UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

DAVID ERMOLD, et al.,	:	**CIVIL ACTION**
	:	
Plaintiffs,	:	**0:15-CV-00046-DLB-EBA**
	:	
v.	:	**DISTRICT JUDGE**
	:	**DAVID L. BUNNING**
KIM DAVIS,	:	
	:	
Defendant.	:	

DEFENDANT'S RESPONSE
IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant, Kim Davis, pursuant to LR 7.1, files this response in opposition to Plaintiffs' Motion for Summary Judgment (Doc. 88, "Plaintiffs' MSJ"). Davis's comprehensive Motion for Summary Judgment (Doc. 93, "Davis MSJ") addresses the same liability and damages issues at some length and is therefore responsive in most respects to Plaintiffs' MSJ. Davis's subsequent Motion for Enlargement of Page Limits (Doc. 94) and Motion for Leave to File Answer to Amended Complaint (Doc. 96), and related filings, are also responsive to the procedural issues raised in Plaintiffs' MSJ. Accordingly, for the convenience of the Court and the parties, Davis herein addresses primarily issues not already covered in her summary judgment motion and subsequent filings, and otherwise incorporates those filings herein by reference.[1]

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[1] Davis has already sought the Court's indulgence of her lengthy summary judgment motion in her pending Motion for Enlargement of Page Limits (Doc. 94). In further support of the enlargement requested therein, Davis has intentionally shortened this response by incorporating where possible argument already presented in her summary judgment motion and subsequent filings. If the Court deems it more appropriate for Davis to file a self-contained response that does not rely on prior filings, then Davis requests leave to do so, and will do so promptly at the Court's direction.

ARGUMENT

I. DAVIS HAS NOT ADMITTED PLAINTIFFS' ALLEGATIONS OR WAIVED ANY DEFENSES BY NOT FILING AN ANSWER BEFORE HER MOTION FOR SUMMARY JUDGMENT.

A. Davis's Answer Was Not Due Before Her Summary Judgment Motion.

Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment (Doc. 88-1, "Plaintiffs' MSJ Memorandum") includes the "gotcha" argument that Davis, under Rule 8(b)(6)[2], has admitted all the allegations of Plaintiffs' First Amended Complaint except for allegations relating to the amount of damages. (Pls.' MSJ Mem. 5.) Davis responded to this argument in her Motion for Leave to File Answer to Amended Complaint (Doc. 96 at 1–5), which Davis incorporates herein by reference. Plaintiffs also asserted the failed-to-answer argument in their Limited Objection to Defendant's Motion for Enlargement of Page Limits (Doc. 95 at 2, 4–5), and again in their Objection to Defendant's Motion for Leave to File Answer to Amended Complaint (Doc. 99 at 3–6.) Davis further responded to Plaintiffs' argument in her Reply in Support of Motion for Enlargement of Page Limits (Doc. 100 at 4–8), and her Reply in Support of Motion for Leave to File Answer to Amended Complaint (Doc. 101 at 2–9), which Davis also incorporates herein by reference.

In short, Davis has not admitted any allegation or waived any defense by not answering because she was never subject to a deadline to answer, by rule or order of the Court, due to the unique circumstances of this case: Davis timely moved to dismiss Plaintiffs' Amended Complaint, and after the Court partially granted and partially denied dismissal, the Court stayed the case throughout Davis's appeal of the partial denial and Plaintiffs' appeal of the partial dismissal. The

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[2] Plaintiffs cite Rule "8(6)" but appear to have intended Rule 8(b)(6).

stay terminated Davis's answer deadline under the Rules, and the Court did not establish a new deadline by order when it lifted the stay 2 years later. It was not improper for Davis to file her summary judgment motion before answering, and there has been no prejudice to Plaintiffs, whether from lack of notice or inability to conduct discovery, or any other reason.

B. Even if Any of Plaintiffs' Allegations Could Be Deemed Admitted, Plaintiffs Have Not Established That Any Well-Pleaded Allegations Could Entitle Them to Relief.

Even if Rule 8(b)(6) required Davis to suffer the admission of Plaintiffs' Amended Complaint allegations for not filing an answer that never came due, only the "well-pleaded" factual allegations, other than those relating to the amount of damages, can be deemed admitted. *See Chen v. JP Standard Constr. Corp.*, No. 14-CV-1086 (MKB), 2016 WL 2909966, at *4 (E.D.N.Y. Mar. 18, 2016), *report and recommendation adopted,* 14-CV-1086 (MKB) (RLM), 2016 WL 2758272 (E.D.N.Y. May 12, 2016). Importantly, "a fact is not well-pleaded if it is inconsistent with other allegations of the complaint, or is contrary to uncontroverted material in the file of the case. Moreover, a pleading's legal conclusions are not assumed to be true . . . ." *Id.*

Plaintiffs make no attempt to identify for the Court or Davis what *well-pleaded* allegations they claim establish any issue in dispute if deemed admitted. Rather, Plaintiffs perfunctorily rely on this Court's 2017 ruling that Plaintiffs' allegations survived dismissal, in part, by "plausibly making out a claim" against Davis. (Pls.' MSJ Mem. 5 (quoting Mem. Op. & Order, Doc. 49, at 8).) But that ruling was issued four years ago at the pleadings stage, and did not consider the now substantial "uncontroverted material in the file of the case" that contradicts Plaintiffs' bare allegations. (*See, e.g.*, Docs. 89–92; Davis MSJ, Doc. 93, 2–25.) For example, Plaintiffs allege "Davis . . . announced a policy to deny same-sex marriage licenses." (Am. Compl., Doc. 27, ¶ 17.) But this Court, in the same Order from 2017, recognized that Davis stopped issuing marriage licenses to all couples. (Doc. 49 at 1–3.) Moreover, substantial record materials contradict

Plaintiffs' allegation. (Davis MSJ, Doc. 93, at 9–10 (citing record materials).) Thus, the allegation is not well-pleaded. Furthermore, as shown by Davis's proposed Answer (Doc. 96-1), which Davis incorporates herein by reference, 20 of the 53 numbered allegations in the Amended Complaint assert legal conclusions in whole or in part. (Ans., Doc. 96-1, ¶¶ 1, 2, 9, 10, 11, 12, 16, 18, 34–45.) Plaintiffs' legal conclusions are also not well-pleaded allegations.

Plaintiffs sat on their failed-to-answer argument for nearly two years after the Court lifted the stay of this case (Doc. 67), during which time all parties cooperatively engaged in full document and deposition discovery to create an evidentiary record for purposes of dispositive motions (*see, e.g.*, Docs. 75, 76). If Plaintiffs now want to sidestep the summary judgment process and avoid dealing with the evidentiary record they helped create, then it is incumbent on Plaintiffs to show the Court and Davis what remaining complaint allegations, that are not "contrary to uncontroverted material in the file," Plaintiffs now claim could entitle them to relief if deemed admitted. In any event, given the Sixth Circuit's "preference for judgments on the merits," *Dassault Systemes, SA v. Childress*, 663 F.3d 832, 841 (6th Cir. 2011), and the absence of any justification for deeming Plaintiffs' allegations admitted in the first place (*see supra* Pt. I.A), the Court should reject Plaintiffs' failed-to-answer argument and hold Plaintiffs to the evidentiary record.

II. PLAINTIFFS HAVE NOT DEMONSTRATED THEY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF LIABILITY.

Plaintiffs' substantive arguments assert they are entitled to summary judgment on the issue of Davis's liability for violating their constitutional right to marry (Pls.' MSJ Mem., Doc. 88-1, at 6–7), and that Davis is not entitled to qualified immunity from that liability (*id.* at 7–8). Plaintiffs do not seek summary judgment on damages but assert that Plaintiffs' damages claims should go

to a jury. (*Id.* at 8.) The Court should reject Plaintiffs' arguments, however, because Davis is entitled to summary judgment against Plaintiffs on both liability and damages.

As comprehensively shown in Davis's summary judgment motion, incorporated herein by reference, Davis is entitled to summary judgment against Plaintiffs because, on the undisputed record now before the Court (*see* Davis MSJ, Doc. 93, at 2–26 (Background and Material Facts Not in Dispute)), Plaintiffs fail to state a claim because the Free Exercise Clause of the First Amendment protects Davis from Plaintiffs' § 1983 claim (Davis MSJ at 27–41 (Arg. I)), there was no violation of Plaintiffs' constitutional right to marry (Davis MSJ at 41–49 (Arg. II)), Davis is entitled to qualified immunity from Plaintiffs' claims because she did not violate any clearly established right (Davis MSJ at 49–62 (Arg. III)), and Plaintiffs' cannot quantify any recoverable damages (Davis MSJ at 62–67 (Arg. IV)). Davis's entitlement to summary judgment on both liability and damages negates any claim to summary judgment by Plaintiffs.

Contrary to Plaintiffs' suggestion (Pls.' MSJ 7–8), none of Davis's summary judgment arguments are precluded by prior decisions of this Court or the Sixth Circuit. As shown in Davis's summary judgment motion (Doc. 93 at 49–50) and her Reply in Support of Motion for Enlargement of Page Limits (Doc. 100 at 4–8), both of which are incorporated herein by reference, both this Court and the Sixth Circuit applied an exceedingly lenient standard in considering whether Plaintiffs carried their burden of stating a claim of violation of their constitutional right to marry sufficient to overcome Davis's qualified immunity defense. *See, e.g.*, *Ermold*, 936 F.3d 429, 432 (6th Cir. 2019) ("That means we don't look at evidence; we look at allegations.") Thus, the interim, pleadings-stage determination on Davis's qualified immunity defense does not dictate the final resolution of Davis's defense on the merits, under the more demanding summary judgment standard.

Furthermore, Davis's Free Exercise defense is supported by the substantial development of Supreme Court case precedent since the Sixth Circuit's 2019 decision, including *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), holding that the City of Philadelphia violated the Free Exercise rights of a religious vendor by requiring the vendor's endorsement of same-sex relationships inconsistent with the vendor's religious beliefs as a condition of participating in a City program, and also including a series of decisions holding state-imposed COVID-19 restrictions on assembling for religious worship are not generally applicable and violate Free Exercise rights when comparable nonreligious activities receive more favorable treatment, *e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020); *Robinson v. Murphy*, 141 S. Ct. 972 (2020). These recent precedents put even more distance between Davis's summary judgment arguments and any prior decisions of this Court or the Sixth Circuit.

CONCLUSION

For all of the foregoing reasons, including those incorporated by reference, Plaintiffs are not entitled to judgment as a matter of law. The Court should deny Plaintiffs' Motion for Summary Judgment and enter summary judgment for Davis. Alternatively, based on the substantial evidentiary record, if the Court does not conclude Davis is entitled to summary judgment on liability or damages, the Court should at least conclude there are issues of material fact precluding summary judgment for Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

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DATED this September 17, 2021.

/s/ Roger K. Gannam
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