No. 15-5961

IN THE 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; and BARRY SPARTMAN,

Plaintiffs,

v.

KIM DAVIS, individually,

Defendant-Third-Party Plaintiff-Appellant.

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-Appellees.

On Appeal From The United States District Court
For The Eastern District of Kentucky
In Case No. 15-cv-00044 Before The Honorable David L. Bunning

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APPELLANT KIM DAVIS' RESPONSE TO MOTION TO DISMISS APPEAL

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Appellant Kim Davis ("Davis") submits this Response to the Motion to Dismiss Appeal filed by Third Party Defendants-Appellees Steven L. Beshear, Governor of Kentucky ("Gov. Beshear"), and Wayne Onkst, Commissioner and State Librarian for the Kentucky Department for Libraries and Archives ("Commr. Onkst") (together, "State-Appellees").

INTRODUCTION

The purpose of preliminary injunctive relief is for **immediate** relief, not relief nine months or later down the road. Thus, the State-Appellees' contention in their motion to dismiss the appeal that the district court's August 25, 2015 order is not immediately appealable to this Court is baseless, and the motion should be denied.

On August 25, 2015, the district entered an order, on its own motion, staying any consideration of Davis' motion for preliminary injunction against State-Appellees "pending review" by this Court of the district court's August 12, 2015 injunction order issued against Davis. Such an indefinite delay effectively refused, and thus denied, Davis' request for injunctive relief against the State-Appellees, which was requested before the district court even entered its August 12, 2015 injunction order. The undeniable effect of the August 25, 2015 order was to permit Davis' immediate and irreparable injury to her individual religious liberty and free speech rights to continue unabated—and without even a hearing and decision on her claims against the State-Appellees—during the potentially lengthy pendency of this

Court's consideration of Davis' appeal of the August 12, 2015 injunction order (docketed as Case No. 15-5880).

Supreme Court and Sixth Circuit precedent directly on point provide the grounds for taking this appeal under 28 U.S.C. § 1292(a), as a practical denial of Davis' motion for preliminary injunction against the State-Appellees in the district court. As this Court is well aware, by deciding that Davis' own motion should be pushed-off until this Court conducts a merits-review of the Injunction, the district court delayed decision by six to nine months at least (if not more), at great harm to Davis who is facing immediate and substantial harm and consequences for exercising her individual constitutional and statutory rights. She has already been forced to spend six days incarcerated for exercising her sincerely held religious beliefs, and she is facing ominous threats of future court sanctions, including incarceration. Such irreparable harm cannot be undone. Thus, effective review of the district court's refusal to grant injunctive relief can only be had by this Court's immediate review. Here, delayed review is no review at all. Plainly, this Court has jurisdiction to decide the merits of this appeal, and should therefore deny State-Appellees' motion to dismiss.

RELEVANT BACKGROUND

Davis has set forth significant factual and procedural background relevant to this appeal in her Emergency Motion for Injunction Pending Appeal filed in this

Court and related briefing (*see* Doc. 26, 32), which are incorporated by reference here and of which this Court is already well aware. The discrete matter at issue herein is the appealability of the district court's August 25, 2015 order (entered on its own motion) staying any consideration of Davis' motion for preliminary injunction against State-Appellees "pending review" by this Court in a separate appeal of the district court's August 12, 2015 injunction order. R.58, Aug. 25, 2015 Order, PgID 1259. The practical effect of this order was to deny or refuse Davis' request for preliminary injunctive relief against the State-Appellees. As a result, on August 31, 2015, Davis timely filed a notice of appeal of the district court's August 25, 2015 order to this Court. R.66, Notice of Appeal, PgID 1471-76. State-Appellees filed a motion to dismiss Davis' appeal on September 8, 2015 (Doc. 27) ("Motion to Dismiss"), after Davis filed her Emergency Motion for Injunction Pending Appeal (Doc. 26). Davis now responds to State-Appellees' Motion to Dismiss.

ARGUMENT

"The courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, **refusing** or dissolving injunctions." 28 U.S.C. § 1292(a)(1) (emphasis added). "An order that does not specifically refuse an injunction but has the practical effect of doing so may be immediately appealable under § 1292(a)(1)." *Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 567 (6th Cir. 1985). The Supreme Court

has carved out an exception for non-final orders that have the effect of denying injunctive relief and thus permits immediate appeals of such orders when "a litigant can show that an interlocutory order of the district court might have serious, perhaps, irreparable consequences and that the order can be effectually challenged only by immediate appeal." *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981).

Courts have "often observed that the literal characterization of an order only begins the inquiry into appealability pursuant to Section 1292." *N.J. State Nurses Ass'n v. Treacy*, 834 F.2d 67, 69 (3d Cir. 1987) (collecting cases). Indeed, this Court "previously held that the actual effect of an order, rather than the district court's characterization of it, shall be considered on appeal." *United States v. Bayshore Assoc., Inc.*, 934 F.2d 1391, 1305 (6th Cir. 1991). To establish jurisdiction under § 1292(a)(1), Davis must show "(1) that the order had the practical effect of [refusing her] request for injunctive relief; (2) that the order will have serious, irreparable consequences . . . and (3) that the order can be effectually challenged only by immediate appeal." *NACCO Materials Handling Grp., Inc. v. Toyota Materials Handling USA, Inc.*, 246 Fed. App'x 929, 945 (6th Cir. 2007).

State-Appellees' claim that this case involves merely a delay in the resolution of Davis' request for injunctive relief is utterly without merit. Motion to Dismiss, at 6. Here, the district court's order refusing Davis' request for injunctive relief has serious and irreparable consequences to Davis' constitutional rights. Such

consequences are not merely a delay, but are "the essence of the basis for permitting immediate appeal of interlocutory injunctions." *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 109 n.2 (3d Cir. 1987). The practical effect of the district court's order indefinitely postponing Davis' motion for a preliminary injunction while ongoing and irreparable injury persists for an unknown and lengthy period of time is not to merely delay, but to *refuse* Davis' request for injunctive relief. Such a denial has caused, is causing, and will continue to cause serious, immediate, and irreparable consequences to Davis' constitutional liberties and will leave Davis with no effective method of review of the district court's refusal to grant injunctive relief. State-Appellees' Motion to Dismiss should be denied.

I. The District Court's Order Has The Practical Effect Of Denying Injunctive Relief.

The dispositive inquiry of whether the district court's August 25, 2015 order is immediately appealable is the substance, not the form, of the order. Indeed, this Court must look at the "actual effect" of the district court's order refusing Davis's injunctive relief. *United States v. Bayshore Assoc., Inc.*, 934 F.2d 1391, 1395 (6th Cir. 1991). "In determining the appealability of an interlocutory order under [§ 1292], we look to its **substantial effect rather than its terminology**." *Tagupa v. East-West Ctr., Inc.*, 642 F.2d 1127, 1129 (9th Cir. 1981) (emphasis added).

This approach is well-accepted among federal appellate courts. The Third Circuit holds that courts should "look[] beyond the form of the . . . orders, such as

this one, to ascertain whether they in effect granted or denied injunctive relief." *N.J. State Nurses Ass'n v. Treacy*, 834 F.2d 67, 69-70 (3d Cir. 1987). The Fifth Circuit agrees that effect, not labels, control appealability of interlocutory orders:

> **A district court may not avoid immediate review of its determination by failing to characterize or label its decision as one denying or granting injunctive relief**. If, for example, an action has the effect of denying the requested relief without actually making a formal ruling, then the refusal of the district court to issue a specific order will be treated as the equivalent to the denial of a preliminary injunction and will be appealable.

Gray Line Motor Tours, Inc. v. City of New Orleans, 498 F.2d 293, 296 (5th Cir. 1974) (emphasis added). In *Gray Line*, the Fifth Circuit noted that one exception to the general rule of requiring final orders for appeal permits a court to exercise jurisdiction over "**an action in which the plaintiff seeks injunctive relief, including a preliminary injunction, and a stay is granted** pending other litigation." *Id.* (emphasis added). The appellate court "held that in a situation where the district court denied preliminary injunctive relief and in the same order stayed further proceedings pending final action . . . jurisdiction under 1292(a)(1) would lie." *Id.* at 297 (emphasis added).

The procedural history in the case at bar is similar to that in *Gray Line*. Here, State-Appellees move to dismiss this appeal solely on the grounds that the district court's August 25, 2015 order simply "set[] the process" or "sequence[d]" the "briefing and consideration" of Davis' motion for preliminary injunction. Motion to

Dismiss, at 4-6. In its actual effect, the district court did much more than establish a mere schedule for hearing Davis' motion for preliminary injunction. Rather, the order stays any briefing or consideration of Davis' motion **until after this Court reviews the merits of a different appeal**. R.58, Aug. 25, 2015, PgID 1289. This delays consideration of Davis' motion for preliminary injunction at least six months, and likely much longer. Thus, despite State-Appellees' protestations to the contrary, jurisdiction indisputably lies with this Court.

Moreover, there is abundant precedent unequivocally refuting State-Appellees' claims that a "stay" does not involve a substantive issue and thus cannot serve as the basis for the denial or refusal of injunctive relief. *See, e.g.*, *Graves v. Mahoning Cnty.*, 534 Fed. App'x 399, 403 (6th Cir. 2013) (holding this Court had jurisdiction under § 1292(a)(1) when district court's order "staying the case had the effect of denying the injunction to each plaintiff"); *Cedar Coal Co. v. United Mine Workers of Am.*, 560 F.2d 1153, 1161 (4th Cir. 1977) ("We think the indefinite continuance amounted to the refusing of an injunction and is appealable as such under 28 U.S.C. § 1292(a)."); *id.* at 1162 ("Were an appeal not allowed under the facts as they are presented to us in this case, it would permit a plain denial of even the bare consideration of whether to grant injunctive relief to go unaccounted for by virtue of an indefinite continuance."); *McCoy v. Louisiana State Bd. of Educ.*, 332 F.2d 915 (5th Cir. 1964) (holding district court's delay of consideration and

resolution of party's motion for injunctive relief to beyond time when irreparable injury had commenced has practical effect of denying injunctive relief); *U.S. v. Lynd*, 301 F.2d 818, 823 (5th Cir. 1962) (holding district court's decision to withhold determination of motion for preliminary injunction indefinitely akin to refusing an injunction and therefore immediately appealable under the § 1292).

Despite the district court's labeling of its August 25, 2015 order staying consideration of Davis' motion for preliminary injunction, the order has the practical effect of denying Davis' request for immediate injunctive relief. As this Court made abundantly clear in *Graves*, a "stay" of the proceedings – even though within the authority of the district court to control its own docket – can also constitute a refusal to grant injunctive relief, giving rise to an immediate appeal, as is the case here. *Graves*, 534 Fed. App'x at 403. The district court's August 25, 2015 order did precisely that. The stay has the effect of denying Davis' preliminary injunctive relief past the point where irreparable injury that can never be corrected has occurred. If immediate review of such an order cannot be had in this Court, then the language in § 1292(a)(1) has no meaning. Such is not this intent of the statute. This appeal falls squarely within the jurisdiction of this Court. Accordingly, State-Appellees' Motion to Dismiss should be denied.

II. The District Court's Order Refusing Injunctive Relief Has Caused, Is Causing, And Will Continue To Cause Serious And Irreparable Consequences To Davis' Constitutional Rights.

"Most of the cases dealing with the practical denial of preliminary relief turn on the fact that characteristically, **preliminary relief must be granted promptly to be effective**." *Gillis*, 759 F.2d at 568 (emphasis added). Indeed, the emergent and extraordinary nature of injunctive relief inherently represents that ongoing and irreparable injury is being suffered by a party seeking refuge in the court's equitable powers. *See, e.g., Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1202 (11th Cir. 1997) ("injunctive relief . . . only addresses ongoing or future violations" of constitutional rights); *Victaulic Co. v. Tieman*, 499 F.3d 227, 232 (3d Cir. 2007) (stating in analysis of whether district court order is causing serious and irreparable consequences, "urgency is the touchstone").

Here, Davis is suffering immediate and irreparable consequences arising from the ongoing loss of her cherished constitutional liberties. This harm has been explained in Davis' Emergency Motion for Injunction Pending Appeal (Doc. 26), incorporated here by reference. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (same). Indeed, the First Amendment rights at issue in this appeal involve nothing short of those liberties lying at the very "foundation of free

government." *Schneider v. New Jersey*, 308 U.S. 147, 165 (1939). If such rights "are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

As explained previously, Davis indisputably holds sincere religious beliefs about marriage, and her inability to issue SSM licenses is motivated by those convictions. R.34, Verified Third-Party Complain ("VTC"), PgID 751. In her belief, marriage is the sacred union of a man and a woman, only. *Id.* The prescribed marriage license form required under Gov. Beshear's SSM Mandate provides no opportunity for the religious objector (Davis) not to participate in endorsement and approval of SSM. The specific form uses the word "marriage" at six different places, requires Davis' name to be on the license at two different places (at least) for any license issued in Rowan County, Kentucky, and also requires her to authorize the "join[ing] together in the state of matrimony" a proposed union that she cannot approve. R.34, VTC, PgID 748-49; *see also* R.34-1, Pre-*Obergefell* Marriage License Form, PgID 778; R.34-4, Post-*Obergefell* Marriage License Form, PgID 784. But Davis cannot authorize a union of two persons which, in her sincerely-held belief, is not marriage. R.34, VTC, PgID 751. She was then **incarcerated for six days** for adhering to those sincerely-held beliefs, while the merits of her appeal are

decided. She is under a serious and continuing risk of incarceration unless she violates her conscience.

Gov. Beshear has flatly rejected Davis' request for religious exemption. In his view, Davis must either comply with his SSM Mandate, or resign from office. R.34, VTC, PgID 754, 757. On Gov. Beshear's own initiative, the KDLA prepared a revised marriage form in response to his SSM Mandate, which was then distributed to county clerks for them to begin using immediately, without exception, per Gov. Beshear's directive. R.34, VTC, PgID 753-54; *see also* R.1-3, Beshear Letter, PgID 26. This new form provided no opportunity for county clerks with religious objections to SSM not to participate in endorsement and approval of SSM. On this new form constructed by Gov. Beshear and the KDLA, the "authorization" to marry (even on licenses she does not personally sign) still unmistakably comes from Davis herself. R.34, VTC, PgID 749; *see also* R.34-4, Post-*Obergefell* Marriage License Form, PgID 784. As in the old forms, the new KDLA-approved form requires Davis to put her imprimatur no less than two times on each and every marriage license issued in her county. R.34, VTC, PgID 748-49, 753-54; *see also* R.34-4, Post-*Obergefell* Marriage License Form, PgID 784. However, as noted above, to authorize a SSM license bearing her imprimatur sears her conscience because she would be endorsing the proposed union and calling something "marriage" that is not marriage according to her beliefs. R.34, VTC, PgID 751.

Gov. Beshear is imposing a direct, severe, and substantial injury on Davis by the SSM Mandate when he forces Davis "to choose between following the precepts of her religion and forfeiting [her job], on the one hand, and abandoning one of the precepts of her religion in order to [keep her job], on the other hand." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). This Hobson's choice imposes undue injury on Davis to choose between her job and her religion. As such, this irreconcilable conflict and the undue pressure arising from it unquestionably represent serious and irreparable consequences to Davis' cherished constitutional liberties.

Loss of these freedoms for an unknown and potentially lengthy period subject to review by a different court of a different motion is certainly sufficient to cause substantial, serious, and irreparable consequences to Davis. She is not merely losing her cherished constitutional freedoms for minimal periods of time, which alone would be sufficient under *Elrod* to constitute irreparable harm and warrant immediate review, she is also subject to continuing deprivation of constitutional rights for extended and indefinite periods. This deprivation clearly has substantial and serious consequences, including threats of incarceration and other court sanctions. As such, immediate review of the district court's August 25, 2015 order is necessary to protect and preserve Davis' cherished constitutional liberties.

III. The District Court's Order Refusing Injunctive Relief Can Only Be Effectively Reviewed Now.

As this Court said in *Gillis*, "preliminary relief **must be granted promptly to be effective**." *Gillis*, 759 F.2d at 567 (emphasis added). The effective challenge prong analyzes whether delayed review constitutes any review at all. *See, e.g.*, *Graves*, 534 Fed. App'x at 403. When the relief requested and pursued in this Court is a preliminary injunction, then denial of that relief can only be effectively reviewed immediately because the harms caused by such a refusal to grant relief are ongoing and irreparable. *Id.* ("The district court's order, which effectively denies an injunction against [unconstitutional practices] can be effectually challenged only by immediate appeal because the harm is ongoing."); *see also NACCO*, 246 Fed. App'x at 945-46 ("If immediate harm was inflicted on NAACO by the improper imposition of injunctive relief, only an immediate appeal could address the harm which occurred before the preliminary injunction was finalized and a trial on the merits was concluded.").

Serious consequences arise where, as here, an injured party is "unable to seek relief for widespread alleged constitutional violations. *Id.* The Third Circuit has found that delayed review is equivalent to no review:

> The question is whether the delay in review will work an injustice. In the case of an application for an injunction, especially a preliminary injunction, the urgency of the matter is obvious. The request for an injunction goes to the

> merits of the case and **delayed review may be the practical equivalent of no review**.

Gardner v. Westinghouse Broad. Co., 559 F.2d 209, 212 (3d Cir. 1977) (emphasis added). Here, delayed review of the district court's August 25, 2015 order will be effectively unreviewable later, because the irreparable damage to Davis, including incarceration, will have been done.

Despite this substantial precedent to the contrary, State-Appellees erroneously suggest that delaying review of Davis' requested injunctive relief represents "no urgency." Motion to Dismiss, at 8. As the above discussion makes abundantly clear, Davis is suffering immediate and irreparable harm every day that her constitutional rights are violated. If Davis does not receive immediate review from this Court, the injury her conscience and constitutional liberties suffer can never be corrected. The injury to Davis' rights will continue unabated until injunctive relief is granted, and delayed review will work a substantial injustice by permitting the abuse of constitutional rights to continue for an unknown period of time based on the actions and decisions of other parties not before this Court. **Such a delayed review is no review at all**. Accordingly, this Court has jurisdiction over the appeal, and State-Appellees' Motion to Dismiss should be denied.

RELIEF REQUESTED

For the reasons set forth above, Appellant Kim Davis respectfully requests that this Court deny State-Appellees' Motion to Dismiss Appeal.

DATED: September 11, 2015

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2015, I caused the foregoing document to be filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service of the filed document upon the following:

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