No. 19-926

IN THE

Supreme Court of the United States

KIM DAVIS,

Petitioner,

v.

DAVID ERMOLD, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, after this Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), it was clearly established that a state official could not refuse to issue marriage licenses to legally eligible couples solely because she disapproved of same-sex marriage.

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INTRODUCTION

The doctrine of "qualified immunity shield[s] an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson v. Callahan*, 555 U.S. 223, 244 (2009). Qualified immunity does not shield an officer from liability when the officer knows that her conduct does *not* comply with the law, even when the officer sincerely disagrees with it.

While people of good conscience may disagree about the correctness of this Court's decision to strike down bans on same-sex marriage as unconstitutional in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), or whether private businesses and individuals can lawfully refuse to provide goods or services in connection with same-sex marriages, this case raises neither of those issues. The straightforward issue in this case is whether, after *Obergefell*, it was clearly established that a state official cannot deprive citizens of their right to marry based solely on personal disapproval of same-sex marriage. Given this Court's holding that "sincere, personal opposition" to same-sex marriage, even when grounded in "decent and honorable religious or philosophical premises," cannot be used as a basis to deny the right to marry, *Obergefell*, 135 S. Ct. at 2602, the Sixth Circuit properly concluded the unconstitutionality of such a deprivation was clearly established. Thus, the allegations that Petitioner Kim Davis denied Respondents marriage licenses solely because of her personal opposition to same-sex marriage—even after a district court and the Sixth Circuit told her she could not do so—support a denial of qualified immunity.

Nearly five years after *Obergefell* and the events at issue in this case, the petition raises no issue worthy of certiorari review. First, as all three judges of the Sixth Circuit panel agreed, Davis had sufficient notice that her conduct violated Respondents' constitutional right to marry. As that court held, *Obergefell* made clear that personal opposition to same-sex marriage, no matter how sincerely held, cannot serve as a basis for state officials to deny marriage licenses to legally eligible couples—the precise conduct that is alleged here. That holding neither conflicts with any decision of this Court or any court of appeals, nor defines the right at issue at too high a level of generality.

Davis argues that her decision to refuse to issue any marriage licenses at all to avoid issuing licenses for same-sex marriages was not a complete ban on marriage and therefore should have been analyzed under the multi-tiered framework set out in *Zablocki v. Redhail*, 434 U.S. 374 (1978). Even were she correct, the result would be the same. Under *Zablocki*, Davis's conduct would likely have been subject to heightened scrutiny, yet Davis waived the argument that her conduct survived such scrutiny. Moreover, as Judge Bush explained in his concurrence below, applying *Zablocki*, "[h]er conduct … does not survive even rational-basis review because of her anti-homosexual animus, which is not a legitimate basis for government action." Pet. App. 22a. As Judge Bush noted, this principle predates *Obergefell* by nearly two decades. *Id.*

Davis's assertion that Kentucky law allowed her to violate Respondents' federal constitutional rights relies on what all three judges of the court of appeals, as well as the district court, agreed was an unjustifiable interpretation of a Kentucky statute—

one unsupported by any court decision or any reasonable reading of the statute itself, and contrary to the position she herself took in related litigation. No reasonable officer would have assumed that state law allowed her to grant herself an exemption from her duty to issue marriage licenses, and she did not seek to invoke the state law procedures for obtaining an accommodation. The Sixth Circuit's analysis of Kentucky law does not warrant this Court's review.

While there may be open questions about the intersection of Free Exercise rights and the fundamental right to marry, this case does not present an appropriate vehicle in which to resolve those questions. Davis did not raise a First Amendment Free Exercise argument below; religious liberty was raised only in the context of the narrow question whether a state law authorized a public official to self-accommodate by refusing to perform non-discretionary duties, thus depriving everyone in a jurisdiction of a fundamental right. Not only does this question arise under state law, but it involves a fact pattern that is unlikely to recur and is thus unsuitable for certiorari review. *See* Sup. Ct. R. 10.

As the concurrence below observed, this case "is relatively easy." Pet. App. 29a. Accepting the allegations in the complaint as true, Davis is not entitled to qualified immunity for knowingly violating Respondents' clearly established rights. The petition should be denied.

STATEMENT

A. Background

On June 26, 2015, this Court held that states could not deny same-sex couples "the fundamental right to

marry." *Obergefell*, 135 S. Ct. at 2604–05. The Court thus invalidated state marriage laws, including those of Kentucky, that restricted marriage to "one man and one woman." *Id.* at 2605; *see* Ky. Const. § 233A; Ky. Rev. Stat. § 402.005.

Under Kentucky law, county clerks exercise the state's authority to issue marriage licenses. *See* Ky. Rev. Stat. § 402.080. Thus, on the same day as the *Obergefell* decision, then-Governor of Kentucky Steve Beshear issued a directive to all county clerks to issue marriage licenses requested by legally eligible same-sex couples in Kentucky. Pet. App. 130a.

Petitioner Kim Davis was at that time the County Clerk of Rowan County, Kentucky. *See id.* 5a, 53a. At all times relevant to this case, marriage licenses in Kentucky were required to bear "[a]n authorization 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 … and the signature of the county clerk or deputy clerk issuing the license." Ky. Rev. Stat. § 402.100(1) (2016). Accordingly, Davis's printed name appeared on all marriage licenses to be issued in Rowan County, and her signature appeared on the licenses that she personally issued. Her office was the only office with the authority to issue marriage licenses in Rowan County.[1]

The day after the *Obergefell* decision, rather than comply with the decision and Governor Beshear's

[1] While, "[i]n the absence of the county clerk, or during a vacancy in the office, the county judge/executive may issue the license," Ky. Rev. Stat. § 402.240, Davis was not "absent" for purposes of the statute because she continued to perform all other duties of the county clerk. *See Miller*, Pet. App. 140a–142a.

directive, and citing her personal objection to same-sex marriage, Davis adopted a policy that her office would not issue marriage licenses. Pet. App. 129a–130a. Davis did not invoke the Kentucky Religious Freedom Restoration Act (KRFRA), Ky. Rev. Stat. § 446.350, or seek an accommodation under it from any state court or official, prior to adopting her policy. *Id.* 32a. (At the time, she also did not indicate that the policy was "temporary," as her Petition suggests. *See e.g.*, Pet. i.) And although at least one of her deputy clerks was willing to issue and sign the licenses in her stead and had the legal authority to do so, Davis directed the deputy clerks not to do so because her name and title would nonetheless appear on the licenses. Pet. App. 130a.

Respondents David Ermold and David Moore have been in a committed relationship since 1998. Respondents James Yates and Will Smith have been in a committed relationship since 2006. On July 6, 2015—ten days after the *Obergefell* decision—each couple went to the Rowan County Clerk's Office and requested a marriage license. Although they were legally eligible to receive marriage licenses, their requests were denied due to the "no marriage licenses" policy adopted by Davis in her position as Clerk of Rowan County. Each couple requested marriage licenses again on August 13 and September 1, 2015; the Rowan County Clerk's Office continued to deny their requests based on Davis's policy. *Id.* 38a, 68a.

Meanwhile, other couples who had been denied marriage licenses in Rowan County sued Davis in the District Court for the Eastern District of Kentucky. *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015), *reproduced at* Pet. App. 121a. On August 12, 2015, the district court issued a preliminary injunction

prohibiting Davis from continuing her "no marriage licenses" policy. Pet. App. 163a. The court found that, "[m]uch like the statutes at issue in *Loving* [*v. Virginia*, 388 U.S. 1 (1967)] and *Zablocki,* Davis' 'no marriage licenses' policy significantly discourages many Rowan County residents from exercising their right to marry and effectively disqualifies others from doing so." *Id*. 142a. The court held that the policy was thus subject to heightened scrutiny under *Zablocki*. *Id*. 142a–143a. In so doing, the court rejected Davis's argument that eliminating the ability to obtain a marriage license in Rowan County was not a significant infringement on the constitutional right because couples could theoretically obtain licenses elsewhere. The court noted the plaintiffs' ties with Rowan County and their interest in getting licenses from their home county, and the undisputed fact that "there are individuals in this rural region of the state who simply do not have the physical, financial or practical means to travel." *Id*. 138a–39a. The district court also recognized that if Davis had the right to deny couples licenses based on personal opposition to same-sex marriage, so would other county clerks, potentially eliminating the right to marry widely across the state. *Id*. 139a.

The court rejected Davis's argument that her "no marriage licenses" policy served a compelling state interest, noting the countervailing interests in avoiding the "arguabl[e]" violation of the Establishment Clause that occurs when a state official "openly adopt[s] a policy that promotes her own religious convictions at the expenses of others," and "in upholding the rule of law," which requires government officials "to respect Supreme Court decisions, regardless of [their] personal opinions." *Id*.

143a–44a. Accordingly, the district court also rejected Davis's arguments that an injunction would violate her rights under the federal Constitution or the KRFRA. *Id*. 163a.

Davis unsuccessfully sought a stay of the district court's preliminary injunction in the Sixth Circuit and in this Court. *See Davis v. Miller*, 136 S. Ct. 23 (2015); *Miller v. Davis*, No. 15-5880, 2015 WL 10692640 (6th Cir. Aug. 26, 2015). In denying her request, the Sixth Circuit addressed Davis's arguments that "the issuance of licenses to same-sex marriage couples infringes on her rights under the United States and Kentucky Constitutions as well as" the KRFRA. The court concluded that "it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." *Miller*, 2015 WL 10692640, at *1. Despite the preliminary injunction, the Sixth Circuit's opinion, and this Court's denial of her request for a stay, Davis maintained her policy of refusing to issue marriage licenses to legally eligible couples. Pet. App. 38a.

On September 3, 2015, the district court found Davis in contempt of its order and remanded her to the custody of the United States Marshal. While Davis was in jail, her deputy clerks issued marriage licenses that had been altered to remove Davis's name. Each Respondent couple received a marriage license from the Rowan County Clerk's Office on September 4,

2015—two months after they first sought a license to wed.[2] *Id.* 168a.

While her appeal of the preliminary injunction was pending, Davis made an emergency motion, asking the district court, for the first time, to order the Governor of Kentucky and the Commissioner of the Kentucky Department of Libraries and Archives to grant her an accommodation under the KRFRA—specifically, the accommodation of "remov[ing] her name and authorization from the marriage license form." *Miller v. Davis*, No. 15-44-DLB, 2015 WL 9461520, at *1, *3 (E.D. Ky. Sept. 11, 2015). The district court refused to do so, citing the Eleventh Amendment and pointing out that she would have to seek any such relief in Kentucky state court. *Id.* at *3. Davis did not do so.

B. District Court Proceedings

In July and August 2015, each Respondent couple filed suit against Davis in her individual and official capacities, alleging claims under 42 U.S.C. § 1983 for violating their constitutional right to marry. Davis filed motions to dismiss in both cases. In September 2017, the district court dismissed Respondents' official-capacity claims against Davis, holding that as a state official she was entitled to sovereign immunity under the Eleventh Amendment. Pet. App. 43a (*Ermold*), 73a (*Yates*).[3] The court, however, denied

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[2] Governor Beshear later made clear that the altered licenses "substantially compl[ied] with" Kentucky law and would "be recognized as valid in the Commonwealth." Pet. App. 169a.

[3] The Sixth Circuit affirmed the district court's dismissal of Respondents' official-capacity claims. Pet. App. 14a. That holding is not at issue here.

Davis's motions to dismiss Respondents' individual-capacity claims on qualified immunity grounds.

As to those claims, Davis argued that she did not violate any of Respondents' clearly established rights. She maintained that denying marriage licenses to legally eligible couples was not a "direct and substantial burden" on the due process right to marry, that her action was thus subject to rational-basis review, and that it survived such review. Viewing the complaints in the two cases and all reasonable inferences therefrom in favor of Respondents, the district court denied Davis's motions to dismiss the individual-capacity claims in two substantively identical opinions issued on the same day. Applying *Zablocki*, the district court held that Davis's "refusal to issue *any* marriage licenses … 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.'" *Id*. 52a (*Ermold*), 82a (*Yates*) (alteration in original; quoting *Zablocki*, 434 U.S. at 387). The court therefore applied strict scrutiny to Davis's conduct.

Although Davis had not argued that her conduct would survive strict scrutiny, thus waiving any such argument, the district court considered, "[o]ut of an abundance of caution," the argument that she had raised in *Miller*: that her "no marriage licenses" policy was a closely tailored means of advancing the compelling interest of protecting the free-exercise rights of state officials. *Id*. 55a n.11 (*Ermold*), 85a n.11 (*Yates*). Citing *Miller*, the court explained that the compelling interest in protecting free-exercise rights of state officials and employees was diminished by Kentucky's "countervailing interests in 'preventing

Establishment Clause violations' and 'upholding the rule of law.'" *Id.* 54a (*Ermold* opinion), 84a (*Yates* opinion). Moreover, even if the interest were sufficiently compelling, the court found that Davis's policy "was not tailored in any meaningful way; it prevented all Rowan County residents from obtaining a marriage license in their home-county." *Id.* 54a (*Ermold*), 85a (*Yates*). In the alternative, the district court concluded that Davis's actions would be unconstitutional even under a rational-basis standard because denying marriage licenses to all couples in Rowan County "is an 'unreasonable means of advancing' any 'legitimate governmental interest' that might exist." *Id.* 55a n.10 (*Ermold*, quoting *Vaughn v. Lawrenceburg Power System*, 269 F.3d 703, 712 (6th Cir. 2001)), 85a n.10 (*Yates*, same).

Next, the district court considered whether Respondents' right to marry was clearly established as of July 6, 2015—the date on which they first requested their marriage licenses from the Rowan County Clerk's Office. The court found that, "[a]fter *Obergefell*, the 'unlawfulness' of the Defendant's refusal to issue marriage licenses to legally eligible couples, including same-sex couples, was 'apparent.'" *Id.* 57a (*Ermold*, quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)), 88a (*Yates*, same). "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." *Id.* 58a (*Ermold*), 88a (*Yates*). It further held that Davis's mere "hope that the [KRFRA] *excused* her conduct in violating Plaintiffs' clearly established rights" was not a basis for qualified immunity. *Id.* 61a (*Ermold*), 92a (*Yates*).

C. The Sixth Circuit's Decision

In a consolidated opinion addressing both cases, the Sixth Circuit affirmed the district court's denial of qualified immunity to Davis. The court emphasized that the case was still "at a relatively early stage," on appeal of a denial of a motion to dismiss: "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." *Id.* 6a.

Applying this standard, the court of appeals held that Respondents had "adequately alleged the violation of a constitution[al] right" and that the right was clearly established at the time of the alleged violation. *Id*. 15a. Specifically, "[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." *Id*. 16a (quoting *Obergefell*, 135 S. Ct. at 2604). In *Obergefell*, the Sixth Circuit explained, this "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." *Id.*

The Sixth Circuit rejected Davis's argument that *Obergefell* did not apply to her conduct because that case involved a total ban on same-sex marriage, whereas she refused to issue licenses only in one county, leaving Respondents the option of obtaining marriage licenses elsewhere in Kentucky. The court stated: "[N]owhere 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." *Id.* 18a.

The court also rejected Davis's argument that it should apply rational-basis review to her conduct because she had only incidentally burdened the right to marry. Although the court agreed that *Obergefell* "didn't abolish the tiers of scrutiny for all marriage restrictions," it explained that *Obergefell* "did jettison them for actions such as Davis's." *Id.* 19a. Moreover, *Obergefell* "said nothing to suggest that government officials may flout the Constitution by enacting religious-based policies to accommodate their own religious beliefs." *Id.* 19a–20a.

Finally, the Sixth Circuit rejected Davis's argument that the KRFRA "required her to do what she did." *Id.* 20a. The court noted that "Davis provide[d] no legal support for her" interpretation of the KRFRA and that no federal or state court had endorsed her construction of the state statute. *Id.* Therefore, "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" when the legislature changed the law a year later. *Id.*

Judge Bush concurred. *Id.* 21a. He agreed with the majority "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." *Id.* 32a. However, Judge Bush would have analyzed Davis's conduct under a different framework. In his view, Davis's conduct was more akin to "a marriage

regulation that is less than a total ban," and *Zablocki's* tiers-of-scrutiny analysis should therefore apply. *Id.* 25a.

Nonetheless, Judge Bush concluded that "[t]he present case … is relatively easy." *Id.* 29a. He found it unnecessary to decide whether Davis' action was a significant burden on the right to marry (and thus subject to heightened scrutiny) 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." *Id.* Since "moral disapproval" of same-sex relationships is not a legitimate state interest under clearly established case law, he explained, such disapproval could not provide a rational basis for Davis's action. *Id.* 30a (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 632 (1996)). Judge Bush also agreed with the majority that Kentucky state law did not entitle Davis "to *self*-create an accommodation." *Id.* 31a. He noted that there was no legal support for her theory that the KRFRA allows "a government employee [to] be relieved from the performance of ministerial duties[.]" *Id.* 33a n.2.

The Sixth Circuit denied Davis's petition for rehearing en banc without dissent. *Id.* 2a.

REASONS FOR DENYING THE WRIT

Davis, correctly, does not suggest that this case presents any issue on which the circuit courts of appeals or state courts of last resort are divided. In addition, although Davis repeatedly references Free Exercise concerns, she does not raise a First Amendment Free Exercise defense to her conduct. This case thus presents no opportunity to consider

questions about the intersection of same-sex marriage rights and Free Exercise rights.

Instead, Davis seeks only what she sees as error correction. She maintains that the Sixth Circuit erred in relying on this Court's decision in *Obergefell* to conclude that Respondents adequately alleged a violation of their clearly established constitutional right to marry without applying the multi-tiered framework set forth in *Zablocki*. This argument, however, does not meet the Court's standards for certiorari review and is incorrect; in any event, the result would be the same under *Zablocki*. Davis's additional argument that her conduct should have been evaluated as an accommodation that "Kentucky" granted her under the KRFRA also fails to meet this Court's criteria for review. As all three judges of the Sixth Circuit agreed, this argument represents an unreasonable view of Kentucky law. Moreover, there is no basis for this Court to depart here from its general practice of deferring to courts of appeals on state-law questions.

Davis's additional argument that the courts below defined the clearly established right at issue at too high a level of generality is easily rejected. And finally, qualified immunity is not available to officials, like Davis, who refuse to perform ministerial duties over which the law affords them no discretion.

I. The Sixth Circuit correctly concluded that *Obergefell* clearly established a right of same-sex couples to marry, regardless of a state official's personal opposition to same-sex marriage.

In *Obergefell*, this Court held that its due process precedent recognizing a fundamental right to

marriage applied to same-sex couples. The Court was explicit that "sincere, personal opposition" to same-sex marriage, even when grounded in "decent and honorable religious or philosophical premises," could not be used as a basis to deny the right to marry. 135 S. Ct. at 2602. This case involves allegations that Davis denied all couples within her jurisdiction the right to marry solely based on her "sincere, personal opposition" to same-sex marriage. The Sixth Circuit thus properly looked to *Obergefell* in analyzing whether Davis's conduct violated a clearly established right.

A. The court of appeals did not err in addressing the constitutionality of Davis's marriage ban without engaging in a *Zablocki* analysis.

Davis argues that the court of appeals erred by applying *Obergefell* without engaging in the two-step analysis described in *Zablocki*. As the Sixth Circuit has explained, under *Zablocki*, "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 v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996) (citing *Zablocki*, 434 U.S. at 383–84). Here, having applied *Obergefell* to conclude that Davis's policy constituted a bar on marriage in the jurisdiction, the court of appeals had no need to frame its opinion in terms of these two steps.

Davis's argument that any restriction on the right to marry must be examined via an express, formalistic *Zablocki* two-step analysis cannot be squared with

Obergefell, which did not expressly do so. That said, and as the court of appeals noted, *Obergefell* did not cast *Zablocki* entirely by the wayside. Rather, *Obergefell* relied on *Zablocki* in reaching its conclusion that the state laws at issue there violated the fundamental right to marry. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2603 ("It was the essential nature of the marriage right, discussed at length in *Zablocki*, that made apparent the law's incompatibility with requirements of equality." (citation omitted)). After *Obergefell*, it would have been odd indeed for the Sixth Circuit not to base its analysis on that case.

Davis herself does not dispute that *Obergefell* clearly established the right of same-sex couples to marry and the unconstitutionality of bans on marriage based on opposition to same-sex marriage. She only argues that it was inappropriate for the court of appeals to rely on *Obergefell* because her "no marriage licenses" policy did not significantly "interfere" with the fundamental right to marry, and thus a lower level of scrutiny applied. Pet. 13 (quoting *Zablocki*, 434 U.S. at 387). But the court of appeals was correct to reject this argument and conclude that the "no marriage licenses" policy was effectively a ban, and thus properly analyzed under *Obergefell*.

Davis's policy did far more than "interfere" with the right to marry; it eliminated the right in Rowan County. Davis acknowledges that Respondents could not have obtained a marriage license from anyone else in Rowan County. She did not mandate an extra form to be submitted, change her office's hours, or require additional witnesses be present. And while Davis asks this Court to speculate that it would not have been burdensome to require Petitioners to leave their rural home county and obtain a license from a clerk in a

different county who did not self-exempt himself from the law, *id.* 14–15, such speculation is inappropriate in reviewing an order denying a motion to dismiss. Moreover, as the Sixth Circuit correctly stated, "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." Pet. App. 18a.

Davis's slippery-slope argument, that the decision below would, contrary to *Zablocki*, render unconstitutional any regulations that prevented couples from obtaining marriage licenses "on-demand," Pet. 34–35, lacks merit. The court of appeals explicitly limited its holding to actions like Davis's that constitute a complete refusal to grant marriage licenses: "*Obergefell* … didn't abolish the tiers of scrutiny for all marriage restrictions. But it did jettison them for actions such as Davis's." Pet. App. 19a. Because the court below stated that regulations short of a ban on marriage would continue to be evaluated under the *Zablocki* framework, there is no reason for the Court to grant review to reiterate that undisputed point.

B. As the concurrence below explained, *Zablocki* leads to the same result.

Review to apply an express *Zablocki* tiers-of-scrutiny analysis is also unwarranted because, as the district court found and Judge Bush noted in his concurrence, doing so would not affect the outcome of this case. Davis has waived any argument that her conduct was constitutional under the strict scrutiny that applies to substantial burdens on marriage, and, as Judge Bush explained, Davis's conduct fails to pass muster even under the rational-basis scrutiny that

applies to less burdensome infringements on the fundamental right.

As Davis recognizes, *Zablocki* held that a policy that "interfere[s] directly and substantially with the right to marry" is "subject to strict scrutiny." Pet. 13 (quoting *Zablocki*, 434 U.S. at 384–87). Here, whether or not characterized as a "ban" on marriage, Davis's elimination of the ability to obtain marriage licenses throughout Rowan County "directly and substantially" interfered with couples' marriage rights, as the district court held. Pet. App. 52a–54a (*Ermold*); 82a–84a (*Yates*); *see also id.* 138a–143a (*Miller v. Davis* preliminary injunction decision). Particularly at the motion to dismiss stage, a court could not conclude that Davis's action imposed only an incidental burden. In light of Davis's waiver of any argument that her conduct would survive strict scrutiny, *see* Pet. App. 55a n.11 (*Ermold*), 85a n.11 (*Yates*), the first step of *Zablocki* leads to the same holding reached below: denial of qualified immunity.

Moreover, even "assum[ing] 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," "the result is still the same." Pet. App. 29a (concurring opinion). Under longstanding precedent, as Judge Bush noted, moral disapproval of same-sex relationships is not a "legitimate state interest." *Id.* 30a (citing *Lawrence*, 539 U.S. at 578). Therefore, "government actions based on moral disapproval of homosexuality fail rational basis review." *Id.* (citing *Romer*, 517 U.S. at 632); *see also Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 635. Thus, even under rational-basis review,

Davis would not be entitled to qualified immunity for her refusal to issue marriage licenses based on her personal objection to same-sex marriage.

As the decision below is not inconsistent with *Zablocki*, and expressly applying *Zablocki* would not alter the outcome of this case, the petition should be denied.

II. Davis's state-law argument is inconsistent with Kentucky law, is inconsistent with her prior litigation positions, and does not provide a basis for review.

A. The lower courts' rejection of Davis's state law argument under the KRFRA was primarily a procedural one, based on the rejection of her assertion that the state statute allows officials to "self-accommodate." *See* Pet. App. 20a (finding "no legal support" for Davis's interpretation of the KRFRA); *id.* 31a–32a (concurrence, stating that Davis's assertion that she was "entitled to *self*-create an accommodation" "goes too far"); *see also id.* 162a (*Miller v. Davis*, stating that, under the KRFRA, Davis's "religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk"). Given this Court's practice of "accord[ing] great deference to the interpretation and application of state law by the courts of appeals," this Court should not grant review to disturb this conclusion. *Pembaur v. Cincinnati*, 475 U.S. 469, 484 n.13 (1986); *see also Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) (noting "the presumption of deference given the views of a federal court as to the law of a State within its jurisdiction").

B. Furthermore, Davis's state-law argument runs contrary to the arguments she made in the *Miller*

case. Although Davis argues here that her adoption of a no-marriage-licenses policy for Rowan County was an act of Kentucky "accommodating" her religious beliefs pursuant to the KRFRA, Pet. 22, 24, she argued in *Miller* that Kentucky was violating the KRFRA by *not* granting her an accommodation.

In *Miller*, after the district court rejected her KRFRA defense and issued a preliminary injunction against Davis's conduct, Davis asked the district court to order state officials to grant her an accommodation under the KRFRA—specifically, to order state officials to "remove her name and authorization from the marriage license form." *Miller*, 2015 WL 9461520, at *3. The court declined to do so, explaining that it lacked the authority to do so under the Eleventh Amendment, and advising Davis that she could seek such an accommodation in state court. *Id.*

Davis's argument in the petition—that she was entitled to, and actually *did*, grant herself a KRFRA accommodation on behalf of Kentucky—is irreconcilable with the position she took in *Miller*. Her attempt to retroactively recharacterize her actions now strongly weighs against review. Davis's position in *Miller* that only a court or a higher-level state official could grant her a KRFRA accommodation bolsters the conclusion that no reasonable state official would have concluded that they were entitled to grant themselves an exemption like the "no marriage licenses" policy. As Judge Bush explained, "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." Pet. App. 32a (concurrence). Her failure to invoke the appropriate procedure is reason enough for

the Court to decline to address what accommodation she might have been entitled to had she done so.

Because no court below accepted Davis's argument that her "no marriage licenses" policy should be treated as an accommodation "Kentucky" granted her under the KRFRA, no court addressed the substantive question of whether it would have been an appropriate accommodation under state law.[4] This Court should decline to be the first to examine this state-law question. *See Sheridan v. United States*, 487 U.S. 392, 401 (1988) (noting "it is not our practice to reexamine a question of state law … or, without good reason, to pass upon it in the first instance").

Even if the Court were to do so, the inconsistency between Davis's position in *Miller* and her position here highlights why her argument is wrong. In *Miller*, Davis argued that the appropriate accommodation would be to remove her name and authorization from the marriage license form. *See* 2015 WL 9461520, at *3. If Davis believed that she had the authority to grant herself a KRFRA accommodation, she could have made *this* accommodation. Indeed, she suggests in a footnote that she *did* do so after the conduct relevant here. *See* Pet. 24 n.11. But for months prior, she adopted a policy that imposed a much more significant burden on the fundamental right to marry. Her decision to adopt the far more burdensome "accommodation" when a far less burdensome one was

[4] Indeed, the argument that the KRFRA allowed state officials to refuse to perform non-discretionary functions and deny citizens rights based solely on personal religious beliefs raises independent constitutional concerns, as noted by Judge Bush. *See* Pet. App. 31a n.1 (concurrence).

available would survive neither strict scrutiny nor rational basis review.

III. The Sixth Circuit defined the right at issue with adequate specificity.

Davis does not dispute that the only basis for her "no marriage licenses" policy was her personal opposition to same-sex marriage. And she does not appear to dispute that *Obergefell* made plain that personal opposition to same-sex marriage could not serve as a legitimate basis for denial of the fundamental right to marry. Her argument is that she did not deny Respondents the right to marry, but rather the "right to marry *on a marriage license issued in Rowan County, by Davis, with her name on it*," Pet. 32, and thus that the court of appeals failed to consider the right at issue with adequate specificity. Davis's argument is inconsistent with the factual allegations of the complaints, the court of appeals' decision, *Obergefell*, and this Court's qualified immunity precedents.

A. The question of specificity, like all other questions in the qualified immunity inquiry, is one of fair notice. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam); *Hope*, 536 U.S. at 739. This Court has repeatedly stated that such notice does not require the identification of "earlier cases involving 'fundamentally similar' facts" or even "'materially similar' facts." *Hope*, 536 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (stating that the Court "does not require a case directly on point for a right to be clearly established"). Indeed, in some instances, "a general constitutional rule already identified in the decisional

law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *United States v. Lanier*, 520 U.S. 259, 271 (1997) (alteration in original; quoting *Anderson*, 483 U.S. at 640).

Obergefell held that a state could not justify a statewide ban on same-sex couples' constitutional right to marry based solely on personal opposition to same-sex marriage. Davis's claim to qualified immunity turns on the theory that this Court's rejection of Kentucky's statewide refusal to issue marriage licenses to same-sex couples did not clearly establish that a countywide refusal to issue marriage licenses to same-sex couples for the same reason would likewise be unlawful. That theory is flatly inconsistent with the Court's opinion in *Obergefell*.

To begin with, as explained *supra* at 16, Davis's conduct did indeed function as a countywide ban on marriage licenses—not simply the deprivation of a license with Davis's name on it.

Furthermore, the fact that Davis did not deprive Respondents of the ability to obtain a license outside of her jurisdiction—depriving them of their constitutional right *only* to the maximum extent that she could—does not meaningfully distinguish the right at issue here from the one in *Obergefell*. In *Obergefell*, after all, the Court found that bans on same-sex marriage in Michigan and Kentucky unconstitutionally violated the fundamental right to marry, even though couples could marry in Minnesota and Illinois. And although the Court could have limited its decision to the question of whether same-sex marriages performed in one jurisdiction were

required to be honored by others, the Court instead held that depriving same-sex couples of the right to obtain a marriage license from their home states was itself a violation of the fundamental right to marry. *See* 135 S. Ct. at 2607–08 (noting resolution of broader question resolved narrower one). Thus, nothing about the Court's decision in *Obergefell* would suggest to a reasonable official that depriving same-sex couples of the right to marry would be constitutional if limited to only a portion of a state.

In addition, in rejecting the asserted bases for denying same-sex couples their fundamental right to marry, including sincerely held personal opposition, "[t]he 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." Pet. App. 16a. The Court's opinion cannot reasonably be read to suggest that personal opposition to same-sex marriage may be a valid reason to burden the rights of couples to marry as long as the burden does not entirely eliminate the fundamental right. Under *Obergefell*, state officials cannot infringe upon the right to marry based solely on personal opposition to same-sex marriage—period.

B. In arguing that *Obergefell* was not sufficient to put her on notice that personal opposition to same-sex marriage was not a constitutional basis to deny Respondents' their fundamental right to marry, Davis relies heavily on case law involving Fourth Amendment rights. *See* Pet. 28–29 (citing *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (excessive force); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (unreasonable seizure); *Anderson*, 483 U.S. at 640 (warrantless search); *Kennedy v. City of Villa Hills*, 635 F.3d 210, 214 (6th Cir. 2011) (wrongful arrest)).

She fails to note, however, that this Court has repeatedly recognized the need for a heightened specificity requirement in such cases in light of policy concerns specific to that context—including "the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Kisela*, 138 S. Ct. at 1152 (alteration and internal quotation marks omitted, quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)). These concerns are not present here, where Davis adopted a blanket policy that she maintained for months, even after a district court enjoined her continued application of that policy and after the Sixth Circuit and this Court denied her requests to stay an injunction of the policy.

Davis's argument that the Sixth Circuit misapplied its own precedent in *Occupy Nashville v. Haslam*, 769 F.3d 434 (6th Cir. 2014), Pet. 28–29, rings hollow for similar reasons. As a preliminary matter, this court does not typically grant review to determine whether a court of appeals misapplied its *own* precedent. To the extent an intracircuit conflict exists, as Justice Harlan explained, that is "an intramural matter to be resolved by the Court of Appeals itself." Harlan, *Manning the Dikes*, 13 Rec. Ass'n B. N.Y. City 541, 552 (1958). Here, the court of appeals denied *en banc* review without dissent. Pet. App. 2a.

In addition, this case bears no resemblance to *Occupy Nashville*. There, plaintiffs argued that a curfew prohibiting use of a public plaza overnight violated their First Amendment right to be present on the plaza to air their grievances against the government. 769 F.3d at 442. The state officials defined the right at issue differently, as a claimed

right to a "24-hour occupation" of the public square. *Id.* The state had looked to *Clark v. Community for Creative Non–Violence*, 468 U.S. 288 (1984), in fashioning the restriction, and both parties agreed that the answer to the "clearly established" question turned on that case. In *Clark*, this Court upheld a National Park Service ban on overnight camping on the National Mall, even though the ban restricted a homelessness-awareness protest. In *Occupy*, the court of appeals held that *Clark* provided the background understanding of what could and could not be done by the state to place a temporal limitation on use of the plaza, and that "reasonable government officials could, like the State Officials here, understand the law" as the defendants had. 769 F.3d at 445.

Occupy is far afield from the facts here. And the court's finding that the plaintiffs there were defining the right at too high a level of generality says nothing about the right at issue here, which this Court had recently addressed and which the Sixth Circuit had specifically applied in denying Davis's request for a stay of the preliminary injunction. *See Miller*, 2015 WL 10692640, at *1. In short, the generality of the right asserted by the *Occupy* plaintiffs says nothing about the specificity of the right asserted here and Davis's undisputed action to block Respondents from exercising that right in Rowan County.

C. Davis was further on "fair notice" that she was violating clearly established law, *see Brosseau*, 543 U.S. at 198, because Kentucky Governor Beshear issued a directive to all county clerks to license the marriages of legally eligible same-sex couples in Kentucky in order to comply with *Obergefell*. Pet. App. 130a; *cf. Hope*, 536 U.S. at 744 (explaining that the Court's conclusion that a prison's use of the hitching

post violated the Eighth Amendment was "buttressed by the fact that the DOJ specifically advised the [prison] of the unconstitutionality of its practices before the incidents in this case took place"). Indeed, in *Miller*, Davis sought relief from the Governor's directive, making plain that she knew it required her to comply absent an "accommodation" from the Governor.

Moreover, the Sixth Circuit's decision in *Miller* applied the holding of *Obergefell* directly to Davis's conduct. There, the court held that, "[i]n light of the binding holding of *Obergefell*, it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." 2015 WL 10692640, at *1. This decision plainly put Davis on notice that her specific conduct was unlawful, yet Davis continued to deny Respondents' requests for marriage licenses.

Given Governor Beshear's directive, the preliminary injunction, and the Sixth Circuit's ruling applying *Obergefell* directly to Davis's conduct, Davis's argument that the court below defined the right at too high a level of generality to put her "on notice that [her] conduct [wa]s unlawful," *Hope*, 536 U.S. at 739, is both unworthy of review and wholly devoid of merit.

IV. Qualified immunity is not available to Davis for knowingly refusing to perform a ministerial duty.

Qualified "[i]mmunity generally is available only to officials performing discretionary functions."

Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982). This limitation "reflect[s] an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Id.* at 807 (internal citation omitted, quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). The need to balance this latter value is not present when an official simply refuses to perform a ministerial duty that is required of her by law.

Under Kentucky law, county clerks do not have discretion whether to provide marriage license forms to legally eligible couples. *See* Pet. App. 13a ("Kentucky *required* Davis to issue marriage licenses to eligible couples."); 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)). Thus, the issuance of marriage licenses is a ministerial duty, not a discretionary act. *See* Pet. App. 32a–33a n.2 ("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." (emphasis added)).

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743. It does not apply to an official, like Davis, who defies the law by refusing to perform a ministerial duty that she knows is required of her, particularly after she has been ordered to do so by the governor and a federal court. *See id.* For this additional reason,

qualified immunity is not available to Davis for the conduct at issue here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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