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 DISTRICT COURT'S SEPTEMBER 3, 2015 INJUNCTION ORDER

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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 September 3, 2015 order modifying the District Court's preliminary injunction ruling.

Davis has already asked three courts – the District Court, this Court, and the United States Supreme Court – to excuse her from performing her official duties. All three courts have declined to make an exception for Davis. In denying Davis' earlier motion for a stay, this Court found that there is "little or no likelihood that the Clerk in her official capacity will prevail on appeal" because Davis, as "the holder of the Rowan County Clerk's office . . . [must] act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." [RE #28-1 (15-5880): Order, at 2.] That conclusion is not limited to the four named Plaintiff couples, as the District Court correctly found when it modified its August 12 preliminary injunction to enjoin Davis from applying her "no marriage licenses" policy to other couples who are legally eligible to marry in Kentucky. Davis' latest attempt to avoid the obligations of her office should likewise be denied.

FACTS

The parties detailed the facts of this case when they litigated Defendant-Appellant Davis' initial emergency motion for a stay. [*See* RE #15-1 (15-5880): Emergency Motion for Immediate Consideration and Motion to Stay District Court's August 12, 2015 Order Pending Appeal; RE #25 (15-5880): Appellees' Response Opposing Motion to Stay.] Rather than reassert those facts, Appellees incorporate by reference their earlier statement of facts and include here only those additional facts that will aid the Court in its resolution of Davis' present emergency stay motion.

After this Court denied Davis' previous stay motion, Davis sought an emergency stay of the August 12 preliminary injunction from the Supreme Court. [*Davis v. Miller, et al.*, No. 15A250 (Aug. 31, 2015).] In a one-line order, the Supreme Court denied that request without asking for a response from Plaintiffs-Appellees and without any apparent dissent. *Davis v. Miller*, No. 15A250, -- S.Ct. --, 2015 WL 5097125, at *1 (U.S. Aug. 31, 2015).

Rather than comply with the preliminary injunction ruling, however, Davis chose to disregard it. The morning after the Supreme Court denied her stay application, Davis directed her employees to continue enforcing her "no marriage licenses" policy. [RE #43 (15-5880): Exhibit C to Davis' Emergency Motion for Stay of September 3rd Injunction Order ("9/3/15

Hrg. Transcript"), Page ID# 1621, 1631 (Kim Davis' testimony admitting that she directed her deputy clerks to disregard District Court's preliminary injunction and Supreme Court' denial of stay request to continue enforcing her "no marriage licenses" policy).] That decision resulted in Plaintiffs Miller and Roberts again being denied a marriage license on September 1, 2015. [*Id*. at Page ID #1638-39.] Left with no other recourse, Plaintiffs filed a motion asking the District Court to hold Davis in contempt for her continued refusal to comply with the August 12 preliminary injunction ruling. [RE #67 (0:15-cv-00044): Plaintiffs' Motion to Hold Kim Davis in Contempt of Court, Page ID #1477.] Plaintiffs also filed a motion to clarify or modify the preliminary injunction ruling to bar Davis from enforcing her "no marriage licenses" policy against any eligible applicants, not just the named plaintiffs. [RE #68 (0:15-cv-00044): Plaintiffs' Motion Pursuant to Rule 62(c) to Clarify the Preliminary Injunction Pending Appeal, Page ID #1488.]

At the contempt hearing, the District Court afforded Davis' counsel an opportunity to respond to Plaintiffs' Rule 62(c) motion. [RE #43 (15-5880): 9/3/15 Hrg. Transcript, Page ID# 1571-1580.] After hearing argument from Davis' counsel, the District Court granted Plaintiffs' motion and entered its September 3 Order modifying the earlier preliminary injunction. [RE #43

(15-5880): 9/3/15 Order, Page ID#1557.] In doing so, the District Court noted that Plaintiffs filed this case as a class action and explained that, even though it had stayed the class certification issue, allowing the August 12th preliminary injunction "to apply to some, but not others, simply doesn't make practical sense." [RE #43 (15-5880): 9/3/15 Hrg. Transcript, Page ID #1581.] The District Court also noted that, after Plaintiffs here filed suit, two related cases were filed by couples seeking to marry. [*Id*. at Page ID #1573.] Those cases raise identical legal issues, and the reasoning behind the August 12 preliminary injunction applies with equal force to the plaintiff couples in those cases. [*Id*. at Page ID# 1576-1577.] Thus, the District Court's September 3 Order modified the August 12 preliminary injunction to bar Davis, in her official capacity, from enforcing her "no marriage licenses" policy against any applicants who are legally eligible to marry. [*Id*.] While several of the named Plaintiff couples sought and received marriage licenses following the issuance of the September 3 Order, one couple – Shantel Burke and Stephen Napier – has not yet done so.

Davis did not thereafter seek a stay of that ruling in the District Court. Rather, she requested certification for an immediate appeal from the September 3 ruling. [RE #43 (15-5880): 9/3/15 Hrg. Transcript, Page ID# 1580.] Davis then filed the present motion asking this Court for an

emergency stay. As further explained below, the motion for an emergency stay should be denied because Davis has not shown that it was impracticable to apply for a stay from the District Court, the District Court retained jurisdiction to modify its preliminary injunction ruling on September 3, 2015, and it properly exercised that jurisdiction to give effect to its earlier decision. For the same reasons that this Court denied Davis' motion for a stay of the August 12 preliminary injunction, Davis' present motion for a stay should be denied.

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. THE STAY MOTION SHOULD BE DENIED BECAUSE DAVIS FAILED TO REQUEST A STAY IN THE DISTRICT COURT AND HAS NOT SHOWN THAT DOING SO WOULD HAVE BEEN IMPRACTICABLE.

Even before reaching the relevant factors for evaluating stay requests, Davis' motion should be denied because she failed to first seek a stay of the September 3 Order in the District Court. "The cardinal principle with respect to stay applications under Rule 8 is that the relief ordinarily must first be sought in the lower court." Wright & Miller, 16A Federal Prac. & Proc. § 3954 (4th ed.). It is undisputed that Davis failed to comply with this prerequisite to appellate review. [RE #43 (15-5880): Davis' Motion to Stay, 11.]

An applicant is excused from this general requirement only if she can "show that moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i). The entirety of Davis' argument regarding the impracticability of her seeking a stay below is limited to a single sentence in which she cites the District Court's "extraordinary doggedness" as a basis for bypassing review there. [RE #43 (15-5880): Davis' Motion to Stay, 11.] But "doggedness" does not justify bypassing the District Court altogether. Even if it could, Davis has not explained how. Davis' motion should be denied, and the District Court should be afforded the opportunity

to address it in the first instance. *See, e.g.*, *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (denying motion for a stay pending appeal because the defendant failed to seek relief in the district court); *S.E.C. v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (same).

II. BECAUSE THE DISTRICT COURT RETAINED JURISDICTION TO ENTER ITS SEPTEMBER 3 ORDER, DAVIS IS UNLIKELY TO SUCCEED ON APPEAL.

Rule 62(c) of the Federal Rules of Civil Procedure provides that a district court retains jurisdiction to modify a preliminary injunction pending an appeal. Specifically, Rule 62(c) provides:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Fed.R.Civ.P. 62(c). Thus, Rule 62(c) creates an exception to the general rule that an appeal divests the district court of jurisdiction. *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) ("[T]the rule depriving a district court of jurisdiction over matters pending on appeal 'is neither a creature of statute nor . . . absolute in character.'" (quoting *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437 (6th Cir. 1985)).

As noted by this Court, sister circuits have variously analyzed Rule 62(c), generally applying one of two standards for determining whether a

particular modification is authorized by the rule. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 513 (6th Cir. 1992). Specifically, some circuits construe Rule 62(c) to permit only those modifications that "preserve the status quo." *George S. Hofmeister Family Trust v. Trans Industries of Ind., Inc.*, 2007 WL 128932, at *2 (E.D. Mich. 2007) (citing *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817 (5th Cir. 1989); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389 (9th Cir. 1984); *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623 (2nd Cir. 1962)). Other circuits, however, construe Rule 62(c) to permit modifications after an appeal is filed "when the district court's action 'preserve[s] the integrity of the proceeding in the court of appeals.'" *Id.* (quoting *Ortho Pharm. Corp. v. Amgen, Inc.*, 887 F.2d 460 (3rd Cir. 1989)).

While this Court has not adopted or rejected either approach, *Basicomputer*, 973 F.2d at 513, the Court need not reach that question in the present appeal because the District Court's September 3 Order satisfies both standards.

Under the "preserve the integrity of the proceedings" standard, the District Court's September 3 Order ensures that Davis, in asserting an appeal that has "little to no likelihood of success," will be unable to continue to enforce her "no marriage licenses" policy against the plaintiffs in those companion cases still pending in the District Court, or against the members

of the putative class. And given Davis' established refusal to comply with the District Court's valid court order, the modification of the August 12 preliminary injunction is necessary to preserve the integrity of the proceedings by avoiding the unnecessary multiplication of litigation, including appellate litigation, that would result from her continuing to enforce her "no marriage licenses" policy against those who are legally eligible to marry.

Similarly, under the "maintain the status quo" standard, the District Court properly entered its September 3 Order barring Davis, in her official capacity, from enforcing the "no marriage licenses" policy against the name Plaintiffs and all applicants who are otherwise eligible to marry –*i.e.*, the members of the putative class. The District Court's Order simply restored the status quo that existed prior to Davis' adoption of the challenged (and unlawful) "no marriage licenses" policy. And in so doing, the Order does not undermine the ability of this Court to exercise jurisdiction over the pending appeal –a proposed formulation for the "maintain the status quo standard." *See S & S Sales Corp. v. Marvin Lumber & Cedar Co.*, 457 F. Supp. 2d 903, 906 (E.D. Wis. 2006) ("Maintaining the status quo means that a controversy will still exist once the appeal is heard. Any action on the district court's part which has the effect of divesting the court of appeals of its jurisdiction over

the matter, by eliminating the controversy prior to the hearing on the appeal is inappropriate." (quoting 12 *Moore's Federal Practice* § 62.06[1] (3d ed. 2006))). The question in that pending appeal will remain the same: May Defendant-Appellant, in her official capacity, deny marriage license applicants their fundamental right to marry and refuse compliance with *Obergefell* because of her personal religious beliefs. *See, e.g.*, *Natural Res. Def. Council, Inc. v. Sw. Marine Inc*., 242 F.3d 1163, 1167 (9th Cir. 2001) (upholding order modifying injunction after notice of appeal filed because the modifications "did not materially alter the status of the consolidated appeal" in that "[t]hey left unchanged the core questions before the appellate panel deciding the consolidated appeal").

Thus, under either analytical framework, Rule 62(c) provides ample justification (and jurisdiction) for the District Court's September 3 Order modifying the preliminary injunction in this case.

Davis' argument that the District Court lacked authority to modify the August 12 preliminary injunction because she had already appealed that ruling ignores Rule 62(c), and the cases on which she relies fail even to mention it. [RE #43: Davis' Emergency Motion to Stay, 12-13 (citing *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585 (6th Cir. 1987) (holding that district court retained jurisdiction "to enforce and clarify" prior

subpoena enforcement order during appeal with no discussion of Rule 62(c)); *Am Town Ctr. v. Hall 83 Associates*, 912 F.2d 104 (6th Cir. 1990) (appeal from district court order dismissing complaint divested district court of jurisdiction to enjoin state court proceedings involving different parties and claims with no discussion of Rule 62(c)); *United States v. Michigan*, Nos. 94-2391, 95-1258, 1995 WL 469430 (6th Cir. 1995) (unpublished) (appeal divested district court of jurisdiction to reduce the number of mental health beds previously ordered without discussing or analyzing Rule 62(c)); *Workman v. Tate*, 958 F.2d 164 (6th Cir. 1992) (in habeas case, holding, without discussing Rule 62(c), that remand solely to consider prisoner's request for release pending appeal did not confer jurisdiction upon district court to amend earlier ruling granting habeas petition); *United States v. Holloway*, 740 F.2d 1373 (6th Cir. 1984) (in criminal case, district court lacked jurisdiction to consider motion under Fed. R. Crim. P. 35 to correct sentence after appeal filed).]

Moreover, even though the District Court previously stayed the class certification issue, the District Court was well within its authority to enjoin Davis from enforcing her "no marriage licenses" policy to all eligible couples, regardless of whether or not those couples are named Plaintiffs in this case. "District courts have the power to order injunctive relief covering

potential class members prior to class certification" pursuant to their "'general equity powers.'" *Lee v. Orr*, No. 13-cv-8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013) (quoting 3 Newberg on Class Actions § 9:45 (4th ed. 2002)); *see, e.g.*, *Welch v. Brown*, No. 12-13808, 2013 WL 3224416, at *3 (E.D. Mich. June 25, 2013) (rejecting defendant's argument that preliminary injunction should apply only to named plaintiffs and not putative class members); *Strouchler v. Shah*, 891 F. Supp. 2d 504, 517 (S.D.N.Y. 2012) (same); *Thomas v. Johnston*, 557 F. Supp. 879, 916 n.29 (W.D. Tex. 1983) ("It appears to be settled . . . that a district court may, in its discretion, award appropriate classwide injunctive relief prior to a formal ruling on the class certification issue based upon either a conditional certification of the class or its general equity powers."). Broad preliminary injunctive relief is appropriate "when activities of the defendant are directed generally at a class of persons." *Lee*, 2013 WL 6490577, at *2. That is certainly true here, where Davis testified at the contempt hearing that she would continue to cause irreparable harm, not only to the named Plaintiff couples, but also to all putative class members, by refusing to comply with the August 12 preliminary injunction. [RE #43 (15-5880): 9/3/15 Hrg. Transcript, Page ID# 1621, 1631 (Kim Davis' testimony admitting that she directed her deputy clerks to disregard District Court's preliminary

injunction and Supreme Court' denial of stay request to continue enforcing her "no marriage licenses" policy).] The District Court was not required to "ignore the alleged harm to putative class members" simply because it had not yet certified a class. *Strouchler*, 891 F. Supp. 2d at 517.[1]

Indeed, "'[i]n the civil rights field, it is common to find an immediate need for preliminary injunctive relief . . . without a formal class ruling.'" *Ill. League of Advocates for Developmentally Disabled v. Ill. Dep't of Human Servs.*, No. 13 C 1300, 2013 WL 3287145, at *3 (N.D. Ill. June 28, 2013) (quoting 3 Newberg on Class Actions § 9:45). Federal district courts thus routinely enjoin state officials from enforcing unconstitutional policies across the board, even where class certification has not been sought. *See, e.g.*, *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at *5 (D. Colo. July 23, 2014) (granting preliminary injunction enjoining state officials from denying marriage licenses to same-sex couples, or denying recognition of otherwise valid out-of-state marriages entered into by same-sex couples, not only to named plaintiff couples); *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014) (same); *see also Evans v. Utah*, 21 F. Supp. 3d 1192, 1215 (D. Utah 2014) (granting preliminary injunction

[1] In addition, because the District Court has multiple similar cases on its docket, "the interest of efficiency and economy compel entry" of class-wide

Footnote continued on next page

enjoining state officials from applying state's marriage bans retroactively to same-sex couples, not only to named plaintiff couples).

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

As before, denying Davis' requested stay will not result in irreparable harm to her. To the extent that Davis is facing potential contempt sanctions, any "harm" results from her own choice to disobey federal courts orders, not from the orders themselves. In any event, the threat of contempt for willful violations of the District Court's valid orders is not "irreparable injury" that would justify a stay.

> The issue on a motion for a stay is whether compliance with the order sought to be stayed would result in irreparable injury, *not whether sanctions imposed for a contempt of court would cause irreparable injury*. . . . It would surely be anomalous to permit the contumacious appellant to satisfy the irreparable injury component by pointing to the consequences of his own contempt . . . .

In re Frankel, 192 B.R. 623, 630 (Bankr. S.D.N.Y. 1996) (emphasis added). *See also Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1480 (9th Cir. 1992) ("It is well established that even the assertion of constitutional rights may be burdened by requiring those who assert them to risk contempt.").

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preliminary injunctive relief at this stage. *Cf. Lee*, 2013 WL 6490577, at *2.

IV. A STAY, IF GRANTED, WOULD RESULT IN ONGOING, IRREPARABLE HARM TO MEMBERS OF THE PUTATIVE CLASS.

If the District Court's September 3 Order were stayed, Defendant Davis' policy of refusing to issue licenses to qualified applicants –*i.e.*, members of the putative class of plaintiffs –would directly and substantially burden their fundamental right to marry, in that it would preclude them from obtaining marriage licenses in Rowan County even though such licenses are a legal prerequisite for marriage in Kentucky. KRS § 402.080. As previously noted, the Rowan County Clerk's office issued approximately two hundred marriage licenses per year prior to the *Obergefell* decision thus enabling roughly four hundred people, annually, to exercise their fundamental right to marry. [RE #26 (15-5880): 7/20/15 Hrg. Transcript, Page ID #243 (212 licenses issued in 2014); *id*. (99 licenses issued in first half of 2015).] If the requested stay were granted, no one would be permitted to obtain a marriage license in Rowan County during the pendency of Davis' appeal even though this Court has previously concluded that "[t]here is thus little or no likelihood that the Clerk in her official capacity will prevail on appeal." [RE #28-1 (15-5880): Order.]

IV. THE PUBLIC INTEREST FAVORS DENYING THE REQUESTED STAY.

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 September 3 ruling modifying the preliminary injunction to take effect.

Federalism does not compel a different result. Enjoining a public official, in her official capacity, from committing future violations of others' federally protected rights is perfectly compatible with notions of federalism and comity because "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

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 DISTRICT COURT'S SEPTEMBER 3, 2015 INJUNCTION ORDER** to be served September 15, 2015, by operation of this Court's electronic filing system, on the following:

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