Case No. 15-5880

UNITED STATES COURT OF APPEALS
for the
SIXTH CIRCUIT

APRIL MILLER, PH.D.; KAREN ANN ROBERTS; SHANTEL BURKE; STEPHEN NAPIER; JODY FERNANDEZ; KEVIN HOLLOWAY; L. AARON SKAGGS; BARRY SPARTMAN

***Plaintiffs-Appellees*,**

v.

KIM DAVIS

***Defendant-Appellant*.**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

APPELLEES' RESPONSE OPPOSING MOTION TO STAY

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Pursuant to Federal Rule of Appellate Procedure 27(a)(3), Plaintiffs-Appellees, April Miller, Karen Roberts, Shantel Burke, Stephen Napier, Jody Fernandez, Kevin Holloway, L. Aaron Skaggs and Barry Spartman (collectively referred to as Plaintiffs), by counsel, submit their response opposing Defendant-Appellant Davis' motion to stay the District Court's August 12, 2015 preliminary injunction ruling. As the District Court correctly found when it rejected Davis' initial stay request below, *all* of the factors relevant to a stay decision weigh in Plaintiffs' favor. Specifically, 1) Davis is "unlikely to prevail on appeal" from the preliminary injunction ruling [Page ID #1268: Order (RE #52)]; 2) Davis will not "suffer irreparable harm" if the stay is denied [*id.*]; 3) granting the stay would "prolong the likely violation of [Plaintiffs'] constitutional rights" [*id.* at 1268-69]; and 4) the public interest is served by denying the stay. [*Id.* at 1269.] Plaintiffs should not have to wait any longer to exercise their fundamental right to marry; thus, Davis' motion for a stay should be denied. If, however, the Court grants Davis' motion for a stay, Plaintiffs respectfully request that the Court enter an expedited briefing schedule on the merits.

FACTS

On June 27, 2015 — one day after the U.S. Supreme Court's ruling in *Obergefell v. Hodges*, 135 S.Ct. 1039 (2015) — Rowan County Clerk Kim

Davis decided that her office would no longer issue marriage licenses because she opposes marriage for same-sex couples due to her personal, religious beliefs. [Page ID #278: 7/20/15 Hrg. Transcript (RE #26).] Rather than issue marriage licenses to same-sex couples, Davis adopted a "no marriage license" policy that bars *all* qualified applicants from obtaining marriage licenses in Rowan County even though Kentucky law specifically imposes upon County Clerks the obligation to issue such licenses. [*Id.*] *See also* KRS § 402.080. Following Davis' adoption of the "no marriage license" policy, Plaintiffs — two same-sex and two opposite-sex couples who reside in Rowan County, Kentucky, and who intend to marry — were denied marriage licenses even though they were otherwise legally qualified to marry. [Page ID #123-25; #133-34; #140-42: 7/13/15 Hrg. Transcript (RE #21).] Plaintiffs filed a putative class-action suit challenging the policy under the First and Fourteenth Amendments, and they brought official-capacity claims against Davis seeking preliminary and permanent injunctive relief barring future enforcement of the policy. [Page ID #1: Complaint (RE #1); Page ID #34: Motion for Preliminary Injunction (RE #2).]

After an evidentiary hearing and full briefing by the parties, the District Court entered a preliminary injunction on August 12, 2015, barring Davis, in her official capacity, from enforcing the "no marriage license"

policy against Plaintiffs. [Page ID #1173: Memo. Op. and Order (RE #43).] Defendant timely filed a notice of appeal from that ruling [Page ID #1174: Notice of Appeal (RE #44)], and she also filed a motion with the District Court requesting a stay of its preliminary injunction ruling pending appeal. [Page ID #1207: Stay Motion (RE #45).]

The District Court denied Davis' motion to stay, but the court also stayed its denial of the motion pending review by this Court. [Page ID #1264: Order (RE #52).] Then, on August 19th, the District Court amended its earlier ruling by clarifying that the "temporary stay" of the preliminary injunction would expire on August 31st absent further order from this Court. [Page ID #1283: Order (RE #55).] Following that clarification, Davis filed the present motion for stay, and Plaintiffs now respond.

LEGAL STANDARD

In evaluating whether to grant a requested stay, courts must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014) (internal quotations and citations

omitted). Of these, the "'first two factors . . . are the most critical.'" *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). As discussed below, *all* of the factors weigh in favor of denying the requested stay.

ARGUMENT

I. DEFENDANT IS UNLIKELY TO SUCCEED ON THE MERITS OF HER APPEAL.

A. Davis is unlikely to establish that performing (or allowing others to perform) the administrative task of issuing marriage licenses unlawfully burdens her free exercise of religion.

Davis' principal argument rests on her contention that being required, in her official capacity as the County Clerk, to issue marriage licenses to same-sex couples violates her free exercise rights because doing so would impose a substantial burden upon her sincerely-held religious beliefs. However, Davis' argument is unlikely to prevail on appeal. While religious freedom is one of our most cherished liberties, it is not unlimited and cannot be used to harm others. The Free Exercise Clause has never been construed to allow a government employee, for personal religious reasons, to withhold government services from individuals who are legally entitled to receive them; nor should it. When individuals assume the role of public servant, they necessarily subject themselves to greater restraints upon their liberty as a consequence of public employment. And this is especially true where, as

here, the public employee's religiously motivated conduct infringes upon the constitutional rights of others. "Though . . . all instrumentalities of government [] must observe the basic free exercise rights of its employees, the scope of the employees' rights must sometimes yield to the legitimate interest of the governmental employer in avoiding litigation by those contending that an employee's desire to exercise his freedom of religion has propelled his employer into an Establishment Clause violation." *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999); *see also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995) ("In *Pickering* and a number of other cases we have recognized that Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.").

Here, any claimed burden upon Davis' religious beliefs results from having to perform legitimate, job-related duties related to the issuance of marriage licenses. Because Kentucky requires individuals to obtain marriage licenses in order to marry, it logically follows that the government, when acting as employer, enjoys more latitude to impose incidental burdens upon its employees' free exercise rights in order to ensure that this essential government service is provided to the public. "[W]hen a government

employee asserts that his constitutional rights have been infringed, the court must strike a balance between the employee's interests as a citizen and 'the interest of the [government] as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Baz v. Walters*, 782 F.2d 701, 708 (7th Cir. 1986) (quoting *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968)); *see also Endres v. Ind. State Police*, 349 F.3d 922, 927 (7th Cir. 2003) (reclassification of police officer, over officer's religiously-based objection, to Gaming Commission Agent and subsequent termination of employment for insubordination, did not "violate[] the free exercise clause of the first amendment").

But, even if the Court analyzed Davis' free exercise claim under the analytical framework used when the government is acting as a sovereign and not as employer, the Free Exercise Clauses of the U.S. and Kentucky Constitutions do not entitle her to refuse to issue marriage licenses to otherwise qualified applicants.

In *Employment Division v. Smith*, the Supreme Court held that the federal Free Exercise Clause is not offended by a neutral law of general applicability. 494 U.S. 872, 885 (1990). Thus, laws that are neutral and generally applicable need only be rationally related to a legitimate government interest. This standard likewise applies to Davis' argument

under the Kentucky Constitution. *See Gingerich, et al. v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012) (free exercise rights under Ky. Constitution coextensive with those under the First Amendment). Here, Kentucky's administrative scheme requires all county clerks to issue marriage licenses. It is undeniably neutral because it is intended to ensure that all qualified couples can exercise the fundamental right to marry. It is also generally applicable because it does not target religiously motivated conduct. That Davis' religious beliefs happen to be the basis for her refusal to perform the administrative tasks associated with her job does not mean that her religious beliefs are somehow "targeted" by the laws mandating those tasks. Under the deferential rational basis standard, requiring Davis to carry out her job duties when acting in her official capacity does not violate her free exercise rights.

Kentucky's Religious Freedom Restoration Act does not change the result. Kentucky has not just a legitimate interest, but a compelling one, in ensuring the freedom to marry for all qualified couples. As an initial matter, Kentucky's administrative scheme does not substantially burden Davis' religious exercise. Prohibiting Davis — who has chosen to assume public office — from denying access to public services does not force her to support, endorse, or participate in any wedding. But, even if issuing

marriage licenses were deemed to substantially burden Davis' religious beliefs *and* the Court applied strict scrutiny to that requirement, it would also satisfy heightened review.

First, Kentucky has compelling interests in ensuring that qualified individuals may exercise their fundamental right to marry *and* in the uniform issuance (and recording) of marriage licenses and marriage-related data. *See Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (state's interest in "improving the health, safety, morals and general well-being of [] citizens" warranted denying Jewish storeowners religious exemption from Sunday closing law); *United States v. Lee*, 455 U.S. 252, 260 (1982) ("broad public interest in maintaining a sound tax system"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) ("[G]overnment interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (a state's "commitment to eliminating discrimination" is a "goal . . . [that] plainly serves compelling state interests of the highest order"); KRS § 213.116 (mandating "collection, indexing, tabulation, and registration of data relating to marriages, divorces, and annulments" by Cabinet for health and Family Services); *see also Romer v. Evans*, 517 U.S. 620, 628 (1996) (state and local governments have the

power to enact statutory schemes to prohibit discrimination on the basis of sexual orientation).

Moreover, the uniform system Kentucky has in place for ensuring that individuals satisfy the state's requirements for marriage would likewise satisfy the "least restrictive means" analysis because it ensures that all Kentuckians have equal access to the public officials responsible for issuing (and recording) those licenses free from discrimination. As the Supreme Court has recognized, an assertion of entitlement to religious freedom does not justify exemptions that adversely impact others even under the strict scrutiny standard applied prior to *Smith*. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (noting that in analyzing religious exemptions, "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries");[1] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.18 (1989) (invalidating sales-tax exemption for religious periodicals in part because exemption would have "burden[ed] non-beneficiaries by increasing their tax bills"); *Thornton v. Caldor*, 472 U.S. 703, 710 (1985)

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[1] *Cutter* was decided under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(1)(1), which prohibits government-imposed substantial burdens on religious exercise unless strict scrutiny is satisfied, just as the Supreme Court's pre-*Smith* free exercise cases did (and just as RFRA does today).

("The First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.") (internal quotation marks and citation omitted); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (exempting claimant from state unemployment benefits policy but noting that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties."); *Barnette*, 319 U.S. at 630 (excusing students from reciting Pledge of Allegiance, but noting that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so").

B. The administrative act of issuing (or allowing others to issue) marriage licenses does not implicate the compelled speech doctrine.

Nor is Davis likely to succeed on appeal regarding her asserted free speech claim, *i.e.*, that having her name, as the Rowan County Clerk, appear on the license as the issuing authority compels her to communicate a message of endorsement of marriage for same-sex couples (or any other couples). [Page ID #342-345: Davis' Resp. to Prelim. Inj. Motion (RE #29).] "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer

discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). As in *Garcetti*, the speech at issue here "owes its existence to a public employee's professional responsibilities" in the performance of her job duties. Thus, a restriction upon that speech "does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id*. at 421-22.

Similarly, this case does not implicate the compelled speech doctrine. County clerks are paid to carry out their official duties on behalf of the government, and their official acts are not expressions of their own viewpoint. The act of issuing a marriage license that includes Davis' name, in her official capacity as County Clerk, does not communicate any message from Davis, let alone her personal endorsement of anyone's marriage. Nor does it compel her "in effect 'to profess any statement of belief or to engage in any ceremony of assent'" to marriage for same-sex couples. *Troster v. Pennsylvania State Dep't of Corr.*, 65 F.3d 1086, 1091 (3d Cir. 1995) (quoting *West Virginia State Bd. of Education v. Barnette,* 319 U.S. 624, 634 (1943)). When Davis issues a marriage license, her doing so does not convey a message to the applicants that Davis personally shares in their joy or otherwise supports their intimate relationship. As the Supreme Court has

recognized, even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (citing *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226 (1990) (plurality)). This distinction between government messages that are necessary for the delivery of governmental services versus the private speech of individuals who are employed as government officials is equally applicable here. Thus, Davis' claim that the administrative task of affixing her name, as the County Clerk, to marriage licenses is akin to "forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' [] trivializes the freedom protected in *Barnette* and *Wooley*" and should be rejected. *Id*. at 62.

Finally, Davis remains free to express her views about marriage for same-sex couples, as she has done. What she may not do is voluntarily assume public office and then use her government position to deny others access to public services to which they are entitled. Requiring Davis to perform her job duties as a government official does not violate her right to free speech.

C. Davis cannot establish that she is likely to succeed on appeal regarding her claim that the administrative task of issuing marriage licenses violates the Religious Test Clause.

Davis' argument that requiring her to issue marriage licenses to same-sex couples would constitute a violation of the Religious Test Clause is also unlikely to succeed. [Page ID #345-347: Davis' Resp. to Prelim. Inj. Motion (RE #29).] The Religious Test Clause provides:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST., Art. VI, clause 3. Here, the neutral and generally applicable requirements for issuing marriage licenses do not violate the Religious Test Clause because they do not constitute "religious test" oaths of the type that clause was designed to eliminate. *See Am. Atheists, Inc. v. Shulman*, 21 F. Supp. 3d 856, 870-71 (E.D. Ky. 2014) (listing cases).

II. DENYING THE REQUESTED STAY WOULD NOT RESULT IN IRREPARABLE INJURY TO DEFENDANT.

Plaintiffs do not dispute that Davis opposes same-sex marriage due to her personal religious beliefs, nor that those beliefs are sincerely held. However, the administrative acts necessary for her office to issue marriage

licenses, including marriage licenses to same-sex couples, do not impose a substantial burden upon her religious freedom. For example, courts have frequently rejected free exercise claims on the basis that the government-compelled action did not impose a substantial burden upon the claimants' free exercise rights even under the strict scrutiny standard applied prior to *Smith*. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990) (collection and payment of sales and use tax did not substantially burden free exercise rights); *Bowen v. Roy*, 476 U.S. 693 (1986) (requirement that applicants possess a social security number in order to qualify for federal aid programs not a substantial burden upon free exercise rights); *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985) (application of labor laws to religious foundation's commercial activities did not substantially burden free exercise rights); *Bd. of Ed. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968) (no substantial burden on exercise of religion from non-coercive government action requiring free book loans to all public and private schools for elementary and secondary students).

Here, as in those instances, the burden upon Defendant Davis, in her official capacity, to perform (or allow her subordinates to perform) the administrative tasks associated with issuing marriage licenses does not rise

to the level of a substantial burden upon her religious belief. *See, e.g., Little Sisters of the Poor v. Burwell*, --- F.3d ---, 2015 WL 4232096 at *30 (10th Cir. July 14, 2015) ("because the [Affordable Care Act's opt-out provision] does not involve them in providing, paying for, facilitating, or causing contraceptive coverage . . . Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves."), *petition for cert. docketed*, (U.S. July 23, 2015) (No. 15-105). Thus, denying the requested stay would impose no irreparable harm on Defendant. Moreover, as noted above, *see supra* § I.A., even if any such burden existed here, it would be fully justified by the government's compelling interests in guaranteeing qualified individuals the fundamental right to marry and in the uniform issuance of marriage licenses.

III. A STAY, IF GRANTED, WOULD RESULT IN ONGOING, IRREPARABLE HARM TO PLAINTIFFS.

Defendant Davis' policy of refusing to issue licenses to qualified applicants directly and substantially burdens Plaintiffs' fundamental right to marry, in that it precludes them from obtaining marriage licenses in Rowan County even though such licenses are a legal prerequisite for marriage in Kentucky. KRS § 402.080. The ongoing constitutional violations resulting from this policy are manifest. Prior to *Obergefell*, the Rowan County Clerk's office issued approximately two hundred marriage licenses per year thus

enabling roughly four hundred people, annually, to exercise their fundamental right to marry. [Page ID #243: 7/20/15 Hrg. Transcript (RE #26) (212 licenses issued in 2014); *id*. (99 licenses issued in first half of 2015).] As a result of the policy at issue, no one is permitted to obtain a marriage license in Rowan County, including that county's residents (such as Plaintiffs). And for Plaintiffs and other Rowan County residents, the policy thus imposes a direct legal obstacle upon their right to marry by forcing them to choose between traveling to another county to obtain a license or forgo their right to marry. As Plaintiffs stated in support of their Motion for Preliminary Injunction, both the Supreme Court and the Sixth Circuit have held that the infringement of protected freedoms constitutes an irreparable injury sufficient to justify the grant of a preliminary injunction. [Page ID #44-45: Plaintiffs' Memo. (RE #2-1).] "[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is *mandated*." *ACLU v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd*, *McCreary County v. ACLU*, 545 U.S. 844 (2005) (emphasis added); *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) ("In other words, the first factor of the four-factor preliminary injunction inquiry — whether the plaintiff shows a substantial likelihood of succeeding on the merits —

should be addressed first insofar as a successful showing on the first factor mandates a successful showing on the second factor — whether the plaintiff will suffer irreparable harm.").

Defendant Davis seeks to minimize the precedent against her position by arguing that there is no irreparable harm to Plaintiffs because they may simply seek (and obtain) marriage licenses in other counties. [RE #15-1: Emer. Motion for Stay, 17-19]. However, Davis has not (and cannot) point to any authority for the proposition that a violation of one's constitutional right does not constitute irreparable harm so long as the victim can go elsewhere to exercise that right. [*Id.*] By contrast, there is ample authority holding that the mere existence of alternative means for the exercise of a constitutional right is insufficient to undermine the irreparable harm caused by a constitutional violation. *See, e.g.*, *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002) ("An Establishment Clause plaintiff need not allege that he or she avoids, or will avoid, the area containing the challenged display."); *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) (Ohio restricted early voting to members of the military. A preliminary injunction was affirmed against this "restriction on the fundamental right to vote" despite ability of non-military Ohio residents to vote on other days); *Spence v. State of Washington*, 418 U.S. 405, 426 n.4 (1974) ("[O]ne is not to have the

exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (internal quotations and citation omitted)).

IV. THE PUBLIC INTEREST FAVORS DENYING THE REQUESTED STAY.

Upholding the constitutional rights of the Plaintiff couples by affording them access to their right to marry without further delay serves the public interest. *See Fed. Trade Comm'n v. E.M.A. Nationwide, Inc.*, No. 13-4169, 2014 WL 4401247, at *12 (6th Cir. Sept. 8, 2014) ("The public interest is furthered where individuals' injuries are remedied in a timely manner.").

Additionally, the public has an interest in treating all families equally under the Constitution. *Cf. Latta v. Otter*, 771 F.3d 496 (9th Cir. 2014) ("The public's interest in equality of treatment of persons deprived from important constitutional rights . . . also supports dissolution of the stay of the district court's order."). The public interest thus also supports denying the requested stay and allowing the District Court's preliminary injunction ruling to take effect.

CONCLUSION

Because all of the relevant factors weigh in favor of denying the requested stay, including that Davis is unlikely to succeed on the merits of her appeal and that she will not suffer a legally cognizable irreparable injury if the stay were denied, Plaintiffs respectfully request that the motion for a stay be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of **APPELLEES' RESPONSE OPPOSING MOTION TO STAY** to be served August 23, 2015, by operation of this Court's electronic filing system, on the following:

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