

No. 15-5880

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL MILLER, et al.,)
)
Plaintiffs-Appellees,)
)
v.)
)
KIM DAVIS, in her individual and official capacity)
as Rowan County Clerk,)
)
Defendant-Appellant.)
)

FILED Aug 26, 2015 DEBORAH S. HUNT, Clerk
--

ORDER

Before: KEITH, ROGERS, and DONALD, Circuit Judges.

Defendant Kim Davis appeals the August 12, 2015 preliminary injunction enjoining her, in her official capacity, “from applying her ‘no marriage licenses’ policy to future marriage license requests submitted by the Plaintiffs.” She moves for a stay of the preliminary injunction pending appeal. The district court denied a similar motion for a stay pending appeal on August 17, 2015. The plaintiffs oppose the motion for a stay pending appeal. Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) moves for leave to file an *amicus curiae* brief in support of the issuance of a stay pending appeal. We grant the motion to file the amicus brief, but deny the motion for a stay.

Davis “bears the burden of showing that the circumstances justify” the exercise of discretion to grant a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Four factors guide our consideration of her motion for a stay: (1) whether Davis has a strong likelihood of success on the merits; (2) whether she will suffer irreparable harm in the absence of

No. 15-5880

-2-

a stay; (3) whether the requested injunctive relief will substantially injure other interested parties; and (4) where the public interest lies. *Id.* at 434; *see also Ohio St. Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014); *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012). “The first two factors of the traditional standard are the most critical.” *Nken*, 556 U.S. at 434. And the four “factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.” *Husted*, 698 F.3d at 343 (internal quotation marks omitted).

As the County Clerk for Rowan County, Kentucky, Davis’s official duties include the issuance of marriage licenses. In response to the Supreme Court’s holding in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), that a state is not permitted “to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex,” Davis unilaterally decided that her office would no longer issue any marriage licenses. According to Davis, the issuance of licenses to same-sex marriage couples infringes on her rights under the United States and Kentucky Constitutions as well as the Kentucky Freedom Restoration Act, KY. Rev. Stat. Ann. § 446.350. The Rowan County Clerk’s office has since refused to issue marriage licenses to the plaintiffs, and this action ensued.

The request for a stay pending appeal relates solely to an injunction against Davis in her official capacity. The injunction operates not against Davis personally, but against the holder of her office of Rowan County Clerk. In light of the binding holding of *Obergefell*, it cannot be defensibly argued that the holder of the Rowan County Clerk’s office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court. There is thus little or no likelihood that the Clerk in her official capacity will prevail on appeal. *Cf. Garcetti v.*

No. 15-5880

-3-

Ceballos, 547 U.S. 410, 421 (2006); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. School Dist.*, 624 F.3d 332, 338 (6th Cir. 2010) (where a public employee’s speech is made pursuant to his duties, “the relevant speaker [is] the government entity, not the individual”).

Eagle Forum’s motion for leave to file a brief in support of the motion for stay as *amicus curiae* is **GRANTED**. Davis’s motion for a stay of the preliminary injunction pending appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk