

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

APRIL MILLER, *et al.*,

Plaintiffs,

v.

KIM DAVIS, *et al.*,

Defendants.

Case No. 0:15-cv-00044-DLB

***Electronically filed***

**REPLY IN SUPPORT OF PLAINTIFFS’  
MOTION TO ENFORCE SEPTEMBER 3 AND SEPTEMBER 8 ORDERS**

Plaintiffs, on behalf of themselves and the putative class, respectfully submit this reply in support of their Motion to Enforce September 3 and September 8 Orders (“Motion to Enforce”) [RE #120]. Davis’ alterations to the marriage licenses currently being issued by the Rowan County Clerk’s office amount to a last-ditch attempt to craft an accommodation for herself – one that this Court, the Sixth Circuit, and the Supreme Court all found that she was not entitled to – by engaging in self-help at the expense of Rowan County couples. As Governor Beshear has now recognized, Davis’ actions have created considerable uncertainty regarding the legality of the altered marriage licenses. They impose significant and ongoing harm on Rowan County couples who are legally eligible to marry but now face doubt and fear that a marriage solemnized pursuant to an altered marriage license could be held invalid at some unknown time in the future. And Davis’ actions effectively brand the altered licenses with a stamp of animus against gay people. This Court can and should eliminate the uncertainty and harm by enforcing its prior orders, as explained below.

**I. SUPPLEMENTAL BACKGROUND.**

This Court is by now well-acquainted with the facts giving rise to this action. Rather than reassert those facts, Plaintiffs include here only those additional facts that developed after Plaintiffs filed their Motion to Enforce on September 21, 2015, and that will aid the Court in its resolution of that motion.

**A. Governor Beshear has expressed concerns about the altered licenses currently being issued by the Rowan County Clerk's office.**

On October 13, 2015, Davis filed her response in opposition to Plaintiffs' Motion to Enforce, indicating that Governor Beshear stated that the licenses currently being issued by the Rowan County Clerk's Office are "going to be recognized as valid in the Commonwealth" [RE #133 at PageID #2490]. After Davis filed her response, the Court entered an order on October 14, 2015, directing the Third-Party Defendants, Governor Beshear and Commissioner Onkst, to file a written response to Plaintiffs' Motion to Enforce within thirty days, *i.e.*, no later than November 13, 2015 [RE #135]. The Court further directed the Third-Party Defendants to address the validity of the marriage licenses issued by the Rowan County Clerk's Office on or after September 14, 2015 [*Id.*].

Governor Beshear and Commissioner Onkst filed a response on November 13, 2015, expressing concerns about the altered licenses currently being issued by the Rowan County Clerk's office [RE #148]. In doing so, Governor Beshear agreed with Plaintiffs that the altered licenses do not comply with Kentucky law prescribing the form of the licenses in at least three ways: (1) the altered licenses do not comply with KRS § 402.100(3)(a) because they do not contain the name of the county clerk or the county where the license was issued, but rather indicate that they are issued "Pursuant to Federal Court Order"; (2) the altered licenses do not comply with KRS § 402.100(1)(c) because

they do not contain the signature of the county clerk or deputy clerk issuing the license, but rather indicate that they are issued by a “Notary Public”; and (3) the altered licenses do not comply with KRS § 402.100(1)(a) because they do not contain an authorization statement by the county clerk, but rather indicate that they are issued by a “Notary Public” [RE #148 at PageID #2253-54, 2556].<sup>1</sup> Governor Beshear further noted that Davis could be subject to criminal sanctions under KRS Chapter 402 if she knowingly failed to discharge her responsibilities properly [*Id.* at PageID #2559 n.2].

Notwithstanding the deficiencies described above, Governor Beshear indicated that, as a matter of policy, the executive branch of the Commonwealth will recognize marriages solemnized pursuant to the altered licenses as valid [*Id.* at PageID #2560]. However, Governor Beshear also recognized that, as a matter of law, his opinion as to whether such marriages are lawful is not controlling [*Id.*]. Only a court of competent jurisdiction, such as a state court resolving a claim for dissolution of a marriage solemnized pursuant to an altered license, can determine conclusively whether such marriages are lawful [*Id.* at PageID #2560-61]. In short, while Governor Beshear expressed the belief that such marriages *should* be treated as lawful, he also indicated that his office lacks authority to determine conclusively whether they *must* be treated as lawful.

**B. Plaintiffs are harmed by the uncertainty surrounding the altered marriage licenses.**

The considerable uncertainty regarding the legality of the marriage licenses and subsequent marriages imposes a significant, unnecessary, and ongoing harm on Plaintiffs

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<sup>1</sup> KRS § 402.100 does not authorize notaries public to issue marriage licenses, and notaries do not have that authority under any other provision of Kentucky law. *See* KRS § 423.010 *et seq.*

Jody Fernandez and Kevin Holloway and other Rowan County couples who are legally eligible to marry but now face fear and doubt that a marriage solemnized pursuant to an altered license could be held invalid at some unknown time in the future. Fernandez and Holloway intend to marry, and they will be required to obtain a new marriage license within thirty days of their wedding. While Fernandez and Holloway previously were able to obtain a marriage license after the Rowan County clerk's office resumed issuing marriage licenses on September 4, 2015 [Fernandez Decl. ¶¶ 3-4], they later decided, for personal reasons, to marry on a date that is beyond the thirty-day period in which the license they obtained was valid [*Id.* ¶ 6]. As a result, they now will be required to obtain a new marriage license in the near future. Fernandez and Holloway remain legally eligible to marry and residents of Rowan County, and they intend to seek a marriage license from the Rowan County Clerk's office [*Id.* ¶ 7]. They expect that when they do, they will, barring some intervening event, receive an altered license. [*Id.* ¶ 11]. And they fear that their marriage solemnized pursuant to an altered license could later be held invalid at some unknown time in the future [*Id.* ¶ 12]. Additionally, Fernandez and Holloway and other Rowan County couples must face the fact that the altered licenses look different from licenses issued in other counties in Kentucky and bear a stamp of animus against gay people solely because of Davis' personal religious beliefs [*Id.*].

**II. THIS COURT HAS JURISDICTION TO ENFORCE THE SEPTEMBER 3 AND SEPTEMBER 8 ORDERS.**

This Court retained jurisdiction under Rule 62(c) of the Federal Rules of Civil Procedure to modify the Preliminary Injunction pending appeal to preserve the status quo. *See Nat. Res. Def. Council, Inc. v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (citing *Newton v. Consol. Gas Co.*, 258 U.S. 165, 177 (1922)). It did exactly that

by entering the September 3 Order to preclude Davis from applying her “no marriage licenses” policy to other eligible couples after Davis testified that she had directed her deputy clerks to continue applying the “no marriage licenses” policy in disregard of the orders of this Court, the Sixth Circuit, and the Supreme Court [RE #78 at PageID #1621, 1623]. This Court was within its power to prevent Davis from circumventing the purpose of the Preliminary Injunction by applying her “no marriage licenses” policy – a policy this Court had already found likely to be unconstitutional – to eligible couples other than the named Plaintiff couples in an effort to preserve the status quo.

Because the Court had jurisdiction to enforce the September 3 and September 8 Orders, it follows that the Court has jurisdiction to enforce those orders. *See N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987). Davis’ argument to the contrary assumes that the Court lacked jurisdiction to enter the September 3 and September 8 Orders – an argument this Court and the Sixth Circuit have already rejected in the context of Davis’ motions for a stay of those orders [RE #121; *Miller v. Davis*, Nos. 15-5880/5961/5978, slip op. at 2 (6th Cir. Nov. 5, 2015)]. This Court should similarly reject that argument now.

**III. PLAINTIFFS HAVE STANDING TO ENFORCE THE SEPTEMBER 3 AND SEPTEMBER 8 ORDERS BECAUSE THEY FACE CONCRETE AND ACTUAL HARM.**

Plaintiffs readily satisfy each of the requirements for standing: (1) “injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a

favorable decision.” *Daubenmire v. City of Columbus*, 507 F.3d 383, 388 (6th Cir. 2007).

Plaintiffs Jody Fernandez and Kevin Holloway have made the requisite showing of injury in fact: They are legally eligible to marry, they wish to marry, and they intend to seek a marriage license from the Rowan County Clerk’s office [Fernandez Decl. ¶ 7]. Davis’ actions in significantly interfering with the marriage licenses currently being issued meets the requirement that Plaintiffs show a “concrete” and “actual” harm. The altered marriage licenses raise serious questions about whether marriages solemnized pursuant to those licenses are valid. As noted above, Fernandez and Holloway expect to receive an altered license barring some intervening event, and they fear that a marriage solemnized pursuant to an altered license could later be held invalid at some unknown time in the future, such as if something were to happen to one of them [*Id.* ¶¶ 11-12; *cf. Arthurs v. Johnson*, 280 S.W.2d 504, 505 (Ky. Ct. App. 1955) (wrongful death action)]. Even if marriages solemnized pursuant to the altered licenses later are held to be valid by a court of competent jurisdiction, the considerable uncertainty regarding the legality of the marriage licenses and subsequent marriages imposes a significant and real harm on Plaintiffs and other marriage applicants now. While mere uncertainty, standing alone, does not establish injury in fact, *see Airline Prof’ls Ass’n of Int’l Bhd. of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne, Inc.*, 332 F.3d 983, 988 (6th Cir. 2003), courts have recognized that “the *present impact* of a future though uncertain harm may establish injury in fact for standing purposes.” *See, e.g., Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1301 (10th Cir. 2008) (emphasis added) (collecting cases).

Moreover, Davis' alterations to the marriage licenses effectively brand those licenses with a stamp of animus against gay people. Solely because of Davis' personal religious beliefs, marriage license applicants in Rowan County receive distinctly different licenses than applicants in other counties in Kentucky. The changes to the marriage licenses were not made in a vacuum. Rather, Davis made the alterations only after first swearing, under oath, that she lacked the authority to do so and after orders of this Court, the Sixth Circuit, and the Supreme Court required her to resume issuing marriage licenses. In this context, both Davis' initial decision to stop issuing marriage licenses altogether and her subsequent decision (in violation of multiple court orders and contrary to her own testimony) to alter the standard marriage license forms signal her belief that gay couples are second-class citizens, unworthy of official recognition and authorization of their marriages. Contrary to Davis' suggestion, Plaintiffs do not claim that Davis is treating gay couples and heterosexual couples differently. The problem is that, solely because of Davis' personal religious beliefs, all marriage license applicants in Rowan County – including heterosexual couples, such as Fernandez and Holloway – are forced to bear the burden of Davis' animus against gay people. Such animus should have no place in the official government functions of Rowan County.

Davis' argument that Plaintiffs lack standing is premised on the mistaken belief that all of the named Plaintiff couples are married already. They are not. While Fernandez and Holloway previously were able to obtain a marriage license after the Rowan County Clerk's office resumed issuing marriage licenses on September 4, 2015 [Fernandez Decl. ¶¶ 3-4], they later decided, for personal reasons, to marry on a date that is beyond the thirty-day period in which the license they obtained was valid [*Id.* ¶ 6]. As

a result, they now will be required to obtain a new marriage license in the future. Fernandez and Holloway's plans to marry in Rowan County easily establish the kind of "concrete" and "imminent" harm required to satisfy Article III's standing requirement. *See, e.g., McGlone v. Bell*, 681 F.3d 718, 730-31 (6th Cir. 2012) (plaintiff's "intention to engage in" conduct regulated by challenged policy sufficient to establish injury in fact).

For the same reasons, Fernandez and Holloway meet the causation and redressability requirements. The fear that they will receive an altered license, and the considerable uncertainty that they face, are caused by Davis' decision to violate this Court's orders by materially altering the form of marriage licenses currently being issued. And those harms would be redressed by an order from this Court directing the Rowan County Clerk's office to issue marriage licenses in the same form and manner as those that were issued on or before September 8, 2015.

Finally, Plaintiffs' official capacity claims for prospective injunctive relief against Davis are not moot. As discussed above, Fernandez and Holloway have not yet married. But *even if* Fernandez and Holloway did not have a personal stake in the outcome (they do), and *even if* all of the named Plaintiffs' official capacity claims were rendered moot (they are not), that would not defeat class certification and render those claims moot because the named Plaintiffs were members of the putative class when they moved for class certification. *See Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3d Cir. 2000); *Barry v. Corrigan*, 79 F. Supp. 3d 712, 727 (E.D. Mich. 2015). For these reasons, as well as those set forth in Plaintiffs' Reply in Support of Plaintiffs' Motion to Reopen Briefing and Expedite Consideration of Class Certification [RE #138], the mootness doctrine does not bar relief under the present circumstances.



**IV. DAVIS' MATERIAL ALTERATIONS TO THE MARRIAGE LICENSES BEING ISSUED VIOLATE THE SEPTEMBER 3 AND SEPTEMBER 8 ORDERS.**

**A. Davis' actions violate this Court's clear directives in the September 3 and September 8 Orders.**

This Court has taken great care to ensure that all eligible couples can receive marriage licenses in Rowan County. Davis' actions in significantly interfering with the marriage licenses currently being issued by the Rowan County Clerk's office violate the clear directives in this Court's September 3 and September 8 Orders. They also frustrate the purpose of those orders by creating doubt and uncertainty and, as a result, undermining the freedom to marry.

*First*, Davis' actions violate this Court's directive that any marriage licenses issued by the Rowan County Clerk's office be issued "on the form that was used" previously [RE #78 at PageID #1724]. It is thus simply untrue that, as Davis claims, "[t]his Court said nothing about the particular details of the marriage licenses that were required to be issued" [RE #133 at PageID #2504]. As noted above, Davis "confiscated all the original forms, and provided a changed form which deletes all mentions of the County, fills in one of the blanks that would otherwise be the County with the Court's styling, deletes her name, deletes all of the deputy clerk references, and in place of deputy clerk types in the name of Brian Mason, and has him initial rather than sign" [RE #114]. Davis cannot claim credibly that the marriage licenses currently being issued, which incorporate all of the changes listed above, are on the same form that was used previously.

*Second*, Davis' actions violate this Court's directive that there should be "no shenanigans" that would cause the Rowan County Clerk's office not to comply with the

Preliminary Injunction [RE #78 at PageID #1732]. Davis' attempt to craft an accommodation for herself – one that this Court, the Sixth Circuit, and the Supreme Court all found she was not entitled to and which she herself testified that she lacked the authority to adopt [RE #26 at PageID #254-55] – by engaging in self-help, at the expense of Rowan County couples, surely “shows a level of disrespect for the Court’s orders” [RE #78 at PageID #1739] that the Court warned the Rowan County Clerk’s office not to display.

*Third*, Davis’ actions violate this Court’s directive when it released Davis from custody that she “shall not interfere in any way, directly or indirectly, with the efforts of her deputy clerks to issue marriage licenses to all legally eligible couples” [RE #89 at PageID #1828]. While Davis was in custody, Deputy Clerk Brian Mason had begun issuing marriage licenses out of the Rowan County Clerk’s office. The licenses were largely unaltered, although they did remove Davis’ name and replace it with the words “Rowan County” [RE #84]. Despite the Court’s explicit instruction that she not interfere with Mason’s (or anyone else’s) efforts to issue marriage licenses, when Davis returned to work on September 14, 2015, she immediately confiscated the original forms Mason had been using and replaced them with the altered forms described above.

Contrary to Davis’ suggestion, Plaintiffs’ motion seeking compliance with the directives listed above is not a motion for contempt. Nor does it have to be. This Court expressly contemplated that enforcement action might become necessary when it entered the September 8 order, noting: “If Defendant Davis should interfere in any way with their issuance, that will be considered a violation of this Order and appropriate sanctions will be considered” [RE #89 at PageID #1828]. Accordingly, Plaintiffs filed their Motion

to Enforce to remedy Davis' violation of the September 3 and September 8 Orders and to request appropriate sanctions.

But even if the Motion to Enforce were construed as a motion for contempt, Plaintiffs have made the requisite showing that Davis violated a "definite and specific" order. *See, e.g., Elec. Workers Pension Trust Fund of Local Union # 58 v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003). There is nothing ambiguous about the Court's directives that the Rowan County Clerk's office issue marriage licenses on the same form that was used previously and that Davis be released from custody on the condition that she not interfere with the issuance of marriage licenses by Mason. Davis' actions have resulted in material alterations to the marriage licenses currently being issued by the Rowan County Clerk's office that create considerable uncertainty about the validity of any marriages solemnized pursuant to those licenses at best, and may result in marriages later being held invalid at worst. This uncertainty goes far beyond any risk the Court contemplated at the September 3, 2015, contempt hearing, regarding whether licenses issued while Davis was in custody would lack the requisite authorization [RE #78 at PageID #1689]. Indeed, Governor Beshear has recognized that it is an open question under Kentucky law whether marriages solemnized pursuant to the altered marriage licenses are valid. That eligible couples in Rowan County face significant uncertainty about the legal status of their marriages frustrates the purpose of the Preliminary Injunction. And if those marriages are later held to be invalid, that would completely eviscerate the freedom to marry the Preliminary Injunction was entered to secure.

**B. Davis' actions have created considerable uncertainty as to whether marriages solemnized pursuant to the altered licenses are valid.**

Davis' alterations to the marriage licenses currently being issued by the Rowan County Clerk's office raise serious questions about whether marriages solemnized pursuant to those licenses are valid. As Deputy Clerk Brian Mason reported to the Court, Davis "confiscated all the original forms, and provided a changed form which deletes all mentions of the County, fills in one of the blanks that would otherwise be the County with the Court's styling, deletes her name, deletes all of the deputy clerk references, and in place of deputy clerk types in the name of Brian Mason, and has him initial rather than sign" [RE #114]. Those changes are material, and they do not comply with the statutory requirements for marriage licenses under KRS § 402.100, for all of the reasons set forth in Plaintiffs' Motion to Enforce [RE #120 at PageID #2316-18] and Governor Beshear's response [RE #148 at PageID #2553-54, 2556].

Davis' decision to interfere significantly with the marriage licenses being issued has resulted in considerable uncertainty as to whether marriages solemnized pursuant to those licenses are valid. And while Governor Beshear has expressed his view that such marriages *should* be treated as lawful, he also recognized that his office lacks authority to declare conclusively that they *must* be. To date, there has been no conclusive determination as to whether those marriages are valid.

The uncertainty Davis' actions have caused imposes a significant and real harm on Plaintiffs and other marriage applicants now. And it will continue to do so until some unspecified time in the future, when a court of competent jurisdiction resolves the question conclusively. While that question could be resolved if one of the couples who received an altered marriage license chooses to file an action to affirm or avoid a disputed

marriage, *see* KRS § 402.250, Plaintiffs should not have to bear the burden and expense of filing such an action made necessary only because of Davis' decision to disregard this Court's unambiguous directives in its September 3 and September 8 Orders.

Thus, this Court can resolve the uncertainty that Fernandez and Holloway and other couples like them face by requiring Davis to comply with its previous orders. Full compliance with the September 3 and September 8 Orders would eliminate any uncertainty about the validity of anyone's marriage.<sup>2</sup>

**C. This Court should enter an appropriate order to enforce its prior orders.**

For the reasons detailed above and in the Motion to Enforce [RE #120 at PageID #2319-21], Plaintiffs respectfully request that this Court enter an order to remedy the violations described above. Specifically, with respect to the September 3 Order, Plaintiffs request that the Court direct the Rowan County Deputy Clerks to (1) issue marriage licenses in the same form and manner as those that were issued on or before September 8, 2015; (2) disregard any instruction from Davis that would require them to issue any marriage license in a form or manner other than the form or manner of licenses that were issued on or before September 8, 2015; (3) continue to file status reports that

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<sup>2</sup> Even if Governor-elect Matt Bevin, upon taking office, issues an executive order directing the Kentucky Department for Libraries and Archives to issue a new form that would remove county clerks' names from marriage licenses, that would be insufficient to remove the cloud of uncertainty that hangs over the altered licenses. *See* Steve Bittenbender, *Governor-elect to remove clerk names from Kentucky marriage licenses*, Reuters (Nov. 6, 2016), <http://www.reuters.com/article/2015/11/06/us-usa-gaymarriage-kentucky-idUSKCN0SV2FV20151106#6uGygLFLugkkFAJw.97>. In fact, it could actually increase the uncertainty, given that the form of marriage licenses – including the requirement that the county clerk's name appear – is prescribed by KRS § 402.100, and the current administration has asserted that the chief executive lacks authority to alter any elements of the form that are required by statute [RE #78 at PageID #1648 (statement of Mr. Vance for Governor Beshear) (“[T]he requirements or the composition of marriage license is dictated by statute, and the governor cannot change the statute.”)].

address their compliance with the Court's Orders and detail any attempt by Davis to interfere with their issuance of marriage licenses in the same form or manner as those that were issued on or before September 8, 2015; and (4) re-issue, *nunc pro tunc*, any marriage licenses that have been issued since September 14, 2015, in the same form or manner as those that were issued on or before September 8, 2015.

Plaintiffs further request, with respect to the September 8 Order, that this Court (1) expressly direct Davis to refrain from interfering with the Deputy Clerks' issuance of marriage licenses in the same form or manner as those that were issued on or before September 8, 2015, including but not limited to taking any action that would cause further alteration to the marriage license forms or taking any action to penalize any Deputy Clerk for issuing marriage licenses in the same form or manner as those that were issued on or before September 8, 2015; and (2) provide Davis with notice that any violation of the enforcement order will result in civil sanctions, including but not limited to (a) the placement of the Rowan County Clerk's office in to a receivership for the limited purposes of issuing marriage licenses, and (b) the imposition of civil monetary fines as appropriate and necessary to coerce Davis' compliance with any enforcement order.

Davis' argument that this Court should not impose civil monetary fines or place the Rowan County Clerk's office into a receivership misses the mark. Plaintiffs are not requesting that the Court do either of those things. Rather, Plaintiffs respectfully request that the Court provide Davis with notice that *further* violations of the Court's order could result in those sanctions. That request is wholly consistent with the Court's commitment to "vigilantly oversee its orders" [RE #78 at PageID #1732] and to "continue to have

oversight of this matter while the litigation continues” [*Id.* at PageID #1738]. The Court previously indicated that it expected the Rowan County Clerk’s office to comply with the Preliminary Injunction [*Id.* at PageID #1739-40]. Plaintiffs, too, hope and expect that no further violations will occur. But, if they do, remedies including civil monetary fines and a limited receivership could be appropriate.

**WHEREFORE**, for the foregoing reasons, as well as those contained in their Motion to Enforce [RE #120], Plaintiffs respectfully request that this Court grant Plaintiffs’ Motion to Enforce September 3 and September 8 Orders.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on November 20, 2015, I filed this Reply in Support of Plaintiffs' Motion to Enforce September 3 and September 8 Orders with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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