

2016

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## Recommended Citation

Neugold, Cassie, "Religious Exercise and Objections to Performing Same-Sex Marriage: An Analysis of Kim Davis' Claim" (2016).  
*Law School Student Scholarship*. 829.  
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February 1, 2016  
Religion and the First Amendment  
AWR Paper

**Religious Exercise and Objections to Performing Same-Sex Marriage:**  
*An Analysis of Kim Davis's Claim*

**I. Introduction**

While the decision in Obergefell v. Hodges<sup>1</sup>, concluding that the right to marry is a fundamental one for both same-sex and opposite sex couples, is applauded by some and rejected by others, what cannot be denied is the host of secondary issues the decision brought with it, both on a state and federal level. One such problem is how to handle the objections of those opposed to same-sex marriage for religious reasons whose jobs task them with responsibilities related to marriage. Especially when those individuals are government employees, charged with carrying out governmental duties, the line between religious exercise protected by the Free Exercise Clause of the First Amendment, and Establishment Clause violations prohibited by the First Amendment, can often become blurred. Now that the law of the land requires states to allow same-sex couples to marry, questions of the duties of state employees responsible for carrying out state marriage licensing requirements are even more important.

An example of such a controversy that has recently risen to the national spotlight is the debate surrounding Kim Davis, the County Clerk of Rowan County, Kentucky, who, because of her religious beliefs, stopped issuing marriage licenses to opposite sex couples and refused to issue marriage licenses to same-sex couples after the decision in Obergefell.<sup>2</sup> As County Clerk, Davis

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<sup>1</sup> Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

<sup>2</sup> Alan Binder and Richard Perez-Pena, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, THE NEW YORK TIMES (Sep. 1, 2015), [http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?\\_r=0](http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?_r=0).

is responsible for “general clerical duties of the fiscal court.”<sup>3</sup> Because of her position and job responsibilities, Davis’ name and signature are required on every marriage license issued in Rowan County.<sup>4</sup> Davis’ objection garnered so much national attention that it has become a rallying point upon which even Presidential hopefuls comment.<sup>5</sup> Pope Francis’s brief meeting with Davis during his visit to the United States similarly caused controversy, prompting the Vatican to go to great lengths to distance the Pope from the situation after the fact.<sup>6</sup> The support for and opposition against Kim Davis has been largely split along party lines, with several surprising exceptions.<sup>7</sup> While coverage of the issue has become highly politicized, it does have important implications moving forward post-Obergefell. As such, it is important to analyze how this situation will be dealt with in the court system.

#### A. *Facts*

Kim Davis, the County Clerk for Rowan County, Kentucky, gained national recognition when she refused to issue marriage licenses to same-sex (or opposite sex) couples following the United States Supreme Court’s decision in Obergefell.<sup>8</sup> After the decision, Kentucky Governor Steven Beshear notified all County Clerks that they should follow the new law of the land as announced

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<sup>3</sup> ROWAN COUNTY CLERK, rowancountyclerk.com (last visited Jan. 29, 2016).

<sup>4</sup> See Binder and Perez-Pena, *supra* note 2.

<sup>5</sup> Presidential hopeful Mike Huckabee was seen with Davis at a public appearance and started a petition to President Obama, Attorney General Lynch, and Judge Bunning requesting the release of Davis from custody after she was held in contempt of court. MIKE HUCKABEE, <http://www.mikehuckabee.com/freekimdavis> (last visited Jan. 29, 2016).

<sup>6</sup> Emma Green, *Why Did Pope Francis Meet With Kim Davis?*, THE ATLANTIC (Sep. 30, 2015), <http://www.theatlantic.com/politics/archive/2015/09/pope-francis-allegedly-met-with-kim-davis-what-does-it-mean/408166/>.

<sup>7</sup> Surprisingly, the Mormon Church has taken a stand against Kim Davis’s actions, arguing that although they oppose same-sex marriage, she should have followed the law. See Jack Healy, *Mormons, still against same-sex marriage, take stand against Kim Davis*, THE SEATTLE TIMES, (Oct 22, 2015 at 4:57 P.M.), <http://www.seattletimes.com/nation-world/mormons-still-against-same-sex-marriage-take-stand-against-kim-davis/>.

<sup>8</sup> See Binder and Perez-Pena, *supra* note 2.

in Obergefell, and issue same-sex marriage licenses.<sup>9</sup> A new marriage license form that was gender-neutral, rather than listing husband and wife was attached to the notification.<sup>10</sup> Three days after the decision was handed down, Davis, citing her Christian beliefs, stopped issuing marriage licenses and forbade those below her from issuing licenses for any couples. Her intention was to avoid discriminating against same-sex couples by refusing to issue any marriage licenses at all, thus precluding opposite sex couples, as well as same-sex couples from marrying.<sup>11</sup> A few days later, the American Civil Liberties Union (ACLU) sued Davis on behalf of four couples (two same-sex and two opposite sex).<sup>12</sup> U.S. District Judge for the District of Kentucky, David Bunning, granted the Plaintiffs' preliminary injunction, and ordered Davis to issue licenses to same-sex (and opposite sex) couples. After a series of pleas to higher courts to overrule the District Court's ruling, Davis was found in contempt of court for continuing to prevent the issuance of marriage licenses and was jailed for five days in September of 2015.<sup>13</sup> Upon her release, pending further litigation on the matter, a compromise was struck under which the Office of County Clerk of Rowan County would continue to issue marriage licenses, but Deputy Clerks, rather than Davis herself would sign the marriage license.<sup>14</sup>

Davis' actions leading up to the announcement of the Supreme Court's decision reveal a carefully planned attempt to continue carrying out her job responsibilities in the manner she believed her religious beliefs mandated, regardless of which way the Court decided. Before the

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<sup>9</sup> Emergency Application to Stay Preliminary Injunction Pending Appeal of Applicant, at E-34, Davis v. Miller, (No. A15-\_\_) [*hereinafter* App. to Stay Prelim. Inj.].

<sup>10</sup> *Id.*

<sup>11</sup> See Binder and Perez-Pena, *supra* note 2.

<sup>12</sup> Mike Wynn and Chris Kenning, *Timeline of Kentucky clerk's gay marriage defiance*, USA TODAY (Sep. 3, 2015 at 8:30 P.M.), <http://www.usatoday.com/story/news/politics/2015/09/03/ky-clerk-gay-marriage-timeline/71670068/>.

<sup>13</sup> Richard Perez-Pena, *Governor-Elect Pledges to Take Clerk's Name Off Kentucky Licenses*, THE NEW YORK TIMES, (Nov. 6, 2015), [http://www.nytimes.com/2015/11/07/us/kentucky-governor-elect-vows-to-remove-clerks-names-from-marriage-licenses.html?\\_r=0](http://www.nytimes.com/2015/11/07/us/kentucky-governor-elect-vows-to-remove-clerks-names-from-marriage-licenses.html?_r=0).

<sup>14</sup> *Id.*

Supreme Court announced its decision in Obergefell, Davis reached out to the Kentucky Legislature and Governor Beshear asking for the government to consider a bill that would protect her and similarly situated clerks if the Supreme Court were to rule that same-sex marriage is a constitutionally protected right, which it eventually did.<sup>15</sup> In a letter to Kentucky Senator Robertson, Davis wrote: “I wanted to have the option, as a person who has deep moral conviction, to choose not to discriminate any party, by allowing a Clerk to apply for an exemption for the issuance of marriage licenses.”<sup>16</sup> Although the deadline for presentation of bills on the floor was around the corner when Davis wrote to Senator Robertson, she expressed her belief that it was “imperative that we be ready to stand with our uncompromising convictions, holding strong to our morals, and beliefs,” in the event that the Supreme Court ruled as it eventually did.<sup>17</sup> Likewise, about a week after the ACLU filed suit against Davis, a different group of county clerks made a plea for a special session of the Kentucky Legislature to be called so that a bill could be passed to accommodate those who have religious objections to issuing same-sex marriage licenses, but were denied by Governor Beshear.<sup>18</sup> Although her attempts to reach the Kentucky Legislature and Executive went unheard, Kim Davis decided to pursue the same route anyway and refused to issue marriage licenses to same-sex couples.<sup>19</sup>

While Davis’s situation in Kentucky has garnered national attention, with many expecting a courtroom showdown, it seems the tides have turned in Kentucky. Governor Beshear, who has “insisted that an act of the Legislature [is] required to change the [marriage form and that a governor could not do it unilaterally,” will leave office on December 8, 2015.<sup>20</sup> Governor-elect,

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<sup>15</sup> App. to Stay Prelim. Inj. at E-36.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Perez-Pena, *supra* note 13.

<sup>19</sup> See Binder and Perez-Pena, *supra* note 2.

<sup>20</sup> Perez-Pena, *supra* note 13.

Matt Bevin has made his views on the controversy known, promising to remove the names of county clerks from the marriage forms.<sup>21</sup> Bevin plans on removing the names of county clerks by executive order, as one of his first acts as Governor of Kentucky when he takes office early this December.<sup>22</sup> Bevin's ultimate goal is to create a system in which marriage licenses are not "something that the government grants; rather it should be a form that anyone can download at will, and then submit to the government purely to be recorded."<sup>23</sup> It remains to be seen what changes will occur in Kentucky once Governor-Elect Bevin takes office, but based on his public statements thus far, it seems that Bevin anticipates a quick resolution to the controversy, specifically, a resolution that does not include further litigation. Nonetheless, Davis's dilemma is important because it is likely to occur in other states as well.

### *B. Litigation History*

While the media's interest in Kim Davis intensified after the court found her in contempt and placed her in jail for five days, from a legal standpoint, much of import happened both before and after her jailing. Immediately following the decision in Obergefell, Davis stopped issuing any marriage licenses, after her repeated attempts with Kentucky legislators to provide some protection for conscientious objectors were left unanswered.<sup>24</sup> In July of 2015, just one week after the Supreme Court decided Obergefell, which recognized marriage between same-sex couples as a fundamental right guaranteed by the Constitution,<sup>25</sup> four couples (two same-sex and two opposite sex) through the ACLU filed suit against Kim Davis in the District Court for the District of

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<sup>21</sup> See Perez-Pena, *supra* note 13.

<sup>22</sup> See Perez-Pena, *supra* note 13.

<sup>23</sup> Perez-Pena, *supra* note 13.

<sup>24</sup> App. to Stay Prelim. Inj. at 9.

<sup>25</sup> Obergefell v. Hodges, 135 S. Ct. 1039 (2015).

Kentucky.<sup>26</sup> The plaintiffs demanded that Davis issue them marriage licenses in Rowan County, and sought a preliminary injunction to bar Davis from “refusing to issue marriage licenses to any future marriage license applications submitted by the Named Plaintiffs.”<sup>27</sup> In response, Davis filed a verified third-party Complaint against Governor Beshear, as well as the Commissioner of the Kentucky Department for Libraries and Archives, the state agency that designed the marriage license forms.<sup>28</sup> Davis also filed a motion for preliminary injunction to enjoin enforcement of the same-sex marriage mandate and to obtain an exemption from the job responsibility of authorizing the issuance of marriage license in Kentucky.<sup>29</sup>

The District Court for the District of Kentucky entered an injunction against Davis enjoining her from “applying her ‘no marriage licenses’ policy to future marriage license requests from the named plaintiffs.”<sup>30</sup> District Court Judge David Bunning poignantly summed up the issue underlying the litigation:

At its core, this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence. One is the fundamental right to marry implicitly recognized in the Due Process Clause of the Fourteenth Amendment. The other is the right to free exercise of religion explicitly guaranteed by the First Amendment. Each party seeks to exercise one of these rights, but in doing so, they threaten to infringe upon the opposing party’s rights. The tension between these constitutional concerns can be resolved by answering one simple question: Does the Free Exercise likely excuse Kim Davis from issuing marriage licenses because she has a religious objection to same sex marriage?<sup>31</sup>

Judge Bunning went on to answer that question in the negative.<sup>32</sup>

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<sup>26</sup> App. to Stay Prelim Prelim. Inj. at 9.

<sup>27</sup> *Id.* at 10.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Miller v. Davis*, No. CIV. A. 15-44 DLB, 2015 WL 4866729 at \*1 (E.D. Ky. Aug. 12, 2015).

<sup>32</sup> *Id.*

As this was a motion for preliminary judgment, Judge Bunning began by addressing the Plaintiff's likelihood of success on the merits.<sup>33</sup> First addressing the fundamental right to marry, Judge Bunning found that, "much like the statutes in *Loving* and *Zablocki*, Davis's 'no marriage licenses' policy significantly discourages many Rowan county residents from exercising their right to marry and effectively disqualifies others from doing so."<sup>34</sup> Davis attempted to refute the Plaintiffs' argument by bringing forth evidence that there were several other options for obtaining marriage licenses.<sup>35</sup> The court, however, denied each of these alternatives in turn. Davis argued that the County Executive Judge could issue the licenses to the couples.<sup>36</sup> The court disagreed with Davis's interpretation of the Kentucky statute allowing the County Executive Judge to issue marriage licenses in the absence of the County Clerk, and found that the application of the statute as suggested by Davis would be a "manipulation of statutorily defined duties."<sup>37</sup> Davis also argued that post-*Obergefell*, more options would be available for couples to seek marriage licenses.<sup>38</sup> The court found that those were not feasible present alternatives, and thus, had "no impact on the Court's 'substantial interference' analysis."<sup>39</sup> Davis's strongest argument was that the Plaintiffs could obtain marriage licenses from any of the seven counties surrounding Rowan County.<sup>40</sup> Yet, the court took issue with this argument as well, worrying that implicit within that argument is the presumption that no other County Clerks would abstain from granting marriage license to same sex-couples even if Davis was successful.<sup>41</sup> While ultimately finding that this was the only feasible alternative, the court was not satisfied, posing the question, "[e]ven if Plaintiffs are able

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<sup>33</sup> *Id.* at 10.

<sup>34</sup> *Id.* at 14.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 11.

<sup>37</sup> *Id.* at 13.

<sup>38</sup> *Id.* at 14.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 12.

<sup>41</sup> *Id.* at 12.



to obtain licenses elsewhere, why should they be required to?”<sup>42</sup> Because the policy significantly discourages Rowan County residents from exercising their right to marry, the court applied a heightened level of scrutiny to the policy.<sup>43</sup>

Since Davis’s action was found to be subject to strict scrutiny, Judge Bunning addressed the state’s compelling interest.<sup>44</sup> Davis argued that the state interest at play was its “interest in protecting her religious freedom.”<sup>45</sup> Although Judge Bunning agreed that the state does have a compelling interest in protecting free exercise, he found that the State had several compelling interests that ran contrary to Davis’s action, including the interest in preventing Establishment Clause violations and the interest in upholding the rule of law.<sup>46</sup> Because Davis failed to meet the strict scrutiny test, the court concluded that the “policy likely infringes upon Plaintiffs’ rights without serving a compelling state interest,” and that “Plaintiffs have demonstrated a strong likelihood of success on the merits of their claim.”<sup>47</sup> Thus, the first factor of the test for a preliminary injunction weighed in favor of the plaintiffs. The court further found that because the right to marry is a fundamental constitutional right, denial of that right results in irreparable harm, thus the second factor also weighed in favor of the plaintiffs.

In assessing whether a preliminary injunction would substantially harm Davis, the third factor in the analysis, the court held that Governor Beshear’s directive did not aim to suppress religious practice<sup>48</sup> and that because Davis’s “speech (in the form of her refusal to issue marriage licenses) is a product of her official duties, it is not likely entitled to First Amendment protection,” thus

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<sup>42</sup> *Id.* at 14.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 15.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 19.

Davis is “unlikely to succeed on her compelled speech claim.”<sup>49</sup> Judge Bunning also dismissed Davis’s argument that conducting her job duties would violate the Religious Test Clause of Article VI of the Constitution.<sup>50</sup> Finally, Davis argued that she would suffer substantial harm under the Kentucky RFRA if the preliminary injunction were granted.<sup>51</sup> The court did not agree that Davis was being substantially burdened, because she was “simply being asked to signify that couples meet the legal requirements to marry. The State [was] not asking her to condone same-sex unions on moral or religious grounds, nor [was] it restricting her from engaging in a variety of religious activities.”<sup>52</sup> Thus, the third factor, whether or not Davis would be substantially harmed by the grant of preliminary injunction, also weighed in favor of the plaintiffs.

Finally, the court considered the public interest.<sup>53</sup> Judge Bunning found that because it is in the best interest to preserve constitutional rights, and because Davis’s policy not only burdens the constitutional rights of others, but is also unlikely to be afforded constitutional protection, the fourth factor weighed in favor of the Plaintiffs as well.<sup>54</sup> Finding that all four factors weighed in favor of granting the requested relief, the Plaintiffs’ motion for preliminary injunction against Kim Davis was granted and Davis’s motion for preliminary injunction was dismissed.<sup>55</sup>

After the August 12, 2015 decision by U.S. District Judge David Bunning, Davis applied to the U.S. Court of Appeals for the Sixth Circuit to grant a stay of Bunning’s decision.<sup>56</sup> When the Sixth Circuit denied the motion, Davis applied for a grant of stay to the United States Supreme Court, which also refused to grant the stay.<sup>57</sup> Her brief to the United States Supreme Court made

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<sup>49</sup> *Id.* at 25.

<sup>50</sup> *Id.* at 26.

<sup>51</sup> *Id.* at 27.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 28.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Wynn and Kenning, *supra* note 12.

<sup>57</sup> See Wynn and Kenning, *supra* note 12.

essentially the same arguments she made to the District Court.<sup>58</sup> Two days after the Supreme Court's denial, on September 3, 2015, Davis was found in contempt of court for continuing to stop marriage licenses from being issued in Rowan County and was taken to jail.<sup>59</sup> After five days in jail, a compromise was reached that would allow Davis to return to work and oversee the issuance of marriage licenses, while not being forced to sign same-sex marriage licenses herself.<sup>60</sup>

### *C. Roadmap of the Paper*

This paper will attempt to analyze Kim Davis's situation, which is likely to come up in other counties in Kentucky and in other states in the United States, through the lens of both Kentucky and Federal law. This paper will also look to approaches taken in nations that legalized same-sex marriage earlier than the United States and as such, have more experience crafting solutions to deal with civil servants' religious objections to aspects of their jobs that in some way involve marrying same-sex couples.

Part II of this paper will give a general background of the Free Exercise Clause of the First Amendment to set the stage for the analysis of Kim Davis's argument that her objection to signing same-sex marriage licenses is protected by the First Amendment and related statutes. Next, Part III of this paper will evaluate Davis's claim under Kentucky state law, including the Kentucky Constitution and the Kentucky Religious Freedom and Restoration Act (K-RFRA). Part III will also examine generally whether similar RFRA statutes in other states would grant the same protection to those similarly situated to Kim Davis. Part IV of this paper will analyze Davis's claim under Federal law, recognizing that as a general proposition, a lessened level of scrutiny applies federally because the Supreme Court invalidated the Federal RFRA. Part IV will also

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<sup>58</sup> See App. to Stay Prelim. Inj.

<sup>59</sup> See Wynn and Kenning, *supra* note 12.

<sup>60</sup> See Perez-Pena, *supra* note 13.

consider, by analogy, whether Davis would have any recourse against the Federal government, if she had been fired for her religious objection. Part IV will end by providing a brief summary of the approaches taken abroad to similar situations, and deciding whether these techniques could prove useful in the United States. Finally, Part V of this paper will conclude by summing up and offering final remarks regarding the general trends to watch for and the possibilities in this area of First Amendment law.

## II. Background of Free Exercise Clause

The First Amendment to the United States Constitution states in relevant part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”<sup>61</sup> Two distinct protections are provided by the Religion Clauses of the First Amendment: protection of the Free Exercise of Religion and protection against Establishment of Religion.<sup>62</sup> There is tension between these two clauses:

On the one hand, the government is prohibited from establishing religion. On the other hand, the free exercise of religion cannot be prohibited. By allowing the free exercise of religion, the government runs the risk of showing favoritism towards a certain religion. This may be construed as encouraging the establishment of that religion or sect.<sup>63</sup>

The Free Exercise Clause of the First Amendment is the clause that is relevant for purposes of analyzing Kim Davis’s claims.<sup>64</sup> While the Free Exercise Clause will be the focus of analysis, the

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<sup>61</sup> U.S. CONST., amend. 1.

<sup>62</sup> Philip Spare, *Free Exercise of Religion: A New Translation*, 96 DICK. L. REV. 705, 707 (1992).

<sup>63</sup> *Id.*

<sup>64</sup> “Most free exercise claims involve requests for exemptions from laws that interfere with how a group or individual practices religion . . . The jurisprudence of free exercise, in short, is the jurisprudence of constitutionally compelled exemption.” *Id.* at 706. Here, Kim Davis is seeking an exemption from the duty of signing same-sex marriage licenses, or in the alternative, an exemption from signing marriage licenses altogether.

Establishment Clause is relevant here because it provides important limits on the Free Exercise Clause. As it is the main body of law implicated here, a brief history of the Free Exercise Clause is crucial in understanding Davis's current situation and the possible legal outcomes.

Although the Free Exercise Clause became law when the Bill of Rights was signed in 1791, it was not until 1878 that the Supreme Court decided what is considered to be the first significant case involving the Free Exercise Clause.<sup>65</sup> In Reynolds v. United States, a Mormon man was charged with violating a federal law prohibiting the practice of polygamy.<sup>66</sup> The Court considered the question of whether the Free Exercise Clause of the Constitution mandated an exception for those whose religion included the practice of polygamy.<sup>67</sup> After partaking in an historical analysis of the views of Madison and Jefferson, and of the drafting of the First Amendment, the Court concluded that while Congress could not regulate opinion, it could legislate against actions.<sup>68</sup> The distinction made in Reynolds between belief and actions – that Congress could not regulate belief, but could regulate action – is still an important part of free exercise law.<sup>69</sup>

In 1940, in Cantwell v. Connecticut, the Free Exercise Clause was incorporated through the Due Process Clause of the Fourteenth Amendment and made applicable to the states, vastly increasing the potential for Free Exercise litigation and development in the law.<sup>70</sup> In a case involving Jehovah's Witnesses right to proselytize, the Court reiterated the holding of Reynolds, concluding that while the freedom to believe is absolute, the freedom to act cannot be absolute.<sup>71</sup> Cantwell is also notable as the first of many cases in the 1940s in which the outcome of a Free

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<sup>65</sup> *Id.* at 707.

<sup>66</sup> Reynolds v. United States, 98 U.S. 145, 158 (1878).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Spare, supra* note 62 at 707.

<sup>70</sup> Cantwell v. State of Connecticut, 310 U.S. 296, 301 (1940).

<sup>71</sup> *Id.*

Exercise analysis was largely dependent on whether any other constitutional rights were involved in the religious conduct.<sup>72</sup>

In 1963, in Sherbert v. Verner, the Supreme Court reevaluated the test to be used in Free Exercise cases.<sup>73</sup> In Sherbert, the Court held that a South Carolina textile worker who was fired because she refused to work on her Sabbath, which fell on Saturdays, could not be denied unemployment compensation benefits.<sup>74</sup> The Court set forth a three-prong test, which raised the level of scrutiny in Free Exercise cases whether or not another fundamental right is involved.<sup>75</sup> First, the court should determine whether a law imposes a burden on free exercise. Second, if a burden is found, the court is tasked with determining whether the government has a compelling interest that justifies the burden. Finally, if the state has a compelling interest, it must show that the interest could not be achieved through a less restrictive means.<sup>76</sup> In perhaps the most expansive application of the Sherbert strict scrutiny test, in Wisconsin v. Yoder, the Court held that the State could not force the parents of Amish children to keep them in school until the age of sixteen.<sup>77</sup>

Sherbert was the law of the land until 1990, when the Court decided Employment Division, Department of Human Resources of Oregon v. Smith. The individual seeking Free Exercise protection in Smith was a drug counselor who was denied unemployment compensation after he was fired from his job at a rehabilitation center for ingesting peyote in a religious ceremony.<sup>78</sup> In Smith, the Court held that religious convictions do not excuse individuals from following neutral laws of general applicability.<sup>79</sup> Smith dramatically changed the way the Free Exercise Clause was

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<sup>72</sup> Spare, *supra* note 62 at 709.

<sup>73</sup> Sherbert v. Verner, 374 U.S. 398, 403 (1963).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Spare, *supra* note 62 at 712.

<sup>77</sup> Wisconsin v. Yoder, 406 U.S. 205, 208 (1972).

<sup>78</sup> Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

<sup>79</sup> *Id.*

construed, essentially reducing the strict scrutiny standard government action is held to, and instead applying a rational basis review where the law at issue is neutrally applicable.<sup>80</sup>

In 1993, as a reaction to Smith, Congress passed the Religious Freedom Restoration Act (RFRA).<sup>81</sup> The statute mandated strict scrutiny, so that once an individual brought forth evidence that their religious practice as substantially burdened, the government must come back with a showing of compelling interest and a showing that the method the government chose was the least restrictive means.<sup>82</sup> This level of review would apply whether or not the law was neutral and generally applicable.<sup>83</sup> In City of Boerne v. Flores, RFRA was held to be unconstitutional as applied to the states, as an improper exercise of Congress's enforcement power.<sup>84</sup> RFRA continues to be applicable to the federal government and many state governments have enacted their own Religious Freedom Restoration Acts.<sup>85</sup> As a result, the system of exemptions is fractured across the states and between the state and federal government, further complicating the issue of Kim Davis's objection to signing same-sex marriage licenses.

### III. State Analysis

#### A. Kentucky

Kim Davis's objection to issuing marriage licenses is a controversy that is likely to arise in other states post-Obergefell, thus it will be important to analyze similar situations in other states and on a federal level. Because this case of first impression will be decided under Kentucky law,

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<sup>80</sup> Spare, *supra* note 62 at 723.

<sup>81</sup> Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 129 (Winter 2015).

<sup>82</sup> *Id.* at 136.

<sup>83</sup> *Id.*

<sup>84</sup> *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

<sup>85</sup> Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State Rfras*, 55 S.D. L. REV. 466, 478 (2010).

it is crucial to first examine the existing legal landscape in Kentucky and what protections that landscape will and will not supply.

Section 5 of Kentucky’s Constitution guarantees the right to religious freedom. For purposes of this paper, the relevant portion of that section provides that: “...the civil rights, privileges, or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma, or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.”<sup>86</sup> While this language may give the impression that the Kentucky Constitution grants greater protection to the practice of religion than the First Amendment of the United States Constitution, the Supreme Court of Kentucky explicitly disavowed such an interpretation in Gingerich v. Commonwealth.<sup>87</sup> At issue in Gingerich was a Kentucky state statute requiring slower-moving vehicles to display an emblem to warn other vehicles of its slow speed.<sup>88</sup> Members of the Old Order Swartzentruber Amish claimed that both the color and the shape of the emblem were at odds with their religious beliefs, and that forcing them to display the emblem would be forcing them to adopt a symbol with which they did not agree.<sup>89</sup> In holding that the statute was constitutional and did not violate the rights of the Amish, the Court elaborated on the proper interpretation of Section 5 of the Kentucky Constitution.<sup>90</sup> The Court opined: “Certainly, the language in the Kentucky Constitution is more specific. But it is linguistically impossible for language to be more inclusive than that in the First Amendment...”<sup>91</sup> Citing Kentucky precedent that closely mirrors United States Supreme Court precedent, the Court continued, explaining that

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<sup>86</sup> K.Y. CONST. Sec 5.

<sup>87</sup> Gingerich v. Com., 382 S.W.3d 835, 837 (Ky. 2012).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 840.



...religious freedom has two components: freedom to believe and freedom to act. What one chooses to believe is an *absolute* freedom, which no power on earth can in reality arbitrate. But in the nature of things, freedom to act cannot be absolute in human society where beliefs and practices vary, and where a given practice, absolutely freely enacted, can inflict harm on others. Thus religious *conduct* must remain subject to regulation for the protection of society.<sup>92</sup>

Thus, Section 5 of the Kentucky Constitution has been interpreted similarly to the First Amendment of the United States Constitution in that a distinction has been recognized between the freedom to believe and the freedom to act, with the freedom to act less vehemently protected, allowing for actions based on one's religion subject to limitation, upon the government meeting a burden of proving that the limitation is necessary in order to protect the rights of others or the public good. In Gingerich, the Kentucky Supreme Court found that "statutes, regulations, or other governmental enactments which provide for the public health, safety, and welfare, and which are statutes of general applicability that only incidentally affect the practice of religion, are properly reviewed for a rational basis under the Kentucky Constitution, as they are under the federal constitution."<sup>93</sup> Thus, Gingerich confirms that the proper *constitutional* analysis to be applied to free exercise claims based on laws that are not directly aimed at religion is rational basis review.<sup>94</sup> Under rational basis review, legislative means must bear rational relationship to a legitimate state end, and laws will be held invalid when totally unrelated to the state's purpose in enacting the law.<sup>95</sup> As such, legislation requiring Kim Davis, or more generally, all county clerks to sign all marriage licenses, whether they be between same-sex or opposite-sex couples, would only be invalid if such a law bore no rational relation to the legislative purpose of carrying out marriage

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<sup>92</sup> *Id.* at 840-41.

<sup>93</sup> *Id.* at 843.

<sup>94</sup> It should be noted that this is the same standard that the Supreme Court adopted in Smith, which will be discussed later.

<sup>95</sup> Gingerich v. Com., 382 S.W.3d 835, 843 (Ky. 2012).

ceremonies. Although Davis relies on Section 5 of the Kentucky Constitution in her Emergency Application to Stay Preliminary Injunction Pending Appeal submitted to the United States Supreme Court, it is unlikely that a court would entertain such a claim.<sup>96</sup> Thus, the Kentucky Constitution alone does not protect Kim Davis.

Although the Kentucky Constitution alone would not likely protect Kim Davis, Kentucky is one of a sizable number of states that has legislatively enacted greater religious protection than that provided by either their state constitution or the federal Constitution. In 2013, Kentucky passed its Religious Freedom Restoration Act (K-RFRA), based on the federal Religious Freedom Restoration Act that was invalidated in City of Boerne.<sup>97</sup> The Kentucky law states that:

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 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.<sup>98</sup>

The effect of the state K-RFRA is to raise the standard that applies constitutionally (rational basis review) to strict scrutiny where free exercise claims are involved. As noted in Burwell v. Hobby Lobby Stores, Inc., by analogy, the K-RFRA is similar to the federal Religious Freedom Restoration Act, which was enacted to “provide very broad protection for religious liberty.”<sup>99</sup> RFRA analysis involves a two-step process: first, the claimant must show that his religious freedom is being substantially burdened; next, the government must meet strict scrutiny by

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<sup>96</sup> See App. to Stay Prelim. Inj.

<sup>97</sup> K.Y. REV. STAT. ANN. § 446.350 (West 2015).

<sup>98</sup> *Id.*

<sup>99</sup> Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014).

showing that there is a substantial government interest and that there are no less restrictive means for the government to fulfill that purpose.<sup>100</sup> The showing of burden on religious freedom has been interpreted broadly, in part because the courts are hesitant to analyze the validity of the claimant's religious beliefs, and instead attempt only to look at the sincerity of that belief.<sup>101</sup>

Although the breadth of RFRA seems vast, there is an important limit on its reach – the Establishment Clause of the First Amendment. As the United States Supreme Court explained in Cutter v. Wilkinson, “[o]ur decisions recognize that ‘there is room for play in the joints’ between the [Free Exercise and Establishment] Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause”<sup>102</sup> In other words, while the State must protect the free exercise of religion, in doing so, it cannot go so far as violating the Establishment Clause.<sup>103</sup> Although this limit does exist, in most cases dealing with the balance, the Court has refused to find that the government action to protect free exercise has gone far enough to violate the Establishment Clause.<sup>104</sup> Nevertheless, it is important to keep that limitation in mind in analyzing Free Exercise issues, as it also applies to state RFRA claims.

In applying Kentucky's K-RFRA to the facts at hand, Kim Davis has argued that Governor Beshear's directive “not only substantially burdens her free exercise rights by requiring her to disregard sincerely-held religious beliefs; it does not serve a compelling state interest.”<sup>105</sup> Davis

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<sup>100</sup> Miller v. Davis, No. CIV. A. 15-44 DLB, 2015 WL 4866729 at \*18-19 (E.D. Ky. Aug. 12, 2015).

<sup>101</sup> See Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 712 (1981) (where Thomas worked in a factory that produced metal that was later used to create military equipment. Thomas's religious beliefs were burdened when he was transferred from one part of the factory to another. In his previous job, the product of his work was further removed from completed military equipment. Although others who were members of the same religion would have had no problem with Thomas's new position, the Court nevertheless found that because his belief that this new position was against his religion was sincere, that was enough to reach the conclusion that transferring him to the new position was a burden on his religion.)

<sup>102</sup> Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Miller v. Davis, No. CIV. A. 15-44 DLB, 2015 WL 4866729 at \*19 (E.D. Ky. Aug. 12, 2015).

also argues that: “Governor Beshear could easily grant her a religious exemption without adversely affecting Kentucky’s marriage licensing scheme, as there are readily available alternatives for obtaining licenses in and around Rowan County.” Indeed, Davis lists several alternatives that she deems less restrictive than Governor Beshear’s post-Obergefell mandate. Davis argues that by mandating that she sign her name on a marriage certificate between same-sex couples, the State is forcing her to condone same-sex marriage, which she cannot do because of her religion.<sup>106</sup> The District Court found that the burden on Davis’s religious freedom is “more slight” than she argues. According to the District Court, “Davis is simply being asked to signify that couples meet the legal requirements to marry. The State is not asking her to condone same-sex unions on moral or religious grounds.”<sup>107</sup> In considering injunctive relief, the District Court did not reach the strict scrutiny analysis because it found that there was no burden on Davis’s practice of religion. Upon further review, in the context of a disposition on the merits of the case rather than an injunction, this conclusion may be questionable.

The District Court found that there was no substantial burden because it interpreted the act of signing the marriage certificate as simply certifying that the requirements for marriage have been met.<sup>108</sup> This holding, however, is inconsistent with the general tendency of courts to defer to claimant on the significance of the act that is in conflict with their religion.<sup>109</sup> This tendency, as noted, flows in part from the Court’s determination that while questioning the *sincerity* of an individual’s religious belief is proper, questioning the *correctness* or *importance* of those beliefs within the claimant’s belief system is improper. A court analyzing this situation on the merits,

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<sup>106</sup> *Id.* at 27.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) and *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 712 (1981).

rather than in determining whether an injunction should issue, very well may find that questioning Kim Davis’s claim that signing the marriage certificate forces her to condone same-sex marriage, which is against her religious beliefs, is an improper valuation of either the correctness of her beliefs, or the importance of those beliefs within her overall belief system. If that is the case, then a court would likely find that forcing Kim Davis to sign the marriage certificates or resign imposes a substantial burden on her free exercise rights.

The analysis of the burden question is critical because of the high burden that strict scrutiny puts on the government. The strict scrutiny standard of review has been called “strict in theory and fatal in fact.”<sup>110</sup> Although generally, when it comes to religious exemptions, strict scrutiny is considered less than fatal, it is still an enormous hurdle for the government to overcome.<sup>111</sup> It seems likely that a court would find that the Governor’s mandate fulfills a substantial state interest – that of carrying out the law the Supreme Court passed down in Obergefell. The least restrictive means test, however, may be harder for the government to satisfy.<sup>112</sup> Although the court took issue with several of the suggestions Davis proposed, several others were not addressed because the District Court did not reach the strict scrutiny test in its analysis. The court could find that something other than requiring Kim Davis to sign same-sex marriage certificates is the least restrictive means to pursue the government interest. Perhaps the court could even find that the temporary process in place currently, that Davis continues to oversee the County Clerk’s Office

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<sup>110</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>111</sup> See Colin A. Devine, *A Critique of the Secular Exceptions Approach to Religious Exemptions*, 62 UCLA L. REV. 1348, 1352-53 (2015).

<sup>112</sup> In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court expressed the least restrictive means test as “requir[ing] the Government to demonstrate that the compelling interest test is satisfied through the application of the challenged law to the person – the particular claimant whose sincere exercise of religion is being substantially burdened.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). Likewise, the Court in *Burwell v. Hobby Lobby Stores, Inc.*, expressed the “exceptionally demanding” nature of the least restrictive means test. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2780 (2014).

and is not required to sign the same-sex marriage certificates, but is required not to interfere with their signing, is a less restrictive means. It is reasonably possible that if the burden determination is overturned, the government may fail strict scrutiny and be forced to grant an exemption to Kim Davis.

### *B. Other States*

Kim Davis's situation will be resolved using Kentucky law, but because this question is likely to arise in other states as well, it is helpful to determine how this issue would be resolved under state law in states that do not have the same framework as Kentucky. Seventeen states, including Kentucky, have Religious Freedom Restoration Acts and eleven states have interpreted their state constitutions' religious freedom provisions to require strict scrutiny, thus rendering a similar result as a state RFRA would.<sup>113</sup> One state, Alabama, has enacted a constitutional amendment similar to an RFRA.<sup>114</sup> Four states have held that there is no strict scrutiny under the state constitution and have no state RFRA.<sup>115</sup> Twelve additional states have no state RFRA and have made no decision on their state constitution.<sup>116</sup> In four states, courts have explicitly expressed their uncertainty, but have declined to resolve the question.<sup>117</sup> One state, New York, has interpreted its constitutional religious freedom provisions to require weak intermediate scrutiny.<sup>118</sup>

In states with RFRA, states that have interpreted their state constitutions' religious freedom provisions to require strict scrutiny, and the state with a RFRA-like constitutional amendment, the result of the analysis would be the same as in Kentucky. In states that have no RFRA, states that

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<sup>113</sup> See *25 State Religious Freedom Restoration Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Sep. 3, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

have made no decision regarding their state constitution, and states that have expressed uncertainty and declined to resolve the issue, it is futile to attempt to guess what standard the court will use. In states with no state RFRA that have decided that strict scrutiny standard does not attach to their constitutional religious freedom provisions, Smith would apply. Under Smith, “the right of free exercise does not relieve an individual of the obligation to comply with ‘valid and neutral laws of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>119</sup> In other words, where a law is valid and neutral in its applicability and does not specifically have the purpose of regulating religious activity,<sup>120</sup> free exercise of religion is no defense to failing to abide by the law.<sup>121</sup> In a state that follows Smith, Kim Davis, or a similarly situated clerk would be offered no protection. Governor Beshear’s mandate requiring County Clerks to authorize same-sex as well as opposite-sex marriages, is not aimed at regulating religion; rather, its purpose is to carry out the law of the land after Obergefell. Thus, Kim Davis’s religious objections would not *require* an accommodation from the government.<sup>122</sup>

New York’s state interpretation of religious freedom is an interesting case which may lead to results different than anywhere else in the nation. New York courts have interpreted the state constitutional protection as requiring a weak intermediate scrutiny.<sup>123</sup> The Court of Appeals of New York traced the history of the state’s constitutional religious freedom protections and laid out

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<sup>119</sup> *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

<sup>120</sup> See Lukumi for an example of a case where a law is aimed at regulating religion and not valid and neutral in its applicability. In Lukumi, the zoning laws were put in place to stop the religious group specifically from conducting rituals involving animal sacrifice, which was a central tenet of the religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>121</sup> *Smith*, *supra* note 119.

<sup>122</sup> Whether or not an accommodation would be required is a different question than whether or not an accommodation would be allowed. See *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) for clarification on the permissible use of accommodations that are neither required by the Free Exercise Clause nor prohibited by the Establishment Clause.

<sup>123</sup> *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (NY, 2006).

the test to be used in Catholic Charities of the Diocese of Albany v. Serio.<sup>124</sup> The court explained that it had previously held “that when the State imposes ‘an incidental burden on the right to free exercise of religion’ we must consider the interest advanced by the legislation that imposes the burden, and that ‘the respective interests must be balanced to determine whether the incidental burdening is justified.’”<sup>125</sup> The court further acknowledged that it had never set out “how the balancing is to be performed.”<sup>126</sup> To give clear guidance to lower courts, the court postulated that: “substantial deference is due the Legislature, and that the party claiming an exemption bears the burden of showing that the claimed legislation, as applied to that party, is an unreasonable interference with religious freedom.”<sup>127</sup> The test laid out by the court, while less defensive of religious rights than the strict scrutiny tests adopted in many state RFRAs, is more protective of religious exercise than the default rule, as laid out in Smith, that would otherwise apply. While holding that the burden of “showing that an inference with religious practice is unreasonable, and therefore requires an exemption from the statute, must be on the person claiming the exemption,” the court pointed out that the burden “should not be impossible to overcome.”<sup>128</sup>

At issue in Catholic Charities was the Women’s Health and Wellness Act, which mandated expanded health insurance coverage for various services needed by women.<sup>129</sup> A provision of the law required employer health insurance contracts that provide coverage for prescription drugs to include coverage for contraceptive drugs or devices.<sup>130</sup> The statute included an exemption for religious employers, but Catholic Charities argued that the exemption was unconstitutionally narrow, as to violate their free exercise rights, because it excluded church-affiliated groups, like

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<sup>124</sup> *Id.* at 525.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 526.

<sup>129</sup> *Id.* at 518.

<sup>130</sup> *Id.*



Catholic Charities, that were not closely enough affiliated with the religious entity to meet the religious employer exemption.<sup>131</sup> The court found that Catholic Charities “fell short of making a showing that the State interfered unreasonably with their right to practice religion.”<sup>132</sup> While the court recognized that the law placed a burden on Catholic Charities religious practices, it pointed out that the law does not compel them to purchase contraceptive coverage for their employees; rather, “policies that provide prescription drug coverage include coverage for contraceptives. Plaintiffs are not required by law to purchase prescription drug coverage at all.”<sup>133</sup> As such, while the law did burden the plaintiff’s rights, it did not *substantially* burden the plaintiffs’ rights. In contrast to the burden on the plaintiffs’ exercise of religion, was the importance of the State’s substantial interest in providing better health care; specifically providing better health care for women, based on comprehensive evidence that women received less adequate healthcare coverage than men. Further, the legislature specifically considered including a broader religious employer exemption, but determined that doing so would leave too many women uncovered by the statute. Accordingly, Catholic Charities failed the intermediate scrutiny test.

Decisions of the appeals courts interpreting the New York constitutional protection of the free exercise of religion (and not the federal Constitution protection of the free exercise of religion), and its application of the rule in Catholic Charities, tend to show that the courts generally reject free exercise claims under this balancing test.<sup>134</sup> It seems likely that given this standard, a free exercise claim like Kim Davis’s would be rejected in New York. If Davis’s claim were to be heard in New York, the court would have to balance the interest of her right of religious worship against the interest the state seeks to enforce, here, the implementation of the United States Supreme

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<sup>131</sup> *Id.* at 520.

<sup>132</sup> *Id.* at 527.

<sup>133</sup> *Id.*

<sup>134</sup> *See* PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK, 10 (1996).

Court's mandate that same-sex couples have a fundamental right to marry. Based on New York precedent, it is more than likely that the state's interest in carrying out the law would outweigh Davis's objection to her part in enforcing the new law after Obergefell.<sup>135</sup> In analyzing how this situation would turn out under various state laws, it seems that, in states with RFRA or constitutional interpretation requiring strict scrutiny, a free exercise claim like Kim Davis's may have some merit. To the contrary, in New York, which uses a weak intermediate scrutiny, and states that apply rational basis review, it seems likely that the state interest would outweigh Davis's free exercise claim.

#### **IV. Federal Analysis**

##### *A. Smith applies*

While the decision of how to handle Kim Davis and other religious objectors who refuse to carry out same-sex marriages is currently being decided on a state-by-state basis, it is important to determine how this issue would be determined on a federal level, because such issues may arise on a federal level in the future. Alternatively, the federal government may have to step in to make sure that federal fundamental rights are protected. As a starting proposition, on the federal level Smith would apply. Under Smith, no religious accommodation is required for a valid and neutral law of general applicability.<sup>136</sup> While this, of course, does not mean that the government is forbidden from extending an accommodation, the court cannot force the government to grant an

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<sup>135</sup> See *La Rocca v. Lane*, 37 N.Y.2d 575, 580 (1975), where the Court held that “the religious practice was found to conflict with the State’s paramount duty to insure a fair and impartial trial. The respective interests must be balanced to determine whether the incidental burdening is justified.” If the State’s interest in ensuring a fair and impartial trial is a “paramount interest” that outweighs religious freedom, it seems that the State’s interest in putting into place procedures to carry out fundamental rights would be considered a “paramount interest” that would also outweigh a religious objection based on a Free Exercise claim.

<sup>136</sup> *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

exemption from the law.<sup>137</sup> Where Smith applies, Kim Davis and similarly situated clerks are not protected or guaranteed an exemption from the law. Governor Beshear's mandate requiring Kentucky County Clerks to sign both same-sex and opposite-sex marriage license, or a law requiring the same thing, is a generally applicable neutral law, as described in Smith. The mandate in this case, which could very well become law in other cases, is one that applies equally to all clerks, and is not aimed at religious believers, as the law was in Lukumi.<sup>138</sup> Thus, the government entity is not required to grant an exemption to the religious believers whether or not the neutrally applicable law is burdensome to the free practice of the believer's religious exercise. Of course, there are likely to be circumstances under the Smith framework in which, in order to foster peace within the organization, and because of the ease of doing so, the governmental entity will grant informal exemptions to the rule. An example of such an informal exemption in Kim Davis's case would be for the office to arrange for someone else to sign the marriage certificate whenever Kim Davis felt that signing the marriage certificate would be problematic in the face of her religious beliefs.<sup>139</sup> All the same, Smith provides no legal protection for Kim Davis or similarly situated religious objectors under federal law.

### *B. Title VII Framework*

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<sup>137</sup> *Id.* See also *Cutter v. Wilkinson*, 544 U.S. 709 (2005) to recall the distinction between accommodations required by the Free Exercise Clause, accommodations forbidden by the Establishment Clause, and permissible accommodations that fall between the two Clauses.

<sup>138</sup> See *Lukumi*, where the rules passed by the City were aimed at ensuring that those who followed Santeria would not be able to carry out animal sacrifices, a large part of their religion, within the city limits. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>139</sup> This would not be possible in Kim Davis's situation because as the elected County Clerk, her name must be on every marriage certificate. Thus, an agreement under which someone else would sign the marriage certificate, would require a formal accommodation because it would be against the letter of Kentucky Law. Such informal arrangements can also cause problems in circumstances where, for example, many of the clerks share similar religious beliefs and a large group are opposed to signing same-sex marriage certificates. In such a case, it may be either extremely burdensome or close to impossible to arrange for someone else, who is not a religious objector, to sign the same-sex marriage certificates.

Title VII of the Civil Rights Act of 1964 was passed by Congress to “eliminate certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice.”<sup>140</sup> By “passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.”<sup>141</sup> Under Title VII, three factors are required for an employee to establish a prima facie claim of religious discrimination.<sup>142</sup> First, the employee must show that she holds a sincere religious belief that conflicts with a job requirement.<sup>143</sup> Next, the employee must show that she informed her employer of the conflict.<sup>144</sup> Finally the employee must show that she was disciplined for failing to comply with the conflicting requirement.<sup>145</sup> Upon establishment of all three factors, the burden shifts to the employer to show either “it made a good-faith effort to reasonably accommodate the religious belief, or such an accommodation would work an undue hardship upon the employer and its business.”<sup>146</sup> Further, “[a]n accommodation constitutes an undue hardship if it would impose more than a *de minimis* cost on the employer.”<sup>147</sup> Undue hardships will be found based on both economic and non-economic costs to the employer.<sup>148</sup> There are generally two types of accommodations employers grant employees under Title VII: first, in some cases, the employer will exempt the employee from whatever work rule or condition conflicts with the employee’s religious belief or practices, while in others, the employer will allow the employee to transfer to a reasonably comparable position where conflicts are less likely to arise.<sup>149</sup> For purposes of this

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<sup>140</sup> Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

<sup>141</sup> *Id.*

<sup>142</sup> Webb v. City of Philadelphia, 562 F.3d 256, 260 (3d Cir. 2009).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Title VII of the Civil Rights Act of 1964 available at <http://www.eeoc.gov/laws/statutes/titlevii.cfm>.

paper, it is more valuable to focus on situations in which the employer exempts the employee from the condition that interferes with the employee's religious belief or practices, because many of the proposed solutions adopt such a procedure.

Although not directly applicable here, the framework created by Title VII is an interesting lens through which to view the general situation in which an employer fires an employee for a religious belief that interferes with his or her job responsibilities. It would be interesting to analyze whether Davis would have any recourse against the government if she were fired for refusing to issue marriage licenses. Title VII is not applicable to Kim Davis' situation for an important reason: as County Clerk of Rowan County, Kim Davis is an elected official and therefore cannot be fired from her job. In order to be removed from office, under the Kentucky Constitution, Kim Davis would have to be impeached by the Kentucky House of Representatives and then tried by the Kentucky Senate.<sup>150</sup>

If the State of Kentucky fired Kim Davis, and Title VII was applicable, would Davis have a claim under Title VII? The compromise struck allowing Davis to retain her position and have Deputy Clerks sign the marriage licenses rather than her signing them, is a common type of accommodation employers can offer under Title VII. But what if such an accommodation was not offered, and instead, Davis was fired? If Davis was fired, the analysis would proceed by first requiring her to show that she holds a sincere religious belief that conflicts with her job duties, that her employer was aware of such a conflict, and that she was dismissed because of this conflict.<sup>151</sup> In a case in which the government was able to fire her, Davis would be able to make this showing: throughout litigation, there has been no allegation that her religious beliefs are not sincerely held and it is clear that her employer is aware of them. The burden would shift to the government to

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<sup>150</sup> K.Y. CONST. Sec 68.

<sup>151</sup> See *supra*, notes 104-106.

show either that it made a good faith effort to accommodate her religious practice or that an accommodation would place an undue burden on the government.<sup>152</sup>

Although it is hard to predict how a court would answer the question of whether granting Davis an accommodation would place an undue burden on the government, based on some similarities between Davis' situation and precedent, it seems likely that the court would find that requiring such an accommodation would place an undue burden on the government. For example, in Parrott v. District of Columbia, the District Court for the District of Columbia held that a police department that suspended an officer who refused to restrain anti-abortion demonstrators because of his religious beliefs did not violate Title VII.<sup>153</sup> Although the officer argued that the cost to the Department in excusing him was *de minimis*, the court pointed to the fact that the officer may not be the only officer to have religious objections to abortion, and there were many situations in which officers must uphold the law despite the fact that it may interfere with their religious or moral beliefs.<sup>154</sup> The court noted the importance of the department being able to organize its forces and guarantee that there are enough officers at any time to enforce any law.<sup>155</sup> Although special considerations involving uniformity come into play when dealing with the police force, several analogies can be drawn between this case and Davis' situation: both involve a branch of the government, responsible to the citizens, and both involve a government employee refusing to carry out a responsibility that could be a large part of their job responsibilities.<sup>156</sup> Similarly, in Ryan v. United States Department of Justice, the court held that the FBI did not violate Title VII when it fired an agent who refused to investigate certain groups that were thought to be responsible for

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<sup>152</sup> See *supra*, note 107.

<sup>153</sup> Parrott v. District of Columbia (1991, DC Dist Col) 58 CCH EPD ¶41369.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *But see* Rodriguez v. City of Chicago, 156 F.3d 771 (7th Cir. 1998), where the court declined to dismiss a claim under Title VII where the Police Department refused to accommodate a police officer's request not to be stationed at an abortion clinic because of his religious beliefs.

incidents of vandalism at military recruiting facilities.<sup>157</sup> The court noted that forcing the FBI to reassign the agent to different work could incur costs and would affect the morale and harmony throughout the government agency.<sup>158</sup> Finally, consider Bruff v. North Mississippi Health Services, where the court held that the employer was not required under Title VII to accommodate a counselor who would not counsel on subjects that she believed conflicted with her religious beliefs.<sup>159</sup> The court cited the undue burden of causing alternative employees to assume a disproportionate workload.<sup>160</sup> In all of these cases, like in Davis' case, the employee was requesting an accommodation from something that was central to his or her job responsibilities. It seems that based on these cases and others like them, a court would likely find that requiring a deputy clerk to sign marriage licenses for same-sex couples would be an undue burden on the department because of the cost to the government office and because of how central this responsibility is to the County Clerk position. Thus, it seems that Davis would not have a claim under Title VII.

### *C. International Comparison*

Although the issue of how the government should respond to clerks, and similar government officeholders, may seem like a novel issue in the United States in the wake of the Supreme Court's decision in Obergefell, the issue has been dealt with in nations that have already legalized same sex marriage. At the time the decision in Obergefell was handed down, nineteen other nations have countrywide mandates allowing same sex marriage.<sup>161</sup> While it is true that the difference in

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<sup>157</sup> Ryan v. U.S. Dept. of Justice, 950 F.2d 458 (7th Cir. 1991).

<sup>158</sup> *Id.*

<sup>159</sup> Bruff v. North Mississippi Health Services, Inc., 244 F.3d 495 (5th Cir. 2001).

<sup>160</sup> *Id.*

<sup>161</sup> Mexico and Finland have also made strides towards legalizing same sex marriage, but for purposes of this paper are less instructive. In Mexico, the right for same sex couples to marry differs from region to region. In Finland, the right for same sex couples to marry has been established, but enforcement has been delayed until 2017. *See* Olivia

law and governmental powers serves as a limitation on the usefulness of comparison between the United States and other nations, and the applicability of the solutions reached by other nations, an exploration into the procedures adopted by other nations may serve as a way to bring new ideas to the discussion. In particular, it may be useful to briefly examine the approaches taken by England and Canada.

In July of 2013, the Queen of England granted royal assent to a bill granting same-sex couples in England the freedom to marry.<sup>162</sup> This came after both the House of Lords and the House of Commons voted in favor of the legislation several times.<sup>163</sup> Same-sex couples were able to begin marrying in March of 2014.<sup>164</sup> Prior to the recognition of same sex marriage in England, same-sex couples were limited to entering into civil partnerships, under the Civil Partnership Act of 2004.<sup>165</sup> The Borough of Islington policy was that its existing registrars would serve to officiate marriages as well as civil partnerships. Ladele objected to the requirement that she officiate civil partnerships on the ground of her Christian beliefs. Her superiors disciplined her and threatened to dismiss her. When she was eventually fired, after several rounds of appeals, the court held that she could not bring a lawsuit for discrimination based on being fired for refusing to officiate civil partnerships.<sup>166</sup> A later decision by the European Court of Human Rights upheld this decision, reasoning that because the rights of same-sex couples were involved, the lower courts struck the proper balance between the employer's right to secure the rights of others and the applicant's right

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B. Waxman, *21 Other Countries Where Same-Sex Marriage is Legal Nationwide*, TIME, (June 26, 2015) at <http://time.com/3937766/us-supreme-court-countries-same-sex-gay-marriage-legal/>, and *The Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> for information about how each nation came to recognize same sex marriage.

<sup>162</sup> *The Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> (last visited Jan. 29, 2016).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Civil Partnership Act 2004*, available at <http://www.legislation.gov.uk/ukpga/2004/33/contents>.

<sup>166</sup> *Ladele v. London Borough of Islington* [2009] EWCA Civ 1357 (15 December 2009).



to practice her religion.<sup>167</sup> The issue in England does not seem to be completely resolved, but it appears as though the courts are taking into account the burden on the rights of same-sex couples in analyzing the situation.

Same-sex marriage became legal in Canada in July of 2005. The Civil Marriage Act, a national piece of legislation passed after more than seventy-five percent of the country had legalized same-sex marriage, provided a gender-neutral definition of marriage.<sup>168</sup> The issue of refusal of those appointed to conduct same-sex marriages has been dealt with in different ways in different jurisdictions within Canada.<sup>169</sup> In some jurisdictions, marriage commissioners who will not perform same-sex marriage ceremonies are forced to resign from their positions.<sup>170</sup> Other jurisdictions permit refusals by commissioners on the basis of religious or conscience.<sup>171</sup> There are several variations of a middle ground approach as well. Certain jurisdictions permit refusals, but only where the marriage commissioners could provide for a replacement commissioner to conduct the ceremony.<sup>172</sup> Other jurisdictions allow opt-outs for existing jurisdictions, but only appoint new marriage commissioners who would agree to marry same-sex couples.<sup>173</sup> The last approach involves a “single entry point” system whereby a central office processes requests by members of the public, thus allowing the religious beliefs of individual marriage commissioners to be accommodated behind the scenes, rather than through confrontation with the public.<sup>174</sup>

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<sup>167</sup> See *id.*, and [http://hudoc.echr.coe.int/fre?i=001-115881#{\"itemid\":\[\"001-115881\"\]}](http://hudoc.echr.coe.int/fre?i=001-115881#{\).

<sup>168</sup> *The Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> (last visited Jan. 29, 2016).

<sup>169</sup> Bruce Mac Dougall, *Conscientious Objection to Creating Same-Sex Unions: An International Analysis*, CANADIAN JOURNAL OF HUMAN RIGHTS, available at: <http://poseidon01.ssrn.com/delivery.php?ID=629021065069067003023110070119029072004042024048051009122064093096091124110026119092123124006123042032124102111120127023108075119033078019018127016014030104092126090082048070096121103066118006085002086107117030067000107073108123094114078127065112001&EXT=pdf>

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

While, as noted above, the differing systems of law in other nations limits the usefulness of a comparison between possible solutions in the United States, and possible solutions abroad, examining varying solutions abroad and evaluating what has been successful and what has not may spark new ideas about how to deal with the same problem in the United States. Although England and Canada have had more experience with this particular problem than the United States, as evidenced above, their solutions have not been uniform, and not enough time has passed to truly examine the levels of success with which these solutions have been met. The Canadian approach of allowing jurisdictions to decide independently how to approach the problem of conscientious objectors at first glance is certainly appealing, as it seems to align nicely with American ideas of federalism. Caution must be taken, however, in implementing such a system, because of the risk that those tasked with creating procedures to accommodate conscientious objectors may do so in a way that overburdens the right of same-sex couples to marry. This risk is especially present in states that did not allow same-sex marriage before Obergefell. As such, any state-by-state system of accommodating conscientious objectors would have to be met with some level of federal oversight to ensure the protection of the right of same-sex couples to marry.

## **V. Conclusion**

While Kim Davis' trouble may be behind her if Governor-Elect Bevin removes clerks' names off of marriage licenses, and the media circus surrounding her has subsided, the questions posed by her situation are certain to continue to arise in other states, and regarding other officials whose religious beliefs and job responsibilities come into conflict with one another since the decision in Obergefell. It is likely that in many instances, such conflicts will be resolved through informal accommodations, like two coworkers voluntarily switching shifts so that a religious objection does

not arise. Such informal accommodations will not involve the guidance of the courts. Likewise, if states follow suit and Governors and Legislatures create statutory exemptions before any individuals file suit, the courts may not have to become involved. But, in all other cases, the courts will become involved and will have to muddle through the confusing and sometimes conflicting state and federal precedent in this area. It remains to be seen what, if any, protections the courts will provide objectors like Davis, but what is sure, is that these objections will continue to arise until some workable system is implemented.