

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION**

APRIL MILLER, ET AL.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	0:15-CV-00044-DLB
	:	
KIM DAVIS, ET AL.,	:	DISTRICT JUDGE
	:	DAVID L. BUNNING
Defendants.	:	

KIM DAVIS,	:	
	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
STEVEN L. BESHEAR, in his official capacity as Governor of Kentucky, and WAYNE ONKST, in his official capacity as State Librarian and Commissioner, Kentucky Department for Libraries and Archives,	:	
	:	
Third-Party Defendants.	:	

**REPLY TO PLAINTIFFS’ RESPONSE TO MOTION TO STAY THE AUGUST 12, 2015
INJUNCTION ORDER PENDING APPEAL**

Defendant/Third-Party Plaintiff Kim Davis (“Davis”), by and through her undersigned counsel, hereby submits this Reply to Plaintiffs’ response to Davis’ Motion to Stay the August 12, 2015 Injunction Order pending her appeal of that order to the Sixth Circuit.

I. INTRODUCTION

In their response to Davis’ immediate and emergency motion to stay the injunction entered on August 12, 2015 pending her already-filed appeal to the Sixth Circuit, Plaintiffs have utterly failed to meet the weight of authority and arguments presented by Davis in her request for a stay.

Rather than address the merits of Davis' motion to stay, Plaintiffs and Plaintiffs' Counsel instead rehash prior assertions, ignore compelling precedent in marriage cases, and cast improper and thinly-veiled threats at Davis and her counsel based upon hearsay-laden misrepresentations. As noted previously, this case presents a matter of first impression resolving a constitutional "tension" and "conflict" that this Court acknowledged, and this Court should grant a stay of the August 12, 2015 injunction until Davis' appeal is finally resolved.

II. REPLY ARGUMENT

A. This Court Need Only Conclude That This Case Presents Serious Questions Going To The Merits Or Matters Of First Impression To Warrant A Stay Pending Appeal.

In their response, Plaintiffs rehash and recycle by reference their arguments for a preliminary injunction (*see* D.E. 46 at 1), but they ignore entirely the Sixth Circuit precedent that a stay pending appeal is appropriate if the movant raises "serious questions going to the merits" or matters of first impression. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *see also Simon Prop. Group, Inc. v. Taubman Ctrs., Inc.*, 262 F. Supp. 2d 794, 798 (E.D. Mich. 2003) (finding that a party seeking a stay "can satisfy this element where substantial legal questions or matters of first impression are at issue"); *see also United States v. Coffman*, No. 09-181, 2010 WL 4683761, at *1 (E.D. Ky. Nov. 12, 2010) (Caldwell, J.) (granting motion to stay pending appeal after finding that "this case will present the Sixth Circuit with an issue of first impression").

Plaintiffs do not even address this Court's conclusion that "this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence," thereby acknowledging that Davis' religious rights are, in fact, being both "threaten[ed]" and "infringe[d]" in this matter. *See* D.E. 43 at 2; *see also Obergefell v. Hodges*, 135 S.Ct. 2584, 2638 (2015) (predicting an "inevitable" conflict between First and Fourteenth Amendment as individuals "are

confronted with demands to participate in and endorse civil marriages between same-sex couples”) (Thomas, J., dissenting). Thus, contrary to Plaintiffs’ suggestion, this Court need not reverse itself, change its mind, or reconsider its conclusions in its August 12, 2015 memorandum opinion and order to nonetheless find that Davis sufficiently satisfies the first factor warranting a stay pending her appeal to the Sixth Circuit.

B. The Remaining Factors Also Support A Stay Pending Appeal.

Although this Court sided with Plaintiffs in the “conflict” of rights between Plaintiffs and Davis in its August 12, 2015 memorandum opinion and order, it remains well-settled law that the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). It is also in the public’s interest to protect First Amendment liberties, *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995), which the Supreme Court unanimously held remain in place despite the redefinition of “marriage,” see *Obergefell*, 135 S.Ct. at 2607 (“persons” are protected under the First Amendment) (Kennedy, J., majority); see also *id.* at 2625 (Roberts, C.J., dissenting); *id.* at 2638 (Thomas, J., dissenting); *id.* at 2642 (Alito, J., dissenting). Here, there is no relief available to Davis later in this litigation if she is forced to violate her religious conscience now. See *Mich. Coal.*, 945 F.2d at 153. The issuance, authorization, and approval of a SSM license is *the act* that violates her conscience and substantially burdens her religious freedom. The record is clear that this harm is at her doorstep: Plaintiffs have already sought a SSM license—but only **after** Davis had filed a Notice of Appeal of this Court’s August 12, 2015 Memorandum Opinion and Order,

and only **after** Davis had also filed an emergency Motion to Stay the August 12, 2015 Injunction Pending Appeal. *See* D.E. 46-2.¹

In comparison, Plaintiffs do not face irreversible harm if they are unable to exercise a newfound constitutional right in this Court's August 12, 2015 memorandum opinion and order to have their same-sex "marriage" authorized and approved by a particular person in a particular county. Prior marriage decisions, which Plaintiffs flatly ignore, support a stay while this constitutional "conflict" and "tension" is resolved by a court with "final say." For instance, Plaintiffs fail to even address (let alone distinguish) the stay order entered in the case of *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), where Judge Heyburn concluded: "Perhaps it is difficult for Plaintiffs to understand how rights won can be delayed. It is a truth that our judicial system can act with stunning quickness, as this Court has; and then with sometimes maddening slowness. **One judge may decide a case, but ultimately others have a final say.** It is the entire process, however, which gives our judicial system and our judges such high credibility and acceptance. This is the way of our Constitution. It is that belief which ultimately informs the Court's decision to grant a stay." *Id.* at 558 (emphasis added).

Moreover, in other marriage decisions arising from Sixth Circuit district courts, completely different Sixth Circuit panels (each of them including a Judge from this Court sitting by designation) granted an emergency motion to stay pending an appeal of the district court's marriage decision, *see, e.g., April DeBoer, et al. v. Richard Snyder, et al.*, No. 14-1341 (6th Cir.

¹ Contrary to Plaintiffs' suggestion, Davis did not "ignore" this Court's injunction (*see* D.E. 46 at 2) but instead took immediate and appropriate steps to protect her legal rights and forestall enforcement of the order while the Sixth Circuit decides the constitutional "conflict" and "tension" this Court acknowledged. Further, Plaintiffs and Plaintiffs' Counsel cast disparaging remarks and thinly-veiled threats against Davis and "Davis' attorneys" based upon factually vacant and hearsay-laden misrepresentations. *See* D.E. 46 at 2-3 (citing D.E. 46-1). Such aspersions are wrong, and their counsel's adoption of same in the response brief are unseemly and improper. *See* Ex. A, Ltr. to V. Puente, *et al.*, Demanding Correction Pursuant to Ky. Rev. Stat. §§ 411.051, 411.061, dated Aug. 14, 2015.

Mar. 25, 2014), and overturned a district court's refusal to grant a stay pending an appeal of the district court's marriage decision, *see, e.g., Valeria Tanco, et al. v. William Haslam, et al.*, No. 14-5297 (6th Cir. Apr. 25, 2014). In these cases, like *Bourke*, the stays entered preserved natural marriage laws but absolutely barred same-sex couples from obtaining marriage licenses (or having marriage licenses recognized) until appeals were resolved. But here, **the named Plaintiffs can indisputably obtain a Kentucky marriage license even with this Court's staying the August 12, 2015 injunction pending appeal**, from more than 130 marriage licensing locations spread throughout Kentucky. Without dispute, nothing physically or economically prevents these named Plaintiffs from obtaining a marriage license from any of these locations. Moreover, Davis' claims are based upon enumerated and individual Constitutional and statutory rights she holds as a person.

Finally, although the circumstances of this case support the granting of a stay pending appeal, Plaintiffs also raise no argument in response to Davis' alternative request for a temporary stay of the injunction to allow her time to make a similar request to the Sixth Circuit. Thus, at a minimum, this Court should grant a temporary stay for Davis to petition the Sixth Circuit.

III. REPLY CONCLUSION

For all the foregoing reasons, and those set forth in Davis' prior briefing, Davis' Motion to Stay The August 12, 2015 Injunction Order Pending Appeal should be granted.

DATED: August 14, 2015

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

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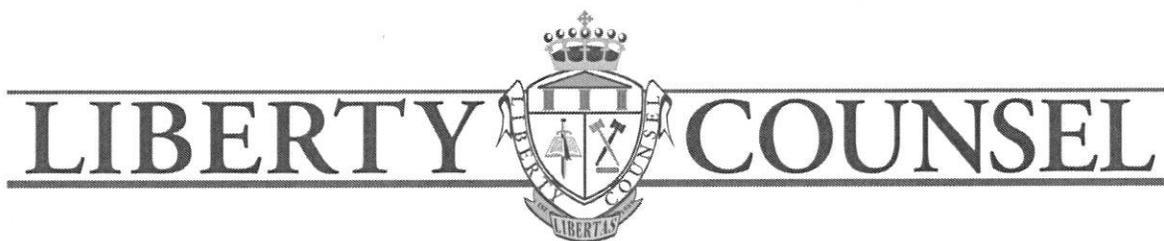
I also hereby certify that two (2) true and correct copies of the foregoing will be sent via U.S.P.S. first class mail to the Attorney General of Kentucky on behalf of Third-Party Defendants Steven L. Beshear, Governor of Kentucky, and Wayne Onkst, Commissioner of the Kentucky Department for Libraries and Archives, at the following location:

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DATED: August 14, 2015

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EXHIBIT A



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August 14, 2015

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Re: Demand for Correction Pursuant to KRS 411.051, 411.061

Gentlemen:

Liberty Counsel, pursuant to KRS 411.051 and 411.061, and as detailed below, hereby demands publication of a conspicuous and timely correction of a false and defamatory statement made in the news story you authored, *Rowan County Clerk's office refuses to issue marriage license to gay couple, defying judge's order*, available at <http://www.wkyt.com/home/headlines/Defying-order-clerk-wont-give-gay-couple-marriage-license-321741082.html> (updated: Aug. 13, 2015, 6:29 PM).

False and defamatory statement: “When reached later, the attorneys told WKYT they have advised Kim Davis not to issue the marriage licenses”

Statement of the facts: No Liberty Counsel attorney told Victor Puente, Garrett Wymer, WKYT, or any other person that they have advised Kim Davis not to issue the marriage licenses. Liberty Counsel is defending Kim Davis in lawsuits against her related to her decision not to issue marriage licenses in violation of her religious conscience.

Demand for correction: In accordance with KRS 411.051 and 411.061, Liberty Counsel demands that you publish, in a conspicuous and timely manner, and in all media formats in which you published the false and defamatory statement specified above, either:

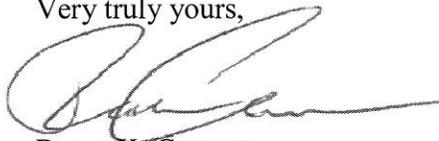
(a) An acknowledgment that the false and defamatory statement is erroneous; or

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Garrett Wymer
August 14, 2015
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(b) In a fair and impartial manner as a matter of law, the foregoing statement of the facts or a fair summary thereof.

Liberty Counsel expressly reserves all rights and remedies under Kentucky and other law. Please be governed accordingly.

Very truly yours,

A handwritten signature in black ink, appearing to read "Roger K. Gannam", written over a horizontal line.

Roger K. Gannam
Senior Litigation Counsel

c: Chris Mossman, General Manager, WKYT (by e-mail to: Chris.Mossman@wkyt.com)
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