CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

KIM DAVIS,

Petitioner

v.

DAVID ERMOLD, DAVID MOORE, WILL SMITH, JAMES YATES,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver,
(Counsel of Record)
Horatio G. Mihet
Roger K. Gannam
Kristina J. Wenberg
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org

Counsel for Petitioner

QUESTIONS PRESENTED

The Questions Presented for this Court's review are:

1. Whether the Sixth Circuit erred when, citing *Obergefell v. Hodges*, it created a special standard for a same-sex couple's claimed temporary burden on the constitutional right to marry, and thereby refused to apply this Court's tiered "direct and substantial burden" analysis in *Zablocki v. Redhail* regarding right-to-marry cases for different-sex couples.

2. Whether the Sixth Circuit erred by refusing to follow this Court's repeated instruction "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, and thereby rejecting a county clerk's qualified immunity claim for temporarily suspending all marriage licenses bearing her name and authority in only one of 120 Kentucky counties in the immediate aftermath of *Obergefell*, while Kentucky's comprehensive marriage laws and forms that govern every duty of the clerk were being re-written, and while seeking a successful accommodation for her sincerely held religious beliefs.

PARTIES

Petitioner is Kim Davis, in her individual capacity.

Respondents are David Ermold, David Moore, Will Smith, and James Yates.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Kim Davis, is an individual person. Thus, Davis has no parent corporation or publicly held stock owner.

DIRECTLY RELATED PROCEEDINGS

*David **Ermold**; David Moore, Plaintiffs–Appellees* (17-6119)*, Plaintiffs–Appellees/Cross-Appellants* (17-6119 & 17-6233) *v. Kim **Davis**, individually, Defendant–Appellant* (17-6119)*, Elwood Caudill, Jr., Clerk of Rowan County, Kentucky, Defendant–Appellant/Cross-Appellee* (17-6119 & 17-6233) [and] *Will **Smith**; James Yates, Plaintiffs–Appellees* (17-6120)*, Plaintiffs–Appellees/Cross-Appellants* (17-6120 & 17-6226) *v. Kim **Davis**, individually, Defendant–Appellant* (17-6120)*, Elwood Caudill, Jr., Clerk of Rowan County, Kentucky, Defendant–Appellant/Cross-Appellee* (17-6120 & 17-6226)*, Rowan County, Kentucky, Defendant–Appellee* (17-6226), Nos. 17-6119/6120/6226/6233 (6th Cir. Judgment Aug. 23, 2019) (consolidating appeals from ***Ermold*** and ***Smith*** E.D. Ky. cases for opinion and judgment)

*David **Ermold** and David Moore, Plaintiffs v.*
*Kim **Davis**, individually, Defendant*,
No. 15-cv-000046 (pending in E.D. Ky.)

*James Yates and Will **Smith**, Plaintiffs v.*
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The Sixth Circuit's opinion affirming the district court's denials of Davis's respective motions to dismiss Respondents' claims against Davis in her individual capacity on qualified immunity grounds (App. B) is published at *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019) (consolidating appeals for opinion and judgment). The Sixth Circuit's order denying Davis's petition for rehearing en banc is unpublished, but is reproduced at Appendix A.

The district court's orders denying Davis's respective motions to dismiss Respondents' claims against Davis in her individual capacity on qualified immunity grounds (App. C, D) are unpublished and available at *Ermold v. Davis*, No. 15-46-DLB-EBA, 2017 WL 4108921 (E.D. Ky. Sept. 15, 2017), and *Yates v. Davis*, No. 15-62-DLB-EBA, 2017 WL 4111419 (E.D. Ky. Sept. 15, 2017).

JURISDICTION

The Sixth Circuit issued its decision on August 23, 2019 and denied rehearing en banc on October 24, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Kentucky Religious Freedom Restoration Act ("Kentucky RFRA") provides, in pertinent part:

> Government shall not substantially burden a person's freedom of religion.

> The right to act **or refuse to act** in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.

Ky. Rev. Stat. § 446.350 (emphasis added).

INTRODUCTION

This case is not about whom a person may marry under Kentucky law, whether Kentucky must license the marriage of a same-sex couple, or even whether Respondents could obtain a Kentucky marriage license when they wanted one. Nor is this case about a county clerk who wanted to re-litigate this Court's decision in *Obergefell v. Hodges*, or to prevent Respondents or any other same-sex couple from receiving a marriage license in Kentucky.

Rather, this case has always been about whether the law forces an "all or nothing" choice between same-sex marriage on the one hand, and religious liberty on the other, with no regard whatsoever for any reasonable accommodation. Now that Kentucky has moved on, after its highest officials changed the law to vindicate Kim Davis's religious liberty rights and provide her requested accommodation, even while ensuring no Kentuckian was denied a valid marriage license, Respondents

want to punish Davis for **temporarily** resisting an act that would have violated her deeply held religious convictions and conscience.

Pursuant to the marriage license directive of former Kentucky Governor Steven Beshear following this Court's *Obergefell v. Hodges* decision, Respondents claim that Davis violated their right to marry when she raised a conscientious objection, according to her deeply held religious beliefs, to issuing marriage licenses to same-sex couples **under her name and authority**. In the context of this case, however, and under well-established precedent, Davis is entitled to qualified immunity from Respondents' claims against her in her individual capacity. Specifically, Respondents have failed to identify any federal constitutional right to receive a marriage license **from a particular state official** (Davis) **at a particular place** (Rowan County), when no policy ever prevented any Respondent from marrying whom he wanted to marry, or obtaining a valid Kentucky marriage license from the state. To be sure, in the mere days after *Obergefell*, such a "strict liability" marriage license right was not "clearly established."

The Sixth Circuit below disregarded this Court's and its own precedents requiring its consideration of Respondents' right-to-marry claims under a tiered, "direct and substantial burden" analysis. The circuit court likewise disregarded this Court's and its own precedents prohibiting the court from defining the applicable "clearly established right" for purposes of Davis's qualified immunity defense at too high a level of generality. Thus, the

resulting Sixth Circuit decision directly conflicts with decades of precedent from this Court and the Sixth Circuit, and Davis respectfully petitions this Court to grant review and, ultimately, reverse the conflicting decision.

STATEMENT OF THE CASE

This petition arises from two separate district court actions against Kim Davis, the former Clerk of Rowan County, Kentucky. Each was brought by a same-sex couple under 42 U.S.C. § 1983, immediately after this Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), asserting Davis violated their respective constitutional rights to marry. (App. B, 5a; App. C, 35a–37a.)

As explained below (*see infra*, Reasons for Granting the Petition pt. I.A), the panel majority below, relying on *Obergefell*, expressly rejected this Court's mandatory tiered analysis of government regulations affecting the constitutional right to marry. As the concurrence reasoned, "I don't believe that the Supreme Court would abolish tiers-of-scrutiny analysis for all marriage regulations without explicitly telling us it was doing so." (App. B, 25a (Bush, J., concurring in part and in the judgment).) Judge Bush's concurrence also cautioned against allowing the majority's error to stand, admonishing, "This is not mere pedantry," and, "The next marriage-regulation case that our court hears may not be amenable to this type of judicial shortcut." (App. B, 28a–29a (Bush, J., concurring in part and in the judgment).)

This Court's *Obergefell* decision invalidated the challenged laws of several states **"to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples**." 135 S. Ct. at 2604–05 (emphasis added). The challenged state laws included the Commonwealth of Kentucky's laws "defin[ing] marriage as a union between one man and one woman." *Id.* at 2593. Kentucky, acting through its then-Governor, Steven Beshear, immediately aligned the Kentucky marriage license form with *Obergefell* by changing it to accommodate same-sex couples on the same terms as different-sex couples. (App. G, 130a.)

Davis was then the Clerk of Rowan County, Kentucky, making her the state official responsible for administering the state's marriage licensing policies in Rowan County. (App. B, 5a–7a.) Davis, however, is also a "Christian with a sincere religious objection to same-sex marriage," for she "believe[s] that marriage is a union between one man and one woman, as many Americans do." (App. G, 123a-124a, 162a; App. B, 111a.) Under Kentucky law as it then existed, all marriage licenses issued in Rowan County **were issued under Davis's name and authority**. (App. G, 127a–128a.) Issuing marriage licenses to same-sex couples would have violated Davis's conscience, informed by her sincerely held religious beliefs, because Davis believes issuing a marriage license **under her name and authority** is tantamount to endorsing the union. (App. G, 129a–130a.) Thus, to accommodate her religious objection, Davis "specifically sought to avoid issuing licenses to same-sex couples without discriminating

against them," so she stopped issuing **all** marriage licenses, same-sex and different-sex, altogether. (App. G, 123a–124a; App. B, 7a.)

While marriage licenses were available to any Kentuckian in at least the seven counties surrounding Rowan County,[1] Davis's "no marriage licenses" policy nonetheless resulted in three lawsuits being filed against her, asserting violations of the constitutional right to marry. (App. G, 126a; App. C, 35a–37a, nn.1–2; App. B, 7a.) The first, *Miller v. Davis*, was filed by four couples (two same-sex and two different-sex) seeking temporary and permanent injunctive relief, declaratory relief, and damages. (App. E, 98a; App. C, 35a–37a, n.1; 1-3.) The second and third were the cases filed by Respondents herein, seeking money damages. (App. App. C, 37a; App. B, 7a.)

The *Miller* plaintiffs moved the district court for a preliminary injunction to force Davis to issue them marriage licenses pursuant to Governor

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[1] Kentucky law allows applicants to seek a Kentucky marriage license, which is effective throughout the state, in any county. *See* Ky. Rev. Stat. § 402.080. There is no allegation by any Respondent that marriage licenses were unavailable in any Kentucky county other than Rowan County.

Beshear's *Obergefell* mandate.[2] (App. 4-2–3; 6-6.) Davis contemporaneously sued Governor Beshear for accommodation of her religious beliefs by filing a third-party complaint in the *Miller* case, and moved the district court for a preliminary injunction effecting the accommodation. (App. E, 99a; App. G, 149a n.9.) The district court heard and granted the *Miller* plaintiffs' preliminary injunction motion against Davis, but did not consider Davis's motion against the Governor. (App. C, 38a; App. G, 149a n.9.)

Davis, on account of her religious objection, could not comply with the *Miller* preliminary injunction, and the district court jailed her for

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[2] Although the district court did not formally consolidate *Miller* with Respondents' cases, the court treated the cases as consolidated for some purposes, including dismissal. (App. F, 116a–120a (dismissing together *Miller* and Respondents' cases under the caption *In re: Ashland Civil Actions*, referring to *Miller* as "the lead case").) Accordingly, it is appropriate to consider relevant portions of the *Miller* proceedings as part of the record in the instant case. *See generally Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680–81 (6th Cir. 2011) ("[A] court may consider exhibits attached to the complaint, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein, without converting the motion to one for summary judgment." (internal quotation marks omitted)).

contempt. (App. C, 38a; App. E, 99a.) Along with the contempt order, the district court entered an additional order expanding the *Miller* injunction beyond the *Miller* plaintiffs, to require issuance of a marriage license to any legally eligible applicant. (App. C, 38a.)

While Davis was jailed, her deputy clerks issued marriage licenses to the *Miller* plaintiffs and to Respondents. (App. C, 39a; App. E, 99a.) The licenses had been altered to remove Davis's name, but Governor Beshear ratified the alteration. (App. I, 168a–170a.) Upon Davis's release from jail and return to work she made an additional alteration to the license form, to effect an accommodation of her religious beliefs by clarifying the licenses were not being issued under her name or authority. (App. I, 168a–170a.) Governor Beshear, although previously unwilling to grant an accommodation to clerks like Davis, nonetheless ratified Davis's post-incarceration, self-made accommodation. (App. I, 168a–170a.)

Davis appealed both the *Miller* preliminary injunction and the district court's effective denial of her third-party motion for preliminary injunction against Governor Beshear. (App. B, 7a–8a; App. E, 100a.) Acting through its new Governor, Matt Bevin, however, Kentucky permanently changed the marriage license form statewide by Executive Order 2015-048 (App. H) to accommodate the sincerely held religious beliefs of county clerks like Davis, by removing the requirement that licenses be issued under the name and authority of county clerks. (App. H.) The Kentucky General Assembly then codified

the accommodation effected by the Executive Order, rendering the *Miller* appeals moot. (App. B, 8a; App. C, 39a.) The Sixth Circuit dismissed the appeals for mootness, and directed the district court to vacate the *Miller* preliminary injunction on remand. (App. B, 8a; App. C, 39a.) The district court did, but also dismissed Respondents' lawsuits on mootness grounds. (App. C, 39a; App. F.) The *Ermold* respondents successfully appealed their dismissal to the Sixth Circuit, resulting in reinstatement of their case and the *Smith* Respondents' case. (App. B, 8a; App. C, 40a; App. D, 70a.)

Following reinstatement of Respondents' cases, Davis moved to dismiss both cases on Eleventh Amendment sovereign immunity grounds, in her official capacity, and on qualified immunity grounds in her individual capacity. (App. B, 8a.) The district court granted dismissal of the official capacity claims, but denied dismissal of the individual capacity claims. (App. B, 8a.)

Davis, under 28 U.S.C. § 1291 and the collateral order doctrine, appealed the district court's denials of her motions to dismiss the

individual claims.[3] (App. B, 8a.) Respondents, respectively, cross-appealed the district court's dismissals of their official capacity claims. (App. B, 8a.) The Sixth Circuit consolidated the appeals and cross-appeals for argument and submission, and issued a single opinion affirming the district court in all respects.[4] (App. B.) Davis petitioned the Sixth Circuit for rehearing en banc as to her qualified immunity defense to the individual claims, which the Sixth Circuit denied. (App. A.) Davis petitions

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[3] The full benefit of immunity from suit conferred on public officials by the qualified immunity doctrine is irreparably lost once the official is subjected to discovery and other litigation burdens. Thus, "(u)nless the plaintiff's allegations state a claim of violation of clearly established law, **a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery**." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "*Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. **The entitlement is an *immunity from suit* rather than a mere defense to liability** . . . ." *Mitchell*, 472 U.S. at 526 (emphasis added). "One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the broad-ranging discovery that can be peculiarly disruptive of effective government. For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (internal quotation marks and citation omitted).

[4] After briefing was complete, but before oral argument, Elwood Caudill, Jr. was elected Rowan County Clerk, replacing Davis. (App. B, 9a.) Respondents, however, persisted with their damages suit against Davis.

this Court to grant certiorari review and vindicate her qualified immunity defense.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S *ZABLOCKI* DECISION AND OTHER SIXTH CIRCUIT PRECEDENTS REQUIRING A TIERED, "DIRECT AND SUBSTANTIAL BURDEN" ANALYSIS OF CONSTITUTIONAL RIGHT-TO-MARRY CLAIMS.

A. *Obergefell* Did Not Elevate a Right to Same-Sex Marriage Above the Existing Fundamental Right to Marry.

Under binding precedent, the court of appeals was tasked with determining Davis's qualified immunity defense under a two-part inquiry: (1) whether a constitutional right has been violated, and (2) if so, whether the right was clearly established and one that a reasonable official should have known. *See Campbell v. City of Springboro*, 700 F.3d 779, 786 (6th Cir. 2012) (citing *Saucier v. Katz*,

533 U.S. 194 (2001)).[5] In addressing the first step, the panel majority opinion (App. B, the "Opinion") conflicts with binding precedent of this Court, *Zablocki v. Redhail*, 434 U.S. 374 (1978), and of the Sixth Circuit, *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996); *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703 (6th Cir. 2001). These precedents require a tiered analysis of a claim that a government policy violated the constitutional right to marry: Policies imposing a direct and substantial burden on the right to marry are subject to strict scrutiny, while policies imposing a lesser burden are subject to only rational basis review. *See, e.g., Montgomery*, 101 F.3d at 1124–29.

The majority below, relying on *Obergefell*, expressly rejected this mandatory tiered analysis (App. B, 18a–19a), and its Opinion is therefore in conflict with decades of binding Supreme Court and Sixth Circuit precedent. As the concurrence reasoned, "I don't believe that the Supreme Court would abolish tiers-of-scrutiny analysis for all marriage regulations without explicitly telling us it was doing so." (App. B, 25a (Bush, J., concurring in part and in the judgment).) Judge Bush's concurrence also cautioned against allowing the majority's error to stand, admonishing, "This is not mere pedantry," and, "The next marriage-regulation

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[5] Deciding the two parts in this order can be beneficial but is not mandatory. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "If *either* inquiry is answered in the negative, the defendant official is entitled to [prevail]," regardless of the order. *Gibbs v. Lomas,* 755 F.3d 529, 537 (7th Cir. 2014) (citing *Pearson*, 555 U.S. at 236)).

case that our court hears may not be amenable to this type of judicial shortcut." (App. B, 28a–29a (Bush, J., concurring in part and in the judgment).)

Thus, having already concluded, unequivocally, that Davis acted for Kentucky—both in issuing marriage licenses, and in not issuing marriage licenses to Respondents (App. B, 14a)—the next step under the well-settled standards for constitutional right-to-marry claims required the circuit court to first determine whether rational basis scrutiny or strict scrutiny applies to the challenged Kentucky policy. *See Montgomery*, 101 F.3d at 1124.[6] Importantly, "not every state action 'which relates in any way to the incidents of or the prerequisites for marriage must be subjected to rigorous scrutiny.'" *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1134 (6th Cir. 1995) (quoting *Zablocki*, 434 U.S. at 388). As this Court held in *Zablocki*, whether challenged on equal protection or due process grounds, only state regulations that "interfere directly and substantially with the right to marry" are subject to strict scrutiny. 434 U.S. at 384–87; *see also Montgomery*, 101 F.3d at 1124. A "direct and substantial" burden requires an "absolute barrier" in which individuals are "absolutely or largely prevented from marrying" whom they want to marry or "absolutely or largely prevented from marrying a large portion of the

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[6] "The right to marry is both a fundamental substantive due process and associational right." *Montgomery*, 101 F.3d at 1124. "Supreme Court precedent, however, specifically establishes that the same level of scrutiny applies in both the First Amendment and substantive due process contexts." *Id.*

otherwise eligible population of spouses." *Vaughn*, 269 F.3d at 710.

Contrary to the circuit court's analysis below, this case is neither the same case as *Obergefell* nor directly controlled by it. That opinion did not address the details of state marriage licensing schemes, like Kentucky's, that must be applied in light of pre-existing, state law religious freedom protections, such as the Kentucky RFRA. At bottom, the majority in *Obergefell* reached two conclusions about the right to marry under the Fourteenth Amendment: (1) states may not absolutely bar an individual from marrying a person of the same-sex, and (2) states that recognize marriage, or provide benefits related to marriage, must do so on the same terms and conditions for same-sex couples as for different-sex couples. *Obergefell*, 135 S.Ct. at 2604–05. Neither of these conclusions is directly implicated in the case at bar. Thus, although this case would not exist but for *Obergefell*, that opinion does not bind this Court to a foregone conclusion in this case.

On the first point, before *Obergefell*, Respondents were "absolutely prevented" from obtaining a Kentucky marriage license if they wanted to marry a person of the same sex. No same-sex couple was able to obtain a Kentucky marriage license in any one of Kentucky's 120 counties. And no same-sex marriage obtained in another state would have been recognized in Kentucky. After *Obergefell*, **even with the "no marriage licenses" policy in place in Rowan County**, same-sex couples desiring marriage licenses could obtain

them because Kentucky was issuing marriage licenses in all surrounding counties. Thus, unlike in the cases consolidated in *Obergefell*, there is no absolute (or even near absolute) statewide ban at issue or being challenged here.

The second point of *Obergefell* is also not at issue here because same-sex couples and different-sex couples are (and were) indisputably being treated the same in Kentucky, **and in Rowan County**, obviating any equal protection issue. The undisputed record shows that Davis discontinued the issuance of **all** marriage licenses, regardless of whether the applicant couple was different-sex or same-sex. Nevertheless, Respondents claim a violation of their right to marry because they were unable to obtain a marriage license **in a particular location** (Rowan County) **approved by a particular individual** (Davis) and bearing the name and authority of that particular individual irrespective of, and without any accommodation for, her conscience and religious beliefs. But this is not a federal constitutional right created by *Obergefell*, or mandated by any other Supreme Court right-to-marry case.

Rather than focus on whether Davis's policy created an "absolute barrier," such that Respondents were "absolutely or largely prevented from marrying" whom they wanted to marry or "absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses," *Vaughn*, 269 F.3d at 710, so that the court could determine whether to apply strict or rational basis scrutiny, the majority instead focused only on

whether Davis provided Respondents licenses on the terms Respondents wanted, irrespective of the availability of Kentucky marriage licenses to Respondents from other Kentucky officials.[7] Thus, the majority did an end-run around the binding precedent of the Supreme Court and the Sixth Circuit and imposed a form of strict liability on Davis that in no way is mandated by *Obergefell*.

B. Under the Binding Precedent Disregarded by the Circuit Court Below, Kentucky's Accommodation of Davis's Religious Beliefs Triggers and Satisfies Rational Basis Scrutiny.

1. Consideration of Binding Precedent and the Minimal Burden Placed on Respondents Compels the Conclusion That Rational Basis Scrutiny Applies to Kentucky's Action in This Case.

As shown above, *Obergefell* neither overruled the *Zablocki–Montgomery–Vaughn* line of precedent, nor relieved the circuit court from applying it to Kentucky's regulation of marriage through Davis's temporary policy. Thus, to determine whether Kentucky violated Respondents'

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[7] *See supra* note 1.

constitutional right to marry by making marriage licenses unavailable in one county, as a means of temporarily accommodating the protected religious conscience rights of a state official, the circuit court was required to first determine whether rational basis scrutiny or strict scrutiny applies to Kentucky's action. *See Montgomery*, 101 F.3d at 1124.

Respondents have not alleged that Kentucky prevented them from marrying. Rather, they allege only that Kentucky, acting through its licensing official, prevented them from obtaining a marriage license in a particular county, to accommodate the official's sincerely held religious beliefs. "[M]erely placing a non-oppressive burden on the decision to marry . . . is not sufficient to trigger heightened constitutional scrutiny." *Id.* at 1125. Consideration of binding precedent and the minimal burden placed on Respondents compels the conclusion that rational basis scrutiny applies to Kentucky's action in this case. (*Cf.* App. B, 24a (Bush, J., concurring in part and in the judgment) ("They suffered a hardship . . . . What they did not suffer was a prohibition on getting married.).)

The Sixth Circuit's own decision in *Montgomery v. Carr* is instructive. There, the circuit court affirmed summary judgment for a group of governmental defendants after applying rational basis scrutiny to the defendants' anti-nepotism policy. 101 F.3d at 1118. The *Montgomery* plaintiffs were a couple who were employed at the same campus of defendants' school system, which was a large secondary school system serving thirty-five

affiliated school districts in Ohio. *Id.* Defendants' anti-nepotism policy prohibited married couples from working at the same campus. *Id.* Pursuant to defendants' policy, upon the plaintiff couple's marriage, the wife's employment was transferred to another campus in the system. *Id.* at 1119. Thus, the policy caused the couple "to drive collectively about 65 miles per day more," and for the wife added "an extra hour per day in commuting time." *Id.* at 1120.

Having considered plaintiffs' increased daily commute, and resulting psychological ailments for the wife, the *Montgomery* court concluded that defendants' anti-nepotism policy **did not impose** a "direct and substantial" burden on the plaintiffs' right to marry. *Id.* at 1124-26. Thus, the court concluded, rational basis scrutiny applied to the court's review of the policy. *Id.* at 1124-29.

In reaching its conclusion, the *Montgomery* court distinguished the case before it from two Supreme Court cases involving "direct and substantial" burdens:

> Two examples of "direct and substantial" burdens on the right of marriage derive from the facts of *Loving* [*v. Va.*, 388 U.S. 1 (1967)] and *Zablocki.* In *Loving,* the anti-miscegenation statute at issue was a "direct and substantial" burden on the right of marriage because it **absolutely** prohibited individuals of different races from marrying. In *Zablocki,* the burden on marriage was

> "direct and substantial" because the Wisconsin statute in that case required non-custodial parents, who were obliged to support their minor children, to obtain court permission if they wanted to marry:
>
> Some of those in the affected class . . . will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or [will not be able to] prove that their children will not become public charges. These persons are **absolutely** prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry.

Id. at 1124–25 (emphasis added) (quoting *Zablocki*, 434 U.S. at 387). Compared to the "direct and substantial" burdens imposed by the *Loving* and *Zablocki* policies, which "absolutely prevented [some] from getting married" or "coerced [some] into foregoing their right to marry," the *Montgomery* court concluded that the anti-nepotism policy involved "a non-oppressive burden on the decision to marry." *Id.* at 1125.

In *Vaughn v. Lawrenceburg Power Sys.*, a case similar to *Montgomery*, the circuit court held that a governmental anti-nepotism policy requiring the

termination of one spouse when two employees married "must be considered a non-oppressive burden on the right to marry, and so subject only to rational basis review by this court." 269 F.3d at 712. Building on *Montgomery*, the court explained:

> Our analysis of the case law in *Montgomery* indicated that we would find direct and substantial burdens only where a large portion of those affected by the rule are **absolutely or largely prevented from marrying**, or where those affected by the rule are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses.

Id. at 710 (emphasis added). The policy in *Vaughn* did not meet the "direct and substantial" test, the court reasoned, because "the policy did not bar [the plaintiff couple] from getting married, nor did it prevent them from marrying a large portion of population even in [their home] County." *Id.*

Under the Sixth Circuit's decisions in *Montgomery* and *Vaughn*, it is clear that the temporary suspension of marriage licenses in Rowan County placed no direct and substantial burden on Respondents' right to marry. Respondents have not alleged any obstacle, economic or otherwise, to their traveling to a clerk's office in one of the seven counties surrounding Rowan County, or any of the over 100 other Kentucky counties, to obtain a Kentucky marriage license. Indisputably, driving

once to the adjoining county clerk's office would have been significantly closer, quicker and less burdensome than the 65-mile **daily** burden deemed not sufficiently "direct and substantial" in *Montgomery*.[8] Nor have Respondents alleged that such travel, one time, would absolutely or largely prevent a large number of people from marrying, or absolutely or largely prevent anyone from marrying a large portion of the otherwise eligible population of spouses. The lack of a marriage license from the Rowan County Clerk "does not change the essential fact" that Respondents were never barred "from getting married, nor did it prevent them from marrying a large portion of population even in [Rowan] County." *Vaughn*, 269 F.3d at 712.

Respondents have not alleged that marriage licenses were unavailable to them in any of Kentucky's other counties. Kentucky does not violate any couple's constitutional right to marry by offering marriage licenses in 119 of 120 counties, or even in just 7 of 7 surrounding counties. [9]

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[8] Each of the seven counties surrounding Rowan County is only thirty minutes to an hour away from the Rowan County seat of Morehead. (App. G, 126a,139a.)

[9] This case does not present, and the Court need not answer, the constitutional question arising from a state that restricts marriage licensing to the county of residence or marriage solemnization, and stops issuing licenses in a particular county as a religious liberty accommodation to an official in that county. Kentucky's geographically permissive marriage licensing policy obviates the need to answer such a question.

2. Kentucky's Accommodation of Davis's Religious Beliefs Was a Reasonable Means of Advancing a Legitimate Government Interest.

Applying rational basis review shows that Respondents' right to marry was not violated because Kentucky's suspension of marriage licenses in one office to accommodate the protected conscience rights of its official was a reasonable means of advancing a legitimate governmental interest. *See Vaughn*, 269 F.3d at 712; *Montgomery*, 101 F.3d at 1129-1130. As ultimately acknowledged by Governor Bevin's Executive Order, Davis's right to relief from carrying out Governor Beshear's mandate to issue marriage licenses on the new Kentucky license form, against her conscience, is protected by and entrenched in the Kentucky Religious Freedom Restoration Act ("Kentucky RFRA") which provides, in pertinent part:

> Government shall not substantially burden a person's[10] freedom of religion. The right to act **or refuse to act** in a manner motivated by a sincerely held religious belief may not

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10 While "person" is not defined in the Kentucky RFRA, it is defined in Kentucky's general definitions statute to include "bodies-politic and corporate, societies, communities, the public generally, **individuals**, partnerships, joint stock companies, and limited liability companies." *See* KY. REV. STAT. § 446.010(33) (emphasis added). There is no exception from the definition for individuals who are publicly elected officials.

> be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.

Ky. Rev. Stat. § 446.350 (emphasis added).

Kentucky RFRA, in turn, applies to all Kentucky statutes. Kentucky RFRA is housed under Chapter 446, 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, Kentucky RFRA is included under a section of Chapter 446 reserved for "Rules of Codification." As such, Kentucky's marriage statutes—much like any other body of Kentucky law—cannot be interpreted without also considering and applying Kentucky RFRA.

Thus, the right to **refuse to act** against religious conscience is expressly conferred by Kentucky RFRA, which applies to Kentucky marriage licensing statutes. Moreover, the specific application of this right to county clerks in the issuance of marriage licenses was expressly established by the Executive Order. Put differently, Kentucky (*i.e.*, Davis in her official capacity) had a duty under Kentucky RFRA not to substantially burden "the right of any person" (*i.e.*, Davis in her

individual capacity) "to act **or refuse to act** in a manner motivated by a sincerely held religious belief . . . ." Ky. Rev. Stat. § 446.350 (emphasis added). Accordingly, both in issuing marriage licenses, and in not issuing licenses pursuant to Kentucky RFRA, Davis was complying with state law, and acting reasonably.

By **temporarily** stopping the issuance of marriage licenses to all couples in one county until appropriate (and very simple) accommodations could be accomplished (via revisions to the marriage license form removing individual clerk names), Kentucky ensured that individuals' fundamental rights to religious accommodation secured by the First Amendment and the Kentucky RFRA (including Davis's) were protected, while leaving ample outlets for marriage licenses open. The stoppage was reasonable under all the circumstances because Davis, as the state official responsible for the stoppage, did not possess any obvious authority when *Obergefell* was decided to unilaterally alter the Kentucky marriage license form to achieve the accommodation **she ultimately received from Governor Bevin's Executive Order, and then the General Assembly**.[11]

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[11] Davis ultimately altered the Kentucky marriage license forms being issued by her office only after she had returned to work following her incarceration, and after her deputy clerk had issued altered license forms while she was in jail. (App. I, 168a–170a.) Governor Beshear approved the altered license forms after-the-fact, which was a change from his mandate first sent to Davis and other Kentucky clerks. (App. I, 168a–170a.)

Issuing no licenses at all in one out of 120 counties was a reasonable policy because it was the only policy Davis could effect at the time that could (i) treat all couples the same, and (ii) rightfully accommodate religious conscience under the Kentucky RFRA and the United States and Kentucky Constitutions, while (iii) leaving marriage licenses readily available to every couple throughout every region of the state and not preventing Respondents from marrying whom they wanted to marry. The resulting burden on the Respondents was minimal, and non-oppressive as a matter of constitutional law.

Indeed, protecting natural and inalienable religious liberties is not merely a legitimate government interest, it is a compelling interest of the highest degree and foundational to the very establishment of the Commonwealth of Kentucky. *See*, *e.g.*, Ky. Const., Preamble (referring to Kentuckians' "religious liberties"); Ky. Const. § 5 ("No human authority shall, in any case whatever, control or interfere with the rights of conscience.") And given that Davis's policy was not only reasonable, but also the only policy she could enact to respect all rights involved, the policy was closely tailored to effectuate Kentucky's compelling religious liberty interests. Thus, the policy satisfies strict scrutiny as well, and Respondents' right to marry was not violated. *See Montgomery*, 101 F.3d at 1124.

Contrary to the majority's conclusion (App. B, 19a–20a), religious accommodations are not incompatible with constitutional rights, and do not

"flout the Constitution." Indeed, the Constitution often requires accommodation to balance competing rights. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987) ("[G]overnment may (and sometimes must) accommodate religious practices and . . . it may do so without violating the [Constitution]."); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (there is "ample room for accommodation of religion under the [Constitution]"). And, contrary to the concurrence below (App. 1), neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *Lawrence v. Texas*, 539 U.S. 558 (2003), required the court to attribute "anti-homosexual animus" to Davis's seeking an accommodation for her sincerely held beliefs. Neither *Romer* nor *Lawrence* involved state laws approving of religious accommodation, based on a balancing test, like Kentucky RFRA provides. To be sure, Kentucky RFRA neither approves nor disapproves of same-sex marriage or any moral aspect of marriage. Instead, Kentucky RFRA reflects a state policy to provide an accommodation of sincerely held religious beliefs, to any person, including public officials, subject to appropriate balancing of competing rights. Kentucky's leaving room for the accommodation of Davis's religious beliefs through Kentucky RFRA is not the same as Kentucky's endorsing her religious beliefs. Thus, Davis' invocation of Kentucky RFRA as grounds for her not issuing marriage licenses while licenses were still available from other Kentucky officials was reasonable, and Davis' policy does not fail

rational basis review automatically as supposed by the majority and concurrence.

Finally, contrary to the suggestions of both the majority (App. B, 19a–20a) and the concurrence (App. B, 22a), Kentucky RFRA did not require Davis to first secure an accommodation judicially before invoking the protections of the statute. By its plain language, Kentucky RFRA confers "**the right to . . . refuse to act**" unless the government meets its burden under the statute. Davis's availing herself of that right, under the plain language of the statute, does not require a judicial determination first. In any event, as recognized by the circuit court below, Davis sued then-Governor Beshear and sought a preliminary injunction to invoke Kentucky RFRA protections in the related *Miller v. Caudill* case, and Davis invoked Kentucky RFRA in her motions to dismiss Respondents' claims in this case. Thus, Davis could not have reasonably invoked Kentucky RFRA any sooner or more directly than she did.

II. THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S *al-KIDD* DECISION AND OTHER SUPREME COURT AND SIXTH CIRCUIT PRECEDENTS THAT PROHIBIT DEFINING CLEARLY ESTABLISHED RIGHTS AT A HIGH LEVEL OF GENERALITY FOR QUALIFIED IMMUNITY PURPOSES.

In addition to the panel majority Opinion's conflict with the this Court's tiered analysis precedents in right-to-marry cases, even as

interpreted by the Sixth Circuit (*see supra* pt. I.A), the Opinion also conflicts with this Court's precedents, as also recognized by the Sixth Circuit, requiring specificity in formulating the "clearly established right" analysis in qualified immunity cases. Even if a violation of Respondents' respective constitutional rights to marry occurred at some level (Davis maintains no such violation occurred), the majority began its "clearly established" analysis at too high a level of generality, in conflict with *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality."). *See also Occupy Nashville v. Haslam*, 769 F.3d 434, 443 (6th Cir. 2014) ("The Supreme Court has 'repeatedly told courts . . . not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" (alteration in original) (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014))).

Under this Court's and the Sixth Circuit's binding precedents, to thwart qualified immunity such a "right 'must have been clearly established **in a . . . particularized . . . sense**: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Kennedy v. Cty. of Villa Hills*, 635 F.3d 210, 214 (6th Cir. 2011) (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (internal quotations omitted). "The level of generality at which the constitutional right in question is defined is of great importance." *Occupy Nashville v. Haslam*, 769 F.3d 434, 443 (6th Cir.

2014); *id.* at 444 ("There must be specificity in the definition of the right at stake."). "In some circumstances, as when an earlier case leaves open whether a general rule applies to the particular type of conduct at issue, **a very high degree a prior factual particularity may be necessary**." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (emphasis added).

> A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.

al-Kidd, 563 U.S. at 741 (alterations in original) (citation and internal quotation marks omitted).

The majority below disregarded this Court's and the Sixth Circuit's binding precedents and defined the right Respondents sought to enforce—at the highest possible level of generality—as the "right to marry." (App. B, 15a–16a.) But this generalized right was no more specific than, for example, the "right to air grievances" that the Sixth Circuit rejected in *Occupy Nashville* as too generalized to begin the "clearly established" inquiry for qualified immunity purposes. *See* 769 F.3d at 443. There, the court focused instead on the particularized right

claimed by the plaintiffs: the right to a "24-hour occupation" of a public plaza to engage in the general right to air grievances. *See id.* Likewise, the majority below should have focused on Respondents' claimed right to marry *on a marriage license issued in Rowan County, by Davis*, "in the particular circumstances [Davis] faced," *Id.* at 443 (emphasis added), meaning forcing her to lend her name and authority against her conscience, without any accommodation.

Instead, in formulating the "clearly established" right for its analysis, the majority truncated *Obergefell*'s holding, focusing only on the passage, "'The Court now holds same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.'" (App. B, 16a (quoting *Obergefell*, 135 S. Ct. at 2604–05).) As shown *supra*, however, *Obergefell*'s holding was more limited, and the majority disregarded the critical part: "**the State laws challenged . . . are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples**." *Obergefell*, 135 S. Ct. at 2605 (emphasis added); *see also id.* at 2607 ("The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."). Davis's obligations thus, with respect to determining Respondents' "clearly established" rights following *Obergefell*, must be considered in light of the obligations imposed on Davis by Kentucky marriage law following *Obergefell*.

As the majority below correctly explained:

> Only Kentucky can discipline county clerks. And Kentucky has "absolute jurisdiction over the regulation of the institution of marriage." Indeed, Kentucky law governs everything about marriage. It defines marriage and sets eligibility requirements. It vests courts with the authority to declare certain marriages void. It describes who may solemnize a marriage and requires a couple to obtain a marriage license prior to marrying. It sets out the process for licensing and recording a marriage. And specific to Davis, Kentucky law vests county clerks with the duty of issuing marriage licenses, recording marriage certificates, and reporting marriages. So Kentucky controls every aspect of how county clerks issue marriage licenses . . . .

(App. B, 11a–12a (citations omitted).) Thus, the majority Opinion contains an irresolvable conflict: on the one hand, the majority holds Kentucky state law absolutely governs all aspects of marriage license eligibility and issuance; but on the other hand, the majority entirely disregards the interaction of Kentucky marriage-licensing law with *Obergefell*'s holding that impliedly, if not expressly, leaves to the states the details of implementing this Court's extension of marriage to include same-sex couples.

As shown above, both in issuing marriage licenses and in not issuing licenses pursuant to Kentucky RFRA, Davis was complying with state law, and acting reasonably. In deciding, then, whether Davis violated a clearly established right of Respondents, the majority below asked the wrong question. Having concluded unequivocally that Davis acted for Kentucky both in issuing marriage licenses, and in not issuing marriage licenses to Respondents, the majority should have asked whether *Kentucky* (acting through Davis) directly and substantially burdened Respondents' ability to marry whom they wanted, which is necessary to establishing the appropriate level of review. (*See supra* pt. I.A.) Instead, the majority imposed a novel, strict liability on Davis because *she* did not license Respondents to marry, regardless of the extent to which Respondents were burdened by Davis herself. (App. B, 14a–20a; *cf.* App. B, 24a (Bush, J., concurring in part and in the judgment) ("They suffered a hardship . . . . What they did not suffer was a prohibition on getting married.).) Furthermore, in deciding whether Respondents' claimed right was clearly established, the majority considered the right at too high a level of generality—the ultimate "right to marry"—instead of asking whether Respondents had a right to marry *on a marriage license issued in Rowan County, by Davis*, *with her name on it*, and then asking whether Davis acted (on Kentucky's behalf) reasonably in removing but one of the many Kentucky marriage licensing options available to Respondents under Kentucky law, in order to balance Davis's conscience

rights and Respondents' right to marry under Kentucky law.

Obergefell did not answer **clearly**, if at all, every question concerning the States' regulation of same-sex marriage in relation to religious liberty and the historical view of marriage as between one man and one woman. *See Pidgeon v. Turner*, 538 S.W.3d 73, 89 n.22 (Tex. 2017) ("The [Supreme] Court's decision to hear and consider *Masterpiece Cakeshop* illustrates that neither *Obergefell* nor *Pavan* provides the final word on the tangential questions *Obergefell*'s holdings raise but *Obergefell* itself did not address." (citing *Pavan v. Smith*, 137 S. Ct. 2075 (2017), *and Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017))). Rather, as shown above, *Obergefell* states an answer to a narrow constitutional question: "The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Obergefell*,135 S. Ct. at 2607. Kentucky immediately changed the Kentucky marriage license form to comply, treating all couples the same. (*See supra*, Statement of the Case.) Six months later, Kentucky changed the marriage license form again, to comply with Kentucky RFRA, still treating all couples the same. (*See supra*, Statement of the Case.) In between, Davis treated all couples the same while she sought the accommodation that Kentucky would soon agree she was entitled to. (*See supra*, Statement of the Case.) It is clear that Kentucky, through Governor Beshear, could have complied with both *Obergefell*

and Kentucky RFRA at the same time, and thereby avoided altogether the conflict between Respondents and Davis. It was not **clearly established**, however, in the mere days following *Obergefell*, that Davis must abandon any claim to the accommodation **she would soon thereafter receive**.

Furthermore, state marriage laws differ across the country, and Kentucky marriage law is far less restrictive than the laws of some other states, even if Kentucky exempted Davis from administering it on the basis of her sincerely held religious beliefs. For instance, some states require prospective couples to obtain a license in the county where the ceremony will occur, *see*, *e.g.*, Md. Code Ann., Fam. Law § 2-401(a), whereas others, like Kentucky, permit residents to obtain their license in one county and hold their ceremony in another county, *see*, *e.g.*, Ky. Rev. Stat. §§ 402.080, 402.100; Minn. Stat. § 517.07. Some states require a prospective couple to obtain their license in their home county, *see*, *e.g.*, Mich. Comp. Laws § 551.101; Ohio Rev. Code Ann. § 3101.05(a), whereas others, like Kentucky, allow residents to obtain a license in any county, *see* Ky. Rev. Stat. § 402.080; Tenn. Code Ann. § 36-3-103. Some states require a prospective couple to wait to receive their license upon application, *see*, *e.g.*, Mich. Comp. Laws § 551.103a (3 days); Minn. Stat. § 517.08(a) (5 days), whereas others, like Kentucky, Ohio, and Tennessee, have no waiting period. These various state regulations on the process and personnel for issuing marriage licenses differ widely in location and timing of access to licenses, and *Obergefell* has nothing to say about

the disparity from state to state, provided the regulations treat same-sex couples and different-sex couples on the same terms. To be sure, there is no plausible argument that *Obergefell* requires every state to issue licenses in the home county of every applicant, regardless of the availability of licenses elsewhere.

The circuit court below erred in its takeaway from *Obergefell*, which it relied on to deny qualified immunity to Davis: "*Obergefell* both recognized the right to same-sex marriage and defined its contours." (App. 1-8.) Contrary to the court's simplistic analysis, *Obergefell* did not clearly establish Respondents' right to receive a marriage license from Davis, when marriage licenses were readily available elsewhere. The court's implicit holding—that individuals have an "on demand" right to a marriage license in a particular county and authorized by a particular person, is not supported by *Obergefell* at all, let alone clearly established. For example, under the circuit court's faulty logic, Maryland, Michigan, and Ohio marriage laws are unconstitutional, because, as discussed above, they restrict marriage applicants from obtaining marriage licenses in the county of their own choosing, requiring instead that licenses be obtained only in counties specified by the state (*e.g.*, county of residence or county of solemnification). Such cannot be the case, and such cannot be the law, even after *Obergefell*.

CONCLUSION

Constitutional right-to-marry cases and cases involving other fundamental rights present substantial questions of federal law. *See, e.g., Obergefell*, 135 S. Ct. at 2601 (noting the "Court's cases and Nation's traditions make clear that marriage is a keystone of our social order"). This Court's Rule 10 expressly identifies, as one of the "compelling reasons" for it to consider review, a case where "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Both the importance of the questions and the fullness of the conflicts explained above solicit this Court's review. For all of the foregoing reasons, this Court should grant Davis's petition and, ultimately, reverse the Sixth Circuit's decision.

Dated this January 22, 2020.

Mathew D. Staver
(Counsel of Record)
Horatio G. Mihet
Roger K. Gannam
Kristina J. Wenberg
LIBERTY COUNSEL
P.O. Box 540774
Orlando, Florida 32854
(407) 875-1776
court@LC.org

Counsel for Petitioner

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING DAVIS'S PETITION FOR REHEARING EN BANC, FILED OCTOBER 24, 2019

Nos. 17-6119/6120/6226/6233

United States Court of Appeals, Sixth Circuit.

David ERMOLD; David Moore,
Plaintiffs-Appellees (17-6119),
Plaintiffs-Appellees/Cross-Appellants (17-6119 & 17-6233),
v.
Kim DAVIS, Individually, Defendant-Appellant (17-6119),
Elwood Caudill, Jr., Clerk of Rowan County, Kentucky, Defendant-Appellant/Cross Appellee (17-6119 & 17-6233).
Will Smith; James Yates, Plaintiffs-Appellees (17-6120), Plaintiffs-Appellees/Cross-Appellants (17-6120 & 17-6226),
v.
Kim Davis, Individually, Defendant-Appellant (17-6120),
Elwood Caudill, Jr., Clerk of Rowan County, Kentucky, Defendant-Appellant/Cross-Appellee (17-6120 & 17-6226).

Filed: October 24, 2019

Before: GRIFFIN, WHITE, and BUSH, Circuit Judges.

Appendix A

ORDER

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petitions then were circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

* Judge Thapar recused himself from participation in this ruling.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AFFIRMING DENIAL OF DAVIS'S MOTIONS TO DISMISS ON QUALIFIED IMMUNITY GROUNDS, FILED AUGUST 23, 2019

936 F.3d 429
United States Court of Appeals, Sixth Circuit.

David ERMOLD; David Moore,
Plaintiffs-Appellees (17-6119),
Plaintiffs-Appellees/Cross-Appellants (17-6119 & 17-6233),
v.
Kim DAVIS, Individually, Defendant-Appellant (17-6119),
Elwood Caudill, Jr., Clerk of Rowan County, Kentucky, Defendant-Appellant/Cross Appellee (17-6119 & 17-6233).
Will Smith; James Yates, Plaintiffs-Appellees (17-6120), Plaintiffs-Appellees/Cross-Appellants (17-6120 & 17-6226),
v.
Kim Davis, Individually, Defendant-Appellant (17-6120),
Elwood Caudill, Jr., Clerk of Rowan County, Kentucky, Defendant-Appellant/Cross-Appellee (17-6120 & 17-6226),
Rowan County, Kentucky, Defendant-Appellee (17-6226).

Nos. 17-6119/6120/6226/6233
|
Argued: January 31, 2019
|

Appendix B

Decided and Filed: August 23, 2019

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Rehearing En Banc Denied October 24, 2019*

* Judge Thapar recused himself from participation in this ruling.

***431** Appeal from the United States District Court for the Eastern District of Kentucky at Ashland. No. 0:15-cv-00046—David L. Bunning, District Judge.

Attorneys and Law Firms

ARGUED: Roger K. Gannam, LIBERTY COUNSEL, Orlando, Florida, for Kim Davis and Elwood Caudill, Jr. Michael J. Gartland, DELCOTTO LAW GROUP PLLC, Lexington, Kentucky, for David Ermold and David Moore. W. Kash Stilz, Jr., ROUSH & STILZ, P.S.C., Covington, Kentucky, for James Yates and Will Smith. Mary Ann Stewart, ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC, Covington, Kentucky, for Rowan County.

ON BRIEF: Roger K. Gannam, Mathew D. Staver, Horatio G. Mihet, Kristina J. Wenberg, LIBERTY COUNSEL, Orlando, Florida, for Kim Davis and Elwood Caudill, Jr. Michael J. Gartland, DELCOTTO LAW GROUP PLLC, Lexington, Kentucky, for David Ermold and David Moore. W.

Appendix B

Kash Stilz, Jr., ROUSH & STILZ, P.S.C., Covington, Kentucky, for James Yates and Will Smith. Jeffrey C. Mando, ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC, Covington, Kentucky, for Rowan County.

Before: GRIFFIN, WHITE, and BUSH, Circuit Judges.

GRIFFIN, J., delivered the opinion of the court in which WHITE, J., joined. BUSH, J. (pp. 438–42), delivered a separate opinion concurring in part and in the judgment.

OPINION

GRIFFIN, Circuit Judge.

***432** At first glance, this case appears simple. When Kim Davis was County Clerk for Rowan County, Kentucky, the Supreme Court recognized a constitutional right to same-sex marriage. One of Davis's duties as County Clerk was to issue marriage licenses. But she believed same-sex marriage was immoral, so she stopped issuing them. Plaintiffs, two couples who sought licenses and were rebuffed, sued her for depriving them of their right to marry.

But Davis claims she is immune from suit, which

complicates matters. That's because the law treats Davis not as one person, but as two: an official and an individual. The doctrine of *sovereign* immunity shields Davis as an *official* if, when refusing to issue marriage licenses, she acted on Kentucky's behalf—but not if she acted on Rowan County's behalf. And the doctrine of *qualified* immunity shields Davis as an *individual* if she didn't violate plaintiffs' right to marry or, if she did, if the right wasn't clearly established when she acted.

And this case comes to us at a relatively early stage. The district court hasn't issued a final ruling, a trial hasn't occurred, and the parties haven't completed discovery. That means we don't look at evidence; we look at allegations. So we ask not whether Davis definitively violated plaintiffs' rights but whether they adequately allege that she did.

The district court ruled that Davis, as an official, acted on Kentucky's behalf, meaning sovereign immunity protected her. Plaintiffs dispute that ruling. The court also ruled that plaintiffs pleaded a plausible case that Davis, as an individual, violated their right to marry and that the right was clearly established, meaning qualified immunity didn't protect her. Davis disputes that ruling. We agree with the district court on both issues and therefore affirm.

I.

Appendix B

In the summer of 2015, Kim Davis was the County Clerk for Rowan County, Kentucky. One of her responsibilities was to issue marriage licenses. But same-sex marriage offended her religious beliefs, so when the Supreme Court recognized a constitutional right to same-sex marriage in *Obergefell v. Hodges*, —— U.S. ——, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015), Davis took matters into her own hands.

One day after the Supreme Court released *Obergefell*, Davis stopped issuing marriage licenses. She didn't discriminate against same-sex couples, though; she stopped issuing licenses altogether. That meant that when plaintiffs—two same-sex couples who lived in Rowan County—sought marriage licenses from the Clerk's Office, they couldn't get them.

With a constitutional right to marry yet no ability to obtain marriage licenses within Rowan County, plaintiffs sued Davis in her individual capacity and in her official capacity as County Clerk. One of the couples also sued the County. Plaintiffs sought damages for Davis's violation of their right to marry.

In a different lawsuit over Davis's conduct (which is before us on a challenge to an attorney's-fees award), the district court enjoined Davis from refusing to issue marriage licenses. With the injunction in place, plaintiffs obtained marriage licenses.

A challenge to that injunction came to our court. Before we could rule on the dispute, however, Kentucky legislators changed the law in a way that convinced Davis to issue licenses without objection. *See* 2016 Kentucky Laws Ch. 132 (SB 216). So Davis asked us to dismiss her appeal, ***433** which we did. *Miller v. Davis*, 667 F. App'x 537, 538 (6th Cir. 2016).

The district court read our opinion so broadly that it dismissed plaintiffs' cases as well, ruling that there was no longer a legal dispute because Davis had agreed to issue marriage licenses. Two plaintiffs appealed the dismissal, and we reversed because they sought damages for the past deprivation of their right to marry, which meant there was still a dispute to resolve. *Ermold v. Davis*, 855 F.3d 715, 720 (6th Cir. 2017).

On remand, the district court also re-opened the other two plaintiffs' case. Davis then moved to dismiss the complaints, arguing that sovereign immunity shielded her from suit in her official capacity and that qualified immunity shielded her from suit in her individual capacity. The district court sided with plaintiffs on the qualified-immunity issue (ruling that the doctrine didn't shield her) and with Davis on the sovereign-immunity issue (ruling that the doctrine did).

Davis appealed the denial of qualified immunity, and plaintiffs appealed the grant of sovereign immunity. After the parties submitted their briefs,

Elwood Caudill, Jr. replaced Davis as Rowan County Clerk and thus became a defendant and cross-appellee in his official capacity.

II.

We begin with sovereign immunity. Unless a State consents to be sued, it enjoys immunity from private lawsuits seeking damages. U.S. Const. amend. XI; *Crabbs v. Scott*, 786 F.3d 426, 428 (6th Cir. 2015). And because lawsuits against state officials in their official capacities equate to lawsuits against the State itself, *see Kentucky v. Graham*, 473 U.S. 159, 165–66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), sovereign immunity shields state officials as well. But the doctrine doesn't extend to counties and county officials. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

Whether sovereign immunity protects an official from being sued in her official capacity, then, depends on her role in government. Sometimes the inquiry is easy. A governor obviously is a state official; a mayor obviously is not. But not all officials operate within jurisdictional silos—some have hybrid duties in which they serve both state and local government. In such scenarios, immunity depends on which entity the official serves when engaging in the challenged conduct. *McMillian v. Monroe Cty.*, 520 U.S. 781, 785 & n. 2, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997). And that inquiry turns on how state and local law treat the official. *Id.* at

786, 117 S.Ct. 1734.

Here, plaintiffs contend that when Davis stopped issuing marriage licenses, she acted on the County's behalf. Caudill and the County, however, claim Davis acted on Kentucky's behalf. To resolve this dispute, we must examine and balance six factors:

> 1. The State's potential liability for a judgment;
>
> 2. How state statutes and courts refer to the official;
>
> 3. Who appointed the official;
>
> 4. Who pays the official;
>
> 5. The degree of state control over the official; and
>
> 6. Whether the functions involved fell within the traditional purview of state or local government.

Crabbs, 786 F.3d at 429.

The first and fourth factors are neutral. Kentucky law appears silent on which level of government must pay for a judgment against a county clerk or clerk's ***434** office, and the parties have provided us nothing but tangentially related hypotheticals about who might pay. Clerk's offices in Kentucky are self-funded. They operate using money from the fees they collect—fees that come from both state and county sources. So both state and county

money paid Davis's salary. And if plaintiffs secured a judgment against Davis in her official capacity (now Caudill in his official capacity) and the Clerk's Office paid the judgment with the money it controls, that money would have both state and local origins.

The second and third factors weigh in favor of Davis having acted on the County's behalf. The Kentucky Constitution refers to clerks as county officials. Ky. Const. § 99. Kentucky courts have also generally characterized county clerks as county officials. *See, e.g.*, *Carroll v. Reed*, 425 S.W.3d 921, 924 (Ky. Ct. App. 2014); *St. Matthews Fire Prot. Dist. v. Aubrey*, 304 S.W.3d 56, 60 (Ky. Ct. App. 2009). County residents elect county clerks. Ky. Const. § 99. And if there is a vacancy, a county judge or executive appoints a new clerk. Ky. Rev. Stat. § 63.220. But these factors offer little help because they pertain to county clerks generally, and no party contests that county clerks mostly work on the behalf of counties—hence the title *county* clerk. What we need is legal authority specific to marriage licensing.

The fifth and sixth factors give us that authority, and they show that Davis acted on the State's behalf. Only Kentucky can discipline county clerks. *See* Ky. Const. § 68; Ky. Rev. Stat. §§ 402.990(6), 522.020–030; *Lowe v. Commonwealth*, 60 Ky. 237 (Ky. 1860). And Kentucky has "absolute jurisdiction over the regulation of the institution of marriage." *Pinkhasov v. Petocz*, 331 S.W.3d 285, 291 (Ky. Ct. App. 2011) (citations omitted). Indeed, Kentucky

law governs everything about marriage. It defines marriage and sets eligibility requirements. Ky. Rev. Stat. §§ 402.005, 402.010, 402.020. It vests courts with the authority to declare certain marriages void. *Id.* at § 402.030. It describes who may solemnize a marriage and requires a couple to obtain a marriage license prior to marrying. *Id.* at §§ 402.050, 402.080. It sets out the process for licensing and recording a marriage. *Id.* at §§ 402.100–402.240. And specific to Davis, Kentucky law vests county clerks with the duty of issuing marriage licenses, recording marriage certificates, and reporting marriages. *Id.* at §§ 402.080, 402.220, 402.230. So Kentucky controls every aspect of how county clerks issue marriage licenses; Rowan County has no say whatsoever.

Plaintiffs acknowledge Kentucky's general control over marriage, but they contend that when Davis refused to issue licenses, she made a discretionary policy on Rowan County's behalf. If true, sovereign immunity wouldn't shield Davis because when an official applies state law that leaves the method of application to her discretion, she acts on behalf of local government.

Perhaps the best example of this principle is *Brotherton v. Cleveland*, 173 F.3d 552 (6th Cir. 1999). There, Ohio law allowed county coroners to remove corneas for medical use. *Id.* at 555. The law didn't specify the process for doing so, but it permitted removal only when the coroner had no knowledge of an objection by the decedent or certain others. *Id.* at 556. One coroner established a

policy of intentional ignorance to potential objections, which meant his subordinates didn't review medical records or paperwork pertaining to a corpse before removing its corneas. *Id*. When sued in his official capacity for making that policy, the coroner claimed that sovereign immunity protected him from suit. *Id*. at 562. We rejected his argument, ***435** holding that he had acted without state compulsion, had selected a policy for his county, and had thus acted on the county's behalf, not the State's. *Id*. at 567.

In comparing Davis's actions to those of the coroner in *Brotherton* (and to other, similar cases), plaintiffs conflate discretion with insubordination. Whereas Ohio's cornea-harvesting law left to officials the method of application, Kentucky's marriage-licensing laws gave county clerks no wiggle room. Kentucky *required* Davis to issue marriage licenses to eligible couples. *See, e.g.*, Ky. Rev. Stat. § 402.100 ("Each county clerk *shall make available* to the public the form prescribed by the Department for Libraries and Archives for the issuance of a marriage license.") (emphasis added); *id*. at § 402.110 ("In issuing the license the clerk *shall deliver* it in its entirety to the licensee." (emphasis added)); *id*. at § 402.080 (2017) ("The license *shall be issued* by the clerk of the county in which the female resides at the time, unless the female is eighteen (18) years of age or over or a widow, and the license is issued on her application in person or by writing signed by her, in which case it may be issued by any county clerk.") (emphasis added). Plaintiffs have cited no authority

suggesting that if a county official acting on the State's behalf fails to do her job, that failure transforms the source of her power from the State to the county. Indeed, such a proposition would make little sense; for whom an official acts has nothing to do with how well she acts. Davis's refusal to issue licenses, then, did nothing to change the government she acted for.

Because Davis acted on Kentucky's behalf when issuing (and refusing to issue) marriage licenses, sovereign immunity protects her (and now Caudill, as the current county clerk) from an official-capacity suit.

III.

Next, we turn to qualified immunity, which shields a government official from a lawsuit against her in her individual capacity if (1) she didn't violate any of the plaintiff's constitutional rights or (2) the rights, if violated, weren't "clearly established" at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Put differently, the doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *White v. Pauly*, —— U.S. ——, 137 S. Ct. 548, 551, 196 L.Ed.2d 463 (2017). Davis challenges the district court's denial of her motion to dismiss, which places our focus on plaintiffs' allegations. If they adequately allege the violation of a clearly established right, we must affirm. *See Cahoo v. SAS Analytics Inc.*, 912 F.3d

887, 898–99 (6th Cir. 2019) (discussing the interplay between qualified immunity and the motion-to-dismiss standard).

That they do. Plaintiffs allege that: (1) the Fourteenth Amendment guarantees them the right, as same-sex couples, to marry; (2) they sought marriage licenses from Davis, whom Kentucky tasked with issuing those licenses; (3) under Kentucky law, they qualified for licenses; and (4) Davis refused to license them. Put differently, they identify the specific right they sought to exercise, what they did to exercise it, who thwarted their efforts, and how she did so. Plaintiffs therefore adequately alleged the violation of a constitution right.

And that right was clearly established when Davis acted. To be clearly established, the right's contours must have been so obvious that a reasonable official would have known that her conduct was out of bounds. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). This need for clarity means the Constitution's text, alone, is often insufficient ***436** to establish a right's edges; terms such as "liberty" and phrases such as "equal protection" are too general—too nebulous—to give an official the notice she needs. Constitutional law, then, regularly fills the void constitutional text creates. In other words, legal opinions that forge constitutional rights frequently set their limits as well.

Here, *Obergefell* both recognized the right to

same-sex marriage and defined its contours. The Court's decree was as sweeping as it was unequivocal:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.

Obergefell, 135 S. Ct. at 2604–05. The Court made no mention of a limit on that right, of an exception to it, or of a multi-factor test for determining when an official violates it. For a *reasonable* official, *Obergefell* left no uncertainty. For Davis, however, the message apparently didn't get through.

And it still doesn't appear to have gotten through: She now argues that *Obergefell* doesn't even apply to her conduct. Because she stopped issuing licenses to all couples regardless of their sexual orientation, she claims, she "obviate[ed] any equal protection issue." That might be so, but the right to marry also arises from the Fourteenth

Amendment's Due Process Clause. *Obergefell*, 135 S. Ct. at 2604 ("[T]he Equal Protection Clause, *like the Due Process Clause*, prohibits this unjustified infringement of the fundamental right to marry. ... [U]nder the *Due Process* and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.") (emphases added). So one could say that Davis provided "equal protection of the laws," U.S. Const., amend. XIV, § 1, but in reality, her alleged conduct amounted to equal *deprivation* of the due-process right to marry. Because *Obergefell* speaks to such deprivations, it applies with force here.

Davis further contends that *Obergefell* doesn't apply for another reason: *Obergefell* involved a total ban on same-sex marriage, but here plaintiffs could've obtained marriage licenses elsewhere in Kentucky. She also presents two other arguments with similar thrusts: (1) The relevant inquiry is whether Kentucky violated plaintiffs' right to marry, not whether she violated it, and (2) *Obergefell* didn't clearly establish a right to demand marriage licenses from particular state officials. The common denominator is a claim that we should focus broadly on Kentucky instead of narrowly on Davis. Yet Davis provides no legal authority for that proposition. We can find none. And we know why: that's not how qualified immunity works, and that's not how constitutional rights work.

Qualified immunity protects government officials from lawsuits against them in their *individual*

capacities. *McCloud v. Testa*, 97 F.3d 1536, 1539 n.1 (6th Cir. 1996). The focus of the analysis, then, is on what the law requires of them individually. And nowhere in the Constitution—or in constitutional law, for that matter—does it say that a government official may infringe constitutional rights so long as another official might not have. *All* government officials must respect *all* constitutional rights. And that means *Obergefell*'s holding applies not just to monolithic governmental entities like Kentucky but to the officials acting for those entities as well.

***437** Davis also asks us to apply rational-basis scrutiny to plaintiffs' constitutional challenge. She says her actions were objectively reasonable because Kentucky's Religious Freedoms Restoration Act, Ky. Rev. Stat. § 446.350, required her to accommodate her personal religious opposition to same-sex marriage. This argument fails because, under *Obergefell*, the direct prohibition of same-sex marriage didn't trigger the tiers-of-scrutiny analysis typical in many other constitutional inquiries. "Rational basis" never appears in the *Obergefell* majority's opinion. Neither does "intermediate scrutiny." And "strict scrutiny" appears only once: in a reference to a Hawaii Supreme Court opinion during a discussion of how "[t]he ancient origins of marriage confirm its centrality" and how the concept "has not stood in isolation from developments in law and society." *Obergefell*, 135 S. Ct. at 2597.

On this point, the concurrence sees things

differently. Although *Obergefell* never invoked the tiers of scrutiny, it reasons, the framework should still apply because Davis merely burdened the right to marry. Sometimes the government regulates marriage without banning it, the concurrence notes, and *Obergefell* didn't overrule that swath of caselaw. Thus, because plaintiffs could have obtained a license in another county and used it to wed within Rowan County, the argument goes, Davis didn't *ban* marriage. And because she didn't *ban* marriage, the argument continues, *Obergefell*'s method of analysis doesn't apply to her actions.

Yet *Obergefell* answered two questions, the first of which was "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex." *Id.* at 2593. The Court said "yes." *Id.* at 2607. *Obergefell* therefore condemned the very action Davis took—refusing to license same-sex marriage—and did so without ever asking what government interest that refusal served or examining the relationship between the refusal and any proffered interest(s). This move "b[roke] sharply with decades of precedent." *Id.* at 2618–19 (Roberts, C.J., dissenting). *Obergefell*, then, didn't abolish the tiers of scrutiny for all marriage restrictions. But it did jettison them for actions such as Davis's.

Davis's request that we apply rational-basis scrutiny fails for a second reason as well. To be sure, *Obergefell* might have created "serious questions about religious liberty," 135 S. Ct. at 2625, (Roberts, C.J., dissenting), but it said nothing

to suggest that government officials may flout the Constitution by enacting religious-based policies to accommodate their own religious beliefs. Davis provides no legal support for her contention that Kentucky's Religious Freedoms Restoration Act required her to do what she did. Her reading of the Act is a subjective one and, as far as we can tell, one no court has endorsed. In the presence of *Obergefell*'s clear mandate that "same-sex couples may exercise the fundamental right to marry," 135 S. Ct. at 2605, and in the absence of any legal authority to support her novel interpretation of Kentucky law, Davis should have known that *Obergefell* required her to issue marriage licenses to same-sex couples—even if she sought and eventually received an accommodation, whether by legislative amendment changing the marriage-license form or by judicial decree adopting her view of the interplay between the Constitution and Kentucky law.

In short, plaintiffs pleaded a violation of their right to marry: a right the Supreme Court clearly established in *Obergefell*. The district court therefore correctly denied qualified immunity to Davis.

***438** IV.

Finally, Davis argues that because plaintiffs haven't pleaded a violation of a constitutional right, the district court lacked subject-matter jurisdiction. As discussed above, plaintiffs have adequately

pleaded a violation of their right to marry. More importantly, Davis conflates the merits of a claim with its source. Plaintiffs sued Davis under 42 U.S.C. § 1983. Section 1983 is a federal law. That means plaintiffs asserted claims "arising under the ... laws ... of the United States." 28 U.S.C. § 1331. And district courts have original jurisdiction to resolve such claims. *Id*. Put differently, if a claim is ultimately unsuccessful, jurisdiction to resolve it doesn't vanish.

V.

For these reasons, we affirm the district court's grant of sovereign immunity and denial of qualified immunity.

CONCURRING IN PART AND IN THE JUDGMENT

JOHN K. BUSH, Circuit Judge, concurring in part and in the judgment.

I concur fully in the Majority's treatment of the sovereign immunity issue. I also concur in the Majority's disposition of qualified immunity, though I follow a different route to that conclusion.

In the Majority's view, Kim Davis banned same-sex

marriage in Rowan County plain and simple, and *Obergefell v. Hodges*, —— U.S. ——, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015) abolished tiers of scrutiny in the analysis of bans on same-sex marriage. Therefore, the Majority does not apply tiers-of-scrutiny analysis to Davis's actions, which were per se unconstitutional under *Obergefell*. Davis is not entitled to qualified immunity because *Obergefell* clearly established that Davis's conduct was unconstitutional, and she may not rely on Kentucky's Religious Freedom Restoration Act ("KRFRA"), Ky. Rev. Stat. § 446.350.

I agree that Davis violated Plaintiffs' constitutional rights and is not entitled to qualified immunity. But, unlike the Majority, I don't find that Davis's actions constituted an outright ban of same-sex marriage, and I believe they should be reviewed using tiers-of-scrutiny analysis. Her conduct, however, does not survive even rational-basis review because of her anti-homosexual animus, which is not a legitimate basis for government action under *Romer v. Evans*, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) and *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). *Romer*, *Lawrence,* and *Obergefell* together clearly established that Davis could not deny marriage licenses to Plaintiffs based on their sexual orientation; therefore, Davis was properly denied qualified immunity. I express no opinion on whether Davis may have been entitled to an exemption under KRFRA or what that exemption may have looked like because she never properly invoked the protections of the statute.

Appendix B

I.

There is no dispute that Davis, confronted by a conflict between her conscience and the dictates of *Obergefell*, ceased issuing marriage licenses in Rowan County. The Majority states that in doing so, Davis "depriv[ed] [Plaintiffs] of their right to marry." Majority Op. at 432. According to the Majority, we must apply *Obergefell* to Davis's actions with the understanding that she effected a "total ban on same-sex marriage" within Rowan County. Majority Op. at 436. The facts, however, are more nuanced than that.

***439** The Commonwealth of Kentucky has two requirements for a valid marriage—licensure and solemnization:

> [T]he General Assembly intended two essential requisites of a legally valid civil marriage which are inviolable. First, the parties intending to be married must obtain a marriage license from a county clerk. Second, having obtained a marriage license, the parties intending to be married must solemnize their intent to be married before a person or society believed in good faith to possess

> authority to solemnize the marriage.

Pinkhasov v. Petocz, 331 S.W.3d 285, 294 (Ky. Ct. App. 2011). It is true that Davis prevented Plaintiffs from acquiring marriage licenses in Rowan County. However, a marriage license issued by any county clerk, in any county in Kentucky, is valid throughout the entire Commonwealth. *See* Ky. Rev. Stat. § 402.080. Thus, Davis did not (and could not) bar Plaintiffs from getting married in Rowan County. Nothing prevented each Plaintiff couple from travelling outside Rowan County, obtaining a marriage license from a different county clerk, and returning to Rowan County to solemnize their marriage.

Plaintiffs do not dispute this, but they hypothesize that Davis's actions might have worked a total marriage ban upon a certain class of marriage license seekers, namely those Rowan County residents who could afford to travel to the Rowan County Courthouse but not to the courthouse of an adjacent county. However, these hypothetical plaintiffs are not before us. In analyzing this issue, I would take Plaintiffs at their word: they were entitled to a marriage license but were prevented from getting one *in Rowan County*. They suffered a hardship, to be sure. What they did not suffer was a prohibition on getting married.

II.

Does this distinction make a difference? It may with regard to whether tiers-of-scrutiny analysis applies. The Majority is correct that the *Obergefell* decision never uses the words "rational basis" or "intermediate scrutiny," and refers to "strict scrutiny" only once, in a non-substantive manner. *See* Majority Op. at 436–37. But the fact that the Supreme Court held in *Obergefell* that a total ban of same-sex marriage was per se unconstitutional, does not necessarily mean that tiers-of-scrutiny analysis is inapplicable for review of a marriage regulation that is less than a total ban. I don't believe that the Supreme Court would abolish tiers-of-scrutiny analysis for all marriage regulations without explicitly telling us it was doing so. In any event, as we have noted, "the Supreme Court itself does not seem terribly bound by the rigid rules of tiering. The lower courts are bound, however, even though the Supreme Court remains free to create new levels of scrutiny or ignore old ones." *Montgomery v. Carr*, 101 F.3d 1117, 1123 (6th Cir. 1996).

I therefore believe we should apply tiers-of-scrutiny analysis to Davis's conduct. This naturally raises the question: what level of scrutiny should govern?

Even—especially—in the wake of *Obergefell*, there is some debate over the nature of the right to marriage under our Constitution. There are several lines of cases recognizing this right on different constitutional grounds. First, there is a substantive

due process right to marriage. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the ***440** orderly pursuit of happiness by free men."). Second, there is an associational right to marriage. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 619–20, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family[, such as] marriage .... [O]nly relationships with these sorts of qualities ... have led to an understanding of freedom of association as an intrinsic element of personal liberty."). And third, as with any other state action, regulation of marriage will fall under the purview of the Equal Protection Clause of the Fourteenth Amendment to the extent that the state regulates different groups differently. *See Reed v. Reed*, 404 U.S. 71, 75–76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) ("The Equal Protection Clause ... den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the object of the statute.").

In the contexts of substantive due process and

associational rights, we analyze a marriage restriction through a two-step process: "first, a court must ask whether the policy or action is a direct or substantial interference with the right of marriage; second, if the policy or action is a direct and substantial interference with the right of marriage, apply strict scrutiny, otherwise apply rational basis scrutiny." *Montgomery*, 101 F.3d at 1124 (citing *Zablocki v. Redhail*, 434 U.S. 374, 383–84, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978)). In the equal protection context, we analyze disparate treatment by the government this way: 1) we ask whether the restriction discriminates against a suspect or semi-suspect class, and 2) if it discriminates against a suspect class, we apply strict scrutiny; if it discriminates against a semi-suspect class, we apply intermediate scrutiny; if it discriminates against neither a suspect nor a semi-suspect class, we apply rational basis review. *See Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988); *Loving*, 388 U.S. at 11, 87 S.Ct. 1817.

Government may sometimes regulate marriage in ways that fall short of a complete ban, but that still place burdens on marriage rights. For example, in *Montgomery*, we considered a school district's policy that forbade employees from being married to fellow employees. *See* 101 F.3d at 1118. Two employees of the school district married each other, and because of the anti-nepotism policy, one of them was forced to take a job in a neighboring district. *Id.* at 1119. We held that forcing an individual to drive sixty-five miles per day as a

condition of marriage was not a significant burden and applied rational basis to uphold the policy. *Id.* at 1121.

I do not read *Obergefell* as overruling cases like *Montgomery*. Aside from passing references to the Fourteenth Amendment, *Obergefell* did not spell out any new understandings of the sources of marriage rights under our Constitution, or when and how to apply which mode of analysis. *Obergefell* answered some questions, but it also left many unanswered.

This is not mere pedantry. A restriction on marriage could be examined in different ways, *possibly with different results*, depending on which analysis is used. For example, suppose that instead of refusing to issue marriage licenses on the basis of moral misgivings about same-sex marriage, the Rowan County clerk had gone on strike, and refused to issue marriage licenses to any applicants until Rowan County gave her a pay raise. Very likely, ***441** were we to analyze such a case under equal protection, we would not find a constitutional violation, because there would simply not be disparate treatment of anyone. *See Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006) (explaining that "[t]he threshold element of an equal protection claim is disparate treatment"). On the other hand, if we were to analyze such a case as a substantive due process violation, we might find a constitutional violation. Even if we agreed that the refusal of one county—out of 120 in Kentucky—to issue marriage

licenses was not a significant interference with the right to marriage (and thus applied rational basis review), it is hard to imagine that we would construe a county clerk's desire for a pay raise as a legitimate government interest to justify the non-issuance of marriage licenses.

The present case, as the Majority points out, is relatively easy. Not because, as the Majority holds, the case does not require us to discern and apply an appropriate level of scrutiny. Instead, this case is straightforward because even if we give Davis the benefit of any doubt and apply the lowest tier of scrutiny, rational basis review, the result is still the same. The next marriage-regulation case that our court hears may not be amenable to this type of judicial shortcut.

Let's assume arguendo—either because Davis's actions were not a significant interference with Plaintiffs' right to marriage, or because her actions were not discriminatory against a suspect or semi-suspect class—that rational basis is the appropriate level of scrutiny. Under rational basis review, state activity is constitutional if it is rationally related to a legitimate purpose. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 694 (6th Cir. 2014). "There is a strong presumption of constitutionality and the regulation will be upheld so long as its goal is permissible and the means by which it is designed to achieve that goal are rational." *Id.* To conclude that the governmental action in question fails rational basis review, we must find that "government action ... 'is so

unrelated to the achievement of any combination of legitimate purposes ... that the government's actions were irrational.' " *Michael v. Ghee*, 498 F.3d 372, 379 (6th Cir. 2007) (quoting *Club Italia Soccer & Sports Org. v. Charter Twp. of Shelby*, 470 F.3d 286, 298 (6th Cir. 2006)).

Although rational basis is the lowest level of scrutiny, there are some instances in which government action does not pass even that low bar. Under *Romer v. Evans*, government actions based on moral disapproval of homosexuality fail rational basis review. *See* 517 U.S. at 632, 116 S.Ct. 1620. Similarly, in *Lawrence v. Texas*, the Supreme Court indicated that moral disapproval on the part of the state legislature was not a "legitimate state interest" justifying interference with homosexual relationships. 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Likewise, county clerks are not allowed to act on this basis. *Cf. Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) ("[L]ocal governments, like every other § 1983 'person,' ... may be sued for constitutional deprivations ....").

Davis argues, however, that she was entitled to an accommodation under KRFRA, or at least had a good-faith basis to argue for such an accommodation, that would entitle her to qualified immunity, notwithstanding the federal constitutional mandates of *Romer, Lawrence,* and *Obergefell*. However, it is not settled whether KRFRA actually entitled Davis to an accommodation.[1] KRFRA provides, in relevant

part:

> ***442** The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.

Ky. Rev. Stat. § 446.350. Based on this language, Davis not only argues that she was entitled to an accommodation but also takes the argument even further: she claims she was entitled to *self*-create an accommodation if none was forthcoming from the state government. The latter point, it seems to me, goes too far.

[1] I note here that the constitutionality of KRFRA is not at issue in this case.

Even if we assume arguendo that KRFRA entitled her to an accommodation,[2] it was not permissible for Davis to take the law into her own hands. Her "accommodation"—refusing to issue any marriage license to any applicant—denied Plaintiffs

marriage licenses in Rowan County to which they were entitled, given the existing state statutory framework and the holding of *Obergefell*. Davis is correct that *Obergefell* neither spelled out the entire nature of marriage rights under our Constitution nor spelled out a comprehensive analysis for constitutional review of restrictions on marriage rights. She also correctly notes that the *Obergefell* majority and dissent agreed that the holding was not meant to denigrate religious faith or people who hold moral viewpoints in opposition to same-sex marriage. *See Obergefell*, 135 S. Ct. at 2607; *id.* at 2625 (Roberts, C.J., dissenting). However, whatever unclarity, whatever unresolved tension, whatever lingering questions remain in the wake of *Obergefell*, one thing is clear from that decision: "Today ... the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage." *Id.* at 2611 (Roberts, C.J., dissenting). Although I cannot agree with the Majority's statement that "*Obergefell* left *no* uncertainty," Majority Op. at 436 (emphasis added), I agree that Davis knew or ought to have known, to a legal certainty, that she could not refuse to issue marriage licenses, as was her duty under state law, because of moral disapproval of homosexuality. And if Davis truly believed that she had a right under KRFRA to not issue marriage licenses, she should have sought and obtained judicial confirmation of her claim. That, she did not do.

[2] This assumption is not necessarily true. My

> research could not find a Kentucky case interpreting KRFRA to support the theory that a government employee may be relieved from the performance of ministerial duties under the auspices of the statute. However, for the purposes of this concurrence, I assume without purporting to decide that Davis's theory of KRFRA is correct.

I therefore agree with the Majority that Plaintiffs have pleaded a violation of their constitutional right to marriage based on Davis's refusal to issue marriage licenses and that the district court correctly denied qualified immunity to Davis because she violated clearly established rights.

All Citations

936 F.3d 429

APPENDIX C — OPINION AND ORDER OF THE UNITED STATED DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY DENYING DAVIS'S MOTION TO DISMISS *ERMOLD, MOORE* CLAIMS ON QUALIFIED IMMUNITY GROUNDS, FILED SEPTEMBER 15, 2017

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United States District Court, E.D. Kentucky,
Northern Division at Ashland.

David ERMOLD, et al., Plaintiffs
v.
Kim DAVIS, individually and in her official capacity, Defendant

CIVIL ACTION NO. 15-46-DLB-EBA
|
Signed 09/15/2017

Attorneys and Law Firms

Joseph Daniel Buckles, Thomas Paul Szczygielski, Chaney Buckles Szczygielski PLLC, Michael Joseph Gartland, Delcotto Law Group PLLC, Lexington, KY, for Plaintiffs.

Horatio G. Mihet, Roger K. Gannam, Liberty Counsel, Orlando, FL, Anthony Charles Donahue, Donahue Law Group, P.S.C., Somerset, KY, for Defendant.

Appendix C

MEMORANDUM OPINION AND ORDER

David L. Bunning, United States District Judge

***1** This matter is before the Court on Defendant Kim Davis's Motion to Dismiss Plaintiffs David Ermold and David Moore's Amended Complaint. (Doc. # 29). Plaintiffs having filed their Response (Doc. # 31), and Defendant having filed her Reply (Doc. # 37), the Motion is fully briefed and ripe for review. For the reasons stated herein, Defendant's Motion to Dismiss will be **granted in part** and **denied in part**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Since August of 2015, three cases against Defendant Kim Davis have been pending on this Court's docket: (1) *Miller, et al. v. Davis, et al.*, 0:15-cv-44-DLB-EBA; (2) *Ermold, et al. v. Davis, et al.*, 0:15-cv-46-DLB-EBA; and (3) *Yates, et al. v. Davis, et al.*, 0:15-cv-62-DLB-EBA.[1] Each of these cases arose from the same circumstances—Kim Davis's refusal to issue marriage licenses to legally eligible couples. Factually, however, the cases differ in significant ways. The first of these—the *Miller* case—is not like the others; the last two—the *Ermold* and *Yates* cases—are nearly identical.[2]

[1] The *Miller* Plaintiffs filed their suit against Kim Davis first, on July 2, 2015. Seven days later, on July 10, 2015, the *Ermold* Plaintiffs

brought another action against Davis. And by August 25, 2015, the *Yates* Plaintiffs had filed a third suit against Davis.

[2] Save an additional defendant, Rowan County, in the *Yates* matter.

In *Miller*, the Plaintiffs sought prospective injunctive relief, which this Court granted. Specifically, the Court enjoined Davis from enforcing her "no marriage licenses" policy. *Miller*, 0:15-cv-44-DLB-EBA (Docs. # 43 and 74 therein). Thereafter, the Court held that the *Miller* Plaintiffs "prevailed" against Davis, in her official capacity, when they obtained a preliminary injunction forcing her to issue marriage licenses. *Id.* (Doc. # 206 therein). Accordingly, the Court recently awarded the *Miller* Plaintiffs attorneys' fees and costs under 42 U.S.C. § 1988 and ordered the Commonwealth of Kentucky, which Davis represented in her official capacity, to foot the bill.[3] *Id.*

[3] As this Court explained in the July 21, 2017 Memorandum Opinion and Order in *Miller*, although attorneys' fees and costs may bear resemblance to monetary relief, they are not money damages. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 206 therein). "Unlike ordinary 'retroactive' relief, such as damages or

> restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court." *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978). "Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." *Id.*

In contrast to the *Miller* Plaintiffs, the *Ermold* and *Yates* Plaintiffs do not pursue prospective injunctive relief. Instead, they seek retrospective money damages. And in suits against government officials, the type of relief requested makes all the difference. Therefore, this case, and the companion case, *Yates, et al. v. Davis, et al.*, will chart their own course.

On June 26, 2015, the United States Supreme Court held that the fundamental right to marry extended to same-sex couples, and therefore, states are constitutionally required to recognize same-sex marriage. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). At that time, Plaintiffs David Ermold and David Moore had been in a committed same-sex relationship for seventeen years. (Doc. # 1 at ¶ 6). Ten days later—on July 6, 2015—Plaintiffs went to the Rowan County Clerk's Office and requested a marriage license. (Doc. # 27 at ¶ 19). The couple's request was denied and they were informed of Rowan County Clerk Kim Davis's "no marriage licenses" policy. *Id.* at ¶ 23. By the end of that week, Plaintiffs filed the instant action against

Davis in her individual and official capacities. (Doc. # 1).

***2** On August 12, 2015, this Court granted the *Miller* Plaintiffs' Motion for Preliminary Injunction and enjoined Davis from enforcing her "no marriage licenses" policy to future marriage-license requests by those Plaintiffs. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 43 therein). Davis unsuccessfully appealed that ruling to the United States Court of Appeals for the Sixth Circuit and to the United States Supreme Court. *Miller v. Davis*, No. 15-5880, 2015 WL 10692640 (6th Cir. Aug. 26, 2015); *Davis v. Miller*, 136 S. Ct. 23 (2015). Despite this Court's directive and her failed appeals, Davis refused to comply with the Court's Order. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 67 therein). In the meantime, Plaintiffs Ermold and Moore's marriage-license requests were denied a second and third time—on August 13, 2015, and September 1, 2015. (Doc. # 27 at ¶¶ 24-25).

On September 3, 2015, the Court found Davis in contempt of the Court's Order and remanded her to the custody of the United States Marshal, pending compliance. *Id.* (Doc. # 75 therein). That same day, the Court modified the preliminary injunction and clarified that Davis, in her official capacity as Rowan County Clerk, was "preliminarily enjoined from applying her 'no marriage licenses' policy to future marriage license requests ... by [any] individuals who [were] legally eligible to marry in Kentucky." *Id.* (Doc. # 74 therein).

The next day—September 4, 2015—Plaintiffs received a marriage license from the Rowan County Clerk's Office. (Docs. # 27 at ¶ 26 and 27-2). And on September 26, 2015, the Plaintiffs were married in a ceremony. (Doc. # 27-3).

While multiple appeals from the *Miller* case were pending before the Sixth Circuit, the briefing in this matter was stayed. (Doc. # 13). Before the Sixth Circuit resolved the *Miller* appeals, the parties in that matter agreed that a legislative change had rendered the consolidated appeals moot, and the Sixth Circuit dismissed those appeals. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 179 therein). In its July 13, 2016 Order, the Sixth Circuit remanded the *Miller* matter to this Court, "with instructions to vacate" the August 12, 2015 and September 3, 2015 Preliminary Injunction Orders. *Id.* After the mandate issued, this Court complied with the Sixth Circuit's instructions and vacated the Preliminary Injunction Orders, denied all pending motions as moot, and dismissed the *Miller* matter from the Court's active docket. *Id.* (Docs. # 180 and 181 therein). In that same Order, the Court lifted the stay in this case, denied the pending motions as moot, and dismissed this matter from the Court's active docket.[4] (Doc. # 19).

[4] The stay in the *Yates* matter was also lifted, and that case was also dismissed from the Court's active docket. (Doc. # 19).

Plaintiffs appealed the Order dismissing this matter to the Sixth Circuit. (Doc. # 20). Because the Plaintiffs sought money damages, not an injunction, the Sixth Circuit determined that the Plaintiffs' money-damages claim was not moot, reversed the Order dismissing Plaintiffs' case, and remanded the action for further proceedings. *Id.* Once the mandate issued (Doc. # 23), the Court held a telephonic conference, granted Plaintiffs leave to file an amended complaint, and set a briefing schedule. (Doc. # 26). Now, the Defendant has moved to dismiss all of Plaintiffs' claims against her, arguing that she is immune from Plaintiffs' damages claims. (Doc. # 29).

II. ANALYSIS

A. Standard of Review

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Put another way, "the plaintiff must allege facts that state a claim to relief that is plausible on its face and that, if accepted as true, are sufficient to raise a right to relief above the speculative level." *Wesley v. Campbell*, 779 F.3d 421, 427 (6th Cir. 2015) (quoting *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 538 (6th Cir. 2012); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

***3** Although "Plaintiffs need not meet a 'probability requirement' ... they must show 'more than a sheer possibility that a defendant has acted unlawfully.' " *Id.* at 427-28 (quoting *Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011)). "In ruling on the issue, a district court must 'construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.' " *Id.* at 428 (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). After all, the "defendant has the burden of showing that the plaintiff has failed to state a claim for relief." *Id.*

B. Immunities

To state a claim under 42 U.S.C. § 1983, Plaintiffs must allege that a person acting under color of state law deprived them of a right secured by the Constitution or federal law. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). When a plaintiff seeks to hold governmental officials liable under § 1983, the Court must first consider immunities, which erect legal hurdles for claims against government entities and their officials. Three variables dictate whether immunity bars these Plaintiffs' suit: (1) the type of government entity the official represents, (2) the nature of the relief requested, and (3) the capacity in which the government official is sued.

First, Davis is a state official. As mentioned above, and discussed in detail in the July 21, 2017

Memorandum Opinion and Order in *Miller*, Davis was acting as an agent of the Commonwealth of Kentucky when she refused to issue marriage licenses to legally eligible couples.[5] Second, Plaintiffs are seeking to vindicate their constitutional rights by obtaining money damages. And third, Plaintiffs have sued Davis in both her official capacity and her personal capacity. "Personal-capacity suits seek to impose personal liability upon a government official for actions ... take[n] under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974)). "Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' " *Id.* (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). Because different immunities apply to Plaintiffs' official-capacity and personal-capacity claims, the Court will address each in turn.

[5] In their briefing, Plaintiffs essentially ask the Court to reconsider its prior conclusion that Davis represented the Commonwealth when she refused to issue marriage licenses. (Doc. # 31 at 3-15). The Court declines such an invitation. A consideration of the relevant factors compelled the Court to conclude that county clerks, when issuing—or refusing to issue—marriage licenses, represent the Commonwealth of Kentucky, not their respective counties.

1. Plaintiffs' official-capacity claim against Davis must be dismissed.

Plaintiffs' official-capacity claim against Davis faces an insurmountable hurdle—sovereign immunity. The Eleventh Amendment's "[s]overeign immunity protects states, as well as state officials sued in their official capacity for money damages, from suit in federal court." *Boler v. Earley*, 865 F.3d 391, 409-10 (6th Cir. 2017) (citing *Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005)). Therefore, Plaintiffs' money-damages claim against Davis in her official capacity, which "is, in all respects other than name, to be treated as a suit against the" Commonwealth, is barred by the Eleventh Amendment.[6] *Graham*, 473 U.S. at 166. Accordingly, to the extent Plaintiffs seek money damages from Davis in her official capacity, she is immune from such relief, and that claim must be dismissed for failure to state a claim upon which relief can be granted. *Barker v. Goodrich*, 649 F.3d 428, 433 (6th Cir. 2011).

[6] Furthermore, "neither a State nor its officials acting in their official capacities are 'persons' " within the meaning of § 1983. *Will*, 491 U.S. at 71. Thus, Plaintiffs' claims against Davis, in her official capacity as a state official, are not cognizable.

2. Plaintiffs' personal-capacity claim against Davis will not be dismissed.

***4** Qualified immunity—although an obstacle to Plaintiffs' personal-capacity claim against Davis—can be overcome. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

"Qualified immunity 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violated the law.' " *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015) (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam)). And "[t]he protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' " *Pearson*, 555 U.S. at 231.

There is a "two-tiered inquiry" for resolving claims

of qualified immunity. *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013) (citing *Austin v. Redford Twp. Police Dep't*, 690 F.3d 490, 496 (6th Cir. 2012)). First, the Court must determine whether "the facts alleged make out a violation of a constitutional right."[7] *Id.* If the plaintiff has shown a violation of a constitutional right, then the Court must proceed to the second step and "ask if the right at issue was 'clearly established' when the event occurred such that a reasonable officer would have known that his conduct violated" the right. *Id.*

[7] The Court recognizes that the sequential procedure mandated in *Saucier v. Katz*, 533 U.S. 194 (2001) is no longer required. *See Pearson*, 555 U.S. at 227. However, as the *Pearson* Court noted, that sequence is "often appropriate" and "beneficial," and that is especially true in this case.

To survive a motion to dismiss on qualified-immunity grounds, both inquiries must be resolved in Plaintiffs' favor. *See Wesley*, 779 F.3d at 489. Plaintiffs bear "the burden of showing that" Davis is "not entitled to qualified immunity." *Johnson*, 790 F.3d at 653; *see also Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016). "At the pleading stage, this burden is carried by alleging facts plausibly making out a claim that the defendant's conduct violated a constitutional right that was clearly established law at the time,

such that a reasonable officer would have known that his conduct violated that right." *Id.* (citing *Wesley*, 779 F.3d at 428).

"Because qualified immunity is 'an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial.' " *Pearson*, 555 U.S. at 231 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Accordingly, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.* at 232 (citing *Hunter*, 502 U.S. at 227). The Sixth Circuit, however, has clarified that only truly "insubstantial claims against government officials should be resolved ... prior to broad discovery," *Johnson*, 790 F.3d at 653, and has cautioned that "it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity." *Wesley*, 779 F.3d at 433. Thus, "[a]lthough an officer's entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12." *Id.* at 433-34 (internal citations and quotation marks omitted).

a. The facts alleged plausibly make out a violation of a constitutional right.

***5** "It is undisputed that the right to marry is protected by ... the Fourteenth Amendment."[8] *Toms v. Taft*, 338 F.3d 519, 524 (6th Cir. 2003) (citing

Zablocki v. Redhail, 434 U.S. 374, 383 (1978)). "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). It is also undisputed that as of June 26, 2015, the fundamental right to marry extended to same-sex couples. *Obergefell*, 135 S. Ct. at 2607-08 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.").

[8] The right to marry is also an "associational right" under the First Amendment. *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996). Because "Supreme Court precedent ... establishes that the same level of scrutiny applies in both the First Amendment and [Fourteenth Amendment] substantive due process contexts," the "level of scrutiny to be applied to state action impinging on the right to marry is invariant with respect to the precise constitutional provision undergirding that right." *Id.* Therefore, there is no reason for the Court to separately consider Plaintiffs' claims under the First Amendment.

When governmental action interferes with the exercise of a fundamental right, like the right to marry, the Court must "decide at what 'level of scrutiny' to evaluate the challenged" policy.

Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703, 710 (6th Cir. 2001). To determine the appropriate level of scrutiny, the Court must first consider "whether the policy or action is a direct or substantial interference with the right of marriage." *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996). Governmental action places a "direct and substantial burden" on the right to marry "where a large portion of those affected by the rule are absolutely or largely prevented from marrying, or where those affected by the rule are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses." *Vaughn*, 269 F.3d at 710 (citing *Montgomery*, 101 F.3d at 1124-25; *Zablocki*, 434 U.S. at 387).

If the policy or action places a "direct and substantial burden" on the right to marry, courts apply strict scrutiny. *Montgomery*, 101 F.3d at 1124. Under strict scrutiny, the policy or action "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388.

However, "not every state action, 'which relates in any way to the incidents of or the prerequisites for marriage must be subjected to rigorous scrutiny.' " *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1134 (6th Cir. 1995) (quoting *Zablocki*, 434 U.S. at 386). States may impose "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship." *Id.* at 1135. If

the policy does not "directly and substantially interfere with the fundamental right to marry," courts will subject the governmental action to a more lenient test—rational basis. *Vaughn*, 269 F.3d at 710. Rational-basis review requires only that the challenged policy is "rationally related to legitimate government interests." *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010).

In their briefing, the parties suggest different standards of scrutiny. The Defendant argues that the Court should apply rational-basis review to her "no marriage licenses" policy because "Plaintiffs were neither absolutely nor largely prevented from marrying whom they wanted under Kentucky law." (Doc. # 29-1 at 31). Instead, the Defendant contends that the Plaintiffs experienced a "mere inconvenience" at the Rowan County Clerk's Office, and could have requested a marriage license from a neighboring county. *Id.* Plaintiffs, however, claim that Defendant's "no marriage licenses" policy should be subjected to strict scrutiny because it "impose[d] a direct and substantial burden on Plaintiffs' right to marry." (Doc. # 31 at 29). Moreover, Plaintiffs argue that the Defendant's "no marriage licenses" policy fails to satisfy even the more lenient rational-basis standard. *Id.* at 29-30.

***6** As the Sixth Circuit has stated, "[c]ase law illustrates what the Supreme Court means by 'direct and substantial.' " *Montgomery*, 101 F.3d at 1124. In *Loving*, the Supreme Court determined that "the anti-miscegenation statute at issue was a 'direct and substantial' burden on the right of

marriage because it absolutely prohibited individuals of different races from marrying." *Id.* (citing *Loving*, 388 U.S. 1). In *Zablocki*, the Court found that "the burden on marriage was 'direct and substantial' because the Wisconsin statute in that case required non-custodial parents, who were obliged to support their minor children, to obtain court permission if they wanted to marry." *Id.* (citing *Zablocki*, 434 U.S. 374). Specifically, the *Zablocki* Court reasoned:

> Some of those in the affected class ... will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which [the Court has] held such freedom to be fundamental.

Zablocki, 434 U.S. at 387.

By contrast, in cases where there is "no direct legal obstacle in the path of persons desiring to get married, and ... no evidence that the laws significantly discouraged, let alone made 'practically impossible,' any marriages," the Supreme Court has found that the governmental action was not a "direct and substantial" infringement on the right to marry. *Id.* at 387 n.12 (citing *Califano v. Jobst*, 434 U.S. 47 (1977) (upholding a Social Security Act provision that terminated benefits for a disabled dependent child when that child married someone who was ineligible for benefits)). Therefore, if the governmental policy or action "merely plac[es] a non-oppresive burden on the decision to marry, or on those who are already married," such a burden is "not sufficient to trigger heightened constitutional scrutiny." *Montgomery*, 101 F.3d at 1125 (applying rational-basis review to public school's anti-nepotism policy, which "impose[d] some costs and burdens on marriage," but were "not 'direct' in the sense that they place[d] an absolute barrier in the path of those who wish to marry."); *see also Wright*, 58 F.3d at 1135-36 (also applying rational-basis review to nepotism policy requiring transfer, which "does not create a legal obstacle that would prevent a class of people from marrying."); *Vaughn*, 269 F.3d at 712 (holding nepotism policy requiring termination "did not bar [plaintiffs] from getting married, nor did it prevent them marrying a large portion of population even in Lawrence County," rather the policy "only made

it economically burdensome to marry a small number of those eligible individuals.").

This Court previously determined that Defendant's "no marriage licenses" policy placed a "direct and substantial burden" on the right to marry and thus, was subjected to strict scrutiny. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 43 therein). Nothing in the record has altered the preliminary decision the Court reached in *Miller*.

The state action at issue in this case is Defendant's refusal to issue *any* marriage licenses. That policy constituted a "direct and substantial interference" with the Plaintiffs' right of marriage because it was a "direct legal obstacle in the path of [all Rowan County residents] desiring to get married." *Zablocki*, 434 U.S. at 387. Defendant's "no marriage licenses" policy differs significantly from the anti-nepotism policies, which simply deter "some persons who might otherwise have married" or economically burden "some who [do] marry." *Montgomery*, 101 F.3d at 1126.

***7** The Court recognizes that the Plaintiffs might have been able to travel to a neighboring county and request a marriage license, as Defendant suggests.[9] (Doc. # 29-1 at 28-29). But that is beside the point. The plaintiffs in *Zablocki* also had a potential "end run" around the challenged statute in that case—they could have complied with the law and obtained the required court order—but the Supreme Court still found that the statute "directly and substantially" interfered with the plaintiffs'

fundamental right to marry. *Zablocki*, 434 U.S. at 387.

[9] The Court does, however, note that Rowan County is situated in a rural portion of eastern Kentucky. And the counties surrounding Rowan County—Fleming, Lewis, Carter, Elliott, Morgan, Menifee, and Bath—have County Clerk's Offices that range from approximately 20 to 40 miles away from the Rowan County Clerk's Office.

Like the plaintiffs in *Zablocki*, some Rowan County residents would "never be able to" receive a marriage license, "because they either lack[ed] the financial [or practical] means" to travel to a neighboring county. *Id.* "These persons [were] absolutely prevented from getting married." *Id.* "Many others, able in theory to" travel to a neighboring county to obtain their marriage license, would have been "sufficiently burdened by having to do so," such that they were "in effect ... coerced into forgoing their right to marry." *Id.* "And even those who [could have been] persuaded" to travel to a neighboring county to obtain their marriage license, "suffer[ed] a serious intrusion into their freedom of choice in an area in which" the Supreme Court has held "such freedom to be fundamental." *Id.*

Therefore, the Defendant's "no marriage licenses" policy placed a "direct and substantial burden" on

the right to marry, and must be subjected to strict scrutiny. *Montgomery*, 101 F.3d at 1124. Accordingly, the "no marriage licenses" policy "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388.

As this Court previously held, Defendant's "no marriage licenses" policy fails to satisfy strict scrutiny.[10] *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 43 therein). The Court acknowledges that the Commonwealth, "certainly has an obligation to 'observe the basic free exercise rights' " of state officials and employees.[11] *Id.* However, the compelling nature of that interest is diminished by the Commonwealth's countervailing interests in "preventing Establishment Clause violations" and "upholding the rule of law." *Id.* Thus, the Defendant's "no marriage licenses" policy was not supported by a sufficiently important state interest. Moreover, even if the "no marriage licenses" policy were supported by a sufficiently important state interest, the policy was certainly not "closely tailored" to effectuate only those interests. The Defendant's "no marriage licenses" policy was not tailored in any meaningful way; it prevented all Rowan County residents from obtaining a marriage license in their home-county. Therefore, viewing the facts alleged in the light most favorable to the Plaintiffs, they have plausibly made out a violation of a constitutional right. *Martin*, 712 F.3d at 957.

[10] In fact, the Defendant's "no marriage licenses" policy would fail to survive even rational-basis review because it is an "unreasonable means of advancing" any "legitimate governmental interest" that might exist. *Vaughn*, 269 F.3d at 712.

[11] The Defendant's briefing stops at challenging the application of strict scrutiny. She does not attempt to argue that strict scrutiny is satisfied, nor does she articulate a specific state interest or argue that her "no marriage licenses" policy was closely tailored to effectuate only those interests. Out of an abundance of caution, however, the Court will consider the state interest the Defendant proffered in *Miller*—the Commonwealth's interest in protecting her religious freedom. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 43 therein).

b. The constitutional right at issue was clearly established.

***8** Having concluded that Defendant's alleged conduct violated Plaintiffs' constitutional rights, the Court now turns to whether the right at issue was clearly established.

A constitutional right is clearly established if the

"contours of the right [are] sufficiently clear that a reasonable official would understand that what [she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). " '[B]inding precedent from the Supreme Court, the Sixth Circuit, or the district court itself' can provide such clarity; persuasive authority from 'other circuits that is directly on point' may also demonstrate that a law is clearly established." *Occupy Nashville v. Haslam*, 769 F.3d 434, 443 (6th Cir. 2014) (quoting *Holzemer v. City of Memphis*, 621 F.3d 512, 527 (6th Cir. 2010)). "This is not to say that an official['s] action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson*, 483 U.S. at 640. Nor must there be "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Put simply, the "salient question" is "whether the state of the law" on July 6, 2015—the day Plaintiffs first requested a marriage license from the Rowan County Clerk's Office—gave Defendant "fair warning that [her] alleged treatment of [Plaintiffs] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). "Plaintiffs have the burden of showing that a right is clearly established." *Toms*, 338 F.3d at 525 (citing *Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995)).

Plaintiffs rely on the Supreme Court's holding in *Obergefell*, which extended the fundamental right to marry to same-sex couples, as proof that their

rights were clearly established when the Defendant adopted her "no marriage licenses" policy. (Doc. # 31). The Defendant claims that Plaintiffs' rights were not clearly established, despite *Obergefell*, for several reasons. (Doc. # 37 at 7-15). Each of the Defendant's arguments, which will be addressed in turn, fail.

First, the Defendant suggests that "recently enacted or modified law cannot be clearly established." *Id.* at 8-9. This argument is not supported by the law. The Defendant cites *Harlow v. Fitzgerald* for the following proposition: "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not previously identified as unlawful." *Id.* (quoting *Harlow*, 457 U.S. at 818). But that principle has no relevance in this particular case. On June 26, 2015, the Supreme Court held that States were prohibited from denying the fundamental right to marry to same-sex couples. *See Obergefell*, 135 S. Ct. 2584. After *Obergefell*, the "unlawfulness" of the Defendant's refusal to issue marriage licenses to legally eligible couples, including same-sex couples, was "apparent."[12] *Hope*, 536 U.S. at 739. Thus, Davis needed not anticipate subsequent legal developments, but merely comply with those legal developments.

[12] Although outside the pleadings in this case, the Court notes that the Defendant's own

> testimony has established that she adopted her "no marriage licenses" policy *in response* to the Supreme Court's decision in *Obergefell*. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 26 at 33:13-36:4; 68:16-23 therein).

***9** Furthermore, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Sutton v. Metro. Gov't of Nashville*, 700 F.3d 865, 876 (6th Cir. 2012). "Some violations of constitutional rights are so obvious that a 'materially similar case' is not required for the right to be clearly established." *Hearring v. Sliwowski*, 712 F.3d 275, 280 (6th Cir. 2013) (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). "When a general constitutional principle is not tied to particularized facts, the principle can clearly establish law applicable in the future to different sets of detailed facts." *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005) (internal citations and quotation marks omitted). The refusal to issue marriage licenses to same-sex couples after June 26, 2015 is such a situation. Even if considered a "novel factual circumstance," the Plaintiffs' fundamental right to marry was so "obvious" after *Obergefell* that the Defendant had fair notice that adopting her "no marriage licenses" policy was unconstitutional.

In support of her qualified-immunity claim, the Defendant also argues that the "Plaintiffs' description of their alleged right is too generalized

to satisfy the clearly established requirement." (Doc. # 37 at 9-11). Specifically, the Defendant claims that the "relevant constitutional question" is not whether it was clearly established that "the Commonwealth of Kentucky [was] required to license and recognize [same-sex marriage]." (Doc. # 29-1 at 22). Rather, Defendant suggests that "the particular inquiry ... is whether *Obergefell* requires Kentucky to compel each and every county clerk to authorize and approve [same-sex marriage] licenses without any accommodation for their sincerely[ ]held religious beliefs." *Id.* Because that issue "has not been specifically litigated in Kentucky courts, let alone decided by the Sixth Circuit or the Supreme Court," the Defendant claims that the law cannot be "clearly established." *Id.*

"The operation of" qualified immunity "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639. Therefore, the Supreme Court has "repeatedly told courts ... not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). If the right is defined too broadly, it "bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone" of the qualified-immunity inquiry, and "Plaintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at

639.

However, the inverse is also true. A constitutional right can be defined with such detail and particularity that each new case would further define and explain the right, converting qualified immunity into absolute immunity. In this case, the correct articulation of the Plaintiffs' claimed right can be easily derived from *Obergefell*:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.

Obergefell, 135 S. Ct. at 2605-06. The right of same-sex couples to exercise the fundamental right to marry is not an extremely abstract right, like "the right to due process of law." *Anderson*, 483 U.S. at 639. Instead, it is sufficiently particularized. *Id.* Therefore, Plaintiffs' alleged right is not "too generalized to satisfy the clearly established requirement."

***10** Moreover, the Defendant's improper characterization of the right that must be clearly established, and her remaining arguments, fail because her focus is misplaced. In her attempt to argue that *Obergefell* did not clearly establish Plaintiffs' rights, the Defendant claims that "*Obergefell* did not answer every question." (Doc. # 37 at 7). Specifically, the Defendant argues that *Obergefell* answered only a "narrow constitutional question"—whether the fundamental right to marry extended to same-sex couples—but left open whether she "must abandon any claim" to a religious accommodation. *Id.* at 7-8. Relatedly, the Defendant argues that the First Amendment's Establishment Clause, Free-Exercise Clause, and the Kentucky Religious Freedom Restoration Act created "reasonable uncertainty" as to her obligations and the clarity of the law. *Id.* at 11-15.

It is not necessary for *Obergefell* to answer every question. *Obergefell* answered one question—whether the fundamental right to marry extended to same-sex couples. The answer was yes, and that clearly established Plaintiffs' constitutional rights. Furthermore, the focus of both of these arguments is on the Defendant—on her rights, her obligations, and her desire for a religious accommodation. But that misses the mark. The cornerstone of the qualified-immunity inquiry is whether *Plaintiffs'* rights, not the Defendant's, are "clearly established."[13] Thus, the Defendant's hope that the First Amendment or Kentucky's Religious Freedom Restoration Act

excused her conduct in violating Plaintiffs' clearly established rights, does not entitle her to qualified immunity.

[13] The cases that the Defendant cites fail to convince the Court otherwise. The Defendant attempts to rely on two First Amendment free-speech cases—*Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990) and *Gossman v. Allen*, 950 F.2d 338 (6th Cir. 1991)—which are inapposite. In addition to being factually distinguishable, the "balance" that *Guercio* and *Gossman* discuss is mandated by the "familiar" First Amendment rule that requires "employees' right to free speech" to be balanced against "the countervailing interests of his employer." *Guercio*, 911 F.2d at 1183 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). There is no precedential support for applying this sort of "balancing" to Plaintiffs' fundamental right to marry.

In conclusion, the Defendant had fair warning on July 6, 2015—when she denied Plaintiffs' request for a marriage license—that her conduct was unconstitutional. *Obergefell* established on June 26, 2015, that same-sex couples, like the Plaintiffs, had the right to exercise the fundamental right to marry. *Obergefell* further explained that States could no longer deny that right to them. Therefore, the "contours of the right" were "sufficiently clear" such that "a reasonable official would understand

that" adopting a "no marriage licenses" policy would violate that right. *Anderson*, 483 U.S. at 640.

The Plaintiffs have met their burden by "alleging facts plausibly making out a claim that the defendant's conduct violated a constitutional right that was clearly established law at the time, such that a reasonable officer would have known that [her] conduct violated that right." *Johnson*, 790 F.3d at 653 (citing *Wesley*, 779 F.3d at 428). Accordingly, the Defendant's Motion to Dismiss Plaintiffs' money-damages claim against her in her personal capacity must be denied.

III. CONCLUSION

Accordingly, for the reasons stated herein,

IT IS ORDERED as follows:

(1) Defendant Kim Davis's Motion to Dismiss Plaintiffs' Amended Complaint (Doc. # 29) is **granted in part**, as to Plaintiffs' claims against Defendant Kim Davis in her official capacity; and **denied in part**, as to Plaintiffs' claims against Kim Davis in her personal capacity; and

***11** (2) Plaintiffs' Amended Complaint (Doc. # 27) is **dismissed** with respect to Plaintiffs' claims against Kim Davis **in her official capacity**.

All Citations

Not Reported in Fed. Supp., 2017 WL 4108921

APPENDIX D — OPINION AND ORDER OF THE UNITED STATED DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY DENYING DAVIS'S MOTION TO DISMISS *SMITH, YATES* CLAIMS ON QUALIFIED IMMUNITY GROUNDS, FILED SEPTEMBER 15, 2017

2017 WL 4111419
Only the Westlaw citation is currently available.
United States District Court, E.D. Kentucky,
Northern Division at Ashland.

James YATES, et al., Plaintiffs
v.
Kim DAVIS, individually and in her official capacity, et al., Defendants

CIVIL ACTION NO. 15-62-DLB-EBA
|
Signed 09/15/2017

Attorneys and Law Firms

Rene B. Heinrich, The Heinrich Firm, PLLC, Newport, KY, William Kash Stilz, Jr., Roush & Stilz, PSC, Covington, KY, for Plaintiffs.

Horatio G. Mihet, Roger K. Gannam, Liberty Counsel, Orlando, FL, Anthony Charles Donahue, Donahue Law Group, P.S.C., Somerset, KY, Cecil R. Watkins, Rowan County Attorney, Morehead, KY, Claire E. Parsons, Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, PLLC, Covington, KY, for Defendants.

Appendix D

MEMORANDUM OPINION AND ORDER

David L. Bunning, United States District Judge

***1** This matter is before the Court on Defendant Kim Davis's Motion to Dismiss Plaintiffs James Yates and Will Smith's Complaint. (Doc. # 29). Plaintiffs having filed their Response (Doc. # 31), and Defendant having filed her Reply (Doc. # 37), the Motion is fully briefed and ripe for review. For the reasons stated herein, Defendant's Motion to Dismiss will be **granted in part** and **denied in part**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Since August of 2015, three cases against Defendant Kim Davis have been pending on this Court's docket: (1) *Miller, et al. v. Davis, et al.*, 0:15-cv-44-DLB-EBA; (2) *Ermold, et al. v. Davis, et al.*, 0:15-cv-46-DLB-EBA; and (3) *Yates, et al. v. Davis, et al.*, 0:15-cv-62-DLB-EBA.[1] Each of these cases arose from the same circumstances—Kim Davis's refusal to issue marriage licenses to legally eligible couples. Factually, however, the cases differ in significant ways. The first of these—the *Miller* case—is not like the others; the last two—the *Ermold* and *Yates* cases—are nearly identical.[2]

[1] The *Miller* Plaintiffs filed their suit against Kim Davis first, on July 2, 2015. Seven days later, on July 10, 2015, the *Ermold* Plaintiffs brought another action against Davis. And by August 25, 2015, the *Yates* Plaintiffs had filed a third suit against Davis.

[2] This matter involves an additional defendant, Rowan County. (Doc. # 1).

In *Miller*, the Plaintiffs sought prospective injunctive relief, which this Court granted. Specifically, the Court enjoined Davis from enforcing her "no marriage licenses" policy. *Miller*, 0:15-cv-44-DLB-EBA (Docs. # 43 and 74 therein). Thereafter, the Court held that the *Miller* Plaintiffs "prevailed" against Davis, in her official capacity, when they obtained a preliminary injunction forcing her to issue marriage licenses. *Id.* (Doc. # 206 therein). Accordingly, the Court recently awarded the *Miller* Plaintiffs attorneys' fees and costs under 42 U.S.C. § 1988 and ordered the Commonwealth of Kentucky, which Davis represented in her official capacity, to foot the bill.[3] *Id.*

[3] As this Court explained in the July 21, 2017 Memorandum Opinion and Order in *Miller*, although attorneys' fees and costs may bear resemblance to monetary relief, they are not

> money damages. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 206 therein). "Unlike ordinary 'retroactive' relief, such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court." *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978). "Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." *Id.*

In contrast to the *Miller* Plaintiffs, the *Ermold* and *Yates* Plaintiffs do not pursue prospective injunctive relief. Instead, they seek retrospective money damages. And in suits against government officials, the type of relief requested makes all the difference. Therefore, this case, and the companion case, *Ermold, et al. v. Davis, et al.*, will chart their own course.

On June 26, 2015, the United States Supreme Court held that the fundamental right to marry extended to same-sex couples, and therefore, states are constitutionally required to recognize same-sex marriage. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). At that time, Plaintiffs James Yates and Will Smith had been in a committed same-sex relationship for nine years. (Doc. # 1 at ¶ 8). Ten days later—on July 6, 2015—Plaintiffs went to the Rowan County Clerk's Office and requested a marriage license. (Doc. # 1 at ¶ 13). The couple's request was denied and they were informed of

Rowan County Clerk Kim Davis's "no marriage licenses" policy. *Id.*

***2** On August 12, 2015, this Court granted the *Miller* Plaintiffs' Motion for Preliminary Injunction and enjoined Davis from enforcing her "no marriage licenses" policy to future marriage-license requests by those Plaintiffs. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 43 therein). The next day—August 13, 2015—Plaintiffs Yates and Smith's marriage-license request was again denied. (Doc. # 1 at ¶ 18). On August 25, 2015, the Plaintiffs filed the instant action. (Doc. # 1).

Davis unsuccessfully appealed the Court's preliminary-injunction ruling to the United States Court of Appeals for the Sixth Circuit and to the United States Supreme Court. *Miller v. Davis*, No. 15-5880, 2015 WL 10692640 (6th Cir. Aug. 26, 2015); *Davis v. Miller*, 136 S. Ct. 23 (2015). Despite this Court's directive and her failed appeals, Davis refused to comply with the Court's Order. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 67 therein).

On September 3, 2015, the Court found Davis in contempt of the Court's Order and remanded her to the custody of the United States Marshal, pending compliance. *Id.* (Doc. # 75 therein). That same day, the Court modified the preliminary injunction and clarified that Davis, in her official capacity as Rowan County Clerk, was "preliminarily enjoined from applying her 'no marriage licenses' policy to future marriage license requests ... by [any] individuals who [were] legally eligible to marry in

Kentucky." *Id.* (Doc. # 74 therein).

While multiple appeals from the *Miller* case were pending before the Sixth Circuit, the briefing in this matter was stayed. (Doc. # 11). Before the Sixth Circuit resolved the *Miller* appeals, the parties in that matter agreed that a legislative change had rendered the consolidated appeals moot, and the Sixth Circuit dismissed those appeals. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 179 therein). In its July 13, 2016 Order, the Sixth Circuit remanded the *Miller* matter to this Court, "with instructions to vacate" the August 12, 2015 and September 3, 2015 Preliminary Injunction Orders. *Id.* After the mandate issued, this Court complied with the Sixth Circuit's instructions and vacated the Preliminary Injunction Orders, denied all pending motions as moot, and dismissed the *Miller* matter from the Court's active docket. *Id.* (Docs. # 180 and 181 therein). In that same Order, the Court lifted the stay in this case and dismissed this matter from the Court's active docket.[4] (Doc. # 16).

[4] The stay in the *Ermold* matter was also lifted, and that case was also dismissed from the Court's active docket. (Doc. # 16).

Plaintiffs filed a Motion for Reconsideration of the Order dismissing this matter. (Doc. # 17). In response to that same Order, the *Ermold* Plaintiffs appealed to the Sixth Circuit. *Ermold*,

0:15-cv-46-DLB-EBA (Doc. # 20 therein). On May 2, 2017, the Sixth Circuit reversed the Order dismissing the *Ermold* Plaintiffs' case, and remanded the action for further proceedings. *Ermold*, 0:15-cv-46-DLB-EBA (Docs. # 21 and 22 therein). Specifically, the Sixth Circuit held that the *Ermold* Plaintiffs' money-damages claim was not moot because they sought money damages, not an injunction. *Id.* For the same reason, this Court granted Plaintiffs' Motion for Reconsideration and set a telephonic conference to discuss a briefing schedule. (Docs. # 24 and 25). Now, the Defendant has moved to dismiss all of Plaintiffs' claims against her, arguing that she is immune from Plaintiffs' damages claims. (Doc. # 29).

II. ANALYSIS

A. Standard of Review

***3** To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Put another way, "the plaintiff must allege facts that state a claim to relief that is plausible on its face and that, if accepted as true, are sufficient to raise a right to relief above the speculative level." *Wesley v. Campbell*, 779 F.3d 421, 427 (6th Cir. 2015) (quoting *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 538 (6th Cir. 2012); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Although "Plaintiffs need not meet a 'probability requirement' ... they must show 'more than a sheer possibility that a defendant has acted unlawfully.' " *Id.* at 427-28 (quoting *Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011)). "In ruling on the issue, a district court must 'construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.' " *Id.* at 428 (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). After all, the "defendant has the burden of showing that the plaintiff has failed to state a claim for relief." *Id.*

B. Immunities

To state a claim under 42 U.S.C. § 1983, Plaintiffs must allege that a person acting under color of state law deprived them of a right secured by the Constitution or federal law. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). When a plaintiff seeks to hold governmental officials liable under § 1983, the Court must first consider immunities, which erect legal hurdles for claims against government entities and their officials. Three variables dictate whether immunity bars these Plaintiffs' suit: (1) the type of government entity the official represents, (2) the nature of the relief requested, and (3) the capacity in which the government official is sued.

First, Davis is a state official. As mentioned above,

and discussed in detail in the July 21, 2017 Memorandum Opinion and Order in *Miller*, Davis was acting as an agent of the Commonwealth of Kentucky when she refused to issue marriage licenses to legally eligible couples.[5] Second, Plaintiffs are seeking to vindicate their constitutional rights by obtaining money damages. And third, Plaintiffs have sued Davis in both her official capacity and her personal capacity. "Personal-capacity suits seek to impose personal liability upon a government official for actions ... take[n] under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974)). "Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' " *Id.* (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). Because different immunities apply to Plaintiffs' official-capacity and personal-capacity claims, the Court will address each in turn.

[5] The Plaintiffs note their disagreement with the Court's prior conclusion that Davis represented the Commonwealth when she refused to issue marriage licenses, and incorporate the *Ermold* Plaintiffs' argument with respect to that issue. (Doc. # 31 at 7). The Court declines to reconsider its prior ruling. A consideration of the relevant factors compelled the Court to conclude that county clerks, when issuing—or refusing to

> issue—marriage licenses, represent the Commonwealth of Kentucky, not their respective counties.
>
> Therefore, as the Court held in *Miller*, "[t]his conclusion insulates Rowan County from liability" for Plaintiffs' money-damages claim. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 206 therein). As Plaintiffs acknowledge, such a finding renders their money-damages claim against Davis in her official capacity "untenable." (Doc. # 31 at 7). For the same reasons, it also renders Plaintiffs' claims against Rowan County untenable. Accordingly, Plaintiffs' claims against Rowan County must be dismissed.

1. Plaintiffs' official-capacity claim against Davis must be dismissed.

***4** Plaintiffs' official-capacity claim against Davis faces an insurmountable hurdle—sovereign immunity. The Eleventh Amendment's "[s]overeign immunity protects states, as well as state officials sued in their official capacity for money damages, from suit in federal court." *Boler v. Earley*, 865 F.3d 391, 409-10 (6th Cir. 2017) (citing *Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005)). Therefore, Plaintiffs' money-damages claim against Davis in her official capacity, which "is, in all respects other than name, to be treated as a suit against the" Commonwealth, is barred by the Eleventh

Amendment.[6] *Graham*, 473 U.S. at 166. Accordingly, to the extent Plaintiffs seek money damages from Davis in her official capacity, she is immune from such relief, and that claim must be dismissed for failure to state a claim upon which relief can be granted. *Barker v. Goodrich*, 649 F.3d 428, 433 (6th Cir. 2011).

[6] Furthermore, "neither a State nor its officials acting in their official capacities are 'persons' " within the meaning of § 1983. *Will*, 491 U.S. at 71. Thus, Plaintiffs' claims against Davis, in her official capacity as a state official, are not cognizable.

2. Plaintiffs' personal-capacity claim against Davis will not be dismissed.

Qualified immunity—although an obstacle to Plaintiffs' personal-capacity claim against Davis—can be overcome. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials

from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

"Qualified immunity 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violated the law.' " *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015) (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam)). And "[t]he protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' " *Pearson*, 555 U.S. at 231.

There is a "two-tiered inquiry" for resolving claims of qualified immunity. *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013) (citing *Austin v. Redford Twp. Police Dep't*, 690 F.3d 490, 496 (6th Cir. 2012)). First, the Court must determine whether "the facts alleged make out a violation of a constitutional right."[7] *Id.* If the plaintiff has shown a violation of a constitutional right, then the Court must proceed to the second step and "ask if the right at issue was 'clearly established' when the event occurred such that a reasonable officer would have known that his conduct violated" the right. *Id.*

[7] The Court recognizes that the sequential procedure mandated in *Saucier v. Katz*, 533 U.S. 194 (2001) is no longer required. *See Pearson*, 555 U.S. at 227. However, as the *Pearson* Court noted, that sequence is "often appropriate" and "beneficial," and that is especially true in this case.

To survive a motion to dismiss on qualified-immunity grounds, both inquiries must be resolved in Plaintiffs' favor. *See Wesley*, 779 F.3d at 489. Plaintiffs bear "the burden of showing that" Davis is "not entitled to qualified immunity." *Johnson*, 790 F.3d at 653; *see also Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016). "At the pleading stage, this burden is carried by alleging facts plausibly making out a claim that the defendant's conduct violated a constitutional right that was clearly established law at the time, such that a reasonable officer would have known that his conduct violated that right." *Id.* (citing *Wesley*, 779 F.3d at 428).

***5** "Because qualified immunity is 'an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial.' " *Pearson*, 555 U.S. at 231 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Accordingly, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.* at 232 (citing *Hunter*, 502 U.S. at 227). The Sixth Circuit, however, has clarified that only truly "insubstantial claims against government officials should be resolved ... prior to broad discovery," *Johnson*, 790 F.3d at 653, and has cautioned that "it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity." *Wesley*, 779

F.3d at 433. Thus, "[a]lthough an officer's entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12." *Id.* at 433-34 (internal citations and quotation marks omitted).

a. The facts alleged plausibly make out a violation of a constitutional right.

"It is undisputed that the right to marry is protected by ... the Fourteenth Amendment."[8] *Toms v. Taft*, 338 F.3d 519, 524 (6th Cir. 2003) (citing *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978)). "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). It is also undisputed that as of June 26, 2015, the fundamental right to marry extended to same-sex couples. *Obergefell*, 135 S. Ct. at 2607-08 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.").

[8] The right to marry is also an "associational right" under the First Amendment. *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996). Because "Supreme Court precedent ... establishes that the same level of scrutiny applies in both the First Amendment

> and [Fourteenth Amendment] substantive due process contexts," the "level of scrutiny to be applied to state action impinging on the right to marry is invariant with respect to the precise constitutional provision undergirding that right." *Id.* Therefore, there is no reason for the Court to separately consider Plaintiffs' claims under the First Amendment.

When governmental action interferes with the exercise of a fundamental right, like the right to marry, the Court must "decide at what 'level of scrutiny' to evaluate the challenged" policy. *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001). To determine the appropriate level of scrutiny, the Court must first consider "whether the policy or action is a direct or substantial interference with the right of marriage." *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996). Governmental action places a "direct and substantial burden" on the right to marry "where a large portion of those affected by the rule are absolutely or largely prevented from marrying, or where those affected by the rule are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses." *Vaughn*, 269 F.3d at 710 (citing *Montgomery*, 101 F.3d at 1124-25; *Zablocki*, 434 U.S. at 387).

If the policy or action places a "direct and substantial burden" on the right to marry, courts

apply strict scrutiny. *Montgomery*, 101 F.3d at 1124. Under strict scrutiny, the policy or action "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388.

However, "not every state action, 'which relates in any way to the incidents of or the prerequisites for marriage must be subjected to rigorous scrutiny.' " *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1134 (6th Cir. 1995) (quoting *Zablocki*, 434 U.S. at 386). States may impose "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship." *Id.* at 1135. If the policy does not "directly and substantially interfere with the fundamental right to marry," courts will subject the governmental action to a more lenient test—rational basis. *Vaughn*, 269 F.3d at 710. Rational-basis review requires only that the challenged policy is "rationally related to legitimate government interests." *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010).

***6** In their briefing, the parties suggest different standards of scrutiny. The Defendant argues that the Court should apply rational-basis review to her "no marriage licenses" policy because "Plaintiffs were neither absolutely nor largely prevented from marrying whom they wanted under Kentucky law." (Doc. # 29-1 at 32). Instead, the Defendant contends that the Plaintiffs experienced a "mere inconvenience" at the Rowan County Clerk's Office, and could have requested a marriage license from a

neighboring county. *Id.* Plaintiffs, however, claim that Defendant's "no marriage licenses" policy should be subjected to strict scrutiny because it "impose[d] a direct and substantial burden on Plaintiffs' right to marry." (Doc. # 31 at 9).

As the Sixth Circuit has stated, "[c]ase law illustrates what the Supreme Court means by 'direct and substantial.' " *Montgomery*, 101 F.3d at 1124. In *Loving*, the Supreme Court determined that "the anti-miscegenation statute at issue was a 'direct and substantial' burden on the right of marriage because it absolutely prohibited individuals of different races from marrying." *Id.* (citing *Loving*, 388 U.S. 1). In *Zablocki*, the Court found that "the burden on marriage was 'direct and substantial' because the Wisconsin statute in that case required non-custodial parents, who were obliged to support their minor children, to obtain court permission if they wanted to marry." *Id.* (citing *Zablocki*, 434 U.S. 374). Specifically, the *Zablocki* Court reasoned:

> Some of those in the affected class ... will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will

> in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which [the Court has] held such freedom to be fundamental.

Zablocki, 434 U.S. at 387.

By contrast, in cases where there is "no direct legal obstacle in the path of persons desiring to get married, and ... no evidence that the laws significantly discouraged, let alone made 'practically impossible,' any marriages," the Supreme Court has found that the governmental action was not a "direct and substantial" infringement on the right to marry. *Id.* at 387 n.12 (citing *Califano v. Jobst*, 434 U.S. 47 (1977) (upholding a Social Security Act provision that terminated benefits for a disabled dependent child when that child married someone who was ineligible for benefits)). Therefore, if the governmental policy or action "merely plac[es] a non-oppresive burden on the decision to marry, or on those who are already married," such a burden is "not sufficient to trigger heightened constitutional scrutiny." *Montgomery*, 101 F.3d at 1125 (applying rational-basis review to public school's anti-nepotism policy, which "impose[d] some costs and burdens on marriage," but were "not 'direct' in the sense that they place[d] an absolute barrier in the path of those who wish to

marry."); *see also Wright*, 58 F.3d at 1135-36 (also applying rational-basis review to nepotism policy requiring transfer, which "does not create a legal obstacle that would prevent a class of people from marrying."); *Vaughn*, 269 F.3d at 712 (holding nepotism policy requiring termination "did not bar [plaintiffs] from getting married, nor did it prevent them marrying a large portion of population even in Lawrence County," rather the policy "only made it economically burdensome to marry a small number of those eligible individuals.").

***7** This Court previously determined that Defendant's "no marriage licenses" policy placed a "direct and substantial burden" on the right to marry and thus, was subjected to strict scrutiny. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 43 therein). Nothing in the record has altered the preliminary decision the Court reached in *Miller*.

The state action at issue in this case is Defendant's refusal to issue *any* marriage licenses. That policy constituted a "direct and substantial interference" with the Plaintiffs' right of marriage because it was a "direct legal obstacle in the path of [all Rowan County residents] desiring to get married." *Zablocki*, 434 U.S. at 387. Defendant's "no marriage licenses" policy differs significantly from the anti-nepotism policies, which simply deter "some persons who might otherwise have married" or economically burden "some who [do] marry." *Montgomery*, 101 F.3d at 1126.

The Court recognizes that the Plaintiffs might have

been able to travel to a neighboring county and request a marriage license, as Defendant suggests.[9] (Doc. # 29-1 at 28-29). But that is beside the point. The plaintiffs in *Zablocki* also had a potential "end run" around the challenged statute in that case—they could have complied with the law and obtained the required court order—but the Supreme Court still found that the statute "directly and substantially" interfered with the plaintiffs' fundamental right to marry. *Zablocki*, 434 U.S. at 387.

[9] The Court does, however, note that Rowan County is situated in a rural portion of eastern Kentucky. And the counties surrounding Rowan County—Fleming, Lewis, Carter, Elliott, Morgan, Menifee, and Bath—have County Clerk's Offices that range from approximately 20 to 40 miles away from the Rowan County Clerk's Office.

Like the plaintiffs in *Zablocki*, some Rowan County residents would "never be able to" receive a marriage license, "because they either lack[ed] the financial [or practical] means" to travel to a neighboring county. *Id.* "These persons [were] absolutely prevented from getting married." *Id.* "Many others, able in theory to" travel to a neighboring county to obtain their marriage license, would have been "sufficiently burdened by having to do so," such that they were "in effect ... coerced into forgoing their right to marry." *Id.* "And

even those who [could have been] persuaded" to travel to a neighboring county to obtain their marriage license, "suffer[ed] a serious intrusion into their freedom of choice in an area in which" the Supreme Court has held "such freedom to be fundamental." *Id.*

Therefore, the Defendant's "no marriage licenses" policy placed a "direct and substantial burden" on the right to marry, and must be subjected to strict scrutiny. *Montgomery*, 101 F.3d at 1124. Accordingly, the "no marriage licenses" policy "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388.

As this Court previously held, Defendant's "no marriage licenses" policy fails to satisfy strict scrutiny.[10] *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 43 therein). The Court acknowledges that the Commonwealth, "certainly has an obligation to 'observe the basic free exercise rights' " of state officials and employees.[11] *Id.* However, the compelling nature of that interest is diminished by the Commonwealth's countervailing interests in "preventing Establishment Clause violations" and "upholding the rule of law." *Id.* Thus, the Defendant's "no marriage licenses" policy was not supported by a sufficiently important state interest. Moreover, even if the "no marriage licenses" policy were supported by a sufficiently important state interest, the policy was certainly not "closely tailored" to effectuate only those interests. The

Defendant's "no marriage licenses" policy was not tailored in any meaningful way; it prevented all Rowan County residents from obtaining a marriage license in their home-county. Therefore, viewing the facts alleged in the light most favorable to the Plaintiffs, they have plausibly made out a violation of a constitutional right. *Martin*, 712 F.3d at 957.

10 In fact, the Defendant's "no marriage licenses" policy would fail to survive even rational-basis review because it is an "unreasonable means of advancing" any "legitimate governmental interest" that might exist. *Vaughn*, 269 F.3d at 712.

11 The Defendant's briefing stops at challenging the application of strict scrutiny. She does not attempt to argue that strict scrutiny is satisfied, nor does she articulate a specific state interest or argue that her "no marriage licenses" policy was closely tailored to effectuate only those interests. Out of an abundance of caution, however, the Court will consider the state interest the Defendant proffered in *Miller*—the Commonwealth's interest in protecting her religious freedom. *Miller*, 0:15-cv-44-DLB-EBA (Doc. # 43 therein).

b. The constitutional right at issue was clearly established.

***8** Having concluded that Defendant's alleged conduct violated Plaintiffs' constitutional rights, the Court now turns to whether the right at issue was clearly established.

A constitutional right is clearly established if the "contours of the right [are] sufficiently clear that a reasonable official would understand that what [she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). " '[B]inding precedent from the Supreme Court, the Sixth Circuit, or the district court itself' can provide such clarity; persuasive authority from 'other circuits that is directly on point' may also demonstrate that a law is clearly established." *Occupy Nashville v. Haslam*, 769 F.3d 434, 443 (6th Cir. 2014) (quoting *Holzemer v. City of Memphis*, 621 F.3d 512, 527 (6th Cir. 2010)). "This is not to say that an official['s] action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson*, 483 U.S. at 640. Nor must there be "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Put simply, the "salient question" is "whether the state of the law" on July 6, 2015—the day Plaintiffs first requested a marriage license from the Rowan County Clerk's Office—gave Defendant "fair warning that [her] alleged treatment of [Plaintiffs] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730,

741 (2002). "Plaintiffs have the burden of showing that a right is clearly established." *Toms*, 338 F.3d at 525 (citing *Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995)).

Plaintiffs rely on the Supreme Court's holding in *Obergefell*, which extended the fundamental right to marry to same-sex couples, as proof that their rights were clearly established when the Defendant adopted her "no marriage licenses" policy. (Doc. # 31 at 10-11). The Defendant claims that Plaintiffs' rights were not clearly established, despite *Obergefell*, for several reasons. (Doc. # 37 at 7-15). Each of the Defendant's arguments, which will be addressed in turn, fail.

First, the Defendant suggests that "recently enacted or modified law cannot be clearly established." *Id.* at 8-9. This argument is not supported by the law. The Defendant cites *Harlow v. Fitzgerald* for the following proposition: "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not previously identified as unlawful." *Id.* (quoting *Harlow*, 457 U.S. at 818). But that principle has no relevance in this particular case. On June 26, 2015, the Supreme Court held that States were prohibited from denying the fundamental right to marry to same-sex couples. *See Obergefell*, 135 S. Ct. 2584. After *Obergefell*, the "unlawfulness" of the Defendant's refusal to issue marriage licenses to legally eligible couples,

including same-sex couples, was "apparent."[12] *Hope*, 536 U.S. at 739. Thus, Davis needed not anticipate subsequent legal developments, but merely comply with those legal developments.

[12] Although outside the pleadings in this case, the Court notes that the Defendant's own testimony has established that she adopted her "no marriage licenses" policy *in response* to the Supreme Court's decision in *Obergefell. Miller*, 0:15-cv-44-DLB-EBA (Doc. # 26 at 33:13-36:4; 68:16-23 therein).

***9** Furthermore, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Sutton v. Metro. Gov't of Nashville*, 700 F.3d 865, 876 (6th Cir. 2012). "Some violations of constitutional rights are so obvious that a 'materially similar case' is not required for the right to be clearly established." *Hearring v. Sliwowski*, 712 F.3d 275, 280 (6th Cir. 2013) (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). "When a general constitutional principle is not tied to particularized facts, the principle can clearly establish law applicable in the future to different sets of detailed facts." *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005) (internal citations and quotation marks omitted). The refusal to issue marriage licenses to same-sex couples after June 26, 2015 is such a situation. Even if considered a "novel factual circumstance," the Plaintiffs' fundamental right to marry was so "obvious" after

Obergefell that the Defendant had fair notice that adopting her "no marriage licenses" policy was unconstitutional.

In support of her qualified-immunity claim, the Defendant also argues that the "Plaintiffs' description of their alleged right is too generalized to satisfy the clearly established requirement." (Doc. # 37 at 9-11). Specifically, the Defendant claims that the "relevant constitutional question" is not whether it was clearly established that "the Commonwealth of Kentucky [was] required to license and recognize [same-sex marriage]." (Doc. # 29-1 at 23). Rather, Defendant suggests that "the particular inquiry ... is whether *Obergefell* requires Kentucky to compel each and every county clerk to authorize and approve [same-sex marriage] licenses without any accommodation for their sincerely[ ]held religious beliefs." *Id.* Because that issue "has not been specifically litigated in Kentucky courts, let alone decided by the Sixth Circuit or the Supreme Court," the Defendant claims that the law cannot be "clearly established." *Id.*

"The operation of" qualified immunity "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639. Therefore, the Supreme Court has "repeatedly told courts ... not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). If the right is

defined too broadly, it "bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone" of the qualified-immunity inquiry, and "Plaintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639.

However, the inverse is also true. A constitutional right can be defined with such detail and particularity that each new case would further define and explain the right, converting qualified immunity into absolute immunity. In this case, the correct articulation of the Plaintiffs' claimed right can be easily derived from *Obergefell*:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.

Obergefell, 135 S. Ct. at 2605-06. The right of same-sex couples to exercise the fundamental right to marry is not an extremely abstract right, like "the right to due process of law." *Anderson*, 483 U.S. at 639. Instead, it is sufficiently

particularized. *Id.* Therefore, Plaintiffs' alleged right is not "too generalized to satisfy the clearly established requirement."

***10** Moreover, the Defendant's improper characterization of the right that must be clearly established, and her remaining arguments, fail because her focus is misplaced. In her attempt to argue that *Obergefell* did not clearly establish Plaintiffs' rights, the Defendant claims that "*Obergefell* did not answer every question." (Doc. # 37 at 7). Specifically, the Defendant argues that *Obergefell* answered only a "narrow constitutional question"—whether the fundamental right to marry extended to same-sex couples—but left open whether she "must abandon any claim" to a religious accommodation. *Id.* at 7-8. Relatedly, the Defendant argues that the First Amendment's Establishment Clause, Free-Exercise Clause, and the Kentucky Religious Freedom Restoration Act created "reasonable uncertainty" as to her obligations and the clarity of the law. *Id.* at 11-15.

It is not necessary for *Obergefell* to answer every question. *Obergefell* answered one question—whether the fundamental right to marry extended to same-sex couples. The answer was yes, and that clearly established Plaintiffs' constitutional rights. Furthermore, the focus of both of these arguments is on the Defendant—on her rights, her obligations, and her desire for a religious accommodation. But that misses the mark. The cornerstone of the qualified-immunity inquiry is whether *Plaintiffs'* rights, not the

Defendant's, are "clearly established."[13] Thus, the Defendant's hope that the First Amendment or Kentucky's Religious Freedom Restoration Act *excused* her conduct in violating Plaintiffs' clearly established rights, does not entitle her to qualified immunity.

[13] The cases that the Defendant cites fail to convince the Court otherwise. The Defendant attempts to rely on two First Amendment free-speech cases—*Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990) and *Gossman v. Allen*, 950 F.2d 338 (6th Cir. 1991)—which are inapposite. In addition to being factually distinguishable, the "balance" that *Guercio* and *Gossman* discuss is mandated by the "familiar" First Amendment rule that requires "employees' right to free speech" to be balanced against "the countervailing interests of his employer." *Guercio*, 911 F.2d at 1183 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). There is no precedential support for applying this sort of "balancing" to Plaintiffs' fundamental right to marry.

In conclusion, the Defendant had fair warning on July 6, 2015—when she denied Plaintiffs' request for a marriage license—that her conduct was unconstitutional. *Obergefell* established on June 26, 2015, that same-sex couples, like the Plaintiffs, had the right to exercise the fundamental right to marry. *Obergefell* further explained that States

could no longer deny that right to them. Therefore, the "contours of the right" were "sufficiently clear" such that "a reasonable official would understand that" adopting a "no marriage licenses" policy would violate that right. *Anderson*, 483 U.S. at 640.

The Plaintiffs have met their burden by "alleging facts plausibly making out a claim that the defendant's conduct violated a constitutional right that was clearly established law at the time, such that a reasonable officer would have known that [her] conduct violated that right." *Johnson*, 790 F.3d at 653 (citing *Wesley*, 779 F.3d at 428). Accordingly, the Defendant's Motion to Dismiss Plaintiffs' money-damages claim against her in her personal capacity must be denied.

III. CONCLUSION

Accordingly, for the reasons stated herein,

IT IS ORDERED as follows:

(1) Defendant Kim Davis's Motion to Dismiss Plaintiffs' Amended Complaint (Doc. # 29) is **granted in part**, as to Plaintiffs' claims against Defendant Kim Davis in her official capacity; and **denied in part**, as to Plaintiffs' claims against Kim Davis in her personal capacity;

(2) Plaintiffs' Complaint (Doc. # 1) is **dismissed** with respect to Plaintiffs' claims against Kim Davis **in her official capacity**;

***11** (3) Having previously determined, and reaffirmed herein, that Defendant Kim Davis represented the Commonwealth of Kentucky when she refused to issue marriage licenses to legally eligible couples, Plaintiffs' Complaint is **dismissed** with respect to Plaintiffs' claims against Defendant Rowan County, Kentucky; and

(4) Defendant Rowan County, Kentucky is **dismissed** as a party to this action, as all claims against it have been dismissed and adjudicated.

All Citations

Not Reported in Fed. Supp., 2017 WL 4111419

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AFFIRMING AWARD OF ATTORNEY'S FEES TO *MILLER* PLAINTIFFS, FILED AUGUST 23, 2019

936 F.3d 442
United States Court of Appeals, Sixth Circuit.

April MILLER; Karen Ann Roberts; Shantel Burke; Stephen Napier; Jody Fernandez; Kevin Holloway; L. Aaron Skaggs; Barry W. Spartman, Plaintiffs-Appellees,
v.
Elwood CAUDILL, Jr., in his official capacity as Rowan County Clerk, Defendant-Appellee/Cross-Appellant, Rowan County, Kentucky, Defendant-Appellee, Matthew G. Bevin, in his official capacity as Governor of Kentucky; Terry Manuel, in his official capacity as State Librarian and Commissioner of the Kentucky Department for Libraries and Archives, Third Party/Defendants-Appellants/Cross-Appellees.

Nos. 17-6385/6404
|
Argued: January 31, 2019
|
Decided and Filed: August 23, 2019

***445** Appeal from the United States District Court for the Eastern District of Kentucky at Ashland. No. 0:15-cv-00044—David L. Bunning, District Judge.

Appendix E

Attorneys and Law Firms

ARGUED: Palmer G. Vance, II, STOLL KEENON OGDEN, PLLC, Lexington, Kentucky, for Matthew G. Bevin and Terry Manuel. William E. Sharp, BLACKBURN DOMENE & BURCHETT, PLLC, Louisville, Kentucky, for April Miller, et al. Roger K. Gannam, LIBERTY COUNSEL, Orlando, Florida, for Elwood Caudill, Jr. ON BRIEF: Palmer G. Vance, II, William M. Lear, Jr., STOLL KEENON OGDEN, PLLC, Lexington, Kentucky, for Matthew G. Bevin and Terry Manuel. William E. Sharp, BLACKBURN DOMENE & BURCHETT, PLLC, Louisville, Kentucky, James D. Esseks, Ria Tabacco Mar, Daniel Mach, Heather L. Weaver, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, Daniel J. Canon, Laura E. Landenwich, CLAY DANIEL WALTON & ADAMS, Louisville, Kentucky, Amy D. Cubbage, ACLU OF KENTUCKY, Louisville, Kentucky, for April Miller, et al. Roger K. Gannam, Mathew D. Staver, Horatio G. Mihet, Kristina J. Wenberg, LIBERTY COUNSEL, Orlando, Florida, for Elwood Caudill, Jr. Jeffrey C. Mando, ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC, Covington, Kentucky, for Rowan County.

Before: GRIFFIN, WHITE, and BUSH, Circuit Judges.

OPINION

Appendix E

GRIFFIN, Circuit Judge.

Under the "American Rule," parties typically pay their own attorney's fees. Congress created an exception, though, for plaintiffs who win cases against government officials over civil-rights violations. Here, plaintiffs applied for marriage licenses only to find that Kim Davis, who oversaw marriage licensing for Rowan County, Kentucky, wouldn't issue them. So they sued her for infringing their constitutional right to marry, and the district court ordered Davis to give them what they wanted. Once they obtained licenses (or chose not to seek them again), they chose not to pursue the lawsuit any further. But they did pursue attorney's fees, which the ***446** district court awarded and required the Commonwealth of Kentucky to pay. The Commonwealth, Rowan County, and the official who replaced Davis now contend that plaintiffs didn't win and thus can't recover attorney's fees. They also dispute who must pay the fee award. And Davis's successor challenges the amount of the award. We reject all the issues the parties raise on appeal and therefore affirm.

I.

In the summer of 2015, Kim Davis was the County Clerk for Rowan County, Kentucky. One of her responsibilities was to issue marriage licenses. But same-sex marriage offended her religious beliefs, so when the Supreme Court recognized a constitutional right to same-sex marriage in

Obergefell v. Hodges, —— U.S. ——, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015), Davis took matters into her own hands.

One day after the Supreme Court released *Obergefell*, Davis stopped issuing marriage licenses. She didn't discriminate against same-sex couples, though; she stopped issuing licenses altogether. That meant that when plaintiffs—two same-sex couples and two different-sex couples who lived in Rowan County—sought marriage licenses from the Clerk's Office, they couldn't get them.

With a constitutional right to marry yet no ability to obtain marriage licenses within Rowan County, plaintiffs sued Rowan County and Davis, in her individual capacity and in her official capacity as County Clerk. They sought injunctive relief, a declaratory judgment, and damages.

Plaintiffs promptly moved for a preliminary injunction. The district court granted the motion, enjoining Davis from enforcing her policy against plaintiffs. Davis asked our court and the Supreme Court to stay the injunction, but she didn't prevail. *Davis v. Miller*, —— U.S. ——, 136 S. Ct. 23, 192 L.Ed.2d 994 (2015); *Miller v. Davis*, No. 15-5880, 2015 WL 10692640 (6th Cir. Aug. 26, 2015).

The morning after the Supreme Court rejected her request for a stay, Davis decided to resist the injunction, so she told her deputy clerks to continue enforcing her no-license policy. Two of the plaintiffs again sought a marriage license but were rebuffed.

Plaintiffs then moved for the district court to hold Davis in contempt of the injunction and to expand the injunction's scope to prevent Davis from enforcing her policy against other couples. The district court did both. And after Davis's deputy clerks told the court they would issue marriage licenses, the court gave Davis a second chance: if she would agree not to interfere with her deputy clerks' compliance with the injunction, she wouldn't be sent to jail. Davis chose jail.

While Davis was in custody, two plaintiffs decided not to seek a marriage license again, six others sought and received them, and four of those six used them to wed. After learning of plaintiffs' successes, the district court lifted the contempt sanction and released Davis from custody. It also ordered her to refrain from interfering with her deputy clerks as they issued licenses.

In addition to fighting the case against her, Davis brought a case of her own. She filed a third-party complaint against the then-Governor of Kentucky, Steven Beshear, and the then-Commissioner of Kentucky's Department of Libraries and Archives, Wayne Onskt ("Kentucky Officials"). She opposed same-sex marriage on religious grounds—the marriage licenses she issued had her name on them, and she felt that her name's appearance was the equivalent of her personal endorsement—so she sought a preliminary injunction requiring the Kentucky Officials ***447** to exempt her from having to issue marriage licenses.

Appendix E

In response to Davis's lawsuit, Governor Matthew Bevin, who had succeeded Beshear, issued an executive order establishing a revised marriage license that didn't contain the names of county clerks. The Kentucky General Assembly also amended Kentucky law so that county clerks weren't required to sign marriage licenses. *See* 2016 Kentucky Laws Ch. 132 (SB 216), General Assembly Reg. Sess. (Ky. 2016).

Those changes appeased Davis, so she asked us to dismiss the various appeals then pending in our court. We granted her request and instructed the district court to vacate its preliminary injunction. *Miller v. Davis*, 667 F. App'x 537, 538 (6th Cir. 2016). On remand, the district court followed our instructions and also dismissed plaintiffs' damages claims *sua sponte*.

Plaintiffs chose not to appeal the dismissal of their damages claims, but they sought attorney's fees under 42 U.S.C. § 1988. The district court awarded plaintiffs $222,695.00, but it imposed liability on the Commonwealth, not the Clerk's Office or Rowan County. That prompted the Kentucky Officials, who hadn't responded to plaintiffs' motion for fees, to ask the district court to amend its ruling to assess fees against the Clerk's Office. The district court refused.

The Kentucky Officials and Davis appealed the fee award. After the parties submitted their briefs, Elwood Caudill, Jr. replaced Davis as Rowan County Clerk and thus as a defendant, appellee,

and cross-appellant in this case. He adopted her arguments, so we will refer to them as his.

II.

The common law contains no right to attorney's fees for the winning party to a lawsuit. *McQueary v. Conway*, 614 F.3d 591, 596 (6th Cir. 2010). Instead, under what is known as the "American Rule," each party pays his, her, or its own fees unless a statute explicitly provides otherwise. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 602, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). Here, 42. U.S.C. § 1988 provides otherwise:

> In any action or proceeding to enforce a provision of ... [§] 1983 ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee ....

42 U.S.C. § 1988(b).

Whether plaintiffs may obtain attorney's fees, then, hinges on whether they prevailed. Caudill and the Kentucky Officials say they didn't; plaintiffs say they did. And if they did, Caudill and the Kentucky Officials also argue over who must pay the award—Caudill points to the Commonwealth; the

Commonwealth (by way of the Kentucky Officials) points back. Caudill, alone, challenges the amount of the award as well. We address each issue in turn.

A.

As an initial matter, we must resolve a split in our caselaw over how we review a district court's determination of whether a party is a "prevailing party" under § 1988. Sometimes we've reviewed for clear error. *See, e.g.*, *DiLaura v. Twp. of Ann Arbor*, 471 F.3d 666, 670 (6th Cir. 2006). Other times we've reviewed de novo. *See, e.g.*, *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 619 (6th Cir. 2007). And when our published opinions conflict, the earliest opinion normally controls because one panel can't overturn another's decision. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016). Indeed, published precedent binds all future panels unless (1) we overrule it ***448** as an en banc court or (2) it conflicts with intervening United States Supreme Court precedent and thus requires modification. *Id.*

Our caselaw reviewing for clear error appears to have begun with *Citizens Coalition for Block Grant Compliance, Inc. v. Euclid*, 717 F.2d 964, 967 (6th Cir. 1983), and our caselaw reviewing de novo appears to have begun with *Radvansky*.[1] But in *Sole v. Wyner*, the Supreme Court considered whether a party was a "prevailing" one under § 1988 and reviewed the question de novo. 551 U.S. 74, 81–86, 127 S.Ct. 2188, 167 L.Ed.2d 1069 (2007).

Sole thus abrogated *Euclid* and our later decisions following *Euclid*'s approach, which means *Radvansky* controls. Applying *Radvansky*, we therefore hold that whether plaintiffs prevailed is an issue we review de novo.

[1] In *Toms v. Taft*, 338 F.3d 519, 528–30 (6th Cir. 2003), this court applied de novo review without explicitly stating the standard of review.

With that standard in mind, we turn to the merits. The district court issued a preliminary injunction (a temporary order that holds things in place until the court or a jury decides the case) and shortly thereafter dismissed the case as moot, so that injunction was all plaintiffs got. In such scenarios, we apply a case-specific inquiry, which we approach with both hesitancy and skepticism because the " 'preliminary' nature of the relief ... generally counsel[s] against fees in the context of preliminary injunctions." *McQueary*, 614 F.3d at 601. And we look for a court-ordered, material, enduring change in the legal relationship between the parties. *Id.* at 597–98.

A few aspects of this inquiry warrant further elaboration. First, for the change to have been *court ordered*, the preliminary injunction must have caused it; it can't stem from Davis's voluntary modification of her conduct. *Id.* at 597. Second, for the change to have been *material*, it must have

directly benefited plaintiffs by altering how Davis treated them. *Id.* at 598. And third, for the change to have been *enduring*, it must have been irrevocable, meaning it must have provided plaintiffs with everything they asked for. *Id.* at 597, 599.

Some examples help make the abstract concrete. "When protesters seek an injunction to exercise their First Amendment rights at a specific time and place—say to demonstrate at a Saturday parade—a preliminary injunction will give them all the court-ordered relief they need and the end of the parade will moot the case." *Id.* at 599. "The same is true of a government employee who seeks to exclude an unconstitutionally obtained report from an administrative hearing and obtains a preliminary injunction that irrevocably excludes the report." *Id.* "So also for a plaintiff who seeks to delay enforcement of a statute until a certain event occurs—say a scheduled public referendum—and the preliminary injunction brings about that result." *Id.*

Here, what happened doesn't fit neatly into those examples. Plaintiffs, unlike the hypothetical protesters, government employee, and public-referendum enthusiast, didn't seek relief specific to a time and place. But that's a distinction without a difference because (1) Kentucky marriage licenses give couples a 30-day window in which to wed, Ky. Rev. Stat. § 402.105, (2) couples can obtain licenses at any time, and (3) those licenses are one-time things for all but the dilatory or

wishy-washy. Put differently, plaintiffs needed only the *opportunity* to obtain marriage licenses because Kentucky law left the rest to their ***449** discretion; with licenses in hand, plaintiffs could choose the time and place to wed.

The preliminary injunction, then, rendered plaintiffs prevailing parties. Their relationship with Davis was one of licensee and licensor. Before the injunction, Davis refused to issue marriage licenses, but the injunction required her to. Thus, Davis went from an unwilling licensor to a compulsory one, while plaintiffs went from unsuccessful licensees to successful ones. So the change was *court ordered*. Under the injunction, plaintiffs could obtain marriage licenses—a direct benefit if there ever was one. So the change was *material*. And once plaintiffs secured the marriage licenses Davis had denied them, Davis could no longer control whether they tied the knot. So the change was *enduring*. In short, the injunction gave plaintiffs all the court-ordered relief they needed, and the issuance of the marriage licenses mooted their request for them. *See McQueary*, 614 F.3d at 600.

Caudill and the Kentucky Officials dispute that conclusion, but we find their arguments unpersuasive. They contend that plaintiffs didn't prevail because two of them never obtained a marriage license and two others never wed. But a decision not to reap the benefits of victory doesn't transform victory into defeat. Consider the first *McQueary* example: the protestors seeking to

demonstrate at a parade. *Id.* at 599. If a preliminary injunction allowed them to demonstrate but they opted instead for a long brunch, would they be any less of prevailing parties than if they had demonstrated? We think not. The injunction would still give them all the court-ordered relief they need, and the end of the parade would still moot the case—regardless of where they were when the crowds dispersed and the streets reopened.

Another argument the Kentucky Officials advance rests on the preliminary injunction's fleeting existence. After the district court vacated the injunction, they argue, Davis could've reinstated her policy, so the change plaintiffs secured wasn't enduring. But Davis couldn't have applied her policy retroactively to nullify the marriage licenses plaintiff had already obtained (or had the opportunity to obtain but chose not to). So she could do nothing to alter the relief that the injunction provided them; once they could obtain licenses, it was game over.

Then there is the Kentucky legislature's alteration of the marriage-license form, which convinced Davis to abandon her policy, and which Caudill and the Kentucky Officials contend shows that the relief plaintiffs received flows from a voluntary change rather than a court-ordered one. By the time that alteration occurred and Davis had a change of heart, however, plaintiffs had already obtained marriage licenses or had chosen not to seek them. The relief plaintiffs obtained—the

unobstructed opportunity to secure pre-alteration marriage licenses—therefore stemmed from the preliminary injunction, not from the legislature's or Davis's later voluntary actions. Consider again the example of the parade protestors. *See McQueary*, 614 F.3d at 599. An injunction gives them the relief they need. *Id*. The parade's end moots the case. *Id*. And that's true regardless of whether the enjoined party (perhaps a local government with a no-demonstration ordinance) later decides to allow demonstration at future parades.

Finally, Caudill and the Kentucky Officials point to the complaint's broad prayer for relief, which requested far more than the injunction plaintiffs obtained. To be sure, plaintiffs sought other forms of relief—including a permanent injunction, a declaratory judgment, damages, and more. ***450** But everything they sought arose from Davis's refusal to issue marriage licenses; they brought the same claim in multiple forms. And, as discussed above, they succeeded on that claim. A win is a win—regardless of whether the winner runs up the score. To prevail, then, plaintiffs didn't need to obtain duplicative relief in every form that they originally sought it. They wanted the opportunity to obtain marriage licenses in Rowan County, and the preliminary injunction gave them exactly that.

As the district court put it, "[p]laintiffs did not achieve 'only a symbolic victory"; "[they] won the war." They prevailed, and because they prevailed, they're eligible to recover attorney's fees under § 1988.

B.

So plaintiffs should recover their attorney's fees. But who must pay them? The logical answer is the party against whom they prevailed. The district court enjoined Davis in her official capacity as Rowan County Clerk (a role Caudill now plays). Must Caudill therefore pay the fee award out of the funds he or the Clerk's Office controls? Not necessarily.

In *Hutto v. Finney*, when determining who had to pay an attorney's-fees award under § 1988, the Supreme Court adopted a binary choice: either "the official, in his official capacity," pays the fees "from funds of his agency or under his control" or "the State or local government" pays them. 437 U.S. 678, 700, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). That is so regardless of whether the government is a party to the lawsuit because "suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself." *Id.* Thus, *Hutto*'s binary tells us that liability for the fees here could fall to the Rowan County Clerk's Office, Rowan County, or the Commonwealth of Kentucky. But *Hutto* doesn't tell us how to choose between those options; the *Hutto* Court faced a choice between individual officers or the government they served, so the Court never determined when and how liability could shift amongst *three* possible parties. *Id.*

In the absence of guidance on when to shift liability up the chain, the district court looked to the entity on whose behalf Davis acted when issuing or refusing to issue marriage licenses. And to decide which entity that was, the court invoked the six-factor test we developed in *Crabbs v. Scott*, 786 F.3d 426 (6th Cir. 2015)—a test we ordinarily use to determine whether a defendant is a state or local official for purposes of sovereign immunity. *Id.* at 429. Those six factors are: "(1) the State's potential liability for a judgment; (2) how state statutes and courts refer to the officer; (3) who appoints the officer; (4) who pays the officer; (5) the degree of state control over the officer; and (6) whether the functions involved fall within the traditional purview of state or local government." *Id.*

We agree with that approach and therefore adopt it, with one modification. Because official-capacity lawsuits seeking injunctive relief are effectively lawsuits against the government, *Hutto*, 437 U.S. at 700, 98 S.Ct. 2565, which government an official serves determines which government a plaintiff prevails against. And when an official serves more than one government, the inquiry turns on which government the official served when taking the challenged action. But the first *Crabbs* factor, in this context, is self-referential: it asks about the State's liability for the fee award, which is the very question we are invoking the *Crabbs* test to answer. So we adopt a modified *Crabbs* test—one that doesn't include the first factor.

***451** Here, application of the modified *Crabbs* test

shows that Davis acted on Kentucky's behalf when she issued and refused to issue marriage licenses. The fourth *Crabbs* factor is the easiest to analyze, so we begin there. It is neutral because neither the Commonwealth nor Rowan County pays Davis's salary; the Clerk's Office pays its own expenses—including Davis's salary—with the fees it collects.

The second and third *Crabbs* factors, to be sure, suggest that Davis acted on the County's behalf. The Kentucky Constitution refers to clerks as county officials. Ky. Const. § 99. Kentucky courts have also generally characterized county clerks as county officials. *See, e.g.*, *Carroll v. Reed*, 425 S.W.3d 921, 924 (Ky. Ct. App. 2014); *St. Matthews Fire Prot. Dist. v. Aubrey*, 304 S.W.3d 56, 60 (Ky. Ct. App. 2009). County residents elect county clerks. Ky. Const. § 99. And if there is a vacancy, a county judge or executive appoints a new clerk. Ky. Rev. Stat. § 63.220. But these factors offer little help because they pertain to county clerks generally, and no party contests that county clerks mostly work on the behalf of counties—hence the title *county* clerk. What we need is legal authority specific to marriage licensing.

The fifth and sixth factors give us that authority, and they are dispositive. Only Kentucky can discipline county clerks. *See* Ky. Const. § 68; Ky. Rev. Stat. §§ 402.990(6), 522.020–030; *Lowe v. Commonwealth*, 60 Ky. 237 (Ky. 1860). And Kentucky has "absolute jurisdiction over the regulation of the institution of marriage."

Pinkhasov v. Petocz, 331 S.W.3d 285, 291 (Ky. Ct. App. 2011). Indeed, Kentucky law governs everything about marriage. It defines marriage and sets eligibility requirements. Ky. Rev. Stat. §§ 402.005, 402.010, 402.020. It vests courts with the authority to declare certain marriages void. *Id.* at § 402.030. It describes who may solemnize a marriage and requires a couple to obtain a marriage license prior to marrying. *Id.* at §§ 402.050, 402.080. It sets out the process for licensing and recording a marriage. *Id.* at §§ 402.100–402.240. And specific to Davis, Kentucky law vests county clerks with the duty of issuing marriage licenses, recording marriage certificates, and reporting marriages. *Id.* at §§ 402.080, 402.220, 402.230. So Kentucky controls every aspect of how county clerks issue marriage licenses; Rowan County has no say whatsoever. That means we can rule out the County as an entity the could be liable for the fee award. Because plaintiffs secured a preliminary injunction dictating how Davis wielded authority that Kentucky law granted her, they prevailed against her in her capacity as a State official, not a county one.

But what about Caudill? The Kentucky Officials and plaintiffs would have us impose liability on the Clerk's Office—in other words, on Caudill in his official capacity—because, they claim, Davis created a discretionary policy specific to her office. We disagree with that characterization. Such an argument conflates discretion with insubordination. Kentucky *required* Davis to issue marriage licenses to eligible couples. *See, e.g.*, Ky.

Rev. Stat. § 402.100 ("Each county clerk *shall make available* to the public the form prescribed by the Department for Libraries and Archives for the issuance of a marriage license.") (emphasis added); *id*. at § 402.110 ("In issuing the license the clerk *shall deliver* it in its entirety to the licensee." (emphasis added)); *id*. at § 402.080 (2017) ("The license *shall be issued by* the clerk of the county in which the female resides at the time, unless the female is eighteen (18) years of age or over or a widow, and the license is issued on her application in person or by writing signed by her, in which case it may be issued by any county clerk.") (emphasis ***452** added). The parties have cited no authority suggesting that if a county official acting on the State's behalf fails to do a job the State requires her to do, that failure creates and confers discretion the State never gave her. Davis's refusal to issue licenses, then, doesn't mean she acted on behalf of the Clerk's Office. And that means that Caudill, in his official capacity, isn't liable for the fee award.

The Kentucky Officials also argue that "special circumstances" warrant not holding the Commonwealth liable for the award because its high-ranking officials acted in good faith and opposed what Davis did. As we reaffirmed in *McQueary*, however, acting in good faith isn't a special circumstance justifying a denial of fees. 614 F.3d at 604.

Thus, because Davis acted on Kentucky's behalf when issuing and refusing to issue marriage licenses, the district court correctly imposed

liability for the award on the Commonwealth.

C.

Caudill, alone, also challenges the attorney's-fees amount. We review that portion of the district court's ruling for an abuse of discretion, *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 551 (6th Cir. 2008), which occurs when the district court relies on clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard, *Wikol ex rel. Wikol v. Birmingham Pub. Schs. Bd. of Educ.*, 360 F.3d 604, 611 (6th Cir. 2004).

To calculate how much an award should be, courts in our Circuit use the "lodestar" method. *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). It has three steps. *Id.* First, a court multiplies a reasonable hourly rate for each attorney who represented the prevailing party by the number of hours that attorney worked on the case. *Id.* This creates a total amount of fees that each attorney generated. *Id.* Next, the court adds together those total amounts to get a grand total—the lodestar amount—of what it cost the prevailing party to win. *Id.* This amount then anchors the last step by giving the court a starting number for the award, after which the court evaluates the case's unique aspects to determine whether to adjust the award. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000).

A party seeking fees must justify the amount of its request. *Reed v. Rhodes*, 179 F.3d 453, 472 (6th Cir. 1999). This burden requires evidence specific to the number of hours each attorney worked and the appropriate hourly rate for that work. *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933. In the absence of such evidence, a district court may reduce the award. *Id*.

Here, the district court correctly applied those standards. Nobody challenged the reasonableness of plaintiffs' counsel's billing rates, but the district court analyzed it anyway. The district court also inspected the time entries each attorney submitted and excluded as unreasonable those for clerical tasks or in block-billing format (where an attorney groups together multiple tasks without specifying how much time each task took). This produced a lodestar amount of $222,695.00.

In response to Davis's argument that plaintiffs' failure to obtain more than a preliminary injunction warranted slashing the lodestar amount by 75%, the district court then considered whether to reduce the award. It emphasized that a prevailing plaintiff may recover fees for legal services relating to unsuccessful claims. The determining factor, said the court, was whether the unsuccessful claims related to the successful one. If so, plaintiffs could recover ***453** the entirety of their fees; if not, they couldn't. Because a common core of facts—Davis's refusal to issue marriage licenses—underpinned everything plaintiffs originally asked for, the district court held that the

claims were related. So the district court awarded the full lodestar amount.

On appeal, Caudill claims as Davis did below that plaintiffs' failure to obtain more than a preliminary injunction means we should cut the award by 75%. But he never argues that the district court made clearly erroneous factual findings, applied the law improperly, or used an erroneous legal standard—the hallmarks of an abuse of discretion. Without a showing of one of those three errors, we will not overturn the award. When a district court gives clear and concise reasons for its award, we give the award substantial deference. *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933. The district court gave us an excellent explanation for the award amount, so we defer to its well-reasoned decision.

III.

For these reasons, we affirm the district court's attorney's-fees award.

All Citations

936 F.3d 442

APPENDIX F — OPINION AND ORDER OF THE UNITED STATED DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY DISMISSING *ERMOLD, MOORE, SMITH, YATES* CLAIMS AS MOOT, FILED AUGUST 18, 2016

2016 WL 9455624
Only the Westlaw citation is currently available.
United States District Court, E.D. Kentucky,
Northern Division at Ashland.

IN RE: ASHLAND CIVIL ACTIONS:
April Miller, et al. v. Kim Davis, individually and in her official capacity, et al.
David Ermold, et al. v. Kim Davis, individually and in her official capacity, et al.
James Yates, et al. v. Kim Davis, individually and in her official capacity, et al.

15-44-DLB, 15-46-DLB, 15-62-DLB
|
Signed 08/18/2016

Attorneys and Law Firms

Daniel J. Canon, Laura E. Landenwich, Clay Daniel Walton & Adams, PLC, Leonard Joe Dunman, Attorney at Law, William Ellis Sharp, ACLU of Kentucky, Louisville, KY, Daniel I. Mach, Heather L. Weaver, American Civil Liberties Union Foundation, Washington, DC, James D. Esseks, Ria Tabacco Mar, ACLU Foundation, New York, NY, for April Miller, et al.

Anthony Charles Donahue, Donahue Law Group,

P.S.C., Somerset, KY, Horatio G. Mihet, Roger K. Gannam, Liberty Counsel, Orlando, FL, Cecil R. Watkins, Rowan County Attorney, Morehead, KY, Claire E. Parsons, Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, PLLC, Covington, KY, for Kim Davis, individually and in her official capacity, et al.

Opinion

David L. Bunning, United States District Judge

***1** In 2015, Plaintiffs filed the above-captioned actions to contest the "no marriage licenses" policy implemented by Defendant Kim Davis, Rowan County Clerk. (Doc. # 1).[1] After hearing oral argument from the parties, the Court entered a Memorandum Opinion and Order granting Plaintiffs' Motion for Preliminary Injunction. (Docs. # 2 and 43). The Court later clarified that Davis was enjoined from applying her "no marriage licenses" policy to future marriage license requests submitted by Plaintiffs as well as other individuals who were legally eligible to marry in Kentucky. (Doc. # 74). It also held Davis in contempt for her refusal to abide by the Court's Order. (Doc. # 75). Davis sought review of these rulings by filing several appeals with the United States Court of Appeals for the Sixth Circuit. (Doc. # 44, 66, 82, and 83).

[1] All citations to the record will refer to the lead

case, *Miller v. Davis*, 0:15-cv-44-DLB.

While these appeals were pending, marriage licenses were issued without incident. (Docs. # 114-119). Matt Bevin also won the Kentucky gubernatorial election. (Doc. # 155). Upon taking office, Governor Bevin signed an executive order removing the names of County Clerks from marriage licenses. (Doc. # 157). This executive order eventually led to the proposal of Kentucky Senate Bill 216 ("SB 216"), which creates a new marriage license form that does not require the County Clerk's signature. (*Id.*). On April 1, 2016, the Kentucky Senate passed SB 216. *See* Legislative Research Commission, SB 216, http://www.lrc.ky.gov/record/16RS/SB216.htm. Governor Bevin signed it into law less than two weeks later. *Id.*

On July 13, 2015, the United States Court of Appeals for the Sixth Circuit dismissed the consolidated appeals for lack of jurisdiction. (Doc. # 179). The Sixth Circuit reasoned that the issues raised on appeal were rendered moot by the enactment of SB 216. (*Id.*). Accordingly, the Sixth Circuit remanded the matter to the Court "with instructions to vacate its August 12, 2015 preliminary injunction order and its September 3, 2015 order modifying that injunction." (*Id.*). The Mandate has now issued, and the Court has complied with these instructions via separate Order. (Docs. # 180 and 181).

In light of these proceedings, and in view of the fact that the marriage licenses continue to the issued without incident (Docs. # 172-176), there no longer remains a case or controversy before the Court. Accordingly, for the reasons stated herein,

IT IS ORDERED as follows:

(1) In *Miller, et al. v. Davis, et al.*, 0:15-cr-44, Plaintiffs' Motion to Certify a Class (Doc. # 31), Defendant Kim Davis' Motion to Dismiss (Doc. # 32), Defendant Kim Davis' Motion for Preliminary Injunction (Doc. # 39), Third-Party Defendant Steven Beshear's Motion to Dismiss (Doc. # 92), and Third-Party Defendant Matt Bevin's Motion to Dismiss (Doc. # 157) be, and are, hereby **DENIED AS MOOT**;

(2) The stays imposed in *Ermold, et al. v. Davis, et al.*, 0:15-cv-46, and *Yates, et al. v. Davis, et al.*, 0:15-cv-62, be, and are, hereby **LIFTED**;

***2** (3) In *Ermold, et al. v. Davis, et al.*, 0:15-cv-46, Defendant Kim Davis' Motion to Dismiss (Doc. # 11) and Plaintiffs' Motion to Set Briefing Schedule (Doc. # 14) be, and are, hereby **DENIED AS MOOT**;

(4) The CJA Attorneys representing the Rowan County Deputy Clerks be, and are, hereby **DISCHARGED** from further service in this matter; and

(5) The three above-captioned actions be, and are, hereby **DISMISSED** and **STRICKEN** from the Court's active docket.

All Citations

Not Reported in Fed. Supp., 2016 WL 9455624

APPENDIX G — OPINION AND ORDER OF THE UNITED STATED DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY GRANTING *MILLER* PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, FILED AUGUST 12, 2015

123 F.Supp.3d 924
United States District Court, E.D. Kentucky,
Northern Division, at Ashland.

April MILLER, et al., Plaintiffs
v.
Kim DAVIS, individually and in her official capacity, et al., Defendants.

Civil Action No. 15–44–DLB.
|
Signed Aug. 12, 2015.

Synopsis

Background: Two same-sex and two opposite-sex couples who sought marriage licenses brought action against county clerk, challenging clerk's refusal to issue marriage licenses as violative of their constitutional rights. Plaintiffs moved for preliminary injunction.

Holdings: The District Court, David L. Bunning, J., held that:

plaintiffs were likely to succeed on the merits of their due process challenge to clerk's policy,

supporting preliminary injunction;

clerk's policy of refusing to issue any marriage licenses likely caused irreparable harm;

rational basis review applied to clerk's free exercise clause challenge to Kentucky governor's directive to issue same-sex marriage licenses;

clerk's refusal to issue marriage licenses was not speech on a "matter of public concern," and thus, was not entitled to First Amendment protection;

governor's directive requiring clerks to issue same-sex marriage licenses did not violate clause of constitution prohibiting religious tests as condition of public employment; and

governor's directive did not substantially burden clerk's free exercise rights.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

West Codenotes

Recognized as Unconstitutional
42 U.S.C.A. § 2000bb–1

Attorneys and Law Firms

***929** Daniel J. Canon, Laura E. Landenwich,

Leonard Joe Dunman, Clay Daniel Walton Adams, PLC, William Ellis Sharp, ACLU of Kentucky, Louisville, KY, for Plaintiffs.

Anthony Charles Donahue, Donahue Law Group, P.S.C., Somerset, KY, Jonathan D. Christman, Roger K. Gannam, Liberty Counsel, Orlando, FL, Cecil R. Watkins, Morehead, KY, Claire E. Parsons, Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, PLLC, Covington, KY, for Defendant.

MEMORANDUM OPINION AND ORDER

DAVID L. BUNNING, District Judge.

I. Introduction

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction (Doc. # 2). Plaintiffs are two same-sex and two opposite-sex couples seeking to enjoin Rowan County Clerk Kim Davis from enforcing her own marriage licensing policy. On June 26, 2015, just hours after the U.S. Supreme Court held that states are constitutionally required to recognize same-sex marriage, Davis announced that the Rowan County Clerk's Office would no longer issue marriage licenses to *any* couples. *See Obergefell v. Hodges,* ——U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). Davis, an Apostolic Christian with a sincere religious objection to same-sex marriage, specifically sought

to avoid issuing licenses to same-sex couples without discriminating against them. Plaintiffs now allege that this "no marriage licenses" policy substantially interferes with their right to marry because it effectively forecloses them from obtaining a license in their home county. Davis insists that her policy poses only an incidental burden on Plaintiffs' right to marry, which is justified by the need to protect her own free exercise rights.

***930** The Court held preliminary injunction hearings on July 13, 2015 and July 20, 2015. Plaintiffs April Miller, Karen Roberts, Jody Fernandez, Kevin Holloway, Barry Spartman, Aaron Skaggs, Shantel Burke and Stephen Napier were represented by William Sharp of the Americans for Civil Liberties Union ("ACLU") and Daniel Canon. Jonathan Christman and Roger Gannam, both of the Liberty Counsel, and A.C. Donahue appeared on behalf of Defendant Kim Davis. Rowan County Attorney Cecil Watkins and Jeff Mando represented Defendant Rowan County. Official Court Reporters Peggy Weber and Lisa Wiesman recorded the proceedings. At the conclusion of the second hearing, the Court submitted the Motion pending receipt of the parties' response and reply briefs. The Court having received those filings (Docs. # 28, 29 and 36), this matter is now ripe for review.

At its core, this civil action presents a conflict between two individual liberties held sacrosanct in American jurisprudence. One is the fundamental

right to marry implicitly recognized in the Due Process Clause of the Fourteenth Amendment. The other is the right to free exercise of religion explicitly guaranteed by the First Amendment. Each party seeks to exercise one of these rights, but in doing so, they threaten to infringe upon the opposing party's rights. The tension between these constitutional concerns can be resolved by answering one simple question: Does the Free Exercise Clause likely excuse Kim Davis from issuing marriage licenses because she has a religious objection to same-sex marriage? For reasons stated herein, the Court answers this question in the negative.

II. Factual and Procedural Background

Plaintiffs April Miller and Karen Roberts have been in a committed same-sex relationship for eleven years. (Doc. # 21 at 25). After hearing about the *Obergefell* decision, they went to the Rowan County Clerk's Office and requested a marriage license 2 from one of the deputy clerks. (*Id.* at 25–26). The clerk immediately excused herself and went to speak with Kim Davis. (*Id.* at 28). When she returned, she informed the couple that the Rowan County Clerk's Office was not issuing any marriage licenses. (*Id.*). Plaintiffs Kevin Holloway and Jody Fernandez, a committed opposite-sex couple, had a similar experience when they tried to obtain a marriage license from the Rowan County Clerk's Office. (*Id.* at 36).

Both couples went straight to Rowan County Judge Executive Walter Blevins and asked him to issue their marriage licenses. (*Id.* at 30–32, 36). Blevins explained that, under Kentucky law, a county judge executive can only issue licenses when the elected county clerk is absent. *See* Ky.Rev.Stat. Ann. § 402.240. Because Davis continued to perform her other duties as Rowan County Clerk, Blevins concluded that she was not "absent" within the meaning of the statute. (*Id.*). Therefore, he did not believe that he had the authority to issue their marriage licenses. (*Id.*).

Plaintiffs Barry Spartman and Aaron Skaggs also planned to solemnize their long-term relationship post-*Obergefell*. (*Id.* at 42–44). Before going to the Rowan County Clerk's Office, they phoned ahead and asked for information about the marriage licensing process. (*Id.*). They wanted to make sure that they brought all necessary documentation with them. (*Id.*). One of the deputy clerks told the couple "not to bother coming down" because they would not be issued a license. (*Id.*).

Seven neighboring counties (Bath, Fleming, Lewis, Carter, Elliott, Morgan and Menifee) are currently issuing marriage licenses. (Doc. # 26 at 53). All are less ***931** than an hour away from the Rowan County seat of Morehead. (*Id.*). While Plaintiffs have the means to travel to any one of these counties, they have admittedly chosen not to do so. (Doc. # 21 at 38, 48). They strongly prefer to have their licenses issued in Rowan County because they have significant ties to that community. (*Id.* at

28–29, 47). They live, work, socialize, vote, pay taxes and conduct other business in and around Morehead. (*Id.*). Quite simply, Rowan County is their home.

According to Kim Davis, the Rowan County Clerk's Office serves as a "pass through collection agency" for the State of Kentucky. (Doc. # 26 at 24–25). She and her six deputy clerks regularly handle delinquent taxes, oversee elections, manage voter registration and issue hunting and fishing licenses. (*Id.*). A portion of the fees collected in exchange for these services is used to fund the Office's activities throughout the year. (*Id.*). The remainder is remitted to the State. (*Id.*).

Under Kentucky law, county clerks are also responsible for issuing marriage licenses.[1] *See* Ky.Rev.Stat. Ann. § 402.080. The process is quite simple. The couple must first go to the county clerk's office and provide their biographical information to one of the clerks. *See* Ky.Rev.Stat. Ann. § 402.100. The clerk then enters the information into a computer-generated form, prints it and signs it. *Id.* This form signifies that the couple is licensed, or legally qualified, to marry.[2] *Id.* At the appropriate time, the couple presents this form to their officiant, who must certify that he or she performed a valid marriage ceremony. *Id.* The couple then has thirty days to return the form to the clerk's office for recording. *See* Ky.Rev.Stat. Ann. §§ 402.220, 402.230. The State will not recognize marriages entered into without a valid license therefor. *See* Ky.Rev.Stat. Ann. § 402.080.

[1] This task requires relatively few resources, at least in Rowan County. (Doc. # 26 at 24–30). Davis testified that her Office issued 212 marriage licenses in 2014. Marriage licenses cost $35.50. (*Id.*). Of that sum, the Office retains $21.17, and remits the remaining $14.33 to the State. (*Id.*). Thus, Rowan County Clerk's Office made about $4,500, or roughly 0.1% of its annual budget, from issuing marriage licenses in 2014. (*Id.*). Davis also estimated that the task of issuing marriage licenses occupies one hour of one deputy clerk's time per week. (*Id.*).

[2] A couple is "legally qualified" to marry if both individuals are over the age of eighteen, mentally competent, unrelated to each other and currently unmarried. *See* Ky.Rev.Stat. Ann. §§ 402.010, 402.020(a)-(d), (f).

The Kentucky Department of Libraries and Archives ("KDLA") prescribes the above-mentioned form, which must be used by all county clerks in issuing marriage licenses.[3] Ky.Rev.Stat. Ann. §§ 402.100, 402.110. It is composed of three sections, which correspond to the steps detailed above: (1) a marriage license, to be completed by a county or deputy clerk; (2) a marriage certificate, to be completed by a qualified officiant; and (3) a

recording statement, to be completed by a county or deputy clerk. The marriage license section has the following components:

[3] Only one aspect of the form has changed since *Obergefell*—whereas the marriage applicants were once referred to as "Bride" and "Groom," they are now identified as "First Party" and "Second Party."

(a) *An authorization statement of the county clerk issuing the license for any person or religious society authorized to perform marriage ceremonies to unite in marriage the persons named;*

(b) Vital information for each party, including the full name, date of birth, place of birth, race, condition (single, widowed, or divorced), number of previous marriages, occupation, current ***932** residence, relationship to the other party, and full names of parents; and

(c) The date and place the license is issued, and the signature of the county clerk or deputy clerk issuing the license.

See Ky.Rev.Stat. Ann. § 402.100(1) (emphasis added).

Davis does not want to issue marriage licenses to same-sex couples because they will bear the above-mentioned authorization statement. She sees it as an endorsement of same-sex marriage, which

runs contrary to her Apostolic Christian beliefs. (*Id.* at 42). Four of Davis' deputy clerks share her religious objection to same-sex marriage, and another is undecided on the subject. (*Id.* at 49). The final deputy clerk is willing to issue the licenses, but Davis will not allow it because her name and title still appear twice on licenses that she does not personally sign. (Doc. # 29–3 at 7).

In the wake of *Obergefell*, Governor Beshear issued the following directive to all county clerks:

> Effective today, Kentucky will recognize as valid all same sex marriages performed in other states and in Kentucky. In accordance with my instruction, all executive branch agencies are already working to make any operational changes that will be necessary to implement the Supreme Court decision. Now that same-sex couples are entitled to the issuance of a marriage license, the Department of Libraries and Archives will be sending a gender-neutral form to you today, along with instructions for its use.

(Doc. # 29–3 at 11). He has since addressed some of the religious concerns expressed by some county clerks:

> You can continue to have your own personal

> beliefs but, you're also taking an oath to fulfill the duties prescribed by law, and if you are at that point to where your personal convictions tell you that you simply cannot fulfill your duties that you were elected to do, th[e]n obviously an honorable course to take is to resign and let someone else step in who feels that they can fulfill those duties.

(Doc. # 29–11). Davis is well aware of these directives. Nevertheless, she plans to implement her "no marriage licenses" policy for the remaining three and a half years of her term as Rowan County Clerk. (Doc. # 26 at 67).

III. Standard of Review

A district court must consider four factors when entertaining a motion for preliminary injunction:

(1) whether the movant has demonstrated a strong likelihood of success on the merits;

(2) whether the movant would suffer irreparable harm; 6

(3) whether an injunction would cause substantial harm to others; and

(4) whether the public interest would be served by the issuance of such an injunction.

See Suster v. Marshall, 149 F.3d 523, 528 (6th

Cir.1998). These "are factors to be balanced, and not prerequisites that must be met." *In re Eagle–Picher Indus., Inc.,* 963 F.2d 855, 859 (6th Cir.1992) (stating further that these factors "simply guide the discretion of the court").

IV. Analysis*A. Defendant Kim Davis in her official capacity*

Plaintiffs are pursuing this civil rights action against Defendants Rowan County and Kim Davis, in her individual and official capacities, under 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or ***933** usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

This statute "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver,* 510 U.S. 266, 271, 114 S.Ct. 807,

127 L.Ed.2d 114 (1994) (internal quotations omitted).

At this stage of the litigation, Plaintiffs seek to vindicate their constitutional rights by obtaining injunctive relief against Defendant Kim Davis, in her official capacity as Rowan County Clerk. Because official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent," one might assume that Plaintiffs are effectively pursuing injunctive relief against Rowan County. *Monell v. New York City Dep't of Soc. Serv.,* 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). However, Rowan County can only be held liable under § 1983 if its policy or custom caused the constitutional deprivation. *Id.* at 694, 98 S.Ct. 2018.

A single decision made by an official with final policymaking authority in the relevant area may qualify as a policy attributable to the entity. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 482–83, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Whether an official acted as a final policymaker is a question of state or local law. *Id.* However, courts must avoid categorizing an official as a state or municipal actor "in some categorical, 'all or nothing' manner." *McMillian v. Monroe Cnty., Ala.,* 520 U.S. 781, 785, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997). They key inquiry is whether an official is a "final policymaker [ ] for the local government in a particular area, or on a particular issue." *Id.* Accordingly, the Court will focus on whether Davis

likely acted as a final policymaker for Rowan County regarding the issuance of marriage licenses.

While Davis is the elected Rowan County Clerk, subject to very little oversight by the Rowan County Fiscal Court, there are no other facts in the record to suggest that she set marriage policy for Rowan County. After all, the State of Kentucky has "absolute jurisdiction over the regulation of the institution of marriage." *Pinkhasov v. Petocz,* 331 S.W.3d 285, 291 (Ky.Ct.App.2011). The State not only enacts marriage laws, it prescribes procedures for county clerks to follow when carrying out those laws, right down to the form they must use in issuing marriage licenses. *Id.; see also* Ky.Rev.Stat. Ann. §§ 402.080, 402.100. Thus, Davis likely acts for the State of Kentucky, and not as a final policymaker for Rowan County, when issuing marriage licenses.

This preliminary finding does not necessarily foreclose Plaintiffs from obtaining injunctive relief against Davis. While the Eleventh Amendment typically bars Plaintiffs from bringing suit against a state or its officials, "official-capacity actions for prospective relief are not treated as actions against the state." *Kentucky v. Graham,* 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). This narrow exception, known as the *Ex parte Young* doctrine, permits a federal court to "enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan,* 440 U.S. 332, 337, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (citing *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441,

52 L.Ed. 714 (1908)). "It rests on the premise—less delicately called a 'fiction,'— ***934** that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes." *Va. Office for Prot. and Advocacy v. Stewart,* 563 U.S. 247, 131 S.Ct. 1632, 1638, 179 L.Ed.2d 675 (2011). Because Plaintiffs seek to enjoin Davis from violating their federal constitutional rights, this Court has the power to grant relief under *Ex parte Young*.[4]

[4] In their reply brief, Plaintiffs argued that the Court need not decide whether Davis is a state actor or municipal policymaker in order to grant injunctive relief. The Court's preliminary finding on this matter does not necessarily foreclose Plaintiffs from arguing the "municipal policymaker" theory in the future. The Court simply seeks to ensure that it is indeed able to grant injunctive relief against Kim Davis in her official capacity.

B. Plaintiffs' Motion for Preliminary Injunction*1. Plaintiffs' likelihood of success on the merits*a. The fundamental right to marry

Under the Fourteenth Amendment, a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend.

XIV, § 1. This "due process" clause has both a procedural component and a substantive component. *See EJS Prop., LLC v. City of Toledo,* 698 F.3d 845, 855 (6th Cir.2012). Procedural due process simply requires that the government provide a fair procedure when depriving an individual of life, liberty or property. *Id.* By contrast, substantive due process "protects a narrow class of interests, including those enumerated in the Constitution, those so rooted in the traditions of the people as to be ranked fundamental, and the interest in freedom from government actions that 'shock the conscience.' " *Range v. Douglas,* 763 F.3d 573, 588 (6th Cir.2014).

Although the Constitution makes no mention of the right to marry, the U.S. Supreme Court has identified it as a fundamental interest subject to Fourteenth Amendment protection. *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (striking down Virginia's anti-miscegenation statutes as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment). After all, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* This right applies with equal force to different-sex and same-sex couples. *Obergefell v. Hodges,* —— U.S. ——, 135 S.Ct. 2584, 2604–05, 192 L.Ed.2d 609 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may not

be deprived of that right and that liberty.").

If a state law or policy "significantly interferes with the exercise of a fundamental right[, it] cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail,* 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). A state substantially interferes with the right to marry when some members of the affected class "are absolutely prevented from getting married" and "[m]any others, able in theory to satisfy the statute's requirements[,] will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry." *Id.* at 387, 98 S.Ct. 673 (invalidating a Wisconsin statute that required individuals with child support obligations to obtain a court order before marrying).

***935** However, "not every state action, 'which relates in any way to the incidents of or the prerequisites for marriage must be subjected to rigorous scrutiny.' " *Wright v. MetroHealth Med. Ctr.,* 58 F.3d 1130, 1134 (6th Cir.1995) (quoting *Zablocki,* 434 U.S. at 386, 98 S.Ct. 673). States may impose "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship." *Id.* at 1135. If the statute does not create a "direct legal obstacle in the path of persons desiring to get married" or significantly discourage marriage, then it will be upheld so long as it is rationally related to a legitimate government interest. *Id.* (quoting *Zablocki,* 434

U.S. at 387–88 n. 12, 98 S.Ct. 673); *see also Califano v. Jobst,* 434 U.S. 47, 54 n. 11, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977) (upholding a Social Security provision that terminated secondary benefits received by the disabled dependent child of a covered wage earner if that child married an individual who was not entitled to benefits).

The state action at issue in this case is Defendant Davis' refusal to issue *any* marriage licenses. Plaintiffs contend that Davis' "no marriage licenses" policy significantly interferes with their right to marry because they are unable to obtain a license in their home county. Davis insists that her policy does not significantly discourage Plaintiffs from marrying because they have several other options for obtaining licenses: (1) they may go to one of the seven neighboring counties that *are* issuing marriage licenses; (2) they may obtain licenses from Rowan County Judge Executive Walter Blevins; or (3) they may avail themselves of other alternatives being considered post-*Obergefell*.

Davis is correct in stating that Plaintiffs can obtain marriage licenses from one of the surrounding counties; thus, they are not totally precluded from marrying in Kentucky. However, this argument ignores the fact that Plaintiffs have strong ties to Rowan County. They are long-time residents who live, work, pay taxes, vote and conduct other business in Morehead. Under these circumstances, it is understandable that Plaintiffs would prefer to obtain their marriage licenses in their home county. And for other Rowan County residents, it

may be more than a preference. The surrounding counties are only thirty minutes to an hour away, but there are individuals in this rural region of the state who simply do not have the physical, financial or practical means to travel.[5]

[5] The median household income in Rowan County is $35,236 and 28.6% of the population lives below the poverty line. *See United States Census Bureau,* http://quickfacts.census.gov/qfd/states/21/21205.html. For the entire state of Kentucky, the median household income is $43,036 and 18.8% of the population lives below the poverty line. *Id.*

This argument also presupposes that Rowan County will be the only Kentucky county not issuing marriage licenses. While Davis may be the only clerk currently turning away eligible couples, 57 of the state's 120 elected county clerks have asked Governor Beshear to call a special session of the state legislature to address religious concerns related to same-sex marriage licenses.[6] (Doc. # 29–9). If this Court were to hold that Davis' policy did not significantly interfere with the right to marry, what would stop the other 56 clerks ***936** from following Davis' approach? What might be viewed as an inconvenience for residents of one or two counties quickly becomes a substantial interference when applicable to approximately half of the state.

[6] *See also* Jack Brammer, *57 County Clerks Ask Governor for Special Session on Same–Sex Marriage Licenses,* The Lexington Herald Leader (July 8, 2015), http: //www.kentucky.com/2015/07/08/3936545_57–kentucky–county-clerks-ask.html?rh=1; Terry DeMio, *Boone, Ky. Clerks Want Same–Sex License Law,* Cincinnati Enquirer (July 9, 2015), http://www.cincinnati.com/story/news/local/northern-ky/2015/07/09/boone-clerk-wants-special-legislative-session-address-sex-marriage-issues-clerks/29919103/.

As for her assertion that Judge Blevins may issue marriage licenses, Davis is only partially correct. KRS § 402.240 provides that, "[i]n the absence of the county clerk, or Case: 0:15–cv–00044–DLB Doc # : 43 Filed: 08/12/15 Page: 13 of 28–Page ID# : 1158 during a vacancy in the office, the county judge/executive may issue the license and, in so doing, he shall perform the duties and incur all the responsibilities of the clerk." The statute does not explicitly define "absence," suggesting that a traditional interpretation of the term is appropriate. *See* Merriam–Webster Online Dictionary, 2015, http://www.merriam-webster.com/, (describing "absence" as "a period of time when someone is not present at a place, job, etc."). However, Davis asks the Court to deem her "absent," for purposes of this

statute, because she has a religious objection to issuing the licenses. While this is certainly a creative interpretation, Davis offers no legal precedent to support it.

This proposal also has adverse consequences for Judge Blevins. If he began issuing marriage licenses while Davis continued to perform her other duties as Rowan County Clerk, he would likely be exceeding the scope of his office. After all, KRS § 402.240 only authorizes him to issue marriage licenses when Davis is *unable* to do so; it does not permit him to assume responsibility for duties that Davis does not wish to perform. Such an arrangement not only has the potential to create tension between the next judge executive and county clerk, it sets the stage for further manipulation of statutorily defined duties.[7] Under these circumstances, the Court simply cannot count this as a viable option for Plaintiffs to obtain their marriage licenses.

[7] Even if the Court were inclined to accept Davis' interpretation of the term "absence," it would have doubts about the practicality of this approach. Judge Blevins is the highest elected official in Rowan County. (Doc. # 26 at 7). He is frequently out of the office on official business. (*Id.*). While Judge Blevins would not have to process a large number of marriage requests, he might not be regularly available for couples seeking licenses. Thus, the Court would be concerned about Judge Blevins'

> ability to perform this function as efficiently as Davis and her six deputy clerks.

Davis finally suggests that Plaintiffs will have other avenues for obtaining marriage licenses in the future. For example, county clerks have urged Governor Beshear to create an online marriage licensing system, which would be managed by the State of Kentucky. While these options may be available someday, they are not feasible alternatives at present. Thus, they have no impact on the Court's "substantial interference" analysis.

Having considered Davis' arguments in depth, the Court finds that Plaintiffs have one feasible avenue for obtaining their marriage licenses—they must go to another county. Davis makes much of the fact that Plaintiffs are able to travel, but she fails to address the one question that lingers in the Court's mind. Even if Plaintiffs are able to obtain licenses elsewhere, why should they be required to? The state has long entrusted county clerks with the task of issuing marriage licenses. It does not seem unreasonable for Plaintiffs, as Rowan County voters, to expect their elected official to perform her statutorily assigned duties. And yet, that is precisely what Davis is refusing to do. Much like the statutes at issue in *Loving* and *Zablocki,* Davis' "no marriage licenses" policy significantly discourages many Rowan County residents from exercising their ***937** right to marry and effectively disqualifies others from doing so. The Court must

subject this policy apply heightened scrutiny.

b. The absence of a compelling state interest

When pressed to articulate a compelling state interest served by her "no marriage licenses" policy, Davis responded that it serves the State's interest in protecting her religious freedom. The State certainly has an obligation to "observe the basic free exercise rights of its employees," but this is not the extent of its concerns. *Marchi v. Bd. of Coop. Educ. Serv. of Albany,* 173 F.3d 469, 476 (2d. Cir.1999). In fact, the State has some priorities that run contrary to Davis' proffered state interest. Chief among these is its interest in preventing Establishment Clause violations. *See* U.S. Const. amend. I (declaring that "Congress shall make no law respecting the establishment of religion"). Davis has arguably committed such a violation by openly adopting a policy that promotes her own religious convictions at the expenses of others.[8] In such situations, "the scope of the employees' rights must [ ] yield to the legitimate interest of governmental employer in avoiding litigation." *Marchi,* 173 F.3d at 476.

[8] Although it is not the focus of this opinion, Plaintiffs have already asserted such an Establishment Clause claim against Kim Davis in her official capacity. (Doc. # 1 at 13).

The State also has a countervailing interest in upholding the rule of law. *See generally Papachristou v. City of Jacksonville,* 405 U.S. 156, 171, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) ("The rule of law, evenly applied to minorities as well as majorities, ... is the great mucilage that holds society together."). Our form of government will not survive unless we, as a society, agree to respect the U.S. Supreme Court's decisions, regardless of our personal opinions. Davis is certainly free to disagree with the Court's opinion, as many Americans likely do, but that does not excuse her from complying with it. To hold otherwise would set a dangerous precedent.

For these reasons, the Court concludes that Davis' "no marriage licenses" policy likely infringes upon Plaintiffs' rights without serving a compelling state interest. Because Plaintiffs have demonstrated a strong likelihood of success on the merits of their claim, this first factor weighs in favor of granting their request for relief.

2. Potential for irreparable harm to Plaintiffs

When a plaintiff demonstrates a likelihood of success on the merits of a constitutional deprivation claim, it follows that he or she will suffer irreparable injury absent injunctive relief. *See Overstreet v. Lexington–Fayette Urban Cnty. Gov't,* 305 F.3d 566, 578 (6th Cir.2002) ("Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable

harm if the claim is based upon a violation of the plaintiff's constitutional rights."); *see also Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (finding that the loss of First Amendment rights for a minimal period of time results in irreparable harm); *Ohio St. Conference of NAACP v. Husted,* 43 F.Supp.3d 808, 851 (S.D.Ohio 2014) (recognizing that a restriction on the fundamental right to vote constitutes irreparable injury).

The Court is not aware of any Sixth Circuit case law explicitly stating that a denial of the fundamental right to marry constitutes irreparable harm. However, the case law cited above suggests that the denial of constitutional rights, enumerated or unenumerated, results in irreparable harm. It follows that Plaintiffs will suffer irreparable harm from Davis' "no marriage licenses" rule, absent ***938** injunctive relief. Therefore, this second factor also weighs in favor of granting Plaintiffs' Motion.

3. Potential for substantial harm to Kim Davis*a. The right to free exercise of religion*

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*." *See Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (applying the First Amendment to the states via the Fourteenth Amendment). This Free Exercise Clause "embraces two concepts,-freedom to believe and freedom to

act." *Id.* at 304, 60 S.Ct. 900. "The first is absolute but, in the nature of things, the second cannot be." *Id.* Therefore, "[c]onduct remains subject to regulation for the protection of society." *Id.*

Traditionally, a free exercise challenge to a particular law triggered strict scrutiny. *See, e.g., Sherbert v. Verner,* 374 U.S. 398, 407, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). A statute would only be upheld if it served a compelling government interest and was narrowly tailored to effectuate that interest. *Id.* However, the U.S. Supreme Court has retreated slightly from this approach. *See Emp't Div., Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). While laws targeting religious conduct remain subject to strict scrutiny, "[a] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Babalu,* 508 U.S. at 532, 113 S.Ct. 2217; *see also Smith,* 494 U.S. at 880, 110 S.Ct. 1595 (stating further that an individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate").

"Neutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Babalu,* 508 U.S. at 532,

113 S.Ct. 2217. A law is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533, 113 S.Ct. 2217 (finding that a local ordinance forbidding animal sacrifice was not neutral because it focused on "rituals" and had built-in exemptions for most other animal killings). The Court has not yet "defined with precision the standard used to evaluate whether a prohibition is of general application." *Id.* at 543, 113 S.Ct. 2217. However, it has observed that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment,' and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542, 113 S.Ct. 2217.

While *Smith* and *Babalu* do not explicitly mention the term "rational basis," lower courts have interpreted them as imposing a similar standard of review on neutral laws of general applicability. *See, e.g., Seger v. Ky. High Sch. Athletic Ass'n,* 453 Fed.Appx. 630, 634 (2011). Under rational basis review, laws will be upheld if they are "rationally related to furthering a legitimate state interest." *Id.* at 635 (noting that "[a] law or regulation subject to rational basis review is accorded a strong presumption of validity"); *see also F.C.C. v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (stating generally that laws subject to rational basis review must be upheld "if there is any reasonably conceivable state ***939** of facts that could provide a rational basis for the

classification").

In response to *Smith* and *Babalu,* Congress enacted the Religious Freedom Restoration Act ("RFRA"). *See* 42 U.S.C. § 2000bb–1. It prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," except when the government demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Id.* Although Congress intended RFRA to apply to the states as well as the federal government, the Court held that this was an unconstitutional exercise of Congress' powers under Section Five of the Fourteenth Amendment. *City of Boerne v. Flores,* 521 U.S. 507, 512, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Free exercise challenges to federal laws remain subject to RFRA, while similar challenges to state policies are governed by *Smith. See, e.g., Burwell v. Hobby Lobby Stores, Inc.,* —— U.S. ——, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014).

For purposes of this inquiry, the state action at issue is Governor Beshear's post-*Obergefell* directive, which explicitly instructs county clerks to issue marriage licenses to 18 same-sex couples. Davis argues that the Beshear directive not only substantially burdens her free exercise rights by requiring her to disregard sincerely-held religious beliefs, it does not serve a compelling state interest. She further insists that Governor Beshear could easily grant her a religious exemption without

adversely affecting Kentucky's marriage licensing scheme, as there are readily available alternatives for obtaining licenses in and around Rowan County.[9]

[9] Davis further develops this argument in her own Motion for Preliminary Injunction (Doc. # 39) against Governor Beshear and KDLA Librarian Wayne Onkst. That Motion is not yet ripe for review.

This argument proceeds on the assumption that Governor Beshear's policy is not neutral or generally applicable, and is therefore subject to strict scrutiny.[10] However, the text itself supports a contrary inference. Governor Beshear first describes the legal impact of the Court's decision in *Obergefell,* then provides guidance for all county clerks in implementing this new law. His goal is simply to ensure that the activities of the Commonwealth are consistent with U.S. Supreme Court jurisprudence.

[10] In *Smith,* the U.S. Supreme Court indicated that free exercise claims involving neutral and generally applicable laws may still be subject to heightened scrutiny if asserted alongside another constitutional right. If the Court concludes that the Beshear directive is neutral and generally applicable, Davis argues that strict scrutiny must still apply

> because her free exercise claim is coupled with a free speech claim. (Doc. # 29 at 23). However, this proposal fails because Davis' free speech rights are qualified by virtue of her public employment. *See Draper v. Logan Cnty. Pub. Library,* 403 F.Supp.2d 608, 621–22 (W.D.Ky.2005) (applying the *Pickering* balancing test to a combined free exercise and free speech claim asserted by a public employee). The Court will discuss this concept further in the next section.

While facial neutrality is not dispositive, Davis has done little to convince the Court that Governor Beshear's directive aims to suppress religious practice. She has only one piece of anecdotal evidence to demonstrate that Governor Beshear "is picking and choosing the conscience-based exemptions to marriage that he deems acceptable." (Doc. # 29 at 24). In 2014, Attorney General Jack Conway declined to appeal a federal district court decision striking down Kentucky's constitutional and statutory prohibitions on same-sex marriage. (Doc. # 29–12). He openly stated that he could not, in good conscience, ***940** defend discrimination and waste public resources on a weak case.[11] (*Id.*). Instead of directing Attorney General Conway to pursue the appeal, regardless of his religious beliefs, Governor Beshear hired private attorneys for that purpose. (Doc. # 29–13). He has so far refused to extend such an "exemption" to county clerks with religious objections to same-sex

marriage. (Doc. # 29–11).

[11] Davis refers to the U.S. District Court for the Western District of Kentucky's decisions in *Bourke v. Beshear,* 996 F.Supp.2d 542, 545 (W.D.Ky.2014), and *Love v. Beshear,* 989 F.Supp.2d 536, 539 (W.D.Ky.2014). Judge John Heyburn held that Kentucky's constitutional and statutory prohibitions on same-sex marriages "violate[ ] the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review." *Bourke,* 996 F.Supp.2d at 544. The Sixth Circuit Court of Appeals consolidated these cases with several similar matters originating from Ohio, Michigan and Tennessee and reversed them. *DeBoer v. Snyder,* 772 F.3d 388 (6th Cir.2014). The Supreme Court of the United States then granted certiorari on these cases, now collectively known as *Obergefell v. Hodges,* —— U.S. ——, 135 S.Ct. 1039, 190 L.Ed.2d 908 (2015).

However, Davis fails to establish that her current situation is comparable to Attorney General Conway's position in 2014. Both are elected officials who have voiced strong opinions about same-sex marriage, but the comparison ends there. Governor Beshear did not actually "exempt" Attorney General Conway from pursuing the same-sex marriage appeal. Attorney General Conway's

decision stands as an exercise of prosecutorial discretion on an unsettled legal question. By contrast, Davis is refusing to recognize the legal force of U.S. Supreme Court jurisprudence in performing her duties as Rowan County Clerk. Because the two are not similarly situated, the Court simply cannot conclude that Governor Beshear treated them differently based upon their religious convictions. There being no other evidence in the record to suggest that the Beshear directive is anything but neutral and generally applicable, it will likely be upheld if it is rationally related to a legitimate government purpose.

The Beshear directive certainly serves the State's interest in upholding the rule of law. However, it also rationally relates to several narrower interests identified in *Obergefell*. By issuing licenses to same-sex couples, the State allows them to enjoy "the right to personal choice regarding marriage [that] is inherent in the concept of individual autonomy" and enter into "a two-person union unlike any other in its importance to the committed individuals." 135 S.Ct. at 2599–2600. It also allows same-sex couples to take advantage of the many societal benefits and fosters stability for their children. *Id.* at 2600–01. Therefore, the Court concludes that it likely does not infringe upon Davis' free exercise rights.

b. The right to free speech

The First Amendment provides that "Congress

shall make no law ... abridging the freedom of speech." Under the Free Speech Clause, an individual has the "right to utter or print, [as well as] the right to distribute, the right to receive and the right to read." *Griswold v. Connecticut,* 381 U.S. 479, 483, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (*citing Martin v. City of Struthers,* 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943)). An individual also has the "right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating a state law that required New Hampshire drivers to display the state motto on their license plates). After all, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.*

***941** While the Free Speech Clause protects citizens' speech rights from government intrusion, it does not stretch so far as to bar the government "from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,* —— U.S. ——, 135 S.Ct. 2239, 2245–46, 192 L.Ed.2d 274 (2015). "[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and carries out its duties on their behalf." *Id.* That being said, the government's ability to express itself is not unlimited. *Id.* "[T]he Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to

convey the government's speech." *Id.* (stating further that "[c]onstitutional and statutory provisions outside of the Free Speech Clause may [also] limit government speech").

This claim also implicates the Beshear directive. Davis contends that this directive violates her free speech rights by compelling her to express a message she finds objectionable. Specifically, Davis must issue marriage licenses bearing her "imprimatur and authority" as Rowan County Clerk to same-sex couples. (Doc. # 29 at 27). Davis views such an act as an endorsement of same-sex marriage, which conflicts with her sincerely-held religious beliefs.

As a preliminary matter, the Court questions whether the act of issuing a marriage license constitutes speech. Davis repeatedly states that the act of issuing these licenses requires her to "authorize" same-sex marriage. A close inspection of the KDLA marriage licensing form refutes this assertion. The form does not require the county clerk to condone or endorse same-sex marriage on religious or moral grounds. It simply asks the county clerk to certify that the information provided is accurate and that the couple is qualified to marry under Kentucky law. Davis' religious convictions have no bearing on this purely legal inquiry.

The Court must also acknowledge the possibility that any such speech is attributable to the government, rather than Davis. *See Walker,* 135

S.Ct. at 2248 (finding that 22 specialty license plates are government speech because the government has exercised final approval over the designs, and thus, chosen "how to present itself and its constituency"). The State prescribes the form that Davis must use in issuing marriage licenses. She plays no role in composing the form, and she has no discretion to alter it. Moreover, county clerks' offices issue marriage licenses on behalf of the State, not on behalf of a particular elected clerk.

Assuming *arguendo* that the act of issuing a marriage license is speech by Davis, the Court must further consider whether the State is infringing upon her free speech rights by compelling her to convey a message she finds disagreeable. However, the seminal "compelled speech" cases provide little guidance because they focus on private individuals who are forced to communicate a particular message on behalf of the government. *See, e.g., W.Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (striking down a state law that required schoolchildren to recite the Pledge of Allegiance and salute the flag). Davis is a public employee, and therefore, her speech rights are different than those of a private citizen.[12] ***942** *Garcetti v. Ceballos,* 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

[12] Most free speech cases involving public employees center on compelled silence rather

> than compelled speech. *See, e.g., Connick,* 461 U.S. at 147–48, 103 S.Ct. 1684 (focusing on a district attorney's claim that she was fired in retaliation for exercising her free speech rights). "[I]n the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 796–97, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

"[T]he government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment," but it does have "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." *Connick v. Myers,* 461 U.S. 138, 156, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Waters v. Churchill,* 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). Accordingly, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti,* 547 U.S. at 418, 126 S.Ct. 1951; *see also U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL–CIO,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (stating that "neither the First Amendment nor any other provision of the Constitution" invalidates the Hatch Act's bar on

partisan political conduct by federal employees).

"[T]wo inquiries [ ] guide interpretation of the constitutional protections accorded to public employee speech." *Garcetti,* 547 U.S. at 418, 126 S.Ct. 1951 (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.,* 391 U.S. 563, 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)). First, a court must determine "whether the employee spoke as a citizen on a matter of public concern." *Id.* (explaining further that this question often depends upon whether the employee's speech was made pursuant to his or her official duties). *Id.* at 421, 126 S.Ct. 1951. If the answer is no, then the employee's speech is not entitled to First Amendment protection. *Id.* at 421, 126 S.Ct. 1951 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."). If the answer is yes, a court must then consider "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* (stating further that the government's restrictions "must be directed at speech that has some potential to affect the entity's operations").

The Court must adapt this test slightly because Davis' claim focuses on her right *not* to speak. In this context, the first inquiry is whether Davis refused to speak (i.e. refused to issue marriage licenses) as a citizen on a matter of public concern. The logical answer to this question is no, as the

average citizen has no authority to issue marriage licenses. Davis is only able to issue these licenses, or refuse to issue them, because she is the Rowan County Clerk. Because her speech (in the form of her refusal to issue marriage licenses) is a product of her official duties, it likely is not entitled to First Amendment protection. The Court therefore concludes that Davis is unlikely to succeed on her compelled speech claim.

c. The prohibition on religious tests

Article VI, § 3 of the U.S. Constitution provides as follows:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a ***943** Qualification to any Office or public Trust under the United States.

Under this Clause, "[t]he fact [ ] that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso v. Watkins,* 367 U.S. 488, 81

S.Ct. 1680, 6 L.Ed.2d 982 (1961) (striking down a state requirement that an individual declare his belief in God in order to become a notary public); *see also McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (invalidating a state law that prevented religious officials from serving in the state legislature).

Davis contends that "[c]ompelling all individuals who have any connection with the issuance of marriage licenses ... to authorize, approve, and participate in that act against their sincerely held religious beliefs about marriage, without providing accommodation, amounts to an improper religious test for holding (or maintaining) public office." (Doc. # 29 at 20). The Court must again point out that the act of issuing a marriage license to a same-sex couple merely signifies that the couple has met the *legal requirements* to marry. It is not a sign of moral or religious approval. The State is not requiring Davis to express a particular religious belief as a condition of public employment, nor is it forcing her to surrender her free exercise rights in order to perform her duties. Thus, it seems unlikely that Davis will be able to establish a violation of the Religious Test Clause.

Although Davis focuses on the Religious Test Clause, the Court must draw her attention to the first half of Article VI, Clause § 3. It requires all state officials to swear an oath to defend the U.S. Constitution. Davis swore such an oath when she took office on January 1, 2015. However, her actions have not been consistent with her words.

Davis has refused to comply with binding legal jurisprudence, and in doing so, she has likely violated the constitutional rights of her constituents. When such "sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell,* 135 S.Ct. at 2602. Such policies simply cannot endure.

d. The Kentucky Religious Freedom Act

Kentucky Constitution § 1 broadly declares that "[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned ... [t]he right of worshiping Almighty God according to the dictates of their consciences." Kentucky Constitution § 5 gives content to this guarantee:

> No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights,

> privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

Kentucky courts have held that Kentucky Constitution § 5 does not grant more protection to religious practice than the First Amendment. *Gingerich v. Commonwealth,* ***944** 382 S.W.3d 835, 839–40 (Ky.2012). Such a finding would normally permit the Court to collapse its analysis of state and federal constitutional provisions. However, the Kentucky Religious Freedom Act, patterned after the federal RFRA, subjects state free exercise challenges to heightened scrutiny:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits,

assessing penalties, or an exclusion from programs or access to facilities.

Ky.Rev.Stat. Ann. § 446.350.

Davis again argues that the Beshear directive substantially burdens her religious freedom without serving a compelling state interest. The record in this case suggests that the burden is more slight. As the Court has already pointed out, Davis is simply being asked to signify that couples meet the legal requirements to marry. The State is not asking her to condone same-sex unions on moral or religious grounds, nor is it restricting her from engaging in a variety of religious activities. Davis remains free to practice her Apostolic Christian beliefs. She may continue to attend church twice a week, participate in Bible Study and minister to female inmates at the Rowan County Jail. She is even free to believe that marriage is a union between one man and one woman, as many Americans do. However, her religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk. The Court therefore concludes that Davis is unlikely to suffer a violation of her free exercise rights under Kentucky Constitution § 5.

4. Public interest

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V*

Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir.1994). Because Davis' "no marriage licenses" policy likely infringes upon Plaintiffs' fundamental right to marry, and because Davis herself is unlikely to suffer a violation of her free speech or free exercise rights if an injunction is issued, this fourth and final factor weighs in favor of granting Plaintiffs' Motion.

V. Conclusion

District courts are directed to balance four factors when analyzing a motion for preliminary injunction. In this case, all four factors weigh in favor of granting the requested relief. Accordingly, for the reasons set forth herein,

IT IS ORDERED that Plaintiffs' Motion for Preliminary Injunction (Doc. # 2) against Defendant Kim Davis, in her official capacity as Rowan County Clerk, is hereby **granted.**

IT IS FURTHER ORDERED that Defendant Kim Davis, in her official capacity as Rowan County Clerk, is hereby preliminarily enjoined from applying her "no marriage licenses" policy to future marriage license requests submitted by Plaintiffs.

All Citations

123 F.Supp.3d 924

APPENDIX H — GOVERNOR BEVIN EXECUTIVE ORDER 2015-048 RELATING TO THE COMMONWEALTH'S MARRIAGE LICENSE FORM, DECEMBER 22, 2015

MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER
2015-048
December 22, 2015

RELATING TO THE COMMONWEALTH'S MARRIAGE LICENSE FORM

WHEREAS, the Constitution of the Commonwealth of Kentucky, Section 233a states: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized"; and

WHEREAS, on June 26, 2015, the Supreme Court of the United States issued a decision styled *Obergefell v. Hodges*, 135 S. Ct. 2584, holding that a fundamental right to marry is guaranteed to same-sex couples under the United States Constitution; and

WHEREAS, the Kentucky Constitution, Section 233a, is now in conflict with the Constitution of the United States; and

WHEREAS, as a result of the Supreme

Court decision in *Obergefell v. Hodges*, the offices of the County Clerks of the Commonwealth are now required to issue marriage licenses in accordance with KRS Chapter 402 to all eligible applicants, including those intending to enter into same-sex marriages; and

WHEREAS, KRS 446.350 (the Kentucky Religious Freedom Restoration Act, or "RFRA"), states:

> **KRS 446.350 – Prohibition upon government substantially burdening freedom of religion – Showing of compelling governmental interest – Description of "burden."** Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities; and

Appendix H

WHEREAS, the issuance of marriage licenses on the form currently prescribed by the Kentucky Department for Libraries and Archives ("KDLA") creates a substantial burden on the freedom of religion of some County Clerks and employees of their offices because the current form bears the name of the issuing County Clerk, and some County Clerks and their employees sincerely believe that the presence of their name on the form implies their personal endorsement of, and participation in, same-sex marriage, which conflicts with their sincerely held religious beliefs; and

WHEREAS, KRS 446.350 requires use of the least restrictive means available to carry out compelling governmental interests, and there are less restrictive means available to further the governmental interest of issuing marriage licenses to all applicants who qualify than the form that is currently being used; and

WHEREAS, there is no compelling governmental interest, particularly under the heightened "clear and convincing evidence" standard required by KRS 446.350, necessitating that the name and signature of County Clerks be present on the marriage license form used in the Commonwealth; and

WHEREAS, the KDLA can readily prescribe a different form that reasonably accommodates the interests protected by KRS 446.350, while at the same time complying with the United States

Constitution, *i.e.*, that allows for County Clerks to issue marriage licenses to same-sex couples, thereby satisfying the compelling governmental interest and complying with the decision in *Obergefell*, without substantially burdening the free exercise of religion by those County Clerks and their employees who hold sincerely-held religious beliefs that conflict with same-sex marriage.

NOW, THEREFORE, in consideration of the foregoing and by virtue of the authority vested in me by Section 69 of the Constitution of the Commonwealth of Kentucky and KRS 446.350, I, Matthew G. Bevin, Governor of the Commonwealth of Kentucky, do hereby Order and Direct the following effective immediately:

I. That the Kentucky Department for Libraries and Archives, through its duly appointed commissioner or other authorized officials, shall forthwith create, prescribe and publish to all County Clerks in the Commonwealth a marriage license form substantially identical to the form attached hereto, henceforth to be used by the offices of all County Clerks in the Commonwealth.

II. This Executive Order requires modification only to the existing "Marriage License" form but not to the existing "Marriage Certificate" form and "Certificate of Marriage" form.

Received and filed in the Secretary of State's Office on December 22, 2015.

APPENDIX I — CNN ARTICLE, "KIM DAVIS STANDS GROUND, BUT SAME-SEX COUPLE GET MARRIAGE LICENSE," FILED JUNE 8, 2017

KIM DAVIS STANDS GROUND, BUT SAME-SEX COUPLE GET MARRIAGE LICENSE

By Mariano Castillo and Kevin Conlon, CNN

Updated 4:24 PM ET, Mon September 14, 2015

(CNN) — Kim Davis, America's highest-profile county clerk, returned to work Monday vowing to deny marriage licenses to same-sex couples.

But that didn't stop Carmen and Shannon Wampler-Collins from successfully walking out of the Rowan County, Kentucky, clerk's office with a marriage license in hand.

Monday was Davis' first day back in her office after spending five days in jail for defying a court order and refusing to give licenses to same-sex couples.

Before starting her workday, Davis appeared defiant, saying she will not issue any marriage licenses that go against her religious beliefs. But she left the door open for her deputies to continue giving out marriage licenses to same-sex couples as long as those documents do not have Davis' name or title on them.

The marriage license that the couple received said "pursuant to federal court order" on it, and instead of

listing Davis' name and Rowan County, it says city of Morehead, the county seat.

David said Monday that any such licenses "will not issued or authorized by me." Her work-around is not to sign them but not interfere with her deputies who do give them out.

"(U.S. District Judge David Bunning) indicated last week that he was willing to accept altered marriage licenses even though he was not certain of their validity," Davis said. "I, too, have great doubts whether the license issued under these conditions are even valid."

Yet one person without such doubts is Kentucky's governor.

"I'm ... confident and satisfied that the licenses that were issued last week (and) this morning substantially comply with the law in Kentucky," Gov. Steve Beshear told reporters Monday. "And they're going to be recognized as valid in the Commonwealth."

CNN senior legal analyst Jeffrey Toobin said that Kentucky law might allow for a deputy's signature to be valid on a marriage license, even without the clerk's consent. But if the documents are altered to remove Davis' name and title, a court may have to rule on their validity.

Attorney: Clerk's office in an impossible position

Davis' strategy is a "good faith" attempt to comply with the judge's ruling while at the same time not violate her conscience, her attorney Harry Mihet said at a news conference Monday.

"Today, Kim Davis remains the bravest woman in America," Mihet said. "She has not compromised her conscience, she has not compromised her faith and she has not quit serving the people of Rowan County that she loves very much."

He reiterated that although one of Davis' deputy clerks issued a license to a same-sex couple Monday, it was done so without her authorization.

The modified marriage license that Carmen and Shannon Wampler-Collins received as well as the licenses issued while Davis was in jail do not have the clerk's authority, Mihet said.

Including the license issued Monday, the clerk's office has issued 11 licenses since Davis went to jail September 3. Eight of those licenses have been for same-sex couples.

"If any of her clerks decide that they must issue licenses to avoid going to jail, she will not take any adverse action against them," Mihet said, adding the clerk's office is caught in an impossible position.

The modified marriage licenses are effectively in limbo, Mihet said, as it is unclear whether they are legal.

Another Davis attorney, Mat Staver, said a solution would be to remove not just Davis' name and office from the marriage licenses themselves but from the process entirely. Have the state issue them instead, he said.

Sounds simple enough, but under current Kentucky state law, the authority to issue marriage licenses rests solely with each of the state's 120 county clerks, meaning it would take an act of the legislature to transfer that authority. The legislature, however, doesn't convene until January 5.

The state's governor, though, thinks "there is just no need to waste hundreds of thousands of dollars of taxpayers' money" by calling a special session.

"If you want to change the way licenses are issued, ... they're free to do so," Beshear said of changes that could be made starting in January. "But I just don't see the urgency now."

Since being released from jail last week, Davis has been keeping a low profile and opening boxes of letters sent to her while she was in jail.

"I am deeply moved by all those who prayed for me," she said in a statement. "All I can say is that I am amazed and very grateful."

CNN's Greg Botelho and Fredricka Whitfield contributed to this report.