Nos. 15-5880 & 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.

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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REPLY BRIEF FOR APPELLANT KIM DAVIS IN SUPPORT OF MOTION TO DISMISS CONSOLIDATED APPEALS FOR LACK OF JURISDICTION AND TO VACATE ORDERS ON APPEAL

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Appellant Kim Davis ("Davis") hereby submits this Reply in support of her motion to dismiss her pending appeals and vacate the orders on appeal.

INTRODUCTION

Plaintiffs agree that Kentucky Senate Bill 216 ("SB 216") moots the consolidated appeals in this matter. But Plaintiffs, while hoping to hold an ongoing injunction over Davis (not to mention the rest of her office) and lean on its preclusive effect, nonetheless resist vacatur as purportedly "unnecessary" in this case. Plaintiffs make no attempt, nor can they, to attribute any fault for the mootness of the appeals to Davis' voluntary actions. Nor do Plaintiffs make any attempt to establish the public interest for keeping the ongoing injunctions and orders in place. Consistent with this Court's "established practice" in **interlocutory** appeals, and as it has done in numerous other **interlocutory** appeals from preliminary injunction orders, this Court should vacate the orders on appeal.

REPLY ARGUMENT

I. Plaintiffs Do Not Dispute – And Therefore Concede – That Davis' Appeals Became Moot Through No Voluntary Action Of Her Own And That The Public Interest Favors Vacatur.

In her Motion, Davis demonstrated that the two factors generally considered by Courts reviewing vacatur requests—fault and the public interest—both favor vacatur in this case. Dkt. 95 at 10-20. In their response (which this Court expressly requested, Dkt. 97), Plaintiffs elected not to raise any argument in opposition to either point. By failing to make any argument on these well-accepted factors after

the Court requested a response to Davis' Motion, Plaintiffs have chosen not to oppose Davis on either factor and therefore concede that her appeals were mooted by SB 216 through no fault of her own and that the public interest supports vacatur.

II. Vacatur In Cases Involving Preliminary Injunctions Is The "Established Practice" Of This Court, And The Expectation Of The Supreme Court.

Plaintiffs oppose vacatur as "unnecessary," entreating this Court to follow the alleged "usual practice" of handpicked decisions from other Circuits which dismissed moot interlocutory appeals without granting vacatur. Dkt. 98 at 4-5. But the purported "usual practice" upon which Plaintiffs stake their opposition is neither usual nor controlling in this Court, where challenged preliminary injunctions that become moot on appeal are routinely vacated. *See*, *e.g.*, *McIntyre v. Levy*, No. 06-5989, 2007 WL 7007938, at *2 (6th Cir. Aug. 1, 2007) (vacating district court's granting of preliminary injunction to "wipe the slate clean, and eliminate the possibility of any adverse legal consequences") (internal quotations and citations omitted); *Intimate Ideas, Inc. v. City of Grand Rapids*, 90 Fed. Appx. 134, 135 (6th Cir. 2004) (vacating order granting preliminary injunction enjoining enforcement of zoning ordinance regulating the operation of adult bookstores, where any future adult bookstore business "would be governed by a new ordinance"); *Smith v. SEC*, 129 F.3d 356, 362-64 (6th Cir. 1997); *Sherrer v. Lowe*, 125 F.3d 856, at *2 (6th Cir. 1997) (vacating order granting preliminary injunction and recognizing that "**the established practice**" is vacatur); *Memphis Planned Parenthood, Inc. v. Sundquist*,

121 F.3d 708, at *2 (6th Cir. 1997) (vacating preliminary injunction enjoining enforcement of a parental consent state statute, where "recent changes in state law" altered the issues in the case and plaintiffs admitted that certain challenges to the statute were "effectively nullified by the recent amendment of the statute"). These decisions involving interlocutory rulings comport with this Court's general rule of vacating injunctions rendered moot on appeal. *U.S. v. City of Detroit*, 401 F.3d 448, 451 (6th Cir. 2005) ("[W]here a case involving an injunction becomes moot on appeal, the case should be remanded to the district court with instructions to vacate the injunction.") (emphasis added).

Thus, this Court should reject Plaintiffs' invitation to adopt the purported "usual practice" of other courts, and should instead continue its "established practice" of granting vacatur in moot appeals, including moot interlocutory appeals:

> If the issues raised by an order on appeal become moot, but the case below does not, **the established practice is to vacate the order** and remand for consideration of the remaining issues.

Sundquist, 121 F.3d 708, at *1 (emphasis added) (vacating preliminary injunction); *see also Sherrer*, 125 F.3d 856, at *1 (recognizing this same "established practice" in interlocutory appeal of preliminary injunction, and vacating preliminary injunction as moot). Importantly, vacatur under circumstances such as are present here is not only the "established practice" in this Court, but also in line with the clear teaching of the Supreme Court:

> Though the entire case is not moot, the question remains whether the issue of the appropriateness of injunctive relief is moot. If the parties lack a legally cognizable interest in the determination whether the preliminary injunction was properly granted, the sole question before us on this appeal, then **we must vacate the district court's order** and remand the case for consideration of the remaining issues. **Because the only issue presently before us—the correctness of the decision to grant a preliminary injunction—is moot, the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court for trial on the merits**.

Univ. of Texas v. Camenisch, 451 U.S. 390, 394 (1981) (internal citation and quotations omitted; emphasis added). Thus, Plaintiffs have not shown a customary, let alone controlling, practice in this Court to deny vacatur of preliminary injunctions following mootness on appeal, and have presented no reason whatsoever for this Court to depart from its "established practice" of granting vacatur.

In fact, to oppose Davis' request for vacatur, Plaintiffs cite only one case from the Sixth Circuit not granting vacatur. *See* Dkt. 98 (citing *Serv. Emps. Int'l Union Local 1 v. Husted*, 531 Fed. Appx. 755 (6th Cir. 2013)). But the refusal to vacate in *Husted* is readily distinguishable from the case at bar. First, unlike here, the underlying preliminary injunction on appeal "**expired by its own terms**." *Husted*, 531 Fed. Appx. at 755 (emphasis added). The injunction, which was issued in late October 2012, affected the counting of provisional ballots cast in the wrong precinct for the upcoming November 2012 elections in Ohio. *Id*. Thus, once those elections occurred, the preliminary injunction simply expired on the basis of the passage of

time alone, engendering mootness on the appeal of that injunction. Not so here. It was the passage of a new law, not the passage of time, which gave rise to the mootness of the appeal.

Second, the party requesting vacatur in *Husted* sought to vacate a **precedential order** of this Court, not the district court's preliminary injunction order on appeal. *Husted*, 531 Fed. Appx. at 755. In *Husted*, this Court granted Ohio an emergency stay from the district court's preliminary injunction ordering certain provisional ballots cast in the wrong precinct to be counted just two weeks before the November 2012 elections. *Servs. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343, 346 (6th Cir. 2012). Ohio's November 2012 election was conducted and the election results certified with no remaining election contests, thus rendering an appeal concerning a preliminary injunction affecting those elections moot. *Husted*, 531 Fed. Appx. at 755. This Court rejected vacatur of its own precedential stay order: "Our stay order continues to serve a jurisprudential purpose in providing guidance on injunctive relief as it concerns last-second changes to election procedures, justifying our denial of vacatur here." *Id.* at 756. In stark contrast, Davis seeks to vacate the **district court's orders** on appeal, not any precedential order of this Court.

Nor do the cases from outside this Court cited by Plaintiffs compel denial of vacatur here. First, several cases were decided before the Supreme Court's more recent pronouncements on vacatur—including its decisions in *U.S. Bancorp Mortg.*

Co. v. Bonner Mall P'ship, 513 U.S. 18, 21-27 (1994); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997); and, *Alvarez v. Smith*, 558 U.S. 87, 94-96 (2009), all cases cited and relied upon by Davis in her Motion. *See* Dkt. 98 at 4-5. In those decisions ignored by Plaintiffs, the Supreme Court emphasized the primary importance of "fault" in determining whether to grant vacatur of a moot appeal. *See, e.g.*, *Bancorp*, 513 U.S. at 24-26. The Court also explained that vacatur is appropriate "because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . **was only preliminary**.'" *Alvarez*, 558 U.S. at 94 (citing *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)) (emphasis added). Plaintiffs ignored this analysis in its entirety. Plaintiffs have shown no reason to depart from the established rule of vacatur, which applies even where a decision "was only preliminary."

Second, many of the cases cited by Plaintiffs involved injunctions similar to the one at issue in *Husted*, which either expired on their own terms due to the passage of time, or involved requests to enjoin events that subsequently happened. *See, e.g.*, *Fleming v. Gutierrez*, 785 F.3d 442, 443 (5th Cir. 2015) (refusing vacatur in case where injunction issues were mooted "by the passage of the 2014 election"); *McLane v. Mercedes-Benz of N. Am., Inc.*, 3 F.3d 522, 523 (1st Cir. 1993) (denying vacatur in appeal of a denial of a preliminary injunction seeking to enjoin certain events where "the events which [appellant] sought to enjoin have in fact occurred");

Gjertsen v. Bd. of Election Comm'rs, 751 F.2d 199, 201 (7th Cir. 1984) (primary election that was the subject of preliminary injunction order "was conducted in compliance with the terms of the order"). None of them involved mootness based upon changes in the law at issue while an appeal is pending, as in this case.

Third, in at least one of the cases relied upon by Plaintiffs, the district court, on its own, had already vacated the subject order on appeal. *In re: Tax Refund Litig.*, 915 F.2d 58, 59 (2d Cir. 1990). The district court here has taken no action to vacate its own orders on appeal—to the contrary, as discussed below, the district court has exercised ongoing oversight over Davis and the Rowan County Clerk's Office.

Fourth, in several of the cases cited by Plaintiffs, the defendants appealing the injunction did not even request vacatur. *Gjertsen*, 751 F.2d at 203 ("[N]o one has requested that it [the order granting a preliminary injunction] be vacated."); *Fleming*, 785 F.3d at 449 ("The County makes no argument as to what we should do in the event we find its appeal moot."). Since vacatur is an equitable doctrine of the Court, the failure to ask for it is cause alone for simply dismissing a moot appeal without vacatur. This case is different: Davis has expressly requested vacatur.

Finally, as even the Court in *Gjertsen* recognized, there are instances—as in the case at bar—in which "letting an interlocutory order stand" can effectuate harm to the party who challenged the order on appeal since "a preliminary injunction issued in it may be given collateral estoppel effect in future litigation between the

parties." *Gjertsen*, 751 F.2d at 202. In *Gjertsen*, a motion for permanent injunction was pending in the district court, eliminating concerns about the preclusive effect of the preliminary injunction rendered unreviewable on appeal. But in this case, no such motion is pending, nor will any permanent injunction ever issue, since the law has indisputably changed to eliminate any ongoing dispute between the parties. Thus, the preclusive effect of the orders is a real possibility and concern, as demonstrated by the district court's ongoing oversight and enforcement of its orders and further confirmed by the Plaintiffs' unambiguous intention to rely upon the district court's unreviewable orders in future litigation between the parties in this case. *See* Dkt. 98 at 5 (claiming that Plaintiffs have "attained the desired result in this phase of the litigation"—a not so thinly-veiled reference to Plaintiffs' future desire to pursue damages and fees). Yet this is precisely why vacatur is necessary here, where Davis unequivocally preserved her appellate rights, even to the point of suffering contempt charges, but her appeals have been rendered moot through no fault of her own.

Vacatur of the underlying orders is further warranted here, where Plaintiffs sought to hold Davis in contempt of those orders even after her appeals were filed, based upon their contention that she was allegedly violating the district court orders that are the subject of her appeals.[1] The district court denied that motion, but kept

[1] R.120, Mot. to Enforce, PgID.2312-28; R.149, Pls.' Reply Mot. to Enforce, PgID.2564-2579; R.158, Pls.' Resp. to Notice of Supp. Auth., PgID.2627-2628.

the prior injunctions and orders in place.[2] Moreover, to this day, the deputy clerks in the Rowan County Clerk's Office remain subject to reporting requirements instituted by the district court's injunction orders, even though those orders are now indisputably moot.[3] Thus, the underlying orders on appeal continue to hang over Davis, and her office, even though SB 216 moots those orders and her appeal challenging those orders, rendering them unreviewable.

Plaintiffs should not be allowed to entrench orders rendered unreviewable to support future litigation between the parties, whether on the issue of damages or any fee dispute. *See Stewart v. Blackwell*, 473 F.3d 692, 693 (6th Cir. 2007) ("[V]acatur is generally appropriate to avoid entrenching a decision rendered unreviewable through no fault of the losing party."); *see also Camreta v. Greene*, 131 S.Ct. 2020, 2035 (vacatur "ensures that 'those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review'" (citation omitted)). Vacatur will clear the path for any further litigation between the

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[2] R.161, Order (2/9/16), PgID.2657-2659 ("The Court will continue to monitor Davis and the Rowan County Clerk's Office to ensure compliance with its Orders.").

[3] R.89, Release Order, PgID.1828 (requiring the deputy clerks to file status reports every 14 days); *see also* R.130, Order (10/6/15), PgID.2446 (extending due dates for deputy clerk status reports to every 30 days); R.163, Virtual Order (2/10/16) (denying requests by multiple deputy clerks to suspend reporting requirement entirely but extending due dates for reports to every 90 days) (text entry on docket only). These deputy clerk status reports have been filed in the district court since September 2015, and most recently in June 2016. R.114, 116-119, 122, 125-129, 131, 141-146, 150-154, 164-168, 172-176, Deputy Clerk Status Reports.

parties in the context of an actual controversy under a very different legal framework (*e.g.*, qualified immunity) and "prevent the preliminary injunction . . . made unreviewable because of mootness, from 'spawning any legal consequences.'" *Sundquist*, 121 F.3d 708, at *2 (citing *Munsingwear*, 340 U.S. at 41).

In sum, vacatur of the underlying district court orders is the expectation of the Supreme Court, the "established practice" in this Court, and entirely appropriate and required in this case, for it preserves all parties' rights in any further litigation, and leaves no party prejudiced by an entrenched and unreviewable order.

RELIEF REQUESTED

For the reasons set forth above and in prior briefing, Davis respectfully requests that this Court dismiss her pending appeals, and vacate the district court orders remaining on appeal.

DATED: July 8, 2016

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2016, 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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