UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT ASHLAND

APRIL MILLER, *et al.*, Plaintiffs, v. KIM DAVIS, *et al.*, Defendants.	Case No. 0:15-cv-00044-DLB ***Electronically filed***

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO REOPEN BRIEFING AND EXPEDITE CONSIDERATION OF CLASS CERTIFICATION [RE #115]

In opposing Plaintiffs' motion to reopen briefing and expedite consideration of class certification [RE #115], Defendants Davis and Rowan County[1] assert that: 1) class certification is unnecessary because valid marriage licenses are being issued [RE #132: Davis' Response in Opposition to Plaintiffs' Motion to Reopen Briefing and Expedite Consideration of Plaintiffs' Class Certification Motion ("Davis' Response"), 6-11]; 2) class certification is premature and would "needlessly multiply the litigation" [*id*. at 11-13]; and 3) Plaintiffs lack standing to pursue class certification. [*Id*. at 13-19.][2] For the following reasons, Defendants' arguments are unavailing, and Plaintiffs' motion should be granted.

[1] Rowan County adopted and incorporated by reference the arguments advanced by Davis in her response [RE # 134], thus citations to defendants' arguments will refer to Davis' brief only.

[2] Davis also argues that class certification is inappropriate without extensive class-based discovery and further briefing. [RE #132: Davis Response, 19-22.] Plaintiffs have adequately established the requirements for class certification in their initial motion [RE #31-1] and do not reargue those factors here.

I. CLASS CERTIFICATION IS NECESSARY AND APPROPRIATE TO PROTECT THE RIGHTS OF THE PUTATIVE CLASS.

Defendants' two principal arguments ostensibly merge into one — that class certification is either unnecessary or premature because "there is no longer a 'no marriage licenses' policy in effect" in Rowan County, valid marriage licenses are being issued, and Davis is not interfering with that process. [RE #132: Davis Response, 6-13.] In doing so, Defendants assert that this purported equilibrium has been achieved because Davis altered the licenses in such a way as to "accommodate [her] sincerely-held religious beliefs" [*id*.], and, as a result, her office does not intend on reinstituting the "no marriage licenses" policy. [*Id*. at 12]

But the fact that Davis now asserts the authority to unilaterally (and materially) alter the marriage license forms to accommodate her personal religious beliefs is directly at odds with her own testimony in this case. Specifically, prior to Davis' release from custody, she consistently maintained that she lacked authority to modify the form or content of marriage licenses. For example, under questioning by her own counsel, Davis disclaimed any authority to make the very changes upon which she now relies.

> Q. And do you have the discretion to create a different kind of license that would not require your authorization for it to be issued?
>
> A. No.

[RE # 26: July 20, 2015 Transcript, PageID #256 (Davis Direct Examination); *see also id*. at Page ID #257 (Davis answering "no" when asked whether she was aware "of any option in Rowan County to issue a marriage license form that's not issued under your authority?"); *id*. at Page ID #257-58 (Davis answering "no" when asked whether she was "aware of any option for a marriage license form that would not show [her] name on

it?").] Davis' counsel also asserted that Kentucky law expressly barred Davis from altering the marriage license forms by removing her name from them. [RE #26: July 20, 2015 Transcript, PageID #296 (Mr. Christman stating "Further down, with the marriage certificate portion of the statute, it then says that the name it refers to -- all the information that needs to be listed again . . . and says the name of the county clerk under whose authority the license was issued. *That's why her name is required on every license in those two places*.") (emphasis added).] And Davis repeated these assertions in order to contest the merits of Plaintiffs' requested preliminary injunction, and to support her claim of "irreparable injury" when she later sought a stay of that adverse ruling. [*See, e.g.*, RE #45: Motion to Stay the August 12, 2015 Injunction Pending Appeal, PageID # 1227 (arguing that denying stay would result in "impending" harm of a "searing act of her conscience").]

Moreover, the very premise upon which Davis' claims against the third-party Defendants are based is that she will be irreparably harmed by complying with the Governor's "SSM mandate" because it does not grant her a religious accommodation and she cannot craft one for herself. [RE #34: Verified Third Party Complaint of Kim Davis, ¶ 10 ("*County clerks have no local discretion under Kentucky law to alter the composition or requirements of the KDLS-prescribed form*.") (emphasis added); *id*. at ¶ 12 ("every marriage license must be issued and signed in the county clerk's name and by the county clerk's authority. In other words, *no marriage license can be issued by a county clerk without her authorization and without her imprimatur*.") (emphasis added); RE #39-1: Third-Party Plaintiff Memorandum in Support of Preliminary Injunction,

PageID #839; *id*. at PageID #872 (claiming "irreparable harm" to Davis if Governor Beshear's "SSM Mandate" not preliminarily enjoined).]

Since her release from custody, however, Davis now concludes that she does, in fact, have authority to make material alterations[3] to the marriage license forms in a way that will accommodate her religious beliefs — a questionable conclusion for the reasons cited in Plaintiffs' pending Motion to Enforce [RE #120] and as articulated by counsel for Deputy Clerk Mason. [RE #114: Notice of Status Update, PageID #2294 ("it also appears [that Davis'] changes [to the marriage license form] were made in some attempt to circumvent the court's orders and may have raised to the level of interference against the court's orders.").] And now, having crafted a religious accommodation that, according to her, she lacked the authority to adopt, Davis points to that religious accommodation to justify why this court need not address class certification.

But Davis' claims that she "has no interest or intent to change the status quo" or "to reinstate any 'no marriage licenses' policy, even if the expanded injunction order is nullified by the Sixth Circuit," are unavailing. To be certain, Davis is content with the status quo because she has granted herself the very relief she sought (unsuccessfully) from the General Assembly prior to *Obergefell* and which she disclaimed (under oath)

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[3] According to Deputy Clerk Mason's status update:

> Kim Davis came to the office and confiscated all the original forms, and provided a changed form which deletes all mentions of the County, fills in one of the blanks that would otherwise be the County with the Court's styling, deletes her name, deletes all of the deputy clerk references, and in place of deputy clerk types in the name of Brian Mason, and has him initial rather than sign. There is now a notarization beside his initials in place of where otherwise signatures would be.

[RE #114: Notice of Status Update, PageID #2293-2294.]

the authority to exercise. But her demonstrated willingness to disregard court orders and craft extrajudicial remedies to accommodate her personal religious beliefs highlight why the court can (and should) address the class certification issue in order to protect the rights of the putative class given the ongoing effort to stay the September 8 Order and Davis' own admissions that she simply does not have the authority to undertake the self-created accommodation she now touts.[4] *McDonald v. Franklin Cnty., Ohio*, 306 F.R.D. 548, 559 (S.D. Ohio 2015) (in rejecting defense argument that 23(b)(2) certification improper because, *inter alia*, the challenged practice had been abandoned, court stated that "if the County's policy is found to violate the Fourth Amendment, then an injunction is necessary to prevent the County from return[ing] to [its] old ways.") (internal quotations and citations omitted).

II. NAMED PLAINTIFFS REMAIN WHO MAY PROPERLY ASSERT CLASS CERTIFICATION ON BEHALF OF THE PUTATIVE CLASS.

Davis also argues that the named Plaintiffs lack standing to pursue class certification because their official-capacity claims are moot having obtained the specific relief they sought: marriage licenses. [RE #132: Davis Response, PageID #2467.] Davis is correct that three of the four Plaintiff couples obtained marriage licenses following Davis' incarceration for civil contempt. And of those, two couples have now married. However, the third, for personal reasons, has decided to wed on a date that is beyond the

[4] Moreover, if, as Davis claims, she may alter marriage license forms to accommodate her religious beliefs without rendering those licenses invalid, then it would seem that her authority to do so undermines her standing to assert a pre-enforcement challenge to the Governor's "SSM mandate" as alleged in her third-party Complaint. *See Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979) (pre-enforcement standing requires litigant to establish "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and *[that] there exists a credible threat of prosecution thereunder*.") (emphasis added).

thirty (30) day period in which the license they obtained remained valid. Thus, that couple will be required to obtain a new marriage license within thirty (30) days of their newly-selected wedding date in 2016. Though that couple — Plaintiffs Fernandez and Holloway — obtained the relief they sought in their preliminary injunction request, a change in circumstances now requires that they seek a new marriage license in the future closer to their planned wedding date. Thus, their official capacity claim for prospective injunctive relief against Davis is not moot because the preliminary injunction may yet be undone on appeal before they are able to completely (and irreversibly) benefit from it.[5]

But *even if* all of the named Plaintiffs' official capacity claims were rendered moot (which they have not), that fact would not defeat class certification because the named Plaintiffs were members of the putative class with standing *when they moved for class certification*.

> Even if the claims of *all* named plaintiffs were moot, this case would nonetheless survive defendant's motion under the "special mootness rules [that] exist for class actions." *Brunet v. City of Columbus,* 1 F.3d 390, 399 (6th Cir.1993). It is well-established in this Circuit that mooting the named plaintiffs' claims while a motion for class certification is pending does not moot the case. *See Carroll v. United Compucred Collections, Inc.,* 399 F.3d 620, 625 (6th Cir.2005); *Dozier v. Haveman,* No. 14–12455, 2014 WL 5483008, at *8–13, 2014 U.S. Dist. LEXIS 153395, at *25–36 (E.D.Mich. Oct. 29, 2014) (thoroughly surveying relevant cases).

Barry v. Corrigan, 79 F. Supp. 3d 712, 7278 (E.D. Mich. 2015), *reconsideration denied sub nom. Barry v. Lyon*, No. 13-CV-13185, 2015 WL 1322728 (E.D. Mich. Mar. 24,

[5] Of course, if Plaintiffs' official-capacity claims are now moot because they received the full and irreversible benefit of that ruling as argued by Davis, then it logically follows that Davis' pending appeal of the preliminary injunction ruling would likewise be moot. *See Bogaert v. Land*, 543 F.3d 862 (6th Cir. 2008) (dismissing as moot appeal from preliminary injunction were specific steps required by preliminary injunction were completed and could not be undone).

2015). *See also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3rd Cir. 2000) ("So long as a class representative has a live claim at the time he moves for class certification, neither a pending motion nor a certified class action need be dismissed if his individual claim subsequently becomes moot.").

WHEREFORE, for the foregoing reasons, as well as those contained in their motion [RE #115], Plaintiffs respectfully request that this Court grant Plaintiffs' Motion to Reopen Briefing and Expedite Consideration of Plaintiffs' Motion to Certify Class.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 23, 2015, I filed this Reply In Support of Plaintiffs' Motion to Reopen Briefing and Expedite Consideration of Class Certification with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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