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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

KIM DAVIS, individually,

Defendant-Third-Party Plaintiff-Appellant,

v.

MATTHEW G. BEVIN, in his official capacity as Governor of Kentucky, and WAYNE ONKST, in his official capacity as State Librarian and Commissioner, Kentucky Department for Libraries and Archives,

Third-Party Defendants-Appellees.

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

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CONSOLIDATED REPLY BRIEF FOR APPELLANT KIM DAVIS

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, Appellant Kim Davis states that she is an individual person. Thus, Davis is not 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 its outcome.[1]

[1] Appellant inadvertently omitted this corporate disclosure statement from her principal brief filed with the Court on November 2, 2015.

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INTRODUCTION

More than six months after filing this lawsuit, Plaintiffs still fail to provide constitutional grounds for the district court's newfound fundamental right to have a marriage license personally signed, authorized, approved, and issued by a particular person in a particular county, **irrespective of the burdens placed upon that individual's freedoms and undisputed sincerely-held religious beliefs about marriage**. No precedent from this Court or the Supreme Court establishes a fundamental constitutional right to obtain a marriage license **in a particular county** authorized and signed **by a particular person**. Thus, as a federal constitutional matter, Plaintiffs have failed to demonstrate, as they must, a direct *and* substantial burden on their right to marry in Kentucky sufficient to establish a likelihood of success on the merits of their Fourteenth Amendment claims, or any constitutionally significant harm.

Moreover, Plaintiffs make several concessions that, together, indisputably trigger strict scrutiny review of Davis' religious liberty claims and defenses under the Kentucky RFRA, not to mention the protections for religious liberty set forth in the United States and Kentucky Constitutions. Critically, Plaintiffs do not dispute that Davis possesses sincerely-held religious beliefs about marriage. Nor do Plaintiffs dispute that, following *Obergefell*, former Governor Beshear sent a letter to Kentucky county clerks "**instructing** them to follow the Supreme Court's

decision in issuing marriage licenses" and "**mandating** the use of newly prepared forms" that forced clerks to either place their own name and authorization on any Kentucky marriage license, including a SSM license over against their sincerely-held religious beliefs, or resign. Pls.' Br. 42 (emphasis added). This kind of choice, which former Governor Beshear's SSM Mandate[2] engendered, plainly constitutes a substantial burden on one's religious beliefs. Despite this burden, neither Plaintiffs nor former Governor Beshear (whose veto of the Kentucky RFRA was overturned by substantial majorities in the Kentucky Legislature) identified any significant or undue hardship in accommodating Davis' undisputed religious convictions through any one of the myriad less restrictive alternatives she proposed. In fact, accommodation was simple from the outset of this case—and, under the "most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (discussing the analogous Federal RFRA), warranted.[3]

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[2] Capitalized terms retain their definitions from Davis' opening brief.

[3] Recognizing both the unmistakable applicability of the Kentucky RFRA and constitutional religious freedoms to this situation and his authority, as governor, to oversee Kentucky marriage law—critical tenets that Davis has consistently argued throughout this litigation—State Defendant Governor Bevin recently issued Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form dated December 22, 2015 (hereinafter, "Marriage Licensing Executive Order") to provide religious accommodation. This executive action both concedes the substantial burden placed on Davis' sincerely-held religious beliefs by the SSM Mandate, and also accommodates those beliefs by eliminating her name and authorization from any Kentucky marriage license issued in Rowan County, Kentucky. R.156-1, Marriage Licensing Executive Order, PgID.2601-2603. State Defendants recently filed a motion to dismiss Davis' appeal against them on

Accordingly, the SSM Mandate fails, and with it, so too the district court's Injunction, which this Court should reverse or, at the very least, vacate as improvidently granted. Because the Injunction never should have issued, this Court should also reverse the district court's subsequent orders that valued expediency over basic principles of jurisdiction and callously trampled upon Davis' due process rights for the purpose of vindicating the district court's own authority. This Court cannot allow such overreaching judicial decisions lacking in jurisdiction, and inquisition-like proceedings lacking in fundamental due process protections, to stand—especially when the consequences of those error-laden rulings placed a duly-elected, public official in jail because she sought a simple religious accommodation as a person who subscribes to a view about marriage that "long has been held—**and continues to be held—in good faith by reasonable and sincere people here and throughout the world**." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2594 (2015) (emphasis added).

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mootness grounds, without also withdrawing their opposition to Davis' appeal. Doc. 78. Davis will respond to State Defendants' motion in accordance with this Court's Rules.

ARGUMENT

I. The District Court Erred In Granting An Injunction Against Davis.

A. Plaintiffs Failed To Demonstrate A Constitutionally Significant Burden On Their Right To Marry Under The Fourteenth Amendment.

Plaintiffs fail to carry their burden in demonstrating a direct and substantial burden on their right to marry under the Fourteenth Amendment sufficient to trigger heightened constitutional scrutiny; thus, rational basis review applies. Importantly, Plaintiffs fail to show how the non-oppressive burden of traveling 30-45 minutes to obtain a marriage license enacts an "absolute barrier" to their fundamental right to marry by "absolutely or largely" preventing them from marrying whom they want to marry or "absolutely or largely" preventing them from marrying "a large portion of the otherwise eligible population of spouses." *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001). Instead, distilled to its essence, Plaintiffs' purported "direct and substantial" burden on their right to marry is really two sides of the same coin: (1) having to "travel to another county" to obtain a Kentucky marriage license and (2) not being able to obtain a marriage license "in their county of residence." Pls.' Br. 32-35. Neither is compelling or constitutionally significant enough to establish an onerous burden on their right to marry under the Fourteenth Amendment.

First, the mere act of having to "travel to another county" to exercise a right constitutionally protected under the Fourteenth Amendment (such as the right to marry) is not, on its face, sufficient to establish a federal constitutional violation. Nor does the record in this matter demonstrate that such travel was any actual burden on these Plaintiffs. "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 873 (1992).

This principle is evidenced by the undue burden analysis applied in abortion cases. In *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 605 (6th Cir. 2006), this Court found that a restriction that forced women to travel 45-55 additional miles to procure an abortion survived *Casey*. A key issue was whether the closing of one abortion clinic – which would require approximately 3,000 patients per year to travel to another clinic for abortions – established an "undue burden" on abortion rights by placing a "substantial obstacle before women seeking abortions." *Id.* at 604. This Court concluded no: "[W]hile closing the Dayton clinic may be burdensome for some of its potential patients, the fact that these women may have to travel farther to obtain an abortion does not constitute a substantial obstacle. *Id.* at 605; *see also Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 748 F.3d 583, 598 (5th Cir. 2014) (no substantial obstacle to abortion rights when clinic closure made the next accessible clinic 150 miles away); *Greenville*

Women's Clinic v. Bryant, 222 F.3d 157, 165 (4th Cir. 2000) (same within 70 miles). As *Casey* further instructs, "[t]he fact that a law . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." 505 U.S. at 874.

But this principle is not limited to abortion rights. *Casey* similarly analogized abortion rights with voting rights, noting the Court's holdings that "not every ballet access limitation amounts to an infringement of the right to vote" and that States "are granted substantial flexibility in establishing the framework" by which voters vote. *Id.* at 873-74 (citations omitted). Accordingly, contrary to Plaintiffs' suggestion, the "existence of alternative means for the exercise of a constitutional right," Pls' Br. 33, is relevant and similarly effective in evaluating this dispute, particularly where Plaintiffs have utterly failed to demonstrate any actual direct and substantial burden on their right to marry.

The undisputed record demonstrates the fallacy of Plaintiffs' suggestion that Plaintiffs had to "forgo their right to marry." Pls.' Br. 34. In fact, the record indisputably demonstrates that Rowan County is bordered by 7 counties, and the clerks' offices in these counties are within 30-45 minutes from the Rowan County clerk's office. R.26, Prelim. Inj. Hr'g (7/20/2015), Davis Testimony, PgID.269.[4]

[4] Also, more than ten other clerks' offices are within a one-hour drive of the Rowan County clerk's office, and marriage licenses were being issued in these counties, along with the two counties where preliminary injunction hearings were

Moreover, Plaintiffs admitted that they never even attempted to obtain a license in any county other than Rowan County, despite the widespread availability of such licenses and even though Plaintiffs have the economic means and no physical handicap preventing such travel. R.21, Prelim. Inj. Hr'g (7/13/2015), Plaintiffs' Testimony, PgID.123, 127-128, 130, 133, 136, 140, 146-147.

According to Plaintiffs' unprecedented view, adopted in error by the district court, the mere act of traveling "to another county" approximately 30 minutes equates to a federal constitutional violation of the right to marry and, not just that, but a violation purportedly so manifest that it trumps individual conscience and religious freedom protections that are enumerated in the Kentucky RFRA and the United States and Kentucky Constitutions. But this alleged burden is no more constitutionally suspect than having to drive 30 minutes to a government office (for any reason) in the first place, even in one's own county. Under Plaintiffs' logic, the closing of a county office for any reason, or no reason, constitutes a federal constitutional injury. Therefore, this Court should conclude that the brief "closing" of marriage licensing in the Rowan County clerk's office did not constitute a direct and substantial burden on Plaintiffs' right to marry "simply because" they "might

held in this matter (which were attended by Plaintiffs who traveled 60 and 100 miles). R.26, Prelim. Inj. Hr'g (7/20/2015), Davis Testimony, PgID.269-270.

have to travel somewhat farther to obtain" a marriage license. *See Baird*, 438 F.3d at 605.[5]

Second, Plaintiffs repeatedly claim that they have a "right" to receive a marriage license "**in their county of residence**"—but there is no such right guaranteed by the Fourteenth Amendment. Said otherwise, securing a marriage license in one's own county of residence has never been a matter of federal constitutional significance. Thus, as Plaintiffs' briefing repeatedly acknowledges, any demand for a marriage license "in their county of residence" is purely a matter of Kentucky law. *See*, *e.g.*, Pls.' Br. 33 (claiming that Plaintiffs were precluded "from obtaining marriage licenses in their county of residence, even though such licenses are a **legal prerequisite for marriage in Kentucky**") (emphasis added) (citing KY. REV. STAT. § 402.080); *id.* at 34 (claiming that Plaintiffs were forced to "travel to another county to obtain a marriage license—a requirement not present or authorized **under Kentucky law**") (emphasis added); *id.* at 35 (claiming that Davis "withheld a government-mandated *prerequisite* for marriage from individuals who were **legally entitled to receive it**.") (italics in original; bold emphasis added) (citing KY. REV. STAT. § 402.080); *id.* (claiming that "whatever alternative means existed

[5] Plaintiffs' brief refers to "all other Rowan County residents," but Plaintiffs submitted no evidence at the preliminary injunction hearings establishing any physical or financial burden on any Rowan County resident, including themselves. Any misleading suggestion otherwise is pure speculation, not supported by the factual record in this case, and should be ignored by this Court.

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**") (emphasis added) (citing KY. REV. STAT. § 402.080).

As indicated above, Plaintiffs improperly suggest that a marriage license from one's own "county of residence" is a "legal prerequisite" to marrying under Kentucky law. No one disputes that **a** marriage license is required by Kentucky law for a valid marriage, but Kentucky law expressly provides that, when the applicant is over the age of 18, as all applicants in this case indisputably are, that license "may be issued by **any** county clerk," not just the county of residence. KY. REV. STAT. § 402.080 (emphasis added). The licenses are not "county" licenses that are recognized by other counties but instead Commonwealth licenses that are recognized throughout the state.[6] As Plaintiffs readily concede, nothing (and no one) is barring them from exercising the right to marry whom they want to marry in Kentucky. Indisputably, **Kentucky** is recognizing marriages, including same-sex "marriages," so Plaintiffs can marry whom they want and, as indicated above, **Kentucky** provides

[6] The Marriage Licensing Executive Order confirms this understanding, because it provides county clerks a religious accommodation from authorizing "Commonwealth" marriage licenses. R.156-1, Marriage Licensing Executive Order, PgID.2601.

more than 130 marriage licensing locations spread across the state, including many locations within 30-45 minutes of Plaintiffs' residence.

Accordingly, the merits of Plaintiffs' claims must be evaluated in terms of the **state-wide** marriage licensing scheme and whether that scheme directly and substantially burdens these Plaintiffs' right to marry. Constitutionally speaking, the brief closure of a single clerk's office for the issuance of all marriage licenses (in this case, until religious accommodations could be appropriately made) is no different than the closure of a single clerk's office because of weather, holidays, vacation, or natural disaster. This situation is far different from prior Supreme Court cases addressing the right to marry—which involved statewide, absolute (or near absolute) bans affecting marriage, some of which also came with criminal penalties attached and raised equal protection concerns, none of which are raised in this case.

Plaintiffs' repeated citation to, and reliance upon, KY. REV. STAT. § 402.080, among other Kentucky statutes, reveal that their purported "direct and substantial" burden is really an interpretation of what Kentucky marriage law purportedly requires, not the Fourteenth Amendment. But Plaintiffs did not assert any state law claim in their Complaint against Davis and, in Plaintiffs' own words, "the Eleventh Amendment bars federal courts from enjoining state actors to comply with state law." Pls.' Br. 43 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89

(1984)).[7] Thus, Plaintiffs cannot rely upon their interpretation of Kentucky marriage law to enjoin Davis. Yet the Injunction entered by the district court enjoining Davis to issue marriage licenses depends upon a state law claim based upon a state law statute regarding a public official's alleged "long entrusted" and "statutorily-assigned" duties to authorize and issue marriage licenses. R.43, Inj., PgID.1149-1150, 1159, 1172-1173. But grounding the opinion on such claims—which Plaintiffs now fully embrace and rely upon—compels reversal of the Injunction on sovereign immunity grounds to the extent Davis is treated as a state official (which the Injunction does). *See Edelman v. Jordan*, 415 U.S. 651, 678 (1974); *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 816 (6th Cir. 2000). Further, if this Court bypasses the Eleventh Amendment issues and nonetheless relies upon purported requirements of Kentucky law to affirm the Injunction, then Kentucky marriage law—including who is responsible for issuing licenses—cannot be interpreted without also considering and applying the Kentucky RFRA.[8]

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[7] Notably, this same analysis does not bar Davis' own injunctive claims. As an initial matter, Plaintiffs did not allege state law claims, whereas Davis did. Moreover, as Davis explained in her briefing, the Kentucky RFRA is not a discretionary statute. Instead, it modifies all Kentucky statutes, including Kentucky's marriage licensing scheme, and applies to all state action, including former Gov. Beshear's SSM Mandate. As such, the Kentucky RFRA creates a liberty interest protected by the Fourteenth Amendment's Due Process Clause and thus a violation of it constitutes an unconstitutional denial of liberty without due process. *Spruyette v. Walters*, 753 F.2d 498, 506 (6th Cir. 1985).

[8] The motions panel in this case relied upon Kentucky state law to deny relief to Davis, but in the same breath refused to consider the implications of the Kentucky

Given the non-onerous burden on Plaintiffs' right to marry as a federal constitutional matter, rational basis review applies. Plaintiffs erroneously proclaim that such review requires affirming the Injunction. Pls.' Br. 37-39. Plaintiffs' rhetoric flatly ignores that Davis' actions ensured that other individuals' fundamental rights to religious accommodation secured by the United States and Kentucky Constitutions and the Kentucky RFRA were protected.

Protecting natural and inalienable religious liberties is not merely a conceivable legitimate interest, but rather a foundational and compelling interest of the highest degree. U.S. Const. amend I; KY. CONST., Preamble, §§ 1, 5; KY. REV. STAT. § 446.350. In Plaintiffs' view, accommodation is an illegitimate government interest—a conclusion easily disbanded by Supreme Court precedent holding that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (there is "ample room for accommodation of religion under the Establishment Clause"). Thus, religious accommodation pre-dates and pre-exists both the

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RFRA on that state law. This Court is not bound by the decision of a prior unpublished order of a motions panel. *Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir. 2011); *Whole Women's Health v. Cole*, 790 F.3d 563, 580 (5th Cir.), *cert. granted*, 136 S.Ct. 499 (2015).

Obergefell opinion and Plaintiffs' attempt to force-feed their version of it upon a reasonable person of good faith who possess sincerely-held religious beliefs, and whose beliefs can so easily be accommodated without much fanfare.

The fact that Davis is a government official does not rob her of such core individual rights. As a person, she retains the dignity of such personhood, including her fundamental rights. In *Hobby Lobby*, Justice Kennedy elaborated on the fundamental protections afforded to a person's free exercise rights:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (internal citations omitted). Accordingly, there is nothing incompatible or antithetical *per se* with religious accommodation and elected office, or religious accommodation and government employees. *See*, *e.g.*, *Slater v. Douglas Cnty.*, 743 F. Supp. 2d 1188, 1192-95 (D. Or. 2010) (denying summary judgment to county defendant that only proposed to reassign a county clerk employee who refused on religious grounds to issue same-sex domestic partnership registrations rather than accommodating her request); N.C. GEN. STAT. § 51-5.5 (permitting recusal of

government officials from "issuing" marriage licenses "based upon any sincerely held religious objection"); UTAH S.B. 297 (2015 Gen. Sess.); La. Gov. Executive Order, BJ 15-8, Marriage and Conscience Order, at § 2 (May 19, 2015); R.156-1, Marriage Licensing Executive Order, PgID.2601-2603.[9]

Davis' actions also kept her (and her deputy clerks) from violating Kentucky's marriage statutes until the uncertainty surrounding the application of those pre-existing, democratically-enacted laws was clarified. R.73, Stivers Amicus, PgID.1548 (Kentucky's Senate President agreeing that "the concept of marriage as between a man and a woman is so interwoven into KRS Chapter 402 that the defendant County Clerk cannot reasonably determine her duties until such time as the General Assembly has clarified the impact of *Obergefell* by revising KRS Chapter 402 through legislation," or "[a]lternatively the clerk's duties could be clarified by Executive Order of the Governor under KRS Chapter 12").[10] Therefore,

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[9] Lacking authority for their absolute denial of religious accommodation rights for public officials, Plaintiffs turn instead to castigating and denigrating Davis for her "personal" religious beliefs about marriage as exclusively a union between a man and a woman. Pls.' Br. 13, 15, 23, 27-30, 36-37, 49, 55. Such sincerely-held religious beliefs, however, happen to coincide with a view that "long has been held—**and continues to be held—in good faith by reasonable and sincere people here and throughout the world**." *Obergefell*, 135 S.Ct. at 2594 (emphasis added). Plaintiffs' refrain amounts to nothing more than a specious attempt to vilify Davis for her "personal" beliefs and create a religious (or anti-religious) test for holding public office.

[10] In fact, Davis' duties were specifically clarified by the Marriage Licensing Executive Order, which expressly provides religious accommodation protections to

the legitimate and important government interests in protecting express constitutional and statutory religious liberties provides ample support for any short-term, insubstantial travel burden on the right to marry until religious accommodation rights were appropriately considered.[11]

B. The District Court Wrongly Held That Davis Will Not Suffer Irreparable Harm To Her Religious Freedom.

1. The District Court Adopted An Incorrect Substantial Burden Analysis.

Plaintiffs hijack the substantial burden analysis under the Kentucky RFRA in the same wrongful manner as the district court. Critically, neither Plaintiffs nor the district court are arbiters of the burden placed upon Davis' religious beliefs, and their attempts to occupy that position usurp and contradict clear Supreme Court precedent. Similar to the Federal RFRA, the Kentucky RFRA asks whether a government mandate (such the SSM Mandate) "imposes a substantial burden on the ability of the objecting parties" to act "in accordance with *their religious beliefs*," not, as Plaintiffs suggest, whether Davis' religious beliefs about authorizing SSM licenses are reasonable. *See Hobby Lobby*, 134 S.Ct. at 2778 (emphasis in original).

Davis and other similarly situated persons in the issuance of Kentucky marriage licenses. R.156-1, Marriage Licensing Executive Order, PgID.2601-2603.

[11] "Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice." *Obergefell*, 135 S.Ct. at 2625 (Roberts, C.J., dissenting); *see also id.* at 2638 (explaining the historical significance of "religious liberty") (Thomas, J., dissenting).

As indicated previously, Plaintiffs do not dispute that Davis holds sincerely-held religious beliefs about marriage—the requisite "honest conviction" that is relevant here. *Hobby Lobby*, 134 S.Ct. at 2778-79 (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)). It is therefore improper to conclude that such beliefs are "incidental" or "insufficiently substantial," Pls.' Br. 42, 45, for these mischaracterizations are just another way of deeming Davis' religious beliefs to be "mistaken," or "insubstantial," or "flawed," which is a step that the Supreme Court has "repeatedly refused to take." *See Hobby Lobby*, 134 S.Ct. at 2778. But it is the exact leap that Plaintiffs invite, and the district court took in error.

Importantly, Davis is not claiming a substantial burden on her religious freedom if ***someone else*** authorizes and approves a SSM license ***devoid of her name and similar personal identifiers (e.g., title)***. Davis is also not claiming that her religious freedom or free speech rights are substantially burdened if she must complete an opt-out form to be exempted from issuing SSM licenses, as Kentucky law already permits for other licensing schemes. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 941 (8th Cir. 2015) (holding that if "one sincerely believes that completing" an opt-out form from the HHS contraceptive mandate "will result in conscience-violating consequences, what some might consider an otherwise neutral act is a burden too heavy to bear"), *cert. petition*

filed, *U.S. Dep't of Health & Human Servs. v. CNS Int'l Ministries*, 15-775 (U.S.). Furthermore, Davis has never claimed that the mere "administrative" act of recording a document, *see*, *e.g.*, Pls.' Br. 43, substantially burdens her religious freedom. To the contrary, Davis indisputably believes that providing the marriage authorization "demanded by" former Gov. Beshear's SSM Mandate on the marriage license form he revised and required is "connected with" SSM "in a way that is sufficient to make it immoral" for her to authorize the proposed union and place her name on it. *See Hobby Lobby*, 134 S.Ct. at 2778. By way of the SSM Mandate, county clerks are not mere scriveners for recording a marriage document. Instead, county clerks were to authorize the marriage license for the proposed union, place their name on each and every license they authorize, and call the union "marriage." Such participation in and personal approval of SSM substantially burdens Davis' religious freedom because she is the person authorizing and approving a proposed union to be a "marriage," which, in her sincerely-held religious beliefs, is not a marriage. She can neither call a proposed union "marriage" which is not marriage in her view, nor authorize that union.

Because of her beliefs, former Gov. Beshear's SSM Mandate threatened Davis with loss of job, civil liability, punitive damages, sanctions, and private lawsuits in federal court if she refused to act in a manner motivated by a sincerely-held religious beliefs about marriage. Certainly, the Kentucky RFRA is designed to

protect a person from choosing between one's lifelong career in the county clerk's office and one's conscience, or between punitive damages and one's religious liberty. *See Hobby Lobby*, 134 S.Ct. at 2775-76 (holding that a substantial burden arises when the government "demands" a religiously-motivated objector to either "engage in conduct that seriously violates [her] religious beliefs" or suffer "substantial" consequences).[12]

Plaintiffs blatantly ignore the substantial burden analysis set forth by the Supreme Court in *Hobby Lobby*, and instead rely upon a series of easily distinguishable free exercise cases. Pls.' Br. 44. For example, in *Jimmy Swaggert Ministries v. Bd. of Educ. of Cal.*, 493 U.S. 378, 391-92(1990), cited by Plaintiffs, the Supreme Court concluded: "There is no evidence in this case that collection and payment of the tax violates appellant's sincere religious beliefs . . . Appellant has never alleged that the mere act of paying the tax, by itself, violates its sincere religious beliefs." *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 (1989) (finding "no evidence" that the sales tax payment affecting "subscribers to religious

[12] In fact, the State Defendants now agree that "the issuance of marriage licenses on the form currently prescribed by the Kentucky Department for Libraries and Archives ('KDLA') creates a substantial burden on the freedom of religion of some County Clerks and employees of their offices because the current form bears the name of the issuing County Clerk, and some County Clerks and their employees sincerely believe that the presence of their name on the form implies their personal endorsement of, and participation in, same-sex marriage, which conflicts with their sincerely held religious beliefs." R.156-1, Marriage Licensing Executive Order, PgID.2602.

periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity"). Similarly, in *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-04 (1985), a religious foundation failed to demonstrate how application of federal wage-and-hour requirements "actually burden[ed]" its members' "right to freely exercise their religious beliefs."

These holdings are unremarkable and do not dictate a result in this case, for establishing a substantial burden necessarily depends upon first demonstrating a sincerely-held religious belief, which the foregoing religious claimants did not do, and Davis unquestionably did. Unlike these religious claimants, Davis also demonstrated that she was being directed to either "engage in conduct that seriously violates [her] religious beliefs" or suffer "substantial" consequences, *Hobby Lobby*, 134 S.Ct. at 2775-76—which plainly evidences a substantial burden on her religious freedom, and requires reversal of the Injunction that declared her burden "more slight," against clear Supreme Court precedent.

2. The SSM Mandate Cannot Survive Strict Scrutiny.

The Kentucky RFRA requires clear and convincing proof of **both** a particularized compelling government interest in infringing Davis' religious freedom *and* the least restrictive means for achieving that interest. The proffered compelling government interests that purportedly overcome the substantial burden on Davis' religious freedom (*i.e.*, eradicating discrimination, uniformity in the

issuance and recording of marriage licenses, providing same-sex couples benefits, or applying the rule of law, *see* Pls.' Br. 46-47; *see also* State Defendants' Br. 46, 56) are the type of "broadly formulated" governmental interests that fail to satisfy RFRA-based strict scrutiny because they do not show any actual harm in granting a "specific exemption" to a "particular religious claimant." *See Gonzales v. O Centro Espirata Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). **The Marriage Licensing Executive Order concedes there is no such compelling government interest, and no actual harm in granting an exemption**: "[T]here is no compelling governmental interest, particularly under the heightened 'clear and convincing evidence' standard required by KRS 446.350, necessitating that the name and signature of County Clerks be present on the marriage license form used in the Commonwealth." R.156-1, Marriage Licensing Executive Order, PgID.2602.

To establish the requisite compelling governmental interest, Plaintiffs misleadingly cite to cases such as *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983), and *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), wrongly suggesting that a discrimination or equal protection claim is involved in the case at bar. The record is clear that Davis has continuously treated all persons (and couples) the same—thus, there is no race-based or gender-based discrimination to "eliminate" or "eradicate." Upholding the rule of law is a governmental interest, but, it cannot be forgotten that the relevant "law" here also includes the Kentucky RFRA and First Amendment.

Furthermore, providing accommodation to Davis—who is treating all persons the same—neither endorses discrimination nor prevents qualified individuals from uniformly acquiring Kentucky marriage licenses from more than 130 marriage licensing locations.

Even if a sufficient compelling interest can be shown through clear and convincing evidence, as required, this Court cannot ignore application of the "exceptionally demanding" least-restrictive-means standard, and the many less restrictive alternatives that (1) provide Plaintiffs with a marriage license **in Rowan County, Kentucky** and (2) simultaneously protect Davis' religious freedom. Plaintiffs' silence on these numerous alternatives does not mute their availability, even if they cost more. *Hobby Lobby*, 134 S.Ct. at 2780. Indeed, the State Defendants now agree that "KRS 446.350 requires use of the least restrictive means available to carry out compelling governmental interests, and **there are less restrictive means available to further the governmental interest of issuing marriage licenses to all applicants who qualify than the form that is currently being used**," and that the KDLA "can readily prescribe a different form that reasonably accommodates the interests protected by KRS 446.350" and does not substantially burden the "free exercise of religion" by county clerks and their employees "who hold sincerely-held religious beliefs that conflict with same-sex marriage." R.156-1, Marriage Licensing Executive Order, PgID.2602 (emphasis added).

In Plaintiffs' totalitarian view, only a "uniform system" that provides **no** religious accommodation whatsoever is acceptable. Pls.' Br. 46-47. But legislative enactments in other states, such as North Carolina and Utah, *see, e.g.*, N.C. GEN. STAT. § 51-5.5; UTAH S.B. 297 (2015 Gen. Sess.), and the Marriage Licensing Executive Order, demonstrate the intolerance and manifest error of this view. Plaintiffs' conclusion also disregards that "government may (and sometimes must) accommodate religious practices," *Hobbie*, 480 U.S. at 144-45, and repudiates this Court's finding that "[o]ur Nation's history is replete with . . . accommodation of religion." *ACLU v. Mercer County, Ky.*, 432 F.3d 624, 639 (6th Cir. 2005).

Finally, Plaintiffs also advance a "third party beneficiary" argument that was squarely rejected by the Supreme Court in *Hobby Lobby*. "Nothing" in the Kentucky RFRA supports giving the government "an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals," for if any governmental act is construed as benefiting a third party then all government actions can be deemed "entitlements to which nobody could object on religious grounds, rendering RFRA meaningless." *See Hobby Lobby*, 134 S.Ct. at 2781, n.37. "Otherwise, for example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an

opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants)." *Id.* Or, by similar extension, government could decide that all county employees must approve, authorize and personally endorse SSM (and thereby exclude Christians, Jews, Muslims, and others with religious objections from serving as government employees). That result is extreme, unyielding, and unnecessary. Here, Kentucky can "readily arrange" for means of providing Kentucky marriage licenses to the Plaintiffs who are "unable to obtain them . . . due to [Davis'] religious objections," *id.*, thereby abrogating Plaintiffs' concern about an exemption for "religious liberty" that allegedly "adversely impact[s] the rights of others." *See* Pls.' Br. 47-48. In fact, the Marriage Licensing Executive Order achieves that precise end, and could have done so before Davis was needlessly jailed.

C. Public Interest Favors Religious Accommodation.

The public has no interest in coercing Davis to irreversibly violate her conscience and religious freedom when ample less restrictive alternatives are readily available. *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (public has a "significant interest" in the "protection of First Amendment liberties"); *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004). This interest is demonstrated by the Marriage Licensing Executive Order, which provides a simple religious accommodation and

protects the pre-eminent place of religious freedom enshrined in the First Amendment, the Kentucky Constitution, and the Kentucky RFRA.

II. The District Court Erred In Practically Denying Davis' Request For An Injunction Against The State Defendants.

By way of the Marriage Licensing Executive Order, State Defendant Governor Bevin concedes that Davis, as county clerk, possesses constitutional and statutory rights and religious liberties that should be recognized and protected by the Kentucky Governor who oversees Kentucky marriage law and policies. Also, as is evidently clear from the Marriage Licensing Executive Order, Governor Bevin has declared that the sincerely-held religious beliefs and religious freedoms of county clerks, such as Davis, are substantially burdened by the issuance of marriage licenses on the form designed and mandated by former Governor Beshear. R.156-1, Marriage Licensing Executive Order, PgID.2602. Moreover, the Marriage Licensing Executive Order demonstrates that, in law and fact, the Kentucky Governor had the authority, ability, and duty, to provide Davis a simple accommodation that removes her name, other personal identifiers, and authorization from Kentucky marriage licenses. *Id.* at PgID.2602-2603 (directing the issuance of a "Commonwealth marriage license form" that removes the name and authorization of county clerks who possess religious objections to SSM). Accordingly, based upon these admissions, the district court erred in practically denying Davis' request for

injunctive relief against the State Defendants.[13] Finally, as indicated above, Davis will respond to State Defendants' recent motion to dismiss on mootness grounds in accordance with this Court's rules.

III. The District Court Erred In Granting The Expanded Injunction Against Davis.

A. The District Court Had No Jurisdiction To Enter The Expanded Injunction Against Davis.

Plaintiffs do not dispute any of the following facts regarding the district court's Expanded Injunction: (1) Plaintiffs did not originally request a class-wide injunction, choosing instead to seek relief only for the specifically "Named Plaintiffs;" (2) the district court did not originally grant a class-wide injunction, instead granting precisely (and only) what Plaintiffs requested; (3) Plaintiffs did not oppose a stay of class-based proceedings after the original Injunction was already on appeal to this Court; (4) the district court granted the Expanded Injunction without more than same-day notice, without taking any evidence, and without allowing Davis the opportunity to submit any written opposition; (5) the district

[13] The August 25, 2015 order from which Davis appealed was, in fact, appealable under Supreme Court and Sixth Circuit precedent. *Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 567 (6th Cir. 1985); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). As this Court is well aware, by deciding that Davis' own motion for injunctive relief should be pushed-off until this Court conducts a merits-review of the original Injunction, the district court delayed decision by six to nine months at least (if not more), at great harm to Davis who faced immediate, serious, and irreparable harm and consequences resulting from such delay, including incarceration before having her own motion for injunctive relief heard.

court expressly acknowledged that the Expanded Injunction was added relief that Plaintiffs "**did not request**" in the "original motion" for a preliminary injunction, R.78, Contempt Hr'g Tr. (9/3/2015), PgID.1578:20-25 (emphasis added); and (6) the district court further acknowledged that its September 3, 2015 order undeniably "**expanded its ruling**" already on appeal to this Court to include new individuals, R.103, Sept. 11, 2015 Order, PgID.2177 (emphasis added). These uncontested facts, which Plaintiffs fail to rebut, unequivocally demonstrate that the district court had no jurisdiction to enter the Expanded Injunction. The district court's own acknowledgements, and the far-reaching scope of its new injunction to include non-parties to the litigation, are fatal to the validity of the Expanded Injunction under this Court's precedents barring the expansion of orders and judgments on appeal as lacking jurisdiction. *See, e.g., City of Cookeville, Tenn. v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 388 (6th Cir. 2007); *Am. Town Ctr. v. Hall 83 Assocs.*, 912 F.2d 104, 110-11 (6th Cir. 1990); *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987).

Nothing in Federal Rule of Civil Procedure 62(c) permits a different result in the case at bar. By its own terms, the rule does not permit an expansion or enlargement of an injunction on appeal. Moreover, the scope and magnitude of the district court's Expanded Injunction—wherein the district court transmogrified an injunction applicable to a limited number of named Plaintiffs into an injunction

applicable to anyone in the world—prevents it from being classified a mere modification. In addition to citing language from the old Rule 62(c)[14], Plaintiffs' reliance upon the rule is misplaced because they fail to take into account the rule's express restriction to consideration of the **parties'** rights. In the case at bar, the Expanded Injunction had no effect whatsoever on the Plaintiffs' rights, and therefore did not secure any rights of a party opposing this appeal, which is all Rule 62(c) allows by its plain language.[15] This basic understanding of Rule 62(c) debunks Plaintiffs' attempts to shelter from review the district court's *ultra vires* act in granting a new and expanded injunction.

Plaintiffs nonetheless claim that the district court's granting of the Expanded Injunction is authorized because it is really a "modified" injunction pursuant to Rule 62(c) that "preserve[d] the status quo." Pls.' Br. 52-55.[16] However, the cases relied

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[14] In their brief, despite their reliance upon the rule, Plaintiffs do not quote the correct language of Rule 62(c), as it currently exists in the Federal Rules of Civil Procedure. Pls.' Br. 51. In relevant part, the rule actually provides that "While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the **opposing party's rights**." Fed. R. Civ. P. 62(c) (emphasis added).

[15] Conversely, the Expanded Injunction purports to grant rights to non-parties, to the substantial and significant detriment of Davis' rights, which Rule 62(c) plainly does not allow.

[16] Plaintiffs now claim the relevant "status quo" is the time period **after** entry of the original Injunction. Pls.' Br. 53-54. Previously, Plaintiffs contended that the relevant "status quo" to be considered was the time period **before** the original Injunction. Doc. 47 at 10. Plaintiffs' inconsistency further highlights the lack of

upon by Plaintiffs are strictly limited to maintaining the status quo "**between the parties**" to the injunction on appeal, not with respect to non-parties. *See, e.g.*, *George S. Hofmeister Family Trust v. Trans Indus. of Ind.*, No. 06-13984, 2007 WL 28932, at *2 (E.D. Mich. 2007); *see also Shell Offshore, Inc. v. Greenpeace, Inc.*, No. 12-42, 2012 WL 1931537, at *15 (D. Alaska May 29, 2012) (amended injunction applied exclusively to the conduct of parties to the original injunction). In fact, in the only Sixth Circuit case relied upon by Plaintiffs, the "status quo" contemplated by this Court in considering a modified (not expanded) injunction pending appeal was **between the same parties** to an original injunction involving the enforcement of noncompetition agreements. *See Basicomputer Corp. v. Scott*, 973 F.2d 507, 513 (6th Cir. 1992). Critically then, Plaintiffs provide no precedent from this Court allowing a district court to expand an injunction that is already on appeal to include newfound legal obligations to non-parties without the presentation of evidence and without more than same-day notice.

The case of *Vasile v. Dean Witter Reynolds, Inc.*, 205 F.3d 1327, 2000 WL 236473 (2d Cir. 2000), is also distinguishable. *Vasile* involved a *pro se* litigant with a "vexatious" history of "resorting to litigation to harass anyone who has encountered him in litigation or anyone who is affiliated with the litigants," and he

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merit in their arguments, and their failed attempts at circumventing this Court's clear precedent.

had previously been sanctioned by the Second Circuit. *Id.* at *2. The individual had turned the courts into his vehicle for harassment, including against the actual parties to that case and the attorneys representing those parties. Thus, although the new injunction against further lawsuits covered additional persons (who were nonetheless agents of the parties to the original injunction) and new forums not listed in the original injunction, the Second Circuit's concern for "preserving the status quo" pending appeal was motivated by its interest in "[p]rotecting the parties from Vasile's vexatious conduct," pending appeal. *Id.* In contrast, the Expanded Injunction has no effect on the status quo between the named Plaintiffs and Davis, the only parties to the original Injunction.

Additionally, contrary to Plaintiffs' suggestion, the Expanded Injunction was not necessary to "preserve the integrity of the proceedings" in this Court. Pls.' Br. 56. To the contrary, the district court acknowledged it was granting new relief not previously requested by Plaintiffs and doing what it deemed to "make practical sense"—a makeshift standard that directly contravenes well-established precedent. Jurisdiction is not a results-oriented analysis, as Plaintiffs' misplaced arguments and the district court's conclusion suggest. Nor is it determined by pragmatism. To the contrary, like service of process, jurisdiction is foundational to the rule of law and preliminary to a federal court's authority to render lawful decisions. Without it, a federal court order is "null and void." *U.S. v. Holloway*, 740 F.2d 1373, 1382 (6th

Cir. 1984). Therefore, the critical, and only, inquiry that matters here is what the district court granted in its original Injunction before that order was appealed to this Court, and before that appeal deprived the district court of jurisdiction to expand or enlarge that injunction. And "what" the district court ordered in this case in its August 12, 2015 injunction is undisputed: an injunction limited exclusively to the **named Plaintiffs** in this case. R.78, Contempt Hr'g Tr. (9/3/2015), PgID.1578:20-25; *see also* R.103, Sept. 11, 2015 Order, PgID.2177. Accordingly, the Expanded Injunction, which included new parties not presently before the court and placed additional and significant burdens on Davis while the original Injunction was on appeal, was improperly entered by the district court.[17]

B. The District Court Violated Davis' Due Process Rights.

Plaintiffs provide no authority supporting the district court's granting of new injunctive relief without more than same-day notice and without taking any evidence, particularly when that new relief expands an injunction indisputably

[17] Plaintiffs also seek refuge under Fed. R. Civ. P. 62.1, but this rule is inapplicable here. Pls.' Br. 45-46. Besides being inapposite, Rule 62.1 is of no help to Plaintiffs because they failed to follow the required procedure. The rule, which necessarily includes a concession that the district court "lacks authority" to grant relief "because of an appeal that has been docketed and is pending," plainly requires Plaintiffs to first seek relief in the district court; after which the district court may issue an indicative ruling; after which Plaintiffs may notify this Court of said indicative ruling; after which this Court may remand the case for the district court's indicative ruling to be implemented. Fed. R. Civ. P. 62.1(a); *see also* Fed. R. App. P. 12.1(a) (same). Nothing in the rule authorizes Plaintiffs to skip the required steps and come directly to this Court for relief.

limited to certain parties to include a new and uncertified putative class not covered by the original Injunction, while that Injunction is on appeal. Decades ago, the Supreme Court concluded that "same day" notice "does not suffice" for the granting of injunctive relief. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 432 n. 7 (1974); *see also* Fed. R. Civ. P. 65(a) (preliminary injunctions require "notice to the adverse party"). This fundamental principle protecting due process was abrogated in this case at the most basic level. As such, what actually challenges the "integrity of the proceedings" in this case is the Expanded Injunction, which the district court had no authority to enter, and which should be vacated by this Court.

Plaintiffs' reliance upon Federal Rule of Civil Procedure 6(c) is misleading. This rule, which generally provides that "[a] written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing," Fed. R. Civ. P. 6(c), actually supports Davis, not Plaintiffs. Although the rule identifies certain exceptions, none of them apply here. Plaintiffs correctly identify that a court may "set a different time" before it rules on a motion, but, in the portion of the rule glaringly omitted by Plaintiffs, this change can only be done "when a court order—which a party may, for good cause, apply for ex parte—sets a different time." Fed. R. Civ. P. 6(c)(1)(C). Here, the Local Rules in the Eastern District of Kentucky do not alter or modify any of the aforementioned requirements and Plaintiffs did not

ask for any expedited consideration of their motion to expand the injunction, R.68, Pls.' Mot. "Clarify" Prelim. Inj., PgID.1488-1495, and the district court provided absolutely no notice that it was going to consider that motion at the September 3, 2015 hearing until the court *sua sponte* took up the motion immediately after beginning the hearing. R.78, Contempt Hr'g (9/3/2015), PgID.1570-1573.

This lack of notice is further demonstrated by the district court's specifically entering an order setting an earlier hearing on the Plaintiffs' motion for contempt (which was filed the same day), and holding a telephonic conference with the parties' counsel regarding that motion. At that conference, the district court never addressed the Plaintiffs' thinly-veiled new injunction motion (which was filed the same day as the contempt motion), Plaintiffs did not ask for it to be heard at the contempt hearing, and the district court's order exclusively setting an expedited hearing on their contempt motion was silent on the matter. R.69, Order (9/1/2015), PgID.1496; R.71, Hr'g Tr. (9/1/2015), PgID.1534-1539. As such, Davis had no notice to present evidence or a defense to the entry of a new and expanded injunction.

IV. The District Court Abused Its Discretion In Holding Davis In Contempt.

A. Davis' Appeal Of The Contempt Order Is Not Mooted By Her Release From Incarceration.

Contrary to Plaintiffs' suggestion, Davis' release from incarceration (hours after she filed an emergency motion in this Court) does not moot her appeal of the Contempt Order. As a general matter, "'a case is moot when the issues presented are

no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Int'l Union v. Dana Corp.*, 697 F.2d 718, 720-21 (6th Cir. 1983) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969). This appeal is not moot because Davis is no longer incarcerated, for she still maintains a right to reversal of a contempt decree that "never should have passed." *Garrison v. Cassens*, 334 F.3d 528, 543 (6th Cir. 2003) (quoting *Blaylock Cheker Oil Co.*, 547 F.2d 962, 966 (6th Cir. 1976)).[18]

The mootness doctrine is subject to multiple exceptions applicable here. Specifically, the Contempt Order presents a dispute "capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975); *see also Rosales-Garcia v. J.T. Holland*, 322 F.3d 386, 396 (6th Cir. 2008). This exception applies where: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein*, 423 U.S. at 149.

In the case at bar, the first prong of this test is satisfied due to the "short duration" of the Contempt Order and the sanction imposed by it (*i.e.*, incarceration), it was "virtually impossible to litigate" its validity "prior to its expiration." *Id.*

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[18] *Garrison* and *Blaylock* address reversal of *civil* contempt orders. A criminal contempt, on the other hand, "may indeed survive the reversal of the [underlying] decree disobeyed," *Blaylock*, 547 F.2d at 966, but not in this case. For if the Contempt Order against Davis is designated as *criminal* contempt, she was not afforded appropriate due process to even enter such contempt.

Indeed, this prong has been satisfied with imprisonments lasting up to two years. *Turner v. Rogers*, 131 S.Ct. 2507, 2515 (2011). It is therefore certainly satisfied here, where the actual incarceration was six days, but the appeal is likely to take six to nine months to be resolved. Indeed, to permit the district court's actions to go unchecked will create troubling precedent, whereby a district court judge can incarcerate an individual over a holiday weekend and then *sua sponte* lift that sanction before this Court has time to review the order. This is a particularly troubling concern in the area of contempt, which is uniquely "liable to abuse." *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

There is also a reasonable expectation that Davis may be subjected to the same action again. At the same time they allege mootness in this Court based upon Davis' release from incarceration, Plaintiffs simultaneously contend in the district court that Davis should be sanctioned, again, for her purported "ongoing defiance" and "repeated failure to comply with this Court's Orders." Among other things, Plaintiffs are specifically asking the district court to enter additional "civil sanctions" against Davis, including, *inter alia*, placing her office "into a receivership" and imposing "civil monetary fines." R.120, Mot. to Enforce, PgID.2312-28; *see also* R.149, Pls.' Reply Mot. to Enforce, PgID.2564-2579; R.158, Pls.' Resp. to Notice of Supp. Auth., PgID.2627-2628. As support for this groundless motion, Plaintiffs repeatedly invoke the district court's prior Contempt Order and contempt proceedings as

alleged support for additional sanctions against Davis and her purported "ongoing defiance" and "repeated failure to comply with this Court's Orders." R.120, Mot. to Enforce, PgID.2314-16, 2319-21. Their request is meritless, to be sure, but Plaintiffs' own "ongoing" reliance upon the prior Contempt Order demonstrates the disingenuous nature of their contemporaneous claim in this Court that the Contempt Order is moot. Plaintiffs cannot use Davis' release as a shield from review in this Court, while also using the Contempt Order as a sword in the district court.

As an additional exception to the mootness doctrine, Davis also possesses a risk of continuing "collateral" consequences. *Spencer v. Kemna*, 523 U.S. 1, 8 (1998); *see also Abela v. Martin*, 380 F.3d 915, 921 (6th Cir. 2004). As noted above, the finding of prior contempt is being used as grounds for purported subsequent contempt and/or additional sanctions, including the takeover of her office and the imposition of civil fines or further incarceration. Not only that, the Contempt Order may be used by other actors in other proceedings against Davis. Thus, review of the district court's Contempt Order remains a live dispute for this Court.

B. The District Court Eviscerated Davis' Due Process Rights.

Plaintiffs concede that Davis was entitled to due process protections in the contempt proceedings. Pls.' Br. 60. However, Plaintiffs wrongly presume that the Contempt Order was civil, not criminal in nature. In doing so, Plaintiffs blatantly overlook the Court's repeated references to 18 U.S.C. § 401 as its contempt authority

and the district court's *sua sponte* appointment of Criminal Justice Act attorneys pursuant to 18 U.S.C. § 3006A for the individual deputy clerks. R.106-111, CJA Appointment Forms, PgID.2189-2194.

Moreover, the district court charted a course intent merely on vindicating its own authority, which evidences a criminal contempt sanction. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). This conclusion can be readily drawn from the record because the district court deprived Davis of her personal liberty while simultaneously not knowing, and refusing to decide, whether the marriage licenses the court was ordering to be issued (over Davis' objection and without her authorization) would even be valid under Kentucky law. R.78, Contempt Hr'g (9/3/2015), PgID.1724 (licenses "may not be valid under Kentucky law"), 1728 ("I'm not saying it is [lawful] or it isn't [lawful]. I haven't looked into the point. I'm trying to get compliance with my order."), 1731-32. Despite relinquishing any responsibility for the validity of marriage licenses, the district court nonetheless proceeded to place Davis in immediate federal custody—a most severe sanction and deprivation of her personal liberty. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Addington v. Texas*, 441 U.S. 418, 425 (1979).

Whether the contempt is characterized as criminal or civil, Davis was not afforded proper procedural safeguards and due process. The Contempt Order here is a far cry from the confinement order affirmed by this Court in *U.S. v. Conces*, 507

F.3d 1028, 1036 (6th Cir. 2007), relied upon by Plaintiffs. In *Conces*, the district court ordered incarceration of a criminal defendant only after multiple contempt hearings over several months, after issuing multiple warnings of incarceration for continued disobedience, and after providing the defendant one-week advance notice of his confinement if he continued to refuse to participate in post-judgment discovery. *Id.* at 1036. In contrast, immediate incarceration was ordered in the case at bar even though Davis had (and still has) a pending motion to dismiss Plaintiffs' Complaint in its entirety; the original Injunction was entered in large part based upon evidence at a hearing that occurred before Davis was even served with the Plaintiffs' Complaint; Davis had a pending request for religious accommodation from the Kentucky Governor; Davis has multiple appeals pending before this Court on the merits of the underlying claims and defenses; and numerous less restrictive and less intrusive measures were available. The district court refused to consider these pending substantive challenges, instead summoning its most powerful sanction to order a state official into federal custody not even knowing whether the consequences of its decision would yield legally-valid Kentucky marriage licenses. This is not the "delicate" care needed in the exercise of contempt power to avoid "oppressive conclusions." *Cooke v. U.S.*, 267 U.S. 517, 539 (1925).

C. The District Court Discarded Davis' Federal RFRA Rights.

Plaintiffs provide no authority excluding judges in contempt proceedings from Federal RFRA obligations. Instead, the only federal appellate authority on point is the Eighth Circuit's ruling in *U.S. v. Ali*, 682 F.3d 705, 709-11 (8th Cir. 2012), in which that circuit court vacated a contempt sanction by a federal judge for failure to evaluate whether the court's contempt order violated Federal RFRA and remanded the case to the district court to consider the applicability of the Federal RFRA to its contempt determination. Here, despite Davis' defense and reliance upon Federal RFRA to any finding of contempt, the district court – like the district court in *Ali* – never considered the Federal RFRA as applied to its finding of contempt, and it never entered any subsequent order addressing Davis' federal RFRA defense to contempt. Plaintiffs' attempt to distinguish *Ali* as "entirely different" on the mere grounds that it is a "criminal" contempt proceeding is baseless. *Ali* involved an alleged contempt based upon compliance with a pretrial order in the courtroom. Thus, the applicability of Federal RFRA does not turn on whether a certain "government" action is in the nature of a "civil" or "criminal" proceeding but instead on the nature of whether the purported government action is, in fact, state action.

Striving to escape the Eighth Circuit's conclusion that the Federal RFRA applies to contempt proceedings, Plaintiffs overlook the basic principle that judicial enforcement constitutes state action. *See Shelley v. Kraemer*, 334 U.S. 1, 16-18

(1943) (holding that judicial action to enforce restrictive covenant that limited a building's use or occupancy on grounds of race would be state action that violates the Constitution). Judicial enforcement in the form of a contempt order is state action subject to the Federal RFRA, which includes a very broad definition of state action. The Federal RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 20000bb-1(a)-(b). The statute further provides that a "person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* The term "government" in the Federal RFRA "includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb-2(1). This broad definition encompasses any "branch" or "department" of government, and does not include any exception for the judicial branch, courts, or judges in contempt proceedings. Plaintiffs provide no authority for a judicial

exemption from the Federal RFRA, or why judicial state action is not also constrained by Federal RFRA.

It is also no argument to say that the Federal RFRA does not apply because, if so, then "every injunction" would "potentially be subject to strict scrutiny under RFRA before the ruling could be enforced by the issuing court." Pls.' Br. 62. For one, the district court's involvement in this action was not just in its entry of an injunction but also in its finding of contempt—a mechanism by which the court exercises a bundle of sanctions against an alleged contemnor, which is different than simply granting or denying a motion for summary judgment. Moreover, Federal RFRA only applies when a person is able to demonstrate a sincerely-held religious belief that will be substantially burdened and, even then, it does not prevent substantial burdens that satisfy the least restrictive means test. Of course, Plaintiffs hope the Court will not notice the critical fact that distinguishes the instant Contempt Order from nearly every order Plaintiffs claim will be weighed down by RFRA if this Court agrees with the Eighth Circuit—the possession by the alleged contemnor of a relevant sincerely-held religious belief. Plaintiffs have never disputed such possession by Davis.

Finally, the fact that this case involves a Contempt Order also distinguishes this Court's decision in *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010), which did not address whether judicial enforcement in

the form of an injunction or a contempt order triggers application of the Federal RFRA. *See id.* at 407 (reviewing appeals of orders denying dismissal, granting partial summary judgment, and entering default judgment in suit between private parties).[19] However, judicial enforcement in the form of a contempt order is uniquely, and precisely, the government action that triggers the application of Federal RFRA in this case. Because the Contempt Order constitutes state action, Federal RFRA applies and this Court must vacate the Contempt Order because the district court failed to evaluate Davis' defense thereunder.

D. The District Court Flouted Principles of Federalism And Comity.

The Contempt Order flouts principles of federalism, and ignores the bedrock principle that sanctions imposed by federal courts against public officials should be the "least intrusive" remedy available. *Kendrick v. Bland*, 740 F.2d 432, 438 (6th Cir. 1984); *Spallone v. U.S.*, 493 U.S. 265, 276 (1990). Certainly, federal courts should provide due process and notice to state officials akin to that provided by the district court in the *Conces* case, *supra*, before imprisoning them.

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[19] In a subsequent opinion following this Court's decision, the Western District of Tennessee held that the Federal RFRA did not prevent the court from holding a party "in contempt and sanctioning him in order to protect the trademark rights of a private party." *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, No. 06-1207, 2012 WL 1155465, at *6 (W.D. Tenn. Apr. 5, 2012). There is no indication that this separate and distinct conclusion was ever appealed, and that decision does not bind this Court.

The district court escalated the contempt sanction to a most severe invasion of a public official's personal liberty—ordering her to be incarcerated—despite the fact that Davis had a pending request for a religious accommodation from the Kentucky Governor (which had not received a formal response, but has now, in fact, been granted), Kentucky's Senate President informed the district court that "the provisions governing the issuance of marriage licenses in Kentucky have been, for the most part, judicially repealed by *Obergefell* and [Davis] cannot be reasonably expected to determine her duties until such time as either the Governor by Executive Order or the General Assembly by legislation provides guidance and clarification," and the district court had made no prior finding of contempt nor entered any prior contempt sanction against Davis in her official capacity. Clearly, there were numerous less restrictive and less intrusive measures that were available, such as holding any contempt sanction in abeyance until the Kentucky Legislature convened to address post-*Obergefell* marriage licensing in Kentucky. But in a rush to judgment, and bound and determined to vindicate its own authority, a district court judge incarcerated a publicly-elected state official as a prisoner of her conscience.

CONCLUSION

For all the foregoing reasons, and those set forth in her opening brief on the merits, Appellant Kim Davis respectfully requests that this Court reverse (1) the district court's August 12, 2015 preliminary injunction against Davis, (2) the district

court's August 25, 2015 order practically denying a preliminary injunction against the State Defendants, (3) the district court's September 3, 2015 expanded injunction against Davis, and (4) the district court's September 3, 2015 contempt order against Davis.

DATED: January 18, 2016

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as modified by the Court's order dated October 1, 2015 (Doc 54-1), because it contains 10,498 words, as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(ii)-(iii) and this Court's Rule 32(b)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2016, 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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