

Nos. 15-5880, 15-5961, 15-5978

**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-Third-Party Plaintiff-Appellant.

v.

STEVEN L. BESHEAR, in his official capacity as Governor of Kentucky, and
WAYNE ONKST, in his official capacity as State Librarian and Commissioner,
Kentucky Department for Libraries and Archives,

Third-Party Defendants-Appellees.

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

**APPELLANT KIM DAVIS' REPLY IN SUPPORT OF RENEWED
MOTION TO STAY DISTRICT COURT'S SEPTEMBER 3, 2015
INJUNCTION ORDER PENDING APPEAL**

(continued on next page)

(continued from prior page)

A.C. Donahue
DONAHUE LAW GROUP, P.S.C.
P.O. Box 659
Somerset, Kentucky 42502
(606) 677-2741
ACDonahue@DonahueLawGroup.com

Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Jonathan D. Christman
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
(407) 875-1776
court@lc.org / hmihet@lc.org /
rgannam@lc.org / jchristman@lc.org

Counsel for Appellant Kim Davis

Appellant Kim Davis (“Davis”) hereby submits this Reply in support of her renewed 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 more than same-day notice, without taking evidence, and without allowing Davis the opportunity to submit any written opposition; (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; and (6) the district court further acknowledged that its September 3, 2015 order undeniably “**expanded its ruling**” already on appeal to this Court.

The district court had no jurisdiction to grant the new and expanded injunction. 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 and pure speculation in hopes that this Court will similarly ignore basic principles of jurisdiction and due process set forth in its own precedent. Simply put, Davis' appeal of the August 12, 2015 injunction deprived the district court of any jurisdiction to alter or expand that injunction, and this Court should therefore stay the Expanded Injunction.

REPLY ARGUMENT

I. Davis Has A Strong Likelihood Of Success On The Merits Of Her Appeal Of The Expanded Injunction.

In their response, Plaintiffs cite no authority that would support a district court's granting of new injunctive relief without notice and without taking any evidence, particularly when that new relief expands an injunction indisputably limited to certain parties to include a new and uncertified putative class not covered by the original injunction, while that injunction is on appeal. Plaintiffs also fail to rebut the district court's own prior acknowledgments that it was adding injunctive relief that Plaintiffs "**did not request**" in their original injunction and the district court did not originally grant, R.78, Contempt Hr'g Tr. (9/3/2015), PgID.1578:20-25 (emphasis added), and "**expanded its ruling**" to include new individuals, R.103, Sept. 11, 2015 Order, PgID.2177 (emphasis added). These oversights are fatal to the validity of the Expanded Injunction under this Court's precedents barring the

expansion of orders and judgments on appeal as lacking jurisdiction, which Davis cited in her prior briefing.

In light of such precedent, Plaintiffs claim that the district court's granting of the Expanded Injunction is nonetheless authorized because it is really a "modified" injunction that "preserve[d] the status quo." *See* Doc. 59 at 3, 10.¹ However, the cases relied upon by Plaintiffs are limited to maintaining the status quo "**between the parties**" to the injunction on appeal, not with respect to non-parties. *See, e.g., George S. Hofmeister Family Trust v. Trans Indus. of Ind.*, No. 06-13984, 2007 WL 28932, at *2 (E.D. Mich. 2007); *see also Shell Offshore, Inc. v. Greenpeace, Inc.*, No. 12-42, 2012 WL 1931537, at *15 (D. Alaska May 29, 2012) (amended injunction applied exclusively to the conduct of parties to the original injunction). In fact, in the only Sixth Circuit case cited by Plaintiffs, the "status quo" contemplated by this Court in considering a modified (not expanded) injunction pending appeal was **between the same parties** to an original injunction involving the enforcement of noncompetition agreements. *See Basicomputer Corp. v. Scott*, 973 F.2d 507, 513 (6th Cir. 1992).

¹ Plaintiffs now claim the relevant "status quo" is the time period **after** entry of the original injunction. *See* Doc. 59 at 11. Previously, Plaintiffs contended that the relevant "status quo" to be considered was the time period **before** the original injunction. *See* Doc. 47 at 10. Plaintiffs' inconsistency on the relevant time period for the "status quo" further highlights the lack of merit in their arguments, and their failed attempts at circumventing this Court's clear precedent.

The non-binding case of *Vasile v. Dean Witter Reynolds, Inc.*, 205 F.3d 1327, 2000 WL 236473 (2d Cir. 2000), is also distinguishable. *Vasile* involved a *pro se* litigant with a “vexatious” history of “resorting to litigation to harass anyone who has encountered him in litigation or anyone who is affiliated with the litigants,” and he had previously been sanctioned by the Second Circuit. *Id.* at *2. The individual had turned the courts into his vehicle for harassment, including against the actual parties to that case and the attorneys representing those parties. Thus, although the new injunction against further lawsuits covered additional persons (who were nonetheless agents of the parties to the original injunction) and new forums not listed in the original injunction, the Second Circuit’s concern for “preserving the status quo” pending appeal was motivated by its interest in “[p]rotecting the parties from Vasile’s vexatious conduct,” pending appeal. *Id.* In contrast, the Expanded Injunction has no effect on the status quo between the named Plaintiffs and Davis.

Additionally, contrary to Plaintiffs’ suggestion, the Expanded Injunction was not necessary to “preserve the integrity of the proceedings” in this Court. *See* Doc. 59 at 13-14. 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, 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. Also, the entry of the Expanded Injunction without notice violated Davis' due process rights. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 432 n. 7 (1974) ("Same day" notice "does not suffice" for the granting of injunctive relief).² 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.³ The

² As further evidence of this point, and contrary to Plaintiffs' multiple misrepresentations of the record, *see* Doc. 59 at 11, 13, the district court entered the Expanded Injunction **without taking any evidence** and before Davis even testified. *See* R.78, Contempt Hr'g Tr. (9/3/2015), PgID.1571-1581; *see also id.* at PgID.1611-1632 (Davis' testimony).

³ The cases of *Lee v. Orr*, No. 13-8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 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

cases cited by Plaintiffs as the purported authority for the district court's Expanded Injunction involve a district court's power to enter an original injunction, rather than 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 Tr. (9/3/2015), PgID.1578:20-25; *see also* R.103, Sept. 11, 2015 Order, PgID.2177. Thus, what 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. Accordingly, the Expanded Injunction should be stayed by this Court.

II. The Remaining Factors Also Favor Staying The Expanded Injunction.

As noted previously, and Plaintiffs ignore entirely, because the likelihood of success on Davis' appeal of the Expanded Injunction is clear based upon the district

injunctions entered where 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.

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. *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 399 (6th Cir. 1997). Irrespective of the foregoing principle, Davis continues to face real and substantial harm absent a stay⁴, and no public interest is served by upholding a district court order that is "null and void" as exceeding the district court's jurisdiction. *U.S. v. Holloway*, 740 F.2d 1373, 1382 (6th Cir. 1984). As noted previously, the district court conditioned Davis' release from incarceration on compliance with the Expanded Injunction, not the original injunction, and Plaintiffs have asked the district court to impose additional sanctions against Davis for allegedly violating the Expanded Injunction. Based upon the district court's prior actions, and Plaintiffs' new request for sanctions, Davis continues to face ongoing real threats of irreparable injury (*i.e.*, fines, incarceration, receivership on her office) that are inescapably tied to an order the district court had no authority to enter.

In stark contrast to Davis' harm, Plaintiffs face no harm (real or potential) from staying the Expanded Injunction, because they received no additional relief from it. Plaintiffs' speculation about the alleged harm of other persons not before

⁴ Given the strength of Davis' position on the merits, any required showing on irreparable injury is reduced. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

this Court—that “no one would be permitted to obtain a marriage license in Rowan County during the pendency of Davis’ appeal” if a stay is granted (Doc. 59 at 17)—is wrong, and unsupported by the record.⁵ State Appellees also face no harm from a stay of the Expanded Injunction.⁶ Accordingly, though “fewer factors” resolve this matter, the remaining factors also favor staying the Expanded Injunction.

III. The Expanded Injunction Should Not Be Treated As An Indicative Ruling By This Court.

Recognizing that this Court’s precedent on jurisdiction is fatal to the Expanded Injunction, Plaintiffs seek refuge under Fed. R. Civ. P. 62.1. This Rule

⁵ In fact, effective September 14, 2015, marriage licenses are being issued in the Rowan County Clerk’s Office to lawfully eligible couples that both accommodate Davis’ religious objections and are validated and authorized by the Kentucky Governor, a party to these consolidated appeals, and the Kentucky Attorney General. Not only that, the persons who actually receive those licenses deem them acceptable. Accordingly, the accommodating solution that is in place **will remain in place** because it is the kind of simple accommodation Davis has been requesting from the outset of this litigation. *See* R.133, Resp. to Pls.’ Mot. to Enforce, PgID.2484, 2489-2495; *see also* R.132, Resp. to Pls. Mot. to Reopen Class Cert., PgID.2456, 2460-2465. As such, contrary to the State Appellees’ suggestion, Davis is not seeking an order from this Court that will stop the issuance of “marriage licenses to qualified couples while the case is on appeal.” *See* Doc. 58 at 5.

⁶ State Appellees claim they “should not be parties to this appeal,” and Davis’ appeal of the August 25, 2015 district court order was an “unappealable interlocutory case management Order.” *See* Doc. 58 at 6-7. Such objections are a mere rehashing of arguments the Court previously rejected when it denied State Appellees’ motion to dismiss Davis’ appeal. *See* Case No. 15-5961, Doc. 37-1 at 2-3 (“The August 25 order has the practical effect of denying immediate injunctive relief. . . We decline to dismiss the appeal for lack of jurisdiction at this time. . . The motion to dismiss the appeal for lack of jurisdiction is **DENIED** without prejudice to reconsideration by the panel assigned to hear the appeal on the merits.”) (emphasis in original).

was principally adopted to incorporate “the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal,” *see* Fed. R. Civ. P. 62.1, advisory committee note (2009); *see also* Wright & Miller et al., 11 Fed. Prac. & Proc. Civ. § 2911 (3d ed.), and is thus inapplicable here.

Moreover, besides being inapposite, Rule 62.1 is of no help to Plaintiffs because they have failed to follow the required procedure. The Rule, which necessarily includes a concession that the district court “lacks authority” to grant relief “because of an appeal that has been docketed and is pending,” *see* Fed. R. Civ. P. 62.1(a); *see also* Fed. R. App. P. 12.1(a) (same), plainly requires Plaintiffs to first seek relief in the district court; after which the district court may issue an indicative ruling; after which Plaintiffs may notify this Court of said indicative ruling; after which this Court may remand the case for the district court’s indicative ruling to be implemented.⁷ Nothing in the Rule authorizes Plaintiffs to skip the required steps and come directly to this Court for relief. Plaintiffs vociferously (and successfully) argued that Davis’ initial motion to stay the Expanded Injunction was procedurally

⁷ *See* Fed. R. Civ. P. 62.1(b) (“The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.”); *see also* Fed. R. App. P. 12.1(a) (“If a timely motion is made in the district court...the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.”).

improper because Davis did not first seek relief in the district court. *See* Doc. 47 at 7-8. The same logic and rules foreclose their argument here.

Even if Rule 62.1 was applicable here, and even if Plaintiffs had followed the prescribed procedure, the Rule would still not save the Expanded Injunction. The Expanded Injunction indisputably constitutes new injunctive relief, but it was entered by the district court without satisfying the basic requirements of Rule 65, including, *inter alia*, notice. Thus, not even Rule 62.1 can cure the inherent due process deficiencies in the new injunction.

RELIEF REQUESTED

For the reasons set forth above and in prior briefing, Appellant Kim Davis respectfully requests that this Court enter an order staying the district court's September 3, 2015 Expanded Injunction pending final resolution of Davis' consolidated appeals in this Court.

DATED: October 20, 2015

A.C. Donahue
Donahue Law Group, P.S.C.
P.O. Box 659
Somerset, Kentucky 42502
(606) 677-2741
ACDonahue@DonahueLawGroup.com

Respectfully submitted:

/s/ Jonathan D. Christman
Mathew D. Staver, *Counsel of Record*
Horatio G. Mihet
Roger K. Gannam
Jonathan D. Christman
Liberty Counsel, P.O. Box 540774
Orlando, Florida 32854
(407) 875-1776
court@lc.org / hmihet@lc.org /
rgannam@lc.org / jchristman@lc.org
Counsel for Appellant Kim Davis

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 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:

William Ellis Sharp
ACLU of Kentucky
315 Guthrie Street, Suite 300
Louisville, KY 40202
sharp@aclu-ky.org

Daniel J. Canon
Laura E. Landenwich
Leonard Joe Dunman
Clay Daniel Walton Adams, PLC
462 S. Fourth Street, Suite 101
Louisville, KY 40202
dan@justiceky.com
laura@justiceky.com
joe@justiceky.com

Daniel Mach
Heather L. Weaver
ACLU Foundation
915 15th Street, NW, Suite 6th Floor
Washington, DC 20005
dmach@aclu.org
hweaver@aclu.org

James D. Esseks
Ria Tabacco Mar
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
jesseks@aclu.org
rmar@aclu.org

Counsel for Appellees

William M. Lear, Jr.
Palmer G. Vance II
Stoll Keenon Ogden PLLC
300 West Vine Street, Suite 2100
Lexington, KY 40507-1380
william.lear@skofirm.com
gene.vance@skofirm.com

Counsel for Third Party Defendants-Appellees

/s/ Jonathan D. Christman
Jonathan D. Christman
Liberty Counsel
P.O. Box 540774
Orlando, Florida 32854
(800) 671-1776
jchristman@lc.org