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

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APPELLANT KIM DAVIS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR IMMEDIATE CONSIDERATION AND MOTION TO STAY DISTRICT COURT'S AUGUST 12, 2015 ORDER PENDING APPEAL

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Appellant Kim Davis ("Davis") hereby submits this Reply in support of her motion for a stay pending appeal of the district court's August 12, 2015 order.

INTRODUCTION

In opposing a stay pending appeal in this first-in-the-nation case, Plaintiffs rehash and recycle theories that ignore enumerated constitutional and statutory rights and outright flout the religious liberty analysis that the Supreme Court has described as the "most demanding test known to constitutional law."[1] Although Plaintiffs are ready to ride roughshod over Davis' individual rights without a full hearing on the merits of the undisputed constitutional "debate" and "conflict" engendered here, this Court should allow neither Plaintiffs' unrelenting desire to force Davis to abandon her conscience nor the district court's errors and similar rush to judgment to forever displace Davis' conscience and religious liberty. In a glaring omission to the merits of a stay, Plaintiffs failed to address, let alone distinguish, prior stays pending appeal granted by this Court in other marriage cases even though the effect of those stays absolutely barred couples from obtaining marriage licenses (or having licenses recognized) in their states (including Kentucky) and did not implicate irreversible infringements upon a particular individual's enumerated rights of conscience, religious liberty, and speech, as are involved here. The substantial legal questions

[1] *See City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (discussing the analogous federal RFRA).

presented here, along with the balancing of the equities, warrant maintaining the status quo and granting a stay until this appeal of first impression is finally resolved.

REPLY ARGUMENT

I. Plaintiffs' claims and purported harms are neither clearly established nor clearly defined by precedent from this Court or the Supreme Court.

In opposing a stay, Plaintiffs proclaim that they "should not have to wait any longer to exercise their fundamental right to marry," and declare that "marriage licenses in Rowan County" are a "legal prerequisite for marriage in Kentucky," *see* Pls.' Resp. to Emergency Mot. to Stay ("Pls.' Resp."), at 2, 16, but nothing (and no one) is barring them from exercising the right to marry whom they want to marry in Kentucky. Indisputably, **Kentucky** is recognizing marriages, including same-sex "marriages," so Plaintiffs can marry whom they want (even while this appeal is pending). Also, **Kentucky** is providing for the issuance of marriage licenses in more than 130 marriage licensing locations spread across the state, including many locations within 30-45 minutes of where Plaintiffs allegedly reside, so Plaintiffs can readily obtain Kentucky marriage licenses from any one of those locations (even while this appeal is pending). Accordingly, the merits of Plaintiffs' claims must be evaluated in terms of the state-wide marriage licensing scheme and whether that scheme, which is currently providing more than 130 locations for Plaintiffs to obtain marriage licenses, directly and substantially burdens these Plaintiffs' right to marry.

Instead, Plaintiffs demand (and the district court erred in finding) a newfound constitutional right to have a marriage license issued by a particular person in a particular county, irrespective of the burdens placed upon that individual's freedoms. But no precedent from this Court or the Supreme Court (including *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)) establishes a fundamental constitutional right to obtain a marriage license **in a particular county** authorized and signed **by a particular person**. According to Plaintiffs' unprecedented view, and adopted in error by the district court, the mere act of traveling approximately 30 minutes equates to a federal constitutional violation of the right to marry and, not just that, but a violation purportedly so manifest that it trumps individual conscience and religious freedom protections that are enumerated in the Kentucky RFRA and the United States and Kentucky Constitutions. But this alleged burden is no more constitutionally suspect than having to drive 30 minutes to a government office (for any reason) in the first place. Thus, Plaintiffs have failed to demonstrate, as they must, a direct *and* substantial burden on their right to marry in Kentucky.

II. The impending harms to Davis' conscience, religious liberty, and free speech rights are protected under the Kentucky RFRA and the United States and Kentucky Constitutions.

In opposing a stay, Plaintiffs fundamentally misconstrue the applicability of the Kentucky RFRA, which directly implicates the merits of the parties' competing claims and the balancing of harms engendered by this litigation.

First, Kentucky marriage law cannot be interpreted without also considering and applying the Kentucky RFRA. The Kentucky RFRA is housed under Chapter 446 of Kentucky's statutes, which is entitled "Construction of Statutes," and includes such other generally applicable provisions as "Definitions for Statutes Generally," "Computation of Time," "Severability," and "Titles, Headings, and Notes." KY. REV. STAT. §§ 446.010, 446.030, 446.090, 446.140. Even more specifically, the Kentucky RFRA is included under a section of Chapter 446 reserved for "Rules of Codification." Moreover, the Kentucky RFRA protects the religious freedom of all "persons" in Kentucky.[2] Thus, Plaintiffs' declarations that "Kentucky law specifically imposes upon County Clerks the obligation to issue" SSM licenses and "Kentucky's administrative scheme requires all county clerks to issue marriage licenses," *see* Pls.' Resp., at 3, 8, fail to consider the necessary Kentucky RFRA analysis embedded in any legislative or regulatory scheme, including Kentucky's state-wide marriage licensing scheme. This analysis, though necessary (albeit untested) before June 26, 2015, is especially significant in the wake of *Obergefell* and Gov. Beshear's SSM Mandate. *See also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature **must** use that alternative.") (emphasis added).

[2] While "person" is not defined in the Kentucky RFRA, it is defined in Kentucky's general definitions statute to include "individuals," and publicly elected officials are not excluded. *See* KY. REV. STAT. § 446.010(33).

Second, Plaintiffs hijack the substantial burden analysis under the Kentucky RFRA. Critically, neither Plaintiffs nor the district court are arbiters of the burden placed upon Davis' religious beliefs, and their attempts to occupy that position usurp and contradict clear Supreme Court precedent. Similar to the federal RFRA, the Kentucky RFRA asks whether a government mandate (such as Gov. Beshear's SSM Mandate) "imposes a substantial burden on the ability of the objecting parties" to act "in accordance with *their religious beliefs*," not, as Plaintiffs suggest, whether Davis' religious beliefs about authorizing SSM licenses are reasonable. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2778 (2014) (emphasis in original).

Davis believes that providing the marriage authorization "demanded by" Gov. Beshear's SSM Mandate is "connected with" SSM "in a way that is sufficient to make it immoral" for her to authorize the proposed union and place her name on it. *See id.* Davis is not claiming that the mere "administrative" act of recording a document, *see, e.g.*, Pls.' Resp., at 5, 11, 13-16, substantially burdens her religious freedom. County clerks are not mere scriveners for recording a marriage document. Instead, county clerks authorize the marriage license for the proposed union, place their name on each and every license they authorize, and call the union "marriage." *See* KY. REV. STAT. § 402.100(1)-(3). Such participation in and approval of SSM substantially burdens Davis' religious freedom because she is the person authorizing and approving a proposed union to be a "marriage," which, in her sincerely-held

religious beliefs, is not a marriage. She can neither call a proposed union "marriage" which is not marriage in her view, nor authorize that union. Importantly, Davis is not claiming a substantial burden on her religious freedom or free speech rights if ***someone else*** authorizes and approves a SSM license ***devoid of her name***. Davis is also not claiming that her religious freedom or free speech rights are substantially burdened if she must complete an opt-out form to be exempted from issuing SSM licenses, as Kentucky law already permits for other licensing schemes.

Accordingly, it is not for Plaintiffs or the district court to say that Davis' religious beliefs "are mistaken or *insubstantial*," but instead the "'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." *Hobby Lobby*, 134 S.Ct. at 2778-79 (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)) (emphasis added). Here, Plaintiffs do not dispute that Davis holds sincerely-held religious beliefs about marriage (*see* Pls.' Resp., at 14)—the requisite "honest conviction." It is therefore improper to conclude that such beliefs are "incidental" or "not ris[ing] to the level" of a substantial burden, *see id.* at 6, 8, 15-16, for that is just another way of deeming Davis' religious beliefs as "flawed," which is a step that the Supreme Court has "repeatedly refused to take." *See Hobby Lobby*, 134 S.Ct. at 2778. But it is the exact leap that Plaintiffs invite, and the district court took in error. By way of Gov. Beshear's SSM Mandate, Davis is being threatened by loss of

job, civil liability, punitive damages, sanctions, and private lawsuits in federal court if she "refuse[s] to act in a manner motivated by a sincerely held religious belief." KY. REV. STAT. § 446.350. Certainly, the Kentucky RFRA is designed to protect a person from choosing between one's lifelong career in the county clerk's office and one's conscience, or between punitive damages and one's religious liberty.

Third, the proffered compelling government interests that purportedly overcome the burden on Davis' religious freedom (*i.e.*, eradicating discrimination and uniformity in the issuance and recording of marriage licenses, *see* Pls.' Resp., at 9) are the type of "broadly formulated" governmental interests that fail to satisfy RFRA-based strict scrutiny because they do not show any actual harm in granting a "specific exemption" to a "particular religious claimant." *See Gonzales v. O Centro Espirata Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). Providing accommodation to Davis—who is treating all persons the same—neither endorses discrimination nor prevents qualified individuals from uniformly acquiring Kentucky marriage licenses from more than 130 marriage licensing locations.

Fourth, even if a compelling interest can be shown, this Court cannot ignore application of the "exceptionally demanding" least-restrictive-means standard, and the many less restrictive alternatives that would (1) provide Plaintiffs with a marriage license **in Rowan County, Kentucky** and (2) simultaneously protect Davis' religious freedom. Plaintiffs' silence on these numerous alternatives does not

mute their availability, even if they cost more. *Hobby Lobby*, 134 S.Ct. at 2780. The Kentucky RFRA requires clear and convincing proof of **both** a particularized compelling government interest in infringing Davis' religious freedom *and* the least restrictive means for achieving that interest. In Plaintiffs' view, only a "uniform system" that provides **no** religious accommodation whatsoever is possible, and permissible. *See* Pls.' Resp., at 10. But legislative enactments in other states, such as North Carolina and Utah, *see, e.g.*, N.C. GEN. STAT. § 51-5.5, and Utah S.B. 297 (2015 Gen. Sess.), and proposals in this state, demonstrate the intolerance and manifest error of this view, *see, e.g.*, D.E. 39-6, An Act Relating to Marriage, Ky. House Bill 101 (2016 Reg. Sess.). Plaintiffs' conclusion also disregards that "government may (and sometimes must) accommodate religious practices," *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987), and repudiates the Sixth Circuit's finding that "[o]ur Nation's history is replete with . . . accommodation of religion." *ACLU v. Mercer County, Ky.*, 432 F.3d 624, 639 (6th Cir. 2005). Thus, despite providing lip service that courts are to "strike a balance" between rights, *see* Pls.' Resp., at 7, Plaintiffs, in fact, demand unrelenting adherence and submission to their orthodoxy—that in all places, and under any circumstances, SSM trumps a person's religious liberty when the two conflict, despite the measured-in-millenia history of marriage as exclusively a union between a man and a woman, and despite Davis' undisputed sincerely-held religious beliefs about marriage.

Accommodating sincere religious beliefs and actions (or non-actions) motivated by those beliefs promotes the religious pluralism and tolerance that have made this country distinctive. Plainly, this is not a situation where an accommodation of Davis' religious objections will swallow the general law on marriage and marriage licenses in Kentucky, because licenses are readily available in more than 130 marriage licensing offices throughout Kentucky.

Finally, Plaintiffs also advance a "third party beneficiary" argument that was squarely rejected by the Supreme Court in *Hobby Lobby*. "Nothing" in the Kentucky RFRA supports giving the government "an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals," for if any governmental act is construed as benefiting a third party then all government actions can be deemed "entitlements to which nobody could object on religious grounds, rendering RFRA meaningless." *See Hobby Lobby*, 134 S.Ct. at 2781, n. 37. But here the government can "readily arrange" for means of providing Kentucky marriage licenses to the Plaintiffs who are "unable to obtain them . . . due to [Davis'] religious objections," *id.*, thereby abrogating Plaintiffs' concern about "exemptions" that allegedly "adversely impact others." *See* Pls.' Resp., at 10.

III. As the district court did in its Injunction, Plaintiffs want this Court to short-circuit the public interest at stake in this lawsuit.

The public has no interest in coercing Davis to irreversibly violate her conscience and religious freedom when ample less restrictive alternatives are readily

available. *See, e.g.*, *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (finding that the public has a "significant interest" in the "protection of First Amendment liberties"); *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) ("[P]ursuant to RFRA, there is a strong public interest in the free exercise of religion even where that interest may conflict with [another legislative scheme].").

REPLY CONCLUSION

For the reasons set forth above and in prior briefing, Davis respectfully requests that this Court grant immediate consideration and enter an order staying the district court's August 12, 2015 order pending resolution of the appeal in this Court.[3]

DATED: August 25, 2015

Respectfully submitted:

/s/ Jonathan D. Christman

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[3] In any event, and out of an abundance of caution, if this Court denies a stay pending appeal, Davis further asks this Court to grant a temporary stay for Davis to submit an emergency application for a stay to the Supreme Court.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 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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