

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

**MOTION BY APPELLANT KIM DAVIS TO CONSOLIDATE APPEALS
FOR BRIEFING AND SUBMISSION AND MOTION FOR EXTENSION OF
TIME TO FILE CONSOLIDATED OPENING BRIEF AND MOTION TO
EXCEED WORD COUNT LIMITATION IN CONSOLIDATED BRIEFS**

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Pursuant to Fed. R. App. P. 3(b), 26, 27, 28, 32(a)(7)(B), and this Court's Rules 26, 27, 28, and 32, Appellant Kim Davis ("Davis") respectfully moves the Court (1) to consolidate for briefing and submission on the merits the above-captioned appeal with the appeals also docketed in this Court at Case Nos. 15-5961 and 15-5978, which arise from the same underlying action in the district court, (2) for an extension of time to file a consolidated opening brief on the merits, and (3) to exceed the word count limitation on briefs and file a consolidated opening brief of up to 25,000 words, and also to file a consolidated reply brief of up to 14,000 words.

1. The matters docketed in this Court at Case Nos. 15-5880, 15-5961, and 15-5978 all arise from the same underlying action in the United States District Court for the Eastern District of Kentucky, and involve the same parties—Plaintiffs, Davis, and Third-Party Defendants Gov. Beshear and Commr. Onkst. Counsel for all of the parties have appeared in all appeals pending in this Court. In all three matters pending before this Court, Davis is the appellant.

2. Case No. 15-5880 involves Davis' appeal of the district court's August 12, 2015 order granting Plaintiffs' motion for preliminary injunction. R.43, Inj., PgID.1146-1173; *see also* R.44, Notice of Appeal, PgID.1174-1206. This matter also includes Davis' more recent appeal of the district court's September 3, 2015 order expanding its original injunction order. R.74, Exp. Inj., PgID.1557; *see also*

R.82, Notice of Appeal, PgID.1785-1790. All of the parties have already participated in motion practice in this appeal.

3. Case No. 15-5961 involves Davis' appeal of the district court's August 25, 2015 order effectively denying Davis' own motion for preliminary injunction. R.58, Aug. 25, 2015 Order, PgID.1289; *see also* R.66, Notice of Appeal, PgID.1471-1476. All of the parties have also already participated in motion practice in this appeal.¹

4. Case No. 15-5978 involves Davis' appeal of the district court's September 3, 2015 order finding Davis in contempt of the district court's August 12, 2015 injunction and ordering that Davis be incarcerated. R.75, Contempt Order, PgID.1558-1559; *see also* R.83, Notice of Appeal, PgID.1791-1797. Davis and Plaintiffs have already participated in motion practice in this appeal.

5. Telephonic mediation conferences with the Sixth Circuit Mediation Office were held with counsel for all parties to the appeals (Plaintiffs, Davis, and the Third-Party Defendants), on September 8, 2015 and September 17, 2015. As of September 17, 2015, the Mediation Office is no longer involved with these appeals.

6. To date, in these multiple, related appeals arising from a single district court action, a briefing schedule has only been set in Case No. 15-5880. In that

¹ On September 15, 2015, a motions panel for this Court denied without prejudice a motion to dismiss this appeal filed by the Third-Party Defendants. *See* Case No. 15-5961, Doc. 37-1.

matter, Davis' opening brief as appellant is due no later than October 2, 2015, Appellees' response briefs are due no later than November 4, 2015, and Davis' reply brief is due seventeen (17) days later. Doc. 18. Thus, no merits-briefing on any of the appeals has yet occurred, as of the time of this filing.

7. Because the appeals arise from a single district court action, involve the same parties and counsel, and will entail significant overlap in relevant facts, procedural history, and certain legal arguments, there is good cause for consolidating all of the appeals for briefing and submission to the Court on the merits. Indeed, as Davis has indicated previously, the grounds on which she sought affirmative preliminary injunctive relief against Third-Party Defendants are necessarily intertwined, though not entirely overlapping, with the grounds on which she opposed Plaintiffs' request for preliminary injunction against her. The contempt order, which was issued in connection with the district court's original August 12, 2015 injunction order, is also necessarily related to Davis' challenge to the underlying injunction order. Accordingly, the appeals should all be consolidated by the Court for briefing and submission by the parties.

8. For the same reasons set forth above, Davis requests an extension of time until Friday, October 30, 2015 to file a consolidated opening brief for the multiple appeals pending in Case Nos. 15-5880, 15-5961, 15-5978. This slight delay in the briefing schedule in Case No. 15-5880 (where Davis' opening brief is

currently due this Friday, October 2, 2015)² is beneficial to the parties and the Court because it will promote the efficient and global resolution of these appeals, and will allow the parties to present the Court with all of the issues and disputes currently pending before it in a consolidated briefing schedule, and thereby avoid any repetition or duplication in the parties' arguments. Also, as indicated above, no briefing schedule has yet been set for the appeals pending in Case Nos. 15-5961 and 15-5978, so this proposed extension of time will allow these matters to be appropriately included in a consolidated opening brief on the merits, and will actually speed up the Court's resolution of all issues in all appeals.

9. A single, consolidated briefing schedule on these appeals will drastically reduce the number of briefs filed in this Court. If the appeals remain separate, the Court would likely receive twelve (12) total briefs from the parties across the appeals (four each in Case Nos. 15-5880, 15-5961, and 15-5978). However, upon consolidation and extension of the time for filing consolidated briefs, the Court will instead likely receive only four (4) briefs: Davis' opening consolidated brief, separate consolidated response briefs from Plaintiffs and Third-Party Defendants, and a consolidated reply brief from Davis. Accordingly, the Court

² Immediately prior to the filing of this Motion, Davis also filed a motion for extension of time to file her opening brief in Case No. 15-5880, pending the Court's determination of the instant Motion.

should grant Davis' request for extension of time to file a consolidated opening brief on all of the appeals pending in Case Nos. 15-5880, 15-5961, and 15-5978.

10. Furthermore, Fed. R. App. P. 32(a)(7)(B)(i) provides that a principal brief in an appeal must not contain more than 14,000 words without prior authorization of the Court. As such, Davis would be entitled to file at least three 14,000-word opening briefs (totaling 42,000 words) in her three pending appeals. Due to the extensive factual and procedural recitation from the district court proceedings which will be necessary, and the number of significant constitutional and statutory issues to be addressed in these multiple appeals in this first-in-the-nation case, Davis' proposed consolidated opening brief would require more than the 14,000-word limit to fully and properly brief her arguments on appeal. However, due to the overlapping issues among the multiple appeals, the consolidated opening brief would not require the equivalent of three principal briefs (42,000 words). Accordingly, upon granting Davis' request to file a consolidated opening brief on all of the appeals pending in Case Nos. 15-5880, 15-5961, and 15-5978, the Court should also grant Davis' request to exceed the word count limitation and allow a consolidated opening brief of up to 25,000 words.

11. In granting the above request, the Court should also similarly make clear that the Appellees may file separate consolidated response briefs of up to 25,000 words. Moreover, Fed. R. App. P. 32(a)(7)(B)(ii) provides that a reply brief

in an appeal must not contain more than half of the type-volume specified for principal briefs, or 7,000 words. Similar to the request above, Davis would be entitled to file at least three 7,000-word reply briefs (totaling 21,000 words) in her three pending appeals. Upon consolidation of the appeals, Davis will be responding to separate consolidated response briefs from the Plaintiffs and Third-Party Defendants, each of which may be up to 25,000 words. Accordingly, to allow sufficient response to multiple response briefs and addressing all issues on the appeal, the Court should also allow Davis to exceed the word count limitation in a consolidated reply brief and allow a consolidated reply brief of up to 14,000 words.

12. Davis contacted counsel for Plaintiffs and Third-Party Defendants by phone and by written electronic communication on September 28, 2015 regarding the requests to consolidate the appeals and for extensions of time to file a consolidated opening brief and exceed the word count limitation in the consolidated opening brief. Plaintiffs have no objection to Davis' motion to consolidate the appeals, for an extension of time to file her consolidated opening brief until October 30, 2015, and to exceed the word count limitation and allow a consolidated opening brief of up to 25,000 words so long as Plaintiffs are also permitted to exceed the word count limitation and file a consolidated response brief of up to 25,000 words. On September 29, 2015, counsel for the Third-Party Defendants responded to Davis' request for his clients' position on this Motion with following response: "We cannot

agree to the motion. Also, we do not agree that any statement of our clients' position may be stated in your motion. We will review the motion once filed and may then take a position with the Court if warranted." Notwithstanding the Third-Party Defendants' cryptic and ambivalent response, this Court should grant the instant Motion without awaiting any further statement from the Third-Party Defendants, because the Motion is not opposed by the Plaintiffs.

13. This motion is not being brought for purposes of delay, and will not prejudice any of the parties' rights on appeal, or in the district court action.

Accordingly, Appellant Kim Davis respectfully requests that the Court grant the instant Motion and (1) consolidate this appeal with the appeals docketed in this Court at Case Nos. 15-5961 and 15-5978, (2) extend the time for Davis to file a consolidated opening brief until October 30, 2015, and (3) allow Davis to exceed the word count limitation in her consolidated opening brief by 11,000 words and file a consolidated principal brief totaling up to 25,000 words, and to also exceed the word count limitation in her consolidated reply brief by 7,000 words and file a consolidated reply brief totaling up to 14,000 words.

DATED: September 29, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th 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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