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

In the United States Court Of Appeals
for the Sixth Circuit

April Miller, Ph.D., et al.
Plaintiffs-Appellees,

v.

Kim Davis,
Defendant-Appellant and Third-Party Plaintiff,

v.

Steven L. Beshear and Wayne Onkst,
Third-Party Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Kentucky, Hon. David L. Bunning

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Brief of *Amicus Curiae* Americans United for Separation of Church and State in Support of Appellees and Affirmance

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-5880 Case Name: April Miller et al. v. Kim Davis

Name of counsel: Gregory M. Lipper

Pursuant to 6th Cir. R. 26.1, Americans United for Separation of Church and State
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on 12/23/2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Gregory M. Lipper

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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Interest of *Amicus Curiae*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization. Founded in 1947, Americans United has more than 125,000 members and supporters. Our mission is to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic government. Americans United regularly participates as a party, as counsel, or as an *amicus curiae* in church-state cases in this Court and across the country, including *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Americans United has long supported religious exemptions that reasonably accommodate religious practice. *See, e.g.*, Brief of Americans United for Separation of Church and State as *Amicus Curiae* in Support of Petitioner, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 2361896 (supporting religious exemption from prison rules prohibiting facial hair). Consistent with our support for religious freedom, Americans United opposes religious exemptions that harm

third parties; and we uphold the principle that governmental bodies must act according to secular law, not the religious beliefs of particular public officials.[1]

Background

Under Kentucky law, "parties intending to be married must obtain a marriage license from a county clerk." *Pinkhasov v. Petocz*, 331 S.W.3d 285, 294 (Ky. Ct. App. 2011) (citing Ky. Rev. Stat. § 402.080). When issuing marriage licenses, county clerks "shall use the form prescribed by the Department for Libraries and Archives," and the form must include "the signature of the county clerk or deputy clerk issuing the license." Ky. Rev. Stat. §§ 402.100 & (1)(c).[2]

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[1] No party's counsel authored this brief in whole or in part; and no party, party's counsel, or person other than *amicus*, its members, or its counsel contributed money intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

[2] On December 22, 2015, Kentucky's new governor issued an executive order directing the relevant agency to "issue a revised marriage license form to the offices of all Kentucky County Clerks. The name of the County Clerk is no longer required to appear on the form." *Governor Bevin Fulfills Commitment to People of Kentucky*, Kentucky.gov (Dec. 22, 2015), http://tinyurl.com/KYExecOrd. The agency has not yet issued this form, and its legality under Kentucky law is at best questionable. *Cf.* Ky. Rev. Stat. §§ 402.100 & (1)(a) (marriage-license form must include "[a]n authorization statement of the county clerk issuing the license").

On June 26, 2015, the Supreme Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), holding that the U.S. Constitution protects the right of same-sex couples to marry. Mere hours later, Rowan County Clerk Kim Davis responded by announcing that her office would no longer issue marriage licenses to any couples. Mem. Op. & Order, R. 43, Page ID #1146. She then adopted an official policy prohibiting all staff of the Rowan County Clerk's Office from issuing marriage licenses. Mem. Supp. Pls.' Mot. for Prelim. Inj., R. 2-1, Page ID #38; Def./Third-Party Pl.'s Mem. Supp. Mot. for Prelim. Inj., R. 39-1, Page ID #844.

Davis responded this way in order to evade *Obergefell*'s ruling that states could no longer prohibit same-sex couples from getting married; she apparently believed that denying marriage licenses to everyone would allow for continuing discrimination against same-sex couples. Davis has admitted that she suspended the issuance of marriage licenses because of her religious belief that "marriage is the sacred union of a man and a woman, only." Def./Third-Party Pl.'s Mem. Supp. Mot. for Prelim. Inj., R. 39-1, Page ID #848. She has insisted: "I can't put my name on a license that doesn't represent what God ordained

marriage to be." *Kentucky Clerk Kim Davis Denied Marriage Licenses for Her Friends*, ABC News (Sept. 22, 2015), http://tinyurl.com/deniedlicenses.

In executing her policy, Davis has turned away couples from the Rowan County Clerk's Office, stating that she is acting under "God's authority." *Id.* (video at 1:05); David Mack, *Meet Kim Davis, the Woman Denying Same-Sex Couples Marriage Licenses in Kentucky*, BuzzFeed (Sept. 1, 2015), http://tinyurl.com/meetkimdavis. She admits that she puts her religious beliefs ahead of her responsibility to Rowan County residents: "My constituents elected me. But the main authority that rules my life is the Lord." *Kentucky Clerk Kim Davis Denied Marriage Licenses for Her Friends*, *supra*.

After Plaintiffs filed suit, the district court issued a preliminary injunction prohibiting Davis from blocking the issuance of marriage licenses in Rowan County. Mem. Op. & Order, R. 43, Page ID #1173. This Court then rejected Davis's request for a stay of that injunction because, "In light of the binding holding of *Obergefell*, it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in

conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." *Miller v. Davis*, No. 15-5580, Order at 2 (6th Cir. Aug. 26, 2015). Davis's stay request was likewise denied, without dissent, by the Supreme Court. *See Davis v. Miller*, No. 15A250, 2015 WL 5097125, at *1 (U.S. Aug. 31, 2015).

Davis refused to comply with the injunction: she continued to deny marriage licenses to couples requesting them, and prohibited the Clerk's Office staff from issuing them as well. As a result, the district court found her in civil contempt, and she spent five days in jail. *See* Min. Entry Order, R. 75, Page ID #1559.

While Davis was in custody, Rowan County's deputy clerks resumed issuing marriage licenses—consistent with the Supreme Court's decision in *Obergefell*, but against Davis's orders. Status R., R. 84, Page ID #1798. The deputy clerks did, however, alter the licenses: where they normally would have borne Davis's name in her official capacity as the county clerk, the licenses instead listed "Rowan County" twice. The licenses thus read: "Issued this [date] in the office of *Rowan County*, Rowan County." *Id.* at Page ID #1801 (emphasis added).

In its order releasing Davis from custody, the district court expressed its satisfaction that, in Davis's absence, "the Rowan County Clerk's Office [was] fulfilling its obligation to issue marriage licenses to all legally eligible couples." Order, R. 89, Page ID #1827. And because the deputy clerks were already issuing marriage licenses, Davis was not required to personally process marriage licenses for any couples (same-sex or otherwise) or even to be present when the licenses were issued. *Id.* at Page ID #1827–28. The district court imposed only one requirement: that Davis not interfere with the issuance of marriage licenses by the Rowan County Clerk's Office. *Id.* at Page ID #1828.

But Davis flouted even that minimal requirement. She confiscated all existing license forms and then deleted from those forms all mentions of Rowan County or the title of Clerk or Deputy Clerk. Notice of Brian Mason, R. 114, Page ID #2293–94. Davis allowed the inclusion of the name of Deputy Clerk Brian Mason, but without any mention of his position or title; and she required Mason to initial the licenses rather than sign them. *Id.* Davis further altered the licenses to state that they were issued "pursuant to federal court order" by a "notary public," rather than—as required under Kentucky law—by a county

clerk. *See* Pls.' Mot. Enforce Sept. 3 & Sept. 8 Orders, R. 120, Page ID #2316–17. As a result, Mason informed the district court that as a result of the changes ordered by Davis, the licenses "may in fact have some substantial questions about validity." Notice of Brian Mason, R. 114, Page ID #2294. Plaintiffs, in turn, asked the district court to prohibit Davis from unlawfully revising the licenses in this manner. *See* Pls.' Mot. Enforce Sept. 3 & Sept. 8 Orders, R. 120, Page ID #2312–13.

Meanwhile, Davis impleaded two state officials, alleging that Kentucky violated her rights by directing the Rowan County Clerk's Office to comply with the Supreme Court's decision requiring states to issue marriage licenses to same-sex couples. Verified Third-Party Compl. Def. Kim Davis, R. 34, Page ID #746. She raised claims under the U.S. and Kentucky constitutions, as well as Kentucky's Religious Freedom Restoration Act, Ky. Rev. Stat. § 446.350; she asked the court to declare that requiring county clerks to issue marriage licenses on equal terms to same-sex and different-sex couples violated her rights under these provisions, Verified Third-Party Compl. Def. Kim Davis, R. 34, Page ID #759–74; and she sought an injunction barring the

Commonwealth from directing the Rowan County Clerk's Office to issue marriage licenses consistent with *Obergefell*, *see id.* at Page ID #774.

Davis now appeals: (1) the preliminary injunction prohibiting her from suspending Rowan County's issuance of marriage licenses and from interfering with the deputy clerks' performance of their legal duties to issue these licenses, (2) the district court's finding of contempt, and (3) a district-court order staying the proceedings related to Davis's claims against Kentucky officials pending resolution of these appeals, *see* Order, R. 58, Page ID #1289.

Summary of Argument

In *Obergefell v. Hodges*, the Supreme Court held that marriage is a fundamental right and that, as a result, the right of same-sex couples to marry is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 135 S. Ct. at 2604–05. The Court acknowledged that some people have strong religious objections to allowing same-sex couples to marry, but it concluded that those religious objections did not permit the government to prohibit same-sex couples from marrying. *See id.* at 2607. Davis has sought to turn the Supreme Court's ruling on its head: she refuses to permit Rowan

County to issue marriage licenses as required by *Obergefell*, and she insists that her religious objections to marriage equality entitle her to place the Rowan County Clerk's Office above the law.

Davis has no right to mold the conduct of the County Clerk's Office to fit her personal religious beliefs. The Establishment Clause prohibits her from suspending the issuance of marriage licenses because of her personal religious objections. And neither the federal Free Exercise Clause nor Kentucky's free-exercise provisions allow Davis to prevent Rowan County and its officials from issuing marriage licenses as required by law. When acting in her capacity as Rowan County Clerk, Davis may not override the constitutional rights of Rowan County's citizens. The Constitution is the law of the land; Davis's religious beliefs are not.

Argument

I. The Establishment Clause Prohibits Davis from Refusing to Issue or Otherwise Interfering with the Issuance of Marriage Licenses.

At its core, the Establishment Clause of the First Amendment serves to prevent "a fusion of governmental and religious functions." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (quotation marks

omitted). Accordingly, governmental action must have neither the purpose nor the effect of advancing religion. Government entities may not act with the "ostensible and predominant purpose of advancing religion," *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005); and it may not act in a manner that has the effect of advancing or endorsing religion, *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

When Davis prohibited Rowan County and its deputy clerks from issuing marriage licenses, she required a government office to act according to her personal religious beliefs, and she did so in a manner that deprived the county's residents of a fundamental right to which they were entitled. Her conduct, then, had both an improper religious purpose and an improper religious effect.

Indeed, at every stage of these proceedings, Davis has made clear that the purpose and effect of her actions are to force Rowan County—and, by extension, all county residents—to conform to her religious beliefs. On the day that the Supreme Court decided *Obergefell*, the Governor of Kentucky properly informed county clerks that they should begin issuing marriage licenses to same-sex couples in order to comply

with the Court's decision. Tr. Prelim. Inj. Hr'g on July 20, 2015, R. 26, Page ID #260. In response, Davis asked the Governor to "call an extraordinary session of [the] General Assembly" to "address the issues that have been caused in this transition from traditional marriage being redefined to include same-sex couples." *Id.* at Page ID #262. Among other things, Davis wanted protection for county clerks who would "go as far as to halt issuing marriage licenses to anyone rather that compromise their deeply held religious convictions." *Id.*

When the governor did not do as Davis asked, she acted unilaterally. The day after *Obergefell*, she suspended the issuance of all marriage licenses in Rowan County. *Id.* at Page ID #249. She then stood behind the Clerk's Office desk and told would-be applicants that she was withholding marriage licenses "on God's authority." *Kentucky Clerk Kim Davis Denied Marriage Licenses for Her Friends*, *supra* (video at 1:05); Mack, *supra*.

Davis has also admitted her religious motivations publicly and unambiguously, insisting that her religious beliefs trump her responsibilities as a public official: "My constituents elected me. But the main authority that rules my life is the Lord." *Kentucky Clerk Kim*

Davis Denied Marriage Licenses for Her Friends, *supra*. She purports to be acting to "defend the Word of God." Todd Starnes, Op-Ed, *ACLU Wants Kim Davis' "Scalp to Hang on the Wall,"* Fox News (Sept. 22, 2015), http://tinyurl.com/davisaclu. After she was released from custody, she told attendees at a rally, "We serve a living God who knows exactly where each and every one of us is. Just keep on pressing, don't let down. Because he is here." Amanda Terkel & Igor Bobic, *Kim Davis Released from Jail Before Defiant Crowd*, Huffington Post (Sept. 8, 2015), http://tinyurl.com/davisrally. In sum, Davis believes that as County Clerk, she is entitled to ignore the Constitution, the Supreme Court, and federal law whenever, in her view, they conflict with her religious beliefs—and that she is entitled to compel the rest of the Rowan County government to do the same.

The Establishment Clause, however, prohibits Davis from imposing her religious beliefs on the citizens of Rowan County. When doing their government jobs, public officials represent and function as the government—not as individual, private citizens whose religious beliefs supersede everything else. *See, e.g.*, *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991) (judge

may not deliver prayers from the bench, because a "judge wearing a robe and speaking from the bench is obviously engaging in official conduct"). Thus, public officials have no right even to express unwanted religious views to the public while doing their jobs, much less use their official status to force those beliefs on others. *See, e.g.*, *Am. Civil Liberties Union of Ohio Found. v. DeWeese*, 633 F.3d 424, 435 (6th Cir. 2011) (Establishment Clause prohibits judge from displaying Ten Commandments poster in courtroom); *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 657 (9th Cir. 2006) (state employee had no right to communicate religious messages to clients or to display religious items); *Daniels v. City of Arlington*, 246 F.3d 500, 503–04 (5th Cir. 2001) (police officer had no right to wear cross pin on uniform). And public officials most certainly may not base official decisions on religious grounds. *See, e.g.*, *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991) (judge cannot take "his own religious characteristics into account in sentencing"). When fulfilling her responsibilities as County Clerk, Davis acts for the state—not for herself—and thus she has no right "to make the promotion of religion a part of her job description." *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1099 (7th Cir. 2007).

Even when something less significant than the fundamental right to marry is at stake, the state may not withhold licenses from its citizens based on a private party's religious objections. In *Larkin*, for example, the Supreme Court held that the Establishment Clause prohibited Massachusetts from giving neighboring churches a say in whether an applicant would receive a liquor license. *See* 459 U.S. at 127. The law had been authoritatively construed "as conferring upon churches a veto power over governmental licensing authority," *id.* at 125, and thus impermissibly subordinated governmental decisions to religious doctrine, *see id.* at 125–26. Under *Larkin*, Davis could not give her church or her pastor the right to block Rowan County from issuing marriage licenses to eligible couples. Nor, therefore, may she arrogate to herself the right to stop the County from issuing those licenses.

If Davis were permitted to suspend the provision of licenses or governmental services based on her faith, there would be little if any principle limiting religious control over state functions. A food-safety inspector with a religious objection to eating meat could suspend the licensing of all meat-packing plants or steakhouses; a clerk in the motor-vehicle department who objected to driving on the Sabbath could

refuse to issue driver's licenses in order to ensure that nobody drives on Sunday; and a fire chief could suspend emergency service on the weekend for similar reasons. *Cf. Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710–11 (1985) (invalidating state law that gave all employees the right to refrain from working on their personal Sabbaths). Davis herself could not identify any limits to her theory that her personal religious beliefs trump the Clerk's Office's legal obligations. Tr. Prelim. Inj. Hr'g, R. 26, Page ID #279–81.

As a private citizen, Davis has the right to marry (or not marry) in a manner that is consistent with her religious beliefs, and she "may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell*, 135 S. Ct. at 2607. But as a public official of Rowan County, Davis is bound by the decisions of the Supreme Court, which has held that "the right to marry"—by both same-sex and different-sex couples—is "protected by the Constitution." *Id.* at 2598. The Establishment Clause prohibits Davis from forcing Rowan County and its citizens to conform to the dictates of her faith, and especially from forcing them to do so in

violation of the U.S. Constitution as interpreted by the U.S. Supreme Court.

II. No Federal or State Religious-Liberty Provision Allows Davis to Violate Plaintiffs' Constitutional Rights.

Davis has no other legitimate ground for blocking Rowan County from issuing valid marriage licenses. Neither the federal or Kentucky free-exercise clauses nor Kentucky's Religious Freedom Restoration Act relieves Davis of her obligation to allow the County Clerk's Office and its staff to issue valid marriage licenses to eligible couples.

A. The federal Free Exercise Clause does not permit Davis to block the issuance of marriage licenses.

Davis has no right under the federal Free Exercise Clause to deny citizens their right to marry. Under *Employment Division v. Smith*, 494 U.S. 872 (1990), the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (quotation marks omitted). Here, the administrative responsibility of Kentucky counties to issue marriage licenses is religiously neutral and applies whether a county clerk's approval or disapproval of certain

marriages arises from religion or anything else. And the requirement applies generally to officials in all Kentucky counties, all of whom are obligated to respect citizens' constitutional right to marry. *Obergefell*, 135 S. Ct. at 2604–05.

Because the requirement that county clerks issue marriage licenses is neutral and generally applicable, the Free Exercise Clause does not entitle Davis to "become a law unto [her]self." *Smith*, 494 U.S. at 885. No matter what her religious beliefs, Davis may not interfere with the faithful execution of the laws protecting citizens' fundamental marriage rights.

B. Kentucky's free-exercise provisions do not permit Davis to block the issuance of marriage licenses.

Davis also has no basis to argue that Kentucky's free-exercise provisions permit her to block the County's issuance of marriage licenses. Under the Supremacy Clause, Plaintiffs' constitutional right to marry cannot be denied or delayed because of any requirement of Kentucky law. In any event, nothing in Kentucky law gives Davis the right to block Rowan County's issuance of marriage licenses or force the Commonwealth to change its forms and procedures for issuing marriage licenses that are uniform and valid under state law.

1. Davis's state-law claims are barred by the Supremacy Clause.

At the outset, the Supremacy Clause provides that "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988). Here, Davis cannot rely on state law to justify her conduct, because withholding marriage licenses from Plaintiffs violates the U.S. Constitution. *See* Mem. Op. & Order, R. 43, Page ID # 1154–60; *see also* Section I above. As this Court explained, in denying Davis's request for a stay of the preliminary injunction, "it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." *Miller v. Davis*, No. 15-5580, Order at 2 (6th Cir. Aug. 26, 2015).

2. Neither the Kentucky Constitution nor the Kentucky RFRA permits Davis to block the issuance of marriage licenses.

Even setting aside the Supremacy Clause, nothing in Kentucky law permits Davis to block Rowan County from issuing marriage licenses to its citizens.

a) Kentucky Constitution

The free-exercise protections of the Kentucky Constitution mirror, in relevant part, those of the federal Free Exercise Clause. *See Gingerich v. Commonwealth*, 382 S.W.3d 835, 839–40 (Ky. 2012). Because Davis has no right under the federal Free Exercise Clause to block the County's issuance of valid marriage licenses, *see* Section II.A above, she thus has no right to do so under Kentucky's analogue either.

b) Kentucky RFRA

Nor does Davis have a claim under Kentucky's RFRA, which provides that the state may not substantially burden a person's "right to act or refuse to act in a manner motivated by a sincerely held religious belief" unless the state has a compelling interest and has "used the least restrictive means to further that interest." Ky. Rev. Stat. § 446.350. Davis's religious exercise is not substantially burdened by the requirement that she refrain from impeding the County's performance of its legal obligations. And even if it were, that burden would be justified by a compelling governmental interest that is being achieved through means that are narrowly tailored. Finally, even if the

exemptions sought by Davis were otherwise required by the Kentucky RFRA, they would, if granted, violate the federal Establishment Clause.

First, requiring Davis to refrain from interfering with Rowan County's issuance of marriage licenses does not substantially burden her religious exercise. Whether or not Davis may have the right to refrain from personally processing marriage-license paperwork, nothing gives her the right to block the entire county and all its employees from doing their jobs as required by the U.S. Constitution and Kentucky law. *Cf. Bowen v. Roy*, 476 U.S. 693, 700 (1986) (religious freedom "does not afford an individual a right to dictate the conduct of the Government"). Davis does not suffer a substantial burden merely because she cannot stop third parties—in fact, Rowan County as a whole—from complying with laws and constitutional mandates to which she happens to object.

Second, even if there were a substantial burden on Davis's religious exercise here, requiring the Rowan County Clerk's Office to issue valid marriage licenses advances compelling governmental interests and is the least-restrictive means of achieving those interests.

Compelling Interests. The state has compelling interests (arising from constitutional responsibilities) in ensuring that Rowan County

residents are able to marry and in protecting the right of same-sex couples to marry on the same terms as different-sex couples. *See Obergefell*, 135 S. Ct. at 2598–99. In Kentucky, those who want to marry must receive a marriage license from a county clerk. Ky. Rev. Stat. § 402.080. Allowing Davis to stop Rowan County from issuing marriage licenses would either prevent Rowan County couples from getting married or so burden their ability to exercise that right as to negate it.

Narrow Tailoring. Requiring the Rowan County Clerk's Office to issue the Commonwealth's standard marriage licenses to eligible couples is the least-restrictive means of achieving its important objectives. The alternatives proposed by Davis do not achieve the Commonwealth's interests and fail to vindicate citizens' right to marry.

It is not a less-restrictive alternative to require Rowan County couples to travel to a different county to receive their marriage licenses. *Cf.* Davis Opening Br. 64. For one, "Plaintiffs have strong ties to Rowan County. They are long-time residents who live, work, pay taxes, vote and conduct other business in [the County]. Under these circumstances, it is understandable that Plaintiffs would prefer to obtain their

marriage licenses in their home county." Memo. Op. & Order, R. 43, Page ID #1157. And for some county residents, "it may be more than a preference. The surrounding counties are only thirty minutes to an hour away, but there are individuals in this rural region of the state who simply do not have the physical, financial or practical means to travel." *Id.* Their trip would grow even longer and more burdensome if clerks from other counties were also permitted to stop their offices from issuing licenses—which they certainly could if Davis can. Even beyond these practical burdens, couples—and especially same-sex couples—would suffer stigmatic and dignitary harms by being forced to travel from county to county (and perhaps even state to state) in search of a clerk's office where nobody objects to their marriage.

Nor is it a less-restrictive alternative to require the Kentucky legislature to amend the law to allow marriage licenses to be "scrubbed of [Davis's] name and authority." Davis Opening Br. 59. Requiring the legislature to revise Kentucky's marriage license whenever an individual clerk raises a religious objection would produce unsustainable administrative and practical burdens. Each time a county clerk asserted a religious objection to the operative marriage

license, the legislature would need to agree on and authorize a different form; the executive would need to design and distribute that new form; and, most importantly, the marrying couple would be unable to get a license unless and until both branches completed these tasks. In addition, county clerks with Davis's commitment to blocking lawful marriages could effectively leave couples in perpetual limbo by continually demanding revised forms and thus ensuring that there is never an operative license available to issue. As marriage-license variants proliferated, moreover, those licenses would become less and less reliable as proof of a valid marriage, in part because the lack of continuity or uniformity could invite fraud and deception. This alternative, then, would impose significant, ever-evolving burdens on both marrying couples and the state, and in the process would hardly vindicate the Commonwealth's compelling interests.

Also unavailing are Davis's arguments, *see* Opening Br. 69, that the Commonwealth should transfer licensing authority from county clerks to judges or other officials or should devise some (thus-far unexplained) statewide licensing scheme. These alternatives would introduce the same delays, costs, and burdens as would amending the

licenses. And they would not work in any event, because one or more of the newly assigned officials would inevitably assert the same or similar religious objections as Davis has. *See, e.g.*, Kent Faulk, *Alabama Judge Asks Not to Have to Wed Same-Sex Couples, Rejects "License to Engage in Sodomy,"* AL.com (Sept. 16, 2015), http://tinyurl.com/ALJudges; Taylor Wofford, *Magistrates in a North Carolina County Refuse to Perform Same-Sex Marriages*, Newsweek (Sept. 10, 2015), http://tinyurl.com/NCJudges; Jonathan J. Cooper, *Oregon Judge Refuses to Perform Same-Sex Marriages*, Assoc. Press (Sept. 5, 2015), http://tinyurl.com/ORJudge; Katherine Krueger, *Ohio Judge Refuses to Marry Same-Sex Couple,* Talking Points Memo (July 8, 2015), http://tinyurl.com/OhioJudges. These alternatives, then, do little more than kick the can down the road—with Rowan County couples left standing idly by, waiting to see where it might come to rest.

3. If granted, the exemptions that Davis demands would violate the federal Establishment Clause.

Finally, even if Kentucky's RFRA otherwise entitled Davis to block the issuance of marriage licenses in Rowan County, the relief that she seeks, if granted, would then violate the Establishment Clause, which of course trumps Kentucky's RFRA. Although governmental

bodies may sometimes lawfully provide religious accommodations beyond what the Constitution requires, under the Establishment Clause "[a]n accommodation must be measured so that it does not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). Here, Davis seeks the extraordinary ability to block an entire county and all its employees from issuing valid marriage licenses to eligible couples—and thereby to deprive couples of their fundamental right to marry, force them to find another office in another county or state willing to respect their constitutional rights, or require them to wait for the legislature to revise the content or form of the marriage license or the process for obtaining that license.

The Supreme Court has made clear that a religious objection rarely if ever justifies such a disproportionate response. In *Caldor*, the Court struck down a law allowing all employees to take the day off on their Sabbath, because such an unqualified right "would cause the employer substantial economic burdens or … would require the imposition of burdens on other employees required to work in place of the Sabbath observers." 472 U.S. at 710. The statute was unconstitutional because its "unyielding weighting in favor of Sabbath

observers over all other interests contravene[d] a fundamental principle of the Religion Clauses"—that "[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* (ellipses and quotation marks omitted).

Here, Davis wants to impose massive burdens on everyone in Rowan County and beyond, even though she need only step aside and let other county officials do their jobs. The exemptions that she demands do not withstand the "careful scrutiny [necessary] to ensure that [they do] not so burden nonadherents … as to become an establishment." *Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring in the judgment). Davis's interest in religious exercise does not give her an absolute veto over the actions of Rowan County and all its employees; she may believe about marriage what she likes, but she may not "unduly restrict other persons … in protecting their own interests, interests the law deems compelling." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786–87 (2014) (Kennedy, J., concurring).

* * *

Like their counterparts throughout Kentucky and across the country, loving couples in Rowan County are entitled to receive, without delay, a valid license that enables them to exercise their fundamental right to marry. Kim Davis's religious beliefs do not permit her to stand in their way.

Conclusion

The judgments of the district court should be affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because it contains 5,218 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). The brief complies with Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because it was prepared in Microsoft Word using Century Schoolbook, a proportionally-spaced typeface, in 14-point font.

/s/ Gregory M. Lipper
Gregory M. Lipper

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On December 23, 2015, I electronically filed this *amicus* brief on through the Court's ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished through the appellate CM/ECF system.

/s/ Gregory M. Lipper
Gregory M. Lipper

Designation of Relevant District Court Documents

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