

SIXTH CIRCUIT REVIEW

Religious Accommodations for County Clerks?

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Rowan County Clerk Kim Davis engendered considerable controversy after she instituted a “no marriage licenses” policy to avoid facilitating the marriages of same-sex couples in conflict with her religious beliefs.¹ Federal District Court Judge David L. Bunning has been overseeing this dispute,² which has included intermittent appeals to the Sixth Circuit,³ and even the United States Supreme Court.⁴ What is the basis and strength of her religious freedom claim? Is the only solution to the conflict between her sincerely held religious beliefs and the right of same-sex couples to marry for Davis to resign from her position as county clerk? The likely answer is yes.

Davis has used religious freedom arguments to be exempted from issuing same-sex marriage licenses and certificates. She has argued she should not be held in contempt for disobeying a federal court’s order to issue marriage licenses and certificates because her refusal is based on sincerely held religious beliefs.⁵ She has also filed a third-party complaint in federal court against Kentucky Governor Steve Beshear and Commissioner Wayne Onkst⁶ seeking primarily an

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¹ See generally *Miller v. Davis*, No. 15-CV-44-DLB, 2015 WL 4866729 (E.D. Ky. Aug. 12, 2015) (granting plaintiffs’ motion for preliminary injunction).

² *Id.*

³ See, e.g., Appellant Kim Davis’ Emergency Motion for Immediate Consideration and Motion to Stay District Court’s September 3, 2015 Injunction Order Pending Appeal, *Miller v. Davis*, No. 15-5880 (6th Cir. Sept. 11, 2015) [hereinafter 6th Circuit Motion to Stay].

⁴ See Emergency Application to Stay Preliminary Injunction Pending Appeal, *Davis v. Miller*, No. 15A250 (U.S. Aug. 28, 2015) [hereinafter Supreme Court Application to Stay].

⁵ See *infra* Part II.

⁶ Onkst is the Commissioner of the Kentucky Department for Libraries and Archives, which has responsibility for creating uniform marriage license and certificate forms. See KY. REV. STAT. ANN. § 402.100 (LexisNexis 2010).

*exemption under state law from issuing marriage licenses and certificates in conflict with her religious beliefs.*⁷

Part I of this article places Davis' legal claims in historical context. Part II discusses the strength of her religious freedom argument. Part III concludes by suggesting how these kinds of claims should be considered in the future. While Davis may have a cognizable claim that her religious freedom is "substantially burdened" by issuing marriage licenses and marriage certificates, it may not be possible for a court to fashion an accommodation under state religious freedom law without unconstitutionally demeaning the marriages of gay men and lesbians.

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I. THE LEGAL CONTEXT

In the 1990 Supreme Court case *Employment Division v. Smith*,⁸ the Court held that Native American plaintiffs, charged with using peyote in religious rituals, could not use a freedom of religion defense to continue their religious practice without state interference.⁹ The Supreme Court used low-level rational basis review to consider their freedom of religion defense, because they could not show that the state enacted the law for the purpose of burdening their freedom of religion.¹⁰

⁷ See *infra* Part II.

⁸ *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

⁹ *Id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982))).

¹⁰ *Id.* at 882 ("There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered since *Reynolds* plainly controls.").

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).¹¹ This statute implemented a strict scrutiny standard for freedom of religion claims, making it easier for plaintiffs to attain accommodations when their religious freedom is burdened by governmental action. Nonetheless, in 1997, the Supreme Court held in *City of Boerne v. Flores*¹² that Congress had exceeded its authority in making state governmental action subject to RFRA.¹³ After the *Boerne* decision, many states, including Kentucky,¹⁴ passed their own religious freedom statutes with language similar to the RFRA.¹⁵

Meanwhile, the Kentucky legislature enacted a statute in 1998,¹⁶ and a constitutional amendment in 2004,¹⁷ restricting marriage to one man and one woman. Following the 2013 Supreme Court decision in *United States v. Windsor*,¹⁸ which overturned Section 3 of the federal Defense of Marriage Act (DOMA),¹⁹ Gregory Bourke and Michael DeLeon were among a group of same-sex couples who filed suit in federal court against Governor Beshear seeking to invalidate Kentucky's ban on same-sex marriage.²⁰ On February 12, 2014, the court, relying on *Windsor*, issued a decision holding Kentucky's ban on same-sex marriage unconstitutional.²¹

Kim Davis, who considers herself to be a devout Christian, was elected county clerk for Rowan, Kentucky on November 4, 2014, and took office on January 1, 2015, for a four-year term.²² Two days after she was elected county clerk, the Sixth Circuit overturned the lower court decision that invalidated Kentucky's ban on same-sex marriage.²³ In January 2015, shortly after Davis took office, the United States Supreme Court announced it would accept

¹¹ Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

¹² *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹³ *Id.* at 536 (“RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”).

¹⁴ KY. REV. STAT. ANN. § 446.350 (LexisNexis 2010). Kentucky's law was passed in 2013 in response to a case involving an Amish buggy driver who was required to display colorful signage in violation of his religious principles. *See Gingerich v. Commonwealth*, 382 S.W.3d 835, 844 (Ky. 2012).

¹⁵ *See generally* W. Cole Durham, Jr., *State RFRA's and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665 (1999) (analyzing current and proposed state RFRA legislation).

¹⁶ KY. REV. STAT. ANN. § 402.005 (LexisNexis 2010).

¹⁷ KY. CONST. § 233A.

¹⁸ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

¹⁹ *See id.* at 2682; Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2012) (defining marriage, under federal law, as “a legal union between one man and one woman”).

²⁰ *See Bourke v. Beshear*, 996 F. Supp. 2d 542, 546 (W.D. Ky. 2014).

²¹ *Id.* at 554.

²² *See* Verified Third-Party Complaint of Defendant Kim Davis at 2–7, *Miller v. Davis*, No. 15-CV-44-DLB (E.D. Ky. Aug. 4, 2015) [hereinafter *Davis Third-Party Complaint*].

²³ *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014).

certiorari in *Obergefell v. Hodges*, which included an appeal from the Kentucky same-sex marriage case.²⁴ One week later, concerned that she would soon be required to issue marriage licenses and certificates in conflict with her religious beliefs,²⁵ Davis requested that state legislators support “legislation that would give county clerks the option to exempt themselves from issuing marriage license, [sic] not only to same sex couples but to all parties, as to not discriminate [sic] anyone.”²⁶

The Supreme Court overturned the Sixth Circuit’s same-sex marriage decision on June 26, 2015.²⁷ On that same day, Governor Beshear sent a letter to all Kentucky clerks instructing them to use a new form that recognized same-sex marriages, and thereby implemented the *Obergefell* decision.²⁸ He urged them to “respect the rule of law” and made no mention of religious exemptions of any kind for clerks or other state officials.²⁹

The next day, Davis announced that her office would discontinue issuing marriage licenses in Rowan County to all couples.³⁰ One week later, four couples filed suit, requesting a federal court to preliminarily enjoin Davis from violating their federal constitutional rights.³¹ In this lawsuit, Davis has argued that the court should respect her right to religious freedom and not enjoin her from refusing to issue marriage licenses.³² Further, on August 4, 2015, Davis filed a third-party complaint in federal court against Governor Beshear and Commissioner Onkst³³ seeking a religious exemption from authorizing the issuance of Kentucky marriage licenses.³⁴

²⁴ 01/16/15 Miscellaneous Order, 2014 Term Court Orders, U.S. Supreme Court (Jan. 16, 2015), http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf [<http://perma.cc/JWA4-WW34>] (listing cases for which the Court granted certiorari).

²⁵ Davis Third-Party Complaint, *supra* note 22, at 8. The actual content of state marriage law will be discussed in Part III, *infra*.

²⁶ See Supreme Court Application to Stay, *supra* note 4, at E-36.

²⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

²⁸ See *Kentucky Gov. Steve Beshear Orders Kentucky County Clerks to Recognize Same Sex Marriages*, WDRB NEWS (June 26, 2015), <http://www.wdrb.com/story/29417314/kentucky-gov-steve-beshear-orders-kentucky-county-clerks-to-recognize-same-sex-marriages> [<http://perma.cc/H8Z2-MAN5>].

²⁹ *Id.*

³⁰ See John Cheves, *Several Kentucky County Clerks Defy Same-Sex Marriage Ruling, Refuse to Issue Marriage Licenses*, KENTUCKY.COM (June 29, 2015), <http://www.kentucky.com/2015/06/29/3923157/some-kentucky-county-clerks-refusing.html> [<http://perma.cc/T94W-GS7N>].

³¹ See Complaint at 1–2, *Miller v. Davis*, No. 15-CV-44-DLB (E.D. Ky. July 2, 2015).

³² See *Miller v. Davis*, No. 15-CV-44-DLB, 2015 WL 4866729, at *1 (E.D. Ky. Aug. 12, 2015).

³³ See Davis Third-Party Complaint, *supra* note 22, at 2–7.

³⁴ See KY. REV. STAT. ANN. § 402.100 (LexisNexis 2010).

On August 12, 2015, the court granted a preliminary injunction to the four couples that had sought marriage licenses in the first legal action.³⁵ The Sixth Circuit³⁶ and the United States Supreme Court³⁷ denied Davis' emergency motion for a stay pending appeal.

On September 3, 2015, the court held Davis in contempt and jailed her for disobeying the court's order to issue marriage licenses.³⁸ On September 8, 2015, the court received a status report from the plaintiffs indicating that they had been able to obtain marriage licenses while Davis was in custody.³⁹ The court ordered Davis released from custody so long as she does "not interfere in any way, directly or indirectly, with the efforts of her deputy clerks to issue marriage licenses to all legally eligible couples"⁴⁰ and ordered a status report every fourteen days.⁴¹ Davis has appealed this contempt decision to the Sixth Circuit, seeking a stay of the contempt order pending appeal.⁴² Further, on September 11, 2015, the district court ruled on Davis' third-party complaint, denying her motion for injunctive relief.⁴³

On September 14, 2015, after returning to work upon her release from jail, Davis confiscated all the office's licenses and certificates to delete all references to the county clerk or the name of the county.⁴⁴ She also eliminated any signature or notary on some of the forms.⁴⁵ Further, she modified the forms to state that they were issued "Pursuant to Federal Court Order #15-CV-

³⁵ *Miller*, 2015 WL 4866729, at *15.

³⁶ *See* Order, *Miller v. Davis*, No. 15-5880 (6th Cir. Sept. 17, 2015) ("On August 28, 2015, we denied Davis's motion for a stay of the August 12 preliminary injunction pending appeal."); *see also* 6th Circuit Motion to Stay, *supra* note 3.

³⁷ *See* Order in Pending Case, *Davis v. Miller*, No. 15A250 (U.S. Aug. 31, 2015) ("The application for stay presented to Justice Kagan and by her referred to the Court is denied."); *see also* Supreme Court Application to Stay, *supra* note 4.

³⁸ Order, *Miller v. Davis*, No. 15-CV-44-DLB (E.D. Ky. Sept. 3, 2015) (finding Davis in contempt of the district court's August 12, 2015 Order).

³⁹ Order, *Miller v. Davis*, No. 15-CV-44-DLB (E.D. Ky. Sept. 8, 2015) (ordering Davis' release from custody upon finding that the Rowan County Clerk's Office was complying with the district court's August 12, 2015 Order).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See* Civil Appeal Statement of Parties and Issues, *Miller v. Davis*, No. 15-5978 (6th Cir. Sept. 17, 2015); *see also* Appellant Kim Davis' Reply in Support of Emergency Motion for Immediate Consideration and Motion to Stay District Court's September 3, 2015 Contempt Order Pending Appeal, *Miller v. Davis*, No. 15-5978 (6th Cir. Sept. 25, 2015).

⁴³ Memorandum Order, *Miller v. Davis*, No. 15-CV-44-DLB (E.D. Ky. Sept. 11, 2015) [hereinafter District Court Order] (denying Davis' Motion for Injunctive Relief).

⁴⁴ Notice at 1-2, *Miller v. Davis*, No. 15-CV-44-DLB (E.D. Ky. Sept. 18, 2015) (report by Defendant Deputy Clerk Brian Mason on the changes in the Rowan County Clerk's Office in response to the district court's orders).

⁴⁵ *Id.*

44 DLB.”⁴⁶ In response to Davis’ conduct, on September 21, 2015, the plaintiffs in the first legal action submitted a motion to enforce the court’s orders of September 3 and September 8, by asking the court to enjoin Davis from altering state marriage licenses and certificates.⁴⁷

The district court and court of appeals continue to consider the merits of the original legal action brought by the couples seeking to get married, and Davis’ third-party complaint.

II. DAVIS’ RELIGIOUS FREEDOM CLAIM

A. Introduction

This case involves two legal actions. In the first legal action, four couples challenged Davis’ “no marriage licenses” policy at her county office and sought a preliminary injunction to require her to issue marriage licenses and certificates.⁴⁸ Davis made several arguments for why a preliminary injunction should not be issued. Principally, she argued that such an injunction would harm her right to religious freedom as protected by the Kentucky Religious Freedom Act (KRFA).⁴⁹ In a twenty-eight page opinion granting the preliminary injunction, the court only allotted a page and a half to this argument, most of which was spent quoting the relevant state statute.⁵⁰ The court disposed of Davis’ religious freedom argument under state law by finding that her religious burden was merely “slight.”⁵¹ Similarly, in its decision to deny a stay pending appeal, the Sixth Circuit gave no consideration to this argument.⁵²

In the second legal action, Davis requested, among other relief, that Governor Beshear and Commissioner Onkst be required to exempt her from having to authorize the issuance of Kentucky marriage licenses, as required by the KRFA.⁵³ She lost this argument on procedural grounds.⁵⁴

⁴⁶ Motion to Enforce September 3 and September 8 Orders at Exhibit 1, *Miller v. Davis*, No. 15-CV-44-DLB (E.D. Ky. Sept. 21, 2015).

⁴⁷ *Id.* at 1.

⁴⁸ See *Miller v. Davis*, No. 15-CV-44-DLB, 2015 WL 4866729, at *1 (E.D. Ky. Aug. 12, 2015).

⁴⁹ KY. REV. STAT. ANN. § 446.350 (LexisNexis 2010).

⁵⁰ *Miller*, 2015 WL 4866729, at *14–15. Further, while the court discusses and quotes the Kentucky Religious Freedom Act, it concludes that her rights were not violated under Section 5 of the Kentucky Constitution; the Kentucky Constitution standard, however, is not the same as the Kentucky statutory standard. *Id.*

⁵¹ *Id.* at *15.

⁵² See Order, *Miller v. Davis*, No. 15-5880 (6th Cir. Aug. 26, 2015) (denying Davis’ motion for a stay of the preliminary injunction pending appeal).

⁵³ Davis Third-Party Complaint, *supra* note 22, at 15–16.

⁵⁴ District Court Order, *supra* note 43, at 5–6 (finding that the action can only be heard in state court).

Thus, in both legal actions, Davis invoked the KRFA to seek an exemption from issuing marriage licenses. A close analysis of this statute is necessary to evaluate the strength of her claim. Kentucky's Religious Freedom Act reads:

Government 'shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.⁵⁵

Under the KRFA, Davis may request the "right to act" or the right to "refuse to act" if she can demonstrate that governmental action has imposed a substantial burden on her religious belief. If she meets that burden of proof, then the government must demonstrate (1) that it has a compelling governmental interest in enforcing the challenged policy and (2) that it has used the least restrictive means to attain that governmental interest. If the government satisfies both prongs, then Davis is not entitled to an exemption from a duty to follow state law.

B. *Davis' Religious Belief*

The starting point in applying the KRFA is to connect one's religious beliefs to the request to refuse to follow state law. This aspect of Davis' claim deserves close attention.

What is Davis' relevant religious belief? At a hearing on July 20, 2015, Davis testified, "[M]y religious beliefs can't condone issuing and being a party to the issuance of a same-sex marriage license."⁵⁶

How does that religious belief relate to her request for an exemption from state law? Based on her religious belief, one would expect her to request an exemption from issuing same-sex marriage licenses. Yet, that was not her request. Before *Obergefell* was decided, Davis requested state "legislation that would give county clerks the option to exempt themselves from issuing marriage license, [sic] not only to same sex couples but to all parties, as to not discriminate [sic] anyone."⁵⁷ After *Obergefell* was decided, she refused to issue *any* marriage licenses or certificates. She explained at the July hearing that her office refused to issue *any* marriage licenses "so [they] didn't

⁵⁵ KY. REV. STAT. ANN. § 446.350 (LexisNexis 2010). HB 279 was enacted in 2013 over the Governor's veto. Jennifer A. Pekman, Note, *The Kentucky Religious Freedom Act: Neither a Savior for the Free Exercise of Religion nor a Monstrous Threat to Civil Rights*, 103 Ky. L.J. 127, 127 (2014-2015).

⁵⁶ Transcript of Preliminary Injunction Hearing at 62, *Miller v. Davis*, No. 15-CV-44-DLB (E.D. Ky. July 20, 2015).

⁵⁷ See Supreme Court Application to Stay, *supra* note 4, at E-36.

discriminate against any party.”⁵⁸ But she did not claim that the “no licenses” policy was mandated by her religious beliefs. In fact, before *Obergefell* was decided, Davis issued marriage licenses and certificates to opposite-sex partners.

Requesting accommodation allowing her to refuse *all* marriage licenses presents a legal quandary that was not discussed by the district court. The KRFA provides no basis for Davis’ request for an exemption beyond those “motivated” by her religious beliefs. If she limited her request for exemption to the acts (or refusals to act) that are motivated by her religious beliefs, then she would ask to be excused from issuing *only* same-sex marriage licenses. However, asking the state to excuse her from issuing marriage licenses to same-sex couples would be asking the state to use the KRFA to treat same-sex couples differently than opposite-sex couples in violation of the equal protection clause.⁵⁹ Under principles of federal constitutional supremacy, a state statute cannot be used as a vehicle for the denial of an individual’s constitutional rights.⁶⁰ Therefore, Davis probably asked to be excused from issuing *all* marriage licenses to avoid asking the state to take an unconstitutional position.

Parallels can be drawn to *Loving v. Virginia*. When a couple was convicted of violating Virginia’s anti-miscegenation statute, the trial court found that “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.”⁶¹ The Supreme Court, in overturning the statute, gave no weight to the state court’s religious basis for enforcing the anti-miscegenation statute. “Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”⁶² Similarly, Davis’ religious justification for denying marriage licenses to same-sex couples but not opposite-sex couples is irrelevant to the issue of whether her actions, as a state actor, violate the right to marry protected by the United States Constitution. The state of Kentucky cannot apply the KRFA to exempt Davis from issuing marriage licenses in a way that conflicts with the state’s obligation to protect the fundamental right to marry, as interpreted by *Obergefell*.

Perhaps Davis knew that she could not use the KRFA to request exemption only from same-sex marriages, due to these constitutional problems. Thus, she requested to be exempt from issuing all marriage licenses.

⁵⁸ Transcript of Preliminary Injunction Hearing, *supra* note 56, at 62.

⁵⁹ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”).

⁶⁰ *Id.* Thus, *Obergefell* invalidated Kentucky’s marriage statute and constitutional provision, which had precluded same-sex marriages. See *id.* at 2608. The KRFA is merely another state statute and, like the Kentucky marriage laws, cannot be used to violate the constitutional right of Kentucky citizens to marry.

⁶¹ *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting trial court judge).

⁶² *Id.* at 12.

But that broader request, even if it is constitutionally permissible, needs to be based on the language of the KRFA. And it is not.

C. Substantial Burden

If Davis makes a cognizable claim that her request for exemption from state law is motivated by her religious beliefs, the next question is whether state law imposes a “substantial burden” on her. The answer to that question lies in the relevant state marriage laws.

Kentucky law requires a couple seeking to marry to (1) obtain a marriage license, and (2) obtain a marriage certificate.⁶³ The “clerk of the county” must issue the marriage license.⁶⁴ In addition, the marriage license must include “the signature of the county clerk *or* deputy clerk issuing the license.”⁶⁵ The disjunctive “or” in the signature requirement suggests that the county clerk does *not* have to be the individual signing the marriage license. Nonetheless, the language about “issuing” the marriage license requires the county clerk to issue it.

The marriage certificate must include “[a] signed statement by the county clerk *or* a deputy county clerk of the county in which the marriage license was issued that the marriage certificate was recorded.”⁶⁶ Similarly, the “or” statement suggests that the county clerk does *not* have to be the individual signing the marriage certificate.

Further, in carrying out the issuance of marriage licenses and certificates, state law requires the county clerk to use the form developed by the state—without alteration.⁶⁷ Accordingly, Davis’ obligation to have her name appear on these documents seems to stem not from the statute itself but from the state’s decision to create forms that have a line for the “county clerk.”⁶⁸

Davis testified that she objected to her name and Rowan County being on these forms.⁶⁹ Even if the deputy signed the form, she informed the judge that she objected to Rowan County’s name being on the form stating, “It is still my authority as county clerk that issues it through my deputy.”⁷⁰ She testified, “[M]y religious beliefs can’t condone issuing and being a party to the issuance of a same-sex marriage license.”⁷¹ The legal question is whether she can meet the statutory requirement of demonstrating that these state law requirements “substantially burdened” her freedom of religion.

⁶³ See KY. REV. STAT. ANN. § 402.100 (LexisNexis 2010).

⁶⁴ § 402.080.

⁶⁵ § 402.100(1)(c) (emphasis added).

⁶⁶ § 402.100(2)(d) (emphasis added).

⁶⁷ See § 402.100.

⁶⁸ The Kentucky Department for Libraries and Archives has the responsibility for creating uniform marriage license and certificate forms. See § 402.100.

⁶⁹ Transcript of Preliminary Injunction Hearing, *supra* note 56, at 80.

⁷⁰ *Id.* at 81.

⁷¹ *Id.* at 62.

A Supreme Court case analyzing the same language under the federal RFRA can be illuminating in understanding whether she met the substantial burden requirement. In *Burwell v. Hobby Lobby Stores, Inc.*,⁷² the plaintiffs objected to a provision of the Affordable Care Act (ACA)⁷³ requiring their employee health plan to offer coverage of four contraceptives.⁷⁴ They did not seek to be exempted from the ACA entirely; they merely sought exemption from the requirement to offer those four contraceptives in their health care plan. The Court found the substantial burden requirement was met and cautioned that it is not appropriate for a judge to “say that their religious beliefs are mistaken or insubstantial.”⁷⁵

In applying the substantial burden test from *Hobby Lobby*, it is helpful to distinguish between Davis’ objection to having her name appear on the documents and her objection to having the name of the *county* appear on the documents. The first objection is easily analogous to the plaintiffs’ objection in *Hobby Lobby* and seems to meet the substantial burden test. The Hobby Lobby plaintiffs did not want their employees to have a company-provided insurance card that covered contraceptives to which they objected. Similarly, Davis does not want married couples to have a marriage certificate, with her name on it, which authorizes a marriage to which she objects. These burdens seem comparable.

Davis’ objection to the name of the county appearing on the forms, however, is problematic because the connection to being complicit in the issuance of the marriage licenses *from the county* is more attenuated than a connection to her *as an individual*. Despite the *Hobby Lobby* language broadly interpreting “substantial burden,” the Seventh Circuit concluded that Wheaton College could not establish a “substantial burden” under the RFRA by merely being required to notify its insurers or the federal government of its objection to covering certain contraceptives.⁷⁶ The Seventh Circuit rejected the argument that notification makes Wheaton College “involuntarily complicit in the provision of emergency contraception.”⁷⁷ Similarly, Davis is arguably not complicit in facilitating same-sex marriage, in violation of her religious

⁷² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁷³ Patient Protection and Affordable Care Act § 2713, 42 U.S.C. § 300gg-13(a)(4) (2012).

⁷⁴ The Plaintiffs opposed these four contraceptives, because they considered them to be abortifacients. *Hobby Lobby*, 134 S. Ct. at 2762, 2765.

⁷⁵ *Id.* at 2779 (finding that plaintiffs “sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial”). The Supreme Court did not have to consider whether the plaintiffs met the “motivated by” test that is included in the RFRA, because the federal RFRA does not have the “motivated by” language. See Religious Freedom Restoration Act of 1993 (RFRA) § 3, 42 U.S.C. § 2000bb-1 (2012).

⁷⁶ See *Wheaton Coll. v. Burwell*, 791 F.3d 792, 801 (7th Cir. 2015).

⁷⁷ *Id.* at 796.

beliefs, when she notifies her deputy clerk of her objection and only the name of the county appears on the document.

Nonetheless, the Eighth Circuit recently found in a fact pattern similar to Wheaton College that a court must accept the plaintiffs' "assertion that self-certification under the accommodation process . . . would violate their sincerely held religious beliefs."⁷⁸ It is therefore unclear how closely a court should examine the purported connection between a person's religious belief and the state law requirement, depending on whether one accepts the view of the Seventh or Eighth Circuit.

D. *Compelling State Interest*

If Davis establishes a substantial burden on her religious exercise, then the burden of proof shifts to the government to demonstrate by clear and convincing evidence that it has a compelling state interest in the challenged rule. In this case, that rule is that clerks must issue marriage licenses and certificates. The government can easily meet the compelling state interest requirement because state courts and state officials have a strong interest in protecting the fundamental rights of their citizens, such as the right to marry.⁷⁹

The government's compelling state interest has grown stronger as the facts have developed. Davis has recently insisted on altering the marriage certificate—removing the notarization and state seal—which impugns the integrity of the instrument. The government has a compelling interest in ensuring the authenticity of its official records.⁸⁰ Further, the government has a compelling interest in controlling the content of its own speech, especially when it is seeking to avoid Establishment Clause violations.⁸¹ Government is allowed to make and implement its own value judgments.⁸² Davis has also modified the document to say that it is issued "pursuant to Federal Court Order #15-CV-44 DLB," which is a subtle way for Davis to suggest it is a second-class marriage document. *Obergefell* emphasized that all marriages should be

⁷⁸ *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 14-1507, 2015 WL 5449491, at *8 (8th Cir. Sept. 17, 2015).

⁷⁹ *See Miller v. Davis*, No. 15-CV-44-DLB, 2015 WL 4866729, at *8 (E.D. Ky. Aug. 12, 2015).

⁸⁰ *See generally Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (recognizing a state's interests in preventing voter fraud).

⁸¹ *See Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2nd Cir. 1999) ("Because BOCES has a strong, perhaps compelling, interest in avoiding Establishment Clause violations, it may proscribe interactions between teachers and parents that risk giving the impression that the school endorses religion.") (citation omitted).

⁸² *See Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (recognizing right of government to make and implement its own value judgments).

entitled to equal dignity; the state is entitled to implement *Obergefell* by using a uniform marriage certificate.⁸³

It is unlikely that the state has a compelling interest in Davis' name, rather than the deputy clerk's name, appearing on the document itself because that name variance does not suggest that one kind of marriage license is a second-class document.⁸⁴ But the kinds of changes that Davis has sought to implement appear to invalidate and demean the status of the documents and are inconsistent with the state's compelling interest in protecting the fundamental right to marry of its citizens.

E. *Least Restrictive Means*

If a court concludes that Kentucky has a compelling state interest in issuing marriage licenses to same-sex couples, then the issue becomes whether Kentucky has an alternative that would allow it to issue the marriage licenses and certificates while also respecting Davis' religious beliefs. This issue is thorny because it depends, in part, on what accommodation Davis would find acceptable. Although Davis filed a third-party complaint seeking injunctive relief against Governor Beshear and Commissioner Onkst, she did not state precisely how these state actors could accommodate her religious beliefs and meet their compelling state interest in ensuring that marriages are available in Rowan County.⁸⁵

Title VII of the Civil Rights Act of 1964, contains a religious accommodation rule similar to the KRFA.⁸⁶ Under Title VII, a request for a religious accommodation "involves an interactive process that requires participation by both the employer and the employee."⁸⁷ Rather than engage in that interactive process, Davis engaged in self-help by refusing to issue any marriage licenses and later modified the forms to satisfy her religious beliefs. As noted by the district court, this kind of self-help presents Establishment

⁸³*Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) ("The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life.").

⁸⁴*See, e.g., Slater v. Douglas Cty.*, 743 F. Supp.2d 1188, 1195 (D. Or. 2010) ("[D]omestic partnership registrant has no cognizable right to insist that a specific clerical employee with religious-based objections process the registration as opposed to another employee (having no such objections). So long as the registration is processed in a timely fashion, the registrants have suffered no injury.").

⁸⁵Davis Third-Party Complaint, *supra* note 22; Defendant/Third-Party Plaintiff Kim Davis' Response in Opposition to Third-Party Defendants' Motion to Dismiss Third-Party Complaint, *Miller v. Davis*, No. 15-CV-44-DLB (E.D. Ky. Sept. 24, 2015).

⁸⁶*See* Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e(j) (2012) (requiring an employer to make reasonable accommodations to religious needs of its employees unless those accommodations impose an undue hardship).

⁸⁷*Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000).

Clause problems because she is “openly adopting a policy that promotes her own religious convictions at the expense of others.”⁸⁸

Had she initiated an appropriate interactive process, the issue would be whether an accommodation is possible. An obvious solution would be for the state to be required to modify its forms to recognize the “or” phrase under state law—that a deputy clerk or clerk can sign these forms. The state could even agree to remove the designation of the precise county in which the couple got married, because that particular state statutory requirement does not seem essential to any compelling state interest.

But would such a solution really satisfy Davis? She might act like the Catholic pharmacist in *Noesen v. Medical Staffing Network, Inc.*⁸⁹ who put customers on hold indefinitely when they called requesting birth control and walked away from customers at the counter, “refus[ing] to tell anyone that a customer needed assistance.”⁹⁰ Or, she might act like the entities covered by the ACA who insist that they cannot even notify the government of their objection to providing contraceptives, so that the government can make alternative arrangements for that coverage.⁹¹ Davis is the head clerk in her office, so an accommodation will necessarily require her cooperation in some way, such as arranging for her deputy clerk to authorize marriage licenses and certificates. In order for people to enjoy the fundamental right to marry, she must agree to *some* process that facilitates marriage without the burden of traveling to another county.

If Davis is willing to cooperate by allowing others to issue the licenses and certificates, the district court’s decision in *Slater v. Douglas County*⁹² suggests a model solution. In *Slater*, a clerk who objected to processing same-sex domestic partner registrations could be relieved of those responsibilities because “a domestic partnership registrant has no cognizable right to insist that a specific clerical employee with religious-based objections process the registration . . . [s]o long as the registration is processed in a timely fashion.”⁹³ However, unlike Davis, the clerk in *Slater* did not object to having other clerks perform the functions she found unacceptable.

If such a solution were put in place, it would be crucially important that Davis not be allowed to demean the right of same-sex couples to marry. Unlike Davis, the employee in *Slater* who refused to process domestic partnership registrations was a low-level employee with little or no direct contact with the public. Davis has sought to be exempted from issuing any marriage licenses or certificates to express her view that same-sex marriage is immoral. While she may make that statement as a private citizen, she may not

⁸⁸ Miller v. Davis, No. 15-CV-44-DLB, 2015 WL 4866729, at *8 (E.D. Ky. Aug. 12, 2015).

⁸⁹ Noesen v. Med. Staffing Network, Inc., 232 Fed. Appx. 581 (7th Cir. 2007).

⁹⁰ *Id.* at 583.

⁹¹ Wheaton Coll. v. Burwell, 791 F.3d 792, 796 (7th Cir. 2015).

⁹² Slater v. Douglas Cty., 743 F. Supp. 2d 1188 (D. Or. 2010).

⁹³ *Id.* at 1195.

associate those views with the government. That view—that same-sex marriages are not recognized by the state—is constitutionally impermissible. Thus, by accommodating Davis is the state associating *itself* with her constitutionally impermissible views on marriage?

In both *Lawrence v. Texas*,⁹⁴ and *Romer v. Evans*,⁹⁵ a purposive inquiry was a central element of the Court's conclusion that the state had acted unconstitutionally.⁹⁶ The *Lawrence* Court invalidated Texas's sodomy statute as unconstitutional not merely because the state might impose a prison sentence on gay men and lesbians for engaging in sexual activity, but because the state had the purpose of expressing its moral disapproval of a group.⁹⁷ The state was not permitted to “demean their existence or control their destiny by making their private sexual conduct a crime.”⁹⁸ Application of the KRFA to facilitate Davis' views on the marriages of same-sex couples puts the state, itself, in the position of furthering an unconstitutional *purpose*. In other words, her request for a broad exemption is a pretext for the impermissible expression by the state of the moral disapproval of a group.

IV. THE FUTURE

Resistance to same-sex marriage on religious grounds is unlikely to end any time soon. Two states have passed laws to exempt some state employees from facilitating same-sex marriages in conflict with their religious beliefs.⁹⁹ Those statutes ensure that marriage licenses or certificates will be issued in the couple's county, even if an individual employee does not participate in that process.¹⁰⁰ Those exemptions, however, may be constitutionally problematic if

⁹⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹⁵ *Romer v. Evans*, 517 U.S. 620 (1996).

⁹⁶ *See, e.g., id.* at 633 (“[W]e ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”).

⁹⁷ *See id.* at 644 (Scalia, J., dissenting); *see also Lawrence*, 539 U.S. at 567 (stating that “[t]heir penalties and purposes . . . have more far-reaching consequences”) (emphasis added).

⁹⁸ *Lawrence*, 539 U.S. at 578.

⁹⁹ *See* N.C. GEN. STAT. ANN. § 51-5.5 (West, Westlaw through ch. 237, 2015 Reg. Sess.) (“Recusal of certain public officials”); UTAH CODE ANN. § 17-20-4 (LexisNexis 2013) (“Duties of country clerk”).

¹⁰⁰ In North Carolina, the assistant register of deeds and deputy register of deeds has the right to recuse themselves from issuing marriage licenses but the register of deeds has the responsibility to ensure that licenses are still issued. § 51-5.5(b). In Utah, the county clerk must name a designee if he or she is unwilling to solemnize a legal marriage. § 17-20-4(2). In North Carolina, according to a news report, there is a county in which all magistrates have refused to issue marriage licenses. *See* Beth Walton, *McDowell Magistrates Refuse to Perform Marriages*, CITIZEN-TIMES (Sept. 11, 2015), <http://www.citizen-times.com/story/news/local/2015/09/10/mcdowell-magistrates-refuse-perform-marriages/72018392/> [http://perma.cc/YQR4-D9ZB].

they are a pretext for the state expressing its moral disapproval of the marriages of same-sex couples.

The problem for some county clerks around the country is that they simply may be unable to work in a job with a primary duty of issuing marriage licenses in conformance with state and federal law, because they would consider their actions to be facilitating same-sex marriages. They may not even feel comfortable engaging in the kind of notifications required by the state statutes exempting clerks from facilitating same-sex marriages. Like the pharmacist in *Noesen*, who was unwilling to cooperate with co-workers to fill prescriptions for contraceptives, some clerks may remain unwilling to cooperate with co-workers to ensure the issuance of marriage licenses and certificates.

Some jobs in our society conflict with people's religious or moral beliefs. A Sabbath-observing Jew cannot work at a job with Saturday-only hours. A pacifist-Quaker cannot work in a combat position in the armed forces. County clerk may be a job that is not suitable for someone opposed to same-sex marriage on religious grounds. It may be time for Davis to look for a new job because her request for a religious accommodation may not be possible without the state facilitating conduct that unconstitutionally demeans the marriages of same-sex couples.