Kim Davis Returns to Work Today. The Legislature Should Assure She Can Follow Her Faith

In Kentucky, Rowan County Clerk Kim Davis has been released from jail for refusing to issue marriage licenses to same-sex couples.

There is a lot of misunderstanding about the nature of Mrs. Davis's case. Various Christian writers have argued that she is embarrassing Evangelical faith, that she simply should resign, that Christian leaders' rhetoric defending Mrs. Davis is overheated, etc.

What they are failing to consider are two essential concepts that underlie the Davis case. They are these:

Accommodation. Does not Mrs. Davis deserve some kind of accommodation? We accommodate so many other religious beliefs in both government and private-sector workplaces. Can we not find one for Mrs. Davis and others like her who, out of the integrity of their consciences, cannot do something that abrades the very core of their religious convictions?

That's why FRC is asking Kentucky Gov. Steve Beshear to call "for a special legislative session and establishing statutory accommodations for clerks like Kim Davis." As noted by legal scholars Craig Bertschi (Kilpatrick Townsend law firm) and Nathan S. Chapman (University of Georgia School of Law) in their brief on behalf of Hobby Lobby, "the Free Exercise Clause *requires* some religious accommodations;" in point of fact, some 2,000 such accommodations now exist. As they write in the conclusion of their brief, "When Congress provides religious accommodations consistent with the

government's compelling interests, including its interests in protecting third parties, it supplements, rather than contradicts, the Religion Clauses' protection of religious liberty."

The federal government has a "compelling interest" to honor the freedom of religion. As the Founders argued, duty to God precedes duty to the state. This precept is essential to the very heart of our system of government. The same can be said of state governments as well.

Burden. The same-sex couples seeking marriage licenses have many other venues from which to obtain them. There are other, simple, only marginally inconvenient ways for them to obtain them.

The Religious Freedom Restoration Act (RFRA), passed by the U.S. Senate 97-3 and signed by President Clinton in a major public ceremony, makes this clear.

At the signing ceremony, the President said, "This event assumes a more majestic quality because of our ability together to affirm the historic role that people of faith have played in the history of this country and the constitutional protections those who profess and express their faith have always demanded and cherished." Note his choice of word – both "profess" *and* "express." Faith that is merely emotional or intellectual but whose public expression is stultified is not the kind of active faith to which religious devotion calls its followers.

Additionally, Kentucky has a RFRA which similarly requires the state government to offer an accommodation to people like Mrs. Davis unless the government can prove it has a compelling interest to advance and is doing so in the least restrictive way possible.

Writing in *The Public Discourse,* Kim Colby, Director of the Center for Law and Religious Freedom at the Christian Legal

Society, says RFRA "incentivizes government officials to find mutually beneficial ways to accomplish a governmental interest while respecting citizens' religious exercise—a win-win solution for all."

Put simply, Mrs. Davis is being burdened in a manner wholly unfamiliar to those advocates of religious liberty who drafted and enacted RFRA only 22 years ago. The burden imposed on her is an unfair one for a simple reason: There are other recourses for those same-sex couples seeking legal legitimation of their unions.

For example, as *Newsweek* reports, Mrs. Davis's attorneys have argued there are options "other than mandating the clerk's name on all marriage licenses. They (range) from having the county judge executive issue the licenses to allowing a deputy clerk to issue them devoid of Davis's name or authority as Rowan County Clerk." Indeed, as reported in today's *Washington Post*, "The licenses issued Friday (September 4) were altered to remove Davis's name. They now say they are issued in the office of 'Rowan County, Rowan County County Clerk'."

In other words, there are ways in which same-sex couples can obtain marriage licenses that respect Mrs. Davis's religious conscience and that do not unduly burden those couples in their pursuit of marriage licenses. And clearly, Kentucky has not met its state RFRA's requirement that the government advance any interest in the least restrictive way possible.

This situation casts into large and vivid relief the kinds of issues the Supreme Court's 5-4 ruling redefining marriage has placed before the country. Religious liberty in its fullest sense is at stake.

Surely, for Kim Davis and myriad Americans like her, accommodations can be found and unnecessary burdens lifted.