No. 15-5880

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-Appellees,

v.

KIM DAVIS, Individually,

Defendant-Appellant.

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' REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY DISTRICT COURT'S SEPTEMBER 3, 2015 INJUNCTION ORDER PENDING APPEAL

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Appellant Kim Davis ("Davis") hereby submits this Reply in support of her motion for a stay pending appeal of the district court's September 3, 2015 injunction order (hereinafter, the "Expanded Injunction").

INTRODUCTION

In opposing a stay of the Expanded Injunction pending appeal, Plaintiffs do not dispute, nor can they, any of the following facts: (1) Plaintiffs did not originally request a class-wide injunction, choosing instead to seek relief only for the "Named Plaintiffs" specifically; (2) the district court did not originally grant a class-wide injunction, instead granting precisely (and only) what Plaintiffs requested; (3) Plaintiffs did not oppose a stay of class-based proceedings after the original injunction was already on appeal to this Court; (4) the district court granted the Expanded Injunction without notice and without allowing Davis the opportunity to submit any written opposition; and, (5) the district court expressly acknowledged that the Expanded Injunction was relief that Plaintiffs "did not request" in the "original motion" for a preliminary injunction. Additionally, Plaintiffs fail to bring to this Court's attention the district court's most recent confirmation from five days ago that its September 3, 2015 order undeniably "**expanded its ruling**" already on appeal to this Court. (R.103, Sept. 11, 2015 Order, PgID 2177 (emphasis added).)[1]

[1] This September 11, 2015 order denying a motion for injunction pending appeal was entered by the district court *after* Davis filed her Emergency Motion to

To its credit, the district court has been consistent and unmistakably clear in what it did in granting the Expanded Injunction—but it simply had no jurisdiction to do it when it did. Rather than conceding the district court's plain error in light of the undisputed facts, the district court's own statements, and binding precedent from this Court, Plaintiffs engage in revisionist history, hollow distraction, willful omission of the district court's most recent statements directly on point, and pure speculation in hopes that this Court will similarly ignore basic principles of jurisdiction and due process. Simply put, Davis' appeal of the August 12, 2015 injunction deprived the district court of any jurisdiction to alter or expand that injunction. Intervention by this Court is therefore necessary to stay the Expanded Injunction.

REPLY ARGUMENT

I. Obtaining A Stay Of The Expanded Injunction From The District Court Is Impracticable.

Contrary to Plaintiffs' suggestion, the record in this case demonstrates that moving for a stay of the Expanded Injunction in the district court would be impracticable. This conclusion is not based upon a "single sentence" in the Motion, *see* Pls.' Resp., at 7, but rather, the obvious deduction of the circumstances

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Stay the September 3, 2015 Injunction Order Pending Appeal (hereinafter, "Motion") in this Court. Otherwise, Davis would have cited it in her Motion.

surrounding, and specific directives provided by, the district court when it granted the Expanded Injunction at the September 3, 2015 contempt hearing.

As set forth previously, the district court took up Plaintiffs' motion to "clarify" just 48 hours after it was filed, at the beginning of a hearing noticed only for a contempt motion on the district court's original and limited injunction, and without giving Davis an opportunity to submit a written opposition. Over against counsel's objections to the lack of notice, due process, and jurisdiction to expand the injunction on appeal, the district court nonetheless granted the Expanded Injunction and flatly stated that "**We'll just include that as part of the appeal. . . And the Sixth Circuit can certainly decide if that's appropriate**." (R.78, Contempt Hr'g, PgID 1580-81 (emphasis added).) The message from the district court was self-evident: if Davis does not like it, she can take it up with this Court. As such, the ordinary course of first filing a motion for a stay of an order in the district court is unnecessary here.[2]

[2] The cases cited by Plaintiffs do not compel a different result. In *Baker v. Adams Cnty.*, 310 F.3d 927, 931 (6th Cir. 2002), the party seeking a stay in that case sought relief in this Court that would require "significant judicial oversight" by a court without first proposing such relief in the district court. In *S.E.C. v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001), the party seeking a stay failed to timely appeal the order at issue and then later sought to intervene in the appeal and seek a stay from the appellate court rather than the district court. Here, staying the Expanded Injunction requires no ongoing oversight, Davis timely appealed the Expanded Injunction, and the district court unambiguously punted the matter to this Court.

II. Davis Has A Strong Likelihood Of Success On The Merits Of Her Appeal Of The "Expanded" (In The District Court's Own Words) Injunction.

The district court agrees that it "expanded" its preliminary injunction while it was on appeal to this Court. In granting the Expanded Injunction, the district court explicitly recognized that the so-called "clarification" sought by Plaintiffs was, in fact, to add relief to the Injunction which was not sought by Plaintiffs in their motion for preliminary injunction. (R.78, Contempt Hr'g, PgID 1578:20-25 ("**I recognize they did not request it in the original motion**." (emphasis added)).) Even more recently, four days before Plaintiffs filed their opposition in this Court, the district court expressly acknowledged, again, its expansion of the injunction: "On September 3, 2015, the Court granted Plaintiffs' Motion Pursuant to Rule 62(c) to Clarify the Preliminary Injunction Pending Appeal and **expanded its ruling** to include other individuals who are legally eligible to marry in Kentucky. (Docs. #68 and 74)." (R.103, Sept. 11, 2015 Order, PgID 2177 (emphasis added).)

Under well-established Sixth Circuit precedent, the district court had no jurisdiction to expand its injunction that was already on appeal to this Court.[3] This

[3] *See, e.g., City of Cookeville, Tenn. v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 388, 394 (6th Cir. 2007) ("**The district court did not have jurisdiction to issue the injunction because the injunction sought to expand the district court's previous order**.") (emphasis added); *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987); *Am. Town Ctr. v. Hall 83 Assocs.*, 912 F.2d 104, 110-11 (6th Cir. 1990).

Court has drawn a crucial distinction between ***expansion*** (or enlargement) of orders, including injunctions, and ***enforcement*** of them. *See Cookeville*, 484 F.3d at 394 (citing *Am. Town Ctr.*, 912 F.2d at 110). Thus, nothing in Federal Rule of Civil Procedure 62(c)[4] permits an expansion or enlargement of an injunction order on appeal to this Court. In this matter, the district court did not "modify" its original injunction—instead, by its own words, it significantly "expanded" the injunction and provided relief that Plaintiffs did not originally request. As such, the cases cited by Plaintiffs as authority for modifying an injunction are inapplicable.

Moreover, modifications of injunction orders on appeal to allegedly preserve a "status quo" are limited to maintaining the status quo "**between the parties**" to the injunction on appeal, not non-parties. *See, e.g.*, *George S. Hofmeister Family Trust v. Trans Indus. of Ind.*, No. 06-13984, 2007 WL 128932, at *2 (E.D. Mich. 2007). The district court cannot "alter the status of the case as it rests before the court of appeals." *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989). Further, Plaintiffs' unfounded reference to "plaintiffs" in "companion cases" who will allegedly be unable to obtain marriage licenses if this Court stays the Expanded

[4] In their opposition, Plaintiffs do not quote the correct language of Rule 62(c), as it currently exists in the Federal Rules of Civil Procedure. *See* Pls.' Resp., at 8. In relevant part, the rule actually provides that "While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c).

Injunction is either woefully uninformed (at best) or intentionally misleading and disingenuous to this Court, for it is widely reported that those very plaintiffs obtained marriage licenses on the same day as the Plaintiffs here (R.78, Status Report, PgID 1798).[5] Plaintiffs' further speculation and hearsay-laden rhetoric about other persons is also unsupported, and irrelevant to the district court's lack of jurisdiction.

Additionally, the district court was not attempting to "preserve the integrity of the proceedings" in this Court. *See* Pls.' Resp., at 10. To the contrary, the district court acknowledged it was granting new relief not previously requested by Plaintiffs and doing what it deemed to "make practical sense"—a makeshift standard that directly contravenes well-established precedent. Jurisdiction is not a results-oriented analysis, as Plaintiffs' misplaced arguments and the district court's conclusion suggest. Nor is it determined by pragmatism. To the contrary, like service of process (which the district court described as "road blocks to getting to the merits," R.21,

[5] Plaintiffs and the district court are presumably referring to the cases of *David Ermold, et al. v. Kim Davis, et al.*, No. 15-cv-00046-DLB, and *James Yates, et al. v. Kim Davis, et al.*, No. 15-cv-00062-DLB, both of which are also pending in the United States District Court for the Eastern District of Kentucky. The named Plaintiffs in those cases have secured marriage licenses not authorized by Davis. *See, e.g.*, Marriage Licenses Issued in Kentucky, but Debate Continues, N.Y. TIMES, Sept. 4, 2015, *available at* http://www.nytimes.com/2015/09/05/us/kim-davis-same-sex-marriage.html?_r=0 (last accessed Sept. 16, 2015); David Ermold and David Moore finally issued marriage license, DAILYMAIL.COM, Sept. 4, 2015, *available at* http://www.dailymail.co.uk/video/news/video-1212676/David-Ermold-David-Moore-finally-issued-marriage-license.html (last accessed Sept. 16, 2015).

Prelim. Inj. Hr'g Tr. July 13, 2015, PgID 117:1-119:7), jurisdiction is foundational to the rule of law and preliminary to a federal court's authority to render lawful decisions. Without it, a federal court order is null and void. As such, what actually challenges the integrity of the proceedings in this case is the Expanded Injunction, which the district court had no authority to enter, and which should therefore be stayed.

Furthermore, in this matter, it is of **no consequence** whatsoever that a district court ***can*** grant class-wide injunctive relief before certifying a class. It is likewise of **no consequence** that some district courts have granted injunctive relief that benefits a purported class of persons even without a pending class action complaint.[6] The cases cited by Plaintiffs as the purported authority for the district court's Expanded Injunction involve a district court power to enter an original injunction, rather than

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[6] The cases of *Lee v. Orr*, No. 13-8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013), *Strouchler v. Shah*, 891 F. Supp. 2d 504, 517 (S.D.N.Y. 2012), *Thomas v. Johnston*, 557 F. Supp. 879, 916 n.29 (W.D. Tex. 1983), *Welch v. Brown*, No. 12-13808, 2013 WL 3224416, at *3 (E.D. Mich. June 25, 2013), *Ill. League of Advocates for Developmentally Disabled v. Ill. Dep't of Human Servs.*, No. 13-1300, 2013 WL 3287145, at *3 (N.D. Ill. June 28, 2013), *Burns v. Hickenlooper*, No. 14-1817, 2014 WL 3634834, at *5 (D. Colo. July 23, 2014), *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014), and *Evans v. Utah*, 21 F. Supp. 3d 1192, 1215 (D. Utah 2014), are therefore easily distinguished. Unlike this matter, the foregoing cases relied upon by Plaintiffs all involve injunctions entered where **a motion for injunctive relief was specifically sought on behalf of both named plaintiffs and those similarly situated and/or the original injunction order entered by the district court specifically granted class-based relief**. Neither of these critical factual predicates exist in this case.

its power to expand injunctions after they have been appealed and after the district court has been divested of its jurisdiction. Indeed, the critical, and only, inquiry that matters here is what the district court granted in its original injunction before that order was appealed to this Court, and before that appeal deprived the district court of jurisdiction to expand or enlarge that injunction. And "what" the district court ordered in this case in its original August 12, 2015 injunction is undisputed: an injunction limited exclusively to the **named Plaintiffs** in this case. (R.78, Contempt Hr'g, PgID 1578:20-25; R.103, Sept. 11, 2015 Order, PgID 2177.) Accordingly, what the Plaintiffs could have requested in their original injunction, and what the district court could have ordered prior to the appeal of that injunction, are misplaced inquiries that are inconsequential and have no bearing on jurisdiction.

III. The Remaining Factors Also Favor Staying A District Court Order That Is Null And Void.

Because the likelihood of success on Davis' appeal of the Expanded Injunction is clear based upon the district court's lack of jurisdiction, this Court need not even make specific findings on the other factors weighed in granting a stay since "fewer factors" are dispositive. *See Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 399 (6th Cir. 1997). Nevertheless, the remaining factors provide additional support for granting a stay of the Expanded Injunction.

Because orders exceeding a district court's jurisdiction are "null and void," *U.S. v. Holloway*, 740 F.2d 1373, 1382 (6th Cir. 1984), no public interest is served by upholding the district court's Expanded Injunction. The filing of a notice of appeal is a point of "jurisdictional significance," conferring jurisdiction on this Court and divesting the district court of same. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). To permit the district court to grant the Expanded Injunction sets a dangerous and harmful precedent for parties challenging by right injunction orders in this Court. Such persons (like Davis) could be subjected to competing obligations and onerous burdens for exercising their appellate rights, with potentially grave (and escalating) consequences.

Those consequences to Davis are real in this case. The district court has already found Davis in contempt for allegedly violating the district court's original August 12, 2015 injunction order, and **incarcerated Davis for six days** as a sanction for the purported contempt. This immeasurable harm and loss of freedom, coupled with the district court's ominous threats in its September 8, 2015 release order—stating that any interference with the issuance of marriage licenses "to all legally eligible couples" will "be considered a violation of this Order and appropriate sanctions will be considered" (R.89, Release Order, PgID 1828)—demonstrate that, according to the district court, any violation of its Expanded Injunction (rather than its original injunction), will be cause for further contempt proceedings. Such threats

hold Davis hostage on an order the district court had no lawful jurisdiction to entertain, let alone authority to enter.

RELIEF REQUESTED

For the reasons set forth above and in prior briefing, Appellant Kim Davis respectfully requests that this Court: (1) grant immediate consideration and (2) enter an order staying the district court's September 3, 2015 Expanded Injunction pending final resolution of the appeal in this Court.

DATED: September 16, 2015

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th 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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