

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT ASHLAND
CIVIL ACTION NO. 15-cv-044-DLB

APRIL MILLER, PH.D.; KAREN ANN ROBERTS;
SHANTEL BURKE; STEPHEN NAPIER;
JODY FERNANDEZ; KEVIN HOLLOWAY;
L. AARON SKAGGS; BARRY W. SPARTMAN;
and OTHERS SIMILARLY SITUATED

PLAINTIFFS

v.

KIM DAVIS, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY AS ROWAN
COUNTY CLERK; and ROWAN
COUNTY KENTUCKY

DEFENDANTS

and

**RESPONSE IN OPPOSITION TO EMERGENCY
MOTION FOR INJUNCTION PENDING APPEAL**

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
OF KENTUCKY DEPARTMENT FOR
LIBRARIES AND ARCHIVES

THIRD-PARTY DEFENDANTS

*** *** *** *** ***

Come the third-party defendants Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives, (collectively "Third-Party Defendants"), by counsel, and respectfully tender this response in opposition to

the Emergency Motion for Injunction Pending Appeal (D.E. 70) (the “Motion”) of Defendant/Third-Party Plaintiff Kim Davis (“Davis”). Davis’ Motion must be denied.

I. PROCEDURAL BACKGROUND

Plaintiffs commenced this action against Davis, the Rowan County Clerk, for violation of their constitutional rights as a result of Davis’ refusal to issue marriage licenses and sought preliminary injunctive relief to require Davis to issue licenses as required by Kentucky law. See Complaint (D.E. 1); Motion for Preliminary Injunction (D.E. 2). In defending her actions, Davis has asserted that performing her statutory duty of issuing marriage licenses to qualified same-sex couples would violate her constitutional rights to free exercise of religion and freedom of speech and further amount to an impermissible religious test for holding public office. See, e.g. Davis Response to Motion for Preliminary Injunction (D.E. 29). ***These are the identical arguments being reasserted in the present motion.***

Following briefing and hearings, this Court entered a preliminary injunction that enjoins Davis in her official capacity from applying her “no marriage licenses” policy. See Memorandum Opinion and Order (D.E. 43). In so doing, the Court devoted thoughtful attention to Davis’ constitutional defenses and rejected each of them. Id. at 16-28. Davis has appealed the decision to the Sixth Circuit Court of Appeals, where it is currently pending. In denying Davis’ request for a stay of the injunction pending appeal, the Sixth Circuit held that her position “cannot be defensibly argued” and that “[t]here is thus little or no likelihood” of success on appeal. See Sixth Circuit Order of 8-26-2015 (Exhibit 2 to D.E. 63). The United States Supreme Court also considered these same arguments and denied Davis’ request for a stay of the preliminary injunction. See

Supreme Court Order of 8-31-2015 (available at http://www.supremecourt.gov/orders/courtorders/083115zr2_d18e.pdf).

During consideration of Plaintiffs' request for injunctive relief, Davis reasserted her same constitutional arguments in the form of a Third-Party Complaint against Steven L. Beshear, in his official capacity as Governor of Kentucky, and Wayne Onkst, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives. See Third-Party Complaint (D.E. 34). Davis alleges that "Kentucky's marriage policies, as effected by Governor Beshear and Commissioner Onkst" violate her rights of free exercise of religion, free speech, and to be free from religious tests for public office. See id. at ¶¶ 46-147.

The alleged "marriage policies" "effected by Governor Beshear and Commissioner Onkst" at issue in the Third-Party Complaint are statements contained in a June 26, 2015 letter from Governor Beshear (hereinafter "Beshear Letter") to Kentucky's county clerks. See id. at ¶ 25 and Exh. C to D.E. 34. The Beshear Letter correctly states that "the United States Supreme Court issued its decision regarding the constitutionality of states' bans on same-sex marriage" and "struck down those laws, finding that they were invalid under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." Id. The Beshear Letter announces that, in accordance with the Obergefell v. Hodges, 135 S. Ct. 2584 (2015) decision, "Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky." Id. The Governor further stated that "all executive branch agencies are already working to make any operational changes that will be necessary to implement the Supreme Court decision." Id. Finally, the Beshear Letter states that "the

Department of Libraries and Archives will be sending a gender-neutral form to you today, along with instructions for its use.” Id. Notably, the Beshear Letter does not instruct Davis or any other county clerk to do anything. Id. In fact, the Governor notes that county clerks “should consult with your county attorney on any particular aspects related to the implementation of the Supreme Court’s decision.” Id.

Davis’ allegation that “Governor Beshear took it upon himself after *Obergefell* to set and announce new Kentucky marriage license policies, and command county clerks to abide by such policies” is demonstrably false. Id. at ¶ 33. The Beshear Letter does not command Davis to do anything. Rather, it is an acknowledgement of Obergefell, an explanation of the Commonwealth’s actions to assist the county clerks with their statutory duties, and a reminder to the county clerks of their obligations as constitutional officers. Indeed, Davis would be in exactly the same position she is today had the Beshear Letter never been transmitted. Davis’ actual dispute is with the Supreme Court’s decision in Obergefell, and she is utilizing the Beshear Letter as a basis to air her political grievances thinly veiled as meritless legal arguments. Because Davis’ claims are wholly without merit, the Third-Party Defendants are timely moving to dismiss the Third-Party Complaint. See Motion to Dismiss Third-Party Complaint.

Though her constitutional arguments have been rejected by this Court, the Sixth Circuit, and the Supreme Court, Davis has now moved for injunctive relief “pending appeal” against Governor Beshear and Commissioner Onkst. See Emergency Motion for Injunction Pending Appeal (D.E. 70). This is not the first time Davis has sought injunctive relief against these officials. Davis originally sought a preliminary injunction against the Third-Party Defendants that enjoins them from enforcing the Governor’s

alleged “mandate” that Davis issue marriage licenses to authorized individuals in conformity with Kentucky statute. See Motion for Preliminary Injunction (D.E. 39). No doubt recognizing that Davis’ motion raised identical constitutional issues that it had already addressed in granting the Plaintiffs’ motion for injunctive relief against Davis, this Court *sua sponte* ruled that briefing on that motion is “stayed pending review of the Court’s Memorandum Opinion and Order (Doc. #43) by the United States Court of Appeals for the Sixth Circuit.” See Order (D.E. 58). The Court indicated that “a briefing schedule on the Motions will be set by subsequent order after the Sixth Circuit renders its decision.” Id. Despite the fact that the Court’s briefing order is plainly interlocutory, Davis appealed it to the Sixth Circuit. See Notice of Appeal (D.E. 66). The Third-Party Defendants have moved to dismiss that appeal on grounds that Davis has attempted to appeal from an Order that is not appealable. See 6th Cir. Case No. 15-5961, Motion to Dismiss Appeal (D.E. 27).

In this latest vexatious and meritless legal filing, Davis has moved for an injunction against the Third-Party Defendants “pending appeal” of the unappealable briefing order. See Emergency Motion for Injunction Pending Appeal (D.E. 70). Of course, this motion raises the very same constitutional arguments that Davis has asserted in the litany of filings detailed above – the very same arguments that this Court, the Sixth Circuit, and the Supreme Court have all rejected. This motion is likewise without merit and should be denied.

II. ARGUMENT

A. The Motion Must Be Denied Because the Third-Party Complaint Must Be Dismissed.

Davis' claims against the Third-Party Defendants are not actionable for the reasons set out in the timely-filed Motion to Dismiss Third-Party Complaint, which the Third-Party Defendants hereby incorporate by reference as if fully set forth herein. Thus, the claims against the Third-Party Defendants must be dismissed, and Davis' Motion must be denied.

B. The Motion Must Be Denied Because it is Improper Procedurally and Raises Arguments that Have Been Raised and Decided.

As detailed above, Davis has repeatedly raised the constitutional arguments she raises in the present Motion. This Court, the Sixth Circuit, and the Supreme Court have rejected those arguments. See Memorandum Opinion and Order (D.E. 43); Sixth Circuit Order of 8-26-2015 (Exhibit 2 to D.E. 63); and Supreme Court Order of 8-31-2015 (at http://www.supremecourt.gov/orders/courtorders/083115zr2_d18e.pdf). This Motion is essentially a motion to reconsider the constitutional arguments considered at length in the Memorandum Opinion and Order. (D.E. 43). As this Court has noted, motions to reconsider are highly disfavored – such motions are meritless when there is no change in controlling law, no additional evidence previously unavailable, or the need to correct a clear error of law. Boyd County v. Merscorp, Inc., 985 F. Supp. 2d 823, 834 (E.D. Ky. 2014). Rather than simply presenting her arguments to the Sixth Circuit in the direct appeal of the injunction against her, Davis repeatedly raises them here in the apparent hope of obtaining a different result after multiple attempts.

In addition, this Motion is an attempt to force immediate consideration of an identical motion that this Court has indicated it will consider after Sixth Circuit review of the injunction against Davis – in which she raised these same constitutional arguments. See Order (D.E. 58). Discontent with that procedure, Davis “appealed” the briefing Order (D.E. 58) and then filed this motion for an injunction “pending appeal.” Of course, Davis’ appeal is meritless because she has attempted to appeal from an unappealable order. This Motion is an end-run around the Court’s briefing order on Davis’ Motion for Preliminary Injunction. Davis’ legal maneuvers are unreasonably multiplying these proceedings. The present Motion must be denied.

C. The Motion Must Be Denied Because the Requested Injunction Will Not Grant Davis the Relief She Seeks.

When a party seeks an order that will not grant relief for its alleged injury, the claim is moot. United States Parole Comm’n v. Garaghty, 445 U.S. 388, 396 (1980). The mootness doctrine ensures that “federal courts are presented with disputes they are capable of resolving.” Id. at 397 (citation omitted). Here, Davis seeks an injunction against Governor Beshear and Commissioner Onkst enjoining them from enforcing the “mandate” contained in the Beshear Letter and “exempt[ing]” Kim Davis “from having to authorize the issuance of Kentucky marriage licenses” pending appeal of the August 25, 2015 briefing order. See Memorandum in Support of the Motion at 1 and proposed order (D.E. 70). The Motion is moot because the Third-Party Defendants cannot provide this relief to Davis. First, the Third-Party Defendants possess no authority over another elected constitutional officer such as Davis and therefore can neither compel nor “exempt” her from following the law. Second, Davis is under a separate Order of this Court to issue marriage licenses to qualified individuals. The Third-Party

Defendants do not have the authority to relieve Davis of an obligation imposed by this Court.

Kentucky law regarding the issuance of marriage licenses is set out at KRS Chapter 402, as Davis concedes. Third-Party Complaint at ¶¶ 9-11. Those statutes provide the logistical scheme for issuing licenses, which only county clerks or their deputies may issue. KRS 402.080 (“[t]he license shall be issued by the clerk of the county . . .”); see also KRS 402.100, 402.110, 402.210, 402.230.¹ The Third-Party Defendants cannot relieve county clerks of the legislatively imposed duty to issue marriage licenses. The Third-Party Defendants do not possess supervisory authority over an elected constitutional officer such as Davis. See Brown v. Barkley, 628 S.W.2d 616, 618 (Ky. 1982). Likewise, the Third-Party Defendants have no authority to suspend a Kentucky statute. Baker v. Fletcher, 204 S.W.3d 589, 593 (Ky. 2006) (holding that governor’s attempted suspension of a statute via executive order was void *ab initio*); Ky. Const. § 15 (only the General Assembly possesses authority to suspend a statute). Indeed, the Third-Party Defendants have no role in the marriage licensing procedure at all, except for the narrow duty of the Kentucky Department for Libraries and Archives (“KDLA”) to prescribe the license and certificate form pursuant to KRS 402.100.

Davis seems to suggest that Obergefell somehow discarded all marriage licensing statutes. Even a cursory reading demonstrates the fallacy of this suggestion. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). The Court held that “the State laws challenged by Petitioners in these cases are now held invalid **to the extent they**

¹ In the limited circumstance in which the county clerk is absent or his/her office vacant, then the county judge/executive may issue a marriage license. See KRS 402.240. Otherwise, Kentucky statute authorizes only county clerks or their deputies to issue marriage licenses.

exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” Id. at 2605 (emphasis added). “The Constitution, however, does not permit the State to bar same-sex couples from marriage ***on the same terms as accorded to couples of the opposite sex.***” Id. at 2607 (emphasis added). Thus, the Supreme Court merely struck down statutes and state constitutional provisions that defined marriage as exclusively between one man and one woman. The Court did not overturn marriage licensing schemes. To the contrary. The Court expressly held that however a state provides a license to an opposite-sex couple, it must provide it in the same manner to a same-sex couple. Id. Thus, Kentucky statutes with respect to marriage licensing remain fully intact following Obergefell, except that same-sex couples must be treated equally as opposite-sex couples. The Third-Party Defendants cannot “exempt” Davis from her statutory obligations.

Neither can the Third-Party Defendants create new marriage licensing statutes as Davis argues. Davis cites a litany of ways in which the marriage licensing statutes could be amended. See Memorandum in Support of Motion at 17-18 (D.E. 70). Those arguments must be addressed to the Kentucky General Assembly. See Ky. Const. §§ 28, 29 (legislative authority vested exclusively in the General Assembly).² The Third-Party Defendants possess no authority to grant Davis the legislative relief she seeks.

Finally, the Third-Party Defendants cannot be enjoined to “exempt” Davis “from having to authorize the issuance of Kentucky marriage licenses” pending appeal of the August 25, 2015 briefing order. See Motion at proposed order (D.E. 70). This is because the Court has already ordered Davis to do exactly the opposite. See

² Under the separation of powers doctrine, while the Governor possesses the sole authority to call the General Assembly into special session [See Ky. Const. § 80], the Governor has no authority to compel the legislative branch to do anything once it is in session.

Memorandum Opinion and Order (D.E. 43) (directing Davis to issue marriage licenses to qualified same-sex couples). While the Third-Party Defendants do not possess supervisory authority over Davis, even if they did, they could not authorize her to violate an Order of this Court.

The Third-Party Defendants cannot possibly provide Davis the relief she seeks. Accordingly, the Motion must be denied.

D. The Motion Must Be Denied Because Davis Has Not Met the High Standard for Injunctive Relief.

The Court may grant an injunction pending appeal “to prevent irreparable harm to the party requesting such relief during the pendency of the appeal.” Overstreet v. Lexington-Fayette Urban County Gov’t, 305 F.3d 566, 572 (6th Cir. 2002). As explained above, however, there is no “pendency of the appeal” because Davis has attempted to appeal from an interlocutory order. An injunction is “an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it.” Leary v. Daeschner, 228 F.3d 729, 739 (6th Cir. 2000) (citations omitted). Davis bears the burden of meeting this high threshold. Id.

1. Davis Has Not Demonstrated a Strong Likelihood of Success on the Merits.

Davis alleges that “Kentucky’s marriage policies, as effected by Governor Beshear and Commissioner Onkst” violate her rights of free exercise of religion, free speech, and to be free from religious tests for public office. See id. at ¶¶ 46-147. Those claims are without merit for the reasons set out in the timely-filed Motion to Dismiss Third-Party Complaint incorporated herein by reference. This Court has

already considered Davis' constitutional arguments and found that they are unlikely to succeed on the merits. See Memorandum Opinion and Order at 16-28 (D.E. 43). The Sixth Circuit agreed, finding that Davis' position "cannot be defensibly argued" and that "[t]here is thus little or no likelihood" of success. See Sixth Circuit Order of 8-26-2015 (Exhibit 2 to D.E. 63). Davis cannot establish a strong likelihood of success on the merits – indeed, the Third-Party Defendants are entitled to dismissal as a matter of law. Accordingly, this factor weighs against issuance of an injunction.

2. Davis Will Not Suffer Irreparable Harm If the Requested Injunction is Denied.

Davis asserts that she will suffer the loss of constitutional rights if the requested injunction is denied. Yet, as explained in Argument C above, the requested injunction will not grant Davis any relief. Even if the Third-Party Defendants were enjoined from enforcing the Beshear Letter, Davis would still be under separate statutory, constitutional, and injunctive obligations to issue marriage licenses to all qualified individuals. Thus, the requested injunction against the Third-Party Defendants will have no effect on Davis' alleged injury. Accordingly, this second factor weighs against issuance of an injunction.

3. The Requested Injunction Would Cause Substantial Harm to Others and to the Public Interest.

As explained above, the requested injunction would have no effect because the Third-Party Defendants cannot "exempt" Davis from performing her obligations under statute and the entered preliminary injunction. Even if the Third-Party Defendants could excuse Davis from complying with the law, such an injunction would cause substantial harm to others, including those qualified citizens in Rowan County who wish to exercise

their fundamental right to marriage. See Memorandum Opinion and Order at 15-16 (D.E. 43) (finding that plaintiffs would suffer irreparable harm if Davis were permitted to refuse marriage licenses). Likewise, the public interest would be harmed if the requested injunction were issued, as “it is always in the public interest to prevent the violation of a party’s constitutional rights,” such as the plaintiffs’ fundamental right of marriage. G&V Lounge v. Mich. Liquor Control Comm’n, 23 F.3d 1071, 1079 (6th Cir. 1994). Accordingly, the third and fourth factors weigh against issuance of an injunction.

All four factors guiding the Court’s injunction analysis weigh against an injunction to enjoin the Third-Party Defendants. Accordingly, the Motion must be denied.

III. CONCLUSION

For the reasons set out above, the Third-Party Defendants respectfully request the Court deny Davis’ Emergency Motion for Injunction Pending Appeal (D.E. 70).

Respectfully submitted,

STOLL KEENON OGDEN PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507-1380
(859) 231-3000
(859) 253-1093 facsimile

By: /s/ Palmer G. Vance II
William M. Lear, Jr.
Palmer G. Vance II

COUNSEL FOR THIRD-PARTY
DEFENDANTS GOVERNOR
STEVEN L. BESHEAR AND
COMMISSIONER WAYNE ONKST
IN THEIR OFFICIAL CAPACITIES

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing with the Court's ECF system on the 8th day of September 2015, which simultaneously serves a copy to the following via electronic mail:

Daniel J. Canon
Laura E. Landenwich
Leonard Joe Dunman
CLAY DANIEL WALTON ADAMS, PLC
dan@dancanonlaw.com
laura@justiceky.com
joe@justiceky.com
COUNSEL FOR PLAINTIFFS
William Ellis Sharp
ACLU OF KENTUCKY
sharp@aclu-ky.org
COUNSEL FOR PLAINTIFFS

Anthony Charles Donahue
DONAHUE LAW GROUP, PSC
acdohue@donahuelawgroup.com
COUNSEL FOR KIM DAVIS

Roger K. Gannam
Jonathan D. Christman
LIBERTY COUNSEL
rgannam@lc.org
jchristman@lc.org
COUNSEL FOR KIM DAVIS

Cecil R. Watkins
ROWAN COUNTY ATTORNEY
cwatkins@prosecutors.ky.gov
COUNSEL FOR DEFENDANT
ROWAN COUNTY KENTUCKY

Jeffrey C. Mando
Claire E. Parsons
ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC
cparsons@aswdlaw.com
jmando@aswdlaw.com
COUNSEL FOR DEFENDANT
ROWAN COUNTY KENTUCKY

/s/ Palmer G. Vance II
COUNSEL FOR THIRD-PARTY
DEFENDANTS GOVERNOR
STEVEN L. BESHEAR AND
COMMISSIONER WAYNE ONKST
IN THEIR OFFICIAL CAPACITIES

119363.152876/4427383.9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT ASHLAND
CIVIL ACTION NO. 15-cv-044-DLB

APRIL MILLER, PH.D.; KAREN ANN ROBERTS;
SHANTEL BURKE; STEPHEN NAPIER;
JODY FERNANDEZ; KEVIN HOLLOWAY;
L. AARON SKAGGS; BARRY W. SPARTMAN;
and OTHERS SIMILARLY SITUATED

PLAINTIFFS

v.

KIM DAVIS, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY AS ROWAN
COUNTY CLERK; and ROWAN
COUNTY KENTUCKY

DEFENDANTS

and

ORDER

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
OF KENTUCKY DEPARTMENT FOR
LIBRARIES AND ARCHIVES

THIRD-PARTY DEFENDANTS

*** *** *** *** ***

This action having come before the Court upon the Emergency Motion for Injunction Pending Appeal (D.E. 70) of Defendant/Third-Party Plaintiff Kim Davis ("Davis"), the Court having reviewed the record and being otherwise sufficiently advised,

IT IS HEREBY ORDERED:

1. That Davis' Emergency Motion for Injunction Pending Appeal (D.E. 70) is DENIED.

This ____ day of _____ 2015.

HON. DAVID L. BUNNING, JUDGE
UNITED STATES DISTRICT COURT