

No. 16-6412

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

DAVID ERMOLD; DAVID MOORE
Plaintiffs-Appellants,

v.

KIM DAVIS, individually, and in her official capacity as
ROWAN COUNTY CLERK
Defendant-Appellee.

On Appeal From The United States District Court
For The Eastern District of Kentucky
In Case No. 15-cv-00046 Before The Honorable David L. Bunning

BRIEF OF APPELLEE KIM DAVIS

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, Appellant Kim Davis states that she is an individual person. Thus, Davis is not a subsidiary or affiliate of a publicly owned corporation, nor is there any publicly owned corporation, not a party to the appeal, that has a financial interest in its outcome.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTi

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIESiv

STATEMENT IN SUPPORT OF ORAL ARGUMENT viii

INTRODUCTION 1

STATEMENT OF JURISDICTION..... 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW2

STATEMENT OF THE CASE.....2

 A. Obergefell and the Kentucky Marriage Licensing Scheme.3

 B. Davis’ Sincerely-Held Religious Beliefs about Marriage.....4

 C. The Miller v. Davis Litigation.....4

 D. Appellants’ Lawsuit. 7

 E. Stay of Appellants’ Lawsuit.....8

 F. The Executive Order.8

 G. SB 216.9

 H. Dismissal of Appellants’ Claims..... 10

SUMMARY OF THE ARGUMENT 11

ARGUMENT 12

I. THE DISMISSAL ORDER SHOULD BE AFFIRMED BECAUSE APPELLANTS’ DAMAGES CLAIMS ARE NOT VIABLE AND ARE THEREFORE MOOT. 12

A.	Davis is Immune from Appellants’ Damages Claims.....	12
1.	In Her Official Capacity, Davis Is a State Agent with Sovereign Immunity under the Eleventh Amendment.	13
2.	In Her Individual Capacity, Davis Has Qualified Immunity from Appellants' Damages Claims Because Davis Did Not Violate Any Clearly Established Law.	17
3.	No Further Proceedings Are Required in the District Court on Immunity Issues Because the District Court Already Answered the Critical Immunity Questions on an Evidentiary Record.	28
4.	Dismissal of Appellants’ Action as Moot Was Appropriate Because Their Damages Claims Are Barred by Immunity	30
B.	Appellants’ Damages Claims Were Not Viable Because They Were Mooted by the Marriage License Executive Order.	34
II.	THE DISMISSAL ORDER SHOULD BE AFFIRMED BECAUSE THERE IS NO FEDERAL SUBJECT MATTER JURISDICTION OVER APPELLANTS’ DAMAGES CLAIMS.....	37
	CONCLUSION.....	41

TABLE OF AUTHORITIES

Cases

Adler v. Elk Glenn, LLC, 758 F.3d 737 (6th Cir. 2014)13

Aldini v. Johnson, 609 F.3d 858 (6th Cir. 2010)38

Anderson v. Creighton, 483 U.S. 635 (1987)18, 20,24

Brehm v. Wesseler, No. 09-60, 2011 WL 1704347
(E.D. Ky. May 4, 2011)37

Brosseau v. Haugen, 543 U.S. 194 (2004)20

Butz v. Economou, 438 U.S. 478 (1978).....27

Cady v. Arenac County, 574 F.3d 334 (6th Cir. 2009).....14

Campbell v. City of Springboro, 700 F.3d 779 (6th Cir. 2012).....18

Cope v. Heltsley, 128 F.3d 452 (6th Cir. 1997)20

Crocket v. Cumberland Coll., 316 F.3d 571 (6th Cir. 2003).....18

D’Ambrosio v. Marino, 747 F.3d 378 (6th Cir. 2014).....14

Daugherty v. Campbell, 935 F.2d 780 (6th Cir. 1991).....20

Estate of Carter v. Detroit, 408 F.3d 305 (6th Cir. 2005)17

Gibbs v. Lomas, 755 F.3d 529 (7th Cir. 2014)19, 26

Gottfried v. Med. Planning Servs., Inc., 280 F.3d 684 (6th Cir. 2002)*passim*

Graves v. Mahoning County, No. 4:10CV2821, 2015 WL 403156
(N.D. Ohio Jan. 28, 2015).....14

Graves v. Mahoning County, 821 F.3d 772 (6th Cir. 2016).....14

Harlow v. Fitzgerald, 457 U.S. 800 (1982) viii, 17, 27, 28, 31

Holzemer v. City of Memphis, 621 F.3d 512 (6th Cir. 2010)18

In re City of Detroit, No. 15-2236, 2016 WL 6677715
 (6th Cir. Nov. 14, 2016).....35

Kennedy v. City of Villa Hills, 635 F.3d 210 (6th Cir. 2011)20

Leslie v. Lacy, 91 F. Supp. 2d 1182 (S.D. Ohio 2000) 14

Loving v. Virginia, 388 U.S. 1 (1968)40

Malley v. Briggs, 475 U.S. 335 (1986)17

McQueary v. Conway, 614 F.3d 591 (6th Cir. 2010)6

Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978)30

Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015).....*passim*

Miller v. Davis, No. 15- 5880, 2015 WL 10692640 (6th Cir. Aug. 26, 2015).....6

Miller v. Davis, Nos. 15-5880, 15-5961, 15-5978, 2015 WL 10692638
 (6th Cir. Nov. 5, 2015).....6

Miller v. Davis, Nos. 15–588015, 15–5978, 2016 WL 3755870
 (6th Cir. July 13, 2016).....3, 10

Mitchell v. Forsyth, 472 U.S. 511 (1985)18, 31

Montgomery v. Carr, 101 F.3d 1117 (6th Cir. 1996)39

Morrison v. Bd. of Educ. of Boyd Cty., 521 F.3d 602 (6th Cir. 2008).....34

Nair v. Oakland County Cmty. Mental Health Auth., 443 F.3d 469
 (6th Cir.2006).....30

O’Malley v. City of Flint, 652 F.3d 662 (6th Cir. 2011).....20

Obergefell v. Hodges, 135 S. Ct. 2584 (2015).....*passim*

Pearson v. Callahan, 555 U.S. 223 (2009).....*passim*

Pinkhasov v. Petocz, 331 S.W.3d 285 (Ky. App. 2011).....14

Pusey v. City of Youngstown, 11 F.3d 652 (6th Cir. 1993).....14

Radvansky v. City of Olmsted Falls, 395 F.3d 291 (6th Cir. 2005).....37

Rondigo, LLC v. Twp. of Richmond, 641 F.3d 673 (6th Cir. 2011)17

Rybarczyk v. TRW, Inc., 235 F.3d 975 (6th Cir. 2000).....30

Ryo Mach., LLC v. U.S. Dep’t of Treasury, 696 F.3d 467 (6th Cir. 2012)34

Saucier v. Katz, 533 U.S. 194 (2001)18

Stein v. Regions Morgan Keegan Select High Income Fund, Inc.,
821 F.3d 780 (6th Cir. 2016)13, 33

Tenney v. Brandhove, 341 U.S. 367 (1951).....28

Thiokol Corp. v. Dep’t of Treasury, State of Mich. Revenue Div.,
987 F.2d 376 (6th Cir. 1993)13

Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703 (6th Cir. 2001).....39

Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993).....20

Zablocki v. Redhail, 434 U.S. 374 (1978)39

Statutes

28 U.S.C. § 13311, 2

28 U.S.C. § 1343(a)1, 2

42 U.S.C. § 19832, 35, 37

2016 Kentucky Laws Ch. 132 (SB 216),
General Assembly Reg. Sess. (Ky. 2016)..... *passim*

Kentucky Religious Freedom Restoration Act,
Ky. Rev. Stat. § 446.350 (2013)*passim*

Ky. Rev. Stat. § 402.0053
 Ky. Rev. Stat. § 402.08015, 38
 Ky. Rev. Stat. § 402.1003, 9, 15
 Ky. Rev. Stat. § 402.1109
 Ky. Rev. Stat. § 446.01016
 Ky. Rev. Stat. § 446.03016
 Ky. Rev. Stat. § 446.09016
 Ky. Rev. Stat. § 446.14016
 Ky. Rev. Stat. § 64.5275(1)14
 Ky. Rev. Stat. Ch. 4027,15
 Ky. Rev. Stat. Ch. 44615
 Md. Code Ann., Fam. Law § 2-401(a).....39

Other Authorities

13C Charles Alan Wright, Arthur R. Miller, et al., Fed. Prac. & Proc. Juris.
 § 3533.3 (3d ed.)31, 32, 33, 34
 Executive Order 2015-048 Relating to the Commonwealth’s
 Marriage License Form.....*passim*

Constitutional Provisions

Ky. Const. § 233A.....3
 Ky. Const. § 24614
 U.S. Const. amend. I21, 22, 24, 29
 U.S. Const. amend. XI2, 11, 12, 13, 14, 17

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee Kim Davis hereby requests oral argument in this appeal. Oral argument should be granted in this appeal because there are various bases upon which this Court may and should affirm the judgment of the district court, all of which involve complex federal questions such as mootness, subject matter jurisdiction, sovereign immunity, and qualified immunity. Moreover, the competing constitutional claims and defenses involved in this appeal significantly impact the societal costs of suits against public officials recognized by the Supreme Court in *Harlow v. Fitzgerald*: “The societal costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.” 457 U.S. 800, 814 (1982).

INTRODUCTION

In this appeal, Appellants Ermold and Moore seek to revive a controversy long since resolved. The controversy was not about whom a person may marry under Kentucky law, whether Kentucky must license the marriage of a same-sex couple, or even whether Appellants could obtain a Kentucky marriage license when they wanted one.

Nor was the controversy about a county clerk who wanted to re-litigate the Supreme Court's decision in *Obergefell v. Hodges*, or to prevent Appellants or any other same-sex couple from receiving a marriage license in Kentucky.

Rather, this case has always been about Appellants' attempt to force 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 Davis' religious liberty rights and provide the requested accommodation, even while ensuring no Kentuckian was denied a valid marriage license, Appellants want to reopen the controversy and force a new reckoning.

The district court properly dismissed this case, and this Court should affirm.

STATEMENT OF JURISDICTION

As set forth herein, the United States district court for the Eastern District of Kentucky ("district court"), did not have jurisdiction of this action under 28 U.S.C.

§ 1331 or 28 U.S.C. § 1343(a), because Appellants (Plaintiffs below) Ermold and Moore failed to state any viable claim permitted under 42 U.S.C. § 1983, and because their claims in any event are barred on grounds of qualified immunity and sovereign immunity under the Eleventh Amendment. Davis does not dispute, however, Appellants' statement of this Court's appellate jurisdiction to the extent that the Dismissal Order on appeal is a final order disposing of all parties' claims, and that Appellants timely filed their notice of appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether Appellants' damages claims are moot, and if not, whether this Court may nonetheless affirm dismissal of those claims on sovereign and qualified immunity grounds, or lack of subject matter jurisdiction.

STATEMENT OF THE CASE

Appellants appeal the dismissal of their purported Section 1983 damages action against Davis in her individual and official capacities, for violating Appellants' constitutional right to marry. (Compl., RE 1, Page ID ## 3-6.) Appellants, however, were not the first to sue Davis in the wake of *Obergefell*. Moreover, the legal landscape affecting marriage licenses in Kentucky has changed drastically since Appellants' suit was filed. These pre- and post-filing contexts of Appellants' lawsuit are presented below.

A. *Obergefell* and the Kentucky Marriage Licensing Scheme.

Importantly, prior to *Obergefell*, Kentucky constitutionally and statutorily defined marriage as the union between one man and one woman. Ky. Const. § 233A (2004); Ky. Rev. Stat. § 402.005 (1998). The pre-*Obergefell* statutory marriage license form included a license to marry under the name and authority of the county clerk. Ky. Rev. Stat. § 402.100 (2006); *Miller v. Davis*, 123 F. Supp. 3d 924, 931-32 (E.D. Ky. 2015), *vacated*, Nos. 15–588015, 15–5978, 2016 WL 3755870 (6th Cir. July 13, 2016).

On June 26, 2015, moments after the Supreme Court announced its decision in *Obergefell*, former Kentucky Governor Steven Beshear (“Gov. Beshear”) issued a directive to all Kentucky county clerks (hereinafter, the “SSM Mandate”) to “recognize as valid all same sex marriages performed in other states and in Kentucky.” (SSM Mandate, RE 1-1, Page ID # 7 (*see also Miller*, 123 F. Supp. 3d at 932).) In this SSM Mandate, Gov. Beshear further commanded, “Kentucky . . . must license and recognize the marriages of same-sex couples,” and ordered the creation and distribution of new marriage license forms to accommodate same-sex couples. (*Id.*) However, the new form retained the requirement to issue the license under the name and authority of the county clerk. (*See Miller*, 123 F. Supp. 3d at 931-32, 931 n.3.)

B. Davis' Sincerely-Held Religious Beliefs about Marriage.

Davis possesses a deeply-held Christian belief that marriage is a union between one man and one woman, only. (Compl., RE 1, Page ID ## 2-3, ¶¶ 16, 18 (*see also Miller*, 123 F. Supp. 3d at 932).) Davis cannot authorize the marriage of same-sex couples because it violates her core religious beliefs: In her sincere belief, the endorsement of her name and authorization equates to approval and agreement. (*See Miller*, 123 F. Supp. 3d at 932.) Following the SSM Mandate, due to her religious beliefs, Davis discontinued authorizing marriage licenses. (Compl., RE 1, Page ID ## 2-3, ¶¶ 16, 18 (*see also Miller*, 123 F. Supp. 3d at 929-930).) Rather than withdraw her authorization for only same-sex marriages, Davis withdrew her authorization to issue *any* marriage license in her name to *any* couple. (*See Miller*, 123 F. Supp. 3d at 929-930.)

C. The *Miller v. Davis* Litigation.

Appellants were not the first to file suit against Davis following *Obergefell*. On July 2, 2015, less than one week after Gov. Beshear issued his SSM Mandate, the plaintiffs in *Miller v. Davis* (two same-sex and two different-sex couples) filed suit alleging federal constitutional claims and demanding issuance of marriage licenses to them in Rowan County, under Kim Davis' name and authority. (*Miller v.*

Davis, No. 0:15-cv-44-DLB (E.D. Ky.), Compl., RE 1, Page ID ## 1-15.¹) The *Miller* Plaintiffs filed the action on behalf of themselves and “a putative class of individuals who are qualified to marry and who intend to seek a marriage license from the Rowan County Clerk.” (*Id.*)

On August 12, 2015, the district court preliminarily enjoined *Davis*, in her official capacity, “from applying her ‘no marriage licenses’ policy to future marriage license requests submitted by Plaintiffs.” (*Miller*, 123 F. Supp. 3d at 930, 944.) On September 3, 2015, the district court expanded the preliminary injunction to apply to “other individuals who are legally eligible to marry in Kentucky.” (*Miller*, Order, Sep. 3, 2015, RE 74, Page ID # 1557.) *Davis* appealed the August 12 and September

¹ Although the district court did not formally consolidate *Miller* with the instant case below, the court treated the cases, along with a third case, *Yates v. Davis*, as consolidated for some purposes, including dismissal in the order on appeal. (*See* Dismissal Order, RE 19, Page ID # 95-97 (dismissing together *Miller*, *Yates*, and the instant case under the caption *In re: Ashland Civil Actions*, referring to *Miller* as “the lead case”); *see also* Order, RE 13, Page ID # 74 (staying briefing in instant case pending outcome of appeal in “related case” *Miller*)). Furthermore, the district court expressly contemplated Appellants’ claims below when it expanded the *Miller* preliminary injunction to benefit not only the *Miller* Plaintiffs, but all persons who may seek a marriage license in Rowan County. (*Miller*, Hr’g Tr. Sep. 3, 2015, RE 78, Page ID ## 1571:4-1581:17 (“There are a couple of companion cases, [*Ermold*, 15-]46 and [*Yates*, 15-]49? 51? I can’t remember the numbers, but there are three cases now pending with various plaintiffs.”) (“[I]n granting that relief that’s requested at Docket 68, the Court finds that given the fact that it does have two companion cases that involve, in essence, the very same allegations with the same lawyers, it just makes judicial sense to have the Circuit review the decision for all three of them.”)) Accordingly, it is appropriate to consider some portions of the *Miller* proceedings as part of the record in the instant case.

3, 2015 preliminary injunction orders to this Court. (*Miller v. Davis*, 6th Cir. Case No. 15-5880.²)

At the September 3, 2015 district court hearing in *Miller*, where the court expanded the *Miller* preliminary injunction to apply to Appellants, the district court expressed hope for a legislative or executive accommodation of the kind ultimately granted by Gov. Bevin in the Executive Order (*see infra* Statement of the Case Parts F, G), and made permanent by the enactment of SB 216: “I recognize, and I mentioned this when we first came out earlier this morning, that **the legislative and executive branches do have the ability to make changes. And those changes may be beneficial to everyone. Hopefully, changes are made.**” (*See Miller*, Hr’g Tr. Sept. 3, 2015, RE 78, Page ID #1658:5-9 (emphasis added)). “**If legislative or executive remedies . . . come to fruition, as I stated, better for everyone.**” *Id.* at

² Davis also sought from this Court stays of the enforcement of the district court’s August 12 and September 3, 2015 preliminary injunction orders, and motions panels of this Court denied those motions on August 26, 2015, *Miller v. Davis*, No. 15-5880, 2015 WL 10692640 (6th Cir. Aug. 26, 2015), and November 5, 2015, *Miller v. Davis*, Nos. 15-5880, 15-5961, 15-5978, 2015 WL 10692638 (6th Cir. Nov. 5, 2015). Appellants rely on these motions panel decisions to support their arguments against dismissal of their damages claim. (Appellants’ Br. 18.) However, when hearing the appeal of a final order, this Court is not bound by decisions of earlier interlocutory appeal or motions panels in the *same* case, *see McQueary v. Conway*, 614 F.3d 591, 599 (6th Cir. 2010), and certainly not by motions panel decisions in *other cases*. In any event, the legal landscape in Kentucky was changed significantly by the Executive Order and enactment of SB 216 (*see infra* Statement of the Case Parts F, G), obviating any continued relevance of those prior motions panel decisions.

Page ID. # 659:3-5 (emphasis added).

At the same hearing, the district court granted the motion of Kentucky Senate President Robert Stivers for leave to file an amicus brief in support of Davis (*Miller*, Hr’g Tr. Sept. 3, 2015, RE 78, Page ID ## 1581:20-1582:23), in which he advised the court that “the concept of marriage as between a man and a woman is so interwoven into KRS Chapter 402 that the defendant County Clerk cannot reasonably determine her duties until such time as the General Assembly has clarified the impact of *Obergefell* by revising KRS Chapter 402 through legislation,” or “[a]lternatively the clerk’s duties could be clarified by Executive Order of the Governor” (*Miller*, Mot. Ky. Senate Pres. Stivers Leave to File Br. as *Amicus Curiae*, RE 73, Page ID ## 1547-48.)

D. Appellants’ Lawsuit.

Appellants filed suit against Davis on July 10, 2015. (Compl., RE 1, Page ID # 1-6.) Appellants are two males residing in Rowan County, Kentucky, who purportedly desired a Kentucky marriage license. (Compl., RE 1, Page ID # 2 ¶¶ 7, 13-14.) Based on *Obergefell* and Gov. Beshear’s SSM Mandate, Appellants claimed their constitutional right to marry included the right to be issued a marriage license **by Davis, in Rowan County**. (Compl., RE 1, Page ID ## 1-2,4, ¶¶ 3-4, 7-8, 11-13, 30.) Davis’ observance of her “deeply held Christian beliefs” about marriage, Appellants claimed, violated their constitutional right to marry. (Compl., RE 1, Page

ID ## 2, 4, ¶¶ 12, 16, 30.) Plaintiffs sought actual and punitive damages, pre- and post-judgment interest, and attorneys' fees and costs against Davis. (*Id.* Page ID # 6.)

E. Stay of Appellants' Lawsuit.

Davis moved to dismiss Appellants' complaint on August 4, 2015. (Mot. Dismiss, RE 11, Page ID ## 34-36; Mem. Supp. Mot. Dismiss, RE 11-1, Page ID ## 37-63.) Appellants filed their response in opposition on August 25, 2015. (Resp. Opp'n Mot. Dismiss, RE 12, Page ID ## 65-73.³) Due to Davis' appeals to this Court in *Miller v. Davis*, however, the district court stayed any further briefing of Davis' motion to dismiss on August 26, 2015, pending this Court's decision in the *Miller* appeals. (Order, RE 13, Page ID # 74).

F. The Executive Order.

On December 22, 2015, newly elected Kentucky Governor Matt Bevin ("Gov. Bevin") issued Executive Order 2015-048 Relating to the Commonwealth's Marriage License Form (the "Executive Order") (Exec. Order, Addendum 2), which explicitly acknowledged the protections afforded Kentucky county clerks under Kentucky's Religious Freedom Restoration Act ("Kentucky RFRA"), Ky. Rev. Stat.

³ Appellants later moved the district court to resume the briefing schedule on Davis' motion to dismiss (Mot. for Briefing Schedule, RE 14, Page ID ## 75-76), which was ultimately denied as moot in the dismissal order which is on appeal. (Order, RE 19, at Page ID # 97.)

§ 446.350 (2013). Specifically, the Executive Order established the substantial burden of the SSM Mandate on the free exercise of religion by some county clerks and their employees, the Kentucky RFRA requirement that the Commonwealth use the least restrictive means available to carry out Kentucky marriage license policy in light of that substantial burden, and the Commonwealth's legal obligation to comply with Kentucky RFRA through the creation and provision of a revised marriage license form removing the requirement of a county clerk's name and authority. (Exec. Order, Add. 2.)

G. SB 216.

On July 14, 2016, Kentucky Senate Bill 216 ("SB 216") took effect, permanently modifying Kentucky law regarding the issuance and authorization of marriage licenses beyond the Executive Order. Specifically, SB 216 expressly modified the Kentucky marriage licensing scheme to remove entirely a County Clerk's name, personal identifiers, and authorization from any license, thereby providing through a permanent change in the law the very religious accommodation Davis sought from the beginning of this litigation. The Kentucky Legislature unanimously passed SB 216 and Gov. Bevin signed it into law on April 13, 2016, thereby amending Ky. Rev. Stat. §§ 402.100 and 402.110. *See* 2016 Kentucky Laws Ch. 132 (SB 216), General Assembly Reg. Sess. (Ky. 2016).

H. Dismissal of Appellants' Claims.

The enactment of SB 216 rendered moot Davis' appeals from the district court's preliminary injunction orders in *Miller*. Accordingly, this Court dismissed the appeals and remanded the case to the district court, instructing it to vacate the August 12 and September 3, 2015 preliminary injunction orders. (Dismissal Order, RE 19, Page ID ## 95-97 (quoting *Miller v. Davis*, Nos. 15-5880, 15-578, 2016 WL 3755870).)

After vacating the preliminary injunction orders in accordance with this Court's mandate, the district court consolidated the instant case with *Miller* and *Yates*, under the caption *In re: Ashland Civil Actions*, for the purpose of finally dismissing all three actions as moot:

In light of these proceedings, and in view of the fact that the marriage licenses continue to be issued without incident, there no longer remains a case or controversy before the [district court]. Accordingly, for the reasons stated herein,

. . . .

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

(Dismissal Order, RE 19, Page ID ## 96-97 (citations omitted).) This appeal of the Dismissal Order ensued.

SUMMARY OF THE ARGUMENT

The dismissal of Appellants' damages claims should be affirmed because Appellants' claims are moot. Pursuant to the marriage license directive of Kentucky Governor Steven Beshear following the Supreme Court's *Obergefell v. Hodges* decision, the Appellants' suit claimed 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 immune from Appellants' damages claims—by Eleventh Amendment sovereign immunity in her official capacity as a state actor, and by qualified immunity in her individual capacity. Accordingly, Appellants' damages claims were not viable, and the district court properly dismissed Appellants' action as moot.

Appellants' damages claims also are moot due to a change in law that fundamentally changed the legal framework in which the claims must be considered. The marriage license executive order entered by the succeeding Kentucky Governor Matt Bevin in December 2015 not only changed the Kentucky marriage license form for all marriages in the future, but it also established with the force of law that Davis was entitled, under Kentucky's Religious Freedom Restoration Act, to relief from the Governor Beshear mandate to issue marriage licenses to same-sex couples under her name and authority, in violation of her conscience. Because Appellants never

claimed their constitutional right to marry was violated by a Kentucky marriage licensing policy that granted Davis an accommodation under Kentucky's Religious Freedom Restoration Act, Appellants pre-executive order damages claims no longer live, and are therefore moot.

Finally, the district court lacked subject matter jurisdiction of Appellants' claims because Appellants case presented no cognizable federal constitutional question. Specifically, Appellants 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 state policy was preventing either Appellant from marrying whom he wanted to marry, or obtaining a valid Kentucky marriage license.

ARGUMENT

I. THE DISMISSAL ORDER SHOULD BE AFFIRMED BECAUSE APPELLANTS' DAMAGES CLAIMS ARE NOT VIABLE AND ARE THEREFORE MOOT.

A. Davis is Immune from Appellants' Damages Claims.

Davis is immune from Appellants' damages claims—by sovereign immunity under the Eleventh Amendment in her official capacity (*see infra* Part I.A.1), and by qualified immunity in her individual capacity (*see infra* Part I.A.2). No further district court proceedings are necessary on the immunity issue because the district court already made the critical immunity findings. (*See infra* Part I.A.3)

Where damages claims are barred by immunity under the circumstances

present in this case, dismissal of the action is appropriate. (*See infra* Part I.A.4.) Indeed, the district court couched its dismissal of Appellants' case in terms of mootness (Dismissal Order, RE 19, Page ID ## 96-97 (concluding that "there no longer remains a case or controversy before the [district court]")). But this Court may affirm the Dismissal Order "for any reason supported by the record, including on grounds different from those on which the district court relied." *Stein v. Regions Morgan Keegan Select High Income Fund, Inc., et al.*, 821 F.3d 780, 786 (6th Cir. 2016); *see also Adler v. Elk Glenn, LLC, et al.*, 758 F.3d 737 (6th Cir. 2014) (Sutton, Cir. J., concurring) ("If the district court reaches the right result, we must in general affirm its decision, whether it gave the right reasons, the wrong reasons, *or no reasons at all.*" (emphasis added)). Thus, whether or not couched in terms of mootness, the Dismissal Order should be affirmed because Davis is immune from Appellants' damages claims.

1. In Her Official Capacity, Davis Is a State Agent with Sovereign Immunity under the Eleventh Amendment.

The Eleventh Amendment "bars suits for monetary relief against state officials sued in their official capacity," *Thiokol Corp. v. Dep't of Treasury, State of Mich. Revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993); *see also Gottfried v. Med. Planning Servs., Inc.*, 280 F.3d 684, 692 (6th Cir. 2002) ("[I]t is well established that states and state officers acting in their official capacities are immune from suits for

damages in federal court . . .”). Where a county officer’s duties “clearly flow from the State,” the officer is a state official for purposes of Eleventh Amendment immunity. *Gottfried v. Med. Planning Servs., Inc.*, 280 F.3d at 693 (holding county sheriff state official when enforcing state court injunction); *cf. D’Ambrosio v. Marino*, 747 F.3d 378, 387 (6th Cir. 2014) (holding county prosecutor state official when prosecuting state crimes); *Cady v. Arenac County*, 574 F.3d 334, 342 (6th Cir. 2009) (same); *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993) (“[A] city official pursues her duties as a state agent when enforcing state law or policy.”); *Graves v. Mahoning County*, No. 4:10CV2821, 2015 WL 403156, *6 (N.D. Ohio Jan. 28, 2015) (holding township clerks acted as state officials when issuing arrest warrants pursuant to state statute), *aff’d*, 821 F.3d 772 (6th Cir. 2016); *Leslie v. Lacy*, 91 F. Supp. 2d 1182, 1194 (S.D. Ohio 2000) (holding county clerk acted as agent of state, not county, where relevant job duties specified by state law and subject to control of state).

Kentucky law leaves no doubt that, in issuing and declining to issue marriage licenses, Davis is a state official. County clerks, such as Davis, are statutorily conferred duties and jurisdiction “coextensive with that of the Commonwealth.” *See* Ky. Rev. Stat. § 64.5275(1); *see also* Ky. Const. § 246. In Kentucky, the Commonwealth has “absolute jurisdiction over the regulation of the institution of marriage.” *Pinkhasov v. Petocz*, 331 S.W.3d 285, 291 (Ky. App. 2011). All matters

relating to marriage in Kentucky, including its definition and the procedures for licensing, solemnizing, and dissolving marriages are governed by Chapter 402 of the Kentucky Revised Statutes. In particular, the duty of county clerks to issue marriage licenses is governed by section 402.080, and the license form that county clerks must use for marriage licenses by section 420.100. Gov. Beshear's SSM Mandate was a directive from the state to all county clerks in the state. In light of this absolute state control over marriage in Kentucky, the district court below found, in the related *Miller* case,

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. Thus, **Davis likely acts for the State of Kentucky, and not as a final policymaker for Rowan County, when issuing marriage licenses.**

123 F. Supp. 3d at 933 (citations omitted) (emphasis added).

Davis' marriage licensing duties and obligations "clearly flow from the state." *See Gottfried*, 280 F.3d at 693. And Davis' decision *not* to issue marriage licenses was no less the act of a state official because that decision was likewise sanctioned by Kentucky state law. As ultimately acknowledged by Governor Bevin's Executive Order and by legislative enactment, Davis' right to relief from carrying out Gov. Beshear's SSM Mandate against her conscience is protected by and entrenched in

Kentucky RFRA⁴ which provides, in pertinent part:

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).

Kentucky RFRA 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

⁴ Davis’ Kentucky RFRA defenses to Appellants’ claims are in addition to her other defenses, including the enumerated United States and Kentucky Constitutional protections for conscience, religious liberty, and speech. (*See* Mot. Dismiss Pls.’ Compl., RE 11, Page ID ## 34-36; Mem. Law Supp. Mot. Dismiss Pls.’ Compl., RE 11-1, Page ID ## 37-63.)

statutes. Moreover, the specific application of this right to county clerks in the issuance of marriage licenses was expressly established by the Executive Order. Accordingly, both in issuing marriage licenses, and in not issuing licenses pursuant to Kentucky RFRA, Davis was at all times a state official enforcing state law.

Because Appellants' damages claims against Davis in her official capacity constitute damages claims against a state official, the claims are barred by the Eleventh Amendment, and this Court should affirm the Dismissal Order.

2. In Her Individual Capacity, Davis Has Qualified Immunity from Appellants' Damages Claims Because Davis Did Not Violate Any Clearly Established Law.

Qualified immunity generally “shields 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.’” *Estate of Carter v. Detroit*, 408 F.3d 305, 310–11 (6th Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. at 818). This immunity is granted broadly and “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). “Qualified immunity is ‘an immunity from suit rather than a mere defense to liability.’” *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (citation omitted). “The purpose of the doctrine is to ensure that insubstantial claims against government officials are resolved at the earliest possible stage in litigation,” *Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 681

(6th Cir. 2011) (citing *Pearson*, 555 U.S. at 231), thereby saving the official from the burdens of discovery and the costs of trial. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity is also intended to serve the public interest “by permitting officials to take action with independence and without fear of consequences.” *Crocket v. Cumberland Coll.*, 316 F.3d 571, 579 (6th Cir. 2003) (internal quotations omitted).

In reviewing qualified immunity at this stage, this Court determines whether an official is entitled to qualified immunity under a two-step 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)). In connection with this second inquiry, Sixth Circuit Courts consider whether the official’s alleged conduct was objectively unreasonable in light of a clearly established constitutional right. *See, e.g., Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2010); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987). “Unless the plaintiff’s allegations state a claim of violation of **clearly established law**, a defendant pleading qualified immunity is entitled to dismissal before commencement of discovery.” *Mitchell*, 472 U.S. at 526 (emphasis added).

The Supreme Court, in *Pearson v. Callahan*, 555 U.S. 223, examined the two-step inquiry set forth in *Saucier*, and concluded,

while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

555 U.S. at 236. This conclusion was appropriate, in part, because “[t]here are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” *Id.* at 237. Thus, “[i]f *either* inquiry is answered in the negative, the defendant official is entitled to [prevail].” *See Gibbs v. Lomas*, 755 F.3d 529, 537 (7th Cir. 2014) (holding police officer entitled to qualified immunity where alleged constitutional right not clearly established).

In the case at bar, Appellants have failed to allege facts sufficient to overcome the application of the doctrine of qualified immunity, and the dismissal of their action as to Davis individually can and should be affirmed on this basis. As discussed *infra* in Part II, and incorporated by reference here, Appellants have failed to state a viable federal constitutional claim: There is no constitutional right for any couple to receive a marriage license **from a particular official, in a particular place**.

But even if Plaintiffs had sufficiently alleged the violation of a federal constitutional right, they have not demonstrated a “clearly established” constitutional right. 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. City of Villa Hills*, 635 F.3d 210, 214 (6th Cir. 2011) (emphasis added) (quoting *Anderson*, 483 U.S. at 640) (internal quotations omitted). The official’s “unlawfulness” must be “apparent” in “the light of pre-existing law.” *Anderson*, 483 U.S. at 640.

In deciding whether a constitutional right is clearly established, the Sixth Circuit “look[s] first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.” *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993) (quoting *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991); see also *O’Malley v. City of Flint*, 652 F.3d 662, 667-68 (6th Cir. 2011). “This standard requires the courts to examine the asserted right **at a relatively high level of specificity**,” and “on a fact-specific, case-by-case basis.” *Cope v. Heltsley*, 128 F.3d 452, 458–59 (6th Cir. 1997) (emphasis added) (internal quotation marks and citations omitted). Where a case arises in an area “in which the result depends very much on the facts of each case,” and no case “squarely governs the case here,” no clearly established right is demonstrated. See *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004).

The relevant constitutional question in this matter is **not** whether the Commonwealth of Kentucky is required to license and recognize SSM as a matter of clearly established law. Immediately after *Obergefell*, Gov. Beshear publicly

declared that Kentucky will issue SSM licenses and recognize SSM licenses issued by other states. (*See* Compl., RE 1, Page ID # 2, ¶ 11; *see also* Beshear Letter, RE 1-1, Page ID # 7.) Instead, the particular inquiry governing this specific matter is whether each and every county clerk must authorize and approve SSM **without any accommodation for their sincerely-held religious beliefs**. This issue has not been specifically litigated in Kentucky, let alone decided by the Sixth Circuit or the Supreme Court (either in its recent *Obergefell* decision or any other case), and therefore the law cannot be “clearly established.” Certainly then, this case is not “squarely” governed by any single case, or set of cases.

To the extent Appellants point to any “pre-existing law” that was clearly established, *see Anderson*, 483 U.S. at 640, to overcome Davis’ qualified immunity, they will be limited exclusively to the sudden redefinition of marriage on June 26, 2015 in the *Obergefell* decision. But **in *Obergefell*, the Court unanimously agreed that First Amendment protections remain despite same-sex “marriage.”** *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Specifically, dissenting justices in *Obergefell* recognized that “[m]any good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion” is specifically “spelled out” in the First Amendment of the Constitution. *Obergefell*, 135 S.Ct. at 2625 (Roberts, C.J., dissenting). Continuing, these Justices noted that “[r]espect for sincere religious conviction has led voters and legislators in every State that has

adopted same-sex marriage democratically to include accommodations for religious practice.” *Id.*; *see also id.* at 2638 (explaining the historical significance of “religious liberty”) (Thomas, J., dissenting). **The majority opinion also recognized that religious freedoms continue unabated even as they redefined marriage:**

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and **persons** are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Obergefell, 135 S.Ct. at 2607 (Kennedy, J., majority) (emphasis added).

Not only that, but the nature of the religious objection in the context of marriage is even more firmly established in history because the “meaning of marriage” as a union between one man and one woman “has persisted in every culture,” “has formed the basis of human society for millennia,” and has singularly “prevailed in the United States throughout our history.” *Obergefell*, 135 S. Ct. at 2612-13 (Roberts, C.J., dissenting); *see also id.* at 2641 (“For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.”) (Alito, J., dissenting). In fact, the majority in *Obergefell* conceded that the institution of marriage as exclusively a union between a man and a woman “has existed for millennia and across civilizations” and this view “long has been held—

and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” *Obergefell*, 135 S. Ct. at 2594 (Kennedy, J., majority) (emphasis added). Thus, although the traditional view of marriage was discarded in *Obergefell*, that long-held view of marriage provides the historical underpinnings for a religious exemption and accommodation from the redefinition of marriage.

The Supreme Court, in *Obergefell*, specifically recognized the tensions that would occur for religious believers and in the law regarding religious accommodations. In *Pearson v. Callahan*, the Supreme Court also specifically contemplated how to analyze claims of qualified immunity in the face of such tensions when it receded from its holding in *Saucier*: “A constitutional decision resting on an **uncertain interpretation of state law** is also of doubtful precedential importance.” *Id.* at 238 (emphasis added). Where Appellants rely on the district court’s preliminary injunction decision and this Court’s motions panel decisions in *Miller v. Davis* (see Appellants’ Br. 18), regarding Davis’ likelihood of success on the merits, any preliminary rejection of qualified immunity at that time necessarily relied on an uncertain interpretation of state law (specifically, the interplay of Kentucky’s marriage licensing statutes and Kentucky RFRA). Appellants’ alleged constitutional violation of a newly minted right to marry for same-sex couples (which is more accurately stated as the right to have a license issued by a particular county clerk, in a particular county) is in direct competition with Davis’

constitutional and statutory rights, specifically including the right to a reasonable accommodation of her religious beliefs under Kentucky RFRA. When Appellants filed their Complaint just two weeks after the *Obergefell* decision, the Kentucky courts had not determined whether Kentucky RFRA would afford a county clerk, who is an elected official, a reasonable accommodation of her religious beliefs. The right to same-sex “marriage” was literally brand new.

To be sure, the district court below, in its preliminary injunction order in the companion *Miller* case, immediately recognized the tension presented by the newfound right to same-sex marriage in *Obergefell*:

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.

Miller, 123 F. Supp. 3d at 930 (emphasis added). This acknowledgement by the district court was not some casual observation, for it was made with the benefit of a factual record following two evidentiary hearings on the *Miller* plaintiffs’ motion for preliminary injunction, and was therefore *Id.* at 930.

The *Obergefell* Court and the district court below acknowledged the tension between old and new rights, and Kentucky’s highest officials took action to resolve

it. Kentucky Senate President Robert Stivers showed the district court below that *Obergefell* made the law unclear, requiring action by the Kentucky Governor or General Assembly to clarify the respective rights of county clerks and marriage licensees. (*Miller*, E.D. Ky. No. 0:15-cv-44-DLB, Mot. Ky. Senate Pres. Stivers Leave to File Br. as *Amicus Curiae*, RE 73, Page ID ## 1547-48.) Gov. Bevin answered the tension with his Executive Order, which explicitly recognized the substantial burden placed upon county clerks' religious beliefs, explicitly declared that there was no compelling governmental interest to justify requiring the name and authority of county clerks on marriage licenses, and explicitly declared that a reasonable accommodation could easily and must be made. (Exec. Order, Addendum 2.) The Kentucky General Assembly further answered the tension by unanimously passing SB 216. (*See supra* Statement of the Case Part G.) Given that Kentucky's highest executive and legislative branch officials took official action to not only identify the uncertainty and tension in Kentucky marriage law following *Obergefell*, but also to explicitly vindicate Davis' position (which official action the district court invited as "better for everyone," *see supra* Statement of the Case Part C), it cannot be reasonably argued that the supposed right asserted by Appellants was clearly established (if established at all). As the Supreme Court noted in *Pearson v. Callahan*, "where there is a divergence of views on [the constitutional question],

it is improper to subject [the public officials] to money damages for their conduct.” 555 U.S. at 245.

A similar situation occurred in the Seventh Circuit case *Gibbs v. Lomas*, 755 F.3d 529. In *Gibbs*, the plaintiff challenged the constitutionality of the defendant Wisconsin police officer’s arrest and search of the plaintiff’s car, and the qualified immunity analysis centered on a recently amended law’s effect on the reasonableness of the officer’s actions. 755 F.3d at 532. The incidents in question took place the year following enactment of the amended law. *Id.* at 532, 539. At that time, the “Wisconsin courts [had] not yet answered important questions about [the amended statute],” such as what specific kind of conduct would be prohibited or protected. *Id.* at 539. Thus, the Seventh Circuit determined that it “would be imprudent to base our decision on speculation about the appropriate scope of the Wisconsin statute.” Because the “interpretive problems [were] best answered by the Supreme Court of Wisconsin,” the court held that “the alleged right at issue was not clearly established at the time [the officer] acted.” *Id.* at 540 (internal quotation marks and citation omitted).

Like the situation in *Gibbs*, prior to the Kentucky General Assembly’s enactment of SB 216, the Kentucky courts had not decided how requests for religious accommodations would be addressed either constitutionally or under Kentucky RFRA by those required to execute the state’s marriage laws. The instant litigation

(with related cases), coupled with Gov. Bevin's and the General Assembly's swift actions to recognize the need for and provide an accommodation at the state level, demonstrate not only that the alleged right in question (the right to obtain a marriage license from a specific clerk in a specific county) was not clearly established (thus making Davis' conduct reasonable), but also that making judicial decisions on the alleged constitutional question without input from Kentucky courts is not prudent.

In light of the foregoing, Appellants have not sufficiently alleged that Davis' actions were objectively unreasonable to survive dismissal of their claims on qualified immunity grounds. Although Appellants' Complaint includes perfunctory allegations of malice and bad faith (Compl., RE 1, Page ID # 5, ¶¶ 31- 35), "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. at 817-18. In this case, Appellants' Complaint is bereft of anything beyond a bare allegation of malice, bad faith, or the like. Conversely, the Complaint explicitly alleges the critical fact that Davis' actions were based upon her "deeply held Christian beliefs." (Compl., RE 1, Page ID # 2, ¶ 16.) The very basis for the Supreme Court's adherence to a broad grant of qualified immunity rests upon the doctrine as "the best attainable accommodation of competing values," *Harlow*, 457 U.S. at 814 (citing *Butz v. Economou*, 438 U.S. 478, 507-08 (1978)). This is so because, in light of "claims that frequently run against the innocent as well as the

guilty—at a cost not only to the defendant officials, but to society as a whole.” *Harlow*, 457 U.S. at 814. “In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed.” *Harlow*, 457 U.S. at 815, n.23 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951)).

In sum, in light of the suddenly changed legal landscape engendered by the Supreme Court’s ruling in *Obergefell*, the enumerated United States and Kentucky Constitutional protections for conscience, religious freedom, and speech, the long-standing historical definition of marriage in Kentucky that comports with Davis’ sincerely-held religious beliefs, the undisputed conviction with which Davis holds her religious beliefs, and the obvious constitutional conflict presented by the case at bar, the doctrine of qualified immunity protects Davis from any civil damages in her individual capacity. Therefore, this Court should affirm the dismissal of Appellants’ claims against Davis individually.

3. No Further Proceedings Are Required in the District Court on Immunity Issues Because the District Court Already Answered the Critical Immunity Questions on an Evidentiary Record.

As shown above, the district court has already answered the critical immunity questions in the companion *Miller* case. Thus, no further proceedings in the district court on immunity issues are required to uphold the Dismissal Order.

With respect to sovereign immunity, in the *Miller* companion case preliminary injunction order, the district court already concluded that Davis acts as a state official in the issuance of marriage licenses:

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. Thus, **Davis likely acts for the State of Kentucky, and not as a final policymaker for Rowan County, when issuing marriage licenses.**

123 Supp. 3d at 933 (citations omitted) (emphasis added).

With respect to qualified immunity, also in the *Miller* companion case preliminary injunction order, the foundation of the district court's ruling was the conflict between an established, explicit right and a new, implicit right, showing that the applicable law was far from "clearly settled":

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.

Miller, 123 F. Supp. 3d at 930 (emphasis added).

With respect to both the sovereign immunity and qualified immunity issues, this Court can and should uphold the district court's rulings on the critical immunity questions, which involve purely legal questions and no disputed matters outside the

record.⁵ *See Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 984 (6th Cir. 2000) (“Here, however, we have a pure question of law that cries out for resolution—and in such a situation we are not foreclosed from considering the issue.”).

4. Dismissal of Appellants’ Action as Moot Was Appropriate Because Their Damages Claims Are Barred by Immunity.

Generally, “where a claim for injunctive relief is moot, relief in the form of damages for a past constitutional violation is not affected.” *Gottfried v. Med. Planning Servs., Inc.*, 280 F.3d at 691. But this general rule has limits: “[A] claim for damages must not be ‘so insubstantial or so clearly foreclosed by prior decisions that th[e] case may not proceed.’” *Id.* at 691 (quoting *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (second alteration in original)). Thus, damages claims that are insubstantial or clearly foreclosed cannot save an otherwise moot action from dismissal. “The key question therefore is whether [the plaintiff] has a *viable* claim for damages.” *Id.* at 691 (italics in original).

Leading commentators on federal practice present these rules as follows:

⁵ The qualified immunity issue was fully briefed in the court below, in this case. (See Mem. Law Supp. Mot. Dismiss Pls.’ Compl., RE 11-1, Page ID ## 54-59; Pls.’ Resp. Opp’n Def. Mot. Dismiss, RE 12, Page ID ## 71-72.) Sovereign immunity, like subject matter jurisdiction, may be raised at any time, including on appeal. *See Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 474 (6th Cir.2006) (“Like subject-matter jurisdiction, a sovereign-immunity defense may be asserted for the first time on appeal, and it may (and should) be raised by federal courts on their own initiative.” (citations omitted)).

A damages claim suffices to avoid mootness only if viable. There is little point in asserting that an action that seeks only damages is “mooted” upon a ruling that damages are not available for the claimed injury. But **if other relief is sought and has become moot, it is appropriate to dismiss the action as moot, without deciding the merits of the claimed wrong, if damages are not legally available for that wrong or the defendant is immune.**^[6]

13C Charles Alan Wright, Arthur R. Miller, et al., Fed. Prac. & Proc. Juris. § 3533.3 (3d ed.) (emphasis added).

When the district court’s dismissal of the instant case is considered in its full context, it is easy to see how the court applied the applicable mootness rules. The district court dismissed Appellants’ case as one of the three *Ashland Civil Actions* the court treated as companion cases. (Dismissal Order, RE 19, Page ID ## 95-97.) The court concluded the cases were moot (*see id.* at Page ID # 96 (“there no longer

⁶ According to the Supreme Court, an immunity defense renders a damages claim **insubstantial**:

[T]he *Harlow* Court refashioned the qualified immunity doctrine in such a way as to “permit the resolution of many **insubstantial** claims on summary judgment” and to avoid “subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery” in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.

Mitchell v. Forsyth, 472 U.S. at 526 (quoting *Harlow v. Fitzgerald*, 457 U.S. at 817-18) (emphasis added) (second alteration in original). The Court’s equating the immunity and insubstantial concepts further reveals the harmony between this Court’s and Wright & Miller’s formulations of the applicable mootness rules.

remains a case or controversy”), expressly as the result of this Court’s proceedings concerning the mootness of the *Miller* plaintiffs’ injunctive relief claims and Davis’ related appeals (*see id.* (“In light of these proceedings”).) The companion injunctive relief claims having become moot, the clear implication of the district court’s dismissal of the three actions as moot is the court’s determination that none of the remaining damages claims was viable. Whether the damages claims were not viable because of Davis’ immunity, *see* 13C Wright & Miller, Fed. Prac. & Proc. Juris. § 3533.3 (“[I]t is appropriate to dismiss the action as moot . . . if . . . the defendant is immune.”) (*see supra* Parts I.A.1, 2), or were “clearly foreclosed” or “not legally available” due to the change in applicable law effected by the Executive Order (*see infra* Part I.B), dismissal for mootness was appropriate and supported by the record.

Appellants seek to avoid the viability question by putting form over substance. Essentially, Appellants argue damages claims cannot be dismissed as moot unless they are coupled with non-monetary claims that have become moot. (Appellants’ Br. 22-23 (citing *Gottfried*, 280 F.3d at 691).) Only then, Appellants argue, may the Court question the viability of the damages claims under the insubstantial or clearly foreclosed framework. (*Id.*) Appellants’ understanding of the law is wrong, and their claims do not survive their own test in any event.

First, as shown above, in the full context of the Dismissal Order on appeal,

Appellants' damages claims were companions to the injunctive relief claims in *Miller*. While it may be unusual for a district court to combine cases for dismissal as moot like it did in the Dismissal Order, the district court's approach is consistent with this Court's admonition in *Gottfried*: "In analyzing issues of mootness it is helpful to keep in mind that these problems often require a highly individualistic, and usually intuitive, appraisal of the facts of each case." Thus, according to Appellants' test, the determination that the *Miller* injunctive relief claims were moot opened the door for the district court to scrutinize the viability of Appellants' damages claims. The Dismissal Order shows that the district court found them wanting.

Second, the critical issue according to this Court's *Gottfried* opinion is the viability of the damages claims, not whether non-monetary claims are also present. *See Gottfried*, 280 F.3d at 691 ("The key question therefore is whether [the plaintiff] has a *viable* claim for damages." (italics in original)). Wright & Miller agree: "A damages claim suffices to avoid mootness only if viable." 13C Wright & Miller, Fed. Prac. & Proc. Juris. § 3533.3. Because this Court may affirm the Dismissal Order "for any reason supported by the record, including on grounds different from those on which the district court relied," *Stein*, 821 F.3d at 786, all that matters is whether Appellants' damages claims were viable. As shown herein, they were not. This Court can, and should, affirm the Dismissal Order upon any finding that

Appellants' damages claims were not viable, regardless of whether the mootness label applies.⁷

In the end, "This is a case about nothing. The course of federal litigation often involves a winnowing of issues. Where, as here, the process of separating wheat from chaff results in a threshing floor bare of justiciable claims, the case is over." *Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 607–08 (6th Cir. 2008) (internal quotation marks omitted).

B. Appellants' Damages Claims Were Not Viable Because They Were Mooted by the Marriage License Executive Order.

Apart from Davis' immunity, there is another basis for affirming the Dismissal Order on mootness grounds: The Executive Order mooted Appellants' damages claims by altering the applicable law.

"A case is moot when there is no prospect that its decision will have an impact on the parties." *See Ryo Mach., LLC v. U.S. Dep't of Treasury*, 696 F.3d 467, 470 (6th Cir. 2012). This rule applies when a change in law "ends the controversy between two parties." *Id.*

⁷ Though Wright & Miller question the use of mootness nomenclature where damages claims are ruled unviable in an action seeking only damages, 13C Wright & Miller, Fed. Prac. & Proc. Juris. § 3533.3 ("There is little point in asserting that an action that seeks only damages is 'mooted' upon a ruling that damages are not available for the claimed injury."), Appellants' reliance on the commentators' semantic objection is misplaced. A "ruling that damages are not available for the claimed injury" still results in dismissal, whether or not it should be said the action was "mooted."

Legislative repeal or amendment of a challenged statute usually eliminates the requisite case-or-controversy But a controversy does not cease to exist merely by virtue of a change in the applicable law—or in this case, the applicable procedure. . . . **If, on the other hand, the procedure has been sufficiently altered so as to present a substantially different controversy, the claim is moot.**

In re City of Detroit, No. 15-2236, 2016 WL 6677715, *5 (6th Cir. Nov. 14, 2016)

(internal quotation marks and citations omitted) (emphasis added).

The viability of the controversy between Appellants and Davis depended on the SSM Mandate because there was no available procedure under Kentucky law to license the marriage of a same-sex couple apart from the SSM Mandate. The pre-*Obergefell* marriage license form was created explicitly for one bride and one groom; the SSM Mandate created a license form to accommodate same-sex couples. (*See supra*, Statement of the Case, Part A.) It was the SSM Mandate that directed all county clerks to issue marriage licenses, on the new form, to same-sex couples. (*See id.*) It was the SSM Mandate on which Appellants relied to request a marriage license in Rowan County. (*See supra*, Statement of the Case, Part D.) And it was the SSM Mandate that Appellants claimed Davis violated as the basis for their Section 1983 damages claims. (*See id.*)

The Executive Order fundamentally altered the legal framework imposed by the SSM Mandate for the issuance of marriage licenses in Kentucky. First, the Executive Order replaced the marriage license form of the SSM Mandate with a form

excluding the name and authority of the county clerk (*see supra* Statement of the Case, Part F), thereby removing the conscience impediment to Davis' issuing marriage licenses. Second, and more importantly, The Executive Order established, with the force of law, that any county clerk who had a conscientious objection, on religious grounds, to the issuance of a marriage license under the clerk's name and authority, had an existing right under Kentucky RFRA to an accommodation, and that Kentucky had an existing obligation under Kentucky RFRA to provide that accommodation. (*See id.*) Thus, the Executive Order did not merely change the applicable marriage licensing law going forward; it fundamentally changed the legal framework for analyzing Davis' conduct prior to the Executive Order, including at the times when Appellants requested a marriage license.

Given the fundamental alteration of the law effected by the Executive Order, Appellants were left with a substantially different controversy, which renders Appellants original claims moot. Appellants claimed their constitutional right to marry was violated by Davis' violation of the SSM Mandate; Appellants never claimed their constitutional right to marry was violated by a Kentucky marriage

licensing policy that granted Davis an accommodation under Kentucky RFRA.⁸ Accordingly, the dismissal of Appellants' claims should be affirmed on mootness grounds.

II. THE DISMISSAL ORDER SHOULD BE AFFIRMED BECAUSE THERE IS NO FEDERAL SUBJECT MATTER JURISDICTION OVER APPELLANTS' DAMAGES CLAIMS.

Even if this Court disagrees that Appellants' monetary damage claims are moot, this Court should affirm the dismissal because the district court could have reached the same result based on subject matter jurisdiction: Appellants failed to allege a viable constitutional claim.

For Appellants' claims under 42 U.S.C. § 1983 to succeed against Davis, they must "establish a violation of **some right guaranteed by the United States Constitution or federal statute** by one acting under the color of state law." *Brehm v. Wessler*, No. 09-60, 2011 WL 1704347, at *4 (E.D. Ky. May 4, 2011) (Bunning, J.) (emphasis added) (citing *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 302 (6th Cir. 2005)). "Section 1983 does not confer substantive rights but merely provides a means to vindicate rights conferred by the Constitution or laws of the

⁸ As shown *infra* in Part II, *Obergefell* does not require states to issue marriage licenses through any particular official or on any particular form. Even if, however, Appellants desired to challenge a state marriage license policy that provides an accommodation to some license issuers under a state RFRA, such a claim would not lie against a state official, individually, for availing herself of an accommodation expressly provided by state law.

United States.” *Aldini v. Johnson*, 609 F.3d 858, 864 (6th Cir. 2010). Ermold and Moore failed to identify any federal constitutional right that has been infringed by Davis. Their reference to a “constitutional right to marry,” *see, e.g.*, Compl., RE 1, Page ID # 4, ¶ 26, is not sufficient.

Critically, the Complaint does not allege that Kentucky prevented Appellants from marrying whom they want to marry or barred them from obtaining a marriage license. To the contrary, the Complaint concedes that marriage licenses, including SSM licenses, were readily available. *See* Compl., RE 1, Page ID # 2, ¶ 11. Under Kentucky law, Ermold and Moore could obtain a marriage license from “*any* county clerk.” Ky. Rev. Stat. § 402.080 (emphasis added). Thus, although Appellants allegedly reside in Rowan County, Compl., RE 1, Page ID # 1-2, ¶¶ 3-4, 7, Kentucky law does not mandate that they must obtain a marriage license from Rowan county.

Rather than allege a violation of a constitutional right, Ermold and Moore merely alleged a violation of a purported federal constitutional right to receive a marriage license signed by a particular individual (“from the Rowan County Clerk”) in a particular county, irrespective of that individual’s sincerely held religious beliefs. *See* Compl., RE 1, Page ID # 2, 4, ¶¶ 13, 30. There is no such right, let alone a clearly established one. In so demanding, Ermold and Moore overlook clear precedent holding that not every act, policy, rule, or regulation “which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous

scrutiny.” *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). Heightened scrutiny only applies to restrictions on the right to marry that are “direct[] and substantial[].” *Id.* at 387.” *Id.* at 387. “[M]erely placing a non-oppressive burden on the decision to marry . . . is not sufficient to trigger heightened constitutional scrutiny.” *Montgomery v. Carr*, 101 F.3d 1117, 1125 (6th Cir. 1996). Any inconvenience complained of for having to travel to another county cannot be considered substantial where other states have similar requirements. For example, Maryland requires 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). To find that Ermold and Moore stated a viable federal constitutional claim here would turn every commonplace marriage-related law in all fifty states into a possible federal constitutional claim. Instead, a “direct and substantial” burden requires an “absolute barrier” in which individuals are “absolutely or largely prevented from marrying” who they want to marry or “absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses.” *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001). The lack of a marriage license “from the Rowan County Clerk,” *see* Compl., RE 1, Page ID # 2, ¶ 13, “does not change the essential fact” that Ermold and Moore are not 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. Ermold and Moore made no allegation that any absolute barrier existed,

preventing them from marrying in Kentucky. Critically, unlike here, the cases cited by Ermold and Moore in their Complaint do not compel a different conclusion. Both *Loving v. Virginia*, 388 U.S. 1 (1968), and *Obergefell*, 135 S.Ct. 2584, involved state-wide bans affecting marriage. *See, e.g., Loving*, 388 U.S. at 11-12 (striking down Virginia ban on inter-racial marriages); *Obergefell*, 135 S.Ct. at 2593, 2599-2605 (redefining marriage to include same-sex couples).

This case is neither the same case as *Obergefell* nor controlled by it. Before *Obergefell*, Ermold and Moore, as two men, were “absolutely prevented” from obtaining a Kentucky marriage license to marry each other. Same-sex marriage was prohibited, and same-sex marriages from other states could not be recognized, in each of Kentucky’s 120 counties. After *Obergefell*, Kentucky began recognizing same-sex “marriage.” *See* Compl., RE 1, Page ID # 2, ¶ 11; *see also* Beshear Letter, RE 1-1, Page ID # 7. The rights demanded by Ermold and Moore, to (i) obtain a marriage license in their home county and (ii) have a marriage license approved by a particular individual, are emphatically not mandated by *Obergefell*. Consequently, neither implicates a direct and substantial burden on a fundamental right to marry.

CONCLUSION

For all the foregoing reasons, this Court should affirm the district court's dismissal of Appellants' claims for damages, whether on grounds of mootness, sovereign and qualified immunity, or lack of subject matter jurisdiction.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE
**With Type -Volume Limitation, Typeface Requirements,
and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,859 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14-point, Times New Roman font.

/s/ Roger K. Gannam
Attorney for Appellee Kim Davis
DATED: December 1, 2016

CERTIFICATE OF SERVICE

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

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ADDENDUM 1**Designation of Relevant District Court Documents
Pursuant to 6 Cir. R. 28(b)(1)(A)(i) and 6 Cir. R. 30(g)(1)(A)-(C)**

Record Entry No.	Document Description
Record Entries in <i>Ermold v. Davis</i>, No. 15-cv-46-DLB (E.D. Ky)	
RE 1 Page ID #1-6	Plaintiffs'/Appellants' Complaint with Jury Demand ("Complaint" or "Compl.")
RE 1-1 Page ID # 7	Beshear Letter ("SSM Mandate")
RE 11 Page ID #34-36	Defendant's/Appellee's Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss")
RE 11-1 Page ID #37-63	Defendant Kim Davis' Memorandum of Law in Support of Her Motion to Dismiss Plaintiff's Complaint ("Memo. Supp. Dismiss")
RE 12 Page ID # 65-73	Plaintiff's Response in Opposition to Defendant's Motion to Dismiss ("Ermold Response")
RE 13 Page ID # 74	Order ("Order Staying Briefing")
RE 14 Page ID #75-76	Plaintiffs' Motion for Briefing Schedule Regarding Defendants' Motion to Dismiss Or In The Alternative Motion To Clarify Court's August 26, 2015 Order (Pls. Mtn. for Briefing Sched.)
RE 19 Page ID # 95-97	In Re: Ashland Civil Actions, Order ("Dismissal Order")
Record Entries in <i>Miller v. Davis</i>, No. 0:15-cv-44-DLB (E.D. Ky)	
RE 1 Page ID ## 1-15	Complaint
RE 73 Page ID ## 1547- 48	Motion by Kentucky Senate President Stivers for Leave to File Brief as <i>Amicus Curiae</i>
RE 74 Page ID # 1557	Order Expanding Preliminary Injunction, September 3, 2015

Record Entry No.	Document Description
RE 78, Page ID ## 1571:4 to1581:17; 1658:5-9; 1659:3- 5; 1581:20 to 1582:23	Hearing Transcript, September 3, 2015

ADDENDUM 2

Executive Order 2015-048

Relating to the Commonwealth's Marriage License Form



MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

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



MATTHEW G. BEVIN
GOVERNOR

EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2015-048
December 22, 2015

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.



MATTHEW G. BEVIN
GOVERNOR


EXECUTIVE ORDER

Secretary of State
Frankfort
Kentucky

2015-048
December 22, 2015

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.



MATTHEW G. BEVIN, GOVERNOR
Commonwealth of Kentucky



ALISON LUNDERGAN GRIMES
Secretary of State

Marriage License

Valid ONLY in the
Commonwealth of Kentucky

To Any Person or Religious Society Qualified to Perform Marriages per KRS 402.050: You are hereby authorized to join together in the state of matrimony, according to the laws of the Commonwealth of Kentucky.

First Party Full Name _____
 Current Residence _____
 Second Party Full Name _____
 Current Residence _____

	<u>First Party</u>	<u>Second Party</u>
Date of Birth (Age)	_____	_____
Place of Birth	_____	_____
Mother's Full Name (Including Maiden)	_____	_____
Father's Full Name	_____	_____
Condition (Single, widowed, divorced, annulled)	_____	_____
No. of Previous Marriages	_____	_____
Occupation	_____	_____
Race	_____	_____
Relationship to other party	_____	_____

We hereby certify the above information is true to the best of our knowledge.

_____ (First Party Signature) _____ (Second Party Signature)

Issued this ____/____/____ pursuant to KRS Ch. 402 in _____
 (mo.) (day) (year) (county name)

County, _____, Kentucky by _____
 (city) (name of issuing official) (title of issuing official)

Note: License valid for 30 days only, including the date it is issued, per KRS 402.105!

Marriage Certificate

(type or print with black ink ball-point pen only)

I do certify that: _____ and _____
 were united in marriage on the _____ day of _____, at _____ Kentucky, under the
 authority of the above license and in the presence of (Please PRINT witnesses' names)

_____ and _____

Given under my hand this _____ day of _____.

_____, _____ of the _____
 (Signature of person performing ceremony) (title) (church, religion, or civil authority)

Note: Person failing to return this Certificate to the Clerk of the County in which it was issued within one month shall be guilty of a violation per KRS 402.990(11).

Recorded this ____/____/____ in the office of _____
 (mo.) (day) (year) (name) (county name)

County Clerk, in Marriage Book _____, page _____.

_____ Clerk
 (recorder's signature) (recorder's title)