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

APRIL MILLER, et al.,
Plaintiffs,

VS.

KIM DAVIS, et al.,
Defendants.

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

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

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

1 [IN OPEN COURT]

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

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

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

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

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

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

17 THE COURT: All right.

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

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

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

24 MS. PARSONS: Claire --

25 THE COURT: Go ahead.

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

3 THE COURT: All right.

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

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

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

12 MR. FLEENOR: Yes, Your Honor.

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

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

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

20 MR. DONAHUE: Thank you, Your Honor.

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

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

25 Before we get started with the contempt

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 DEPUTY CLERK: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

1 plaintiffs in this case.

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

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

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

14 MR GANNAM: We do, Your Honor.

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

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

1 to -- to argue against that motion.

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

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

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

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

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

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

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

8 THE COURT: I understand that.

9 MR. GANNAM: And the --

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

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

15 THE COURT: That I stayed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 THE COURT: All right. A brief reply.

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

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

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

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

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

17 THE COURT: All right. Mr. Watkins?

18 MR. WATKINS: No, Judge.

19 THE COURT: Mr. Vance?

20 MR. VANCE: No, Your Honor.

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

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

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

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

16 DEPUTY CLERK: Thank you, Your Honor.

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

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

19 THE COURT: And your objection's overruled.

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

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

25 Any objection to that?

1 MR. SHARP: No objection, Your Honor.

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

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

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

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

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

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

25 I know the Sixth Circuit, when it was

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

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

12 MR. SHARP: No objection, Your Honor.

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

15 MR GANNAM: No, Your Honor.

16 MR. WATKINS: No, Your Honor.

17 MR. VANCE: No, Your Honor.

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

20 MR. FLEENOR: Thank you, Your Honor.

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

24 All right. Now --

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

1 question?

2 THE COURT: Yes.

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

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

7 MR. GANNAM: Okay.

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

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

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

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

1 here again.

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

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

6 MR. CHRISTMAN: Good morning, Your Honor.

7 THE COURT: Thank you, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 THE COURT: Correct.

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

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

1 worked as quickly as it could to resolve that.

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

6 Mr. Vance?

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

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

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

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

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

4 MR. SHARP: Yes, Your Honor.

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

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

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

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

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

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

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

8 Would you be able to do that?

9 MR. VANCE: Yes, Your Honor.

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

12 MR. VANCE: Yes.

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

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

20 THE COURT: All right. Thank you.

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

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

1 MR. SHARP: Thank you, Your Honor.

2 MR. CHRISTMAN: Your Honor --

3 THE COURT: Yes, sir?

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

6 THE COURT: All right.

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

11 THE COURT: On your motion?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MR. CHRISTMAN: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

1 those that I think are available.

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

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

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

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

25 So at this point, both sides have filed a

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

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

6 MR. GANNAM: Mr. Christman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 How is that any different than this? Or it

1 may not be different, I ...

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

5 THE COURT: You would defend them?

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

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

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

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

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

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

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

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

18 THE COURT: Okay.

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

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

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

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

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

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

9 THE COURT: All right.

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

15 THE COURT: Neither side is.

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

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

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

2 Thank you.

3 [INTERRUPTION IN THE COURTROOM]

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

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

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

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

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

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

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

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

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

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

24 THE COURT: Appropriate sanction would be.

25 MR. CHRISTMAN: -- the appropriate sanction

1 --

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

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

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

13 THE COURT: All right.

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

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

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

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

25 Her intent is to adhere and follow what her

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

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

22 THE COURT: Are they ready to act?

23 MR. CHRISTMAN: They are, Your Honor.

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

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

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

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

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

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

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

1 opportunity to be heard by you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 THE WITNESS: I don't want any.

13 THE COURT: Are you sure? All right.

14 THE WITNESS: Do you have any tissues?

15 THE COURT: No, I don't have they of those.

16 Here we go. Here, take this just in case. You might
17 need that. There you go. Thank you.

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

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

1 Good afternoon, ma'am.

2 THE WITNESS: Good afternoon.

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

4 MR. GANNAM: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY: MR. GANNAM:

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

9 A. I'm Christian Apostolic.

10 Q. And when did you become a Christian?

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

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

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

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

23 MR. SHARP: Objection, relevance.

24 THE COURT: Overruled.

25 A. It was out of respect for her.

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

3 A. No.

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

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

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

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

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

24 A. Every day.

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

1 belief about what marriage is?

2 A. Yeah.

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

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

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

9 A. No.

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

13 A. No.

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

16 A. It is.

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

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

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

23 A. No.

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

1 same-sex couple based on your religious belief?

2 A. No.

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

5 A. I cannot.

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

10 MR. SHARP: Objection. Relevance.

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

13 A. Ask the question again, please.

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

18 A. No.

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

23 A. No.

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

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

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

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

10 A. No.

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

15 A. No.

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

21 A. No.

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

24 THE COURT: Any cross?

25 MR. SHARP: Thank you, Your Honor.

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CROSS-EXAMINATION

BY: MR. SHARP:

Q. Good afternoon, Ms. Davis.

A. Good afternoon.

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

A. I am.

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

A. I did.

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

A. Correct.

Q. First in this court?

A. Yes.

Q. Then in the Court of Appeals?

A. Yes.

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

A. Yes.

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

1 A. Yes.

2 Q. I'm sorry?

3 A. Yes.

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

8 A. Yes.

9 Q. Do you recall your response?

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

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

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

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

20 A. You mean on the first?

21 Q. Yes, ma'am.

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

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

1 decision?

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

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

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

9 Q. Do you recall telling the press that?

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

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

16 A. Did I have to think about it?

17 Q. Yes, ma'am.

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

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

23 A. Correct, yes.

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

1 case?

2 A. No, sir.

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

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

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

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

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

13 A. Yes.

14 Q. And you met with your deputy clerks?

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

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

19 A. They all knew.

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

23 A. We are not issuing marriage licenses.

24 Q. I'm sorry?

25 A. We are not issuing marriage licenses.

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

4 A. Correct.

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

7 A. Correct.

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

12 A. That's right.

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

15 A. He supersedes everything, sir.

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

17 A. Yes, sir.

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

20 A. I do.

21 Q. As contrary to God's law?

22 A. I do.

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

25 A. I do.

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

4 A. I have.

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

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

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

14 A. That's correct.

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

19 A. Not presently, no.

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

22 A. Correct.

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

25 A. You're correct.

1 Q. And issued 214 last year?

2 A. That's correct.

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

5 A. We do.

6 Q. You've got the personnel?

7 A. I do.

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

11 A. Presently you are correct.

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

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

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

19 A. The five that work the front line.

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

24 A. No.

25 Q. You've previously indicated that you

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

3 A. That's correct.

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

7 A. It is.

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

11 A. I am.

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

15 A. I am.

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

19 A. They have not.

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

22 A. My conscience will not allow me.

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

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

3 THE COURT: Overruled.

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

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

6 A. I guess me.

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

12 A. No.

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

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

19 Q. And what do you tell them?

20 A. Send them to my counsel.

21 Q. Liberty Counsel?

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

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

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

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

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

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

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

14 A. I couldn't tell you.

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

17 A. People calling, people coming in.

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

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

23 Q. And who told you that?

24 A. County Attorney.

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

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

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

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

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

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

13 A. Sure it is.

14 Q. I'm sorry?

15 A. I said, sure it is.

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

17 A. About that.

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

20 THE COURT: Her third-party complaint?

21 MR. SHARP: Yes, sir.

22 THE COURT: All right, sir.

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

1 A. Correct.

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

5 A. Yes.

6 Q. And natural law?

7 A. Yes.

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

10 A. Yes.

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

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

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

18 A. My conscience is.

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

22 A. Yes.

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

25 A. I said yes.

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

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

9 A. Yes.

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

13 A. Yes.

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

17 A. Yes.

18 Q. Regardless of what their religion may be?

19 A. Yes.

20 MR. SHARP: Nothing further, Your Honor.

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

24 MS. PARSONS: No, Judge.

25 THE COURT: Mr. Vance?

1 MR. VANCE: No, Your Honor.

2 THE COURT: Mr. Gannam?

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

4 THE COURT: Sure.

5 REDIRECT EXAMINATION

6 BY: MR. GANNAM:

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

10 A. No.

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

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

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

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

21 A. That's correct.

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

1 A. No, they do not.

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

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

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

11 THE WITNESS: Yes.

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

15 THE WITNESS: Yes.

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

18 THE WITNESS: Thank you.

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

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

23 REDIRECT EXAMINATION

24 BY: MR. GANNAM:

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

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

4 A. Yes.

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

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

17 THE WITNESS: It is.

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

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

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

1 MR. CHRISTMAN: No, Your Honor.

2 THE COURT: No?

3 MR. CHRISTMAN: No, Your Honor.

4 THE COURT: Mr. Sharp.

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

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

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

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

13 THE WITNESS: Okay. Thanks. Awesome.

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

16 DIRECT EXAMINATION

17 BY: MR. CANON:

18 Q. Good afternoon, Dr. Miller.

19 A. Good afternoon.

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

22 A. April Miller.

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

25 A. I do.

1 Q. How long have you lived there?

2 A. Nine years and one month.

3 Q. Do you work in Rowan County?

4 A. Yes.

5 Q. What do you do for a living?

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

8 Q. What do you teach?

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

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

14 A. Nine years.

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

16 A. I do.

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

19 A. I do.

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

22 A. Yes, I did.

23 Q. Who'd you vote for?

24 A. I actually voted for Kim Davis.

25 Q. Are you currently in a relationship?

1 A. Yes, I am.

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

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

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

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

11 A. Yes, sir.

12 Q. And you have a daughter together?

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

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

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

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

25 A. I am.

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

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

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

10 A. Yes, sir.

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

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

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

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

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

2 A. Yes, sir.

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

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

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

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

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

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

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

24 A. Uh-huh (affirmatively).

25 Q. And since the last time you testified,

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

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

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

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

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

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

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

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

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

1 issuing marriage licenses pending appeals."

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

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

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

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

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

18 A. Correct.

19 Q. At that time?

20 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

11 A. We are.

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

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

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

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

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

7 A. Oh, yeah.

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

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

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

19 A. Can't pick a date.

20 Q. Why not?

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

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

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

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

10 A. Oh, yeah. Yes, sir.

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

13 A. No.

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

16 A. No.

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

18 A. I want to get a marriage license.

19 MR. CANON: Nothing further.

20 THE COURT: Any cross?

21 MR. GANNAM: No questions, Your Honor.

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

23 Thank you. Any further proof?

24 MR. SHARP: No, Your Honor.

25 THE COURT: All right. Turn the white noise

1 on, please.

2 [SHORT PAUSE IN THE PROCEEDINGS]

3 THE COURT: Turn that off.

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

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

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

11 THE COURT: Counsel?

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

14 THE COURT: You have.

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

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

25 MR. CHRISTMAN: The prior ruling did not

1 address contempt.

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

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

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

25 So this Court would have to find a compelling

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

4 THE COURT: Thank you. Go ahead.

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

18 THE COURT: In your response.

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

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

24 MR. CHRISTMAN: Correct.

25 THE COURT: All right.

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

4 THE COURT: Completely agreed. Completely
5 agreed.

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

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

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

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

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

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

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

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

13 THE COURT: All right.

14 MR. CHRISTMAN: Your Honor --

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

16 MR. SHARP: Thank you, Your Honor.

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

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

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

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

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

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

19 THE COURT: I recall the change.

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

24 THE COURT: Right.

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

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

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

11 THE COURT: Did you concede that?

12 MR. SHARP: No, Your Honor.

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

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

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

23 THE COURT: Well, I previously found that.

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

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

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

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

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

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

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

25 The Court finds that the plaintiffs have

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

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

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

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