

Case No. 15-5961

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IN THE  
**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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APRIL MILLER, PH.D., KAREN ANN ROBERTS, SHANTEL BURKE,  
STEPHEN NAPIER, JODY FERNANDEZ, KEVIN HOLLOWAY,  
L. AARON SKAGGS, and BARRY W. SPARTMAN  
Plaintiffs/Appellees

v.

KIM DAVIS, INDIVIDUALLY  
Third-Party Plaintiff/Defendant/Appellant

v.

STEVEN L. BESHEAR and WAYNE ONKST,  
IN THEIR OFFICIAL CAPACITIES  
Third-Party Defendants/Appellees

Appeal from  
United States District Court for the Eastern District of Kentucky  
Case No. 15-cv-044-DLB  
Honorable David L. Bunning, Presiding

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**MOTION TO DISMISS APPEAL**

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September 8, 2015

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Come the appellees 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, by counsel, and pursuant to 28 U.S.C. §§ 1291 and 1292, respectfully move the Court to dismiss the appeal of this action. Appellants have attempted to appeal from an interlocutory order that is not appealable. Accordingly, this action must be dismissed.

### I. PROCEDURAL BACKGROUND

Plaintiff/Appellees are a group of same-sex and opposite-sex couples residing in Rowan County, Kentucky who filed suit against Kim Davis (“Davis”), the Rowan County Clerk, for violation of their constitutional rights as a result of Davis’ refusal to issue marriage licenses. [DE 1, Complaint, Page ID 1-2]. Following briefing and hearings, the District Court entered a preliminary injunction that enjoins Davis in her official capacity from applying her “no marriage licenses” policy. [DE 43, Memorandum Opinion and Order, Page ID 1146-73]. The District Court temporarily stayed the effect of the injunction through August 31, 2015. [DE 52, Order, Page ID 1264-1270; DE 55, Order, Page ID 1283-84].

Davis has appealed the preliminary injunction to this Court where it is currently pending. See Case No. 15-5880. This Court denied Davis’ request for a

stay pending appeal, finding that her position “cannot be defensibly argued” and that “[t]here is thus little or no likelihood” of success on appeal. [Case No. 15-5880 DE 28 at 3]. The United States Supreme Court likewise denied Davis’ request for a stay of the preliminary injunction. [Case No. 15-5880 DE 30]. The first brief in the appeal of the preliminary injunction is due October 2, 2015. [Case No. 15-5880 DE 18]. Following expiration of the stay, Davis defied the preliminary injunction and persisted in her refusal to issue marriage licenses to qualified couples. [DE 67, Motion for Contempt, Page ID 1477-87]. The District Court found Davis in contempt. [DE 75, Minute Order, Page ID 1558-59].

While defending against the plaintiffs’ claims below, Davis filed 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 (collectively “State Appellees”). [DE 34, Third-Party Complaint, Page ID 745-92]. Davis alleges that “Kentucky’s marriage policies, as effected by Governor Beshear and Commissioner Onkst” are unlawful actions for which she seeks declaratory and injunctive relief. [*Id.* at ¶¶ 46-147]. Specifically, Davis contends that “Kentucky marriage policies” violate her rights of free exercise of religion, free speech, and constitute an unlawful religious test for holding office. [*Id.*]. State Appellees have

until September 11, 2015 to plead in response to the Third-Party Complaint. [DE 61, Agreed Order, Page ID 1295-96].

Davis moved the District Court to enter a preliminary injunction against State Appellees that enjoins them from enforcing the Governor's alleged "mandate" that Davis issue marriage licenses to authorized individuals in conformity with Kentucky statute. [DE 39, Motion for Preliminary Injunction, Page ID 824-1130]. The District Court *sua sponte* ruled that briefing on Davis' motion for injunctive relief<sup>1</sup> 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." [DE 58, Order, Page ID 1289]. That is, the District Court held that it will consider Davis' Motion for Preliminary Injunction against these Appellees after this Court considers the appeal of the preliminary injunction entered against Davis (Sixth Circuit Case No. 15-5880). The District Court indicated that "a briefing schedule on the Motions will be set by subsequent order after the Sixth Circuit renders its decision." [Id.].

Davis now attempts to appeal from the District Court Order staying briefing on and consideration of her Motion for Preliminary Injunction. [DE 66, Notice of Appeal, Page ID 1471-76].

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<sup>1</sup> The District Court also stayed briefing and consideration of Davis' Motion to Dismiss (DE 32).

## II. ARGUMENT

The District Court Order of August 25, 2015 (hereinafter “August 25 Order”) from which Davis appeals is plainly interlocutory. Generally, this Court has appellate jurisdiction over only final decisions of the district courts. 28 U.S.C. § 1291. There are limited circumstances in which a party may seek appellate review of an interlocutory order. 28 U.S.C. § 1292. The August 25 Order does not meet any of those limited exceptions. Accordingly, this appeal must be dismissed.

While Davis’ Notice of Appeal offers no rationale for seeking review of a plainly unappealable order, her Emergency Motion for Immediate Consideration and Motion for Injunction Pending Appeal [DE 26] pending in this Court asserts that the August 25 Order can be appealed pursuant to 28 U.S.C. § 1292(a)(1) because it has the practical effect of denying an injunction. Such an argument is without merit. This statute provides for appellate review of interlocutory orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . .” *Id.* The August 25 Order does none of those things. Rather, it simply sets the process by which the District Court will consider Davis’ Motion for Preliminary Injunction. It cannot be questioned that “a district court has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 707 (1997). There is no authority

that requires a court to consider a motion for preliminary injunction at a certain time or in a certain sequence.

The Supreme Court has explained that 28 U.S.C. § 1292(a)(1) must be narrowly construed to keep with “the general congressional policy against piecemeal review.” Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981). In order to invoke appellate review, the litigant must “show more than that the order has the practical effect of refusing an injunction.” Id. That is because section 1292(a)(1) is not “a golden ticket litigants can use to take any decision affecting injunctive relief on a trip to the court of appeals.” Edwards v. Prime Inc., 602 F.3d 1276, 1290 (11th Cir. 2010).

The August 25 Order does not have the “practical effect of refusing an injunction.” Indeed, the August 25 Order does not address the merits of Davis’ motion at all but rather sequences its briefing and consideration. This Court has explained that “[o]rders that have the practical effect of an injunction are subject to interlocutory appeal under section 1292(a)(1) *only if* the order has a serious, perhaps irreparable, consequence and the order can be effectively challenged only by means of an immediate appeal.” Williamson v. Recovery Ltd. P’ship, 731 F.3d 608, 621 (6th Cir. 2013) (citations omitted) (emphasis added).<sup>2</sup> That is certainly

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<sup>2</sup> In Williamson, the District Court had ordered the pre-judgment attachment of seven crates of artifacts, decreeing that “[t]hese crates are not to be moved, encumbered or sold without further order of this Court.” Id. at 620. The Sixth

not the case here. The August 25 Order was issued *sua sponte* without consultation with the parties. Yet, Davis has made no effort to ask the District Court to reconsider the August 25 Order and let briefing commence. Surely, this would have been a far less drastic course than pursuing this meritless appeal.

Orders that are “restraints or directions . . . concerning the conduct of parties or their counsel, unrelated to the substantive relief sought” are not appealable under section 1292(a)(1). Pressman-Gutman Co. v. First Union Nat’l Bank, 459 F.3d 383, 393 (3d Cir. 2006). “[A] stay of proceedings in an action does not involve a determination of a substantive issue, and therefore it is not appealable as an injunction pursuant to section 1292(a)(1).” See Moore’s Federal Practice at § 203.10[6][b][i]. An order that does “require[] or forbid[] any party to perform certain acts” is not appealable under section 1292(a)(1). Booher v. N. Ky. Univ. Bd. of Regents, 163 F.3d 395, 397 (6th Cir. 1998).

Delaying consideration of Davis’ Motion for Preliminary Injunction does not cause a “serious, perhaps irreparable, consequence” such that the August 25 Order

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Circuit conceded that this Order is somewhat injunctive in nature but nonetheless found that it is not appealable under 28 U.S.C. § 1292(a)(1). Id. at 621. The Court noted that the appellants had not shown “how the order results in serious harm to them or why interlocutory appeal is the only avenue of relief available to them.” Id. This Court further noted that the lower court had sought to make the order “as minimally invasive as possible, stating that though it was specifically ordering the artifacts to ‘stay put,’ the court would timely consider, and be inclined to grant, any reasonable request to make use of the artifacts.” Id. Therefore, this Court found “no serious or irreparable consequence flowing from the attachment order, regardless of whether it had an injunctive element to it.” Id.

may be immediately appealed. Davis' Motion for Preliminary Injunction seeks to enjoin Appellees from enforcing their alleged "mandate" that Davis issue marriage licenses to authorized individuals. [DE 39, Motion for Preliminary Injunction, Page ID 824-1130]. However, Davis is already under a separate legal obligation and Court Order to issue marriage licenses. [DE 43, Memorandum Opinion and Order, Page ID 1146-73]. Thus, even if Davis' Motion for Preliminary Injunction were granted, she still has to issue marriage licenses – the District Court has ordered Davis to do so, and her attempts to obtain a stay of that Order have been exhausted. Davis' Motion for Preliminary Injunction has no urgency. The August 25 Order does not constitute a denial of injunctive relief and therefore cannot be interlocutorily appealed.

### III. CONCLUSION

For the reasons set out above, State Appellees respectfully request entry of an Order dismissing this appeal.



Respectfully submitted,

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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:

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