Nos. 15-5880 & 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.

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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MOTION BY APPELLANT KIM DAVIS TO DISMISS CONSOLIDATED APPEALS FOR LACK OF JURISDICTION AND TO VACATE ORDERS ON APPEAL

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Pursuant to Fed. R. App. P. 27 and this Court's Rule 27, Appellant Kim Davis ("Davis") respectfully moves the Court to dismiss her pending appeals for lack of jurisdiction on mootness grounds, and vacate the orders on appeal.

INTRODUCTION

On July 14, 2016—only two weeks before this case is now scheduled for oral argument—Kentucky Senate Bill 216 ("SB 216") will take effect, modifying Kentucky law regarding the issuance and authorization of marriage licenses and, as a result, moot Davis' consolidated appeals.[1] SB 216 amends key provisions of the Kentucky marriage licensing scheme at issue here. Specifically, SB 216 expressly modifies the Kentucky marriage licensing scheme to remove entirely a County Clerk's name, personal identifiers, and authorization from any license, thereby providing through a change in the law the very religious accommodation Davis sought from the beginning of this litigation. The enactment and implementation of

[1] SB 216 was signed into law on April 13, 2016 and amends KY. REV. STAT. §§ 402.100, 110. *See* 2016 Kentucky Laws Ch. 132 (SB 216), General Assembly Reg. Sess. (Ky. 2016) (copy attached to this Motion as Exhibit "1"). SB 216 does not specify an effective date for its implementation, thus triggering the general rule under the Kentucky Constitution for when a bill becomes a law. *See* KY. CONST. § 55 (ninety days after adjournment of the legislative session in which it was passed). The Kentucky Legislature's 2016 general session concluded on April 15, 2016. The period of ninety days after that adjournment will expire on July 14, 2016, at which point SB 216 will take effect as Kentucky's new marriage licensing law. With this effective date on the horizon, counsel for appellant timely brings these facts and law raising mootness to the Court's attention, expedited by the Court's recent notice scheduling oral argument in this matter for July 28, 2016. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997).

SB 216—which was passed unanimously by the Kentucky Legislature and signed by Governor Bevin—is an exercise of appropriate and responsible lawmaking. It also renders Davis' appeals from the district court's orders moot and therefore deprives this Court of appellate jurisdiction over her appeals.

Because Davis' appeals are rendered moot by this recent legislative enactment before the merits of her appeals have been decided, this Court, in dismissing the appeals, should also follow its normal course of vacating the district court's orders on appeal. The mootness of Davis' appeals is the result of a change in the law at issue, motivated by actions and circumstances beyond Davis' control. Without vacatur, Davis, through no fault of her own or voluntary action, will be prevented from obtaining a review of the adverse rulings against her, even as the law now undeniably recognizes the simple accommodation she sought. The public interest will be served by granting vacatur because the underlying marriage law at issue and in dispute on appeal is now significantly altered so as to remove the controversy, and no one is arguing for or threatening a return to the former law. Moreover, vacatur reinforces the doctrine of constitutional avoidance and protects the appellate process in which Davis never once slept on her rights. Instead, she unequivocally preserved those rights until she could receive a merits-determination on the district court's orders, even to the point of suffering contempt charges and being incarcerated. Accordingly, this Court should vacate the district court's orders on appeal.

ARGUMENT

I. Kentucky Senate Bill 216 Deprives This Court Of Jurisdiction And Moots Davis' Appeals.

"The Constitution's case or controversy requirement confines the jurisdiction of the courts to 'real and substantial controvers[ies] admitting of specific relief through a decree of conclusive character . . .' *Demis v. Sniezek*, 558 F.3d 508, 512 (6th Cir. 2009) (citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). "Accordingly, this Court lacks jurisdiction to consider any case or issue that has 'lost its character as a present, live controversy' and thereby becomes moot." *Demis*, 558 F.3d at 512 (citing *Hall v. Beals*, 396 U.S. 45, 48 (1969)). "**No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights**.'" *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 727 (2013) (citing *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)) (emphasis added). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Demis*, 558 F.3d at 512 (quotations and citation omitted). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990). "If 'events occur during the pendency of a litigation which render the court unable

to grant the requested relief,' the case becomes moot and thus falls outside our jurisdiction." *Demis*, 558 F.3d at 512 (citation omitted).

"A case is moot when there is no prospect that its decision will have an impact on the parties," and "**[t]his rule applies where the enactment of legislation ends the controversy between two parties**." *Ryo Mach., LLC v. U.S. Dep't of Treasury*, 696 F.3d 467, 470 (6th Cir. 2012) (citations omitted) (emphasis added). The enactment of a new statute, or the revision of an existing one as in the case here, are events occurring while a case is pending on appeal that can make it "impossible for the court to grant 'any effectual relief whatever' to a prevailing party," warranting dismissal of the appeal on mootness grounds. *Mich. Bldg. & Constr. Trades Council v. Snyder*, 729 F.3d 572, 576-77, 582 (6th Cir. 2013) (finding Michigan Governor's appeal of injunction "is now moot" following "enactment of the current version" of act at issue on appeal) (quoting *Church of Scientology of Cal. v. U.S.*, 506 U.S. 9, 12 (1992)); *see also Williams v. Leslie*, 28 Fed. Appx. 387, 390 (6th Cir. 2002) (noting "changes in law" while appeal is pending can moot claims); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997) ("Legislative repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates this requisite case-or-controversy because a statute must be analyzed by the appellate court in its present form."); *Mosley v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990) (new federal statute "rendered the issues covered by the district court's declaratory

judgment and injunction moot"). Because this Court must "apply the law as it is now," *Kremens v. Bartley*, 431 U.S. 119, 129 (1977) (citations omitted), it "can no longer declare unconstitutional nor enjoin the enforcement" of a governmental action or act "that is no longer in effect." *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (6th Cir. 2004).

Plaintiffs' claims against Davis hinge entirely on Kentucky marriage law governing County Clerks. Indeed, their injunctive claims depend upon their assertion that an individual County Clerk must issue a marriage license bearing his or her name, personal identifiers, and authorization to any eligible couple. *See* R.1, Compl., PgID.7; *see also* R.2-1, Memo. Supp. Pls.' Mot. Prelim. Inj., PgID.41; Dkt. No. 68, Pls.' Br. at 33-35, 41.[2] Lacking this legal contention, Plaintiffs are without any basis to demand a particular County Clerk's name and authorization on their marriage license. Moreover, the district court's injunction orders (and by implication any contempt order based thereon) are fundamentally and wholly dependent on its acceptance of the legal conclusion that a County Clerk's name and authorization are required on marriage licenses. *See, e.g.*, R.43, Inj., PgID.1149-1150, 1159, 1172-

[2] Notably, for same-sex couples to make this claim, Plaintiffs necessarily also relied upon the directive of former Gov. Beshear (the "SSM Mandate") ordering all Kentucky County Clerks to authorize all marriage licenses, regardless of their sincerely-held beliefs and Kentucky's obligation to provide religious accommodation. *See* R.1, Compl., PgID.7-8; R.1-3, Beshear Letter, PgID.26; R.2-1, Memo. Supp. Pls.' Mot. Prelim. Inj., PgID.42. This SSM Mandate opened the door for Plaintiffs' claims against Davis.

1173 (enjoining Davis to issue marriage licenses based upon alleged "long entrusted" and "statutorily-assigned" duties of County Clerks under Kentucky law to authorize and issue marriage licenses). Thus, Kentucky's marriage licensing scheme is central to Davis' appeals. As a result, a substantial legislative amendment to that licensing scheme—enacted while Davis' consolidated appeals were pending and taking effect on approximately July 14, 2016—moots the orders on appeal.

Critically, SB 216 plainly removes any suggestion in Kentucky law that an individual County Clerk must authorize any and all marriage licenses to eligible couples. *See* Ex. 1, SB 216 (amending KY. REV. STAT. § 402.100 to remove: (i) the authorization statement "of the county clerk issuing the license"; (ii) the "signature of the county clerk . . . issuing the license"; (iii) the "signed statement by the county clerk . . . of the county in which the marriage license was issued"; and (iv) the marriage certificate requirement identifying the "name of the county clerk under whose authority the license was issued."); *see also* Dkt. No. 93, Pls.' Rule 28(j) Letter (acknowledging same amendments). SB 216 thus removes the County Clerk's name, personal identifiers, and authorization from the marriage license.

In defending against Plaintiffs' claims, Davis consistently argued that her religious freedoms were substantially burdened by the SSM Mandate and that Kentucky law had to be construed and interpreted to provide for her own religious accommodation rights. But the recent legislative amendment to Kentucky marriage

law extricates County Clerks in their entirety from authorizing the marriage license and having their name and other personal identifiers affixed to the license. As such, no religious accommodation is necessary for Davis because the prior statute requiring the County Clerk's name and authorization no longer exists once SB 216 takes effect. *See Williams*, 28 Fed. Appx. at 390 (concluding "new version" of title transfer statute affecting court clerks' obligations, enacted while appeal was pending—"perhaps in response to the district court's holding"—mooted appeal); *see also Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981-82 (6th Cir. 2012) (government had "imposed an entirely new statutory scheme" and there were "no allegations that the new scheme poses any constitutional issues"; concluding injunctive claims moot); *Banas v. Dempsey*, 742 F.2d 277, 281 (6th Cir. 1984) (holding "change in federal law" during action rendered moot plaintiffs' request for injunctive relief against government official "from enforcing state practices that allegedly were in violation of plaintiffs' rights under the Fourteenth Amendment and in violation of the Supremacy Clause of the Constitution"). Thus, reversing or removing the district court's injunction orders would have no legal effect on the parties' rights because a new Kentucky marriage law is in effect that dispenses with the controversy.

This legislative response was envisioned, and even invited, in an amicus filing submitted by a leading Kentucky legislator and statements made by the district court

in the court below. At the September 3, 2015 contempt hearing below, the district court expressed hope for a legislative or executive accommodation of the kind granted by Governor Bevin in the Marriage Licensing Executive Order and now recognized by the Kentucky Legislature through the enactment of SB 216: "I recognize, and I mentioned this when we first came out earlier this morning, that **the legislative and executive branches do have the ability to make changes. And those changes may be beneficial to everyone. Hopefully, changes are made**." *See* R.78, Contempt Hr'g Tr. (9/3/15), PgID.1658:5-9 (emphasis added). "**If legislative or executive remedies . . . come to fruition, as I stated, better for everyone**." *Id.* at PgID.1659:3-5 (emphasis added).[3] That remedy has, in fact, come to fruition in the form of SB 216. As a result, Davis' appeals of the district court's orders are moot and this Court must dismiss the appeals for lack of jurisdiction.[4]

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[3] In an amicus filing opposing the entry of a contempt order against Davis, Kentucky's Senate President argued 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." R.73, Stivers Amicus, PgID.1548; *see also id.* ("[T]he 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.").

[4] In prior briefing, Plaintiffs argued that the contempt order was moot, *see* Dkt. No. 68, Pls.' Br. at 47-49, which Davis previously opposed. *See* Dkt. No. 79, Davis Reply Br. at 44-47. Because the underlying injunction order upon which the

II. Because Kentucky Senate Bill 216 Moots Davis' Appeals, This Court Should Vacate The District Court's Orders On Appeal.

When a civil matter becomes moot pending appeal, the "established practice" in the federal court system is to vacate the challenged judgment below. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (citing *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)).[5] In the same vein, "**where a case involving an injunction becomes moot on appeal, the case should be remanded to the district court with instructions to vacate the injunction**." *U.S. v. City of Detroit*, 401 F.3d 448, 451 (6th Cir. 2005) (citing *McPherson v. Michigan High Sch. Ath. Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)) (emphasis added).[6]

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contempt order depended is now moot, so too the 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)), and which will now avoid appellate review due to the mootness of the underlying injunction order.

[5] The statutory power for the act of vacatur is conferred by 28 U.S.C. § 2106, which provides that any appellate court "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994).

[6] This Court has regularly vacated district court orders, judgments, and injunctions, including preliminary injunctions, when a matter is rendered moot pending appeal. *See, e.g., Snyder*, 729 F.3d at 576-77, 582 (ordering vacatur of injunction after enactment of new law mooted appeal challenging injunction); *Ryo Mach.*, 696 F.3d at 470 (finding mootness due to change in law and vacating preliminary injunction "in its entirety"); *Libertarian Party of Ohio v. Husted*, 497 Fed. Appx. 581, 582 (6th Cir. 2012); *McIntyre v. Levy*, No. 06-5989, 2007 WL 7007938, at *2 (6th Cir. Aug. 1, 2007) (vacating grant of preliminary injunction);

Courts usually vacate lower court judgments, orders and injunctions in these situations "because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Alvarez*, 558 U.S. at 94 (citing *Munsingwear*, 340 U.S. at 40). Vacatur is appropriate "when mootness occurs through happenstance—circumstances not attributable to the parties—or . . . the 'unilateral action of the party who prevailed in the lower court.'" *Arizonans*, 520 U.S. at 71-72 (quoting *Bancorp*, 513 U.S. at 26). This is necessary because appellate courts must review lower court decisions "in light of [the] law as it now stands, not

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Stewart v. Blackwell, 473 F.3d 692, 694 (6th Cir. 2007); *Howard v. Whitbeck*, 212 Fed. Appx. 421, 426 (6th Cir. 2007); *City of Detroit*, 401 F.3d at 452 (vacating district court's judgment and remanding to district court to vacate its injunction); *Intimate Ideas, Inc. v. City of Grand Rapids*, 90 Fed. Appx. 134, 135 (6th Cir. 2004) (vacating order entering preliminary injunction); *Williams*, 28 Fed. Appx. at 390 (vacating judgment granting injunctive relief after legislative amendment rendered appeal moot); *Young v. Peoples First Acquisition Corp.*, 188 F.3d 510, at *1 (6th Cir. 1999) (vacating injunction order on appeal); *Smith v. SEC*, 129 F.3d 356, 362-64 (6th Cir. 1997) (vacating two preliminary injunctions); *Sherrer v. Lowe*, 125 F.3d 856, at*2 (6th Cir. 1997) (vacating order granting preliminary injunction); *Memphis Planned Parenthood, Inc. v. Sundquist*, 121 F.3d 708, at *2 (6th Cir. 1997) (vacating preliminary injunction); *McPherson*, 119 F.3d at 464 (vacating preliminary injunction); *Ford v. Clevenger*, 78 F.3d 584, at *1 (6th Cir. 1996); *Lepore v. Husic*, 27 F.3d 566, 1994 WL 262069, at *3 (6th Cir. June 14, 1994) (vacating injunction order); *U.S. v. Taylor*, 8 F.3d 1074, 1077 (6th Cir. 1993); *Mosley*, 920 F.2d at 414, 417 (ordering vacation of injunction where "intervening events" including passage of new law rendered injunction moot); *WJW-TV, Inc. v. City of Cleveland*, 878 F.2d 906, 912 (6th Cir. 1989); *City of Romulus v. County of Wayne*, 634 F.2d 347, 349 (6th Cir. 1980) (vacating orders granting and dissolving injunction).

as it stood when the judgment below was entered." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972).

The equitable remedy of vacatur "ensures that 'those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review.'" *Camreta v. Greene*, 131 S.Ct. 2020, 2035 (2011). "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Bancorp*, 513 U.S. at 25. Thus, "[w]hen happenstance prevents that review from occurring, the normal rule should apply: Vacatur then rightly 'strips the decision below of its binding effect,' and 'clears the path for future relitigation.'" *Camreta*, 131 S.Ct. at 2035 (internal citations omitted); *see also Stewart*, 473 F.3d at 693 ("[V]acatur is generally appropriate to avoid entrenching a decision rendered unreviewable through no fault of the losing party.").

In considering requests for vacatur, the "principal condition" for awarding this relief is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Bancorp*, 513 U.S. at 24; *see also Ford v. Wilder*, 469 F.3d 500, 505 (6th Cir. 2006) (holding that "[t]he question of fault is central to our determination regarding vacatur"). Critically, the mootness of Davis' pending appeals is not the result of actions and events within her own control, but rather the exclusive control of others—namely, the Kentucky Legislature, which passed SB

216, and Governor Bevin who signed it into law.[7] In this way, the ensuing mootness is not Davis' "fault," but the result of "happenstance," as that term is understood in *Munsingwear* and its progeny. This appeal has been rendered moot by the intervening and independent actions of the legislature, not the voluntary action of Davis who filed the appeals. As a result, it would be inequitable not to vacate the underlying district court orders because Davis is prevented from arguing the merits issues raised by her appeals. The fact that Davis' religious rights are, in fact, protected and preserved through SB 216 does not mollify the inescapable frustration of her appellate rights here. Being a direct beneficiary of a new law that moots a pending appeal does not mean a person surrenders the right to review or acquiesces to a challenged decision.

Circuit courts agree that lower court orders appealed by government officials should be vacated following mootness through legislative amendment:

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[7] On April 19, 2016, this Court dismissed Governor Bevin from Davis' appeals on mootness grounds based upon Governor Bevin's executive action to protect Davis' religious freedom in the Marriage Licensing Executive Order Relating to the Commonwealth's Marriage License Form. *See* Dkt. No. 85-1, Apr. 19, 2016 Order, at 2 (explaining that executive order "eliminate[d] the need for the name and signature of the county clerk" on Kentucky marriage licenses); *see also* R.156-1, Marriage Licensing Executive Order, PgID.2601-2603. This executive order reversed former Gov. Beshear's SSM Mandate but did not change, nor could it, the underlying statutory scheme regarding the issuance of marriage licenses. SB 216 completely alters the legislative scheme at the heart of this litigation.

> Clearly, the passage of new legislation represents voluntary action, and thus on its face the *Bancorp* presumption might seem to govern. We believe, however, that application of the *Bancorp* presumption in this context is not required by the *Bancorp* opinion's rationale and would be inappropriate, at least if there is no evidence indicating that the legislation was enacted in order to overturn an unfavorable precedent. The rationale underlying the *Bancorp* presumption is that litigants should not be able to manipulate the judicial system by "roll[ing] the dice . . . in the district court" and then "wash[ing] away" any "unfavorable outcome" through use of settlement and vacatur. . . . The mere fact that a legislature has enacted legislation that moots an appeal, without more, provides no grounds for assuming that the legislature was motivate by such a manipulative purpose. The legislature may act out of reasons totally independent of the pending lawsuit, or because the lawsuit has convinced it that the existing law is flawed.

Khodara Envtl., Inc. ex rel Eagle Envtl., L.P. v. Beckman, 237 F.3d 186, 195 (3d Cir. 2001) (Alito, J.) (quoting *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 351-52 (D.C. Cir. 1997) (internal citations and quotations omitted)); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 120 (4th Cir. 2000); *see also*, e.g., *Snyder*, 729 F.3d at 576-77, 582; *Williams*, 28 Fed. Appx. at 390; *Mosley*, 920 F.2d at 414, 417.

It is also of no consequence that Davis actively sought a change in the law to provide an explicit religious accommodation—for herself and other similarly situated present and future County Clerks. Such actions do not qualify as voluntary actions preventing application of vacatur:

> Lobbying Congress or a state legislature cannot be viewed as 'causing' subsequent legislation for purposes of the vacatur inquiry. Attributing the actions of a legislature to third parties rather than to the legislature itself is of dubious legitimacy, and the cases uniformly decline to do so. Even where new legislation moots the executive branch's appeal of an adverse judgment, the new legislation is not attributed to the executive branch.

Chem. Producers & Distributors Ass'n v. Helliker, 463 F.3d 871, 879 (9th Cir. 2006); *see also Khodara*, 237 F.3d at 194-95 (declining to apply *Bancorp* presumption where government agency's appeal was mooted by legislative action); *Valero*, 211 F.3d at 121 ("In this case, mootness was, as noted, caused by the state *legislature's* amendment of statutory provisions that it had earlier enacted, and not by the actions of the defendants before this court, all of whom are state executive officials, none of whom is the Governor. Therefore, defendant state *executive* officials are in a position akin to a party who finds its case mooted by 'happenstance,' rather than events within its control." (citations and internal quotation marks omitted; emphasis in original)); *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1187 (D.C. Cir. 1992) (finding "appellate duty" to vacate was "certain" after government officials lost in district court below and Congress amended statute); *see also U.S. Dep't of the Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986) (vacating lower court judgment that gun statutes were unconstitutional because "Congress came to the conclusion, as a matter of legislative policy, that the firearms statutes should be redrafted").

In this case, the enactment of SB 216 is "attributed to the legislature alone." *See Helliker*, 463 F.3d at 879; *see also Khodara*, 237 F.3d at 195 ("Mindful of the fact that legislative actions are presumptively legitimate, we are wary of impugning the motivations that underline a legislature's actions.") (citations and internal quotation marks omitted); *Nat'l Black Police Ass'n*, 108 F.3d at 352 ("The legislature may act out of reasons totally independent of the pending lawsuit, or because the lawsuit has convinced it that the existing law is flawed."); *Am. Library Ass'n*, 956 F.2d at 1187 ("Congress rendered the case moot by passing legislation designed to repair what may have been a constitutionally defective statute. Congress' action represents responsible lawmaking, not manipulation of the judicial process."). SB 216 is an appropriate legislative response to ensuring the protection of religious accommodation rights in the issuance of Kentucky marriage licenses. Davis should not be penalized in her appeals because the Kentucky Legislature decided to rewrite Kentucky marriage law while the appeals were pending.

Declining to vacate the district court's orders would deprive Davis of the merits review to which she was entitled when she timely filed her appeals. *See Arizonans*, 520 U.S. at 74 (finding vacatur appropriate because, "when the mooting event occurred," the defendant was pursuing his "right to present argument on appeal"). Neither the voluntary actions of Davis, nor the mere passage of time has caused this matter to become moot pending appeal. Instead, the passage of a new

and controlling underlying marriage law governing the issuance of Kentucky marriage licenses has caused mootness.[8] Therefore, because Davis' appeals are mooted by SB 216 through no fault of her own, the principal consideration for this Court—*i.e.*, fault—counsels in favor of vacatur. *See Stewart*, 473 F.3d at 693 (vacatur appropriate "to avoid entrenching a decision rendered unreviewable through no fault of the losing party").

A final consideration for a Court applying the general rule of vacating orders, injunctions, and judgments rendered moot on appeal is the public interest. *See Ford*, 469 F.3d at 506; *see also Bancorp*, 513 U.S. at 26-27 ("As always, when federal courts contemplate equitable relief, our holding must also take account of the public interest."). In this case, because Kentucky marriage law has been so fundamentally altered, no public interest remains in allowing to stand orders based upon, and interpreting, the former law. Any purported precedential value to the public in the district court's orders is eviscerated by the significant change in the underlying Kentucky statutes governing marriage licensing. *See Valero*, 211 F.3d at 121 (concluding that since the law[s] "declared unconstitutional either no longer exist or

[8] Davis' situation is therefore unlike the denials of vacatur in *Bancorp*, 513 U.S. at 25, where the appealing party had "surrender[ed] his claim to the equitable remedy of vacatur" through a settlement that "voluntarily forfeited his legal remedy by the ordinary processes of appeal," or, *Karcher v. May*, 484 U.S. 72, 83 (1987), where the losing party never even filed an appeal. This matter is also unlike cases denying vacatur where an appeal is moot simply due to the passage of time or the expiration of the injunction on its own terms.

have been substantially revised, and there is no suggestion of their likely reenactment," the public interest did not bar vacatur).

Moreover, granting vacatur here also serves the public interest in the "well-established principle that courts should avoid unnecessarily deciding constitutional questions." *Nat'l Black Police*, 108 F.3d at 353 (citing *Ashwander v. TVA*, 297 U.S. 288, 345-47 (1936) (Brandeis, J., concurring)); *see also Kremens*, 431 U.S. at 128, 133-34 & n.15 (discussing policy of avoiding unnecessary and premature constitutional decisions, where new legislation mooted case, and ordering vacation of lower court orders); *Adams v. City of Battle Creek*, 250 F.3d 980, 986 (6th Cir. 2001) ("[C]ourts should avoid unnecessary adjudication of constitutional issues."). This Court would be rendering a decision on key constitutional issues tied to a legal framework that no longer exists. The district court recognized the constitutional conflict at issue, which SB 216 eliminates.[9] This Court is not established to render advisory opinions where no live controversy exists.

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[9] The district court stated that "this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence," thereby conceding that Davis' individual religious rights are being "threaten[ed]" and "infringe[d]" by Plaintiffs' demands for her approval of their proposed unions, and by the SSM Mandate to provide exactly that or resign. R.43, Inj., PgID.1147; *see also Obergefell v. Hodges*, 135 S.Ct. 2584, 2638 (2015) (predicting the "inevitable" conflict instigated by the majority opinion in *Obergefell*, as individuals "are confronted with demands to participate in and endorse civil marriages between same-sex couples") (Thomas, J., dissenting). The enactment of SB 216 removes the apparent conflict by removing County Clerks' names, personal identifiers, and authorization from

Furthermore, because the orders on appeal have become unreviewable by circumstances outside Davis' control, it is important to vacate these orders in light of any remaining litigation between the parties. Although matters related to the injunctions have now become moot, Plaintiffs maintain damages claims against Davis, R.1, Compl., PgID.14, and have not indicated any intent to drop these claims despite the change in the law and Gov. Bevin's reversal of the SSM Mandate. The fact that issues still remain to be litigated in the district court between the parties on a proper record and under a very different legal framework (*e.g.*, qualified immunity) does not mean that a live controversy exists on the orders presently on appeal. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 394 (1981) ("Because the only issue presently before us—the correctness of the decision to grant a preliminary injunction—is moot, the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court for trial on the merits."); *see also Sundquist*, 121 F.3d 708 ("Vacatur of the injunction will not impede the plaintiff's ability to seek" other relief not yet considered by district court). Vacatur will clear the path for future relitigation in the context of an actual controversy.

Finally, the public is also served by granting vacatur because it protects the "demands of 'orderly procedure'" in the appellate process. *Bancorp*, 513 U.S. at 27

Kentucky marriage licenses. As such, the resolution of this conflict as a federal constitutional matter will have to wait for a live controversy.

(quoting *Munsingwear*, 340 U.S. at 41). In *Munsingwear*, the party seeking vacatur had "slept on its rights" and was now asking the Court "to do what by orderly procedure it could have done for itself." 340 U.S. at 41. In *Bancorp*, a party voluntarily agreed to a settlement that engendered mootness of the issues on appeal, and then "step[ped] off the statutory path to employ the secondary remedy of vacatur." 513 U.S. at 27. In contrast to parties seeking vacatur in those cases, Davis never once stepped off the designated statutory path for challenging the district court's orders and preserving her rights. In fact, she unequivocally preserved her appellate rights, even to the point of suffering contempt charges. *See U.S. v. Cleveland Elec. Illuminating Co.*, 689 F.2d 66, 68 (6th Cir. 1982) (noting that appellant "could have refused to comply with the order, thereby risking civil contempt but preserving the issues for appellate review"). Accordingly, for all the foregoing reasons, vacatur also serves the public interest. Therefore, in addition to dismissing the appeals for lack of jurisdiction on mootness grounds, this Court should also vacate the underlying orders on appeal.

RELIEF REQUESTED

Davis respectfully requests that this Court dismiss her pending appeals, and vacate the district court orders remaining on appeal: (1) the August 12, 2015 injunction order (R.43, Inj., PgID.1146-1173); (2) the September 3, 2015 expanded injunction order (R.74, Exp. Inj., PgID.1557); and (3) the September 3, 2015

contempt order (R.75, Contempt Order, PgID.1558-1559). Davis further requests that, due to the circumstances depriving the Court of jurisdiction and leading to dismissal of the appeals, no costs be taxed against her.

DATED: June 21, 2016

Respectfully submitted:

/s/ Jonathan D. Christman

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 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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