3 A. No. I have a little part-time girl I
4 hired to help with the preparation of elections.

5 Q. Did you count her in the total today?

6 A. Let me see, 1, 2, 3 -- 5, 6, 7, and I
7 guess there's eight. But she doesn't wait the front,
8 or she just simply files and helps, but she is a
9 part -- she is a part-time deputy.

10 Q. Thank you. Ms. Davis, as an elected
11 county clerk, your salary is a matter of public
12 record?

13 A. Sure it is.

14 Q. I'm sorry?

15 A. I said, sure it is.

16 Q. You make approximately \$80,000 a year?

17 A. About that.

18 Q. Ms. Davis, in your verified complaint in
19 this case, you stated that in order to be --

20 THE COURT: Her third-party complaint?

21 MR. SHARP: Yes, sir.

22 THE COURT: All right, sir.

23 Q. In order to be a county clerk, you swore
24 an oath to support the Constitution and laws of the
25 United States and the Commonwealth of Kentucky?

1 A. Correct.

2 Q. You also said that you understood that
3 those oaths meant that you also would uphold the moral
4 law of God?

5 A. Yes.

6 Q. And natural law?

7 A. Yes.

8 Q. And your sincerely-held religious beliefs
9 and convictions?

10 A. Yes.

11 Q. You decide when your job duties conflict
12 with God's moral law, correct?

13 A. No. It's more like God's moral law
14 convicts me when it conflicts with my job duties.

15 Q. But you were the -- you were the
16 decision-maker about when your job duties conflict
17 with God's moral law?

18 A. My conscience is.

19 Q. And you're also the decision-maker about
20 when your job duties conflict with what you've
21 described as natural law?

22 A. Yes.

23 Q. I'm sorry. We're going to need an audible
24 answer.

25 A. I said yes.

1 THE COURT: If we don't have the air
2 conditioning on in here at all, it's going to get an
3 oven, so everybody has to try to keep their voices up.
4 Thank you.

5 Q. And when, in your judgment, a statute or
6 constitutional provision or job duty conflicts with
7 God's moral law or natural law, God's moral law or
8 natural law trumps, correct?

9 A. Yes.

10 Q. As it did in this instance when your
11 belief about God's law conflicted with the Court's
12 preliminary injunction ruling?

13 A. Yes.

14 Q. And is it your contention that each and
15 every government employee has the same right that you
16 do?

17 A. Yes.

18 Q. Regardless of what their religion may be?

19 A. Yes.

20 MR. SHARP: Nothing further, Your Honor.

21 THE COURT: All right. Anything else
22 redirect-wise -- or I didn't ask you. Ms. Parsons,
23 anything?

24 MS. PARSONS: No, Judge.

25 THE COURT: Mr. Vance?

1 MR. VANCE: No, Your Honor.

2 THE COURT: Mr. Gannam?

3 MR. GANNAM: May I have a moment, Your Honor?

4 THE COURT: Sure.

5 REDIRECT EXAMINATION

6 BY: MR. GANNAM:

7 Q. Ms. Davis, does your office receive any
8 money from marriage licenses that your office does not
9 issue?

10 A. No.

11 THE COURT: Now, the testimony at the
12 preliminary injunction hearing was it was just a small
13 amount of her entire budget. I remember we talked
14 about that.

15 MR. GANNAM: It was one-tenth of one percent.

16 THE COURT: Yeah, a very small amount, very
17 small.

18 Q. But just so I'm clear, but if your office
19 isn't issuing a marriage license, it's not receiving
20 any funds from marriage licenses, correct?

21 A. That's correct.

22 Q. And, Ms. Davis, does any deputy clerk in
23 your office have any authority to issue a marriage
24 license that doesn't come from your authority as the
25 county clerk?

1 A. No, they do not.

2 MR. GANNAM: No further questions, Your
3 Honor.

4 THE COURT: All right. I just have a couple
5 of follow-ups, and I will try to be as specific as I
6 can.

7 Given your testimony today, it's not your
8 intention on complying with the Court's August 12th,
9 2015, order which enjoined you from applying your "no
10 marriage license" policy; is that correct? Yes?

11 THE WITNESS: Yes.

12 THE COURT: All right. And have you
13 instructed your deputy clerks not to comply with the
14 order as well?

15 THE WITNESS: Yes.

16 THE COURT: All right. All right. Very
17 well. You may step down. Thank you.

18 THE WITNESS: Thank you.

19 MR. GANNAM: Your Honor, may I have just a
20 brief follow-up on that issue?

21 THE COURT: Sure. I mean, I just asked two
22 questions, so ...

23 REDIRECT EXAMINATION

24 BY: MR. GANNAM:

25 Q. Ms. Davis, as the clerk who employed eight

1 employees in your office, do you have an obligation to
2 consider any religious objection that an employee
3 might make to any job duty in your office?

4 A. Yes.

5 MR. GANNAM: No further questions, Your
6 Honor.

7 THE COURT: All right. And you testified
8 previously, ma'am, in July that -- and I have my
9 notes; I know the transcript reflects the actual
10 language that was used, but I didn't realize you had
11 seven or eight. You may have hired someone part time
12 in the interim to help with the elections, as you've
13 stated, but several of the deputies shared your
14 belief, and at least one had indicated that they would
15 issue the licenses if you would allow it; is that
16 still the case?

17 THE WITNESS: It is.

18 THE COURT: All right. Okay. Thank you.
19 You may step down now. Anything else? I don't mean
20 to -- did you have any follow-up?

21 MR. SHARP: No follow-up with her, Your
22 Honor. We did intend to call one of the plaintiffs.

23 THE COURT: Okay. That's fine. Thank you.
24 Any further proof with respect to the defense of the
25 civil contempt charge here? Mr. Gannam?

1 MR. CHRISTMAN: No, Your Honor.

2 THE COURT: No?

3 MR. CHRISTMAN: No, Your Honor.

4 THE COURT: Mr. Sharp.

5 MR. SHARP: Thank you, Your Honor. The
6 plaintiffs call Dr. April Miller.

7 THE COURT: That's fine. Come around, ma'am.

8 [APRIL MILLER, having been first
9 placed under oath, was examined and testified
10 as follows:]

11 THE COURT: You're welcome to a water, ma'am,
12 if you need it.

13 THE WITNESS: Okay. Thanks. Awesome.

14 THE COURT: Good catch. Try to keep your
15 voice up, please. You may proceed.

16 DIRECT EXAMINATION

17 BY: MR. CANON:

18 Q. Good afternoon, Dr. Miller.

19 A. Good afternoon.

20 Q. Would you please state your full name for
21 the record.

22 A. April Miller.

23 Q. And, Ms. Miller, do you live in Rowan
24 County?

25 A. I do.

1 Q. How long have you lived there?

2 A. Nine years and one month.

3 Q. Do you work in Rowan County?

4 A. Yes.

5 Q. What do you do for a living?

6 A. I'm a university professor at Morehead
7 State University.

8 Q. What do you teach?

9 A. My courses are focused on special
10 education, and also some that are relevant for
11 elementary education teachers as well.

12 Q. Very good. And how long have you held
13 that position?

14 A. Nine years.

15 Q. And do you pay taxes in Rowan County?

16 A. I do.

17 Q. And do you vote for elected officials in
18 Rowan County?

19 A. I do.

20 Q. And did you vote in the last county clerk
21 election?

22 A. Yes, I did.

23 Q. Who'd you vote for?

24 A. I actually voted for Kim Davis.

25 Q. Are you currently in a relationship?

1 A. Yes, I am.

2 Q. And can you describe that relationship to
3 the Court.

4 A. It's a long-term, mutually exclusive
5 partnership with Karen Roberts. We've been together
6 as a family for 11 years with our daughter.

7 THE COURT: The record will reflect
8 Ms. Roberts just raised her hand in court.

9 Q. Now you said "long-term," that was --
10 you've been together for 11 years?

11 A. Yes, sir.

12 Q. And you have a daughter together?

13 A. Our daughter is -- biological mother is
14 Karen Roberts. But when we came together as a family
15 in 2000 -- 11 years ago, I accepted both Karen and
16 Jessica into my heart and my home, and we are a
17 family, and I consider Jessica my daughter as much as
18 Karen considers her her daughter.

19 Q. And you've parented Jessica now for 11
20 years approximately?

21 A. Yes. And was a very close friendship for
22 many years before that.

23 Q. And are you engaged to be married to
24 Ms. Roberts?

25 A. I am.

1 Q. And when did you become engaged to be
2 married to her?

3 A. Actually, we probably made that commitment
4 to each other in 2000 -- I'm sorry, 11 years ago when
5 in Dallas, Texas, we -- we started living together as
6 a family, and we made a commitment then to eventually
7 get married.

8 Q. And so you've had an approximately 11-year
9 engagement?

10 A. Yes, sir.

11 Q. And so why didn't you get married for that
12 entire 11 years?

13 A. Well, first, we lived in places where
14 marriage equity was not available to us under the
15 Constitution or the state laws.

16 Q. And you said first you lived in those
17 places. Explain what you mean by that.

18 A. That's the number one reason. The second
19 reason is there were other states that were available
20 that were issuing same-sex couples marriage licenses.
21 But when we considered going to another state or
22 another country even, we recognized that our marriage
23 would not be available to us or recognized in many
24 parts of the United States, and specifically in the
25 places that we lived.

1 Q. But you know that's different now, right?

2 A. Yes, sir.

3 Q. And why is that; what's your understanding
4 of that?

5 A. On June 26th, the Supreme Court of the
6 United States ruled that there was marriage equity
7 under the Fourteenth Amendment.

8 Q. And tell the Court a little bit about how
9 you felt when that ruling came down.

10 A. Elated. We were really proud of our
11 country. We celebrated, and were very excited that we
12 had now the opportunity across all 50 states to
13 have -- to be married and to have that marriage
14 recognized.

15 Q. And did you make plans to actually get
16 married once that decision came down?

17 A. We didn't make physical plans as in oh,
18 here's our date, or here's our -- we made plans to do
19 it and get married, actually we were thinking about in
20 the summer.

21 Q. And so you've testified previously to this
22 Court about your efforts to get a license in Rowan
23 County?

24 A. Uh-huh (affirmatively).

25 Q. And since the last time you testified,

1 have you made any further efforts to get a marriage
2 license in Rowan County?

3 A. Yes. Our first attempt was June 30th, and
4 we did discuss that in court in hearings previously.

5 The second attempt was August 13th, after a
6 preliminary injunction was decided by this Court.

7 The third time we attempted to get a marriage
8 license was on September 1st, Tuesday of this week.

9 Q. And let's just focus on what happened this
10 week. Tell the Court what happened when you went up
11 there to get your marriage license.

12 A. Well, actually we came to the courthouse a
13 few minutes before 8:00. We rallied a bit with
14 Supporters of Equality, and we actually sang with --
15 along with Kim Davis's supporters, "Amazing Grace."

16 A few minutes passed, and we entered the
17 courthouse after it opened. We went to the counter.
18 We asked for a marriage license. And the clerk that
19 we saw that day said, "We are not issuing marriage
20 licenses pending appeals."

21 We said, "Our understanding was that the
22 appeal on the preliminary injunction had gone through
23 the court system to the Supreme Court, and they had
24 ruled to deny a continuing stay."

25 We asked again, and she said, "We are not

1 issuing marriage licenses pending appeals."

2 We asked to speak with Ms. Davis. We were
3 told that she was working on monthly reports and was
4 not available to speak to us.

5 We commented that we thought this might be a
6 more important business matter, and we would like to
7 see Ms. Davis. And we were again refused. We said,
8 "Thank you very much. Have a nice day," turned around
9 and left the courtroom.

10 Q. Did you actually hope that you were going
11 to get your license that day?

12 A. Yes. We were hopeful that we would walk
13 in there and receive a license and sign the
14 information so that we could get married.

15 Q. And I think you testified that it was your
16 understanding that the Supreme Court said no stay,
17 right?

18 A. Correct.

19 Q. At that time?

20 A. Yes.

21 Q. And tell the Court how you felt having
22 been denied a third time on the application for a
23 marriage license.

24 A. Well, each time we entered the -- the
25 county clerk's office to get a marriage license, we

1 had obviously an intent to get married and wanted a
2 marriage license so that we could go get that -- so
3 that we could go get married.

4 When you go into a courthouse to get a
5 marriage license, you are -- you have that giddiness
6 of, "We're gonna' get married. This is going to be
7 it." And each time we went there, we were very
8 excited and hopeful.

9 When the *Obergefell* decision came down, it
10 meant that no longer were we -- could we be
11 discriminated against in requesting a marriage
12 license, that we could -- that we could actually get a
13 marriage license.

14 So, yes, every time we've gone in, we've been
15 very excited and very hopeful.

16 Q. Do you feel like being able to get married
17 would bring any sort of validity to your relationship,
18 to your family?

19 A. Yeah. That's what marriage is about, to
20 show other people that you are in a long-term,
21 committed relationship, and that it's recognized all
22 across our country, and that you are a family. This
23 is -- it's legitimized. It's permanent. It's a part
24 of who you are.

25 Q. Why is it important to you to get your

1 license in Rowan County? Couldn't you go someplace
2 else?

3 A. Well, I live in Rowan County. I pay taxes
4 there. I own property in Rowan County. I work in
5 Rowan County. In fact, the last nine years that we've
6 lived there, we've done all of our county business in
7 Rowan County. So I expect to get my license there,
8 yes.

9 Q. Safe to say, you're part of a community in
10 Rowan County?

11 A. We are.

12 Q. Do you feel like more or less part of that
13 community if you're not able to get a marriage
14 license?

15 A. Well, for the last two months it's been
16 pretty demoralizing. We really feel like this
17 marginalizes us again. After the *Obergefell* decision
18 on June 26th, we expected that we were going to be
19 treated equally and fairly.

20 On June 30th, when that first refusal or
21 denial of being allowed a marriage license, that just
22 marginalized us. And actually we were, I believe told
23 to just go to another county by the clerk's office,
24 the clerk that -- or deputy clerk that saw us that
25 day.

1 That's kind of like saying, "We don't want
2 gays or lesbians here. We don't think you're
3 valuable. We don't think you're equal. We don't want
4 you here."

5 Q. Are you still planning to get married to
6 Ms. Roberts?

7 A. Oh, yeah.

8 Q. And what's the stat -- how are you
9 planning to do that? What's the status of your
10 marriage plans now?

11 A. Well, right now we're waiting on a
12 marriage license. But Karen and I have rings, we --
13 we have an officiant for our wedding. We are waiting
14 to find a date, which is dependent on the marriage
15 license, for a venue. We have picked out some
16 catering and flowers, and we've kind of envisioned all
17 of how our party's going to go.

18 Q. But you haven't picked a date yet?

19 A. Can't pick a date.

20 Q. Why not?

21 A. Well, this case has obviously changed our
22 plans for getting married in the summer. And if I
23 pick a date right now, when I am -- when I'm able to
24 get a license in Rowan County, once I get that
25 license, I'll have 30 days. During that 30-day window

1 is when we'll have to get the marriage performed and
2 have our party and do our thing.

3 We're doing it as a legitimate wedding.
4 There's nothing else but this party, that we're
5 waiting for our family and friends to come and witness
6 our marriage and enjoy a celebratory party with us.
7 So we can't make an arrangement for it.

8 Q. Safe to assume that you plan on having
9 your wedding here in Rowan County?

10 A. Oh, yeah. Yes, sir.

11 Q. Are you trying to force Ms. Davis to
12 change her beliefs about anything?

13 A. No.

14 Q. Is it your intention to force her to
15 believe anything in particular?

16 A. No.

17 Q. What's the point of this lawsuit?

18 A. I want to get a marriage license.

19 MR. CANON: Nothing further.

20 THE COURT: Any cross?

21 MR. GANNAM: No questions, Your Honor.

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

23 Thank you. Any further proof?

24 MR. SHARP: No, Your Honor.

25 THE COURT: All right. Turn the white noise

1 on, please.

2 [SHORT PAUSE IN THE PROCEEDINGS]

3 THE COURT: Turn that off.

4 All right. I always like to make sure the
5 court reporter has an opportunity for a break.

6 All right. I've read your briefs. Do you
7 all wish to be heard on the motion? And we've already
8 kind of argued the motion itself.

9 MR. SHARP: Your Honor, we think the evidence
10 and the previous argument speaks for themselves.

11 THE COURT: Counsel?

12 MR. CHRISTMAN: Your Honor, we've -- we've
13 asserted additional arguments in the briefing.

14 THE COURT: You have.

15 MR. CHRISTMAN: Just -- if Your Honor would
16 like any further argument on any -- any kind of
17 contempt finding that would be made in this Court,
18 would be subject to the Federal Religious Freedom
19 Restoration Act as well, and which requires this Court
20 to go through the substantial burden analysis, and
21 also find a compelling government interest. But we
22 specifically --

23 THE COURT: Well, and we've addressed that in
24 the prior ruling. I understand that.

25 MR. CHRISTMAN: The prior ruling did not

1 address contempt.

2 Now, as a matter of substantial burden,
3 Ms. Davis is being faced with the Hobson's choice of
4 choosing this conscience that is being applied on her
5 and making it factually impossible for her to
6 complying with the Court's order, or dangling out on
7 the other side a potential finding of contempt by this
8 Court, and by any understanding or interpretation of
9 the Supreme Court's precedent on what a substantial
10 burden is, just like heavy fines and heavy penalties
11 for companies that have to provide contraceptive
12 coverage or abortion-related coverage --

13 THE COURT: Or any other non -- I mean,
14 there's a lot of other things other than that.

15 MR. CHRISTMAN: -- and any other -- any other
16 government kind of mandate, the choice between
17 contempt and one's conscience is a substantial burden.
18 And as a result of substantial burden, this Court
19 would then also have to find that a compelling
20 government interest has been found. But that's a
21 compelling government interest in forcing the
22 particular religious claimant to violate their
23 sincerely-held beliefs, which there's no dispute
24 Ms. Davis has those beliefs.

25 So this Court would have to find a compelling

1 government interest in forcing Ms. Davis to violate
2 her religious beliefs, and I think that showing has
3 been made. In addition to that --

4 THE COURT: Thank you. Go ahead.

5 MR. CHRISTMAN: -- I think the Court would
6 have to analyze the case under the least restrictive
7 means. And as we set forth in our briefing, we have
8 parties in this case who have authority to make
9 modifications, make changes that allow the plaintiffs
10 in this case to obtain a marriage license in Rowan
11 County. If that's is what they really desire and
12 really want, they can get licenses elsewhere. But
13 there are means available, alternatives available that
14 they can get a license in Rowan County, and
15 Ms. Davis's conscience can be forever protected and
16 not irreversibly harmed. We've set forth those
17 alternatives for this Court --

18 THE COURT: In your response.

19 MR. CHRISTMAN: -- in prior -- in prior
20 briefing.

21 THE COURT: And the prior briefing. But the
22 prior briefing was on the preliminary injunction,
23 correct?

24 MR. CHRISTMAN: Correct.

25 THE COURT: All right.

1 MR. CHRISTMAN: And we set forth those
2 alternatives. The power of contempt is a wand that is
3 meant to be waved rarely and --

4 THE COURT: Completely agreed. Completely
5 agreed.

6 MR. CHRISTMAN: -- and in this case, all of
7 those alternatives being made available and presented
8 with a party in this case, including Governor Beshear
9 and Commissioner Onkst who are ready, equipped, and
10 available to make these alternatives available because
11 it's a license -- it's a Kentucky marriage license
12 that's requiring Kim Davis personally to authorize
13 that license and affix her name on it.

14 The governor can change that form, make it a
15 state form with no personal authority, no Kim Davis
16 name on it, available in a Rowan County Clerk's
17 office, and this case would be over, Your Honor.

18 THE COURT: Okay. Thank you. Is Governor
19 Beshear -- can he do this by executive order?

20 MR. VANCE: Your Honor, there is no executive
21 order. In fact, Governor Beshear isn't going to do
22 anything.

23 THE COURT: But is he -- does he have the
24 authority to do that by executive order versus by
25 calling a special session? And I have some

1 familiarity with the requirements of a special
2 session, but I'm just curious. By executive order, I
3 know the president can issue executive orders for a
4 variety of reasons. I'm assuming that the executive
5 of the state would be able to do that on certain
6 things as well.

7 Is this something where he can just change
8 the form by executive order?

9 MR. VANCE: No, Your Honor, because the
10 requirements or the composition of marriage license is
11 dictated by statute, and the governor cannot change
12 the statute.

13 THE COURT: All right.

14 MR. CHRISTMAN: Your Honor --

15 THE COURT: Hold on. How do you respond --

16 MR. SHARP: Thank you, Your Honor.

17 THE COURT: -- to Mr. Christman's argument?

18 MR. SHARP: Your Honor, with all due respect
19 to Ms. Davis, the sincerity with which she believes
20 that issuing these licenses is a substantial burden on
21 her religious belief does not necessarily correlate to
22 a finding of substantiality in this Court.

23 As the Court found, and as the parties
24 briefed in the preliminary injunction ruling itself,
25 in support of the preliminary injunction ruling, the

1 burden, though sincerely held, and to Ms. Davis
2 certainly substantial, is not sufficient for a court
3 of law to find a substantial burden sufficient to
4 justify heightened scrutiny under either Kentucky or
5 federal RFRA standards. As the Court wrote, "The
6 burden on her religious belief is more slight than
7 substantial."

8 THE COURT: Well, and the Sixth Circuit may
9 disagree with that. And you stood up. I'm going to
10 certainly give you every right to be heard, sir.

11 MR. CHRISTMAN: Thank you, Your Honor. With
12 all due respect to counsel, Governor Beshear has
13 already made the change. The form that existed in
14 Kentucky before the *Obergefell* decision was a form
15 that was designed by the KDLA, and that form would not
16 have prevented the plaintiffs from even obtaining a
17 marriage license because it was tied to gender-based
18 terms.

19 THE COURT: I recall the change.

20 MR. CHRISTMAN: So Governor Beshear then
21 ordered and directed the KDLA to modify the form, and
22 change, very limited fashion, change it to just say
23 "spouse" and take out the gender --

24 THE COURT: Right.

25 MR. CHRISTMAN: -- the gender-based terms.

1 So Governor Beshear cannot now argue that, "I suddenly
2 don't have authority to modify the form." We're in
3 this courtroom because he modified the form and forces
4 Kim Davis to authorize that license.

5 So he can certainly modify that form with the
6 least restrictive alternative that doesn't place that
7 substantial burden, which my counsel for the
8 plaintiffs, in all due respect, has just conceded is a
9 substantial burden on Ms. Davis. By that
10 concession --

11 THE COURT: Did you concede that?

12 MR. SHARP: No, Your Honor.

13 MR. CHRISTMAN: He just said it was sincere.
14 The record will reflect that.

15 THE COURT: Well, it's sincere. I never have
16 -- hold on. I've never found that it wasn't sincere.
17 I've not -- I've never once in this case taken a
18 position that was contrary to her belief. I mean, I
19 -- or stated that it was anything other than genuinely
20 held. I have never said that.

21 MR. CHRISTMAN: Mr. Sharp said it was a
22 sincerely-held religious belief --

23 THE COURT: Well, I previously found that.

24 MR. CHRISTMAN: -- and that substantially
25 burdens Kim Davis. Then he said the Court -- the

1 Court has reached a different decision as the
2 substantial burden, but he's admitted that there is a
3 substantial burden --

4 THE COURT: Well, my prior order -- I'm not
5 going to repeat what the Court found, and it's law of
6 the case, at least for now, and so -- I understand
7 your argument. He changed it before, why he can't
8 change it now.

9 Mr. Vance, how do you respond to that?

10 MR. VANCE: Judge, the form was changed in
11 response to a final decision of the United States
12 Supreme Court that did change marriage in the sense
13 that same-sex marriage was protected by the Fourteenth
14 Amendment, and so the form was modified to reflect
15 compliance of the decision of the United States
16 Supreme Court.

17 The United States Supreme Court disturbed no
18 other portion of Kentucky's marriage laws, so the
19 governor does not have the ability to change those
20 himself because they are in the statute.

21 THE COURT: All right. Well -- I do plan,
22 and I haven't decided if I'm going to enter a written
23 order or not. I probably will enter some sort of
24 written order following up the Court's decision.

25 The Court finds that the plaintiffs have

1 established through not only their filing, but the
2 testimony of Ms. Miller, as well as Ms. Davis's own
3 admissions here this morning and into this afternoon,
4 by clear and convincing evidence that she has and will
5 continue to violate this Court's order requiring that
6 she issue marriage licenses to the plaintiffs in this
7 case. And I'll explain my reasoning, but I want to
8 make sure that the record reflects the Court's
9 decision.

10 The Court also finds that Ms. Davis has
11 failed to establish that she took all reasonable steps
12 within her power factually and otherwise to comply
13 with the Court's order. She says she can't do it
14 because of her religious beliefs; that's her
15 honestly-held religious beliefs. She says she can't
16 do it, but that's not a factual impossibility.

17 Her reasons for non-compliance are simply
18 insufficient to establish that she is presently unable
19 to comply with the Court's order under the Sixth
20 Circuit authority that the Court has reviewed.

21 In the case of *In Re Jaques*, and it's
22 J-A-Q-U-E-S, 761 F.2d 302 at page 306. It's a 1985
23 decision. The Sixth Circuit stated that, "A
24 contemnor's intent in disobeying an order is
25 irrelevant to the validity of a civil contempt

1 finding."

2 While it may be relevant to the chosen
3 sanction, it's not relevant to the validity of the
4 contempt finding. The Court finds that Ms. Davis is
5 therefore in contempt of this Court's order.

6 Now, the Court doesn't do that lightly,
7 ma'am. I don't -- you don't strike me as being
8 someone who's contentious or combative. I simply
9 believe that in making this contempt finding, it's
10 necessary, for a number of reasons that I'll get into.

11 The Court does reject your argument that you
12 are presently unable to comply. The case law
13 discusses the concept of being factually unable to
14 comply where you may not have any control over certain
15 things. There was an example of money in a bank
16 account. That's -- one of the cases discusses that.

17 There's simply no authority that the Court
18 can find for the proposition that "presently unable to
19 comply" includes a situation where someone chooses not
20 to comply because they have religious objections from
21 doing so.

22 This case is not a situation where there is a
23 factual impossibility of complying. In fact,
24 Ms. Davis testified herself that she's not
25 physically -- it's not physically impossible for her

1 to issue the licenses. She's choosing not to do so
2 because of her religious beliefs.

3 Her good faith belief is simply not a viable
4 defense in this civil context proceeding. And the
5 Court cites the *Glover V. Johnson* case, 934 F.2d 703,
6 at page 708, Sixth Circuit, 1991.

7 The Court must be mindful, especially in
8 cases which have garnered the public's interests, as
9 this one has, in avoiding situations which would cause
10 a proverbial slippery slope.

11 And in making the Court's determination that
12 she's in contempt, I have to be mindful of the fact
13 that whatever the Court does here, it may have a
14 ripple effect on other types of situations.

15 What's to prevent the next person or party
16 from refusing to comply with a lawfully issued order
17 because they personally disagree with it for a variety
18 of reasons, in this case, the reason being her
19 genuinely-held religious beliefs.

20 I, myself, have generally-held religious
21 beliefs. I'm sure many of the folks in this courtroom
22 have their own genuinely-held religious beliefs.

23 I took an oath 13-plus years ago. Ms. Davis
24 took an oath in January. Many of the marshals in this
25 room took an oath. Many of the law enforcement

1 officers took an oath. Oaths mean things.

2 I used the example earlier about a Catholic
3 clerk, and I only used that because I'm Catholic, and
4 I generally have an idea of what is in the Catechism,
5 the Second Vatican Council, I have a general idea. I
6 went to Catholic high school. I have some vague
7 familiarity from my prior life of what Catholics
8 believe in.

9 The marriage license forum itself asks
10 questions such as prior marriages. And if a Catholic
11 clerk wouldn't -- didn't want to issue a marriage
12 license to someone who was eligible to marry because
13 they hadn't had their marriage annulled, would that
14 clerk be able to do so? That's just one example.

15 I mean, if I were to agree that someone could
16 have a religious objection to doing this, what's to
17 prevent him or her from doing it in that case? And
18 you can extend this out to other types of situations
19 where it could cause a ripple effect.

20 In this country, we live in a society of
21 laws. Our system of justice requires citizens, and
22 significantly our elected officials, to follow orders
23 of the Court. Indeed, the fabric of our judicial
24 branch relies upon that principle practically every
25 day.

1 There's a number of other particular
2 arguments in the response that the Court is going to
3 address.

4 Ms. Davis raises the issue of due process,
5 that her due process rights have been violated during
6 these contempt proceedings. She has had notice and an
7 opportunity to be heard. Her constitutional rights
8 have been addressed in the Court's prior decision.
9 There's simply no viable due process argument in the
10 Court's view regarding these civil contempt
11 proceedings.

12 She also argues that criminal contempt
13 proceedings require greater protections. The Court
14 agrees. If this was a criminal contempt proceeding,
15 there would be greater protections. However, this is
16 a civil contempt proceeding, which is designed to
17 coerce or gain compliance with the Court's order. So
18 these added protections that are mentioned in the case
19 law for criminal contempt simply don't apply.

20 She also argues, and Mr. Christman has argued
21 this this afternoon, that any contempt order will
22 substantially burden her religious rights under RFRA.
23 The Court did address her RFRA argument in the prior
24 memorandum, opinion and order. And I may issue a
25 brief order on that particular issue post-hearing.

1 But for today's purposes, the Court -- those of you
2 who have read the Court's order know what the Court's
3 prior decision was.

4 The Court found no substantial burden because
5 she is merely certifying that the couple is legally
6 qualified to marry. And frankly, that -- I think when
7 it comes to that particular issue, given the fact that
8 the Circuit language in its order denying the motion
9 to stay was so specific as it relates to her substant
10 -- her ability to prove that she has a likelihood of
11 success on the merits. That order, while it's only an
12 order denying the motion to stay, it is telling us to
13 what the Circuit -- or how the Circuit may view the
14 merit's appeal.

15 Also, the defendant argues that by entering a
16 contempt order, it would be premature and improperly
17 intrusive in the state of affairs. The Court
18 disagrees. It's not premature in the Court's view.
19 This Court and both appellate courts, as everyone
20 knows, both the Sixth Circuit Court of Appeals and the
21 Supreme Court, have upheld the denial of the motion to
22 stay, pending appeal.

23 The Court does have the authority under
24 rule -- not Rule 4, but Section 401 of Title 18 to
25 enforce its lawfully issued orders through this civil

1 contempt proceeding.

2 The defendant argues that it's not a
3 situation to where contempt is warranted because less
4 intrusive alternatives are available.

5 I recognize, and I mentioned this when we
6 first came out earlier this morning, that the
7 legislative and executive branches do have the ability
8 to make changes. And those changes may be beneficial
9 to everyone. Hopefully, changes are made. But it's
10 not this Court's job to make those changes. I don't
11 write law.

12 Now, sometimes district courts are called to
13 rule on things that there aren't any cases or other
14 authority for. They talk about writing on a clean
15 slate. It's a rare opportunity for a court to write
16 on a clean slate. In those situations, the Court
17 occasionally is called upon to interpret what the law
18 is, and that's kind of what this Court is doing here,
19 to a certain extent.

20 These legislative and executive options which
21 have been identified in the response have not yet come
22 to pass, or were previously addressed in the prior
23 memorandum, opinion, and order. This idea that she's
24 absent because she's chosen not to issue these
25 licenses, I previously addressed that. I'm not going

1 to plow that same ground here this afternoon.

2 Civil contempt is the Court's way of
3 compelling or coercing compliance with its orders. If
4 legislative or executive remedies do not -- or do come
5 to fruition, as I stated, better for everyone.
6 However, the Court cannot condone the willful
7 disobedience of its lawfully issued order. To do
8 otherwise, would allow individuals to violate the
9 orders of the Court without any consequences. And the
10 Court simply cannot allow that to occur.

11 I simply think that if you give people the
12 opportunity to choose which orders that they follow,
13 that's what potentially causes problems. Society
14 depends on individuals and entities and parties to
15 follow lawfully issued orders.

16 This idea of natural law superseding this
17 Court's authority. I have no doubt that you believe
18 that, ma'am; I do. I mean, that's your right to
19 believe that. But to allow that to carry the day, if
20 you will, in ruling on this motion simply would be a
21 dangerous precedent, indeed.

22 Regarding the sanction, the case law suggests
23 that we have the least possible sanction considered to
24 coerce compliance with the order.

25 In this case, the Court finds that the

1 requested financial penalties would simply be
2 insufficient to compel her immediate compliance with
3 the order.

4 The probable effectiveness of any financial
5 sanction will not bring about the desired result of
6 compliance. I don't say these things lightly; I
7 don't. I have given this case a lot of thought.

8 Each of the judges that have sworn an oath to
9 uphold the Constitution and follow the law and not
10 create law, have a handful of cases where what is
11 required that they do may be different than what I
12 think perhaps the Court should do.

13 But 13 years ago, I told senators in
14 Washington that I would do what was required to be
15 done. So -- and I brought that up initially because I
16 think it's important for everybody to recognize
17 that -- I mean, I don't hold -- I think I've had two
18 or three times in 13 years where I've actually been
19 asked to hold a party or a person in contempt. And
20 the Court doesn't do this lightly. It's necessary in
21 this case, because to do otherwise, would allow
22 someone to -- who took an oath to follow the law, to
23 kind of pick and choose what orders they want to
24 follow. And that's simply not the way that the court
25 system is set up, nor is it the way that the court

1 system can operate in a civilized society.

2 And frankly, the judicial branch wouldn't
3 function properly if we allowed individuals to simply
4 decide not to follow orders of the court.

5 In not ordering that a fine be issued, and I
6 know you've requested a fine here. The fact that
7 there's these other funds set up, and I realize the
8 testimony was somewhat vague about that, I'm not
9 convinced that other individuals would pay the
10 penalties if I imposed a fine.

11 So in this particular instance, ma'am, I'm
12 going to order that you be remanded to the custody of
13 the marshal. To gain compliance with the order, I
14 believe it's necessary in this case. So I'm going to
15 order that you be remanded to the custody of the
16 marshal for your refusal to comply with the Court's
17 order.

18 You can purge yourself of that contempt order
19 by indicating compliance. I'm not going to put a
20 deadline on it. If you want to order your clerks to
21 allow the licenses to be issued, you can purge
22 yourself of contempt.

23 So that will be the order of the Court. So
24 you'll be remanded to the custody of the marshal,
25 pending your compliance with the Court's order.

1 Now -- you can go ahead and escort her out.

2 Thank you.

3 THE DEFENDANT: Thank you, Judge.

4 THE COURT: Thank you, ma'am.

5 All right. Before moving on to the deputy
6 clerks, I want to mention that the Court's order dated
7 August 12th, enjoined the defendant, Ms. Davis, in her
8 official capacity from enforcing her policy, which I
9 amended this morning over the plaintiffs' objection.
10 That is a continuing order, unless and until it's set
11 aside by this Court, having a different order or any
12 other reviewing court.

13 So if there's a -- if I'm notified that
14 Ms. Davis has purged herself of the contempt, I can do
15 that. The fact that this contempt hearing was even
16 necessary demonstrates the need for that.

17 All right. As you know from the telephone
18 conference two days ago, I did order the deputy clerks
19 to be present for the hearing today.

20 Rule 65(d)(2)(B) and (C) set forth who was
21 bound by the injunction. And I brought out my statute
22 book -- or my rule book, excuse me.

23 Two, persons -- the order binds only the
24 following who received actual notice of it by personal
25 service or otherwise.

1 The parties' -- B., the parties' official's
2 agents, servants, employees.

3 And C., other persons who are in active
4 concert or participation with anyone described in the
5 rule.

6 So she did testify, Ms. Davis, that she
7 instructed the deputy clerks not to issue licenses.
8 So would you concur or disagree with the proposition
9 that under Rule 65(d) (2) (B) and (C), that the deputy
10 clerks are agents or servants or employees of the
11 parties in this case?

12 MR. GANNAM: Your Honor, the deputy clerks --

13 THE COURT: You don't represent them?

14 MR. GANNAM: We do not, Your Honor.

15 THE COURT: Okay.

16 MR. GANNAM: And I would simply assert that
17 they have a right to be heard in this case.

18 THE COURT: They do. They do. And we're
19 going to take up that in a second. But do you wish --
20 you both stood up immediately, and I want to give you
21 an opportunity to be heard.

22 MR. CHRISTMAN: Your Honor, before we move on
23 to the deputies and whatever the Court has in mind,
24 we'd ask that your finding of contempt, that you would
25 certify that finding and ruling for immediate appeal

1 to the Sixth Circuit under 1291.

2 THE COURT: Well, I'll take that up in a
3 moment. I'm not going to do that right now because I
4 have some other matters I need to take up first.

5 MR. CHRISTMAN: And in addition to that, we
6 would ask that you would -- upon certifying it, if you
7 grant that motion, then you would also stay any
8 enforcement for sanction from the contempt to allow
9 Ms. Davis to seek emergency relief from the Sixth
10 Circuit from this very weighty ruling from the Court
11 that is different and substantial in terms of
12 affecting her individual rights.

13 THE COURT: Well, I recognize it's an
14 important ruling. I do. I do. I certainly haven't
15 made the decision lightly, Mr. Christman.

16 MR. CHRISTMAN: And given that, Your Honor,
17 we would ask that you would allow immediate appeal of
18 that ruling and a stay of any enforcement of any
19 sanction from which the Court has just ordered.

20 THE COURT: So your oral motion is to certify
21 the issue for immediate appeal. Because a contempt
22 order is ordinarily not something like the preliminary
23 injunction was entered, you had an appeal of right.
24 You don't have an appeal of right on a contempt order.
25 And you recognize that it needs -- it needs to be

1 certified.

2 MR. CHRISTMAN: There are exceptions to the
3 1291 ruling, the Collateral Order Doctrine in
4 particular that can be raised. But to expedite the
5 appeal process, given the weightiness and significance
6 of this Court's ruling today, we would ask for that
7 emergent -- that certification to short-circuit our
8 ability to file that appeal in the Sixth Circuit,
9 because the Court's order today is tied to the
10 merits of --

11 THE COURT: Well, I agree with that.

12 MR. CHRISTMAN: -- the preliminary injunction
13 that had been taken up.

14 THE COURT: So I'm just trying to make sure
15 since we'll have the minutes of this proceeding -- and
16 frankly, just before I forget. Madam Clerk, when
17 you're doing the minutes --

18 DEPUTY CLERK: Yes, sir.

19 THE COURT: -- the plaintiffs' motion, it's
20 67, to hold Ms. Davis in contempt was granted for the
21 reasons set forth on the record. I'm likely going to
22 supplement with that with perhaps a brief follow-up
23 memorandum order on part of the reasoning that I
24 wanted to kind of -- I may want to supplement that,
25 and I'll do that relatively quickly.

1 The minutes will also reflect that you're
2 orally moving for the Court to certify the issue
3 regarding the granting of the motion for contempt, and
4 also orally moving to have that order stayed pending
5 appeal.

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

7 THE COURT: Okay. All right. We'll make
8 sure the record reflects that.

9 Do you want to file a written response to
10 that?

11 MR. SHARP: I mean, we object, Your Honor.
12 I mean, we --

13 THE COURT: I know you object. I understand
14 that. I'll just -- I'll just submit that.

15 I know I could probably have a 30-page motion
16 with a memoranda filed by this afternoon by, I guess,
17 other Liberty Counsel who aren't in court, but I --

18 MR. CHRISTMAN: Your Honor, with all due
19 respect, we could not get more emergent than the
20 circumstances that have happened, so we --

21 THE COURT: Well, I understand that.

22 MR. CHRISTMAN: -- would ask for a ruling on
23 that motion.

24 THE COURT: Okay. That motion will be
25 denied.

1 MR. SHARP: Your Honor, thank you.

2 THE COURT: That motion will be denied.

3 Now, the motion to stay will be denied, and
4 the motion to -- to --- the certification motion will
5 be denied as well.

6 MR. CHRISTMAN: In -- in light of that, Your
7 Honor, then alternatively, we would move that you
8 would suspend any sentence until the legislature meets
9 and has an opportunity to revise the Kentucky marriage
10 licensing scheme and permit Kim Davis to be taken out
11 of the custody until the legislature has a chance to
12 address the entire Kentucky marriage licensing scheme.

13 THE COURT: That motion will be denied as
14 well.

15 This case, at its core, is about individuals
16 following the Court's order, and that's -- the Court
17 previously found that she had not, and the Court
18 certainly didn't make its decision lightly.

19 Okay. Given that Ms. Davis and her deputies
20 did discuss, and she, in fact, did indicate that she
21 had instructed her deputies not to issue the marriage
22 licenses, the Court has chosen to ask several
23 court-appointed counsel who are members of the Federal
24 Public Defender list here in Ashland to advise the
25 deputies.

1 And I don't know who the deputies are. Up to
2 this point, they've just been deputies of Kim Davis.
3 So what I'm going to need to do is I have -- and what
4 we did, I just had the clerk call the six panel
5 attorneys who would otherwise be appointed to
6 represent individuals who may have -- may be subject
7 to being in contempt themselves.

8 So if you're one of the deputy clerks --
9 there were eight identified, but I only called six
10 attorneys because -- the individuals who are
11 front-line deputies, I don't know who you are, if you
12 would all would stand. I mean, if you're one of the
13 five.

14 Okay. All right. There were six. But if
15 you would just first of all identify yourself, sir.

16 MR. DAVIS: Nathaniel Ray Davis.

17 THE COURT: Nathaniel Davis?

18 MR. DAVIS: Yes.

19 THE COURT: Okay. All right. And you,
20 ma'am?

21 MS. PLANK: Kristie Plank.

22 THE COURT: What's your last name?

23 MS. PLANK: Plank, P-L-A-N-K.

24 THE COURT: Plank, P-L-A-N-K?

25 MS. PLANK: Uh-huh (affirmatively).

1 THE COURT: All right. Sir?

2 MR. MASON: Brian Mason.

3 THE COURT: B-R-Y-A-N?

4 MR. MASON: B-R-I-A-N.

5 THE COURT: Okay. Mason --

6 MR. MASON: Yes, M-A-S-O-N.

7 THE COURT: -- like the county?

8 MR. MASON: M-A-S-O-N.

9 THE COURT: Okay. You, ma'am?

10 MS. RUSSELL: Kim Russell.

11 THE COURT: Kim Russell, common spelling last
12 name, like the county here?

13 MS. RUSSELL: R-U-S-S-E-L-L.

14 THE COURT: All right. Kim, K-I-M?

15 MS. RUSSELL: Yes.

16 THE COURT: All right. And what's your name,
17 ma'am?

18 MS. THOMPSON: Melissa Thompson.

19 THE COURT: Melissa Thompson?

20 MS. THOMPSON: Uh-huh (affirmatively).

21 THE COURT: Okay. Now, what I'm going to do,
22 in the order in which Kelly, the clerk, yesterday gave
23 me the list in order. I'm assuming the list she gave
24 me was just the order in which they'd be -- they would
25 have been called?

1 DEPUTY CLERK: Yes.

2 THE COURT: All right. Mr. Davis, I'm going
3 to have you meet with Mike Campbell. He's a member of
4 the federal public defender list here in Ashland.

5 Ms. Plank, I'm going to have you meet with
6 Michael Fox.

7 Brian Mason, the Court is going to -- and I'm
8 going to appoint each of you to represent each of
9 the -- because you are -- each of you are non-parties
10 to this litigation. But because of the way the rule
11 reads, you could potentially be held in contempt
12 yourselves because you're acting as her agent. That's
13 why the Court felt it was important to have you talk
14 to counsel. Liberty Counsel represent Ms. Davis, not
15 each of you.

16 So, Mr. Mason, you'll be meeting with
17 Mr. Hughes. Ms. Russell, you'll be meeting with
18 Mr. Joy. And, Ms. Thompson, you'll be meeting with
19 Mr. Markelonis.

20 Mr. Clark, I thought there were six clerks.

21 MR. CLARK: That's fine, Your Honor.

22 THE COURT: I apologize for having you here.
23 All right.

24 MS. EARLEY: Judge, as Barry said, I'm a
25 non-issuing marriage license -- I'm not -- the

1 department I work in does not issue marriage licenses,
2 but I am one of the deputies.

3 THE COURT: But are you eligible to issue the
4 licenses, though?

5 MS. EARLEY: As a deputy, I would assume. I
6 do not do it now. It's not part of my department.

7 THE COURT: Okay. Well, I -- just out of an
8 abundance of caution then, ma'am, I'm going to have
9 Jeremy Clark, a member of the public defender list,
10 appointed to represent you.

11 MS. EARLEY: Okay.

12 THE COURT: What we're going to do -- I know
13 we have a large contingency of folks here today. And
14 this courtroom and courthouse is somewhat small. So
15 rather than clear the courtroom, I'm going to give
16 each of you 30 minutes. We'll come back at 1:45.

17 Each of you can meet with each of your
18 respective lawyers. And what I'm going to in essence
19 be asking, the Court could find that one or more of
20 you would be in contempt of the order as a non-party
21 pursuant to the rule I previously stated, and the
22 sanction for such finding could include fines and/or
23 imprisonment. The Court has asked each of these
24 public defenders to advise you of your rights.

25 So after having the opportunity to meet with

1 counsel, I'm going to be asking each of you, after a
2 brief recess, whether or not you intend on complying
3 with the Court's order requiring you to issue marriage
4 licenses from the plaintiffs in this case, or any
5 other individuals who are legally eligible to marry.

6 So, Mr. Marshal, if you could -- I know
7 there's several jury rooms. There's the grand jury
8 suite in the back. There's a jury room back here in
9 chambers.

10 I'm, of course, not going to be party to any
11 of this. I'm just trying to get -- if you could find
12 six different places for them to meet --

13 DEPUTY MARSHAL: Yes, Your Honor.

14 THE COURT: -- with their respective
15 attorneys. And we'll make sure that each of you are
16 appointed to represent each of these particular
17 deputies.

18 So we'll allow that to occur. We'll come
19 back in at 1:45.

20 MR. CHRISTMAN: Your Honor, if I could -- if
21 I could make an objection.

22 THE COURT: What -- what's your objection to?

23 MR. CHRISTMAN: That all of these deputies
24 can only issue marriage licenses based upon the
25 authority of Kim Davis, and Kim Davis has not given

1 them that authority.

2 So the one deputy clerk has -- who has said
3 she cannot issue licenses, it's not in her department,
4 that applies to all of the deputy clerks because none
5 of the deputy clerks can issue a marriage license
6 bearing Kim Davis's name and on her authorization
7 because she has not given that authorization.

8 THE COURT: Well, your objection's noted and
9 overruled. I'm going to have them talk to these
10 lawyers.

11 MR. CHRISTMAN: Thank you, Your Honor.

12 THE COURT: We'll be in recess until 1:45.

13 [RECESS - 1:13 - 1:51 p.m.]

14 [IN OPEN COURT]

15 THE COURT: All right. Before we took our
16 recess, I had appointed CJA panel attorneys to the six
17 deputies.

18 And I apologize, what was your name, ma'am?

19 MS. EARLEY: Mine?

20 THE COURT: Yes.

21 MS. EARLEY: Roberta Earley.

22 THE COURT: Earley?

23 MS. EARLEY: Earley, E-A-R-L-E-Y

24 THE COURT: Is that E -- E-A-R-L?

25 MS. EARLEY: E-A-R-L-E-Y.

1 THE COURT: Okay. All right. And I had
2 appointed counsel for the six deputies so that they
3 could advise them of their rights.

4 And before we broke, and I apologize, I had
5 been citing to Rule 62. It's actually Rule 65(d)(2).
6 That was my error.

7 I mentioned earlier, I'm -- my eyes aren't as
8 good as they used to be, so I was just -- I had the
9 wrong rule regarding whether or not agents or
10 employees are bound by a prior injunction order, and
11 that rule will stand for that proposition.

12 And there was an issue that you had raised,
13 Mr. Christman, about they only act at her behest, and,
14 therefore, they can't do something without her
15 authority.

16 I have found earlier that she is in contempt
17 of the Court's order. And, of course, you disagree
18 with that, and I recognize that, because she's not
19 complying with the order.

20 If she instructs the deputies to not comply
21 with the order, how is that different than from, like,
22 for instance, a biracial couple comes in, and she
23 says, "Don't issue the license."? Or a completely
24 African-American couple comes in and she says, "Don't
25 issue the license."? If it's an unlawful order, do

1 they have to -- do they have to -- do they have to
2 follow it?

3 MR. CHRISTMAN: Which lawful order -- the
4 lawful order --

5 THE COURT: Well, either one. I mean, giving
6 those examples, let's say, for instance, Ms. Davis
7 gave an order to her clerks -- and I'm not saying that
8 she would ever do this -- but hypothetically, a
9 biracial couple comes in, "Don't issue the order." Of
10 course, *Loving V. Virginia*, and we're not going to get
11 into the details, but, I mean, that's -- obviously,
12 that would be an unlawful order. Would they have to
13 follow it, even if they -- gosh, I don't think that's
14 right, but if that's an unlawful order, do the
15 deputies have to follow it?

16 MR. CHRISTMAN: Well, their authorization
17 under Kentucky statute comes from --

18 THE COURT: What statute?

19 MR. CHRISTMAN: -- the county clerk. The
20 chapter for marriage laws is 402, and --

21 THE COURT: What chapter governs what the
22 deputy clerks have to do?

23 MR. CHRISTMAN: Well, the statute that was in
24 place before *Obergefell*, 402.100, and --

25 THE COURT: What does that say the deputy

1 clerks have to do?

2 MR. CHRISTMAN: Well, that -- that statute is
3 the one that says the authorization statement is from
4 the county clerk, which hasn't been given, and also --

5 THE COURT: Well, I'm holding that she's in
6 violation of the Court's order by not authorizing it.

7 MR. CHRISTMAN: That -- that is what you held
8 --

9 THE COURT: Correct.

10 MR. CHRISTMAN: -- but their authority comes
11 from her, not from you.

12 THE COURT: Well, if they follow her
13 authority and her authority's in contempt, why can't
14 they be held in contempt as agents or employees of
15 hers?

16 MR. CHRISTMAN: Because the only authority
17 they can give is from her. This Court doesn't have
18 authority to rewrite Kentucky marriage statutes.

19 THE COURT: Okay. So I can't -- so taking
20 that to its logical conclusion, though, if someone --
21 an employer tells an employee to do something, and
22 they -- just general agency principals, if they're an
23 agent, why, under Rule 65(d)(2)(B), shouldn't they be
24 bound by the Court's preliminary injunction?

25 MR. CHRISTMAN: Well, because here, the

1 employer has told the employee, "You don't have my
2 authority to issue it." You're --

3 THE COURT: Are they able to do it without
4 that? Let's say one of them --

5 MR. CHRISTMAN: The analogy you're creating
6 is you're inserting yourself as the employer and the
7 authorizing agent and issuer of the marriage license.

8 THE COURT: Okay. If I told them they can't
9 do it, but a court says they have to, they still --
10 you're saying they can't do it because she said they
11 couldn't?

12 MR. CHRISTMAN: Because their authority --
13 because at that point then, you're raising
14 implications and issues with respect to what the
15 Kentucky marriage law and the marriage licensing
16 scheme, which again, has been completely overwritten,
17 but those aspects that are being -- are trying to be
18 applied, that authority comes exclusively from the
19 county clerk. That's the -- that's the core issue
20 here.

21 THE COURT: All right. Mr. Sharp, what's
22 your response to this? They're arguing, in essence --
23 and correct me if I'm wrong, because I want to make
24 sure that we get it right -- because the clerk is not
25 authorizing them to issue the licenses, and she

1 testified this morning that she's very plainly,
2 candidly, and I certainly appreciate that, that she
3 told them that, "We are not issuing licenses pending
4 appeal," I think is what she said.

5 MR. SHARP: We think the Court's absolutely
6 correct as far as there is a valid court order
7 preliminarily enjoining Ms. Davis in her official
8 capacity from enforcing the "no marriage license"
9 policy.

10 To the extent her employees continue to
11 adhere to enforcement of what this Court has enjoined,
12 then we think 65(d)(2)(B) would in fact be implicated,
13 and, you know, their ability to be held in contempt,
14 even as a non-party, would be at play.

15 THE COURT: Okay. Let me ask you,
16 Ms. Parsons, Mr. Watkins. What the Court does -- I
17 recognize that what the Court does here potentially
18 impacts the services, et cetera, provided by the
19 clerk's office of Rowan County. Do you all take a
20 position on the applicability of Rule 65(d)(2)(B) as
21 it relates to the deputies?

22 MR. WATKINS: Judge, I -- I think they can
23 issue them in her absence at that point because
24 they're -- they're acting in concert as -- as the
25 clerk.

1 If -- if what they say is true, she's allowed
2 to pick the religious beliefs of her deputy clerks,
3 and everybody knows that's -- that's illegal.

4 THE COURT: Ms. Parsons? So -- so it's the
5 position of the county attorney, sir, that they can
6 issue the licenses in her absence?

7 MR. WATKINS: Absolutely.

8 THE COURT: All right. Ms. Parsons?

9 MS. PARSONS: I have the same position.

10 THE COURT: All right. All right. Let me
11 now turn to the actual individuals in play here and --
12 I can't remember who was appointed to represent who,
13 so maybe you all can help me.

14 I'll start with you, Mr. Campbell.

15 MR. CAMPBELL: I was appointed to represent
16 Mr. Davis.

17 THE COURT: All right, sir. Did you have an
18 opportunity to talk to him in the interim?

19 MR. CAMPBELL: I did, Your Honor.

20 THE COURT: All right. Did you explain to
21 him the potential consequences of compliance with the
22 Court's order?

23 MR. CAMPBELL: I did.

24 THE COURT: All right. Mr. Davis, did you
25 meet with Mr. Campbell, sir?

1 MR. DAVIS: I did, sir.

2 THE COURT: Okay. And I take it -- and I
3 don't think the record really reflects this, so I'll
4 just ask. I mean, Kim Davis is your mother; is that
5 right?

6 MR. DAVIS: She is my mother, sir, yes.

7 THE COURT: Okay. All right. Again, we go
8 back to what's of the public domain and what's
9 actually of record domain, and I wanted to make sure
10 that reflects that. Mr. Campbell?

11 MR. CAMPBELL: Yes, that's his mother, Your
12 Honor.

13 THE COURT: All right. Okay. I'm going to
14 ask you all collectively something. Thank you.

15 Mr. Fox, who were you appointed for?

16 MR. FOX: Yes, Your Honor. I represent
17 Ms. Plank.

18 THE COURT: Ms. Plank?

19 MS. PLANK: Yes.

20 THE COURT: All right. Mr. Fox, did you have
21 an opportunity to talk to Ms. Plank about the
22 potential consequences of compliance with the Court's
23 order?

24 MR. FOX: I did, Your Honor.

25 THE COURT: All right. Ms. Plank, did you

1 talk to Mr. Fox about that?

2 MS. PLANK: I did.

3 THE COURT: Okay. All right. Mr. Joy?

4 MR. JOY: Yes, sir.

5 THE COURT: Let me make a note here.

6 Campbell, Fox.

7 MR. JOY: I have Ms. Russell, Judge.

8 THE COURT: Ms. Russell? All right.

9 In the interim during the recess, Mr. Joy,
10 did you have an opportunity to talk to Ms. Russell?

11 MR. JOY: I did, Your Honor.

12 THE COURT: And did you explain to her the
13 potential consequences of a contempt finding?

14 MR. JOY: I did, Your Honor.

15 THE COURT: All right. Ms. Russell, is that
16 accurate; did you speak with Mr. Joy?

17 MS. PLANK: I did.

18 THE COURT: Okay. All right. Thank you.

19 Mr. Hughes, you have Mr. Mason?

20 MR. HUGHES: Yes, sir, I do.

21 THE COURT: All right. Mr. Hughes, did you
22 have an opportunity to discuss with Mr. Mason the
23 contempt proceedings and the possibilities and the
24 possible consequences for not complying with the
25 Court's order?

1 MR. HUGHES: Yes, I did.

2 THE COURT: All right. Mr. Mason, did you
3 have a chance to talk to him about that?

4 MR. MASON: Yes, Judge.

5 THE COURT: Okay. Thank you. And Mr. --
6 who's left? Mr. Markelonis, you have Ms. Thompson?

7 MR. MARKELONIS: Yes, sir, I did.

8 THE COURT: And, Mr. Markelonis, the same
9 questions. Did you have a chance to talk to her about
10 the contempt proceedings and the potential
11 consequences of non-compliance with the Court's order?

12 MR. MARKELONIS: I did, Judge.

13 THE COURT: All right. Ms. Thompson, did you
14 speak with Mr. Markelonis about that?

15 MS. THOMPSON: I did, Judge.

16 THE COURT: Okay. Thank you. And,
17 Ms. Earley, you met with Mr. Clark; is that right?

18 MS. THOMPSON: I did.

19 THE COURT: Mr. Clark, did you explain to her
20 the potential consequences of non-compliance with the
21 Court's order?

22 MR. CLARK: I did, Your Honor.

23 THE COURT: Okay. Ms. Earley, did you speak
24 to him about that?

25 MS. EARLEY: I did.

1 THE COURT: Okay. All right. Now, up to
2 this point, the record does not reflect which deputy
3 the individual plaintiffs may have spoken with on
4 prior occasions.

5 I know since the order denying the motion to
6 stay was entered by the Supreme Court, which was
7 Monday of this week, which was I think approximately
8 7:00 on Monday night, the 31st, I don't know who
9 Ms. Miller met with; she may remember which one.

10 But the important thing for the Court at this
11 point is to see if any of the deputies would be
12 intending on complying with the Court's order, the
13 preliminary injunction order which has enjoined
14 Ms. Davis from enforcing her "no marriage license"
15 policy to the plaintiffs in this case or to any other
16 individuals who were legally eligible to marry.

17 I guess we'll just start with each of you in
18 the order in which I addressed you earlier.

19 MR. HUGHES: Judge, if I may --

20 THE COURT: Yes.

21 MR. HUGHES: -- save that trouble. Mr. Mason
22 was the one that had discussed that with Ms. Davis,
23 and he'd already indicated to her that he would issue
24 those licenses, if he were allowed to do so.

25 He has indicated to me that he will comply

1 with this Court's order to do that. But there are
2 some practical problems. One, he doesn't even have a
3 key to get in the offices. That can probably be
4 overcome.

5 The second is the concern that was raised by
6 honorable counsel here involving the state statutes
7 and what authority they have if in fact Ms. Davis is
8 still saying that she does not give them the
9 authority.

10 So he -- that may be an issue that has to be
11 addressed somewhere outside this Court. Perhaps this
12 Court can answer his question, but he wants you to
13 know that he intends to comply with this Court's
14 ruling and issue the licenses.

15 THE COURT: Mr. Davis -- or, Mr. Mason? I'm
16 sorry. Yes, if you'd come around, please, with
17 Mr. Hughes.

18 I'm going to go ahead and place you under
19 oath.

20 Madam Clerk, if you would place Mr. Davis
21 under oath, please. Sorry, Mr. Mason. I'm sorry. I
22 have Mr. Davis first on the list. Mr. Mason, I
23 apologize, sir.

24 [BRIAN MASON, having been first placed
25 under oath, was examined and responded as

1 follows:]

2 THE COURT: All right. Mr. Mason, do you
3 intend on complying with this Court's order which
4 previously enjoined Ms. Davis from enforcing her "no
5 marriage license" policy?

6 MR. MASON: I advised her that -- and she
7 knew that I was willing to issue those from the
8 beginning, but I did not want to go against her
9 wishes. But, you know, I can't go to jail or be fined
10 either.

11 THE COURT: How long -- how long have you
12 been a deputy?

13 MR. MASON: I started working there in
14 January of 2014.

15 THE COURT: Okay. So you started a year
16 before she became --

17 MR. MASON: Yes.

18 THE COURT: You worked for her mother?

19 MR. MASON: Yes. Ms. Bailey.

20 THE COURT: Okay. All right. So you are not
21 going to follow her -- well, put it this way. You've
22 told me that you are willing to comply with the
23 Court's order requiring you to issue marriage licenses
24 to the plaintiffs in this case or any other
25 individuals who are legally eligible to marry; is that

1 right?

2 MR. MASON: Yes.

3 THE COURT: All right. Now, by doing so, and
4 I bring this up because I mentioned earlier, that this
5 Court has an ongoing -- thank you, sir. You -- you
6 may step back -- this Court has an ongoing interest in
7 ensuring that its orders are complied with. And what
8 I want to avoid is a situation where someone issues a
9 license, something occurs with that individual, we're
10 right back here next week, and we have a proverbial
11 ping-pong match going forward.

12 And I have always been, since the very
13 beginning of this filing when the case was reassigned
14 to me, interested in trying to see if we could get
15 some sort of resolution, and there has been -- at
16 every turn, the parties have been at odds.

17 And I say the "parties." You all are not
18 parties. The six of you all are non-parties. You are
19 not sued in this action. But each of you are
20 employees or agents of Ms. Davis, and I previously
21 found her to be in contempt. Now, I gave my reasons
22 for that. I probably am going to follow up with a
23 brief written order to supplement part of the prior
24 oral findings.

25 But if -- if Mr. -- I simply don't think in

1 the Court's view that telling someone to not comply
2 with a lawful order is something that a clerk, or
3 anyone else who takes an oath to uphold the law, is
4 able to do.

5 MR. JOY: Your Honor, may I?

6 THE COURT: Yes, sir. Mr. Joy?

7 MR. JOY: Your Honor, I think you addressed
8 an issue earlier, but I think you kind of glanced over
9 that. I think I feel the need to -- to bring that
10 back up. You addressed agency principal earlier.

11 THE COURT: Right.

12 MR. JOY: Under an agency principal, an agent
13 is able to -- well, consent can be withdrawn at a
14 certain time. And I think we have an issue here, I
15 think, if you -- and you also spoke of a ping-pong
16 match next week coming right back to you. I think if
17 you -- you are entering a valid order -- you are --

18 THE COURT: I -- I believe it to be a valid
19 order.

20 MR. JOY: Right.

21 THE COURT: The Circuit may disagree. But
22 the language the Circuit used in their stay order kind
23 of tells me that they very well may not disagree.

24 MR. JOY: Correct. And in looking at all of
25 that, I still don't think the statute under 402.100

1 necessarily gives, under agency theory, the permission
2 for either Mr. Mason, or my client, Ms. Russell, to
3 issue a valid marriage license. They could issue you
4 a license. Now, is that valid? I think that's the
5 million dollar question that needs to be answered at
6 some point. I don't think that question's being asked
7 of us here today, but I just wanted to bring that to
8 the Court's attention.

9 THE COURT: So you believe that if he issued
10 the license without her authority, it would be an
11 invalid license?

12 MR. JOY: Absolutely.

13 THE COURT: All right. Mr. Sharp -- usually
14 the -- the only time that would come up perhaps would
15 be if there was a divorce, we were never married, or
16 some contention later.

17 Mr. Sharp, what's your position on the
18 validity of the license, if it's issued without her
19 authority? Do you take a position on that?

20 MR. SHARP: Well, I mean, we think that she
21 cannot condition her authority on an unlawful act,
22 and -- which is what she has -- what counsel seems to
23 be alluding to the fact that if she is withholding or
24 may withhold her permission to issue licenses based on
25 illegal conduct as far as --

1 THE COURT: Well, I didn't find it to be
2 illegal. I found that it was in violation of the
3 Court's order.

4 MR. SHARP: Contemptuous conduct, correct.
5 We don't think her authority extends that far, insofar
6 as the office, apart from Kim Davis, exists to perform
7 certain public functions. Kim Davis does not have to
8 personally touch every marriage license. She employs
9 people for the purpose of carrying out the duties of
10 that office.

11 To the extent Kim Davis has an erroneous
12 instruction of her ability to block them from doing
13 that, that, nonetheless, does not mean that they
14 cannot perform those functions.

15 THE COURT: Well, the form says the clerk or
16 deputy clerk. It does bear her name. And we're not
17 going to plow that ground again. I previously found
18 that really the clerk is performing a ministerial task
19 verifying that the person is otherwise legally
20 eligible to marry, and I'm not going to rehash that.
21 The prior Court's order speaks for itself.

22 This individual has -- Mr. Mason has
23 indicated that he will issue the licenses.

24 Now, I don't think it's necessary at this
25 point, given your statement to me here under oath,

1 that you would issue the licenses, for me to ask each
2 of the others if they're going to follow the order or
3 not. Because by doing that -- yes, sir?

4 MR. HUGHES: I don't want to put Mr. Mason in
5 the position, and he had a valid concern, and I
6 certainly don't want to put the others in that
7 position because there's a -- obviously, a least
8 restrictive way to go ahead involving these licenses.

9 His concern is, is that you heard her use the
10 term "front-line, five people," and that basically
11 means he's going to be the only one -- not that
12 there's that many people that will be applying, but
13 with the publicity of this case, I wouldn't be
14 surprised if they come from all over. But the point
15 is, is that he's going to be --

16 THE COURT: And unfortunately, I can't
17 control that.

18 MR. HUGHES: I know you can't.

19 THE COURT: This case has been tried -- not
20 tried -- both sides have been equally -- "guilty" has
21 a bad context -- participance, equal participance in
22 making this a very public -- and the issues are
23 weighty issues; no question, but making it far more
24 public than it perhaps would otherwise be.

25 And I don't want to put anybody in a bad

1 situation; I don't. It's not the way the Court
2 operates.

3 MR. HUGHES: He recognizes that. He just --
4 it's probable that there may be some others that also
5 agree to comply.

6 But the point is, is that if we would stop it
7 at this point, as understandable as that is, he faces
8 singular ostracism from the public.

9 THE COURT: I appreciate that, and you're
10 right. That's a good point. That's a good point.
11 Because what -- the Court's whole goal here -- it's
12 not the Court's goal ever to hold anyone in contempt
13 for violating an order. I mentioned earlier, I'll
14 mention it again. I mean, there's very little law
15 because most individuals comply.

16 If someone is willing to comply, and most of
17 the -- well, it seems as if there have been situations
18 where other clerks who may have religious objections
19 have allowed other deputies to issue licenses for him
20 or her to enable the Supreme Court's *Obergefell's*
21 decision to be implemented, and this individual's
22 willing to do that.

23 Okay. I will proceed. Thank you. You
24 all -- you can step back, Mr. Mason.

25 Mr. Davis --

1 MR. CAMPBELL: Judge, why don't we ask how
2 many other compliers we've got before we get to
3 Mr. Davis. If we have two or three other clerks that
4 also will comply, I might want to be last in line.

5 THE COURT: Well, I can recognize that. I
6 mean, I -- we all love our parents. I mean, that's
7 not a -- well, we -- most of us love our parents.
8 Perhaps there may be reasons why we may not in an
9 individual case or two.

10 Any other defense attorneys after speaking
11 with their respective clients that I appointed
12 indicate that they would be willing to issue the
13 licenses?

14 Mr. Markelonis?

15 MR. MARKELONIS: Judge, if we can approach
16 the podium.

17 THE COURT: Sure. Come around. And this is
18 Ms. Thompson?

19 MS. THOMPSON: Yes.

20 MR. MARKELONIS: Yes, sir.

21 THE COURT: All right. Ms. Thompson, if you
22 would swear her, please, under oath. Thank you.

23 [MELISSA THOMPSON, having been first
24 placed under oath, was examined and responded
25 as follows:]

1 THE COURT: And I understand that this may be
2 difficult for all of you. And I -- and I, on behalf
3 of the Court, had never intended on any of these
4 proceedings to put any of you in harm's way or make
5 you uncomfortable with anything. Because frankly, we
6 were just talking about this during the break. I
7 mean, the most difficult cases are the hardest ones,
8 and they're hard for a variety of reasons. Legally
9 perhaps, emotionally perhaps, factually -- and I've
10 not been to Morehead recently. I understand what's
11 occurring almost on a daily basis there. I know folks
12 that go to Morehead State. We have jurors from Rowan
13 County who come up here and serve.

14 So I want you all to know that the Court has
15 tried to shepherd this case through the court, at
16 least here in the district court level, in a way that
17 enables the issues to be raised and adjudicated as
18 promptly as possible, while making sure that each of
19 your individual circumstances are taken care of.

20 Now, you really haven't -- you've all been
21 behind the -- we talk about "behind the curtain." I
22 mean, you've been behind the desk for a long -- for
23 the whole time. And unfortunately, based upon the
24 actions here, I've had to summons you each to court.

25 So I just felt -- I saw you getting ready to

1 tear up and I wanted you -- I wanted to address that
2 to you because I don't like to make anybody cry; I
3 don't. I don't think the Court would ever want to do
4 that. I don't think these lawyers would ever want to
5 do that. They have issues they want to raise, both
6 sides do.

7 I've said it once, I'll say it a thousand
8 times. We -- we can have all our individual
9 disagreements as citizens of the United States. But
10 here in the United States, we resolve those in a way
11 that are -- we peacefully have disobedience, we
12 peacefully protest, we expect at the end of the day
13 for the Court's orders to be complied with, and that's
14 how things work here in America.

15 So, Ms. -- did you place her under oath? I'm
16 sorry.

17 DEPUTY CLERK: Yes, I did.

18 THE COURT: Okay.

19 MR. MARKELONIS: Judge, if I could?

20 THE COURT: Yes.

21 MR. MARKELONIS: I spoke at some length, like
22 the other lawyers, with Ms. Thompson. I would say
23 that she's uniquely situated here.

24 Before going to work at the county clerk's
25 office, she worked for Judge Mains, the circuit judge

1 there, for some time as his secretary.

2 THE COURT: Is he still the circuit judge
3 there?

4 MR. MARKELONIS: No. He's been retired for a
5 while.

6 THE COURT: That's what I thought. That's
7 what I thought.

8 MR. MARKELONIS: But I think she's probably
9 maybe uniquely qualified among the deputies to
10 appreciate judges who want their orders complied with.

11 THE COURT: Well, I think any judge would
12 expect, not want, expect the orders to be complied
13 with.

14 MR. MARKELONIS: And she understands that,
15 Judge. She's wrestled with this. But she indicated
16 to me that she's willing to comply with the Court's
17 order. She has her own personal feelings about the
18 issue, like all the other persons in here. But she's
19 indicated to me that she'll comply with the Court's
20 order and do what she has to do.

21 THE COURT: All right. So, Ms. Thompson, how
22 long have you been employed with the clerk's office?

23 MS. THOMPSON: I was there almost 13 years,
24 and then I left and I came back, so probably about 15,
25 16 years.

1 THE COURT: Okay. So you left there to go
2 work for the circuit judge?

3 MS. THOMPSON: I worked for Judge Mains about
4 a year-and-a-half.

5 THE COURT: Okay. And then you came back?
6 So I worked for Ms. Davis's mother as well?

7 MS. THOMPSON: I worked for Ms. Bailey, yes.

8 THE COURT: It was Ms. Bailey?

9 MS. THOMPSON: Uh-huh, Jean Bailey.

10 THE COURT: Okay. Okay. Are you willing to
11 comply with this Court's order requiring that marriage
12 licenses be issued to the plaintiffs in this case or
13 any other individuals who are legally eligible to
14 marry in Kentucky?

15 MS. THOMPSON: Yes, Your Honor. I don't
16 really want to, but I will comply with the law. I'm a
17 preacher's daughter, and this is the hardest thing
18 I've ever done in my life --

19 THE COURT: Well, we all have things we
20 don't --

21 MS. THOMPSON: -- but I will comply.

22 THE COURT: -- we don't want to do. Now,
23 I've been very careful in this case --

24 MS. THOMPSON: I don't hate anyone at all.

25 THE COURT: Well, I don't believe Ms. Davis

1 does.

2 MS. THOMPSON: None of us hate --

3 THE COURT: The rhetoric that goes on outside
4 the courtroom --

5 MS. THOMPSON: None of us hate anybody. It's
6 just hard.

7 THE COURT: No one does. I appreciate that;
8 I really do.

9 It's always folks that aren't involved that
10 speak the loudest because they want -- they don't --
11 they sometimes don't have all the information and they
12 -- someone sends an email and says, "Look what's going
13 on in Kentucky. We need to be heard and --"

14 I mentioned the 2,000 calls. I don't blame
15 folks for calling. I think every judge in America
16 isn't going to be swayed by calls like that.

17 That's -- the public interest is important,
18 clearly. I appreciate that. And I appreciate your
19 hesitation. I think in a very real way, you're likely
20 like many of the individuals in this courtroom. Both
21 sides -- there's strong views on both sides, no
22 question.

23 It's not my job to tell five Supreme Court
24 Justices that they're wrong. The Supreme Court is
25 able to revisit their decisions, but it's the Supreme

1 Court that does that.

2 So this issue that's been raised -- I mean,
3 he doesn't have a key, Mr. Mason. I mean, I don't
4 know -- Mr. Watkins, you're the county attorney. Are
5 you in the building --

6 MR. WATKINS: Yes, sir.

7 THE COURT: -- where the county -- the
8 clerks' office is?

9 MR. WATKINS: Yes, sir. Yes, sir. Usually
10 when they go to the clerk's office and it doesn't work
11 out, they end up in my office, Your Honor.

12 THE COURT: Okay. Well, will you -- and I
13 don't know who -- is there a chief deputy? I know
14 everybody -- sometimes you have a -- someone who's a
15 chief --

16 MR. WATKINS: There is. Roberta Earley.

17 MS. EARLEY: Roberta Earley.

18 THE COURT: You're the chief deputy?

19 MS. EARLEY: I am.

20 THE COURT: Okay. I think, and if necessary,
21 I'll eventually get to you. But I appreciate your
22 candor, ma'am; I do. Thank you.

23 If you'd step back. And now, Mr. Fox?

24 MS. PLANK: Ms. Plank.

25 THE COURT: Ms. Plank, come around, ma'am.

1 All right. If you would be sworn. Thank
2 you.

3 [KRISTIE PLANK, having been first
4 placed under oath, was examined and responded
5 as follows:]

6 THE COURT: Okay. Ms. Plank, the Court has
7 asked Ms. Thompson and Mr. Mason about the prior
8 order. You're aware of the Court's prior order
9 requiring that Ms. Davis no longer enforce her "no
10 marriage license" policy?

11 MS. PLANK: Yes, Your Honor.

12 THE COURT: Okay. Have you -- and you've
13 spoken with Mr. Fox about the potential consequences
14 of not complying with that?

15 MS. PLANK: Yes.

16 THE COURT: All right. Mr. Fox?

17 MR. FOX: Yes, Your Honor. We did speak at
18 quite length. And Ms. Plank presents a situation that
19 I predicted to Mr. Campbell this morning when we
20 talked about this case that would be present, which is
21 that --

22 THE COURT: Be what?

23 MR. FOX: That --

24 THE COURT: If you'd try to -- be -- we have
25 the air on, so ...

1 MR. FOX: I'm sorry.

2 THE COURT: Go ahead, sir.

3 MR. FOX: Ms. Plank's situation's one that I
4 predicted, Your Honor. She is a mother of an
5 11-year-old child. She and her husband work hard to
6 keep up and make ends meet.

7 She's in a situation where she has personal
8 convictions, just like, as you've indicated, most
9 people in this courtroom, but she also has financial
10 obligations. She has a duty to her child, to care for
11 her child. And she has struggled and is struggling
12 with the idea of balancing convictions with
13 obligations, family and otherwise.

14 THE COURT: I think that's something
15 everyone's doing.

16 MR. FOX: So our discussion primarily for the
17 half-hour that we met was about those convictions and
18 the balancing, and ultimately a choice of lesser of
19 evils. And I think but for some of the these other
20 obligations and responsibilities that she has, her
21 response to you today would be different. But these
22 are real world issues. And there are two things that
23 she wanted me to talk about.

24 One, she wanted it to be clear that she had
25 personal opinions and beliefs that are contrary to

1 what is expected of her in her job. But she respects
2 the Court, and she recognizes that she's under an
3 obligation under Rule 65 that you discussed, that the
4 orders that apply to Ms. Davis also would apply to her
5 as an employee of Ms. Davis, and I believe she will
6 tell you that she will comply with your order.

7 She was quite articulate in explaining to me
8 and us discussing this issue of whether she has the
9 authority to do that. And while I was back there --
10 and fortunately, recent court orders allow us to bring
11 these devices into the courthouse -- and 402.080, KRS
12 402.080 says that, "No marriage shall be solemnized
13 without a license therefor. The license shall be
14 issued by the clerk of the county."

15 She believes, and I don't know that she's
16 wrong, that the authority is with the clerk. And if
17 the clerk hasn't given her authority, then she
18 probably doesn't have authority.

19 However, our discussion wasn't about whether
20 she has authority to issue a license. Our discussion
21 was about whether she was obligated to follow your
22 order to do so. And she recognizes that she does have
23 that -- or that she is under your authority to issue a
24 license.

25 THE COURT: She appreciates the authority of

1 the Court?

2 MR. FOX: That's right. That's right. And
3 whether -- as Mr. Joy and I've discussed -- whether
4 that license, when issued by her or Mr. Mason, or
5 anyone else, which is done without being given
6 authority by Ms. Davis, whether that's valid or not,
7 that's, I guess, going to be up to the plaintiffs to
8 find out.

9 But her final concern is this, and this
10 was -- this is almost an emphatic concern. Her duties
11 within the clerk's office are primarily to deal with
12 automobile dealers. There are about 30 of them in
13 Rowan County. This is a large --

14 THE COURT: So she does -- she does like
15 licensing of autos?

16 MR. FOX: Licensing, the title transfers, and
17 all the things that go along with that.

18 THE COURT: And I know that line is always
19 the longest when you go to the clerk's office.

20 MR. FOX: That line's the longest. And
21 that's her primary duty.

22 She has been directed as an administrative
23 issue within the office, when the dealers come in,
24 take care of the dealers. And she's been concerned,
25 and asked me several times in different ways, "That

1 that's my job, is to deal with the motor vehicle
2 licensing. If there's no else that can issue other
3 types of licenses or do other things, then yes, I'm a
4 deputy clerk and I'll do what I'm told. But I'm also
5 told to take care of the dealers and those things
6 first because that's my primary responsibility."

7 THE COURT: Right. And you were told that,
8 ma'am, by Ms. Davis to take care of those folks,
9 right?

10 MS. PLANK: Yes, sir.

11 THE COURT: Okay. Okay.

12 MR. FOX: So I've tried to allay her concerns
13 that if it occurs that, for example, Mr. Mason's
14 unavailable or if he's out sick, and she's the person
15 that's there who can issue a license, a marriage
16 license, she should do her job as she normally does
17 and take care of the dealers, and then take care of
18 marriage licenses, because that's what she's done for
19 the entire time that she's worked in the clerk's
20 office.

21 MS. PLANK: Well, in the last year. We
22 changed that last year.

23 MR. FOX: So that's -- that's been a concern.
24 She doesn't want to be accused of being in contempt
25 when she's following administrative practices in the

1 office.

2 THE COURT: Understood. Understood. All
3 right.

4 Ma'am, I appreciate your attorney's comments
5 about his discussions with you and your concerns. All
6 the concerns he just raised, do you share those,
7 ma'am?

8 MR. CHRISTMAN: Your Honor, I'm sorry to
9 object, but I'm not sure she's been sworn in.

10 DEPUTY CLERK: Yes, she was.

11 THE COURT: Oh, I hadn't -- I swore her
12 earlier.

13 MR. CHRISTMAN: Okay. Sorry, Your Honor.

14 THE COURT: Thank you. I appreciate the
15 heads-up. I did do that; did I not, Madam Clerk?

16 DEPUTY CLERK: Yes, you did.

17 THE COURT: Okay. Thank you. So setting
18 aside for the moment the discussion of whether or not,
19 without the authority of the clerk, you have the
20 ability to issue those marriage licenses, I mean,
21 would you or are you willing to comply with the
22 Court's order requiring you to issue marriage licenses
23 to the plaintiffs in this case or any other
24 individuals who are legally eligible to marry in
25 Kentucky?

1 MS. PLANK: Yes.

2 THE COURT: What was that?

3 MS. PLANK: Yes.

4 THE COURT: Yes? Okay. All right. Thank
5 you. All right.

6 MR. HUGHES: Judge, if I may --

7 THE COURT: Yes, sir.

8 MR. HUGHES: -- just briefly. I know you
9 have others, but on behalf of Mr. Mason, some of the
10 things we discussed was -- and I want to make it clear
11 from the decision that he's made as well.

12 One, if you consider that -- that Ms. Davis
13 is incapacitated at this point, and I think
14 incarceration probably qualifies for that, and not a
15 person that dies, leaves office, resigns, or just
16 incapacitated, there has to be some method to transfer
17 the authority or the power to other people to keep
18 operating the office.

19 THE COURT: Well, you know what? It's --
20 it's an interesting point you raise, and it wasn't my
21 case. I think it was Judge Van Tatenhove's case. The
22 former judge/executive in Knott County. I'm not going
23 to ask either of you to identify where Knott County
24 was, but some of the other Kentucky lawyers may
25 remember -- I think his name was Thompson.

1 MR. WATKINS: Randy.

2 THE COURT: Is that correct?

3 MR. WATKINS: Randy Thompson.

4 THE COURT: Randy Thompson, yes. He was the
5 county judge after being convicted of, I think it was
6 a vote-buying case. It's been a few years ago, and it
7 wasn't my case, so again, I don't follow it
8 completely, but he actually ran the county from jail,
9 at least allegedly, for a while.

10 MR. FOX: That's correct.

11 THE COURT: So -- if there is, and perhaps
12 there might be some mechanism that would allow for
13 that. I don't know.

14 MR. HUGHES: Well, I say that, Judge, and
15 just coincidentally, the clerk in Boyd County is
16 retiring. In fact, she retired Monday. She resigned
17 her office.

18 The office is open and it can't be filled
19 until a person that's going to be appointed has to
20 take the test during the vacancy. You can't take it
21 just in advance, believe it or not. You have to take
22 it during -- so the office then does not have a clerk.

23 So what they've done is they simply bring a
24 clerk from another county over. I mean, that's the
25 position that they've always done when clerks resign

1 or they're incapacitated. I don't know that applies
2 to this case, but --

3 THE COURT: Well, and I don't know if they
4 brought another clerk over from another county to do
5 that here, I mean, whose authority would that be
6 issued under?

7 MR. HUGHES: I mean, I don't know the answer.
8 I just know that -- I just to want to make the point
9 that Mr. Mason is in -- is in the same -- the same
10 glass globe that everybody is that's going to be
11 looking at it. He wants to comply with your orders.

12 Now, how they work this out in Rowan County
13 or Franklin County, or wherever it has to go, will be
14 their -- their issue. But -- but his consensus is
15 that he's going to comply with your orders, unless
16 someone stops him otherwise from doing it.

17 The second thing is, is it's long standing
18 law in divorce cases, that that's what they're worried
19 about, is that even if there's a mistake made
20 somewhere along the line, if the parties thought they
21 were getting married, they're considered married.

22 THE COURT: Like common law -- common law
23 marriage.

24 MR. HUGHES: And I don't know about the other
25 issues that may arise, but -- but at least for that

1 purpose they are.

2 THE COURT: Well, most people when they get
3 married don't expect to get divorced.

4 MR. CHRISTMAN: Your Honor, I'd -- I'd just
5 like to make two remarks in response to the comments.

6 THE COURT: Sure, just two. Go ahead.

7 MR. CHRISTMAN: Thank you, Your Honor. The
8 first would be this gentleman has referred to another
9 county --

10 THE COURT: Mr. Hughes?

11 MR. CHRISTMAN: Mr. Hughes. I'm sorry. I
12 didn't remember your name --

13 THE COURT: Thank you, sir. I just wanted to
14 make sure you were ref --

15 MR. CHRISTMAN: -- immediately. But the --
16 he just suggested that other county clerks can come in
17 and issue licenses.

18 THE COURT: I don't know if that's true or
19 not. That would be a least alternative.

20 MR. HUGHES: I'm just saying that they do it
21 real commonly when they transfer authority.

22 THE COURT: When authority's transferred?

23 MR. HUGHES: Yes. And I don't know -- you
24 know, there's not that many clerks that probably this
25 issue comes up on a regular basis or to challenge. I

1 just know that it has been policy in the past, and
2 I've been at this 40 years now, that whenever clerks
3 leave their offices, for whatever, there is a gap
4 there and that is -- that's commonly how it's taken
5 care of so that the public offices continue.

6 THE COURT: All right.

7 MR. CHRISTMAN: And I would just raise that
8 that's exactly one of the least restrictive
9 alternatives that we've proposed. That if somebody
10 wanted to get a license in Rowan County issued by the
11 county clerk, they could get it from another county
12 authorizing that.

13 THE COURT: Recognizing -- sure.

14 MR. CHRISTMAN: And there's been testimony
15 being raised previously that 402.240 is a statute
16 discussing absence of a county clerk. And there's
17 been discussions now, you know, with Ms. Davis
18 incapacitated and incarcerated, Kentucky marriage law
19 provides, as we argued before, that her conscience
20 provides the absence. And certainly in the Kentucky
21 --

22 THE COURT: Well, I found previously that the
23 -- hold on -- I found previously that the conscience
24 doesn't provide the absence for purposes of absence in
25 the prior ruling.

1 MR. CHRISTMAN: But Kentucky marriage law
2 provides the outlet for -- the answer for when the
3 county clerk is absent and unable to authorize a
4 license isn't to change Kentucky marriage law and make
5 the deputy county clerk the authorizing agent. What
6 that does is turn Judge Blevins into the authority
7 under that section when the clerk is absent to --

8 THE COURT: But it would still be issued
9 under her authorization.

10 MR. CHRISTMAN: No.

11 THE COURT: The form would be under her name,
12 though.

13 MR. CHRISTMAN: No. The statute provides
14 that when the clerk is absent, that the marriage
15 licenses be issued by the county judge/executive on a
16 memorandum.

17 As Judge Blevins testified, he'd -- he had
18 never done it before, but under the facts and
19 circumstances here, Kim Davis is currently now
20 rendered absent.

21 The authority -- there is no authority for
22 the deputy clerks. Kentucky marriage law then says
23 that authority vests into the county judge/executive
24 to issue a marriage memorandum.

25 THE COURT: All right. Mr. Watkins?

1 MR. WATKINS: Judge, I think he just said an
2 inaccurate statement. It -- it allows him. It says
3 "may issue a license." There's no requirement there
4 for a judge/executive to ever issue a license.

5 THE COURT: All right. Well, ultimately
6 here, if I were to follow your argument,
7 Mr. Christman, to its logical conclusion by -- it
8 would enable her to be found in contempt, but then get
9 what she wants, doesn't it strike you as a little
10 disingenuous?

11 MR. CHRISTMAN: In terms of get what she
12 wants?

13 THE COURT: Well, she wants the -- you argued
14 initially that she wants the judge/executive to do it
15 as a least restrictive alternative. He can issue it.

16 I previously found that her religious
17 objection doesn't allow her to be absent. You're
18 saying now she's been locked up for violating my
19 order. "She's now absent, actually absent, Judge.
20 They can go to the county judge." That's what you
21 argued before. It seems like I would be rewarding her
22 for her contemptuous behavior by allowing the judge to
23 do it. Clear those up for me.

24 MR. CHRISTMAN: No. The Court -- the Court
25 would simply be -- the Court made its determination on

1 what the word "absent" meant in the statute under the
2 facts and circumstances that were presented before the
3 Court then.

4 THE COURT: Correct.

5 MR. CHRISTMAN: The facts and circumstances
6 are different now, so the Court makes an
7 interpretation of what the word "absent" means. Is
8 Kim Davis currently absent from issuing marriage
9 licenses?

10 THE COURT: Okay. Okay. Then when is she
11 then purged of her contempt?

12 MR. CHRISTMAN: Well, she's purged of her
13 contempt when, at this point, we're left to file
14 certain writs in order to have her released from the
15 custody that she is in, and the merits of her claims
16 are challenged and taken up on appeal, and she
17 prevails on the merits of her appeal, which have not
18 been addressed.

19 THE COURT: No, the merits have not. The
20 likelihood of success has been addressed.

21 MR. CHRISTMAN: And that was likelihood of
22 success in her capacity -- in her official capacity to
23 which the appeal was taken, she has raised those
24 individual claims against the governor and for any
25 liability that she may have --

1 THE COURT: Those are not on appeal right
2 now.

3 MR. CHRISTMAN: -- and they have not been
4 taken up, which is again, further, why our due process
5 concerns as to the judgments and determinations that
6 are being taken here. She's now been sent into
7 confinement -- as Your Honor said, the purpose of
8 contempt is to coerce the contemnor into compliance.

9 THE COURT: Correct.

10 MR. CHRISTMAN: Now, in addition and well
11 beyond that, the Court is now deciding, after putting
12 Kim Davis in imprisonment for civil contempt of an
13 order, the Court is now stepping in, short of the
14 merits being fully decided, and saying, "I'm going to
15 now order others without the authority, without the
16 merits of her appeal being taken up to do an act that
17 she cannot do." It is literally the analogous
18 situation. And physically -- we've now moved to the
19 point where if she's in contempt, as you've found, and
20 now a marriage license that she says she gives no
21 authority to and is challenging on the merits of
22 appeal, you force that license to go out on her
23 authority and on her name, you have forced the nurse
24 to --

25 THE COURT: Forced the who?

1 MR. CHRISTMAN: -- perform the abortion. You
2 have forced --

3 THE COURT: Why do we always use that
4 analogy? There's so many others to use.

5 MR. CHRISTMAN: Because those are the
6 analogies in which religious conscience claims have
7 been raised in cases, Your Honor.

8 THE COURT: Well, you've -- you've
9 represented other parties other than religious cases,
10 have you?

11 MR. CHRISTMAN: I've -- I've represented
12 other people who are religious, yes.

13 THE COURT: Well, or non-religious. I mean,
14 I think ...

15 MR. CHRISTMAN: And I have plenty of years of
16 representing non-religious people as well.

17 THE COURT: Well, I know that. I know that.
18 I would just prefer a different analogy; that's all.
19 I understand your analogy, though.

20 MR. CHRISTMAN: But the analogies are in the
21 context of religious conscience to understand that she
22 has -- you have found her in contempt --

23 THE COURT: I have.

24 MR. CHRISTMAN: -- for a conscience claim
25 that you didn't accept, that conscience claim, the

1 merits of which are being challenged on appeal and
2 have not been finally decided by a court of final
3 appeal.

4 And so you told her that she has an
5 opportunity to purge her contempt if she -- if she
6 authorizes and issues the license. So her ability to
7 purge the contempt, her -- again, the purpose of
8 contempt is to coerce the contemnor into compliance.
9 You've told her what that is.

10 If it -- if the hearing is now going to turn
11 into "let's find somebody to issue the license with
12 Kim Davis's name on it and her authority," then what
13 the Court is now doing is turning Kim Davis's sanction
14 into a criminal punishment for what --

15 THE COURT: No. I'm not doing that.

16 MR. CHRISTMAN: -- she's done. You're taking
17 the extra step of forcing the conscientious objector
18 to actually have the act that they object to performed
19 before the merits of that have been decided.

20 If the Judge -- if this Court decides that
21 it's going to find somebody else to issue a license,
22 then --

23 THE COURT: Well, I'm not finding anyone.
24 I'm just asking if they're willing to comply with the
25 order.

1 MR. CHRISTMAN: Then the authority for that
2 marriage license is not Kim Davis. It's --

3 THE COURT: Well, it very well may not be
4 her.

5 MR. CHRISTMAN: -- it's this Court. And our
6 position would be -- and --

7 THE COURT: Well, it's not this Court; it's
8 the Rowan County Clerk's office. But go ahead.

9 MR. CHRISTMAN: No, because Rowan County
10 Clerk's office authority is Kim -- is Kim Davis, and
11 Kim Davis is not giving that authority.

12 So if marriage licenses are issued, those
13 marriage licenses -- if Judge Blevins is not willing
14 to exercise the opportunity he now has to issue the
15 marriage licenses that he said he would issue, then
16 this Court becomes the authorizing and issuing agent.
17 And for any of those marriage licenses, the
18 authorization statement should come from this Court,
19 and the authorization agent should be United States
20 District Court Judge David Bunning --

21 THE COURT: All right. Thank you.

22 MR. CHRISTMAN: -- not Kim Davis.

23 THE COURT: You wanted to say something,
24 Ms. Parsons?

25 MS. PARSONS: No. I -- I just agree with

1 Mr. Watkins's point. We don't believe that this is an
2 absence. We believe it is a -- if a religious
3 conscience objection does not qualify as an absence,
4 we don't understand how incarceration caused by that
5 objection and refusal to comply with your order
6 constitutes an absence.

7 THE COURT: All right.

8 MS. PARSONS: We also believe that the deputy
9 clerks' willingness to issue the licenses removes that
10 absent issue entirely under KRS 402.240.

11 THE COURT: All right. Mr. Vance, Mr. Sharp,
12 do you all wish to be heard on this, this issue of
13 authorization and --

14 MR. VANCE: No, Your Honor.

15 THE COURT: No?

16 MR. SHARP: No. Your Honor, we agree with
17 the county.

18 THE COURT: All right. Well, I take it,
19 Mr. Davis, Ms. Russell, Ms. Earley, you've all spoken
20 with your attorneys?

21 MR. DAVIS: Yes.

22 MS. RUSSELL: Yes.

23 MS. EARLEY: Yes.

24 THE COURT: Where are we? We're here and
25 here and here. Okay.

1 MS. EARLEY: Yes.

2 THE COURT: Okay. Let me ask the attorneys
3 who represent you.

4 Mr. Campbell, Mr. Joy and Mr. --

5 MR. CLARK: Clark.

6 THE COURT: Yes, Mr. Clark. I'm sorry. I
7 was looking here and not who was standing.

8 I take it after you speaking with your
9 respective clients, the answers that were given by the
10 other deputy clerks, is it safe to assume that they
11 would be different with your clients?

12 MR. JOY: Did you say they'd be different?

13 THE COURT: Different answers.

14 MR. JOY: Your Honor, I don't -- I don't
15 think that would be accurate. I think they would be
16 pretty similar, at least from my client.

17 THE COURT: All right. Mr. Clark?

18 MR. CLARK: Your Honor, my client has been
19 unable to give me her answer at this point.

20 THE COURT: All right. Mr. Campbell?

21 MR. CAMPBELL: Same as Mr. Clark's. We don't
22 have an answer for the Court at this point.

23 THE COURT: All right. Well, I think it's --
24 for completeness sake, I think -- and I am -- in
25 response to what Mr. Christman said, the Court is

1 trying to gain compliance with its order.

2 I -- less than an hour-and-a-half ago, I made
3 the difficult decision to incarcerate Ms. Davis for
4 being in civil contempt of the Court's prior order.
5 This Court recognizes that she has raised issues that
6 are currently on appeal.

7 I read Rule 65(d)(2)(B) to cover the deputies
8 because they are employees of the clerk's office, and,
9 therefore, they are bound by the same order that
10 Ms. Davis is bound by.

11 I'm not authorizing the issuance of the
12 licenses on the authority of this Court. I'm trying
13 to gain compliance with the Court's order.

14 I think whenever any judge -- or whenever any
15 judge issues an order, he or she expects the party who
16 is subject to that order to comply or any agents or
17 employees that are otherwise bound by that order these
18 deputies under 65(d)(2)(B) to comply as well.

19 We'll go ahead and -- Mr. Joy, and,
20 Ms. Earley, if you'd come around. I'm sorry.
21 Mr. Clark. I was -- come around.

22 [ROBERTA EARLEY, having been first
23 placed under oath, was examined and responded
24 as follows:]

25 THE COURT: Okay. Now, Ms. Earley, I know

1 your individual situation is a little bit different in
2 that earlier you told me, or someone represented that
3 you are -- you're the chief deputy, though?

4 MS. EARLEY: I am the chief deputy, yes.

5 THE COURT: Okay. But you're not really a --
6 is it true that you're not like one of the front-line
7 folks?

8 MS. EARLEY: I don't work on the front line.
9 I work back in the legal department.

10 THE COURT: Okay. The legal department?

11 MS. EARLEY: Uh-huh (affirmatively).

12 THE COURT: So do you work with --

13 MS. EARLEY: Recording, and work -- assist
14 the attorneys, yes.

15 THE COURT: Okay. So when the attorneys come
16 in and ask for help --

17 MS. EARLEY: Right.

18 THE COURT: -- they are pointed toward you?

19 MS. EARLEY: Right.

20 THE COURT: Now, how long have you been with
21 the clerk's office?

22 MS. EARLEY: I've been there 16 years.

23 THE COURT: Sixteen (16) years. Okay. So
24 you worked for Ms. Bailey as well then?

25 MS. EARLEY: I did.

1 THE COURT: Okay. Are you willing to comply
2 with the Court's order requiring the issuance of
3 marriage licenses to the plaintiffs in this case or
4 any other individuals who are legally eligible to
5 marry in Kentucky?

6 MR. CLARK: Judge, if I could briefly respond
7 for her on that.

8 THE COURT: Yes.

9 MR. CLARK: In discussions with her,
10 obviously, she hasn't issued marriage licenses in
11 years --

12 THE COURT: Well, she'd been there 16 years,
13 so, right.

14 MR. CLARK: Yeah. Her concern at this point
15 is obviously -- it's kind of a short period of time.
16 I don't know that she expected this to be thrust upon
17 her in this circumstance like this today.

18 THE COURT: And I -- again, I'm not going to
19 apologize for everyone here. I'm just -- the docket
20 is what it is and we're trying to get to a resolution.

21 MR. CLARK: No. I understand that, Your
22 Honor, and she does as well. I guess what we would
23 request is -- or what she was asking for was maybe
24 some more time to think about it. I've explained to
25 --

1 MS. EARLEY: Get a game plan together,
2 uh-huh.

3 MR. CLARK: Yeah. I've explained to her
4 what, in effect, the consequences of the Court's order
5 of not following that order, and she's well aware of
6 that. And she's also well aware of the arguments
7 that, I think, Ms. Davis's counsel has made. And she
8 does have some differing viewpoints.

9 THE COURT: When you say "differing," there's
10 lots of different viewpoints.

11 MR. CLARK: Yes.

12 THE COURT: Some of them have been made
13 available here today. And there's also ones that
14 remain in each of our hearts.

15 MR. CLARK: Correct, Your Honor. And I think
16 that she's probably a little bit of all of those. But
17 she was unable to tell me exactly whether she would
18 follow the order or not, Your Honor. I would just ask
19 for time for her to be able to make that decision.

20 THE COURT: And when you say "time", are you
21 wanting me to recall her a little bit later or ...

22 MR. CLARK: I was thinking maybe a day or
23 two, Your Honor.

24 THE COURT: Well, I'm certainly -- I am not
25 going to reconvene another one of these hearings

1 tomorrow here in Ashland, or -- I guess Monday's Labor
2 Day -- or Tuesday.

3 So you're wanting more time to consider that;
4 is that right?

5 MS. EARLEY: Well, it seems like every step
6 we take, we've got questions, and -- like who's in
7 authority, you know, whose name goes on that. And
8 that's -- things like that, I think, need to be worked
9 out, and definitely, I'm not an attorney.

10 THE COURT: Well, we have lots of attorneys
11 here have been making their arguments here this
12 afternoon and this morning.

13 MS. EARLEY: And I guess one of the questions
14 was, is Kim still the one that's going to be telling
15 us what to do? Do we go by her authority or ...

16 THE COURT: Well, the authority -- the reason
17 for this hearing is because Ms. Davis was not
18 complying with the order of the Court. There's a lot
19 of discussion --

20 MS. EARLEY: Uh-huh.

21 THE COURT: -- but at its very core, the
22 hearing is about compliance with the Court's orders.

23 MS. EARLEY: I understand that.

24 THE COURT: And whether or not a marriage
25 license issued tomorrow by any one of the agents of

1 Ms. Davis is a valid license under the Kentucky
2 statute.

3 These plaintiffs are going to have to decide
4 whether or not they want to perhaps have a license
5 issued, which may not be valid under Kentucky law, but
6 they're willing to take that chance.

7 Or perhaps they're not going to take that
8 chance and hope that maybe in some future date the
9 statute is amended or there's some activity by the
10 elected officials to change it.

11 That's not -- I'm trying to gain compliance
12 with the order, and that's -- so you do -- have raised
13 some interesting questions, as the other attorneys
14 have as well.

15 But what I'm getting at is, if I have
16 individuals who've indicated they're willing to issue
17 the licenses, and I order that to occur, it will be on
18 the form that was used.

19 That's -- if there's a move afoot to amend
20 that, great. I think that would enable all parties to
21 come away with something.

22 Many times in litigation certain parties win
23 and certain parties lose. Oftentimes, though, you
24 have cases where everybody gets something.

25 I've struggled in this case to find middle

1 ground on anything because both sides have been so
2 insistent on digging their heels in at every turn,
3 which is certainly the litigant's right to do. And
4 it's my job to try to keep the decorum even, try to
5 keep everybody on the same page.

6 So I guess getting back to my initial
7 question, do you wish additional time to answer that
8 question, or are you willing to issue those licenses?

9 MS. EARLEY: Well, I'm not set up to issue
10 them, but I won't go against your order.

11 THE COURT: All right. Thank you. Mr. Joy,
12 Ms. Russell.

13 All right. Would you place Ms. Russell under
14 oath, please.

15 [KIM RUSSELL, having been first placed
16 under oath, was examined and responded as
17 follows:]

18 THE COURT: All right. Ms. Russell, you've
19 had a chance to talk to your lawyer now about the
20 consequences of not complying with the order, correct?

21 MS. RUSSELL: Yes, sir.

22 THE COURT: All right. Mr. Joy.

23 MR. JOY: Your Honor, in speaking with her --

24 THE COURT: If you'd speak close to the
25 microphone. The air's on. Thank you.

1 MR. JOY: Your Honor, in speaking with her,
2 I think the fundamental issue that she had was that
3 she was rehired by Ms. Davis in March of this year.
4 She's only worked there for a few months at this
5 point.

6 On or about June 30th, after -- after the
7 decision by the Supreme Court came out, Ms. Davis
8 revoked her authority to issue any marriage licenses
9 to the entire office. I think that's what led to this
10 hearing.

11 And as I previously stated, that's the same
12 issue she has right now, is she does not believe she
13 has authority to go forward and issue, from Ms. Davis,
14 that is, no authority to issue a marriage license.

15 But I believe her position will be that in
16 regards to the Court's order, she will issue a
17 marriage license, she will comply with that going
18 forward.

19 She is torn with that decision, but she does
20 not want to go to jail, and that's the simple
21 semantical --

22 THE COURT: Well, that's an option the Court
23 has. I mean, the Court could fine her in the
24 alternative of jail.

25 MR. JOY: Correct, Your Honor. But I believe

1 the Court's action in regarding to send Ms. Davis
2 to -- to the marshal's custody for not complying with
3 that order has led her to believe that -- although a
4 contempt hearing has not been held in regards to her,
5 that if the Court does have a contempt hearing, that's
6 the way the Court could go.

7 So based on that information, I believe she
8 is willing to issue a marriage license, if the Court
9 orders her to do so here today.

10 THE COURT: So, ma'am, do you intend on
11 complying with the Court's order requiring you to
12 issue marriage licenses to the plaintiffs in this case
13 or any other individuals who are legally eligible to
14 marry in Kentucky?

15 MS. RUSSELL: Although I don't believe in it,
16 yes, sir, I will.

17 THE COURT: All right. Thank you. All
18 right. Mr. Campbell?

19 MR. CAMPBELL: Your Honor?

20 THE COURT: Yes, sir?

21 MR. CAMPBELL: Since we have so many people
22 who are going to comply, I don't think there's any
23 needs to question Mr. Davis.

24 THE COURT: Mr. Davis, you would answer "No"
25 if -- and I recognize your mother's in custody and

1 I recognize that --

2 MR. DAVIS: I would, yes.

3 THE COURT: Pardon?

4 MR. DAVIS: I said, I would.

5 THE COURT: You would answer "No?"

6 MR. DAVIS: Yes.

7 THE COURT: Okay. All right. I don't think
8 it's necessary to place him under oath.

9 MR. CAMPBELL: Thank you, Your Honor.

10 THE COURT: All right. Thank you, unless one
11 of the parties think it's necessary.

12 Having heard from neither of the parties
13 then.

14 Okay. Here's what we're going to do. Now,
15 there has been an issue raised about the validity of a
16 marriage license issued that does not have the
17 authorization of Ms. Davis under Rule -- I'm sorry --
18 KRS 402.

19 Whether or not a license issued by the Rowan
20 County Clerk's office is valid or not, I mean,
21 that's -- that's kind of something that Mr. Sharp and
22 your clients, if they believe it to be valid -- I'm
23 not saying it is or it isn't. I haven't looked into
24 that point. I'm trying to get compliance with my
25 order.

1 The impact of compliance with the order is
2 left for you. I mean, if you think that's a
3 legitimate issue, then you can advise your clients
4 accordingly, but that's not really something that I
5 think precludes the Court from gaining compliance with
6 the Court's order.

7 And, of course, the Sixth Circuit's decision
8 denying the motion to stay, it isn't a marriage
9 decision. I recognize that. I recognize that there's
10 a motion to dismiss -- or a motion for preliminary
11 injunction that you filed. I recognize there's a
12 motion to dismiss filed that you filed. I recognize
13 that there's going to be a motion to dismiss filed by
14 the governor's office. There's a whole myriad of
15 issues which are part of this case which have not yet
16 been adjudicated. I recognize all of that.

17 I also recognize that pursuant to the Supreme
18 Court's decision in *Obergefell*, the Fourteenth
19 Amendment recognizes the rights that these plaintiffs
20 in this case have.

21 So I've entered my order. I'm seeking
22 compliance. I've had this hearing. And now I have
23 multiple deputies.

24 Now, I'm confident that if a deputy clerk
25 issues a marriage license to any of these plaintiffs

1 or to any individuals who are eligible to marry, given
2 the nature of this proceeding, that all of you are --
3 I mean, I think you can do that under the authority
4 that you were compelled -- you didn't -- you didn't
5 want to be held in contempt of the Court's order,
6 because that's what we're here to discuss today.

7 I would doubt that there would be any
8 employment ramifications for doing so because you're
9 following the Court's order. And in fact, if there
10 was, that would be an issue that would be a separate
11 proceeding, that frankly, I don't know if that even --
12 we need to even discuss that. But I'm confident that
13 that's not going to happen. I -- I have every belief
14 that Ms. Davis is sincere and wouldn't do anything
15 like that to begin with.

16 But I am going to find that the -- given the
17 representations of Mr. Mason, Ms. Thompson, Ms. Plank,
18 Ms. Earley and Ms. Russell, five of the six deputies
19 that are here, that they would comply with the Court's
20 order. That the five of you as agents of Ms. Davis
21 shall comply with the Court's order, which in essence
22 precludes you or enjoins you from enforcing the prior
23 order -- or prior -- enforcing the prior "no marriage
24 license" policy implemented by Ms. Davis, over your
25 objection. Your objection's noted and overruled, as

1 early as tomorrow. I mean, tomorrow's before a long
2 holiday. That's going to be the order of the Court.

3 If in fact that's done, I think that would
4 have the potential impact of purging the contempt.
5 It's not my job -- it's not my intention to keep
6 Ms. Davis locked up just because I think it's the
7 right thing to do. I think it's the right thing to do
8 to follow the Court's orders, and she has been found
9 to be in contempt.

10 So -- and I understand, Mr. Davis, you may
11 not agree with the Court's order, as your attorney
12 stated and you stated to me under oath, but there's
13 been enough discussion to fill this courtroom ten
14 times over outside.

15 I'm hoping that cooler heads prevail and that
16 the -- these licenses, which I previously found the
17 policy to be invalid. I'm not going to go into the
18 reasons; I've already stated that in my prior opinion.

19 So the plaintiffs are going to be able to
20 obtain the licenses from Rowan County at the clerk's
21 office. Whether or not they're valid or not's up to
22 you all.

23 If you want to wait until you absolutely are
24 sure they're valid, that's up to you. That's not up
25 to the Court. I'm just trying to gain compliance with

1 the order.

2 I hope there's no shenanigans of, "Well, I'm
3 going to be off today. I'm going to be off today, and
4 let's all get together and be off," so the only person
5 working is Mr. Davis so that they can't comply with
6 the Court's order.

7 The Court will vigilantly oversee its orders,
8 understanding that the orders are subject to -- some
9 orders are subject to appeal as a right.

10 I've previously denied your -- your
11 interlocutory order -- or your request for an
12 interlocutory order under 1291. I'm not going to
13 revisit that.

14 So, Mr. Sharp, I just want to make sure as we
15 leave today that my order's specific. And it will
16 be -- I don't know if I'll be entering my minute order
17 today or not. Given the lateness of the hour, I'm
18 probably -- I don't know when it will actually be
19 entered. Probably sometime tomorrow.

20 But we have five deputy clerks who have
21 indicated they're willing to issue the licenses. They
22 have argued -- Ms. Davis has argued through counsel
23 that they're not valid licenses because she hasn't
24 authorized the licenses. You disagree with that. I'm
25 not taking a position on that. I think they're agents

1 of her. They can -- agency principals, they can issue
2 the licenses.

3 MR. SHARP: We agree, Your Honor, and we
4 agreed with the county.

5 Our primary concern, and we're -- we're happy
6 for the Court to -- you know, with the deputy clerks'
7 testimony here today to find that that purges the
8 contempt. Our --

9 THE COURT: Well, I'm not going to purge the
10 contempt today --

11 MR. SHARP: Okay.

12 THE COURT: -- because I can see what will
13 happen, is I purge the contempt, and she goes back and
14 you're not doing it no more, and then we're right back
15 here tomorrow.

16 MR. SHARP: That's correct, Judge.

17 THE COURT: And I'm simply not going to allow
18 that to occur --

19 MR. SHARP: That's precisely our --

20 THE COURT: -- because it's the ping-pong
21 match that -- if we get to next Tuesday, or let's say
22 a week from today. I mean, because what I don't want
23 to happen is I purge the contempt, and then somebody
24 from Zilpo -- raise your hand if you know where Zilpo
25 is. Yeah, a few of you. Really good muskie fishing

1 in Cave Run Lake down there. A couple from Zilpo
2 decides we're going to get married, heterosexual,
3 same-sex, what have you, and I purge the contempt, and
4 Ms. Davis says, "I'm -- I'm not going to allow that to
5 occur." This is not going to go back and forth, in my
6 view. I'm trying to gain compliance with the Court's
7 order pending appeal.

8 I mean, if the Supreme Court had said, "Judge
9 Bunning, you need to stay your decision," it would
10 have been stayed. We wouldn't have had this hearing.
11 But the appellate courts said, "You don't need to stay
12 it, Judge," and I'm following that.

13 MR. SHARP: And we agree, Your Honor. And
14 that's our biggest concern, that, you know, once the
15 purge is obtained, disruption to the workforce,
16 adverse employment actions could follow. We've --

17 THE COURT: Well, I don't think there'll be
18 adverse employment. If there are, I mean, I think
19 we've -- the record speaks for itself. I mean, that
20 would not be prudent.

21 MR. SHARP: And we understand. You know,
22 what we would suggest to the Court is perhaps a do not
23 interfere component to the contempt insofar as
24 Ms. Davis's ability to purge herself of contempt. She
25 is, based on her testimony, perhaps unlikely to

1 necessarily agree to the issuance of marriage
2 licenses.

3 THE COURT: I don't think she will.

4 MR. SHARP: But if perhaps she could agree to
5 a do not interfere component, that would allow her
6 deputies to do their jobs and issue marriage licenses
7 to those who are entitled to receive them. Perhaps
8 that may be a way for her to do so.

9 THE COURT: Rowan County counsel, any
10 thoughts on that?

11 MR. WATKINS: I'm fine with it, Judge.

12 THE COURT: Mr. Gannam?

13 MR. GANNAM: Your Honor, now that the Court
14 has obtained the agreement, or at least indication
15 from at least five of the deputy clerks that they will
16 issue marriage licenses, at this point, the Court's --
17 the contemnor is Kim Davis in her official capacity.
18 And without waiver of any of the prior positions we've
19 taken and arguments we've made, Kim Davis in her
20 official capacity with that designation is the Office
21 of Rowan County. It's a designation for a government
22 entity through its head.

23 And for that reason, having obtained now the
24 statements from five deputy clerks that they will
25 issue marriage licenses, then as a matter of fact, the

1 Court's incarceration of Kim Davis has accomplished
2 the goal of enforcement of the order. And any
3 additional confinement would serve the purpose of
4 punishment and not coercive enforcement of the order,
5 because you've -- you've already obtained that now
6 from these other deputy clerks.

7 THE COURT: Well, why don't -- why don't we
8 do this. Why don't we have her brought back in and
9 see if she -- if I purge the contempt, and she then --
10 well, I've had several deputy clerks that have
11 indicated that they're going to be issuing the
12 licenses so that they're not in violation of my order.

13 Bring her back in to see if she would then
14 protest and not let them do that if she's purged of
15 the contempt.

16 MR GANNAM: Your Honor, may I have a
17 question? If she's going to be brought back in, that
18 we have an opportunity to confer, at least briefly,
19 before they bring her out?

20 THE COURT: Why don't you do that. We'll be
21 in recess until 3:30.

22 [RECESS - 3:06 - 3:40 p.m.]

23 [IN OPEN COURT]

24 THE COURT: All right. We had given
25 Mr. Christman and Mr. Gannam additional time that

1 they've asked, approximately ten minutes.

2 You all wanted to be heard without Ms. Davis
3 being brought into the courtroom; is that right?

4 MR. GANNAM: Yes, Your Honor. You offered to
5 bring Ms. Davis back in at -- based on our request to
6 consider purgation of the contempt based on the
7 representations of the deputy clerks.

8 THE COURT: Correct.

9 MR. GANNAM: At this point, we're prepared
10 to, rather than bring Ms. Davis in, simply communicate
11 to the Court that she does not grant her authority for
12 any licenses to be issued under her authority or by
13 her name. And she -- she also does not make any
14 representations as to whether she would allow any
15 employee of her office to issue those licenses, even
16 without her authorization.

17 THE COURT: So if I were to ask her if -- so
18 you're not seeking to have her -- the prior contempt
19 order purged based upon the answers that you
20 anticipate she would give?

21 MR. GANNAM: Yeah. Just so I'm clear, Your
22 Honor, we -- we cannot represent to the Court that
23 Ms. Davis would -- would allow licenses to be per --

24 THE COURT: So if I would allow her to be
25 released from custody, you're not able to make a

1 representation that she would allow the issue -- the
2 licenses to be issued tomorrow?

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

4 THE COURT: Okay. All right. Fair enough.
5 Fair enough.

6 You can go ahead and take her back into
7 custody -- or she's still in custody, but she was
8 waiting outside the hallway.

9 Okay. Well, of course, as I previously
10 mentioned, the Court will continue to have oversight
11 of this matter while the litigation continues.

12 Having indicated previously that five of the
13 deputies have expressed a willingness to comply with
14 this Court's prior order enjoining Kim Davis in her
15 official capacity from enforcing the "no marriage
16 license" policy to these plaintiffs, or anyone else
17 legally eligible to marry under Kentucky law, the
18 Court would expect each of the deputies -- and I'm
19 going to mention this to you, Mr. Davis.

20 I haven't -- at your request and through
21 Mr. Campbell, I haven't asked you to formally be
22 placed under oath and answer questions because I have
23 five others that have indicated a willingness to do
24 it. I have oversight over this matter. Again, I -- I
25 rule on what's part of the record.

1 What someone -- and frankly, I don't know why
2 there's a need to -- just because you're allowed to
3 take a camera into a clerk's office, why is that
4 necessary? I have five individuals who've said
5 they're going to issue the licenses.

6 I know when I -- again, I just -- I want to
7 ensure that the orders of the Court are complied with,
8 and that's the whole reason why we've been here for
9 the better part of five hours, or a little bit less
10 than five hours today.

11 I would hate for this to turn into, we went
12 back, we were told by Mr. Davis that he's going to
13 enforce his mother's order. There's no marriage
14 policy -- "no marriage license" policy, and we're
15 not -- "we're not allowing any licenses today," or
16 we're posting a sign that says, "We're working on
17 computers, or we're doing something else," that shows
18 a level of disrespect for the Court's orders. And I
19 would expect that the Court's orders as reflected by
20 the five individuals have indicated that they will
21 follow the Court's August 12th, 2015 order, that it be
22 enforced, that it be complied with.

23 Two circuit courts, the immediate Circuit
24 Court, Sixth Circuit and the Supreme Court have not
25 stayed my order, so it will be -- I do expect

1 compliance.

2 All right. Counsel, we will be entering a
3 minute order. I would anticipate it not being entered
4 until tomorrow. I want to make sure that it's
5 accurate. I likely will follow up with part of the
6 Court's prior order on the contempt finding with a
7 white order next week.

8 The -- anything else today that we need to
9 take up specifically? Mr. Hughes?

10 MR. HUGHES: Judge, only just some
11 housekeeping.

12 THE COURT: And you are on behalf of
13 Mr. Mason?

14 MR. HUGHES: Yes.

15 THE COURT: All right, sir.

16 MR. HUGHES: Yes, sir. But I've discussed it
17 with the other counsel too.

18 At the conclusion of this, that our clients
19 be allowed to stay until the courtroom's cleared. And
20 when the courthouse is cleared, then maybe have the
21 marshals escort them to their vehicles just because of
22 the emotional issue outside.

23 THE COURT: I think that's appropriate.

24 DEPUTY MARSHALL: Yes, sir.

25 THE COURT: I can only -- I can only say

1 this, and I probably said it in a half-dozen ways
2 today. And I mentioned in my initial order staying my
3 order denying the motion to stay. Now, emotions seem
4 to be running high, and they are. And these are
5 important social issues that have been addressed. The
6 Court hopes and expects individuals to treat each
7 other with respect. Sometimes the person who shouts
8 loudest is the one who doesn't get hurt. And that
9 applies not only in a situation like this, but it also
10 applies in our daily life.

11 Hopefully, the discourse which has occurred
12 -- and I haven't been outside, but I can hear it --
13 can be peaceful, and will continue to be so. And I am
14 hopeful that everyone understands whatever side you're
15 on in this case, that the Court's order complying --
16 or compelling compliance with the Court's prior order
17 was reasoned. And you can disagree with it. But know
18 that the Court put a lot of time and effort into
19 reviewing the law and what has occurred up to this
20 point in this action.

21 I hope that everyone will be civil. Because
22 someone has indicated to the Court that they are
23 willing to comply with an order of the Court, they
24 need to save face because with someone who they're
25 talking about, the Judge has ordered that we comply.

1 That's correct; I have ordered compliance, because the
2 Circuits have -- the Circuit and the Supreme Court
3 have upheld my denial of the order staying or not
4 staying this action pending appeal.

5 I hope that everyone is treated with respect
6 in this action. We can have a -- this country has
7 always had disagreements. But what makes our country
8 different than other countries is we are able to
9 respect the rule of law, allow important issues to be
10 raised fairly and calmly, and then allow decisions to
11 be made, and then respect those decisions and comply
12 with those decisions, whether we agree with them or
13 not, unless such -- unless some court says that they
14 don't need to be complied with. And up to this point,
15 there's no court that has done that here. So I hope
16 the discourse isn't -- doesn't continue.

17 I would hope that individuals would under --
18 they've stated under oath their intentions. I would
19 hope that they would follow up with that.

20 I would hate to have to be -- come back to
21 Ashland tomorrow. I'm certainly not going to come on
22 Saturday. There's some football games being played on
23 Saturday that I think some of us probably want to
24 attend.

25 Okay. Mr. Sharp, anything further, sir,

1 today?

2 MR. SHARP: Not from the plaintiffs, Your
3 Honor.

4 THE COURT: Mr. Gannam, anything today?
5 Mr. Christman?

6 MR. GANNAM: No, Your Honor.

7 THE COURT: Ms. Parsons?

8 MS. PARSONS: No, Judge.

9 THE COURT: Mr. Watkins?

10 MR. WATKINS: No, Your Honor.

11 THE COURT: Mr. Vance?

12 MR. VANCE: No, Your Honor.

13 THE COURT: All right. Very well. Court
14 will be in recess.

15 [END OF PROCEEDINGS - 3:50 p.m.]

16 C E R T I F I C A T E

17 I, Sandra L. Wilder, certify that the
18 foregoing is a correct transcript from the record of
19 proceedings in the above-entitled matter.

20

21 /s/ Sandra L. Wilder

22 SANDRA L. WILDER, RMR, CRR,

23 COURT REPORTER Date: 09/05/2015

24

25