

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.**

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. IIju**





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



**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**

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*

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]



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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*



**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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