Nos. 15-5880, 15-5961, 15-5978

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; BARRY SPARTMAN,
Plaintiffs-Appellees,

v.

KIM DAVIS,
Third-Party Plaintiff-Defendant-Appellant,

v.

MATTHEW G. BEVIN; WAYNE ONKST, in their official capacities,
Third-Party Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky, No. 0:15-cv-00044-DLB

BRIEF OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and 6 Cir. R. 26.1, Plaintiffs-Appellees state that they are individual persons. Thus, no Plaintiff is a subsidiary or affiliate of a publicly owned corporation, nor is there any publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees agree that oral argument would likely aid the Court in its resolution of these consolidated appeals and thus respectfully request oral argument in this matter.

STATEMENT OF JURISDICTION

Plaintiffs-Appellees respectfully disagree with Defendant-Appellant Kim Davis insofar as she asserts that this Court possesses jurisdiction over her appeal from the district court's civil contempt finding. [Davis Br. 4-5.] As explained in Section III below, Plaintiffs-Appellees maintain that the Court lacks jurisdiction over that appeal because it is moot. *See United States v. Zakharia*, 418 F. App'x 414, 425-26 (6th Cir. 2011) ("'In the context of purely coercive civil contempt, a contemnor's compliance with the district court's underlying order moots the contemnor's ability to challenge his contempt adjudication.'" (quoting *In re Grand Jury Subpoena Duces Tecum*, 955 F.2d 670, 672 (11th Cir. 1992))).

COUNTERSTATEMENT OF THE ISSUES

1. Whether the district court properly granted a preliminary injunction barring Rowan County Clerk Kim Davis, in her official capacity, from enforcing a policy (based on her personal, religious opposition to marriage for same-sex couples) of denying marriage licenses to qualified applicants.

2. Whether the district court properly denied Davis' motion for a preliminary injunction, which sought to force then-Governor Steven L. Beshear and Commissioner Wayne Onkst to exempt Davis—on the basis of her personal, religious opposition to marriage for same-sex couples—from performing her official duties under Kentucky's neutral and generally applicable law regarding marriage licensing.

3. Whether the district court, while an appeal was pending from the preliminary injunction barring Davis' official-capacity enforcement of the "no marriage licenses" policy as to the named Plaintiffs, had jurisdiction to modify that preliminary injunction under Rule 62(c) to include within its protection other qualified marriage license applicants.

4. Whether Davis' appeal from a civil contempt sanction is moot, where the sanction has been lifted and the contempt purged by the district court.

5. If Davis' appeal is not moot, whether the district court properly found her in civil contempt for her continued refusal to comply (or to permit her

subordinates to comply) with the preliminary injunction after she had exhausted her attempts to stay that ruling.

COUNTERSTATEMENT OF THE CASE

On June 27, 2015—one day after the U.S. Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015)—Rowan County Clerk Kim Davis decided that her office would no longer issue marriage licenses because she opposes marriage for same-sex couples due to her personal, religious beliefs. [Page ID #278: 7/20/15 Hr'g Tr. (RE #26).] Rather than issue licenses to same-sex couples, Davis adopted a "no marriage licenses" policy that barred *all* qualified applicants from obtaining licenses in Rowan County. After Davis adopted this policy, Plaintiffs—two same-sex and two opposite-sex couples who reside in Rowan County—were denied licenses. [Page ID #123-25; #133-34; #140-42: 7/13/15 Hr'g Tr. (RE #21).]

The Plaintiffs include Dr. April Miller and Karen Roberts, two women who have been in a committed relationship with one another for eleven years and who have lived in Rowan County since 2006. [Page ID #123-24: 7/13/15 Hr'g Tr. (RE #21).] Upon learning that the Supreme Court recognized marriage equality for same-sex couples in *Obergefell*, April and Karen were "elated" to be able to marry in Kentucky, and they sought a marriage license for that purpose on June 30, 2015. [*Id*. at Page ID #125; Page ID #1637: 9/3/15 Hr'g Tr. (RE #78).] When they went to their county clerk's office to apply for the license, however, a deputy clerk

consulted with Kim Davis before informing them that the office would not be issuing marriage licenses. [Page ID #127: 7/13/15 Hr'g Tr. (RE #21).]

Plaintiffs Jody Fernandez and Kevin Holloway have known each other since 2005 when they both lived in Florida. [*Id*. at Page ID #133.] Jody and Kevin have been in a committed relationship since 2006, and in 2008 they moved to Rowan County, where they have lived ever since. [*Id*.] On July 1, 2015, Jody and Kevin went to their county clerk's office to apply for a marriage license. [*Id*. at Page ID #135.] That date held a particular significance for Jody because July 1 was her late father's birthday, and he would have been eighty-one years old on the date Jody and Kevin sought their marriage license. [*Id*. at Page ID #136.] But when they arrived at the county clerk's office, Kim Davis, without explanation, informed them that the office would not issue them a marriage license. [*Id*. at Page ID #135.]

Plaintiffs Barry Spartman and Aaron Skaggs have been in a committed relationship for more than twenty years after having met in college. [*Id*. at Page ID #140-41.] Barry and Aaron both attended college in Rowan County, Kentucky, and the two of them have lived there ever since. [*Id*. at Page ID #141.] After learning of the *Obergefell* decision and what it meant for their ability to finally wed legally in Kentucky, Barry and Aaron contacted the Rowan County Clerk's office by telephone on June 30, 2015, to inquire about the requirements for obtaining a marriage license. [*Id*. at Page ID #142.] During that call, they were informed that

the Rowan County Clerk's office would not be issuing marriage licenses and that they need not come to the office for that purpose. [*Id*. at Page ID #143.][1]

After being denied marriage licenses, Plaintiffs filed a putative class-action suit challenging the "no marriage licenses" policy under the First and Fourteenth Amendments, and they brought official-capacity claims against Davis seeking preliminary and permanent injunctive relief barring future enforcement of the policy. [Page ID #1-2: Compl. (RE #1); Page ID #34: Mot. for Prelim. Inj. (RE #2).][2]

Appeal No. 15-5880

After an evidentiary hearing and full briefing by the parties, the district court entered a preliminary injunction on August 12, 2015 ("Preliminary Injunction"), barring Davis, in her official capacity, from enforcing the "no marriage licenses" policy against Plaintiffs. [Page ID #1173: Memo. Op. & Order (RE #43).] Davis filed a notice of appeal from that ruling [Page ID #1174: Notice of Appeal (RE

[1] Plaintiffs Stephen Napier and Shantel Burke did not testify at the Preliminary Injunction hearing; thus, there is no evidence in the record regarding their engagement, qualifications to marry, or license denial.

[2] Plaintiffs, on behalf of themselves only, also asserted damages claims against Davis, in her individual capacity, and against Rowan County, Kentucky. Those claims are not before the Court in these consolidated appeals.

#44)], and she also filed a motion with the district court requesting a stay of its Preliminary Injunction pending appeal. [Page ID #1207: Stay Mot. (RE #45).]

The district court denied Davis' stay motion, but also stayed its denial of the motion pending review by this Court. [Page ID #1264-65: Order (RE #52).] Then, on August 19, the district court amended its earlier ruling by clarifying that the "temporary stay" of the Preliminary Injunction would expire on August 31 absent further order from this Court. [Page ID #1283: Order (RE #55).] Following that clarification, Davis filed a motion to stay the Preliminary Injunction with this Court. That request was also denied. [RE #28-1: Order (15-5880).] In its Order, the panel explained:

> The request for a stay pending appeal relates solely to an injunction against Davis in her official capacity. The injunction operates not against Davis personally, but against the holder of her office of Rowan County Clerk. In light of the binding holding of *Obergefell*, *it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court. There is thus little or no likelihood that the Clerk in her official capacity will prevail on appeal*.

[*Id*. at 2 (emphasis added).]

Davis then sought an emergency stay of the Preliminary Injunction from the Supreme Court. In a one-line order, the Supreme Court denied that request without asking for a response from Plaintiffs and without any published dissent. *Davis v. Miller*, 136 S. Ct. 23 (2015).

Nonetheless, Davis flagrantly disregarded the Preliminary Injunction. The morning after the Supreme Court denied her stay application, Davis directed her employees to continue enforcing her "no marriage licenses" policy. [Page ID #1621, 1631: 9/3/15 Hr'g Tr. (RE #78).] That decision resulted in Plaintiffs April Miller and Karen Roberts again being denied a marriage license on September 1, 2015. [*Id*. at Page ID #1638-39.] Left with no other recourse, Plaintiffs filed a motion asking the district court to hold Davis in contempt to compel her compliance with the Preliminary Injunction. [Page ID #1477: Pls.' Mot. to Hold Kim Davis in Contempt of Ct. (RE #67).] Plaintiffs also filed a Rule 62(c) motion to modify the Preliminary Injunction so that Davis would be barred from enforcing her "no marriage licenses" policy against any eligible applicants, not just the named Plaintiffs. [Page ID #1488: Pls.' Mot. Pursuant to Rule 62(c) to Clarify Prelim. Inj. Pending Appeal (RE #68).] On September 1, 2015, the same day that Plaintiffs filed their motions for contempt and under Rule 62(c), the district court held a telephonic conference, at which the district court set Plaintiffs' contempt motion for a hearing on September 3, 2015. [Page ID #1496: Order (RE #69).]

At the contempt hearing, the district court afforded Davis' counsel an opportunity to respond to Plaintiffs' Rule 62(c) motion. [Page ID #1571-80: 9/3/15 Hr'g Tr. (RE #78).] After hearing argument, the district court granted Plaintiffs' motion and entered an order ("September 3 Order") modifying the Preliminary

Injunction. [Page ID #1557: Order (RE #74).] In doing so, the district court explained that, even though briefing on Plaintiffs' still-pending class certification motion had been stayed,[3] allowing the Preliminary Injunction "to apply to some, but not others, simply doesn't make practical sense." [Page ID #1581: 9/3/15 Hr'g Tr. (RE #78).] The district court also noted that after Plaintiffs filed their suit, two related cases were filed by couples also seeking to marry. [*Id.* at Page ID #1573.] Those cases raised identical legal issues, and the reasoning behind the Preliminary Injunction applied with equal force to the plaintiff couples in those cases. [*Id.* at Page ID #1576-77.] Thus, the district court's September 3 Order modified the Preliminary Injunction by barring Davis, in her official capacity, from enforcing her "no marriage licenses" policy against *any* applicants who are legally eligible to marry. [*Id.*]

On September 3, the district court also found Davis in civil contempt for her continued refusal to comply (or to allow her subordinates to comply) with the Preliminary Injunction, and the court remanded her to the custody of the U.S. Marshal. [Page ID #1559: Minutes Order (RE #75).] Prior to the conclusion of the day's proceedings, and after Davis' deputy clerks informed the court that they

[3] In a Virtual Order, the district court granted Davis' unopposed motion to extend the briefing on Plaintiffs' class certification motion until "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." [RE #57.]

would comply with the Preliminary Injunction, the district court afforded Davis an opportunity to purge herself of contempt immediately by agreeing not to interfere with the deputy clerks' compliance with the Preliminary Injunction. [Page ID #1736: 9/3/15 Hr'g Tr. (RE #78).] Davis' counsel met with her during a court recess to discuss the matter, and when they returned they informed the court that she would not agree to do so. [*Id*. at Page ID #1737-38.]

While Davis remained in custody on the civil contempt ruling, several of the named Plaintiff couples sought and received marriage licenses [Page ID #1798: Status Report (RE #84)], as did the plaintiff couples in the two related cases. [Page ID #2217: Def./Third-Party Pl. Kim Davis' Mem. of Law in Support of Mot. for Immediate Consideration & Mot. to Stay Sept. 3, 2015 Inj. Order Pending Appeal (RE #113-1).]

Davis sought an emergency stay of the September 3 Order with this Court. [RE #43: Appellant Davis' Emergency Mot. for Immediate Consideration & Mot. to Stay District Court's September 3, 2015 Inj. Order Pending Appeal (15-5880).] This Court denied Davis' motion because she failed to first seek a stay in the district court as required by Rule 8(a)(1) of the Federal Rules of Appellate Procedure. [RE #50-1: Order (15-5880).] Davis then sought emergency relief with the district court to stay the September 3 Order, but the district court denied the request. [Page ID #2329: Mem. Order (RE #121).] In doing so, the court found that

the September 3 Order was necessary to preserve the status quo created by the Preliminary Injunction, which enjoined Davis from enforcing her "no marriage licenses" policy—a policy the court found violated the Supreme Court's *Obergefell* decision by imposing an unlawful burden on the fundamental right to marry. [Page ID #2329, #2331-32: Mem. Order (RE #121).] The district court also concluded that it would be "inconsistent with basic principles of justice and fairness" to enjoin Davis from applying her unconstitutional "no marriage licenses" policy only to some couples while leaving other eligible couples at Davis' mercy. [*Id.* at Page ID #2332.]

More than a week after the district court denied Davis' emergency motion for a stay, Davis again moved this Court for a stay of the September 3 Order. [RE #57-1: Renewed Mot. of Appellant Kim Davis to Stay District Court's September 3, 2015 Inj. Order Pending Appeal (15-5880).] That stay request was again denied. [RE #62-1: Order (15-5880).]

Appeal No. 15-5961

On August 4, 2015, Davis filed a third-party complaint asserting claims against then-Kentucky Governor Steven L. Beshear and the state's Librarian and Commissioner for the Department for Libraries and Archives Wayne Onkst (the

"State Defendants").[4] [Page ID #745: Verified Third-Party Compl. of Defendant Kim Davis (RE #34).] In her complaint, Davis sought, *inter alia*, injunctive relief requiring the State Defendants to create an exemption that would relieve her—because of her personal, religious opposition to marriage for same-sex couples—from performing her official duties under Kentucky's neutral and generally applicable laws governing marriage licensing. [*Id*. at Page ID #774.]

One day before Davis filed her preliminary injunction motion, the parties completed their briefing on Plaintiffs' preliminary injunction motion. [Page ID #797: Reply in Support of Plaintiffs' Mot. for Prelim. Inj. (RE #36) (filed Aug. 6, 2015).] Less than a week later, the district court granted Plaintiffs' motion and issued the Preliminary Injunction against Davis, barring her, in her official capacity, from enforcing her "no marriage licenses" policy against the Plaintiffs. [Page ID #1173: Memo. Op. & Order (RE #43) (Aug. 12, 2015).] Davis appealed that ruling the day it was issued. [Page ID #1174: Notice of Appeal (RE #44) (filed Aug. 12, 2015).] And, of course, Davis filed the first of her stay motions the following day. [Page ID #1207: Stay Mot. (RE #45) (filed Aug. 13, 2015.]

[4] By operation of Fed. R. App. P. 43(c)(2), Kentucky Governor Matthew G. Bevin replaces former Governor Steven L. Beshear in Davis' official capacity claim against that office. [*See* RE 67: Notice of Substitution of Appellee (15-5880).]

It is against this backdrop that the district court, on August 25, *sua sponte* stayed briefing on Davis' preliminary injunction motion pending appellate review of the Preliminary Injunction.[5] [Page ID #1289: Order (RE #58).] Davis filed a notice of appeal from that August 25 ruling. [Page ID #1471: Notice of Appeal (RE #66) (filed Aug. 31, 2015).] Then, on September 1, 2015, having exhausted her attempts to stay the Preliminary Injunction, Davis persisted in refusing to comply with that ruling, prompting Plaintiffs' contempt motion noted above. [Page ID #1477 (RE #67).]

After Plaintiffs moved to hold Davis in contempt (but before the hearing on that motion), Davis again moved the district court for preliminary injunctive relief against the State Defendants, this time on an "emergency" basis pending her appeal from the August 25 ruling. [Page ID #1498: Emergency Mot. for Inj. Pending Appeal (RE #70).] On September 11, 2015, the district court denied Davis' second motion seeking preliminary injunctive relief. [Page ID #2175: Mem. Order (RE #103).]

Arguing that the district court had improperly conducted a hearing on Plaintiffs' contempt motion, found Davis in civil contempt, and remanded her to

[5] In addition to staying briefing on Davis' preliminary injunction motion, the district court also stayed briefing of her motion to dismiss. [Page ID #1289: Order (RE #58).]

custody before issuing a ruling on Davis' initial request for an emergency preliminary injunction, Davis sought an emergency injunction from this Court pending appeal. [RE #26-1: Emergency Mot. for Immediate Consideration & Mot. for Inj. Pending Appeal (15-5961).] When she filed that motion, Davis remained in custody on the civil contempt finding. [*Id.* at 3.] At that time, Davis maintained that an emergency injunction against the State Defendants was necessary because she lacked authority to alter the marriage license form prescribed by the Kentucky Department for Libraries and Archives, and because, absent the requested injunction, she would be forced to violate her religious beliefs by issuing licenses pursuant to Kentucky law. [*Id.* at 10, 13.] The Plaintiffs and State Defendants responded. [RE #28 (15-5961); RE #30-1 (15-5961).] By the time Davis filed her reply, however, she had been released from custody. [RE #32: Davis Reply in Support of Mot. for Emergency Prelim. Inj. (15-5961) (filed Sept. 10, 2015).] Four days later, upon her return to work, Davis "confiscated all of the original [marriage license] forms, and provided a changed form which deletes all mentions of the County, fills in one of the blanks that would otherwise be the County with the [federal district] Court's styling, deletes her name, deletes all of the deputy clerk references, and in place of the deputy clerk types in the name [of the deputy clerk tasked with issuing marriage licenses] and has him initial rather than sign" the

forms as a notary public rather than as a deputy county clerk. [Page ID #2293-94: Notice of Brian Mason (RE #114).][6]

Appeal No. 15-5978

As discussed above, at the conclusion of the September 3 hearing, the district court found Davis in civil contempt and remanded her to custody in order to compel her compliance with the Preliminary Injunction. [Page ID #1559: Minutes Order (RE #75).] While Davis remained in custody, three of the Plaintiff couples obtained marriage licenses that were issued by a Rowan County deputy clerk, and Plaintiffs notified the district court of that fact on September 8, 2015. [Page ID #1798: Status Report (RE #84).] The district court then lifted the contempt sanction and released Davis from custody in light of the deputies' compliance with the Preliminary Injunction.[7] The district court further ordered that Davis "**shall not interfere** in any way, directly or indirectly, with the efforts of her

[6] Plaintiffs have filed, and the parties have fully briefed, a motion that has been submitted to the district court seeking appropriate relief for the altered licenses being issued by Davis' office since her release from custody. [Page ID #2312: Mot. to Enforce (RE #120); Page ID #2478: Davis' Resp. to Mot. to Enforce (RE #133); Page ID #2551: State Defendants' Resp. to Mot. to Enforce (RE #148); Page ID #2564: Plaintiffs' Reply Br. (RE #149).]

[7] Earlier on September 8, prior to her release, Davis filed an emergency motion with this Court to stay the contempt sanction. This Court denied that motion as moot because Davis had already been released from custody by the time the motion was fully submitted. [RE #39-1: Order (15-5978).]

deputy clerks to issue marriage licenses to all legally eligible couples." [Page ID # 1827: Order (RE #89) (emphasis in original).]

SUMMARY OF THE ARGUMENT

Plaintiffs agree with Davis' contention that things are not always what they seem. [Davis Br. 1.] However, this is not one of those instances. This case is exactly what it appears to be—a government official who, for no reason other than her own personal, religious opposition to marriage for same-sex couples, used the authority of her office to adopt a policy denying Plaintiffs' (and all other Rowan County residents') right to marry by refusing to issue marriage licenses to them. [Page ID #278: 7/20/15 Hr'g Tr. (RE #26).] In doing so, Davis unlawfully imposed a direct and substantial burden upon individuals' right to marry by withholding a legal prerequisite to exercise that fundamental right, and she imposed her personal, religious views upon her office, her staff, and the constituents she was elected to serve.

The district court correctly enjoined Davis' "no marriage licenses" policy because all of the relevant preliminary injunction factors weighed in Plaintiffs' favor. [Page ID #1773: Mem. Op. & Order (RE #43).] Plaintiffs enjoy a strong likelihood of success on the merits of their Fourteenth Amendment claims because the challenged policy imposed a direct and substantial burden on the fundamental right to marry that neither serves an important state interest nor is closely tailored

to any such interest. Moreover, even if the more deferential rational basis review applies, the "no marriage licenses" policy nonetheless fails because Davis' personal, religious opposition to marriage for same-sex couples does not constitute a legitimate government interest. Even if it did, the complete prohibition on marriage licenses is not rationally related to that interest.

And even though Davis appealed the Preliminary Injunction barring her, in her official capacity, from enforcing the "no marriage licenses" policy against the named Plaintiffs, the district court retained jurisdiction pursuant to Fed. R. Civ. P. 62(c) to also prohibit enforcement of the challenged policy against "other individuals who are legally eligible to marry in Kentucky." [Page ID #1557: Order.]

After Davis exhausted her attempts to stay the Preliminary Injunction, she persisted in refusing to comply (and in directing her subordinates to refuse to comply) with that ruling. [Page ID #1621, 1631: 9/3/15 Hr'g Tr. (RE #78).] Thus, the district court properly found in her in civil contempt and remanded her to custody. [Page ID #1559: Minutes Order (RE #75).] Because the district court thereafter secured compliance with the Preliminary Injunction through Davis' deputy clerks, that compliance justified Davis' release from custody but also rendered moot her present appeal from the civil contempt finding.

In short, Davis' appeals incorrectly seek judicial approval to use the authority of her public office to elevate her own personal, religious beliefs over the clearly established rights of others. If accepted, Davis' argument would have the effect of allowing individual public employees' personal, religious beliefs to determine the availability of governmental services—even where, as here, the government services are legal prerequisites for the exercise of other individuals' constitutionally guaranteed rights. Such a result would create a patchwork system in which the availability of governmental services would depend upon the personal, religious views of the various public officials responsible for providing them. Fortunately, clearly established legal precedents do not support such a result. Thus, the district court's rulings should be affirmed.

STANDARD OF REVIEW

This Court "'review[s] the District Court's legal rulings *de novo* . . . and its ultimate conclusion as to whether to grant the preliminary injunction for abuse of discretion.'" *O'Toole v. O'Connor*, 802 F.3d 783, 788 (6th Cir. 2015) (quoting *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 454 (6th Cir. 2014)); *see also City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc).

In deciding whether to grant or deny a preliminary injunction, a district court must balance four factors: "(1) whether the movant has a strong likelihood of

success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Am. Civil Liberties Union Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015) (internal quotation marks and citations omitted). "Whether the movant is likely to succeed on the merits is a question of law" that is reviewed *de novo*. *City of Pontiac Retired Emps. Ass'n*, 751 F.3d at 430 (internal quotation marks omitted).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED A PRELIMINARY INJUNCTION PROHIBITING DAVIS FROM ENFORCING HER "NO MARRIAGE LICENSES" POLICY.

The district court preliminarily enjoined Davis, in her official capacity, from enforcing the "no marriage licenses" policy, which she adopted because of her personal, religious opposition to marriage for same-sex couples. [Page ID #1152-73: Mem. Op. & Order (RE #43).] In doing so, the district court correctly concluded that all of the relevant factors weighed in Plaintiffs' favor. [*Id.*] For the reasons that follow, the Preliminary Injunction should be affirmed.

A. The district court correctly found that Plaintiffs were likely to succeed on the merits of their Fourteenth Amendment claims.

Government policies that impose a direct and substantial burden on the

fundamental right to marry are valid *only* if they are supported by "sufficiently important state interests" and are "closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996). In other words, such state action "must be subjected to rigorous scrutiny." *Zablocki*, 434 U.S. at 387.

Here, the district court found that the "no marriage licenses" policy imposed a direct and substantial burden on Plaintiffs' fundamental right to marry. [Page ID #1159; Mem. Op. & Order (RE #43).] Thus, it concluded that Plaintiffs established a strong likelihood of success because the challenged policy did not serve an adequate state interest under heightened scrutiny. [*Id*. at Page ID #1159-60.] The district court reached the correct result both as to the substantial burden analysis and Plaintiffs' likelihood of success. However, even if Davis' "no marriage licenses" policy did not impose a substantial burden on the fundamental right to marry, Plaintiffs nonetheless have a strong likelihood of success on the merits of their Fourteenth Amendment claims because the "no marriage licenses" policy fails even rational basis review.

1. *The challenged policy imposed a direct and substantial burden on Plaintiffs' fundamental right to marry that was not closely tailored to serve an important state interest.*

First, it is clearly established that the Plaintiffs, two opposite-sex couples and two same-sex couples, enjoy a fundamental right to marry that is protected by

the Fourteenth Amendment. *Obergefell*, 135 S. Ct. at 2604 ("[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 couples of the same-sex may not be deprived of that right and that liberty."). And it cannot be reasonably disputed that Davis' "no marriage licenses" policy implicated Plaintiffs' fundamental right to marry, in that it completely barred them (and all other Rowan County residents) from obtaining marriage licenses in their county of residence.

Strict scrutiny applies to government policies that impose a direct and substantial burden on the fundamental right to marry. *Zablocki*, 434 U.S. at 388. A government policy imposes a direct and substantial burden on this fundamental right when "a large portion of those affected by the rule are absolutely or largely prevented from marrying." *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001); *see also Califano v. Jobst*, 434 U.S. 47, 54 (1977) (noting, in upholding SSA provision terminating benefits if recipient marries ineligible individual, that provision did not constitute "an attempt to interfere with the individual's freedom to make a decision as important as marriage"); *Zablocki*, 434 U.S. at 387 n.12 (distinguishing impermissible marriage regulation from permissible one upheld in *Jobst* by describing the latter as one that did not erect a

"direct legal obstacle in the path of persons desiring to get married"); *Akers v. McGinnis*, 352 F.3d 1030, 1040 (6th Cir. 2003) (summarizing cases).

Davis' "no marriage licenses" policy directly and substantially burdened Plaintiffs' fundamental right to marry because it precluded them (and all other Rowan County residents) from obtaining marriage licenses in their county of residence even though such licenses are a legal prerequisite for marriage in Kentucky. Ky. Rev. Stat. § 402.080. That Plaintiffs could have obtained marriage licenses elsewhere does not ameliorate this burden. As ample authority makes clear, the mere existence of alternative means for the exercise of a constitutional right is insufficient to undermine the irreparable harm caused by a constitutional violation. *See, e.g.*, *Spence v. Washington*, 418 U.S. 405, 426 n.4 (1974) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (internal quotation marks and citation omitted)); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (affirming preliminary injunction enjoining Ohio voting provision that limited early, in-person voting to members of the military as a "restriction on the fundamental right to vote" even though non-military Ohio residents were able to vote on other days); *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002) ("An Establishment Clause plaintiff need not allege that he or she avoids, or will avoid, the area containing the challenged display."). And indeed, Davis has not (and

cannot) point to any authority for the proposition that a civil-rights plaintiff is less likely to prevail on a claimed constitutional violation if she can take some conceivable action to avoid the constitutional harm. Davis' "no marriage licenses" policy thus constitutes a direct legal obstacle to Plaintiffs' ability to marry by forcing them to either travel to another county to obtain a marriage license—a requirement not present or authorized under Kentucky law—or forgo their right to marry.

Davis' reliance on employment cases involving anti-nepotism policies is misplaced. [*See, e.g*, Davis Br. 33-34 (citing *Montgomery*, 101 F.3d at 1125; *Vaughn*, 269 F.3d at 710).] In those cases, the policies did not actually prevent anyone from marrying. Instead, the anti-nepotism policies imposed burdens on the employment of one spouse. *Vaughn*, 269 F.3d at 712 (holding that anti-nepotism policy requiring termination of one employee if two employees marry subject only to rational basis review because policy "did not bar [the employees] from getting married . . . [i]t only made it economically burdensome to marry a small number of those eligible individuals, their fellow employees"); *Montgomery*, 101 F.3d at 1125 (ruling that anti-nepotism policy barring married teachers from working on the same campus subject only to rational basis review because burdens on marriage, though real, not "'direct' in the sense that they place an absolute barrier in the path of those who wish to marry"); *see also Anderson v. City of LaVergne*, 371 F.3d

879, 882 (6th Cir. 2004) (upholding City policy of barring "dating relationships between police department employees of different ranks" as rationally related to legitimate governmental interest of "avoiding sexual harassment suits"). Accordingly, anti-nepotism policies generally are subject only to rational basis review. *Montgomery*, 101 F.3d at 1126.

Unlike anti-nepotism policies, however, Davis' "no marriage licenses" policy withheld a government-mandated *prerequisite* for marriage from individuals who were legally entitled to receive it. Ky. Rev. Stat. § 402.080. And whatever alternative means existed for Plaintiffs to secure valid marriage licenses, they are entitled, under Kentucky law, to obtain licenses from their local County Clerk who is vested with the responsibility for issuing them. *Id*. By withholding an essential government service that is legally required for marriage, Davis created a direct legal obstacle to Plaintiffs' ability to marry and thus imposed a direct and substantial burden on their right to do so.[8]

This burden on Plaintiffs' ability to marry does not serve any important state interest. The policy directly denied marriage licenses to eligible couples,

[8] The nature of the burden imposed is underscored by the fact that prior to adopting the "no marriage licenses" policy, the Rowan County Clerk's office issued approximately 200 marriage licenses per year. [Page ID #243: 7/20/15 Hr'g Tr. (RE #26) (212 licenses issued in 2014); *id*. (99 licenses issued in first half of 2015).]

contravened the admonition of Kentucky's then-Governor to comply with the *Obergefell* decision, and imposed upon Rowan County residents the requirement that they obtain marriage licenses elsewhere or forfeit their right to do so. The only interest served by the policy is one that is not a proper government interest at all, let alone a sufficiently important one: Davis' *personal* interest in not having her name, or her official position, used in the issuance of marriage licenses to same-sex couples. [Page ID #296-97: 7/20/15 Hr'g Tr. (RE #26) (Davis testifying, in response to question from the court, that she would nonetheless object to marriage licenses issued by her office even if they did not contain her name because they would be issued under her official "authority" as county clerk); *id*. at Page ID #278 (Davis testifying "No" when asked if there was "any reason, other than your personal, religious beliefs, for refusing to issue those [marriage] licenses").] This interest is plainly impermissible and cannot justify a direct and substantial burden on the fundamental right to marry. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (in striking down criminal law proscribing homosexual conduct, answering in the negative the question of "whether the majority may use the power of the State to enforce these [moral] views [about homosexuality] on the whole society through operation of the criminal law").

2. *Plaintiffs have a strong likelihood of success even if the Court applies rational basis review.*

The district court properly applied heightened scrutiny to Davis' "no marriage licenses" policy. However, even if the policy did not impose a direct and substantial burden on the fundamental right to marry, this Court should nonetheless affirm the Preliminary Injunction because Plaintiffs are likely to succeed on the merits of their claims even under rational basis review.

First, the policy fails rational basis review because it did not serve any legitimate governmental interest. As noted above, Davis' own testimony establishes that she adopted the policy *solely* because of her personal, religious opposition to same-sex marriage. It is beyond cavil that the personal, religious beliefs of a governmental official are inadequate to constitute a *governmental* interest sufficient to justify the withholding of public services from those legally entitled to receive them. *See Lawrence*, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[B]are congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) (noting that "the *Lawrence* Court determined that there was no legitimate state interest that was adequate to 'justify' the intrusion on liberty").

Davis argues that the "no marriage licenses" policy served the legitimate governmental interest of ensuring "that other individuals' fundamental rights to religious accommodation . . . were protected." [Davis Br. 57.][9] But even if that sufficed as a legitimate government interest, the "no marriage licenses" policy lacked a rational connection to it. The "no marriage licenses" policy was not an "accommodation" for Davis; it was a blanket prohibition upon others' ability to obtain marriage licenses. The policy completely denied Plaintiffs the right to obtain a marriage license in their county of residence despite the fact that they were legally entitled to do so. The policy made no attempt to allow valid licenses to be issued by Davis' subordinates, and it made no attempt to find alternative means for Rowan County residents to obtain marriage licenses without having to travel elsewhere to do so.

When viewed properly, this policy was at least as defective as the prison marriage regulation that failed rational basis review in *Turner v. Safley*, 482 U.S. 78 (1987). There, the Supreme Court invalidated a prison regulation that barred

[9] Davis cites, without explanation, *Curto v. City of Harper Woods*, 954 F.2d 1237 (6th Cir. 1992) (per curiam) for the contention that applying rational basis review requires reversal of the preliminary injunction ruling. [Davis Br. 40.] In *Curto*, the Court held that, in the context of a substantive due process challenge, a municipal zoning ordinance served a legitimate government interest, but the Court reversed the grant of summary judgment for the city because the record lacked sufficient evidence to establish the ordinance's rational relation to that interest. *Curto* is thus neither controlling nor persuasive authority.

inmates from marrying absent prior approval from the prison superintendent who granted such approval only for "compelling reasons." *Id.* at 82. The Court concluded that, even though rational basis review applied, the regulation violated inmates' right to marry because it represented "an exaggerated response" to the prison's legitimate security concerns. *Id.* at 91, 97-98. As in *Turner*, the policy here imposed a dramatic, irrational, and unreasonable restriction upon the right of those seeking to marry.

Thus, even if the challenged policy were subjected to the deferential rational basis review, Plaintiffs have established a strong likelihood of success either because the policy failed to advance any legitimate governmental interest or because it represented "an unreasonable means" of achieving any such interest. *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1136 (6th Cir. 1995) (internal quotation marks and citation omitted). In either event, the district court's Preliminary Injunction barring Davis, in her official capacity, from enforcing the "no marriage licenses" policy should be affirmed.

B. The district court correctly found that Plaintiffs would suffer irreparable harm absent an injunction and that the Preliminary Injunction would not impose irreparable harm on Davis.

The ongoing constitutional violations caused by Davis' "no marriage licenses" policy readily established irreparable harm to Plaintiffs and the putative class. As discussed above, the policy directly and substantially burdened the

fundamental right to marry by precluding Plaintiffs and other qualified applicants from obtaining marriage licenses in Rowan County, even though such licenses are a legal prerequisite for marriage in Kentucky. Prior to *Obergefell*, the Rowan County Clerk's office issued approximately two hundred marriage licenses per year—in other words, that office enabled four hundred people per year to exercise their fundamental right to marry. [Page ID #243: 7/20/15 Hr'g Tr. (RE #26) (212 licenses issued in 2014); *id*. (99 licenses issued in first half of 2015).] As a result of Davis' "no marriage licenses" policy, however, that number fell to zero. No one was permitted to obtain a marriage license in Rowan County.

Marriage sits "at the center of so many facets of the legal and social order" and impacts individuals' freedom to shape the most basic and fundamental aspects of their lives. *Obergefell*, 135 S. Ct. at 2601. The district court correctly found that the infringement of that right constituted irreparable injury. Indeed, "when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. *ACLU v. McCreary Cty.*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005); *cf. Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (holding that lesbian and gay residents would suffer irreparable injury absent injunction against state's marriage ban).

By contrast, the Preliminary Injunction has not caused any substantial harm to others, including Davis herself.[10] As the Supreme Court has held, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)).

Here, the duties to which Davis objects consist of neutral, generally applicable requirements for issuing marriage licenses. Specifically, Kentucky law requires individuals to obtain a license in order to marry, Ky. Rev. Stat. § 402.080,[11] imposes upon county clerks the responsibility for issuing those licenses, *id*., and sets the eligibility requirements for applicants. Ky. Rev. Stat. § 402.020. It

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[10] Of course, the unauthorized alterations Davis has made to every license issued by her office since September 14 have enabled her to avoid the irreparable injury she claims would result from the Preliminary Injunction. [Page ID #2293-94.] Even if those self-created accommodations were removed, however, Davis would not suffer a substantial harm.

[11] Ky. Rev. Stat. § 402.080 provides:

> No marriage shall be solemnized without a license therefor. The license shall be issued by the clerk of the county in which the female resides at the time, unless the female is eighteen (18) years of age or over or a widow, and the license is issued on her application in person or by writing signed by her, in which case it may be issued by any county clerk.

also mandates that state-issued marriage licensing forms be used throughout the Commonwealth. Ky. Rev. Stat. § 402.100. And, following *Obergefell*, the Governor sent a letter to county clerks instructing them to follow the Supreme Court's decision in issuing marriage licenses and mandating the use of newly prepared forms that reflect the right of same-sex couples to wed. Kentucky's marriage licensing scheme is thus undeniably neutral and generally applicable, in that it is uniform throughout the state, intended to ensure that all qualified couples can exercise their fundamental right to marry, and does not target religiously motivated conduct.

Under the United States Constitution, the incidental burden upon religious belief caused by this neutral and generally applicable framework is insufficient to establish a violation of Davis' free exercise rights.[12] And, as Davis has no right to be exempted from these neutral and generally applicable laws, she cannot show that she has suffered the type of substantial harm necessary to successfully oppose

[12] Davis suggests that strict scrutiny applies because her free exercise claim also implicates her speech rights. [Davis Br. 44 n.12.] But this Court has rejected the notion that hybrid rights claims are subject to strict scrutiny. *Watchtower Bible & Tract. Soc'y of N.Y., Inc. v. Vill. of Stratton*, 240 F.3d 553, 561 (6th Cir. 2001), *overruled on other grounds*, 536 U.S. 150 (2002). Indeed, even if the hybrid rights doctrine applied, Davis has not presented "a colorable independent constitutional claim" under the Free Speech Clause that would support heightened scrutiny. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006).

the Preliminary Injunction issued in Plaintiffs' favor. Moreover, even if Davis could show that she has suffered substantial harm, that harm would be outweighed by the irreparable injury suffered by Plaintiffs if a preliminary injunction did not issue. *Cf. Babler v. Futhey*, 618 F.3d 514, 524-25 (6th Cir. 2010) (affirming grant of preliminary injunction where harm to defendants and others was outweighed by threat of substantial harm to plaintiffs).

Nor has Davis established substantial harm to her religious freedom rights under Kentucky's Religious Freedom Restoration Act. At the outset, Davis' request for injunctive relief under Kentucky's RFRA statute must fail because the Eleventh Amendment bars federal courts from enjoining state actors to comply with state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

In any event, enjoining Davis' policy of refusing to perform the administrative tasks associated with issuing marriage licenses, including marriage licenses to same-sex couples, does not impose a substantial burden on her religious freedom necessary to trigger heightened scrutiny under the state law. *See Little Sisters of the Poor v. Burwell*, 749 F.3d 1151, 1193 (10th Cir. 2015) ("[B]ecause the [Affordable Care Act's opt-out provision] does not involve them in providing, paying for, facilitating, or causing contraceptive coverage . . . Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves."), *cert. granted sub nom. S. Nazarene Univ. v. Burwell*, 136 S. Ct. 445

(2015) and *cert. granted in part sub nom. Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Burwell*, 136 S. Ct. 446 (2015).

As the district court correctly found here, any burden upon religious belief claimed by Davis "is more slight" than substantial because issuing marriage licenses in her official capacity involves merely "being asked to signify that couples meet the legal requirements to marry." [Page ID #1172: Mem. Op. & Order (RE #43).] This finding is compatible with established precedent in the free exercise context in which the claimed burden was insufficiently substantial to trigger heightened scrutiny. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990) (collection and payment of sales and use taxes did not substantially burden free exercise rights); *Bowen v. Roy*, 476 U.S. 693 (1986) (requirement that applicants possess a social security number in order to qualify for federal aid programs not a substantial burden upon free exercise rights); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (application of labor laws to religious foundation's commercial activities did not substantially burden free exercise rights); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968) (no substantial burden on exercise of religion from non-coercive government action requiring free book loans to all public and private schools for elementary and secondary students).

Moreover, even if requiring Davis to perform her official duties were found to impose a substantial burden on her religious beliefs, it would still be insufficient to defeat issuance of the Preliminary Injunction because incidental burdens upon public employees' First Amendment rights may be outweighed by the government's interest in the delivery of public services. "'[T]he government as employer . . . has far broader powers than does the government as sovereign,' enjoying a 'freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large.'" *Draper v. Logan Cty. Pub. Library*, 403 F. Supp. 2d 608, 622 (W.D. Ky. 2005) (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994)). As with public employees' speech rights, it follows that the government, when acting as employer, enjoys more latitude to impose incidental burdens upon its employees' free exercise rights when those burdens result from legitimate, job-related duties not specifically targeted at religious belief. It is thus unsurprising that courts have frequently viewed those government employment regulations more permissibly than if those same burdens were imposed in the government-as-sovereign context. *Id.*; *see also Shahar v. Bowers*, 114 F.3d 1097, 1103 (11th Cir. 1997) (en banc) (right to intimate association); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (right to petition); *Hatcher v. Bd. of Pub. Educ.*, 809 F.2d 1546, 1559 (11th Cir. 1987) (right of expressive association); *Fyfe v. Curlee*, 902 F.2d 401, 405 (5th Cir. 1990)

(Fourteenth Amendment privacy rights); *Stough v. Crenshaw Cty. Bd. of Educ.*, 744 F.2d 1479, 1481 (11th Cir. 1984) (Fourteenth Amendment privacy rights); *cf. Endres v. Ind. State Police*, 349 F.3d 922, 924 (7th Cir. 2003) (holding that refusal to reassign police officer who objected to assignment as Gaming Commission Agent because he viewed gambling as sinful, and officer's subsequent termination for insubordination, did not "violate[] the free exercise clause of the first amendment, as *Smith* understands that clause").

And finally, even if Kentucky's requirements for issuing marriage licenses were deemed to substantially burden Davis' religious freedom *and* even if the Court applied strict scrutiny to those requirements under either the First Amendment or Kentucky's RFRA, the purported harm to Davis would still be insufficient to outweigh the irreparable harm to Plaintiffs because the licensing requirements would satisfy heightened judicial scrutiny. First, Kentucky has compelling interests in ensuring that qualified individuals may exercise their fundamental right to marry *and* in the uniform issuance (and recording) of marriage licenses and marriage-related data. *See Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (state's interest in "improving the health, safety, morals and general well-being of [] citizens" warranted denying Jewish storeowners religious exemption from Sunday closing law); *Lee*, 455 U.S. at 260 ("broad public interest in maintaining a sound tax system"); *Bob Jones Univ. v. United States*, 461 U.S.

574, 603-04 (1983) ("[G]overnment interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (a state's "commitment to eliminating discrimination" is a "goal . . . [that] plainly serves compelling state interests of the highest order"); *cf.* Ky. Rev. Stat. § 213.116 (mandating "collection, indexing, tabulation, and registration of data relating to marriages, divorces, and annulments" by Cabinet for Health and Family Services).

Moreover, the uniform system Kentucky has in place for ensuring that individuals meet the state's requirements for marriage would likewise satisfy the "least restrictive means" analysis because it ensures that all Kentuckians have equal access to the public officials responsible for issuing (and recording) those licenses free from discrimination.[13] And, as the Supreme Court has recognized, religious liberty serves as a restraint against governmental intrusion upon religious

[13] Davis argues that the Governor's June 26, 2015, letter constituted a mandate with which she had to comply and that "less restrictive" options would have alleviated her from having to issue marriage licenses to same-sex couples. [Davis Br. 49-53.] But, as correctly noted in the State Defendants' brief, "neither Governor Beshear nor Commissioner Onkst is responsible for setting or enforcing 'Kentucky's marriage policies,' and neither has authority to compel Davis to act . . . [or] possess supervisory authority over" her as an elected constitutional officer. [RE #66, 14-15 (15-5880).] Thus, any burden upon Davis' religious belief stems from Kentucky's neutral and generally applicable laws governing marriage licensing.

belief, not a mechanism by which to adversely impact the rights of others. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (noting that in analyzing religious exemptions, "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries"); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (invalidating sales-tax exemption for religious periodicals in part because exemption would have "burden[ed] non-beneficiaries by increasing their tax bills"); *Thornton v. Caldor*, 472 U.S. 703, 710 (1985) ("The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." (internal quotation marks and citation omitted)); *cf.*, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (exempting claimant from state unemployment benefits policy but noting that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties."); *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (excusing students from reciting Pledge of Allegiance, but noting that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so").

C. The district court properly concluded that the public interest favored issuing the Preliminary Injunction.

Davis also argues that the district court erred in finding that the public interest favored issuing the Preliminary Injunction because the public had "no

interest in coercing Davis to irreversibly violate her conscience" [Davis Br. 72], and because "[p]rudence and caution" support reversal of the injunction in light of possible action by Kentucky's political branches. [*Id*. at 72-73.]

As explained above, however, the "no marriage licenses" policy imposed a direct and substantial burden on individuals' right to marry. Thus, issuing the Preliminary Injunction served the public interest because "[t]he public has an interest in ensuring that only constitutional laws are enforced." *Bassett v. Snyder*, 951 F. Supp. 2d 939, 971 (E.D. Mich. 2013); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (public "as a whole" has interest in protecting constitutional liberties); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *cf. Latta*, 771 F.3d at 500 ("The public's interest in equality of treatment of persons deprived from important constitutional rights . . . also supports dissolution of the stay of the district court's order.").

Similarly, the public interest favored enjoining a government policy that: 1) withheld an essential government service from individuals legally entitled to receive it, and 2) was adopted solely to further the personal, religious interests of the official responsible for it. To conclude otherwise would have the effect of elevating public officials' personal, religious views about various governmental

services over the rights of the public to receive those services. Such a result cannot serve the public interest because it would give rise to an untenable system in which the availability of governmental services would depend upon the religious views of the public official responsible for providing them. *See Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 422 (S.D. Miss. 2013) (granting preliminary injunction enjoining state regulations that would have had the effect of closing abortion provider, and rejecting state's argument that abortion services would be available elsewhere), *aff'd as modified sub nom. Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014).

Finally, federalism concerns do not alter the conclusion that the public interest favored issuing the Preliminary Injunction. "[W]here the actions or omissions of elected public officials, whether representatives of federal, state, or local government, impermissibly infringe on the constitutionally protected rights of individuals," federal courts "must act to stop such infringement." *Shaw v. Allen*, 771 F. Supp. 760, 763 (S.D. W. Va. 1990). Davis' "no marriage licenses" policy is just such an action requiring judicial intervention. *See Green v. Mansour*, 474 U.S. 64, 68 (1985).

II. THE DISTRICT COURT HAD THE DISCRETION TO ENTER ITS SEPTEMBER 3 ORDER MODIFYING THE PRELIMINARY INJUNCTION AGAINST DAVIS.

A. The district court retained jurisdiction under Fed. R. Civ. P. 62(c) to modify the Preliminary Injunction pending appeal.

Rule 62(c) of the Federal Rules of Civil Procedure specifically provides that a district court retains jurisdiction to modify a preliminary injunction pending an appeal. Rule 62(c) provides:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Thus, Rule 62(c) creates an exception to the general rule that an appeal divests the district court of jurisdiction. *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) ("[T]the rule depriving a district court of jurisdiction over matters pending on appeal 'is neither a creature of statute nor . . . absolute in character.'" (quoting *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437, 439 (6th Cir. 1985)).

As noted by this Court, sister circuits have variously analyzed Rule 62(c), generally applying one of two standards for determining whether a particular modification is authorized by the rule. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 513 (6th Cir. 1992). Specifically, some circuits have construed Rule 62(c) to permit only those modifications that "preserve the status quo." *George S.*

Hofmeister Family Trust v. Trans Indus. of Ind., Inc., No. 06-cv-13984-DT, 2007 WL 128932, at *2 (E.D. Mich. Jan. 12, 2007) (citing *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817 (5th Cir. 1989); *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962)). Other circuits, however, have construed Rule 62(c) to permit additional modifications after an appeal is filed "when the district court's action 'preserve[s] the integrity of the proceeding in the court of appeals.'" *George S. Hofmeister Family Trust*, 2007 WL 128932, at *2 (quoting *Ortho Pharm. Corp. v. Amgen, Inc.*, 887 F.2d 460, 464 (3rd Cir. 1989)). While this Court has not adopted or rejected either approach, *Basicomputer*, 973 F.2d at 513, the Court need not reach that question in the present appeal because the September 3 Order satisfies both standards.

A district court's jurisdiction to amend an injunction to preserve the status quo pending appeal includes the power to modify an order in response to a party's attempts to circumvent it. *See Vasile v. Dean Witter Reynolds, Inc.*, 205 F.3d 1327 (table), 2000 WL 236473, at *2 (2d Cir. 2000); *Shell Offshore Inc. v. Greenpeace, Inc.*, No. 3:12-cv-00042-SLG, 2012 WL 1931537, at *13-15 (D. Alaska May 29, 2012), *aff'd*, 709 F.3d 1281 (9th Cir. 2013). For example, in *Vasile*, the district court enjoined a vexatious litigant from initiating new civil actions in a particular federal judicial district against the defendants in the case. 2000 WL 236473, at *1. While the injunction was pending on appeal, however, the litigant continued to

harass the defendants and their counsel by filing actions in state court and submitting grievances to executive agencies. *Id.* The district court granted the defendants' motion to expand the original injunction to enjoin the litigant from filing *any* action in *any* forum against any of the defendants *or their professional associates*. *Id.* The Second Circuit affirmed the grant of the expanded injunction under Rule 62(c), finding that the "amended injunction became essential to preserve the status quo in light of [the litigant's] continued harassment." *Id.* at *2.

Similarly, in *Shell Offshore*, the district court's original preliminary injunction was applicable only to the defendant's tortious conduct in United States territorial waters or ports. 2012 WL 1931537, at *13. While the defendant's appeal of the preliminary injunction was pending, the plaintiff filed a motion for additional preliminary injunctive relief seeking to expand the terms of the original injunction to prohibit similar conduct outside of the United States. *Id.* The district court found that modification of the injunction was warranted to preserve the status quo. *Id.* at *15.

As the above examples illustrate, the relevant question for purposes of Rule 62(c) is whether the amended injunction preserves the status quo, not whether it can be described as "enforcing," "modifying," or "expanding" the original order. Here, the relevant status quo for purposes of Rule 62(c) is the state of affairs after the Preliminary Injunction issued—*i.e.*, Davis was precluded from applying her

"no marriage licenses" policy because of her personal, religious beliefs. Just as it became necessary in *Vasile* to preclude the plaintiff from filing vexatious litigation in other forums *and* against other individuals, and just as it became necessary in *Shell Oil* to preclude the defendant from committing tortious conduct in other jurisdictions, here the September 3 Order became necessary to preclude Davis from applying her "no marriage licenses" policy to other eligible couples after Davis testified that she had directed her deputy clerks to continue applying the "no marriage licenses policy" in disregard of the orders of the District Court, this Court, and the Supreme Court. [RE #78 (0:15-cv-00044): 9/3/15 Hr'g Tr., Page ID #1621, 1623.] The District Court was within its power to prevent Davis from circumventing the purpose of the Preliminary Injunction by applying her "no marriage licenses" policy—a policy the District Court had already found likely to be unconstitutional—to eligible couples other than the named Plaintiff couples in an effort to preserve the status quo.

Such modification of a preliminary injunction to preserve the status quo is appropriate as long as the amended injunction "left unchanged the core questions before the appellate panel" as they existed after the district court's grant of the original injunction. *Nat. Res. Def. Council, Inc. v. Sw. Marine, Inc.*, 242 F.3d 1163, 1167 (9th Cir. 2001); *George S. Hofmeister Family Trust*, 2007 WL 128932, at *2 n.1 (noting that "the relevant status quo for purposes of Rule 62(c)" is "the new

status quo . . . that the court's grant of the injunction creates"). In other words, "[m]aintaining the status quo means that a controversy will still exist once the appeal is heard. [Conversely, a]ny action on the district court's part which has the effect of divesting the court of appeals of its jurisdiction over the matter, by eliminating the controversy prior to the hearing on the appeal is inappropriate." *S & S Sales Corp. v. Marvin Lumber & Cedar Co.*, 457 F. Supp. 2d 903, 906 (E.D. Wis. 2006) (quoting 12 *Moore's Federal Practice* § 62.06[1] (3d ed. 2006)).

The September 3 Order modified the Preliminary Injunction only to the extent that it prohibited Davis from applying her "no marriage licenses" policy to all eligible couples. That limited modification did not materially alter the status quo of the case on appeal to this Court. Indeed, the September 3 Order left unchanged the core question raised by Davis' appeal of the Preliminary Injunction: whether Davis, in her official capacity as Rowan County Clerk, may deny eligible couples access to marriage licenses in Rowan County because of her personal, religious objection to the Supreme Court's decision in *Obergefell*. The September 3 Order did not alter the legal issues at stake or deprive this Court of the opportunity to address them. Consequently, the September 3 Order preserved the status quo of the case on appeal to this Court and was within the District Court's jurisdiction under Rule 62(c).

Because the September 3 Order satisfies the narrower "preserve the status quo" standard, it also satisfies the more expansive "preserve the integrity of the proceedings" standard. *See George S. Hofmeister Family Trust*, 2007 WL 128932, at *2 (noting that the "preserve the integrity of the proceedings" standard "go[es] beyond the status quo rule" to allow "substantive modification imposing more requirements in an injunction order pending appeal"). Given Davis' documented refusal to comply with the Preliminary Injunction, the September 3 Order was necessary to preserve the integrity of the proceedings by avoiding the unnecessary multiplication of litigation, including appellate litigation, that would have resulted from her continuing to enforce her "no marriage licenses" policy against those who are legally eligible to marry. Thus, under either analytical framework, Rule 62(c) provided ample justification (and jurisdiction) for the September 3 Order modifying the Preliminary Injunction. Davis' argument that the district court lacked authority to modify the Preliminary Injunction because she had already appealed that ruling ignores Rule 62(c), and the cases on which she relies fail even to mention it. [Davis Br. 75-76 (citing various cases that do not discuss or analyze Rule 62(c)).][14]

[14] Alternatively, the Court may, pursuant to Fed. R. Civ. P. 62.1, construe the September 3 Order as an indicative ruling on a motion for relief that is barred by a pending appeal and remand for the purpose of allowing the district court to grant

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B. The district court did not violate Davis' due process rights by granting Plaintiffs' Rule 62(c) motion.

The district court provided constitutionally adequate notice to Davis before granting Plaintiffs' Rule 62(c) motion. Plaintiffs filed their Rule 62(c) motion on September 1, 2015, the same day Plaintiffs filed their motion to hold Davis in contempt. [*Compare* Page ID #1488: Plaintiffs' Mot. Pursuant to Rule 62(c) to Clarify the Prelim. Inj. Pending Appeal (RE #68) (filed Sept. 1, 2015) *with* Page ID #1477: Mot. to Hold Davis in Contempt of Court (RE #67) (filed Sept. 1, 2015).] Also that day, the district court held a telephonic conference, at which the district court set Plaintiffs' contempt motion for a hearing on September 3, 2015. [Page ID #1496: Order (RE #69).]

Davis acknowledged, in writing, her receipt of Plaintiffs' Rule 62(c) motion in a pleading filed on September 2, 2015. [*See* Page ID #1542 n.2: Davis' Response to Motion for Contempt (RE #72).] Then, at the September 3, 2015, hearing, the court afforded Davis an opportunity to respond orally to the motion before ruling on it. [*Id*. at Page ID #1573-1579.] That the court elected, at the September 3 hearing, to afford Davis an opportunity to respond did not deprive her

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the motion. *See* Fed. R. Civ. P. 62.1(c); Fed. R. App. P. 12.1(b); *United States v. Cardoza*, 790 F.3d 247, 248-49 (1st Cir. 2015).

of due process. To the contrary, the district court sought to provide Davis with process.

Under Rule 6(c)(1)(C), a motion must be served "at least 14 days before the time specified for the hearing," unless the court "sets a different time." Here, the court set a different time for the hearing on Plaintiffs' Rule 62(c) motion, and nothing in the Federal Rules prohibits a court from doing so.

Moreover, the district court did not abuse its discretion in addressing, and deciding, the Rule 62(c) motion at the September 3 hearing without further delay. The Rule 62(c) motion did not involve any new questions of law or fact beyond the issues presented by the Preliminary Injunction motion [*See* Page ID #1574-80: 9/3/15 Hr'g Tr. (RE #78)], and the parties had fully and fairly litigated the underlying preliminary injunction ruling.[15]

III. THE DISTRICT COURT PROPERLY FOUND DAVIS IN CIVIL CONTEMPT.

A. Davis' appeal of the contempt ruling should be dismissed as moot.

As an initial matter, this Court should dismiss Davis' appeal from the contempt ruling because it was rendered moot when the district court lifted the

[15] Moreover, Davis is unable to establish any actual prejudice that resulted from the purported due process denial because the September 3 order merely enjoined her official-capacity enforcement of an otherwise unconstitutional policy. *See Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010) ("[A] party who claims to be aggrieved by a violation of procedural due process must show prejudice.").

contempt sanction, deemed her contempt purged, and released her from custody. Specifically, after the district court found that the deputy clerks were complying with the Preliminary Injunction, it released Davis from custody and lifted the prior contempt sanction against her. [Page ID #1827-28: Order (RE #89).] As a result, no live case or controversy remains for adjudication. *See United States v. Zakharia*, 418 F. App'x 414, 425-26 (6th Cir. 2011) ("'In the context of purely coercive civil contempt, a contemnor's compliance with the district court's underlying order moots the contemnor's ability to challenge his contempt adjudication.'" (quoting *In re Grand Jury Subpoena Duces Tecum*, 955 F.2d 670, 672 (11th Cir. 1992))); *RES-GA Cobblestone, LLC v. Blake Const. & Dev., LLC*, 718 F.3d 1308, 1314 (11th Cir. 2013) ("In the context of purely coercive civil contempt, a contemnor's compliance with the district court's underlying order moots the contemnor's ability to challenge his contempt adjudication." (internal quotation marks and citation omitted)).

Nor does Davis' appeal fall within the capable of repetition yet evading review exception to mootness. Any future harm to Davis would result from her own choice to disobey federal court orders, not from the orders themselves or her inability to comply. Moreover, Davis now asserts that she has abandoned her "no marriage licenses" policy. [Page ID #2489: Davis' Resp. Opposing Pls.' Mot. to Enforce (RE #133).] Thus, the specific violation for which she was found in

contempt—the continued imposition of her "no marriage licenses policy"—will not, by her own admission, be repeated. Should Davis take some *other* action that violates the Preliminary Injunction, whether the district court would hold her in contempt a second time for that particular violation is highly uncertain, as is the nature of any specific sanction that may be imposed. Thus, the "capable of repetition yet evading review" exception to mootness does not save Davis' appeal of the civil contempt finding. *See Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60, 62 (6th Cir. 1993) (capable of repetition yet evading review doctrine requires that the challenged action be too short to be fully litigated and that there be a reasonable expectation that "the same complaining party would be subjected to the same action again.").

Accordingly, Davis' appeal from the civil contempt ruling must be dismissed as moot.

B. The district court did not violate Davis' due process rights by holding her in civil contempt for violating the Preliminary Injunction.

Even if Davis' appeal of the civil contempt sanction were not moot, this Court should affirm. First, fewer due process protections are afforded to parties held in civil, as compared to criminal, contempt. *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011). All that is required is "notice, an impartial hearing, and an opportunity to present [one's] case." *Satyam Comput. Serv., Ltd. v. Venture Global*

Eng'g, LLC, 323 F. App'x 421 (6th Cir. 2009) (affirming civil contempt finding as consistent with due process); *Cincinnati Bronze, Inc.*, 829 F.2d at 589 (same). Davis unquestionably had notice of the September 3 hearing [RE #69], an impartial adjudicator, and an opportunity to file a brief in advance of the hearing [RE #72] and to present oral argument at the hearing [RE #78].

Moreover, "the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings." *Turner*, 131 S. Ct. at 2520. Nevertheless, Davis *was* represented by counsel who argued in her defense, both in a written response to Plaintiffs' contempt motion and at the contempt hearing itself. [*See* Page ID #1540: Davis Resp. to Plaintiffs' Mot. for Contempt (RE #72); Page ID #1563: 9/3/15 Hr'g Tr. (RE #78).] Moreover, Davis' counsel called her to the stand in order for her to testify in her own defense [*id*. at Page ID #1611], and she was permitted (but elected not) to cross-examine Plaintiff April Miller. [*Id*. at Page ID #1643.]

In addition to these safeguards, the district court also afforded Davis an opportunity to purge herself of contempt before the conclusion of the day's proceedings by simply agreeing not to interfere with her deputies' performance of their job duties with respect to marriage licensing in order to gain compliance with the Preliminary Injunction. [*Id*. at Page ID #1736.] But Davis, through her counsel, would not agree. [*Id*. at Page ID #1737-38.] Davis was afforded sufficient due

process. *See United States v. Conces*, 507 F.3d 1028, 1043 (6th Cir. 2007) (where defendant was offered opportunity to purge contempt and obtain his own release, due process required only "notice and an opportunity to be heard").

C. The federal RFRA does not apply to the district court's civil contempt ruling.

Similarly, Davis' assertion that the federal RFRA applies to the district court's order is incorrect. The parties in this case are not federal actors; they are private individuals and local and state officials to whom RFRA does not apply. *See City of Boerne v. Flores*, 521 U.S. 507, 534-35 (1997) (holding that RFRA cannot constitutionally be applied to the states); *cf. Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010) (holding that federal RFRA does not apply in suits by private parties seeking to enforce federal law against other private parties), *cert. denied*, 131 S. Ct. 2097 (2011). Moreover, RFRA may not be invoked as a defense to a federal court order that is entered in a dispute between non-federal actors, as here. *See id.* at 410 (noting that the Supreme Court has "vindicated the application of RFRA against the *federal* government," and ruling that the RFRA "defense does not apply in suits between private parties" (emphasis in original)). Were it otherwise, every injunction issued by a federal judge—regardless of whether the parties involved in the case are federal entities—would potentially be subject to strict scrutiny under RFRA before the ruling could be enforced by the issuing court.

And Davis' reliance on the decision of the Eighth Circuit in *United States v. Ali*, 682 F.3d 705 (8th Cir. 2012), is inapposite. *Ali* involved multiple *criminal* contempt findings imposed after the defendant was held in contempt for refusing, on religious grounds, to comply with a rule of courtroom decorum. *Id*. The district court found that Ali's religious beliefs did not constitute a defense to the criminal contempt charges because "Ali had no right under the First Amendment to disobey the court's rules of decorum." *Id*. at 709. But the district court did not consider Ali's RFRA argument. *Id*. On appeal, the Eighth Circuit remanded to allow the trial court to consider the party's RFRA defense to the criminal contempt convictions, but it did not resolve the question of whether criminal contempt was the least restrictive means of enforcing discipline and decorum in the courtroom. *Id*. at 710. However, a federal court's enforcement of its own courtroom decorum rules by means of criminal contempt is entirely different than civil contempt rulings that enforce validly entered orders that resolve (private and non-federal) litigants' competing claims and defenses. Even if RFRA provides a defense to criminal contempt in the former situation, that does not mean that RFRA applies in the latter, particularly given that this Court has already held that the federal RFRA does not apply in suits in which a private party seeks to enforce federal law against another private party. *Gen. Conference Corp. of Seventh-Day Adventists*, 617 F.3d at 410. It follows, then, that the federal RFRA does not apply against federal

courts' ability to enforce orders entered in such suits. *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, No. 1:06-CV-01207-JDB, 2012 WL 1155465, at *6 (W.D. Tenn. Apr. 5, 2012) ("[T]he appeals court rejected McGill's argument that RFRA prohibits a court from enforcing Plaintiffs' trademarks under generally applicable trademark law. Likewise, RFRA does not prevent the Court from holding Chartier in contempt and sanctioning him in order to protect the trademark rights of a private party.").

However, even if federal RFRA did apply here, the district court considered and rejected Davis' purported RFRA defense. Remand is thus unnecessary. [Page ID #1656-57: 9/3/15 Hr'g Tr. (RE #78).]

D. Interests of federalism and comity do not support reversal of the civil contempt finding.

"[P]rinciples of federalism and comity" also do not justify reversing the civil contempt finding, as Davis suggests. [Davis Br. 86.] Federal courts, of course, may enjoin government officials from committing future violations of individuals' federally secured rights. *Ex Parte Young*, 209 U.S. 123, 154 (1908) (exception to Eleventh Amendment immunity for actions against state officials, in their official capacities, to enjoin those officials from future violations of federal law). And "[i]n exercising their prospective powers under *Ex parte Young* and *Edelman v. Jordan*, federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto v.*

Finney, 437 U.S. 678, 690 (1978). This includes enforcement by means of civil contempt. *Id*. at 691 ("Civil contempt proceedings may yield a conditional jail term or fine." (citing *United States v. United Mine Workers*, 330 U.S. 258, 305 (1947)); *see also* 18 U.S.C. § 401; *Int'l Union v. Bagwell*, 512 U.S. 821, 826-27 (1994).

Here, the district court did not overreach or otherwise offend notions of federalism and comity by finding Davis in civil contempt and remanding her to custody. Instead, the federal judicial system afforded Davis repeated opportunities to seek to stay a ruling with which she disagreed. But rather than comply with the ruling when those efforts proved unsuccessful, Davis chose to simply disregard it. [Page ID #1619-21: 9/3/15 Hr'g Tr. (RE #78).] And she further directed her subordinates to disregard it, too. [*Id*.] When given the opportunity to avoid incarceration by simply agreeing not to interfere with her deputies' issuance of valid marriage licenses, Davis refused. [*Id*. at Page ID #1736-37.] Thus, Davis' flagrant refusal to comply (or to allow her subordinates to comply) with a valid court order rendered the district court's civil contempt finding appropriate, and its decision to remand her to the custody of the U.S. Marshal the least restrictive means available to gain her compliance.

IV. DAVIS IS NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF AGAINST THE STATE DEFENDANTS.

Finally, in seeking a preliminary injunction against the State Defendants, Davis, in effect, sought to circumvent the Preliminary Injunction that the court had already issued barring her official-capacity enforcement of the "no marriage licenses" policy. As explained above, the district court properly granted Plaintiffs' requested Preliminary Injunction. For those reasons, as well as those contained in the State Defendants' brief [RE #66: Br. of Appellees Beshear & Onkst (15/5880)], Davis was not entitled to an order excusing her from complying with that Preliminary Injunction; thus her appeal from the district court's denial of that request should be affirmed.

CONCLUSION

For the foregoing reasons, the Preliminary Injunction, and the September 3 Order modifying that ruling, should be affirmed. Davis' appeal from the civil contempt finding should be dismissed as moot or, in the alternative, affirmed. For the reasons stated in the brief of Third-Party Defendants/Appellees, the denial of Davis' request for a preliminary injunction should likewise be affirmed.

Respectfully submitted,

s/ William E. Sharp

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C), I certify that the **Brief of Plaintiffs-Appellees** was prepared using a proportional 14-point typeface and contains 12,954 words (excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)) as calculated by the word processing system used to prepare this brief.

s/ William E. Sharp_____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **BRIEF OF PLAINTIFFS-APPELLEES** to be served December 16, 2015, by operation of this Court's electronic filing system, on the following:

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Document Description	Page ID #	Date
1	Complaint with Exhibits	1-26	7/2/15
2	Plaintiffs' Motion for Preliminary Injunction	34-36	7/2/15
2-1	Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction	37-47	7/2/15
10	Order on July 13, 2015 Proceedings	77-78	7/13/15
24	Order on July 20, 2015 Proceedings	215	7/20/15
29	Defendant Davis' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction	318-66	7/30/15
34	Verified Third-Party Complaint of Defendant Kim Davis	745-76	8/4/15
36	Plaintiffs' Reply Memorandum in Support of Preliminary Injunction	797-813	8/6/15
39	Defendant/Third-Party Plaintiff Kim Davis' Motion for Preliminary Injunction	824-27	8/7/15
39-1	Defendant/Third-Party Plaintiff Kim Davis' Memorandum in Support of Motion for Preliminary Injunction	828-76	8/7/15
43	Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction	1146-73	8/12/15
44	Notice of Appeal from RE #43	1174-76	8/12/15
58	Order Staying Further Briefing of Defendant/Third Party Plaintiff Kim Davis' Motion for Preliminary Injunction	1289	8/25/15
66	Notice of Appeal from RE #58	1471-73	8/31/15
67	Plaintiffs' Motion to Hold Defendant Kim Davis in Contempt of Court	1477-84	9/1/15
67-1	Declaration of April Miller, PhD.	1485-86	9/1/15
68	Plaintiffs' Motion Pursuant to Rule 62(c) to Clarify the Preliminary Injunction Pending Appeal	1488-92	9/1/15
72	Defendant Kim Davis' Response in Opposition to Contempt Motion	1540-46	9/2/15

Record No.	Document Description	Page ID #	Date
74	Order Granting Plaintiffs' Motion Pursuant to Rule 62(c) to Clarify the Preliminary Injunction	1557	9/3/15
75	Order Granting Plaintiffs' Motion to Hold Defendant Davis in Contempt	1558-59	9/3/15
79	Amended Notice of Appeal Amending RE #44	1744-46	9/6/15
82	Notice of Appeal from RE #74	1785-88	9/8/15
83	Notice of Appeal from RE #75	1791-94	9/8/15
89	Order Releasing Defendant Davis from Custody	1827-28	9/8/15